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CONNECTICUT APPELLATE REPORTS

Vol. 199

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ANNMARIE CASTLE, TRUSTEE *v.* KATHERINE DIMUGNO

(AC 41607)

DiPentima, C. J., Bright and Devlin, Js.*

Syllabus

The plaintiff trustee sought to collect on a promissory note executed by the defendant and to foreclose a mortgage on certain real property securing the defendant's obligations under the note. In accordance with a stipulation entered into by the defendant and her former husband, D, which was incorporated into the judgment dissolving their marriage, D transferred his interest in the property to the defendant and the defendant executed a promissory note in the amount of $160,000 in favor of D. The note provided that it was payable by the defendant until the sale of the property or her death and that, if the property were transferred, the

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

unpaid principal with accrued interest would become due and payable at the option of the holder of the note. Thereafter, the plaintiff, as trustee, brought an action against D for, inter alia, breach of fiduciary duty for actions he had taken as the original trustee of the trust. The trial court rendered judgment in favor of the plaintiff and, following its granting of the plaintiff's motion for postjudgment modification of a prejudgment attachment that had been granted in her favor, ordered that the plaintiff could "garnish" the note from the defendant and that a copy of the original note was to be turned over to her. D never turned over the original note to the plaintiff. The defendant subsequently quitclaimed title to the property to her daughter for no consideration and retained a life use of the property. The plaintiff then filed a judgment lien on the property, claiming that the defendant's transfer of the property to her daughter triggered her obligation to pay the note in full. After the defendant did not respond to the plaintiff's demand that she make full payment on the note, the plaintiff commenced the present two count action. The trial court rendered summary judgment in favor of the defendant on both counts of the complaint, and the plaintiff appealed to this court. *Held* that the plaintiff lacked standing to enforce the note and to foreclose on the mortgage, and, therefore, the trial court should have dismissed both counts of her complaint for lack of subject matter jurisdiction: because the plaintiff never possessed the original note, she lacked standing to enforce it, and her contention that she was entitled to enforce the note as D's successor pursuant to the order of attachment and garnishment issued by the trial court in her action against D was unavailing, as it was contrary to the plain language of the statute (§ 42a-3-309) that governs the enforcement of lost, destroyed or stolen instruments, which was directly applicable to the situation underlying the present case; moreover, there was no merit to the plaintiff's argument that her possession of a copy of the note was sufficient to confer standing on her to enforce the note, as she could not meet the requirements of § 42a-3-309 because the statute clearly and unambiguously provides that to enforce a lost note, the person seeking to enforce it must have had possession of it when it was lost; furthermore, there was no basis to conclude that the plaintiff had standing to foreclose on the mortgage, as she failed to produce any necessary and proper secondary evidence to create a genuine issue of material fact that she was the owner of the debt underlying the mortgage, and this court was not persuaded by the plaintiff's contention that she had standing pursuant to the statute (§ 52-329) providing for the garnishment of a debt as a prejudgment remedy or the trial court's common-law powers of equity, as she neither pursued the statutory (§ 52-381) procedure to execute on the garnishment nor brought a scire facias action against the defendant, and she failed to explain what common-law powers of equity would permit a court, on the facts of this case, to grant an ownership interest in a debt without following the required statutory procedures.

Argued December 3, 2019—officially released September 1, 2020

Procedural History

Action to, inter alia, recover on a promissory note, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant filed a counterclaim; thereafter, the court, *Aurigemma*, *J.*, granted the defendant's motion for summary judgment on the complaint and rendered judgment thereon, from which the plaintiff appealed to this court. *Improper form of judgment*; *judgment directed.*

Mario Cerame, with whom, on the brief, were *Juri E. Taalman* and *Timothy Brignole*, for the appellant (plaintiff).

Rowena A. Moffett, for the appellee (defendant).

Opinion

BRIGHT, J. This appeal arises out of the plaintiff's action to collect on a promissory note (note) executed by the defendant, Katherine DiMugno, and to foreclose on the mortgage securing the defendant's obligations under the note. The plaintiff, AnnMarie Castle, as trustee for the Mary DiMugno Irrevocable Trust (trust), appeals from the judgment of the trial court rendered in favor of the defendant following its granting of the defendant's motion for summary judgment on the plaintiff's complaint. The plaintiff claims that the court (1) misinterpreted the defendant's payment obligations under the note, (2) improperly considered parol evidence regarding the meaning of certain language in the note, and (3) incorrectly concluded that there are no genuine issues of material fact regarding the defendant's alleged default under the note. In response, in addition to defending the analysis of the trial court, the defendant reasserts her claim that the plaintiff lacks standing to enforce the note and to foreclose on the corresponding mortgage, and that the court, therefore, should have dismissed the action. We agree with the defendant that

the plaintiff lacks standing, and, therefore, we reverse the judgment of the trial court and remand the case to the trial court with direction to render a judgment of dismissal.

The following undisputed facts and procedural history are relevant to our analysis. On July 28, 2005, the court dissolved the defendant's marriage to Donald DiMugno (Donald). Incorporated into the judgment of dissolution rendered by the court was a stipulation entered into by the defendant and Donald. Relevant to this dispute, the defendant and Donald stipulated: "The husband shall transfer to the wife all of his right, title and interest in the real estate located at 11 Billow Road, Old Saybrook, Connecticut [(property)] . . . . In consideration for the transfer the wife shall execute a Promissory Note in the principal amount of $160,000 together with simple interest at the rate of 2 [percent] per annum, which Note shall be payable on the first of the following events: the sale of said premises by the wife and/or death of the wife." On August 24, 2005, upon Donald's transfer of his interest in the property to her, the defendant executed the note in favor of Donald in the principal amount of $160,000. In conformity with the stipulation, the note provides for simple interest to accrue at the rate of 2 percent per year. The note further provides in its second paragraph: "The undersigned promises to pay the said principal and interest as follows: 1. The sale of the [property]; or 2. The death of the [m]aker hereof." Under the note, the defendant also is responsible to pay all taxes and mortgage obligations associated with the property and is required to keep the property insured and free of mechanic's liens. The note further provides, in its penultimate paragraph, that "[i]f any payment due hereunder shall not have been paid within [fifteen] days after the same is due . . . or if title to said property is transferred, then the entire unpaid principal, with accrued interest, shall, at the option of the holder

hereof, become due and payable forthwith." The defendant's obligations under the note are secured by a mortgage on the property, which she executed contemporaneously with the note.[1]

In 2012, the plaintiff, both as trustee of the trust and conservator of Mary DiMugno, brought an action against Donald for breach of fiduciary duty, civil theft and fraud for actions that Donald had taken when he acted as the original trustee of the trust and as a fiduciary of Mary DiMugno, his mother. Following a trial, the court, on August 30, 2013, rendered judgment in favor of the plaintiff and against Donald. Following the entry of judgment, the plaintiff filed a motion for postjudgment modification of the prejudgment attachment that previously had been granted in favor of the plaintiff. At the hearing on the motion, the plaintiff's counsel expressed his concern that Donald had secreted certain assets that could be used to satisfy the plaintiff's judgment against him. Consequently, he asked the court to order that "someone in trust take them and hold them until the end [of] this case." In granting the plaintiff's motion, on September 27, 2013, the court made clear that the plaintiff could "take [the assets], you can hold them, but you can't sell them. . . . And the same thing with any bank accounts. You can put a hold on them. You can put an attachment on something, but you can't execute on it unless and until . . . a final judgment." With respect to the note, the plaintiff's counsel argued that he "should be entitled to receive the [original] promissory note. *So when the trigger of the contingency*

[1] On December 1, 2010, Donald and the defendant executed a document titled "Divorce Decree Amendment" (amendment) by which Donald released the 2 percent interest due under the note and which provided that no further interest would accrue on the note. Otherwise, the amendment confirmed the defendant's obligation to pay the note according to its terms. On January 3, 2014, the parties filed a joint motion to open and modify their dissolution judgment to incorporate the amendment, which the court granted on the same day.

occurs, the money gets paid and we hold on to it." (Emphasis added.) When the court ordered that a copy of the note be turned over to the plaintiff, the plaintiff's counsel interceded by saying, "[a]gain, that would be the original of the promissory note. *I can only execute against the original.*" (Emphasis added.) The court agreed. When Donald's attorney stated that he had a copy of the note but was unsure as to the location of the original, the court replied: "See what you can do." As part of its order, issued following the hearing, the court ordered that "the plaintiff shall garnish the promissory note from [the defendant], *with a copy of the original promissory note* to be turned over to the plaintiff within seven days on or before October 5, 2013." (Emphasis added.) Although the record is unclear as to whether Donald delivered a copy of the note to the plaintiff, there is no dispute that Donald never delivered the original note to the plaintiff or that the plaintiff has never had possession of the original note.

On January 23, 2014, the defendant quitclaimed title to the property to her daughter, Michele Rossignol, for the consideration of love and affection, and retained a life use of the property (life use deed). The defendant executed the life use deed so that the property would not have to go through probate if she died and to protect it from seizure by the state if she went into a convalescent home. The life use deed did not purport to release or extinguish Donald's mortgage on the property.

After learning of the defendant's transfer of title to the property to Rossignol, the plaintiff, relying on the language in the note that "if title to said property is transferred, then the entire unpaid principal, with accrued interest, shall, at the option of the holder hereof, become due and payable forthwith," on May 4, 2015, filed a judgment lien on the property, claiming that the defendant's transfer of title to the property to Rossignol triggered her obligation to pay the note in full. The

judgment lien noted that the plaintiff, in her action against Donald, had secured a one million dollar attachment of all of Donald's assets, including the note. On May 5, 2015, the plaintiff's counsel sent the defendant and Rossignol a letter notifying them of the judgment lien attaching the debt the defendant owed to Donald, and stating his intention "to try and work with you for the payment of said note . . . before we attempt on foreclosing on the judgment lien." On September 28, 2015, Rossignol, by way of a quitclaim deed, transferred title to the property back to the defendant for no consideration. The defendant did not otherwise respond to the plaintiff's demand that she make full payment on the note.

By complaint dated October 23, 2015, the plaintiff instituted the underlying action against the defendant. In count one of the complaint, the plaintiff sought payment on the note. In that count, she alleged that the court in her action against Donald "assigned the [note] to the [plaintiff] for payment." The plaintiff further alleged that she "is now the HOLDER of the negotiable instrument of the [note]," and described herself as the "court-ordered holder of the [note] . . . ." She sought, as a remedy, "money damages for the repayment of principal and interest under the terms of the [n]ote, plus attorney's fees, in accordance with the terms [of] the [note]."

In count two, the plaintiff incorporated her allegations from count one, including that the note was assigned to her and that she is the holder of the note. She sought to foreclose on the mortgage securing the note but did not seek to foreclose on the judgment lien, as suggested in her counsel's earlier letter.

The defendant moved to dismiss the action on the ground that the plaintiff lacks standing because she is not the holder of the note. In opposition to the motion,

the plaintiff argued that she was entitled to enforce the note pursuant to the court's postjudgment order of attachment issued in her action against Donald. She further argued that she did not need to have possession of the original note because it had been lost and its whereabouts were unknown. The court denied the motion to dismiss because "[t]here is an issue of fact as to whether the note was lost."

Thereafter, the defendant filed a motion to strike both counts of the complaint on the basis that the note required payment only if one of two events occurred—the defendant sold the property or she died. The defendant argued that because the complaint did not allege either of the events, the plaintiff failed to state a claim on which relief could be granted and both counts of the complaint should be stricken. In response, the plaintiff argued that the defendant's transfer of title to Rossignol triggered the defendant's obligation to pay the note in full and her failure to do so constituted an event of default under the note that supported both her action for payment on the note in count one of the complaint and her action to foreclose on the corresponding mortgage in count two. The court denied the motion to strike because, "[w]hen the express terms of the note are construed in a light most favorable to the plaintiff, the defendant's 'transfer' to her daughter could be considered an event of default. The plaintiff's complaint is legally sufficient."

The defendant then answered the complaint. Thereafter, she filed a revised answer, denying the essential allegations of the plaintiff's complaint and pleading several special defenses.[2]

[2] The defendant also pleaded a four count counterclaim in which she seeks compensatory, statutory, and punitive damages and attorney's fees. The counterclaim is still pending in the trial court and not at issue in this appeal, which was taken from a final judgment. See Practice Book § 61-2 ("judgment . . . rendered on an entire complaint . . . shall constitute a final judgment"); *Nationwide Mutual Ins. Co.* v. *Pasiak*, 327 Conn. 225, 233–34 n.6, 173 A.3d 888 (2017) ("[a]lthough the defendant's counterclaim

After the parties engaged in discovery, including taking the depositions of the defendant, Donald, and the defendant's attorney in the dissolution action, who was involved in the drafting and execution of the note, the defendant moved for summary judgment on both counts of the plaintiff's complaint. In support of her motion, the defendant first argued that she had not defaulted on the note because payment was not due until she sold the property for value or died, neither of which had occurred. With respect to the "transferred" language relied on by the plaintiff, the defendant argued that "[t]he undisputed evidence makes clear that the term 'transferred' as used in [the note] means a transfer for value, and the life use deed [did] not constitute a transfer which renders the note due and payable." The defendant submitted various extrinsic evidence in support of her argument. First, she argued that the note should be read in light of the stipulation that she and Donald signed that was incorporated into their dissolution judgment from which the note resulted. The stipulation provided that the note "shall be payable on the first of the following events: the sale of [the property] by the wife and/or death of the wife." The stipulation makes no mention of any other event, including a transfer for no consideration, as triggering the defendant's obligation to pay any amounts due under the note.

Second, the defendant relied on her and Donald's deposition testimony. The defendant testified that her understanding of her repayment obligation under the note and judgment was that the note had to be paid when she sold the property or died, and that the transfer of title to Rossignol for no consideration as part of her estate planning, was not a sale. Similarly, Donald testified that the defendant was obligated to pay him

remains pending before the trial court, the decision on the declaratory judgment action was an appealable final judgment because the court's decision disposed of all counts of the plaintiff's complaint").

under the note when she either sold the property or died. He further described the defendant's interest in the house under the dissolution judgment as a "life use" of the house.

Finally, the defendant relied on the deposition testimony of Attorney Timothy Sheehan, who represented the defendant in the dissolution proceeding, participated in the negotiation of the stipulation incorporated into the judgment of dissolution, and drafted the note. Sheehan testified that the reference in the note to the title of the property being transferred meant "[t]ransferred for value."

The defendant argued that it was appropriate for the court to consider extrinsic evidence because the note "is not integrated" or, alternatively, because the word " 'transferred' " in the note is ambiguous. The defendant reasoned that because all of the participants to the negotiation and drafting of the note[3] had the same understanding as to its meaning and that meaning was confirmed by the judgment of dissolution, there was no factual basis to conclude that the defendant's action in quitclaiming title to the property to Rossignol, for no consideration, while retaining life use of the property, triggered her payment obligation under the note.

Alternatively, the defendant argued that the plaintiff did not have standing to enforce the note or to foreclose on the mortgage. As to enforcement of the note, the defendant argued that the plaintiff admitted that the note is not payable to the plaintiff and that the plaintiff has never been in possession of the note. Consequently, according to the defendant, the plaintiff is neither a

[3] Donald's attorney during the dissolution proceedings, Charles G. Karanian, also participated in the negotiations that resulted in the judgment of dissolution and note. He died on March 1, 2016. Neither party submitted to the court any evidence regarding Karanian's understanding of the "transferred" language at issue.

holder of the note nor a nonholder in possession of the note, as defined in General Statutes § 42a-3-301, and she is not entitled to enforce it. The defendant further argued that the plaintiff could not rely on General Statutes § 42a-3-309, which provides for the enforcement of lost, destroyed or stolen instruments, because she was not in possession of the note at the time it was lost, destroyed or stolen.[4] As to the plaintiff's efforts to foreclose on Donald's mortgage on the property, the defendant argued that the mortgage was never assigned to the plaintiff, and, therefore, she lacked standing to foreclose on it.

In opposition to the defendant's motion for summary judgment, the plaintiff argued that the language in the note is clear and unambiguous in requiring full payment of the amounts due thereunder if " 'title to [the] property is transferred.' " She further argued that the life use deed constituted a transfer of title to the property from the defendant to Rossignol, triggering the defendant's payment obligation under the note. The plaintiff also argued that the court should not consider Sheehan's deposition testimony regarding the parties' intent in using the "transferred" language because the language is not ambiguous and reliance on Sheehan's testimony would violate the parol evidence rule, as acceptance of Sheehan's interpretation would vary or contradict the terms of the note.

As to the defendant's standing arguments, the plaintiff argued that, although she did not possess the original note, she has a copy of it and has standing, as the successor to Donald's rights in the note, to enforce it. The plaintiff did not address the defendant's argument that the she lacks standing to foreclose on the mortgage because it had never been assigned to her.

[4] The location of the original note appears to be unknown.

In ruling on the defendant's motion for summary judgment, the trial court did not address the standing arguments made by the defendant. Instead, the court resolved the motion on the basis of its interpretation of the "transferred" language in the note.[5] The court held that the plaintiff's reliance on a single provision in the note was misplaced because "[t]he entire note must be read in light of the judgment pursuant to which the note was executed." The court also considered the defendant's and Donald's deposition testimony and concluded: "It is clear, based on the plain language of the judgment, that Donald and [the defendant] intended for payment to become due only in the event of either the sale of the property or the death of [the defendant]. . . . Moreover, both parties to the note have confirmed their intent and understanding that the note would become due during the defendant's lifetime only in the event of a transfer for value. . . . The extrinsic evidence makes it clear that neither the maker of the note nor the payee understood that the word 'transfer' used in the note meant anything other than a transfer for value, since without value, the defendant would have no money to pay the payee." Consequently, the court rendered summary judgment in favor of the defendant on both counts of the plaintiff's complaint. Additional facts will be set forth as necessary.

In this appeal, the plaintiff claims that the court erred in its analysis of the note. In particular, she claims, as

[5] Because standing implicates the court's subject matter jurisdiction, the court should have addressed the defendant's standing arguments before turning to the question of whether there was a genuine issue of material fact as to the defendant's alleged breach of her payment obligation under the note. See *418 Meadow Street Associates, LLC* v. *One Solution Services, LLC*, 127 Conn. App. 711, 716, 15 A.3d 1140 (2011) ("Once the question of lack of jurisdiction of a court is raised, it must be disposed of no matter in what form it is presented. . . . Additionally, a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim." [Citation omitted; internal quotation marks omitted.]).

she did before the trial court, that the language of the note is clear and unambiguous in linking the defendant's payment obligation to any transfer by her of the title to the property and that the court erred in relying on extrinsic evidence to reach an interpretation of the language that varied or contradicted that clear and unambiguous meaning. Furthermore, even though the trial court did not mention Sheehan's testimony in its memorandum of decision rendering summary judgment, the plaintiff claims that such testimony should have been stricken and not considered by the court. Finally, although the trial court did not address standing or the plaintiff's right to enforce the note or to foreclose on the mortgage, the plaintiff argues that she has such rights.

In response, the defendant argues that the trial court properly construed the note in light of the undisputed evidence of the intent of the defendant and Donald when they entered into the stipulation that resulted in the defendant executing the note and mortgage. Alternatively, the defendant argues that the plaintiff lacks standing to enforce the note and to foreclose on the mortgage. We agree with the defendant's alternative standing arguments and, therefore, do not reach the question of how the note should be construed.

Although the trial court did not address the defendant's arguments that the plaintiff lacks standing to pursue her claims, because the question of standing implicates the trial court's subject matter jurisdiction, we address those arguments first.[6]

[6] The plaintiff notes in her reply brief: "Successor counsel is not sure why the enforceability issue was raised on appeal at all. It did not form the basis of the judgment of the trial court, nor was it identified as an alternative ground to affirm." Counsel's apparent confusion is puzzling given that the plaintiff's original appellate counsel extensively briefed the issue in the plaintiff's principal appellate brief, the defendant clearly raised the issue of the plaintiff's standing to enforce the note and to foreclose on the corresponding mortgage in her motion for summary judgment, and issues impacting subject matter jurisdiction, such as standing, can be raised at any time.

"Standing 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. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of this question of law is plenary." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

In *J.E. Robert Co.*, our Supreme Court analyzed the plaintiff's right to enforce a promissory note and to foreclose on a mortgage securing the note as a question of standing. Id., 319. In doing so, the court noted: "A plaintiff's right to enforce a promissory note may be established under the [Uniform Commercial Code (UCC) as adopted in General Statutes § 42a-1-101 et seq.]." Id. "Under the UCC, a [p]erson entitled to enforce an instrument means [inter alia] (i) the holder of the instrument, [or] (ii) a nonholder in possession of the instrument who has the rights of a holder . . . . A person may be a person entitled to enforce the instrument *even though the person is not the owner of the instrument* . . . . General Statutes § 42a-3-301. The UCC's official comment underscores that a person entitled to enforce an instrument . . . *is not limited to holders. . . . A nonholder in possession of an instrument includes a person that acquired rights of a holder . . . under* [*General Statutes § 42a-3-203 (a)*]." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 319–20.

In addition, pursuant to § 42a-3-301 (iii), " '[p]erson entitled to enforce' an instrument" includes "a person not in possession of the instrument who is entitled to

enforce the instrument pursuant to section 42a-3-309 . . . .'' Section 42a-3-309 (a) provides: ''A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, *and* (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.'' (Emphasis added.) Finally, General Statutes § 42a-1-201 (b) (21) defines a '' '[h]older' '' of a promissory note as: ''(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; (B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or (C) The person in control of a negotiable electronic document of title.'' Consequently, someone who is not in possession of the original note can be neither a holder nor a nonholder in possession. See *Seven Oaks Enterprises, L.P.* v. *DeVito*, 185 Conn. App. 534, 547, 198 A.3d 88, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018).

The plaintiff concedes that she has never had possession of the original note. For this reason, the defendant argues, the plaintiff has no right to enforce the note as a holder or nonholder in possession pursuant to § 42a-3-301 (i) or (ii). The plaintiff argues that, even though she never possessed the note, she acquired the holder's rights and became the person entitled to enforce the note when the court in her action against Donald issued a postjudgment order of *attachment and garnishment* of the note in her favor. In support of her argument,

the plaintiff relies on the official commentary to § 42a-3-301, which states, inter alia, that a " '[p]erson entitled to enforce' an instrument . . . also includes any other person who under applicable law is a successor to the holder or otherwise acquires the holder's rights." Conn. Gen. Stat. Ann. (West 2009) § 42a-3-301, comment, p. 522. We are not persuaded.

The UCC and the official commentary both clearly describe how someone not in physical possession of a note can enforce it. Section 42a-3-309 (a) explicitly provides the circumstances under which "[a] person not in possession of an instrument is entitled to enforce the instrument . . . ." It is not sufficient for a person to claim merely that she is the successor to the rights of the holder. In fact, § 42a-3-309 (a) (i) specifically provides that the person seeking to enforce the instrument must show that she "was in possession of the instrument and entitled to enforce it when loss of possession occurred . . . ." In addition, the official commentary to § 42a-3-301, on which the plaintiff's argument is built, specifically references the right to enforce a lost or stolen instrument pursuant to § 42a-3-309. The plaintiff's argument that the reference in the official commentary to one who is "a successor to the holder or otherwise acquires the holder's rights"; Conn. Gen. Stat. Ann. (West 2009) § 42a-3-301, comment, p. 522; includes a person who never had possession of the instrument is illogical and contrary to the plain language of § 42a-3-309.

In fact, this court recently rejected a nearly identical argument in *Seven Oaks Enterprises, L.P.* v. *DeVito*, supra, 185 Conn. App. 552–54. In that case, Seven Oaks Enterprises, L.P. (SOE) sold a limited liability company to the defendant, who, as part of the purchase, executed a note in favor of SOE for $1.325 million. Id., 538. After the sale, SOE transferred and assigned the note to a related company, Seven Oaks Management Company

(SOM). Id., 539, 543. At the time of the transfer to SOM, SOE no longer had possession of the original note from the defendant, and SOM never was in possession of the note. Id., 554. SOE and SOM later brought an action against the defendant. Id., 539. In that action, SOM claimed that the defendant had breached the promissory note by failing to pay the amounts due thereunder. Id. The defendant argued that SOM had no right to enforce the note because it never possessed the note, as the note was lost while in SOE's possession and before any assignment to SOM. Id., 537. The case was tried to a jury, which returned a verdict in favor of SOM on its claim under the promissory note. Id., 539. "The jury indicated in its answers to interrogatories that it had found that SOE and the defendant originally had been the parties to the note, that SOE possessed the note when it was lost, that the note nonetheless had effectively been assigned to SOM, and that the defendant failed to make payments on the note." Id., 541–42. The defendant filed motions to set aside the verdict and for judgment notwithstanding the verdict, both of which the trial court denied. Id., 539–40.

On appeal, this court held that the trial court erred in denying the motions to set aside the verdict and for judgment notwithstanding the verdict. Id., 554. After thoroughly reviewing the applicable sections of the UCC and case law both in Connecticut and in other states applying those sections to similar circumstances, we concluded: "[T]he application of § 42a-3-301, in the circumstances of the present case, leads to the conclusion that SOM is entitled to enforce the note only if it satisfies the standards stated in § 42a-3-309. Subsection (a) of § 42a-3-309, in turn, provides that [*a*] *person* not in possession of an instrument is entitled to enforce the instrument if (i) *the person* was in possession of the instrument and entitled to enforce it when loss of

possession occurred . . . . The only logical construction of the statutory language compels the conclusion that the only person who can enforce the note is the person in possession of the note when it was lost." (Emphasis in original; internal quotation marks omitted.) Id., 551–52. We explicitly rejected SOM's argument that it could enforce the note as an assignee even though it was not in possession of the note, because the clear language of the statute precluded such a result. Id., 552. We similarly rejected SOM's argument that the common law of assignments supplements the UCC and creates an alternative basis for an assignee not in possession of a note to enforce it, concluding that "[b]ecause § 42a-3-309 is directly applicable to the situation underlying the present case, the common law of assignments does not displace its clear provisions." Id., 552–53.

The plaintiff's argument in the present case, that she is entitled to enforce the note as Donald's successor pursuant to the order of attachment and garnishment issued by the court in her action against Donald, is not materially different from SOM's argument in *Seven Oaks Enterprises, L.P.* For the same reason that we rejected the argument in that case, we reject it here.[7] Thus, the

[7] The plaintiff's argument in this case suffers from another infirmity that did not confront SOM in *Seven Oaks Enterprises, L.P.* In that case, there was no dispute that SOE had assigned the promissory note to SOM and that if SOM had had possession of the note, it could have enforced it. In the present case, the plaintiff's right to enforce the note, even if she had possession of it, at best, is questionable. The note was never assigned to her. She was granted, at most, only a postjudgment remedy of attachment of the note in her action against Donald. Although the court's order stated that the plaintiff could "garnish" the note, the transcript of the hearing makes clear that the court intended only that the plaintiff would hold the note and Donald's other assets as security for the judgment. The court made clear that the plaintiff could not convert those assets to her own use, but would have to execute on them if final judgment was rendered in her favor. Even the plaintiff's counsel acknowledged that he would have "to execute" on the original note. There is no evidence that the plaintiff ever sought an execution on the note.

plaintiff has standing to enforce the note only if she meets the requirements of § 42a-3-309.

The defendant argues that the plaintiff indisputably cannot meet the requirements of § 42a-3-309 because the whereabouts of the note appear to be unknown and the plaintiff was not in possession of the note when it was lost. In response, the plaintiff details the efforts she made to secure the original note and then argues that, although she never possessed the original note, she has a copy of the note and the copy is sufficient to confer standing on her. The plaintiff's argument is without merit.

The wording of § 42a-3-309 is clear and unambiguous. In order to enforce a lost note, the person seeking to enforce it must have had possession of it when it was lost. Furthermore, that was this court's holding in *Seven Oaks Enterprises, L.P.* See *Seven Oaks Enterprises, L.P.* v. *DeVito*, supra, 185 Conn. App. 551–52. The plaintiff's efforts to secure possession of the original note or her possession of a copy of the note are simply irrelevant to whether she has complied with the statutory requirements. The plaintiff, in fact, recognized this during the postjudgment proceeding in her action against Donald. When the court stated that Donald was to turn over *a copy* of the note, the plaintiff's counsel responded: "Again, that would be the original of the . . . note. *I can only execute against the original.*" (Emphasis added.)

Having been unable to secure the original note, the plaintiff cites a number of cases that purportedly support her new contention that she never needed possession of the original note to enforce it. Those cases provide her with little support. In *Guaranty Bank & Trust Co.* v. *Dowling*, 4 Conn. App. 376, 381–82, 494 A.2d 1216, cert. denied, 197 Conn. 808, 499 A.2d 58 (1985), this court affirmed the judgment in favor of the

plaintiff on a promissory note that had been lost and was not in the plaintiff's possession when it was lost. However, the court did so under General Statutes (Rev. to 1985) § 42a-3-804, which, in 1991, was repealed and replaced by § 42a-3-309. General Statutes (Rev. to 1985) § 42a-3-804 provides in relevant part: "The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. . . ." See *Guaranty Bank & Trust Co.* v. *Dowling*, supra, 381. Unlike § 42a-3-309, General Statutes (Rev. to 1985) § 42a-3-804 did not require that the person seeking to enforce a lost note have possession of it when it was lost. Id., 381–82. Thus, *Guaranty Bank & Trust Co.* is inapposite to the present case.

The other cases relied on by the plaintiff involved foreclosures and not actions to enforce the note. As this court explained in *Seven Oaks Enterprises, L.P.*, a foreclosure action is different from an action to enforce a note. See *Seven Oaks Enterprises, L.P.* v. *DeVito*, supra, 185 Conn. App. 547–48. "[O]ur Supreme Court considered the language of § 42a-3-309 (a) in *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 759–60, 680 A.2d 301 (1996). In that case, the defendant contended that the plaintiff could not obtain a judgment of strict foreclosure under §§ 42a-3-301 and 42a-3-309. . . . Specifically, the defendant claimed that because the plaintiff never proved it possessed the original note, it could not satisfy the requirement of § 42a-3-309 to show possession to enforce a lost note. . . . Our Supreme Court rejected this claim, noting that [i]t is well established . . . that the [mortgagee] is entitled to pursue its remedy at law on the notes, or to pursue its remedy in equity upon the mortgage, or to pursue both. . . . The defendant did not

dispute that it executed the note and mortgage and that the debt existed. . . . The plaintiff chose its equitable remedy, foreclosure of the mortgage. . . .

"In deciding the case, however, our Supreme Court observed that because the plaintiff had chosen to pursue the equitable action of foreclosure of the mortgage, rather than a legal action on the note, the fact that [the plaintiff] never possessed the lost promissory note [was] not fatal to its foreclosure of the mortgage. . . . [W]hatever restrictions §§ 42a-3-301 and 42a-3-309 might put upon the enforcement of personal liability based solely upon a lost note, they [did] not prohibit [the plaintiff] from pursuing an action of foreclosure to enforce the terms of the mortgage." (Citations omitted; internal quotation marks omitted.) *Seven Oaks Enterprises, L.P.* v. *DeVito*, supra, 185 Conn. App. 547–48.

Consequently, the fact that a party, who is not in possession of the note evidencing the debt underlying a mortgage, may be able to foreclose on that mortgage, does not lead to the conclusion that the party has standing to enforce the note. In fact, we specifically have rejected such a conclusion. See id., 547–48, 554. In the present case, the plaintiff, never having possessed the original note, lacks standing to enforce it. For this reason, the trial court should have dismissed count one of the plaintiff's complaint because it lacked subject matter jurisdiction to consider the plaintiff's cause of action.

As noted, however, this conclusion as to count one does not necessarily mean that the plaintiff lacks standing to assert the foreclosure claim in count two of her complaint. Possession of the original note underlying the mortgage is not a necessary prerequisite for that claim because "[t]he mortgage secures the indebtedness itself, not the written evidence of it." (Internal quotation marks omitted.) *New England Savings Bank*

v. *Bedford Realty Corp.*, supra, 238 Conn. 759. For this reason, "[t]he loss of the note . . . does not preclude proof of the debt by other evidence. A . . . note is not a debt; it is only primary evidence of a debt; and where this is lost, impaired or destroyed bona fide, it may be supplied by secondary evidence. . . . The loss of a . . . note alters not the rights of the owner, but merely renders secondary evidence necessary and proper." (Citation omitted; internal quotation marks omitted.) Id., 760. In *New England Savings Bank*, although the plaintiff did not possess the original promissory note, it was able to prove its ownership of the debt underlying the mortgage through secondary evidence, in particular, the assignments of the note and the mortgage that secured the debt. Id.

In the present case, as the defendant correctly notes, there was no assignment of the mortgage to the plaintiff. Nor does the plaintiff base her foreclosure claim on anything other than the note. Specifically, in her complaint, the plaintiff based her right to foreclose on the mortgage on her status as the assignee and holder of the note. Furthermore, the note, and its purported assignment to her, is the only evidence she offered the court in support of her claim that she owned the debt secured by the mortgage.

Yet, she never possessed the note and the note, in fact, never was assigned to her. See footnote 7 of this opinion. Furthermore, under General Statutes § 49-17, a party has no standing to foreclose on a mortgage without ever having been assigned the debt underlying the mortgage; § 49-17 allows the holder of the debt to foreclosure on property without having been assigned the mortgage, but it does not allow the converse, indicating that the legislature did not intend to permit the holder of the mortgage, without having been assigned the debt, to foreclose on the mortgage. See *Fleet National Bank* v. *Nazareth*, 75 Conn. App. 791,

794–95, 818 A.2d 69 (2003). In the present case, at the time she brought this action, the plaintiff, at most, had an attachment of the note and the debt underlying the mortgage.[8] A postjudgment attachment though is not self-executing. The plaintiff recognized as much when her counsel stated during the postjudgment hearing in her case against Donald that the plaintiff needed possession of the original note "[s]o when the trigger

[8] In *Winslow* v. *Fletcher*, 53 Conn. 390, 4 A. 250 (1886), our Supreme Court explained that stock certificates are evidence "that the person therein named possesses those rights and is subject to those duties, but it is not in law the equivalent of those rights and duties. They are muniments of title, but not the title itself; much less the real property. While these certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property . . . yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. *They are no more subject to an attachment or a trustee process than a promissory note.* The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificate cannot be." (Citation omitted; emphasis added.) Id., 395–96; see B. Matson, Creditor Process Against Negotiable Notes: The Case for a New UCC § 3-420, 24 Wm. & Mary L. Rev. 503, 530 (1983) ("the historical treatment of promissory notes parallels that of investment securities, [and] the [UCC] and a majority of jurisdictions still do not provide for the seizure of negotiable notes"); see also *Grosvenor* v. *Farmers & Mechanics Bank*, 13 Conn. 104, 108 (1839) (promissory note cannot be attached as goods and effects under foreign attachment statute because they are choses in action, which cannot be sold on execution). But see General Statutes § 52-341 ("[w]hen a debt evidenced by a negotiable promissory note has been attached by process of foreign attachment and the defendant has had actual notice thereof, he shall not negotiate or transfer such note during the continuance of the attachment lien").

"Despite the early English characterization of a note as tangible property, most states enacted execution and enforcement of money judgment provisions that codified [common-law] conceptions of notes as intangible property not subject to seizure. Moreover, statutes that conflict with this [common-law] notion have been construed narrowly. The [common-law] approach to the levying on and seizure of negotiable promissory notes still prevails when the execution statutes are silent on the nature of these notes. A majority of jurisdictions follow the common law through express statutory enactments, judicial precedent, or an absence of any contrary law." (Footnotes omitted.) B. Matson, supra, 24 Wm. & Mary L. Rev. 509–10, citing, inter alia, *Grosvenor* v. *Farmers & Mechanics Bank*, supra, 13 Conn. 104. In the present case, the issue of whether the plaintiff legally could have an attachment or garnishment on the note itself is left for another day.

of the contingency occurs, *the money gets paid and we hold on to it*." (Emphasis added.) Counsel's statement was consistent with the court's statement just moments earlier in the hearing that counsel could hold or attach Donald's assets but could not execute on them until the plaintiff had secured a final judgment against Donald.

General Statutes § 52-356a sets forth in great detail the steps a judgment creditor must take to execute on the assets of a judgment debtor, including levying any debt owed to the judgment debtor by a third party.[9]

[9] General Statutes § 52-356a provides in relevant part: "(a) Procedure. Levying officer's responsibilities. (1) On application of a judgment creditor or a judgment creditor's attorney, stating that a judgment remains unsatisfied and the amount due thereon, and subject to the expiration of any stay of enforcement and expiration of any right of appeal, the clerk of the court in which the money judgment was rendered shall issue an execution pursuant to this section against the nonexempt personal property of the judgment debtor other than debts due from a banking institution or earnings. . . .

"(2) The property execution shall require a proper levying officer to enforce the money judgment and shall state the names and last-known addresses of the judgment creditor and judgment debtor, the court in which and the date on which the money judgment was rendered, the original amount of the money judgment and the amount due thereon, and any information which the judgment creditor considers necessary or appropriate to identify the judgment debtor. The property execution shall notify any person served therewith that the judgment debtor's nonexempt personal property is subject to levy, seizure and sale by the levying officer pursuant to the execution and, if the judgment debtor is a natural person, shall be accompanied by a notice of judgment debtor rights as prescribed by section 52-361b and a notice to any third person of the manner, as prescribed by subdivision (4) of this subsection, for complying with the execution.

"(3) A property execution shall be returned to court within four months after issuance. The untimely return of a property execution more than four months after issuance shall not of itself invalidate any otherwise valid levy made during the four-month period.

"(4) The levying officer shall personally serve a copy of the execution on the judgment debtor and make demand for payment by the judgment debtor of all sums due under the money judgment. On failure of the judgment debtor to make immediate payment, the levying officer shall levy on nonexempt personal property of the judgment debtor, other than debts due from a banking institution or earnings, sufficient to satisfy the judgment, as follows . . .

"(C) With respect to a judgment debtor who is a natural person, if such personal property, including any debt owed, is in the possession of a third

The plaintiff does not claim that she took any of the necessary steps to levy on the debt she claims the defendant owed. Under these circumstances, the plaintiff, unlike the plaintiff in *New England Savings Bank*, has failed to produce any necessary and proper secondary evidence to create a genuine issue of fact that she is the owner of the debt underlying the mortgage. In the absence of such evidence, there is no basis to conclude that the plaintiff has standing to foreclose on the mortgage.[10]

In her reply brief, without providing any analysis whatsoever, the plaintiff dismisses the significance of the statutes relied on by the defendant and discussed

person, the levying officer shall serve that person with two copies of the execution, required notices and claim forms. On receipt of such papers, the third person shall forthwith mail a copy thereof postage prepaid to the judgment debtor at the last-known address of record with the third person and shall withhold delivery of the property or payment of the debt due to the levying officer or any other person for twenty days. On expiration of the twenty days, the third person shall forthwith deliver the property or pay the debt to the levying officer provided (i) if an exemption claim has been filed in accordance with subsection (d) of section 52-361b, the property shall continue to be withheld subject to determination of the claim, and (ii) if a debt is not yet payable, payment shall be made when the debt matures if within four months after issuance of the execution.

"(5) Levy under this section on property held by, or a debt due from, a third person shall bar an action for such property against the third person provided the third person acted in compliance with the execution.

"(6) If the levying officer cannot remove any property on which he seeks to levy without the danger of injury thereto, he may levy on and take possession of the property by posting on or adjacent to the property a conspicuous notice of the levy.

"(7) Subject to the provisions of section 52-328, if the property to be executed against is already subject to an attachment, garnishment or judgment lien of the judgment creditor as security for that judgment, the priority of the execution shall hold from the date of perfecting of the attachment, garnishment or other lien. A sale pursuant to the execution forecloses any interest acquired as a result of the attachment, garnishment or judgment lien. . . ."

[10] Because the plaintiff sought to foreclose on only the mortgage and not its judgment lien, we do not consider the validity or enforceability of the judgment lien.

previously in this opinion by contending that she has standing pursuant to General Statutes § 52-329 or the "court's common-law powers of equity." We are not persuaded.

Section 52-329 provides for a garnishment of a debt as a type of prejudgment remedy.[11] General Statutes § 52-381 sets forth the statutory procedure for executing on such a garnishment, including requiring the plaintiff to "direct the officer serving the [execution] to make demand of such garnishee for the effects of the defendant in his hands, and for the payment of the debt due the defendant, and such garnishee shall pay such debt or produce such effects, to be taken and applied on such execution. . . ." Pursuant to § 52-381, the plaintiff may also institute a scire facias[12] action to recover the property that is the subject of the garnishment. It is undisputed that the plaintiff neither pursued the statutory procedure to execute on the garnishment nor brought a scire facias action against the defendant.

[11] We note that there is nothing in the record to show that the plaintiff complied with the service requirements of § 52-329, further calling into question the validity of her garnishment.

[12] "The writ of scire facias is generally used to collect other debts owed to the judgment debtor. This writ may not be used, however, unless the debt has first been garnisheed. . . . It is rather obvious that these ancient writs of execution have become so encrusted with procedural barnacles that frequently they are not suited to the needs of modern society." (Citations omitted.) *Burchett* v. *Roncari*, 181 Conn. 125, 127, 434 A.2d 941 (1980). "The plaintiff can summon the garnishee before the court to show cause why he should not pay the garnishment only by obtaining judgment and then seeking to collect the debt for which the judgment has been rendered through a writ of scire facias. . . . The whole purpose of scire facias is to give the garnishee an opportunity to defend. Under the statute, in an action of scire facias in consummation of an action begun by process of foreign attachment, there really can be no issue reaching the merits of the action other than the one whether or not the defendant in scire facias was indebted to the defendant in the original action at the time of service." (Citations omitted; internal quotation marks omitted.) *Vidal Realtors of Westport, Inc.* v. *Harry Bennett & Associates, Inc.*, 1 Conn. App. 291, 295, 471 A.2d 658, cert. denied, 192 Conn. 804, 472 A.2d 1284 (1984).

Furthermore, the plaintiff fails to explain what common-law powers of equity would permit a court, on the facts of this case, to grant an ownership interest in a debt without following the required statutory procedures. Connecticut has had statutes regulating the garnishment of property and the execution of such property postjudgment since 1726. See *Hayes* v. *Weisman*, 97 Conn. 387, 394–98, 116 A. 878 (1922). Consequently, our Supreme Court stated long ago that "[t]he proceeding in favor of a creditor to attach and appropriate the debt of a third person due the debtor, is given by statute." *Day* v. *Welles*, 31 Conn. 344, 349 (1863). Although our Supreme Court has recognized that in certain limited circumstances a judgment creditor may bring a creditor's bill in equity "to enforce the payment of a debt out of property of a debtor under circumstances which impede or render impossible the collection of the debt by the ordinary process of execution . . . [t]he . . . requirement for the maintenance of such a bill is that the plaintiff must not have an adequate remedy at law." (Citations omitted.) *Burchett* v. *Roncari*, 181 Conn. 125, 128, 434 A.2d 941 (1980). There is little question that the plaintiff has an adequate remedy at law through our garnishment and execution statutes. Finally, as noted previously in this opinion, the "garnishment remedy" issued by the court was no more than an attachment of the note. It did not *assign the debt* to the plaintiff. The attachment of the note, assuming the validity of the attachment, without more, does not give the plaintiff any right to pursue a judgment on the note or to foreclose on the mortgage.

For these reasons, the trial court lacked subject matter jurisdiction to consider count two of the plaintiff's complaint, and that count, as well, must be dismissed.

The form of the judgment is improper; the judgment is reversed and the case is remanded with direction

to render a judgment of dismissal for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

JASON S. PARISI *v.* ABBY NIBLETT
(AC 42438)

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

Syllabus

The plaintiff, who had sought to modify child custody orders entered as part of the judgment of dissolution of his marriage to the defendant, appealed from the trial court's dismissal of that motion. The plaintiff and the defendant had been divorced in Florida. Subsequently, the defendant moved to Alabama and the plaintiff moved to Connecticut. The parties rotated custody of the child on a monthly basis. Their settlement agreement provided that once the child reached formal school age, the parties were to negotiate a time sharing schedule in the best interest of the child. The parties thereafter each sought to enroll the child in kindergarten, in both Connecticut and Alabama. The plaintiff filed a petition for modification of child custody in Florida, which he subsequently withdrew, and the defendant also filed a petition for modification in Florida. The plaintiff then filed a motion to modify child custody in Connecticut. The trial court conducted a telephone conference with the Florida court to discuss jurisdiction, and determined that Florida retained jurisdiction, as the Florida court did not stay its proceedings or relinquish jurisdiction because there was a custody action pending in Florida at the time the plaintiff filed his motion to modify in Connecticut. On appeal, the plaintiff claimed, inter alia, that the trial court erred in concluding that it lacked subject matter jurisdiction without first conducting an evidentiary hearing. *Held*:

1. The trial court properly applied the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (§ 46b-115 et seq.) to determine if that court had subject matter jurisdiction to modify the Florida court's custody order; contrary to the plaintiff's argument, the domestication of a foreign judgment pursuant to statute (§ 46b-70 et seq.) did not automatically grant subject matter jurisdiction over a foreign judgment, rather, the UCCJEA expressly and unambiguously required that the trial court determine if it had subject matter jurisdiction under the UCCJEA prior to considering the modification of a custody order.

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* The listing of judges reflects their seniority status on this court as of the date of oral argument.

2. The trial court improperly determined that it lacked subject matter jurisdiction because it did not afford the plaintiff an evidentiary hearing, as there were unresolved issues of fact that could not initially be determined on appeal, including whether Connecticut was the home state of the child when the plaintiff filed his motion for modification, whether the time the child spent in Alabama was considered a temporary absence from Connecticut, whether Florida was the home state of the child at the time the defendant's motion for modification was filed in Florida, and whether the plaintiff and the child have a significant connection with Connecticut.

Argued January 23—officially released September 1, 2020

Procedural History

Motion by the plaintiff for modification of child custody in connection with a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Hartford, where the court, *Olear*, *J.*, dismissed the plaintiff's motion, and the plaintiff appealed to this court. *Reversed*; *further proceedings.*

John F. Morris, for the appellant (plaintiff).

Opinion

DiPENTIMA, C. J. The plaintiff, Jason S. Parisi, appeals from the judgment of the trial court dismissing his motion for modification of Florida child custody orders on jurisdictional grounds. On appeal, the plaintiff claims that the court improperly (1) failed to conclude that it had subject matter jurisdiction to modify the Florida judgment pursuant to General Statutes § 46b-56 (a), and (2) deferred to the Florida court and determined that it lacked subject matter jurisdiction regarding the plaintiff's motion for modification without first conducting an evidentiary hearing. We do not agree with the plaintiff's first claim, but agree with his second claim.[1] Accordingly, we reverse the judgment of the trial court.

[1] The defendant did not file a brief and we have ordered that this appeal be considered on the basis of the plaintiff's brief, oral argument and the record.

The following facts, as gleaned from the record, and procedural history are relevant to the plaintiff's claims on appeal. In March, 2016, the marriage of the plaintiff and the defendant, Abby Niblett, was dissolved in a Florida Circuit Court. The judgment of dissolution incorporated by reference the parties' settlement agreement and parenting plan. The settlement agreement provided that the parties share parental responsibilities with respect to their minor child. The parenting plan provided that "[t]he parents shall have 50/50 parenting time" and specifically provided that "[t]he parents shall have month to month time sharing with the father having the child in the even months and the mother having the child in the odd months. . . . Once the child starts school, the parties shall negotiate to develop a time sharing schedule that is in the best interest of the child." With respect to modification, the parenting plan provided that "[t]he court will revisit the issue of time sharing when the minor child begins attending formal kindergarten."

The plaintiff filed a "supplemental petition for modification of time sharing" in Florida on April 12, 2017. In that petition, the plaintiff stated that, prior to the judgment of dissolution, the defendant had moved to Alabama. The plaintiff sought to be the child's major time sharing parent as a result of the child's having reached the age to attend formal kindergarten. On July 14, 2017, the defendant moved to dismiss the petition. On August 9, 2018, the defendant filed an "emergency motion for return of the minor child" in Florida. In this motion, the defendant alleged that she had moved to Warrior, Alabama in July, 2014, and that, since 2015, both parties continuously conducted parenting time on a monthly rotating basis, but that the plaintiff interfered with that schedule by keeping the child for longer than one month.

In October, 2017, the plaintiff moved to Connecticut. The plaintiff voluntarily withdrew his petition in Florida on September 13, 2018. On September 22, 2018, the defendant filed a petition for modification in Florida.[2] On October 9, 2018, the plaintiff filed a postjudgment motion for modification in Connecticut. In this motion, the plaintiff alleged that the minor child had attained school age and that the parties have not been able to agree on the school that the child should attend or on new time sharing arrangements. The plaintiff stated that he had enrolled the child in kindergarten in Newington, where he resided, and that the defendant attempted to enroll the child in school in Warrior, Alabama, where she resided. The plaintiff did not file an affidavit, as required by Practice Book § 25-57.[3] On November 5, 2018, the defendant moved to dismiss the plaintiff's motion for modification. In that motion, she noted that the plaintiff had failed to notify the Connecticut court regarding the ongoing child custody litigation in Florida, and argued that Florida retained jurisdiction over the matter.

On December 14, 2018, the Connecticut court conducted a telephone conference with the Florida court

[2] The defendant represented this undisputed procedural history to the Connecticut court in her motion to dismiss the plaintiff's motion for modification.

[3] Practice Book § 25-57 provides: "Before the judicial authority renders any order in any matter pending before it involving the custody, visitation or support of a minor child or children, an affidavit shall be filed with the judicial authority averring (1) whether any of the parties is believed to be pregnant; (2) the name and date of birth of any minor child born since the date of the filing of the complaint or the application; (3) information which meets the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act, General Statutes § 46b-115 et seq.; (4) that there is no other proceeding in which either party has participated as a party, witness, or otherwise, concerning custody of the child in any state; and (5) that no person not a party has physical custody or claims custody or visitation rights with respect to the child. This section shall not apply to modifications of existing support orders or in situations involving allegations of contempt of support orders."

to discuss jurisdiction.[4] Counsel for both parties were present, as well as the plaintiff himself.[5] The Florida court noted that a child custody case was pending in Florida. The Florida court explained that it "had jurisdiction when the initial divorce occurred," but that "the parties decided for whatever reason to basically relocate without permission of the Florida court. So in order for the Florida court to have any jurisdiction, one of them would need to move back here with that child. And obviously, they've been doing whatever they want to do, and now, unfortunately, they've got a problem, and coming to the courts to say, we've messed up. So, taking that into account, Florida certainly is not–would have continuing jurisdiction, however, since the child is not here, the venue should not be in Florida, and honestly, it should not be in Connecticut either. The venue should be in Alabama . . . where this child's been for the entire time since the divorce." The Connecticut court stated that "I think since no one is in Florida, not one parent, and not the child, that . . . even though I believe you did have jurisdiction, I believe you had continuing jurisdiction until I think you lost it when everyone left." The Florida court continued, "so we have jurisdiction . . . the problem is this . . . Florida is not going to hear it. . . . [The plaintiff] needs to go to Alabama because we're in a situation where Florida doesn't have any of these people. . . . These two people decided to

[4] General Statutes § 46b-115h provides in relevant part: "(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter. (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. . . ." See *Berg* v. *Somers*, Superior Court, judicial district of Litchfield, Docket No. FA-12-4012307-S (January 31, 2013) (discussing process of communication between courts); *Coyt* v. *Valdez*, Superior Court, judicial district of Fairfield, Docket No. 11-4035939-S(June 22, 2011) (same).

[5] The Florida court explained that, under Florida law, the defendant's counsel, but not the defendant, was permitted to attend.

do whatever they wanted to do, no matter what the court order said. . . . I assume what's going to happen is . . . [the defendant's] attorney will do a motion to domesticate in Alabama, which is actually where that child has been for the last three or four years." The Connecticut court stated that it only had allegations, and no affidavits regarding the child's residence following the divorce. The Florida court noted that the child would come to Florida while the plaintiff resided in Florida and the defendant in Alabama, and then the plaintiff moved to Connecticut. The Florida court reasoned, "so, right now Florida maintains the continuing jurisdiction, but . . . unless one of them, being the mother or father, is going to move back here to Florida . . . this is going to have to be heard in Alabama, which is where that child has actually been . . . because the [plaintiff] decided to vacate the state of Florida." The plaintiff's attorney noted that the plaintiff had lived in Connecticut for more than one year and the child lived equally in both Connecticut and Alabama during that time. The Florida court noted that the defendant had submitted an affidavit that did not indicate that. The Florida court stated that "the fact of the matter is Florida has continuing jurisdiction." The Connecticut court stated, "I agree, until you give it up." The Florida court stated that it was not giving up jurisdiction. The Florida court asked, "would you just dismiss your jurisdiction or lack of jurisdiction, then [the defendant's attorney] will do what needs to be done?" The Connecticut court responded in the affirmative and stated, "so, you're keeping jurisdiction. So, I'll enter a ruling in our case that due to Florida retaining jurisdiction, we don't have any." The Connecticut court issued an order that day stating that "Florida shall retain jurisdiction in this matter and the plaintiff's motion to modify . . . is hereby dismissed." This appeal followed.

Following oral argument before this court, we ordered the trial court to articulate the factual and

legal basis for its decision that it lacked subject matter jurisdiction over the plaintiff's motion for modification. The court clarified that the defendant was living in Alabama and that the plaintiff relocated to Connecticut in violation of the Florida divorce decree and without the consent of the defendant. The court noted that, at the time it dismissed the plaintiff's motion to modify, a custody action was pending in Florida. The court determined that the Florida court did not stay its proceedings or relinquish jurisdiction. The court stated that it dismissed the plaintiff's motion to modify pursuant to General Statutes §§ 46b-115a, 46b-115k, 46b-115*l*, and 46b-115m, particularly in light of the fact that Florida had not relinquished jurisdiction.

I

The plaintiff first claims that, because he followed the statutory procedures for registering the Florida judgment in this state pursuant to General Statutes § 46b-70 et seq., the court was required to conclude that it had subject matter jurisdiction to modify the Florida judgment pursuant to § 46b-56 (a). On September 17, 2018, the defendant filed in Connecticut a copy of the Florida judgment, and certified that the parties had been divorced in Florida on March 23, 2016, that to the best of his knowledge the judgment is final and has not been modified, altered, amended, set aside or vacated, and that the enforcement of such judgment has not been stayed or suspended, and that such certificate sets forth the full name. He further provided the last known address of the defendant. See General Statutes § 46b-71.[6] He contends that he properly registered the Florida

[6] General Statutes § 46b-71 provides: "(a) Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final, has not been modified, altered, amended, set aside or vacated and that the enforcement of such judgment has not been stayed or suspended, and such certificate shall set forth the full name and last-known address of the other party to such judgment and the name and address of the court in the

judgment pursuant to § 46b-71 and he also states that "[t]here is no claim . . . that he failed to properly notify the defendant or wait the requisite period before filing this motion." See General Statutes § 46b-72.[7] We do not agree that, following the filing of a certified copy of the Florida judgment, the court was required to conclude that it had subject matter jurisdiction without first examining the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which is codified in Connecticut at General Statutes § 46b-115 et seq.

Although the plaintiff did not raise this issue in the trial court, we will nonetheless address it because this issue implicates subject matter jurisdiction, which can be raised at any time, including on appeal. See, e.g., *Gonzalez* v. *Commissioner of Correction*, 107 Conn. App. 507, 511, 946 A.2d 252, cert. denied, 289 Conn. 902, 957 A.2d 870 (2008). Plenary review is afforded to issues of subject matter jurisdiction; see, e.g., *Temlock* v. *Temlock*, 95 Conn. App. 505, 518, 898 A.2d 209, cert. denied,

foreign state which rendered such judgment. (b) Such foreign matrimonial judgment shall become a judgment of the court of this state where it is filed and shall be enforced and otherwise treated in the same manner as a judgment of a court in this state; provided such foreign matrimonial judgment does not contravene the public policy of the state of Connecticut. A foreign matrimonial judgment so filed shall have the same effect and may be enforced or satisfied in the same manner as any like judgment of a court of this state and is subject to the same procedures for modifying, altering, amending, vacating, setting aside, staying or suspending said judgment as a judgment of a court of this state; provided, in modifying, altering, amending, setting aside, vacating, staying or suspending any such foreign matrimonial judgment in this state the substantive law of the foreign jurisdiction shall be controlling."

[7] General Statutes § 46b-72 provides: "Within five days after the filing of such judgment and certificate, the party filing such judgment shall notify the other party of the filing of such foreign matrimonial judgment by registered mail at his last-known address or by personal service. Execution shall not issue on any such foreign matrimonial judgment for a period of twenty days from the filing thereof and no steps shall be taken to enforce such judgment until proof of service has been filed with the court."

279 Conn. 910, 902 A.2d 1070 (2006); and statutory construction. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019).

The procedures for domesticating a foreign matrimonial judgment are established by statute. "Foreign matrimonial judgments may be enforced, modified or otherwise dealt with in Connecticut pursuant to the provisions of General Statutes §§ 46b-70 through 46b-75. Section 46b-71 requires the filing of a certified copy of a foreign matrimonial judgment in the courts of this state where enforcement is sought and empowers the courts of this state to treat such a judgment in the same manner as any like judgment of a court of this state." (Footnote omitted.) *Vitale* v. *Krieger*, 47 Conn. App. 146, 148, 702 A.2d 148 (1997). "[Section] 46b-71 (b) consigns to the courts of this state the power to enforce, satisfy, modify, alter, amend, vacate, set aside or suspend a foreign matrimonial judgment that has been properly filed in a Connecticut court." *Mirabal* v. *Mirabal*, 30 Conn. App. 821, 825, 622 A.2d 1037 (1993). "Foreign matrimonial judgment," as the term is used in General Statutes §§ 46b-70 through 46b-75, includes "any judgment, decree or order of a court of any state in the United States in an action for divorce . . . for the custody, care, education, visitation, maintenance or support of children or for alimony, support or the disposition of property of the parties to an existing or terminated marriage, in which both parties have entered an appearance." General Statutes § 46b-70.

Section 46b-70 et seq. establishes the procedures for domesticating a foreign matrimonial judgment in this state, and the jurisdiction of a trial court to modify a foreign child custody order is limited by the UCCJEA. A trial court is required to determine whether it has jurisdiction to make a custody determination pursuant to the UCCJEA. See *Scott* v. *Somers*, 97 Conn. App. 46, 50–51, 903 A.2d 663 (2006). According to § 46b-56 (a),

a trial court may make or modify a child custody order *only* if it has jurisdiction under the UCCJEA. Section 46b-56 (a) provides in relevant part: "In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction under the provisions of chapter 815p [UCCJEA]."[8]

The purposes of the UCCJEA coincide with the statutory requirement that a trial court assess its jurisdiction under the UCCJEA prior to modifying a child custody order made by another state. "The purposes of the UCCJEA are to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; promote cooperation with the courts of other states; discourage continuing controversies over child custody; deter abductions; avoid [relitigation] of custody decisions; and to facilitate the enforcement of custody decrees of other states. . . . The UCCJEA addresses [interjurisdictional] issues related to child custody and visitation. . . . The UCCJEA is the enabling legislation for the court's jurisdiction." (Citations omitted; internal quotation marks omitted.) *In re Iliana M.*, 134 Conn. App. 382, 390, 38 A.3d 130 (2012).

Accordingly, § 46b-56 (a) does not automatically grant subject matter jurisdiction over a properly domesticated foreign child custody judgment but, rather, expressly

[8] "[Section] 46b-56 (a) which grants the [S]uperior [C]ourt the general authority to make or modify any proper order as to the custody or care of minor children grants that authority only if the court 'has jurisdiction under the provisions of [c]hapter 815p' which is the chapter setting forth Connecticut's version of the UCCJEA. Accordingly, the criteria for determining jurisdiction set forth in the UCCJEA are applicable in virtually every [family relations] proceeding in which custody and/or visitation orders may be entered. Nevertheless, the issue is not likely to be raised and the UCCJEA requirements are not likely to be discussed if everyone involved resides in Connecticut." A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice (2010) § 40:3, p. 437.

and unambiguously requires the trial court to examine the enabling legislation, the UCCJEA, in order to determine whether it has subject matter jurisdiction to modify Florida's child custody order. We conclude, therefore, that it was proper for the court to apply the provisions of the UCCJEA.[9]

II

The plaintiff claims, alternatively, that the court erred by deferring to the Florida court and dismissing his motion for lack of jurisdiction without first conducting an evidentiary hearing regarding unresolved factual issues pertaining to jurisdiction. We agree with the plaintiff that the court should have held an evidentiary hearing.

"A determination regarding a trial court's subject matter jurisdiction is a question of law. . . . Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . If a court lacks subject matter jurisdiction to hear and determine cases of the general class to which the proceedings in question belong, it is axiomatic that a court also lacks the authority to enter orders pursuant to such proceedings. . . . We must determine whether the court had subject matter jurisdiction to entertain the plaintiff's [motion to modify]. We are mindful that [a] court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it . . . . [W]here a decision as to whether a court has subject matter jurisdiction is required, every

[9] We note, however, that the portion of the plaintiff's motion for modification concerning child support is not governed by the UCCJEA. Financial orders, such as child support, are not governed by the UCCJEA. General Statutes § 46b-115a (3) defines "child custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order. The term does not include an order relating to child support or other monetary obligation of an individual."

presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Temlock* v. *Temlock*, supra, 95 Conn. App. 518–19.

"[W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . [W]hen issues of fact are necessary to the determination of a court's jurisdiction . . . due process requires that a [trial like] hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . [I]n some cases . . . it is necessary to examine the facts of the case to determine whether it is within a general class that the court has power to hear. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 652–54, 974 A.2d 669 (2009).

The following discussion regarding the enactment of the UCCJEA, as described by the Tennessee Court of Appeals provides background for our analysis. "The UCCJEA was designed as a replacement for the Uniform Child Custody Jurisdiction Act (UCCJA) . . . [which was] [p]romulgated in 1968 in an effort to bring order out of the chaos that once marked interstate custody disputes when the courts of different states claimed authority to issue contradictory custody orders. . . . By 1983, all fifty states had enacted some version of the CCJA. Unfortunately, state legislatures made significant changes to the UCCJA before adopting it, and . . . [a]s a result, the goal of seamless enforcement of child custody determinations across state lines remained unattained. In 1980, Congress added an additional layer of complexity when it exercised its authority under the

[f]ull [f]aith and [c]redit [c]lause [of the United States constitution] and other constitutional provisions to enact the Parental Kidnapping Prevention Act of 1980 (PKPA) . . . . [T]he PKPA deviated from the UCCJA [and] significantly altered the analysis for modification jurisdiction. . . . The PKPA added the concept of continuing jurisdiction, 28 U.S.C.A. § 1738A (c) (2) (E) [and] (d), and provided that once a state had entered or modified a child custody determination in compliance with the statute's jurisdictional requirements, its jurisdiction would continue . . . as long as . . . such [s]tate remains the residence of the child or of any contestant. . . . The PKPA prohibited courts from modifying another state's child custody determination if the other state had continuing jurisdiction over the determination and had not declined to exercise it. 28 U.S.C.A. § 1738A (g) [and] (h). Thus, while home state jurisdiction was at the top of the jurisdictional hierarchy under the UCCJA, under the PKPA, continuing jurisdiction trumped home state jurisdiction.

"The prioritization of the four basic jurisdictional tests [of home state jurisdiction, significant connection jurisdiction, inconvenient forum jurisdiction, and jurisdiction when no other basis for jurisdiction is available][10] and the addition of the concept of continuing jurisdiction in the modification context created a gap between the jurisdictional standards of the UCCJA and the PKPA. As a result, child custody determinations made in compliance with the UCCJA were usually, but not always, entitled to full faith and credit—i.e., enforcement and [nonmodification]—in all fifty states as a matter of federal law under the PKPA. . . . The differences between the uniform act and the federal statute spawned

[10] These jurisdictional tests also form the basis for initial custody jurisdiction under Connecticut's UCCJEA. See General Statutes § 46b-115k.

numerous jurisdictional clashes that often resulted in the creation of conflicting case law as the courts struggled to parse the fine distinctions between the jurisdictional requirements of the PKPA and the various state versions of the UCCJA. . . . Thus, one of the primary goals of the UCCJEA was to eliminate the friction between the jurisdictional analysis of the PKPA and the uniform act by incorporating clarified versions of the PKPA's prioritized [four part] hierarchy for subject matter jurisdiction and the concept of continuing jurisdiction. . . . Another primary goal of the UCCJEA was to sweep away the enormous body of conflicting decisions that had accreted over the past thirty years under the UCCJA by streamlining the language and structure of the underlying uniform statute. Thus, while the UCCJEA retained the central concepts of the UCCJA and the PKPA, it substantially revised and clarified both the statutory text and the official commentary with the goal of allowing the courts to develop a new and truly uniform body of decisional law to govern interstate child custody disputes." (Citations omitted; footnotes added and omitted; internal quotation marks omitted.) *Staats* v. *McKinnon*, 206 S.W.3d 532, 544–47 (Tenn. App. 2006), appeal denied, Tennessee Supreme Court (October 16, 2006).

In order for a Connecticut court to determine if it had jurisdiction to modify Florida's initial custody order, it must refer to § 46b-115m. That section provides in relevant part that "a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under subdivisions (1) to (4), inclusive, of subsection (a) of section 46b-115k and one of the following occurs: (1) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under a provision substantially similar

to section 46b-115*l*; (2) a court of another state determines that a court of this state would be a more convenient forum under a provision substantially similar to section 46b-115q; or (3) a court of this state or another state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state." General Statutes § 46b-115m (a).

On the basis of the plain language of § 46b-115m (a), in order for Connecticut to have jurisdiction to modify Florida's initial custody order, there must be two findings in the present case:[11] that the Connecticut trial court has initial custody jurisdiction pursuant to § 46b-115k (a) (1) through (4) *and* either that Connecticut or Florida determines that neither parent nor the child presently resides in Florida, thereby ending Florida's exclusive, continuing jurisdiction. These two steps as to whether Connecticut has initial custody jurisdiction and as to whether Florida retains exclusive, continuing jurisdiction, stand on equal footing under the plain language of § 46b-115m (a). We begin our analysis with the latter because it formed the basis of the decision of the Connecticut court.

During the phone conference, the Connecticut court agreed with the Florida court that that Florida court retains exclusive, continuing jurisdiction until the Florida court decides to relinquish such jurisdiction and, as a result, the Connecticut court dismissed the plaintiff's motion for modification. In its articulation, the court noted that it dismissed the plaintiff's motion to modify in light of the UCCJEA, "particularly as Florida did not relinquish jurisdiction." The plaintiff argues that the court improperly deferred to the Florida court, and we agree. The exclusive, continuing jurisdiction provision

[11] There are only two basic findings required in this case because § 46b-115m (a) (1) and (2) are not applicable.

of Florida's UCCJEA, Fla. Stat. Ann. § 61.515,[12] which is substantially similar to § 46b-115*l*, provides in relevant part: "(1) . . . [A] court of this state which has made a child custody determination consistent with [the provision of Florida's UCCJEA pertaining to initial child custody jurisdiction] . . . has exclusive, continuing jurisdiction over the determination until: (a) A court of this state determines that the child, the child's parents, and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or (b) A court of this state *or a court of another state* determines that the child, the child's parent, and any person acting as a parent do not presently reside in this state. (2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under s. 61.514." (Emphasis added.) According to the plain language of Fla. Stat. Ann. § 61.515 (1) (a), only Florida can determine if it lost jurisdiction due to a lack of significant contacts/substantial evidence, but pursuant to subsection (b), *either* the Florida court *or* the Connecticut court can determine that the Florida court no longer has exclusive, continuing jurisdiction over the child custody matter due to the child and the child's parents no longer presently residing in Florida.

During the phone conference, the Florida court stated that both parents and the child had left Florida and had relocated to other states. The Florida court specifically

[12] See A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice (2010) § 40:10, p. 451 ("[A] Connecticut trial court faced with a motion to modify an out-of-state custody determination should refer to the other state's version of the UCCJEA to determine if modification jurisdiction continues there. If it does, the Connecticut action should be dismissed." (Footnote omitted.)).

explained that the defendant relocated to Alabama, that the child would visit Florida every month while the plaintiff was still in Florida, but that eventually the plaintiff relocated to Connecticut, resulting in a situation in which the child and both parents were no longer in the state of Florida. The Florida court further stated that it would not hear the case and that Alabama, in which no proceeding was then pending, was the proper venue. The Connecticut court stated that "everyone left" Florida, but concluded that it would "enter an order in our case that due to Florida retaining jurisdiction, we don't have any."

The Connecticut court based its decision on an incorrect interpretation of the UCCJEA that Florida retains exclusive, continuing jurisdiction *until* it decides to relinquish it. Although the UCCJEA grants exclusive, continuing jurisdiction over child custody disputes to the state that made the initial custody determination, the UCCJEA also provides an end date to that exclusive, continuing jurisdiction.[13] See General Statutes 46b-115*l* (a); Fla. Stat. Ann. § 61.515 (West 2012); see also *In re Marriage of Nurie*, 176 Cal. App. 4th 478, 502, 98 Cal. Rptr. 3d 200 (2009) (noting UCCJEA "reflects a deliberate effort to provide a clear end-point to the decree state's jurisdiction, to prevent courts from treading on one another's jurisdiction, and to ensure that custody

[13] Similar to the exclusive, continuing jurisdiction provisions of the UCCJEA, the PKPA "anchor[s] exclusive modification jurisdiction in the original home state as long as the child or one of the contestants remain in that state." (Internal quotation marks omitted.) *Scott* v. *Somers*, supra, 97 Conn. App. 53; see 28 U.S.C. § 1738A (2000). The PKPA extends the requirements of the full faith and credit clause to custody determinations and mandates that each state "shall enforce according to its terms, and shall not modify" a child custody determination, except as provided by the PKPA, "any custody determination or visitation determination made consistently with the provisions of this section by a court of another [s]tate." 28 U.S.C. § 1738A (a) (2000). Under the supremacy clause, the PKPA preempts state law when the two conflict. See, e.g., *Scott* v. *Somers*, supra, 97 Conn. App. 51 (discussing UCCJA, which was later replaced by UCCJEA).

orders will remain fully enforceable until a court determines they are not").

The comment to § 202 of the UCCJEA, which concerns continuing exclusive jurisdiction, explains that "[t]his is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed in the UCCJA. Its absence caused considerable confusion, particularly because the PKPA, § 1738 (d), requires other [s]tates to give [f]ull [f]aith and [c]redit to custody determinations made by the original decree [s]tate pursuant to the decree [s]tate's continuing jurisdiction so long as that [s]tate has jurisdiction under its own law and remains the residence of the child or any contestant. . . . This section provides [that the] continuing jurisdiction of the original decree [s]tate is exclusive. It continues until one of two events occurs: 1. If a parent or a person acting as a parent remains in the original decree [s]tate, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree [s]tate and there is no longer substantial evidence concerning the child's care, protection, training and personal relations in that [s]tate. . . . 2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent *no longer reside* in the original decree [s]tate. . . . The phrase ['do not presently reside'] is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a [s]tate in the exercise of its continuing jurisdiction when that [s]tate remains the residence of. . . . It is the intention of [the section of the UCCJEA regarding exclusive continuing jurisdiction that the phrase "presently reside"] means that the named persons no longer continue to actually live within the [s]tate. Thus, unless a modification proceeding has been commenced, when the child,

the parents, and all persons acting as parents physically leave the [s] tate to live elsewhere, the exclusive, continuing jurisdiction ceases. . . . If the child, the parents, and all persons acting as parents have all left the [s]tate which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in [s]tate B, as well as a court in [s]tate A, can decide that [s]tate A has lost exclusive, continuing jurisdiction. . . . [O]nce a [s]tate has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of [initial custody jurisdiction]. . . .'' Unif. Child Custody Jurisdiction and Enforcement Act (1997), § 202, comment, 9 U.L.A. (Pt. IA) 511–12 (2019).

Pursuant to the UCCJEA, exclusive continuing jurisdiction ends when the original decree state determines that the significant connection and the substantial evidence requirements are no longer met, *or* when either the original decree state or another state determines that neither parent nor the child continues to reside in the original decree state. See General Statutes § 46b-115*l* (a); Fla. Stat. Ann. § 61.515 (West 2002). The comment to § 203 of the UCCJEA, which concerns jurisdiction to modify a custody determination by another state, states in relevant part: ''The modification [s]tate is not authorized to determine that the original decree [s]tate has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other [s]tate. In other words, a court of the modification [s]tate can determine that all parties have moved away from the original [s]tate.'' Unif. Child Custody Jurisdiction and Enforcement Act (1997), § 203, comment, 9 U.L.A. (Pt. 1A) 516. Accordingly, the Connecticut court was not required to defer automatically to the Florida court

under all circumstances, but had the authority to determine whether Florida lost exclusive, continuing jurisdiction as a result of neither parent nor the child presently residing in Florida at the time that the plaintiff commenced his Connecticut modification proceeding.[14] We remand the matter so that the court can apply the proper law.

The remaining step in determining whether Connecticut has jurisdiction to modify the Florida order pursuant to § 46b-115m is for the Connecticut court to assess whether it has jurisdiction to make an initial custody determination pursuant to § 46b-115k (a) (1) through (4). We agree with the plaintiff that the Connecticut court was unable to make the prerequisite findings without an evidentiary hearing.

Section 46b-115k (a) (1) through (4) establishes a hierarchy of four bases that grant a state jurisdiction to make an initial custody determination: home state jurisdiction, significant connection jurisdiction, and more appropriate forum jurisdiction. Specifically, § 46b-115k

[14] We do not express an opinion as to whether, under the sparse factual record before the trial court, the parents and the child presently reside in Florida. We need not determine, for purposes of this appeal, precisely what the term "presently resides" means, but note that other states have expressed a concern with conflating the phrase with physical presence, reasoning that such an interpretation leads to jurisdictional instability permitting a parent to race to establish a new home state for their child in effort to relitigate custody issues in a friendlier forum once the other parent is no longer physically present in the original decree state for a variety of reasons. See *Brandt* v. *Brandt*, 268 P.3d 406 (Colo. 2012) (concerned with situation in which issuing state could lose jurisdiction if parent is temporarily out of state in hospital or on military assignment); see also K. Wessel, "Home Is Where the Court Is: Determining Residence for Child Custody Matters Under the UCCJEA," 79 U. Chi. L. Rev. 1141, 1143–75 (2012) (detailing difficulties in defining "presently reside"). In an effort to combat forum shopping and encourage stability in custody orders, some states have adopted an approach wherein the relevant inquiry is not whether the parents reside somewhere other than the original decree state, but whether the parents and the child had stopped residing in the original decree state. See *In re Marriage of Nurie*, supra, 176 Cal. App. 4th 499.

(a) provides in relevant part: "(1) This state is the home state of the child on the date of the commencement of the child custody proceeding; (2) This state was the home state of the child within six months of the commencement of the child custody proceeding, the child is absent from the state, and a parent or a person acting as a parent continues to reside in this state; (3) A court of another state does not have jurisdiction under subdivisions (1) or (2) of this subsection, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships; (4) A court of another state which is the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision substantially similar to section 46b-115q or section 46b-115r, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships . . . ."

It is undisputed that the Florida court had jurisdiction to make an initial determination regarding custody when it rendered its dissolution judgment on March 23, 2016. In the judgment of dissolution, the Florida court found that Florida was the home state of the child and that the father had been a resident of the state of Florida for at least six months prior to the filing of the petition for the dissolution of marriage. See Fla. Stat. Ann. § 61.514 (West 2002). Since then, however, circumstances have changed and the child and both parents have relocated out of Florida. Although the Florida court had jurisdiction to make the March 23, 2016 initial determination regarding custody, there currently are

unresolved issues of fact regarding whether Florida or Connecticut has jurisdiction to modify the March 23, 2016 determination.

Home state jurisdiction, which is given first priority when determining initial custody jurisdiction, exists when, in relevant part, a state is the "home state" of the child "on the date of the commencement" of the proceeding or when the state was the home state of the child within six months of the "commencement" of the proceeding. See General Statutes § 46b-115k (1) and (2). Section 46b-115a (7) defines "home state" in relevant part as "the state in which a child lived with a parent or persons acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. . . . A period of temporary absence of any such person is counted as part of the period."

Although Florida had jurisdiction on March 23, 2016, to make an initial determination, there exists no provision in the UCCJEA providing that jurisdiction to make an initial determination continues until the state relinquishes jurisdiction even if all parties have moved out of the state prior to the commencement of a modification proceeding. In other words, "initial determination" and the "commencement" of a proceeding do not necessarily mean the same thing. An "initial determination" is defined as "the first child custody determination concerning a particular child . . . ." General Statutes § 46b-115a (8). " 'Commencement' " is defined as "the filing of the first pleading in a proceeding . . . ." General Statutes § 46b-115a (5). " 'Child custody proceeding' means a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. . . ." General Statutes § 46b-115a (4). A proceeding concerning the modification of an initial custody determination fits within the definition of "child custody proceeding." Accordingly, as the UCCJEA bears

out, a motion for modification of child custody constitutes the commencement of a child custody proceeding.

The general scheme of the UCCJEA and Connecticut case law provide a basis for interpreting the filing of a motion for modification as the commencement of a proceeding. First, § 46b-115m (3) provides that this state can modify another state's custody order if certain criteria relevant to initial custody jurisdiction are met and, among other possible additional factors, a court of this state or another state determines that the child and the parents no longer reside in the other state. Additionally, in *Temlock* v. *Temlock*, supra, 95 Conn. App. 522, this court used the date of the filing of a motion for modification as the relevant date for determining home state. We find persuasive, and agree with, the reasoning used by the Nevada Supreme Court when interpreting "commencement of the proceeding" under the UCCJEA provision of Nevada's initial custody jurisdiction statute, which is virtually identical to § 46b-115k. The court stated: "The relevant proceeding for purposes of determining the date of the commencement of the proceeding . . . is not the original divorce proceeding. Rather, it is the [postdivorce] motion concerning custody or visitation that controls. . . . To hold that the proceeding refers to the original dissolution action would confer perpetual jurisdiction over matters of custody to the courts of the state which granted the dissolution, regardless of whether the parties or child had any further connection with that state . . . a result that is contrary to the underlying purpose of the UCCJEA. . . . [W]e [therefore] must interpret commencement of the proceeding to mean the recent, [postdivorce] proceeding concerning the custody of the child." (Internal quotation marks omitted.) *Friedman* v. *Eighth Judicial District Court*, 127 Nev. 842, 849, 264 P.3d 1161 (2011); see also *Wahlke* v. *Pierce*, 392 S.W.3d 426, 429 (Ky. App. 2013) ("[J]urisdiction under the UCCJEA 'attaches at the commencement of a proceeding' . . . .

So, a family court's jurisdiction to modify custody is determined at the time the motion to modify is filed.").

The plaintiff filed his motion for modification in Connecticut on October 9, 2018, approximately one year after he moved to Connecticut. At that time, the defendant lived in Alabama and the child resided with the parties on an alternating monthly basis. Under these circumstances, there are issues of fact as to whether Connecticut was the home state of the child on October 9, 2018, particularly whether the time the child spent in Alabama is considered a "temporary absence" from Connecticut.[15]

Next in the hierarchy of initial custody jurisdiction is "significant connection" jurisdiction, § 46b-115k (a) (3), which exists when a court of another state does not have home state jurisdiction and the child and at least one parent must have a significant connection to the state.[16] Whether Florida was the home state of the child at the time the defendant's motion for modification was filed in Florida is an unresolved factual issue as is the question of whether the plaintiff and the child have a significant connection with Connecticut.[17] Thus,

[15] We reject the plaintiff's argument that the Connecticut court has subject matter jurisdiction over the motion for modification because Connecticut is the home state of the child. An evidentiary hearing is required in order for the court to make the necessary factual findings for that determination.

[16] The final jurisdictional basis that is implicated in § 46b-115m, is "more appropriate forum" jurisdiction pursuant to § 46b-115k (a) (4). There is no discussion in the record regarding more appropriate forum jurisdiction.

[17] It is not disputed that more than one year after the plaintiff moved to Connecticut in October, 2017, he filed a motion to voluntarily dismiss his Florida modification proceeding on September 13, 2018. Fla. Family Law Rules of Procedure § 12.420 provides in relevant part: "(a) Voluntary Dismissal. (1) *By Parties.* An action or a claim may be dismissed (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision . . . ."

During the phone conference, the Florida court agreed with the defendant's counsel that the plaintiff had voluntarily dismissed his Florida motion,

the determination of jurisdiction is dependent on unresolved factual issues that "cannot initially be determined on appeal. . . . When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a [trial like] hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Citation omitted; internal quotation marks omitted.) *Temlock* v. *Temlock*, supra, 95 Conn. App. 523. We conclude that the court improperly determined that it lacked jurisdiction because it did not afford the plaintiff an evidentiary hearing. See id.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion, including an evidentiary hearing on the plaintiff's motion for modification.

In this opinion, DEVLIN, J., concurred.

ELGO, J., concurring in part and dissenting in part. The present case exemplifies the confounding nature that child custody proceedings can take when a court is tasked to decide whether it has jurisdiction to modify a child custody order despite a proceeding having been commenced in another state. When such circumstances arise, it is imperative that the statutory scheme of the Uniform Child Custody Jurisdiction and Enforcement Act (act), General Statutes § 46b-115 et seq., is applied in a formulaic manner in order to effectuate the public policy goals at its foundation. The majority concludes that issues of fact remain as to whether Connecticut was the home state of the child at the time the plaintiff,

and that the defendant's motion for modification was still pending in the Florida court. It is clear from the phone conference, that the courts were deciding whether Connecticut had jurisdiction over the plaintiff's motion for modification in Connecticut or Florida had jurisdiction over the defendant's pending motion for modification.

Jason S. Parisi, commenced the *Connecticut proceeding* to modify a child custody judgment rendered in Florida. On the basis of a plain reading and application of the act, I would conclude, to the contrary, that the relevant proceeding for determining the child's home state is the Florida proceeding in question. Because there are no issues of fact concerning the child's home state at the time that the Florida proceeding was commenced, and because the Florida court has before it a pending motion over which it has not relinquished its jurisdiction to adjudicate, I would conclude that the trial court properly determined that it lacked jurisdiction to modify the original child custody decree and dismissed the action. Accordingly, I respectfully dissent from part II of the majority opinion.[1]

Before addressing the merits of the plaintiff's claim, I begin with the policies and purposes of the act. As this court has observed, "[t]he purposes of the [act] are to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; promote cooperation with the courts of other states; discourage continuing controversies over child custody; deter abductions; avoid [relitigation] of custody decisions; and to facilitate the enforcement of custody decrees of other states." (Internal quotation marks omitted.) *In re Iliana M.*, 134 Conn. App. 382, 390, 38 A.3d 130 (2012). The Supreme Court of New Hampshire recently elaborated on the reasons that prompted the act's enactment. As it explained: "The [act] was promulgated, in part, to resolve issues resulting from decades of conflicting court decisions interpreting and applying the [Uniform Child Custody Jurisdiction Act (UCCJA)]. . . . The UCCJA turned out to have exploitable loopholes allowing for concurrent jurisdiction in more than one state, which encouraged jurisdictional competition

[1] I fully agree with part I of the majority opinion and, accordingly, join it in all respects.

. . . and forum shopping. . . . The [act] addressed these problems, in part, by making clear that [t]he continuing jurisdiction of the original decree [s]tate is exclusive." (Citations omitted; internal quotation marks omitted.) *In re Guardianship of K.B.*, Docket No. 2019-0126, 2019 WL 5496009, *2 (N.H. October 25, 2019). The act, therefore, reflects "a pact among states limiting the circumstances under which one court may modify the orders of another." *In re Custody of A.C.*, 165 Wn. 2d 568, 574, 200 P.3d 689 (2009) (en banc). Through this pact among states, the act seeks to control the circumstances under which a court in one state is permitted to modify an original child custody decree rendered in another. See 24A Am. Jur. 2d Divorce and Separation 631, § 1072 (2018) ("[i]n accord with the letter of the [act], concerning modification of custody decrees of courts of other states, and its purpose to achieve greater stability of custody arrangements and avoid forum shopping, all petitions for modification must be addressed to the state that rendered the original decree if that state had and retains jurisdiction under the standards of the [act]").

With that fundamental purpose in mind, I now provide a brief review of the relevant portions of Connecticut's version of the act, which governs the modification of a child custody decree rendered in another state. My analysis begins with and is constrained by the dictates of General Statutes § 46b-115m,[2] which, by its terms,

[2] General Statutes § 46b-115m provides: "(a) Except as otherwise provided in section 46b-115n, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under subdivisions (1) to (4), inclusive, of subsection (a) of section 46b-115k and one of the following occurs: (1) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under a provision substantially similar to section 46b-115*l*; (2) a court of another state determines that a court of this state would be a more convenient forum under a provision substantially similar to section 46b-115q; or (3) a court of this state or another state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state."

provides the exclusive basis by which a Connecticut court is permitted to modify a child custody determination of a foreign state.

Section 46b-115m provides in relevant part: "(a) Except as otherwise provided in section 46b-115n, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an *initial determination* under subdivisions (1) to (4), inclusive, of subsection (a) of section 46b-115k *and* one of the following occurs . . . ." (Emphasis added.) Accordingly, the initial inquiry is whether the court has jurisdiction to make an initial child custody determination under any of the first four subdivisions of § 46b-115k (a).[3] Conversely, because of the use of the conjunctive

[3] General Statutes § 46b-115k provides: "(a) Except as otherwise provided in section 46b-115n, a court of this state has jurisdiction to make an initial child custody determination if: (1) This state is the home state of the child on the date of the commencement of the child custody proceeding; (2) This state was the home state of the child within six months of the commencement of the child custody proceeding, the child is absent from the state, and a parent or a person acting as a parent continues to reside in this state; (3) A court of another state does not have jurisdiction under subdivisions (1) or (2) of this subsection, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships; (4) A court of another state which is the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under a provision substantially similar to section 46b-115q or section 46b-115r, the child and at least one parent or person acting as a parent have a significant connection with this state other than mere physical presence, and there is substantial evidence available in this state concerning the child's care, protection, training and personal relationships; (5) All courts having jurisdiction under subdivisions (1) to (4), inclusive, of this subsection have declined jurisdiction on the ground that a court of this state is the more appropriate forum to determine custody under a provision substantially similar to section 46b-115q or section 46b-115r; or (6) No court of any other state would have jurisdiction under subdivisions (1) to (5), inclusive, of this subsection."

"(b) Subsection (a) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state."

"and," if a court of this state does not have jurisdiction to make an initial child custody determination under any of those first four provisions, the inquiry ends.

Turning to the first of those subdivisions, § 46b-115k (a) (1) provides that "[e]xcept as otherwise provided in section 46b-115n, a court of this state has jurisdiction to make an *initial child custody determination* if: (1) This state is the home state of the child on the date of the commencement of the child custody proceeding." (Emphasis added.) Critical to this subdivision is determining the relevant "child custody proceeding." In the present case, we must discern whether the *initial* child custody proceeding under § 46b-115k (a) contemplates the Florida marital dissolution proceeding commenced sometime near March, 2016, or the Connecticut modification proceeding commenced in October, 2018.

Resolving that question requires looking to the statutory definitions of key terms found in §§ 46b-115k and 46b-115m. It is well settled that "when a statutory definition applies to a statutory term, the courts must apply that definition." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 536, 46 A.3d 102 (2012). Further providing guidance is "the principle that the legislature is always presumed to have created a harmonious and consistent body of law. . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter. . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 21, 981 A.2d 427 (2009).

True to its title, § 46b-115k serves to determine whether a court has jurisdiction to make an "initial child custody determination." The act defines the term

" '[i]nitial determination' " as "the first *child custody determination* concerning a particular child . . . ." (Emphasis added.) General Statutes § 46b-115a (8). It further defines " '[c]hild custody determination' " as "a judgment, decree, or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order . . . ." General Statutes § 46b-115a (3).

Section 46b-115a (7) also provides a definition of the term " '[h]ome state,' " defining it in relevant part as "the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the *commencement* of a *child custody proceeding*." (Emphasis added.) " 'Commencement' " is also defined as "the filing of the first pleading in a proceeding . . . ." General Statutes § 46b-115a (5). Lastly, the act defines " '[c]hild custody proceeding' " in relevant part as "a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for dissolution of marriage, divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which the issue may appear. . . ." General Statutes § 46b-115a (4).

Bound by those definitions, I now look to apply them to § 46b-115k (a) in a manner that provides consistency—between both the terms and the statutes that employ them. Read together, §§ 46b-115k (a) (1) and 46b-115m (a) provide that a Connecticut court has jurisdiction to modify another state's decree only if, as a prerequisite, Connecticut "is the home state of the child on the date of the commencement of the child custody proceeding . . . ." In its more elaborated form, the statute provides as follows: A Connecticut court has jurisdiction to modify another state's decree only if, first, Connecticut has jurisdiction to make the *first* judgment,

decree, or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. Compare General Statutes § 46b-115k (a) (1) with General Statutes § 46b-115m (a). Under § 46b-115k (a) (1), Connecticut must be the state in which the child lived with a parent or person acting as a parent for at least six consecutive months immediately before the *first* filing or pleading of the proceeding in which legal custody, physical custody or visitation with respect to that child is an issue. I therefore respectfully submit that a plain reading of the statute in light of its defined terms compels the conclusion that the "child custody proceeding" at issue under § 46b-115k (a) (1) refers back to the *first* proceeding in which the child's custody was at issue.

That conclusion finds further support in the relative locations of the terms "initial child custody determination" and "child custody proceeding" in § 46b-115k (a). The contiguity of the phrase "the child custody proceeding" with "initial child custody determination" strongly suggests that the former relates back to the latter. Therefore, under subdivision (1) of that statute, "the child custody proceeding" at issue can only logically refer to the proceeding that concerns the *initial* child custody determination. Otherwise, there would be no purpose for the language found in § 46b-115m that explicitly conditions jurisdiction to modify another state's child custody determination only if "a court of [Connecticut] has jurisdiction to make an *initial determination* under [one of § 46b-115k (a) (1) through (4)] . . . ." (Emphasis added.) Indeed, "[m]odification means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the prior custody determination . . . ." (Internal quotation marks omitted.) General Statutes § 46b-115a (11). It is,

therefore, inconsistent with the statutory text to conclude that a modification proceeding could be considered as the *first* proceeding in which a determination of the child's custody is at issue. Had the act envisioned the modification proceeding to qualify as the "child custody proceeding" under § 46b-115k (a) (1)—as opposed to the proceeding that resulted in the initial child custody determination—it would have provided for that distinction in either of the aforementioned statutes. It does not, and, instead, expressly limits a court's jurisdiction to modify a foreign court's decree only if the court is the home state of the child at the time the initial child custody determination is made.

In the record before us, the Final Judgment of Dissolution of Marriage with Minor Children, attached to the certification filed by the plaintiff on September 17, 2018, documents the jurisdictional findings by the Florida court when it dissolved the marriage and issued custodial orders. It specifically found that (1) it had jurisdiction over the parties, (2) the petitioner had been a resident of Florida for a least six months prior to the commencement of the action, (3) Florida was the home state of the child, (4) it had continuing jurisdiction pursuant to Florida law and the UCCJEA, and (5) it was the sole jurisdictional state to determine child custody. Moreover, the Florida court declared that it "expressly retains jurisdiction of this cause for the purposes of enforcing, construing, interpreting, or modifying the terms of this [f]inal [j]udgment . . . ." Thus, there can be no dispute that the Florida dissolution proceeding—commenced at some point prior to the March 23, 2016 dissolution judgment—rendered the initial child custody determination concerning custody of the child at issue here.

Importantly, the Florida court expressly retained its jurisdiction during the telephone call between that court and the Connecticut court. On the basis of these

facts, an evidentiary hearing is entirely unnecessary and, indeed, improper. Accordingly, the Florida court's unambiguous declination to relinquish its jurisdiction during the telephone communications is dispositive. The dissolution judgment rendered in Florida constitutes an initial child determination and, thus, is a bell that cannot be unrung for purposes of modification under § 46b-115m.

In my view, the majority's contrary conclusion also is at odds with a primary purpose of the act: to prevent jurisdictional competition, conflict, and forum shopping. See *In re Iliana M.*, supra, 134 Conn. App. 390; see also annot., Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act, 100 A.L.R.5th 1 (2002), prefatory commentary (noting that UCCJA's "exploitable loopholes" encouraged jurisdictional competition, conflict, and forum shopping, problem that "the [act] has attempted to address by prioritizing home-state jurisdiction"). In the present case, the plaintiff originally filed a "supplemental petition for modification of time sharing" with the Florida court on April 12, 2017, to which the defendant, Abby Niblett, filed a motion to dismiss. The plaintiff thereafter moved to Connecticut in October, 2017, and filed on December 14, 2017, an amended supplemental petition for modification and petition to relocate. On January 4, 2018, the defendant filed an answer to the amended petition, and on August 9, 2018, filed an "emergency motion for return of the minor child" in the Florida court. On September 13, 2018, the plaintiff withdrew his motion in the Florida court, followed shortly thereafter by the defendant's own petition for modification in Florida filed on September 22, 2018. On October 9, 2018, the plaintiff instituted the underlying proceedings in Connecticut seeking a postjudgment modification of the Florida judgment.[4]

[4] As the majority opinion correctly notes, we are obligated to give full faith and credit to child custody determinations of a foreign state rendered in conformity with the act and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2018). See footnote 15 of the majority opinion.

There can be little doubt as to the effect of the Connecticut action; two modification proceedings now are pending in the courts of two different states regarding the judgment originally rendered in Florida. Should the Connecticut court, on remand, determine that it possesses subject matter jurisdiction over the plaintiff's motion based on the majority's interpretation of the act, how will two separate determinations on the two motions to modify be reconciled should the Florida court dispose of the pending motion before it? In short, this is precisely the conundrum that, in supplanting the UCCJA, the act sought to avoid.

The majority opinion suggests that my interpretation would "confer perpetual jurisdiction over matters of custody to the courts of the state, which granted the dissolution, regardless of whether the parties or child had any further connection with that state . . . a result that is contrary to the underlying purpose of the [act] . . . ."[5] (Internal quotation marks omitted. See part II of the majority opinion (quoting *Friedman* v. *Eighth Judicial District Court*, 127 Nev. 842, 849, 264 P.3d 1161 (2011)). I respectfully and fundamentally disagree. Under my reading of the statutes in question, a Connecticut court would have jurisdiction to modify a custody determination if the court *of the other state* determines that it no longer has exclusive, continuing jurisdiction under its version of § 46b-115*l*, provided that a court of this state satisfies one of the first four subdivisions

[5] The majority's emphasis on this quotation in support of its conclusion is misplaced. The origin of this particular quote can be traced to *Kioukis* v. *Kioukis*, 185 Conn. 249, 257, 440 A.2d 894 (1981), in which our Supreme Court interpreted the now-repealed UCCJA—not the act presently before us. "Given the substantially different principles now governing the issue of jurisdiction to modify an existing order, decisions under the UCCJA which discuss the issues, such as *Kioukis* . . . should not be viewed as representing the law or analysis which would apply under the [act] on the jurisdiction issue." (Footnotes omitted.) A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice (2010) § 40:10, p. 451.

of § 46b-115k. See General Statutes § 46b-115m (a). Had the plaintiff brought this issue to the Florida court, that court—and not this court—could properly have determined that it no longer has exclusive, continuing jurisdiction. See generally Fla. Stat. Ann. § 61.515 (West 2002) (Florida's version of § 46b-115*l* (a)). As a result, the Florida court would be presented with two options. The first would be to nevertheless retain jurisdiction under its version of § 46b-115k—notwithstanding its loss of exclusive, continuing jurisdiction—in order to dispose of any pending matters before it. See Fla. Stat. Ann. § 61.515 (2) (West 2002) ("[a] court of [Florida] which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under [section] 61.514"). The alternative, of course, would be for the Florida court to decline to exercise jurisdiction. In the latter scenario, both §§ 46b-115k (a) (4) and 46b-115m (a) are satisfied and the resulting effect would be that the Connecticut court has jurisdiction to modify Florida's original decree.

The statutory scheme in the present case plainly envisions that the Florida court—as the home state of the child at the time the original child custody proceedings were commenced—be given deference to make that initial determination. It is not within the purview of a court of this state to upend the Florida court's statutory authority to do so. Consistent with the primary purpose of the act, a court that is presented with a modification petition should not become a tool to be wielded by a party to escape a foreign court's jurisdiction by virtue of simply leaving the state.[6] On the record before us, I

[6] This concern is touched on in the majority opinion in its discussion of defining "presently reside" for purposes of determining if the child and his or her parents have vacated the original decree state. See footnote 14 of the majority opinion.

have little doubt that the Florida court in this case likely would decline to exercise its jurisdiction after it dealt with the matters that it has yet to resolve. Indeed, it may very well be compelled to do so given the present posture of the case. The judge of the Connecticut Superior Court rightfully acknowledged the Florida court's authority to make that decision during the telephone conference, and, noting the defendant's unresolved countermotion before the Florida court in its articulation, dismissed the Connecticut action. The majority opinion deprives the Florida court from exercising its statutory power, thereby upending the core policies and purposes of the act. As a result of today's decision, parties will be permitted to circumvent the careful process of transferring jurisdiction by simply absconding from the state in which the initial child custody determination was rendered.

The analysis advanced by both the majority and the plaintiff is not saved by the remaining subdivisions of § 46b-115k (a) (2) through (4). Under § 46b-115k (a) (2), Connecticut was not "the home state of the child within six months of the commencement of the child custody proceeding . . . ." Subdivision (3) also fails because a court of another state, namely Florida, *does* have jurisdiction under its version of subdivision (1) of § 46b-115k (a). Lastly, subdivision (4) is not satisfied because Florida did not decline to exercise jurisdiction on the ground that Connecticut is the more appropriate forum. See General Statutes § 46b-115k (a) (4). Instead, it expressly stated its intent to retain jurisdiction despite the parties having left that state. Between the pending motions before it and its familiarity with the long history of this dispute among the parties, the Florida court was within its authority to forgo declining jurisdiction. This was the only vehicle by which the Connecticut court could satisfy § 46b-115k (a) as a prerequisite to

obtaining jurisdiction to modify a foreign state's judgment under § 46b-115m. The plaintiff was fully entitled to have this matter addressed by the Florida court. Instead, he chose to use the Connecticut court to break from the yoke of the Florida court's jurisdiction—despite the act's mandate that courts prevent him from doing so. I therefore would conclude that the trial court in the present case properly dismissed the plaintiff's motion to modify for lack of subject matter jurisdiction.

Given my belief that no issues of fact exist surrounding whether the Connecticut court has jurisdiction under § 46b-115k (a) (1) through (4), that conclusion should be the first and last stop in disposing of the plaintiff's claim. The majority opinion, however, takes a different approach. Instead of first determining the threshold issue of whether the court has jurisdiction to make an initial determination under § 46b-115k (1) through (4), the majority opinion begins its analysis by skipping this initial inquiry and proceeding to the second part of § 46b-115m. It determines that the trial court improperly applied the law by relying on the Florida court's determination that it retained exclusive, continuing jurisdiction. I respectfully disagree with the majority opinion's analysis and conclusion.

The majority opinion properly assesses this issue under Florida law. Looking to Fla. Stat. Ann. § 61.515, which is Florida's equivalent to § 46b-115*l*, I respectfully submit that the Florida court properly determined that it had exclusive, continuing jurisdiction. Section 61.515 provides in relevant part: "(1) Except as otherwise provided in s. 61.517, a court of [Florida] which has made a child custody determination consistent with s. 61.514 or s. 61.516 has exclusive, continuing jurisdiction over the determination until: (a) A court of [Florida] determines that the child, the child's parents, and any person acting as a parent do not have a significant connection with [Florida] and that substantial evidence is no longer

available in this state concerning the child's care, protection, training, and personal relationships; or (b) A court of [Florida] or a court of another state determines that the child, the child's parent, and any person acting as a parent do not presently reside in [Florida]." Fla. Stat. Ann. § 61.515 (West 2002).

As noted by the majority opinion, the comment to § 202 of the act provides that "*unless a modification proceeding has been commenced*, when the child, the parents, and all persons acting as parents physically leave the [s]tate to live elsewhere, the exclusive, continuing jurisdiction ceases." (Emphasis added.) Unif. Child Custody and Enforcement Act (1997), § 202, comment, 9 U.L.A. (Pt. IA) 511 (2019); see also S. Stephens, 23 Florida Practice: Florida Family Law (Rev. 2020) § 7:14 ("[t]ermination [of jurisdiction] by operation of law occurs when all of the parties have moved out of the state unless there is a pending custody proceeding" (footnote omitted)). Although I acknowledge this commentary, it is my view that the majority opinion incorrectly applies it to the facts of the present case. The record reflects that, on April 12, 2017, the plaintiff filed a petition for modification in the Florida court. The plaintiff thereafter moved to Connecticut in 2017. It was not until September 13, 2018, that the plaintiff voluntarily withdrew his petition in Florida. Yet, before that withdrawal, the defendant filed an "emergency motion for return of the minor child" on August 9, 2018, in the Florida court. Additionally, the defendant filed her own petition for modification in Florida nine days after the plaintiff's voluntary withdrawal. Finally, more than two weeks later, on October 9, 2018, the plaintiff filed his motion for modification in the Connecticut court.[7] Thus,

[7] It is not lost on me that this flurry of events happened so close in time. In fact, the timing and sequence of filings raise the specter of forum shopping, a practice that the act seeks to avoid. See *In re Custody of A.C.*, supra, 165 Wn. 2d 574; cf. *Martinez* v. *Empire Fire & Marine Ins. Co.*, 322 Conn. 47, 62, 139 A.3d 611 (2016) ("[a]dopting a different interpretation in the present case would create confusion . . . and would potentially encourage forum

the record clearly establishes that, as of the date of the plaintiff's institution of the Connecticut action, through to the date of the hearing before the court, there was a pending motion before the Florida court.

Given these facts, it is of little significance that the plaintiff withdrew his petition for modification—the defendant had already filed an emergency motion in the Florida court and would file her own petition for modification shortly after the plaintiff's withdrawal. See *Cabrera* v. *Mercado*, 230 Md. App. 37, 83–82, 146 A.3d 567 (2016) (because plaintiff filed proceeding for protective order in Maryland prior to commencing proceeding in Puerto Rico, Maryland retained exclusive, continuing jurisdiction). Therefore, I believe that the Florida court exercised its right to maintain exclusive, continuing jurisdiction under Fla. Stat. Ann. § 61.515. Under such circumstances, the Connecticut court is precluded from modifying the judgment under § 46b-115m. See Unif. Child Custody and Enforcement Act (1997), § 203, comment, 9 U.L.A. (Pt. 1A) 516. (noting that parallel statute of § 46b-115m "prohibits a court from modifying a custody determination made consistently with [the act] by a court in another [s]tate unless a court of that [s]tate determines that it no longer has exclusive, continuing jurisdiction"); see also P. Hoff, "The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act," 32 Fam. L.Q. 267, 282 (1998) ("[a] court in the new home state cannot modify the initial decree unless the decree state loses [exclusive, continuing jurisdiction], or declines to exercise [exclusive, continuous jurisdiction], or declines to exercise [exclusive, continuous jurisdiction] on inconvenient forum grounds in favor of the second state"). Thus, no issues of fact exist for the trial court to settle for purposes of determining

shopping"); *Kleen Energy Systems, LLC* v. *Commissioner of Energy & Environmental Protection*, 319 Conn. 367, 393 n.25, 125 A.3d 905 (2015) (admonishing party for engaging in forum shopping).

whether it has subject matter jurisdiction to modify the Florida child custody determination. Accordingly, I would affirm the judgment of the trial court dismissing the motion to modify for lack of subject matter jurisdiction.

For the foregoing reasons, I respectfully concur in part and dissent in part.

STATE OF CONNECTICUT *v.* ERROL J.*
(AC 42080)

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

Syllabus

Convicted, after a jury trial, of the crimes of risk of injury to a child in violation of statute (§ 53-21 (a) (1)) and cruelty to persons in connection with his actions in beating and whipping the victim, his minor child, with an electrical cord, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court erred by restricting his cross-examination of three of the state's expert witnesses, B, M and W, thereby violating his constitutional right to confrontation: contrary to the defendant's claim that that court improperly prevented him from cross-examining B, who had diagnosed the victim with post-traumatic stress disorder, about whether she had considered alternative diagnoses, the record revealed that the defendant was able to inquire of B as to how she reached her diagnosis, to explore whether she had considered other disorders and to scrutinize the methods she used, and, therefore, the court's ruling on the scope of the defendant's cross-examination of B was not constitutionally defective; moreover, this court concluded that the trial court did not abuse its discretion in sustaining the prosecutor's objections to defense counsel's line of questioning with respect to B, as the defendant failed to meet his burden of showing that the restrictions imposed on cross-examination were clearly prejudicial; furthermore, this court declined to review the defendant's claims as to M and W, as those claims were not adequately briefed.

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

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

2. The defendant's claim that the trial court erred in admitting into evidence unredacted medical records and testimony addressing the ultimate issue in the case was unavailing: that court did not abuse its discretion because it properly admitted the unredacted medical records and related testimony under the medical diagnosis or treatment exception to the hearsay rule, as the medical reports were created by medical practitioners in the furtherance of the victim's medical treatment and the testimony at issue likewise was related to his medical diagnosis and treatment; moreover, the record was inadequate to review the part of the defendant's claim related to a motion in limine filed by the defendant that sought to preclude the state from eliciting testimony from witnesses that went to the ultimate issue of whether the defendant abused the victim, as there was no indication in the record that the court ruled on that motion.

3. The defendant could not prevail on his claim that the prosecutor made several improper statements during her closing argument, thereby violating his constitutional right to a fair trial:

   a. Contrary to the defendant's claim, the prosecutor did not disparage defense counsel, as the challenged statements did not rise to the level of improper conduct because they were directed at challenging and criticizing the theory of defense that the victim's behavioral issues existed before the alleged abuse by the defendant.

   b. The prosecutor did not improperly express her personal opinion and allude to facts outside of the evidence; the prosecutor's comment about whether the victim's behavioral problems were caused by the defendant's actions referred to issues addressed in testimony by various witnesses throughout the trial, and her comments about why certain children are "bad" similarly referred to evidence presented during the trial about the victim's behavioral problems stemming from the post-traumatic stress disorder caused by the defendant's abuse, and the comments encouraged the jurors to draw reasonable inferences from the evidence and their own experiences and common knowledge about children.

   c. Although the prosecutor's statement comparing the defendant's actions to cruel and unusual punishment prohibited by the government under the eighth amendment to the United States constitution was a misstatement of the law and therefore improper, this court, applying the factors set forth in *State* v. *Williams* (204 Conn. 523), concluded that it did not deprive the defendant of his due process right to a fair trial.

4. The defendant's claim that the trial court erred in failing to give the jury an instruction on the statutory (§ 53a-18 (1)) parental justification defense with respect to the situation prong of the risk of injury to a child charge in count two of the information was unavailing, as that court properly concluded that the defense did not apply to the situation prong of § 53-21 (a) (1): this court declined to extend the holding in *State* v. *Nathan J.* (294 Conn. 243), that the parental justification defense may be applied to conduct under the act prong of § 53-21 (a) (1), to the

situation prong of that statute; moreover, the plain language of § 53a-18 (1) demonstrates that the parental justification defense is available only for the specific circumstance in which a defendant uses reasonable physical force that he believes to be necessary to discipline or promote the welfare of a child, and, therefore, it does not apply to the situation prong.

Argued February 6—officially released September 1, 2020

Procedural History

Substitute information charging the defendant with two counts each of the crimes of risk of injury to a child and assault in the second degree, and with one count of the crime of cruelty to persons, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Holden*, *J.*; verdict and judgment of guilty of two counts of risk of injury to a child and one count of cruelty to persons, from which the defendant appealed to this court. *Affirmed.*

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

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *John Smriga*, former state's attorney, *Margaret Kelly*, state's attorney, and *Judy Stevens*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Errol J., appeals from the judgment of conviction, rendered following a jury trial, of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and one count of cruelty to persons in violation of General Statutes § 53-20 (b) (1). The defendant challenges several of the trial court's evidentiary rulings and jury instructions and raises claims of prosecutorial impropriety. Specifically, he claims that (1) the court erred by restricting his cross-examination of the state's expert witnesses,

which violated his constitutional rights to confrontation and to present a defense, (2) the court erred in admitting into evidence certain medical records and testimony, (3) the prosecutor advanced several improper arguments during her closing arguments, violating the defendant's constitutional right to a fair trial, and (4) the court erred in failing to give the parental justification instruction on one of the counts of risk of injury to a child. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. Between January 1 and May 27, 2015, the defendant beat or whipped his son, the victim, with an electrical cord. At the time of the injuries, the victim was a student at a Bridgeport school. On May 27, 2015, the victim met with Christopher Mack, a security officer employed by the Bridgeport Board of Education, who worked at the victim's school. In his role there, Mack assisted in maintaining a safe environment at the school and mentoring students. Mack was familiar with the victim from working at the school. When the victim came into the office to meet with Mack on May 27, 2015, Mack noticed that he had a large bump on his head and asked the victim what was on his head. The victim stepped into Mack's office and responded, "I have more, can you keep a secret?" He then lifted up his shirt to show Mack what Mack described as "almost unreal. I noticed . . . slashes across his back, scars, fresh. When I say fresh, I mean, there were still scabs. There were some that were old. But there were so many that I couldn't even count." The victim also showed Mack his side. The school nurse was called to examine the victim. Mack then telephoned the Department of Children and Families (department).

Andrea Sellers, a department investigative social worker, responded to the call from Mack on the hotline for suspected abuse. Once at the school, Sellers reviewed photographs of the victim taken by Mack and

spoke to the victim and his siblings, who were also students at the school. Sellers then called the victim's parents and requested that they come to the school. While meeting with Sellers, the defendant admitted to Sellers that he had used a wire to discipline the victim. The children were transported to Southwest Community Health Center, and the victim was examined by a nurse there. After it was determined that some of the injuries on the victim were recent, a ninety-six hour hold issued pursuant to General Statutes § 17a-101g and the department took temporary custody of the children.[1]

The record establishes the following procedural history. The defendant was charged in an amended long form information with two counts of risk of injury to a child in violation of § 53-21 (a) (1) (act prong and

[1] General Statutes § 17a-101g provides in relevant part: "(e) If the Commissioner of Children and Families, or the commissioner's designee, has probable cause to believe that the child or any other child in the household is in imminent risk of physical harm from the child's surroundings and that immediate removal from such surroundings is necessary to ensure the child's safety, the commissioner, or the commissioner's designee, shall authorize any employee of the department or any law enforcement officer to remove the child and any other child similarly situated from such surroundings without the consent of the child's parent or guardian. The commissioner shall record in writing the reasons for such removal and include such record with the report of the investigation conducted under subsection (b) of this section.

"(f) The removal of a child pursuant to subsection (e) of this section shall not exceed ninety-six hours. During the period of such removal, the commissioner, or the commissioner's designee, shall provide the child with all necessary care, including medical care, which may include an examination by a physician or mental health professional with or without the consent of the child's parents, guardian or other person responsible for the child's care, provided reasonable attempts have been made to obtain consent of the child's parents or guardian or other person responsible for the care of such child. During the course of a medical examination, a physician may perform diagnostic tests and procedures necessary for the detection of child abuse or neglect. If the child is not returned home within such ninety-six-hour period, with or without protective services, the department shall proceed in accordance with section 46b-129. . . ."

situation prong), assault in the second degree in violation of General Statutes § 53a-60 (a) (2), assault in the second degree in violation of § 53a-60 (a) (1), and cruelty to persons in violation of § 53-20 (b) (1). Prior to trial, the defendant filed a motion in limine requesting that the court preclude the state from (1) referring to the complainant child as a victim, (2) eliciting information that the department had substantiated allegations of abuse, and (3) using the word "abuse" when describing the child's injuries and eliciting testimony from its witnesses that the child was abused. Following a trial by jury before *Holden*, *J.*, the defendant was found not guilty of the two counts of assault and was found guilty of the two counts of risk of injury to a child and one count of cruelty to persons. The court sentenced the defendant to a total effective term of fifteen years of incarceration, execution suspended after ten years, with five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant raises two evidentiary claims. He first claims that the court violated his constitutional rights to confrontation and to present a defense by restricting his cross-examination. Secondly, he claims that the trial court erred in admitting into evidence, over his objection, medical records and testimony that addressed the ultimate issue in the case. We reject both claims.

"The standard to be used to review a trial court's decision on the relevance and admissibility of evidence is abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Markeveys*, 56 Conn.

App. 716, 718–19, 745 A.2d 212, cert. denied, 252 Conn. 952, 749 A.2d 1203 (2000).

A

The defendant first challenges the court's rulings on the scope of cross-examination in reference to the testimony of three of the state's witnesses: Rebecca Moles, a pediatrician with training in treating victims of child abuse employed at the Connecticut Children's Medical Center; Ariane Brown, a licensed professional counselor at LifeBridge Community Services who treated the victim in June, 2015; and Natasha Wright, a clinical social worker at the Family and Children's Agency (agency). The defendant argues that the court erred in preventing him from cross-examining Brown about whether she considered alternative diagnoses, in particular, oppositional defiant disorder, when diagnosing the victim. We first briefly address the purported claims as to Moles and Wright.

The defendant's appellate briefs do not adequately identify nor analyze any claims as to Moles and Wright. The defendant does not discuss how the trial court's rulings as to Moles' testimony violated his rights to confrontation and to present a defense. The defendant also only references Wright's testimony; there is no discussion in the briefs as to the prosecutor's objection to the scope of defense counsel's cross-examination of Wright or how the court's ruling was constitutionally defective.[2] "We are not required to review issues that have been improperly presented to this court through an inadequate brief." (Internal quotation marks omitted.) *Bushy* v. *Forster*, 50 Conn. App. 233, 236, 718 A.2d 968 (1998) (citing *Connecticut National Bank* v. *Giacomi*, 242 Conn. 17, 44–45, 699 A.2d 101 (1997)), cert. denied,

[2] We note that the defendant also has not complied with Practice Book § 67-4 (e) (3).

247 Conn. 944, 723 A.2d 321 (1998). Therefore, we decline to review these claims.

We turn to the defendant's challenge to the court's restrictions on his cross-examination of Brown.[3] As stated previously in this opinion, the "general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . ." (Internal quotation marks omitted.) *State* v. *Reeves*, 57 Conn. App. 337, 346, 748 A.2d 357 (2000). This discretion, however, "comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment." (Internal quotation marks omitted.) Id. To determine if the sixth amendment has been satisfied, we, as the reviewing court, must engage in a two step analysis. We must determine "first whether the cross-examination permitted to defense counsel comported with sixth amendment standards . . . and second, whether the trial court abused its discretion in restricting the scope of that cross-examination. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Citations omitted; internal quotation marks omitted.) Id. "Once it is established that the trial court's ruling on the scope of cross-examination is not constitutionality defective, this court will apply [e]very reasonable presumption . . . in favor of the correctness of the court's ruling in determining

[3] The defendant's appellate briefs do not adequately address his claim regarding the purported violation of his right to present a defense. The briefs include only the relevant law without any further application to the facts of the case. See *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 245 (2008) (noting that when "issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived" (internal quotation marks omitted)). Accordingly, we decline to address this potential claim.

whether there has been an abuse of discretion." (Internal quotation marks omitted.) Id., 347. "To establish an abuse of discretion, [the defendant] must show the restrictions imposed upon [the] cross-examination were clearly prejudicial." (Internal quotation marks omitted.) Id., 346.

The following additional facts are relevant to this claim. In her testimony, Brown described how she arrived at her conclusion that the victim's symptoms were caused by post-traumatic stress disorder (PTSD) through various diagnostic methods, including trauma and feelings assessments. Brown testified that all of the victim's behavioral problems were attributable to his PTSD. On cross-examination, defense counsel returned to the issue of how Brown had arrived at her diagnosis of PTSD. In her questioning, defense counsel asked Brown a number of questions about whether the victim had been "defiant" or failed to follow instructions from adults. Defense counsel then asked a number of questions about whether Brown had considered another disorder called oppositional defiant disorder.[4] The prosecutor objected to this line of questioning, arguing:

[4] Specifically, the following colloquy occurred between defense counsel and Brown:

"Q. You're familiar with the DSM, correct?

"A. Correct.

"Q. That's the Diagnostic Statistical Manual.

"A. Right. . . .

"Q. And it's generally accepted in the psychological community and mental health community as an authoritative text, right?

"A. Yes. . . .

"Q. And you're familiar with the diseases that are in here.

"A. Yes.

"Q. The mental illnesses that are described.

"A. Yes. I mean I don't have it memorized, but, yes, I'm familiar with them. . . .

"Q. You are familiar with oppositional defiant disorder.

"A. Yes. . . .

"Q. Thank you. Now, in the DSM, oppositional defiant disorder is defined as a pattern of angry irritable mood, argumentative defiant behavior or vindictiveness lasting at least six months, correct?

"[T]his goes well beyond the scope of the direct examination. This [witness] has not testified that she's a psychologist. She has testified that she used this book. She's testified as to her diagnosis, as to the diagnosis that was made at LifeBridge [Community Services], and this goes now into speculation into perhaps other diagnoses that could have or may have been made or maybe I don't know what the whole [gist] of this line of questioning is. However, it goes well beyond the scope of direct examination." In response, defense counsel argued that the defendant was "entitled to present a defense as well as alternative theories as to that kind of mental illness this child may be suffering if any." The court disagreed and sustained the objection. Defense counsel continued this line of questioning, however, and asked: "So, I guess I just want to be clear. You never even considered oppositional defiant disorder as something to test?" The prosecutor immediately objected again, and the court sustained the objection.

Later in cross-examination, defense counsel asked whether Brown had considered "[o]ther diagnostic explanations for [the victim's] behaviors?" The prosecutor objected that the question had been asked and answered. The court agreed but allowed Brown to answer the question. She testified that "the diagnosis that was determined to be the most accurate was [PTSD]." The following exchange then took place:

"Q. So, you did consider other kinds of potential diagnosis from the [Diagnostic Statistical Manual].

"A. Yes, I believe so. You're reading from it there so yes. . . .

"Q: Can you not remember off the top of your head the specific language from the definition of oppositional defiant disorder?

"A. When we're diagnosing, we're not doing it by just memory. We have the tools with us.

"Q. Right. So, if I may, Your Honor? If I may approach, I'm happy to provide this for you. I believe this is something you were familiar with at one point, and this is what you would use to diagnosis, correct?

"A. Right."

"A. You don't go into an assessment assuming the diagnosis. So, everything is considered.

"Q. And that would include several of the other mental illnesses that are described in the DSM, right?"

The prosecutor then objected again to this line of questioning as going beyond the scope of direct examination. The court sustained the objection, stating, "[i]t does. . . . Other diagnosis; yes, she considered." Defense counsel continued and subsequently asked Brown, "But my question was were there specific illnesses that you . . . ?" The prosecutor objected, arguing that the question had been asked and answered several times. The court again sustained the objection.

The trial court's ruling on the scope of the defendant's cross-examination of Brown was not constitutionally defective. The defendant was able to inquire of Brown how she reached her diagnosis of PTSD. By doing so, the defendant was able to explore whether Brown had considered other disorders before diagnosing the victim with PTSD and to scrutinize the methods that she used in reaching the PTSD diagnosis. Brown testified that she considered "everything" and did not begin her assessment assuming a diagnosis. The sixth amendment right to cross-examination includes the right to an opportunity for cross-examination, not the right to unrestricted cross-examination. See *State* v. *Reeves*, supra, 57 Conn. App. 353. The record reveals that the defendant had the opportunity to criticize Brown's diagnosis of the victim and her methods of achieving this diagnosis. We conclude, therefore, that the defendant's sixth amendment right to cross-examination was not violated.

We now consider whether the court abused its discretion in sustaining the prosecutor's objection. "To establish an abuse of discretion, [the defendant] must show

that the restrictions imposed upon [the] cross-examination were clearly prejudicial. . . . Once it is established that the trial court's ruling on the scope of cross-examination is not constitutionally defective, this court will apply [e]very reasonable presumption . . . in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Citations omitted; internal quotation marks omitted.) Id., 346–47.

Our review of the record leads us to the conclusion that the court did not abuse its discretion. As discussed previously, the defendant had the opportunity to criticize and challenge Brown's testimony regarding the victim's diagnosis. Additionally, the defendant has the burden of showing that "the restrictions imposed upon [the] cross-examination were clearly prejudicial." (Internal quotation marks omitted.) Id., 355. He has not met that burden. We conclude, therefore, that the trial court did not abuse its discretion and, therefore, did not violate the defendant's sixth amendment constitutional right to confrontation.

B

The defendant's second evidentiary claim is that the trial court erred in admitting into evidence unredacted medical records and testimony addressing the ultimate issue in the case. The defendant filed a motion in limine before trial that sought to prevent the state from eliciting testimony that went to the ultimate issue the jury was to decide. At trial, the defendant also moved to have medical records proffered by the state redacted. The state responds that the portion of this claim as to the motion in limine is unreviewable because the record is inadequate for review. In support of this argument, the state notes that the record contains no argument on the motion, nor any ruling by the court. We agree with the state that the record is inadequate to review

the part of this claim addressed in the motion in limine. We further conclude that the court did not err in admitting into evidence the challenged unredacted medical records and testimony.

The record reveals the following facts relevant to this claim. The defendant filed a motion in limine on April 9, 2018. In the motion, the defendant requested that the state be barred from referring to the complainant as a "victim," eliciting information that the department had substantiated allegations of abuse, eliciting testimony that the defendant was "abusive," using the word "abuse" when describing the complainant's injuries or eliciting testimony in which the word "abuse" is used when describing the complainant's injuries. Neither party has directed us to a written ruling on this motion or a transcript excerpt reflecting an oral ruling.[5]

During the trial, the defendant objected to a number of the exhibits proffered by the state that pertained to the victim's medical records from Southwest Community Health Center in Bridgeport (center) on the grounds that they included the word "abuse" or referred to the defendant's conduct as "abusive."[6] The defendant sought to have these exhibits redacted because they went to the ultimate issue: whether the defendant had abused the victim. Defense counsel also raised a hearsay objection to the medical records. The court denied the defendant's request and determined that the exhibits were admissible under the medical diagnosis or treatment

[5] In the defendant's reply brief, he argues that, because the court referenced the motion in limine, the court ruled on it "incrementally." He argues that, because the court referenced the motion before evidence, "[it] was [an] ongoing open motion dependent upon witness' testimony . . . [that] was argued and ruled upon incrementally." It is well established that arguments cannot be raised for the first time in a reply brief. See *State* v. *Gavin*, 242 Conn. 296, 312, 699 A.2d 921 (1997). Accordingly, we do not review this claim.

[6] These exhibits included medical reports from three separate visits the victim made to the center.

exception to the hearsay rule.[7] See Conn. Code Evid. § 8-3 (5).

Two medical professionals who treated the victim during one of his visits to the center testified about these records. The first was Carolyn Walsh, an advanced practice registered nurse who treated the victim when the department brought him and his siblings to be examined. Regarding the medical report she created for that visit, she testified: "[T]he reason for visit is physical abuse. The symptoms are reported as being physical abuse, evaluation, patient presents to clinic with [department] case worker, mother, and three siblings, following a report of recent abuse by [the defendant] that patient may have disclosed to security guard, head [department] worker and mother. Parents were called to school two weeks ago for behavioral problems, after which patient reported to school security guard, [the defendant] had beaten him. Police were called to school, but [the defendant] was not arrested on criminal charges, [the department] worker's requesting that patient be evaluated for any signs of possible recent abuse." Walsh further testified from her report about a note dated June 9, 2015, which related to the victim's psychosocial functioning. She testified that the note stated that the "patient with history of significant physical abuse by [the defendant] and subsequent behavioral problems, removed from home and siblings by [the department] on [May 27, 2015]." Defense counsel objected to Walsh's testimony regarding this exhibit by reiterating her earlier objection to the exhibit.[8]

[7] The court overruled the defendant's objections and stated: "The court finds that they are [admissible] pursuant to the exception, the medical records and treatment."

[8] During Walsh's testimony about her examination of the victim and her notes from that examination, the prosecutor proffered the exhibits into evidence. The court stated: "This was subject to discussion outside the presence of the jury. The court relied on the hearsay exception to medical records, and it's being offered pursuant to that motion as a full exhibit." The court then asked defense counsel, "Counsel, any further objection?" In

Later in the trial, Dara Richards, a pediatrician at the center, testified about visits the victim had made to the center, specifically, an office visit on July 29, 2015. She read from the report of that visit, which stated under the "present illness" section: "Scars from physical abuse to scalp remains, child was hit in the head multiple times by [the defendant] with electrical cord, largest scar to an occipital region of scalp, still tender and child complains it hurts at times. Children in grandparents' custody now, [the department] on case." Richards further testified from the report: "Patient with history of significant physical abuse by [the defendant] and subsequent behavioral problems, removed from home with siblings by [the department] on May 27, [2015]."

Although the record before this court includes a copy of the motion in limine filed with the trial court and the trial transcript, in which the trial court refers to the motion in limine, the record does not reflect a ruling on the motion by the trial court. The defendant, as the appellant, bears the burden of providing this court with an adequate record for review. See *Chester* v. *Manis*, 150 Conn. App. 57, 61, 89 A.3d 1034 (2014); see also Practice Book § 61-10. Further, "[w]e cannot pass on the correctness of a trial court ruling that was never made." (Internal quotation marks omitted.) *State* v. *McLaughlin*, 135 Conn. App. 193, 202, 41 A.3d 694, cert. denied, 307 Conn. 904, 53 A.3d 219 (2012). Because we are unable to determine that any ruling was made on the motion in limine, we cannot opine on the court's action on the motion. Accordingly, this claim must fail.

Further, the court did not abuse its discretion in denying the defendant's request to have the medical reports from the center redacted when the state moved to admit them into evidence. As discussed previously, the court

response, defense counsel merely stated, "No, I just reserve the issues [that] were raised."

admitted the exhibits into evidence pursuant to the medical diagnosis or treatment exception to the hearsay rule.[9] Section 8-3 (5) of the Connecticut Code of Evidence, titled "Statement for purposes of obtaining medical diagnosis or treatment," provides an exception to the hearsay rule. It provides: "A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." Conn. Code Evid. § 8-3 (5). "The admissibility of statements offered under the medical diagnosis and treatment exception to the hearsay rule turns on whether the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends." (Internal quotation marks omitted.) *State* v. *Estrella J.C.*, 169 Conn. App. 56, 72, 148 A.3d 594 (2016).

The record reflects that the testimony at issue was related to a medical diagnosis or treatment of the victim. The medical reports prepared by medical practitioners at the center were created in furtherance of medical treatment of the victim. Therefore, the records and related testimony were properly admitted under the medical diagnosis or treatment exception to the hearsay rule.[10]

II

The defendant next claims that the prosecutor made several improper statements during her closing argument, thereby violating the defendant's constitutional

[9] See footnote 7 of this opinion.

[10] The defendant argues that the court permitted the exhibits at issue, and the subsequent testimony regarding their contents, to be admitted as expert opinion evidence pursuant to § 7-3 of the Connecticut Code of Evidence. This contention is belied by the record. In overruling the defendant's objection to the admission of the documents from the center, the court stated: "The court finds that they are [admissible] pursuant to the exception, the medical records and treatment."

right to a fair trial. Specifically, he claims that the prosecutor acted improperly in three ways: (1) by disparaging defense counsel; (2) by expressing her personal opinion and pointing to facts outside of the evidence; and (3) by misstating the law and appealing to the emotions of the jurors. The state argues that the prosecutor did not advance any improper arguments and that, even if this court were to find that she acted improperly, her actions did not deny the defendant his due process rights to a fair trial. We agree with the defendant as to the impropriety of one of the statements made by the prosecutor but conclude that the defendant's right to a fair trial was not violated.

We review the defendant's claims of prosecutorial impropriety under a two step analytical process. "We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . .

[T]he touchstone of due process analysis in cases of alleged [harmful] prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's [actions at trial] so infected [the trial] with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial . . . we must view the prosecutor's [actions] in the context of the entire trial. . . .

[I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a

whole. . . . [A] determination of whether the defendant was deprived of his right to a fair trial . . . must involve the application of the factors set out . . . in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)." (Internal quotation marks omitted.) *State* v. *Bunn*, 196 Conn. App. 549, 557–58, A.3d , cert. denied, 335 Conn. 918, A.3d. (2020). These factors require us to consider "[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Albert D.*, 196 Conn. App. 155, 162, A.3d , cert denied, 335 Conn. 913, A.3d (2020).

A

The defendant first claims that the prosecutor acted improperly by disparaging defense counsel in three statements. In the first instance, the defendant contends that the prosecutor impugned the role of defense counsel when the prosecutor argued to the jury that evidence proffered by the state was admitted over objections by defense counsel. The defendant also argues that the prosecutor improperly disparaged the role of defense counsel by criticizing her line of questioning when cross-examining Brown.[11] Finally, the defendant claims that the prosecutor disparaged the defense when she argued: "What happened to the child is a tragedy. But here's the bigger tragedy, that he is being blamed and vilified in this courtroom for the unlawful acts of [the defendant]."

[11] The defendant argues that the prosecutor "sarcastically" argued to the jury, "[a]pparently . . . Brown had to consider every other mental disease and disorder in that [Diagnostic Statistical Manual], the psychiatric bible that was held up for you. That's a very thick book."

"There is a distinction between argument that disparages the integrity or the role of defense counsel and argument that disparages a theory of defense." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 558, 949 A.2d 1092 (2008). Our review of the challenged portion of the prosecutor's argument leads us to conclude that these statements were directed at challenging and criticizing the theory of defense that the victim's behavioral issues existed before the alleged abuse by the defendant. Therefore, these arguments do not rise to the level of improper conduct by the prosecutor.

B

Next, the defendant contends that the prosecutor improperly expressed her personal opinion and alluded to facts outside of the evidence. Specifically, the defendant directs us to the following statements by the prosecutor: "Were the child's behavior issues as a result of the physical trauma inflicted by the defendant as punishment or was the child born bad? I don't think [that] children are born bad. We are all formed by our environment. Children learn from what they hear or see or experience. No child is born bad. Bad children are made."

"It is well settled that, in addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . The prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Nor should a prosecutor express his opinion, directly or indirectly, as to the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to

ignore because of the prosecutor's special position. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Citations omitted; internal quotation marks omitted.) *State* v. *Singh*, 259 Conn. 693, 712–13, 793 A.2d 226 (2002). "In deciding cases, however, [j]urors are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to a jury's common sense in closing remarks." (Internal quotation marks omitted.) *State* v. *Rolli*, 53 Conn. App. 269, 281, 729 A.2d 245, cert. denied, 249 Conn. 926, 733 A.2d 850 (1999).

We conclude that the prosecutor's comments about whether the victim's behavioral problems were caused by the defendant's actions referred to issues addressed in testimony by various witnesses throughout the trial. Additionally, the prosecutor's comments about why certain children are "bad" similarly refer to evidence presented during the trial about the victim's behavioral problems stemming from the PTSD caused by the abuse from the defendant. Finally, the statements do not constitute prosecutorial impropriety. Our Supreme Court has stated: "Although prosecutors generally should try to avoid using phrases that begin with the pronoun 'I,' such as 'I think' or 'I believe,' we recognize that the 'use of the word "I" is part of our everyday parlance and . . . because of established speech patterns, it cannot always be easily eliminated completely from extemporaneous elocution.' . . . Therefore, if it is clear that the prosecutor is arguing from the evidence presented at trial, instead of giving improper unsworn testimony with the suggestion of secret knowledge, his

or her occasional use of the first person does not constitute misconduct." (Citations omitted.) *State* v. *Luster*, 279 Conn. 414, 436, 902 A.2d 636 (2006). The prosecutor's comments encouraged the jurors to draw reasonable inferences from the evidence. Moreover, these comments also requested that the jurors draw inferences from their own experiences and common knowledge about children. See *State* v. *Glenn*, 97 Conn. App. 719, 735, 906 A.2d 705 (2006), cert. denied, 281 Conn. 913, 916 A.2d 55 (2007). We conclude, therefore, that these comments were not improper.

C

The defendant's final claim of prosecutorial impropriety is that the prosecutor misstated the law and appealed to the jurors' emotions. In support of this claim, the defendant points to the following statements by the prosecutor during closing arguments: "Now the alternative for you to consider, and again, this is . . . under the statute, is whether this punishment of [the defendant's] nine year old son was cruel and wilful. Now the state argues that the facts, and again I'm not saying them all again, but all of the facts demonstrate that the defendant did in fact maltreat and torture [the victim] and that punishment was cruel and unlawful punishment, and I am going to refer you to the [United States] constitution, which . . . prevents cruel and unusual punishment. Our government is not allowed to use this type of punishment toward people who have been convicted of crimes. Should the defendant be allowed to do that to his child?"

"[P]rosecutors are not permitted to misstate the law . . . ." (Internal quotation marks omitted.) *State* v. *Albert D.*, supra, 196 Conn. App. 167. The United States constitution's prohibition against cruel and unusual punishment is irrelevant to the issue of whether the defendant committed acts against the victim in violation

of § 53-20 (b) (1).[12] The eighth amendment to the United States constitution prohibits the government from imposing cruel and unusual punishment. It is not implicated in a defendant's alleged conduct in a criminal trial for alleged cruelty to persons. The prosecutor's comparison of the defendant's alleged conduct to the government's constitutionally impermissible conduct under the eighth amendment was misleading. The prosecutor's statement that the defendant's actions constituted cruel and unusual punishment under the eighth amendment to the United States constitution was a misstatement of the law and therefore improper.

Having found that prosecutorial impropriety occurred, "we ask whether the trial as a whole was fundamentally unfair and [whether] the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Albert D.*, supra, 196 Conn. App. 177–78. As discussed previously in this opinion, our determination of whether the defendant's due process right to a fair trial was denied as a result of the impropriety is guided by an examination of the six factors set forth by our Supreme Court in *State* v. *Williams*, supra, 204 Conn. 540. These factors are "[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted.) Id.

[12] As discussed previously in this opinion, the defendant was convicted of cruelty to persons in violation of § 53-20 (b) (1), which provides: "Any person who, having the control and custody of any child under the age of nineteen years, in any capacity whatsoever, intentionally maltreats, tortures, overworks or cruelly or unlawfully punishes such child or intentionally deprives such child of necessary food, clothing or shelter shall be guilty of a class D felony."

Applying the *Williams* factors, we conclude that the prosecutor's statement about the eighth amendment to the United States constitution, although improper, did not deprive the defendant of his due process right to a fair trial. The first and fourth factors weigh in favor of the defendant as the statement was not invited by defense counsel and was directed to a central issue in the trial, which was whether the defendant's actions were cruel and wilful under the cruelty to persons charge. The other four factors, however, lead us to conclude that the defendant's right to a fair trial was not abridged. As to the second and third factors, we note that the improper reference to the eighth amendment was made only once during closing argument and that it could not be considered severe, as it was not blatantly egregious. See *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007) (noting that, in determining severity of prosecutorial impropriety, court will "look to whether the impropriety was blatantly egregious or inexcusable"). Further, "the severity of the impropriety is often counterbalanced in part by the third *Williams* factor, namely, the frequency of the [impropriety] . . . ." (Internal quotation marks omitted.) *State* v. *Albert D.*, supra, 196 Conn. App. 179. Accordingly, we find the second and third factors in favor of the state. As to the fifth *Williams* factor, although there were no specific curative instructions provided to the jury beyond the standard instruction that arguments by lawyers are not evidence, we note that, "[i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) Id., 180. Finally, the strength of the state's case mitigated the effect of the prosecutor's misstatement of the law. After reviewing the prosecutor's statement in light of these factors, we agree with the state that the defendant was not deprived of his due process right to a fair trial.

III

The defendant's remaining claim is that the court erred by failing to give the parental justification defense instruction as to the situation prong of the risk of injury to a child charge in count two of the information. In a written request to charge and at trial, the defendant argued that the parental justification instruction should be given for count two. The court declined to do so.[13] The defendant argues that our Supreme Court precedent requires that the parental justification defense "applies to all offenses involving a parent's use of reasonable force against a child." (Emphasis omitted.)

[13] The court instructed the jury as follows: "After you have considered all of the evidence in this case, if you find that the state has proved beyond a reasonable doubt each element of the crimes as charged, you must then consider whether the defendant acted with parental justification in the discipline of [the victim]. You must consider this defense in connection with count one, risk of injury to a minor. The state alleges that the act of the defendant must cause blatant physical abuse to [the victim]. The parental—this defense, parental justification, is to be applied to that charge.

"If you find the state has proven beyond a reasonable [doubt] the elements of risk of injury, then you consider whether or not the state has disproven . . . this justification defense. There's no burden for the defense to prove anything. The defense was raised with evidence in the trial through perhaps the testimony of some witnesses as well as the stipulation read to you called admissions regarding the physical discipline. That's raised.

"So, in order to determine whether or not the state has disproven the justifiable discipline of justification, parental justification, you must first find beyond a reasonable doubt unanimously that the state has proven the elements of the crime. Count one, risk of injury. If you find the state has not proven beyond a reasonable doubt the elements of the crime, then, of course, you need not consider this justification defense.

"Now, in considering the evidence, you find the state has proven beyond a reasonable doubt each of the elements of the crime, you must go on and consider whether the defendant acted with parental justification in the discipline of [the victim]. You must consider this offense in connection with counts one, risk of injury with the act prong, count three, serious—assault in the second degree with a dangerous instrument, count three, count four, assault in the second degree and count five, cruelty to persons, [the defense] does not apply to [the] situation prong on count two."

The court provided further instructions on the elements on the crimes with which the defendant was charged and reiterated that the defense did not apply to the situation prong.

State v. *Nathan J.*, 294 Conn. 243, 253, 982 A.2d 1067 (2009). The defendant concedes, however, that *Nathan J.* addresses only the act prong of risk of injury to a child. We decline to extend the holding of *Nathan J.* to apply the parental justification defense to the situation prong at issue here. Further, the plain language of the parental justification defense demonstrates that the defense does not apply to the situation prong. We, therefore, are not persuaded by the defendant's claim.

We begin by setting forth the relevant principles of law. "If [a] defendant asserts a recognized legal defense and the evidence indicates the availability of that defense, such charge is obligatory and the defendant is entitled, as a matter of law, to a theory of defense instruction. . . . The defendant's right to such an instruction is founded on the principles of due process." (Internal quotation marks omitted.) *State* v. *Lynch*, 287 Conn. 464, 470, 948 A.2d 1026 (2008). "A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." (Internal quotation marks omitted.) *Mann* v. *Reagan*, 108 Conn. App. 566, 576, 948 A.2d 1075 (2008).

The relevant defense in this case, the parental justification defense, is set forth in General Statutes § 53a-18, which provides in relevant part: "The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: (1) A parent, guardian or other person entrusted with the care and supervision of a minor . . . may use reasonable physical force upon such minor or . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor . . . ."

Count two of the information asserts that the defendant violated the situation prong of § 53-21 (a), which

provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired . . . shall be guilty of . . . a class C felony . . . ." "Health" in the situation prong includes the mental health of the child. See *State* v. *Payne*, 240 Conn. 766, 771, 695 A.2d 525 (1997), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 490, 849 A.2d 760 (2004).

Determining whether the parental justification defense of § 53a-18 should apply to the situation prong of § 53-21 (a) (1) requires us to employ the tools of statutory interpretation. "Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does apply. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable

interpretation." (Footnote omitted; internal quotation marks omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 199, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016).

We first examine the language of the § 53a-18 (1), which provides in relevant part that "[a] parent, guardian or other person entrusted with the care and supervision of a minor . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor . . . ." The meaning and applicability of this defense is plain and unambiguous: the defense applies only to the use of reasonable physical force on a minor. The situation prong of § 53-21 (a) (1) encompasses a wider range of conduct beyond physical acts. Therefore, the plain language of §53a-18 (1) makes clear that the defense is available to only a narrow range of conduct as provided for in the statute.

Accordingly, for a defendant to deploy the protection afforded by the parental justification defense, the defendant must be charged with committing some physical act against a child. Both the defendant and the state rely on *Nathan J.* to support their positions. The defendant relies on *Nathan J.* to support his contention that the parental justification defense must also be applied to the situation prong of § 53-21 (a) (1). The state, in contrast, emphasizes that *Nathan J.* addressed only the act prong of § 53-21 (a) (1), and, thus, the court's reasoning is inapplicable to the situation prong at issue here. In *Nathan J.*, the defendant was charged with assault in the third degree, disorderly conduct, and risk of injury to a child under the act prong of § 53-21 (a) (1). *State* v. *Nathan J.*, supra. 294 Conn. 248. The trial court instructed the jury on the parental justification defense as to the assault and disorderly conduct charges. Id.,

249. It also expressly instructed the jury that the defense did not apply to the risk of injury charge. Id. The defendant then appealed to this court, which determined that the defense applied as a matter of law to conduct charged under § 53-21 (a) (1). Id., 250. On appeal to our Supreme Court, the state argued that the "blatant physical abuse required under the risk of injury statute," which is consistent with the judicial gloss established in *State* v. *Schriver*, 207 Conn. 456, 466, 542 A.2d 686 (1988), "is logically inconsistent with corporal punishment that is reasonably necessary for purposes of parental discipline, as required under [the] parental justification defense." *State* v. *Nathan J.*, supra, 250. The court rejected this contention. The court discussed how *Schriver* "left in place the authoritative judicial gloss prescribed under our case law limiting the type of physical harm prohibited by the act prong of § 53-21 [(a) (1)] to blatant physical abuse." Id., 253. The court then determined that the text of § 53a-18 (1) indicates that it applies to all offenses involving a parent's use of reasonable force on a child. Id. It further determined that it was not inconsistent with the requirement of blatant physical abuse under § 53-21 (a) (1), as the state argued, to apply the parental justification defense to conduct brought under the act prong. Id., 254. The court turned to the meaning of the words "blatant physical abuse" and concluded that there is no reasonableness component to "blatant physical abuse" that would conflict with the reasonableness inquiry inherent in the parental justification defense. Id., 257. Accordingly, the defense could be applied to such conduct.[14] Id., 260. The court concluded that it was improper for the jury to be only "directed, in accordance to the *Schriver* gloss, to consider whether the defendant's conduct was

[14] The court noted that "a forceful spanking might well qualify as blatant physical abuse because it is an obvious, wilful, nonaccidental force against a child." *State* v. *Nathan J.*, supra, 294 Conn. 260.

blatant physical abuse'' and not consider the reasonableness of the defendant's actions pursuant to the parental justification defense. Id.

The court in the present case discussed *Nathan J.* when it denied the defendant's request to apply the parental justification defense to the situation prong of § 53-21 (a) (1). The court stated that "the situation prong is a different gloss."

As the defendant and the state both note, the charges at issue in *Nathan J.* involved physical force. In seeking to use the parental justification defense, the defendant in *Nathan J.* argued that he used reasonable physical force against the minor child because he believed that it was necessary for the discipline and welfare of that child. *State* v. *Nathan J.*, supra, 294 Conn. 260. The same logic does not apply to the situation prong. The very purpose of the parental justification defense, as evidenced by the plain language of § 53a-18 (1), is rooted in the physical act committed against the child. The situation prong goes beyond that scope of the parental justification defense.[15]

In the present case, the defendant argued, both at trial and in his appellate brief, that the state did not explicitly make clear what theory—injury to life or limb, health or morals of the child—it was arguing under the situation prong. In his appellate brief, the defendant argues that the state's theory was that the defendant's conduct of physically disciplining the victim created the situation that was likely to cause injury to the victim's health or morals. Thus, it was the act of disciplining the victim itself that created the situation that harmed

[15] In *Nathan J.*, the court noted that "[t]he reach of the situation prong of § 53-21 (a) (1) is actually broader than that of the act prong." *State* v. *Nathan J.*, supra, 243 Conn. 264 n.13; see *State* v. *Payne*, supra, 240 Conn. 782 ("a defendant need not touch a child in order to violate the [situation prong of § 53-21 (a) (1)]").

the victim. Accordingly, the defendant argues, because the physical discipline under the act prong caused the harmful situation under the situation prong, and because the defendant received the justification instruction on the "act," he should also have received it on the "situation." This argument overlooks the plain language of § 53a-18 (1): the parental justification defense is available only for the specific circumstance in which the defendant uses reasonable physical force that he or she believes to be necessary to discipline or promote the welfare of the child. As the court noted, the judicial gloss on the act prong distinguishes it distinctly from the situation prong. The court did not err in concluding that the parental justification defense did not apply to the situation prong of the risk of injury to a child charge in count two of the information.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSEPHINE TOWERS, L.P., ET AL. *v.* DIANA KELLY (AC 41920)

Alvord, Moll and Beach, Js.

Syllabus

The plaintiffs sought, by way of summary process, to regain possession of certain premises occupied by the defendant. The plaintiffs served on the defendant a pretermination notice, alleging that the defendant had violated her lease agreement, the house rules of the apartment building where the defendant resided, and several statutory provisions (§ 47a-11 (a) through (g)). Subsequently, a kitchen fire started in the defendant's apartment after she began cooking on her stove and then fell asleep. Thereafter, the plaintiffs served on the defendant a notice to quit possession of the premises. The trial court rendered a judgment of immediate possession in favor of the plaintiffs. Thereafter, the court denied the defendant's motions to open the judgment and to dismiss for lack of subject matter jurisdiction, and the defendant appealed to this court, claiming that the plaintiffs served an insufficient notice to quit. *Held*

that the trial court properly denied the defendant's motions to open and to dismiss and the court had subject matter jurisdiction to render judgment on the ground of nuisance: notwithstanding the defendant's claim that the notice to quit did not adhere to statutory requirements (§ 47a-23) in the absence of a new pretermination notice regarding the kitchen fire, a landlord is required to provide only the statutorily required notices, the notice to quit was required to state only that the pretermination notice had been served and that the lease had terminated on the ground of nuisance, and the notice to quit included language that the defendant violated § 47a-11, which states that the defendant shall not conduct herself in a manner that constitutes a nuisance, and, thus, the pretermination notice provided the defendant with necessary information, and the notice to quit satisfied jurisdictional requirements.

Argued January 22—officially released September 1, 2020

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Waterbury, Housing Session, and tried to the court, *Spader*, *J.*; judgment for the plaintiffs; thereafter, the court denied the defendant's motions to dismiss and to open, and the defendant appealed to this court. *Affirmed.*

Sally R. Zanger, for the appellant (defendant).

Lee N. Johnson, for the appellees (plaintiffs).

Opinion

BEACH, J. In this summary process action, the defendant, Diana Kelly, appeals from the decisions of the trial court denying her motions to open the judgment and to dismiss for lack of subject matter jurisdiction. She contends that the court lacked jurisdiction and, thus, improperly denied her motions, because the plaintiffs, Josephine Towers, L.P., and SHP Management Corporation, served an insufficient notice to quit. She argues that the notice to quit was insufficient to confer jurisdiction because (1) although a pretermination notice previously had been served, the notice to quit alleged new violations that had not been included in the prior pretermination notice, and (2) the notice to

quit did not adequately allege a serious nuisance. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts and procedural history. On February 8, 2012, the defendant entered into a written lease agreement with the plaintiffs for an apartment at Josephine Towers, a federally subsidized housing complex in Waterbury. Under the terms of the lease, the defendant agreed to abide by the house rules of Josephine Towers, a copy of which she acknowledged and signed.

On October 12, 2017, pursuant to General Statutes § 47a-15, the plaintiffs served on the defendant a pretermination, or *Kapa*,[1] notice. The notice averred that the defendant had violated her lease agreement, Josephine Towers' house rules, and several statutory provisions. The notice recited eleven alleged violations of § 10 of the lease, which stated that the defendant "shall not use residence or permit it to be used for any disorderly or unlawful purpose or in any manner so as to interfere with other [r]esidents' quiet enjoyment of their residence." (Internal quotation marks omitted.) Specific allegations claimed that the defendant made false accusations against other tenants, yelled at the property manager about mail delivery, harassed other tenants for cigarettes and money, told another tenant, "I don't care if Puerto Ricans die," when that tenant refused to give her money, complained about being pushed in the elevator but refusing to call the police, verbally insulted a disabled tenant, and threatened to hit another tenant. (Internal quotation marks omitted.) The notice also asserted that the defendant had violated General Statutes § 47a-11 (a) through (g).[2] It further informed the

[1] See *Kapa Associates* v. *Flores*, 35 Conn. Supp. 274, 408 A.2d 22 (1979).

[2] General Statutes § 47a-11 provides in relevant part: "A tenant shall: (a) Comply with all obligations primarily imposed upon tenants by applicable provisions of any building, housing or fire code materially affecting health and safety . . . (f) not wilfully or negligently destroy, deface, damage,

defendant, consistent with the provisions of § 47a-15, of her opportunity to repair or remedy the violations.

On January 30, 2018, several months after the service of the pretermination notice, the Waterbury Fire Department responded to a report of a fire in the defendant's apartment. The resulting investigation report indicated that a fire started after the defendant began cooking on her kitchen stove but then fell asleep, leaving the stove unattended. The fire caused $330 in damages. The plaintiffs did not serve a second pretermination notice in response to the fire but, rather, on February 10, 2018, served a notice to quit possession of the premises on or before February 26, 2018.

Not a model of brevity, the notice to quit alleged several types of violations as bases for eviction. It first reiterated the lease violations recited in the pretermination notice and claimed that those violations had not been cured or remedied. It then added an allegation regarding the kitchen fire of January 30, 2018, and the reasons why the defendant's conduct regarding the fire violated lease provisions and the tenant's statutory obligations pursuant to § 47a-11. Finally, the notice to quit stated that the defendant's conduct constituted a nuisance, as defined in General Statutes § 47a-32, or a serious nuisance, as defined in § 47a-15.

The plaintiffs served a summons and summary process complaint on March 8, 2018. The complaint alleged two counts. The first count restated the allegations of the pretermination notice and claimed lease violations. The second count incorporated the allegations of the first count and added a paragraph regarding the fire,

impair or remove any part of the premises permit any other person to do so; (g) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises or constitute a nuisance, as defined in section 47a-32, or a serious nuisance, as defined in section 47a-15 . . . ."

asserting that the defendant's conduct concerning the fire violated § 47a-11 and created a nuisance. The second count specifically alleged a violation of General Statutes § 47a-23 (a) (1) (F), which provides that a violation of § 47a-11 may be a ground for an eviction. After a bench trial, the court, *Spader*, *J.*, rendered judgment of immediate possession in favor of the plaintiffs on June 20, 2018. The stated ground in the judicial notice of the judgment was serious nuisance; the court later stated, in the course of its articulation of the bases for denial of the motion to open and the motion to dismiss, that although the coded judicial notice referred only to the ground of serious nuisance, judgment was actually rendered in favor of the plaintiffs on both counts of the complaint.[3] The judgment was not appealed and an execution was issued on June 28, 2018, but this execution was "returned unsatisfied."

The defendant, while still represented by counsel who had represented her at trial, filed, as a self-represented party, an application for a temporary injunction and a motion to quash execution (audita querela) on July 17, 2018. On July 18, 2018, counsel for the defendant moved for permission to withdraw his appearance. On July 25, 2018, new counsel entered her appearance; on the same day, the defendant filed motions to dismiss and to open the judgment.

The court considered all of the pending motions at a hearing on July 25, 2018. The gravamen of the defendant's motions to open and to dismiss was that the

[3] According to the trial court, if judgment is rendered on two or more grounds, the ground corresponding to the shortest resulting stay of execution will be coded. The court stated in a footnote of its articulation that, "[p]rocedurally, in all summary process cases in which the [p]laintiff has claimed multiple counts and/or statutory causes of action, the clerks of our courts 'code' the judgment under one count for the purposes of determining how to handle the filing of an Application for Stay of Execution pursuant to . . . General Statutes § 47a-37 et seq. Here, while the clerk coded the judgment as 'serious nuisance,' judgment entered in favor for plantiff[s] in full on BOTH counts of [their] complaint."

notice to quit, in light of the pretermination notice, was insufficient to confer subject matter jurisdiction. Essentially, the defendant made two arguments: (1) the notice to quit did not claim a serious nuisance, for which the court rendered judgment; and (2) as to the ground of lease violations, the plaintiffs had failed to serve a pretermination notice regarding the kitchen fire. The court denied all of the defendant's motions. The defendant vacated the premises on July 30, 2018.[4]

On October 15, 2018, the defendant moved for articulation of the factual and legal bases on which the court had rendered its decision denying her motions to open and to dismiss. The court issued an articulation on October 29, 2018. In its articulation, the court explained that several factual premises of the defendant's memorandum of law in support of her motion to dismiss were incorrect, in that, contrary to an assertion in the defendant's memorandum, serious nuisance was mentioned in the notice to quit, and a pretermination notice had been served as to the other lease violations. The court also explained that, despite the fact that the judicial notice of the judgment mentioned only serious nuisance, it had actually found that the allegations of lease violations were also proven, such that judgment had been rendered in favor of the plaintiffs on both counts. The court thus adhered to its prior decision regarding the motions to open and to dismiss. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[4] Although vacating the premises ordinarily causes an appeal from a summary process judgment to be rendered moot; see, e.g., *Bridgeport* v. *Grace Building, LLC*, 181 Conn. App. 280, 295, 186 A.3d 754 (2018) ("[a]s a general matter, this court has concluded that an appeal has become moot when, at the time of the appeal, an appellant no longer is in possession of the premises"); the parties agree that eviction from subsidized housing causes collateral consequences such that mootness is avoided. See id., 295–96 ("[the] general [mootness] rule does not apply when an appellant can demonstrate that 'the judgment has potentially prejudicial collateral consequences to the defendant' ").

The defendant appeals from the denial of her motions to dismiss and to open the judgment, which motions were filed after the time to appeal from the judgment had run. The denial of the motions constitutes an appealable event, but only the propriety of the court's action regarding the posttrial motions, rather than the merits of the underlying judgment, may be considered on appeal. See, e.g., *Alix* v. *Leech*, 45 Conn. App. 1, 3–4, 692 A.2d 1309 (1997).

The gravamen of both motions is that the court lacked subject matter jurisdiction because of defects in the notice to quit. The motions were filed on the same day on which the court heard the parties and decided the motions. The court appeared to consider the motion to dismiss first and the motion to open second. Although technically the court should have ruled on the motion to open before any other motion was entertained, the nearly simultaneous filing and consideration of the two motions in this case, together with the identity of issues presented in the motions, compel the conclusion that declining to address the merits of the motions would be a hypertechnical elevation of form over substance. See *Weinstein & Wisser, P.C.* v. *Cornelius*, 151 Conn. App. 174, 179, 94 A.3d 700 (2014) (holding that trial court's dismissal of "inextricably intertwined" motions to open and dismiss did not render appeal moot because "[t]he motions asserted the same grounds and sought very similar relief" (internal quotation marks omitted)).

Our review of the claim of lack of subject matter jurisdiction is plenary. See, e.g., *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532, 911 A.2d 712 (2006); *Ins. Co. of Pennsylvania* v. *Waterfield*, 102 Conn. App. 277, 281–82, 925 A.2d 451 (2007). The determination of whether a trial court lacked subject matter jurisdiction in the present case is based on a review of the documents in the record.

A brief overview of the statutory scheme provides useful context to the analysis of the present claim. "Summary process is a statutory remedy which enables the landlord to recover possession from the tenant upon the termination of a lease. . . . Pursuant to § 47a-15, before a landlord may proceed with a summary process action, except in those situations specifically excluded, the landlord must first deliver a [pretermination] notice to the tenant specifying the alleged violations and offer the tenant a . . . period to remedy. . . . The legislative purpose . . . is to discourage summary evictions against first offenders . . . . [I]f substantially the same act or omission for which notice was given recurs within six months, the landlord may terminate the rental agreement in accordance with the provisions of [General Statutes §§] 47a-23 to 47a-23b, inclusive." (Citations omitted; internal quotation marks omitted.) *Housing Authority* v. *Rodriguez*, 178 Conn. App. 120, 126–27, 174 A.3d 844 (2017).

Section 47a-15 provides in relevant part that "[p]rior to the commencement of a summary process action, except in the case in which the landlord elects . . . to evict based on nonpayment of rent [or] on conduct by the tenant which constitutes a serious nuisance . . . if there is a material noncompliance with section 47a-11 which materially affects the health and safety of the other tenants or materially affects the physical condition of the premises, or if there is a material noncompliance by the tenant with the rental agreement or a material noncompliance with the rules and regulations adopted in accordance with section 47a-9, and the landlord chooses to evict based on such noncompliance, the landlord shall deliver a written notice to the tenant specifying the acts or omissions constituting the breach and that the rental agreement shall terminate upon a date not less than fifteen days after receipt of the notice." Section 47a-15 further provides that a landlord

may proceed to serve a notice to quit pursuant to §§ 47a-23 through 47a-23b if (1) where the breach can be remedied by repair, the tenant fails within fifteen days to remedy the breach or to pay damages, or (2) "substantially the same act or omission for which notice was given recurs within six months . . . ." Section 47a-15 further defines the term "serious nuisance."

The notice to quit, in turn, terminates the lease and provides the jurisdictional basis for the summary process action. See *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, 133 Conn. App. 1, 17, 33 A.3d 848 (2012) ("[a] notice to quit is a condition precedent to a summary process action and, if defective, deprives the court of subject matter jurisdiction" (internal quotation marks omitted)). Section 47a-23 (a) (1) lists the grounds that may provide the basis for eviction, providing that a rental agreement or lease may terminate for, inter alia, "(C) violation of the rental agreement or lease or of any rules or regulations . . . [or] (F) violation of section 47a-11 or subsection (b) of section 21-82 . . . [or] (G) nuisance, as defined in section 47a-32, or serious nuisance, as defined in section 47a-15 . . . ." Section 47a-23 (b) prescribes the form of the notice to quit: it must include the reason for terminating the rental agreement, but the reason is to be expressed in "statutory language or words of similar import . . . ."

If the tenant fails to vacate the premises within the designated time, the landlord may cause a complaint to be served; see General Statutes § 47a-23a; and the merits may be decided by the Superior Court.

If an eviction is based on a claim of serious nuisance, then, as that term is defined in § 47a-15, a pretermination notice is not required. A landlord may simply serve a notice to quit alleging serious nuisance[5] and, if appropriate, move to the next step. If the eviction is based

[5] The defendant argues that some specificity in the allegation of serious nuisance is required, such as the specific statutory subsection relied on. Because we conclude that the notice to quit confers jurisdiction on the

on a lease violation other than nonpayment of rent and/or material noncompliance with the tenant's obligations as prescribed in § 47a-11, then a pretermination notice and opportunity to cure are required before a notice to quit may be served to terminate the tenancy. See General Statutes § 47a-15.

Turning to the application of the principles described herein to the circumstances of the present case, we first consider whether the trial court had subject matter jurisdiction to render judgment on the ground of nuisance.[6] We conclude that it did.

The pretermination notice of October 12, 2017, stated that the defendant was materially noncompliant with the rental agreement, house rules, and the requirements of §§ 47a-11 (a) through (g) and 47a-32.[7] The notice listed eleven specific examples of the defendant's behavior that allegedly interfered with other tenants' quiet enjoyment of their residences, and included language from § 47a-15 regarding the opportunity to remedy and the consequences of recurring behavior within six months. The defendant does not appear to contest that examples of conduct constituting nuisance were included in the pretermination notice.

ground of nuisance, rather than serious nuisance, we need not reach this claim.

[6] There is some confusion in the record as to what ground or grounds formed the basis for the judgment. As stated previously, the judicial notice of judgment states serious nuisance as the sole ground. At the conclusion of the June 20, 2018 hearing, the court stated: "So [the] plaintiff established its case for nuisance and the equitable factors do not offset that judgment . . . ." The court later stated in its articulation that it had found all counts of the complaint were proven. In any event, the court's statement at the time it rendered judgment establishes that judgment was rendered, at a minimum, on the ground of nuisance.

[7] General Statutes § 47a-32 provides: "In any action of summary process based upon nuisance, that term shall be taken to include, but shall not be limited to, any conduct which interferes substantially with the comfort or safety of other tenants or occupants of the same or adjacent buildings or structures."

The notice to quit, served approximately four months after the pretermination notice, repeated the statements included in the pretermination notice and added a reference to the kitchen fire of January 30, 2018. The defendant argues that her conduct with respect to the kitchen fire is not "substantially the same act or omission" as the eleven specific allegations included in the pretermination notice, and, therefore, that the notice to quit did not adhere to statutory requirements in the absence of a new pretermination notice regarding the kitchen fire. (Internal quotation marks omitted.) She argues that the court, therefore, lacked jurisdiction to proceed.

We disagree with the defendant's conclusion. In *Housing Authority* v. *Martin*, 95 Conn. App. 802, 814, 898 A.2d 245, cert. denied, 280 Conn. 904, 907 A.2d 90 (2006), we held that a landlord is required to provide only the statutorily required notices. "[Section 47a-15] indicates that the landlord *shall* deliver a written notice to the tenant . . . specifying the breach or violation, that the tenant has fifteen days to remedy the breach if it can be remedied and that the rental agreement shall not terminate if a breach is remedied within the cure period. Because the statute specifically provides that the landlord must deliver the pretermination notice specifying the acts or omissions claimed to be in violation of the lease, our case law has established that a landlord must plead compliance with the notice requirements in a summary process action. . . .

"Although the statute provides that the rental agreement will not terminate if the tenant can and does remedy a breach within the fifteen day period, it does not *require* the landlord to do anything more than deliver the specified written notice. The statutory language places an obligation on the landlord to deliver the pretermination notice. In this case, the landlord has alleged that it did deliver the requisite pretermination notice. *The notice claims that the tenant's breach is*

not remediable. We conclude that there was no need to allege that there was a continuing violation. If a violation is not remediable, it is irrelevant if it continues.

"If a tenant claims that a breach can be and has been remedied and is no longer continuing, the tenant should state those claims in a special defense to the summary process action." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 813–14.

The context of *Martin* is somewhat different from the record in the present case, in that the appeal in *Martin* arose from a judgment in favor of the tenant after the trial court granted a motion to strike the complaint on the ground that the complaint failed to allege that the defendant had failed to remedy violations of the lease agreement and §§ 47a-11 and 47a-32. Id., 803–804. The principles announced in *Martin*, however, apply directly to the circumstances of the present case. Once the landlord serves the pretermination notice prescribed in § 47a-15, setting forth violations of a rental agreement, house rules and regulations, and material noncompliance with the tenant's obligations pursuant to § 47a-11 or § 47a-32, the landlord has no obligation prior to the service of the notice to quit to articulate just how the situation has not been remedied; the point of the pretermination notice is to put the tenant on notice that he or she will be subject to eviction if the violation is not remedied or, as in this case, if behavior constituting nuisance continues.

The notice to quit, on the other hand, serves the entirely different purpose of terminating the lease and providing the jurisdictional basis for a summary process action. See *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 18–20. Section 47a-23 (b) prescribes the form to be followed in drafting a notice to quit: the notice is to identify, quite perfunctorily, the

parties, the premises, the quit date, and the reason for termination of the lease or rental agreement. The reason need only follow the statutory language.

The distinction is developed in *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, supra, 133 Conn. App. 19–20 n.7: "Section 47a-15 is designed to provide notice to the tenant specifying the alleged violations and offer the tenant a period of time to remedy. . . . Under § 47a-15 [i]f the tenant can remedy the violation by repair or by paying damages . . . the rental agreement continues. If the violation is not or cannot be remedied, the landlord may institute a summary process action . . . . There is a clear distinction between the two statutory provisions: A pretermination notice . . . does not have the effect of terminating a tenancy or of altering the relationship of the landlord and tenant. . . . In contrast, it is well established that service of a notice to quit possession pursuant to § 47a-23 is typically an unequivocal act terminating a lease agreement with a tenant. . . . Thus, § 47a-15 requires a necessary level of specificity in order to provide the tenant with the opportunity to remedy the violation. In contrast, a notice to quit under § 47a-23 terminates the lease agreement, and there is no opportunity to remedy the violation. It follows that a notice to quit . . . does not require the same level of specificity as required under § 47a-15." (Citations omitted; internal quotation marks omitted.)

The notice to quit in the present case, then, for the purpose of establishing nuisance as a ground for eviction, was required to state only that the pretermination notice had been served and that the lease had terminated on the ground of nuisance, as defined in § 47a-32. The notice to quit included language stating that "you have violated . . . § 47a-11 . . . which states that you shall conduct yourself . . . in a manner that will not disturb . . . [neighbors'] peaceful enjoyment of the premises or *constitute a nuisance as defined in § 47a-32* . . . ." (Emphasis added.)

Because the pretermination notice provided the defendant with necessary information,[8] and because the notice to quit satisfied jurisdictional requirements, we conclude that the trial court properly denied the defendant's motions to open and to dismiss. We further conclude that the court had subject matter jurisdiction to render judgment on the ground of nuisance.[9] Because of our conclusion that the notice to quit conferred subject matter jurisdiction on the court to render judgment on the ground of nuisance, we need not consider the defendant's second issue on appeal, that serious nuisance was not sufficiently stated as a ground in the notice to quit.

The judgment is affirmed.

In this opinion the other judges concurred.

RICHARD S. JEWELER, TRUSTEE, ET AL. *v.* TOWN OF WILTON
(AC 43008)

Keller, Prescott and Elgo, Js.

Syllabus

The plaintiffs sought a declaratory judgment that proposed boundary line adjustments with respect to certain real property in Wilton did not require subdivision approval from the town zoning commission. The plaintiffs proposed to utilize a certain parcel of abutting land to adjust the size of three lots in an existing resubdivision. The defendant municipality maintained that dividing the parcel into four parts constituted a subdivision of the property, as well as a resubdivision, pursuant to the applicable

[8] We do not address the issue of whether there was sufficient evidence for the court to conclude that judgment should be rendered on the ground of nuisance; the inquiry necessary to address that issue would include the question of whether the defendant committed acts or omissions of substantially the same character as those referenced in the pretermination notice. The issue of the sufficiency of the evidence is different from the jurisdictional issues raised in the defendant's posttrial motions and on appeal.

[9] Additionally, nuisance, as defined in § 47a-32, is referred to as a violation of a tenant's responsibilities in § 47a-11 (g).

statute (§ 8-18). The trial court concluded that the boundary line adjustments did not constitute a subdivision under § 8-18, but did constitute a resubdivision thereunder. The court rendered judgment in favor of the defendant, from which the plaintiffs appealed to this court. *Held*:

1. Contrary to the defendant's claim, the trial court properly concluded that the plaintiffs' proposed boundary line adjustments did not constitute a subdivision pursuant to § 8-18; because the plaintiffs' proposal merely reconfigured the contours of four existing lots and did not divide the abutting parcel into three or more lots, the court properly concluded that the line adjustments did not constitute a subdivision under § 8-18.
2. The trial court improperly concluded that the plaintiffs' proposal constituted a resubdivision under § 8-18, as no additional building lot would be created under the plaintiffs' proposal: prior to the boundary line adjustments proposed by the plaintiffs, there existed twelve lots in the resubdivision, as well as two separate parcels on abutting land that are unrelated to the resubdivision, and only three of those twelve lots and one of those parcels are relevant to this appeal, those four properties presently exist and will continue to exist under the reconfiguration contemplated by the plaintiffs; moreover, although one of the abutting parcels would be reduced in size, it would nonetheless continue to exist as the remainder parcel, and that reduction in size cannot constitute a resubdivision under § 8-18; furthermore, the defendant could not prevail on his claim that, because the plaintiff's survey map included not only revised depictions of the three lots of the resubdivision, but also the abutting remainder parcel, it reflected the creation of an additional building lot in the resubdivision, the defendant having failed to provide this court with any authority, and this court was aware of none, in which the mere inclusion of an abutting and previously existing building lot on a map, which was not part of either a prior subdivision or resubdivision, was held to constitute the creation of an additional building lot under § 8-18.

Submitted on briefs April 17—officially released September 1, 2020

Procedural History

Action seeking a declaratory judgment that certain boundary line adjustments in an existing resubdivision did not require subdivision approval, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment for the defendant, from which the plaintiffs appealed to this court. *Reversed in part*; *judgment directed.*

Robert A. Fuller and *Matthew C. Mason* filed a brief for the appellants (plaintiffs).

Peter V. Gelderman filed a brief for the appellee (defendant).

Opinion

ELGO, J. This case concerns the reconfiguration of lot lines in an existing resubdivision. The plaintiffs, Richard S. Jeweler and Derry Music Company,[1] own seven parcels of land situated between Millstone Road and Hickory Hill Road in Wilton. They brought this action seeking a declaratory judgment that certain boundary line adjustments among those parcels do not require subdivision approval under General Statutes § 8-18. The trial court concluded that the boundary line adjustments proposed by the plaintiffs did not constitute a subdivision pursuant to § 8-18, but did constitute a resubdivision thereunder. We disagree with the latter conclusion and, accordingly, reverse in part the judgment of the trial court.

The relevant facts are not in dispute. In 1954, the Planning and Zoning Commission of the Town of Wilton (commission) approved a subdivision of real property located between Millstone Road and Hickory Hill Road. In 1968, the commission approved a resubdivision of the southwesterly portion of that subdivision into twelve lots, as documented on map no. 2784 on the Wilton Land Records. The plaintiffs currently own six of those lots, known as lots 5 through 10 of the resubdivision.[2] Those lots are located in a residential zone.

[1] Richard S. Jeweler is a party to this action in his capacity as trustee of both the David W. Brubeck Trust and the Iola Brubeck Trust. In their complaint, the plaintiffs describe Derry Music Company as "a Brubeck family entity . . . ."

[2] The other six lots of the resubdivision are owned by third parties and are not at issue in this action.

In 1969, the owner of an abutting 10.588 acre parcel of land[3] divided that property into two lots, known as parcel 1A and parcel 1B, as shown on map no. 2871 on the land records. In 1979, a boundary line adjustment was made to those two parcels, which increased the size of parcel 1A by one acre, while decreasing the size of parcel 1B accordingly. As a result of that adjustment, parcel 1B contained 7.066 acres. The 1979 boundary line adjustment is memorialized on map no. 3697 on the land records. Map no. 3697 contains notations from the Wilton town planner that "[t]his plan is neither a subdivision nor a resubdivision" under the General Statutes and that "[p]arcel 1B meets all zoning requirements for area and dimension." The plaintiff Derry Music Company is the current owner of parcel 1B.

The present action concerns the plaintiffs' attempt to utilize parcel 1B to adjust the size of three lots in the resubdivision.[4] Specifically, they propose a reconfiguration of certain boundary lines, which would result in the transfer of three segments of land from parcel 1B to lot 7, lot 8, and lot 9 of the resubdivision. Both before and after the reconfiguration proposed by the plaintiffs, parcel 1B and lots 7, 8, and 9 all satisfied the minimum lot size requirements for the residential zone in which they are situated.[5]

[3] That 10.588 acre parcel was not part of either the 1954 subdivision or the 1968 resubdivision.

[4] In their complaint, the plaintiffs alleged in relevant part that "[w]hen the . . . resubdivision was approved in 1968, the [town of Wilton] had not yet enacted inland wetlands regulations (which occurred in 1974); all of the . . . remaining undeveloped lots [in the resubdivision] have inland wetlands on them. The plaintiffs have proposed boundary line adjustments for [conservation] reasons to make the lots and proposed development more environmentally sensitive and to avoid wetland impacts and restrictions, and to prevent problems with access and development of their current remaining lots."

[5] Douglas Faulds, a licensed land surveyor, testified at trial that the minimum size of a building lot in the applicable residential zone is two acres. The court also was presented with uncontroverted evidence that, as a result of the reconfiguration proposed by the plaintiffs, the lot size of parcel 1B would be reduced from 7.066 to 2.04 acres, lot 7 would be reduced from

The proposed reconfiguration of those boundary lines is documented on the "Property Survey Depicting Revised Properties" (survey) prepared by the plaintiffs. In addition, the plaintiffs created a document titled "Data Accumulation Plan Revision to Parcel 1B," which details the "portions" of parcel 1B that would be transferred to lots 7, 8, and 9 of the resubdivision, as well as the configuration of what it describes as "Remainder of Revised [Parcel] 1B" (remainder parcel).

The plaintiffs commenced this declaratory judgment action in May, 2018. In their complaint, they alleged that the "boundary line adjustments and the addition and consolidation of the three parts of [parcel] 1B to adjacent [l]ots . . . is allowed as a matter of law and is not a subdivision of land as defined in [§] 8-18 . . . and is allowed without the . . . approval of the [c]ommission." By contrast, the defendant municipality maintained that dividing parcel 1B into four parts constitutes a subdivision of the property, as well as a resubdivision, pursuant to § 8-18.

A court trial followed, at which both testimonial and documentary evidence was admitted. In its subsequent memorandum of decision, the court agreed with the plaintiffs that the proposed boundary line adjustments did not constitute a subdivision of the property. The court further determined that, because the remainder parcel proposed by the plaintiffs "creates an additional building lot which is part of the resubdivision," the plaintiffs' proposed boundary line reconfiguration "constitutes a resubdivision" under § 8-18. The court thus rendered judgment in favor of the defendant, and this appeal followed.

The dispute in this case centers on whether the boundary line adjustments proposed by the plaintiffs

5.265 to 4.981 acres, lot 8 would be increased from 3.17 to 3.772 acres, and lot 9 would be increased from 2.30 to 5.168 acres.

constitute either a subdivision or a resubdivision requiring commission approval. Because that issue concerns the proper application of § 8-18 to undisputed facts, our review of that legal question is plenary. See, e.g., *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 699, 200 A.3d 1118 (2019); see also *Webster Bank* v. *Zak*, 259 Conn. 766, 773, 792 A.2d 66 (2002).

I

SUBDIVISION

In both the proceeding before the trial court and this appeal, the defendant claimed that that the boundary line adjustments proposed by the plaintiffs constitute a subdivision requiring commission approval pursuant to § 8-18. In its memorandum of decision, the court concluded that the plaintiffs' proposal does not meet the definition of a subdivision set forth in § 8-18. We agree.

Section 8-18 defines "subdivision" as "the division of a tract or parcel of land into three or more parts or lots made subsequent to the adoption of subdivision regulations by the commission, for the purpose, whether immediate or future, of sale or building development expressly excluding development for municipal, conservation or agricultural purposes, and includes resubdivision . . . ." Our Supreme Court has held that "the language of § 8-18 is clear and unambiguous. . . . [I]n order to constitute a subdivision, the clear language of the statute has two requirements: '(1) [t]he division of a tract or parcel of land into three or more parts or lots, and (2) for the purpose, whether immediate or future, of sale or building development.' " (Citation omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 510, 196 A.3d 315 (2018). The court further emphasized that "the appropriate inquiry under § 8-18 is whether one lot has been divided into three or more lots." Id., 514.

When an owner of multiple parcels of real property proposes boundary line adjustments that do not result

in the division of one parcel into three or more lots but, rather, simply reconfigure the shape of presently existing lots, such action does not constitute a subdivision of the parcel. Id.; accord *500 North Avenue, LLC* v. *Planning Commission*, 199 Conn. App. 115, 126, A.3d (2020) (rejecting claim that proposed reconfiguration of boundary lines constituted division of parcel and concluding that plaintiffs' proposed boundary line adjustments did not constitute subdivision under § 8-18 because "there simply was no additional lot created"). That is precisely the case here. Because the plaintiffs' proposal merely reconfigures the contours of four existing lots, and does not divide parcel 1B into three or more lots, the court properly concluded that it does not constitute a subdivision under § 8-18.[6]

II

RESUBDIVISION

The court also concluded that the plaintiffs' proposal constituted a resubdivision under § 8-18. On appeal, the plaintiffs challenge the propriety of that determination.

[6] The defendant also raised an issue of statutory construction in the proceeding before the trial court, claiming that the phrase "three or more parts or lots," as used in § 8-18, suggests that the proposed transfer of three segments of land from parcel 1B to lot 7, lot 8, and lot 9 constituted the division of parcel 1B into four parts. The court rejected that contention, and the defendant in this appeal has not offered any statutory analysis of the language in question.

We nonetheless note that this court, in *500 North Avenue, LLC* v. *Planning Commission*, supra, 199 Conn. App. 132–33, recently rejected an identical claim regarding the proper construction of § 8-18. As the court explained, "when the word 'parts,' as used in the definition of subdivision pursuant to § 8-18, is read in light of its commonly approved usage and together with the definition of resubdivision, its meaning is plain and unambiguous because it is susceptible to only one reasonable interpretation. . . . [T]he word 'parts' is to be read together with the word 'lots' so as to clarify the latter's meaning." Id. This court further concluded that "the legislature intended the word 'parts' to refer to separate but whole, not fractional, members of a tract of land." Id., 131. The analysis provided by the trial court in the present case fully comports with that precedent.

Section 8-18 defines " 'resubdivision' " as "a change in a map of an approved or recorded subdivision or resubdivision if such change (a) affects any street layout shown on such map, (b) affects any area reserved thereon for public use or (c) diminishes the size of any lot shown thereon and creates an additional building lot, if any of the lots shown thereon have been conveyed after the approval or recording of such map . . . ." In the present case, it is undisputed that the plaintiffs' proposal does not affect a street shown on the 1968 resubdivision map or an area reserved thereon for public use.[7] Accordingly, the relevant inquiry is whether the plaintiffs' proposal "diminishes the size of any lot shown thereon *and* creates an additional building lot . . . ." (Emphasis added.)

The parties agree, and the court so concluded, that the plaintiffs' proposed boundary line adjustments diminish the size of lot 7. See footnote 5 of this opinion. The parties disagree as to whether the plaintiff's proposal creates an additional building lot. In its memorandum of decision, the court concluded that the plaintiffs' proposal would result in the creation of an additional building lot, namely, the remainder parcel. We do not agree.

Prior to the boundary line adjustments proposed by the plaintiffs, there existed twelve lots in the resubdivision, as well as two separate lots on abutting land known as parcel 1A and parcel 1B that are unrelated to the resubdivision. See footnote 3 of this opinion. Only four of those lots are relevant to this appeal—lots 7, 8, and 9 of the resubdivision, and parcel 1B. Those four lots presently exist and will continue to do so under the reconfiguration contemplated by the plaintiffs. See

[7] In its memorandum of decision, the court found that "[i]t is obvious that the only portion of § 8-18 [that] is implicated by the proposed lot realignment is subsection (c)." The defendant does not contest that determination in this appeal.

footnote 5 of this opinion. As a result, no additional building lot will be created under the plaintiffs' proposal.

Admittedly, parcel 1B will be reduced in size, but it nonetheless will continue to exist as the remainder parcel depicted on the data accumulation plan that was admitted into evidence. More importantly, that reduction in size cannot constitute a resubdivision under § 8-18. As this court has observed, "resubdivision means a change to either an approved subdivision or a recorded subdivision. . . . [T]here can be no resubdivision unless there has first been a subdivision. . . ." (Citation omitted; internal quotation marks omitted.) *Mandable* v. *Planning & Zoning Commission*, 173 Conn. App. 256, 263, 163 A.3d 69 (2017). In their complaint, the plaintiffs alleged in relevant part that "[t]he parties agree that the proposed boundary line adjustments and the reduction in the size of [parcel] 1B on map [no.] 3697 is not a resubdivision of that property because it is not a change in an approved or recorded subdivision . . . ." In its answer, the defendant admitted the truth of that allegation and it is, therefore, bound by that admission. See *Rudder* v. *Mamanasco Lake Park Assn., Inc.*, 93 Conn. App. 759, 769, 890 A.2d 645 (2006) ("[T]he admission of the truth of an allegation in a pleading is a judicial admission conclusive on the pleader. . . . A judicial admission dispenses with the production of evidence by the opposing party as to the fact admitted, and is conclusive upon the party making it. . . . [The] admission in a plea or answer is binding on the party making it, and may be viewed as a conclusive or judicial admission . . . . It is axiomatic that the parties are bound by their pleadings." (Citations omitted; internal quotation marks omitted.)); see also *Franchi* v. *Farmholme, Inc.*, 191 Conn. 201, 214, 464 A.2d 35 (1983) (answer to allegation in complaint binding as judicial admission).

The defendant, however, contends that because the survey includes not only revised depictions of lots 7, 8, and 9 of the resubdivision, but also the remainder parcel, it reflects the creation of an additional building lot in the resubdivision. We disagree. As the plaintiffs note in their principal appellate brief, "[t]he fact that [the remainder parcel] abuts the [resubdivision] property as shown on the [survey] does not make it a part of the resubdivision. Maps of property prepared and/or filed in the land records frequently show abutting lots, parcels or property boundaries, without intending to or resulting in the consolidation of those parcels; they are only to identify the physical location of the adjacent properties, its owners and other relevant information and features of the other land in the area. Many maps also show two or more abutting parcels of land with the same property owner that remain as separate lots, which are not consolidated into one property." We concur with that observation. We further emphasize that the salient provisions of § 8-18 contemplate the division of an existing parcel of land that results in the creation of an additional building lot. The defendant has provided this court with no authority, and we are aware of none, in which the mere inclusion of an abutting and previously existing building lot on a map, which was not part of either a prior subdivision or resubdivision, was held to constitute the creation of an additional building lot, as that terminology is used in § 8-18. To paraphrase *500 North Avenue, LLC* v. *Planning Commission*, supra, 199 Conn. App. 126, there simply was no additional lot created, as the same number of lots exist before and after the plaintiffs' proposal.

We, therefore, conclude that the boundary line adjustments proposed by the plaintiffs do not constitute a resubdivision pursuant to § 8-18. For that reason, the court improperly rendered judgment in favor of the defendant.

The judgment is reversed in part and the case is remanded with direction to render a declaratory judgment in favor of the plaintiffs in accordance with this opinion.

In this opinion the other judges concurred.

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genuine issue of material fact that she was owner of debt underlying mortgage; whether plaintiff had standing to foreclose on mortgage pursuant to statute (§ 52-329) or trial court's common-law powers of equity.

Chelsea Groton Bank *v.* Belltown Sports, LLC 294

Foreclosure; whether defendants could meet their burden of proving evidentiary basis to establish existence of genuine issue of material fact regarding unclean hands special defense; whether trial court properly determined that plaintiff's alleged misconduct failed to sufficiently relate to making, validity, or enforcement of mortgage.

Cohen *v.* Postal Holdings, LLC. 312

Summary judgment; negligence; private nuisance; whether defendant maintained control of property pursuant to terms of ground lease.

Crouzet *v.* First Baptist Church of Stonington. 532

Environmental contamination; real property; claim that trial court's determination that there was secondary source of oil contamination in plaintiff's basement was clearly erroneous; whether trial court's decision was based on speculation and was legally unsound.

DeMattio *v.* Plunkett 693

Breach of contract; violation of Home Improvement Act (§ 20-418 et seq.); judicial bias; whether trial court properly concluded that contract was invalid and unenforceable against defendants because contract did not have cancellation notice provision required by statutes (§§ 20-429 and 42-135a); claim that trial court made factual findings that were contrary to evidence; claim that trial court failed to find that defendants did not mitigate damages; whether trial court properly calculated damages award; claim that trial court acted in biased manner toward plaintiff.

D. S. *v.* R. S. 11

Application for relief from abuse; domestic violence restraining order; whether trial court erred in issuing domestic violence restraining order pursuant to statutory (§ 53a-181d) definition of stalking rather than definition of stalking in Princess Q. H. *v.* Robert H. *(150 Conn. App. 105); reviewability of claim that trial court erroneously relied on testimony that plaintiff gave on behalf of minor child; harmlessness of trial court's ruling.*

Falcigno *v.* Falcigno. 663

Breach of fiduciary duty; claim that trial court's finding that defendant proved fair dealing and full disclosure was clearly erroneous and inconsistent with its finding that defendant had made false representations to plaintiff; claim that trial court erred in finding that defendant proved by clear and convincing evidence that defendant engaged in fair dealing and full disclosure as to purchase of plaintiff's minority shares of stock; whether framework in Konover Development Corp. *v.* Zeller *(228 Conn. 206) for fiduciaries was applicable; whether trial court improperly rendered judgment for plaintiff on defendant's counterclaim seeking attorney's fees.*

Fazio *v.* Fazio 282

Dissolution of marriage; whether trial court improperly granted motion to modify or to terminate alimony; claim that trial court erred by concluding that it was bound by finding of cohabitation made by prior judge in case; whether trial court properly construed this court's remand order in prior appeal; claim that trial court erred by failing to make factual finding as to parties' intent regarding whether certain article of separation agreement incorporated remedial aspects of statute (§ 46b-86 (b)); claim that trial court erred by exceeding scope of remand order in prior appeal when it made unnecessary and binding factual findings concerning article of separation agreement not at issue.

500 North Avenue, LLC *v.* Planning Commission 115

Zoning appeal; whether Superior Court improperly concluded that there was substantial evidence in record to support planning commission's finding that plaintiff's proposed lot line adjustment of two adjacent lots constituted subdivision under statute (§ 8-18); claim that Superior Court improperly concluded that subdivision approval was required because proposed lot line revision was more than minor adjustment; claim that because plaintiff's proposed boundary line revision would create third part, it required subdivision approval.

Flood *v.* Flood 67

Dissolution of marriage; motions for modification of child support; whether trial court's finding that there had been substantial change in defendant's financial circumstances was clearly erroneous; whether trial court abused its discretion

in determining amount of defendant's child support obligation; claim that trial court erred by failing to consider and rule on defendant's motion for modification of child support obligation.

Godbout *v.* Attanasio 88
Official misconduct pursuant to statute (§ 12-170); motor vehicle tax assessment; claim that trial court improperly granted motion to dismiss on ground that it lacked subject matter jurisdiction because plaintiff failed to exhaust administrative remedies; claim that motion to dismiss was improper procedural vehicle to challenge legal sufficiency of complaint; claim that trial court improperly determined that the complaint was insufficiently pleaded.

In re Aisjaha N. 485
Child neglect; motion for continuance; claim that respondent mother's due process rights were violated by trial court's denial of motion for continuance of neglect proceeding.

In re Probate Appeal of Nguyen 498
Probate appeal; involuntary commitment; claim that Probate Court exceeded its statutory authority by involuntarily committing plaintiff because psychiatric hospital failed to comply with notice requirements set forth in statute (§ 17a-498 (e)); claim that Probate Court improperly admitted certain police report into evidence; harmless error; claim that Probate Court improperly admitted two physician's certificates into evidence; claim that Probate Court's findings that plaintiff was gravely disabled and that less restrictive placement was not available were clearly erroneous, arbitrary or capricious, characterized by abuse of discretion, or clearly unwarranted exercise of discretion.

Jeweler *v.* Wilton 842
Declaratory judgment; whether proposed boundary line adjustments with respect to certain real property required subdivision approval; whether trial court properly concluded that boundary line adjustments did not constitute subdivision pursuant to statute (§ 8-18); whether trial court properly concluded that plaintiffs' proposed boundary line adjustments constituted resubdivision under § 8-18.

Josephine Towers, L.P. *v.* Kelly 829
Summary process; motion to open judgment; motion to dismiss; claim that plaintiffs served insufficient notice to quit; whether trial court had subject matter jurisdiction to render judgment on ground of nuisance; claim that notice to quit did not adhere to statutory (§ 47a-23) requirements; whether trial court properly denied motions to dismiss and to open judgment.

Kovachich *v.* Dept. of Mental Health & Addiction Services 332
Employment discrimination; retaliation; mootness; claim that trial court improperly admitted into evidence settlement communications between parties and relied on those communications in finding defendant liable for violation of Connecticut Fair Employment Practices Act (§ 46a-51 et seq.); claim that trial court improperly precluded admission of plaintiff's deposition responses that had been amended by errata sheet; claim that trial court erred in concluding that all statements made by defendant's employees were admissible as statements made by party opponent.

Labissoniere *v.* Gaylord Hospital, Inc. 265
Medical malpractice; motion to dismiss; personal jurisdiction; subject matter jurisdiction; whether trial court lacked subject matter jurisdiction over defendant that was not legal entity when patient was treated; whether opinion letter authored by physician and general surgeon was by "similar health care provider" as defined by statute (§ 52-184c) when defendant physicians were board certified in internal medicine.

Mendes *v.* Administrator, Unemployment Compensation Act 25
Unemployment compensation; appeal from decision of Board of Review of Employment Security Appeals Division affirming decision finding plaintiff ineligible for certain unemployment benefits; motion to open; claim that trial court exceeded scope of its authority by assessing factual findings of appeals referee as adopted by board; whether plaintiff was required to file motion to correct board's factual findings pursuant to rule of practice (§ 22-4).

Norwalk Medical Group, P.C. *v.* Yee 208
Arbitration; application to vacate arbitration award; application to confirm arbitration award; claim that arbitration award was not mutual, final and definite due to failure of arbitrator to allocate arbitration costs, expenses and compensation and to set forth reasoned award with respect to attorney's fees.

Parisi *v.* Niblett 761
Child custody; motion to modify; whether trial court properly applied provisions of Uniform Child Custody Jurisdiction and Enforcement Act (46b-115 et seq.) to determine whether court had subject matter jurisdiction to modify Florida court's custody order; whether trial court erred in concluding that it lacked subject matter jurisdiction to decide plaintiff's motion to modify child custody orders of foreign judgment without first conducting evidentiary hearing on unresolved factual issues.

Prime Locations of CT, LLC *v.* Rocky Hill Development, LLC. 642
Declaratory judgment; claim that amendment to declaration creating common interest community association was void and unenforceable; whether provision (§ 47-236 (a) (1)) of Common Interest Ownership Act requiring 67 percent of vote to amend declaration was applicable; claim that trial court improperly concluded that defendant lot owner was entitled to connect his lot to association's drainage system.

State *v.* Coleman. 172
Assault in first degree; robbery in first degree; criminal possession of firearm; whether state's three year delay in filing charges violated defendant's right to due process; claim that right to speedy trial under sixth amendment and right under Interstate Agreement on Detainers (§ 54-186 et seq.) to final disposition of case within 180 days from date on which defendant requested speedy disposition were violated; claim that three year delay caused defendant actual substantial prejudice and was unreasonable and unjustifiable; claim that state deliberately delayed arrest to gain tactical advantage; waiver of claims stemming from postarrest delay.

State *v.* Errol J. 800
Risk of injury to child; cruelty to persons; claim that trial court erred by restricting defendant's cross-examination of state's expert witnesses, thereby violating his constitutional right to confrontation; whether trial court abused its discretion in sustaining prosecutor's objections to defense counsel's line of questioning with respect to certain expert witness; whether trial court properly admitted unredacted medical records and related testimony under medical diagnosis or treatment exception to hearsay rule; claim that several improper statements by prosecutor during closing argument violated defendant's constitutional right to fair trial; claim that trial court erred in failing to give jury instruction on statutory (§ 53a-18 (1)) parental justification defense with respect to situation prong of risk of injury to child charge; whether parental justification defense applied to situation prong of statute (§ 53-21 (a) (1)).

State *v.* Ingala 240
Motion to suppress; whether trial court properly concluded that search was lawful under exigent circumstances exception to warrant requirement; whether trial court properly denied defendant's motion to suppress.

State *v.* Lopez 56
Attempt to commit robbery in first degree; conspiracy to commit robbery in first degree; claim that trial court improperly admitted uncharged misconduct evidence; harmless error.

State *v.* Mayo. 166
Breach of peace in second degree; whether evidence was sufficient to support defendant's conviction.

State *v.* Orr 427
Violation of probation; whether claim that evidence was insufficient for trial court to find that defendant violated his probation was moot; unpreserved claim that state violated rule of Brady *v.* Maryland *(373 U.S. 83) by failing to disclose photographs of scene of drug crimes that led to violation of probation charge; unpreserved claim that defendant was denied due process and fair trial because state failed to adhere to trial court's order to file motion to proceed with probation violation case before it tried drug charges; claim that defendant was denied constitutional right to notice of charges against him; unpreserved claim that defendant's rights were violated as result of state's failure to file bill of particulars; unpreserved claim that trial court's comments violated rule (2.10 (a)) of Code of Judicial Conduct applicable to public statements by judge; unpreserved claim that trial court abused its discretion when it granted state's motion to open violation of probation case to present evidence of drug charges.*

State *v.* Romero 39
Violation of probation; claim that trial court improperly declined to apply exclusionary rule pursuant to article first, § 7, of Connecticut constitution; whether warrantless search violated Connecticut constitution under certain condition of defendant's probation; whether defendant could reasonably be subjected to search of residence and possessions when probation officer had reasonable suspicion that defendant was violating conditions of probation.
State *v.* Sumler 187
Murder; conspiracy to commit robbery in first degree; carrying pistol without permit; criminal possession of pistol or revolver; motion in limine; motion to suppress; unpreserved claim that trial judge violated defendant's constitutional right to due process by improperly failing to recuse himself from presiding over defendant's trial because he previously had signed search and seizure and arrest warrants against defendant; whether defendant could prevail pursuant to State *v.* Golding *(213 Conn. 233); whether trial judge's failure to recuse himself constituted plain error; claim that trial court abused its discretion in admitting witness' testimony identifying defendant in surveillance video; whether witness' testimony constituted opinion on ultimate issue for jury; claim that trial court improperly denied motion to suppress certain statements defendant made to police officer; whether police officer's conversation with defendant constituted custodial interrogation for purposes of* Miranda *v.* Arizona *(384 U.S. 436).*
Stephen S. *v.* Commissioner of Correction 230
Habeas corpus; whether habeas court abused its discretion in rendering judgment declining to issue writ of habeas corpus; whether habeas petition was wholly frivolous on its face within meaning of applicable rule of practice (§ 23-24 (a) (2)); claim that habeas petition raised claims not raised in petitioner's two previous habeas petitions.
25 Grant Street, LLC *v.* Bridgeport 600
Negligence; recklessness; statutory governmental immunity (§ 52-557n (b) (8)); whether trial court properly rendered summary judgment for defendant; statute of limitations; relation back doctrine, discussed.
Whistnant *v.* Commissioner of Correction 406
Habeas corpus; subject matter jurisdiction; claim that habeas court abused its discretion in denying petition for certification to appeal; reviewability of claim that habeas court improperly failed to conduct hearing before declining to issue writ of habeas corpus pursuant to applicable rule of practice (§ 23-24 (a) (1)); claim that habeas court improperly concluded that it lacked subject matter over claims in petition for writ of habeas corpus that retroactive application of 2013 amendment to parole eligibility statute (§ 54-125a (b) (2)) to petitioner violated ex post facto clause of federal constitution and petitioner's right to due process.

Notices

Notice of Application for Reinstatement to the Bar

On August 14, 2020, John Wang filed in the Superior Court for the Judicial District of Hartford, in CV-14-6048385, 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.

Brandon Pelegano
Chief Clerk
Hartford JD

Notice of Application for Reinstatement to the Bar

On 7/14/20 Genevieve Park Salvatore filed in the Superior Court of Ansonia/Milford, in Docket #AAN-CV-14-6015687-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.

James F. Quinn, Esq.
Chief Clerk
Judicial District of Ansonia/Milford