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CONNECTICUT APPELLATE REPORTS

Vol. 200

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JOHN B. CLINTON *v.* MICHAEL E. ASPINWALL ET AL.

(AC 41568)
(AC 42396)

Lavine, Alvord and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of contract in connection with certain operational decisions the defendants made pursuant to a limited liability operating agreement with regard to the ownership and operation C Co., of which the plaintiff had been a member. The managers of C Co. created a $3 million capital reserve. Thereafter, the defendants, who controlled 61 percent of the interests of C Co., voted to amend a section of the agreement that effected how distributions are to be made. This was done over the objections of the plaintiff, who also challenged the necessity of the capital reserve. The defendants subsequently voted to remove the plaintiff as a member of C Co. The plaintiff then commenced the present action, alleging three counts of breach of contract and two counts of breach of fiduciary duty, arising out of the amendment of the company agreement, the removal of the plaintiff as a member, and the capital reserve. The jury returned a verdict in favor of the plaintiff on his breach of contract claims and did not reach the breach of fiduciary duty claims. The defendants thereafter filed motions to set aside the verdict and for judgment notwithstanding the verdict, which the trial court denied and thereafter rendered judgment in favor of the plaintiff. Subsequently, the court granted the plaintiff's motion for attorney's fees and costs. On the separate appeals brought to this court by the defendants, *held*:

1. The trial court erred in denying the defendants' posttrial motions as to the breach of contract claims regarding the amendment to the agreement and the removal of the plaintiff as a member of C Co.; the court misinterpreted the company agreement because the defendants could not have breached § 3.4 of the agreement in amending that agreement and in removing the plaintiff as a member because § 3.4 applied to managers, and they were acting in their capacity as members, not managers, in undertaking those actions.
2. Although the trial court improperly instructed the jury that the defendants owed a duty to act in good faith and without wilful misconduct or gross negligence, this court determined that any error was harmless; the defendants did have a duty to exercise their best judgment in conducting the company's operations and performing their duties and, if the jury found that the defendants breached the agreement because they acted in bad faith or their actions constituted gross negligence or

wilful misconduct, then those actions would certainly not have been in their best judgment in conducting the company's operations.

3. The defendants could not prevail on their claim that the trial court improperly awarded attorney's fees and costs to the plaintiff pursuant to the agreement, which provided for such relief to a party damaged by a breach of the agreement: an award of attorney's fees and costs was proper as this court affirmed the judgment in favor of the plaintiff on the breach of contract claim related to the capital reserve, but, in light of the results obtained by the plaintiff following this appeal, the reversal of the judgment with respect to two of the breach of contract counts, the judgment with respect to the award of attorney's fees and costs was reversed and the matter the remanded for a new hearing on attorney's fees and costs.

Argued February 10—officially released September 22, 2020

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina*, *J.*, rendered summary judgment for the plaintiff on the defendants' counterclaim; thereafter, the matter was tried to the jury before *Shapiro*, *J.*; verdict for the plaintiff, and the defendants appealed to this court; subsequently, the court, *Shapiro*, *J.*, denied the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict and rendered judgment in accordance with the verdict, from which the defendants filed an amended appeal; thereafter, the court, *Hon. Robert. B. Shapiro*, judge trial referee, granted the plaintiff's motion for attorney's fees and costs, and the defendants filed a second amended appeal and a separate appeal to this court, which consolidated the appeals. *Reversed in part*; *further proceedings*.

Barbara M. Schellenberg, with whom was *Garrett S. Flynn*, for the appellants (defendants).

Glenn W. Dowd, with whom was *Howard Fetner*, for the appellee (plaintiff).

Opinion

LAVINE, J. In this breach of contract and fiduciary duty case, the defendants, Michael E. Aspinwall, Steven F. Piaker, and David W. Young, appeal from the judgment of the trial court, rendered after a trial to the jury, in favor of the plaintiff, John B. Clinton. The parties' dispute arises out of their ownership and operation of CCP Equity Partners, LLC (CCP). The defendants' principal claim on appeal is that the court erred in its construction of the operating agreement that governed CCP, resulting in multiple erroneous rulings throughout the course of the litigation. The defendants specifically claim that the court improperly (1) denied their motion to strike, (2) denied their motion for summary judgment, (3) denied their motion in limine, (4) charged the jury, (5) denied their motion for judgment notwithstanding the verdict and motion to set aside the verdict (posttrial motions), and (6) awarded the plaintiff attorney's fees and costs. We agree that the court improperly construed portions of the agreement and reverse the judgment in part and affirm it in part, and remand the case for a new hearing on the issue of attorney's fees and costs.[1]

The parties, Gerard Vecchio, and Preston Kavanagh organized CCP in accordance with the Delaware Limited Liability Company Act (act), Del. Code Ann. tit. 6, § 18-101 et seq. (2005 & Supp. 2012). CCP was to operate pursuant to an amended and restated limited liability company operating agreement (agreement) that was executed by the members on December 29, 2003. CCP was founded to provide management services to, and serve as the general partner of, certain private equity funds. Pursuant to the agreement, each member was

[1] We resolve the defendants' appeals by concluding that the court improperly denied the defendants' posttrial motions and improperly charged the jury. Accordingly, we need not reach the defendants' claims regarding the trial court's rulings on their other motions.

to serve as a manager and on the board of managers (board).[2] CCP, therefore, was manager-managed. See Del. Code Ann. tit. 6, § 18-402 (2005) ("Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members . . . ."). The plaintiff was the managing partner[3] of CCP from its formation in 2003 until March 11, 2008.

On June 30, 2004, Vecchio left CCP. On August 11, 2005, the managers of CCP created a capital reserve of $3 million.[4] CCP managed two private equity funds. In 2006, the members decided not to raise investor capital to create another private equity fund. The members expected all CCP operations to close and that substantially all portfolio companies would be liquidated by the end of 2012. On March 11, 2008, the defendants, who controlled 61 percent of the interests of CCP, voted to amend § 8.1 of the agreement, over the objections of the plaintiff and Kavanagh. Before the amendment, § 8.1 provided that general distributions shall be made pro rata among the members, in proportion to their capital accounts. The amendment added language to the section, providing that distributions could otherwise be determined by the consent of all members.[5] The

[2] The agreement provides that "[t]he Board of Managers shall act and serve as the manager of the Company and shall be the 'manager' of the Company as defined under Section 18-101 (10) of the [act]. Subject to the provisions of this Agreement, the management, policies and control of the Company shall be vested exclusively in the Board of Managers."

[3] The agreement provides that "[s]ubject to the control of the Board of Managers, the Managing Partner shall have general charge and control of the business and affairs of the Company, including, without limitation, setting the agenda for meetings of the Board of Managers, preparing compensation schedules and budgets and generally determining the Company's business priorities and the manner in which they will be implemented."

[4] On August 11, 2005, the managers were the parties and Kavanagh.

[5] The amendment pertained to section 8.1 of the agreement:

"**[*Original*] *Language*:**

8.1 General Distributions. Subject to applicable law and except as otherwise provided in Section 8.5, the Company shall make distributions to the Members at such times and in such aggregate amounts as may be

defendants made this amendment pursuant to § 2.5 of the agreement.[6]

On September 8, 2008, Kavanagh commenced a lawsuit against CCP and the remaining members of the company. At a meeting of the members on October 31, 2008, the defendants voted to remove Kavanagh as a member of the company. Also at that meeting, the plaintiff challenged the necessity of CCP's $3 million capital reserve. The defendants explained that the reserve was necessary to meet CCP's obligations to investors for several more years, to defend against Kavanagh's lawsuit, and for the possibility that the plaintiff may take legal action against CCP.

determined by the Board of Managers, in its sole discretion. Each such distribution shall be made *pro rata* among the Members in proportion to their relative Capital Accounts as of the date of the applicable distribution.

"**[*Amended*] *Language:***

8.1 General Distributions. Subject to applicable law and except as otherwise provided in Section 8.5, the Company shall make distributions to the Members at such times and in such aggregate amounts as may be determined by the Board of Managers, in its sole discretion. Each such distribution shall be made *pro rata* among the Members in proportion to their relative Capital Accounts as of the date of the applicable distribution, *unless otherwise determined and agreed by all of the Members and subject to the remainder of this Section VIII*." (Emphasis in original.)

[6] Section 2.5 of the agreement, titled "Actions Requiring Member Approval," provides in relevant part: "In addition to the other matters specified hereunder, subject to the prior approval by the Board of Managers, the consent of Members holding 60% or more of the Percentage Interests shall be required for . . . (vii) any amendment to this Agreement." "Percentage Interests" is defined in the agreement by reference to § 5.2, which states: "Each Member shall have a certain percentage interest for purposes of apportioning certain allocations and distributions (a 'Percentage Interest') as indicated on his Economic Exhibit attached as Schedule B hereto. Each Member's Economic Exhibit shall be automatically amended without the consent of any Member from time to time to reflect any changes in the Percentage Interest of such Member made in accordance with the terms of this Agreement. The sum of all Percentage Interests shall be equal at all times to 100%. Subject to Section 2.5, each Member's Percentage Interest may be increased or reduced prospectively, without such Member's consent, from time to time by the Board of Managers."

On February 20, 2013, the defendants voted to remove the plaintiff as a member of CCP, also pursuant to § 2.5 of the agreement.[7] The plaintiff does not dispute that he was removed as a member by the consent of members holding 60 percent or more of the percentage interests.

The plaintiff commenced the present action against the defendants on June 13, 2013. His third amended complaint, filed on October 15, 2014, is the operative complaint. In this complaint, the plaintiff alleged that the defendants breached their contractual and fiduciary duties in three specific ways, by (1) amending the operating agreement in 2008,[8] (2) removing the plaintiff as a member of CCP, and (3) maintaining a capital reserve of $3 million.[9] The plaintiff alleged that by virtue of their acts, the defendants breached the fiduciary duties they owed him under Connecticut law and, alternatively, the fiduciary duties they owed him under Delaware law. The plaintiff also alleged that, by virtue of their acts, the defendants breached § 3.4 of the agreement[10]because they "did not exercise their best judgment; did not act in good faith; did not act in a manner

[7] See footnote 6 of this opinion.

[8] The plaintiff alleged that the 2008 amendment had the effect of reducing the percentage of his and Kavanagh's interests in the company and their capital accounts, while increasing the comparable interests and capital accounts of the defendants. The plaintiff also alleges that the 2008 amendment was "part of a pattern and practice of behavior on the part of [the defendants] of operating CCP in bad faith so as to advantage themselves at the expense of [the plaintiff] and Kavanagh and violating [the plaintiff's] rights as a minority member of CCP."

[9] By maintaining a capital reserve of $3 million, the plaintiff claims that the defendants effectively reduced the amount he received when CCP repurchased his interest upon his removal as a member.

[10] Section 3.4 of the agreement provides in relevant part: "The Managers shall exercise their best judgment in conducting the Company's operations and in performing their other duties hereunder. The Managers shall not incur any liability to the Company, any Member . . . which arises out of any action or omission of the Managers . . . provided, however that (i) the Managers . . . acted in good faith and in a manner such Person reasonably believed to be in, or not opposed to, the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause

they reasonably believed to be in, or not opposed to, the best interests of the Company; committed gross negligence or wilful misconduct . . . ."

On December 15, 2014, the defendants moved to strike the entire complaint, arguing in part that they did not breach the agreement by (1) amending it in 2008 and (2) removing the plaintiff as a member, because they took both actions as members pursuant to § 2.5, and § 3.4 only governs the acts of managers. The court denied the defendants' motion to strike because the plaintiff pleaded facts sufficient to state a claim for breach of contract.[11] The defendants also filed a motion for summary judgment on December 21, 2016, which the court denied on July 21, 2017.

On February 14, 2018, the defendants filed a motion in limine, seeking to preclude the plaintiff from introducing parole evidence at trial to vary the meaning of the unambiguous contract language in §§ 3.4 and 8.1 and also from introducing evidence or making arguments based on such provisions. The defendants submitted that the court was "obligated to perform an independent pretrial analysis of the [agreement's] plain meaning and not to compound the effect of rulings, reached in settings deferential to the plaintiff that cannot yet be appealed, that are contrary to the law cited herein." The defendants requested that the court rule, as a matter of law, that

to believe such Person's conduct was unlawful, and (ii) such course of conduct did not constitute gross negligence or willful misconduct of the Managers . . . . The Managers . . . shall be fully protected and justified with respect to any action or omission taken or suffered by any of them in good faith if such action or omission is taken or suffered in reliance upon and in accordance with the opinion or advice as to matters of law of legal counsel, or as to matters of accounting of accountants, selected by any of them with reasonable care. In addition, the Managers . . . shall be entitled to indemnification by the Company to the extent provided in Article XIV hereof." (Emphasis in original.)

[11] See Practice Book § 10-39 (a) ("[a] motion to strike shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint").

the second sentence of § 3.4 cannot form a basis of a breach of contract. The motion in limine was heard by the court on March 6, 2018. The court ruled on the motion in limine on March 8, 2018, and stated in part: "The defendants' arguments regarding [§§] 3.4 and 8.1 as amended of the LLC agreement at issue were previously the subject of other decisions in this case by other judges. The motion in limine, in essence, seeks reargument as to certain aspects of those decisions. . . . The court declines to categorically exclude the general subject matter alluded to in the defendants' motion. What evidence is admitted at trial remains to be determined. The motion is denied."

The plaintiff's case was tried to the jury over the course of ten days. The jury verdict form[12] first asked

[12] The jury verdict form stated:

"**2008 Amendments**

"1. On the plaintiff's breach of contract claim concerning the 2008 amendments to the LLC Agreement, we, the jury, find in favor of:

"Plaintiff

"Defendants

"*If you have found in favor of the Plaintiff on Question 1, proceed to Question 2. If you have found in favor of the Defendants on Question 1, skip Question 2 and proceed to Question 3.*

"2. If you have found in favor of the Plaintiff on Question 1, what amount of damages do you award to [the] Plaintiff on his breach of contract claim concerning the 2008 amendments?

"$

"**$3 Million Capital Reserve**

3. On the Plaintiff's breach of contract claim concerning the $3 million capital reserve, we, the jury, find in favor of:

"Plaintiff

"Defendants

"*If you have found in favor of the Plaintiff on Question 3, skip Question 4 and proceed to Question 5.*

"If you have found in favor of the Defendants on Question 3, proceed to Question 4.

"4. On the Plaintiff's breach of fiduciary duty claim concerning the $3 million capital reserve, we, the jury, find in favor of:

"Plaintiff

"Defendants

"*If you have found in favor of the Plaintiff on Question 4, proceed to Question 5.*

the jury to decide the three breach of contract counts. Only if the jury found in favor of the defendants on those counts, was it then asked to address the two breach of fiduciary duty counts, related to the member removal and the capital reserve.[13] On March 28, 2018,

"If you have found in favor of the Defendants on Questions 3 and 4, skip Question 5 and proceed to Question 6.

"5. If you have found in favor of the Plaintiff on Question 3 or Question 4, what amount of damages do you award to [the] Plaintiff on his claim concerning the $3 million capital reserve?

"$

"**Removal from CCP**

"6. On the Plaintiff's breach of contract claim concerning his removal from CCP, we, the jury, find in favor of:

"Plaintiff

"Defendants

"*If you have found in favor of the Plaintiff on Question 6, skip Question 7 and proceed to Question 8.*

"If you have found in favor of the Defendants on Question 6, proceed to Question 7.

"7. On the Plaintiff's breach of fiduciary duty claim concerning his removal from CCP, we, the jury, find in favor of:

"Plaintiff

"Defendants

"*If you have found in favor of the Plaintiff on Question 7, proceed to Question 8.*

"*If you have found in favor of the Defendants on Questions 6 and 7, skip Question 8.*

"8. If you have found in favor of the Plaintiff on Question 6 or Question 7, what amount of damages do you award to [the] Plaintiff on his claim concerning his removal from CCP?

"$

"*If you awarded damages to the Plaintiff in Questions 2, 5, and/or 8, proceed to Question 9.*

"*If you have not awarded damages to the Plaintiff in Questions 2, 5, or 8, skip Question 9 and have your foreperson sign and date this form where indicated below.*

"**Total Damages**

"9. If you have rendered a verdict for the Plaintiff on one or more of the above claims, insert the total amount awarded below.

"$ "

[13] The plaintiff withdrew the breach of fiduciary duty claim related to the amendment to the agreement because the defendants were going to file a motion arguing that the claim was barred by the statute of limitations and, the plaintiff's counsel reasoned: "[I]t's an issue that's largely covered by our

the jury returned its verdict in favor of the plaintiff on the three breach of contract counts. The jury, therefore, did not reach the two breach of fiduciary duty counts. The jury awarded the plaintiff $146,901 for the breach of contract related to the 2008 amendment, $672,208 for the breach of contract related to the member removal, and $303,426 for the breach of contract related to the capital reserve.

On April 9, 2018, the defendants filed both a motion for judgment notwithstanding the verdict and a motion to set aside the verdict, which were denied by the court. On July 11, 2018, the plaintiff filed a motion for attorney's fees and costs, pursuant to § 15.7 of the agreement.[14] Following an evidentiary hearing on the motion, the court issued a memorandum of decision, in which it awarded the plaintiff $716,200 for attorney's fees and $6118.75 for costs.

These consolidated appeals followed.

I

On appeal, the defendants claim that the court misconstrued the agreement and, therefore, erred when it denied their motion to strike, motion for summary judgment, motion in limine, and posttrial motions, and when it instructed the jury. Specifically, the defendants claim that the trial court "erroneously construed the second sentence of [§] 3.4 as imposing affirmative contractual duties, rather than as an exculpatory clause that creates potential immunity." We agree, pursuant to our plenary review, that the trial court misconstrued

breach of contract claim that it is going to make the jury deliberations and verdict form and jury interrogatories unduly confusing."

[14] Section 15.7 of the agreement provides in part: "In the event of a breach by any party to this Agreement of its obligations under this Agreement, any party injured by such breach, in addition to being entitled to exercise all rights granted by law, including recovery of damages and costs (including reasonable [attorney's] fees), will be entitled to specific performance of its rights under this Agreement."

the agreement and, therefore, erred in denying the defendants' posttrial motions with respect to the breach of contract counts related to the amendment and member removal, and erred in instructing the jury on the breach of contract count related to the capital reserve.

We begin by setting forth the provisions of the agreement, which, we conclude, the trial court erred in interpreting. Section 2.5 of the agreement provides: "In addition to the other matters specified hereunder, subject to the prior approval by the Board of Managers, the consent of *Members* holding 60% or more of the Percentage Interests shall be required for: (i) the admission of a new Member, (ii) *the removal of a Member other than on account of death or voluntary resignation*, (iii) the determination that a Member is disabled, (iv) the Sale of the Company, (v) the dissolution of the Company, (vi) any change in the Subscription or Percentage Interest of any Member, and (vii) *any amendment to this Agreement*." (Emphasis added.)

Section 3.4 of the agreement states in relevant part: "The *Managers* shall exercise their best judgment in conducting the Company's operations and in performing their other duties hereunder. The *Managers* shall not incur any liability to the Company, any Member or any other Person for any loss suffered by the Company or such other Member or Person which arises out of any action or omission of the Managers . . . provided, however that (i) the Managers . . . acted in good faith and in a manner such Person reasonably believed to be in, or not opposed to, the best interests of the Company and, with respect to any criminal action or proceeding, had no reasonable cause to believe such Person's conduct was unlawful, and (ii) such course of conduct did not constitute gross negligence or willful misconduct of the Managers . . . . The Managers . . . shall be fully protected and justified with respect to any action or omission taken or suffered by any of

them in good faith if such action or omission is taken or suffered in reliance upon and in accordance with the opinion or advice as to matters of law of legal counsel, or as to matters of accounting of accountants, selected by any of them with reasonable care. In addition, the Managers . . . shall be entitled to indemnification by the Company to the extent provided in Article XIV hereof." (Emphasis added.)

The following standard of review and substantive law[15] govern our interpretation of these provisions. "The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 403, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

"Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff." (Internal quotation marks omitted.) *Connelly* v. *State Farm Mutual Automobile Ins. Co.*, 135 A.3d 1271, 1279 n.28 (Del. 2016). "To determine what contractual parties intended, Delaware courts start with the text. When the contract is clear and

[15] The parties agree that Delaware substantive law governs this claim because the choice of law provision—§ 15.5 of the agreement—provides: "This Agreement shall be construed in accordance with the laws of the [s]tate of Delaware, without giving effect to the principles of conflicts of law thereof that would cause the application of the laws of any jurisdiction other than the [s]tate of Delaware."

unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions, without resort to extrinsic evidence. To aid in the interpretation of the text's meaning, Delaware adheres to the objective theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party. The contract must also be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term mere surplusage. But general terms of the contract must yield to more specific terms.

"If, after applying these canons of contract interpretation, the contract is nonetheless reasonably susceptible [to] two or more interpretations or may have two or more different meanings, then the contract is ambiguous and courts must resort to extrinsic evidence to determine the parties' contractual intent." (Footnotes omitted; internal quotation marks omitted.) *Sunline Commercial Carriers, Inc.* v. *CITGO Petroleum Corp.*, 206 A.3d 836, 846–47 (Del. 2019).

We now address the trial court's interpretation of these provisions in ruling on the posttrial motions and in instructing the jury.

A

Amendment and Member Removal[16]

We first conclude that the trial court's improper construction of the agreement caused it to err in denying the defendants' posttrial motions with respect to the breach of contract counts pertaining to the amendment and member removal.

"[D]irected verdicts are disfavored because [l]itigants have a constitutional right to have factual issues resolved

[16] For the reasons set forth in this part of the opinion, we address the claims regarding the amendment to the operating agreement and the plaintiff's removal as a member together.

by the jury. . . . Therefore, [o]ur review of a trial court's refusal to direct a verdict or to render a judgment notwithstanding the verdict takes place within carefully defined parameters. We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial . . . giving particular weight to the concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony . . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion." (Citation omitted; internal quotation marks omitted.) *Riley* v. *Travelers Home & Marine Ins. Co.*, 333 Conn. 60, 70–71, 214 A.3d 345 (2019). It is well settled that the proper construction of an unambiguous contract involves a question of law over which our review is plenary. *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 193 Conn. App. 403.

The following additional facts are relevant. On April 9, 2018, the defendants filed a motion for judgment notwithstanding the verdict and a motion to set aside the verdict. In those posttrial motions, the defendants argued, among other things, that (1) there was no contractual qualification that limited their ability to amend the agreement in the present case, specifically under §§ 2.1, 2.5, 5.2, and 15.6 of the agreement, and (2) apart from the requisite percentages to remove a member under the agreement, which were met in the present case, nothing in § 2.5 limited their ability to remove another member. On July 2, 2018, the court denied the defendants' posttrial motions and reasoned that, on the basis of the evidence, the jury reasonably could have found that the defendants breached § 3.4 of the agreement by amending the agreement and removing the plaintiff as a member.

Because the court's ruling on the defendants' posttrial motions involved contractual interpretation of the agreement, our review is plenary. Upon careful review of the agreement at hand, we determine that, as a matter of law, the defendants could not have breached § 3.4 of the agreement by exercising their rights under § 2.5 as members—to amend the agreement in 2008 and to remove the plaintiff as a member—because § 3.4 governed the acts of managers, not members. Accordingly, we conclude that the court erred in denying the defendants' posttrial motions by misinterpreting the agreement.

Pursuant to § 2.5, the defendants amended the operating agreement in 2008 and removed the plaintiff as a member of the company in 2013. Section 2.5, titled "Actions Requiring Member Approval," is located under article II of the agreement, "MEMBERS & INTERESTS." In reading the agreement as a whole and giving meaning to each term, we determine that the contract is unambiguous and, therefore, do not consider extrinsic evidence of the parties' intent.[17] We conclude that the plain language of § 2.5 requires the consent of members holding 60 percent or more of the percentage interests for the actions enumerated in § 2.5 to be taken. The language "[i]n addition to the other matters specified hereunder, subject to the prior approval by the Board of Managers," is not an additional requirement for board approval,

[17] Following oral argument before this court, we ordered the parties to file simultaneous supplemental briefs, addressing the following question: "Whether the defendants were bound by, and therefore could have breached, [§] 3.4 of the operating agreement, a section applicable to *managers*, when they amended the operating agreement and removed the plaintiff as a member pursuant to [§] 2.5 of the operating agreement, a section that authorized them to take certain actions as *members*."

In addressing this question, the plaintiff relied extensively on extrinsic evidence, namely testimony at trial, to support his interpretation of the agreement. We decline the plaintiff's invitation to consider this evidence because it is irrelevant in the face of clear and unambiguous language in the agreement.

despite the parties' assertions to that effect on appeal. Instead, we conclude that the language references other provisions in the agreement that specifically require board approval, in addition to the member approval required by § 2.5.

Our construction is supported by the fact that other provisions of the agreement specify what actions taken under § 2.5 also require board approval to take effect. Section 5.5, titled "Admission of Additional Members," provides that "subject to Section 2.5, *the Board of Managers may* admit to the Company one or more additional Persons as Members. . . ."[18](Emphasis added.) Section 10.4, titled "Obligations in a Company Sale," states in relevant part: "If the Board of Managers and the Members in accordance with Section 2.5 authorize the Sale of the Company, the Board of Managers shall give written notice describing the terms and conditions of such proposed sale to all the Members . . . ."

By contrast, certain actions provided for by § 2.5 do not require board approval.

For example, § 11.1, titled "Dissolution," provides: "The Company shall be dissolved and its affairs shall be wound up upon the first to occur of the following: (a) *The consent of Members holding 60% or more of the Percentage Interests*; or (b) The entry of a decree of judicial dissolution under the LLC Act.'' (Emphasis added.) Section 15.6, titled "Entire Agreement; Amendments," provides in relevant part: "This Agreement . . . constitutes the entire agreement of the parties with

[18] Section 3.1, titled "Management and Control of the Company," states that the language "the Board of Managers may," found in § 5.5 and elsewhere in the agreement, requires majority consent by the board. Section 3.1 (g) (i) provides: "all decisions or actions which this Agreement provides *may be made by* 'the Managers' or *the 'Board of Managers*', may be made with the consent of a majority of the entire Board of Managers voting in proportion to their Percentage Interests . . . ." (Emphasis added.)

respect to the subject matter hereof and *this Agreement may be amended, modified or supplemented only by a written instrument duly executed by the Company and Members holding 60% or more of the Percentage Interests as required by Section 2.5*." (Emphasis added.)

Taking these provisions together, it is apparent that only certain actions taken under § 2.5—i.e., the admission of a new member and the sale of the company—require board approval in addition to member approval. No provision of the agreement requires board approval to amend the agreement or to remove a member.

Having construed § 2.5, we now turn to § 3.4—the provision that the plaintiff alleges the defendants breached. Section 3.4 applies solely to *managers* and, therefore, the defendants could not have breached § 3.4 by amending the agreement and removing the plaintiff because they took those actions in their capacities as *members*, pursuant to § 2.5. We recognize that the parties were both members and managers of CCP, but they had different rights, powers, restrictions, and liabilities depending on whether they were acting in their capacity as either members or managers. See Del. Code Ann. tit. 6, § 18-403 (2005) ("[a] person who is both a manager and a member has the rights and powers, and is subject to the restrictions and liabilities, of a manager and, except as provided in a limited liability company agreement, also has the rights and powers, and is subject to the restrictions and liabilities, of a member to the extent of the manager's participation in the limited liability company as a member"). Because we determine that the defendants were acting as members, not managers, when they voted to amend the agreement and remove the plaintiff as a member of CCP, we conclude, as a matter of law, that the defendants could not have breached § 3.4, applicable to managers, in doing so.

For the foregoing reasons, we conclude that the court improperly construed the agreement and erred by denying the defendants' posttrial motions. In other words, the jury could not legally have concluded that the defendants breached § 3.4 in amending the agreement and removing the plaintiff as a member because they were not bound by that section in taking those actions. Accordingly, we reverse the judgment with respect to the breach of contract counts regarding the amendment to the agreement and the plaintiff's removal as a member, and remand the case with direction to render judgment in favor of the defendants.[19]

[19] The plaintiff argues that, if this court reverses a breach of contract count, we should remand the case with instructions to render judgment for the plaintiff on the related breach of fiduciary duty claim. In support of this argument, the plaintiff quotes the trial court's statement in its memorandum of decision on the motion for attorney's fees and costs: "The jury was not required to reach the plaintiff's breach of fiduciary duty claim since it found in his favor as to breach of contract and awarded the full amount of damages sought. There was a substantial identity of the facts required to prove the breach of contract and breach of fiduciary duty claims, which may not be readily separated." We decline to remand the case with direction to render judgment on the related breach of fiduciary duty claim because the plaintiff did not take an exception to the jury verdict form that instructed the jury to bypass consideration of the breach of fiduciary duty counts related to the plaintiff's removal as a member and the maintenance of the capital reserve and, therefore, the plaintiff failed to preserve the claim. See *McMahon* v. *Middletown*, 181 Conn. App. 68, 76, 186 A.3d 58 (2018) ("[i]t is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level" (internal quotation marks omitted)). Breach of contract and breach of fiduciary duty are distinct theories of liability and nothing prevented the plaintiff from prevailing under both theories, if successful. See *Connelly* v. *State Farm Mutual Automobile Ins. Co.*, supra, 135 A.3d 1279 n.28 (elements of breach of contract are "1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) resulting damage to the plaintiff" (internal quotation marks omitted)); contra *Chioffi* v. *Martin*, 181 Conn. App. 111, 138, 186 A.3d 15 (2018) (elements of breach of fiduciary duty are "[1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty"

B

Capital Reserve

The defendants claim that the trial court improperly instructed the jury on the meaning of § 3.4, which affected the jury's verdict on the capital reserve claim. We agree that the court misconstrued § 3.4 and improperly instructed the jury; however, we conclude that any such error was harmless.

We begin with the well settled standard of review of claimed instructional errors. "When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Burke* v. *Mesniaeff*, 334 Conn. 100, 116, 220 A.3d 777 (2019). "Therefore, [o]ur standard of review on this claim is whether it is reasonably probable that the jury was misled." (Internal quotation marks omitted.) *Geary* v. *Wentworth Laboratories, Inc.*, 60 Conn. App. 622, 625, 760 A.2d 969 (2000).

At trial, the court instructed the jury that § 3.4 required the managers to exercise their best judgment in performing the company's operations and their other duties under the agreement, and prohibited them from

(internal quotation marks omitted)); *Estate of Eller* v. *Barton*, 31 A.3d 895, 897 (Del. 2011) ("[t]o establish liability for the breach of a fiduciary duty, a plaintiff must demonstrate that the defendant owed her a fiduciary duty and that the defendant breached it").

taking actions that were done in bad faith, or with gross negligence or willful misconduct. Specifically, the court instructed: "In this case, the plaintiff claims that the defendants breached [§] 3.4, the duty of care provision of the LLC agreement on three occasions. Section 3.4 requires the managers of CCP to exercise their best judgment in conducting the company's operations and in performing their other duties under the LLC agreement and prohibits actions that are taken in bad faith or with gross negligence or wilful misconduct. Bad faith is synonymous with the absence of good faith which in turn means honesty . . . and the observance of reasonable standards of fair dealings. A determination will be considered to be in good faith unless it went so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith. Wilful misconduct means intentional wrongdoing, not mere negligence, gross negligence or recklessness. And wrongdoing means malicious conduct or conduct designed to defraud or seek an unconscionable advantage. Gross negligence means conduct that constitutes reckless indifference or actions that are without the bounds of reason. . . .

"[T]he plaintiff claims that the defendants . . . breached the duty of care provision by maintaining a $3 million capital reserve for CCP, which reduced by $750,000 the amount that [the plaintiff] was paid upon his removal. [The plaintiff] claims there was no good faith basis for a $3 million capital reserve at the time of his removal and that the defendants maintained the $3 million capital reserve at that time for the bad faith purpose of depriving [the plaintiff] of money. . . .

"The defendants do not dispute that they maintained the $3 million capital reserve, but they deny they did so in bad faith or in breach of the LLC agreement . . . .

"The defendants deny that they acted in bad faith, committed gross negligence or wilful misconduct. And

they allege that they believe their action[s] to be in CCP's best interest or not opposed to them. They also contend that their actions were authorized by the sections of the agreement which permitted amendment of the LLC agreement, removal of members, and retention of the capital reserve."

On appeal, it is undisputed that the defendants maintained the capital reserve in their capacity as managers[20]and that the first sentence of § 3.4 establishes an express duty that the managers "exercise their best judgment in conducting the Company's operations and in performing their other duties hereunder." The defendants, however, claim that the trial court improperly construed the second sentence of § 3.4 as imposing affirmative contractual duties upon the managers to act in good faith, and without gross negligence or wilful misconduct. Instead, the defendants argue, the second sentence of § 3.4 is an exculpatory clause that serves to immunize individuals from liability in certain circumstances. The plaintiff counters that § 3.4 contains explicit requirements that the managers act in good faith and that their actions not constitute gross negligence or wilful misconduct. We agree with the defendants.

We believe that the meaning of § 3.4 is clear and unambiguous. The first sentence of § 3.4 sets forth a clear duty of the managers to exercise their "best judgment" when performing the company's operations. The second sentence, however, provides that a manager will

[20] Section 3.2 of the agreement, which details the powers of managers, provides in relevant part: "(a) Subject to the provisions of this Agreement, the powers delegated to the Executive Committee and the Investment Committee and the rules and procedures adopted from time to time by the Board of Managers, any Manager shall have the power on behalf and in the name of the Company to carry out and implement any and all of the purposes of the Company and to exercise any of the powers of the Company, including, without limitation, the power to . . . (xiii) establish from time to time a capital reserve for future expenses of the Company."

not be liable to the company, as long as the manager acted in good faith, and such action did not amount to gross negligence or wilful misconduct. This second sentence does not contain an express duty, as the trial court so concluded. Rather, it provides circumstances in which a manager would not be protected from liability to the company. Our reading is supported by § 2.3, titled "Limitation of Liability," which states in part: "No Member shall be liable under a judgment, decree or order of any court, or in any other manner, for a debt, obligation or liability of the Company, except as provided by law or as otherwise specifically provided herein." Section 3.4 "specifically provide[s]" the circumstances in which a manager shall be liable to or for the company. These provisions taken together mean that a manager will not be liable to the company, unless he or she acts in bad faith or with gross negligence or wilful misconduct.

Our interpretation of this provision is consistent with Delaware case law interpreting similar provisions in limited liability company operating agreements. For example, in *Fisk Ventures, LLC* v. *Segal*, Docket No. 3017-CC, 2008 WL 1961156 (Del. Ch. May 7, 2008), aff'd, 984 A.2d 124 (Del. 2009), the Chancery Court of Delaware addressed a contractual provision similar to the one at issue in the present case: " 'No Member shall have any duty to any Member of the Company except as expressly set forth herein or in other written agreements. No Member, Representative, or Officer of the Company shall be liable to the Company or to any Member for any loss or damage sustained by the Company or to any Member, unless the loss or damage shall have been the result of gross negligence, fraud or intentional misconduct by the Member, Representative, or Officer in question. . . .' " Id., *9. The counterclaim and third-party plaintiff in that case, Andrew Segal, argued that

the provision established a " 'duty to act without gross negligence, fraud or intentional misconduct.' " Id. The court stated that, "[u]nder Segal's reading, a . . . member would be liable to the [c]ompany or other members for *any* damage caused by gross negligence, [wilful] misconduct, or a knowing violation of law. There is no guidance as to how or when this 'code of conduct' applies, and this [c]ourt declines to follow Segal's invitation to turn an expressly exculpatory provision into an all encompassing and seemingly boundless standard of conduct." (Emphasis in original.) Id. Accordingly, the court in *Fisk* concluded that the provision at issue did not create an express duty to act in a certain way; instead, it exculpated members from liability for a loss unless the loss was caused by that member's gross negligence, fraud, or intentional misconduct. Although not bearing on our resolution of the claim in this appeal, we find the analysis by the court in *Fisk* persuasive.

The trial court erred, therefore, when it instructed the jury that "[§] 3.4 requires the managers of CCP to exercise their best judgment in conducting the company's operations and in performing their other duties under the LLC agreement *and prohibits actions that are taken in bad faith or with gross negligence or wilful misconduct*." (Emphasis added.) We determine, however, that this instruction, premised upon an improper interpretation of § 3.4, constituted harmless error. A party is entitled to a new trial for an instructional error only if the error likely affected the verdict. See *Perez* v. *Cumba*, 138 Conn. App. 351, 378–79, 51 A.3d 1156 ("[B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict."), cert. denied, 307 Conn. 935, 56 A.3d 712 (2012). The trial court's instruction to the jury was harmless because if the jury found that the defendants breached § 3.4 of

the agreement because they acted in bad faith or their actions constituted gross negligence or wilful misconduct, then any of those actions would certainly not have been in their "best judgment" in conducting the company's operations.

We conclude that the court erred in instructing the jury that the defendants owed the duty under the agreement to act in good faith and without wilful misconduct or gross negligence; however, this error was harmless. Accordingly, we affirm the judgment with respect to the breach of contract claim regarding the maintenance of the capital reserve.

II

The defendants also claim that the trial court improperly awarded attorney's fees and costs to the plaintiff pursuant to § 15.7 of the agreement, which provides for such relief to a party damaged by a breach of the agreement. See footnote 14 of this opinion. They argue that because the agreement and the evidence do not support the notion that the defendants breached an obligation under the agreement, the award cannot stand. Because we affirm the judgment in favor of the plaintiff on the breach of contract count related to the capital reserve, an award of attorney's fees and costs is appropriate in accordance with § 15.7. We reverse the judgment in part and remand the matter for a new hearing as to attorney's fees and costs, however, in light of the "results obtained" by the plaintiff following this appeal—that is, the reversal of two breach of contract counts. See *Mahani* v. *Edix Media Group, Inc.*, 935 A.2d 242, 245–46 (Del. 2007) ("[t]o assess a fee's reasonableness, case law directs a judge to consider the factors set forth in the Delaware Lawyers' Rules of Professional Conduct, which, include . . . (4) the amount involved and the results obtained . . . ." (footnote omitted)).

The judgment is reversed with respect to the counts alleging breach of contract related to amendment and member removal and the case is remanded with direction to render judgment on those counts for the defendants and for a new hearing on the plaintiff's motion for attorney's fees and costs; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KATHLEEN BUDRAWICH *v.* EDWARD BUDRAWICH, JR.
(AC 41125)

Alvord, Bright and Bear, Js.*

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the postjudgment rulings of the trial court modifying his alimony obligation and denying his motion to reassign to a different court the plaintiff's motion for an order seeking reimbursement from him for certain expenses of the parties' children. The defendant also challenged on appeal the trial court's granting of the plaintiff's motion to correct the court's memorandum of decision. The trial court had requested of the parties a waiver of the 120 day deadline mandated in the applicable rule of practice (§ 11-19) to issue a decision on the plaintiff's motion for an order seeking reimbursement. When the defendant did not respond to the request, a status conference was scheduled at which the plaintiff agreed to extend the 120 day deadline but which the defendant did not attend because, he asserted, he went to the incorrect courthouse. The court stated at the status conference that it would proceed with the agreement of counsel. The defendant thereafter sought reassignment of the plaintiff's motion for an order, claiming that the court had failed to render a timely decision under Practice Book § 11-19. The defendant's motion was assigned to a different court, which denied the motion after indicating that the prior court had found that the defendant consented to the extension of time. The prior court then ruled in favor of the plaintiff on her motion for an order. *Held*:

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

1. The trial court's finding that the defendant had consented to the prior court's request for an extension of time to rule on the plaintiff's motion for an order was clearly erroneous, the court having been required under Practice Book § 11-19 to reassign the plaintiff's motion to a different judge; the defendant timely filed his motion for reassignment, there was no evidence to support a finding of consent, and, although this court did not condone the defendant's failure to respond to the court's e-mail or to attend the status conference, those failures could not be construed as a waiver of the 120 day deadline.

2. The trial court improperly granted the plaintiff's motion to modify alimony, as its construction of the dissolution judgment's alimony provision was unclear and its determination that the plaintiff met her burden to establish a substantial change in circumstances was predicated in part on a clearly erroneous factual finding as to her medical expenses:

   a. The trial court failed to reduce the plaintiff's weekly expenses by the amount of the uninsured medical expenses she listed on her financial affidavit but later withdrew, and, as a result, the court improperly found that approximately 30 percent of her weekly expenses went to medical expenses when the court should have found that 11 percent went to those expenses; accordingly, this court did not need to address the defendant's claim that the trial court improperly granted the plaintiff's motion to correct and issued a corrected memorandum of decision, as there remained no judgment that could be corrected in light of this court's conclusion that the trial court improperly granted the plaintiff's motion to modify and this court's reversal of the trial court's judgment.

   b. The alimony provision in the dissolution judgment did not relieve the plaintiff of her burden to demonstrate a substantial change in circumstances, as the language of the provision expressed the court's intention to preclude modification as to term and to permit it as to amount, but only if the plaintiff's earnings fell below $100,000 per year; the alimony provision did not permit a second look upon the occurrence of a specified event, it did not state that a specified event shall be considered a substantial change in circumstances or that a party shall have the right to seek a modification upon the occurrence of a specified event without showing a substantial change in circumstances, and it gave no indication that the court intended to permit the plaintiff to obtain de novo review of the defendant's alimony obligation without first showing a substantial change in circumstances.

(*One judge concurring and dissenting*)

3. The defendant's claim that the trial court improperly granted his motion to modify his alimony obligation downward was rendered moot, the relief sought in the defendant's motion having been afforded to him as a result of this court's conclusion that the trial court improperly granted the plaintiff's motion to modify alimony.

Argued February 3—officially released September 22, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Abery-Wetstone*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Sommer*, *J.*, granted the plaintiff's motion for modification of alimony, and the defendant appealed to this court; subsequently, the court, *Sommer*, *J.*, granted the plaintiff's motion to correct the court's memorandum of decision modifying alimony and issued a corrected memorandum of decision, and the defendant filed an amended appeal; thereafter, the court, *Wenzel*, *J.*, denied the defendant's motion for reassignment; subsequently, the court, *Sommer*, *J.*, granted the plaintiff's motion for order and issued an order requiring the defendant to pay certain unreimbursed expenses, and the defendant filed an amended appeal; thereafter, the court, *Wenzel*, *J.*, granted the defendant's motion for modification of alimony, and the defendant filed an amended appeal. *Reversed in part*; *further proceedings*.

Edward Budrawich, *Jr.*, self-represented, the appellant (defendant).

Kathleen Budrawich, self-represented, the appellee (plaintiff).

Opinion

ALVORD, J. The self-represented defendant, Edward Budrawich, Jr., appeals from the trial court's rulings on postjudgment motions filed by both him and the self-represented plaintiff, Kathleen Budrawich. On appeal, the defendant argues that the court improperly (1) denied his motion for reassignment of the plaintiff's motion for order, (2) granted the plaintiff's motion to modify alimony, (3) granted the plaintiff's motion to

correct and issued a corrected memorandum of decision, and (4) modified his alimony obligation pursuant to his motion to modify alimony. We agree with the defendant's first and second claims and, accordingly, reverse the judgment of the court. In light of our resolution of the defendant's first two claims, we need not address his third claim and we conclude that his fourth claim is rendered moot.

The following facts, as set forth by this court in a prior appeal; *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015); and procedural history are relevant to our resolution of this appeal. The parties were married in 1982, and had three children. Id., 631. "The plaintiff filed an action seeking dissolution of the parties' marriage in June, 2004. In June, 2006, the parties reached an agreement regarding a parenting plan, which the court [*Abery-Wetstone*, *J.*] found to be in the best interests of the children. Accordingly, it approved and incorporated the agreement by reference into the judgment of dissolution. . . . The parties also entered into a binding arbitration agreement in November, 2006, and a corrected decision and award was issued on May 30, 2007, which the court approved at the time of dissolution. . . . After approving the parties' agreement and the decision of the arbitrator, on November 28, 2007, the court rendered judgment dissolving the parties' twenty-five year marriage." (Internal quotation marks omitted.) Id., 631–32. On November 29, 2007, the court amended its memorandum of decision to add a paragraph concerning alimony, which it stated had been deleted inadvertently from the original decision. That paragraph (alimony provision) stated: "The husband shall pay to the wife the sum of $1.00 per year as alimony. Payment shall be made, during the husband's lifetime and until the wife's death, remarriage, or suspension of alimony due to cohabitation pursuant to the statute and case law or

November 28, 2022. Alimony shall be modifiable as to amount if the wife earns less than $100,000 per year. Alimony shall not be modifiable as to term."

Postjudgment proceedings in this dissolution case resulted in two prior appeals. The first appeal is not relevant to our discussion. The second appeal concerned, inter alia, the trial court's order requiring the parties to submit to arbitration to resolve their dispute concerning reimbursement for past expenses that each party had incurred on behalf of their minor children. *Budrawich* v. *Budrawich*, supra, 156 Conn. App. 630. On April 21, 2015, this court issued its decision, in which it concluded that "the [trial] court erred in ordering the parties to submit to arbitration to resolve their dispute over unreimbursed expenses because the parties did not execute a voluntary arbitration agreement." Id., 648. This court reversed the judgment only as to the order requiring the parties to submit to arbitration. Id., 650.

The parties also filed several postjudgment motions. The defendant has appealed from the court's rulings on his March 1, 2018 motion for reassignment of the plaintiff's November 25, 2015 motion for order seeking reimbursement for the children's expenses and unreimbursed medical expenses, the plaintiff's April 20, 2017 motion to modify alimony and her December 6, 2017 motion to correct the court's memorandum of decision rendered thereon, and the defendant's March 23, 2018 motion to modify alimony. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that the court improperly denied his motion for reassignment of the plaintiff's motion for order. Specifically, he argues that he did not consent to the court's requested extension of time to issue its decision on the plaintiff's motion for order and, therefore, his motion seeking to have the

motion for order reassigned to another judge should have been granted. The plaintiff responds that the defendant has "waived any right to claim that matters before the court are reassigned" by his failure to respond to the court's e-mails requesting an extension and to attend a status conference scheduled following his failure to respond to the e-mails. We agree with the defendant that the court improperly denied his motion for reassignment.

The following additional undisputed facts and procedural history are relevant to this claim. On November 25, 2015, the plaintiff filed a motion for order, alleging that she was owed reimbursement for the children's extracurricular expenses and unreimbursed medical expenses. The court, *Sommer*, *J.*, held hearings over six days, beginning on August 8, 2016, and ending on September 27, 2016. Both parties filed posthearing memoranda of law on October 27, 2017. With the 120 day deadline to issue a decision on the plaintiff's motion for order approaching; see Practice Book § 11-19; the case flow coordinator from the Stamford Superior Court e-mailed the parties on February 16, 2018, on behalf of Judge Sommer, to request a waiver of the 120 day deadline. The defendant did not respond to the e-mail. A status conference was scheduled for February 22, 2018. On that date, the plaintiff's counsel appeared before the court, *Sommer*, *J.*, in Stamford.[1] Neither the plaintiff nor the defendant were present. The plaintiff's counsel informed the court that the plaintiff was not present because she was ill, and that counsel did not know why the defendant was not present.

The court stated that the defendant "had been contacted with the request for the extension of time for

[1] The plaintiff was represented by counsel in the relevant proceedings before the trial court. The plaintiff also filed her own appearance in addition to counsel.

the court to have additional time to render its decision. And because he did not reply to case flow, it was necessary for the court to schedule this hearing today to give him an opportunity to come and to be heard on the requested extension." The court indicated that its requested extension was due to the "very, very heavy press of business in the family assignment resulting in the court handling a vast volume of cases" and "the additional complication" of completing a decision in this matter where the physical file remained in Bridgeport and that "it was not clear that all of the exhibits that are related to [the motion for children's expenses] are here with me." Accordingly, the court sought an additional period of time to issue its ruling. The plaintiff's counsel stated that the exhibits submitted were essential for the court to render its decision and indicated that "there's no objection on our part" to the court's proposed March 30, 2018 deadline to issue its decision.

The court then stated: "Well, I will consider that [the defendant] has been duly notified by case flow of the request for the extension. Not having received any response from [the defendant], this court scheduled a hearing this afternoon to provide [the defendant] an opportunity to appear and speak to the requested extension. [The defendant] has not appeared, it now being 2:25, the matter having been scheduled for two o'clock. And the court will proceed on with the agreement of counsel to the extension to March 30, which I would anticipate being able to over the next couple of weeks either have the file, those crucial exhibits, and they are crucial, I do remember their production and initial review throughout the testimony. And the exhibits are essential to this court's decision. So that matter will be addressed."

On March 1, 2018, pursuant to Practice Book § 11-19, the defendant filed a motion for reassignment of

the plaintiff's motion for order on the ground that the court had not rendered a timely decision on the plaintiff's motion. On March 22, 2018, the plaintiff filed an objection, representing that the "Family Caseflow Coordinator for Judge Sommer in Stamford, CT, e-mailed all parties 3 times on this matter on 2/16/18 and twice on 2/21/18. The plaintiff replied on 2/19/18, making that 4 e-mails sent to [the defendant]. The defendant . . . failed to reply to any of the e-mails . . . ." The plaintiff attached to her objection what she represented were copies of the e-mails[2] and further argued that the defendant had failed to appear for the February 22, 2018 status conference, which had been scheduled because of the defendant's failure to respond to the e-mails.

The parties appeared before the court, *Wenzel*, *J.*, on March 21, 2018. The defendant argued that he missed the status conference because he had appeared at the courthouse located at 1061 Main Street in Bridgeport, the courthouse identified as the location of the status conference in the JDNO notice. Following argument on the motion for reassignment, the court confirmed that the only issue for its consideration was "whether or not Judge Sommer's finding that there was consent to the extension was proper." The court then stated: "I am put in the unfortunate position of being asked to second-guess Judge Sommer's decision. I am not in any position to do that. I'm not saying that her finding of consent that the extension should be allowed is right or wrong. I'm in no way as well equipped as she was to address that issue or make that finding . . . . So based on another judge's finding of consent, I have to deny this motion."

[2] The defendant confirmed during oral argument before this court that he received e-mails from the court requesting his consent to the extension. He maintained that he did not reply to the e-mails because he received notice that the court scheduled the status conference before he had finished looking into the topic.

On April 2, 2018, the court, *Sommer*, *J.*, issued its ruling on the plaintiff's motion for order.[3] The court ordered the defendant to pay the plaintiff the sum of $21,687, the amount he owed of the children's expenses and unreimbursed medical expenses. On April 9, 2018, the defendant filed an appeal from Judge Wenzel's denial of his motion for reassignment, which appeal was treated by this court as an amended appeal.

We first set forth applicable legal principles. Practice Book § 11-19 provides a 120 day time limit for the court to issue a decision on short calendar matters submitted to it. Section 11-19 (a) provides that a judge "shall issue a decision on such matter not later than 120 days from the date of such submission, unless such time limit is waived by the parties." It further provides that "[i]f a decision is not rendered within this period the matter may be claimed in accordance with subsection (b) for assignment to another judge or referee." Practice Book § 11-19 (a). Section 11-19 (b) provides that "[a] party seeking to invoke the provisions of this section shall not later than fourteen days after the expiration of the 120 day period file with the clerk a motion for reassignment of the undecided short calendar matter which shall set forth the date of submission of the short calendar matter, the name of the judge or referee to whom it was submitted, that a timely decision on the matter has not been rendered, and whether or not oral argument is requested or testimony is required. The failure of a party to file a timely motion for reassignment shall be deemed a waiver by that party of the 120 day time."

This court, in *Reyes* v. *Bridgeport*, 134 Conn. App. 422, 431, 39 A.3d 771 (2012), addressed whether "a court

[3] In its April 2, 2018 order, the court also found that the defendant's failure to reimburse the plaintiff for the children's expenses was in direct violation of a clear and unambiguous court order. It further found that the defendant had the ability to pay his share of expenses, but wilfully failed to do so. The court ordered the defendant to pay attorney's fees and stated that a hearing would be set for review of the plaintiff's attorney's affidavit of fees.

is required to grant a motion for reassignment if properly and timely filed." The court stated: "We read subsection (a) to provide that unless there is a waiver by the parties, a judge is required to issue a decision on a short calendar matter within 120 days, and if the judge fails to do so, that the matter must be reassigned at any party's request subject to that party's compliance with subsection (b). This reading is further supported by the language found in subsection (b). . . . If a party wants to invoke the right to have a matter reassigned, he or she must timely file a motion for reassignment. It is only if a party fails to do so, or otherwise waives the 120 day filing deadline, that he or she waives the right to have the matter reassigned. . . . This reading necessarily implies that by timely filing a motion for reassignment, a party who has not waived the filing deadline is able to invoke his or her right to reassignment, which a court must then grant." (Citations omitted; internal quotation marks omitted.) Id., 431–32.

In the present case, there is no dispute that the court did not issue its decision within the 120 day limit or that the defendant timely filed a motion for reassignment. The only issue for our consideration is whether the court properly found that the defendant, by his conduct in failing to respond to the case flow coordinator's e-mails and failing to appear for the status conference, waived the 120 day filing deadline.

"Waiver is the intentional relinquishment or abandonment of a known right or privilege. . . . As a general rule, both statutory and constitutional rights and privileges may be waived. . . . Waiver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel would be enforced. . . . Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . .

Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) Id., 429–30. "[B]ecause waiver [is a question] of fact . . . we will not disturb the trial court's [finding] unless [it is] clearly erroneous." (Internal quotation marks omitted.) *Northland Two Pillars, LLC* v. *Harry Grodsky & Co.*, 133 Conn. App. 226, 230, 35 A.3d 333 (2012).

We conclude that the court's finding of consent to the requested extension is clearly erroneous. First, Judge Wenzel's suggestion that Judge Sommer had made a finding that the defendant had consented to the extension is inaccurate. Our review of Judge Sommer's remarks during the February 22, 2018 status conference reveals that she stated that the defendant had not responded to the requested extension, had not appeared for the status conference, and that she was proceeding with the agreement of the plaintiff's counsel to the requested extension.

Moreover, although we do not condone the defendant's failure to respond to the case flow coordinator's e-mail requesting his consent to an extension, we cannot construe his silence in failing to respond to an e-mail from the case flow coordinator as a waiver of the 120 day filing deadline. With respect to the defendant's failure to appear for the status conference, we observe that the JDNO notice scheduling the conference, of which Judge Wenzel took judicial notice, incorrectly identified its location as 1061 Main Street in Bridgeport, when the hearing actually took place in Stamford. Again, although we do not condone the defendant's failure to communicate with the court or the plaintiff's counsel following his missing the status conference, we canot construe his failure to appear at the status conference held at the Stamford Superior Court as a

waiver of the 120 day filing deadline. Because the defendant timely filed his motion for reassignment, and there was no evidence in the record to support a finding of consent to an extension or waiver of the 120 day filing deadline, the court was required to order that the matter be reassigned to another judge. See *Reyes* v. *Bridgeport*, supra, 134 Conn. App. 431–32. We thus conclude that the court erred in denying the plaintiff's motion for reassignment. Accordingly, we reverse the court's ruling on the plaintiff's motion for order.

II

We next address the defendant's claim that the court improperly granted the plaintiff's motion to modify alimony. In his request for relief, the defendant asks this court to "reverse the judgment of the trial court and remand the matter for a new hearing." We agree with the defendant that the court improperly granted the plaintiff's motion to modify alimony and that he is entitled to a new hearing.

Before turning to the merits of the defendant's claim with respect to the plaintiff's motion to modify alimony, we note that the defendant also claims on appeal that the court, following the issuance of its decision on the plaintiff's motion to modify alimony, improperly granted the plaintiff's motion to correct and issued a corrected memorandum of decision. We need not address the defendant's claim with respect to the court's issuance of a corrected memorandum of decision. Because we conclude that the court improperly granted the plaintiff's motion to modify alimony, which requires that we reverse the judgment of the trial court, there remains no judgment that could be corrected. See *Central Connecticut Teachers Federal Credit Union* v. *Grant*, 27 Conn. App. 435, 438–39, 606 A.2d 729 (1992) (declining to address second claim that court improperly increased order of payments from $75 to $150 per month pursuant

to motion to correct judgment, because conclusion on first claim required reversal of judgment, including order of payments). We therefore refer to the court's corrections, without passing on their propriety, only to demonstrate; see footnote 10 of this opinion; that the corrections do not disturb our conclusion that the court improperly granted the plaintiff's motion to modify alimony.

The following additional facts and procedural history are relevant to our resolution of the defendant's claim. On April 20, 2017, the plaintiff filed a motion to modify alimony. She alleged that she had lost her job and had health setbacks, and that the defendant's income had increased, while her earning capacity was less. On June 9, 2017, the court held a hearing on the plaintiff's motion, during which both parties testified.

On November 9, 2017, the court issued a memorandum of decision in which it granted the plaintiff's motion to modify alimony. It found that, at the time of the dissolution in 2007, the plaintiff was employed by Pitney Bowes at a gross annual income of approximately $122,000. The court credited the plaintiff's testimony that, following the termination of her employment with Pitney Bowes in the fall of 2016, "despite having made continuing good faith efforts to seek employment she has been unable to obtain employment at any salary level near her former level." It found that "she has been unable to obtain employment at a salary that would enable her to meet her financial needs. The only employment opportunities available to the plaintiff are near minimum wage positions in retail employment which do not guarantee a full [forty] hour week." The court credited the plaintiff's estimation that "at best she will be able to earn $30,000 per year." The court found: "These jobs do not pay bonuses, have minimal wage increases and do not provide benefits comparable to the benefits she received as a Pitney Bowes employee.

Although the plaintiff has retirement assets, these are not accessible at this time and should not be depleted to pay for her present living expenses."

The court found: "[The plaintiff's] combined expenses for medical insurance premiums and uninsured medical expenses constitute approximately 30 percent of her weekly expenses. The additional cost of obtaining medical insurance independently through COBRA[4] and the out-of-pocket expenses which the plaintiff incurs due to the medical issues which she faces subsequent to the dissolution support her claim that she has experienced a substantial change in circumstances." (Footnote added.) The court concluded its findings of fact by stating that, "[a]lthough the plaintiff has planned for her retirement, she is now faced with unforeseen financial need for support at least seven years before she will be able to receive social security benefits and well before she is able to access her retirement savings." See footnote 7 of this opinion.

Turning to the two step inquiry required in the adjudication of a motion to modify alimony, the court first found that the plaintiff had met her burden of establishing a substantial change in circumstances. The court referred to the alimony provision as stating that "the plaintiff would receive alimony in the amount of $1 per year until November 28, 2022, and that if the plaintiff's income fell below $100,000 annually that would constitute a substantial change in circumstances as a predicate to modification."[5] The court additionally found: "[The plaintiff's] income has effectively been eliminated

[4] See the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §§ 1161 through 1168.

[5] The court stated that, "[a]s a threshold matter, the court has confirmed that the January, 2012 agreement, incorporated by reference in the dissolution judgment, expressly permits modification of the alimony and child support provisions, except with respect to extending the term." See footnote 7 of this opinion.

through circumstances beyond her control. She has established through credible evidence that she has made good faith efforts to obtain employment but has been unsuccessful. The court concludes based on the credible evidence that the job market in Bradenton, Florida, does not provide opportunities for fifty-eight year old women with the plaintiff's experience. The plaintiff's current financial affidavit reflects that she has exhausted her severance and unemployment benefits. Accepting a minimum wage job would still put her income 70 percent below the level she earned at the time of dissolution. Her total weekly expenses, including weekly liability expenses, have also decreased, but are well beyond her ability to meet them. On its face, the plaintiff's current financial affidavit shows that she is not meeting her expenses each week. The court does not find that the defendant's financial circumstances have changed materially."

Next, the court considered the statutory criteria set forth in General Statutes § 46b-82 (a). It found: "The defendant is sixty years old. He did not present any health issues, appears to be healthy and is still employed at Pitney Bowes. The plaintiff is a fifty-eight year old woman who, despite a successful career internally at a single employer, is unable to compete more broadly in the current job environment and has demonstrated that the only jobs available to her pay [far] less than her previous job. The plaintiff's income has decreased significantly in the decade since she lost her job in the fall, 2016. She also testified credibly that she has health issues which limit her employability." The court granted the motion to modify alimony, which was made retroactive to April 20, 2017; see footnote 7 of this opinion; and ordered the defendant to pay alimony to the plaintiff in the amount of $700 per week.[6]

[6] On November 30, 2017, the defendant filed a motion to reargue the court's November 9, 2017 decision, which motion he subsequently withdrew on May 4, 2018.

On December 6, 2017, the plaintiff filed a motion to correct the court's November 9, 2017 memorandum of decision. On February 22, 2018, the plaintiff's counsel appeared before the court, and the court took up the matter of the plaintiff's motion to correct. The plaintiff's counsel described each requested correction, and the court stated on the record that it had "confirmed that the requested corrections are all warranted. They are each of them as presented proper, based on the actual record in the case and the findings by the court at trial. So whether it was to reflect the correct date and amount of retroactivity, to reflect the court's intention with respect to the plaintiff's ability to access social security benefits and the correct reference to the underlying decision by Judge Abery-Wetstone. So [the motion to correct] is granted. The court will file a corrected memorandum of decision reflecting those items." On July 24, 2018, the defendant filed an objection to the plaintiff's motion to correct. On September 27, 2018, the court issued a corrected decision,[7] and the defendant filed an amended appeal therefrom.

[7] The court made the following multiple corrections. First, in its November 9, 2017 memorandum of decision, the court had ordered the modification of alimony retroactive to April 20, 2017, which corresponded with the date the plaintiff filed her motion to modify alimony. In the corrected memorandum of decision, the court ordered the modification of alimony retroactive to May 21, 2017, which corresponded with the date the defendant was served with the motion to modify, in accordance with General Statutes § 46b-86 (a).

Second, in its November 9, 2017 memorandum of decision, the court stated: "As a threshold matter, the court has confirmed that the *January, 2012 agreement*, incorporated by reference in the dissolution judgment, expressly permits modification of the alimony *and child support provisions* except with respect to extending the term." (Emphasis added.) It further stated that "[t]he burden is on the plaintiff, as the moving party, to show that a substantial change in *his* circumstances has occurred since the parties' divorce in *January, 2012*, so as to warrant a modification of the alimony *and child support provisions*." (Emphasis added.) In the corrected memorandum of decision, the court removed the reference to the January, 2012 agreement and substituted the November, 2007 memorandum of decision. It deleted the references to child support, and changed "his circumstances" to "her circumstances."

Third, in its November 9, 2017 memorandum of decision, the court stated: "The plaintiff is fifty-eight years old and the defendant is sixty years old.

Prior to the court's issuance of the corrected memorandum of decision, the defendant had filed a motion for articulation. On November 16, 2018, the court issued an articulation. The court stated that it found the plaintiff's earning capacity to be "in the range of $30,000-$35,000 . . . ." The court cited as the basis for its earning capacity finding the credible testimony of the plaintiff. The court articulated that it accepted the plaintiff's testimony that "her skills were self-taught and specifically adapted to the needs of Pitney Bowes. Furthermore, the court found the plaintiff's testimony credible that despite good faith efforts she has been unable to become employed, that the local job market in Bradenton, Florida, does not have employment opportunities for individuals with her skills, that technology support jobs are now being filled by younger individuals with technology degrees and training rather than self-taught individuals such as the plaintiff, that jobs available to her are near minimum wage retail position and that at age fifty-six[8] she has found it difficult to be considered for employment." (Footnote added.)

At the outset, we set forth our standard of review and relevant legal principles. "[W]e will not disturb the

Although the plaintiff has planned for her retirement, she is now faced with unforeseen financial need for support *at least seven years before she will be able to receive social security benefits and well before she is able to access her retirement savings*." (Emphasis added.) In the corrected decision, the court stated: "at least seven years before the recommended age to access social security benefits and well before she is able to access her retirement savings without penalty."

Finally, in its November 9, 2017 memorandum of decision, the court stated: "The plaintiff's income has decreased significantly in the decade since *she lost her job in the fall, 2016*." (Emphasis added.) The court changed this sentence to: "The plaintiff's income has decreased significantly in the decade since the 2007 dissolution as a result of losing her job in the fall of 2016."

[8] We note that there exists a discrepancy between the trial court's statement of the plaintiff as fifty-eight years old in its November 9, 2017 memorandum of decision and fifty-six years old in its November 16, 2018 articulation. This discrepancy does not affect our analysis.

trial court's ruling on a motion for modification of alimony or child support unless the court has abused its discretion or reasonably could not conclude as it did, on the basis of the facts presented." (Internal quotation marks omitted.) *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 672, 133 A.3d 482 (2016). Furthermore, "[t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 593, 187 A.3d 1184 (2018).

"[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case, the disputed issue is alimony . . . the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of

one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . More specifically, these criteria, outlined in. . . § 46b-82, require the court to consider the needs and financial resources of each of the parties and their children, as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties. . . . The power of the trial court to modify the existing order does not, however, include the power to retry issues already decided . . . or to allow the parties to use a motion to modify as an appeal. . . . Rather, the trial court's discretion includes only the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties. . . .

"Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, 310 Conn. 665, 671–74, 81 A.3d 215 (2013).

Before turning to the defendant's arguments, we note that, despite our careful reading of the court's memorandum of decision, it is unclear whether the trial court (1) considered, pursuant to § 46b-86, whether the plaintiff had established a substantial change in circumstances or (2) construed the alimony provision to abrogate the statutory requirement of proof of a substantial

change in circumstances. See footnote 11 of this opinion. Accordingly, in part II A of this opinion, we assume that the court determined that the plaintiff met her burden of demonstrating a substantial change of circumstances pursuant to the requirement stated in § 46b-86. Because we conclude that the court's determination of a substantial change in circumstances was predicated, in material part, on a clearly erroneous factual finding as to the plaintiff's medical expenses, we reverse the judgment on the plaintiff's motion to modify on this basis.

Because the question of how the dissolution court's alimony order should be interpreted will arise on remand, we elucidate the order, as it is a question of legal interpretation. Language from the trial court's memorandum of decision on the plaintiff's motion to modify can be construed as suggesting that it interpreted the alimony provision as directing that the plaintiff automatically satisfied, or was relieved from, her obligation of showing a substantial change in circumstances by virtue of her earning less than $100,000 per year. We demonstrate, in part II B of this opinion, why this reading of the alimony provision is legally improper.

A

On appeal, the defendant raises a number of arguments in support of his claim that the court erred in granting the plaintiff's motion to modify alimony.[9] We first address

[9] In addition to the arguments discussed in this opinion, the defendant also argues that the court improperly denied his request to conduct discovery, made clearly erroneous findings as to the plaintiff's earning capacity and net income, improperly considered expenses of the children, including those incurred following the children's reaching the age of majority, and abused its discretion in awarding the plaintiff $700 per week alimony. Given our conclusion that the court's findings regarding the plaintiff's expenses require us to reverse the judgment of the trial court and to remand the case for a new hearing on the plaintiff's motion to modify alimony, we need not address the defendant's remaining arguments and decline to do so. See *Steller* v. *Steller*, supra, 181 Conn. App. 599.

his argument that the court, in considering the plaintiff's weekly expenses, improperly failed to reduce the expenses by the amount of uninsured medical expenses that she originally had listed on her financial affidavit but later withdrew. We agree with the defendant.

Although the plaintiff averred on her financial affidavit that she incurs $291 weekly in uninsured medical/dental expenses, she requested, after consultation with her counsel, that the court remove the $291 weekly expense and substitute zero for that amount. Her counsel canvassed her as to that request during the July 9, 2017 hearing, and the court stated that it was "noted for the record." In its memorandum of decision, however, the court found that "[the plaintiff's] combined expenses for medical insurance premiums and uninsured medical expenses constitute approximately 30 percent of her weekly expenses."

A review of the court's mathematical calculations necessarily underlying that 30 percent finding reveals that, despite the plaintiff's request to remove the $291 weekly expense from consideration of her expenses, and the court noting that request, the court failed to do so. The plaintiff listed on her financial affidavit total weekly expenses in the amount of $1593, which, after subtracting the $291 in uninsured medical/dental expenses, amounts to $1302. The plaintiff's financial affidavit shows $141 in weekly expenses for medical/dental insurance premiums. Had the court removed the uninsured medical/dental expenses in accordance with the plaintiff's request and considered only the $141 in medical/dental insurance premium expenses, the court's calculations would have resulted in a finding that the plaintiff's remaining medical/dental insurance premium expenses constituted approximately 11 percent of her total weekly expenses ($141 divided by $1302). Thus, it is evident that the court's finding that "approximately 30 percent of [the plaintiff's] weekly expenses" went

to medical expenses improperly included the $291 in uninsured expenses that the plaintiff abandoned.

In its memorandum of decision, the court identified the "out-of-pocket expenses which the plaintiff incurs due to the medical issues which she faces" as "support[-ing] her claim that she has experienced a substantial change in circumstances." Accordingly, the court's determination of a substantial change in circumstances was premised, at least in part, on its clearly erroneous factual finding regarding the plaintiff's uninsured medical/dental expenses. See *Sargent* v. *Sargent*, 125 Conn. App. 824, 827–28, 827 n.7, 9 A.3d 799 (2011) (reversing court's ruling reducing alimony obligation of defendant where ruling was premised on clearly erroneous finding that defendant incurred expenses of $777 monthly to include plaintiff on his medical coverage; defendant's financial affidavit showed no deduction for medical expenses and expenses associated with medical coverage "costs were borne solely by the defendant's employer and the plaintiff in the form of medical deductibles and co-pays").

The court's clearly erroneous finding as to the plaintiff's expenses requires that the court's judgment modifying the defendant's alimony obligation be reversed and the case remanded for a new hearing on the plaintiff's motion for modification.[10]

[10] We note that the court also made erroneous factual findings with respect to the plaintiff's ability to access her retirement assets and social security benefits. In its November 9, 2017 memorandum of decision modifying alimony, the court found that, "[a]lthough the plaintiff has planned for her retirement she is now faced with unforeseen financial need for support at least seven years before she will be able to receive social security benefits and well before she is able to access her retirement savings." The court subsequently corrected this finding to state: "at least seven years before the recommended age to access social security benefits and well before she is able to access her retirement savings without penalty." See footnote 7 of this opinion. The court also stated, in its articulation, that it had "previously addressed these questions" in its corrected memorandum of decision and that it had "clarified its statement regarding the effect of plaintiff's accessing her retirement assets." Specifically, the court articulated that it "did not find based on its comprehensive review of plaintiff's financial

B

We next address the defendant's argument that the court improperly construed the alimony provision as stating that "if the plaintiff's income fell below $100,000 annually that would constitute a substantial change in circumstances as a predicate to modification."[11] He argues that "the divorce decree prevented the plaintiff from moving for modification if she earned more than . . . $100,000. If she made less than $100,000 she could move for modification, but still needed to present evidence showing how a change in her earning capacity, expenses, assets and liabilities substantiated a substantial change in circumstances from the prior order."

circumstances that it was reasonable or fair to require the plaintiff to deplete her retirement assets at this time."

The court's determinations as to the plaintiff's ability to access her retirement assets and social security benefits are not supported by the evidence in the record. The plaintiff presented no evidence as to when she would be able to access her retirement assets, and the only reference in the record to social security was the plaintiff's testimony that she would become social security eligible at age sixty-two and her agreement with her counsel's question that this was "on the early side of receiving benefits . . . ." During oral argument before this court, when asked whether she presented evidence that she could not access her 401 (k) without penalty before the age of sixty-five, the plaintiff responded that she did not present that evidence, and she stated: "I never claimed that." Similarly, when asked during oral argument before this court what evidence was presented showing that it is not recommended to access social security before the age of sixty-five, the plaintiff responded: "I don't think there was any evidence that said that, and it wasn't my claim that I could not access it before that time." Wholly lacking evidence, the court was not in a position to evaluate the plaintiff's ability to access her retirement assets and social security benefits.

[11] In its articulation, the court further stated that it had concluded that "the plaintiff had sustained her burden of showing that a substantial change in circumstances has occurred as a result of the plaintiff's loss of employment through no fault of her own and that she is entitled to receive alimony. Not only did her income decrease below the stipulated $100,000 level which according to the parties' agreement entitled her to alimony, she presented credible evidence of her needs and her effort to find a job." We note that the court previously had referred incorrectly to the alimony provision as part of an agreement; see footnote 7 of this opinion; rather than properly as a provision of the judgment of dissolution.

Although it is unclear to us whether the court construed the alimony provision to mean that the plaintiff's income falling below $100,000, in and of itself, constituted a substantial change in circumstances, we address this issue because it may arise on remand.

We first set forth the standard of review. "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Perry* v. *Perry*, 156 Conn. App. 587, 593, 113 A.3d 132, cert. denied, 317 Conn. 906, 114 A.3d 1220 (2015).

We next set forth relevant principles of law. Section 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." "This statutory provision suggests a legislative preference favoring the modifiability of orders for periodic alimony . . . [and requires that] the decree itself must preclude modification for this relief to be unavailable. . . . If an order for periodic alimony is meant to be nonmodifiable, the decree must contain language to that effect. . . . Such a preclusion of modification must be clear and unambiguous. . . . If a provision purportedly precluding modification is ambiguous, the order will be held to be modifiable." (Footnote omitted;

internal quotation marks omitted.) *Burke* v. *Burke*, 94 Conn. App. 416, 422, 892 A.2d 964 (2006). "In determining whether the alimony award is modifiable or nonmodifiable, only the dissolution decree itself may be used." (Footnote omitted; internal quotation marks omitted.) Id.

This court previously has construed certain language contained in a separation agreement to relieve the party seeking to modify alimony of the statutorily mandated burden of demonstrating that a substantial change in circumstances has occurred. See *Steller* v. *Steller*, supra, 181 Conn. App. 584, 584–85 n.1; *Taylor* v. *Taylor*, 117 Conn. App. 229, 231, 978 A.2d 538, cert. denied, 294 Conn. 915, 983 A.2d 852 (2009). In *Steller* v. *Steller*, supra, 584–85 n.1, this court considered the term of a separation agreement that provided in relevant part: "It is acknowledged that the husband has the right to retire upon reaching the age [of] sixty-five (65) years and he may petition the [c]ourt to take a 'second look' for a hearing to determine the amount of alimony which he shall pay to the wife. The retirement of the husband at age sixty-five (65) shall be considered a substantial change in circumstances, but in any event, even if the husband does not retire at age sixty-five (65), he shall have a right to seek a modification of alimony at age sixty-five (65) without the need of showing a substantial change in circumstances." This court concluded that "the plain language of the agreement permitted the court to take a fresh look at the parties' financial circumstances after the defendant reached his sixty-fifth birthday." Id., 602. This court stated that the trial court did not need to find a substantial change in circumstances because the language of the agreement permitted the court to conduct a de novo review of the defendant's alimony obligation. Id.

In *Taylor* v. *Taylor*, supra, 117 Conn. App. 232, the parties' separation agreement required the plaintiff to

pay alimony in the amount of $60,000 per year. The agreement stated that the "amount shall be modifiable by either party. Upon the [plaintiff's] 65th birthday or the death of the [defendant's] father, whichever shall first occur, the alimony shall be subject to a second-look by the Superior Court for the [s]tate of Connecticut to determine the then appropriate order, if any." (Internal quotation marks omitted.) Id. This court rejected the defendant's argument that "because the agreement failed to include language that after the events mentioned, alimony would be subject to a de novo review, the second look should be based on a substantial change of circumstances." Id. This court construed the agreement to permit the court to "take a fresh look at the parties' financial circumstances either after the plaintiff reached his sixty-fifth birthday or after the death of the defendant's father." Id., 233. In reaching this conclusion it reasoned: "If that was not the intent of the parties, the second look language would have been superfluous because the agreement provided that alimony could be modified at any time if a substantial change of circumstances occurred. The agreement, however, specifically provides that on the happening of either of the two previously mentioned events, alimony may be given a second look. We conclude, therefore, that this language permits a de novo review of the plaintiff's alimony obligation." Id.

In contrast with the language considered in *Steller* and *Taylor*, the relevant language of the present alimony provision states only that "[a]limony shall be modifiable as to amount if the wife earns less than $100,000 per year. Alimony shall not be modifiable as to term." The alimony provision does not permit a "second look" upon the occurrence of a specified event, does not state that the occurrence of a specified event shall be considered a substantial change in circumstances, or that a party shall have the right to seek a modification

of alimony upon occurrence of a specified event without showing a substantial change in circumstances. Nor does the alimony provision give any other indication that it was intended by the dissolution court to permit the plaintiff to obtain a de novo review of the defendant's alimony obligation without first showing a substantial change in circumstances. In the absence of such indication, the relevant language of the alimony provision addresses only the issue of whether the alimony award is modifiable or nonmodifiable. Expressed in the alimony provision is the dissolution court's intention to preclude modification as to the term of the alimony and to permit modification as to the amount, but only if the plaintiff's earnings fall below $100,000 per year. Accordingly, the alimony provision does not relieve the plaintiff of her burden to demonstrate a substantial change in circumstances.

III

The defendant's final claim on appeal is that the court, *Wenzel*, *J.*, improperly modified his alimony obligation. He argues, inter alia, that if this court reverses the prior modification of alimony ordered by Judge Sommer, Judge Wenzel's order modifying alimony likewise should be reversed. We conclude that our resolution of the defendant's claim in part II A of this opinion renders the defendant's arguments with respect to his motion to modify alimony moot.

The following additional procedural history is relevant to this claim. On March 23, 2018, the defendant filed a motion to modify alimony. He alleged therein that since the date of the court's November 9, 2017 order regarding alimony, there had been a substantial change in circumstances, in that he had lost his job and was unemployed, had health issues that limit his employment opportunities, and had decreased earning

capacity. He further alleged that the plaintiff had cohabitated, had an increased earning capacity, and her financial circumstances had improved. The plaintiff filed an objection on April 23, 2018. On September 18, 2018, the court, *Wenzel*, *J.*, issued an order regarding the defendant's motion to modify alimony. It found that the defendant had established a substantial change in circumstances, in that the defendant's employment had been terminated and he had been unable to find new employment. The court ordered alimony payments reduced from $700 per week to $350 per week. The defendant filed a motion to reargue, which was denied. The defendant thereafter amended his appeal.

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Pryor* v. *Pryor*, 162 Conn. App. 451, 455, 133 A.3d 463 (2016).

We have concluded in part II A of this opinion that the court improperly granted the plaintiff's motion to modify alimony, and we have reversed the judgment. Reversing the judgment as to the motion for modification has the effect of returning the parties to their status as of the original dissolution judgment, which required the defendant to "pay to the [the plaintiff] the sum of

$1.00 per year as alimony." Accordingly, the defendant's motion seeking a downward modification of his alimony obligation is moot, given that the relief sought in that motion has already been afforded the defendant as a result of this court's decision in part II A of this opinion. See *Lynch* v. *Lynch*, 135 Conn. App. 40, 54–55 n.12, 43 A.3d 667 (2012) (arguments challenging rulings on postjudgment motions for modification rendered moot by remand order for new hearing on all financial orders entered by trial court at time of dissolution).[12]

[12] In the plaintiff's appellate brief, she asks this court to dismiss portions of the defendant's appeal and issue sanctions. As to the plaintiff's arguments for dismissal, she maintains that the defendant's appeal from the November 9, 2017 order granting the plaintiff's motion for modification and his amended appeal from the September 18, 2018 order on the defendant's motion for modification both were untimely. We conclude that the plaintiff has waived her right to seek dismissal of the appeal and amended appeal as untimely. Practice Book § 66-8 provides in relevant part: "Any claim that an appeal . . . should be dismissed, whether based on lack of jurisdiction, failure to file papers within the time allowed or other defect, shall be made by a motion to dismiss the appeal . . . . A motion to dismiss an appeal that claims any defect other than a lack of jurisdiction must be filed within ten days after the filing of the appeal. . . ." See also *Connecticut Commercial Lenders, LLC* v. *Teague*, 105 Conn. App. 806, 809, 940 A.2d 831 (2008) (finding that defendants waived right to claim that appeal should be dismissed as untimely due to failure to file timely motion to dismiss as required by Practice Book § 66-8). In the present case, the plaintiff did not file a motion to dismiss within ten days of the filing of the appeal or the amended appeal and, therefore, she waived her right to challenge the timeliness of both the appeal and the amended appeal.

The plaintiff also requests that this court impose sanctions on the defendant. Specifically, in the plaintiff's statement of relief requested, she asks "this court to consider imposing sanctions on the defendant for [his] misconduct and dismissing all matters on appeal, including but not limited to the cost of printing and shipping [the] plaintiff's brief, [attorney's] fees for [the plaintiff's counsel's] limited appearance, travel fees [the] plaintiff incurred flying from Florida to CT to access court records, and compensation for the time and effort required to respond to this frivolous appeal since it was first filed 12/1/17." The plaintiff cites, as the basis for her sanctions request, various alleged improprieties, including the defendant's attempt to submit new evidence, and she asserts that his appeal is frivolous. We decline to address this issue because the plaintiff failed to make her request in a separate motion. See *Battistotti* v. *Suzanne A.*, 182 Conn. App. 40, 55 n.10, 188 A.3d 798, cert. denied, 330 Conn. 904, 191 A.3d 1000 (2018); see also

The judgment is reversed only as to the plaintiff's motions for order and to modify alimony and the case is remanded with direction to reassign the plaintiff's motion for order and for a new hearing on the plaintiff's motion to modify alimony; the judgment is affirmed in all other respects.

In this opinion BRIGHT, J., concurred.

BEAR, J., concurring and dissenting. I concur in the results reached by the majority with the exception of part II B of its opinion, which addresses an argument that the trial court improperly construed one sentence in the alimony provision of the judgment, which provides that "[t]he [defendant, Edward Budrawich, Jr.] shall pay to the [plaintiff, Kathleen Budrawich] the sum of $1.00 per year as alimony. Payment shall be made, during the [defendant's] lifetime and until the [plaintiff's] death, remarriage, or suspension of alimony due to cohabitation pursuant to the statute and case law or November 28, 2022. Alimony shall be modifiable as to amount if the [plaintiff] earns less than $100,000 per year. Alimony shall not be modifiable as to term." I disagree with the majority's legal interpretation of the sentence "[a]limony shall be modifiable as to amount if the [plaintiff] earns less than $100,000 per year."[1] The

Practice Book § 85-3; *Tyler* v. *Tyler*, 163 Conn. App. 594, 598 n.3, 133 A.3d 934 (2016) (declining to review request for sanctions when not raised in motion for sanctions); *Hernandez* v. *Dawson*, 109 Conn. App. 639, 644, 953 A.2d 664 (2008) (same).

[1] I specifically disagree with the majority's assertions, analysis and conclusions in these two paragraphs set forth in part II B of its opinion: "In contrast with the language considered in *Steller* [v. *Steller*, 181 Conn. App. 581, 187 A.3d 1184 (2018)] and *Taylor* [v. *Taylor*, 117 Conn. App. 229, 978 A.2d 538, cert. denied, 294 Conn. 915, 983 A.2d 852 (2009)], the relevant language of the present alimony provision states only that '[a]limony shall be modifiable as to amount if the wife earns less than $100,000 per year. Alimony shall not be modifiable as to term.' The alimony provision does not permit a 'second look' upon the occurrence of a specified event, does not state that the occurrence of a specified event shall be considered a substantial change in circumstances, or that a party shall have the right to seek a modification of

majority explains its reason for including part II of its opinion: "Because the question of how the dissolution court's alimony order should be interpreted will arise on remand, we elucidate the order, as it is a question of legal interpretation. Language from the trial court's memorandum of decision on the plaintiff's motion to modify can be construed as suggesting that it interpreted the alimony provision as directing that the plaintiff automatically satisfied, or was relieved from, her obligation of showing a substantial change in circumstances by virtue of her earning less than $100,000 per year. We demonstrate, in part II B of this opinion, why this reading of the alimony provision is legally improper." I conclude, instead, that the court properly determined that the substantial change in circumstances requirement was satisfied because her income, in fact, fell below the $100,000 per year threshold.

The plaintiff's motion for modification was based on her income being reduced to less than $100,000 per year. The provision that "[a]limony shall be modifiable as to amount if the [plaintiff] earns less than $100,000 per year" was applicable to her motion. The trial court interpreted that provision as follows: "[T]he plaintiff would receive alimony in the amount of $1 per year until November 28, 2022, and that if the plaintiff's income fell below $100,000 annually that would constitute a

alimony upon occurrence of a specified event without showing a substantial change in circumstances.

"Nor does the alimony provision give any other indication that it was intended by the dissolution court to permit the plaintiff to obtain a de novo review of the defendant's alimony obligation without first showing a substantial change in circumstances. In the absence of such indication, the relevant language of the alimony provision addresses only the issue of whether the alimony award is modifiable or nonmodifiable. Expressed in the alimony provision is the dissolution court's intention to preclude modification as to the term of the alimony and permit modification as to the amount, but only if the plaintiff's earnings fall below $100,000 per year. Accordingly, the alimony provision does not relieve the plaintiff of her burden to demonstrate a substantial change in circumstances."

substantial change in circumstances as a predicate to modification." The majority instructs the trial court on remand that a finding of a substantial change in circumstances is required. I agree with the trial court's interpretation of the provision and I disagree with the majority that such a finding is necessary if the plaintiff proves that her income, at the time of the filing of her motion to modify, was less than $100,000 per year.

I accept the majority's statement of the standard of review that we must apply in construction of the judgment: "Because [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary. As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Perry* v. *Perry*, 156 Conn. App. 587, 593, 113 A.3d 132, cert. denied, 317 Conn. 906, 114 A.3d 1220 (2015).

If the provision language, "[a]limony shall be modifiable as to amount if the [plaintiff] earns less than $100,000 per year," did not appear in the judgment, the language of General Statutes § 46b-86 would require a finding by the court that a reduction of the plaintiff's income to a level below $100,000 in the context of the facts existing at the time of the filing of the motion constituted a substantial change in circumstances. I accept the majority's statement of the law in that regard: "Section 46b-86 (a) provides in relevant part: 'Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be . . . modified by the court upon a showing

of a substantial change in the circumstances of either party . . . .' *Burke* v. *Burke*, 94 Conn. App. 416, 422, 892 A.2d 964 (2006)."

A court in its judgment can determine that the occurrence of an event, in and of itself, will constitute a substantial change in circumstances. This court in other appeals has determined that a trial court has the power to do that, as recognized by the majority: "This court previously has construed certain language contained in a separation agreement to relieve the party seeking to modify alimony of the statutorily mandated burden of demonstrating that a substantial change in circumstances has occurred. See *Steller* v. *Steller*, 181 Conn. App. 581, 584 n.1, 187 A.3d 1184 (2018); *Taylor* v. *Taylor*, 117 Conn. App. 229, 231, 978 A.2d 538, cert. denied, 294 Conn. 915, 983 A.2d 852 (2009)." The provision placed by the court in its judgment has that effect: "Alimony shall be modifiable as to amount if the [plaintiff] earns less than $100,000 per year." It is our duty to give effect to all of the language in the judgment, including this language. See, e.g., *Bauer* v. *Bauer*, 308 Conn. 124, 131, 60 A.3d 950 (2013); *Lashgari* v. *Lashgari*, 197 Conn. 189, 196–97, 496 A.2d 491 (1985); see also *Almeida* v. *Almeida*, 190 Conn. App. 760, 769, 213 A.3d 28 (2019) ("in construing a marital dissolution judgment, the court's judgment must be interpreted as a whole").

In the present case, the majority focuses on the fact that the alimony provision does not contain language (1) allowing for a "second look," (2) stating that the occurrence of a specified event shall be considered a substantial change in circumstances, or (3) stating that a party shall have the right to seek a modification of alimony upon the occurrence of a specified event without showing a substantial change in circumstances, as was provided in *Steller* and *Taylor*, and that the absence of such language requires the plaintiff to show that there was a substantial change in circumstances after her salary fell below $100,000. Such a reading from *Steller* and *Taylor* is too narrow.

As the majority recounts, specifically with regard to *Taylor*, this court rejected the argument that, "because the agreement failed to include language that after the events mentioned, alimony would be subject to a de novo review, the second look should be based on a substantial change of circumstances." *Taylor* v. *Taylor*, supra, 117 Conn. App. 232. Instead, this court concluded that "the separation agreement permitted the court to take a fresh look at the parties' financial circumstances either after the plaintiff reached his sixty-fifth birthday or after the death of the defendant's father." Id., 233. This court continued that, "[i]f that was not the intent of the parties, the second look language would have been superfluous because the agreement provided that alimony could be modified at any time if a substantial change of circumstances occurred. The agreement, however, specifically provides that on the happening of either of the two previously mentioned events, alimony may be given a second look. We conclude, therefore, that this language permits a de novo review of the plaintiff's alimony obligation." Id. The court further concluded that, "by the terms of the separation agreement, the parties had already agreed on events that would constitute a substantial change. The parties agreed that once the plaintiff became sixty-five or the defendant's father died, those circumstances in and of themselves would trigger a second look at the alimony order. We conclude, therefore, that the court correctly determined that it did not need to find a substantial change of circumstances and properly conducted a de novo review." Id., 233–34. Although *Taylor* involved a separation agreement incorporated into a judgment, and not a judgment of the court after a contested dissolution trial, the rules of interpretation to be applied to the relevant language are the same. See *Bauer* v. *Bauer*, supra, 308 Conn. 131; *Barnard* v. *Barnard*, 214 Conn. 99, 109–10, 570 A.2d 690 (1990).

In the present case, although the sentence, "[a]limony shall be modifiable as to amount if the [plaintiff] earns less than $100,000 per year," does not specifically state that a second look is permitted without a substantial change in circumstances or that the plaintiff's earnings of less than $100,000 per year constitutes a substantial change in circumstances, the specific language and meaning of the sentence makes the addition of those terms unnecessary. See *Perry* v. *Perry*, supra, 156 Conn. App. 593 ("[e]ffect must be given to that which is clearly implied as well as to that which is expressed" (internal quotation marks omitted)); see also *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010) ("an opinion must be read as a whole without particular portions read in isolation"); cf. *Halperin* v. *Halperin*, 196 Conn. App. 603, 615, A.3d (2020) ("intent . . . is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage" (internal quotation marks omitted)).

I, therefore, conclude that the court properly interpreted the provision placed in the judgment by the dissolution court to waive the requirement that the plaintiff prove a substantial change in circumstances other than the fact of a reduction of her annual income below $100,000. I do not disagree with the remand for a new hearing for the reasons set forth in part II A of the majority opinion. I disagree, rather, with the majority's interpretation of the sentence, "[a]limony shall be modifiable as to amount if the wife earns less than $100,000 per year." I would instruct the court on remand to determine whether the plaintiff proved that her income at the time of the filing of her motion to modify alimony was less than $100,000 per year and, if so, to proceed to the determination of alimony pursuant to General Statutes § 46b-82.

ANDRES SOSA *v.* DAVE ROBINSON ET AL.
(AC 41832)

Prescott, Bright and Moll, Js.*

Syllabus

The plaintiff inmate appealed to this court from the summary judgment rendered by the trial court in favor of the defendant D, a commissary operator at the correctional facility in which the plaintiff was incarcerated. The plaintiff brought an action against D in his individual and official capacities, claiming under federal law (42 U.S.C. § 1983) that D violated his rights under the first amendment by denying his application to work in the prison commissary in retaliation for claims the plaintiff previously had filed against other Department of Correction employees. The plaintiff further alleged that D discriminated against him on the basis of race in employment assignments and violated the takings clause of the fifth amendment by misappropriating from inmate trust accounts the interest earned on inmates' Social Security benefits. The plaintiff had been employed in the prison commissary in 2006 until he was given a disciplinary citation and his employment was terminated, which he did not dispute. More than seven years later, he applied for an assignment in the commissary, but was denied by D because of the prior termination. At the time the plaintiff's application was denied, the prison had a written policy that provided that, for an inmate to be eligible to work in the commissary, he must have not been previously terminated from a commissary position. The trial court dismissed the first two counts of the plaintiff's complaint, in which he sought money damages and injunctive and declaratory relief against D in his individual capacity. The court concluded that it lacked subject matter jurisdiction because sovereign immunity barred those claims. The court rendered summary judgment on the plaintiff's remaining claims because he failed to exhaust his administrative remedies under the Prison Litigation Reform Act (42 U.S.C. § 1997e (a)) or to seek permission from the Claims Commissioner, pursuant to statute (§§ 4-141 through 4-165) to sue the state. On appeal, the plaintiff claimed, inter alia, that the trial court erred in concluding that it did not have subject matter jurisdiction over his claims for compensatory relief against D in his individual capacity and in concluding that D was entitled to summary judgment because the plaintiff failed to exhaust his administrative remedies. *Held*:

1. The trial court erred when it dismissed for lack of subject matter jurisdiction the first two counts of the plaintiff's complaint, as sovereign immunity did not bar his claims for compensatory relief against D in his

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

individual capacity: the trial court's application of the test established in *Somers* v. *Hill* (143 Conn. 476) to determine if the plaintiff's claim under § 1983 was against the state and, thus, barred by the eleventh amendment was incorrect, as the Supreme Court's decision in *Sullins* v. *Rodriguez* (281 Conn. 128) made clear that § 1983 claims must be analyzed pursuant to federal law and that the eleventh amendment analysis of *Somers* is wholly inapplicable, and, although the plaintiff named D in his official and individual capacities as the party against whom he sought relief, this court viewed the claim for damages as against D solely in his individual capacity, and, thus, the plaintiff's articulation of D's capacity in the complaint was sufficient to commence a § 1983 claim against a state officer in his individual capacity.

2. D was entitled to summary judgment on the first count of the plaintiff's complaint, which alleged retaliation, and the second count of the complaint, which alleged discrimination, failed as a matter of law:

a. The plaintiff failed to submit any evidence to create a genuine issue of material fact that there was a causal connection between his protected first amendment activity and the adverse employment action, as he produced no evidence disputing his termination from the commissary in 2006 or the existence and applicability of the prison's hiring policy, and he produced no evidence that D had any role in the adoption of the policy or that it was not applied in a consistent fashion to all inmates.

b. The plaintiff failed to demonstrate the existence of a genuine issue of material fact as to D's discriminatory intent, as the plaintiff's prior termination from his job as a commissary line worker constituted a legitimate, nondiscriminatory reason for the denial of his application for employment in the commissary; although the plaintiff proffered evidence that tended to show that he was a member of a protected class who was qualified for the position and had suffered an adverse employment action, he failed to offer any evidence, direct or circumstantial, that established an inference of discrimination underlying D's rejection of his application, and this court could not infer from his allegations of discrimination alone that D acted with discriminatory intent.

3. The plaintiff's takings claim failed as a matter of law, as he neither alleged nor submitted any evidence regarding an appropriation of his property or any evidence of an unconstitutional taking by D, his right to recover having been limited to the allegations set forth in his complaint, which alleged that inmates without Social Security numbers are denied employment in the commissary.

Argued February 19—officially released September 22, 2020

Procedural History

Action to recover damages for the defendants' alleged violations of the plaintiff's constitutional rights, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the action was withdrawn as against the defendant Steven Plourde; thereafter, the court, *Swienton*, *J.*, dismissed certain counts

of the complaint; subsequently, the court granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Improper form of judgment*; *affirmed in part*; *judgment directed in part.*

Andres R. Sosa, self-represented, the appellant (plaintiff).

Janelle R. Medeiros, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (named defendant).

Opinion

BRIGHT, J. The plaintiff, Andres Sosa, appeals from the judgment of the trial court, dismissing certain counts of his complaint in which he sought compensatory relief from the defendant, Dave Robinson,[1] a correctional commissary lead operator at the MacDougall-Walker Correctional Institution (MacDougall), in his individual capacity and rendering summary judgment on the remainder of the complaint in favor of the defendant. The plaintiff claims that the court erred in concluding that it did not have subject matter jurisdiction over his claims seeking compensatory relief against the defendant in his individual capacity and erred in concluding that the defendant was entitled to summary judgment on the remainder of the plaintiff's complaint due to the plaintiff's failure to exhaust his administrative remedies. In addition to arguing that the court's subject matter jurisdiction analysis was correct, the defendant argues in the alternative that the court correctly rendered summary judgment in his favor because

[1] In his complaint, the plaintiff also named as a defendant Steven Plourde, the fiscal administrative supervisor for commissary administration for the Department of Correction. Plourde was sued in his individual and official capacities. At oral argument on the defendant's motion for summary judgment, however, the plaintiff withdrew all counts against Plourde. Accordingly, we refer to Robinson as the defendant.

the plaintiff's claims fail as a matter of law. We agree with the plaintiff that the court had jurisdiction over the claims in which he seeks compensatory relief against the defendant in his individual capacity. We agree, however, with the defendant's alternative argument that the plaintiff's claims fail on their merits as a matter of law. Therefore, we reverse in part and affirm in part the judgment of the trial court.[2]

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to our analysis of the plaintiff's claims.

At all times relevant to this appeal, the plaintiff was an inmate at MacDougall. While incarcerated, the plaintiff filed a number of inmate complaints alleging that several Department of Correction (department) employees

[2] We need not address in detail the trial court's determination that those counts brought against the defendant in his official capacity are barred because he failed to exhaust his administrative remedies. First, we do not need to address the issue of exhaustion because failure to meet the requirements of the Prison Litigation Reform Act, 42 U.S.C. § 1997e et seq., on which the defendant and the trial court relied, does not implicate the court's subject matter jurisdiction. See *Johnson* v. *Rell*, 119 Conn. App. 730, 734 n.4, 990 A.2d 354 (2010) ("we remind counsel that a prisoner's alleged failure to exhaust administrative remedies properly is the focus of a motion to strike rather than a motion to dismiss, as it does not implicate the subject matter jurisdiction of the court"); see also *Richardson* v. *Goord*, 347 F.3d 431, 434 (2d Cir. 2003) ("Numerous circuits have pointed out that § [1997e] lacks the sweeping and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements. . . . We are persuaded by the reasoning of these cases and we likewise conclude that exhaustion is not jurisdictional." (Citations omitted; internal quotation marks omitted.)).

Second, the court's conclusion that it lacked subject matter jurisdiction to consider the plaintiff's damages claim against the state because he did not first obtain permission to sue from the Claims Commissioner misconstrues the claim as seeking damages against the state as opposed to against the defendant in his individual capacity. See footnote 8 of this opinion. Because the plaintiff is seeking damages against the defendant only in his individual capacity, the need to obtain permission to sue from the Claims Commissioner is not implicated. Furthermore, we note that the defendant did not rely on the exhaustion argument in his appellate brief.

were engaging in discriminatory practices and favoritism. The first complaint of record was in response to the plaintiff's removal from the M housing unit (M-unit)[3] on August 24, 2004, for "unknown reasons." On September 1, 2004, the plaintiff wrote to the M-unit major, claiming that he was discriminated against because no misconduct report was filed prior to his removal. The plaintiff further suggested that Warden John Sieminski was retaliating against him for his pending lawsuit against Warden Giovanny Gomez.

On September 22, 2004, the plaintiff filed an inmate request form, alleging that he was discriminated against by the defendant on September 17, 2004. Specifically, the plaintiff stated that when he showed up to begin working in the commissary, the defendant turned him away twice for not having completed a commissary work application, a document the plaintiff alleged he, in fact, did complete. On October 15, 2004, Andrea S. Baker, the classification committee chairperson, issued a response to the plaintiff's request in which she concluded that there was no discrimination in the plaintiff's assignment. Baker further stated that the plaintiff was "on the institutional laundry waiting list as a primary, as well as, the commissary waiting list as a secondary" and that job placement was moving slowly "due to the volume of inmates on the job waiting lists."

On January 3, 2005, the plaintiff began working in the commissary until he subsequently was transferred to the restrictive housing unit on June 27, 2005, for allegedly "interfering with . . . safety and security." The plaintiff later was acquitted of the disciplinary citation on July 12, 2005. Soon thereafter, the plaintiff spoke with Sieminski about having his job restored because the disciplinary citation was dismissed and he was released from restrictive housing. Sieminski advised the

[3] At MacDougall, each housing unit is designated by a different letter.

plaintiff to write to his unit major to resolve the matter. After again alleging that he was being discriminated against, the plaintiff, with the help of the Inmates' Legal Assistance Program, was reinstated to his commissary job on September 9, 2005.

While working in the commissary, the plaintiff received, for the most part, positive feedback from his supervisors for his job performance. On May 8, 2006, however, Alicia Demars, a commissary supervisor, issued the plaintiff a class B disciplinary citation, allegedly because he "became belligerent" and started "causing a disruption" when she gave him a direct order. As a result, the plaintiff's employment in the commissary was terminated. There is no evidence that the plaintiff disputed the disciplinary citation or his termination of employment from the commissary.

On September 10, 2013, the plaintiff filed another inmate request form, this time with Warden Peter Murphy, requesting assistance with the commissary application process. In response, on September 23, 2013, a paralegal with the department's legal affairs unit informed the plaintiff that Lou Failla, the commissary lead supervisor, would consider the plaintiff's application for an assignment in the commissary, provided that the plaintiff met all of the qualifications for such a position. On February 7, 2014, the plaintiff was informed that the defendant had denied his application due to the plaintiff's May, 2006 disciplinary report and termination. At the time that the plaintiff's application was denied, MacDougall had a written policy that provided that, for an inmate to be eligible to work in the commissary, he must "[h]ave not been previously terminated from a commissary position."

On February 8, 2014, the plaintiff filed a grievance against the defendant and Steven Plourde, the department's fiscal administrative supervisor for commissary

administration, alleging that they denied his commissary job application despite his meeting all of the requisite criteria. The plaintiff further alleged that the defendant and Plourde engaged in the inconsistent enforcement of facility rules, favoritism, and retaliation.

On February 18, 2015, the plaintiff commenced this action for compensatory, declaratory, and injunctive relief against the defendant in his individual and official capacities, raising federal claims pursuant to 42 U.S.C. § 1983 and a takings claim.[4] In the first count of his three count complaint, the plaintiff alleged that the defendant violated his rights under the first amendment to the United States constitution by denying his commissary job application in retaliation for claims he previously had filed against other department employees.[5] In particular, the plaintiff claimed that his filing of claims against other department employees was protected speech, and that, by denying his commissary job application, the defendant took adverse action against him in violation of his first amendment right to petition the government for redress of grievances.

[4] In addition to the federal constitutional claims in his complaint, the plaintiff purported to allege state claims pursuant to article first, §§ 1, 4, 10 and 20, of the Connecticut constitution. The plaintiff, however, failed to provide a separate analysis for his state constitutional claims—as required under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992)—and, consequently, we decline to review them. See *State* v. *Kiser*, 43 Conn. App. 339, 353–54, 683 A.2d 1021 (declining to review defendant's state constitutional claim because she failed to provide analysis separate from her federal constitutional claim), cert. denied, 239 Conn. 945, 686 A.2d 122 (1996); see also *State* v. *Stanley*, 161 Conn. App. 10, 23 n.13, 125 A.3d 1078 (2015) (same), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). Thus, our appellate review is limited to the plaintiff's § 1983 claims that his federal constitutional rights were violated.

[5] Specifically, the plaintiff alleged that he filed two claims with the Commission on Human Rights and Opportunities; see *Sosa* v. *Dept. of Correction*, CHRO No. 0810091; *Sosa* v. *Dept. of Correction*, CHRO No. 1310363; as well as a claim in the Superior Court. See *Sosa* v. *Foltz*, Superior Court, judicial district of New London, Docket No. CV-10-5014068-S (June 4, 2013), appeal dismissed, Docket No. AC 35831 (Conn. App. September 10, 2013).

In the second count, the plaintiff alleged that the defendant violated the equal protection clause of the fourteenth amendment to the United States constitution by discriminating against him in his employment assignments. Specifically, the plaintiff stated: "The [defendant] is clearly violating the equal protection of law by deliberately and purposely discriminating [against] the plaintiff, a minority race (Hispanic), a [n]ative [c]itizen of the Dominican Republic in the [c]lassification of [a] [j]ob [a]ssignment [in the commissary] . . . ."

Finally, in his third count, the plaintiff set forth a claim that made reference to the defendant's allegedly misappropriating from inmate trust accounts interest earned by inmates on their Social Security benefits. The plaintiff alleged that the defendant had a practice of not employing illegal immigrants and citizens without Social Security numbers because he could take interest earned on Social Security benefits only from the inmate accounts of individuals with a Social Security number. The plaintiff further alleged that a property interest exists in whatever interest has accrued on moneys in an inmate trust account, and the defendant's appropriation of that interest constitutes an unconstitutional taking in violation of the takings clause of the fifth amendment to the United States constitution.

As to the first and second counts of his complaint, the plaintiff sought actual damages, punitive damages, declaratory relief, and injunctive relief against the defendant in both his individual and official capacities. As to the third count of his complaint, although the plaintiff did not allege that there had been any taking of any money from his inmate trust account, the plaintiff sought the return of all "tax return" interest collected by the defendant.

In his answer, filed on June 26, 2015, the defendant denied the plaintiff's allegations and raised five special

defenses. The defendant asserted that (1) the court lacked jurisdiction over all three counts because the defendant is immune from suit pursuant to General Statutes § 4-165, (2) the plaintiff failed to state a claim for which relief may be granted, (3) in the absence of an allegation of permission to sue the state, pursuant to General Statutes § 4-160 (b), the plaintiff failed to state a claim on which relief may be granted, (4) to the extent that the plaintiff sought equitable relief and recovery of money damages from the defendant, the court lacks subject matter jurisdiction over the dispute on the basis of sovereign immunity, and (5) the plaintiff has failed to exhaust his administrative remedies.

On November 19, 2015, the defendant filed a motion for summary judgment, asserting that the decision to reject the plaintiff's commissary application was based on nondiscriminatory reasons, namely, because the plaintiff previously had been terminated from a commissary position. The plaintiff filed an objection to the defendant's motion on January 18, 2016, arguing that (1) the adverse action taken by the defendant would not have occurred but for the plaintiff's filing of claims against other department officials, (2) a genuine issue of material fact existed as to whether the plaintiff was intentionally treated differently from other similarly situated inmates in his housing unit and whether there was a rational basis for the difference in treatment, and (3) the defendant's unconstitutional taking did not arise out of the denial of the plaintiff's commissary job application but, rather, arose out of the defendant's withholding of interest on moneys in the plaintiff's inmate trust account.

On February 16, 2018, the defendant filed a supplemental memorandum of law in support of his motion for summary judgment, arguing that (1) sovereign immunity barred the plaintiff's claims for money damages against the defendant in his official capacity, (2)

sovereign immunity barred the plaintiff's claims for money damages against the defendant in his individual capacity, (3) all of the plaintiff's claims for official capacity relief were barred by sovereign immunity under the eleventh amendment to the United States constitution, (4) the plaintiff's takings, equal protection, and retaliation claims failed as a matter of law, (5) the plaintiff failed to exhaust the administrative remedies available to him prior to bringing the underlying action, as required under the Prison Litigation Reform Act, 42 U.S.C. § 1997e (a), and (6) the plaintiff could not prove the existence of any genuine issue of material fact regarding the grounds for his denial of employment in the commissary.

On March 21, 2018, the plaintiff filed a memorandum of law in opposition to the defendant's supplemental memorandum of law in support of the motion for summary judgment, arguing that (1) the plaintiff's claims for money damages against the defendant were not barred by sovereign immunity, (2) the plaintiff's property interest was protected by the takings clause, and "appropriation of that interest by prison officials may be a taking for public [use] that requires just compensation," (3) the plaintiff suffered an adverse action in connection with his employment in the commissary, and the adverse action occurred under conditions giving rise to an inference of discrimination, (4) the defendant disproportionately applied a custom hiring policy against the plaintiff and could not provide a legitimate, nondiscriminatory reason for the denial of his commissary job application, (5) the evidence proved that the defendant retaliated against the plaintiff because the plaintiff was qualified to work in the commissary and the defendant's custom hiring policy, which was not in effect during the plaintiff's employment in the commissary, cannot be applied retroactively, and (6) the plaintiff proffered sufficient evidence that showed the existence of a genuine issue of material fact.

On May 30, 2018, the court (1) dismissed the plaintiff's claims for money damages against the defendant in his individual capacity because it concluded that those claims were barred by sovereign immunity,[6] (2) dismissed the plaintiff's claims seeking injunctive and declaratory relief against the defendant in his individual capacity because the court lacked subject matter jurisdiction over those claims, as they were similarly barred by sovereign immunity, and (3) rendered summary judgment in favor of the defendant as to the plaintiff's remaining claims because the plaintiff had failed to exhaust his administrative remedies before pursuing those claims. The court reasoned that, to the extent that the plaintiff brought claims for money damages against the defendant in his official capacity, those claims would constitute an action against the state, which would be barred by sovereign immunity. The court also concluded that the plaintiff's claim for damages against the defendant in his individual capacity was barred by sovereign immunity because, inter alia, the state is the real party against whom relief is sought. Similarly, to the extent that the plaintiff brought claims for declaratory and injunctive relief against the defendant in his individual capacity, the court determined that, notwithstanding those claims falling under the second and third exceptions to sovereign immunity under state law,[7] the plaintiff's claims would subject the state

[6] Although the court noted that the defendant was being sued in his official and individual capacities, its memorandum of decision determined only that the court lacked "subject matter jurisdiction in this matter against the defendant in his individual capacity" and dismissed only "the action brought against the defendant in his individual capacity . . . ." The plaintiff's memorandum of law in opposition to the defendant's motion for summary judgment and his appellate brief make clear that the plaintiff concedes that he seeks money damages against the defendant solely in his individual capacity.

[7] To overcome a bar of sovereign immunity *under state law*, a plaintiff, through the allegations in his complaint, must establish that any one of the three recognized exceptions to sovereign immunity apply to his claim. *Carter* v. *Watson*, 181 Conn. App. 637, 642, 187 A.3d 478 (2018). The three exceptions to sovereign immunity are: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign

to liability as the real party against whom relief would be sought, which, according to the court, barred those claims on sovereign immunity grounds. As to exhaustion, the court concluded that the plaintiff had failed to comply with the exhaustion requirements of 42 U.S.C. § 1997e et seq., and had failed to seek the permission of the Claims Commissioner, pursuant to General Statutes §§ 4-141 through 4-165, before seeking money damages against the state. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff first claims that the trial court erred in concluding that, because he was seeking money damages from the defendant, sovereign immunity barred his retaliation and discrimination claims brought against the defendant in his individual capacity. The defendant responds that the court properly dismissed the claims seeking money damages against him in his individual capacity. In the alternative, the defendant argues that, even if the court erred, the claims, nonetheless, fail on their merits as a matter of law. We agree that the claims are not barred by sovereign immunity but conclude that they fail as a matter of law.

At the outset, we note that sovereign immunity implicates the court's subject matter jurisdiction, which raises a question of law subject to plenary review. See, e.g., *Manifold* v. *Ragaglia*, 94 Conn. App. 103, 114, 891 A.2d 106 (2006). We also note that a challenge to the court's subject matter jurisdiction is ordinarily raised by way of a motion to dismiss. Id., 116 ("[i]n general,

immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Internal quotation marks omitted.) Id.

a motion to dismiss is the appropriate procedural vehicle to raise a claim that sovereign immunity . . . bars the action" (internal quotation marks omitted)). Our Supreme Court, however, has held that a motion for summary judgment is also an appropriate means of challenging the court's subject matter jurisdiction, as the question of subject matter jurisdiction can be raised at any time. See, e.g., id., 119. Furthermore, once the question of the court's subject matter jurisdiction is raised, it must be resolved before the court addresses the merits of the plaintiff's claims. See id., 116.

The trial court determined that it did not have subject matter jurisdiction over any count that alleged that the defendant was liable in his individual capacity because such liability was barred by sovereign immunity. Consequently, the court dismissed those claims. Therefore, we first must address the jurisdictional question of whether the court properly applied sovereign immunity to each of the plaintiff's individual capacity claims.

In his complaint, the plaintiff alleged that the defendant (1) violated his first amendment right to petition the government for redress of grievances by denying his commissary job application in retaliation for the claims he previously had brought against other department officials and (2) violated his fourteenth amendment right to equal protection of the law by discriminating against him on the basis of race in job placements. The plaintiff maintained that the defendant's alleged constitutional violations of his rights entitled him to both compensatory relief and punitive damages. In response, the defendant argued that the eleventh amendment to the United States constitution barred the plaintiff's claims for money damages because the defendant at all times was acting in his official capacity. The trial court agreed, concluding that it lacked subject matter jurisdiction over the plaintiff's individual capacity claims. For the reasons that follow, we conclude that the court applied

the incorrect legal test to the plaintiff's § 1983 claims. Applying the correct test, we conclude that sovereign immunity does not bar the plaintiff's claims for compensatory relief against the defendant in his individual capacity.

The following legal principles are relevant to our resolution of the plaintiff's claim for money damages against the defendant in his individual capacity. "Section 1983 of title 42 of the United States Code provides in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any [s]tate or [t]erritory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [c]onstitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . . A state as an entity having immunity under the eleventh amendment to the United States constitution, is not a person within the meaning of § 1983 and thus is not subject to suit under § 1983 in either federal court or state court. . . . *This rule also extends to state officers sued in their official capacities*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Miller* v. *Egan*, 265 Conn. 301, 310–11, 828 A.2d 549 (2003).

"[S]tate officials sued for money damages in their official capacities are not 'persons' within the meaning of § 1983 because the action against them is one against the office and, thus, no different from an action against the state itself. . . . State officials are, however, 'persons' within the meaning of § 1983 and may be held personally liable when sued as individuals for actions taken in their official capacities and, thus, under color of law." (Citation omitted.) *Sullins* v. *Rodriguez*, 281 Conn. 128, 141, 913 A.2d 415 (2007).

"The United States Supreme Court has asserted that [f]ederal law is enforceable in state courts . . . because the [c]onstitution and laws passed pursuant to it are as much laws in the [s]tates as laws passed by the state legislature. . . . State courts have concurrent jurisdiction over claims brought under § 1983. . . . Nevertheless, [c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . . *The elements of, and the defenses to, a federal cause of action are defined by federal law*." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 133–34.

In *Sullins*, the court was faced with the question of whether the trial court erred in denying the defendant's motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction on sovereign immunity grounds in circumstances similar to those present in this case. Id., 129–30. The plaintiff, a former inmate of Northern Correctional Institution (Northern), sought compensatory relief against the defendant in his individual capacity pursuant to § 1983, arising out of the defendant's alleged violation of the plaintiff's eighth and fourteenth amendment rights under the United States constitution. Id., 130–32. The defendant, a former warden of Northern, argued that the trial court improperly "applied federal, not state, sovereign immunity law" and improperly "rejected [his] position that the state is the real party in interest, despite the plaintiff's allegations naming the defendant in his individual capacity." Id., 130. As does the defendant in this case, in *Sullins*, the defendant argued that the four part test articulated in *Spring* v.

Constantino, 168 Conn. 563, 362 A.2d 871 (1975), and *Somers* v. *Hill*, 143 Conn. 476, 123 A.2d 468 (1956), applied to determine whether the plaintiff's claim was a claim against the state that was barred by the eleventh amendment. *Sullins* v. *Rodriguez*, supra, 281 Conn. 131.[8]

The court explicitly rejected the defendant's reliance on these cases and the eleventh amendment. Id., 133 n.8. Instead, the court concluded that, "when sovereign immunity is claimed as a defense to a cause of action pursuant to § 1983, federal sovereign immunity jurisprudence preempts analysis under state law." Id., 133. In reaching its conclusion, the court cited to a number of cases that stand for the proposition that federal precedent defines the contours of immunity available to government officials in the context of an action under § 1983. Id., 134–36. Notably, the court cited to its decision in *Miller*, in which it considered whether both the plaintiff's state law and federal § 1983 claims were barred by the defendants' sovereign immunity defense. Id., 135. The court noted that, in *Miller*, it addressed separately the plaintiff's § 1983 claim and concluded that, pursuant to *federal precedent*, the plaintiff's claim was an action against the state, which was barred by sovereign immunity. Id., 135 n.9. The court explained: "Thus, we conclude that, although the test set forth in *Spring* and *Miller* is an appropriate mechanism for our state courts to determine the capacity in which the

[8] To determine whether an action is against the state or against an officer in his individual capacity, our Supreme Court in *Somers* established four criteria that, if met, render it an action against the state and, therefore, subject to a bar under sovereign immunity. The criteria are: "(1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal quotation marks omitted.) *Kenney* v. *Weaver*, 123 Conn. App. 211, 216, 1 A.3d 1083 (2010).

named defendants are sued in actions asserting violations of state law, to employ that test to divest state courts of jurisdiction to hear otherwise cognizable § 1983 claims would be to erect a constitutionally impermissible barrier to the vindication of federal rights. . . . We find no merit in the defendant's contention that the result of our conclusion is to preclude the defense of sovereign immunity in every action under § 1983. Sovereign immunity may bar a plaintiff's claim pursuant to § 1983, but the trial court concluded, and we agree, that federal law must govern that inquiry." (Citation omitted.) Id., 136.

The court then considered the defendant's argument that, in *Alden* v. *Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), the United States Supreme Court determined that the eleventh amendment barred federal claims brought against a state both in federal and state courts. *Sullins* v. *Rodriguez*, supra, 281 Conn. 136–38. In *Alden*, the Supreme Court stated that "the sovereign immunity of the [s]tates neither derives from, nor is limited by, the terms of the [e]leventh [a]mendment." *Alden* v. *Maine*, supra, 713. The court in *Alden* stated further that, "save where there has been a surrender of [sovereign] immunity [in the constitution]"; (internal quotation marks omitted) id., 730; "Congress lacks the [a]rticle I power to subject the [s]tates to private suits in [their own courts]." Id., 748.

The court in *Sullins* reasoned that *Alden* "introduced uniformity in the state and federal courts as to the availability of a sovereign immunity defense. In *Howlett* [v. *Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)], the court held that a sovereign immunity defense that was *not available in federal court could not be employed in state court*. . . . In *Alden*, the court achieved uniformity in the other direction, by making available in a state forum a sovereign immunity defense that was already available in federal court." (Citation

omitted; emphasis added.) *Sullins* v. *Rodriguez*, supra, 281 Conn. 138. Nevertheless, the court concluded that *Alden* was inapplicable to the plaintiff's § 1983 claim. "Congress, however, did not pass § 1983 pursuant to its article one power. It was, instead, 'one of the means whereby Congress exercised the power vested in it by § 5 of the [f]ourteenth [a]mendment to enforce the provisions of that [a]mendment.' *Monroe* v. *Pape*, 365 U.S. 167, 171, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) [overruled in part on other grounds by *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)]. Section 5 empowers Congress to abrogate state sovereign immunity. According to the Supreme Court, '[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional [a]mendment whose other sections by their own terms embody limitations on state authority. *We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the [f]ourteenth [a]mendment, provide for private suits against [s]tates or state officials which are constitutionally impermissible in other contexts.*' . . . *Fitzpatrick* v. *Bitzer*, [427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976)]." (Emphasis in original; footnote omitted.) *Sullins* v. *Rodriguez*, supra, 139–40.

Thus, our Supreme Court's thorough analysis in *Sullins* makes clear that the plaintiff's § 1983 claims must be analyzed pursuant to federal law and that the eleventh amendment analysis of *Spring* and *Somers* is wholly inapplicable. Nevertheless, in reaching its conclusion that sovereign immunity barred the plaintiff's individual capacity claims for compensatory relief, the trial court in the present case did not discuss *Sullins* or any of the legal principles discussed therein. Instead,

the trial court incorrectly applied the four-pronged test established in *Somers*.[9] We now apply the correct test and analyze under federal law whether the plaintiff's claims for money damages against the defendant in his individual capacity are barred by sovereign immunity.

In the first and second counts of his complaint, the plaintiff explicitly named the defendant, in both his official and individual capacities, as the party against whom he sought relief. Nevertheless, in his memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiff acknowledged that "sovereign immunity . . . protect[s] the government and the [s]tate . . . . [It does not] protect those [like] the defendant who commit unconstitutional practices by [breaking] the law." Thus, we view the plaintiff's claim for damages against the defendant as seeking damages against him solely in his individual capacity. See footnote 6 of this opinion. Although the United States Supreme Court has held that a sovereign immunity defense cannot be overcome merely by the "mechanics of captions and pleading"; *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997); our Supreme Court has interpreted the holding in *Coeur d'Alene Tribe of Idaho* "to stand for the narrow proposition that, when a plaintiff seeks relief that *only* the state can provide, he or she may not overcome sovereign immunity simply by suing an individual actor." (Emphasis in original.) *Sullins* v. *Rodriguez*, supra, 281 Conn. 143. Because the money damages sought by the plaintiff are relief that the defendant, in fact, can provide, the plaintiff's articulation of the defendant's capacity in his complaint "is

[9] It is perplexing to us that the Office of the Attorney General relies on *Somers* and *Spring* and ignores *Sullins*. In fact, the appellee's brief inexplicably does not mention *Sullins*. The failure to discuss this controlling precedent is all the more surprising given that the attorney general not only represents the defendant in this case but also represented the defendant in *Sullins*.

sufficient to commence a § 1983 claim against a state officer in his individual capacity." Id., 141.

Accordingly, we conclude that the trial court erred when it determined that the plaintiff's claims for compensatory relief against the defendant in his individual capacity are barred by sovereign immunity. Consequently, the court erred when it dismissed for lack of subject matter jurisdiction counts one and two against the defendant in his individual capacity.[10]

II

Having addressed the court's subject matter jurisdiction, we consider the defendant's alternative argument that the plaintiff's claims for retaliation and discrimination fail on their merits, as a matter of law.

[10] We note that, although the court had jurisdiction to consider the plaintiff's individual capacity claims against the defendant, it could not have granted the declaratory relief the plaintiff sought. "Under the doctrine of *Ex parte Young*, 209 U.S. 123, [28 S. Ct. 441, 52 L. Ed. 714] (1908), *a plaintiff may seek prospective injunctive and declaratory relief to address an ongoing or continuing violation of federal law* or an imminent threat of a future violation of federal law. . . . In determining whether *Ex* [*p*]*arte Young* applies, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (Citations omitted; emphasis added; internal quotation marks omitted.) *Baltas* v. *Erfe*, Docket No. 3:19-cv-1820 (MPS), 2020 WL 1915017, *11 (D. Conn. 2020).

Because the plaintiff's claims for declaratory relief request that the court declare that the defendant's *past* conduct and policies were unconstitutional, the relief sought is retrospective and, therefore, is barred by sovereign immunity. See *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 205 (1993) ("The doctrine of *Ex parte Young,* which ensures that state officials do not employ the [e]leventh [a]mendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to [e]leventh [a]mendment immunity. . . . Moreover, the exception is narrow: [i]t applies only to prospective relief, [*it*] *does not permit judgments against state officers declaring that they violated federal law in the past* . . . ." (Citations omitted; emphasis added.)).

By contrast, because the plaintiff's request for injunctive relief sought prospective relief, the court could have awarded such relief against the defendant. "[A] state official in his or her official capacity, *when sued for injunctive relief, would be a person under § 1983* because official-capacity actions for prospective relief are not treated as actions against the [s]tate."

We begin with our standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment [as to the merits of a claim] are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Escourse* v. *100 Taylor Avenue, LLC*, 150 Conn. App. 819, 823, 92 A.3d 1025 (2014).

"Where the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive alternat[ive] ground for which there is support in the trial court record." (Citation omitted; internal quotation marks omitted.) *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, 259 Conn. 592, 599, 790 A.2d 1178 (2002).

The following additional facts and procedural history are relevant to our resolution of the plaintiff's retaliation

(Emphasis added; internal quotation marks omitted.) *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

and discrimination claims. In support of his argument that he did not deny the plaintiff's commissary application for retaliatory or discriminatory reasons, the defendant attached his sworn affidavit to his November 19, 2015 motion for summary judgment. In his affidavit, the defendant averred that he knew of the plaintiff's other lawsuits against department employees but that he did not know the names of those employees. The defendant further averred that he did not recall seeing the plaintiff's 2014 commissary application but that the plaintiff "would not have been hired because one of the requirements is that the inmate was not previously terminated from the [c]ommissary." Finally, the defendant averred that he was "not responsible for the policy concerning the eligibility of inmates for jobs in the [c]ommissary."

In addition to his affidavit, the defendant also attached a copy of the commissary inmate worker classification requirements (MacDougall hiring policy), revised on February 27, 2010, which stated in relevant part: "In order to be eligible to be classified to a position in the MacDougall/Walker commissary each inmate must meet the conditions stated below. Prior to being classified the inmate must . . . [h]ave not been previously terminated from a commissary position . . . [and] [n]o candidate will be placed in the commissary without meeting all of the conditions stated above."

In his January 18, 2016 memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiff maintained that he was denied commissary employment for retaliatory reasons. Specifically, the plaintiff argued that "[t]here is no legitimate penological nondiscriminatory reason [for] the [defendant] not to afford the plaintiff with the same job/program equal opportunity other than retaliation and discrimination since the plaintiff was already not working in the prison commissary at the time the custom policy was [established]. . . . [It cannot] apply retroactive[ly] to the

plaintiff at all, [e]specially when the same custom policy is not being use[d] with other inmates hired by the [defendant] who fall under the same criteria as the plaintiff." The plaintiff further argued that the defendant was "personally involved not only because of [his] linkage in the chain of command but also because [he] drafted the unconstitutional custom prison policy used in the employment decision . . . ." The plaintiff submitted no evidence in support of these arguments.

The defendant, in his February 16, 2018 supplemental memorandum of law in support of his motion for summary judgment, argued, among other things, that the plaintiff's claims fail as a matter of law. Specifically, the defendant argued that, with respect to the plaintiff's discrimination claim, any purported adverse action that he took against the plaintiff was for legitimate, nondiscriminatory reasons, namely, the plaintiff's failure to meet the requirements under the MacDougall hiring policy. As to the plaintiff's retaliation claim, the defendant argued further that the plaintiff failed to provide any evidence to suggest that his allegations against other department officials motivated the defendant's decision to deny the plaintiff employment in the commissary.

A

We now turn our attention to the plaintiff's retaliation claim. The following legal principles inform our conclusion that the defendant is entitled to judgment as a matter of law. "[The United States Court of Appeals for the Second Circuit] has held that retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the [f]irst and [f]ourteenth [a]mendments and is actionable under § 1983. . . . [I]ntentional obstruction of a prisoner's right to seek redress of grievances is precisely the sort of oppression that . . . [§] 1983 [is] intended to remedy." (Citation omitted; internal

quotation marks omitted.) *Graham* v. *Henderson*, 89 F.3d 75, 80 (2d Cir. 1996).

"To prevail on a [f]irst [a]mendment retaliation claim, an inmate must establish (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected [conduct] and the adverse action. . . . An inmate bears the burden of showing that the protected conduct was a substantial or motivating factor in the prison officials' disciplinary decision. . . . The defendant official then bears the burden of establishing that the disciplinary action would have occurred even absent the retaliatory motivation, which he may satisfy by showing that the inmate committed the . . . prohibited conduct charged in the misbehavior report." (Citations omitted; internal quotation marks omitted.) *Holland* v. *Goord*, 758 F.3d 215, 225–26 (2d Cir. 2014).

"The Second Circuit has 'approach[ed] prisoner claims of retaliation with skepticism and particular care,' noting that such claims are 'easily fabricated' and that 'virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act.' *Dawes* v. *Walker*, 239 F.3d 489, 491 (2d Cir. 2001). 'Because claims of retaliation are easily fabricated, the courts . . . require that they be supported by specific facts; conclusory statements are not sufficient.' " *Lockhart* v. *Semple*, Docket No. 3:18-cv-1497 (JCH), 2018 WL 5828298, *4 (D. Conn. November 7, 2018).

The complaint in the present case alleges that the defendant retaliated for the plaintiff's prior claims against other department officials. To that end, the plaintiff's speech was protected, and, therefore, his allegations satisfy

the first element necessary to sustain a claim of first amendment retaliation. Furthermore, the defendant's rejection of the plaintiff's application for employment in the commissary constitutes an adverse action against the plaintiff. The defendant argues, however, that the undisputed evidence shows that the decision not to hire him to work in the commissary was not causally connected to his prior grievances. In support of his argument, the defendant submitted to the trial court his affidavit, documents relating to the plaintiff's prior work history at the commissary, and the MacDougall hiring policy. This evidence showed that (1) the plaintiff's prior employment in the commissary was terminated on May 8, 2006, because of a disciplinary report and a poor work report, and (2) the MacDougall hiring policy, revised as of February 27, 2010, and in effect at the time the plaintiff's application for employment was rejected, explicitly provided that an inmate must meet several conditions prior to being classified to work in the commissary, including not having been previously terminated from a commissary position.

Because the defendant submitted evidence that, if unrebutted, would have entitled him to summary judgment as a matter of law, the plaintiff had the burden to produce some evidence that created a genuine issue of material fact that the refusal to hire him in the commissary was the result of retaliation by the defendant for the plaintiff's earlier grievances, complaints, or lawsuits against other department employees. See *Bruno* v. *Whipple*, 162 Conn. App. 186, 213–14, 130 A.3d 899 (2015) ("Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact *together with the evidence disclosing the existence of such an issue.* . . . It is not enough . . . for the opposing party

merely to assert the existence of such a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Emphasis in original; internal quotation marks omitted.)), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016). The plaintiff failed to produce any such evidence.

First, he produced no evidence disputing his termination from the commissary in 2006. Second, he produced no evidence disputing the existence and applicability of the MacDougall hiring policy. Third, he produced no evidence that the defendant had any role in the adoption of the policy. Fourth, he failed to produce any evidence that the policy was not applied in a consistent fashion to all inmates. Consequently, the plaintiff has failed to submit any evidence to create a genuine issue of material fact that there was a causal connection between his protected first amendment activity and the adverse employment action. See, e.g., *Everitt* v. *DeMarco*, 704 F. Supp. 2d 122, 132 (D. Conn. 2010) ("[i]n order to survive a motion for summary judgment on a [f]irst [a]mendment retaliation claim, a plaintiff must bring forth evidence showing that he was engaged in protected [f]irst [a]mendment activity, he suffered an adverse employment action, and there was a causal connection between the protected [f]irst [a]mendment activity and the adverse employment action" (internal quotation marks omitted)). Consequently, the defendant was entitled to summary judgment on the first count of the plaintiff's complaint.

B

The following legal principles are relevant to our resolution of the plaintiff's discrimination claim in the second count of his complaint. "Although inmates have

no right to a particular job assignment while they are incarcerated . . . prison officials cannot discriminate against an inmate by making a job assignment on the basis of race. . . . Proof of discriminatory racial purpose is required to establish an equal protection violation; an official act is not unconstitutional solely because it has a racially disproportionate impact." (Citations omitted; internal quotation marks omitted.) *Williams* v. *Federal Bureau of Prisons & Parole Commission*, 85 Fed. Appx. 299, 305 (3d Cir. 2004).

"It is well established that [p]roof of a racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause. . . . Therefore, a plaintiff pursuing a claimed . . . denial of equal protection under § 1983 must show that the discrimination was intentional. . . .

"It is true that we have previously observed that [m]ost of the core substantive standards that apply to claims of discriminatory conduct in violation of Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.] are also applicable to claims of discrimination in employment in violation of . . . the [e]qual [p]rotection [c]lause. . . . But each of those occasions involved individual claims of discrimination, and in each we apply either the [framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*)] or a hostile work environment analysis. . . .

"Under the *McDonnell Douglas* framework, a plaintiff establishes a prima facie case of intentional discrimination by showing that (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) he suffered an adverse employment action; and (4) the adverse action took place under circumstances giving rise to [an] inference of discrimination. . . . If the

plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to come forward with a legitimate, nondiscriminatory reason for the adverse employment action. . . . If the employer does so, the burden then returns to the plaintiff to demonstrate that race was the real reason for the employer's adverse action. . . . Importantly, [t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (Citations omitted; internal quotation marks omitted.) *Reynolds* v. *Barrett*, 685 F.3d 193, 201–203 (2d Cir. 2012).

As set forth previously in this opinion, the defendant, in support of his motion for summary judgment, submitted evidence that the plaintiff's application to work in the commissary was rejected because he previously had been terminated from working in the commissary and that the MacDougall hiring policy disqualified any inmate who previously had been terminated from being rehired in the commissary. Also, as previously noted, the plaintiff submitted no evidence contesting these basic facts. Furthermore, the plaintiff submitted no evidence to the trial court to support any inference that he was the victim of discrimination. Consequently, despite proffering evidence that tended to show that he is a member of a protected class, qualified for the position, and was subject to an adverse employment action, the plaintiff failed to produce any evidence that would give rise to an inference that he was the victim of discrimination. Indeed, the plaintiff alleged, and the defendant does not dispute, that he is a member of a protected class because he is of Hispanic origin. The plaintiff, through the exemplary performance evaluations that he had received while he was employed as a commissary line worker, also established that he was qualified for the position at issue. Furthermore, the plaintiff established that he suffered an adverse employment

action, namely, the inability to obtain employment in the commissary. Where the plaintiff's claim falls short, however, is in his failure to establish that the adverse employment action complained of occurred under circumstances giving rise to an inference of discrimination. Although numerous courts have described the burden of establishing a prima facie case of discrimination under *McDonnell Douglas* as "minimal"; *Walsh* v. *New York City Housing Authority*, 828 F.3d 70, 75 (2d Cir. 2016); bald allegations of intentional discrimination are not sufficient to meet that burden. See *Cohen* v. *Federal Express Corp.*, 383 Fed. Appx. 88, 89 (2d Cir. 2010) (concluding that trial court properly rendered summary judgment because plaintiff offered only conclusory allegations in support of prima facie case of discrimination under *McDonnell Douglas* framework), cert. denied, 565 U.S. 930, 132 S. Ct. 369, 181 L. Ed. 2d (2011). Consequently, "a [trier of fact] cannot infer discrimination from thin air." *Norton* v. *Sam's Club*, 145 F.3d 114, 119 (2d Cir.), cert. denied, 525 U.S. 1001, 119 S. Ct. 511, 142 L. Ed. 2d 124 (1998).

At no point did the plaintiff offer any evidence, direct or circumstantial, that established an inference of discrimination underlying the defendant's rejection of the plaintiff's application for employment in the commissary. We cannot infer from the plaintiff's allegations of discrimination alone that the defendant acted with discriminatory intent.

Even if we were to conclude that the plaintiff established a prima facie case of discrimination under the *McDonnell Douglas* framework, the defendant has met his burden of articulating a legitimate, nondiscriminatory reason for the denial of the plaintiff's application, namely, the MacDougall hiring policy. As stated previously in this opinion, the MacDougall hiring policy provided in relevant part: "In order to be eligible to be

classified to a position in the MacDougall . . . commissary each inmate must meet the conditions stated below. Prior to being classified the inmate must . . . [h]ave not been previously terminated from a commissary position . . . .'' The plaintiff's prior termination from his job as a commissary line worker on May 8, 2006, foreclosed any possibility of future employment in the commissary pursuant to the MacDougall policy. Thus, the defendant established a legitimate, nondiscriminatory reason for the denial of the plaintiff's application. Consequently, the plaintiff was required to proffer some evidence that the defendant's justification for his hiring decision was a pretext for racial animus.

In his memorandum of law in opposition to the defendant's motion for summary judgment, the plaintiff essentially asked the court to infer that racial discrimination motivated the defendant's alleged employment decision because ''what other reasons [would] the [defendant] . . . have to mess with the plaintiff and have him moved to other units when he was still classified to work for the defendant . . . ?'' Given evidence of the nondiscriminatory reason proffered by the defendant, in order to conclude, as the plaintiff's question suggests, that discrimination is the only logical reason for his not being hired, we would have to ''infer discrimination from thin air''; *Norton* v. *Sam's Club*, supra, 145 F.3d 119; which is an analytical leap the court cannot and will not make. Consequently, the plaintiff failed to demonstrate the existence of a genuine issue of material fact as to the defendant's discriminatory intent, and, accordingly, his discrimination claim fails as a matter of law.[11]

[11] We also note that the plaintiff, both in his memorandum of law in opposition to the defendant's motion for summary judgment and in his appellate brief, asserts his equal protection claim under a ''class-of-one'' theory.

''A class-of-one claim exists where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. . . . We have held that

III

In his final claim, the plaintiff argues that the court erred by rendering summary judgment in favor of the defendant on the third count of his complaint, which asserted a claim under the takings clause of the fifth amendment to the United States constitution. In its memorandum of decision, the court did not address the merits of the plaintiff's takings claim but, instead, relied on the plaintiff's failure to exhaust administrative remedies as the basis for granting the defendant's motion for summary judgment. We agree that summary judgment was appropriate, albeit for a different reason.

"The [t]akings [c]lause of the [f]ifth [a]mendment provides that no private property shall be taken for public use, without just compensation. . . . The [t]akings [c]lause applies against [s]tate actors through the [f]ourteenth [a]mendment. . . . To state a claim under . . . the [t]akings [c]lause, plaintiffs [a]re required to allege facts showing that state action deprived them of a protected property interest." (Citations omitted; internal quotation marks omitted.) *Abrahams* v. *Dept. of Social Services*, Docket No. 3:16-CV-00552 (CSH), 2018 WL 995106, *9 (D. Conn. February 21, 2018).[12]

to succeed on a class-of-one claim, a plaintiff must establish that: (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake." (Citation omitted; internal quotation marks omitted.) *Analytical Diagnostic Labs, Inc.* v. *Kusel*, 626 F.3d 135, 140 (2d Cir. 2010), cert. denied, 563 U.S. 1033, 131 S. Ct. 2970, 180 L. Ed. 2d 247 (2011).

As with the plaintiff's claim under the *McDonnell Douglas* framework, the MacDougall hiring policy that disqualified him from employment in the commissary, coupled with his failure to proffer any evidence in support of his allegations of discrimination, render his claim under a class of one theory meritless.

[12] We note that sovereign immunity is not a defense to a properly pleaded takings claim under the United States constitution. See also *184 Windsor Avenue, LLC* v. *State*, 274 Conn. 302, 319, 875 A.2d 498 (2005) (sovereign

"A fundamental tenet in our law is that the plaintiff's complaint defines the dimensions of the issues to be litigated. [T]he right of a plaintiff to recover is limited to the allegations of [his] complaint. . . . The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent [surprise. . . . A] plaintiff may not allege one cause of action and recover upon another." (Internal quotation marks omitted.) *Mamudovski* v. *BIC Corp.*, 78 Conn. App. 715, 732, 829 A.2d 47 (2003), appeal dismissed, 271 Conn. 297, 857 A.2d 328 (2004).

In the third count of his complaint, the plaintiff alleged that the policy at MacDougall is to deny employment to immigrants or citizens without Social Security numbers because the department cannot collect the interest accrued on commissary earnings in such inmates' trust accounts. To that end, the plaintiff asserted that "[t]his can be another obstacle the [defendant] [is] using . . . to discriminate [against] the plaintiff . . . ." In his memorandum of law in support of his motion for summary judgment, the defendant argued that "[i]t is unclear how refusing to hire the plaintiff for a commissary job constitutes a taking. In any event, an inmate does not have a constitutionally protected right to a job." In response, the plaintiff asserted that "at no time . . . [did] the plaintiff . . . state in his complaint [that] not hiring the plaintiff constitute[d] a taking . . . ." The plaintiff argued further that, contrary to the defendant's characterization, his takings claim arose out of the defendant's appropriation of the interest on moneys in his inmate trust account.

Having viewed the evidence in the light most favorable to the plaintiff, we conclude that the plaintiff's takings claim fails as a matter of law. As stated previously in this opinion, the plaintiff's right to recover

immunity is not available as defense to takings clause under state constitution).

is limited to the allegations as set forth in his complaint. See, e.g., *Mamudovski* v. *BIC Corp.*, supra, 78 Conn. App. 732. Short of his allegation that inmates are denied employment in the commissary for not having a Social Security number, the plaintiff neither alleged nor submitted any evidence regarding an appropriation of *his* property. Nor did he bring forth any evidence of an unconstitutional taking by the defendant. Consequently, the lack of evidence proffered by the plaintiff in support of his takings claim, coupled with the plaintiff's failure to establish the existence of a genuine issue of material fact regarding the defendant's role, if any, in any alleged unconstitutional taking of which the plaintiff complains, leads us to conclude that the plaintiff's takings claim fails as a matter of law.

The form of the judgment is improper, the judgment is reversed only as to the dismissal of the plaintiff's claims in the first and second counts for monetary relief against the defendant in his individual capacity, and the case is remanded with direction to render summary judgment for the defendant on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ROBERT V. PENTLAND III *v.* COMMISSIONER OF CORRECTION
(AC 42761)

Alvord, Keller and Elgo, Js.

Syllabus

The petitioner, who had been found guilty of two counts of witness tampering and sentenced to concurrent terms of one year of imprisonment on each count, appealed to this court from the judgment of the habeas court, dismissing his petition for a writ of habeas corpus for lack of subject matter jurisdiction. The petitioner's total effective sentence expired in December, 2011, after which he pleaded guilty to charges that had been lodged against him in 2008 and 2010 and for which he

was sentenced to thirty years of incarceration. The habeas court determined that, because the petitioner already had served his sentence for the witness tampering convictions at the time he filed his petition, he was not in custody, as required by the statute (§ 52-466) governing the filing of habeas corpus petitions. On appeal, the petitioner claimed that the habeas court improperly concluded that he was not in custody on his convictions of the witness tampering charges. *Held* that the habeas court properly dismissed the petitioner's petition for a writ of habeas corpus, as his sentence on the convictions of the witness tampering charges had expired long before he filed his habeas petition and, thus, he was not in the custody of the respondent Commissioner of Correction at the time he filed that petition; although the petitioner claimed that the sentences on the 2008 and 2010 convictions, and his sentence on the witness tampering convictions, should be treated as consecutive sentences under *Garlotte* v. *Fordice* (515 U.S. 39) because he lost one year of jail credit on the witness tampering convictions, the fact that he was sentenced to one year of incarceration on the witness tampering charges while he was in pretrial confinement on the 2008 and 2010 charges did not convert the former into a consecutive sentence as to the concurrent sentences on the latter convictions, which were imposed after the sentences on the witness tampering convictions had been fully served, any effect on the petitioner's jail credit due to his time served on the witness tampering convictions was merely a collateral consequence of those convictions that was not sufficient to render him in custody for the purpose of a habeas petition, and the mere fact that he was incarcerated at the time he filed the habeas petition was not sufficient to satisfy the custody requirement for purposes of subject matter jurisdiction.

Argued March 11—officially released September 22, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

John C. Drapp III, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. This is a certified appeal from the judgment of the habeas court dismissing the amended petition for a writ of habeas corpus filed by the petitioner, Robert V. Pentland III. On appeal, the petitioner claims that the court improperly dismissed his petition for lack of subject matter jurisdiction on the ground that he already had served his sentence, and, therefore, was not "in custody." We conclude that, with respect to the convictions challenged in the amended petition, the petitioner was not in the custody of the respondent, the Commissioner of Correction. Accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. On November 17, 2008, the petitioner was arrested and charged with sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1), risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and unlawful restraint in the second degree in violation of General Statutes § 53a-96 (2008 charges). On June 1, 2010, the petitioner was arrested and charged with two counts of risk of injury to a child in violation of § 53-21 (a) (2) (2010 charges). On those charges, he was held in pretrial confinement in lieu of bond and, on June 9, 2010, his bond was raised on the 2010 charges in order to allow for pretrial confinement credit on the 2008 charges.

On December 20, 2010, the petitioner was arrested and charged with two counts of tampering with a witness in violation of General Statutes § 53a-151 (witness tampering charges). Following a trial to the court, *J. Fischer*, *J.*, the petitioner was found guilty of both counts and, on December 9, 2011, sentenced to a term of one year of imprisonment on each count, to be served

concurrently. The petitioner's total effective sentence expired on December 19, 2011.

On February 16, 2012, two months after the expiration of his sentence on the witness tampering convictions, the petitioner pleaded guilty under the *Alford* doctrine[1] to the 2008 charges and the 2010 charges. On May 22, 2012, the court, *Fasano*, *J.*, sentenced the petitioner to a total effective term of 30 years of incarceration, execution suspended after 222 months, followed by 25 years of probation.

On May 22, 2015, the petitioner filed a petition for a writ of habeas corpus challenging his witness tampering convictions (2015 petition). On March 29, 2016, pursuant to Practice Book § 23-29 (1),[2] the habeas court, *Oliver*, *J.*, dismissed the 2015 petition on the ground that "the petitioner was no longer in custody for the conviction being challenged at the time the petition was filed." On May 2, 2016, the petitioner appealed from the habeas court's dismissal of the 2015 petition.

On March 20, 2017, before that appeal was resolved, the petitioner filed a second petition for habeas corpus (2017 petition). The 2017 petition challenged the petitioner's witness tampering convictions on the ground that his habeas counsel, Christopher Y. Duby, provided ineffective assistance because "he never contacted the petitioner to discuss the case, nor did he investigate the case, nor become familiar with surrounding law." On March 28, 2017, the habeas court, *Bright*, *J.*, dismissed the 2017 habeas petition pursuant to Practice

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . .

"(1) the court lacks jurisdiction . . . ."

Book § 23-29 (4)[3] because the petitioner's appeal from the dismissal of the 2015 petition was pending before this court. On April 19, 2017, the habeas court granted the petitioner's "Motion to Reargue/Reconsider" the dismissal of the 2017 petition, and the petitioner filed an amended petition that same day.

On September 26, 2017, this court affirmed the dismissal of the 2015 habeas petition. See *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 169 A.3d 851 (*Pentland I*), cert. denied, 327 Conn. 978, 174 A.3d 800 (2017). In *Pentland I*, this court concluded that "the petitioner failed to allege sufficient facts [in the 2015 petition] to establish the habeas court's subject matter jurisdiction to hear his petition for a writ of habeas corpus."[4] Id., 786.

[3] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . .

"(4) the claims asserted in the petition are moot or premature . . . ."

[4] In *Pentland I*, this court noted that "the facts alleged by the petitioner in his [2015 petition] were quite sparse in regard to the issue of the court's jurisdiction." *Pentland I*, supra, 176 Conn. App. 782. Specifically, the 2015 petition alleged only that "he was serving a sentence for two counts of witness tampering, that he was arrested in December, 2010, and was sentenced in 'summer, 2011,' to a total effective sentence of one year of incarceration." Id. "Because the [habeas] court did not hold, and the petitioner did not request, a hearing on the issue of the court's subject matter jurisdiction, the record before us [was] limited to those facts alleged in the petitioner's [2015] petition." Id. "On appeal, the petitioner attempt[ed] to remedy the dearth of facts in the record" by improperly alleging facts in his appellate brief that were "not alleged in his [2015] petition," such as the petitioner's subsequent sexual assault convictions on May 22, 2012, and the issue of jail credit. Id., 783. Thus, this court concluded that "the record [was] devoid of specific facts alleged by the petitioner that could have established the habeas court's subject matter jurisdiction to hear his petition." Id., 786–87. For example, "[t]he petitioner did not attach court records from his other cases to his [2015 petition] . . . ." Id., 787 n.5.

In the present matter, the respondent conceded at oral argument that the amended 2019 petition, which is the subject of this appeal, contains sufficient factual allegations to support a colorable claim that the petitioner was "in custody." We agree. Unlike in *Pentland I*, the petitioner has asserted that, as a result of his incarceration since June 1 and 9, 2010, pursuant to the

On November 29, 2018, the habeas court, *Newson*, *J.*, dismissed the 2017 petition, relying on *Pentland I*. In doing so, the court stated: "It would appear to follow, as a matter of law, that, if the habeas court lacked jurisdiction to hear the underlying matter, the court also lacks jurisdiction to grant the petitioner relief for any other claims related to that same petition, including a claim that counsel was ineffective in his representation of the petitioner in that same case."[5]

On December 10, 2018, the petitioner filed a "Motion to Reargue/Reconsider Judgment of Dismissal" challenging the habeas court's reliance on *Pentland I* to dismiss his 2017 petition. On December 11, 2018, the court granted the petitioner's motion to reargue/reconsider. On January 31, 2019, the petitioner filed an amended petition (2019 petition). On February 8, 2019, the habeas court held a hearing on the motion to reargue and reconsider its dismissal of the 2017 petition but, by then, had before it the 2019 petition. That petition, which is the subject of this appeal, was dismissed for lack of subject matter jurisdiction.[6] On February 14,

2008 and 2010 charges, he continues to be in custody for purposes of the witness tampering charges and is entitled to pretrial confinement jail credit.

[5] In *Pentland I*, this court did not address the merits of the petitioner's custody argument because the court concluded that the factual allegations in the self-represented petition were inadequate. See *Pentland I*, supra, 176 Conn. App. 786.

[6] Although the habeas court ultimately ruled that it was not "reconsidering its dismissal," suggesting that it was referring to the 2017 petition, the record considered in its entirety indicates that the court dismissed the amended 2019 petition. The petitioner's motion to reargue references an agreed upon scheduling order of October 31, 2018, in which the petitioner had been given leave to file an amended petition. The motion to reargue additionally noted the petitioner's intention to anchor his jurisdiction claim based on the "amended petition" that he had not yet filed but which we understand to be the 2019 petition, the dismissal of which is on appeal before this court. We also note that, at the hearing, the parties discussed the merits of the petitioner's claim that he was in custody pursuant to his theory that his sentences on the witness tampering charges, the 2008 charges, and the 2010 charges operated as consecutive sentences. Because these are jurisdictional facts alleged in the 2019 petition, we conclude that the habeas court dis-

2019, the petitioner filed a petition for certification for appeal, which the habeas court granted, and this appeal followed.

On appeal, the sole issue is whether the habeas court properly dismissed the 2019 petition for lack of subject matter jurisdiction. The petitioner claims that the court improperly concluded that he was not "in custody" for his convictions on the witness tampering charges, and, accordingly, was without subject matter jurisdiction. We disagree.

We begin by setting forth the standard of review. "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532, 911 A.2d 712 (2006). "This court has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 568–69, 877 A.2d 761 (2005). Furthermore, the question of whether the petitioner is in custody for purposes of a habeas petition implicates the habeas court's subject matter jurisdiction. See *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 526, 876 A.2d 1178 (2005) ("We conclude that the history and purpose of the writ of habeas corpus establish that the habeas court lacks the power to act on a habeas petition absent the petitioner's allegedly unlawful custody. Accordingly, we conclude that the custody requirement in [General Statutes § 52-466 (governing applications for writs of habeas corpus)] is jurisdictional."), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 747, 754, 91 A.3d 862 (2014).

missed the 2019 petition and that its comment that it was not "reconsidering its dismissal" was a minor misstatement and did not refer to the 2017 petition.

We now turn to the question of whether the petitioner satisfied the custody requirement embodied in § 52-466. Section 52-466 (a) (1) provides in relevant part: "An application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose *custody is in question* is claimed to be illegally confined or deprived of such person's liberty." (Emphasis added.) Thus, under Connecticut law, for a court to have subject matter jurisdiction over a petition for a writ of habeas corpus, the petitioner must be in custody at the time the habeas petition is filed. See *Lebron* v. *Commissioner of Correction*, supra, 274 Conn. 530. "[C]onsiderations relating to the need for finality of convictions and ease of administration . . . generally preclude a habeas petitioner from collaterally attacking expired convictions." (Citation omitted; internal quotation marks omitted.) Id., 517, citing *Lackawanna County District Attorney* v. *Coss*, 532 U.S. 394, 402, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001).

In the present matter, the petitioner's sentence arising from his convictions for the witness tampering charges had expired long before he filed his 2019 habeas petition. Thus, because the petitioner was not in custody at the time he filed the 2019 petition, the habeas court would lack subject matter jurisdiction. "An exception exists, however, to the custody requirement." *Pentland I*, supra, 176 Conn. App. 785. A petitioner who is serving consecutive sentences may challenge a future sentence even though he is not serving that sentence at the time his petition is filed. See *Peyton* v. *Rowe*, 391 U.S. 54, 67, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968). A petitioner may also challenge a consecutive sentence served *prior* to his current conviction if successfully doing so would advance his release date. See *Garlotte* v. *Fordice*, 515 U.S. 39, 47, 115 S. Ct. 1948, 132 L. Ed. 2d 36 (1995). "In other words, the federal courts view

prior and future consecutive sentences as a 'continuous stream' of custody for purposes of the habeas court's subject matter jurisdiction." *Oliphant* v. *Commissioner of Correction*, supra, 274 Conn. 573.

Because the petitioner is challenging a sentence served prior to the conviction for which he currently is incarcerated, the petitioner asserts that the *Garlotte* exception should be extended to the facts of this case. Specifically, he asserts that the initial witness tampering convictions on December 9, 2011, and subsequent sexual assault and contact convictions on February 16, 2012, created "one continuous, aggregate term of imprisonment, as if they were imposed consecutively . . . ." In other words, the petitioner argues that, because he lost "one year of jail credit on the [convictions of sexual assault and risk of injury to a child] because of the tampering convictions," the sentences should be treated as consecutive. We disagree with the petitioner's argument that these facts are sufficient to warrant an extension of the *Garlotte* exception to the custody requirement under § 52-466.

In *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 6 A.3d 52 (2010), the petitioner was convicted of possession of marijuana with intent to sell and was subsequently convicted of a federal drug offense. Id., 692. The petitioner was thereafter sentenced to a mandatory term of life imprisonment. Id. After the expiration of his state drug conviction, but while serving the sentence on the federal drug conviction in federal prison, the petitioner filed a petition for a writ of habeas corpus challenging his state drug conviction. Id., 693. In affirming the habeas court's judgment dismissing the petition, our Supreme Court rejected "the petitioner's assertion that the custody requirement of § 52-466 may be satisfied by confinement alone" and reaffirmed the principle that "a petitioner [must] be *in custody on the conviction under attack* at the time the habeas petition

is filed . . . .'' (Emphasis in original; internal quotation marks omitted.) Id., 699. Accordingly, the mere fact that the petitioner in the present matter was incarcerated at the time he filed the 2019 habeas petition is not sufficient to satisfy the custody requirement for purposes of subject matter jurisdiction.

With respect to the petitioner's jail credit argument, this court rejected a similar claim in *Foote* v. *Commissioner of Correction*, 170 Conn. App. 747, 155 A.3d 823, cert. denied, 325 Conn. 902, 155 A.3d 1271 (2017). In *Foote*, the petitioner was convicted of possession of cocaine with intent to sell by a person who is not drug-dependent and received a sentence of eight years of incarceration and five years special parole (Ansonia conviction). Id., 749. While on parole for the Ansonia conviction, the petitioner was arrested for participating in a narcotics sale and thereafter pleaded guilty under the *Alford* doctrine (Waterbury conviction). Id. After the petitioner was sentenced, the Department of Correction informed him that the unexpired portion of his special parole on the Ansonia conviction would not begin to run until after the petitioner completed his Waterbury sentence. Id., 749–50. After completing his sentence for the Waterbury conviction—but before completing the unexpired portion of his sentence for the Ansonia conviction—the petitioner filed a petition for a writ of habeas corpus challenging the Waterbury conviction. Id., 750. The petitioner in *Foote* argued that, ''because his special parole did not begin to run until the expiration of the sentence on the Waterbury conviction, the sentences should be treated as one continuous stream of custody, and, therefore, the *Garlotte* custody exception should apply.'' Id., 754. In rejecting that argument, this court explained that, simply because the petitioner's parole in the concurrent Ansonia sentence was delayed, it ''did not automatically convert the concurrent sentences into consecutive sentences . . . . Rather, the delay in special parole, which cannot be

served while one is incarcerated, was merely a consequence of the sentence on the Waterbury conviction, which included incarceration, being imposed." (Footnote omitted.) Id., 754–55.

As in *Foote*, the petitioner in the present matter is not in custody on the witness tampering convictions he seeks to challenge. Moreover, the fact that he was sentenced to one year of incarceration on the witness tampering charges while he was in pretrial confinement on the 2008 and 2010 charges does not convert the former into a consecutive sentence as to the concurrent sentences on the latter convictions. As to the latter convictions, the sentencing court imposed its sentences on the petitioner five months after the sentence on the witness tampering convictions had been fully served. Any effect on the petitioner's jail credit due to his time served on the witness tampering convictions is merely a collateral consequence of those convictions. "The collateral consequences of a completed sentence are not sufficient to render an individual in custody for the purpose of a habeas petition, even if the petitioner is suffering those consequences at the time that he filed his petition." Id., 755; see also *Ajadi* v. *Commissioner of Correction*, supra, 280 Conn. 540 ("once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual in custody for the purposes of a habeas attack upon it" (internal quotation marks omitted)).

On the basis of the foregoing, we conclude that the habeas court properly dismissed the 2019 habeas petition for lack of subject matter jurisdiction pursuant to § 52-466 because the petitioner was not in the custody of the respondent in connection with the witness tampering convictions when he filed his petition.

The judgment is affirmed.

In this opinion the other judges concurred.

B. SHAWN MCLOUGHLIN ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF BETHEL
(AC 42561)

Keller, Prescott and Devlin, Js.

Syllabus

The plaintiffs, M and M Co., appealed to the Superior Court from the decision of the defendant town planning and zoning commission denying their application for a special permit to construct a crematory on property owned by M that is located in an industrial park in the town. Prior to filing their application, the plaintiffs proposed a text amendment to the town's zoning regulations that would make the operation of a crematory a specially permitted use in the town's two industrial zones. Following the commission's approval of the text amendment, the plaintiffs submitted their special permit application and an application to construct and operate a crematory. Thereafter, the commission adopted a text amendment filed by the intervening defendant that repealed the prior text amendment, and, after holding four public hearings, it denied the plaintiffs' special permit application, determining that the plaintiffs failed to meet their burden of demonstrating that their application satisfied certain criteria for special permits set forth in the applicable town zoning regulation (§ 8.5.E). The Superior Court subsequently dismissed the plaintiffs' appeal, concluding that there was substantial evidence in the record to support the commission's denial of the plaintiffs' application, and the plaintiffs, on the granting of certification, appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the Superior Court improperly concluded that there was substantial evidence in the record to support the commission's denial of their application for a special permit, as there was substantial evidence in the record from which the commission reasonably could have determined that the plaintiffs failed to meet their burden of demonstrating that their application satisfied the general standards set forth in §§ 8.5.E.3 and 8.5.E.4 of the zoning regulations: on the basis of the testimony and the evidence in the record, the commission reasonably could have concluded that, by allowing the plaintiffs to operate a crematory at the location they proposed, the development of the industrial park and surrounding area and the welfare of the town would be adversely affected in that businesses and individuals would be less inclined to either remain in or to purchase property in and around the industrial park and property values in the industrial park and surrounding area would be depressed; moreover, contrary to the plaintiffs' claim, the Superior Court properly relied on *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission* (176 Conn. App. 570) in dismissing the plaintiffs' appeal.

2. The plaintiffs' claim that the commission improperly failed to consider their application for a special permit on the merits because of its predisposition to keep a crematory from being located in the industrial park and its conviction that it made a legislative misjudgment in adopting their proposed text amendment was unavailing: contrary to the plaintiffs' assertion that the commission's reasons for denying their application were insufficient, the commission authored a detailed resolution of denial in which it stated that it denied the plaintiffs' application, in part, because it failed to satisfy both § 8.5.E.3 and § 8.5.E.4 of the zoning regulations, and this court concluded that the commission's denial of the application on the basis of those provisions was supported by substantial evidence; moreover, the plaintiffs' reliance on *Marmah, Inc.* v. *Greenwich* (176 Conn. 116) in support of their predetermination claim was misplaced because, unlike in that case, in which deliberation over the plaintiff's site plan application was afforded one public hearing before being denied, the plaintiffs' application in the present case was afforded attention at four public hearings at which the commission entertained an immense amount of evidence and testimony; furthermore, to the extent that the plaintiffs challenged the commission's authority to repeal a text amendment to the zoning regulations despite contrary findings that it made when had it adopted the amendment, that argument was without merit in light of the commission's broad discretion when acting in a legislative capacity.

Argued May 13—officially released September 22, 2020

Procedural History

Appeal from the decision of the defendant denying the plaintiffs' application for a special permit, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the court, *Hon. Marshall K. Berger, Jr.*, judge trial referee, granted the motion to intervene as a defendant filed by Connecticut Coining, Inc.; thereafter, the matter was tried to the court, *Hon. Marshall K. Berger, Jr.*, judge trial referee; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Daniel E. Casagrande, for the appellants (plaintiffs).

Charles R. Andres, for the appellee (defendant).

Barbara M. Schellenberg, with whom, on the brief, was *Neil R. Marcus*, for the appellee (intervening defendant).

Opinion

PRESCOTT, J. The plaintiffs, B. Shawn McLoughlin and Mono-Crete Step Co. of CT, LLC (Mono-Crete), appeal from the judgment of the Superior Court dismissing their administrative appeal from the decision of the defendant, the Planning and Zoning Commission of the Town of Bethel (commission).[1] In that decision, the commission denied the plaintiffs' application for a special permit (application) to construct a crematory in an industrial park zoning district (industrial zone). On appeal, the plaintiffs claim that the court improperly dismissed their appeal because (1) the commission's denial was not supported by substantial evidence in the record and (2) the commission failed to consider their application on its merits. We disagree and, accordingly, affirm the judgment of the Superior Court.

The following undisputed facts and procedural history are relevant to this appeal.[2] McLoughlin owns property located at 12 Trowbridge Drive (property) in the Clarke Business Park (park) in Bethel. The park is located in one of the town's two industrial zones. Mono-Crete, of which McLoughlin is the sole member, operates a business on the property. Mono-Crete produces precast concrete, which is used to make items such as burial vaults.

Because Mono-Crete's business was declining and the number of cremations in the United States was

[1] On March 9, 2016, Connecticut Coining, Inc., a business located near the proposed crematory, moved to intervene as a defendant in the plaintiffs' appeal pursuant to Practice Book § 9-6 and General Statutes § 8-8 (p). The trial court granted this motion on September 17, 2018. Accordingly, Connecticut Coining, Inc., is a party to this appeal.

[2] At the hearing before the court, the parties stated that they were in agreement as to the facts underlying this appeal.

increasing, McLoughlin decided to seek approval to operate a crematory on the property. In furtherance of that goal, the plaintiffs proposed a text amendment to the Bethel Zoning Regulations (regulations) that would make the operation of a crematory a specially permitted use within either of the two industrial zones in the town. Prior to the commission's voting on the proposed text amendment, the plaintiffs' counsel acknowledged, at two separate meetings of the commission, that the commission's decision on whether to approve the proposed text amendment and any future special permit application seeking site plan approval were mutually exclusive inquiries, each involving unique considerations.[3]

On July 22, 2014, the commission voted to approve the text amendment (July, 2014 text amendment) by a

[3] At the April 22, 2014 meeting of the commission, the plaintiffs' counsel stated that, when considering the proposed text amendment, the commission does not "have the actual proposal in front of [it]; [it doesn't] have the building that's going to be built; [it] can't look at traffic generation; [it] can't look at what screening [the plaintiffs] would be proposing; *all of this can be looked at in detail on a specific site plan special permit application* including the exact make model manufacturer of the equipment that we're proposing to use and what the actual in emissions of that would be." (Emphasis added.) At that same meeting, the plaintiffs' counsel noted that the commission's decision whether to approve the text amendment "is step one, [and] *if the commission sees fit to approve this text amendment*, [*then*] *we still* [*have*] some *hurdles ahead of us*; we [have to] find the right place on our property; we [must] have a good design; [we have] to convince you that the units that we are going to install are going to be satisfactory to meet the air pollution concerns because they are concerns. *Step one is why we're here that's the text amendment* and we're hopeful that you will receive this favorably." (Emphasis added.)

At the May 27, 2014 meeting of the commission, the plaintiffs' counsel stated: "At the onset I just want to make clear again, which you all know but just to reiterate, that we are applying for a text amendment. *There will be, if you approve this, another process where we have to deal with the specific site in question, site specific issues* such as the operation traffic—visual impairment, issues like that. *We are talking simply about the text amendment which would apply in either business park. . . .* As I noted, *we have to come to you for a* [*s*]*pecial* [*p*]*ermit, even if you approve this text amendment.* I think that a lot of the operational issues that people are concerned with *can be dealt with in that process*. Because you'll be dealing with a specific property, you'll know what it's going to look like, where it's going to go, how it's going to work." (Emphasis added.)

four to three vote. The notice of approval, dated August 5, 2014, stipulated that the commission would allow for the specially permitted use of crematories conditioned on the satisfaction of eight technical requirements.[4] The commission also noted that "the proposed text amendment is . . . a reasonable request . . . in character with the uses in the [i]ndustrial [zone]."

After the commission approved the July, 2014 text amendment, the plaintiffs submitted a special permit application but withdrew it in January, 2015. The plaintiffs then resubmitted their application on February 25, 2015. On May 7, 2015, the plaintiffs submitted to the commission an application to construct and operate a crematory as required by General Statutes § 19a-320.[5]

[4] The technical requirements for crematories set forth in § 4.3.C.10a of the Bethel Zoning Regulations are as follows: "Crematory facility for the disposal by incineration of the bodies of the dead [shall be permitted], provided:

"a. No such crematory facility shall be located within two (2) miles of any other crematory facility;

"b. Any discharge point from such crematory facility, such as a chimney or smokestack, shall be located at least 1,000 feet from any residence, and shall be screened from view in all directions;

"c. Any [s]tructure containing a retort shall be located at least five hundred feet from any land zoned for residential purposes not owned by the owner of the crematory;

"d. No more than two (2) retorts shall be installed in any such crematory facility;

"e. A dedicated loading space shall be provided which is screened from view from all roadways adjoining the property with a vegetative screen;

"f. The crematory facility shall be located indoors within structures, including any viewing areas;

"g. No funerals or memorial services may be conducted on the premises unless a special permit for a funeral home is issued pursuant to Section 4.3 (C) (10). Use of a viewing area to view the process of incineration shall not constitute a funeral or memorial service; and

"h. The [commission] may, but need not, consider an application for approval of the location of a crematory facility pursuant to [General Statutes] § 19a-320 (b) simultaneously with the required application for special permit."

[5] General Statutes § 19a-320 provides in relevant part: "(a) Any resident of this state, or any corporation formed under the law of this state, may erect, maintain and conduct a crematory in this state and provide the necessary

Prior to the plaintiffs' resubmission of their special permit application, Connecticut Coining, Inc. (Connecticut Coining), on February 12, 2015, submitted an application for a text amendment to the commission. The proposed amendment would, in effect, repeal the July, 2014 text amendment and impose a one year moratorium on the commission's entertaining applications for and permitting the construction of crematories in the town. At its May 12, 2015 meeting, the commission voted to adopt this amendment (May, 2015 amendment) by a four to three vote. The plaintiffs then appealed the commission's adoption of the May, 2015 amendment to the Superior Court.

On June 17, 2015, Connecticut Coining filed an application for a new text amendment that purportedly sought to correct a procedural defect noted by the plaintiffs in their appeal of the May, 2015 text amendment (revised repeal amendment). The commission, at its September 22, 2015 meeting, voted to adopt the revised repeal amendment by the same margin that it voted to adopt the May, 2015 amendment.[6]

Despite its repeal of the July, 2014 text amendment, the commission, nevertheless, continued to deliberate on the plaintiffs' application.[7] After holding four public

appliances and facilities for the disposal by incineration of the bodies of the dead, in accordance with the provisions of this section. The location of such crematory . . . shall be within the confines of a plot of land approved for the location of a crematory by the selectmen of any town, the mayor and council or board of aldermen of any city and the warden and burgesses of any borough; provided, in any town, city or borough having a zoning commission, such commission shall have the authority to grant such approval. . . .

"(b) Application for such approval shall be made in writing to the local authority specified in subsection (a) of this section . . . ."

[6] The plaintiffs also appealed the commission's decision to adopt the revised repeal amendment. The parties agreed to delay the court's adjudication of the plaintiffs' appeals from the May, 2015 amendment and the revised repeal amendment pending the outcome of the present appeal.

[7] Because the plaintiffs' application was submitted to the commission before the commission repealed the July, 2014 text amendment, the commis-

hearings on the plaintiffs' application, the commission, at its September 8, 2015 deliberative session, voted to deny it by a four to three vote. Three of the four members who voted to approve the July, 2014 text amendment also voted to approve the plaintiffs' application. Meanwhile, the three members who voted against the July, 2014 text amendment also voted against the plaintiffs' application. The chairperson of the commission, however, voted to approve the July, 2014 text amendment but voted to deny the plaintiffs' application. After voting to deny the plaintiffs' application, the commission, by the same margin, later voted to deny their application to construct and operate a crematory pursuant to § 19a-320.[8]

At its September 22, 2015 meeting, the commission presented its formal resolution of denial of the plaintiffs' application (resolution of denial), in which it set forth its reasoning for denying the plaintiffs' application. The commission generally found that "[t]he [plaintiffs] ha[ve] not demonstrated that the proposed use in the proposed location will not cause harmful health effects to neighboring properties or their occupants and ha[ve] not demonstrated that the use will not cause a loss in

sion was required to consider the application on the basis of the requirements set forth in the July, 2014 text amendment. See General Statutes § 8-2h (a). Section 8-2h (a) provides that "[a]n application filed with a zoning commission, planning and zoning commission, zoning board of appeals or agency exercising zoning authority of a town, city or borough which is in conformance with the applicable zoning regulations as of the time of filing shall not be required to comply with, nor shall it be disapproved for the reason that it does not comply with, any change in the zoning regulations or the boundaries of zoning districts of such town, city or borough taking effect after the filing of such application."

[8] In their appellate brief, the plaintiffs note that "[t]he commission considered the [§ 19a-320] application together with the special permit and site plan applications." They also assert that, "if they are entitled to a special permit, the § 19a-320 application should be approved as well." Connecticut Coining contests this assertion in its appellate brief. Because we affirm the trial court's judgment with respect to the special permit application, we need not address the § 19a-320 application.

value of property or economic development potential. Specifically, the commission stated that the plaintiffs failed to meet their burden of demonstrating that their application satisfied the criteria for special permits set forth in §§ 8.5.E.2,[9] 8.5.E.3,[10] 8.5.E.4,[11] and 8.5.E.5[12] of the regulations. The plaintiffs filed an appeal from that decision with the Superior Court on October 13, 2015.

The Superior Court heard the plaintiffs' appeal on June 26, 2018. In a memorandum of decision dated October 4, 2018, the court dismissed the plaintiffs' appeal, concluding that there was substantial evidence in the record to support the commission's denial of the application based on

[9] Section 8.5.E.2 of the Bethel Zoning Regulations, which pertains to "[e]nvironmental [p]rotection and [c]onservation," requires the commission to evaluate "[w]hether appropriate consideration has been given to the protection, preservation, and/or enhancement of natural, scenic, historic, and unique resources including, where appropriate, the use of conservation restrictions to protect and permanently preserve natural, scenic, historic, or unique features which enhance the character and environment of the area."

[10] Section 8.5.E.3 of the Bethel Zoning Regulations, which pertains to "[o]verall [n]eighborhood [c]ompatibility," requires the commission to evaluate "[w]hether the proposed use will have a detrimental effect on neighboring properties and residences or the development of the district."

[11] Section 8.5.E.4 of the Bethel Zoning Regulations, which pertains to whether the location proposed for the specially permitted use is a "[s]uitable [l]ocation [f]or [that] [u]se," requires the commission to evaluate "[w]hether the location and size of the site, the nature and intensity of the operations involved in or conducted in connection with the use, and the location of the site with respect to streets giving access to it are such that the use will be in harmony with the appropriate and orderly development in the district in which it is located and shall promote the welfare of the [t]own."

[12] Section 8.5.E.5 of the Bethel Zoning Regulations, which pertains to "[a]ppropriate [i]mprovements," requires the commission to evaluate in relevant part: "a. Whether the design elements of the proposed development will be attractive and suitable in relation to the site characteristics, the style of other buildings in the immediate area, and the existing and probable future character of the neighborhood in which the use is located.

"b. Whether the location, nature and height of buildings, walls, and fences, planned activities and the nature and extent of landscaping on the site will be such that the use shall not hinder or discourage the appropriate development and use of adjacent land and buildings or impair the value thereof."

the criteria for special permits set forth in §§ 8.5.E.3, 8.5.E.4, and 8.5.E.5 of the regulations.[13]

On November 6, 2016, the plaintiffs filed a petition for certification to appeal pursuant to General Statutes § 8-8 (o) and Practice Book § 81-1. This court granted the plaintiffs' petition on January 16, 2019. Additional facts and procedural history will be set forth as necessary.

Before addressing the plaintiffs' claims on appeal, we first set forth certain legal principles concerning special permits. Our Supreme Court has observed that "[a] special exception allows a property owner to use his property in a manner expressly permitted by the local zoning regulations. . . . Nevertheless, special exceptions, although expressly permitted by local regulations, must satisfy [certain conditions and] standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values [as required by General Statutes § 8-2]. . . . Moreover, we have noted that the nature of special exceptions is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site. . . . Thus, we have explained that the goal of an application for a special exception is to seek permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular

[13] The court noted, however, that the evidence in support of the commission's denial based on § 8.5.E.2 of the regulations was not substantial. On appeal, the parties do not dispute the trial court's determination that there was not substantial evidence to support the commission's determination that the plaintiffs' application failed to satisfy § 8.5.E.2. Thus, we do not address this issue in this opinion. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 427, 941 A.2d 868 (2008) ("[t]he [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given" (internal quotation marks omitted)).

zoning district." (Emphasis omitted; internal quotation marks omitted.) *Municipal Funding, LLC* v. *Zoning Board of Appeals*, 270 Conn. 447, 453–54, 853 A.2d 511 (2004).

Moreover, "[§] 8-2 (a) authorizes municipal zoning commissions to enact regulations providing that certain . . . uses of land are permitted only after obtaining a special permit . . . from a zoning commission . . . . [That subsection] further provides that the obtaining [of] a special permit or special exception . . . [is] subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Thus, in accordance with § 8-2 (a), an applicant's obtaining of a special [permit] pursuant to a zoning regulation is subject to a zoning commission's consideration of these general factors. . . . The special [permit] process is discretionary, and the zoning board may base its denial of such an application on general considerations such as public health, safety and welfare, which are enumerated in zoning regulations . . . ." (Citation omitted; internal quotation marks omitted.) Id., 454–55.

In addition, we are also mindful that our legislature has vested in local governments the authority to determine whether to permit crematories in their towns. See *Urbanowicz* v. *Planning & Zoning Commission*, 87 Conn. App. 277, 295, 865 A.2d 474 (2005). Indeed, this court has stated that "[t]he legislative history of § 19a-320 indicates that local authorities should decide the location of crematories not sited within a cemetery" and that "[t]he location of a crematory is a matter for local zoning approval." Id., 295, 291 n.10. With these principles concerning special permits and local governments' decision-making authority with respect to crematories in mind, we now turn to the plaintiffs' claims on appeal.

I

The plaintiffs first claim that the court improperly concluded that there was substantial evidence in the record to support the commission's denial of their application. We disagree with the plaintiffs and conclude that there was substantial evidence to support the commission's denial based on the general standards set forth in §§ 8.5.E.3 and 8.5.E.4 of the regulations.[14]

We begin by setting forth the legal principles concerning the discretion that planning and zoning commissions are afforded in determining whether to approve an application for a special permit. Our Supreme Court has stated: "Although it is true that the zoning commission does not have discretion to deny a special permit [if] the proposal meets the standards, it does have discretion to determine whether the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special exception, as it applies the regulations to the specific application before it." (Emphasis omitted.) *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 628, 711 A.2d 675 (1998). In exercising its discretion, a commission's review of a special permit application "is inherently fact-specific, requiring an examination of the particular circumstances

[14] The plaintiffs also claim that the court improperly concluded that there was substantial evidence to support the commission's denial of their application based on § 8.5.E.5 of the regulations. We need not reach this issue, however, because we conclude that there is substantial evidence in the record to support the denial of the application based on §§ 8.5.E.3 and 8.5.E.4 of regulations. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 427, 941 A.2d 868 (2008) ("[t]he [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given").

of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed [use] would be [made]." *Municipal Funding, LLC* v. *Zoning Board of Appeals*, supra, 270 Conn. 457; *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 600, 170 A.3d 73 (2017) (*St. Joseph's*).

Our standard for review of a commission's decision on an application for a special permit accounts for the significant discretion that a commission is afforded in making such a decision. Indeed, our Supreme Court has stated: "In reviewing a decision of a zoning [commission], a reviewing court is bound by the substantial evidence rule, according to which . . . [c]onclusions reached by [a zoning] commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the trial court would have reached the same conclusion . . . but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning [commission's] findings, it cannot substitute its judgment for that of the [commission]. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 427, 941 A.2d 868 (2008). Moreover, "[s]ubstantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue

can be reasonably inferred." (Internal quotation marks omitted.) *Sams* v. *Dept. of Environmental Protection*, 308 Conn. 359, 374, 63 A.3d 953 (2013).

The court also has stated that the "substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review." (Internal quotation marks omitted.) Id. In light of the significant amount of deference that the substantial evidence standard affords a commission, the court has described it as "an important limitation on the power of the courts to overturn a decision of an administrative agency . . . [that] provide[s] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action." (Internal quotation marks omitted.) *Property Group, Inc.* v. *Planning & Zoning Commission*, 226 Conn. 684, 697–98, 628 A.2d 1277 (1993).

In sum, "[o]n appeal, judicial review [of a commission's denial of a special permit application] is confined to the question of whether the commission abused its discretion in finding that an applicant failed to demonstrate compliance with the requirements of applicable zoning regulations. *When there is evidence in the record to substantiate the commission's determination, the determination must stand.*" (Emphasis added.) *St. Joseph's*, supra, 176 Conn. App. 606–607.

Turning to the present case, the commission, in denying the plaintiffs' application, relied, in part, on the application's failure to comply with §§ 8.5.E.3 and 8.5.E.4 of the regulations. These provisions set forth general standards that the commission must consider when determining whether to approve a special permit application. Specifically, § 8.5.E.3, which pertains to "[o]verall [n]eighborhood [c]ompatibility," required the commission to evaluate "[w]hether the proposed use

will have a detrimental effect on neighboring properties and residences or the development of the district." Section § 8.5.E.4, which pertains to whether the location proposed for the proposed specially permitted use is a suitable location for that use, required the commission to evaluate "[w]hether the location and size of the site, the nature and intensity of the operations involved in or conducted in connection with the use, and the location of the site with respect to streets giving access to it are such that the use will be in harmony with the appropriate and orderly development in the district in which it is located and shall promote the welfare of the [t]own." In sum, both provisions required the commission to consider whether the crematory, based on the location at which it was proposed, would adversely affect the development of the park and surrounding area and promote the welfare of the town.[15]

We note that this court recently held that, "under Connecticut law, a zoning commission may deny a special permit application on the basis of *general standards* set forth in the zoning regulations, *even when all technical requirements of the regulations are met*." (Emphasis added.) *St. Joseph's*, supra, 176 Conn. App. 594. We also note that it was the plaintiffs' burden to prove to the commission that their application satisfied *both* of these provisions. See *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan &*

[15] With respect to interpreting zoning regulations, our Supreme Court recently stated: "Because the interpretation of the regulations presents a question of law, our review is plenary. . . . [Z]oning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Moreover, regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . . The process of statutory interpretation involves the determination of the meaning of the statutory language [or . . . the relevant zoning regulation] as applied to the facts of the case, including the question of whether the language does so apply." (Internal quotation marks omitted.) *Lime Rock Park, LLC* v. *Planning & Zoning Commission*, Conn. , , A.3d , (2020).

Zoning Commission, 189 Conn. App. 332, 340, 207 A.3d 1053 (2019). Thus, if the commission determined that the plaintiffs failed to meet their burden of proving that their application complied with *either* § 8.5.E.3 or § 8.5.E.4, then it could deny their application. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 427 ("[t]he [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given" (internal quotation marks omitted)); *St. Joseph's*, supra, 594 ("commission may deny a special permit application on the basis of *general standards* set forth in the zoning regulations" (emphasis added; internal quotation marks omitted)).

Because the commission did, in fact, deny their application, in part, because it found that it failed to comply with §§ 8.5.E.3 and 8.5.E.4 of the regulations, the plaintiffs, on appeal, had "the burden of proof to show that [the commission's decision] is not supported by the record." *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, 293 Conn. 93, 113, 977 A.2d 127 (2009); see also *Verney* v. *Planning & Zoning Board of Appeals*, 151 Conn. 578, 580, 200 A.2d 714 (1964); *St. Joseph's*, supra, 176 Conn. App. 602. To do so, the plaintiffs were required to "do more than simply show that another decision maker, such as the trial court, might have reached a different conclusion. Rather than asking the reviewing court to retry the case de novo . . . the [plaintiffs were required to] establish that substantial evidence does not exist in the record as a whole to support the [commission's] decision." (Internal quotation marks omitted.) *Unistar Properties, LLC* v. *Conservation & Inland Wetlands Commission*, supra, 113.

Related to their claim that there was not substantial evidence in the record to support the commission's denial of their application, the plaintiffs argue that, in dismissing

their appeal, the court improperly concluded that it was bound by this court's recent decision in *St. Joseph's*, supra, 176 Conn. App. 570. In support of this argument, the plaintiffs assert that *St. Joseph's* is distinguishable from the present case because "the evidence supporting the special permit denial in that case was fact based and grounded in the firsthand experience of the objecting neighbors." We disagree with the plaintiffs' claim that the court improperly relied on our decision in *St. Joseph's*.

In *St. Joseph's*, this court addressed an apparent conflict in our state's case law concerning whether general standards in the zoning regulations alone could serve as the basis for denying a special permit application. Id., 587–94. In doing so, this court concluded that "[t]here . . . is no doubt that, under Connecticut law, a zoning commission may deny a special permit application on the basis of general standards set forth in the zoning regulations, even when all technical requirements of the regulations are met." Id., 594. The plaintiffs, at oral argument before this court, stated that they do not dispute this conclusion.

Contrary to the plaintiffs' claim, the Superior Court's reliance on *St. Joseph's* was not based on the type of testimony that was offered in that case. Rather, in light of what this court said in *St. Joseph's* about general standards predicating a commission's denial of a special permit application, the court concluded that it was compelled to uphold the commission's denial of the plaintiffs' application because the commission "based [its decision] *upon general standards* concerning the nature of the use, the welfare of the town, and the harmony with other uses and the orderly development in the district." (Emphasis added.) Thus, we conclude that the court properly relied on this court's decision in *St. Joseph's*.

In determining whether there was substantial evidence in the record from which the commission reasonably could have concluded that the plaintiffs' application failed to satisfy §§ 8.5.E.3 and 8.5.E.4 of the regulations, the following additional facts and procedural history are relevant. Prior to the commission's adoption of the July, 2014 text amendment, the town's Economic Development Commission (EDC) provided testimony to the commission in which it voiced its concerns about allowing a crematory to operate in the park. In particular, the EDC stated that, a crematory, if allowed to operate in the park, would have an adverse economic impact on the park and the town.

After the commission adopted the July, 2014 text amendment, the EDC then offered additional testimony that buttressed these concerns. Indeed, in an April 13, 2015 letter to the commission, the EDC restated its "concerns about the negative impact the [proposed crematory] may have on existing properties, businesses, future ownership and the expansion of [the] [p]ark" and noted that "[t]hese were not only the concerns of the EDC, but also business and property owners within [the] [p]ark." In support of its concerns, the EDC pointed out that a person who owned property in the town had decided to sell his properties *after* the commission adopted the July, 2014 text amendment. Indeed, the EDC noted that its "concerns [about the crematory] recently became a reality when a property owner in [the] [p]ark . . . who submitted letters and spoke at the public hearings against this use in the park, put all of his seven Bethel properties (both commercial and residential) on the market. *His decision*, as he stated to the [d]irector of the Office of Economic Development, *was based solely on the* [*July, 2014 text*] *amendment approval.* These properties represent over $41,000 in tax revenue and a loss of over $27,000 a year in

potential tax revenue for the expansion he was planning . . . .'' (Emphasis added.)

With respect to this property owner's decision to sell his properties, the EDC warned that ''this is the first of many potential negative impacts that [allowing a crematory in the park] may have on the [industrial] zone.'' Moreover, after the July, 2014 text amendment was adopted, another person who owned a business in the park similarly decided to delay making $100,000 worth of improvements to his property and later decided to put his property up for sale.

The EDC then submitted an additional letter on July 13, 2015, in opposition to the plaintiffs' crematory. In light of property owners already putting their properties up for sale after the commission adopted the July, 2014 text amendment, the EDC stated that allowing the plaintiffs to operate a crematory at the proposed location in the park ''would negatively impact our ability to sell the additional lots [nearby] for a fair price.''

In light of this testimony, the commission, with respect to § 8.5.E.3 of the regulations, found that ''the applicant [failed to demonstrate] that the proposed crematory use [would] not have a detrimental effect on neighboring properties and residences and the development of the [zoning] district.'' Moreover, the commission found that the application failed to satisfy § 8.5.E.4 because the plaintiffs failed to demonstrate ''that the proposed location [was] suitable for the crematory use.''

Based on this testimony alone, there was substantial evidence from which the commission reasonably could have concluded that, by allowing the plaintiffs to operate a crematory at the location they proposed, the development of the park and surrounding area as well as the welfare of the town would be adversely affected. In particular, there was substantial evidence from which the commission reasonably could have concluded that,

by approving the plaintiffs' application, businesses and individuals would be less inclined to either remain or to purchase property in and around the park. For example, the EDC, in its testimony, pointed to a property owner who *already* had sold his property *after* the commission adopted the July, 2014 text amendment. Based on this testimony and the testimony of another property owner who sold his property in the park after the July, 2004 text amendment was adopted, there was substantial evidence from which the commission reasonably could have concluded that allowing crematories in the park would make property in and around the park less attractive to current and prospective property owners. As a result of this, the town could face difficulty retaining current area businesses and residents and attracting new ones, which would adversely affect the development of the park and surrounding area, as well as the overall welfare of the town.

Moreover, there was substantial evidence from which the commission reasonably could have concluded that approving the plaintiffs' application would depress property values in the park and the surrounding area. First, the EDC noted that it would have difficulty selling new, nearby lots at a *fair price* if the crematory were allowed to operate at the location proposed in the application. In addition, the commission had evidence that two nearby properties had sold after the July, 2014 text amendment was adopted, from which it reasonably could have inferred that property in this area was now less desirable and, as a result, property values would decline. In light of property being less valuable in the park and surrounding area, we conclude that there was substantial evidence from which the commission reasonably could have determined that allowing a crematory to operate at the location proposed by the plaintiffs would negatively impact the development of the park

and surrounding area as well as the overall welfare of the town.[16]

Furthermore, even *the plaintiffs'* counsel admitted to the commission that the location that the plaintiffs proposed for the crematory was *not ideal*. Indeed, at an April 14, 2015 meeting before the commission, the plaintiffs' counsel, in response to Connecticut Coining's counsel asking why the plaintiffs did not place the crematory on a different part of the property, stated that the plaintiffs would "love to. . . . This would make this a much simpler application for [them]. As you noted in the site walk, there's a huge hill here. This would be natural screening from everybody. Really, you would have no idea that it was there. Obviously, the 500 foot rule is causing us to not be able to do that.[17] In order to do that, we would have to either change the 500 foot rule in [the statute], which I'm working on but haven't succeeded in doing yet, or the [c]ommission would have to rezone this property . . . which we may come and ask you to do in the future but, for now, we are just proceeding on the assumption that we have to comply with the 500 foot rule." (Footnote added.)

In addition, at a July 15, 2015 meeting of the commission, the plaintiffs' counsel stated that, "[i]n terms of the location on the site, [the plaintiffs'] preference, and

[16] With respect to property values in the surrounding area, the commission discredited "an opinion by a real estate agent that there would be negligible effects on the value of property in the [industrial] [z]one and nearby residential properties" and noted that "[t]he [plaintiffs] did not submit any studies from an appraiser on this issue." We note that determining "[t]he credibility of the witnesses . . . [is] solely within the province of the [commission]." (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 427.

[17] General Statutes § 8-2n provides in relevant part: "The zoning regulations adopted under section 8-2 or any special act shall not authorize the location of a crematory within five hundred feet of any residential structure or land zoned for residential purposes not owned by the owner of the crematory. . . ."

[they have] expressed this to you all along, would be to have this down in the existing building or in a small addition to the existing building. [The plaintiffs] think it provides much better screening from the . . . park and is a better location."

Based on the testimony before it, there was substantial evidence from which the commission reasonably could have determined that the plaintiffs failed to meet their burden of demonstrating that their application satisfied §§ 8.5.E.3 and 8.5.E.4 of the regulations. Thus, we conclude that the commission's decision to deny their application was not improper.[18]

II

Even though there was substantial evidence from which the commission reasonably could have concluded that their special permit application did not satisfy §§ 8.5.E.3 and 8.5.E.4 of the regulations, the plaintiffs nevertheless claim that the commission improperly failed to "consider [their] . . . application on its merits . . . ." The plaintiffs argue that, instead, the commission improperly denied their application on the basis of "its predisposition to keep a crematory out of [the park] regardless of whether the . . . application complied with the regulations" and "its conviction that it

[18] The plaintiffs also claim that the commission deprived them of their rights to due process and fundamental fairness because it "reli[ed] on the purported visibility of the crematory stacks" in denying their application, even though it declined the plaintiffs' invitation to "shoot a sight line measurement in all directions to determine if the stacks actually would be visible to the neighboring property owners, *if the commission felt this was necessary*." (Emphasis added.) We need not address this claim, however, because we conclude, for reasons other than the purported visibility of the crematory stacks, that there was substantial evidence in the record to support the commission's denial of the plaintiffs' application. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 427 ("[t]he [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given" (internal quotation marks omitted)).

had made a legislative misjudgment in adopting the [July, 2014] text amendment," which allowed for specially permitted uses of crematories in the town's two industrial zones.

In addressing this claim, we first set forth the relevant legal principles concerning an applicant's claim that a commission denied his or her special permit application on the basis of a predisposition or predetermination that it held rather than on the application's merits. In addressing this claim, we are mindful that "[t]he law does not require that members of zoning commissions must have no opinion concerning the proper development of their communities. It would be strange, indeed, if this were true. . . . The human mind . . . is no blank piece of paper. . . . Interests, points of view, preferences, are the essence of living. . . . An open mind, in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, [and] would be that of an utterly emotionless human being . . . ." (Citations omitted; internal quotation marks omitted.) *Cioffoletti* v. *Planning & Zoning Commission*, 209 Conn. 544, 555, 552 A.2d 796 (1989). If, however, "the commission acted with predisposition and predetermination, the commission's actions are capricious, unreasonable and illegal, and cannot be allowed to stand." *Marmah, Inc.* v. *Greenwich*, 176 Conn. 116, 123–24, 405 A.2d 63 (1978).

In addressing this claim, we also are mindful that a claim of predisposition or predetermination is difficult to prove. See R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 47:2, p. 35. Indeed, "[w]e presume that administrative [agency] members acting in an adjudicative capacity are not biased." *Simko* v. *Ervin*, 234 Conn. 498, 508, 661 A.2d 1018 (1995). To overcome this presumption and to prove a claim of predetermination, a claimant has the burden of proving that "the commissioners had made

up their minds that they were going to disapprove the plaintiffs' plan regardless of any evidence or argument presented at the public hearing." *Daviau* v. *Planning Commission*, 174 Conn. 354, 358, 387 A.2d 562 (1978); see also *Cioffoletti* v. *Planning & Zoning Commission*, supra, 209 Conn. 555 (burden of proving predetermination is on party advancing such claim). To satisfy this burden, a party claiming that a zoning commission denied his or her application on the basis of a predisposition may, pursuant to § 8-8 (k), move to supplement the administrative record in order to proffer evidence to the trial court in support of this claim. See *Marmah, Inc.* v. *Greenwich*, supra, 176 Conn. 121.

Although the plaintiffs raised a claim of predetermination in their Superior Court brief, they did not move to supplement the record to proffer evidence in support of their predetermination claim. Indeed, the only evidence in the record on which the plaintiffs rely relates to the timing of the commission's denial of their application, which closely followed its decision to repeal the July, 2014 text amendment allowing specially permitted uses of crematories in the town's two industrial zones. Specifically, the plaintiffs direct us to remarks made by certain commissioners during deliberative sessions of the commission,[19] as well as "[t]he interplay between

[19] In support of this argument, the plaintiffs generally direct us to "the remarks of the chair[person] during the deliberative sessions on the . . . application held on August 11, 2015 and September 8, 2015." Specifically, they direct us to the statements made by the chairperson and some commissioners during the September 8, 2015 session. During this session, the chairperson stated: "I think what we've been hearing—this most recent go around with this application is that not only are the neighbors concerned but the businesses in the [p]ark are concerned. And, we've had a lot information pro and con but, it's very difficult to separate that which is fact from that which is not because pretty much you could find anything on the Internet to support what your beliefs might be. And, is it going to be compatible with other businesses in the park? I don't believe it is—based on the feedback that you've had from businesses, who say they may leave the park. And, based on [a business owner's] purchase of his building at 1.2 million dollars, unfortunately not being told about the application, and who's made the decision that he is going to sell his business—his building. That's a great

the proceedings on the . . . application and the proceedings to delete the [July, 2014 text amendment] on which [the] application was predicated," "the weakness of the commission's reasons for denying the . . . application," and "the blatant inconsistency between its findings in July, 2014, that a crematory on the property is in character with the uses in the [industrial] zone and its opposite finding a little over a year later." Moreover, the plaintiffs direct our attention to our Supreme Court's decision in *Marmah, Inc.* v. *Greenwich*, supra, 176 Conn. 116, in support of their predetermination claim, even though they acknowledged in their reply brief to the Superior Court that *Marmah, Inc.*, is distinguishable from the present case "in some respects."

After describing the plaintiffs' arguments in support of their predetermination claim in its memorandum of decision, the court implicitly concluded that the commission did not deny their application on the basis of

concern and I think a number of them have pulled back on expansions and we have to—I feel that we have to take a look and say, 'is it worth the risk to lose businesses in the park?' And, the number that said they may leave because for me that's a huge economic drawback not only to Bethel but to the [p]ark and for that reason, I don't think it works and is compatible."

Following the chairperson's remarks, one commissioner opined that, by approving the application, the commission "would be doing the citizens of Bethel a disservice [by] tak[ing] [the] risk" of "possible adverse" impacts to business and residents caused by a crematory being located at the proposed site within the park. Another commissioner then pointed out that "there was just an abundance of material [presented to the commission when it considered the [application] and frankly none of [it] was available—I'm sure it was available but none of it was in front of us when we originally gave a decision to pass the [July, 2014] text amendment. None of the information was, (indiscernible), we did the best job that we could based on the information that we had at that time but, now I believe it's different, it's changed." Following this statement, another commissioner acknowledged that "we all were more or less in the same corners we are now," referencing the fact that, with the exception of the chairperson, the commissioners who voted to approve the July, 2014 text amendment also voted to approve the application, and the three commissioners who voted against the July, 2014 text amendment supported denial of the application.

a predisposition that it held.[20] We disagree with the plaintiffs that the commission predetermined the merits of their application.[21]

We first address the plaintiffs' reliance on our Supreme Court's decision in *Marmah, Inc.*, in which it concluded that the Greenwich Planning and Zoning Commission improperly had enacted a "zoning amendment . . . primarily for the purpose of [denying the plaintiff's site plan application, thus] preventing the plaintiff from going forward with its contemplated building project." *Marmah, Inc.* v. *Greenwich*, supra, 176 Conn. 123. In that case, our Supreme Court described "[t]he commission's overt consideration of the site plan [as] casual and perfunctory. The commission appeared to be favoring opponents of the application throughout the public meeting at which it was discussed. Representatives of the [plaintiff] were not permitted to question the representative capacity, or the technical credentials, of those who spoke or wrote in opposition to the application. There was no expert testimony about traffic, architectural design or building design, other than the approvals of [the plaintiff's] application by the defendant town's traffic department,

[20] To the extent the trial court's decision on this claim was ambiguous, the plaintiffs failed to move for an articulation pursuant to Practice Book § 66-5 to clarify its conclusion. This court has stated: "[I]t is axiomatic that the appellant must provide this court with an adequate record for review. . . . It is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal." (Citations omitted; internal quotation marks omitted.) *Breen* v. *Judge*, 124 Conn. App. 147, 161, 4 A.3d 326 (2010).

[21] Because the plaintiffs failed to supplement the record with evidence supporting their claim of predetermination and the Superior Court did not make any findings with respect to this claim, our consideration of this claim on appeal is limited to the arguments and evidence that they presented to the Superior Court.

architectural review board, and building department. Nonetheless, the commission voted to disapprove the site plan on the grounds of increased traffic and unsatisfactory parking layout, as well as the absence of a request for new facilities by the postal authorities." (Emphasis omitted.) Id., 118. In support of its conclusion that the "zoning amendment [at issue] was enacted primarily for the purpose of preventing the plaintiff from going forward with its contemplated building project"; id., 123; the court observed that the commission did not provide the plaintiff with a fair hearing on his site plan application and that none of the reasons that the commission provided for denying his site plan application were legitimate. Id., 118–19, 123; see also 9B R. Fuller, supra, § 47.2, p. 37.

Unlike *Marmah, Inc.*, in which deliberation over the plaintiff's site plan application was afforded one public hearing before being denied; *Marmah, Inc.* v. *Greenwich*, supra, 176 Conn. 122–23; the plaintiffs' application in the present case was afforded attention at four public hearings. Moreover, at these hearings and during its deliberative sessions, the commission entertained an immense amount of evidence and testimony.

In addition, contrary to the plaintiffs' assertion that the commission's reasons for denying their application were insufficient, the commission, in fact, authored a detailed resolution of denial in which it stated that it denied the plaintiffs' application, in part, because it did not satisfy §§ 8.5.E.3 and 8.5.E.4 of the regulations. Indeed, in part I of this opinion, we concluded that the commission's denial of the plaintiffs' application on the basis of these provisions in the regulations was supported by substantial evidence.

Furthermore, to the extent that the plaintiffs challenge the commission's authority to repeal a text amendment despite contrary findings that it made when

it adopted the amendment, this argument is meritless. Indeed, when a commission adopts or repeals a text amendment to a town's zoning regulations, it acts in its legislative capacity, and, when acting in this capacity, it is afforded immensely broad discretion. See *Morningside Assn.* v. *Planning & Zoning Board*, 162 Conn. 154, 157–58, 292 A.2d 893 (1972). When acting in a legislative capacity, a commission "must be relatively free to amend or modify its regulations whenever time and experience have demonstrated the need for a revision. [A commission], acting in a legislative capacity, [is], therefore, not bound by the general rule which would prohibit it from reversing an earlier decision without evidence of a change in conditions." (Citations omitted.) Id., 158.

Our Supreme Court has stated on many occasions that "courts cannot substitute their judgment for the wide and liberal discretion vested in local zoning authorities when they have acted within their prescribed legislative powers. . . . The courts allow zoning authorities this discretion in determining the public need and the means of meeting it, because the local authority lives close to the circumstances and conditions which create the problem and shape the solution. . . . Courts, therefore, must not disturb the decision of a zoning commission unless the party aggrieved by that decision establishes that the commission acted arbitrarily or illegally." (Citations omitted; internal quotation marks omitted.) *First Hartford Realty Corp.* v. *Planning & Zoning Commission*, 165 Conn. 533, 540–41, 338 A.2d 490 (1973).

In arriving at our conclusion that the commission's denial of the plaintiffs' application was not improper, we take this occasion to underscore the Superior Court's cogent observation that "[t]his appeal underscores the inevitable tension between a commission's legislative determination leading to the presumptive

compatibility of the use . . . and a subsequent administrative determination denying a special permit based upon the use adversely [affecting] the district. . . . The analysis is complicated in the current case by the stigma of the proposed use because it is a cremator[y]." (Citations omitted.) Indeed, a person seeking to operate a crematory on his or her property could, in response to a commission's finding that operating a crematory is "in character" with the uses in a zone in its *legislative capacity*, expend significant resources preparing a special permit application only for the commission subsequently to disallow the crematory when acting in its *administrative capacity*.

The question of regulatory authority for the siting of crematories, however, is an issue for our legislature to resolve. At the present time, our legislature has chosen to vest significant authority in local governments to determine whether to allow crematories in their municipalities. See General Statutes § 19a-320; *Urbanowicz* v. *Planning & Zoning Commission*, supra, 87 Conn. App. 291 n.10, 295. If our legislature determines, as a matter of policy, that there is a significant need for crematories statewide and the local zoning authorities are unduly hampering the ability to meet new demand, then, by statute, it can circumscribe the authority of the local governments and thereby not require those who wish to operate a crematory to seek approval from local planning and zoning commissions. Such a policy determination, however, is ill-suited for resolution in an appeal from a commission's denial of a special permit application.

The judgment is affirmed.

In this opinion the other judges concurred.

HSBC BANK USA, NATIONAL ASSOCIATION, TRUSTEE *v.* HOWARD I. GILBERT ET AL.
(AC 42599)

Alvord, Keller and Elgo, Js.

Syllabus

The plaintiff, which had been assigned a note secured by a mortgage on certain real property owned by the defendants, commenced this action to foreclose that mortgage. The defendants filed an answer, in which they admitted that they owned the property but denied that they were in default, and special defenses, alleging, inter alia, that the plaintiff had failed to provide them with proper notice of the acceleration of the debt. The plaintiff filed a motion for summary judgment as to liability only, claiming that there were no genuine issues as to any material fact alleged in its complaint and appended documentation that included an affidavit from R, a contract management coordinator with O Co., the plaintiff's mortgage loan servicer and holder of the note. R attested, inter alia, that the note and mortgage were in default and that notice of the default, a copy of which was attached as an exhibit to her affidavit, had been given to the defendants. During argument on the summary judgment motion, the plaintiff's counsel stated that, when the exhibit was electronically filed with the court, a scanning error occurred that resulted in the exclusion from the exhibit of certain documents necessary to demonstrate the plaintiff's compliance with the notice requirements of the mortgage. Thereafter, the defendants filed an objection to the plaintiff's summary judgment motion, asserting that genuine issues of material fact existed because R's affidavit did not comply with the applicable rule of practice (§ 17-46) and constituted inadmissible hearsay. The defendants alleged, inter alia, that R's affidavit did not identify which entity's business records she was familiar with and could testify to pursuant to *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC* (183 Conn. App. 128). The defendants further claimed that R's affidavit failed to establish that the plaintiff sent to them proper notice of the default and instructions to cure the default and a date by which the default had to be cured. Prior to argument on the summary judgment motion, the plaintiff filed a supplemental affidavit from H, a different contract management coordinator with O Co. H averred, inter alia, that she had personal knowledge of the transactions at issue and the manner in which the business records that related to the servicing of the defendants' mortgage loan were created. A copy of the notice of default was attached to H's affidavit. The trial court overruled the defendants' objection and granted the plaintiff's motion for summary judgment as to liability only. Thereafter, the court rendered judgment of foreclosure by sale, from which the defendants appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court erred in granting the plaintiff's motion for summary judgment because there was no evidence from which the court could have determined which of the two notices attached to the affidavits of R and H was sent to the defendants and that the existence of the two affidavits, one of which had a defective notice attached to it, created a genuine issue of material fact as to whether the defendants received proper notice of default and acceleration: the trial court declined to transform the consequence of a scanning error into a genuine issue of material fact, the plaintiff's counsel having explained at the hearing on the summary judgment motion that the documentation attached to the affidavits of R and H was intended to be the same and that R's affidavit was supplemented because important pages from the notice of default and acceleration were inadvertently excluded from R's affidavit because of the scanning error; moreover, the court did not err when it relied in part on the representations of the plaintiff's counsel as to facts that related to an error in conjunction with electronic filing, as it could not be said that counsel attempted to present testimony that concerned disputed facts related to the foreclosure action.
2. The trial court did not err in relying on the affidavits of R and H in granting the plaintiff's summary judgment motion, as the affiants' employment status with O Co. was sufficient to demonstrate that they were competent to aver to the facts contained in their affidavits, and there was no requirement in the law or the rules of practice that averments need to be supported by documentary evidence; moreover, the plaintiff submitted admissible evidence to the court that established that the loan was in default, that the plaintiff was the holder of the note and record holder of the mortgage, and that a valid notice of default and acceleration had been sent to the defendants, who offered no evidence to refute that showing.
3. This court found unavailing the defendants' claim that the trial court incorrectly rendered judgment of foreclosure, which was based on the defendants' assertion that the plaintiff's affidavit of debt did not comply with the holding of *Jenzack Partners, LLC*, because the affiant lacked personal knowledge as to the starting balance of the debt: the record did not suggest, as the defendants claimed, that the plaintiff relied on a hearsay source as to the starting balance of the defendants' debt, as the affiant attested that she relied on records of data compilations that related to the loan, there was no evidence that she relied on business records from a third party, and the defendants never raised a defense that was sufficient to prohibit the admission of the affidavit of debt pursuant to the applicable rule of practice (§ 23-18 (a)); moreover, even if Practice Book § 23-18 (a) was inapplicable, the defendants' reliance on *Jenzack Partners, LLC*, was unavailing, as our Supreme Court reversed in part this court's judgment in *Jenzack Partners, LLC*, and held that the entirety of the record of debt owed on a promissory note

was admissible under the business records exception to the hearsay rule when that record is maintained by the lender's assignee and incorporated into the initial business entry that the lender provided to the assignee.

Argued March 11—officially released September 22, 2020

Procedural History

Action to foreclose a mortgage on certain of the defendants' real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Genuario*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court rendered judgment of foreclosure by sale, from which the defendants appealed to this court. *Affirmed.*

James R. Winkel, for the appellants (defendants).

Marissa I. Delinks, for the appellee (plaintiff).

Opinion

KELLER, J. The defendants Howard I. Gilbert and Mary S. Gilbert[1] appeal from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, HSBC Bank USA, National Association, as Trustee for Fremont Home Loan Trust 2005-E, Mortgage-Backed Certificates, Series 2005-E. On appeal, the defendants claim that the court erred in granting the plaintiff's motion for summary judgment as to liability only (1) because the plaintiff failed to establish that there was no genuine issue of material fact as to whether it sent proper notice of default and acceleration to the defendants, (2) because the plaintiff's affidavits submitted to the court in support of the motion failed to satisfy the requirements of Practice Book § 17-46,

[1] Although they were also named as defendants, the Department of Revenue Services, and the United States Department of the Treasury, Internal Revenue Service, are not parties to this appeal.

Throughout this opinion we refer to Howard Gilbert and Mary Gilbert individually by name where necessary and collectively as the defendants.

and (3) despite the fact that the plaintiff's affiants failed to establish that they had personal knowledge of the facts that were the subject of the affidavits,[2] and that the court erred in rendering judgment of foreclosure by sale because the plaintiff's affidavit of debt was insufficient to demonstrate the amount of debt due on the subject note. We disagree and, thus, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to the resolution of this appeal. On November 7, 2005, Howard Gilbert executed a promissory note to Fremont Investment and Loan (Fremont) in the amount of $720,000. To secure his repayment of the loan, Howard Gilbert executed a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Fremont, on the property located at 245 Pepper Ridge Road in Stamford (property). The mortgage was recorded on the Stamford land records on November 14, 2005. On December 13, 2016, MERS, as nominee for Fremont, assigned the mortgage to the plaintiff.

Thereafter, on February 6, 2017, the plaintiff commenced this foreclosure action by seeking to foreclose that mortgage. Following an unsuccessful mandatory mediation, the plaintiff filed an amended complaint on August 22, 2018, alleging, inter alia, that the note and mortgage were in default for nonpayment of the monthly installments of principal and interest due on June 1, 2016, and anytime thereafter. On September 13, 2018, the defendants filed an answer and special defenses in which they admitted their ownership of the property and denied that they were in default. The defendants also alleged the following special defenses:

[2] The defendants' second and third claims raise materially similar issues concerning the affidavits and, thus, we consider them together in part II of this opinion.

(1) the plaintiff failed to provide proper notice of acceleration of the debt; (2) the plaintiff does not have standing to bring the action; (3) the plaintiff failed to plead properly the necessary elements for a foreclosure action; and (4) the plaintiff lacks the authority to prosecute the action.

On October 12, 2018, the plaintiff filed a motion for summary judgment as to liability, claiming that there was no genuine issue of material fact regarding the allegations in the complaint and, therefore, it was entitled to judgment as a matter of law. In support of its motion, the plaintiff argued that the defendants had admitted their ownership and possession of the premises, it is the party entitled to collect the debt to enforce the note and the mortgage, and the conditions precedent to foreclose the mortgage had been satisfied. Moreover, the plaintiff asserted that the defendants' special defenses do not preclude the entry of summary judgment because the plaintiff's affidavit affirmed that notice was sent and that the plaintiff had standing to bring the present action. Attached as exhibits to its motion were a copy of the mortgage and assignment to the plaintiff, the note, the notice of default, and an affidavit from Flora V. Rashtchy, a contract management coordinator of Ocwen Loan Servicing (Ocwen). In her affidavit, Rashtchy attested that Ocwen is the plaintiff's mortgage loan servicer and that, in her position, she was authorized to make the affidavit and had personal knowledge of the facts and matters in the document. She further attested that the note and mortgage on the property were in default as of June 1, 2016, that the plaintiff was entitled to collect the debt, and that the notice of default, a copy of which was attached as an exhibit to her affidavit, had been given to the defendants on July 27, 2016. According to the plaintiff's counsel, when the exhibit was electronically filed with the court, a scanning error occurred that resulted in

certain documents, necessary to demonstrate the plaintiff's compliance with the notice requirements of the mortgage, being excluded from the exhibit. Specifically, the exhibit failed to include a letter that identified the action required to cure the default and included only the amount due. Additionally, the exhibit failed to include a letter that (1) identified a date, not less than ten days from the date the notice was given to the defendants, by which the default must be cured, and (2) informed the defendants that failure to cure the default on or before the specified date in the notice may result in acceleration of the sums secured by the mortgage or the sale of the property. The exhibit also failed to include a letter that informed the defendants of their right to reinstate after acceleration and the right to assert in court the nonexistence of a default or any other defense against acceleration and foreclosure or sale.

Thereafter, the defendants filed an objection to the plaintiff's motion for summary judgment and argued that genuine issues of material fact existed because Rashtchy's affidavit did not comply with Practice Book § 17-46 and constituted inadmissible hearsay. Specifically, the defendants argued that the affidavit was insufficient because (1) it was not accompanied by other documentation to validate Rashtchy's claim that Ocwen is the plaintiff's loan servicer, (2) it failed to establish that she was competent to attest to the matters set forth in her affidavit, and (3) it did not identify which entity's particular business records she was familiar with and could testify to, pursuant to *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 192 A.3d 455 (2018), rev'd in part, 334 Conn. 374, 222 A.3d 950 (2020). Last, the defendants argued that the court should not render summary judgment in this matter because Rashtchy's affidavit failed to establish that the plaintiff sent notice of default that was compliant

with the notice requirements of the mortgage, the plaintiff failed to provide instructions that explained the action that was required to cure the default, and the plaintiff failed to provide a date by which the default had to be cured.

On December 5, 2018, the plaintiff filed a supplemental affidavit in support of its motion for summary judgment signed by Anel Hernandez, a different contract management coordinator with Ocwen. Like Rashtchy, Hernandez attested that Ocwen is the plaintiff's mortgage loan servicer, that she was authorized to make the affidavit, and that she had personal knowledge of the facts and matters stated in the affidavit. Hernandez further attested that, in the regular performance of her job responsibilities, she "has access to and [is] familiar with the business records . . . relating to the servicing of the mortgage loan at issue in this foreclosure action . . . ." Additionally, she attested that she had personal knowledge of the transactions at issue and the manner in which the business records were created. She also reiterated that the note and mortgage were in default as of June 1, 2016, that the plaintiff was entitled to collect the debt, and that notice of default, a copy of which was attached to the affidavit as exhibit A-2, had been given to the defendants on July 27, 2016.

On December 10, 2019, the court held a hearing on the plaintiff's motion for summary judgment. In support of its position, the plaintiff reiterated its argument that the two affidavits satisfied the business record exception to the hearsay rule. See General Statutes § 52-180; Conn. Code Evid. § 8-4 (a). The plaintiff's counsel, in arguing the motion, also explained that, when the plaintiff first submitted Rashtchy's affidavit, "there was some kind of scanning error" and that the plaintiff submitted the second affidavit in order to provide a more complete record of the notice sent to the defendants. In response,

the defendants argued that the filing of the second affidavit raised an issue of fact because the second affidavit failed to explain why the first affidavit was not accurate.

In granting the plaintiff's motion for summary judgment, the court order stated that, "[t]he motion for summary judgment having been heard, it is hereby found that no genuine issue of material fact as to liability or damages exists. . . . [Howard Gilbert] in his objection raises two important issues. The first relates to the admissibility of the plaintiff's affidavit under the business records rule. The defendant claims that the affidavit contains inadmissible hearsay, and the defendant may have a valid point based on the holding in *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, [supra, 183 Conn. App. 128]. However, parts of the affidavit, and particularly those parts necessary to establish the default, are admissible under the business records rule. The affidavit includes statements by the affiant that [Howard Gilbert] has failed to make payments each and every month in breach of his obligations under the note up until the present time. The affiant is an employee of the current servicer of the loan and familiar with those current records. The affidavit establishes her familiarity with the current business records and that they were made in the ordinary course of business of the affiant's employer. That is sufficient to establish that [Howard Gilbert] is in default and has been since the current servicer acquired its responsibilities. [Howard Gilbert] has offered nothing to contradict the evidence that he is in default. This is a motion for summary judgment as to liability only, and the issue of the precise amount the defendant owes is therefore beyond the scope of this motion. The reasonable hearsay issues raised by defense counsel relate to the precise amount owed and the admissibility of that conclusion contained in the affidavit based on information that may have been provided to the current servicer, which as yet may

not comply with the business records rule. However, based on the clearly admissible portions of the affidavit and [Howard Gilbert's] failure to rebut the same, there is no genuine issue of material fact that [he] is in default.

"The second issue [Howard Gilbert] raises is the issue of compliance with the provisions of the loan documents requiring notice of default, notice of acceleration, and notice of how to cure the default. In its supplemental affidavit, filed on December 5, 2018, the plaintiff provided by way of affidavit a copy of the notice it had sent to [Howard Gilbert]. That notice complies with the requirements of the loan documents. At oral argument, [Howard Gilbert] did not request additional time to respond to the December 5 affidavit. That affidavit and its exhibits [establish] that there is no genuine issue of material fact . . . concerning compliance with the applicable notice provisions. Accordingly, the motion for summary judgment as to liability only [is granted]. The plaintiff is on notice, however, that in moving for final judgment it must submit evidence (whether by affidavit or testimony) that complies with the holding of *Jenzack Partners, LLC*."

Following the granting of the plaintiff's motion for summary judgment, the defendants filed a motion for reconsideration, arguing that the court "failed to address the genuine issue of material fact as to the [two] different notices of default which [were] offered as true and accurate copies of the notices sent [to] the defendants." The plaintiff objected to the motion. On January 16, 2019, the court denied the defendants' motion, stating that "[t]he revised affidavit provides all the necessary elements to support the entry of summary judgment, and the defendants have provided nothing to rebut the facts and exhibits set forth in that affidavit. Nor [have] the [defendants] provided anything to rebut the quite credible statement of [the] plaintiff that the difference between the exhibit attached to the original affidavit

and the revised affidavit was the result of anything other than a scanning/clerical error. To suggest that a clerical error cannot be corrected in a revised affidavit is to exalt form over substance. Nor in requesting reargument [have] the [defendants] provided anything meaningful to cast doubt on the statement of the plaintiff that the revision was filed to correct a clerical error." Following the court's denial of the defendants' motion for reconsideration, the plaintiff submitted a preliminary statement of debt, a foreclosure worksheet, an affidavit of debt, an oath of appraisers, and an appraisal. Thereafter, the court rendered judgment of foreclosure by sale.[3] This appeal followed.

I

The defendants first claim that the court erred in granting the motion for summary judgment because the plaintiff failed to establish that there was no genuine issue of material fact as to whether it sent proper notice of default and acceleration to the defendants. Specifically, the defendants claim that a genuine issue of material fact existed because, when the plaintiff filed the supplemental affidavit, the court, in effect, had before it inconsistent affidavits that were executed by two different employees of Ocwen authenticating different notices of default and acceleration, one of which was clearly defective. Additionally, the defendants argue

[3] In the interest of procedural clarity, it necessary to set forth some additional procedural history. On July 10, 2017, the plaintiff filed a motion for a judgment of strict foreclosure. On July 14, 2017, the defendants filed an objection to the plaintiff's motion for a judgment of strict foreclosure on the ground that it was premature because no default or summary judgment had been rendered against the defendants, and the defendants were participating in mediation. The court sustained the defendants' objection on the ground that the plaintiff's motion for a judgment of strict foreclosure was premature. It was not until after the court granted the plaintiff's motion for summary judgment and the plaintiff submitted the necessary foreclosure documents previously mentioned that the court rendered judgment of foreclosure by sale.

that the trial court incorrectly relied on the statement of the plaintiff's counsel explaining the clerical error rather than on evidence. We disagree.

We begin with our standard of review. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material fact which, under applicable principles of substantive law, entitle him to judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . This court's review of a trial court's decision to grant a motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Caldrello*, 192 Conn. App. 1, 19, 219 A.3d 858, cert. denied, 334 Conn. 905, 220 A.3d 37 (2019).

The defendants argue that summary judgment should not have been rendered because a genuine issue of material fact existed. Specifically, they claim that because there was no evidence from which the court could have determined which of the two notices was sent to the defendants, the existence of the two affidavits, one of which attached a defective notice, created a genuine issue of material fact as to whether the defendants ever

received proper notice of default and acceleration. The plaintiff's attorney, however, explained to the court at the hearing on the motion for summary judgment that the documentation attached to the first affidavit and to the second affidavit was intended to be the same, that the first affidavit was supplemented because a scanning error had occurred when he electronically filed the documentation with the court, and that the scanning error caused the inadvertent exclusion of important pages from the notice of default and acceleration. Additionally, the plaintiff reiterated this scanning error in its objection to the defendants' motion to reargue, explaining that the two affidavits attach "the same exact letter with identical tracking information, except that the second [affidavit] does not have the same error in scanning." (Emphasis omitted.) The supplemental affidavit of Hernandez, provided by the plaintiff, was properly before the court, and it showed that the plaintiff sent all of the necessary information prior to the commencement of the foreclosure action. As the trial court stated, "[t]o suggest that a clerical error cannot be corrected in a revised affidavit is to exalt form over substance." Like the trial court, we decline the defendants' invitation to transform the consequence of a scanning error incident to filing an affidavit into a genuine issue of material fact under the circumstances of this case.

Additionally, the defendants claim that the court erred in granting the plaintiff's motion for summary judgment because it based its determination as to whether the defendants were provided with a proper notice of default and acceleration, in part, on statements of the plaintiff's counsel during the December 10, 2018 hearing on the motion for summary judgment, rather than on evidence, in making its determination. Specifically, the defendants argue that the court committed reversible error when it relied on a statement made by the plaintiff's counsel to the

court that "there was some kind of scanning error" because that statement was not admissible evidence. The defendants argue that the court could not rely on this statement because the plaintiff's counsel was not under oath, the statement did not constitute evidence, and the plaintiff's counsel failed to establish that he had personal knowledge as to why two different notices of default were provided to the court. Our precedent, however, undermines the defendants' argument. "[I]t long has been the practice that a trial court may rely upon certain representations made to it by attorneys, who are officers of the court and bound to make truthful statements of fact or law to the court." (Internal quotation marks omitted.) *Maio* v. *New Haven*, 326 Conn. 708, 729, 167 A.3d 338 (2017); see also *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 132–33, 74 A.3d 1225 (2013) (reliance on counsel's representation was proper because counsel is officer of court); *Certo* v. *Fink*, 140 Conn. App. 740, 752–53, 60 A.3d 372 (2013) (trial court properly relied on representations of plaintiff's counsel that he provided defendant with requested documents). Here, it cannot be said that counsel, by means of his representations, was attempting to present testimony concerning disputed facts related to the action but, rather, counsel was presenting facts related to an error that occurred during the litigation itself, in conjunction with electronic filing. In consideration of applicable precedent, we conclude that the trial court did not err when it relied, in part, on the statement of the plaintiff's counsel in granting the motion for summary judgment.

II

The defendants next claim that the trial court erred in granting the plaintiff's motion for summary judgment because the plaintiff's affidavits failed to satisfy the requirements of Practice Book § 17-46. Specifically, the defendants argue that the affidavits failed to satisfy the business records exception to the hearsay rule because neither affiant worked for the plaintiff; the original note

owner, Fremont; or the original mortgage holder, MERS. The defendants argue, moreover, that the affiants did not provide any documentation to prove that they were authorized to testify for the plaintiff, that they were competent to testify, or that they had personal knowledge of the facts contained in their affidavits. Essentially, the defendants argue that the court, in granting the motion for summary judgment, relied on inadmissible evidence. We disagree.

In part I of this opinion, we set forth the standard of review governing a trial court's granting of a motion for summary judgment. "Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § 17-46 provides in relevant part that affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . See, e.g., *12 Havemeyer Place Co., LLC* v. *Gordon*, 93 Conn. App. 140, 157, 888 A.2d 141 (2006) (explaining that affidavit [that] does not contain admissible evidence as required by our rules of practice . . . is therefore insufficient to oppose a motion for summary judgment). Moreover, affidavits must be accompanied by [s]worn or certified copies of all papers or parts thereof referred to in an affidavit . . . . Practice Book § 17-46.

"Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . Unless subject to an exception, hearsay is inadmissible. . . . If the proffered evidence consists of business records, the court must determine whether the documents satisfy the modest requirements under § 52-180 to admit them under the business records exception to the hearsay rule." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 655, 137 A.3d 1 (2016).

"To admit evidence under the business record exception to the hearsay rule, a trial court judge must first find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was in the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . To qualify a document as a business record, the party offering the evidence must present a witness who testifies that these three requirements have been met." (Internal quotation marks omitted.) Id., 656. Additionally, "business records may be authenticated by the testimony of one familiar with the books of the concern, such as a custodian or supervisor, who has not made the record or seen it made, that the offered writing is actually part of the records of business." (Internal quotation marks omitted.) *Customers Bank* v. *Tomonto Industries, LLC*, 156 Conn. App. 441, 450, 112 A.3d 853 (2015).

In support of its motion for summary judgment, the plaintiff submitted certified copies of the mortgage and the assignment to the plaintiff. Additionally, the plaintiff submitted an affidavit from Rashtchy, a contract management coordinator of Ocwen. In her affidavit, Rashtchy averred that she is authorized to make the affidavit, that she is familiar with the business records maintained by the plaintiff, which records were made and are maintained in the regular and usual course of business, that she had personal knowledge of the manner in which the records are created, and that she had reviewed and relied on the records in making her affidavit. More specifically, Rashtchy stated that, on November 7, 2005, the defendants owed Fremont $720,000 plus interest as evidenced by a promissory note. She further stated that, prior to the commencement of this foreclosure action,

the plaintiff became the party entitled to collect the debt evidenced by the note and is the party entitled to enforce the mortgage securing the debt. She explained that the unpaid balance of the note was $217,786.82 plus interest from May 1, 2016, which increased the principal balance to a total of $496,300. As a consequence of nonpayment, Rashtchy explained, the note and mortgage were in default and the plaintiff had exercised its option to declare the entire balance of the note due. Last, Rashtchy stated that notice of default was given to Howard Gilbert on July 27, 2016, and that the default was not cured. The second affidavit, attested to by Hernandez, set forth the same information in substance as was set forth in Rashtchy's affidavit.

After a careful review of the affidavits, we conclude that the affiants' employment status with Ocwen, which was the servicer of the loan and holder of the note endorsed in blank, was sufficient to demonstrate that they were competent to aver to the facts contained in their affidavits—there is no requirement in the law or the rules of practice that averments need to be supported by documentary exhibits attached thereto. Therefore, we conclude that the plaintiff submitted admissible evidence to the court that established that the loan was in default, that the plaintiff is the holder of the note and the record holder of the mortgage, that a valid notice of default and acceleration was sent to the defendants, and that the defendants have offered no evidence to refute this showing. Accordingly, the trial court did not err in relying on the affidavits in granting the motion for summary judgment.

III

Finally, the defendants argue that the court incorrectly rendered judgment of foreclosure because the plaintiff's affidavit of debt did not comply with the holding in *Jenzack Partners, LLC* v. *Stoneridge Associates*,

LLC, supra, 183 Conn. App. 128. Specifically, the defendants contend that the affidavit of debt that the plaintiff submitted in support of the judgment of foreclosure was inadmissible hearsay because the starting balance of the debt was provided by an entity other than Ocwen, and, thus, the affiant had no personal knowledge as to the starting balance.[4] In response, the plaintiff argues that judgment of foreclosure was correctly rendered pursuant to Practice Book § 23-18. We agree with the plaintiff.

The following facts and procedural history are necessary for the resolution of this issue. On January 24, 2019, the plaintiff submitted an affidavit of debt. The affiant for the affidavit of debt, Rashtchy, attested that she was a contract management coordinator of Ocwen, the loan servicer for the plaintiff, and that, as such, she is authorized to make the affidavit, that she is familiar with the business records maintained by the plaintiff, which records were made and are maintained in the regular and usual course of business, that she had personal knowledge of the manner in which the records are created, and that she had reviewed and relied on the records in making her affidavit.

Thereafter, on January 28, 2019, the court heard argument on the plaintiff's motion for a judgment of strict foreclosure. During the hearing, counsel for the defendants argued that the motion for a judgment of foreclosure should not proceed because the affidavit of debt provided to the court by the plaintiff was "insufficient" and cited to *Jenzack Partners, LLC*. The defendants, in support of their argument, explained that the court, in granting the plaintiff's motion for summary judgment,

[4] The defendants' argument, however, presumes that the affiant relied on documentation from a third party in calculating the starting balance of the note. That presumption, however, is not supported by evidence in the record. We will present in this opinion a more robust discussion of this point.

had stated that *Jenzack Partners, LLC*,[5] was applicable to the matter but that there was enough evidence for the court to find default. The court, however, further stated that the plaintiff would have to satisfy the requirements of *Jenzack Partners, LLC*, in order to foreclose the mortgage. On the basis of the court's statement, counsel for the defendants argued that the affidavit of debt is essentially the same affidavit provided to the court during the summary judgment phase, and, thus, the information necessary for the court to render judgment of foreclosure remained insufficient. In response, the plaintiff argued that the requirements of *Jenzack Partners, LLC*, are inapplicable in the present matter. Additionally, the plaintiff argued that the present circumstances are similar to the circumstances in *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 484, 166 A.3d 670 (2017), and, thus, the affidavit of debt is admissible pursuant to Practice Book § 23-18. In support of its position, the plaintiff noted that the defendants have not contested the amount of the debt, and, rather, have merely stated that the affidavit of debt is insufficient—which is inadequate to overcome the *Chainani* requirements. Thereafter, the court reviewed the original note, the original mortgage, and the certified assignment, and found that the plaintiff is the holder

[5] In *Jenzack Partners, LLC*, the plaintiff presented a witness at trial to establish the amount of the debt due on the note. *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 183 Conn. App. 141. The witness admitted during voir dire that his knowledge of the starting balance due on the note, as reflected in the exhibit the plaintiff was trying to introduce into evidence, came from data provided by the prior lender when the plaintiff purchased the loan. Id. The trial court admitted the exhibit over the defendant's hearsay objection. Id., 140–41. The Appellate Court reversed in part the judgment of strict foreclosure, finding that a business record introduced as evidence to establish the starting balance of the debt due on a note, which the testifying witness acknowledged was made on records received, rather than made, failed to satisfy § 52-180 and was inadmissible hearsay. Id., 143. We will present in this opinion a fuller discussion of *Jenzack Partners, LLC*.

of the note and the assignee of the mortgage. Additionally, the court found that the affidavit of debt complied with Practice Book § 23-18 (a).

We begin with the standard of review. "A trial court's decision to admit evidence, if premised on a correct view of the law . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made a *legal determination* that a particular statement . . . is subject to a hearsay exception . . . is it [then] vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, supra, 163 Conn. App. 653. "Therefore, a trial court's legal determination of whether Practice Book § 23-18 (a) applies is a question of law over which our review is plenary." *Bank of America, N.A.* v. *Chainani*, supra, 174 Conn. App. 484.

Practice Book § 23-18 provides in relevant part: "(a) In any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto. . . ."

Additionally, our case law is clear that "a defense challenging the amount of the debt must be actively made in order to prevent the application of [Practice Book] § 23-18 (a). [A] mere claim of insufficient knowledge as to the correction of the amount stated in the affidavit of debt is not a defense for purposes of [§ 23-18 (a)]. . . .

"A defense, however raised, must be squarely focused on the amount of the debt rather than other matters that are ancillary to the amount of the debt, such as whether the loan is in default, which is a matter of liability, or challenges that attack the credibility of the affiant or defects in the execution of the affidavit itself. . . .

"The pleadings that the defendant characterizes as challenges to the amount of the debt simply are not defenses to the amount of the debt. Regarding [a] claim of insufficient knowledge to admit or deny the amount of the debt, the case law is clear that this is not a defense to the debt sufficient to bar application of Practice Book § 23-18 (a)." (Citations omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Chainani*, supra, 174 Conn. App. 486–87.

The defendants' claim is unpersuasive. The defendants, in their brief, argue that the plaintiff improperly relied on a hearsay source, but they do not identify this alleged hearsay source. Moreover, the record does not suggest that the plaintiff relied on a hearsay source. In the affidavit of debt submitted by the plaintiff, the affiant attested that she relied on records of data compilations of transactions that related to the loan, which very well may be the plaintiff's own records. There is no evidence in the record that the affiant relied on business records from a third party. Moreover, the defendants never raised a defense to the amount of the debt sufficient to prohibit the admission of the affidavit of debt under Practice Book § 23-18 (a). As *Chainani* explained, an answer of insufficient knowledge is not a sufficient defense that would bar the application of § 23-18 (a). See *Bank of America, N.A.* v. *Chainani*, supra, 174 Conn. App. 487. Accordingly, we conclude that the court did not err in its legal determination that the requirements of § 23-18 (a) apply as an exception to the hearsay rule in this case.

In the event, however, that the requirements of Practice Book § 23-18 (a) did not apply as an exception to the hearsay rule, such information would be admissible pursuant to *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 222 A.3d 950 (2020). In the defendants' principal brief, they argue that the affidavit of debt submitted by the plaintiff to support the judgment of foreclosure was inadmissible hearsay because the starting balance of the debt was provided by an entity other than Ocwen, and, thus, the affiant had no personal knowledge of the starting balance. Our Supreme Court, however, has since reversed in part the judgment of the Appellate Court in *Jenzack Partners, LLC*, supra, 183 Conn. App. 128. Specifically, contrary to this court's holding, on which the defendants rely, our Supreme Court held in *Jenzack Partners, LLC*, that the record of debt owed on the promissory note, which was maintained by the lender's assignee and incorporated into the initial business entry that the lender had provided to the assignee, was admissible under the business records exception to the hearsay rule.[6] *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 388–90. Our Supreme Court provided its rationale pertaining to the reliability of the information, and it stated that, "[b]y relying on information from a third party, an entity stakes not only its livelihood on the accuracy of the information received but also its reputation as being a trustworthy entity with which to do business in the future." Id., 392.

In the event that the plaintiff relied on the starting balance of the debt from a third party and incorporated the amount due on the note into its business

[6] "If part of the data was provided by another business, as is often the case with loan records in connection with the purchase and sale of debt, the proponent does not have to lay a foundation concerning the preparation of the data it acquired but must simply show that these data became part of its own business record as part of a transaction in which the provider had a business duty to transmit accurate information." *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 391.

records, our Supreme Court in *Jenzack Partners, LLC*, explained that the incorporation of those documents is sufficient to establish that the entirety of the plaintiff's record of debt owed on the note, including the initial entry, is admissible as a business record.

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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MEMORANDUM DECISIONS

LAWRENCE RUSCOE *v.* COMMISSIONER OF CORRECTION (AC 42434)

Bright, C. J., and Suarez and Lavery, Js.

Submitted on briefs September 9—officially released September 22, 2020

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

Per Curiam. The judgment is affirmed.

IN RE ELIZABETH W. ET AL. (AC 43905)

Alvord, Alexander and Harper, Js.

Argued September 9—officially released September 22, 2020

Respondent father's appeal from the Superior Court in the judicial district of Waterbury, Juvenile Matters, *Hon. William T. Cremins*, judge trial referee.

Per Curiam. The judgments are affirmed.

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Negligence; premises liability; business invitee; whether trial court properly imposed liability on defendant under mode of operation rule enunciated in Kelly v. *Stop & Shop, Inc.* (281 Conn. 768), where boxes fell off shelf in defendant's store and struck plaintiff; whether evidence was sufficient to establish that affirmative act on part of defendant caused boxes to fall on plaintiff.

HSBC Bank USA, National Assn. *v.* Gilbert 335
Foreclosure; whether trial court erred in granting motion for summary judgment as to liability; claim that genuine issue of material fact existed as to whether defendants received proper notice of default and acceleration of note; claim that trial court erred when it relied in part on representations of counsel as to facts related to error in conjunction with electronic filing; claim that trial court erred in relying on plaintiff's affidavits in support of motion for summary judgment; claim that plaintiff's affidavit of debt did not comply with holding of Jenzack Partners, LLC *v.* Stoneridge Associates, LLC *(183 Conn. App. 128), because affiant lacked personal knowledge as to starting balance of debt.*

In re Elizabeth W. (Memorandum Decision) 901

Maldonado *v.* Flannery 1
Negligence; personal injury; damages; motion for additur; claim that trial court abused its discretion in granting plaintiffs' joint motion for additurs; failure of trial court to identify part of trial record that supported its conclusion that jury's failure to award noneconomic damages was unreasonable; whether jury reasonably could have determined that plaintiffs failed to prove any noneconomic damages for pain and suffering.

McLoughlin *v.* Planning & Zoning Commission 307
Zoning; appeal from decision of defendant planning and zoning commission denying plaintiffs' application for special permit to construct crematory in industrial zone; claim that Superior Court improperly concluded that there was substantial evidence in record to support commission's denial of application; claim that commission improperly failed to consider special permit application on merits; whether commission predetermined its denial of application.

Pentland *v.* Commissioner of Correction 296
Habeas corpus; whether habeas court properly dismissed petition for writ of habeas corpus for lack of subject matter jurisdiction; whether petitioner was in custody at time he filed habeas petition; claim that sentences petitioner was serving and sentence on convictions he had completed when he filed habeas petition should be treated as consecutive sentences under Garlotte *v.* Fordice *(515 U.S. 39) for purpose of advancing his release date.*

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

Sosa *v.* Robinson 264
Alleged deprivation of plaintiff's federal constitutional rights; whether trial court erred when it dismissed for lack of subject matter jurisdiction counts of complaint that sought compensatory relief against defendant correctional institution employee in his individual capacity; whether defendant was entitled to summary judgment on count of complaint that alleged retaliation where plaintiff failed to submit evidence to create genuine issue of material fact that there was causal connection between his protected first amendment activity and adverse employment action; whether plaintiff failed to demonstrate existence of genuine issue of material fact as to defendant's discriminatory intent where plaintiff's prior termination from job as commissary line worker constituted legitimate, nondiscriminatory reason for denial of his application for employment in commissary; whether plaintiff's takings claim failed as matter of law where plaintiff neither alleged nor submitted any evidence regarding appropriation of property or any evidence of unconstitutional taking.

State *v.* Curet 13
Possession of narcotics with intent to sell; motion to suppress; whether trial court properly denied defendant's motion to suppress; whether trial court properly concluded that search was lawful under exigent circumstances exception to warrant requirement; whether trial court properly concluded that search was justified under emergency doctrine.

State *v.* Syms 55
Motion to correct illegal sentence; robbery in first degree; conspiracy to commit robbery in first degree; unpreserved claim that trial court violated defendant's rights to due process when it accepted his guilty pleas without advising him that sentence could run consecutively to unrelated sentence he was then serving; claim that combination of sentence of incarceration followed by special parole violated federal prohibition against double jeopardy.
Stilkey *v.* Zembko 165
Statutory theft; whether trial court abused its discretion in applying continuing course of conduct doctrine; whether trial court was within its discretion to determine that no party was prejudiced by lapse in pleading specific statute of limitations or continuing course of conduct doctrine; claim that trial court improperly concluded that continuing course of conduct doctrine tolled statute of limitations; claim that trial court's findings that plaintiff had no knowledge of defendant's actions and had not consented to or authorized them were clearly erroneous.

NOTICES

Notice of Reinstatement of Attorney

As Henry J. Kelston has paid the Client Security Fund Fee, notice is hereby given that on June 15, 2020 he has been reinstated to the bar pursuant to Connecticut Practice Book Section 2-70(b).

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of August 3, 2020:

Steven Andrew Hobbs	Financial Accounting Foundation
Ilene K. Kobert	Franchise World Headquarters, LLC

Certified as of August 5, 2020:

Adam Brian Felsenthal	Great Point Partners, LLC

Certified as of August 10, 2020:

Aniosca Cortinas	Hartford Healthcare
Bobbi-Sue Doyle-Hazard	NBC Sports
Kristen M. Wickham	Deloitte

Certified as of August 14, 2020:

Dalmau Garcia	Victoria Capital Partners Services Co.

Certified as of August 17, 2020:

Jeffrey Lawrence Adams	Unitedhealthcare, Inc.
Susanne Marie Muller	UBS AG
Jose Mauricio Recio	Collins Aerospace
Cristina Maria Ana Richards	The Milestone Aviation Group, LLC
Seth Wolkofsky	W.J. Deutsch & Sons Ltd.

Certified as of August 18, 2020:

Valerie Ann Campbell	Charter Communications, Inc.
Jeffrey Adam Gershowitz	Edgewell Personal Care Co.

Hon. Patrick L. Carroll III
Chief Court Administrator