CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXII No. 14 October 6, 2020 199 Pages

Table of Contents

CONNECTICUT REPORTS

Davis *v.* Commissioner of Correction (Order), 335 C 948 6
Kammili *v.* Kammili (Order), 335 C 947 5
Maselli *v.* Regional School District Number 10 (Order), 335 C 947 5
Semac Electric Co. *v.* Skanska USA Building, Inc. (Orders), 335 C 945 3
Stanley *v.* Commissioner of Correction (Order), 335 C 946 4
State *v.* Dyous (Order), 335 C 948. 6
State *v.* Joseph V. (Order), 335 C 945. 3
Summit Saugatuck, LLC *v.* Water Pollution Control Authority (Order), 335 C 944 2
Wells Fargo Bank, N.A. *v.* Melahn (Order), 335 C 947 5
Summit Saugatuck, LLC *v.* Water Pollution Control Authority (Order) (replacement pages), 334 C 915–16. v
Volume 335 Cumulative Table of Cases 7

CONNECTICUT APPELLATE REPORTS

Dempsey *v.* Cappuccino, 200 CA 653 . . . . . 101A
Child custody; mootness; claim that trial court improperly permitted defendant to have unsupervised visits with minor child and failed to find that defendant had substance abuse issues; whether subsequent trial court order rendered appeal moot; whether plaintiff failed to adequately brief claim regarding order of joint custody.
Deutsche Bank National Trust Co. *v.* Pototschnig, 200 CA 554 . . . . . 2A
Foreclosure; standing; whether trial court properly determined that plaintiff had standing to bring foreclosure action; claim that trial court failed to accord res judicata and collateral estoppel effect to New York court decision; claim that trial court erred in failing to consider whether trust for which plaintiff is trustee ever received note and mortgage; whether trial court abused its discretion in making certain evidentiary rulings.
Deutsche Bank National Trust Co. *v.* Shivers (Memorandum Decision), 200 CA 903 . . . 171A
Goody *v.* Bedard, 200 CA 621 . . . . . 69A
Negligence; premises liability; motion for extension of time; summary judgment; claim that trial court abused its discretion in effectively denying plaintiff's third motion for extension of time to respond to defendant's motion for summary judgment; claim that trial court improperly granted motion for summary judgment; whether trial court erred in determining that there was no disputed issue of material fact that defendant did not owe duty of care to decedent.
Jackson *v.* Yale University (Memorandum Decision), 200 CA 902 . . . . . 170A
Larmel *v.* Metro North Commuter Railroad Co., 200 CA 660 . . . . . 108A
Negligence; accidental failure of suit statute (§ 52-592 (a)); motion to dismiss; arbitration (§ 52-549u et seq.); claim that trial court failed to hold that plaintiff's action was viable pursuant to § 52-592 (a); whether Nunno *v.* Wixner *(257 Conn. 671) was controlling.*
Lepeska *v.* Commissioner of Correction (Memorandum Decision), 200 CA 903 . . . . . 171A
Marshall *v.* Marshall, 200 CA 688 . . . . . 136A
Dissolution of marriage; whether trial court acted within scope of this court's remand order when it used methodology of reasonable compensation to determine plaintiff's pre-tax income in context of effectuating parties' separation agreement; whether trial court erred when it used plaintiff's reasonable compensation to determine his alimony obligation; claim that this court's previous determination

(continued on next page)

that alimony calculation was to be made using pre-tax income was law of case; whether trial court improperly considered plaintiff's argument, which he did not advance in prior proceedings, that alimony obligation should be based on his reasonable compensation; whether trial court's determination of plaintiff's pre-tax income on basis of his reasonable compensation was clearly erroneous; whether trial court improperly modified alimony retroactively for period of four years prior to plaintiff's motion to modify alimony.

Schuler *v.* Commissioner of Correction, 200 CA 602 . . . . . 50A

Habeas corpus; ineffective assistance of counsel; whether habeas court abused its discretion in denying petition for certification to appeal from judgment denying petition for writ of habeas corpus because certification to appeal form contained no specified grounds for appeal; claim that habeas court reasonably should have concluded that petitioner intended to appeal from denial of ineffective assistance of counsel claim; whether habeas court improperly denied claim of ineffective assistance of counsel.

Speer *v.* Skaats (Memorandum Decision), 200 CA 903 . . . . . 171A

State *v.* Byrne (Memorandum Decision), 200 CA 902 . . . . . 170A

State *v.* Freddy T., 200 CA 577 . . . . . 25A

Risk of injury to child; sexual assault in first degree; whether trial court abused its discretion by admitting into evidence portions of video recording of social worker's forensic interview with child; claim that forensic interview did not meet requirements of medical diagnosis and treatment exception to rule against hearsay as set forth in provision of Code of Evidence (§ 8-3 (5)).

State *v.* Robert B., 200 CA 637 . . . . . 85A

Unlawful restraint in first degree; breach of peace in second degree; whether defendant's claim that his rights to due process and fair trial were violated when witness testified as to defendant's prior bad acts and arrests was preserved and of constitutional magnitude; claim that defendant was denied fair trial due to prosecutorial impropriety; whether defendant's unpreserved claim that trial court erred by failing to instruct jury on lesser included offense of unlawful restraint in second degree was waived.

Volume 200 Cumulative Table of Cases 173A

NOTICES OF CONNECTICUT STATE AGENCIES

Notice of Intent to Amend Connecticut Green Bank 1B

(continued on next page)

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

RICHARD J. HEMENWAY, *Publications Director*

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

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

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

MISCELLANEOUS

Notice of Reprimand of Attorneys 1C

STATE OF CONNECTICUT *v.* KENYON JOSEPH

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 684 (AC 41379), is denied.

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

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

Decided January 8, 2020

CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION

The petitioner Chrysostome Kondjoua's petition for certification to appeal from the Appellate Court, 194 Conn. App. 793 (AC 41930), is denied.

Jennifer B. Smith, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided January 8, 2020

STATE OF CONNECTICUT *v.* LASHAWN R. CECIL

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 446 (AC 42097), is denied.

Christopher Y. Duby, assigned counsel, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided January 8, 2020

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

The defendant Shlomit Ruttkamp's petition for certification to appeal from the Appellate Court (AC 42865) is dismissed.

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

Benjamin T. Staskiewicz, in opposition.

Decided January 8, 2020

[Space Intentionally Blank]

[Page Intentionally Blank]

SUMMIT SAUGATUCK, LLC *v.* WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF WESTPORT*

The plaintiff's petition for certification to appeal from the Appellate Court, 193 Conn. App. 823 (AC 41949), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that the trial court had improperly substituted its own judgment for the discretion of the defendant water pollution control authority by ordering the defendant to conditionally approve the plaintiff's application for a sewer extension to service the plaintiff's proposed affordable housing development subject to Westport's completion of ongoing improvements and upgrades of capacity to the sewer system?"

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

Timothy S. Hollister, in support of the petition.

Peter V. Gelderman, in opposition.

Decided January 14, 2020

SCOTT CRAWLEY *v.* COMMISSIONER OF CORRECTION

The petitioner Scott Crawley's petition for certification to appeal from the Appellate Court, 194 Conn. App. 574 (AC 41052), is denied.

Cheryl A. Juniewic, assigned counsel, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided January 14, 2020

* On September 15, 2020, the Supreme Court amended the order for certification. See *Summit Saugatuck, LLC* v. *Water Pollution Control Authority*. 335 Conn 944, A.3d (2020).

ORDERS

CONNECTICUT REPORTS

VOL. 335

SUMMIT SAUGATUCK, LLC *v.* WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF WESTPORT

The plaintiff's petition for certification to appeal from the Appellate Court, 193 Conn. App. 823 (AC 41949), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that the trial court had improperly substituted its own judgment for the discretion of the defendant water pollution control authority by ordering the defendant to conditionally approve the plaintiff's application for a sewer extension to service the plaintiff's proposed affordable housing development subject to Westport's completion of ongoing improvements and upgrades of capacity to the sewer system?

"2. May the defendant water pollution control authority decline to approve a proposed sewer extension for the sole reason that the Planning and Zoning Commission of the Town of Westport issued a negative report on a referral under General Statutes § 8-24 and the applicant did not appeal to the Westport Representative Town Meeting and obtain a reversal?"

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

Timothy S. Hollister, in support of the petition.

Peter V. Gelderman, in opposition.

Decided September 15, 2020

SEMAC ELECTRIC COMPANY, INC. *v.* SKANSKA USA BUILDING, INC.

The plaintiff's petition for certification to appeal from the Appellate Court, 195 Conn. App. 695 (AC 41054), is denied.

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

Louis R. Pepe and *Laura W. Ray*, in support of the petition.

Michael J. Donnelly, *Kevin W. Munn* and *Bruce Meller*, pro hac vice, in opposition.

Decided September 22, 2020

SEMAC ELECTRIC COMPANY, INC. *v.* SKANSKA USA BUILDING, INC.

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 695 (AC 41054), is denied.

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

Michael J. Donnelly, *Kevin W. Munn* and *Bruce Meller*, pro hac vice, in support of the petition.

Louis R. Pepe and *Laura W. Ray*, in opposition.

Decided September 22, 2020

STATE OF CONNECTICUT *v.* JOSEPH V.

The defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 712 (AC 42295), is granted, limited to the following issues:

"1. Did the Appellate Court properly uphold the trial court's denial of the defendant's request for a specific unanimity charge and correctly conclude that, under *State* v. *Mancinone*, 15 Conn. App. 251, 274, 545 A.2d 1131, cert. denied, 209 Conn. 818, 551 A.2d 757 (1988), cert. denied, 489 U.S. 1017, 109 S. Ct. 1132, 103 L. Ed.

2d 194 (1989), a specific unanimity charge is required only when the defendant has been charged with violating multiple subsections or multiple 'statutory elements' of a statute?

"2. If a specific unanimity charge is required when there is evidence presented at trial of more than one separate and distinct criminal act that could serve as the basis for a single count, did the Appellate Court correctly conclude that the state's information was not duplicitous where the state presented evidence of more than one separate and distinct incident that could have served as the basis of conviction on each of the three counts?"

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

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

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided September 22, 2020

STEVEN K. STANLEY *v.* COMMISSIONER OF CORRECTION

The petitioner Steven K. Stanley's petition for certification to appeal from the Appellate Court, 196 Conn. App. 903 (AC 42754/AC 42756), is denied.

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

Steven K. Stanley, self-represented, in support of the petition.

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

Decided September 22, 2020

SRINIVAS KAMMILI *v.* SAISUDHA KAMMILI

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 656 (AC 41576), is denied.

David V. DeRosa, in support of the petition.

Steven R. Dembo, in opposition.

Decided September 22, 2020

WELLS FARGO BANK, N.A., TRUSTEE *v.* MICHAEL JOHN MELAHN ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 151 (AC 39426), is denied.

Ridgely Whitmore Brown, in support of the petition.

Marissa I. Delinks, in opposition.

Decided September 22, 2020

THERESA MASELLI *v.* REGIONAL SCHOOL DISTRICT NUMBER 10 ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 198 Conn. App. 643 (AC 41809), is denied.

A. Paul Spinella, in support of the petition.

Kevin R. Kratzer and *Ashley A. Noel*, in opposition.

Decided September 22, 2020

STATE OF CONNECTICUT *v.* ANTHONY DYOUS

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 253 (AC 42006), is denied.

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

Richard E. Condon, Jr., senior assistant public defender, in support of the petition.

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided September 22, 2020

EDWARD V. DAVIS *v.* COMMISSIONER OF CORRECTION

The petitioner Edward V. Davis' petition for certification to appeal from the Appellate Court, 198 Conn. App. 345 (AC 42372), is denied.

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

Damian K. Gunningsmith, in support of the petition.

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

Decided September 22, 2020

Cumulative Table of Cases
Connecticut Reports
Volume 335

(Replaces Prior Cumulative Table)

American Tax Funding, LLC *v.* First Eagle Corp. (Order) . . . 942
Bagalloo *v.* Commissioner of Correction (Order) . . . 905
Bank of America, N.A. *v.* Balgobin (Order) . . . 903
Bank of New York Mellon *v.* Orlando (Order) . . . 917
Bank of New York Mellon *v.* Ruttkamp (Order) . . . 919
Benitez *v.* Commissioner of Correction (Order) . . . 924
Berka *v.* Middletown (Order) . . . 906
Boria *v.* Commissioner of Correction (Order) . . . 901
Brown *v.* Commissioner of Correction (Order) . . . 920
Carabetta Organization, Ltd. *v.* Meriden (Order) . . . 940
Cheswold (TL), LLC, BMO Harris Bank, N.A. *v.* Kwong (Order) . . . 941
Chief Disciplinary Counsel *v.* Burbank (Order) . . . 906
Christiana Trust *v.* Bliss (Order) . . . 916
Cinotti *v.* Shred It U.S.A., LLC (Order) . . . 930
Cooke *v.* Commissioner of Correction (Order) . . . 911
Daley *v.* Kashmanian (Orders) . . . 939,940
Davis *v.* Commissioner of Correction (Order) . . . 948
Dept. of Social Services *v.* Freeman (Order) . . . 922
Diaz *v.* Commissioner of Correction . . . 53
Habeas corpus; claim of ineffective assistance of counsel; certification to appeal from habeas court's judgment; certification from Appellate Court; whether Appellate Court improperly raised and decided unpreserved issue of waiver without first providing parties opportunity to be heard on that issue, in contravention of this court's decision in Blumberg Associates Worldwide, Inc. *v.* Brown & Brown of Connecticut, Inc. *(311 Conn. 123); proper scope of order of remand to Appellate Court, discussed.*
Dombrowski *v.* New Haven (Order) . . . 908
Edward Kowalsky Revocable Trust *v.* B & D Properties, LLC (Order) . . . 914
Ervin *v.* Commissioner of Correction (Order) . . . 905
Factor King, LLC *v.* Housing Authority (Order) . . . 927
Federal National Mortgage Assn. *v.* Trojan (Order) . . . 910
Garcia *v.* Cohen . . . 3
Premises liability; negligence; contributory negligence; general verdict rule; certification from Appellate Court; whether Appellate Court correctly concluded that general verdict rule precluded it from reviewing plaintiff's claim of instructional error; whether proposed interrogatories were properly framed; nondelegable duty doctrine, discussed; whether Appellate Court incorrectly concluded that plaintiff's instructional error claim was not reviewable on ground that plaintiff had failed to raise independent claim of error on appeal with respect to trial court's decision not to submit her proposed interrogatories to jury.
Goguen *v.* Commissioner of Correction (Order) . . . 925
Hassiem *v.* O & G Industries, Inc. (Order) . . . 928
Haywood *v.* Commissioner of Correction (Order) . . . 914
Holliday *v.* Commissioner of Correction (Order) . . . 901
In re Aisjaha N. (Order) . . . 943
In re Brian P. (Order) . . . 907
In re Cataleya M. (Order) (See In re Gabriel C.) . . . 938
In re Corey C. (Order) . . . 930
In re Gabriel C. (Order) . . . 938
In re Isabella M. (Order) (See In re Gabriel C.) . . . 938
In re Omar I. (Order) . . . 924
In re Savanah F. (Order) (See In re Gabriel C.) . . . 938

Jason B. *v.* Commissioner of Correction (Order) 903
Jemiola *v.* Hartford Casualty Ins. Co. 117
Homeowners insurance; breach of contract; denial of coverage by defendant insurance company for cracks in basement walls under provision in policy insuring against collapse of building or part thereof; summary judgment; claim that trial court incorrectly concluded that only homeowners insurance policies issued to plaintiff by defendant since March, 2005, were applicable to plaintiff's claim for coverage; whether there was genuine issue of material fact as to whether structural integrity of plaintiff's basement walls was substantially impaired when policies issued to plaintiff before March, 2005, were in effect; whether trial court correctly concluded that collapse provision of applicable homeowners insurance policy unambiguously excluded coverage for cracks in plaintiff's basement walls; whether plaintiff's house suffered abrupt falling down or caving in, complete or partial, such that it could not be occupied for its intended purpose; claim that definition of "collapse" contained in policy was ambiguous and, therefore, that substantial impairment of structural integrity standard adopted by this court in Beach *v.* Middlesex Mutual Assurance Co. *(205 Conn. 246) applied for purpose of determining coverage.*
Jepsen *v.* Camassar (Order) 926
Johnson *v.* Preleski 138
Petition for new trial based on newly discovered evidence; certification from Appellate Court; claim that petition was time barred because it was served on respondent state's attorney one day after expiration of applicable limitation period; whether Appellate Court incorrectly concluded that savings statute (§ 52-593a (a)), which requires that process be personally delivered to marshal within applicable limitation period, did not save untimely petition when process was sent by facsimile to marshal on final day of limitation period but there was no evidence as to when marshal came into physical possession of process; whether process is personally delivered to marshal within meaning of § 52-593a (a) when sender transmits it by facsimile; whether there was sufficient evidence to establish that process was personally delivered to marshal within applicable limitation period.
Jordan *v.* Commissioner of Correction (Order) 931
Kammili *v.* Kammili (Order) 947
Karas *v.* Liberty Ins. Corp. 62
Homeowners insurance; breach of contract; crumbling foundations; motion for summary judgment; certified question from United States District Court for District of Connecticut; reformulation of certified question; whether substantial impairment of structural integrity standard, as set forth in Beach *v.* Middlesex Mutual Assurance Co. *(205 Conn. 246), was applicable to provision of plaintiffs' homeowners insurance policy covering collapse of building; evidence required to satisfy substantial impairment of structural integrity standard, discussed; claim that, to satisfy substantial impairment of structural integrity standard, home must be in imminent danger of falling down or caving in, that is, in imminent danger of actual collapse; whether coverage exclusion in plaintiffs' homeowners insurance policy for collapse of "foundation" unambiguously included basement walls of plaintiffs' home.*
Kirby *v.* Commissioner of Correction (Order) 930
Kohl's Dept. Stores, Inc. *v.* Rocky Hill (Order) 917
Langston *v.* Commissioner of Correction. 1
Habeas corpus; certification from Appellate Court; claim that habeas court improperly dismissed habeas petition as untimely filed; whether Appellate Court correctly concluded that petitioner lacked good cause for his untimely filing when he had relied on advice of his attorney to withdraw previous, validly filed petition and to file present petition in its place, even though it would be subject to statutory (§ 52-470 (d)) presumption of delay; certification improvidently granted.
Lenti *v.* Commissioner of Correction (Order) 905
Lopez *v.* Commissioner of Correction (Order). 904
Maselli *v.* Regional School District Number 10 (Order) 947
Morton *v.* Syriac (Order) 915
Mosby *v.* Board of Education (Order) 939
Nationstar Mortgage, LLC *v.* Washington (Orders) 909
Nietupski *v.* Del Castillo (Order) 916
Nonhuman Rights Project, Inc. *v.* R.W. Commerford & Sons, Inc. (Order) 929
Pentland *v.* Commissioner of Correction (Order) 919
Peterson *v.* Torrington (Order) 921

Petrucelli *v.* Meriden (Order) . . . 923
Pfister *v.* Madison Beach Hotel, LLC (Order) . . . 923
Platt *v.* Tilcon Connecticut, Inc. (Order) . . . 917
Reserve Realty, LLC *v.* BLT Reserve, LLC (see Reserve Realty, LLC *v.* Windemere Reserve, LLC) . . . 174
Reserve Realty, LLC *v.* Windemere Reserve, LLC . . . 174
Breach of contract; anticipatory breach; antitrust; claim that plaintiffs could not recover brokerage fees under certain real estate listing agreements because those agreements were list-back agreements that, defendants claimed, constituted per se illegal tying arrangements in violation of federal Sherman Act (15 U.S.C. § 1); certification from Appellate Court; claim that this court should overrule State *v.* Hossan-Maxwell, Inc. *(181 Conn. 655), which held that list-back agreements committing purchaser of real property to use services of particular broker when leasing or reselling property are per se illegal, as no longer consistent with federal antitrust law;* Hossan-Maxwell, Inc., *to extent it held that real estate list-back agreements affecting not insubstantial volume of commerce are per se illegal, overruled; newly clarified standard governing antitrust challenges to list-back agreements, discussed.*
Rojas *v.* Commissioner of Correction (Order) . . . 925
Ruiz *v.* Commissioner of Correction (Order) . . . 915
Scholz *v.* Epstein (Order) . . . 943
Seaport Capital Partners, LLC *v.* Speer (Order) . . . 903
Semac Electric Co. *v.* Skanska USA Building, Inc. (Orders) . . . 945
Sherman *v.* Commissioner of Correction (Order) . . . 929
Stanley *v.* Commissioner of Correction (Order) . . . 946
Starboard Resources, Inc. *v.* Henry (Order) . . . 919
State *v.* Albert D. (Order) . . . 913
State *v.* Bermudez (Order) . . . 908
State *v.* Bradbury (Order) . . . 925
State *v.* Brown (Order) . . . 902
State *v.* Brown (Order) . . . 942
State *v.* Bunn (Order) . . . 918
State *v.* Carpenter (Order) . . . 940
State *v.* Corprew (Order) . . . 918
State *v.* Covington . . . 212
Carrying pistol or revolver without permit; certification from Appellate Court; claim that Appellate Court incorrectly concluded that there was sufficient evidence to support defendant's conviction of carrying pistol or revolver without permit; whether state presented sufficient, circumstantial evidence to permit jury reasonably to conclude beyond reasonable doubt that firearm defendant was carrying had barrel less than twelve inches in length.
State *v.* Douglas C. (Order) . . . 904
State *v.* Dyous (Order) . . . 948
State *v.* Earley (Order) . . . 902
State *v.* Fortin (Order) . . . 926
State *v.* Francis (Order) . . . 912
State *v.* Holley (Order) . . . 922
State *v.* Joseph V. (Order) . . . 945
State *v.* Lynch (Order) . . . 914
State *v.* Milner (Order) . . . 928
State *v.* Mitchell (Order) . . . 912
State *v.* Nusser (Order) . . . 918
State *v.* Petersen (Order) . . . 921
State *v.* Randy G. (Order) . . . 911
State *v.* Richards (Order) . . . 931
State *v.* Rosa (Order) . . . 920
State *v.* Sawyer . . . 29
Possession of child pornography second degree; whether trial court incorrectly concluded that search warrant affidavit provided probable cause to search defendant's residence for evidence of possession of child pornography; unpreserved claim that this court should adopt more demanding standard under Connecticut constitution for assessing whether there is probable cause to issue search warrant.
State *v.* Smith (Order) . . . 932
State *v.* Taupier (Order) . . . 928
State *v.* Tinsley (Order) . . . 927

State *v.* Torres (Order) . . . 913
State *v.* Tyus (Order) . . . 907
State *v.* Villar (Order) . . . 916
State *v.* Watson (Order) . . . 912
State *v.* White (Order) . . . 906
Streifel *v.* Bulkley (Order) . . . 911
Summit Saugatuck, LLC *v.* Water Pollution Control Authority (Order) . . . 944
Thomas *v.* Commissioner of Correction (Order) . . . 929
Thompson *v.* Commissioner of Correction (Order) . . . 913
Turek *v.* Zoning Board of Appeals (Order) . . . 915
U.S. Bank, National Assn. *v.* Madison (Order) . . . 941
U.S. Bank, National Assn. *v.* Mamudi (Order) . . . 921
U.S. Bank National Assn. *v.* Rothermel (Order) . . . 910
U.S. Bank Trust, N.A. *v.* O'Brien (Order) . . . 922
Vera *v.* Liberty Mutual Fire Ins. Co. . . . 110
Homeowners insurance; breach of contract; motion for summary judgment; removal of action from state court to federal court; certified question from United States District Court for District of Connecticut; reliance on this court's decision in companion case of Karas *v.* Liberty Ins. Corp. *(335 Conn. 62); whether, to satisfy substantial impairment of structural integrity standard, as set forth in* Beach *v.* Middlesex Mutual Assurance Co. *(205 Conn. 246), home must be in imminent danger of falling down or caving in, that is, in imminent danger of actual collapse.*
Wells Fargo Bank, N.A. *v.* Melahn (Order) . . . 947
Williams *v.* Commissioner of Correction (Order) . . . 923
Woods *v.* Commissioner of Correction (Order) . . . 938

CONNECTICUT APPELLATE REPORTS

Vol. 200

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* HUBERT POTOTSCHNIG ET AL. (AC 41229)

DiPentima, C. J., and Lavine and Keller, Js.*

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant P, who filed an answer with special defenses and counterclaims. Thereafter, the plaintiff filed a motion to strike all of the defendant's special defenses and counterclaims. Several of the special defenses challenged the plaintiff's standing to commence the foreclosure action. Following an evidentiary hearing, the trial court determined that the plaintiff had standing and granted the plaintiff's motion to strike the special defenses that implicated the plaintiff's standing and denied the motion to strike as to the remaining special defenses and all of the counterclaims. The trial court thereafter rendered judgment in favor of the plaintiff, from which the defendant appealed to this court. *Held*:

1. The trial court properly determined that the plaintiff had standing to bring the foreclosure action; the court found credible evidence demonstrated that the note had been endorsed in blank prior to the commencement of the foreclosure action and had been in the plaintiff's possession until the time of trial; moreover, the defendant failed to rebut the presumption that the plaintiff, as holder of the note, was the rightful owner of the debt, as the court clearly credited testimony regarding when the note was endorsed and rejected assertions made by the defendant that the plaintiff was not in possession of the note during a certain time period.
2. Contrary to the defendant's claim, the trial court properly concluded that a decision of a New York court did not have preclusive effect under

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

the doctrines of res judicata and collateral estoppel; the parties in the present case were not in privity with the parties in the New York case and the cases involved factually distinct claims and different loans.

3. The defendant's claim that the trial court erred in failing to consider whether the trust for which the plaintiff is trustee ever received the note and mortgage was unavailing; the court did in fact address this argument in its memorandum of decision on the foreclosure complaint and clearly rejected it, and the defendant failed to present evidence sufficient to rebut the presumption that the plaintiff was owner of the debt and entitled to enforce the terms of the note and mortgage and it was unclear whether the defendant could even challenge the nature of the transfer.

4. The trial court did not abuse its discretion in making certain evidentiary rulings denying certain of the defendant's motions and requests; it was not improper for the court to deny the defendant's motion for leave to add special defenses as that request was made more than three years after the commencement of the foreclosure action and only after the court had granted in part the plaintiff's motion to strike the defendant's special defenses; moreover, the court was within its discretion to deny the defendant's requests for deposition commissions in light of the fact that the defendant failed to show that certain of the proposed individuals had any knowledge of the note or that the denial hamstrung his ability to rebut the plaintiff's presumption of ownership of the note; furthermore, the court properly determined that cease and desist orders of a New York state agency directed at the original lender that the defendant sought to introduce into evidence were irrelevant to the issue of standing, and the defendant did not pursue their admissibility.

Argued January 21—officially released October 6, 2020

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the named defendant filed a counterclaim; thereafter, the matter was tried to the court, *Roraback, J.*; judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

Randolph E. White, pro hac vice, with whom was *Patrick Zailckas*, for the appellant (named defendant).

Brian D. Rich, with whom, on the brief, was *Logan A. Carducci*, for the appellee (plaintiff).

DiPENTIMA, C. J. The defendant Hubert Pototschnig[1] appeals from the judgment of foreclosure rendered by the trial court in favor of the plaintiff, Deutsche Bank National Trust Company, as Trustee, for HSI Asset Securitization Corporation 2005-NC2 Mortgage Pass-Through Certificates, Series 2005-NC2 (HSI). On appeal, the defendant claims that the court (1) improperly determined that the plaintiff had standing to bring the foreclosure action, (2) failed to follow the decision of an out of state court, (3) failed to consider whether the securitized trust, HSI, ever received the note and mortgage, and (4) abused its discretion in several of its evidentiary rulings. We affirm the judgment of the trial court.

At the center of this appeal is the issue of whether the plaintiff had standing to commence this action. The trial court twice addressed this issue. First, in ruling on the plaintiff's motion to strike the defendant's special defenses, the court concluded, following an evidentiary hearing, that the plaintiff had standing. Later, in its memorandum of decision on the foreclosure complaint, the court addressed the issue of standing after noting that the defendant in his posttrial brief "largely attempts to relitigate the question of whether the plaintiff has standing to bring this action. It is within this court's discretion to treat its 2015 hearing decision as the law of the case with regard to the issue of standing. . . . Even if this court were to reconsider the question, the evidence offered at trial was sufficient to establish the

[1] The complaint also named as defendants: George Galetti; Douglas Faraldi; United States of America, Internal Revenue Service; and the State of Connecticut, Department of Revenue Services. The trial court stated that none of these defendants "participated in or filed any objections to the foreclosure." In this opinion, we refer to Hubert Pototschnig as the defendant.

plaintiff's standing to enforce the note." (Citation omitted.) We agree with the court that the plaintiff had standing because the facts, as found by the trial court, establish that an employee of the original lender, New Century Mortgage Corporation (New Century), endorsed the note in blank sometime prior to the end of August, 2005, which preceded both New Century's 2007 bankruptcy and the transfer of New Century's assets to a liquating trust in 2008. There was evidence, which the trial court credited, that the plaintiff possessed the note endorsed in blank at the time the foreclosure action was commenced in 2012.

In its decision on the foreclosure complaint, the court found the following facts and reached the following conclusions. "The plaintiff . . . seeks to foreclose a mortgage on a Woodbury . . . property owned by the defendant . . . . In its amended complaint, filed January 28, 2013, the plaintiff alleges that it is the holder of the promissory note and owner of the mortgage which are the subject of this lawsuit. The loan documents are alleged to have been prepared by the original lender, New Century . . . and executed by the defendant in connection with a $750,000 loan he received on June 10, 2005. The undisputed evidence at trial was that no payment has been made on this loan since January 23, 2012.

"On September 24, 2014, the defendant filed his fourth amended answer, asserting ten special defenses and three counterclaims. On November 10, 2014, the plaintiff moved to strike all of the special defenses and counterclaims. Several of the special defenses challenged the plaintiff's standing, thereby implicating the court's subject matter jurisdiction. In the fourth special defense, the defendant alleged that the plaintiff is an improper party, and in the sixth and seventh special defenses, the defendant alleged that the assignments of the mortgage by [New Century] to the plaintiff, made after July

15, 2008, are invalid. The fourth, sixth and seventh special defenses were all grounded in the allegation that [New Century] filed for chapter 11 bankruptcy in 2007 and that all of its assets were transferred, by order of the Bankruptcy Court, to a liquidating trust on July 15, 2008. It was the defendant's position that, based on the bankruptcy and transfer of assets, [New Century] either ceased to exist as an entity competent to endorse the note in blank and assign the mortgage to the plaintiff, or lacked the authority to unilaterally transfer assets after the bankruptcy was filed. In contrast, it was the plaintiff's position that the note was endorsed in blank by [New Century] prior to its bankruptcy, the plaintiff was the holder of the note when the present action was initiated and the defendant's challenges to [New Century's] assignment to the plaintiff were insufficient to deprive the plaintiff of standing to pursue this foreclosure action.

"An evidentiary hearing was held on October 2, 2015, to determine whether the plaintiff had standing to bring the foreclosure action. At that hearing, it was established that the endorsement on the note, bearing the name Magda Villanueva, was placed there by a stamp, not by an original signature. In her deposition, which was introduced at the hearing . . . Villanueva testified that she sometimes used a stamp to endorse notes on behalf of her employer, [New Century], and at least one of the stamps she used was missing a part of the letter 'G' in her first name. . . . Villanueva was employed by New Century until August of 2005, and, when she left, she destroyed all the stamps she had used for endorsing notes. It was also established at this hearing that the note had been endorsed in blank by . . . Villanueva sometime prior to June 24, 2009.

"Based on the evidence produced at the hearing, this court concluded that the plaintiff was the valid holder

of the note and entitled to enforce it based on its possession of the note, endorsed in blank by [New Century]. . . . The plaintiff's production of the note established a presumption in its favor that it is the owner of the underlying debt. . . . The production of the note established the plaintiff's prima facie case against the defendant, and it was for the defendant to prove facts limiting or changing the plaintiff's rights. . . . The defendant did not, however, meet his burden of proving that the debt belonged to a person or entity other than the plaintiff, and as such, this court concluded that the plaintiff had standing to pursue this foreclosure action. . . .

"At trial, the defendant stipulated to the authenticity of his signature on the original note and mortgage, both of which the plaintiff entered into evidence. Also introduced as an exhibit was a loan modification agreement entered into by the parties to resolve a prior foreclosure action. Jeremy Summerford, an employee of JP Morgan Chase Bank, N.A. (Chase), the loan servicer, testified credibly that, based upon his examination of Chase's business records, the plaintiff was the holder of the note and mortgage at the time it initiated the present foreclosure. Summerford further testified that the defendant has been in default of his payment obligations under the note since February of 2012. This fact was later confirmed by the defendant's own testimony. The plaintiff also introduced into evidence, as an exhibit, the requisite notice of default, which was sent to the defendant in advance of this action being commenced. Based on the foregoing, this court finds that the plaintiff has established its prima facie case and, as such, will be entitled to judgment unless the defendant proves any of his special defenses. . . . [T]he defendant has not met its burden in proving that the plaintiff is not the owner of the debt." (Citations omitted; footnotes omitted.)

Following the filing of the present appeal, the defendant filed a motion for articulation. In its memorandum of decision on the defendant's motion for articulation the court clarified: "Evidence regarding the note was presented both at the hearing conducted by the court on October 2, 2015, in response to issues raised by the defendant challenging the standing of the plaintiff to bring this action and at trial. On the basis of that evidence, the court found that the plaintiff was the holder of the original note endorsed in blank at the time the foreclosure action now on appeal was commenced. The court further found that the defendant had not met its burden of rebutting the presumption that the plaintiff was the rightful owner of the underlying debt at the time it instituted this action. In addition, the court also expressly finds that the original note was endorsed in blank by . . . Villanueva while she was employed by [New Century]. She left [New Century] in August of 2005. The defendant contends that [New Century] filed for bankruptcy in 2007. On the basis of these findings, the court concludes that the subject note was endorsed in blank by [New Century] before it filed for bankruptcy. . . .

"This court expressly finds on the basis of the testimony and exhibits offered by Albert Smith [a home lending research officer for Chase] at the October 2, 2015 hearing and on the basis of the testimony and exhibits offered by . . . Summerford at trial that the plaintiff was in possession of the original note endorsed in blank no later than May of 2009 and that the original note has remained in the possession of the plaintiff from at least May of 2009 until the time of trial. While there was no evidence presented which would enable the court to determine the precise date upon which the plaintiff took physical possession of the note, there was credible evidence offered that it had been in possession of the original note since at least May of 2009. On the

strength of that evidence, this court finds that the plaintiff was in possession of the original note endorsed in blank by . . . Villanueva for [New Century] from at least May of 2009 until the time of trial."

I

The defendant first claims that the court improperly determined that the plaintiff had standing to bring this foreclosure action. We disagree.

"It is well established that [a] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of the question of [a] plaintiff's standing is plenary. . . . Furthermore, [t]he scope of review of a trial court's factual decisions related to the issue of standing on appeal is limited to a determination of whether they are clearly erroneous in view of the evidence and pleadings." (Citation omitted; internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Gaudiano*, 142 Conn. App. 440, 444, 68 A.3d 101, cert. denied, 310 Conn. 902, 75 A.3d 29 (2013).

"The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that

it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt. . . . The defendant [must] . . . prove the facts which limit or change the plaintiff's rights." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 489, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, U.S. , 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

General Statutes § 49-17[2] "codifies the common-law principle of long standing that the mortgage follows the note"; (internal quotation marks omitted) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 127, 74 A.3d 1225 (2013); and "allows the holder of a note to foreclose on real property even if the mortgage has not been assigned to him." Id. "[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under § 49-17. The possession by the bearer of a note [e]ndorsed in blank imports prima facie that he acquired the note in good faith for value and in the course of business, before maturity and without notice of any circumstances impeaching its validity. The production of the note establishes his case prima facie against the makers and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." (Internal quotation marks omitted.) Id., 135.

A

The defendant argues that the court erred in determining that the plaintiff had standing to bring the

[2] General Statutes § 49-17 provides: "When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies."

present foreclosure action. He contends that the plaintiff has not established the rebuttable presumption that it is the holder of the note entitled to enforce the note because it failed to demonstrate "when it acquired the note, how it acquired the note [and] from whom." He contends that the only evidence the plaintiff produced to support standing was conflicting testimony from Smith and Summerford "as to the timing and significance of computer generated images of the note allegedly contained in . . . Chase's computer system. Such limited evidence, without more, is unreliable and provided an insufficient and clearly erroneous basis for the trial court to find that the plaintiff had established standing as a matter of law." We do not agree with the defendant's argument.

In his argument, the defendant highlights conflicts between Smith's deposition testimony and his testimony at the October 2, 2015 hearing regarding internal computer generated documents of the note by Chase. Although the defendant's argument fails on legal grounds that we will discuss later, it is worth noting that evidence is not insufficient because it is conflicting, rather it is the function of the trier of fact to weigh conflicting versions of events and determine which is more credible. *Masse* v. *Perez*, 139 Conn. App. 794, 798, 58 A.3d 273 (2012), cert. denied, 308 Conn. 905, 61 A.3d 1098 (2013). In the present case, however, the trial court explained in its decision on the motion to strike the discrepancy between Smith's deposition testimony and October 2, 2015 testimony as follows. "Smith is a home lending research officer for . . . Chase which services the mortgage loan to the defendant, which is the subject of this dispute. . . . Smith had examined the business records of . . . Chase in an effort to determine when the stamped endorsements had been placed on the note. At his deposition held on December 8, 2014 . . . Smith had testified that the endorsement had been placed on

the note on June 6, 2012. That conclusion was based on . . . Smith's misapprehension at the time he was deposed that the information contained in the defendant's exhibit 1 indicated that this document recorded the date of endorsement. At the hearing . . . Smith corrected his earlier testimony and explained that the information on exhibit 1 only evidenced that . . . Chase had, as part of an internal document review process, confirmed on June 6, 2012 that the note in its possession had been properly endorsed. In addition . . . Smith testified that further research of the business records of . . . Chase turned up evidence that the subject note had been endorsed sometime prior to June 24, 2009. This is because plaintiff's exhibit 1 revealed that, on that day, a copy of the note endorsed in blank by the stamped signature of . . . Villanueva had been furnished to the defendant in response to a discovery request he had promulgated in connection with a prior action, which had been commenced to foreclose the mortgage which the note secures." Accordingly, the discrepancy was explained by the court as relating a misapprehension by Smith, and the court explained that the June, 2012 date referred to the date on which Chase confirmed that the note had been endorsed, not the date of endorsement.

The defendant also contends that the testimony of Summerford at the foreclosure trial that he reviewed the computer generated images in Chase's computer system sometime in February or March, 2017, and saw a computer scan of the note allegedly entered into the system in May, 2009, did not constitute evidence of when and how the plaintiff acquired physical possession of the note.

In his argument, the defendant mischaracterizes Connecticut foreclosure law. The plaintiff is not required to prove the factual details of the delivery of the note, such as the precise date and manner in which it acquired

the note. "Generally, in order to have standing to bring a foreclosure action the plaintiff must, *at the time the action is commenced*, be entitled to enforce the promissory note that is secured by the property." (Emphasis in original; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, supra, 159 Conn. App. 488. Accordingly, the defendant's argument regarding Chase's computer generated images of the note do not relate to whether the plaintiff has established the presumption of ownership of the debt. Case law is clear that "[a] holder only has to produce the note to establish [the] presumption [that it is the rightful owner of the underlying debt]. The production of the note establishes his case *prima facie* against the [defendant] and he may rest there. . . . It [is] for the defendant to set up and prove the facts [that] limit or change the plaintiff's rights." (Emphasis in original; internal quotation marks omitted.) *JPMorgan Chase Bank National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 144 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016). By producing the note endorsed in blank, the plaintiff established the presumption that it is the rightful owner of the debt.

Furthermore, even though a plaintiff is not required to prove the precise date it came into possession of the note, in its articulation, the court stated that the credible evidence demonstrated that the plaintiff was in possession of the note endorsed in blank by Villanueva for New Century from at least May, 2009, until the time of trial. Accordingly, the plaintiff met its initial burden with respect to standing.

B

The defendant raises several arguments in support of his claim that the court improperly determined that he did not successfully rebut the presumption that the plaintiff is the owner of the debt. We disagree.

"The defending party may rebut the presumption that the holder is the rightful owner of the debt, but bears the burden to prove that the holder of the note is not the owner of the debt. . . . This may be done, for example, by demonstrating that ownership of the debt had passed to another party. . . . The defending party does not carry its burden by merely identifying some documentary lacuna in the chain of title that might give rise to the possibility that a party other than the foreclosing party owns the debt. . . . To rebut the presumption that the holder of a note endorsed specifically or to bearer is the rightful owner of the debt, the defending party must prove that another party is the owner of the note and debt. . . . Without such proof, the foreclosing party may rest its standing to foreclose the mortgage on its status as the holder of the note." (Citations omitted.) Id., 145–46, citing *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 146–47, 125 A.3d 262 (2015).

The defendant first contends that the presumption was rebutted by a July, 2008 order, which was admitted as an exhibit at the October 2, 2015 hearing, by the United States Bankruptcy Court for the District of Delaware confirming New Century's bankruptcy plan to transfer its asserts to a liquidating trust. He argues that New Century could not endorse the note in blank and assign it to the plaintiff because, as a result of New Century's bankruptcy filing, the liquidating trust was the entity that owned the note, mortgage, and underlying debt, not New Century, which ceased to exist as an entity. We disagree.

The transcript of Villanueva's deposition, which was admitted as an exhibit at the October 2, 2015 hearing, reveals that Villanueva testified that she had used her actual signature 95 percent of the time and that she used her signature stamp for a period of time but could not recall approximately when that time period occurred.

She further testified that she personally destroyed all of her signature stamps after her employment with New Century was terminated in August, 2005, and that, as far as she was aware, no additional signature stamps with her name then existed. She stated that during her time working for New Century she was not aware of any instances in which someone used her signature stamp without her knowledge.

The court credited Villanueva regarding the timing of the destruction of the stamps she used when she endorsed notes.[3] In its decision on the plaintiff's motion to strike, the court found that Villanueva, whose name was stamped on the endorsement in blank, testified that she was employed by New Century until August, 2005, that at least one of the stamps she used when endorsing notes is missing part of the letter "G" in her first name, and that she destroyed all of her stamps she used for endorsements when she left the employ of New Century in August, 2005.[4] The court concluded

[3] The defendant attempts to challenge the court's findings regarding the credibility of Villanueva's testimony by referencing two out of state cases, *In re Hunter*, 466 B.R. 439 (Bankr. E.D. Tenn. 2012), and *In re Wilson*, 442 B.R. 10 (Bankr. D. Mass. 2010), which purport to demonstrate that Villanueva's stamp with a missing letter "G" was used for endorsements after she left New Century. In its decision on the foreclosure complaint, the court found that "[n]o evidence was adduced at trial which would lead the court to conclude that . . . Villanueva's stamped signature on the subject note in this case was the product of dishonest or unlawful conduct on her part or on the part of any other party." We decline the defendant's invitation to evaluate the credibility of Villanueva, let alone examine her testimony in the present case in light of findings in other cases regarding Villanueva's endorsements. There are a number of reasons why we cannot engage in such an assessment, but we will simply note the clear rule against appellate assessment of credibility. "We cannot second guess the trial court's assessment of the credibility of the witnesses . . . . It is the trial court [that] had an opportunity to observe the demeanor of the witnesses and parties; thus, it is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, 230 Conn. 486, 507, 646 A.2d 1289 (1994).

[4] The stamped endorsement on the note contains an incomplete letter "G."

that these facts are consistent with the plaintiff being the owner of the debt, and we agree. According to these facts, the plaintiff demonstrated that the note, which bears Villanueva's stamped endorsement, was endorsed prior to August, 2005, which date precedes both the date that New Century filed for bankruptcy in 2007 and the 2008 transfer of assets to a liquidating trust. As a result, the defendant has not shown that the liquidating trust was the owner of the debt at the time the plaintiff commenced the present action.

The defendant additionally makes an attenuated argument that the plaintiff was not in possession of the note from September 6, 2008 to July 31, 2013, but, rather, Chase Home Finance, LLC, alleged in a September, 2008 complaint that it was the holder of the note, but all records in that file subsequently were destroyed. The defendant contends that the note was released to foreclosure counsel on July 31, 2013. The court clearly rejected these claims and the related testimony offered by the defendant, and concluded in its decision on the motion to strike, which conclusion it repeated in its decision on the foreclosure complaint, that the defendant had not met his burden of proving that the debt belonged to a person or entity other than the plaintiff. The defendant's argument does not demonstrate that the court's finding in this regard was clearly erroneous.

Because the plaintiff established the presumption that it is the owner of the debt and because the defendant has not rebutted that presumption, we conclude that the trial court properly determined that the plaintiff had standing to commence the foreclosure action.

II

The defendant next claims that the decision by the New York Supreme Court in *Deutsche Bank National Trust Co.* v. *Pototschnig*, Docket No. 109449/10 (N.Y. Sup. July 19, 2016), "should be accorded res judicata

and collateral estoppel effect," and that the trial court erred in not so doing. In its memorandum of decision on the foreclosure complaint, the trial court determined that "[n]one of the conclusions reached by the New York court with regard to a foreclosure initiated by a different plaintiff seeking to foreclose on a different mortgage secured by a different note for a different amount executed on a different date and secured by different property have any relevance or dispositive relationship to the claims in the present case." We agree with the court and are not persuaded by the defendant's claim.

"The related doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter that it already has had a fair and full opportunity to litigate. . . . Despite being close cousins, those doctrines are not alternate expressions of the same. . . . [C]ollateral estoppel operates to bar the reassertion of an issue already fully litigated, [while] res judicata precludes one from raising causes of action, facts or issues that either already were adjudicated or could have been litigated fully in a prior action between the same parties or those in privity with them." (Citation omitted; internal quotation marks omitted.) *Sellers* v. *Work Force One, Inc.*, 92 Conn. App. 683, 685–86, 886 A.2d 850 (2005).

"[C]ollateral estoppel, or issue preclusion . . . prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not

dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually have the characteristics of dicta. . . . Furthermore, [t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . Both issue and claim preclusion express no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. . . .

"If a party cannot succeed on a claim of collateral estoppel, though, it may be able to preclude claims on the basis of res judicata. [T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 649–50, 164 A.3d 731 (2017), aff'd, 332 Conn. 67, 208 A.3d 1223 (2019). "Additionally, the applicability of res judicata and collateral estoppel presents a question of law over which we employ plenary review." *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010); see also *Bruno* v. *Geller*, 136 Conn. App. 707, 726, 46 A.3d 974 (applying principles of res judicata on basis of decision of New York court), cert. denied, 306 Conn. 905, 52 A.3d 732 (2012).

Neither collateral estoppel nor res judicata applies in the present case. The parties in the present case and

the New York case are not the same or in privity and the issues in both cases are different. In the New York case, the plaintiff was Deutsche Bank National Trust Company, as indenture trustee for New Century Home Equity Loan Trust 2005-3, which is a different entity than the plaintiff in the present case, which is Deutsche Bank National Trust Company as Trustee for HSI Asset Securitization Corporation 2005-NC2 Mortgage Pass-Through Certificates, Series 2005-NC2. The plaintiff in the present case and the plaintiff in the New York case are not in privity because the claims raised in both cases are factually distinct, involving different loans.[5] Moreover, the claims and issues raised in the New York case and the present case are different. In the New York case, the defendant asserted in his motion for summary judgment to dismiss the action that the plaintiff lacked standing for multiple reasons including that New Century went bankrupt in 2007 and therefore did not exist to assign the note and mortgage in 2010. The New York Supreme Court agreed with the plaintiff and concluded that "[t]he sole allegation in the complaint supporting [the] plaintiff's claim of standing is the alleged assignment to it from New Century approximately two weeks before the commencement of this action in July, 2010 . . . . However, as Pototschnig argued . . . New Century was powerless to make an assignment after its bankruptcy in 2007." The standing issues presented in the present case are wholly different from those in the New York case and can have no preclusive effect because the issues in the present case

[5] "While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented because of his purported privity with a party at the initial proceeding. . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 813, 695 A.2d 1010 (1997).

involve a different note and entirely different circumstances.

III

The defendant further claims that the court "erred in failing to consider whether the securitized trust ever received the note and mortgage." Specifically, he argues that, at the October 2, 2015 evidentiary hearing, he raised the issue and established through testimony that the plaintiff did not transfer the loan documents and the note to the securitized trust for which the plaintiff is acting as trustee, thereby raising an issue of subject matter jurisdiction that the court never addressed. The defendant's claim is unavailing because the court addressed this argument in its memorandum of decision on the foreclosure complaint.

The court heard the arguments and testimony presented by the defendant at the October 2, 2015 hearing and concluded in its April 21, 2016 decision on the motion to strike, that the plaintiff had standing to bring the foreclosure action, that it was the holder of the original note endorsed in blank at the time of the commencement of the foreclosure action and that the defendant had not proven that the debt belonged to another person or entity. In its decision on the foreclosure complaint, the court noted that, in his posttrial brief, the defendant attempted to relitigate the issue of standing and reiterated its conclusion that the plaintiff had standing to foreclose. In addressing the defendant's argument in his posttrial brief that the note and mortgage were never transferred to the securitized trust, the court concluded that "[t]he defendant's first argument, that the plaintiff did not prove the note was transferred to it in compliance with a pooling and service agreement, is meritless. Not only did the defendant not offer evidence sufficient to rebut the presumption, established by the plaintiff, that it is the owner of the debt and entitled

to enforce the terms of the note and mortgage, but it is not even clear that the defendant has standing to challenge the nature of the transfer pursuant to the pooling and service agreement. . . . Accordingly, this court rejects the defendant's first argument." (Citation omitted.) The court clearly rejected the defendant's argument, and we agree with the trial court that his argument lacks merit and does not rebut the presumption that the plaintiff is the owner of the debt.

IV

In his last claim, the defendant challenges several rulings of the court. He argues that the court improperly denied his motion for leave to add special defenses, request to conduct further depositions, and request to introduce cease and desist orders into evidence at the October 2, 2015 evidentiary hearing. We are not persuaded by these claims.

First, we conclude that the court did not abuse its discretion in denying the defendant's motion for leave to add special defenses. "Whether to allow an amendment [to a pleading] is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [amending party's] burden . . . to demonstrate that the trial court clearly abused its discretion." (Internal quotation marks omitted.) *Beckenstein* v. *Reid & Riege, P.C.*, 113 Conn. App. 428, 435, 967 A.2d 513 (2009). In denying the defendant's request to amend his special defenses, the court stated: "I'm denying these requests because it is more than three years since this action has begun. There's been every opportunity for these issues to have been raised and addressed. Judge Zemetis made a ruling earlier in the life of this case that he was going to permit ten special defenses to be interposed, that's my understanding. I'm going to stand

by his ruling. Ten special defenses were interposed. The fact that several of those special defenses have been stricken or dismissed after a hearing held on their propriety isn't an invitation to introduce more special defenses because it will go on potentially indefinitely if we don't close the pleadings and have a trial on the substance of this matter." It was not improper for the court to deny the defendant's eleventh hour request to add more special defenses after the court granted the plaintiff's motion in part to strike the defendant's special defenses.

Second, we determine that it was not an abuse of discretion for the court to deny the defendant's motions for commission. The motions to take the deposition testimony of two out-of-state representatives of Chase, and the deposition testimony of a representative of HSI Asset Securitization Corporation were filed in September, 2016, more than three years after the commencement of the foreclosure action and months after the court's April, 2016 decision on the motion to strike in which it determined that the plaintiff had standing. The defendant argues in his brief that the denial of these motions "hamstrung [his] ability to provide evidence rebutting that presumption [that the plaintiff was the owner of the debt] by denying discovery as to when, how and under what circumstances, if any, [the] plaintiff . . . came into possession of the note and how, when, and under what circumstances a signature stamp bearing Villanueva's name was stamped as an endorsement on its back."

"[T]he granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion. . . . [I]t is only in rare instances that the trial court's decision will be disturbed. . . . That ample discretion is limited, however, by the provisions

of the rules [of practice] pertaining to discovery; Practice Book §§ 217 [through] 221 [now §§ 13-2 through 13-5]; especially the mandatory provision that discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Brody* v. *Brody*, 153 Conn. App. 625, 637–38, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014).

At a hearing on September 19, 2016, the court denied the defendant's requests for deposition commissions, including the ones specified in this appeal. With respect to two representatives of Chase, the court reasoned that "I don't find any evidence to . . . suggest that there's . . . anything faulty with this particular note. I'm gonna deny the motion for commission for these two employees of [Chase] unless you demonstrate to me that either of them has a specific recollection of this particular instrument." The court was within its discretion to deny the defendant's motions in light of the fact that the defendant failed to show that the Chase representatives could assist in proving that the note was faulty and/or endorsed after New Century ceased to exist as an entity, given that there was nothing demonstrating that they had any knowledge of this particular note. We further conclude, after a careful review of the record, that the court did not abuse its discretion in denying the defendant's motion for commission to depose HSI Asset Securitization Corporation. Moreover, the defendant cannot prevail on his claim that the court hamstrung his ability to rebut the presumption of ownership for the additional reason that at the conclusion of the September 19, 2016 hearing, the court permitted the defendant to further depose Villanueva regarding the note.

Third, the court did not abuse its discretion in declining to admit into evidence at the October 2, 2015 evidentiary hearing cease and desist orders of the New York

State Department of Finance, which were directed at New Century. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . [E]videntiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 489, 958 A.2d 1195 (2008). At the evidentiary hearing, the defendant's counsel sought to introduce the cease and desist orders issued while New Century existed, which the defendant believed were a triggering event in New Century's filing for bankruptcy, for the purposes of establishing that New Century existed, at least as to an enforcement agency, at the time the cease and desist orders were issued. The court ruled, "I don't think that they're relevant to the issues for this hearing. They might be relevant at a trial, but . . . the issues for this hearing—aren't centered on any alleged wrongdoing of New Century." The court did not abuse its discretion in determining that the case and desist orders were not relevant to the issue of standing before the court. At trial, the defendant offered the cease and desist orders as exhibits for identification, but did not pursue their admissibility.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* FREDDY T.*
(AC 41755)

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

Syllabus

Convicted, after a jury trial, of two counts of risk of injury to a child in violation of statute (§ 53-21 (a) (1) & (2)), stemming from his alleged sexual abuse of his minor child, the defendant appealed to this court. *Held* that the trial court abused its discretion by admitting into evidence portions of the video recording of a forensic interview with the defendant's child conducted by C, a licensed clinical social worker, because the child's statements failed to satisfy the requirements of the medical diagnosis and treatment exception to the rule against hearsay as set forth in the Code of Evidence (§ 8-3 (5)): the state failed to adequately demonstrate that the statements were reasonably pertinent to obtaining medical treatment as the state could not demonstrate that the child understood C's interview to be for medical treatment, the child had received medical care prior to the forensic interview and the record did not establish that the forensic interview was used to inform the subsequent medical examination of the child, and the basic purpose of the interview was for an investigative purpose; moreover, the court's error was not harmless and substantially affected the jury's verdict, as there was a lack of corroboration in the form of witnesses to the alleged sexual abuse or physical evidence, the child's trial testimony was at times contradictory but also inconsistent with statements made during the forensic interview, and the fact that the jury deadlocked on a count of sexual assault in the first degree supported the conclusion that the admission of portions of the forensic interview played a significant role in the jury's verdict of guilty of two counts of risk of injury to a child.

Argued May 11—officially released October 6, 2020

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the child or others through whom her identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

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

Procedural History

Substitute information charging the defendant with one count of the crime of sexual assault in the first degree and two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Pavia*, *J.*; verdict of guilty of two counts of risk of injury to a child; thereafter, the state entered a nolle prosequi as to the charge of sexual assault in the first degree; subsequently, the court, *Pavia*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Reversed*; *new trial.*

Virginia M. Paino, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Melissa E. Patterson, assistant state's attorney, with whom, on the brief, were *Josephy T. Corradino*, state's attorney, *John C. Smriga*, former state's attorney, and *Colleen P. Zingaro*, senior assistant state's attorney, for the appellee (state).

Jennifer B. Smith filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

LAVINE, J. The defendant, Freddy T., appeals from the judgment of conviction, rendered after a trial to a jury, of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2). On appeal, the defendant claims that (1) the court improperly admitted portions of a recording of a forensic interview of the child under the medical treatment exception to the hearsay rule that were harmful to him, (2) his convictions under both § 53-21 (a) (1) and (2) constitute double jeopardy, and (3) the court abused its discretion

by declining to order disclosure of certain of the child's records following its in camera review of them. We agree that the court improperly admitted portions of the forensic interview of the child that constituted harm. We, therefore, reverse the judgment of the trial court.[1]

The following facts and procedural history are relevant to this appeal. On or about October 10, 2015, the defendant allegedly engaged in sexual acts with his then five year old daughter (child). The defendant allegedly kissed her and touched her vagina and "butt." The child reported the defendant's actions to her grandmother, who called the police on October 19, 2015. The child was taken to Bridgeport Hospital by ambulance, where she was examined by Karen Della-Giustina, a physician in the pediatric emergency department. That night, following Della-Giustina's examination, the child was interviewed by a hospital social worker, Abigail Alvarez-Quiles, who inquired about the child's family situation and mental state. Alvarez-Quiles made a report to the hotline for the Department of Children and Families (department). The responding officer also contacted the department and the Department of Social Services, and referred the grandmother's report to the department's Youth Bureau for further investigation. The child was discharged from the hospital that night. The emergency department report contained a general instruction from Della-Giustina to make an appointment with the child sexual assault team.

[1] Because we conclude that the defendant is entitled to a new trial because the trial court improperly admitted portions of the video of the forensic interview that constituted harmful error, we need not address the defendant's remaining claims. We are aware that the second issue may arise again on remand, but we do not decide it today. Although there may be double jeopardy implications with regard to § 53-21 (a) (1) and (2), because this ultimately is a fact-dependent inquiry, we do not think it prudent to address it at this time. As for the third issue, the court's in camera review of the child's records, should it arise again on remand, we believe this is better left to the discretion of the trial court.

On October 23, 2015, the child was taken to the Center for Family Justice (center), which provides forensic interview services in sexual assault cases, where she met with Brenda Concepcion, a licensed clinical social worker and forensic interviewer, who conducted the forensic interview that is at issue in the present case. During the interview, the child identified the defendant as her father and disclosed several instances of his sexual conduct, including vaginal and anal penetration. Following the forensic interview, Concepcion recommended that the child receive mental health and psychiatric therapy services and have a forensic medical examination.[2]

The defendant was arrested on December 10, 2015. On December 28, 2015, the defendant was charged in a long form information with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and one count of risk of injury to a child in violation of § 53-21 (a) (2). The state later filed an amended information, adding a second count of risk of injury to a child under § 53-21 (a) (1).

At trial, the following witnesses testified: Officer Laura Azevedo-Rasuk, Della-Giustina, Concepcion, the child, Detective Jessi Pizarro, and Danielle Williams.[3] Concepcion testified both before and after the child testified.

Prior to the trial, the state requested that the court review a video recording of the forensic interview of the child, indicating that it intended to offer portions

[2] On November 3, 2015, the child received a follow-up forensic physical examination at Yale New Haven Hospital.

[3] Azevedo-Rasuk was the officer who responded on October 19, 2015. Williams, a psychologist and forensic interviewer who works for Klingberg Child Advocacy Center and for the Center for Youth and Families in Torrington, testified as an expert on the techniques used by forensic interviewers to collect accurate information from young children who may be impacted by trauma from abuse.

of it during the trial pursuant to the medical diagnosis and treatment exception to the hearsay rule. The defendant objected on the grounds that the exception did not apply because medical treatment had concluded and that the purpose of the interview was investigative rather than medical. After Concepcion's initial testimony, the court heard argument on the state's motion and ruled that portions of the video recording were admissible. After the child testified, portions of the video of the forensic interview were shown to the jury.

The jury found the defendant guilty of both counts of risk of injury to a child. On the charge of sexual assault in the first degree under § 53a-70 (a) (2), the jury was deadlocked, and the court declared a mistrial. The state then entered a nolle prosequi on the count of sexual assault. The court accepted the jury's verdict and imposed a total effective sentence of eighteen years in prison, execution suspended after twelve years, with twenty years of probation and sexual offender registration upon release.[4] This appeal followed. Additional facts will be set out as necessary.

On appeal, the defendant's dispositive claim is that the trial court abused its discretion by admitting into evidence portions of the forensic interview of the child conducted by Concepcion. We agree.

We begin with the standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of [our law of evidence], our standard of review is plenary. . . . We review the trial court's decision to admit . . . evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence . . . . Thus, [w]e will make every reasonable presumption in favor of upholding the

[4] Additionally, the court ordered a standing criminal protective order prohibiting the defendant from contacting the child.

trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] concluded as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

"[E]videntiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In a criminal case, [w]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Jordan*, 329 Conn. 272, 287–88, 186 A.3d 1 (2018). "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the [defendant's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotations marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019).

The following additional facts inform our analysis. Della-Giustina testified that the purpose of her physical examination of the child on October 19, 2015, was "to

evaluate and address any urgent or acute needs such as bleeding or medical conditions that are obvious." She conducted a "head to toe" examination but only a "very cursory" examination of the child's vaginal and rectal area. She could not perform an extensive examination of those parts of the child's body because the child would not allow it. Despite this "quick peek," which lasted approximately fifteen seconds, Della-Giustina saw no bleeding or discharge and the child's vaginal/rectal region appeared normal, with "no evidence of trauma or bleeding or bruising."[5]

Thereafter, when Concepcion conducted the forensic interview of the child on October 23, 2015, a multidisciplinary team comprised of Detective Michael Cantrell, Kechia Sadler and Vanessa Torres from the department, and Kayte Cwikla-Masas and Katherine Azana from the Child Advocacy Center/Center for Family Justice, observed the interview on a monitor.[6] Prior to the interview, members of this team provided Concepcion with information regarding the allegations against the defendant.[7] Concepcion testified on direct examination that the purpose of a forensic interview is "to obtain more information for the investigation." With respect to the present case, Concepcion testified that the purpose of the interview was to help the multidisciplinary team

[5] Della-Giustina testified that she did not use a colposcope, a magnification tool often used in forensic medical examinations of sexual assault victims, in this examination as it is not normally available in the emergency room.

[6] Concepcion characterized the group of individuals observing the forensic interview as a "multidisciplinary team."

[7] During defense counsel's cross-examination of Concepcion, she testified as follows:

"Q. And you had met with team members, other team members prior to the interview taking place.

"A. Correct.

"Q. So you had information about what the allegations were and against whom they were made prior to the interview taking place.

"A. Yes."

determine how and if the investigation should go forward. The interview was of interest to multiple parties, including the department and the police. According to Concepcion, part of her responsibility was to provide recommendations for further treatment for the child on the basis of the interview. Concepcion prepared a written report of the interview that was placed into evidence, which included a referral for follow-up mental and physical treatment and examination.

Conception also testified that a forensic interview typically is utilized in cases involving allegations of abuse of young children. The interview facilitates a setting in which the child feels safe and comfortable talking. She testified that forensic interviewers at the center are trained to use an open-ended, rapport-building approach and to take into account the more limited focus of younger children. Interviewers set ground rules such as telling children that they can speak freely and that they should tell the interviewer if they do not understand something. In particular, Concepcion does not "use the words *true* or *not true* all the time but [tells] the child if you don't know an answer, just say I don't know." At the beginning of her interview with the child, Concepcion informed the child that "[she] could say whatever [she] want[ed] in this room because [she was] not in trouble with [her]." In addition, she told the child that "we talk about things that are in this room we talk about things that are true and we talk about safe, being safe." During the course of the interview, Concepcion utilized anatomically correct dolls and diagrams of male and female bodies, inviting the child to identify and describe various body parts. During the interview, the child disclosed details of the defendant's abuse of her, including vaginal and anal penetration. At one point, Concepcion asked the child the name of her dad, and the child gave a different name. When asked again, the child gave the name "Freddy." At the conclusion of the

interview, Concepcion asked the child about staying safe and whether she had someone to talk to if she felt unsafe or scared.[8] Eleven days after the forensic interview, on November 3, 2015, Janet Murphy, a pediatric nurse practitioner at Yale New Haven Hospital, conducted a forensic physical examination of the child. Murphy viewed Concepcion's summary report prior to examining the child.

The day before evidence began, following jury selection, the state made an oral proffer of evidence regarding portions of the video recording of the forensic interview under the medical diagnosis and treatment exception to the hearsay rule.[9] In its proffer, the state

[8] The transcript of the interview reveals the following exchange between Concepcion and the child:

"Concepcion: Okay. So all right. So [child] I want to tell you two quick things okay cause I think we're all done. . . . First I want to tell you thank you for coming. Okay. Did you hear what I said? Okay. So I want to thank you for coming. And the second thing I wanna make sure . . . that you're safe. Remember I said that we talk about safe things to make . . . sure that you're safe. . . . So hold on. We're not done. . . . So last thing I want to tell you . . . listen if you're ever not feeling safe or somebody bothers you or you're scared who can you tell? Who can you go to that you trust?

"[The Child]: You.

"Concepcion: Well I'm not gonna be there. How about in school if somebody bothers you. Who can you tell?

"[The Child]: The teacher.

"Concepcion: Right. Good. And how about at home if somebody bothers you? Do you have somebody you can talk to? Can you tell your grandma? Would you like to have somebody to talk to? Yes? Okay. So I'm gonna tell your grandma that you're interested in having somebody to talk to. Okay. So I'm gonna take you back to your grandma. So let's go back to your grandma."

[9] The portions of the interview that the state proffered run from pages 11 through 18 and from the bottom of page 25 through page 27 of the transcript admitted for identification as exhibit 5. The first portion begins with Concepcion asking the child to identify various parts of the pictured human bodies. The child identified the parts of the human body displayed on a chart shown to her and stated that the defendant touched her vagina (referred to as "toto" in the interview) and butt "a lot." When asked by Concepcion, the child responded in the affirmative that the defendant had used his penis to touch her vagina. She stated that her clothes were on. The following exchange occurred when Concepcion asked the child if the defendant had taken her clothes off:

referenced *State* v. *Griswold*, 160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015), asserting that the proffered portions were relevant to finding out "what happened to [the child] on the physical and mental aspects of [the assault]" for purposes of an ultimate medical diagnosis, and that a foundation for the evidence could be laid via Concepcion's testimony. The state provided the court with the DVD of the interview and a transcript of the DVD's content to review, and the court heard argument regarding the proffer the following day mid-evidence, prior to the child's testimony. In its offer of proof, the state offered the evidence on the ground that Concepcion's interview obtained specific information about the allegations that was reasonably pertinent to ensuring an adequate follow-up medical examination. The defense objected on the ground that the medical diagnosis and treatment exception did not apply, given that the child

"[The Child]: I. . . . my clothes on.

"Concepcion: You had your clothes on? Okay. And how

"[The Child]: And he take it off.

"Concepcion: He took your . . . did he take your clothes off? Okay. And then what happened?

"[The Child]: He was like this.

"Concepcion: He, he took it off with his hands?"

Concepcion asked if the defendant's penis had touched the child's skin or clothes. The child responded that the defendant's penis, which she described as "big," "black," and "soft," had touched her skin. Concepcion then asked the child if the defendant's penis had gone on top of her vagina or inside. The child responded in the affirmative, stating "inside" and that it had done so "a lot." The child also told Concepcion that the same was true for her butt (which she referred to as "coolo"). Specifically, she stated that the defendant's penis had gone inside, again "a lot." The child stated that the defendant told her he wanted to marry her, that he kissed her on her lips and grabbed her head "a lot," and that he "[a]sked us to have a baby." She confirmed that his name was "Freddy."

In the second portion of the video shown to the jury, Concepcion asked the child whether the defendant had put his penis "on top or inside of your toto or something else." The child responded "inside." Concepcion asked the same question in regard to the defendant's hands. The child stated that the defendant's finger had gone inside. Finally, the child stated that this had occurred in the room where the defendant sleeps and that nobody had seen it.

already had received medical treatment and the interview was conducted for an investigative purpose. After reviewing the relevant portions of the interview, the court overruled the defendant's objection, relying on *State* v. *Estrella J.C.*, 169 Conn. App. 56, 148 A.3d 594 (2016), and *State* v. *Eddie N.C.*, 178 Conn. App. 147, 174 A.3d 803 (2017),[10] to conclude that the forensic interview was reasonably pertinent to the child's physical and mental health treatment. The trial court explained that the interview was pertinent to and motivated by medical treatment because Concepcion had referred the child for physical and mental follow-up examinations and treatment, both of which the hearsay exception covered, and that, as a result, the state had shown a sufficient connection between the interview and the follow-up treatment.[11]

At trial, the child testified that, during the interview, she had answered questions from Concepcion about male and female body parts. The child testified that she had told Concepcion that the defendant had touched certain parts of her body. The state then offered the previously identified portions of the forensic interview video and the court admitted them as a full exhibit pursuant to its prior ruling. During her trial testimony, the child identified body parts she previously had identified during the forensic interview, naming eye, mouth, hand, belly, butt, and hair. She responded in the affirmative

[10] In *Estrella J.C.*, this court upheld the admission of statements made in a forensic interview, applying the rule set out in *State* v. *Griswold*, supra, 160 Conn. App. 528. *State* v. *Estrella J.C.*, supra, 169 Conn. App. 76–80. In *Eddie N.C.*, this court upheld the admission of a forensic interview conducted by a social worker prior to the child's follow-up medical examination, relying again on *Griswold*. *State* v. *Eddie N.C.*, supra, 178 Conn. App. 173.

[11] The trial court stated in particular that "I understand while the defense is arguing that [it] really only relates to the investigation and assisting the police, the testimony really is that it supports a whole host of different interests. Medical included and I think that that is borne out by the fact that then this particular witness does refer the complainant for these two types of treatments and then those referrals do take place."

when the assistant state's attorney asked her whether "anybody touch[ed] those parts," but responded in the negative when asked, "Did anybody put anything inside those parts?" The assistant state's attorney repeated the answer, and the child responded "[y]es."[12] The child also testified that she visited the defendant on weekends. She gave conflicting responses when the assistant state's attorney asked her if anything happened when she went to see the defendant; initially the child denied that anything happened and then answered that the defendant had touched her in his bedroom.[13] The child testified that the defendant had touched her "on" her

[12] The assistant state's attorney conducted the following examination of the child:

"Q. Okay. And did you tell Brenda things about those parts?

"A. Yeah.

"Q. Did anybody touch those parts?

"A. Yes.

"Q. Did anybody put anything inside those parts?

"A. No.

"Q. No.

"A. Yes.

"Q. Who?

"A. My father."

[13] The assistant state's attorney examined the child as follows:

"Q. And when you visited him on weekends did anything happen on a weekend when you went to see him?

"A. No.

"Q. Never. Nothing.

"A. Yes.

"Q. Yes. What if anything happened when you went to go see him? Tell me all about that. What would you do on the weekend?

"A. I would go eat. Have fun.

"Q. Did you ever go into his bedroom?

"A. Yes.

"Q. Did anything ever happen when you were in the bedroom with him?

"A. No.

"Q. Never.

"A. Yes.

"Q. So did things happen in the bedroom with him?

"A. Yes.

"Q. When you were in the bedroom with him, what would happen?

"A. He touched me."

pants, that the touching was always on top of her clothes, and that it occurred more than once. She testified that the defendant kissed her. The child testified that the defendant had touched her on the "inside," pointing to the vaginal area on a diagram held by the assistant state's attorney. The defendant also touched the child on her butt, "inside." The child's clothes were on, and the touching was "[i]n [the child's] clothes." The child denied that she had seen the defendant with his clothes off. The jury then viewed the portions of the forensic interview, which contained the child's descriptions of the defendant's vaginal and anal penetration. The child confirmed that she talked to Concepcion.

On appeal, the defendant claims that at trial the court improperly admitted portions of the forensic interview under the medical diagnosis and treatment exception to the hearsay rule because the interview focused on aiding the police investigation and not on medical treatment for the child. The defendant argues that medical treatment for the child had concluded by the time the interview was conducted.[14] The state argues pursuant to the standard set out in *Griswold*, as well as *Estrella J.C.*, that the child's statements in response to Concepcion's questions were reasonably pertinent to obtaining medical treatment even though the interview also aided in the investigation. At trial, the state relied on Concepcion's testimony that the interview involved "multiple interests," that Concepcion referred the child for psychological and physical follow-up treatment, and that Conception asked the child if she had someone to talk

[14] The defendant also argues that this court should overrule *State* v. *Griswold*, supra, 160 Conn. App. 528, and its progeny. It is axiomatic that we cannot overrule the decision made by another panel of this court in the absence of en banc consideration. *In re Zoey H.*, 183 Conn. App. 327, 340 n.5, 192 A.3d 522, cert. denied, 330 Conn. 906, 192 A.3d 426 (2018). The defendant filed a motion for en banc consideration of the present appeal, which this court denied on April 8, 2020.

to if she felt unsafe. On this basis, the state argues that it had laid a proper foundation to admit the child's statements on the extent and specifics of the defendant's assault under § 8-3 (5) of the Connecticut Code of Evidence because they were necessary to enable a fully effective forensic medical examination. We agree with the defendant, that portions of the interview at issue should not have been introduced into evidence and shown to the jury.

We begin our analysis by setting forth the relevant legal principles and applicable standard of review. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . In other words . . . after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception . . . it [becomes] 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." (Internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 536.

"Hearsay is an out-of-court statement offered for the truth of the matter asserted and generally is inadmissible. . . . The rules of evidence, however, recognize that certain out-of-court statements warrant an exception to the general rule that hearsay constitutes inadmissible evidence." (Citations omitted.) *State* v. *Michael T.*, 194 Conn. App. 598, 611, 222 A.3d 105 (2019). The medical diagnosis and treatment exception to the hearsay rule is codified in § 8-3 (5) of the Connecticut Code of Evidence: "A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment."

Admissibility of such statements turns on whether "the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends." (Internal quotation marks omitted.) *State* v. *Cruz*, 260 Conn. 1, 8, 792 A.2d 823 (2002). "[S]tatements made by a sexual assault victim to a social worker who is acting within the chain of medical care may be admissible under the medical treatment exception to the hearsay rule." Id., 10. "The rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his [or her] health . . . will restrain him [or her] from giving inaccurate statements to a physician employed to advise or treat him [or her]." (Internal quotation marks omitted.) Id., 7. "The term 'medical' encompasses psychological as well as somatic illnesses and conditions." *State* v. *Telford*, 108 Conn. App. 435, 440, 948 A.2d 350, cert. denied, 289 Conn. 905, 957 A.2d 875 (2008).

"[S]tatements may be 'reasonably pertinent' . . . to obtaining medical diagnosis or treatment even when that was not the *primary purpose* of the inquiry that prompted them, or the principal motivation behind their expression." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552–53. "Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, our cases have permitted this requirement to be satisfied inferentially." (Citation omitted; internal quotation marks omitted.) *State* v. *Telford*, supra, 108 Conn. App. 441–42; see id., 443 (child's testimony supported inference that she understood statements to social worker were for treatment purposes); see also *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d

266 (2009) (interviewer's statements supported inference that child understood interview's medical purpose, even though child testified that she did not remember), cert. denied, 291 Conn. 910, 969 A.2d 174 (2009).

In *Manuel T.*, this court defined the test for determining the admissibility of hearsay statements under § 8-3 (5) of the Connecticut Code of Evidence.[15] See *State* v. *Manuel T.*, 186 Conn. App. 51, 61–62, 198 A.3d 648 (2018), cert. granted in part, 330 Conn. 968, 200 A.3d 189 (2019). "[T]he statements of a declarant may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that *the declarant understands that the interview has a medical purpose*. Statements of others, including the interviewers, may be relevant to show the circumstances." (Emphasis altered; internal quotation marks omitted.) Id., quoting *State* v. *Abraham*, 181 Conn. App. 703, 713, 187 A.3d 445, cert. denied, 329 Conn. 908, 186 A.3d 12 (2018). In *Manuel T.*, this court explained that "*the focus of the medical treatment exception is the declarant's understanding of the purpose of the interview* . . . ." (Emphasis added.) *State* v. *Manuel T.*, supra, 62. Accordingly, "the inquiry must be restricted to the circumstances that could be perceived by the declarant, as opposed to the motivations and intentions of the interviewer that were not apparent to the declarant." Id. This focus accords with the rationale for the medical diagnosis and treatment exception that patients are motivated to speak truthfully to their

[15] This court rendered its decision in *Manuel T.* in November, 2018; the present case was tried in January, 2018. In January, 2019, our Supreme Court granted the defendant's petition for certification to appeal, limited to, inter alia, the issue of whether the "Appellate Court [applied] the proper standard in determining that, in a criminal prosecution for sexual abuse of a child, hearsay statements made during a forensic interview of the child complainant are admissible under § 8-3 (5) of the Connecticut Code of Evidence?" *State* v. *Manuel T.*, 330 Conn. 968, 200 A.3d 189 (2019).

medical care providers when their own well-being is at stake.

Under our case law, the state need only show that the forensic interview had a medical purpose that the declarant reasonably understood. See *State* v. *Manuel T.*, supra, 186 Conn. 61–62; *State* v. *Abraham*, supra, 181 Conn. App. 713. This court on numerous occasions has upheld the admission of forensic interviews where the purpose of the interview was primarily investigative. See, e.g., *State* v. *Manuel T.*, supra, 186 Conn. App. 63–64; *State* v. *Eddie N.C.*, supra, 178 Conn. App. 173; *State* v. *Estrella J.C.*, supra, 169 Conn. App. 77–78; *State* v. *Griswold*, supra, 160 Conn. App. 552–53. The issue in the present case, therefore, turns on whether the five year old child, the declarant, understood the interview to have a medical purpose. See *State* v. *Manuel T.*, supra, 62.

We conclude that the state has not demonstrated, on the basis of the interview's content, that the child understood that Concepcion's interview was for medical treatment purposes. Our review of the interview supports the conclusion that the basic purpose of the interview was "to obtain more information for the investigation," as Concepcion testified. Because the medically-oriented content was in fact de minimis, the child would not have understood the interview to be anything but investigative, if she understood its purpose at all. The interview was focused on determining what had happened, until its conclusion where Concepcion conveyed "brief safety messages" to the child, and referred her for psychiatric therapy and a further forensic examination following the interview. The state argued before the trial court that Concepcion's inquiries about the alleged assault served the medical purpose of gathering information for the subsequent physical examination to which Concepcion referred the child. The trial court agreed, ruling that the interview had a medical purpose

in addition to the investigative, "borne out by the fact that then [Concepcion] does refer the [child] for these two types of treatments . . . ." The test, however, is what the declarant understands, not what the interviewer's motivation is. See *State* v. *Manuel T.*, supra, 186 Conn. App. 62. Unlike *Donald M.*, where the child was told in advance "that she would be meeting with someone at the hospital who would help her deal with what she went through and determine whether she needed therapy or other medical treatment statements"; *State* v. *Donald M.*, supra, 113 Conn. App. 71; the record does not show that the child understood the interview to relate to medical treatment or that it would lead to follow-up medical treatment in the present case. At oral argument, the state argued that, even though Concepcion's inquiry about the child's safety did not occur until the end of the interview, it still helps inform the conclusion that the child understood previous portions of the interview to relate to medical treatment. We find this argument unpersuasive. The brief medical content at the interview's conclusion was insufficient to give the questioning that preceded it a reasonably pertinent medical purpose.[16]

Second, the fact that the child had been examined at the hospital prior to the time the forensic interview was conducted weighs against the inference that the

[16] We also agree with the defendant that, as a policy matter, allowing the hearsay exception to be invoked as a result of medical referrals made at the end of a forensic interview poses a risk that the state can "sanitize" the interview and subvert the hearsay exception. Ultimately, the focus of the hearsay exception is the declarant's understanding of the interview's purpose, i.e., was it relevant for medical purposes. See *State* v. *Manuel T.*, supra, 186 Conn. App. 62. Pro forma referrals at the end of an interview, even if fulfilled, do not satisfy this requirement. The evidence does not reveal that the child was aware that Concepcion would make referrals for further treatment at the end of the interview based on the information given in the interview, nor has the state shown that she was aware of the purpose of the interview when she made the hearsay statements at issue here to Concepcion.

child understood the interview's purpose to be medical. Della-Giustina examined the child when she was taken to the hospital. Afterward, Alvarez-Quiles, the hospital social worker, interviewed the child. Concepcion's interview occurred four days after the child had completed her immediate medical treatment. Moreover, the subsequent forensic medical examination at Yale-New Haven Hospital occurred eleven days after the interview. Thus, the timing of examinations does not support an inference that the child would have understood that the forensic interview was in the service of continuing medical treatment.

In its ruling, the court in the present case relied on *State* v. *Estrella J.C.*, supra, 169 Conn. App. 56, and *State* v. *Eddie N.C.*, supra, 178 Conn. App. 147, both of which are distinguishable from the present case on the basis of not only interview content but also contextual timing. In *Estrella J.C.*, this court noted, in upholding the forensic interview's admission under the hearsay exception, that the child was undergoing treatment for post-traumatic stress disorder resulting from the defendant's acts at the time the interview occurred and that "the physical examination of the [child] was informed by the forensic interview," given that the pediatric nurse practitioner had met with the forensic interviewer prior to the physical examination to obtain medical history and other relevant details. *State* v. *Estrella J.C.*, supra, 169 Conn. App. 80. Because the timing and context supported the inference that the child was seeking medical treatment and the interview reasonably was pertinent to medical treatment, this court concluded that the court properly admitted the child's statements even though many of the questions asked of the child pertained to what had happened between the child and the defendant. The forensic interview at issue in the present case, on the contrary, did not occur in conjunction with medical treatment but followed the child's physical examination, and the record does not establish

that it was used directly to inform the subsequent examination to the extent that the forensic interview was used in *Estrella J.C.*

In *Eddie N.C.*, the trial court admitted statements from the child, A, made to a clinical social worker at the Yale Child Sexual Abuse Clinic. *State* v. *Eddie N.C.*, supra, 178 Conn. App. 169. A preliminary interview was conducted "so that [Lisa] Pavlovic [a physician] could fully understand the nature of the complaint before her examination." Id., 168. The trial court determined that "the fact that at least one purpose of the interview was to aid . . . Pavlovic in her follow-up examination of A was sufficient to qualify A's statements under the medical diagnosis and treatment exception." Id., 169. The follow-up examination's purpose was "to determine whether A's injuries had healed." Id., 168. This court found the statement was admissible because "the purpose of [Monica] Vidro's interview was to help . . . Pavlovic better understand the nature of A's complaint so that . . . Pavlovic could conduct a thorough medical examination of A." Id., 173. In the present case, Concepcion's referral did not occur until after the conclusion of the forensic interview, and the facts do not support an inference that the child was aware that she was being interviewed to determine whether and what kind of medical and psychological follow-up treatment may be recommended. Moreover, the child in the present case made no physical or emotional complaints to Conception. Unlike Concepcion's interview, the interview in *Eddie N.C.* demonstrated a clearer inference that the child in that case would have understood it pertained to medical treatment.

Finally, the focus on the understanding of the declarant that there is a medical purpose for the interview remains even when the declarant is a young child. The law in Connecticut is that, although statements made by young children are admissible under the medical

diagnosis and treatment exception to the hearsay rule, the principle holds true that "[s]tatements made [in sexual assault cases] . . . reciting history, causation, and the identity of the person causing the injury should be scrutinized to ensure that they are generated for the proper purpose, namely treatment and not litigation." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.17.4 (b), p. 569, citing *State* v. *DePastino*, 228 Conn. 552, 566 n.10, 638 A.2d 578 (1994). "Because of the difficulty of ascertaining a child's subjective understanding of the purpose for which the statement was made, the court should identify indicia of reliability before admitting such statements." E. Prescott, supra, § 8.17.2, p. 567, citing *State* v. *Juan V.*, 109 Conn. App. 431, 445-47, 951 A.2d 651 (2000); *State* v. *Donald M.*, supra, 113 Conn. App. 71. Consequently, our case law recognizes that the age of a child sometimes necessitates allowing an inference, rather than direct evidence, to conclude that the declarant understood the purpose of the interview to be medical. See, e.g., *State* v. *Griswold*, supra, 160 Conn. App. 556; *State* v. *Telford*, supra, 108 Conn. App. 442. The need for reliability remains no less important, however, and the trial court's responsibility to consider it prior to admitting the evidence is implicit in the rationale for the medical diagnosis and treatment exception. The rationale of § 8-3 (5) of the Connecticut Code of Evidence is that reliability stems from a declarant's motivation to be truthful with medical care providers. See, e.g., *State* v. *Cruz*, supra, 260 Conn. 7. This court recently iterated that the exception looks objectively to whether a reasonable declarant would understand that the interview had a medical purpose. See *State* v. *Manuel T.*, supra, 186 Conn. App. 64 n.15 ("In addition, whether the information provided by the declarant ultimately is determined to be true, false, or inconsistent has never been the test to determine whether the statement should be

admitted in the first place. Again, the test focuses on the declarant's understanding of the purpose for the interview, not the adverse party's attacks on the veracity of the statements made during the interview.") Other courts similarly have held that a foundation regarding the declarant's understanding is required when dealing with the medical diagnosis and treatment hearsay exception even with young children. "In cases involving very young children, who do not seek medical treatment by themselves but instead are brought to the physician by someone else, there must be evidence that the child understood the physician's role in order to trigger the motivation to provide truthful information." *United States* v. *Barrett*, 8 F.3d 1296, 1300 (8th Cir. 1993). In Indiana, "courts have recognized that alleged child victims might be too young for a fair presumption they understood the medical purpose, and have required a foundation that they had this understanding." *Hoglund* v. *Neal*, 959 F.3d 819, 834 (7th Cir. 2020). The defendant cites *VanPatten* v. *State*, 986 N.E.2d 255, 265 (Ind. 2013), which is instructive. Citing *Barrett*, the court in *VanPatten* held that "[s]uch young children may not understand the nature of the examination, the function of the examiner, and may not necessarily make the necessary link between truthful responses and accurate medical treatment. In that circumstance, there must be evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information." (Internal quotation marks omitted.) Id., 261. The child in the present case was five years old at the time of the forensic interview. There was no evidence, direct or indirect, that she understood that there was a medical purpose for the forensic interview. In the absence of such evidence, the jury should not have been permitted to see and hear the child during the forensic interview.

Having demonstrated that the trial court abused its discretion when it admitted portions of the forensic

interview of the child into evidence, we turn to whether the court's error was harmful. Examining the evidence here, we cannot conclude, with a fair assurance, that the trial court's abuse of discretion did not substantially affect the jury's verdict. In the present case, the state's case turned on the credibility of the five year old child. Given the absence of witnesses to the alleged sexual assault and the lack of physical evidence relating to it, the state relied on the video of the forensic interview and the testimony of the child to establish the facts of the charged conduct. In cases of sexual assault or risk of injury to a child, a lack of "corroborating physical evidence or any witnesses to the alleged sexual assaults"; *State* v. *Fernando V.*, supra, 331 Conn. 216; weakens the state's case. See id., 216–17 (finding exclusion of defense witness testimony harmful where case turned on the testimony of state's witness); see also *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012) (describing sexual assault cases that turn on complainant's credibility as not particularly strong); *State* v. *Grenier*, 257 Conn. 797, 807–808, 778 A.2d 159 (2001) ("state's case rested entirely on S's credibility . . . inasmuch as S's version of the events provided the only evidence of the defendant's guilt, the state's case was not particularly strong"). In the present case, Della-Giustina testified that the child's intimate parts appeared normal, with no evidence of trauma, and the state did not produce any witnesses to the abuse apart from the child herself. Contra *State* v. *Eddie N.C.*, supra, 178 Conn. App. 174 (noting that any error was harmless because "the overall strength of the state's case was high," with physical evidence of abuse and corroborating witness who testified to defendant's abuse).

This was a close case. The jury was deadlocked on the count of sexual assault and found the defendant guilty of only the charges of risk of injury to a child. See *State* v. *Favoccia*, supra, 306 Conn. 813 ("[I]t is

highly significant that . . . the jury subsequently was unable to reach a verdict on the charge of sexual assault in the second degree, but found the defendant guilty of two counts of risk of injury. That circumstance alone indicates that the case was a close one in the eyes of the jury, making it more likely that the improper evidence might have tipped the balance.'') As in *Favoccia*, the jury's inability to reach a verdict on the sexual assault charge in the present case supports the conclusion that the forensic interview's admission played a significant role in the jury's verdict of guilty of two counts of risk of injury to a child.

Finally, the video portions of the forensic interview were a significant factor in the jury's determination, because the portions provided the most damaging evidence of the defendant's alleged abuse of the child.[17] The jury heard testimony about the interview from both Concepcion and the child, and then had an opportunity to watch the interview itself. The portions of the interview shown to the jury contained the child's allegations to Concepcion, which were not fully corroborated by her trial testimony. In the forensic interview, the child stated that the defendant had put his penis inside her vagina and butt ''a lot.'' At trial, however, the child initially denied that anyone had put anything inside her body, before changing her answer to ''yes.'' Similarly, she denied that anything had ever happened between her and the defendant in the bedroom, before changing her answer to the affirmative. The child testified that the defendant had touched her on her pants, always on top of her clothes, but subsequently testified that he had done so ''in my clothes.'' She testified that the defendant had touched her on the inside of her vagina and ''butt,'' but denied that she had seen him without clothing. The child's testimony at trial was not only

[17] The full transcript of the interview, the full video, and the forensic report prepared by Concepcion were marked only as identification exhibits.

contradictory at times, but it also was inconsistent with the statements she made in the forensic interview. The child gave conflicting answers about whether touching had occurred and where, or what type of touching occurred. The video portions of the forensic interview, which were made available to the jury, provided the only support for the state's theory that the defendant penetrated the child as well as introducing the new allegation that the defendant removed the child's clothing. We note, as well, that during its deliberations, the jurors sent out a note requesting to see the summary of the forensic interview, but because it was not a full exhibit, the jurors were not permitted to see it. We recognize the difficulties the state faces in prosecuting cases involving allegations of sexual assaults of young children when there is no physical evidence but conclude that the child's allegations of sexual abuse by the defendant as revealed in the forensic interview were not admissible under the medical treatment exception to the hearsay rule and played a substantial role in the jury's decision to find the defendant guilty of the charge of risk of injury to a child.

We conclude that the trial court's decision to admit the excerpts of the child's forensic interview under the medical diagnosis and treatment exception to the hearsay rule constituted an abuse of discretion that was not harmless, because the evidence substantially affected the jury's verdict. We, therefore, reverse the judgment of conviction.

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

In this opinion the other judges concurred.

SHELDON SCHULER *v.* COMMISSIONER OF CORRECTION (AC 41886)

Lavine, Alvord and Bright, Js.*

Syllabus

The petitioner, who previously had been convicted of sexual assault in the second degree, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance when he requested a jury instruction, which the trial court accepted and modified before instructing the jury, that contained a mandatory presumption that, if the jury believed that the petitioner's prior sexual misconduct had occurred, it was required to find that that conduct supported a theory that the petitioner had a propensity to commit similar criminal sexual misconduct. The habeas court rendered judgment denying the habeas petition. Thereafter, the petitioner filed a petition for certification to appeal using a Judicial Branch form on which he marked a box that stated that his grounds for appeal were written in a separate Judicial Branch form that pertained to the application for the appointment of appellate counsel and the waiver of fees, costs and expenses for the appeal to this court. The petitioner failed to attach that application form to his petition for certification to appeal. After the habeas court denied the petition for certification to appeal because it did not state any grounds for appeal, the petitioner filed an application for appointment of counsel form on which he identified the proposed grounds for appeal. The habeas court thereafter granted the application for a waiver of fees, costs and expenses and appointed appellate counsel, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal: the habeas court was not apprised of the issue or issues that the petitioner sought to raise on appeal, as the petition for certification to appeal form did not state any grounds on which he proposed to appeal, the petitioner did not attach the application form to his petition for certification to appeal form, and, although the petitioner claimed that the habeas court should have reasonably concluded that he intended to appeal from the denial of his ineffective assistance of counsel claim, the habeas court was left to speculate as to what issue or issues he might have sought to raise on appeal, and his concession that certain other potential claims fell outside the scope of the habeas court's denial of certification to appeal did not negate his failure before the habeas court; furthermore, the petitioner's ineffective assistance of counsel claim was unavailing, as the trial court provided

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

the jury with limiting instructions concerning the evidence of his prior sexual misconduct that were sufficient to counteract any ambiguity in his counsel's requested instruction, the petitioner was not prejudiced by the court's jury instruction, as the factual similarities between the prior sexual misconduct and that with which he was charged made the evidence of the prior misconduct so probative of his propensity to commit similar misconduct that there was no reasonable probability that the result of the trial would have been different, irrespective of any ambiguity in the court's instruction regarding the petitioner's prior sexual misconduct, and there was strong evidence to support the jury's finding that the victim did not consent to sexual intercourse with the petitioner.

Argued July 1—officially released October 6, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Edward J. Mullarkey*, judge trial referee; thereafter, the petitioner withdrew the petition in part; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Gary Nicholson*, former senior assistant state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Sheldon Schuler, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus, in which he challenged his conviction of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3). On appeal, the petitioner claims that the court (1)

abused its discretion in denying his petition for certification to appeal and (2) improperly denied his ineffective assistance of counsel claim. We dismiss the appeal.

In its memorandum of decision, the habeas court quoted this court's decision in *State* v. *Schuler*, 157 Conn. App. 757, 118 A.3d 91, cert. denied, 318 Conn. 903, 122 A.3d 633 (2015), which summarized the facts reasonably found by the jury in the petitioner's underlying criminal case. "On January 27, 2012, the victim was celebrating her thirtieth birthday at her home with several friends and family members. Among those in attendance were the victim's three older sisters, CM, LM and SM, and the [petitioner]. The [petitioner] cohabitated with SM at the time and is the father of three of her children.

"During the party, the victim drank three shots of alcohol and one wine glass sized cup of vodka punch and smoked marijuana. At around 12 a.m., the victim started to take a sip of vodka punch when she felt a spinning sensation in her head. One of her sisters, CM, observed the victim stumble and noted that she appeared to be intoxicated. Shortly afterwards, the victim decided to go upstairs and lie down. After going upstairs, she felt cool air coming from a fan in her son's bedroom and decided to enter that room instead of her own bedroom. She lay down on the floor, hoping that the cool air would alleviate the spinning sensation in her head. When SM entered the room and asked the victim if everything was okay, the victim responded that something was wrong. The victim then removed her jewelry and shirt and fell asleep. SM noticed that the victim appeared to be intoxicated.

"At around 1:30 a.m., the party ended and SM and KS, a friend of the victim, went upstairs to say goodbye. SM placed the victim's cell phone near her head and told her that they had cleaned up and were going to

leave. At that point, only CM, SM, KS, and the [petitioner] remained in the house. After locking the doors, CM drove SM and the [petitioner] to their home. KS left the victim's house separately.

"At approximately 1:40 a.m., SJ, the victim's boyfriend, arrived at the victim's house. He had been invited to the party but had been unable to attend. On his way over to the victim's house, he placed several calls to the victim's cell phone but received no response. Upon arriving at the house, he noticed that the lights were on, and he proceeded to knock on the door, ring the doorbell, and shout into the mailbox slot. After receiving no response, SJ left the victim's house and went out with a friend. SJ testified that the victim was a very heavy sleeper, especially after consuming alcohol.

"Meanwhile, SM and the [petitioner] arrived back at their home. Just before 2:46 a.m., the [petitioner] told SM that he needed to go to the bank and to buy cigarettes. The [petitioner] walked several blocks from his house and then called a taxi using SM's cell phone. The taxi picked up the [petitioner] at 2:53 a.m. and dropped him off at the victim's house. The [petitioner] then entered the victim's house using keys given to him by SM earlier in the night.

"At approximately 3 a.m., the victim believed that she was dreaming that someone was on top of her, licking her breasts and vagina, and penetrating her vagina. When the victim awoke, she found the [petitioner] on top of her, subjecting her to sexual intercourse. She quickly pushed the [petitioner] off of her, screamed, and ran into her bedroom. Although it was dark in her son's room, she was able to identify the [petitioner] because the lights in her bedroom were on, casting light into her son's room. The victim heard the [petitioner] walk downstairs and then saw him, through an upstairs window, exit the house through the back

door. The victim quickly located her car keys and cell phone, and drove to SM's home.

"As she was driving to SM's home, the victim contacted SJ on his cell phone. The victim was crying and more upset than SJ had ever witnessed her at any other time during their four year relationship. The victim would not explain to SJ what was wrong, but told him that she was driving to SM's home. When she arrived, the victim told SM what had happened. SM responded by stating her belief that the [petitioner] was at home, but after searching the home, she determined that he was not there.

"About ten to fifteen minutes later, SJ arrived at SM's home. As he was standing outside, the [petitioner] arrived. The [petitioner] approached SJ and said, 'Do you wanna fight?' SJ was confused by the question, as he had not yet been apprised of the evening's events. As a result, no confrontation occurred between him and the [petitioner], and the [petitioner] entered the home. When the [petitioner] entered, SM began to yell at him and hit him repeatedly. Initially, the victim ran away, but later she joined her sister in hitting the [petitioner]. Eventually, SJ pulled the victim away from the [petitioner], and together they left the premises in SJ's car.

"SJ then drove the victim to Yale-New Haven Hospital, where she was examined by a nurse with specialized training in treating victims of sexual assault. After examining the victim, the nurse gathered evidence from her using a sexual assault evidence collection kit, and notified the police of the incident. During the examination, saliva was found on both of the victim's breasts and sperm was found in the victim's vagina. Subsequent testing of DNA extracted from the seized saliva and sperm samples revealed that it matched the [petitioner's] DNA.

"The [petitioner] was subsequently charged with one count of sexual assault in the second degree in violation of § 53a-71 (a) (3). On July 10, 2013, at the conclusion of trial, a jury found the [petitioner] guilty as charged. The court then sentenced the [petitioner] to ten years imprisonment, execution suspended after seven years, with fifteen years of probation." (Footnotes omitted.) Id., 759–62. Following his conviction, the petitioner appealed to this court, claiming that the trial court improperly (1) admitted evidence of his prior sexual misconduct toward the victim and (2) instructed the jury concerning such prior sexual misconduct evidence. Id., 758–59. This court affirmed the trial court's judgment of conviction; id., 759; and our Supreme Court denied the petitioner's petition for certification to appeal. *State* v. *Schuler*, 318 Conn. 903, 122 A.3d 633 (2015).

On February 27, 2015, the self-represented petitioner filed a petition for a writ of habeas corpus. On July 18, 2017, following the appointment of counsel, the petitioner filed an amended petition, in which he alleged that Christopher Y. Duby, defense counsel at his criminal trial, rendered ineffective assistance.[1] Following a trial on the amended petition, the habeas court issued a memorandum of decision on May 10, 2018, in which it denied the petitioner's claims. Thereafter, on May 16,

[1] Specifically, the petitioner alleged that Attorney Duby rendered ineffective assistance by (1) conceding that evidence of the petitioner's prior sexual misconduct was admissible under *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), (2) failing to object to a limiting instruction provided by the trial court to the jury following the state's direct examination of the victim, (3) submitting an improper request to charge regarding evidence of the petitioner's prior sexual misconduct, which the trial court adopted in its instructions to the jury, and (4) referring to the petitioner's character for untruthfulness several times during his closing argument. The petitioner further alleged that Attorney Duby's errors, "both independently and cumulatively," constituted ineffective assistance of counsel.

At trial on the amended petition, the petitioner withdrew his first two claims.

2018, the petitioner filed a petition for certification to appeal on Judicial Branch form JD-CR-84A (petition for certification form). The petition for certification form contains a section wherein a petitioner must set forth "[t]he grounds for [his] request for certification" by marking one of two boxes. By marking the first box, a petitioner indicates that his grounds for certification are "written in the Application for Waiver of Fees, Costs and Expenses and Appointment of Counsel on Appeal (Form JD-CR-73), which [he will be] submitting with [his] petition." By marking the second box, a petitioner indicates that his grounds for certification are stated on the petition for certification form, specifically in a lined space to the right of the second box and adjacent text stating, "(*Specify grounds*, *attach additional sheets if necessary*)." (Emphasis in original.)

In the present case, the petitioner marked the first box, signaling that his grounds for certification were written in the application for waiver of fees, costs and expenses and appointment of counsel on appeal form (application form) that he would attach to his petition for certification form. The petitioner, however, failed to attach an application form to his petition for certification form. Moreover, on his petition for certification form, the petitioner neither marked the second box nor wrote his grounds for certification in the lined space to the right of the second box. Accordingly, no specific grounds for appeal were raised before the habeas court.

On June 15, 2018, the court denied the petitioner's petition for certification, writing on its denial: "No grounds stated; no fee waiver with grounds filed." On June 28, 2018, the petitioner filed his application form. The application form was dated May 16, 2018. In the space provided to write the "grounds on which [he] propose[d] to appeal," the petitioner wrote: "1.) Whether or not the court [erred] in not finding ineffective assistance of counsel. 2.) Any other issue that may become apparent

after a review of the trial transcripts." On June 28, 2018, the court granted the petitioner's application for a waiver of fees, costs, and expenses, and appointed counsel. This appeal followed.

"We begin by setting forth the applicable standard of review and procedural hurdles that the petitioner must surmount to obtain appellate review of the merits of a habeas court's denial of the habeas petition following denial of certification to appeal. In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our Supreme Court] concluded that . . . [General Statutes] § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [our Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Emphasis omitted; internal quotation marks omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 214–15, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013).

"As our standard of review . . . makes clear, an appeal following the denial of a petition for certification to appeal from the judgment denying a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether

the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous. . . . Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal." (Citation omitted.) Id., 216. In past decisions, "[t]his court has determined that a petitioner cannot demonstrate that a habeas court abused its discretion in denying a petition for certification to appeal on the basis of issues that were not actually raised in the petition for certification to appeal. . . . Under such circumstances, the petition for certification to appeal could not have apprised the habeas court that the petitioner was seeking certification to appeal based on such issues. . . . A review of such claims would amount to an ambuscade of the [habeas] judge." (Internal quotation marks omitted.) *Stenner* v. *Commissioner of Correction*, 144 Conn. App. 371, 374–75, 71 A.3d 693, cert. denied, 310 Conn. 918, 76 A.3d 633 (2013).

On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal and improperly denied his ineffective assistance of counsel claim. The record reflects that the petition for certification to appeal filed by the petitioner on May 16, 2018, failed to state *any* grounds on which he proposed to appeal, let alone that he sought to challenge on appeal the court's denial of his ineffective assistance of counsel claim. The petitioner neither wrote the grounds on which he proposed to appeal in his petition for certification form nor attached the application form, which purportedly contained his grounds for appeal, to his petition for certification form. As a result, the habeas court was not apprised of the issue or issues that the petitioner sought to raise on appeal when it ruled on his petition for certification to appeal on June 15, 2018. Therefore, there is no basis for us to conclude that the

court abused its discretion in denying the petitioner's petition for certification because it was not called on to exercise any such discretion as to the issue the petitioner raises for the first time on appeal. See *Tutson* v. *Commissioner of Correction*, supra, 144 Conn. App. 216 ("it is impossible to review an exercise of discretion that did not occur"); see also id., 217 ("[t]his court has determined that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue that the petitioner later raises on appeal was never presented to, or decided by, the habeas court" (internal quotation marks omitted)).

The petitioner argues that, although his petition for certification "omitted a list of grounds on which [he] intended to appeal," we, nevertheless, can review the merits of his ineffective assistance of counsel claim on appeal because that was the "sole claim" raised in his petition for a writ of habeas corpus, and, thus, "the habeas court should have reasonably concluded that [he] intended to appeal the denial of that claim." We disagree that the habeas court "reasonably" could have concluded that the petitioner sought to challenge on appeal only the denial of his ineffective assistance of counsel claim. Rather, in the absence of any stated grounds on which the petitioner proposed to appeal, the habeas court was left to *speculate* as to what issue or issues the petitioner might have sought to raise on appeal. For instance, in arguing that the habeas court "should have reasonably concluded that [he] intended to appeal the denial of" his ineffective assistance of counsel claim, the petitioner, in his appellate brief, "concedes that other claims, such as evidentiary claims or rulings on pretrial motions, fall outside the scope of the habeas court's denial of certification, and are not subject to this court's review." The petitioner's concession to this court on appeal does not alter the fact that,

without having been apprised of the grounds on which the petitioner proposed to appeal, the habeas court could only guess whether he intended to challenge on appeal the court's denial of the sole claim alleged in his petition for a writ of habeas corpus or, instead, rulings on ''evidentiary claims or . . . pretrial motions.'' Moreover, the petitioner's concession to this court on appeal does not negate his failure before the habeas court.[2] Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal on the ground that it contained no specified grounds for appeal.[3]

We further determine that, even if we were to reach the merits of the petitioner's claim on appeal that the

[2] The petitioner argues that, ''[i]t is notable that, in virtually every case in which this court declined to review a claim because it was omitted from the petition for certification to appeal, the claim this court declined to review was not the primary claim in the proceeding below.'' We reject the invitation to condone the petitioner's failure to state in his petition for certification the grounds on which he proposed to appeal because he had alleged one claim, as opposed to multiple claims, in his petition for a writ of habeas corpus. As the petitioner seemingly acknowledges with his concession on appeal, even in petitions for a writ of habeas corpus in which a petitioner alleges one claim, there may be subsidiary issues arising from the trial of that claim from which he or she might want to appeal. Furthermore, as set forth previously in footnote 1 of this opinion, the petitioner alleged that his trial counsel committed four different errors, each of which constituted ineffective assistance of counsel. Yet, he challenges only the court's conclusion as to one of those alleged errors. Consequently, even though the petitioner asserted only one ''claim,'' he made multiple arguments to the court, and his failure to identify the issue that he wanted to raise on appeal deprived the court of the ability to exercise properly its discretion to consider the specific issue that the petitioner has raised before us.

[3] In his brief, the petitioner states that ''the omission of grounds for appeal in the petition for certification appears to have been an administrative oversight on the part of habeas counsel, rather than the fault of the petitioner.'' We cannot determine the accuracy of the petitioner's appellate statement on the basis of the record before us. Nonetheless, we cannot conclude that the habeas court abused its discretion in denying the petitioner's petition for certification because, regardless of who is at fault for this alleged oversight, the petition for certification form did not state the grounds for appeal or have attached to it the application form stating those grounds.

habeas court improperly denied his ineffective assistance of counsel claim, we would affirm the judgment of the habeas court.

On appeal, the petitioner argues that, at his criminal trial, Attorney Duby "filed a proposed jury instruction that informed the jury that, if it concluded that the petitioner had engaged in prior criminal sexual misconduct, it was *required* to conclude that he had a propensity to engage in such misconduct." (Emphasis in original.) The petitioner argues that Attorney Duby's proposed instruction, which the trial court accepted, "was unsupported by the law, which permits the jury to draw that conclusion, but does not require it," and, therefore, that his performance was deficient. The petitioner further argues that, but for Attorney Duby's deficient performance, the outcome of his criminal trial would have been different because the jury instruction (1) "drew the jury's attention to the fact that uncharged criminal sexual misconduct lent itself to the inference that an individual had a propensity to engage in that misconduct," and (2) "informed the jury that it was *required* to draw that inference as a matter of law" despite the fact that the "evidence supporting that inference was weak" and "the state's evidence against [him] on the question of consent was not strong." (Emphasis in original.)

The following additional facts are relevant to this claim. "On July 8, 2013, the first day of evidence at [the petitioner's criminal] trial, the [petitioner] filed a motion in limine, seeking a ruling that would preclude evidence related to a prior instance of sexual misconduct by the [petitioner]. . . . The state presented an offer of proof regarding the prior misconduct evidence, consisting entirely of testimony from the victim. The victim testified that during the summer of 2011, approximately six months prior to the charged sexual assault, she had had another nonconsensual sexual encounter with the

[petitioner]. The victim stated that on that occasion, she had attended a bar with SM, the [petitioner], and several friends. While at the bar, she had consumed alcohol. Later that night, the [petitioner] drove SM and the victim back to the [petitioner's] home. Because the victim felt intoxicated, she decided to sleep in SM's daughter's bedroom, which was unoccupied that evening. She then went upstairs, took off her pants, locked the bedroom door, and went to sleep. At some point in the evening, she awoke to find the [petitioner] at the bottom of her bed with his head between her legs. The victim remembered that the [petitioner] was spreading her legs apart, attempting to perform oral sex upon her, and repeatedly saying, 'stop playing.' Upon awakening, she jumped out of bed and ran into a nearby bathroom.

"Defense counsel was then given an opportunity to cross-examine the victim and asked whether she and the [petitioner] had been involved in a consensual sexual relationship prior to the 2011 incident. The victim responded that they had not. . . . [T]he [trial] court ruled that the evidence was admissible." (Citation omitted.) *State* v. *Schuler*, supra, 157 Conn. App. 763–64.

"On July 8, 2013, after ruling on the admissibility of evidence related to the [petitioner's] prior sexual misconduct, the [trial] court stated that it would give limiting instructions to the jury after the testimony was presented and again in its final charge. . . .

"Upon the conclusion of the state's direct examination of the victim regarding the [petitioner's] prior sexual misconduct, the court gave the jury the following limiting instruction . . . . 'In a criminal case in which the [petitioner] is charged with a crime exhibiting aberrant and compulsive criminal sexual behavior, evidence of the [petitioner's] commission of another offense is admissible and may be considered for its bearing on any matter to which it is relevant; however, evidence of a prior offense on its own is not sufficient to prove

the [petitioner] guilty of the crime charged in the information. Bear in mind as you consider this evidence that at all times the state has the burden of proving that the [petitioner] committed each of the elements of the offense charged in the information. I remind you that the [petitioner] is not on trial for any act, conduct, or offense not charged in the information.' . . .

"In its final charge to the jury, the court provided, inter alia, the following instruction: 'Next, I want to talk to you about other misconduct, uncharged sexual misconduct. Now, in a criminal case, ladies and gentlemen, in which the [petitioner] is charged with a crime exhibiting . . . criminal sexual misconduct, evidence of the [petitioner's] commission of another uncharged offense involving similar criminal sexual misconduct may be considered . . . for its bearing on any matter to which it is relevant, so long as you believe it, that the other sexual conduct did, in fact, occur and was, in fact, criminal misconduct. Consensual sexual contact is not criminal sexual misconduct.

" 'In this case, the state offered evidence of prior sexual contact between [the victim] and the [petitioner] in August, 2011. It is your job to determine, first, whether that prior sexual contact did, in fact, occur, and, second, if you believe it did occur, whether it was criminal misconduct. If you believe the prior sexual contact occurred and that it was criminal misconduct, then you must also find that it rationally and logically supports a theory that the [petitioner] had a propensity to commit similar criminal sexual misconduct. If, on the other hand, you find the prior sexual contact either did not occur or was not criminal misconduct, then you must also find that it does not tend to rationally or logically support a theory that the [petitioner] had a propensity to commit similar criminal sexual misconduct, and you must not consider the prior sexual misconduct evidence for any purpose as part of your deliberations but must ignore it altogether.

" 'You must keep in mind that evidence of . . . criminal sexual misconduct on its own is not sufficient to prove the [petitioner] is guilty of the crime charged in the information. Even if you determine the prior criminal sexual misconduct occurred, you must bear in mind that at all times the state still has the burden of proving that the [petitioner] committed each and every one of the elements of the offense charged in the information. I remind you that the [petitioner] is not on trial for any act, conduct, or offense not charged in the information, including any alleged prior sexual misconduct.' " Id., 770–73. The trial court's instruction regarding evidence of the petitioner's prior sexual misconduct during its final charge to the jury was adopted from a request to charge by Attorney Duby. Id., 774. The court added to Attorney Duby's proposed charge only that the prior sexual misconduct occurred in August, 2011. Id., 775.

In his direct appeal of his conviction, the petitioner argued; id., 774; as he does in this appeal, that the instruction requested by Attorney Duby contained a mandatory presumption in the following language: "If you believe the prior sexual contact occurred and that it was criminal misconduct, then *you must also find* that it rationally and logically supports a theory that the [petitioner] had a propensity to commit similar criminal sexual misconduct . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 776. This court, when reviewing the instruction for plain error,[4] concluded that the petitioner's interpretation of the instruction that it contained a mandatory presumption was "not

[4] The instruction was reviewed for plain error because it was requested by the petitioner's defense counsel, Attorney Duby, and, thus, if improper, would have constituted induced error that "may not form the basis of a reversal." *State* v. *Schuler*, supra, 157 Conn. App. 775; see also id. (plain error doctrine is "a rule of reversibility" that "this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy" (internal quotation marks omitted)).

the only reasonable one." Id., 776. This court "[t]hus . . . conclude[d] that the statement was, at most, ambiguous . . . ." Id., 777.

The following standard of review and legal principles are applicable to this claim. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 363–64, 77 A.3d 777 (2013). "With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) Id., 365.

We need not address whether Attorney Duby performed deficiently by requesting the jury instruction on which the petitioner's claim is based because we conclude that the petitioner was not prejudiced by the instruction.[5] We reach this conclusion for three reasons.

First, the striking factual similarities between the petitioner's prior sexual misconduct from August, 2011 (prior misconduct), and his charged sexual misconduct from January, 2012 (charged misconduct), made the evidence of the prior misconduct so probative of the petitioner's propensity to commit similar misconduct that there is no reasonable probability that the result of the trial would have been different, irrespective of any ambiguity in the court's instruction regarding the petitioner's prior sexual misconduct. The victim was the subject of both the petitioner's prior and charged misconduct, which incidents occurred within a six month period. *State* v. *Schuler*, supra, 157 Conn. App. 763. On both occasions, the victim was asleep when she awoke to the petitioner sexually violating her. Id., 760, 763. Each time the victim was intoxicated prior to going to sleep. Id., 759, 763. According to the victim's boyfriend, SJ, the victim was a "very heavy sleeper, especially after consuming alcohol." Id., 760. Each time,

[5] Attorney Duby's requested instruction did not pertain to an essential element of the petitioner's charged offense. Accordingly, we do not analyze prejudice in this case under the standard employed in *Holloway* v. *Commissioner of Correction*, supra, 145 Conn. App. 367 ("Proof of such deficient performance in failing to object or except to the omission of any such essential element from the court's charge . . . will almost invariably satisfy the second, prejudice prong of *Strickland* . . . because in the absence of any alternative way for the jury to learn the requirements of the law, the giving of such an incomplete instruction will invariably lead the jury to deliberate on the charged offense without determining if the state has proved the omitted element beyond a reasonable doubt. The only exceptional situation in which a different finding as to prejudice may be justified, on the theory of harmless error, is when the reviewing court, in examining the entire record, is satisfied beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (Emphasis omitted; internal quotation marks omitted.)).

when the victim awoke to the petitioner sexually violating her, she reacted by immediately stopping the petitioner and quickly exiting the room. Id., 760, 763. These factual similitudes would be difficult for a jury to ignore when considering whether the prior misconduct supported a finding that the petitioner had a propensity to commit similar sexual misconduct.

Second, there was strong evidence to support the jury's finding that the victim did not consent to sexual intercourse with the petitioner. At some time after 12 a.m., both of the victim's sisters, CM and SM, observed the victim to be intoxicated prior to her falling asleep. Id., 759. Combined with SJ's testimony that the victim was a deep sleeper when she was intoxicated; id., 760; the jury reasonably could infer that the victim remained asleep until awoken by the petitioner's having sexual intercourse with her at about 3 a.m. and, accordingly, could not have consented to that intercourse with the petitioner.

Perhaps the strongest evidence to support the finding that the victim did not consent to sexual intercourse with the petitioner was the several actions she took immediately upon being awakened to the petitioner's having sexual intercourse with her. The victim "quickly pushed the [petitioner] off of her, screamed, and ran into her bedroom." Id., 760. After the petitioner left her home, at approximately 3 a.m., the victim "quickly located her car keys and cell phone, and drove to SM's home." Id., 760–61. The victim called SJ while en route to SM's home; she was "crying and more upset than SJ had ever witnessed her at any other time during their four year relationship." Id., 761. After arriving at SM's home, the victim told SM what the petitioner did to her. Id. When the petitioner arrived at SM's home some ten to fifteen minutes after the victim, "SM began to yell at him and hit him repeatedly. Initially the victim ran away, but later she joined her sister in hitting the [petitioner]." Id. Thereafter, the victim was driven by SJ to

the hospital, "where she was examined by a nurse with specialized training in treating victims of sexual assault." Id. All of the actions taken by the victim after awaking to discover the petitioner having sexual intercourse with her were corroborated by other witnesses and are consistent with someone who had not consented to such intercourse.

By contrast, at his criminal trial, the petitioner failed to present any evidence to corroborate his testimony that, prior to his sexual contact with the victim in January, 2012, they had an arrangement in which he paid her for sex and, in accordance with that prior arrangement, they had consensual sexual intercourse in January, 2012. The evidence from several witnesses as to the victim's actions in the instant aftermath of awaking to find the petitioner having sexual intercourse with her and the dearth of evidence corroborating the petitioner's testimony concerning consent, reflect, contrary to the petitioner's argument, that the case against the petitioner was very strong, further undermining a claim that any ambiguity in the court's charge affected the outcome of the petitioner's criminal trial.

Third, the trial court provided the jury with limiting instructions concerning the evidence of the petitioner's prior sexual misconduct following the state's direct examination of the victim; id., 771; and in its final charge. Id., 771–72. Specifically, the jury was instructed that evidence of the petitioner's prior sexual misconduct "on its own [was] not sufficient to prove the [petitioner] guilty of the crime charged in the information," that "at all times the state [had] the burden of proving that the [petitioner] committed each of the elements of the offense charged in the information," and that the petitioner was "not on trial for any act, conduct, or offense not charged in the information." (Internal quotation marks omitted.) Id., 771; see also id., 773; see generally *Hickey* v. *Commissioner of Correction*, 329 Conn.

605, 620, 188 A.3d 715 (2018) ("[i]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge" (internal quotation marks omitted)). We conclude that the trial court's limiting instructions to the jury were sufficient to counteract any ambiguity that existed in the propensity instruction requested by Attorney Duby.

Accordingly, even if we were to excuse the petitioner's failure to state the grounds on which he proposed to appeal in his petition for certification, we, nonetheless, would conclude that he could not satisfy the second, prejudice prong of *Strickland* v. *Washington*, supra, 466 U.S. 687. Thus, his ineffective assistance of counsel claim would fail.

The appeal is dismissed.

In this opinion the other judges concurred.

ROBERT GOODY, ADMINISTRATOR (ESTATE OF RICHARD GOODY) *v.* MICHAEL J. BEDARD ET AL.
(AC 42259)

Alvord, Elgo and Devlin, Js.

Syllabus

The plaintiff administrator of the estate of the decedent sought to recover damages from the defendant S for negligence in connection with the drug overdose and subsequent death of the decedent at her residence. He alleged that, on the day that the decedent overdosed, B, who lived with S at her residence, invited the decedent to consume drugs at the residence where the decedent became unresponsive and unconscious, that the decedent thereafter died and that the decedent's injuries and death were caused by S's negligence in that she knew or should have known that drugs were being used on the premises and she failed, inter alia, to take any action to remove the drugs from the premises. S filed a motion for summary judgment and an affidavit in support thereof in which she averred that she did not invite the decedent to her residence and B did not ask her permission to have him there, that she was not present at her residence when the decedent was there and that she did

not learn that he had been there until the day after he had overdosed. Thereafter, the trial court granted, over S's objection, two motions filed by the plaintiff for an extension of time to respond to S's motion for summary judgment. Nearly two weeks after the second deadline date and four days before the rescheduled date for oral argument on S's motion for summary judgment, the plaintiff filed a third motion for an extension of time, which the court did not act on. Thereafter, following a hearing, the trial court granted S's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff's claim that the trial court abused its discretion in effectively denying his third motion for an extension of time to respond to S's motion for summary judgment because additional time for discovery was needed to obtain B's medical records and to perform depositions of other witnesses was unavailing; the plaintiff already had been granted two prior motions for an extension of time and there were no affidavits before the trial court articulating with specificity what additional discovery might justify a further continuance of the hearing and, potentially, the trial, the third motion for an extension of time was filed just four days before the rescheduled hearing and there was an absence of information verified by affidavit detailing precisely what facts were within the exclusive knowledge of the person to be deposed.
2. The plaintiff could not prevail on his claim that the trial court improperly granted S's motion for summary judgment, which was based on his assertion that that court erred in determining that there was no disputed issue of material fact that S did not owe a duty of care to the decedent: no genuine issue of material fact existed as to whether S was at her residence when the decedent was there, as the only evidence before the court on that issue was S's affidavit in which she averred that she was not present when he was there; moreover, contrary to the plaintiff's contention that S had a duty to aid and to protect the decedent because she knew or should have known that B possessed drugs and alcohol in her residence and that they would cause the decedent harm, on the basis of the evidence presented, this court could not conclude that an ordinary person in S's position would anticipate that the decedent would ingest drugs in her residence and suffer serious physical injuries that would result in his death, and the plaintiff did not allege any recognized special relationship of custody or control between the decedent and S that would warrant the imposition of a duty; furthermore, the plaintiff's assertion that S owed the decedent a duty of care under the theory of premises liability was without merit, as he failed to provide any case law to support his contention that B's possession of drugs and alcohol constituted a defect on S's premises.

Argued February 18—officially released October 6, 2020

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the named defendant was defaulted for failure to appear; thereafter, the plaintiff filed a motion for an extension of time; subsequently, the court, *Swienton*, *J.*, granted the motion for summary judgment filed by the defendant Flori Schmoegner and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Peter G. Billings, for the appellant (plaintiff).

Joseph M. Busher, Jr., for the appellee (defendant Flori Schmoegner).

Opinion

ELGO, J. The plaintiff, Robert Goody, administrator of the estate of Richard Goody (decedent), appeals from the summary judgment rendered by the trial court in favor of the defendant Flori Schmoegner.[1] On appeal,

[1] The plaintiff also brought this action against Michael J. Bedard. The plaintiff alleged that Bedard was living with Schmoegner at her home when Bedard invited the decedent to Schmoegner's home for the purpose of consuming drugs, which is where the decedent overdosed. Bedard was served with notice of the action on May 2, 2017. After failing to file an appearance, Bedard was defaulted for failure to appear pursuant to Practice Book § 17-20. Because the plaintiff has not filed a motion for judgment, no judgment has been entered as to Bedard, and, as such, the counts against him remain pending in the trial court. For clarity, in this opinion, we refer to Schmoegner as the defendant and to Bedard by name.

Although the action is still pending as to Bedard, this court has the jurisdiction to decide the plaintiff's appeal. Our jurisdiction is limited to appeals taken from final judgments, unless otherwise provided by law. See Practice Book § 61-1. "Our rules of practice . . . set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3 . . . ." (Internal quotation marks omitted.) *Krausman* v. *Liberty Mutual Ins. Co.*, 195 Conn. App. 682, 687–88, 227 A.3d 91 (2020). Because all counts of the complaint pertaining to the defendant have been disposed of, we have jurisdiction to hear the plaintiff's appeal.

the plaintiff claims that the court erred by (1) effectively denying his motion for an extension of time to conduct additional discovery when it rendered summary judgment, and (2) determining that the defendant did not owe a duty of care to the decedent in rendering summary judgment. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to our resolution of this appeal. "The defendant . . . owned the residence located at 8 Illinois Court, Oakdale . . . where she lived with . . . Bedard, her 'husband, boyfriend and/or friend.' . . . On February 9, 2016, the [decedent] . . . was invited to the premises in order to consume drugs. . . . Around 7 p.m. on that day, the [decedent] became unresponsive and could not breathe. Bedard waited until 8:32 p.m. to seek medical assistance, and, when the emergency medical personnel arrived at the Illinois Court premises, the [decedent] was unconscious and unresponsive. He was transported to the emergency room at Backus Hospital, where he received Narcan, was placed on life support and received additional medical treatment. The [decedent] was then transferred to Yale New Haven Hospital where he received critical care until his death on February 11, 2016. . . .

"In count four [of his complaint] against the defendant . . . the plaintiff alleges that the injuries and death of [the decedent] were caused by the negligence of [the defendant] in that she allowed Bedard to live on the premises, she knew or should have known that drugs were being used on the premises and failed to take any action to remove the drugs from the premises. In addition, she failed to take any action to save the [decedent], failed to warn or protect his safety, failed to provide emergency medical personnel with information regarding the decedent's activities, and failed to exercise control over the premises.

"The defendant . . . has provided an affidavit in support of her motion for summary judgment which states that she did not invite [the decedent] to her residence, that Bedard did not ask permission to have [the decedent] to her home, that she was not at home at any time [the decedent] was at the premises, and [that] she did not learn of his presence at her home until February 10, 2016. She was at work while [the decedent] was at her premises.

"On February 21, 2018, the defendant . . . filed her motion for summary judgment. On June 18, 2018, the plaintiff filed an 'initial' memorandum in opposition to the defendant's motion for summary judgment. He has indicated that he filed for an extension of time in order to respond to the motion for summary judgment, which motion was pending before the court. The court docket indicates that he filed a motion for [an] extension of time on March 20, 2018, seeking until June 1, 2018, to respond to the motion for summary judgment, which motion for [an] extension of time was granted over objection. . . . On June 14, 2018, the plaintiff filed a second motion for [an] extension of time, seeking until September 1, 2018, to respond, which motion was granted on June 18, 2018. . . .

"The plaintiff filed his 'initial' response on June 18, 2018. On September 13, 2018, a third motion for [an] extension of time to respond was filed by the plaintiff, the defendant filed an objection to the motion, and the court heard oral argument on the motion for summary judgment on September 17, 2018." (Citations omitted.) On October 3, 2018, the trial court granted the defendant's motion for summary judgment and rendered summary judgment in her favor. The plaintiff subsequently filed this appeal.

I

The plaintiff first claims that the court improperly denied his motion for an extension of time to respond

to the motion for summary judgment. Specifically, he argues that the court abused its discretion because he had "demonstrated a compelling reason why the additional time was needed to conduct discovery and the steps [his] counsel had already taken for that purpose." We disagree.

The following additional facts are relevant to our resolution of this claim. The plaintiff submitted, and the court accepted, a scheduling order in which all dispositive motions were to be filed by March 15, 2018. Trial was scheduled for November 6, 2018. The defendant filed her motion for summary judgment on February 21, 2018. On March 20, 2018, the plaintiff filed a motion for an extension of time—to June 1, 2018—to respond to the defendant's motion for summary judgment. Over objection by the defendant, the court granted the plaintiff's motion. On June 14, 2018, two weeks after his requested deadline date, the plaintiff filed a second motion for an extension of time requesting that the deadline to respond again be extended, to September 1, 2018. That motion also was granted by the court. On June 18, 2018, the plaintiff filed an initial response to the defendant's motion for summary judgment. On September 13, 2018, nearly two weeks after his second deadline date and four days before the rescheduled date for oral argument on the motion for summary judgment, the plaintiff filed his third motion for an extension of time. The defendant filed an objection. Oral argument on the motion for summary judgment went forward as scheduled on September 17, 2018, at which time the plaintiff stated that he needed more time to conduct discovery. The trial court issued its memorandum of decision on October 3, 2018, granting the defendant's motion for summary judgment and did not act on the plaintiff's third motion for an extension of time.

We begin by setting forth the applicable standard of review. Practice Book § 17-45 provides in relevant

part: "(a) A motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents. (b) Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence. . . ." Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." "A trial court's adjudication of a motion for a continuance pursuant to Practice Book § 17-47 is reviewed for an abuse of discretion." *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 860, 222 A.3d 1025 (2019). "Under the abuse of discretion standard for review, [an appellate court] will make every reasonable presumption in favor of upholding the trial court's ruling and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 701–702, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010).

On appeal, the plaintiff argues that the court abused its discretion in denying his third motion for an extension of time because additional time was needed to obtain documents and to perform depositions to contradict the defendant's affidavit and to respond to her motion for summary judgment. The plaintiff claims that those documents, specifically Bedard's medical records and depositions of other witnesses, would demonstrate that the defendant was aware of Bedard's "numerous

stints in drug and alcohol rehabilitation" and that the defendant "could have [been] present" at the time of the decedent's death.

As we discuss in part II of this opinion, however, the plaintiff has not demonstrated how mere knowledge of Bedard's drug addiction would have created an issue of material fact with respect to the defendant's duty to the decedent. In addition, the plaintiff made reference in his motion to unnamed witnesses with nothing more specific than the claim that they were "further witnesses to the events at issue . . . ." In his brief before this court, the plaintiff insinuates that the deposition testimony of those further witnesses would support his contention that the defendant could have been present at the time of the decedent's death. Although the plaintiff did not provide to the court the affidavits required pursuant to Practice Book § 17-47, the court specifically asked how this additional discovery sought by the plaintiff would have any bearing on the issues presented in the defendant's motion for summary judgment.[2] The plaintiff responded, in reference to Bedard's medical records, that they would show the defendant to be "uncredible" with respect to her denial that Bedard consistently abused substances in her home.

[2] As additional grounds for affirming the trial court, the defendant notes that the plaintiff's third motion for an extension of time failed to comply with Practice Book § 17-47, which requires affidavits that show "precisely what facts are within the exclusive knowledge of the [party to be deposed] and what steps [the plaintiff] has taken to attempt to acquire these facts." (Internal quotation marks omitted.) *Weissman* v. *Koskoff, Koskoff & Bieder, P.C.*, 136 Conn. App. 557, 559, 46 A.3d 943 (2012). In response, the plaintiff is dismissive of that claim and suggests this failure is merely procedural. To the contrary, this court recently reaffirmed the principle that a party's failure to comply with the requirements of § 17-47 is "fatal to [the] claim that [a] trial court abused its discretion" in refusing to grant a motion for continuance to accommodate discovery in response to summary judgment motions. (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, supra, 194 Conn. App. 861.

As the court emphasized in its memorandum of decision, the plaintiff had already been granted two prior motions for extensions of time. The plaintiff's third motion for an extension of time, which was filed just four days before the rescheduled hearing on the summary judgment motion, requested that the deadline to respond be moved to October 21, 2018, just over two weeks before the jury trial was scheduled to begin on November 6, 2018. After hearing from the parties, the court indicated that it would review the motions and issue its decision. It is in this context that we emphasize that proper affidavits with the required showing of "precisely what facts are within the exclusive knowledge of the [party to be deposed]" are not merely procedural rules. (Internal quotation marks omitted.) *Weissman* v. *Koskoff, Koskoff & Bieder, P.C.*, 136 Conn. App. 557, 559, 46 A.3d 943 (2012). They form the basis on which a court can rely and make an informed determination as to whether the information potentially to be discovered justifies the requested continuance. Moreover, in considering whether the court abused its discretion, we observe that "[m]atters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court." (Internal quotation marks omitted.) *Sowell* v. *DiCara*, 161 Conn. App. 102, 132, 127 A.3d 356, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015). Here, the court had before it the representations of counsel and no affidavits articulating with any specificity what additional discovery might justify a continuance of the hearing on the motion for summary judgment and, potentially, the trial. Given the timing of the third motion for an extension of time and, in the absence of information verified by affidavit detailing "precisely what facts are within the exclusive knowledge of the [party to be deposed]"; (internal quotation marks omitted) *Weissman* v. *Koskoff, Koskoff & Bieder, P.C.*, supra, 559; we

cannot conclude that the court abused its discretion in failing to grant the plaintiff's third motion for an extension of time.

II

The plaintiff next claims that the court improperly granted the defendant's motion for summary judgment. Specifically, he argues that the defendant failed to demonstrate, and the court improperly determined, that there "were no material facts in dispute that would give rise to the existence of a legal duty owed by the defendant . . . ." We disagree.

The following legal principles govern our review of this claim. "The standard governing our review of a trial court's decision to grant a motion for summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue.

Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Cyr* v. *VKB, LLC*, 194 Conn. App. 871, 877, 222 A.3d 965 (2019).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty. . . . The issue of whether a duty exists is a question of law . . . which is subject to plenary review." (Internal quotation marks omitted.) *Vermont Mutual Ins. Co.* v. *Fern*, 165 Conn. App. 665, 671, 140 A.3d 278 (2016).

"Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner. . . . Nevertheless, [t]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Citation omitted; internal quotation marks omitted.) *Streifel* v. *Bulkley*, 195 Conn. App. 294, 304, 224 A.3d 539, cert. denied, 335 Conn. 911, 228 A.3d 375 (2020).

"Duty is a legal conclusion about relationships between individuals, made after the fact, and [is] imperative to a negligence cause of action. . . . Thus, [t]here can be no actionable negligence . . . unless there exists a cognizable duty of care. . . . [T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should

have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Citations omitted; internal quotation marks omitted.) *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 525–26, 832 A.2d 1180 (2003).

On appeal, the plaintiff claims that the court improperly rendered summary judgment when it determined that there was no dispute as to any material fact. The plaintiff, however, does not specify or discuss which material facts were still in dispute. The first part of the plaintiff's brief, addressing the motion for an extension of time, claims that he needed more time to complete discovery so as to demonstrate that the defendant was aware of Bedard's issues with drugs and alcohol and that she was present at her home when the decedent was there. The plaintiff claims that "[t]he trial court relied on a self-serving affidavit from the defendant . . . which was inconsistent with the deposition testimony of . . . Bedard and neglected to consider the complaint in its entirety." He does not, however, expand on this claim. We note that the defendant submitted an affidavit to the trial court, attached to her memorandum of law in support of her motion for summary judgment, in which she averred that she was not present at her home on February 9, 2016, when the decedent was there and that she did not learn that the decedent had been at her home until the next day. As the nonmoving party, the burden shifted to the plaintiff to dispute this fact. See *Cyr* v. *VKB, LLC*, supra, 194 Conn. App. 877; *Streifel* v. *Bulkley*, supra, 195 Conn. App. 300 ("The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of

fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.)). The plaintiff did not present any evidence to the court that the defendant was home when the decedent was present. As such, the only evidence before the court to consider regarding whether the defendant was home was the defendant's affidavit. The court, therefore, properly determined that no dispute of material fact existed on that issue.

The plaintiff further argues that the court improperly rendered summary judgment because the defendant knew or should have known that Bedard possessed drugs and alcohol in her home and that she failed to take any action to remove them or to protect the decedent when she knew or should have known that they would cause harm to persons, namely, the decedent. The plaintiff asserts that the court failed to consider a number of allegations in his complaint, namely, "that the defendant . . . 'failed to take any action to save the . . . decedent, failed to warn or protect his safety, failed to provide emergency medical personnel with information regarding the decedent's activities, and failed to exercise control over the premises.' "[3] (Emphasis omitted.) We disagree.

[3] The plaintiff alleged in his complaint and now argues on appeal that the defendant failed to aid or to provide emergency medical care to the decedent. First, we reiterate that the defendant submitted an affidavit to the court in which she averred that she was not home when the decedent was present, she did not invite the decedent to her home, she did not give Bedard permission to invite the decedent to her home, she did not know that Bedard had invited the decedent to her home, and she was not aware that the decedent had been at her home on February 9, 2016, until the following day. The plaintiff did not produce any evidence to rebut the assertions in the defendant's affidavit. The plaintiff, therefore, could not succeed on his claims that the defendant failed to provide emergency medical care to the decedent or to take any action to save the decedent's life because the only evidence presented to the court established that she was not present at her home while the decedent was there and, thus, could not have taken any action to aid the decedent.

The court first analyzed the plaintiff's claims under the general negligence standard. The court explained that "[t]he consequences surrounding [the decedent's] death are too remote to be reasonably foreseeable to the defendant . . . ." Next, the court discussed the public policy considerations relevant to determining whether a duty existed. The court explained that "[there is a] general prohibition against imposing upon an individual a duty to control the conduct of a third party. . . . [Under the policy analysis] there generally is no duty that obligates one party to aid or to protect another. One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or protect another." (Citation omitted; internal quotation marks omitted.) The court thereafter explained that, even "[i]f the court accepts as fact, [the allegation] that Bedard was the 'husband, boyfriend and/or friend' of the defendant," there is no basis for finding that this relationship gives rise to a duty to aid or to protect a third party.

The court subsequently analyzed the plaintiff's claims using a premises liability standard. The court stated that "in order for the plaintiff to succeed on such a theory, he must show that [the defendant] owed [the decedent] a duty to warn [the decedent] of the presence of dangerous and intoxicating drugs on the premises." The court then explained that the revised complaint alleged that the decedent was invited by Bedard to the premises in order to consume drugs and that the decedent's voluntary consumption of drugs, "if it can be proven that [the decedent's] death was the result of drugs consumed on the [defendant's] premises, was the cause of his own death."

The plaintiff alleged that the defendant knew or should have known that Bedard possessed drugs and alcohol in her home and that she therefore had a duty

to aid or to protect the decedent. He did not produce any evidence, in the form of exhibits or counteraffidavits, to support the allegation that the defendant was aware that drugs were in her home. Also, the plaintiff did not present any evidence, beyond mere speculation, to support the contention that the defendant should have known that Bedard possessed drugs and alcohol in her home. Instead, the court was presented with undisputed evidence that the defendant did not invite the decedent to her home, that she did not give permission for Bedard to invite the decedent into her home, and that she was not aware the decedent was in her home until the following day. On the basis of what was presented to the court regarding what the defendant knew or should have known, we cannot conclude that an ordinary person in her position would anticipate that the decedent would ingest drugs in her home and suffer serious physical injuries that would result in his death. See *Sic* v. *Nunan*, 307 Conn. 399, 409, 54 A.3d 553 (2012) ("[W]hat is relevant . . . is the . . . attenuation between [the defendant's] conduct, on the one hand, and the consequences to and the identity of the plaintiff, on the other hand. . . . [D]ue care does not require that one guard against eventualities which at best are too remote to be reasonably foreseeable." (Citation omitted; internal quotation marks omitted.)).

As the trial court explained, there is generally no duty to aid or to protect another person in the absence of a special relationship of custody or control between the parties that would warrant the imposition of such a duty. See *Demond* v. *Project Service, LLC*, 331 Conn. 816, 836, 208 A.3d 626 (2019). The plaintiff has not specifically alleged any recognized special relationship between the parties that would warrant the imposition of a duty.

The plaintiff did allege in his complaint that the defendant was the owner of the home where Bedard lived

and that she, therefore, owed the decedent a duty of care under the theory of premises liability, in that, as the owner of the house, she had a duty to warn the decedent of the presence of intoxicating substances. "To hold the defendant liable for her personal injuries . . . the plaintiff must prove (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 628, 195 A.3d 707 (2018). Here, the plaintiff's claim cannot succeed because the alleged "defect" in the premises was another party's conduct, in that Bedard possessed drugs and alcohol and provided them to the decedent. The plaintiff has not provided any case law to support the contention that a codefendant's possession of drugs and alcohol constitutes a defect on her premises.

On the basis of the foregoing, we conclude that the trial court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT B.*
(AC 42423)

Lavine, Prescott and Moll, Js.

Syllabus

Convicted of the crimes of unlawful restraint in the first degree and breach of the peace in the second degree in connection with an incident involving his former wife, T, and their two sons, the defendant appealed to this court. He claimed that he was denied his constitutional right to a fair trial and that the trial court erred by not instructing the jury on a certain lesser included offense. *Held*:

1. The defendant could not prevail on his claim that his rights to due process and a fair trial were violated when T testified on cross-examination as to his prior bad acts and arrests, his claim being unpreserved and not of constitutional magnitude: the claim was not reviewable because the defendant failed to preserve it at trial by either moving to strike the testimony at issue or seeking a curative instruction; moreover, the defendant's claim was not of constitutional magnitude, and, therefore, not reviewable under the second prong of *State* v. *Golding* (213 Conn. 233), the admission of evidence of a defendant's other crimes being controlled by the law of evidence, not principles of constitutional law.
2. The defendant could not prevail on his claim that he was denied a fair trial due to prosecutorial impropriety in that one of the two prosecutors who represented the state objected during his cross-examination of a witness despite not having conducted the direct examination of that witness, the claimed error having not constituted prosecutorial impropriety; our rule of practice (§ 5-4), on which the defendant based his claim, concerns the examination or cross-examination of a single witness by counsel for one party, and there is nothing explicit in the rule regarding whether one counsel alone is required to object to opposing counsel's examination of a witness.
3. The defendant could not prevail on his claim that the trial court erred by failing to instruct the jury on the lesser included offense of unlawful restraint in the second degree, his claim being unpreserved, as it was waived; the defendant did not submit a request to charge, ask the court to include an instruction on that lesser included offense after he had

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

reviewed the court's proposed charge, or take an exception to the charge as given, and therefore acquiesced in the charge and waived the right to raise the claim on appeal.

Argued June 29—officially released October 6, 2020

Procedural History

Substitute information charging the defendant with the crimes of unlawful restraint in the first degree and breach of the peace in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, and tried to the jury before *Blawie*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Michael J. Tortora, for the appellant (defendant).

James M. Ralls, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, former state's attorney, and *Michael Nemec*, deputy assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Robert B.,[1] appeals from the judgment of conviction, rendered after a jury trial, of unlawful restraint in the first degree in violation of General Statutes § 53a-95 and breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1). On appeal, the defendant claims that (1) he was denied his constitutional right to a fair trial when a witness repeatedly testified about the defendant's prior bad acts and arrests, (2) the court erred by not instructing the jury on the lesser included offense of unlawful restraint in the second degree, and (3) he was denied a fair trial due to prosecutorial impropriety because one of the two prosecutors who represented the state objected during the defendant's cross-examination of a witness despite not having conducted the direct examination of that witness. We affirm the judgment of the trial court.

[1] The defendant represented himself at the criminal trial but was represented by counsel at sentencing and on appeal.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. The defendant and his former wife, T, were divorced in 2003. They have two sons, P and D, who were nineteen and sixteen, respectively, at the time of the underlying incident. On the morning of August 12, 2017, T and the sons (collectively, victims) were leaving the office of a Stamford dentist by the rear stairs. They saw a man wearing a hat and sunglasses, facing away from them, standing at the bottom of the stairs, blocking their way. When the victims reached the bottom of the stairs, the man grabbed D's arm and stated: "Happy Birthday . . . we got to go to court."[2] The victims then recognized the defendant. T instructed the sons to get into her car. Before they could do so, the defendant grabbed D from behind, held him around the neck and stomach, and dragged him toward his vehicle, which was parked in front of the building. T and P yelled for the defendant to stop and tried to pull D from the defendant's grasp. D struggled to free himself. His shoes came off and his feet were dragged on the ground as he was pulled by the defendant. A dental patient who noticed the incident went into the dentist's office and asked someone to called 911. The defendant put his cell phone in T's face and stated that he was recording her.

T pulled the defendant's sunglasses from his face and threw them into the street. P blocked the defendant from putting D into his car. A third party came from a nearby business and pushed the defendant away from D, who was able to run across the street away from the defendant. The defendant got into his vehicle and drove away. After the police arrived, the victims went to the police department and gave written statements.

[2] Although the defendant and T were divorced in 2003, they apparently have had a contentious and litigious relationship since that time and the sons allegedly are estranged from the defendant. The record, however, does not disclose why the defendant acted as he did on August 12, 2017.

Members of the Stamford Police Department investigated the incident and arrested the defendant pursuant to a warrant on August 18, 2017.[3] He was charged in a long form information with unlawful restraint in the first degree and breach of the peace in the second degree.[4] The defendant, who represented himself, pleaded not guilty and elected to be tried by a jury. The presentation of evidence commenced on September 20, 2018. On September 24, 2018, the jury found the defendant guilty of both charges. The court sentenced the defendant to eighteen months of incarceration on the unlawful restraint conviction and six months of incarceration on the breach of the peace conviction, to be served concurrently, for a total effective sentence of eighteen months in prison and a $5000 fine. The defendant appealed.

I

The defendant first claims that his rights to due process and a fair trial were violated when a witness, T, testified on cross-examination as to the defendant's prior bad acts and arrests. The defendant's claim fails because it is unpreserved and is not of constitutional magnitude.

The following facts are relevant to the defendant's claim. The state called T to testify about the August

[3] The offenses listed on the Stamford Police Department incident report were breach of the peace in the second degree and *unlawful restraint in the second degree.*

[4] Count one of the information charged the defendant with unlawful restraint in the first degree, in that "in the city of Stamford, on [or] about August 12, 2017, [the defendant] did restrain another person, [D], under [circumstances] which did expose that person to a substantial risk of physical injury in violation of [§] 53a-95 (a) of the . . . General Statutes."

Count two of the information charged the defendant with breach of the peace in the second degree, in that "in the city of Stamford, on [or] about August 12, 2017, [the defendant] with intent to cause inconvenience, annoyance and alarm, and recklessly creating a risk thereof, such person did engage in fighting and in violent, tumultuous, and threatening behavior in a public place, in violation of [§] 53a-181 (a) (1) of the . . . General Statutes."

12, 2017 incident. On cross-examination, the defendant questioned T in such a way that he elicited the testimony about which he now complains, claiming that the testimony violated his constitutional right not to have evidence of his prior bad acts placed before the jury.[5] The

[5] As examples of the testimony about which he complains, the defendant included the following portions of his cross-examination of T in his brief:

"[The Defendant]: Okay. Okay. So . . . when you came out of the dentist office, you walked into the parking lot?

"[T]: When I came out of the dentist office, I opened the door and there were the stairs and there [you were] blocking them.

"[The Defendant]: Blocking the stairs?

"[T]: That's correct.

"[The Defendant]: So you were stuck on the stairs?

"[T]: Your body was to the right. There's three stairs down exactly. Your body was right at the bottom of the third step. And immediately I started panicking when I realized it was you because you had—

"[The Defendant]: Why did you panic?

"[T]: —glasses and—

"[The Defendant]: Why did you panic again?

"[T]: Because we have—you've been estranged from the kids since you were last arrested when [P] was twelve years old and you picked him up intoxicated at the police station—

"[The Defendant]: Estranged—excuse me, Your Honor. Just—

"The Court: Sustained.

"[T]: —and they—and you haven't seen the—

"The Court: Ma'am—ma'am.

"[The Defendant]: Ma'am.

"The Court: I sustained the objection.

* * *

"[The Defendant]: You mentioned the word blocking.

"[T]: I'm very fearful of you and your body . . . .

"[The Defendant]: And why are you very fearful?

"[T]: Because you've done nothing but harass me and the children for years—

"[The Defendant]: Well, I'm sorry, how did I harass you?

"[T]: —and we have nothing but protective orders against you for the past twelve years.

"[The Defendant]: She's rambling on—

"The Court: Stop. All right.

* * *

"[The Defendant]: So why, prior to the incident, did you not want to allow the parenting time with the minor child to occur?

"[T]: I was going to court for supervised visits because [the defendant] was arrested when my son . . . was twelve years old at an exchange at

defendant argues that "[a]t no time during the trial did the trial court ever instruct [T] to stop making such improper statements nor did [the court strike] the evidence from the record or give a curative instruction."[6] To support his claim, the defendant relies on *State* v.

the police department. He showed up drunk and he asked the workers there if they had green cards to be working there. . . .

"[The Defendant]: Wait, wait, wait. You're rambling on. Your Honor, we just asked her—

"The Court: Stop. Stop ma'am. Ma'am.

"[T]: I'm sorry.

"The Court: All right. You asked a question, but again, we have to focus on the events of August 12, 2017.

* * *

"[The Defendant]: And prior to that, did you give the children up on a weekly basis like you're supposed to? . . .

"[T]: The children were always given to you . . . before you got drunk and arrested. And [P] was twelve years old and I went to court for supervised visits, which we fought about for six years. . . .

"[The Defendant]: You keep mentioning this drunk thing. All right. Do you have any . . . proof that there—

"[T]: You were—yes. It's in the evidence that you were—you went to jail for sixty days.

"[The Defendant]: Excuse me, Your Honor.

"[T]: You were false reporting—

"The Court: Ma'am—ma'am, excuse me. Ladies and gentlemen, I'm going to ask you to step out while we take this up.

* * *

"[The Defendant]: Why do you tell the minor child that he doesn't have to listen to his father?

"[T]: Because you're unsafe. We've had protective orders against you for the past twelve years. I was told by a judge you need [a] psychiatric evaluation before you even could have supervised visitation with the children. And we've been nothing but scared for the past eight years with nothing but protective orders against you. . . .

"[The Defendant]: So why doesn't the child have to listen to their father again?

"[T]: He has a psychiatric problem. We've had protective orders against him . . . ."

[6] The record discloses that at one point during the defendant's cross-examination of T, the court stopped the examination and excused the jury. The court stated to the defendant: "Sir, you have to keep the questioning focused on the events of August 12, 2017. . . . I get the fact this was a contentious divorce, but [these are] irrelevant questions and answers. Again, I don't want this trial to get off track. The focus has to remain on the events

Ferrone, 97 Conn. 258, 116 A. 336 (1922). See id., 266 ("[e]vidence tending to show the commission of other crime on the part of the accused, or facts disclosing his bad character or repute, are not material or relevant to the charge against the accused, and should never be permitted to be introduced; for its purpose can be none other than to prejudice the jury against the accused, and hence to deny him the fair trial which the law guarantees him of being proven guilty of the crime with which he stands charged by evidence which our law accepts"). The defendant also relies on cases in which our appellate courts have addressed the propriety of the state's having introduced a defendant's prior misconduct. See, e.g., *State* v. *Nash*, 278 Conn. 620, 655–60, 899 A.2d 1 (2006) (rationale of rule is to guard against use of prior misconduct merely to show evil disposition of accused); *State* v. *Boykin*, 74 Conn. App. 679, 682–89, 813 A.2d 143 (remark's lack of specificity did not unfairly prejudice defendant), cert. denied, 263 Conn. 901, 819 A.2d 837 (2003).

In response, the state argues that there was no error because the defendant, not the state, elicited T's testimony at issue during his cross-examination of her.[7] See footnote 5 of this opinion. More significantly, however, the state contends that the claim is evidentiary in nature, not constitutional, and therefore, is not reviewable

of August 12, 2017, not whether or not something happened with [D's] older brother, [P], when he was twelve. That's not relevant to what's going on in this trial, and I don't want that to become the focus of this trial.

"So the questioning has to be more relevant and your answer—you can wait till you finish the question, ma'am, to decide whether or not—but it just should be in response to either a question from [Assistant State's] Attorney Nemec or a question from [the defendant]. But volunteering information about past incidences or arrests or—again . . . ."

[7] "So long as the answer is clearly responsive to the question asked, the questioner may not later secure a reversal on the basis of invited error," and this includes those answers that are "not phrased in language the defendant would have preferred . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, 212 Conn. 593, 611, 563 A.2d 671 (1989); see also *State* v. *Holley*, 327 Conn. 576, 621, 175 A.3d 514 (2018) (court properly declined to strike answer that was responsive to question asked).

because the defendant failed to move to strike T's testimony and thus preserve the claim for appellate review. We agree that the claim is not reviewable because the defendant failed to preserve it at trial by either moving to strike the testimony or seeking a curative instruction.[8]

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

The defendant requests, if we determine that the claim is not preserved, that we review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). A defendant can prevail on an unpreserved claim under *Golding* if four conditions are met: (1) the record is adequate for review, (2) the claim is of constitutional magnitude alleging the violation of a fundamental right, (3) the "violation . . . exists and . . . deprived" the defendant of a fair trial, and (4) if subject to harmless error analysis, the state failed to demonstrate the harmlessness of the error beyond a reasonable doubt. See *State* v. *Golding*, supra,

[8] In his brief, the defendant argues that he preserved his claim because he objected to T's use of the word "estranged." The state argues that the defendant did not preserve his claim because the defendant did not " 'distinctly raise' " or state the basis of his objection to put the court on notice. See Practice Book § 60-5. Although the court sustained the defendant's objection, the record is unclear as to the basis of the defendant's objection. Therefore, it was not properly preserved.

239–40. "[T]he first two [prongs of *Golding*] involve a determination [as to] whether the claim is reviewable; the second two . . . involve a determination [as to] whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Whitford*, 260 Conn. 610, 621, 799 A.2d 1034 (2002). The defendant's claim is not reviewable because it is not of constitutional magnitude.

Generally, "evidence of the commission of other crimes or specific acts of misconduct is inadmissible to prove that a defendant is guilty of the crime charged against him." *State* v. *Talton*, 197 Conn. 280, 289, 497 A.2d 35 (1985). The admission of evidence of a defendant's other crimes is controlled by the law of evidence, not principles of constitutional law. See *State* v. *Gardner*, 297 Conn. 58, 65, 1 A.3d 1 (2010) (erroneous introduction of prior misconduct evidence involves claim arising under state law and does not involve constitutional right). Because the defendant's unpreserved claim is an evidentiary one, it is not of constitutional magnitude. He, therefore, is not entitled to review pursuant to *Golding*.

II

The defendant's second claim is that the court erred by failing to instruct the jury on the lesser included offense of unlawful restraint in the second degree.[9] The defendant cannot prevail on the claim because it is unpreserved.

[9] The state charged the defendant in a long form information with violation of § 53a-95 (a), unlawful restraint in the first degree. General Statutes § 53a-95a (a) provides: "A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury."

General Statutes § 53a-96 (a), unlawful restraint in the second degree, provides: "A person is guilty of unlawful restraint in the second degree when he restrains another person."

The following facts are relevant to the defendant's claim. On September 20, 2018, immediately prior to the swearing in of the jurors, the court, the defendant and the prosecutors discussed a variety of matters related to the trial. The court asked the defendant whether there was anything that he wished to say. The defendant represented that the last time he was in court with the prosecutors, Steven Weiss and Michael Nemac, Weiss mentioned that he wanted "to drop the unlawful restraint in the first down to unlawful restraint in the second." The defendant was concerned that the state was adding an additional charge against him. The court understood the defendant's concern and explained that the state could not add an additional charge at that time. Nemec then addressed the court: "The state would ask—at the time we discuss the charge to the jury, the state is going to be asking for—I think this is what [the defendant] is referring to. I did bring it up with Judge White. Just—I wanted it on the record I'm providing notice that the state would be asking for unlawful restraint in the second degree as a lesser included offense. We'd be asking Your Honor for—at the time of charging that that charge be included."

The court explained the lesser included defense doctrine to the defendant. The court then stated: "So I understand your point and then we can have additional discussions about this as the—when the time comes, but the state should be prepared to submit a properly drafted request to charge, especially for the benefit of [the] self-represented party as to what you're discussing. And I've only given you very preliminary discussion of it. *I have not made a ruling on whether a lesser included offense is proper*, but in light of what the state said, that's sort of what I'm telling you." (Emphasis added.)

During the presentation of evidence, the defendant placed into evidence the incident report from the Stamford Police Department listing the offenses commit-

ted as breach of the peace in the second degree and unlawful restraint in the second degree. At the conclusion of evidence, the court inquired of the state whether it would be seeking a lesser included offense instruction with respect to the charge of unlawful restraint in the second degree as it had previously indicated. The state responded that it would file a request to charge on Monday, September 24, 2018. The court stated that it would take up the matter during a charge conference. On Monday, when the court asked the state whether it was proceeding on any lesser included offense, the state answered that it was not. The court stated that it was a two count information, as drafted.

During the charge conference, the court discussed the procedures for summation and informed the defendant that he could not make any argument regarding plea offers because they were not in evidence. But, because the police incident report that the defendant had put into evidence stated the offense was unlawful restraint in the second degree, the defendant could argue that crime. See footnote 3 of this opinion. The court provided the parties with copies of its proposed charge, which it reviewed with the defendant and the prosecutors and solicited comments from them.[10] Notably, the defendant did not file a request to charge, and he did not request that the court instruct the jury on the lesser included offense of unlawful restraint in the second degree. During the state's final argument, Nemec argued that the jury should find the defendant guilty of unlawful restraint in the first degree, explicitly discussing the elements of that crime. Nemec did not mention unlawful restraint in the second degree. When the defendant presented his final argument, he did not mention unlawful restraint in the second degree. The court instructed the jury only on unlawful restraint in

[10] The defendant objected to a portion of the breach of the peace instruction, but that instruction is not at issue on appeal.

the first degree and breach of the peace in the second degree. The defendant took no exception to the instruction as given by the court.

On appeal, the defendant claims that the state "clearly and unequivocally placed the defendant on notice that the lesser included charge of unlawful restraint in the second degree would be charged." He argues that, although he did not take an exception to the charge, the record does not indicate that he acquiesced to the charge as he was "under the impression [that] he could argue it during closing and therefore, it cannot be concluded that [he] abandoned his request."[11] The state argues that the claim is unpreserved and, therefore, the defendant is not entitled to review of it. We conclude that the defendant waived his right to appellate review of his claim of instructional error.

In Connecticut, "unpreserved claims of improper jury instructions are reviewable under [*State* v. *Golding*, supra, 213 Conn. 239–40] unless they have been . . . implicitly waived." *State* v. *Kitchens*, 299 Conn. 447,

[11] The defendant also contends, pursuant to *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980), that the court erred by failing sua sponte to instruct the jury on the lesser included offense of unlawful restraint in the second degree. Under *Whistnant*, "a lesser included offense instruction should be given when: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." (Internal quotation marks omitted.) *State* v. *Rudd*, 62 Conn. App. 702, 706, 773 A.2d 370 (2001). The defendant's contention is predicated on the police incident report that he placed into evidence charging him with unlawful restraint in the second degree. Even though the court advised the defendant that he could argue the evidence regarding the affidavit and information, the transcript of the defendant's final argument discloses that he made no such argument.

468, 10 A.3d 942 (2011). "[W]aiver is an intentional relinquishment or abandonment of a known right or privilege. . . . It involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim present on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim [under *Golding*]." (Citation omitted; internal quotation marks omitted.) Id., 469.

Implied waiver may be found when counsel fails "to take exception or object to the instructions together with (1) acquiescence in, or expressed satisfaction with, the instructions following an opportunity to review them, or (2) references at trial to the underlying issue consistent with acceptance of the instructions ultimately given." Id., 469–70. The rationale for the implied waiver rule is that "[t]o allow [a] defendant to seek reversal [after] . . . his trial strategy has failed would amount to allowing him to . . . ambush the state [and the trial court] with that claim on appeal." (Internal quotation marks omitted.) Id., 470.

In the present case, the defendant did not submit a request to charge, ask the court to include an instruction on the lesser included offense of unlawful restraint in the second degree after he had reviewed the court's proposed charge, or take an exception to the charge as given. The defendant therefore acquiesced in the charge and waived the right to raise the claim on appeal. The defendant's instructional claim therefore is not reviewable.

III

The defendant's third claim is that he was denied a fair trial due to prosecutorial impropriety because one of the two prosecutors who represented the state objected during the defendant's cross-examination of a witness despite not having conducted the direct examination of that witness. We disagree.

We begin with the well-known standard of review for claims of prosecutorial impropriety. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Internal quotation marks omitted.) *State* v. *Pernell*, 194 Conn. App. 394, 403, 221 A.3d 457, cert. denied, 334 Conn. 910, 221 A.3d 44 (2019). If we first determine that an impropriety exists, we then apply the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). Because we conclude that there was no prosecutorial impropriety as claimed by the defendant, we need not address the *Williams* factors.

The defendant grounds his claim of prosecutorial impropriety in the following facts, about which there is no dispute. Prosecutors Nemec and Weiss represented the state at trial. The defendant has assumed that Nemec was the lead counsel as he called all of the state's witnesses and conducted the direct examination of each of them. Nemec also made the state's final argument. During the defendant's cross-examination of the state's witnesses, however, Weiss voiced objections to

the defendant's questions. Also, both Nemec and Weiss responded to questions from the court throughout trial. The defendant acknowledges that it is common practice for a party to have lead counsel and a second chair, but that it was fundamentally unfair for both Nemec and Weiss to "flip flop" as to who was doing the examination and who was objecting during his cross-examination of the witnesses whom Nemec called and examined. The defendant claims that he was prejudiced by having to defend himself against not one, but two, prosecutors at the same time. Although the defendant never objected to the prosecutor's "flip flop," he claims on appeal that the court should have stopped the "flip flop" from happening and issued a warning to the prosecutors. The defendant also claims that had Weiss' objections not been sustained by the court, he would have been able to present further evidence through cross-examination that would have led the "jury to think differently."[12]

The defendant bases his claim on Practice Book § 5-4. Section 5-4 provides: "The counsel who commences the examination of a witness, either in chief or on cross-examination, must alone conduct it; and no associate counsel will be permitted to interrogate the witness, except by permission of the judicial authority."[13]

"The interpretative construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine

[12] The defendant did not identify what evidence he was prevented from presenting due to Weiss' objections and how "the jury [would have thought] differently."

[13] See also Practice Book § 5-8 ("[n]o more than one counsel on each side shall be heard on any question of evidence . . . without permission of judicial authority"); E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.14, p. 344 (direct examination).

[the] meaning [of a statute or rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Fraboni*, 182 Conn. App. 811, 818–21, 191 A.3d 247 (2018). "We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise. . . . Put differently, we follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Internal quotation marks omitted.) Id., 822.

Practice Book § 5-4 concerns the examination or cross-examination of a single witness by counsel for one party. Counsel who commences the examination or cross-examination alone must conduct it; no associate counsel may conduct the examination without permission of the judicial authority. There is nothing explicit in § 5-4 regarding whether one counsel alone is required to object to opposing counsel's examination of a witness. Considering all of the circumstances present, we do not conclude that the claimed error constitutes prosecutorial impropriety, although we do not approve of the practice engaged in by the prosecutors and discourage its use in the future. See, e.g., *State* v. *Bermudez*, 195 Conn. App. 780, 824, 228 A.3d 96 (not every misstep by prosecutor amounts to impropriety), cert. granted on other grounds, 335 Conn. 908, 227 A.3d 521 (2020); *State* v. *Roberts*, 158 Conn. App. 144, 152, 118 A.3d 631 (2015) (same).

The judgment is affirmed.

In this opinion the other judges concurred.

SHAUNA DEMPSEY *v.* VINCENT CAPPUCCINO
(AC 42751)

Prescott, Elgo and Devlin, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court granting the parties joint legal custody of their minor child and giving the defendant unsupervised visitation. The plaintiff claimed that the trial court erred in awarding the defendant unsupervised visitation and in not finding that he had substance abuse issues. After the commencement of her appeal, the plaintiff filed a postjudgment motion to modify the custody and visitation order. The court modified the visitation order, changing the defendant's visitation to supervised visits and finding that the defendant had substance abuse issues. *Held* that the plaintiff's appeal was dismissed as moot because the aspects of the custody order that she challenged on appeal were superseded by the subsequent order issued in response to the plaintiff's motion to modify; moreover, although an order superseding the order of joint legal custody was not issued, the plaintiff failed to adequately brief this issue on appeal and, therefore, any claim of error pertaining to the order of joint custody was not properly before this court.

Argued May 22—officially released October 6, 2020

Procedural History

Application for custody of the parties' minor child, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Klatt, J.*; judgment granting, inter alia, joint legal custody to the parties and visitation rights to the defendant, from which the plaintiff appealed to this court; thereafter, the court, *M. Murphy, J.*, granted in part the plaintiff's motion to modify custody and access and denied the plaintiff's motion for contempt. *Appeal dismissed.*

Steven R. Dembo, with whom were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellant (plaintiff).

Adam J. Teller, for the guardian ad litem.

Opinion

DEVLIN, J. The plaintiff, Shauna Dempsey, appeals from the February 21, 2019 judgment of the trial court awarding the defendant, Vincent Cappuccino, unsupervised visitation rights with their minor child. On appeal, she claims that the court erred by allowing the defendant unsupervised visits without requiring any testing for marijuana use, finding that the defendant does not have a substance abuse problem, and denying her motion for reargument and reconsideration. On February 20, 2020, the court issued subsequent orders that superseded the visitation orders that are challenged on appeal. We therefore dismiss the appeal as moot.[1]

The following undisputed facts and procedural history are relevant to this appeal. The parties met in 2014, and had a romantic relationship that lasted approximately four years but were never married. In September, 2015, the plaintiff gave birth to the parties' only child (minor child). Since the minor's child's birth, the plaintiff has lived with the minor child in her parents' home in Avon. Although the defendant previously lived in Connecticut, he has lived with his parents in Norfolk, Massachusetts since March, 2016. On January 17, 2018, the plaintiff filed a custody application requesting, inter alia, sole legal custody of the minor child. In response, the defendant moved for joint legal custody of the minor child with the minor child's primary residence with the plaintiff and an appropriate parenting schedule. On June 7, 2018, by agreement of the parties, the court appointed Attorney Rhonda Morra to serve as the guardian ad litem for the minor child.

Trial commenced on February 20, 2019. During trial, the guardian ad litem and the parties testified to the defendant's struggles with chemical dependency. In

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

2016, he was convicted of driving under the influence and later, in 2018, an ignition interlock device was installed in his vehicle, which requires the driver to test negative for the presence of alcohol before the engine will start. In March, 2016, he overdosed on heroin and Xanax, which prompted his move to Norfolk, Massachusetts. In 2017, he overdosed once more. According to the defendant, since 2017, he has not used heroin and has not abused prescription medication. He further testified, though, that he routinely self-administers medicinal marijuana every evening to treat his anxiety. On March 24, 2018, following the commencement of this proceeding, he obtained a prescription for marijuana to treat his anxiety, insomnia, and back pain.[2] Despite numerous requests to do so, he did not provide any record of his drug treatment history after 2014 to either the guardian ad litem or to the court. The defendant also failed to complete two hair follicle tests and a random urinalysis test sought in advance of trial.

On February 21, 2019, the trial concluded and the court, *Klatt, J.*, entered orders that, inter alia, the parties would have joint legal custody of the minor child with primary residence with the plaintiff; the defendant would have one hour of unsupervised visitation with the minor child in a public location every week, which would increase incrementally at later scheduled dates; the defendant would continue to be routinely tested for alcohol and his visitation rights would be terminated upon any test showing a blood alcohol content of greater than 0.01; and the defendant would not use marijuana within forty-eight hours of visiting the minor child. Judge Klatt did not order any further testing of the defendant for marijuana. Judge Klatt also found that

[2] We note that the palliative use of marijuana is permitted, subject to certain restrictions, under the laws of Connecticut and Massachusetts. See General Statutes § 21a-408a (a); Mass. Ann. Laws ch. 94*I*, § 2 (a) (LexisNexis 2018).

"[b]oth [parties] currently are . . . clean and sober . . . that is substance abuse free, and have been since mid-2017." On March 29, 2019, the plaintiff filed the present appeal raising challenges to these orders.

Following the entry of the February 21, 2019 judgment and the commencement of this appeal, the plaintiff moved the Superior Court to modify Judge Klatt's visitation order, and later moved the court to hold the defendant in contempt for allegedly violating Judge Klatt's order to not consume alcohol. These motions were consolidated, and the trial court, *M. Murphy, J.*, conducted three days of hearings on the motions. On February 20, 2020, Judge Murphy entered a modified visitation order that provided, inter alia: except for two weekends in March, 2020, the defendant's parenting time would take place only at his parents' home in Massachusetts, and one of his parents would be present at all times during the minor child's visit; the defendant was not to consume alcohol or marijuana for twenty-four hours prior to and during his parenting time; the defendant was not permitted to operate a motor vehicle with the minor child in the car; the defendant was required to submit to a hair follicle drug test every three months and to a Soberlink blood alcohol test prior to the start of his parenting time and periodically during his parenting time; a positive test—defined as either a hair follicle test showing the presence of a substance not medically prescribed to the defendant or a blood alcohol content of 0.02 or greater, a missed test, a belated test, or a test that is unable to be completed due to the defendant having insufficient hair—results in immediate suspension of his parenting time until further court order; and the defendant was ordered to provide the plaintiff with the results of positive alcohol or drug tests. Judge Murphy also found that the defendant "has a substance [abuse] problem, which affects his ability to care for his child."

On appeal, the plaintiff challenges Judge Klatt's February 21, 2019 order permitting the defendant to have unsupervised visits with the minor child, prohibiting the defendant from consuming marijuana within forty-eight hours of his visits with the minor child without requiring regular drug testing, and finding that the defendant does not have a substance abuse problem. The plaintiff's central claim is that, given the defendant's prior substance abuse problems, Judge Klatt's orders were insufficient to protect the minor child's safety. Judge Murphy's subsequent orders, mandating supervised visitation, directly address this issue.

We first address whether the plaintiff's claims on appeal are moot as a result of Judge Murphy's February 20, 2020 orders. "When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . It is axiomatic that if the issues on appeal become moot, the reviewing court loses subject matter jurisdiction to hear the appeal. . . . It is a [well settled] general rule that the 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. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal." (Citation omitted; internal quotation marks omitted.) *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 599, 952 A.2d 115 (2008); see also *Santos* v. *Morrissey*, 127 Conn. App. 602, 605, 14 A.3d 1064 (2011).

In light of the foregoing principles, on August 16, 2020, this court issued an order allowing the parties to file supplemental briefs "to address the issue of whether the orders issued by Judge Klatt, that are the subject of this appeal, have been superseded by the February

20, 2020 orders entered by Judge Murphy such that the issues in the present appeal are now moot." On August 11, 2020, the plaintiff filed a supplemental brief in accordance with that order and, on August 14, 2020, the guardian ad litem for the minor child filed a notice adopting the position set forth in the plaintiff's brief.

In her supplemental brief, the plaintiff argues that her appeal is not moot because Judge Murphy's orders did not supplant Judge Klatt's order that the parties would share joint legal custody of the minor child. Although that is true—Judge Murphy did not issue an order superseding Judge Klatt's order of joint legal custody—the plaintiff's initial brief to this court cannot reasonably be read as a challenge to that order. The plaintiff's entire brief is focused solely on the risk posed to the minor child by Judge Klatt's order that the defendant enjoy unsupervised visitation with the minor child. Although the plaintiff broadly appeals from Judge Klatt's orders, nowhere in her brief does she mount any factual or legal challenge to the order of joint custody. Because the plaintiff did not brief any claim of error pertaining to the custody order, any such claim is not properly before us. See *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 529, A.3d (2020) ("We are not required to review issues that have been improperly presented to this court through an inadequate brief . . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs . . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.)) Therefore, the fact that Judge Murphy did not enter any order that superseded Judge Klatt's joint custody order is immaterial

to the issue of whether the orders that the plaintiff has challenged are moot, an issue that the plaintiff did not address in her supplemental brief.[3]

Judge Klatt's February 21, 2019 orders that the plaintiff has in fact challenged—the unsupervised visitation orders—have been superseded by Judge Murphy's February 20, 2020 order and are no longer in effect. The plaintiff's appeal from Judge Klatt's visitation order focuses on her decision to not require the defendant to submit to any drug testing. Following Judge Murphy's orders, however, the defendant is now required to submit to hair follicle tests every three months. Furthermore, aside from two weekends in March, 2020, the defendant is no longer permitted to have unsupervised visits with the minor child. Put differently, Judge Klatt's order permitting the defendant to have unsupervised visits with the minor child has been superseded by Judge Murphy's order permitting only supervised visits with the minor child starting in April, 2020. Moreover, the plaintiff is no longer aggrieved by Judge Klatt's earlier finding that the defendant does not have a substance abuse problem because Judge Murphy subsequently found that the defendant does have a substance abuse problem. As a result, each aspect of Judge Klatt's February 21, 2019 orders that the plaintiff challenges on appeal is no longer in effect, and she has not amended her appeal to challenge Judge Murphy's February 20, 2020 order. Thus, we conclude that there is no practical relief that this court can afford the plaintiff and, therefore, the plaintiff's appeal is moot. See, e.g., *Thunelius* v. *Posacki*, 193 Conn. App. 666, 686, 220 A.3d 194 (2019); *Kennedy* v. *Kennedy*, supra, 109 Conn. App. 599–600.

The appeal is dismissed.

In this opinion the other judges concurred.

[3] Also immaterial to the mootness issue are the plaintiff's complaints about alleged deficiencies in Judge Murphy's present visitation orders.

PHYLLIS LARMEL *v.* METRO NORTH COMMUTER RAILROAD COMPANY
(AC 42647)

Lavine, Prescott and Eveleigh, Js.

Syllabus

The plaintiff previously sought to recover damages from the defendant for personal injuries she sustained in a fall on the defendant's premises. The matter was referred by the court to an arbitrator pursuant to statute (§ 52-549u). The arbitrator issued a decision finding in favor of the defendant and the plaintiff failed to request a trial de novo within twenty days of the decision being mailed as required by statute (§ 52-549z (d)). The court rendered judgment in accordance with the arbitrator's decision pursuant to § 52-549z (a). The plaintiff filed a motion to open the judgment, which the court denied. The plaintiff thereafter filed a new action pursuant to the accidental failure of suit statute (§ 52-592 (a)). The defendant filed a motion to dismiss, arguing that the trial court lacked subject matter jurisdiction under the doctrine of res judicata because there had been entry of a final judgment on the merits pursuant to § 52-549z. The court granted the motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that, although the trial court improperly dismissed the plaintiff's action on jurisdictional grounds, the plaintiff could not avail herself of § 52-592 (a) because her first action had been tried on its merits, as the judgment rendered by the court in accordance with the arbitrator's decision in the first action was a judgment on the merits, the arbitration having given the parties an opportunity to address the merits of the case, and the court should have rendered judgment for the defendant, rather than dismissing the action; moreover, this case was not controlled by *Nunno* v. *Wixner* (257 Conn. 671), because a different statute ((Rev. to 2001) § 52-192a) was at issue in *Nunno* that not only had a different purpose than the statute at issue in the present case, § 52-592 (a), but was textually distinguishable.

(*One judge dissenting*)

Argued February 4—officially released October 6, 2020

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *S. Richards*, *J.*, granted the defendant's motion to dismiss

and rendered judgment thereon, from which the plaintiff appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed.*

James P. Brennan, for the appellant (plaintiff).

Beck S. Fineman, for the appellee (defendant).

Opinion

LAVINE, J. The plaintiff, Phyllis Larmel, commenced the present personal injury action (second action) against the defendant, Metro North Commuter Railroad Company (Metro North), pursuant to the accidental failure of suit statute, General Statutes § 52-592 (a). Metro North responded by filing a motion to dismiss the second action on the ground that it was barred by the doctrine of res judicata. The trial court, *S. Richards*, *J.*, dismissed the second action. On appeal, the plaintiff claims that the court improperly (1) dismissed the second action, (2) held that the doctrine of res judicata applies to an arbitrator's decision rendered pursuant to "informal compulsory arbitration" under General Statutes § 52-549u, (3) failed to hold that a judgment rendered pursuant to General Statutes § 52-549z is a matter of form, (4) failed to hold that the second action was viable pursuant to § 52-592 (a), and (5) failed to hold that the plaintiff's failure to file a demand for a trial de novo constituted mistake, inadvertence, or excusable neglect. The defendant claims that the second action is barred by the doctrine of res judicata or, in the alternative, that § 52-592 (a) does not save the second action. We conclude that the accidental failure of suit statute does not save the second action.[1] The form of the judgment is improper. We, therefore, reverse the judgment of dismissal and remand the case with direction to render judgment in favor of Metro North.

[1] Because we conclude that the second action is not saved by the accidental failure of suit statute, we need not address the plaintiff's remaining claims.

The following facts and procedural history gave rise to the present appeal.[2] On the rainy morning of October 1, 2014, the plaintiff slipped and fell as she entered a Metro North passenger railcar at Union Station in New Haven. On June 15, 2015, the plaintiff commenced a personal injury action against Metro North (first action), alleging that Metro North was negligent and that she sustained injuries when she fell due to the wet and slippery condition of the railcar's floor. On November 2, 2016, the trial court, *Abrams*, *J.*, accepted the parties' trial management schedule that was signed by counsel for the parties. According to the schedule, the parties were to complete discovery and be prepared for a pretrial conference in April, 2017. Trial was to begin in October, 2017. In March, 2017, the plaintiff filed the first of several motions to modify the scheduling order, including the time within which to disclose an expert witness. She also noticed the deposition of a Metro North agent. Metro North filed motions for protective orders. On September 22, 2017, the plaintiff filed a motion to continue the trial until April, 2018. Judge Abrams denied the motion to continue, but marked the trial "off" and sent the parties to court-mandated arbitration pursuant to § 52-549u.[3]

The arbitration was held on December 1, 2017, and the arbitrator, Attorney David Crotta, issued his decision on February 26, 2018, finding in favor of Metro North. The clerk of the court mailed notice of the arbitrator's decision to counsel for the parties on February

[2] "The Appellate Court, like the trial court, may take judicial notice of the files of the Superior Court in the same or other cases." (Internal quotation marks omitted.) *Wasson* v. *Wasson*, 91 Conn. App. 149, 151 n.1, 881 A.2d 356, cert. denied, 276 Conn. 932, 890 A.2d 574 (2005).

[3] General Statutes § 52-549u provides in relevant part: "[T]he judges of the Superior Court may make such rules as they deem necessary to provide a procedure in accordance with which the court, in its discretion, may refer to an arbitrator, for proceedings authorized pursuant to this chapter, any civil action in which in the discretion of the court, the reasonable expectation of a judgment is less than fifty thousand dollars exclusive of legal interest and costs and in which a claim for a trial by jury and a certificate of closed

27, 2018, as evidenced by the postmark. The plaintiff did not demand a trial de novo within twenty days pursuant to § 52-549z (d).[4] On March 21, 2018, in the absence of a demand for a trial de novo, Judge Abrams rendered judgment in the first action in favor of Metro North in accordance with the arbitrator's decision. See General Statutes § 52-549z (a). On March 23, 2018, counsel for the plaintiff filed a motion to open the judgment; Metro North opposed the motion to open. Judge Abrams granted the plaintiff's request for oral argument on her motion to open the judgment. Following oral argument in August, 2018, the court denied the motion to open. The plaintiff did not seek an articulation of the court's decision, and she did *not* appeal from the judgment denying her motion to open.

On October 26, 2018, the plaintiff commenced the second action pursuant to § 52-592 (a), the accidental failure of suit statute.[5] In the second action, the plaintiff

pleadings have been filed. An award under this section shall not exceed fifty thousand dollars, exclusive of legal interest and costs. . . ."

[4] General Statutes § 52-549z provides in relevant part: "(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

"(b) A decision of the arbitrator shall become null and void if an appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section. . . .

"(d) *An appeal by way of a demand for a trial de novo must be filed with the court clerk within twenty days* after the deposit of the arbitrator's decision in the United States mail, as evidenced by the postmark, and it shall include a certification that a copy thereof has been served on each counsel of record, to be accomplished in accordance with the rules of court. . . ." (Emphasis added.)

[5] General Statutes § 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be *tried on its merits* because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the

repeated the allegations of negligence pleaded against Metro North in the first action. She also alleged that she "had a prior pending case against [Metro North] arising out of the same nucleus of facts as" the second action. Also, she alleged that an arbitrator issued a decision in favor of Metro North on February 26, 2018, and that the clerk of the court forwarded to the parties a copy of the decision postmarked February 27, 2018. She further alleged that the decision did not arrive at the office of her counsel until March 13, 2018. Counsel was out of the state on vacation during the week of March 12, 2018, and returned to the office on March 19, 2018. Counsel's paralegal, his sole employee save a part-time bookkeeper, was out of the office in February and March, 2018, due to illness and did not return until March 22 or 23, 2018. The plaintiff further alleged that her counsel did not know that judgment in the first action had entered against her until March 21, 2018, when he received notice from the Judicial Branch. The plaintiff further alleged that she failed to file a motion for a trial de novo within the time required by § 52-549z (d) and the trial court rendered judgment on the arbitrator's decision on March 21, 2018. In addition, the plaintiff alleged that she filed a motion to open the judgment on March 23, 2018, which was denied on August 27, 2018. Finally, the plaintiff alleged that her failure to file a timely motion for a trial de novo in the first action was due to mistake, inadvertence, and/or excusable neglect, and that the second action was commenced pursuant to § 52-592 (a).

In response to the second action, on December 13, 2018, Metro North filed a motion to dismiss the action, contending that the trial court lacked "subject matter jurisdiction under the principles of res judicata, as entry of final judgment on the merits in [the first action] pursuant to . . . § 52-549z, make[s] . . . § 52-592 (a)

plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action . . . . " (Emphasis added.)

inapplicable." On January 14, 2019, the plaintiff's counsel filed an objection to the motion to dismiss to which he attached a memorandum of law and his affidavit. In his affidavit, the plaintiff's counsel averred the facts alleged in the second action as to why he did not file a timely motion for a trial de novo following receipt of the arbitrator's decision in the first action. Judge Richards dismissed the second action on February 24, 2019. The plaintiff appealed on February 27, 2019.

On March 19, 2019, the plaintiff filed a motion for articulation requesting that Judge Richards articulate the basis and reason for granting Metro North's motion to dismiss. The court issued its articulation on April 5, 2019, stating, in relevant part, that the plaintiff commenced the second action against Metro North pursuant to the accidental failure of suit statute alleging "that her failure to file a timely trial de novo [motion in the first action] was due to mistake, inadvertence and/or excusable neglect. In response, Metro North filed a motion to dismiss claiming that the trial court in [the second action] lacked subject matter jurisdiction under the doctrine of res judicata, as there was *an entry of a final judgment* in [the first action]. This court agreed with the arguments and reasoning propounded by Metro North in its motion to dismiss on said ground and granted its motion to dismiss . . . ." (Emphasis added; internal quotation marks omitted.)

I

On appeal, the plaintiff claims that the court improperly granted Metro North's motion to dismiss because "the doctrine of res judicata is not applicable to a case *dismissed* pursuant to . . . § 52-549z."[6] (Emphasis

[6] The premise of the plaintiff's claim is incorrect. The first action was not dismissed. Pursuant to § 52-549z (a) and (d); see footnote 4 of this opinion; Judge Abrams rendered judgment in favor of Metro North as a matter of law. The arbitrator's decision in favor of Metro North became a judgment of the court when the plaintiff failed to demand a trial de novo twenty days after the arbitrator's decision was mailed to the parties.

added.) Although the first action was not dismissed, the plaintiff argues that the controlling issue is whether the first action was "dismissed" as a matter of form. She contends that a "dismissal pursuant to . . . § 52-549z is similar to a disciplinary dismissal" and that the trial court was required to determine whether the first action failed because her conduct in failing to file a demand for a trial de novo occurred under circumstances constituting mistake, inadvertence, or excusable neglect that would allow her to pursue the second action on its merits, or whether her conduct was so egregious that the merits of the case should not be reached. She cites *Ruddock* v. *Burrowes*, 243 Conn. 569, 570, 576–77, 706 A.2d 967 (1998), in support of her argument.[7] "In order to fall within the purview of § 52-592 . . . the original lawsuit must have failed for one of the reasons enumerated in the statute." *Skinner* v. *Doelger*, 99 Conn. App. 540, 553, 915 A.2d 314, cert. denied, 282 Conn. 902, 919 A.2d 1037 (2007). The plaintiff, therefore, contends that Judge Richards was required to make a factual finding regarding the nature of the plaintiff's conduct in failing to demand a trial de novo.[8]

The present appeal presents a number of procedural irregularities, many of which we need not address. Although we agree with the plaintiff that Metro North

[7] In *Ruddock*, the trial court dismissed the personal injury action pursuant to what is now Practice Book § 14-3, titled Dismissal for Lack of Diligence, because the named plaintiff's mother and the plaintiff's attorney failed to attend a scheduled pretrial conference. *Ruddock* v. *Burrowes*, supra, 243 Conn. 570–71.

[8] In her appellate brief, the plaintiff states that she objected to Metro North's motion to dismiss the second action because the doctrine of res judicata properly is raised by way of a special defense, citing *Metcalfe* v. *Sandford*, 271 Conn. 531, 535 n.4, 858 A.2d 757 (2004). She noted, however, that a trial court may consider the motion to dismiss, if the plaintiff has no objection; id.; and that "once the defense of res judicata has been raised the issue may be resolved by way of summary judgment." *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 687, 490 A.2d 509 (1985). The plaintiff agreed to resolve the question of res judicata by motion to dismiss.

improperly filed a motion to dismiss the second action on the ground of res judicata,[9] we disagree that the trial court needs to make a factual determination regarding the nature of the plaintiff's conduct in failing to timely demand a trial de novo. A judgment in favor of Metro North was rendered in the first action as a matter of law in accordance with § 52-549z, which is not a matter of form under the accidental failure of suit statute, § 52-592 (a).

The relevant procedural history is brief. The court ordered the parties to arbitrate the first action pursuant to § 52-549u. The arbitration took place on December 1, 2017, and the arbitrator filed his decision in favor of Metro North on February 26, 2018. The clerk sent the decision to the parties the next day, February 27, 2018. The plaintiff did not demand a trial de novo within twenty days. On March 21, 2018, Judge Abrams rendered judgment for Metro North on the basis of the arbitrator's decision. The plaintiff filed a motion to open the judgment, which Judge Abrams denied.[10] Thereafter, the plaintiff commenced the second action. In response, Metro North filed a motion to dismiss, stating that the trial court "lacks subject matter jurisdiction under the principles of res judicata, as entry of final judgment on the merits in [the first action], pursuant to . . . § 52-549z,

[9] The proper procedure by which to assert that a claim is barred by the doctrine of res judicata is to plead it as a special defense. See Practice Book § 10-50 ("res judicata must be specially pleaded"). In its brief on appeal, Metro North has conceded that a defense of res judicata does not deprive the trial court of subject matter jurisdiction and that its motion to dismiss was "inartful."

[10] In her brief, the plaintiff suggests that Judge Abrams abused his discretion by failing to grant her motion to open the judgment in the first action. The propriety of Judge Abrams' decision is not before us in the present appeal. By failing to take an appeal from the denial of her motion to open, the plaintiff acquiesced in the denial. See, e.g., *Ruddock* v. *Burrowes*, supra, 243 Conn. 577–78 (consent inferred by failure to file memorandum in opposition to motion to strike).

make[s] . . . § 52-592 (a) inapplicable." Judge Richards granted the motion to dismiss and articulated that she agreed with the arguments and reasoning of Metro North.

"A motion to dismiss challenges the court's subject matter jurisdiction. See Practice Book § 10-30 . . . ." (Citation omitted.) *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 686 n.6, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). We disagree that the court lacked subject matter jurisdiction to adjudicate the second action.

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010).

General Statutes § 51-164s provides in relevant part: "The Superior Court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . ." "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. 1 Restatement (Second), Judgments § 11. A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is

well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727–28, 724 A.2d 1084 (1999).

Our plenary review of the complaint in the second action; see *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012) (review of trial court's construction of pleadings is plenary); indicates that the plaintiff's second action is an effort to revive her personal injury action against Metro North pursuant to the accidental failure of suit statute. We agree with the plaintiff that a personal injury lawsuit is an action within the meaning of § 52-592 (a) and, therefore, Metro North's motion to dismiss lacked merit. See *Ruddock* v. *Burrowes*, supra, 243 Conn. 570. The trial court had jurisdiction to adjudicate the second action and improperly dismissed the second action on jurisdictional grounds. We now turn to the question of whether the second action was viable under the accidental failure of suit statute.

The plaintiff claims that the court improperly dismissed the second action because she has a viable cause of action pursuant to § 52-592 (a) as judgment in the first action was rendered due to mistake, inadvertence or excusable neglect in that she failed to file a timely demand for a trial de novo. She argues that the judgment rendered by Judge Abrams, when she failed to file a motion for a trial de novo after the arbitrator's decision was issued, is akin to a disciplinary dismissal. We are not persuaded. "Disciplinary dismissals refer to cases dismissed for [a] variety of punitive reasons, such as the failure to attend a scheduled pretrial conference . . . or the failure to close the pleadings in a timely manner." (Citation omitted.) *Skinner* v. *Doelger*, supra, 99 Conn. App. 553–54. In the present case, there was no untoward behavior on the part of the plaintiff or her

counsel in failing to obey an order of the court; the plaintiff submitted the first action to arbitration as ordered by the court. The arbitrator found in favor of Metro North and his decision was timely mailed to counsel for the parties. The plaintiff failed to file a timely demand for a trial de novo, and Judge Abrams rendered judgment in the first action in accordance with § 52-549z. The judgment was rendered as a matter of law.

The plaintiff's claim requires us to construe § 52-592. "Statutory construction . . . presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Rosato* v. *Rosato*, 77 Conn. App. 9, 18, 822 A.2d 974 (2003). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine the meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Mickey* v. *Mickey*, 292 Conn. 597, 613–14, 974 A.2d 641 (2009).

Section 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times *to be tried on its merits* . . . for any matter of form . . . the plaintiff . . . may commence a new action . . . ." The words of the statute are plain and unambiguous. A new action may be commenced if an action has failed "to be tried on its merits." Pursuant to § 52-549u, "[t]he trial court is authorized to refer to an arbitrator any civil action in which

the court has a reasonable expectation that the judgment will be less than $50,000." *Nunno* v. *Wixner*, 257 Conn. 671, 678, 778 A.2d 145 (2001). "The arbitrator is required to submit a decision in writing within 120 days after the hearing. . . . The parties then have the opportunity to request a trial de novo . . . within twenty days of the [mailing] of the arbitrator's decision. If neither party requests a trial de novo within twenty days, the decision of the arbitrator becomes the judgment of the court." (Citations omitted; footnote omitted.) Id., 679. Section 52-549z (a) provides that "[a] decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo" is filed within twenty days. See footnote 4 of this opinion. The plaintiff does not contend otherwise. As the plaintiff's counsel averred in his affidavit, the first action was submitted to arbitration under § 52-549u and arbitrated on December 1, 2017. The arbitrator rendered a decision in favor of Metro North and that decision was mailed to counsel for the parties on February 27, 2018. Judge Abrams rendered a judgment on the arbitrator's decision on March 21, 2018. By filing a motion to open the judgment, the plaintiff herself recognized that judgment had been rendered. The judgment in the first action was rendered on the arbitrator's decision as a matter of law and, therefore, the plaintiff may not take advantage of § 52-592 because she has not met the factual predicate that the first action was not tried on its merits.

The case of *Legassey* v. *Shulansky*, 28 Conn. App. 653, 611 A.2d 930 (1992), is instructive. The plaintiffs in *Legassey* attempted for a second time to quash certain subpoenas served on their banks by the Commissioner of Banking. Id., 653–54. The trial court had granted the plaintiffs' first applications to quash and the Commissioner of Banking appealed to our Supreme Court, which reversed the judgment of the trial court. Id., 655. The

plaintiffs again filed applications to quash the subpoenas on the same grounds. Id., 657–58. This court concluded that the dismissal of the first applications was a judgment on the merits and, thus, the second applications were barred by the doctrine of res judicata. Id., 656. The plaintiffs claimed that the second applications were permitted under the accidental failure of suit statute. Id., 658. This court disagreed. "Judgments based on the following reasons are not rendered on the merits: want of jurisdiction; pre-maturity; failure to prosecute, unavailable or inappropriate relief or remedy; lack of standing." (Internal quotation marks omitted.) Id. Significantly, judgments rendered pursuant to § 52-549u are not one of the enumerated judgments considered not rendered on the merits. This court stated that § 52-592 (a), "by its plain language, is designed to prevent a miscarriage of justice if the plaintiff fails to get a proper day in court due to the various enumerated procedural problems.[11] It is not a device for avoiding our [well settled] rules of res judicata." (Footnote added.) Id., 659.

The plaintiff argues that the judgment in the first action entered pursuant to § 52-549z was akin to a disciplinary dismissal. This argument is unpersuasive. The judgment in the first action was not a disciplinary dismissal—it was a judgment on the merits as authorized by a legislatively enacted statute to resolve cases pending on an overburdened docket.[12] It would be an anom-

[11] See footnote 4 of this opinion.

[12] "The legislative history of § 52-549u indicates that the primary goal in enacting § 52-549u was to reduce the backlog of civil jury cases . . . . See 25 S. Proc., Pt. 11, 1982 Sess., p. 3658, remarks of Senator Howard T. Owens, Jr. (explaining that '[t]he court system in the [s]tate is being choked by new cases . . . all types of civil cases. . . . It's just, [courts are] inundated with the stuff and [at] some stage we're going to have to start weeding this out and I think this is a step in the right direction.') . . . see also 40 S. Proc., Pt. 4, 1997 Sess., pp. 1260–1261, remarks of Senator Thomas F. Upson ('[W]hatever we can do to unclog the system . . . is good. . . . It's not an alternate dispute, it's arbitration, but it's one way to expedite cases so that people won't be in the system two, three, four or five years.')." (Emphasis omitted.) *Nunno* v. *Wixner*, supra, 257 Conn. 687–88 (*Katz*, *J.*, dissenting).

aly for the legislature to pass a law to facilitate the resolution of judicial disputes by arbitration under the proviso that they were not tried on the merits. "The canons of statutory construction instruct us to interpret statutes using our common sense to avoid absurd results." *Bengtson* v. *Commissioner of Motor Vehicles*, 86 Conn. App. 51, 60, 859 A.2d 967 (2004), cert. denied, 272 Conn. 922, 867 A.2d 837 (2005). Judge Abrams rendered judgment in the first action after the arbitrator submitted his decision, which timely was sent to the parties, and the plaintiff failed to file a demand for a trial de novo within twenty days. This procedural history accords with § 52-549z. The judgment, therefore, was not merely a matter of form.

Our Supreme Court has stated with regard to cases arising under § 52-592 (a) that it had "not often decided that a plaintiff, after a dismissal under an applicable rule of practice, should be denied access to the statute because the prior judgment was not a matter of form. When [it has] done so, [its] decision has focused on conduct other than mistake, inadvertence or excusable neglect. For example, [it has] held that § 52-592 (a) affords no relief in cases in which a plaintiff's prior action was dismissed because the plaintiff withdrew it voluntarily . . . or consented to its dismissal. Such consent may be inferred from a plaintiff's failure to file a memorandum in opposition to a defendant's motion to strike . . . or from a plaintiff's inordinate delay in appointing an administrator or executor." (Citations omitted; internal quotation marks omitted.) *Ruddock* v. *Burrowes*, supra, 243 Conn. 577–78. In the present case, the dispute between the parties with respect to the first action was resolved on its merits by an arbitrator in accordance with § 52-549u. The arbitrator found in favor of Metro North, issued a decision that was mailed to the parties, and the plaintiff failed to file a timely motion for a trial de novo.[13]

[13] The plaintiff asked that we reverse the judgment of dismissal and remand the case for a factual determination as to whether the first action failed to

We conclude, therefore, that the second action is not saved by the accidental failure of suit statute. We are required to apply the statute as enacted by the legislature. The plaintiff's claim therefore fails.

II

We now turn to the dissent, which relies heavily on the majority opinion in our Supreme Court's decision in *Nunno* v. *Wixner*, supra, 257 Conn. 671, to conclude that the judgment in the first action rendered as a result of compulsory arbitration under § 52-549z does not constitute a trial on the merits and that the plaintiff properly may bring the second action under the accidental failure of suit statute. We disagree that this case is controlled by *Nunno*.

Although *Nunno* and the present case arise out of personal injuries suffered by the respective plaintiffs and a trial court ordered that each case be arbitrated pursuant to § 52-549u and Practice Book § 23-61, the similarities end there. The statutes at issue in *Nunno* and the present case not only have different purposes

be tried on the merits due to mistake, inadvertence, and/or excusable neglect. The first action, however, was tried on its merits. Even if that were not the case, no purpose would be served by such a factual determination. Judgment was rendered in favor of Metro North in the first action because counsel failed to file a timely demand for a trial de novo as required by statute. In his affidavit, counsel admitted that neither he nor a member of his staff was in his office for a period of time in March, 2018, to receive notices from the clerk's office and that he did not file a motion for a trial de novo within twenty days of receiving notice of the arbitrator's decision. "Under the law of this state, judgments may be opened under Practice Book § 17-4 or General Statutes § 52-212a for a variety of reason, including fraud, mistake, duress or as otherwise provided by law . . . . *Kim* v. *Magnotta*, 249 Conn. 94, 104, 733 A.2d 809 (1999)." (Footnotes omitted; internal quotation marks omitted.) *Nastro* v. *D'Onofrio*, 76 Conn. App. 814, 820–21, 822 A.2d 286 (2003). Negligence of a party or her counsel for judgments entered upon default or similar procedural reasons do not provide relief to the plaintiff. See, e.g., *State* v. *Ritz Realty Corp.*, 63 Conn. App. 544, 548–49, 776 A.2d 1195 (2001) (negligence of party's counsel is insufficient for purposes of § 52-212 to set aside default judgment).

but also are textually distinguishable. The issue in *Nunno* was whether the plaintiff motorist was entitled to interest under what was then known as the offer of judgment statute;[14] the issue in the present case is whether the plaintiff may bring a second action under the accidental failure of suit statute. Moreover, the language of the statutes relevant to their respective cases is entirely different.

The current revision of the statute at issue in *Nunno*, General Statutes § 52-192a (c), titled in part "Offer of compromise by plaintiff," provides in relevant part: "*After trial* the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight percent annual interest . . . ." (Emphasis added.)[15] The determinative issue on appeal was what constituted a *trial*.

[14] The statute at issue in *Nunno* was General Statutes (Rev. to 2001) § 52-192a, titled "Offer of judgment by plaintiff. Acceptance by Defendant. Computation of interest," which provides in relevant part: "*After trial* the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept." (Emphasis added.) General Statutes (Rev. to 2001) § 52-192a (b).

At the time of the arbitration in the present case and now, the statute is titled "Offer of compromise by plaintiff," "Acceptance by defendant," and "Amount and computation of interest," and provides in relevant part: "*After trial* the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. . . ." (Emphasis added.) General Statutes § 52-192a (c). There were other amendments to the statute, but they are not relevant to the present appeal. The dissent in the present case focuses on the words *after trial*, but those words do not appear in § 52-592 (a). The words in § 52-592 (a) that are relevant to the present case are *tried on its merits*. The texts of the two statutes are clearly distinguishable and, therefore, *Nunno* cannot control the present case.

[15] In *Nunno*, the injured motorist filed an "offer of judgment" under § 52-192a (a), which the defendants did not accept. *Nunno* v. *Wixner*, supra, 257 Conn. 674. The case was referred to the mandatory arbitration program. Id., 674–75. The arbitrator awarded the motorist damages that exceeded her

The *Nunno* majority determined that compulsory arbitration pursuant to § 52-549u was not a trial. *Nunno* v. *Wixner*, supra, 257 Conn. 676–77.

The dissent argues that *Nunno* is not limited to its facts, even though the analysis in the present case concerns a different statute. The language of the statutes and decisional law do not support such an argument. The statute at issue in the present case is § 52-592, the accidental failure of suit statute, which provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times *to be tried on its merits* . . . for any matter of form . . . the plaintiff . . . may commence a new action . . . ." (Emphasis added.) General Statutes § 52-592 (a). The determinative issue in *Nunno* was what constituted a trial. The word *trial* does not appear in § 52-592 and, therefore, what constitutes a trial cannot be the determinative issue in the present case. The relevant language in § 52-592 is *tried on its merits*.

The majority in *Nunno* concluded that an arbitration conducted pursuant to § 52-549u was not a trial. *Nunno* v. *Wixner*, supra, 257 Conn. 678. This court, however, determined in *Tureck* v. *George*, 44 Conn. App. 154, 162, 687 A.2d 1309, cert. denied, 240 Conn. 914, 691 A.2d 1080 (1997),[16] that the words "after trial" mean final judgment. "After trial," however, is not at issue in the present case. Section 52-549z provides in relevant part: "(a) A

offer of judgment; the award became a judgment of the court. Id., 675. The motorist filed a motion seeking interest on her offer of judgment pursuant to § 52-192a (b). Id., 676. The trial court denied the motorist's motion, and she appealed. Id. In a divided decision, our Supreme Court affirmed the trial court's decision, concluding that arbitration "is not a trial within the meaning of § 52-192a (b) . . . [because it] would undermine the purposes of the court-mandated arbitration statute." Id., 676–77.

[16] In *Tureck*, another personal injury action, the plaintiff filed a motion for summary judgment as to liability only, which was granted by the trial court. *Tureck* v. *George*, supra, 44 Conn. App. 156. This court determined that summary judgment as to liability in favor of the plaintiff is not a final judgment from which an appeal may be taken. Id., 157.

decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed . . . (d) . . . within twenty days after the deposit of the arbitrator's decision in the United States mail . . . ." The plaintiff failed to file a demand for a trial de novo and judgment entered in accordance with § 52-549z.

In addition to their textual distinctions, the different purposes and policies underlying the offer of compromise statute, § 52-192a, and the accidental failure of suit statute, § 52-592, militate against the dissent's position that the present case is controlled by *Nunno*. "The purpose of § 52-192a (b) is to encourage pretrial settlements and, consequently, to conserve judicial resources." (Internal quotation marks omitted). *Stiffler* v. *Continental Ins. Co.*, 288 Conn. 38, 43, 950 A.2d 1270 (2008). "[T]he strong public policy favoring the pretrial resolution of disputes . . . is substantially furthered by encouraging defendants to accept reasonable offers of [compromise]. . . . Section 52-192a encourages fair and reasonable compromise between litigants by penalizing a party [who] fails to accept a reasonable offer of settlement. . . . In other words, interest awarded under § 52-192a is solely related to a defendant's rejection of an advantageous offer to settle before trial and his subsequent waste of judicial resources." (Internal quotation marks omitted.) *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 513, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015). "The purpose of § 52-192a is to encourage pretrial settlement by penalizing a party [who] fails to accept a reasonable offer of settlement in any civil action based upon contract or seeking the recovery of money damages." (Internal quotation marks omitted.) *Aubin* v. *Miller*, 64 Conn. App. 781, 800, 781 A.2d 396 (2001).

By comparison, § 52-592 (a) "was passed to avoid hardships arising from an unbending enforcement of

limitation statutes. . . . As [our Supreme Court has] also stated, however, the extension of time [in § 52-592 is] in terms made applicable to all cases where a suit seasonably begun [has] failed for the causes stated." (Internal quotation marks omitted.) *Megos* v. *Ranta*, 179 Conn. App. 546, 553, 180 A.3d 645, cert. denied, 328 Conn. 917, 180 A.3d 961 (2018). "Although § 52-592 should be broadly construed because of its remedial nature, it should not be construed so broadly as to hamper a trial court's ability to manage its docket by dismissing cases for appropriate transgressions. . . . Nevertheless, looming behind § 52-592 is the overarching policy of the law to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant [his or her] day in court." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 102 Conn. App. 305, 313, 925 A.2d 432, cert. denied, 284 Conn. 906, 931 A.2d 261 (2007).

To summarize, the rationale underlying our Supreme Court's decision in *Nunno* relied in significant part on the purpose of the offer of compromise statute, i.e., promotion of pretrial settlement. Arbitration satisfies many of the same goals underlying the offer of compromise statute, the efficient and less expensive resolution of the parties' dispute without the need for a full trial before a judge or jury. Thus, enforcing offers of compromise in cases that are resolved by arbitration does not advance those goals. By contrast, the accidental failure of suit statute is not intended to promote the informal resolution of the parties' dispute, but to assure, in certain circumstances, that litigants are able to have their disputes resolved on the merits. The arbitration that the parties in the present case engaged in clearly provided them with an opportunity to address the merits of the case. *Nunno*, therefore, does not control.

For all of the foregoing reasons, the plaintiff's appeal fails.

The form of the judgment is improper, the judgment dismissing the action is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion PRESCOTT, J., joined.

EVELEIGH, J., dissenting. I respectfully dissent. I disagree with the majority's conclusions that (1) the judgment in the first action was one on the merits for purposes of General Statutes § 52-592 (a), and (2) the determination of whether the first action failed as a matter of form under the accidental failure of suit statute did not require a factual determination by the trial court of the plaintiff's conduct. Contrary to the majority, I would conclude that a judgment in the first action rendered as a result of compulsory arbitration pursuant to General Statutes § 52-549z does not result from a trial on the merits so as to necessarily preclude applicability of the accidental failure of suit statute. Specifically, I would conclude that the trial court must make a factual determination as to whether the failure of the plaintiff, Phyllis Larmel, to demand a trial de novo within twenty days of the issuance of the arbitration decision caused the first action to fail as a matter of form. Accordingly, I would reverse the judgment dismissing the action and remand the case to the trial court for further factual findings.

I

I begin by noting my agreement with the statement of facts in the majority's opinion and with the majority's discussion of our standard of review. I do not, however, fully agree with its examination of the governing legal principles surrounding what constitutes a trial on the merits. Specifically, I believe that the majority improperly found inapplicable our Supreme Court's decision in *Nunno* v. *Wixner*, 257 Conn. 671, 778 A.2d 145 (2001),

which I find to be controlling precedent in the present matter.

In *Nunno*, our Supreme Court addressed the issue of whether the provisions of General Statutes (Rev. to 2001) § 52-192a,[1] concerning an offer of judgment, apply to a judgment rendered as a result of a mandatory arbitration proceeding pursuant to General Statutes § 52-549u,[2] which is the same statutory scheme under consideration in the present case. Id., 674. Because the language of § 52-192a (b) specifically indicates that the statute is applicable only after the action has gone to trial, the court's central determination was whether the court-mandated arbitration proceeding constituted a trial for purposes of the offer of judgment statute. See id., 676–77. Although the present matter concerns the accidental failure of suit statute, which is different from the one at issue before the court in *Nunno*, namely, the offer of judgment statute, I believe that the underlying

[1] General Statutes (Rev. to 2001) § 52-192a (b) provides in relevant part: "*After trial* the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in his 'offer of judgment,' the court shall add to the amount so recovered twelve per cent annual interest on said amount . . . ." (Emphasis added.)

All references herein to § 52-192a are to the 2001 revision of the General Statutes.

[2] In *Nunno*, the plaintiff was involved in a motor vehicle collision. After filing an action against the defendants, the plaintiff filed an offer of judgment for $19,000 pursuant to § 52-192a (a). *Nunno* v. *Wixner*, supra, 257 Conn. 674. The defendants did not accept the offer of judgment. Id. Subsequently, the case went to arbitration under the court's mandatory arbitration program pursuant to § 52-549u. Id., 674–75. The arbitrator issued a decision awarding the plaintiff $21,945, which became a judgment of the court pursuant to § 52-549z. Id., 675. Thereafter, the plaintiff filed a motion seeking an award of 12 percent interest on the judgment pursuant to § 52-192a because the amount awarded through arbitration exceeded the amount of the plaintiff's offer of judgment. Id., 676. The trial court denied the plaintiff's motion after determining that "mandatory arbitration is not a trial and therefore the offer of judgment provisions do not apply"; (internal quotation marks omitted) id., 676 n.9; and our Supreme Court affirmed the court's judgment. Id., 677.

reasoning and analysis employed by our Supreme Court in distinguishing between a judgment rendered as a result of an arbitration decision and one resulting from an adjudication on the merits, specifically in the form of a trial, is decisive here and should have been followed by the majority in rendering its decision.

The court in *Nunno* interpreted the definition of a trial narrowly. It stated: "Black's Law Dictionary (7th Ed. 1999) defines trial as '[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding.' It further defines 'judicial' as '[o]f or relating to, or by the court' and 'determination' as '[a] final decision by a court or administrative agency . . . .' " *Nunno* v. *Wixner*, supra, 257 Conn. 681. After highlighting the procedural differences between arbitration and judicial proceedings[3] and recognizing the informality of arbitration proceedings, the court concluded that the arbitration was not conducted as a trial

[3] The court stated the following regarding arbitration proceedings: "Court-mandated arbitration proceedings pursuant to § 52-549u do not include many of the distinctive hallmarks of a trial. . . . [T]he United States Supreme Court concluded that [a]rbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited. . . . [T]he United States Supreme Court also distinguished arbitration from judicial proceedings, concluding that arbitral [fact-finding] is generally not equivalent to judicial [fact-finding]. . . . [T]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . [Our Supreme Court] also has distinguished arbitration from judicial proceedings, concluding that an arbitration proceeding is not an action for purposes of the statute of limitations. . . . In doing so, the court concluded that arbitration proceedings do not occur in court, indeed that their very purpose is to avoid the formalities, the delay, the expense and vexation of ordinary litigation. . . . [T]hese proceedings are not governed by our rules of procedure." (Citations omitted; internal quotation marks omitted.) *Nunno* v. *Wixner*, supra, 257 Conn. 679–80.

such that it would trigger the right to imposition of interest "after trial" pursuant to the offer of judgment statute.[4]

In my view, the court's analysis is directly applicable to the present matter. The decision in *Nunno* is not limited to its facts. That the analysis in *Nunno* was conducted pursuant to a different statute is of no moment, because the underlying issue of whether an arbitration is fundamentally analogous to a trial for policy reasons is the same. In the present case, the arbitration suffers from largely the same procedural deficiencies as in *Nunno*. Specifically, no testimony was offered by either party; instead, the parties only submitted exhibits, including the plaintiff's deposition, medical records and bills, and a report following a medical records review. Further, there was no cross-examination, there was no objection to evidence, and the arbitrator did not have to provide reasons for his conclusions. Also, the decision of the arbitrator, a nonjudicial officer, is nonbinding as long as the requisite pleading is filed.

Because our Supreme Court has spoken on the issue, we are bound by the court's holding that, where an arbitration lacks the formalities and hallmarks of a judicial proceeding, as it does here, pursuant to the statutory scheme of § 52-549 et seq., it cannot constitute a trial.[5] See *Cannizzaro* v. *Marinyak*, 139 Conn. App. 722,

[4] The court in *Nunno* stated: "[N]o witnesses testified for either party and no formal exhibits were offered. The parties merely submitted copies of a police report, photographs, transcripts of depositions, medical reports and medical bills. The parties also summarized their respective cases through their counsel. After reviewing all of the information provided, the arbitrator issued his nonbinding award. The arbitration proceedings in this case differed greatly from a trial. The procedures were informal and parties were allowed to present unsworn evidence. None of the rules of evidence applied in this proceeding. In addition, the proceeding was presided over by a nonjudicial officer, whose decision was not binding on the parties." *Nunno* v. *Wixner*, supra, 257 Conn. 680–81.

[5] The majority attempts to distinguish a trial as analyzed in *Nunno* from "tried on its merits," as that phrase is used in the accidental failure of suit statute. Specifically, the majority states that "[t]he statute at issue in the

734, 57 A.3d 830 (2012) ("this court, as an intermediate body, is bound by Supreme Court precedent" (internal quotation marks omitted)), aff'd on other grounds, 312 Conn. 361, 93 A.3d 584 (2014). Accordingly, the plain-

present case is § 52-592, the accidental failure of suit statute," which concerns an action that has "failed one or more times *to be tried on its merits* . . . for any matter of form . . . . The determinative issue in *Nunno* was what constituted a trial. The word *trial* does not appear in § 52-592 and, therefore, what constitutes a trial cannot be the determinative issue in the present case. The relevant language in § 52-592 is *tried on its merits*." (Emphasis in original.) The word trial, a noun, means a "formal examination before a competent tribunal of the matter in issue in a civil or criminal cause in order to determine such issue . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003), p. 1334. The word "tried" is the past tense of the verb "try," which means "to examine or investigate judicially . . . to conduct the trial of . . . to participate as counsel in the judicial examination of . . . ." Id., 1344. Given that "trial" and "tried" essentially mean the same thing, it is of no consequence that the accidental failure of suit statute refers only to the verb tried, as opposed to the noun trial; it's a distinction without a difference. Accordingly, I disagree with the majority's attempt to distinguish *Nunno* in this regard and conclude that the analysis in *Nunno* concerning what constitutes a trial is directly relevant to the determination in the present case of whether the arbitration matter failed to be tried on its merits as a matter of form.

Moreover, in finding that *Nunno* is not controlling, the majority opinion states that "our Supreme Court's decision in *Nunno* relied in *significant* part on the purpose of the offer of compromise statute," which is to promote the pretrial settlement of cases, whereas the accidental failure of suit statute ensures that litigants are able to have their disputes resolved on the merits and is "not intended to promote the informal resolution of . . . [disputes] . . . ." (Emphasis added.) I disagree. What the court in *Nunno* focused on was the arbitration proceeding itself, and whether that procedure constituted a trial, which was necessary for a determination of whether the offer of compromise statute was applicable to a judgment rendered following court-mandated arbitration. See *Nunno* v. *Wixner*, supra, 257 Conn. 680 ("[a]n examination of the arbitration proceeding in the present case supports our conclusion that the arbitration proceeding was not conducted as a trial"). Although the court referred to the punitive nature of the offer of judgment statute and found that it was "inconsistent with the legislature's intention in enacting court-mandated arbitration"; id., 684; its primary focus was on the nature of the arbitration procedure itself, which it found did not constitute a trial. See id., 679–83. That procedure is essentially the same one at issue in the present case, which also should not be found to constitute a trial. Accordingly, I would find, on the basis of *Nunno*, that the matter previously had failed to be tried on its merits.

tiff's first action was not tried on the merits, so as to not preclude application of the accidental failure of suit statute.[6]

II

I must next determine whether the action failed for any of the reasons enumerated in the statute—of particular relevance to the present matter is failure as a matter of form. This necessarily involves a factual finding by the trial court as to the plaintiff's conduct and whether such conduct led to the first action failing for procedural reasons, thus rendering the statute applicable to the plaintiff's second action. Therefore, I disagree with the majority's statement that, even if the first action were not tried on its merits, "no purpose would be served by such a factual determination."

The majority states that "[n]egligence of a party or her counsel for judgments entered upon default or *similar procedural reasons* do not provide relief to the plaintiff." (Emphasis added.) Significantly, however, the majority only discusses the context of judgments rendered upon default and not other "similar procedural reasons . . . ." It cites to only one case, *State* v. *Ritz Realty Corp.*, 63 Conn. App. 544, 548–49, 776 A.2d 1195 (2001), which is limited to the context of General Statutes § 52-212, for the proposition that a party's negligence is an insufficient cause for opening a judgment. Yet, this court recognized in *Skinner* v. *Doelger*, 99

[6] The majority also relies on *Legassey* v. *Shulansky*, 28 Conn. App. 653, 611 A.2d 930 (1992), in support of its conclusion. Specifically, the majority relies on the following statement by this court in *Legassey*: "Judgments based on the following reasons are not rendered on the merits: want of jurisdiction; pre-maturity; failure to prosecute, unavailable or inappropriate relief or remedy; lack of standing." (Internal quotation marks omitted.) Id., 658. The majority points out that "judgments rendered pursuant to § 52-549u are not one of the enumerated judgments considered not rendered on the merits." Nowhere in *Legassey*, however, did this court state that that list was exhaustive. *Nunno*, which was decided after *Legassey*, clearly added to that list.

Conn. App. 540, 559, 915 A.2d 314, cert. denied, 282 Conn. 902, 919 A.2d 1037 (2007), that §§ 52-592 and 52-212 "have different purposes and, thus, employ different legal standards." Subsequently, in *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 207, 180 A.3d 595 (2018), this court reiterated this difference of standards, stating: "To open a nonsuit pursuant to § 52-212 (a), a plaintiff must demonstrate that it was prevented from prosecuting its action by mistake, accident or other reasonable cause . . . . In contrast, the matter of form provision of § 52-592 (a) . . . requires a plaintiff to demonstrate that the prior suit failed in circumstances such as mistake, inadvertence or *excusable neglect*." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) "In cases where [our Supreme Court] either stated or intimated that the 'any matter of form' portion of § 52-592 would not be applicable to a subsequent action brought by a plaintiff, [our Supreme Court has] concluded that the failure of the case to be tried on its merits had not resulted from accident or even *simple negligence*." (Emphasis added.) *Lacasse* v. *Burns*, 214 Conn. 464, 473, 572 A.2d 357 (1990). Simply stated, I am unpersuaded by the majority's position and believe that a factual determination regarding the plaintiff's conduct should be made by the trial court in order to determine whether the accidental failure of suit statute is applicable.

Although there is no case law directly on point in the context of a judgment rendered pursuant to § 52-549z, there have been cases concerning actions that have failed for other procedural reasons, wherein the court has analyzed the plaintiff's conduct and determined whether it amounts to mistake, inadvertence, or excusable neglect so as to constitute failure as a matter of form for purposes of § 52-592. I find the underlying analysis conducted by this court in two particular cases to be persuasive in the present matter.

In *Stevenson* v. *Peerless Industries, Inc.*, 72 Conn. App. 601, 603, 806 A.2d 567 (2002), the plaintiff failed to respond to discovery requests, leading to a judgment of nonsuit. The plaintiff then brought a second action pursuant to § 52-592, which was dismissed after the trial court found that the plaintiff's failure to respond to discovery requests was caused by inaction and not mistake, inadvertence, or excusable neglect. Id., 605. This court reversed the trial court's decision and held that the plaintiff was not precluded from bringing a second action pursuant to the accidental failure of suit statute, because the plaintiff's failure to respond to a discovery request, which occurred in a span of only six months, did not result in considerable delay or inconvenience to the court or to opposing parties. Id., 610. Additionally, recognizing that the plaintiff provided a credible excuse, namely, miscommunication with out-of-state counsel, this court concluded that the plaintiff's conduct was not dilatory or a delay tactic, and that the situation involved an "excusable neglect" so as to constitute failure as a matter of form for purposes of the remedial statute. Id.

In *Tellar* v. *Abbott Laboratories, Inc.*, 114 Conn. App. 244, 246, 969 A.2d 210 (2009), the plaintiff's first action was dismissed because the plaintiff similarly failed to respond in any manner to the court's discovery order. Subsequently, the plaintiff filed a second action pursuant to § 52-592, which was dismissed after the trial court concluded that the plaintiff had not demonstrated excusable neglect. Id., 248–49. On appeal, the plaintiff contended that because the conduct precipitating the dismissal of the first action was not egregious, he should be entitled to the relief afforded by the statute. This court agreed with the plaintiff; we noted that the plaintiff's conduct "was neither repeated nor protracted . . . [but] consisted of a singular failure to comply with a

discovery request over the course of four months"; id., 252; that "did not result in considerable delay or inconvenience to the defendant or the court." Id., 254. These considerations, combined with the fact that the plaintiff had a credible excuse, namely, illness of family members of the plaintiff's counsel, led this court to conclude that the failure of the first action was as a matter of form under circumstances of excusable neglect. Id., 255.

In my opinion, the various factors considered by this court in both *Stevenson* and *Tellar* should be applied by the trial court in the present matter in making its factual determination regarding whether the plaintiff's conduct rises to the level of egregiousness that would justify precluding applicability of the accidental failure of suit statute. I note, for instance, that the time period in this case is not particularly long, and the defendant was not prejudiced by the actions of the plaintiff's attorney. Further, this case involves one instance rather than a number of repeated or protracted actions. Ultimately, "looming behind § 52-592 is the overarching policy of the law to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Skinner* v. *Doelger*, supra, 99 Conn. App. 554–55. "[I]t is well established in our long line of case law interpreting the statute . . . that § 52-592 (a) is remedial and is to be liberally interpreted." (Internal quotation marks omitted.) *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 49, 12 A.3d 885 (2011). It is with this policy in mind that the trial court must make its determination of whether the first action failed as a matter of form.

On the basis of the foregoing, I would reverse the judgment dismissing the action and remand the case to the trial court for further proceedings consistent with this opinion. Therefore, I respectfully dissent.

WILLIAM MARSHALL, JR. *v.* KIMBERLY L. MARSHALL
(AC 41216)

Alvord, Elgo and Pellegrino, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court, claiming, inter alia, that the trial court erred when it went beyond the scope of this court's remand order in a prior appeal involving the parties when construing their separation agreement, which had been incorporated into the dissolution judgment, and calculating the alimony arrearage the plaintiff owed to the defendant. In her prior appeal to this court from the judgment dissolving her marriage, the defendant claimed that the dissolution court erred in calculating the plaintiff's alimony obligation on the basis of his W-2 income without considering the K-1 distributions to him from A Co., of which he was an owner. This court concluded that the separation agreement was ambiguous as to whether the K-1 distributions from A Co. were to be included in the plaintiff's pre-tax income from employment and, if so, to what extent. This court further concluded that the dissolution court had improperly granted the plaintiff's motion to modify alimony. In its rescript, this court thus reversed the dissolution court's granting of the plaintiff's motion to modify alimony and the court's calculation of his alimony arrearage, affirmed the judgment in all other respects and remanded the case to the trial court to determine the parties' intent and to determine the plaintiff's alimony arrearage accordingly. On remand, the trial court first determined that the intent of the parties was that some K-1 distributions to the plaintiff from A Co. should be included in the plaintiff's pre-tax income. The court then found that the parties had adopted the reasonable compensation calculation to establish the plaintiff's pre-tax income for alimony purposes and modified his alimony obligation for the nearly four years prior to the plaintiff's motion to modify alimony. *Held*:

1. The trial court acted within the scope of this court's remand order when it used the methodology of reasonable compensation to determine the plaintiff's pre-tax income in the context of effectuating the parties' separation agreement, the relevant provisions of which this court had determined to be ambiguous: the trial court's use of the plaintiff's reasonable compensation instead of his pre-tax income did not alter the terms of the separation agreement and change the formula on which the dissolution proceedings were premised.
2. The defendant could not prevail on her claim that the trial court erred when it used the plaintiff's reasonable compensation to determine his alimony obligation, which was based on her assertion that this court's

determination that the alimony calculation was to be made using pre-tax income was the law of the case: because the trial court acted within the scope of this court's remand order, it could not have violated, and did not fail to abide by, the principle that an appellate court's opinion establishes the law of the case, and, contrary to the defendant's assertion, this court's affirmance of the trial court's judgment in all respects other than its granting of the plaintiff's motion to modify alimony and calculation of his arrearage did not mean that the trial court correctly used his actual income rather reasonable compensation to calculate the arrearage and did not establish the trial court's calculations as the law of the case on remand; furthermore, this court's affirmance of the trial court's judgment in other respects addressed the trial court's decisions to decline to award the defendant interest and to reject her claim that the trial court erred in failing to find the plaintiff in contempt.

3. The defendant's claim that the trial court improperly considered the plaintiff's argument, which he did not advance in prior proceedings, that his alimony obligation should be based on his reasonable compensation was unavailing; although the defendant's assertion rested on the principle that an appellant who fails to brief a claim abandons that claim, the plaintiff was the appellee in this appeal and in this court's decision that reversed in part the trial court's judgment, and our Supreme Court has declined to depart from the principle that an appellee will not be deemed to have forfeited a claim that could have been, but was not, brought in the context of an appellant's appeal.
4. The trial court's determination of the plaintiff's pre-tax income on the basis of his reasonable compensation was not clearly erroneous, as the court reasonably found that the parties had adopted the reasonable compensation calculation in their separation agreement and properly carried that methodology forward, that determination having been supported by evidence in the record.
5. Contrary to the defendant's claim, the trial court did not improperly modify alimony retroactively for a period of four years prior to the plaintiff's motion to modify alimony, that court having interpreted and effectuated the separation agreement's alimony provision as it was directed to by this court's remand order; the trial court determined the plaintiff's alimony obligation for those four years, calculated the overpayment or underpayment for each year and, after having separately found that the plaintiff had established a substantial change in circumstances, reduced his alimony obligation to zero retroactive to the day after he served the defendant with his motion to modify alimony.

Argued May 15—officially released October 6, 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, *Alander*, *J.*;

judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Klatt*, *J.*, denied the defendant's motion for contempt and granted the plaintiff's motion to modify alimony, and the defendant appealed to this court, *Beach*, *Sheldon* and *Norcott*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings; subsequently, the court, *Hon. Gerald I. Adelman*, judge trial referee, granted the plaintiff's motion to modify alimony and the defendant's motion for contempt in part, and the defendant appealed and the plaintiff cross appealed to this court. *Affirmed.*

George J. Markley, for the appellant-cross appellee (defendant).

Alexander J. Cuda, for the appellee-cross appellant (plaintiff).

Opinion

ALVORD, J. The defendant, Kimberly L. Marshall, appeals from the rulings of the trial court on her motion for contempt and the motion of the plaintiff, William Marshall, Jr., to modify his alimony obligation. On appeal, the defendant claims that the court improperly (1) exceeded the scope of this court's remand orders in her prior appeal,[1] (2) failed to abide by the law of

[1] The defendant also claims on appeal that, by determining that alimony was to be based on the plaintiff's reasonable compensation, the trial court on remand improperly "modified the terms of the parties' [separation] agreement and consequently the terms of the judgment into which the agreement had been incorporated by reference . . . ." (Citation omitted.) The defendant maintains that such an alleged modification was improper in the absence of a pleading seeking a modification of the terms of the judgment. The defendant's claim is premised on her contention that the court on remand modified the terms of the parties' separation agreement. Because we conclude in parts I and IV of this opinion that the court on remand acted within the scope of this court's remand orders and appropriately calculated the plaintiff's alimony obligation using the methodology of reasonable compensation, we reject the defendant's claim and its underlying premise.

the case as established in the decisions of both the trial court and this court in her prior appeal, (3) allowed the plaintiff to claim that his alimony obligation should be determined using reasonable compensation when he had not made that argument at any time prior to the hearing on remand, (4) used reasonable compensation as a basis for calculating the plaintiff's alimony obligation when the parties' separation agreement (agreement) did not provide for that method, and (5) retroactively modified the plaintiff's alimony obligation for a period of nearly four years prior to the plaintiff's motion to modify. We affirm the judgment of the trial court.[2]

The following facts, as set forth by this court in the defendant's prior appeal; see *Marshall* v. *Marshall*, 151 Conn. App. 638, 640, 97 A.3d 1 (2014) (*Marshall I*); and procedural history are relevant to our resolution of this appeal. "The parties were married in 1981. Four children were born of the marriage; only one was a minor at the time of dissolution. In 2006, the plaintiff filed a complaint seeking dissolution of his marriage to the defendant. In May, 2007, the court rendered judgment of dissolution and incorporated by reference [the agreement] between the parties, which the court found to be fair and equitable." Id.

Article 4 of the agreement is entitled "alimony and child support." Paragraph 4.1 provides: "For purposes of this Article Four, 'pre-tax income from employment' shall only include salary and cash bonus received by the [plaintiff] in cash (or check) from employment before any deductions, including, but not necessarily limited to federal, state or municipal income taxes, social security, Medicare, insurance of any kind, or payments by the [plaintiff] to any defined contribution plan,

[2] Because we affirm the judgment of the trial court, we need not consider the plaintiff's alternative ground for affirmance, which he raised by way of cross appeal.

e.g. a 401 (k) plan. The foregoing to the contrary notwithstanding, specifically excluded from this definition of 'pre-tax income from employment' shall be . . . (v) Subchapter S distributions received by the [plaintiff] by virtue of his forty (40%) percent interest in Artisans Home Builders, Inc. or other like distributions from any company in which the [plaintiff] acquires an ownership interest . . . ."

Paragraph 4.2 of the agreement provides that, commencing June 1, 2007, and until the death of either party, the defendant's remarriage or cohabitation, or sixty months, whichever shall first occur, "the [plaintiff] shall pay unallocated alimony and child support in cash to the [defendant] as follows: an amount equal to forty (40%) percent of the [plaintiff's] pre-tax income from employment, which income the parties stipulate to be $192,000 per year."[3] Paragraph 4.2 of the agreement also provides: "The $192,000 pre-tax income from employment is based upon the accepted opinion of a joint appraisal conducted by Meyers, Harrison & Pia as to the fair market value of the [plaintiff's] 40% interest in Artisans, Maker of Fine Homes, Inc. (Artisans). Said appraisal concluded that reasonable and appropriate compensation levels of the [plaintiff] for the year ended in December 1, 2005 is $175,000. In addition to the $175,000, the parties agree to include, as 'pre-tax income' monies paid directly by Artisans for the benefit of the [plaintiff]. Currently, this direct payment benefit consists of the payment of medical insurance premium in the approximate annual amount of $17,000. Accordingly, for purposes of modification, the parties have ascribed a base

[3] Paragraph 4.3 of the agreement provides that, commencing June 1, 2012, and until the death of either party or the defendant's remarriage or cohabitation, whichever shall first occur, the plaintiff shall pay to the defendant, "as alimony, an amount equal to thirty-seven and one-half (37 1/2 %) percent of the [plaintiff's] then pre-tax income from employment as defined above. By way of example, if, in sixty months, the [plaintiff's] base salary plus the cash value of benefits is $200,000, the [plaintiff's] monthly alimony payment to the [defendant] would be $6,250 per month ($200,000 x .375 12 = $6,250)."

salary of $175,000 plus additional direct benefits of $17,000 for a total pretax income of $192,000. Specifically excluded from this pre-tax income and not to be considered in a modification hearing is the return on investment the [plaintiff] receives as an equity holder in the business. By way of example, in 2005, the [plaintiff's] income from wages and salaries (W-2) and S Corporation income (K-1) was $681,982. Notwithstanding, because the earnings of Artisans (i.e. in sums in excess of $192,000) were used to value Artisans as an asset, monies the [plaintiff] receives in excess of $192,000 shall not be considered a 'pre-tax income from employment.' "

Paragraph 4.4 provides: "If the [plaintiff's] base salary and direct benefits from Artisans Home Builders, Inc., or a subsequent employer, exceeds or is less than $192,000, the [plaintiff] shall immediately notify the [defendant] of such change and advise her of the amount of increase or decrease. The change in the [defendant's] entitlement of the forty (40%) percent or thirty-seven and one-half (37 1/2 %) percent, whether more or less, shall be effective on the first day of the month following the [plaintiff's] receipt of a salary increase or of a salary decrease."

Paragraph 4.6 of the agreement states: "Either party shall have the right to move for modification of the provisions of paragraphs 4.1, 4.2 and 4.3 in the event there is a substantial change in the nature of the [plaintiff's] compensation and/or the [plaintiff] is no longer employed by Artisans Home Builders, Inc. and/or no longer has an ownership interest in Artisans Home Builders, Inc."

The plaintiff paid alimony of $76,010 in 2008 and $17,200 in 2009. In 2010 and 2011, the plaintiff paid no alimony. "In August, 2011, the plaintiff filed a postjudgment motion to modify alimony on the ground that the

agreement provided that either party had the right to move for modification of alimony on the basis of a substantial change in circumstances and that there had been such a change. In September, 2011, the defendant filed a postjudgment motion for contempt on the ground that the plaintiff had failed to pay unallocated alimony and child support as provided in the agreement. In that motion, the defendant also sought counsel fees and statutory interest. In March, 2012, after a hearing on the motions, the court [*Klatt*, *J.*] denied the defendant's motion for contempt, declined to award the defendant attorney's fees or statutory interest, and granted the plaintiff's motion to modify." *Marshall I*, supra, 151 Conn. App. 640.

"In its March, 2012 decision, the court found that the plaintiff paid alimony in accordance with the agreement in 2007 and 2008, that he reduced alimony payments to $3200 for the first six months of 2009, and that he stopped all alimony payments as of July 1, 2009. The court noted that the plaintiff testified that he was an owner of Artisans, a company that built custom homes, and that by 2009, Artisans had suffered a significant decline in business. The court found that the plaintiff's income was $192,000 in 2007, that it had been reduced to $72,000 by 2009, and remained at approximately $72,000 for 2010 and 2011.

"The court determined that paragraph 4.4 of the agreement was self-executing and provided a straightforward formula for calculating unallocated alimony and child support obligation that was based on certain increases or decreases in income. The court concluded that the agreement did not provide for the complete cessation of alimony payments in the event of a change in income; rather, the plaintiff should have reduced his alimony payments, in accordance with paragraph 4.4, to 40 percent of his W-2 income. The court found that the plaintiff's yearly W-2 salary in 2009 was $72,000 and

concluded that he owed $2400 per month for that year. The court found that the plaintiff owed alimony in the following amounts: $14,400 for the year 2009 (six months @ $2400/month); $28,800 for the year 2010 (twelve months @ $2400/month); $19,200 for the year 2011 (eight months @ $2400/month); for a total of $62,400 to be paid in monthly installments of $2400 until paid in full. The court modified the plaintiff's alimony payments pursuant to paragraph 4.6 of the agreement to $1 per year retroactive to August 31, 2011." Id., 643–44.

The defendant then filed an appeal with this court, claiming, inter alia, that the trial court erred in calculating the amount of alimony owed by the plaintiff under the agreement. Id., 639. The defendant's specific claim in *Marshall I* was that the court erred in calculating the plaintiff's alimony obligation on the basis of his W-2 income only, without considering the distributions he received from Artisans. Id., 644–45. This court concluded that the agreement was ambiguous "as to whether the plaintiff's distributions from Artisans, or K-1 income, were to be included in 'pre-tax income from employment' and, if so, to what extent." Id., 648. This court reasoned: "Paragraph 4.1 specifically excludes '[s]ubchapter S distributions' from the definition of 'pre-tax income from employment.' Paragraph 4.2, however, does not limit 'pre-tax income from employment' to W-2 income only. That paragraph defines 'pre-tax income from employment' as 'base salary' plus additional benefits. In paragraph 4.2, the parties used the fair market value of the plaintiff's 40 percent interest in Artisans to arrive at 'reasonable and appropriate compensation levels' for the plaintiff's 'base salary' for the 2005 tax year. The plaintiff's 2007 amended federal 1040 form indicated that his W-2 income was $126,144, which amount is less than the stipulated amount in paragraph 4.2 of $175,000 for the

plaintiff's base salary. Paragraph 4.4 provides for a modification if the plaintiff's 'base salary and direct benefits' should be greater or less than $192,000. In order to reconcile paragraphs 4.1 and 4.2, and to determine the extent to which K-1 income is to be included in the calculation of 'base salary,' the trial court must engage in fact-finding as to the intent of the parties." (Footnote omitted.) Id., 648. Having found the agreement ambiguous, this court remanded the case to the trial court to determine the intent of the parties and the arrearage.[4] Id.

This court in *Marshall I* also addressed the defendant's claim that the trial court improperly granted the plaintiff's motion to modify alimony, concluding: "The court erred in comparing 'apples and oranges' and determining the amount of the plaintiff's compensation for 2007 through 2011, and calculating a 60 percent change in income by comparing the stipulated income of $192,000 in 2007, which included direct benefits and some K-1 income, with the plaintiff's W-2 income only for the subsequent years. Paragraph 4.6 [of the agreement] specifies that either party shall have the right to move for modification of [of the provisions of paragraphs 4.1, 4.2 and 4.3] in the event there is a 'substantial change in the nature of the [plaintiff's] compensation . . . .' It is perhaps significant that the agreement uses the term 'compensation,' in paragraph 4.6, rather than 'pre-tax income' or another term previously used in

[4] In *Marshall I*, supra, 151 Conn. App. 645, the defendant also claimed that the trial court improperly failed to include the plaintiff's direct benefits, which amounted to $17,000 per year, in its calculation of the alimony arrearage. This court agreed and directed the trial court on remand to include the direct benefits in its calculation of the arrearage.

With respect to the defendant's contempt motion, this court affirmed the trial court's decision to decline to find the plaintiff in contempt, stating: "As stated in part I B of this opinion, the agreement is ambiguous as to whether and to what extent K-1 income properly was to be factored into the calculation of alimony. Although we remand the case for further proceedings on this limited issue, we discern no basis on which to disturb the court's conclusions regarding contempt." Id., 651.

article 4. In any event, because the factual basis underlying the court's granting of the plaintiff's motion for modification is clearly erroneous, we remand this issue to the trial court for further proceedings." Id., 657. This court's rescript provided: "The judgment is reversed with respect to the granting of the plaintiff's motion to modify alimony and the calculation of the amount of the alimony arrearage owed by the plaintiff to the defendant and the case is remanded for further proceedings consistent with this opinion. The judgment is affirmed in all other respects." Id., 658.

On remand, the court, *Hon. Gerard I. Adelman*, judge trial referee, ruled that it "would bifurcate the issues by first deciding whether or not all or any portion of the plaintiff's K-1 income was to be included in the modification hearing and then, based on the first ruling, hold a second hearing to establish the amount of the plaintiff's income. At the second hearing, the court would rule on the motion for modification and perhaps set a new alimony order in compliance with the original agreement of the parties."

The court held the first part of the bifurcated hearing on July 19 and 25, 2016. Both parties testified, as did Attorneys Ellen Lubell and Melissa J. Needle, who represented the defendant and the plaintiff, respectively, at the time of the dissolution, and Mark Harrison, who performed a business valuation as it related to the plaintiff's interest in Artisans as of September 30, 2006. Following the conclusion of the hearing on July 25, 2016, the court issued the following oral ruling: "[T]he intent of the parties was that in reaching the reasonable compensation, the court should consider income, even including some distributions from the business, irregardless of the fact that Mr. Marshall got to keep his 40 percent interest and it was excluded. Because I think the intent of the parties was to include it in some level."

The second part of the hearing was held over three days on October 23, 24 and 25, 2017. The court heard the testimony of both parties; the plaintiff's former business partner, Christopher Phillips; the plaintiff's expert witness, John Kramer; and the defendant's expert witness, John M. Leask II.

Kramer, a certified public accountant with experience in valuation of closely held businesses, testified that he was retained by the plaintiff to determine his reasonable compensation from employment from 2008 through 2011. Kramer testified generally that, when valuing a closely held business, the income stream is split into reasonable compensation and return on investment. He testified that the reasonable compensation component is "basically the amount that somebody like Mr. Marshall would be paid if he were not an owner, if he had to hire somebody to perform his . . . functions of the business," whereas the return on investment is "the piece that went into determining [what his] interest was worth—I think the number was 845,000."[5]

Kramer testified that he had reviewed the parties' agreement, the valuation report prepared by Harrison, Artisans' tax returns and financial statements, the plaintiff's personal tax returns, updated salary surveys that had been used by Harrison in his analysis, and transcripts of Phillips' deposition testimony. In addition to speaking to David Bailey, Artisans' certified public accountant, Kramer also spoke with Harrison and his associate, Joseph DeCusati, regarding the methodology

[5] Section 6.1 of the agreement stated in relevant part: "For purposes of this Agreement, and based on the business appraisal completed by Meyers, Harrison & Pia in May, 2007, the parties have ascribed a value of $845,000 to the Husband's forty (40%) percent interest in Artisans Home Builders, Inc." Section 6.7 of the agreement further provided: "The Husband shall retain all of his interest in Artisans Home Builders, Inc. free and clear of any claim by the Wife. The Wife hereby waives any claim or entitlement which she may have to the Husband's business including return on investment."

they had used to determine reasonable compensation for the valuation report they had prepared. Kramer testified that he had recalculated what Harrison and DeCusati had done and talked to them about his recalculations to "make sure that it was appropriate" and then "carried forward that . . . same methodology to the relevant years." Kramer testified that the methodology involved multiplying the gross revenue of the business by a certain percentage to determine reasonable compensation. Harrison had determined, following his review of certain compensation surveys,[6] that 2 percent "was an appropriate percentage to use for this particular business company of a size of $18 million in the home-building industry, and that was the basis for [Harrison's] calculation of normalized compensation."

Regarding the formula Kramer used to determine the plaintiff's reasonable compensation in 2008, Kramer testified: "I did a similar calculation to . . . Harrison . . . . I wanted to keep it comparable to what they had done. So I took the sales of Artisans. That would've come from the company's tax returns and financial statements. That just represents the gross sales. Multiplied by a percentage, and that's really where I did the bulk of my work, determining what the appropriate percentage should be as a result of looking at [Risk Management Association (RMA)] and BizMiner and

[6] Specifically, Kramer testified that Harrison had used a couple of compensation surveys, one of which was Risk Management Association's (RMA) survey. Kramer described RMA as "a non-profit that . . . deals with the financial services industry. . . . [F]or many, many years, they've been putting together a survey of not only compensation but of operating statistics of business by . . . company type, company size, by some other attributes, showing percentages of revenue to various expense items on an income statement, one of those items being officer compensation to revenue."

In addition to RMA, Kramer testified that he also used a source called BizMiner, which he stated he used in place of Integra, a source that Harrison used. According to Kramer, although Integra was widely used and a viable source at the time of Harrison's analysis, BizMiner had "really replaced Integra for all intents and purposes today."

Integra for . . . the appropriate years here, determined in this particular case that 2.5 percent is the appropriate percentage to use for company's that's doing about $9 million in sales in this particular industry. So, I multiplied the sales by the percentage to get the total . . . reasonable compensation." See footnote 6 of this opinion. Kramer testified that he performed a similar calculation for 2009 through 2011, adjusting the percentage as necessary on the basis of his examination of the compensation surveys.

Although the plaintiff held a 40 percent ownership interest in Artisans, Kramer testified that he assigned 50 percent of the total reasonable compensation to the plaintiff, as Harrison had done. Kramer testified that, when Harrison did his valuation, he "treated the owners as equal for this purpose, so I . . . carried it forward and used the 50 percent." With respect to the plaintiff's medical benefits, Kramer testified that, for 2010 and 2011, he used the figure reported by Artisans on the plaintiff's K-1 tax form. For 2008 and 2009, Kramer spoke with Bailey, who verified the amount Artisan paid for the plaintiff's medical benefits.[7] On the basis of his calculations, Kramer found the plaintiff's reasonable compensation and direct medical benefits to be $134,500 for 2008, $61,500 for 2009, $115,800 for 2010, and $126,400 for 2011. Kramer recorded these findings in a schedule of the plaintiff's reasonable compensation.

The defendant's expert witness, Leask, also a certified public accountant with experience in valuation of closely held businesses, testified that he was retained by the defendant to determine the plaintiff's income

[7] Kramer initially looked to the plaintiff's K-1 forms for 2008 and 2009 in order to determine the amount Artisan paid for the plaintiff's medical benefits. After noticing that the number did not make sense as it was higher than the other years, Kramer spoke with Bailey, who indicated that it was an oversight. Bailey then helped Kramer determine the correct numbers for 2008 and 2009.

from Artisans. He determined the plaintiff's net income share, i.e., what the plaintiff would have earned had Artisans' distributed 100 percent of its earnings.

On December 14, 2017, the court issued its memorandum of decision. It made the following relevant findings of fact: "The court has used the concept of reasonable compensation to determine the pre-tax income (reasonable compensation) of the plaintiff for the purposes of calculating the alimony owed for each year . . . . Based on that concept, the plaintiff's gross income for purposes of alimony modification calculations was $134,500 for 2008; $61,500 for 2009; $115,800 for 2010, and $126,400 for 2011 . . . . Using 40 percent (40%) of gross income to arrive at the alimony obligation, as agreed to by the parties in their agreement and the order of the court, the plaintiff's alimony obligation for 2008 was $53,800; for 2009, it was $24,600; for 2010, it was $46,320; and for 2011, it was $50,560 . . . . Accepting as accurate the tax returns of both parties, the overpayment for 2008 would be $22,210. In 2009, the plaintiff paid to the defendant a total of $17,200, which would be an underpayment of $7400. In 2010, the plaintiff paid no alimony at all to the defendant for an underpayment of $46,320 and, in 2011, there was no alimony paid for an underpayment of $50,560. Those amounts total $82,270 . . . . Both parties agree that the plaintiff paid to the defendant an additional $62,400 as ordered by the court (*Klatt*, *J.*) after the January 2012 hearing . . . . There had been a substantial change in the financial circumstance for both parties for the year 2011 and going forward . . . . The court finds that based on the relative financial circumstances of the parties for 2011, the appropriate alimony payment should be modified to zero retroactive to September 1, 2011, thereby reducing the arrearage for that year by $16,853 ($4213.33 per month for four months, so that the alimony owed for 2011 would be modified to

$33,707) . . . . After applying credits for all payments and reducing the obligation retroactive to September 1, 2011, the plaintiff would owe to the defendant alimony in the amount of $2817 (—$22,210 + $7400 + $46,320 + $33,607 = $65,217 — $62,400 = $2817) . . . ." (Footnote omitted.)

Accordingly, the court granted the plaintiff's August 16, 2011 motion to modify alimony and ordered the plaintiff's alimony obligation for 2008 through 2010 and the first eight months of 2011 reduced to "40 percent of the plaintiff's reasonable compensation as found by the court . . . ." See footnote 14 of this opinion. It further ordered the plaintiff's alimony obligation for the last four months of 2011 reduced to zero. The court granted the defendant's September 29, 2011 motion for contempt only as to the finding of the arrearage in the amount of $2817 and denied the plaintiff's March 7, 2017 motion for an order regarding an alimony overpayment. This appeal followed.

I

The defendant first claims that the court "erred by going far beyond the scope of the Appellate Court remand orders." Specifically, she argues that "[t]he Appellate Court never instructed the trial court to determine whether the Agreement required the application of the formula to the plaintiff's pre-tax income or instead to his 'reasonable compensation.' " The plaintiff responds that "the trial court's orders utilizing a reasonable compensation approach were in adherence to the scope of the Appellate Court's remand and should be affirmed." We agree with the plaintiff.

We first set forth our standard of review and relevant principles of law. "Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed

with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . 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. . . .

"At the outset, we note that, [i]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered. . . . As a result, [w]ell established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . .

"Compliance [with a mandate] means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . No judgment other than that directed or permitted by the reviewing court may be rendered. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . We are mindful, however, that [w]e have rejected efforts to construe our remand orders so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383–85, 3 A.3d 892 (2010).

In applying these principles to the present case, we first review our analysis, remand and mandate in *Marshall I*. As set forth previously in this opinion, this court, in *Marshall I*, found the agreement ambiguous "as to whether the plaintiff's distributions from Artisans, or K-1 income, were to be included in 'pre-tax income from employment' and, if so, to what extent." *Marshall I*, supra, 151 Conn. App. 648. Paragraph 4.1, as this court noted, "specifically excludes '[s]ubchapter S distributions' from the definition of 'pre-tax income from employment,' " while paragraph 4.2 "does not limit 'pre-tax income from employment' to W-2 income only" and instead defines " 'pre-tax income from employment' as 'base salary' plus additional benefits." Id. This court acknowledged that, "[i]n paragraph 4.2, the parties used the fair market value of the plaintiff's 40 percent interest in Artisans to arrive at 'reasonable and appropriate compensation levels' for the plaintiff's 'base salary' for the 2005 tax year." Id. This court further stated that the plaintiff's 2007 tax return indicated that his W-2 income of $126,144 was below the stipulated base salary amount of $175,000 in paragraph 4.2. Id. This court reiterated that paragraph 4.4 provides for a modification if the plaintiff's "base salary and direct benefits" should be greater or less than $192,000. Id. As framed by this court, paragraphs 4.1 and 4.2 required reconciliation. Id. This court recognized that the reconciliation process would involve a "determin[ation] [of] the extent to which K-1 income is to be included in the calculation of 'base salary,' " which required "fact-finding as to the intent of the parties." Id. Having found the agreement ambiguous, this court remanded the matter to the trial court "to determine the intent of the parties and to determine the arrearage accordingly." Id. This court "remanded [the case] for further proceedings consistent with this opinion." Id., 658.

On remand, the trial court bifurcated the hearing. It first took up this court's mandate to engage in "fact-

finding as to the intent of the parties." Id., 648. At the conclusion of the first portion of the hearing on July 25, 2016, the court issued its factual finding: "[T]he intent of the parties was that in reaching the reasonable compensation, the Court should consider income even including some distributions from the business, irregardless of the fact that Mr. Marshall got to keep his 40 percent interest and it was excluded . . . ." The court determined that "the intent of the parties was to include [K-1 distributions] in some level." The court stated that, in the next portion of the hearing, "[w]hat Mr. Marshall's actual compensation was, is going to become . . . the key. And whether or not you need a new evaluation to decide what reasonable compensation is or not, I'll leave that to the parties . . . ."

The court then held the second portion of the hearing, during which it heard expert testimony proffered by both parties. In its memorandum of decision, the court found that the parties had "adopted the 'reasonable compensation' calculation to establish income for alimony and child support purposes." The court saw "no reason not to follow that agreed-upon methodology going forward." It found Kramer's calculations "to be a fair and reasonable adaptation of those done by [Harrison] the mutual expert witness for the parties' 2007 agreement." The court thereafter determined the plaintiff's pre-tax income for the relevant years and determined the amount of the arrearage, as directed by this court in its remand order.

A thorough examination of this court's opinion in *Marshall I* and the proceedings on remand leads us to reject both the defendant's narrow interpretation of our remand order and her representation of the court's decision on remand.[8] She contends that this court's

[8] The cases cited by the defendant in support of her claim that the court exceeded the scope of the remand order are factually and legally distinguishable. See *Bruno* v. *Whipple*, 186 Conn. App. 299, 312–13, 199 A.3d 604 (2018) (court on remand acted improperly in rendering judgment for defendant

remand order in *Marshall I* restricted the trial court's inquiry to "whether the K-1 income was to be included in the plaintiff's pre-tax income." Once the court determined that the K-1 income was to be included, the defendant maintains, the court's only tasks "were to confirm the amount of the K-1 income in each of the years in question, to add it to the plaintiff's W-2 income and direct benefits of $17,000, and to multiply the resulting number by 40% to determine the plaintiff's alimony in each year." We disagree that this court's order so constrained the court on remand. Moreover, we disagree with the defendant's arguments that the court "us[ed] the plaintiff's 'reasonable compensation' instead of his pre-tax income" and, in doing so, "alter[ed] the terms of the parties' agreement" and "changed the formula" on which the postdissolution proceedings had been premised. We conclude that the court acted within the scope of the remand order in *Marshall I* when it used the methodology of reasonable compensation to determine the plaintiff's pre-tax income in the context of effectuating the terms of the parties' separation agreement, the relevant provisions of which this court had determined to be ambiguous.

II

The defendant's second claim on appeal is that "[t]he Appellate Court's determination that the alimony calculation was to be made on the basis of plaintiff's pre-

where remand order did not disturb jury verdict in favor of plaintiff and case was remanded for hearing in damages only), cert. denied, 331 Conn. 911, 203 A.3d 1245 (2019); *Oldani* v. *Oldani*, 154 Conn. App. 766, 776, 108 A.3d 272 (court exceeded limited remand order for new hearing on financial orders and attorney's fees when, following remand, plaintiff sought to amend complaint to add six counts unrelated to remand order and court rendered judgment on all counts of amended complaint), cert. denied, 315 Conn. 930, 110 A.3d 433 (2015); *Grady* v. *Schmitz*, 21 Conn. App. 111, 115–16, 572 A.2d 71 (remand order with direction to render judgment for plaintiff was exceeded where breadth of injunction rendered by trial court on remand gave plaintiffs more than that to which they were entitled under terms of restrictive covenant at issue), cert. denied, 215 Conn. 806, 576 A.2d 537 (1990).

tax income was the law of this case which the trial court was bound to follow, [and the court on remand] erred when [it] based the plaintiff's alimony obligation on his supposed 'reasonable compensation' instead." The plaintiff responds that "[h]ow to calculate [the] [p]laintiff's income was relevant and not extraneous to the issues and purposes of the remand. Therefore, it was within the scope of the remand, and outside the scope of any 'law of the case' in this matter." We agree with the plaintiff.

We first set forth our standard of review and relevant legal principles. "[T]he application of the law of the case doctrine involves a question of law, over which our review is plenary." (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 739, 166 A.3d 832, cert. denied, 327 Conn. 926, 171 A.3d 59 (2017). "The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Olson* v. *Mohammadu*, 169 Conn. App. 243, 263, 149 A.3d 198, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016). "Intervening appellate proceedings, however, change the nature of this seemingly discretionary doctrine. [I]t is a well-recognized principle of law that the opinion of an appellate court, so far as it is applicable, establishes the law

of the case upon a retrial, and is equally obligatory upon the parties to the action and upon the trial court." (Internal quotation marks omitted.) *Fazio* v. *Fazio*, 199 Conn. App. 282, 289–90, A.3d (2020).

The defendant argues that the trial court on remand failed to "abide by the law of the case as established through the prior decisions" in *Marshall I* by both the trial court and this court. We first discuss this court's opinion. As set forth in part I of this opinion, this court in *Marshall I* concluded that the relevant provisions of the agreement were ambiguous and remanded for a determination "as to whether the plaintiff's distributions from Artisans, or K-1 income, were to be included in 'pre-tax income from employment' and, if so, to what extent." *Marshall I*, supra, 151 Conn. App. 648. Because we have concluded in part I of this opinion that the trial court properly acted within the scope of the remand order in rendering its decision, it could not have violated the principle "that the opinion of an appellate court, so far as it is applicable, establishes the law of the case upon a retrial . . . ." (Internal quotation marks omitted.) *Fazio* v. *Fazio*, supra, 199 Conn. App. 289–90. It necessarily follows that the trial court did not fail to abide by the law of the case of this court's opinion in *Marshall I*.

Moreover, in *Marshall I*, this court concluded that the trial court erred in calculating the amount of alimony owed by the plaintiff under the agreement and "remand[ed] the case to the trial court for further proceedings on this issue." *Marshall I*, supra, 151 Conn. App. 640. Specifically, this court reversed the judgment of the trial court "with respect to the granting of the plaintiff's motion to modify alimony and the calculation of the amount of the alimony arrearage owed by the plaintiff to the defendant . . . ." Id., 658. Notwithstanding this language, the defendant argues that this court's affirmance of the trial court in all other respects, means

that "[the trial court in *Marshall I*'s] calculation of the arrears using the plaintiff's actual income and not his 'reasonable compensation' was correct, was affirmed by the Appellate Court, and became the law of this case." We disagree that this court's statement that "[t]he judgment is affirmed in all other respects"; *Marshall I*, supra, 658; established the trial court's calculations as the law of the case. This court's opinion in *Marshall I* also held that the trial court did not abuse its discretion in declining to award the defendant statutory interest and rejected the defendant's claim that the court erred in failing to find the plaintiff in contempt. Id., 651, 652. This court "discern[ed] no basis on which to disturb the court's conclusions regarding contempt" and explained that "[t]he court's failure to find wilfulness—an issue on which the defendant had the burden of proof—would not logically be altered on remand." Id., 651. On the basis of the foregoing, we conclude that the calculations found in the trial court opinion in *Marshall I* did not constitute the law of the case on remand, and that this court's affirmance of the judgment in other respects addressed the trial court's statutory interest and contempt conclusions.

III

The defendant's third claim on appeal is that "it was improper for the trial court to consider an argument never previously presented by the plaintiff and which, in fact, was directly contradictory to the position that the plaintiff had maintained from the outset of this matter until the remand hearing." Specifically, the defendant argues that, until the hearing on remand, the plaintiff "never suggested that the alimony to be paid ought to be based on an annual determination of what his 'reasonable compensation' might be in light of the value of Artisans as it changed from time to time." According to the defendant, because the plaintiff failed to argue in *Marshall I* that alimony should be based on

an annual determination of his reasonable compensation, either before the trial court or by way of cross appeal, he should not have been permitted on remand to argue that his pre-tax income should be determined on the basis of reasonable compensation.[9] We disagree.

The defendant's argument rests on the principle that "[a]n *appellant* who fails to brief a claim abandons it . . . ." (Emphasis in original; internal quotation marks omitted.) *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 319, 50 A.3d 841 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013). "As the [United States Court of Appeals for the Third Circuit] has explained, [a]dherence to the rule that a party waives a contention that could have been but was not raised on [a] prior appeal . . . is, of course, necessary to the orderly conduct of litigation. Failure to follow this rule would lead to the bizarre result . . . that a party who has chosen not to argue a point on a first appeal should stand better as

[9] To the extent that the defendant argues on appeal that the trial court improperly failed to conclude that the doctrine of judicial estoppel barred the plaintiff on remand from arguing that reasonable compensation should be used to determine his pre-tax income, we agree with the plaintiff that the defendant did not raise this claim before the trial court. Accordingly, it is unreviewable. The defendant never raised judicial estoppel before the trial court during the hearing on remand, and her posttrial brief likewise lacks any reference to the doctrine.

Moreover, the relevant section of the defendant's principal brief on appeal claims that the plaintiff has abandoned any argument that his pre-tax income should be determined using reasonable compensation on the ground that he failed to raise such an argument in *Marshall I*. It is not until the defendant's reply brief that she seeks to ground her claim in the doctrine of judicial estoppel. In her reply brief, she argues: "While the defendant had not labeled her argument as [one based on judicial estoppel], nevertheless it certainly applies." We decline to consider the defendant's argument that the doctrine of judicial estoppel barred the plaintiff from arguing that reasonable compensation should be used to determine his pre-tax income, as such claim was not raised before the trial court and was raised for the first time in the defendant's reply brief. See, e.g., *Gordon* v. *Gordon*, 170 Conn. App. 713, 718 n.10, 155 A.3d 809, cert. denied, 327 Conn. 904, 170 A.3d 1 (2017).

regards the law of the case than one who had argued and lost. . . . In keeping with this reasoning, this court previously has refused to consider claims on subsequent appeals by the same party in which [n]o valid reason has been alleged as to why the [appellant] could not have brought the present claim when the prior one was brought." (Citations omitted; internal quotation marks omitted.) Id.

The defendant relies on *O'Brien* v. *O'Brien*, 161 Conn. App. 575, 581, 128 A.3d 595 (2015), rev'd on other grounds, 326 Conn. 81, 161 A.3d 1236 (2017), as support for her argument that the plaintiff's failure to cross appeal from the trial court's opinion in *Marshall I* precluded him from arguing on remand for a determination of his pre-tax income on the basis of his reasonable compensation. In *O'Brien*, the dissolution court treated all unvested stock options held by the plaintiff at the time of dissolution as marital property subject to equitable distribution. Id., 580–81. The plaintiff appealed from the judgment of dissolution but did not challenge the property division orders. Id., 581. After remand, the plaintiff again appealed to this court. Id., 576. In his second appeal, the plaintiff raised an argument that the unvested stock options were not marital property and, therefore, he could not have violated the automatic orders applicable in all marital dissolution actions; see Practice Book § 25-5; by converting certain of his stock options into cash. *O'Brien* v. *O'Brien*, supra, 580 n.4. This court concluded that "[b]ecause the plaintiff could have challenged the court's treatment of the stock options as marital property in his prior appeal but failed to do so, the plaintiff has waived his right to argue that the unvested stock options were not marital property and, thus, that their exercise could not have violated the automatic orders." Id. This court further concluded that "[t]he plaintiff similarly has waived any argument, now or on further remand, that the proceeds resulting

from the exercise of those options are not subject to distribution by the court in accordance with General Statutes § 46b-81." Id. The present case is distinguishable from *O'Brien* in that the plaintiff in the present case was the appellee in *Marshall I* and is, once again, the appellee in this appeal.[10] See footnote 2 of this opinion. This court in *O'Brien* cited *Harris*, in which our

[10] The defendant also relies on *Gennarini Construction Co.* v. *Messina Painting & Decorating Co.*, 15 Conn. App. 504, 508, 545 A.2d 579 (1988). In *Gennarini Construction Co.*, the trial court denied the plaintiff's application to vacate an arbitration award and confirmed the existing award in favor of the defendant. Id., 507. The Superior Court rejected the defendant's request to supplement an arbitrator's award with interest and attorney's fees. Id. The plaintiff appealed to this court. Id. Although the defendant filed a preliminary statement of issues, in which it listed a claim that the trial court erred in its failure to award it the supplemental moneys it sought, this court declined to address the defendant's claim on the ground that it was not properly raised. Id., 508. This court noted that "[t]he defendant did not file a cross appeal raising this issue." Id., 508 n.6. This court affirmed the Superior Court's affirmance of the arbitration award. Id., 507–508. Following the release of this court's decision, the defendant reclaimed with the trial court a motion for an order, again seeking supplemental interest and attorney's fees. Id., 508. The court denied the defendant's motion. Id., 508–509. An articulation by the court indicated that "the issue of supplemental fees had been fully presented to and decided by [the Superior Court prior to the first appeal], and thus, the defendant was barred under the doctrine of res judicata from raising this claim once again." Id., 509. In the second appeal, this court considered whether the trial court properly determined that the defendant was barred from litigating the claim a second time. Id. This court concluded that the defendant raised an impermissible collateral attack on the first judgment. Id., 511. It emphasized that "[w]hereas the defendant did not take advantage of . . . options [for review], exemplified by its failure to cross appeal from that judgment in [*Gennarini Construction Co.* v. *Messina Painting & Decorating Co.*, 5 Conn. App. 61, 496 A.2d 539 (1985)] . . . it cannot now be heard to complain. A case cannot be presented by halves. In the event of an appeal to this court an appellee must be prepared to have the case decided with reference to all facts on the record presented for determination by either party. . . . The defendant should have been more diligent in ensuring that it had properly protected its rights." (Citations omitted; internal quotation marks omitted.) *Gennarini Construction Co.* v. *Messina Painting & Decorating Co.*, supra, 15 Conn. App. 512–13.

The procedural posture of the present case renders it distinct from *Gennarini Construction Co.* v. *Messina Painting & Decorating Co.*, supra, 15 Conn. App. 504. Once this court determined that the agreement was ambiguous and remanded the matter to the trial court, the plaintiff's arguments as to the method of calculating his pre-tax income were not barred by res

Supreme Court declined to depart "from the previously announced general principle that an appellee will not be deemed to have forfeited a claim that could have been, but was not, brought in the context of the appellant's appeal." *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 306 Conn. 324. Thus, *O'Brien* does not lend support to the defendant's claim.[11]

Accordingly, we reject the defendant's argument that plaintiff was barred from arguing that his pre-tax income should be determined on the basis of reasonable compensation because he did not advance such a theory in prior proceedings.

IV

The defendant next claims that the court improperly used the plaintiff's reasonable compensation as the basis for alimony calculations where the "agreement does not provide for that method." We disagree.

At the outset, we note that, because this court determined in *Marshall I* that the agreement is ambiguous, the interpretation of the agreement by the trial court on remand is subject to the clearly erroneous standard of review. "It is well established that a separation agreement, incorporated by reference into a judgment of dissolution, is a contract between the separating parties. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject

judicata, as the question of whether, and to what extent, his distributions were to be included in his pre-tax income remained unresolved, and that question was returned to the trial court for resolution on remand.

[11] The defendant also relies on authorities addressing a party's ability to try his case on one theory and seek to reargue or to appeal on a different theory. See *Clark* v. *Commissioner of Motor Vehicles*, 183 Conn. App. 426, 441, 193 A.3d 79 (2018); *Ritcher* v. *Childers*, 2 Conn. App. 315, 318, 478 A.2d 613 (1984). The defendant's reliance is misguided, as the plaintiff has not sought reargument on a different theory, nor did he change his position from the hearing on remand to this appeal.

to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Hammond* v. *Hammond*, 145 Conn. App. 607, 611–12, 76 A.3d 688 (2013); see also *Thoma* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 62, 100 A.3d 917 (2014) (reviewing court's resolution of ambiguous contract provision under clearly erroneous standard because "[w]hen . . . a contract provision is ambiguous or contract provisions are internally inconsistent, a question of fact is involved" (internal quotation marks omitted)). "The interpretation of a contract term that is not so clear as to render its interpretation a matter of law is a question of fact, subject to the clearly erroneous standard of review. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Internal quotation marks omitted.) *Bijur* v. *Bijur*, 79 Conn. App. 752, 759, 831 A.2d 824 (2003). "This court has stated frequently that [a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . While conducting our review, we properly afford the court's findings a great deal of deference because it is in the unique [position] to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us."[12] (Internal quotation marks omitted.) Id., 761–62.

[12] The defendant argues that this court should afford plenary review to her claim. She maintains that the agreement "was unambiguous as to the basis on which alimony was to be calculated. It was to be determined on the basis of pre-tax income from employment, not on reasonable compensation."

The defendant argues that the "notion" of reasonable compensation is found only in paragraph 4.2 of the agreement "simply to explain the rationale for using $192,000 as the stipulated amount of the plaintiff's pre-tax income at the time of the Agreement, as it consisted of $175,000 in salary and distributions, being the reasonable amount of compensation at the time of the Agreement as determined by the accountants for purposes of valuing Artisans, and the $17,000 in plaintiff's direct benefits. But future calculations were to be based on the plaintiff's actual receipts from the company by way of W-2 salary, direct benefits, and, as found by Judge Adelman, K-1 distributions."[13]

She further argues that the court on remand "never found that it was the parties' intent to utilize 'reasonable compensation' as the basis for alimony calculations." The defendant argues that the only question remaining following this court's decision in *Marshall I* was whether the K-1 income was to be included in the plaintiff's pre-tax income from employment. According to the defendant, the court on remand resolved the ambiguity in favor of the defendant's interpretation. Once the court concluded that the distributions were to be included, "the trial court had no further authority to act beyond undertaking the ministerial act of calculating the arrears that were owed."

We disagree with the defendant. As discussed in part I of this opinion, this court in *Marshall I* determined that paragraphs 4.1 and 4.2 of the agreement required reconciliation. This court recognized that the reconciliation process would involve a "determin[ation] [of] the extent to which K-1 income is to be included in the calculation of 'base salary,' " which this court recognized required "fact-finding as to the intent of the parties." *Marshall I*, supra, 151 Conn. App. 648. The ambiguity recognized by this court and to be resolved by the trial court on remand extended beyond a simple all or nothing determination as to the plaintiff's distributions, and the court's findings as to the intent of the parties are entitled to deference. Accordingly, we review the court's findings under the clearly erroneous standard.

[13] The defendant also argues that "[i]f the alimony order was intended to be based on the plaintiff's 'reasonable compensation,' it could not possibly be self-executing since determining such compensation would require forensic accountants, and there would surely be differing opinions on that issue." We disagree that calculating the plaintiff's income using reasonable compensation is irreconcilable with the determination that paragraph 4.4 of the agreement is self-executing.

In the defendant's principal appellate brief before this court, she recognizes that the trial court in *Marshall I* determined that the alimony provision was self-executing and that this court in *Marshall I* "accepted that notion . . . ." We cannot discern that utilization of the methodology of reasonable compensation, buttressed by the assistance of an accounting professional,

We conclude that the court's determination of the plaintiff's pre-tax income on the basis of his reasonable compensation was supported by evidence in the record. Given the court's preliminary ruling that "the intent of the parties was to include [K-1 distributions] in some level," the court, in its memorandum of decision, identified the central dispute as "how to determine the plaintiff's income . . . ." It repeated the plaintiff's position that "the court should determine his reasonable compensation in accordance with the terms of the parties' agreement" and the defendant's position that "the court should consider all of the actual business funds available for distribution to the partners in addition to the actual salaries paid to them." The court then reviewed the expert testimony proffered by each party and found Kramer's testimony entirely credible. Last, the court stated: "In attempting to determine an accurate and fair income of an individual operating in a closely held corporation or other similar business model, it is always difficult to differentiate between the various methods available. Each has its merits and its limitations. Using a straight W-2 income approach may not be fair or accurate given that the owners of the closely held business have the ability to set salary figures as they wish. Using all available funds for distribution would likewise not be fair given the plaintiff's prior buyout of the defendant's equitable claim to his business interests. The defendant cannot be paid for her equitable claim and then seek to profit from the plaintiff's full ownership interest in the business. In this particular situation, the parties had negotiated a resolution in their agreement when they adopted the 'reasonable compensation' calculation to establish income for alimony and child support purposes. The court sees no reason not to follow that agreed-upon methodology going forward. The court further finds the calculations performed by Kramer, the plaintiff's expert witness, to be a fair and

precludes paragraph 4.4 from operating in what previously has been determined to be a self-executing manner.

reasonable adaptation of those done by the mutual expert witness for the parties' 2007 agreement."

In so deciding, the trial court reasonably found that the parties had adopted the reasonable compensation calculation in their agreement, and it properly carried that methodology forward. Having thoroughly reviewed the record before the trial court on remand, we conclude that the court's determination was not clearly erroneous.

V

The defendant's last claim on appeal is that the court improperly "modified the alimony for a period of nearly four years prior to" the plaintiff's motion to modify. (Emphasis omitted.) The plaintiff responds that "Judge Adelman simply calculated the alimony due from the plaintiff to the defendant and the arrearage for the years at issue in the appeal, based on his resolution of the ambiguities in the parties' Agreement. That was not an improper retroactive modification, but exactly the task assigned to the trial court on remand." We agree with the plaintiff.

We first set forth our standard of review and relevant principles of law. "Our deferential standard of review [in domestic relations cases] . . . does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Internal quotation marks omitted.) *Coury* v. *Coury*, 161 Conn. App. 271, 293, 128 A.3d 517 (2015). Moreover, "[t]he construction of [an order or] judgment is a question of law for the court . . . [and] our review . . . is plenary. As a general rule, [orders and] 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 [order or] judgment." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 484–85, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016). General Statutes § 46b-

86 (a) provides in relevant part: "No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party . . . ."

The defendant contends that this court's decision in *Lynch* v. *Lynch*, 153 Conn. App. 208, 238, 100 A.3d 968 (2014), cert. denied, 315 Conn. 923, 108 A.3d 1124, cert. denied, U.S. , 136 S. Ct. 68, 193 L. Ed. 2d 66 (2015), is determinative of this issue. We disagree. In *Lynch*, this court considered the plaintiff's claim that the trial court erred in granting the defendant's motion for contempt on the basis of the plaintiff's nonpayment of alimony and child support where the trial court also found that the defendant owed him reimbursements for alimony and child support. Id. The trial court had ordered reimbursements from the defendant to the plaintiff for an overpayment of child support and alimony. Id., 234. On appeal, the defendant maintained that he was entitled to offset his accrued obligations by his overpayments. Id., 239. This court rejected his argument, stating: "Retroactive modifications of support orders are ordinarily impermissible. . . . With the exception of the period following service of a motion for modification, [n]o order for periodic payment of permanent alimony or support may be subject to retroactive modification . . . . The power of the trial court to modify orders of support and alimony is . . . a creature of statute. General Statutes § 46b-86. Nothing in our statute regarding modification of alimony and support can be construed as authorizing retroactive modification. Such a construction has been expressly disavowed by our Supreme Court. . . . Simply stated, *alimony already accrued may not be modified*." (Emphasis in original; internal quotation marks omitted.) Id.

We disagree that the court, in adjudicating the matter on remand, impermissibly permitted retroactive modification of alimony. A review of the court's memorandum of decision reveals that, for the years 2008 through 2011, it first found the plaintiff's income and then determined his alimony obligation. Following its determination of his alimony obligation, the court then calculated the overpayment or underpayment for each year. The court did not engage in a modification of alimony but rather interpreted and effectuated the alimony provision of the agreement, as it was directed to do by this court's remand order.[14] Separately, the court found that the plaintiff had established a substantial change in circumstances, and it modified his alimony obligation, reducing it to zero, retroactive to September 1, 2011. Because the plaintiff's motion to modify was served on the defendant on August 31, 2011, the court's alimony modification retroactive to September 1, 2011, did not violate § 46b-86. Accordingly, the record does not show an improper retroactive modification of alimony.

The judgment is affirmed.

In this opinion the other judges concurred.

---

[14] We recognize that the court, in its orders, imprecisely described its action as reducing the plaintiff's alimony obligation for 2008 through 2011. Previously in its memorandum of decision, however, the court made clear that, for the years prior to the plaintiff's filing of his motion to modify, the court's function was to interpret the agreement and to determine the plaintiff's income and resulting alimony obligation, not to modify the alimony obligation. The court expressly recognized that it lacked authority "to make any modified order retroactive past the date of service of the underlying motion absent an agreement of the parties." The court's modification of alimony, which reduced the plaintiff's alimony obligation, was retroactive to September 1, 2011.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 200

ARLETTE JACKSON *v.* YALE UNIVERSITY
(AC 42871)

Alvord, Moll and Bishop, Js.

Argued September 17—officially released October 6, 2020

Plaintiff's appeal from the Compensation Review Board.

Per Curiam. The decision of the Compensation Review Board is affirmed.

STATE OF CONNECTICUT *v.* SEAN BYRNE
(AC 41982)

Prescott, Elgo and Moll, Js.

Argued September 21—officially released October 6, 2020

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, *Hudock*, *J.*

Per Curiam. The appeal is dismissed as moot.

JOHN LEPESKA *v.* COMMISSIONER OF CORRECTION
(AC 42447)

Elgo, Moll and Pellegrino, Js.

Argued September 22—officially released October 6, 2020

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

Per Curiam. The judgment is affirmed.

SHERI SPEER *v.* DONNA SKAATS ET AL.
(AC 43096)

Prescott, Suarez and DiPentima, Js.

Submitted on briefs September 22—officially released October 6, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Budzik*, *J.*

Per Curiam. The judgment is affirmed.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* THOMAS J. SHIVERS, JR., ET AL.
(AC 43336)

Lavine, Prescott and Elgo, Js.

Argued September 15—officially released October 6, 2020

Named defendant's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 200

(Replaces Prior Cumulative Table)

Borg *v.* Cloutier 82
Private nuisance; invasion of privacy; defamation; defamation per se; trespass; punitive damages; permanent injunction; motion for contempt; claim that trial court abused its discretion in failing to set aside jury's verdict; whether trial court failed to inquire adequately into possible juror misconduct; claim that trial court improperly awarded punitive damages to defendant; whether trial court correctly determined that permanent injunction was warranted; claim that trial court improperly held named plaintiff in contempt for failing to comply with its permanent injunction order.

Budrawich *v.* Budrawich 229
Dissolution of marriage; whether trial court properly found that defendant consented to court's request for extension of 120 day time period pursuant to rule of practice (§ 11-19) to issue decision on plaintiff's motion for order; whether trial court properly granted plaintiff's motion to modify alimony; whether trial court properly found that plaintiff met her burden to establish substantial change in circumstances; claim that trial court improperly granted plaintiff's motion to correct and issued corrected memorandum of decision; clarity of court's construction of alimony provision in dissolution judgment; whether language of alimony provision relieved plaintiff of burden to demonstrate substantial change in circumstances; mootness; claim that trial court improperly granted defendant's motion for downward modification of alimony.

Clinton *v.* Aspinwall 205
Breach of contract; motion to set aside verdict; motion for judgment not withstanding verdict; whether trial court improperly construed agreement and erred in denying posttrial motions; whether trial court improperly instructed jury regarding provision of agreement; harmless error; whether trial court improperly awarded attorney's fees and costs.

Davis *v.* Davis 180
Dissolution of marriage; whether trial court provided defendant with adequate notice that it might dispose of plaintiff's motion for modification of alimony at certain hearing; claim that trial court improperly ordered reimbursement to plaintiff for expenses related to fixing septic system at marital residence; claim that trial court abused its discretion by failing to consider plaintiff's conduct relative to defendant's efforts to make repairs himself; unpreserved claim that trial court failed to apply unclean hands doctrine; whether trial court failed to apply statute (§ 46b-224) governing suspension of child support order in calculating child support arrearage; claim that trial court improperly refused to deduct from arrearage amount for period of time parties' minor child was in defendant's custody.

Dempsey *v.* Cappuccino 653
Child custody; mootness; claim that trial court improperly permitted defendant to have unsupervised visits with minor child and failed to find that defendant had substance abuse issues; whether subsequent trial court order rendered appeal moot; whether plaintiff failed to adequately brief claim regarding order of joint custody.

Deutsche Bank National Trust Co. *v.* Pototschnig 554
Foreclosure; standing; whether trial court properly determined that plaintiff had standing to bring foreclosure action; claim that trial court failed to accord res judicata and collateral estoppel effect to New York court decision; claim that trial court erred in failing to consider whether trust for which plaintiff is trustee ever received note and mortgage; whether trial court abused its discretion in making certain evidentiary rulings.

Deutsche Bank National Trust Co. *v.* Shivers (Memorandum Decision) 903
Diaz *v.* Commissioner of Correction 524
Habeas corpus; whether habeas court abused its discretion in denying certification to appeal from judgment denying petition for writ of habeas corpus; whether habeas court improperly denied motion for evidentiary hearing to preclude certain testimony; claim that prosecutor at petitioner's criminal trials intentionally committed violations of Brady *v.* Maryland *(373 U.S. 83); claim that prosecution of petitioner at second criminal trial constituted violation of right against double jeopardy; claim that defense counsel at second criminal trial had conflict of interest pursuant to statute (§ 54-1f); claim that counsel at second criminal trial rendered ineffective assistance.*
Ferri *v.* Powell-Ferri. 63
Vexatious litigation; trusts; cross complaint; motion for summary judgment; whether trial court erred in determining that defendants had probable cause to bring cross complaint; whether trial court applied correct standard for determining whether defendants had probable cause to prosecute cross complaint; whether trial court properly determined that meritless action did not necessitate conclusion that it lacked probable cause or was frivolous; whether trial court correctly determined that lack of precedent in other jurisdictions did not render cross complaint as being without probable cause.
Giordano *v.* Giordano 130
Dissolution of marriage; motion to modify alimony; motion for contempt; claim that trial court erred in interpreting separation agreement to include defendant's supplemental pension as basis for modification of alimony; claim that agreement unambiguously did not include supplemental pension as part of gross annual compensation; claim that trial court erred in failing to interpret separation agreement as distributing supplemental pension to defendant at time of dissolution; whether trial court abused its discretion in modifying alimony award; whether trial court improperly granted plaintiff's motion for contempt.
Goody *v.* Bedard. 621
Negligence; premises liability; motion for extension of time; summary judgment; claim that trial court abused its discretion in effectively denying plaintiff's third motion for extension of time to respond to defendant's motion for summary judgment; claim that trial court improperly granted motion for summary judgment; whether trial court erred in determining that there was no disputed issue of material fact that defendant did not owe duty of care to decedent.
Hill *v.* OSJ of Bloomfield, LLC. 149
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
Jackson *v.* Yale University (Memorandum Decision) 902
Larmel *v.* Metro North Commuter Railroad Co.. 660
Negligence; accidental failure of suit statute (§ 52-592 (a)); motion to dismiss; arbitration (§ 52-549u et seq.); claim that trial court failed to hold that plaintiff's action was viable pursuant to § 52-592 (a); whether Nunno *v.* Wixner *(257 Conn. 671) was controlling.*
Lepeska *v.* Commissioner of Correction (Memorandum Decision) 903
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.

Manere *v.* Collins 356
Breach of contract; breach of fiduciary duty; dissolution of limited liability company; claim that trial court improperly concluded that defendant limited liability company's counterclaim stated claim on which relief could be granted; whether defendant pleaded facts which sufficiently alleged claim of breach of fiduciary duty; whether trial court improperly applied six year statute of limitations to defendant's counterclaim; whether defendant properly alleged action for accounting; whether trial court improperly rejected plaintiff's application to dissolve defendant limited liability company on ground of oppression pursuant to statute (§ 34-267 (a) (5)).

Marshall *v.* Marshall. 688
Dissolution of marriage; whether trial court acted within scope of this court's remand order when it used methodology of reasonable compensation to determine plaintiff's pre-tax income in context of effectuating parties' separation agreement; whether trial court erred when it used plaintiff's reasonable compensation to determine his alimony obligation; claim that this court's previous determination that alimony calculation was to be made using pre-tax income was law of case; whether trial court improperly considered plaintiff's argument, which he did not advance in prior proceedings, that alimony obligation should be based on his reasonable compensation; whether trial court's determination of plaintiff's pre-tax income on basis of his reasonable compensation was clearly erroneous; whether trial court improperly modified alimony retroactively for period of four years prior to plaintiff's motion to modify alimony.

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.

Nationstar Mortgage, LLC *v.* Zanett (Memorandum Decision). 901

Norwich *v.* Loskoutova (Memorandum Decision). 902

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.*

Rider *v.* Rider 466
Quiet title; fraud; breach of fiduciary duty; whether trial court properly granted motions to dismiss for lack of subject matter jurisdiction because plaintiff lacked standing; claim that, because Probate Court lacked statutory (§ 45a-646) authority to appoint conservator, all subsequent actions of Probate Court were void ab initio; claim that plaintiff had standing to bring certain claims that he alleged arose subsequent to resolution of his bankruptcy proceedings.

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

Schuler *v.* Commissioner of Correction 602
Habeas corpus; ineffective assistance of counsel; whether habeas court abused its discretion in denying petition for certification to appeal from judgment denying petition for writ of habeas corpus because certification to appeal form contained no specified grounds for appeal; claim that habeas court reasonably should have concluded that petitioner intended to appeal from denial of ineffective assistance of counsel claim; whether habeas court improperly denied claim of ineffective assistance of counsel.

Silver *v.* Silver 505
Dissolution of marriage; claim that trial court abused its discretion by opening and modifying dissolution judgment in granting plaintiff's motion to "clarify and effectuate" dissolution judgment when plaintiff did not request such relief; whether trial court modified, rather than clarified, dissolution judgment; whether trial court properly exercised its statutory (§ 52-212a) authority to open and modify dissolution judgment.

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.

Speer *v.* Skaats (Memorandum Decision) 903

State *v.* Byrne (Memorandum Decision) 902

State *v.* Castro 450
Murder; unpreserved claim that counsel's waiver of defendant's confrontation right was invalid because trial court failed to make finding that counsel's decision was legitimate trial tactic or part of prudent trial strategy; claim that right to confrontation can only be personally waived by defendant; claim that article first, § 8, of state constitution provides greater protection than federal constitution, rejected.

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.* Freddy T. 577
Risk of injury to child; sexual assault in first degree; whether trial court abused its discretion by admitting into evidence portions of video recording of social worker's forensic interview with child; claim that forensic interview did not meet requirements of medical diagnosis and treatment exception to rule against hearsay as set forth in provision of Code of Evidence (§ 8-3 (5)).

State *v.* Rivera (AC 42388) 401
Breach of peace in second degree; whether defendant's sufficiency claim was unreviewable because state claimed that defendant, through counsel, explicitly waived right to have state prove beyond reasonable doubt that altercation occurred in public place under applicable statute (§ 53a-181 (a) (1)) by conceding that element during closing argument; claim that evidence was insufficient to support finding that conduct giving rise to conviction occurred in public place for purposes of § 53a-181 (a) (1).

State *v.* Rivera (AC 43411) 487
Murder; conspiracy to commit assault in first degree; unlawful restraint in first degree; unlawful discharge of firearm; carrying pistol without permit; whether trial court abused its discretion in limiting defense counsel's closing arguments; whether trial court abused its discretion in admitting copy of cell phone recording containing defendant's confession; whether trial court should exercise supervisory powers to heighten requirements for admission of copies of digital evidence.

State *v.* Robert B. 637
Unlawful restraint in first degree; breach of peace in second degree; whether defendant's claim that his rights to due process and fair trial were violated when witness testified as to defendant's prior bad acts and arrests was preserved and of constitutional magnitude; claim that defendant was denied fair trial due to prosecutorial impropriety; whether defendant's unpreserved claim that trial court erred by failing to instruct jury on lesser included offense of unlawful restraint in second degree was waived.

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.

State *v.* Williams 427

Sexual assault in first degree; sexual assault in fourth degree; risk of injury to child; claim that defendant was deprived of right to fair trial as result of prosecutorial impropriety during direct examination and closing arguments; unpreserved claim that there was insufficient evidence for jury to find beyond reasonable doubt that victim was under ten years of age at time of first sexual assault to support mandatory minimum sentence imposed by trial court pursuant to statute (§ 53a-70).

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 OF CONNECTICUT STATE AGENCIES

Notice of Intent to Amend Connecticut Green Bank C-PACE Program Guidelines

In accordance with Section 1-121 of the General Statutes of Connecticut, NOTICE IS HEREBY GIVEN that the Connecticut Green Bank (the ''Green Bank'') proposes to update the program guidelines (the ''Program Guidelines'') for the commercial sustainable energy program authorized pursuant to Section 16a-40g of the General Statutes of Connecticut (the ''C-PACE Program'').

Summary of written procedures: The updated Program Guidelines for the C-PACE Program establish the rules for all program participates (e.g. capital providers, technical reviewers, borrowers etc.). There are two changes in the updated Program Guidelines: (1) addition of two new defined terms ''Refinancing'' and ''Restructuring'', and (2) change in the application of the EUL term restriction in the context of Restructuring.

Statement of purpose: To adopt the updated Program Guidelines for the C-PACE Program.

The proposed Program Guidelines may be viewed on Green Banks website, at the following address: www.ctgreenbank.com/cpacecomment2020. Due to Covid-19 restrictions, the offices of the Green Bank are not open to the public, however a copy may be requested via e-mail at: barbara.johnson@ctgreenbank.com. All interested parties may submit comments in connection with the proposed Program Guidelines, within thirty (30) days following publication of this notice, to Barbara Johnson, the Administrative Coordinator at the Connecticut Green Bank, 845 Brook Street, Rocky Hill, CT 06067 or via e-mail at: publiccomment@ctgreenbank.com.

NOTICE

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimands

February 10, 2020:	Michael A. Peck, Hartford, Connecticut—045776 Brian Dale Russell, Bloomfield, Connecticut—410172
March 6, 2020:	Abelardo J. Arias, Bristol, Connecticut—426528

Copies of the full text of the decision of the Statewide Grievance Committee is available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel