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CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JANET H. FOISIE *v.* ROBERT A. FOISIE
(SC 20384)

D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 52-599 (b)), a civil action or proceeding, including a dissolution action, shall not abate by reason of the death of any party but may be continued by or against the executor or administrator of the deceased party, and, if a defendant dies, the plaintiff, within one year after receiving notification of the defendant's death, may apply for an order to substitute the defendant's executor or administrator in the place of the defendant.

Pursuant further to statute (§ 52-599 (c) (1)), substitution under § 52-599 (b) is precluded when the purpose or object of the civil action is defeated or rendered useless by the death of a party.

The plaintiff appealed from the trial court's denial of her motion to substitute the coexecutors of the estate of R, the defendant and the plaintiff's former husband, pursuant to § 52-599 (b), in place of R. Approximately four years after the marriage of the plaintiff and R had been dissolved, and while R was still living, the plaintiff filed a motion to open the judgment of dissolution on the ground of fraud, claiming that R wilfully had failed to disclose assets he held in offshore accounts. The plaintiff and R stipulated that the judgment could be opened for the limited purpose of conducting discovery regarding the plaintiff's allegations, but, prior to complying with the court's discovery orders, R died. At the time of R's death, the motion to open was pending and the dissolution judgment remained open. In denying the plaintiff's motion to substitute, the trial court concluded that R's death defeated or rendered useless the underlying motion to open the dissolution judgment, and, thus, substitution of the coexecutors as defendants was prohibited under § 52-599 (c) (1). The court reasoned that, if the plaintiff's motion to open were granted, the marriage would be reinstated but would have automatically dissolved on the date of R's death pursuant to statute (§ 46b-40). Accordingly, the court determined, it could not again dissolve the marriage and redistribute the financial assets, as the plaintiff had requested in her motion to open. On appeal, the plaintiff claimed that R's death did not defeat or render useless her motion to open the dissolution judgment and thereby prohibit substitution of the coexecutors as defendants under § 52-599. *Held* that the trial court improperly denied the plaintiff's motion to substitute as defendants the coexecutors of R's estate: substitution of an executor or administrator for a deceased defendant is permitted under § 52-599 (b) when the action or proceeding to which the deceased defendant is a party is pending, and, in the present case, the plaintiff's motion to open was pending before the trial court

at the time of R's death; moreover, when a motion to open a dissolution judgment on the basis of financial fraud, such as the plaintiff's motion, seeks to open that judgment only for the purpose of reconsideration of the financial orders, the granting of that motion does not reinstate the marriage and, thus, does not defeat or render useless the underlying divorce proceeding; in the present case, although the plaintiff did not specifically request, in her motion to open, that the trial court open the dissolution judgment for the limited purpose of reconsideration of the financial orders, the allegations in that motion and the supporting memorandum of law made clear that the plaintiff was seeking to have the court open the judgment for that limited purpose rather than for the purpose of reinstating the marriage, and, therefore, contrary to the trial court's conclusion, substitution was not precluded under § 52-599 (c) (1).

Argued January 22—officially released April 27, 2020*

Procedural History

Action for the dissolution of marriage, and for other relief, brought to the Superior Court in the judicial district of New London at Norwich and tried to the court, *Hon. Joseph J. Purtill*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Diana*, *J.*, granted the plaintiff's motion to open the judgment in accordance with the parties' stipulation; subsequently, the court, *Carbonneau*, *J.*, denied the plaintiff's motion to substitute Sir Clare Roberts et al., coexecutors of the estate of Robert A. Foisie, as the defendants, and the plaintiff appealed. *Reversed in part*; *further proceedings*.

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellant (plaintiff).

Janet A. Battey and *Aidan R. Welsh* filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

Opinion

D'AURIA, J. In this appeal, we are asked to decide for the first time whether a party to a dissolution of mar-

* April 27, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

riage action may substitute the executor or administrator of the estate of a deceased party in the place of the decedent under General Statutes § 52-599 when the pending civil proceeding seeks to open a judgment of dissolution on the basis of financial fraud. The plaintiff, Janet H. Foisie, claims that the trial court improperly denied her motion to substitute the coexecutors of the estate of the defendant, Robert A. Foisie,[1] her former husband, in his place. Specifically, she argues that the trial court incorrectly determined that, pursuant to § 52-599 (c), the defendant's death defeated and rendered useless her underlying motion to open the judgment of dissolution, thereby prohibiting substitution under § 52-599 (b). The trial court ruled that granting the motion to open would reinstate the parties' marriage, the reinstated marriage automatically would be dissolved under General Statutes § 46b-40 due to the defendant's death, and, thus, the reopened action for dissolution would abate, preventing the court from granting the plaintiff any relief. We disagree and therefore reverse in part the judgment of the trial court.

The following procedural history is relevant to our review of the plaintiff's claim. The trial court dissolved the parties' marriage in 2011. The judgment of dissolution incorporated a separation agreement entered into by the parties, which included financial orders. Approximately four years later, the plaintiff moved to open and set aside the judgment of dissolution on the ground of fraud or, alternatively, on the ground of mutual mistake. Specifically, the plaintiff alleged that the defendant had failed to disclose assets totaling several million dollars held in bank accounts in Switzerland.[2] The plaintiff

[1] Neither the defendant nor the coexecutors of his estate participated in this appeal.

[2] The plaintiff subsequently amended her motion to open to include allegations that the defendant, in addition to failing to disclose the funds held in Switzerland, also failed to disclose the existence of loans he had made in excess of ten million dollars.

requested that the court open and set aside the judgment of dissolution and hold a new trial on all financial issues. In her supporting memorandum of law, she argued that "[t]he defendant wilfully and purposefully misrepresented the value of marital assets by failing to disclose the existence and value of his offshore holdings and thereby secured the stipulated dissolution judgment by means of direct and calculated fraud. . . . Law and equity require that the stipulated dissolution judgment be opened and vacated on such grounds, so that a fair division of the parties' assets may be had."

The parties stipulated that the judgment of dissolution could be opened for the limited purpose of conducting discovery regarding the plaintiff's allegations of fraud.[3] Despite this stipulation, the defendant failed to produce any discovery and failed to comply with the trial court's discovery orders, leading the court to hold him in contempt and to issue multiple financial sanctions. Prior to complying with the discovery orders, the defendant died, nearly seven years after the judgment of dissolution was rendered, while the motion to open was pending and the dissolution judgment remained open for the limited purpose of conducting discovery.

After the defendant's death, the plaintiff moved to substitute the coexecutors of the defendant's estate in place of the defendant pursuant to § 52-599.[4] The trial

[3] The defendant stipulated that he was waiving his right to a hearing under *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 270, 540 A.2d 713 (1988), which requires a party seeking to open a judgment of dissolution on the ground of fraud to substantiate the allegations of fraud beyond mere suspicion to be entitled to open the judgment for the limited purpose of conducting discovery. The defendant further stipulated that the plaintiff would have been able to sustain her burden of establishing " 'beyond a mere suspicion' " that he had engaged in fraud.

[4] In the plaintiff's motion to substitute, she originally sought to substitute the defendant's son, Michael R. Foisie, the curator of the estate, in place of the defendant. She subsequently amended her motion to substitute the coexecutors of the defendant's estate, Sir Clare Roberts and C. Kamilah Roberts, in place of the defendant.

court denied the plaintiff's motion to substitute. The court explained that, pursuant to § 52-599 (c), to substitute the executors of the estate of a deceased party in place of the party, the pending civil action or proceeding must not be defeated or rendered useless by the death of the party. The trial court determined that, if the plaintiff's motion to open the dissolution judgment were granted, the parties' marriage would be reinstated. Because the parties' reinstated marriage would have automatically dissolved on the date of the defendant's death, pursuant to § 46b-40,[5] nearly seven years after the dissolution judgment had been rendered, the court reasoned that it could not again dissolve the parties' marriage and redistribute the financial assets, as the plaintiff requested in her motion to open. Thus, the trial court concluded that the motion to open was defeated or rendered useless, and, therefore, it had to deny the motion to substitute.

The plaintiff appealed to the Appellate Court from the trial court's denial of the motion to substitute. The appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

The plaintiff argues that the trial court incorrectly concluded that opening the dissolution judgment would reinstate the parties' marriage, thereby defeating the underlying motion to open and prohibiting substitution. She argues that the granting of a motion to open a judgment of dissolution for purposes of reconsidering the financial orders does not reinstate the parties' marriage and, thus, does not abate upon the death of a party. As a result, she contends, the exceptions enumerated in § 52-599 (c) do not apply, but, rather, § 52-599 (b) permits substitution in the present case.[6]

[5] General Statutes § 46b-40 (a) provides: "A marriage is dissolved only by (1) the death of one of the parties or (2) a decree of annulment or dissolution of the marriage by a court of competent jurisdiction."

[6] Although no brief was filed in opposition to the plaintiff's brief, the Connecticut chapter of the American Academy of Matrimonial Lawyers filed

We agree that when a motion to open a dissolution judgment on the basis of financial fraud seeks to open the judgment only for the limited purpose of reconsideration of the financial orders, granting the motion does not reinstate the party's marriage and, thus, does not defeat or render useless the underlying civil proceeding so that substitution is permitted under § 52-599. We also agree with the plaintiff that her motion to open the dissolution judgment in the present case sought to open the judgment only for the limited purpose of reconsideration of the financial orders. Therefore, we conclude that the underlying civil proceeding was not defeated or rendered useless by the defendant's death, and, thus, the trial court improperly denied the plaintiff's motion to substitute.

Although we generally review a trial court's decision whether to grant a motion for substitution of a party for abuse of discretion, in the present case, because the plaintiff's claim requires us both to consider the trial court's legal authority to grant the motion to substitute—whether there was a viable underlying civil proceeding—and to construe and gauge the applicability of statutes, our review is plenary. See *In re David B.*, 167 Conn. App. 428, 439, 142 A.3d 1277 (2016).

Substitution of a deceased party in a civil action or proceeding, including a dissolution action; see *Charles* v. *Charles*, 243 Conn. 255, 257, 701 A.2d 650 (1997) ("[a]n action for dissolution of a marriage 'obviously is a civil action' "), cert. denied, 523 U.S. 1136, 118 S. Ct. 1838, 140 L. Ed. 2d 1089 (1998); is governed by § 52-599. Subsection (a) of § 52-599 provides that "[a] cause

a brief as amicus curiae, in which it argued that, if the granting of a motion to open dissolves the divorce, thereby reinstating the parties' marriage, we should affirm the trial court's judgment because, otherwise, there would be serious consequences in cases in which a party subsequently has remarried. If granting the motion, however, would affect only the financial orders, the amicus argues, we should reverse the trial court's judgment.

or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person." Subsection (b) of § 52-599 specifies that "[a] civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. . . . If a party defendant dies, the plaintiff, within one year after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed." Subsection (c) of § 52-599, however, prohibits substitution in three limited circumstances: "The provisions of this section shall not apply: (1) To any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto, (2) to any civil action or proceeding whose prosecution or defense depends upon the continued existence of the persons who are plaintiffs or defendants, or (3) to any civil action upon a penal statute." General Statutes § 52-599 (c).

In interpreting § 52-599, we are guided by our well established legal principles regarding statutory construction: "Because the issue presents a question of statutory interpretation, our analysis is guided by General Statutes § 1-2z, the plain meaning rule. In seeking to determine the meaning of a statute, § 1-2z directs us first to consider the text of the statute itself and its relationship to the broader statutory scheme. 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. General Statutes § 1-2z. The test to deter-

mine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Dudley*, 332 Conn. 639, 645, 212 A.3d 1268 (2019).

The language of subsections (a) and (b) of § 52-599 is broad. Subsection (a) permits any "cause or right of action" to survive in the event of a party's death. Subsection (b) specifies the procedure for seeking substitution and explicitly allows substitution in any "civil action or proceeding . . . ." Under subsection (b), when a plaintiff seeks to substitute the executor of the estate for the deceased defendant, the plaintiff must file the motion in the court in which the action is pending within one year of receiving notice of the defendant's death. We infer from this language that, to permit substitution, there must be a pending action or proceeding. Because, at the time of the defendant's death, the plaintiff's motion to open was pending before the trial court, which already had granted the motion in part for discovery purposes, we have no trouble concluding that there was a pending action and that substitution was permissible under the unambiguous language of subsection (b). See *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 559–60, 133 A.3d 140 (2016) (civil action is pending when either action has been commenced, but there is no judgment, or judgment has been rendered, then opened); *Bank of Stamford* v. *Schlesinger*, 160 Conn. App. 32, 44 n.9, 125 A.3d 209 (2015) (same).

This is consistent with our prior cases interpreting § 52-599, in which this court has described subsection (a) as having a "broad sweep," limited only by the three narrow exceptions enumerated in subsection (c). *Commission on Human Rights & Opportunities* v. *Greenwich Catholic Elementary School System, Inc.*, 202 Conn. 609, 614, 522 A.2d 785 (1987). This broad applica-

tion of this provision reflects "the general policy favoring the continuation and timely resolution of actions on the merits whenever possible." *In re David B.*, supra, 167 Conn. App. 442. We have explained that the purpose of § 52-599 was to abrogate "[the common-law rule that] the death of a sole plaintiff or defendant abated an action . . . ." (Citation omitted; footnote omitted.) *Burton* v. *Browd*, 258 Conn. 566, 570–71, 783 A.2d 457 (2001); see also *In re David B.*, supra, 441 (rejecting common law's overtechnical formal requirements in favor of substitution and recognizing policy that "[t]he addition or substitution of parties to legal proceedings generally is favored in order to permit courts to make timely and complete determinations on behalf of parties with genuine interests in the outcome of controversies brought before them"). Thus, as long as all filing requirements are satisfied, permitting substitution is the rule, unless one of the three exceptions in subsection (c) applies.

The trial court in the present case determined that the first exception applied—that the plaintiff's motion to open was defeated or rendered useless by the defendant's death.[7] This exception focuses on whether a party's death affects the continuing vitality of the proceedings. See *Groton* v. *Commission on Human Rights & Opportunities*, 169 Conn. 89, 100–101, 362 A.2d 1359 (1975) (analyzing whether party's death affected con-

[7] The trial court did not address the other two exceptions in § 52-599 (c)—whether the motion to open depended on the continued existence of the defendant, or whether the motion to open involved a civil action on a penal statute. We determine that neither of these other exceptions applies in the present case. As to whether the motion to open depends on the defendant's continued existence, for the same reason that the first exception does not apply, this exception also does not apply—the defendant's estate can take the place of the defendant because granting the motion to open would not reinstate the parties' marriage but, rather, would affect only the financial orders of the dissolution judgment. As to the third exception, this case does not involve a civil action on a penal statute.

tinuing vitality of proceedings); id., 103–104 (*Cotter*, *J.*, concurring) (same). Under this exception, courts have looked to the remedy sought in determining the viability of the underlying action. For example, this court has permitted substitution in cases in which the death of the party had no effect on the continuing vitality of the proceeding because the estate could fill the shoes of the decedent, such as when the pending civil case sought monetary damages, which could be awarded to or against the estate just as damages could be awarded to or against the deceased party had the party survived. See *Commission on Human Rights & Opportunities* v. *Greenwich Catholic Elementary School System, Inc.*, supra, 202 Conn. 614 (recovery of monetary losses in connection with age discrimination claim would enhance value of decedent's estate); *Groton* v. *Commission on Human Rights & Opportunities*, supra, 103–104 (*Cotter*, *J.*, concurring); see also *Hillcroft Partners* v. *Commission on Human Rights & Opportunities*, 205 Conn. 324, 331, 533 A.2d 852 (1987) (§ 52-599 (b) is applicable when "executor has entered the administrative proceeding by filing an amended complaint seeking any remedy to which the deceased complainant may have been entitled" (emphasis omitted; internal quotation marks omitted)); *In re David B.*, supra, 167 Conn. App. 446 ("the applicability of § 52-599 [when a party seeks to substitute the estate of a deceased plaintiff] reasonably can be viewed as limited to those civil cases in which, despite a party's death, the continuation of the litigation arguably could benefit the decedent's estate, typically in some pecuniary manner"). In contrast, courts have prohibited substitution in cases in which the action sought specific relief that was unique to the parties, such as seeking an injunction for specific performance. See *Groton* v. *Commission on Human Rights & Opportunities*, supra, 100–101.

Whether this exception applies in the present case requires us to determine whether the plaintiff's motion

to open the dissolution judgment on the basis of fraud was defeated or rendered useless by the defendant's death. In so doing, we are guided by the following legal principles regarding motions to open judgments of dissolution. Although, under General Statutes § 52-212a,[8] generally, a motion to open must be filed within four months following the date on which judgment was rendered, a judgment in a civil action, including "[a] marital judgment based upon a stipulation may be opened if the stipulation, and thus the judgment, was obtained by fraud. . . . The power of the court to vacate a judgment for fraud is regarded as inherent and independent of statutory provisions authorizing the opening of judgments; hence judgments obtained by fraud may be attacked at any time." (Citation omitted; internal quotation marks omitted.) *Billington* v. *Billington*, 220 Conn. 212, 217–18, 595 A.2d 1377 (1991); see also *Reville* v. *Reville*, 312 Conn. 428, 441, 93 A.3d 1076 (2014) ("[a]n exception to the four month limitation applies, however, if a party can show, inter alia, that the judgment was obtained by fraud").

"There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there is a [reasonable probability] that the result of the new trial will be different." (Footnote omitted; internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 442. Additionally, "the granting of such relief must not unfairly jeopardize interests of reliance that have taken shape on the basis of the judgment."

[8] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ."

(Internal quotation marks omitted.) *Billington* v. *Billington*, supra, 220 Conn. 218 n.6.

This court has not expressly addressed the present issue—whether a motion to open a dissolution judgment on the basis of fraud abates after a party's death. The determination of this issue turns on the relief requested in the motion to open. Our trial courts have entertained motions to open dissolution judgments, which sought, on the basis of fraud, to set aside the dissolution of the marriage and, thereby, to reinstate the parties' marriage.[9] See *Bonilla* v. *Bonilla*, Superior Court, judicial district of Hartford, Docket No. FA-12-4063256-S (August 5, 2014) (60 Conn. L. Rptr. 778, 779–80) (court granted motion to open dissolution judgment, vacated dissolution judgment and financial orders and reinstated validity of original marriage, where plaintiff alleged that defendant had tricked her into defaulting in dissolution proceedings, then remarried her); *Levesque* v. *Levesque*, Docket No. FA-96-007L336, 1996 WL 521167, *1 (Conn. Super. September 3, 1996) (court granted motion to open dissolution judgment on ground that "[n]o harm would come to anyone if [the] judgment were vacated, and it would foster the preservation and stability of the family, which is the public policy of the [s]tate," where defendant had alleged that dissolution was mistake and both parties wanted to reconcile and continue marriage). In these cases, because granting the motion to

[9] We note that, although parties have filed motions to open dissolution judgments seeking reinstatement of the dissolved marriage, the granting of these motions "must not unfairly jeopardize interests of reliance that have taken shape on the basis of the judgment." (Internal quotation marks omitted.) *Billington* v. *Billington*, supra, 220 Conn. 218 n.6. Even if a stipulated judgment of dissolution were obtained by fraud and one of the parties would not have agreed to the dissolution of the marriage in the absence of the fraud, a court would have to consider whether reliance on the dissolution judgment, for example, the subsequent remarriage of the parties to different people, should prohibit the opening of the judgment and the reinstating of the dissolved marriage.

open would reinstate the marriage, a party's death while the motion was pending would have defeated and rendered useless the underlying civil proceeding, as the reinstated marriage would automatically be dissolved as of the date of the deceased party's death. See General Statutes § 46b-40.

Although a motion to open, if granted, may vacate the dissolution of the marriage and thereby reinstate the marriage, that does not mean that the granting of every motion to open necessarily vacates the dissolution of the marriage. Not every motion to open *seeks* to vacate the dissolution of the marriage. Rather, courts in this state consistently have granted motions to open dissolution judgments on the basis of fraud for the limited purpose of reconsidering the financial orders.[10] See, e.g., *Reinke* v. *Sing*, 186 Conn. App. 665, 667 n.1, 201 A.3d 404 (2018) (trial court granted motion to open dissolution judgment in accordance with parties' stipulation for limited purpose of permitting court to reconsider financial orders); see also *Lavy* v. *Lavy*, 190 Conn. App. 186, 192, 210 A.3d 98 (2019) (same); *Forgione* v. *Forgione*, 186 Conn. App. 525, 528, 200 A.3d 190 (2018) (same); cf. *Jenks* v. *Jenks*, 232 Conn. 750, 752, 657 A.2d 1107 (1995) ("trial court . . . granted the motion to open and set aside that part of the stipulated judgment that dealt with the disposition of the marital property").

When courts have granted motions to open dissolution judgments on the basis of fraud for the limited purpose of reconsidering the financial orders, courts have used the date of the original dissolution judgment as the valuation date for the marital property. We infer from this that courts in those cases have considered the orig-

[10] Additionally, dissolution judgments may be opened for other limited purposes, such as conducting discovery regarding a claim of fraud. See *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 270, 540 A.2d 713 (1988). Opening dissolution judgments for this limited purpose might never lead to the reinstatement of the underlying marriage.

inal judgment of dissolution to remain intact despite the granting of the motion to open to reconsider the financial orders. See *Lavy* v. *Lavy*, supra, 190 Conn. App. 204–205 (using value of marital property on date of dissolution to determine whether plaintiff was harmed by defendant's financial fraud despite opening dissolution judgment to reconsider financial award); see also *Reville* v. *Reville*, supra, 312 Conn. 433 (trial court used date of dissolution judgment as valuation date for marital property when reconsidering financial award); *Forgione* v. *Forgione*, supra, 186 Conn. App. 529 (same); *Taveres-Doram* v. *Doram*, Docket No. FA-04-4002471-S, 2007 WL 155155, *6 (Conn. Super. January 2, 2007) (court's opening of dissolution judgment for limited purpose of reconsidering financial award did not affect dissolution of marriage or custodial orders but determined new financial award based on value of marital assets as of date of dissolution decree); cf. *Weinstein* v. *Weinstein*, 275 Conn. 671, 708 n.28, 882 A.2d 53 (2005) ("[t]he result of this case [reversal of the denial of the motion to open the judgment of dissolution on the ground of fraud and remanding for further proceedings regarding assets] essentially is no different [from] any other reversal of judgment in a dissolution action requiring a new trial, affording the trial court enormous discretion, as to valuation and division of the marital assets and other attendant financial orders"). The granting of these motions to open for the limited purpose of reconsidering the financial orders did not reinstate the parties' marriages. Allowing parties to open dissolution judgments, when financial fraud has been alleged, for the limited purpose of reconsidering the financial orders without reinstating the parties' marriage, is both equitable and sound public policy. If the granting of a motion to open a judgment of dissolution on the basis of financial fraud, regardless of the relief requested, led to the reinstatement of the marriage, parties who have suffered from financial

fraud but have since remarried would be stuck between the proverbial rock and a hard place—they would have to choose between redress for the financial fraud and the validity of their subsequent marriage. See *Bonilla* v. *Bonilla*, supra, 60 Conn. L. Rptr. 779 (voiding subsequent remarriage of parties after granting motion to open dissolution judgment and reinstating dissolved marriage because, " '[i]f a marriage is contracted before the prior marriage of one of the parties is dissolved and while the spouse from that prior marriage is still living, the subsequent marriage is void' "); see also footnote 9 of this opinion. Additionally, if the parties have remarried, this result also would be inequitable and unfair to the spouse of either party, who had the reasonable expectation that the prior marriage had been dissolved.

Additionally, this is consistent with how we have valued marital property when a dissolution judgment has been reversed for reconsideration of the financial orders. In *Sunbury* v. *Sunbury*, 216 Conn. 673, 583 A.2d 636 (1990), this court was asked to determine how, on remand, to value marital assets after financial orders contained in a judgment of dissolution were set aside on appeal. Id., 674–75. Relying on General Statutes (Rev. to 1985) § 46b-81 (a)[11] and General Statutes § 46b-82,[12] we determined that property that is the subject of financial orders in dissolution proceedings ordinarily must be valued as of the date of dissolution: "In the absence of any exceptional intervening circumstances occurring in the meantime, [the] date of the granting of the divorce would be the proper time as of which to determine the value of the estate of the parties upon which to base

[11] General Statutes (Rev. to 1985) § 46b-81 (a) provides in relevant part: "At the time of entering a decree . . . dissolving a marriage . . . the superior court may assign to either the husband or wife all or any part of the estate of the other . . . ."

[12] General Statutes § 46b-82 (a) provides in relevant part: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other . . . ."

the division of property." (Internal quotation marks omitted.) Id., 676. Despite the financial orders contained within the dissolution judgment having been set aside, the dissolution judgment date remained intact and, thus, was the proper date by which to determine the value of the marital property. Id. Setting aside a limited portion of the dissolution judgment—the financial orders—did not open the entire judgment of dissolution or reinstate the parties' marriage. Although *Sunbury* did not involve a motion to open, it is instructive that, in granting the relief sought on appeal and setting aside the financial orders, we did not contemplate or order the reinstatement of the parties' marriage.

The Appellate Court, relying on *Sunbury*, came to a similar conclusion in *LaBorne* v. *LaBorne*, 189 Conn. App. 353, 207 A.3d 58 (2019), in which it held that, when a trial court grants a motion to open a dissolution judgment on the basis of fraud for the limited purpose of reconsidering the financial award, in reconsidering the financial award, "the appropriate date of valuation of the parties' marital assets, for purposes of the distribution of those assets, was the date of its original decree . . . ." (Internal quotation marks omitted.) Id., 362. The Appellate Court reasoned that, because marital property ordinarily must be valued as of the date of the dissolution judgment, the marital property had to be valued as of the date of the original decree, not as of the date that the financial orders were reconsidered. Id., 362–63. Implicit in this analysis and in the relief orders was a recognition that opening the dissolution judgment for the limited purpose of reconsidering the financial orders did not reinstate the parties' marriage.

Because granting a motion to open the judgment of dissolution for the limited purpose of reconsidering the financial orders does not reinstate the parties' marriage, a party's death would not necessarily defeat such a motion or render it useless. If the granting of the motion

served to reinstate the marriage, the party's death would defeat and render useless the motion, because, once granted, the reinstated marriage would automatically be dissolved as of the date of the deceased party's death; General Statutes § 46b-40; and, thus, the court could not then reconsider the financial award and redissolve the marriage.[13] Rather, despite the defendant's death in the present case, and in light of the relief sought, the motion to open could be granted for the limited purpose of reconsidering the financial orders, which would not affect the status of the marriage and therefore would not defeat or render useless the motion. Accordingly, this exception to substitution under § 52-599 (c) did not apply in the present case.

[13] In support of its conclusion that the plaintiff's motion to open in the present case was defeated and rendered useless by the defendant's death, the trial court relied on a series of Superior Court cases that held that, if a party dies during the pendency of a dissolution proceeding before judgment of dissolution has been rendered, the marriage is automatically dissolved under § 46b-40, and, thus, substitution of the deceased party is prohibited because the dissolution proceeding is defeated and rendered useless. See *Diana* v. *Diana*, Superior Court, judicial district of Tolland, Docket No. FA-99-69335 (September 14, 2001) (30 Conn. L. Rptr. 402, 403) ("[t]he death of a spouse automatically dissolves the marriage, and once the marriage is dissolved by the death of one of the parties, the purpose for continuing an action seeking to dissolve the marriage becomes meaningless"); *Dalton* v. *Dalton*, Superior Court, judicial district of Waterbury, Docket No. FA-95-126681 (March 7, 1997) (19 Conn. L. Rptr. 169, 169) ("the death of the plaintiff has ended the court's jurisdiction over the parties with regard to the [pending] divorce"); *Misheff* v. *Misheff*, Docket No. FA-94-0139817, 1995 WL 781428, *2 (Conn. Super. December 12, 1995) (" 'if an action for divorce is commenced, and one of the parties dies thereafter, but before the entry of a final decree, the action abates' ").

All of these cases, however, are distinguishable because they involved the death of a party prior to the rendering of a judgment of dissolution. In those cases, the party's death automatically dissolved the marriage under § 46b-40, and, thus, the action for dissolution abated because the trial court could not dissolve an already dissolved marriage. These cases would apply to the present case only if the granting of the motion to open reinstated the parties' marriage because, then, the defendant's death would automatically dissolve the reinstated marriage. These cases, however, do not shed any light on whether granting a motion to open a dissolution judgment in fact reinstates the marriage.

In the absence of the applicability of one of the three exceptions enumerated in § 52-599 (c), when a party seeks to open a dissolution judgment on the basis of fraud for the limited purpose of reconsidering the financial orders, we discern no reason to prohibit substitution of the executor or the administrator of the estate in the event of a party's death.[14] Not only, as explained, would granting the motion to open not affect the status of the parties' marriage, but, also, this is the kind of matter in which the executor or administrator of the estate can step into the role of the deceased party. As in other cases in which substitution has been permitted under § 52-599, the granting of the motion to open for this limited purpose and the resulting reconsideration of the financial orders would do no more than enhance or diminish the estate the same as it would have enhanced or diminished the deceased defendant's assets if he had lived. See *Commission on Human Rights & Opportunities* v. *Greenwich Catholic Elementary School System, Inc.*,

[14] The Appellate Court has reached a similar conclusion, albeit sub silentio. In *Berzins* v. *Berzins*, 122 Conn. App. 674, 998 A.2d 1265 (2010), rev'd, 306 Conn. 651, 51 A.3d 941 (2012), the defendant husband filed a motion to open the judgment of dissolution, which the trial court denied. Id., 676. The defendant husband appealed to the Appellate Court but died during the pendency of the appeal. Id. The Appellate Court stayed the appeal until there was compliance with § 52-599. Id., 676–77. The plaintiff wife subsequently filed a motion to substitute the administrator of the defendant's estate as the defendant, which the trial court granted. Id., 677. The administrator did not object to the motion to substitute. Id., 680.

As the proceedings progressed, the plaintiff wife filed, and the trial court granted, a motion for sanctions and attorney's fees against the administrator, who then appealed to the Appellate Court, arguing that the trial court lacked subject matter jurisdiction to sanction him on the ground that he had been improperly substituted as a defendant because the motion to open abated with the defendant husband's death. Id., 678, 680. The Appellate Court determined that the administrator was barred from raising this claim on the basis of the principles of collateral estoppel; id., 681; because the Appellate Court, in deciding the motion to substitute, already had "determined that the administrator was the proper party to be substituted in [the] action and that the [plaintiff wife's] action did not abate upon the death of [the defendant husband]. See General Statutes § 52-599." *Berzins* v. *Berzins*, supra, 122 Conn. App. 680.

supra, 202 Conn. 614 ("claim of the deceased complainant before the [Commission on Human Rights and Opportunities] for monetary losses resulting from the termination of her employment is not 'defeated or rendered useless' by her death, because a recovery upon such a claim would enhance the value of her estate"). Additionally, the executor or administrator of the estate would have access to the defendant's financial records and assets, which are the subject of the motion to open. See id. (deceased complainant's continued existence was not necessary to prosecution of claim because estate and defendant had access to prior testimony and other evidence).

Moreover, permitting a party to substitute the executor or administrator of the estate of the deceased party and to open a dissolution judgment for the limited purpose of reconsidering the financial orders when fraud has been alleged is consistent with the general principle that, "[i]n family matters, the court exercises its equitable powers." *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 271, 540 A.2d 713 (1988). "While an action for divorce or dissolution of marriage is a creature of statute, it is essentially equitable in its nature." *Pasquariello* v. *Pasquariello*, 168 Conn. 579, 584, 362 A.2d 835 (1975). The trial court has considerable discretion to balance equities in a dissolution proceeding. See *Sunbury* v. *Sunbury*, 210 Conn. 170, 174, 553 A.2d 612 (1989) (" 'The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute . . . .' "). "For that reason, equitable remedies are not bound by formula but are molded to the needs of justice." *Oneglia* v. *Oneglia*, supra, 272. "[I]n some situations, the principle of protection of the finality of judgments must give way to the

principle of fairness and equity." (Internal quotation marks omitted.) *Brody* v. *Brody*, 153 Conn. App. 625, 632, 103 A.3d 981 (quoting *Kim* v. *Magnotta*, 249 Conn. 94, 109, 733 A.2d 809 (1999)), cert. denied, 315 Conn. 910, 105 A.3d 901 (2014).

As a result, we must determine whether the plaintiff in the present case requested that the court open the dissolution judgment in its entirety or for the limited purpose of reconsidering the financial orders. The plaintiff's motion to open was labeled simply as "Motion to Open, Postjudgment." She requested that the trial court "open and set aside its September 8, 2011 judgment of dissolution of marriage, which incorporated a separation agreement entered into by the parties, and attendant financial orders." On the basis of the labeling of her motion, the plaintiff did not specifically request that the court open the dissolution judgment for the limited purpose of reconsidering the financial orders. Rather, the motion could fairly be read to seek to open the dissolution judgment in its entirety, affecting the status of her marriage (or rather, of her divorce).

Even when a motion to open does not expressly seek to have the court open the dissolution judgment only for the limited purpose of reconsidering the financial award, however, we have looked to the substance of the motion and the relief sought in determining the extent to which a party seeks the opening of the dissolution judgment. For example, in *Reville* v. *Reville*, supra, 312 Conn. 428, the plaintiff filed a motion to open and set aside the dissolution judgment on the ground of financial fraud four years after the judgment of dissolution, arguing that the court should reconsider the financial award because the defendant had failed to disclose certain marital property. Id., 432–33. Although the motion to open was broadly labeled, seeking to open and set aside the judgment of dissolution, on the basis of the allegations and the relief requested, the trial court and

this court treated the motion as a request to open the judgment for the limited purpose of reconsidering the financial award. See id. Similarly, in *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 130, 429 A.2d 837 (1980), despite labeling the motion as a motion to open the dissolution judgment, "the defendant expressed dissatisfaction only with that portion of the judgment which involved the disposition of the family residence," and, thus, the motion was granted only as to the financial orders, leaving the portion of the judgment dissolving the marriage intact. These cases are consistent with our judicial policy of construing pleadings broadly and realistically. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014) (pleadings should be construed "broadly and realistically, rather than narrowly and technically" (internal quotation marks omitted)); see also *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 554–55 (courts must look to substance of motion rather than to its form).

We now turn to the allegations in the plaintiff's motion to open and supporting memorandum of law, from which it is clear that the plaintiff sought to have the court open the judgment of dissolution for the limited purpose of reconsidering the financial orders, not for the purpose of reinstating the parties' marriage. In her motion to open, the plaintiff "assert[ed] that the dissolution judgment was secured by fraud . . . specifically, the defendant failed to disclose funds that he was holding in offshore bank accounts . . . ." As a result, the plaintiff requested that the trial court "hold a new trial as to all financial issues." Similarly, in her memorandum of law in support of her motion to open, the plaintiff argued that the fraud was premised on nondisclosure of certain offshore bank accounts and that, in light of this financial fraud, "[l]aw and equity require[d] that the stipulated dissolution judgment be opened and

vacated on such grounds, so that a fair division of the parties' assets may be had."

It is clear that the alleged fraud involved the defendant's assets alone. It is also clear that the plaintiff, in filing the motion to open, requested that the court reconsider the financial orders in response to this financial fraud. She did not request that the court open and set aside that portion of the dissolution judgment dissolving the marriage. She specified that she wanted a new trial as to the financial orders. She was not attempting to have the marriage reinstated. Rather, she was seeking "a fair division of the parties' assets." Although the plaintiff perhaps could have been more explicit by stating specifically that she was requesting that the judgment of dissolution be opened for the limited purpose of reconsidering the financial orders, under *Reville* and *Kenworthy*, construing her pleadings realistically, as we must, the substance of her motion and supporting memorandum of law dispels any confusion that she was requesting that the dissolution judgment be opened for the limited purpose of reconsidering the financial orders.

Because the plaintiff sought the opening of the dissolution judgment only for the limited purpose of reconsidering the financial orders, the granting of the motion would not have reinstated the parties' marriage, and the coexecutors of the defendant's estate could have been substituted as defendants and stepped into the deceased defendant's shoes. Thus, the defendant's death did not defeat and render useless the underlying civil proceeding. Therefore, the trial court improperly denied the plaintiff's motion to substitute the coexecutors of the defendant's estate in place of the defendant.

The judgment is reversed only as to the denial of the plaintiff's motion to substitute as defendants the coexecutors of the defendant's estate and the case is

remanded with direction to grant the motion and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

GERALYNN BOONE, EXECUTRIX (ESTATE OF MARY BOONE) *v.* BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., ET AL.
(SC 20200)

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

Syllabus

The plaintiff, the executrix of the estate of the decedent, M, sought to recover damages from the defendants, alleging that a certain brand-name anticoagulant medication they had designed, manufactured or sold wrongfully caused M's death. The defendants had received approval from the United States Food and Drug Administration to market the medication, and, for some time, M took the medication without significant side effects. Several years later, M suffered a gastrointestinal bleed and subsequently died. The plaintiff alleged that the defendants negligently failed to give adequate warnings, directions, and instructions to guard against the risk of bleeding caused by the medication and to investigate the benefits of establishing a therapeutic range for its administration. The plaintiff also alleged that the medication was defectively designed due to the absence of a reversal agent. The trial court granted the defendants' motion for summary judgment on the claim relating to the absence of a reversal agent, concluding, inter alia, that it was preempted by federal law. Thereafter, the plaintiff filed a request to charge, asking the court to instruct the jury that the defendants had improperly failed to maintain certain materials for the purpose of discovery, specifically, that they had lost or destroyed files of a former employee, L, while litigating prior federal actions relating to the medication, and that the jury could draw an adverse inference from the loss or destruction of such materials. At the conclusion of the trial, the court issued a spoliation instruction. The trial court also granted in part the defendants' motion in limine, seeking to exclude evidence, testimony, or argument regarding their failure to test reagrading a certain dose of the medication on the ground that a failure to test claim was preempted by federal law. The jury returned a verdict for the defendants, finding that, although the defendants negligently failed to give adequate warnings, directions, and

instructions to guard against the risk of bleeding caused by the medication, the plaintiff failed to prove that the defendants' conduct caused M's death. The trial court rendered judgment thereon for the defendants, from which the plaintiff appealed. *Held*:

1. The trial court did not abuse its discretion in excluding evidence and arguments relating to the issue of spoliation, as the doctrine of induced error precluded the plaintiff from making that claim: the plaintiff represented during argument on her request to charge regarding the defendants' failure to maintain L's files that the requested instruction would obviate the need to introduce evidence relating to spoliation and that the instruction itself, together with evidence introduced at trial relating to L's involvment in the development of the medication, would adequately provide the jury with the information it would need to draw an adverse inference against the defendants; accordingly, the plaintiff having had the opportunity to introduce evidence relating to L's involvement in developing the medication, having asked the court to give the requested spoliation instruction, and the court having done so in reliance on the plaintiff's representations, the plaintiff could not prevail on the ground that opening statements and evidence informing the jury about the defendants' loss or destruction of L's files was necessary to put the requested instruction in an appropriate context.
2. The trial court did not abuse its discretion in precluding the plaintiff from introducing, on rebuttal, an excerpt from the deposition of C, the defendants' senior vice president for clinical development; the court correctly concluded that the proffered excerpt was not proper rebuttal because C was not discussing a situation in which a person's gastrointestinal bleed had resolved prior to his or her death but, rather, was discussing only that a gastrointestinal bleed can indirectly lead to death, and such a broad statement did not contradict the more precise testimony of the defendants' experts that M's death was caused by other medical conditions rather than M's gastrointestinal bleed, which had resolved more than two weeks before M's death.
3. The trial court properly granted the defendants' motion for summary judgment on the plaintiff's claim relating to the defendants' failure to market a reversal agent for its medication, as the plaintiff's claim was preempted by federal law: five years after the medication was approved by the Food and Drug Administration, and after M's death, the defendants obtained approval to market a chemical reversal agent for the medication, and, in order to have cured the design defect alleged by the plaintiff, the defendants would have had to bring the reversal agent to market before M's gastrointestinal bleed, and, because there was no dispute that the reversal agent was not approved by the Food and Drug Administration until after the incident that gave rise to the plaintiff's design defect claim, the defendants could not have satisfied their alleged state law duty to M without marketing an unapproved drug in violation of federal law; moreover, the plaintiff's assertion that it was technologically

feasible to develop the reversal agent before M's death was insufficient to preclude preemption, as that fact was inapposite to the issue of whether marketing the reversal agent prior to M's gastrointestinal bleed would have required the Food and Drug Adminitration's special permission and assistance, and the possibility that that agency would have looked favorably on an earlier application for approval of the reversal agent did not alter the fact that, at the time of M's death, the defendants were precluded from marketing the reversal agent under federal law.

4. The trial court did not commit reversible error when it issued a curative instruction to the jury after closing arguments that it could not hold the defendants liable for failing to conduct tests regarding a particular dose of the medication that were described in a particular exhibit; contrary to the plaintiff's claim, the defendants did not open the door to the plaintiff's use of that exhibit during closing argument, the trial court's instruction merely precluded the jury from considering a single exhibit to support a particular claim that the court had determined was preempted by federal law, and the plaintiff was not unfairly prejudiced, as the trial court's curative instruction was brief, contained no explicit reprimand, and was conveyed to the jury with reasonably measured language.

Argued December 19, 2019—officially released May 4, 2020*

Procedural History

Action to recover damages for personal injuries sustained as a result of an allegedly defective product designed, manufactured or sold by the defendants, and for other relief, brought to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the court, *Moll, J.*, granted in part the defendants' motions for summary judgment and rendered judgment thereon; thereafter, the case was tried to the jury; verdict and judgment for the defendants, from which the plaintiff appealed. *Affirmed.*

Brenden P. Leydon, with whom were *Neal L. Moskow* and *Kelly A. Koehler*, pro hac vice, and, on the brief, *Richard I. Nemeroff*, pro hac vice, for the appellant (plaintiff).

* May 4, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Paul W. Schmidt, pro hac vice, with whom were *Patrick M. Fahey*, *Gregory Halperin* and *Michael X. Imbroscio*, pro hac vice, and, on the brief, *Phyllis A. Jones*, pro hac vice, for the appellees (defendants).

Opinion

KAHN, J. The plaintiff, Geralynn Boone, the executrix of the estate of Mary Boone (decedent), brought the present action against the defendants, Boehringer Ingelheim Pharmaceuticals, Inc., and Boehringer Ingelheim International, GmbH, alleging, inter alia, that an oral anticoagulant medication, Pradaxa, wrongfully caused the decedent's death. A jury returned a verdict in favor of the defendants, from which the plaintiff now appeals.[1] The plaintiff claims that the trial court improperly (1) precluded evidence and arguments related to spoliation, (2) prevented the plaintiff from using an excerpt from a particular deposition on rebuttal, (3) granted the defendants' motion for summary judgment on a design defect claim relating to the absence of a reversal agent, and (4) issued a curative instruction to the jury after closing arguments. We disagree with each of these claims and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the present appeal. After experiencing intermittent heart palpitations in 2003, the decedent was diagnosed with nonvalvular atrial fibrillation. That condition may cause the formation of blood clots and, as a result, substantially increased the decedent's risk of suffering an ischemic stroke. In order to reduce that risk, Jeffrey Fierstein, a cardiologist, prescribed an anticoagulant named warfarin to the decedent. The use of warfarin requires dietary restrictions, frequent blood

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c).

testing, and dose titration to keep the concentration of medication present in the bloodstream within an accepted therapeutic range. Like all anticoagulants, warfarin increases the risk of uncontrolled bleeding.[2]

In October, 2010, the defendants received approval from the United States Food and Drug Administration (FDA) to begin selling dabigatran etexilate, an anticoagulant marketed under the brand name Pradaxa. Unlike warfarin, Pradaxa requires no dietary restrictions and was approved for use without blood monitoring or dose titration. In November, 2010, Fierstein met with the decedent and recommended switching from warfarin to Pradaxa. Fierstein testified at trial that the decedent had been tolerating warfarin well and that he had recommended the switch "out of convenience." The decedent agreed and, for some time, took Pradaxa without any significant side effects.

On March 5, 2014, the decedent suffered a severe gastrointestinal bleed and was admitted to a hospital. The decedent underwent kidney dialysis to remove Pradaxa from her blood and was administered multiple blood transfusions. Although the bleeding stopped three days later, the decedent's kidneys began to fail. On March 25, 2014, the decedent died. The death certificate lists "[a]cute [k]idney [i]njury," "chronic kidney [d]isease," "[r]etroperitoneal [f]ibrosis," and "occult neoplasia" as causes of death.[3] The death certificate also lists "[d]abi-

[2] Stanley Schneller, a cardiologist, testified at trial that "below [the accepted therapeutic] range [patients] don't get any benefit, it's as if they're not taking the drug, and above that range [patients] get no further benefit in terms of stroke prevention." Thus, Schneller testified, the "targeted range is designed to give [patients] stroke protection without undue bleeding risk." Fierstein testified that the decedent was inside of the accepted therapeutic range "at least 75 percent of the time" she was taking warfarin.

[3] According to testimony offered at trial, retroperitoneal fibrosis is a medical condition that can cause kidney damage by obstructing the flow of urine. This condition was not related to the decedent's use of Pradaxa. The phrase "occult neoplasia" denoted an undiagnosed cancer.

gatran [i]nduced [c]oagulopathy" and "gastrointestinal bleed" as "significant" conditions contributing to the decedent's death. (Emphasis omitted.) No autopsy was performed.

The plaintiff subsequently commenced the present action, alleging, inter alia, that (1) the defendants negligently failed to give adequate warnings, directions, and instructions to guard against the risk of bleeding caused by Pradaxa, (2) the defendants negligently failed to test, study, and investigate the benefits of establishing a therapeutic range for Pradaxa, and (3) Pradaxa was defectively designed due to the absence of a reversal agent. On January 24, 2018, the trial court granted the defendants' motion for summary judgment on the claim relating to the absence of a reversal agent, concluding, among other things, that it was preempted by federal law.[4]

The plaintiff filed a pretrial motion asking the trial court to instruct the jury that the defendants had improperly failed to maintain certain relevant materials for the purpose of discovery. Specifically, the plaintiff claimed that the defendants had lost or destroyed files of one of its former employees, Dr. Thorsten Lehr, while litigating previous federal actions relating to Pradaxa. The trial court, applying the test set forth in *Beers* v. *Bayliner Marine Corp.*, 236 Conn. 769, 777–79, 675 A.2d 829 (1996), concluded that a spoliation instruction was warranted and, over the defendants' objection, provided such an instruction to the jury at the end of the trial. See footnote 6 of this opinion.

The jury returned a verdict, finding that, although the defendants had negligently failed to give adequate warnings, directions, and instructions to guard against

[4] The judgment file incorrectly notes that the defendants' various motions for summary judgment were denied in their entirety. This appears to have been a scrivener's error.

the risk of bleeding caused by Pradaxa, the plaintiff had failed to prove that the defendants' wrongful conduct caused the decedent's death. The trial court subsequently rendered judgment in favor of the defendants, from which the plaintiff appealed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly precluded certain evidence and arguments related to the issue of spoliation.[5] Specifically, the plaintiff posits that the absence of such information deprived the jury of the context necessary to decide whether to draw an adverse inference against the defendants, as permitted by the trial court's spoliation instruction. In response, the defendants argue that the trial court's limitations in this regard were proper.[6] For the reasons

[5] The plaintiff also makes the conclusory assertion that the trial court's rulings with respect to spoliation "would seem to violate basic notions of fundamental fairness, due process, and the right to counsel." The plaintiff's brief, however, contains no analysis applying those constitutional principles to the facts of the present case. As a result, we deem those claims, insofar as they were raised, to have been abandoned. *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008) ("We repeatedly have stated that [w]e 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." [Internal quotation marks omitted.]).

[6] The defendants argue that the trial court's decision to give a spoliation an instruction was, itself, improper. Because the defendants prevailed at trial, we decline to address that claim of error in the present appeal. See Practice Book § 61-1; see also *Seymour* v. *Seymour*, 262 Conn. 107, 110, 809 A.2d 1114 (2002) ("[o]rdinarily, a party that prevails in the trial court is not aggrieved"). We note, however, that other trial courts overseeing Pradaxa trials in this state have adopted divergent approaches to this issue. See *Bedsole* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-16-6070289-S (September 14, 2018) (68 Conn. L. Rptr. 206) (declining to provide adverse inference instruction); *Gallam* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-16-6067874-S (April 13, 2018) (following trial court's approach in present case, but also giving spoliation instruction during presentation of evidence); see also *In re Petition of*

that follow, we decline to conclude that the trial court abused its discretion by precluding evidence and arguments relating to the issue of spoliation in the present case.

The following additional facts and procedural history are relevant to our consideration of this claim. In 2012, certain federal litigation relating to Pradaxa was centralized in the Southern District of Illinois pursuant to 28 U.S.C. § 1407, and a federal district court judge, David R. Herndon, was appointed to preside. *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, 883 F. Supp. 2d 1355, 1355–56 (J.P.M.L. 2012). Various discovery disputes in that consolidated federal litigation led to motions seeking sanctions against the defendants. See *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, Docket No. 3:12-MD-02385 (DRH), 2013 WL 6486921, *1 (S.D. Ill. December 9, 2013).

As a result of those disputes, on September 18, 2013, Judge Herndon issued a mandatory injunction requiring the defendants to conduct "an immediate search for any yet undisclosed materials . . . ." (Internal quotation marks omitted.) Id., *3–5. During a subsequent deposition, the plaintiffs in that proceeding discovered that Lehr was a potentially relevant source of additional information and, as a result, requested production of his custodial file. Id., *9. Approximately one month after that deposition, the defendants informed Judge Herndon that Lehr had not been identified as a custodian and that, as a result, some of his documents and files had been destroyed. Id.

In reviewing a subsequent motion for sanctions, Judge Herndon found that Lehr "was a prominent scientist . . . that played a vital role in researching Pradaxa," that the defendants were familiar with his work,

Boehringer Ingelheim Pharmaceuticals, Inc., 745 F.3d 216, 220 (7th Cir. 2014) (noting wide range of sanctions available to district court).

and that the evidence on record in that case would "lead a reasonable person to infer a motive for the defendant[s] to abstain from placing a litigation hold on [Lehr's] materials . . . ." Id., *12. On the basis of these findings, the court concluded that the defendants had failed to maintain Lehr's files "in bad faith."[7] Id., *18. This conduct, together with certain other discovery violations, led Judge Herndon to impose immediate sanctions on the defendants, including a substantial monetary fine and an order compelling the attendance of various corporate employees at depositions in the United States. Id., *20. In a separate ruling, Judge Herndon also specifically put the defendants on notice that additional sanctions, including an adverse inference instruction, would be considered at the close of discovery and would "apply to any actions pending before [that] court at [that] time . . . ." *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, United States District Court, Docket No. 3:12-MD-02385 (DRH), MDL No. 2385, CMO 50-1 (S.D. Ill. December 18, 2013), available at https://www.ilsd.uscourts.gov/Documents/mdl2385/cmo50-1.pdf (last visited May 1, 2020). The defendants challenged Judge Herndon's order by filing a petition for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit. *In re Petition of Boehringer Ingelheim Pharmaceuticals, Inc.*, 745 F.3d 216–17 (7th Cir. 2014). In that proceeding, the Seventh Cir-

[7] Prior to 2015, there was a split in federal courts regarding the factual findings necessary to support an imposition of sanctions, such as an adverse inference instruction, for the spoliation of electronically stored information; some courts imposed sanctions on a finding a gross negligence, while others required intentional destruction. Compare *Residential Funding Corp.* v. *DeGeorge Financial Corp.*, 306 F.3d 99, 99–101 (2d Cir. 2002) (gross negligence standard), and *Bracey* v. *Grondin*, 712 F.3d 1012, 1020 (7th Cir. 2013) (bad faith standard). The Federal Rules of Civil Procedure were ultimately amended in 2015 to require a finding of bad faith. See Fed. R. Civ. P. 37 (e)(2) (permitting imposition of sanctions "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation").

cuit concluded that the order compelling the deposition of corporate employees in the United States was improper. Id., 219–20. In reaching this conclusion, the Seventh Circuit expressly declined to revisit the factual findings underlying the District Court's finding of bad faith and its imposition of other sanctions. Id., 218. Following Judge Herndon's decision, the consolidated federal litigation settled. See *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, United States District Court, Docket No. 3:12-MD-02385 (DRH) (S.D. Ill. May 1, 2015), available at https://www.ilsd.uscourts.gov/documents/mdl2385/MinuteOrder656.pdf (last visited May 1, 2020).

Notwithstanding the resolution of the consolidated federal litigation, several cases related to Pradaxa remained pending in this state. Those cases were placed onto a single, consolidated docket governed by a series of case management orders. See *In re Connecticut Pradaxa Litigation*, judicial district of Hartford, Complex Litigation Docket, Docket No. HHD-CV-13-5036974S. The trial court in the present case noted that, under one such order dated July 23, 2015, "all discovery propounded and completed in the [consolidated federal litigation was] deemed propounded and responded to for purposes of [Connecticut's consolidated Pradaxa litigation] docket . . . ." That order, which the parties agreed to be bound by, required the defendants to provide the plaintiff with all evidence produced during the course of the consolidated federal litigation, and provided that all discovery requests and responses in that proceeding "shall be deem[ed] served in this court for purposes of the parties' respective rights and obligations with regard thereto."

On January 5, 2018, the plaintiff filed a pretrial request to charge, requesting a spoliation charge relating to, among other things, the defendants' failure to maintain

Lehr's files.[8] Relying principally on Judge Herndon's finding of bad faith, the plaintiff requested an instruction indicating that the elements of spoliation had been met as a matter of law. The defendants objected, and the trial court heard oral argument on January 29, 2018. During oral argument, the plaintiff argued that the presentation of evidence relating to spoliation would be "time-consuming" and "extraordinarily difficult" to put in context.[9] The plaintiff indicated that such an endeavor would be an unnecessary "sideshow" that would waste both time and judicial resources. On several occasions, the plaintiff represented that she would not seek to introduce such evidence, if the court were to conclude, at the outset of the trial, that she was entitled to the requested instruction.[10]

The court then asked the plaintiff the following specific question: "[I]f the court granted the requested charge and you didn't put on any evidence of Judge Herndon's order, et cetera, how would the jury be equipped to determine whether to draw an adverse inference? As . . . you know, it's not mandatory." In response, the plaintiff stated that the instruction itself

[8] The plaintiff also requested instructions relating to the destruction of certain text messages and corporate e-mails. Those aspects of the plaintiff's request to charge are not at issue in the present appeal.

[9] The plaintiff noted, in particular, that such evidence would likely require calling one of the defendants' attorneys, Eric Hudson, as a witness.

[10] During oral argument, the plaintiff implied that the introduction of such evidence could be avoided at least three times. On one occasion, the plaintiff stated that, "if the court doesn't grant this motion, then [she] intend[s] to put on evidence that there was a prior proceeding in which [the defendants] were obligated to preserve this information and they failed to do so." On another occasion, the court asked the plaintiff the following question: "So your position is that if the court were to grant the request for a spoliation charge, you would not intend to put on any evidence of Judge Herndon's order?" The plaintiff responded by stating: "That's correct." Finally, the plaintiff concluded her argument on as follows: "We believe that the motion should be granted for the reasons we've articulated, but if the court denies it, we'd ask that it be denied with direction that we be permitted to put on the evidence as we've discussed here today."

would inform the jury of her claim that the defendants had "intentionally . . . or recklessly lost or destroyed" documents, including files from Lehr, that were relevant "to the issues of the benefits of assessing and adjusting Pradaxa dosing based on blood concentrations . . . ." The plaintiff asserted that, armed with such an instruction and testimony from various witnesses discussing Lehr, the jury "would be able to put [the spoliation issue] in context."[11]

On February 18, 2018, in a comprehensive, written decision,[12] the trial court granted the plaintiff's request for a spoliation charge, finding that, in light of the proceedings before Judge Herndon, the plaintiff had satisfied the elements of spoliation set forth in *Beers* as a matter of law and was entitled to a jury instruction to that effect.[13] In so doing, the court noted: "The parties agreed to be bound by, and not duplicate, the discovery process that had occurred in the [consolidated federal litigation]. It necessarily follows that an offending party who failed to identify a custodian of potentially relevant evidence and who failed to preserve such evidence in the underlying proceeding should also be bound by any judicial findings by the underlying court relating to such discovery failures. The contention that Judge Herndon's discovery related findings should be ignored altogether smacks of unfairness under the very unusual circumstances of the discovery process in [Connecticut's con-

[11] During a supplemental oral argument before the trial court, the plaintiff repeated her belief that the jury could be provided with an adequate context through evidence regarding Lehr's involvement in the research underlying Pradaxa and, specifically, the concept of a therapeutic range.

[12] The trial court's written decision summarized the proceedings related to spoliation sanctions before Judge Herndon, including the relevant factual findings and conclusions.

[13] As noted subsequently in this opinion, the ultimate question of whether to draw an adverse inference was reserved for the jury. See, e.g., *Paylan* v. *St. Mary's Hospital Corp.*, 118 Conn. App. 258, 264, 983 A.2d 56 (2009); see also Connecticut Civil Jury Instructions (2012) § 2.3-4, available at https://jud.ct.gov/JI/Civil/Civil.pdf (last visited May 1, 2020).

solidated Pradaxa litigation] docket." The court then concluded that the "relitigation of the spoliation issues relating to . . . Lehr . . . would . . . offend principles of judicial economy, would create a trial within a trial, would risk one or more trial counsel being called as witnesses, and would create possible, if not inevitable, confusion with the jury, who would be presented with testimony and other evidence (e.g., court orders, among other things) relating to the [consolidated federal litigation]." See footnote 6 of this opinion.

The following day, the trial court granted a motion in limine filed by the defendants seeking to exclude " 'evidence, testimony, or argument regarding alleged spoliation issues' " relating to Lehr.[14] The trial court based its decision on the plaintiff's previous representations that such issues would not need to be presented to the jury if the court granted, as it did, her request for a spoliation charge.

On February 23, 2018, the plaintiff filed a motion asking the court to issue the instruction on spoliation at the commencement of trial. In that motion, the plaintiff also sought permission to "inform the jury during opening, at trial, and during closing argument of [the defendants'] unlawful destruction of critically important evidence . . . ." On that same day, the defendants objected, and the trial court heard oral argument. The court ruled that references to spoliation during opening statements risked unfair prejudice to the defendants and, accordingly, exercised its discretion to proscribe

[14] The plaintiff's written objection to the defendant's motion in limine reiterated her position that she would seek to introduce evidence relating to spoliation only in the event the trial court declined to give the requested instruction. The plaintiff argued, specifically, that "in the event that the spoliation issues addressed by Judge Herndon's orders are to be relitigated in this case, then [the] plaintiff believes that the court should admit as full exhibits [the various court orders] reflecting Judge Herndon's identification of the discovery orders, [the] bad faith conduct in breaching same, and the consequences of that conduct."

such references. See Practice Book § 15-6. The trial court also made clear that, although the plaintiff was free to discuss Lehr's importance to the case generally, information relating to the "destruction" of documents could not be communicated to the jury during the evidentiary portion of the trial in the absence of a witness with personal knowledge of that event.[15] The trial court noted that the sanction the plaintiff had procured was powerful. The court was particularly concerned about the use by the plaintiff's counsel of the terms "sanction" or "bad faith" because, "although [it] found as a matter of law that Judge Herndon's findings satisfies *Beers*, he made findings that go beyond *Beers* and so he made a bad faith finding that is not necessary under *Beers*." (Internal quotation marks omitted.) Finally, the trial court expressly reserved decision on whether arguments relating to spoliation would be permitted in closing, noting that it had not yet determined whether it would give the adverse inference instruction when evidence relating to Lehr was admitted during trial, or after closing arguments.

Lehr's involvement in the development of Pradaxa featured prominently at trial. In his opening statement, the plaintiff's counsel told the jury that the defendants had an interest in suppressing scientific information showing a "therapeutic range" for Pradaxa because frequent blood testing would place that product at a competitive disadvantage. The plaintiff's counsel noted, in particular, that the defendants had pressured one of their own scientists, Paul Reilly, to remove such infor-

[15] Although conceding that the scheduled witnesses lacked such personal knowledge, the plaintiff did indicate to the trial court that a particular corporate e-mail had identified Lehr as the "father" of a manuscript relating to dabigatran etexilate exposure, and that expert witnesses who had reviewed the materials produced by the defendants could testify that they had been unable to locate any version of that manuscript authored by Lehr. As discussed subsequently in this opinion, testimony to this effect was, in fact, ultimately presented to the jury.

mation from a manuscript relating to dabigatran etexilate exposure. The plaintiff's counsel indicated that certain corporate documents had identified Lehr as the "father" of that same manuscript and that Reilly had simply continued Lehr's work.[16] The plaintiff's counsel then urged the jury to "pay close attention to the paper and how it developed."[17]

One of the plaintiff's expert witnesses, a pharmacologist named Laura Plunkett, opined during her testimony that blood monitoring should have been required for Pradaxa because, like warfarin, Pradaxa has a particular therapeutic range that balances the various risks posed by clots and bleeds. She based her opinion, in part, on information contained in Reilly's exposure response paper. Plunkett then testified that she had reviewed various communications about the exposure response paper and that, in her opinion, important scientific information demonstrating a specific therapeutic range had been suppressed by the defendants in order to avoid the need for blood monitoring.[18] Finally, Plunkett testified, over the defendants' objection, that she had

[16] The published version of that paper, which was admitted into evidence as a full exhibit, lists both Reilly and Lehr as authors, and indicates that both Reilly and Lehr "contributed equally."

[17] The plaintiff's opening statement was accompanied by various slides that were shown to the jury. One such slide read as follows: "We do not have the first version of the Pradaxa paper."

[18] In one e-mail, Reilly writes that, "I am aware that the conclusions that appear to emerge from this paper are not the ones currently wished for by marketing (that dose adjustment will optimize therapy) . . . ." In a separate string of e-mails discussing specific upper and lower blood concentration measurements, Reilly notes that he has "been facing heavy resistance internally on this paper about the concept of a therapeutic range, at least stating it outright." In certain other communications discussing the need for blood monitoring with Pradaxa in specific populations, Andreas Clemens, the head of the department of medical affairs for dabigatran etexilate, wrote as follows: "This needs [to be] a TelCon and we should NOT interact via e-mail on this." All of this correspondence was admitted into evidence and placed before the jury for consideration.

looked for the first draft of the exposure response paper and had been unable to find that document.[19]

Our review of the record indicates that, over the course of the nearly three weeks of trial that followed, there was only one particular instance in which the plaintiff proffered, and the trial court excluded, testimony directly relating to the destruction of Lehr's files. On that occasion, the plaintiff sought to introduce an excerpt from a deposition of Andreas Barner, the defendants' chairman of corporate management, relating generally to his awareness of the defendants' failure to preserve Lehr's computer. The plaintiff argued that this excerpt would provide "bread crumbs" to assist the jury in determining whether to draw an adverse inference against the defendants. The trial court, however, precluded admission of that excerpt, concluding that the information fell "squarely within" its previous rulings related to spoliation and the adverse inference instruction.

On the final day of the plaintiff's case-in-chief, the defendants filed a motion seeking reconsideration of the court's previous decision to charge the jury on the issue of spoliation. In that motion, the defendants argued, inter alia, that the plaintiff's factual basis for requesting a spoliation charge had been undercut at trial. See footnote 19 of this opinion. The plaintiff objected, arguing that the evidence presented to the jury did not undermine the requested charge. The plaintiff further claimed that, even if evidence of spoliation was lacking, precluding the charge on that ground would be improper in light of the fact that the trial court had

[19] The defendants sought to undercut this testimony on recross-examination by introducing a version of the exposure response paper that *Reilly* had characterized in an e-mail as the "first draft." Plunkett later testified that she had specifically attempted to locate an earlier version of that paper from *Lehr* in light of an e-mail that identified Lehr as the "father" of the manuscript.

excluded evidence of spoliation during trial. The plaintiff noted that the trial court's "carefully tailored spoliation charge is an appropriate sanction for [the defendants'] wrongful conduct." The trial court denied the defendants' motion.[20]

The defendants subsequently called Reilly as a witness during their case-in-chief. During that testimony, Reilly described the defendants' efforts to evaluate blood concentration data, stating that the exposure response paper had "gone through . . . multiple iterations" and that Lehr had "initiated . . . dose titration modeling to see whether . . . he could identify a target range of dabigatran and a target dose adjustment." Reilly testified that, despite their best efforts, the defendants had not been able to identify a particular therapeutic range for Pradaxa and, had such a range been established, it would have been communicated to physicians. Reilly then indicated that the FDA and the scientific community had reached the same consensus.

On cross-examination, the plaintiff's counsel questioned Reilly about a specific e-mail in which Andreas Clemens, the head of the department of medical affairs for dabigatran etexilate, referred to Lehr as the "father" of the exposure response paper. (Internal quotation marks omitted.) That correspondence, which was admitted into evidence as a full exhibit, indicates that Reilly "took [that paper] over and changed it significantly." In response, Reilly testified that he was personally unaware of any drafts of the exposure response paper prior to his own and that Clemens had been "sadly

[20] During oral argument on the defendants' motion for reconsideration, the plaintiff stated as follows: "[W]e wanted the record to be clear that [the] plaintiff has understood the court's instruction regarding the spoliation charge was that the plaintiff would not be offering evidence during the course of its case as to issues of spoliation or suppression of documents. . . . [T]o the extent that the court entertains the motion to [reconsider], we [do] not want to waive the right to put on such evidence by resting . . . ."

misinformed." See also footnotes 15 and 19 of this opinion.

Following the close of evidence, the plaintiff again requested permission to inform the jury during closing argument of the defendants' spoliation and the impact it had on the present case. Without such information, the plaintiff argued, the jury would lack the context necessary to draw the adverse inference invited by the court's instruction. The plaintiff, however, did not proffer the substance of the new or additional information relating to spoliation that she wanted to use in closing argument. Rather, she again referenced Lehr's general importance to the development of Pradaxa and his involvement with the exposure response paper. The trial court ruled that the issue of spoliation would not be "fodder for closing argument" but expressly noted that the parties were free to "mention what [had] already come into evidence . . . ."

The plaintiff's closing argument, in fact, discussed the evidence relating to Lehr at length. Specifically, the plaintiff's counsel repeated the argument that the defendants had sought to suppress information relating to a therapeutic range for Pradaxa because blood monitoring would put their product at a competitive disadvantage. The plaintiff's counsel emphasized that the authors of the exposure response paper had explored the concept of blood monitoring, that Clemens' e-mail implied the existence of an early draft manuscript authored by Lehr, and that such a manuscript had never been discovered.[21] Finally, the plaintiff's counsel asked the jury to pay "close attention" to the trial court's instructions relating to Lehr and to "be the judge" of whether such facts were important.

[21] In response, the defendants posited during their closing argument that Reilly's testimony, together with various documents and correspondence, had disproved the existence of such a draft.

The trial court ultimately issued the following instruction to the jury relating to spoliation: "The plaintiff claims that certain evidence was not available to her because [the defendants] destroyed or failed to preserve it, at a time when it had a legal duty to preserve it. Specifically, [the defendants] destroyed or failed to preserve the desktop computer, laptop computer, Blackberry phone, and paper files of . . . Lehr, about whom there was some evidence during the trial, who was a scientist and employee of [the defendants and] who did research concerning Pradaxa until he left the company in September, 2012. The plaintiff contends such evidence is relevant to her claim concerning the benefits of assessing blood plasma concentrations. I instruct you that . . . Lehr's desktop computer, laptop computer, Blackberry phone, and paper files were not preserved at a time when [the defendants were] on notice of a legal duty to preserve them and that the failure to retain such files was intentional, in the sense that it was not inadvertent. Our law allows you to draw an adverse inference that the destroyed evidence would have been unfavorable to [the defendants]. You may therefore draw an inference that the evidence that was destroyed or not preserved would be unfavorable to [the defendants], but you are not required to do so. Understand that this is not a claim for which you would award damages; rather, it permits an adverse inference to be drawn as you consider all the evidence relating to the plaintiff's claims. If you choose to draw such an inference, you may not use the inference to supply the place of evidence of material facts or to shift the burden of proof from the plaintiff to [the defendants] on the plaintiff's claims, but it may turn the scale when the evidence is closely balanced. By giving you this instruction, the court does not mean to place emphasis on this issue versus any other aspect of the evidence that you may consider, and the court takes no view as to whether

such an inference should be drawn, as that decision is for you, the jury, to decide."[22]

Following the jury's verdict in favor of the defendants, the plaintiff filed a motion to set aside the verdict, claiming, among other things, that the trial court had "improperly prevented [her] from informing the jury of [the defendants'] acts of spoliation and the court's sanction regarding the same." The plaintiff argued that the issue of spoliation was itself relevant and probative to the defendants' reckless disregard for consumer safety. She renewed her claim that the trial court's restrictions on opening statements, the admission of evidence, and closing arguments prevented her from providing the jury with the context necessary to decide whether to draw an adverse inference against the defendants. The trial court found this claim to be "wholly without merit" because the plaintiff, in seeking an instruction, expressly represented that evidence relating to spoliation would not need to be presented at trial. Relying in part on the induced error doctrine, the trial court denied the motion, concluding that the plaintiff had found "purported error in the very approach for which she successfully advocated."

We begin by noting the standard of review and the general principles of law applicable to the plaintiff's claim. "The trial court possesses inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Internal quotation marks omitted.) *Downs* v. *Trias*, 306 Conn. 81, 102, 49 A.3d 180 (2012). We review the relevant rulings of the trial court in the present case for an abuse of that discretion. See, e.g., *McBurney* v. *Paquin*, 302 Conn.

[22] The plaintiff does not claim in the present appeal that the content of the trial court's ultimate instruction deviated in any material respect from her request.

359, 378, 28 A.3d 272 (2011) ("[t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion" (internal quotation marks omitted)); *Naughton* v. *Hager*, 29 Conn. App. 181, 188, 614 A.2d 852, ("[t]he trial court is vested with broad discretion over the latitude of the statements of counsel during argument"), cert. denied, 224 Conn. 920, 618 A.2d 527 (1992).[23] In applying that standard, "[w]e [must] make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 119, 124 A.3d 501 (2015).

We agree with the trial court's assessment that the present case implicates the doctrine of induced error. "[T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [allegedly] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional error and induced

[23] The plaintiff argues that, in light of the trial court's decision to instruct the jury on spoliation, its decision to "preclude counsel from commenting [on that issue] in any manner" should be reviewed de novo. We disagree for two reasons. First, as set forth previously in this opinion, the plaintiff was permitted to introduce evidence regarding Lehr's research and his involvement with the exposure response paper. Second, to the extent that the plaintiff assails the scope of the remedy ultimately fashioned, we note that the imposition of sanctions for discovery misconduct is also vested in the sound discretion of the trial court. See, e.g., *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 70, 176 A.3d 1167 (2018); *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 28, 60 A.3d 222 (2013).

constitutional error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party. . . . [W]hether we call it induced error, encouraged error, waiver, or abandonment, the result—that the . . . claim is unreviewable—is the same." (Internal quotation marks omitted.) *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 724, 200 A.3d 1118 (2019); see also *State* v. *Fay*, 326 Conn. 742, 765 n.22, 167 A.3d 897 (2017) ("a finding of induced error is supportable when a party's claim on appeal will result in an inappropriate ambush of the trial court"). With these standards in mind, we turn to the trial court's rulings in the present case.

Our review of the record leads us to conclude that the doctrine of induced error precludes the plaintiff from claiming that the trial court improperly excluded opening statements and evidence relating to spoliation. In response to the plaintiff's pretrial request for an adverse inference instruction, the court specifically asked the plaintiff how the jury would be able to decide whether to draw such an inference without any evidence relating to the underlying conduct. The plaintiff not only represented to the trial court that the requested instruction would obviate the need for such evidence; see footnote 10 of this opinion; but also indicated that the instruction itself, together with evidence generally relating to Lehr's involvement in the development of Pradaxa, would adequately equip the jury with the information it would need to draw an adverse inference against the defendants.

The trial court afforded the plaintiff broad latitude to introduce evidence and testimony describing the nature of Lehr's work, his research regarding the possible existence of a therapeutic range, and the scope of his involvement in the exposure response paper. The plaintiff used the testimony proffered by Plunkett and Reilly, in particular, to develop a detailed theory that

Lehr had authored an early version of the exposure response paper that the defendants had never produced. The trial court's instruction clearly stated that the defendants had failed to preserve Lehr's files despite having a legal duty to do so, and that the jury could choose to infer that the information in those files would have been adverse to the defendants. Having encouraged the trial court to structure the proceeding in this precise manner, the plaintiff cannot now prevail on the ground that opening statements and evidence informing the jury about the defendants' destruction of Lehr's files was, in fact, *necessary* to put the requested instruction in an appropriate context. Cf. *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 236–37, 116 A.3d 297 (2015) ("Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Internal quotation marks omitted.)).

Reaching the opposite conclusion would substantially undercut the grounds on which the trial court concluded that the plaintiff's requested instruction was appropriate in the first instance, including improving judicial economy, avoiding a trial within a trial, and preventing confusion of the jurors. The trial court's decision to exclude the deposition testimony relating to Barner's knowledge regarding the destruction of Lehr's computer demonstrates this point. If the plaintiff had been permitted to lay a trail of "bread crumbs" for the jury using that testimony, the defendants would have been entitled to marshal any admissible evidence showing that this same trail should not be followed. Presenting such a dispute to the jury would necessitate the very "sideshow" that the plaintiff had purposefully forgone in requesting a spoliation instruction before the outset of trial.[24]

[24] The trial court's exclusion of Barner's deposition testimony, like its pretrial ruling on the defendants' motion in limine, placed the plaintiff on

Our conclusion that the trial court did not abuse its discretion by declining to admit evidence that could have initially been presented at a sanctions hearing also resolves, in large measure, the plaintiff's claims relating to the restrictions that the court imposed on closing arguments. As this court has previously noted, a trial court acts well within its broad discretion when it restricts the scope of an argument "to prevent comment on facts that are not properly in evidence . . . ." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 713, 900 A.2d 498 (2006); cf. *State* v. *Weatherspoon*, 332 Conn. 531, 551, 212 A.3d 208 (2019) ("[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence" (internal quotation marks omitted)); *State* v. *Lopez*, 280 Conn. 779, 803, 911 A.2d 1099 (2007) ("Counsel may comment [on] facts properly in evidence and [on] reasonable inferences to be drawn from them. . . . Counsel may not, however, comment on or suggest an inference from facts not in evidence." (Internal quotation marks omitted.)).[25] Because the trial court ruled at the outset that evidence relating to the conduct underlying Judge Herndon's finding of bad faith would not be admitted or presented to the jury, we agree with the trial court's assessment that such evidence was not proper "fodder" for arguments by counsel.

notice that the trial court intended to hold her to the representations she had made in requesting an adverse inference instruction. If the plaintiff believed that the instruction she had requested could not properly be considered in the absence of Barner's testimony, she could have withdrawn her request for the charge and sought to introduce evidence to prove the elements of spoliation under *Beers*. The plaintiff did not do so. See also footnote 26 of this opinion.

[25] We note that this well established legal principle also undercuts the plaintiff's claim that the trial court's restriction on closing arguments was unforeseeable.

We note that the plaintiff was not compelled to seek the benefit of the findings made by Judge Herndon, or to request an adverse inference instruction as a matter of law. The plaintiff could have, for example, asked the trial court to independently review the evidence relating to the destruction of Lehr's files and, as is typically the case, argued that any evidence ultimately admitted at trial supported a corresponding instruction.[26] See *Paylan* v. *St. Mary's Hospital Corp.*, 118 Conn. App. 258, 264, 983 A.2d 56 (2009) (discussing whether plaintiff adduced sufficient evidence at trial to warrant spoliation instruction under *Beers*). The plaintiff could have also chosen to pursue still other sanctions available for discovery misconduct under our rules of practice. See Practice Book § 13-14. The plaintiff, as a matter of strategy, chose a different path.[27] Accordingly, we decline to conclude that the trial court abused its discretion by precluding evidence and arguments relating to spoliation in the present case.[28]

[26] The plaintiff also did not seek to revert to such a procedure after the trial court granted the defendants' motion in limine and denied her motion for permission to "inform" the jury of the issues relating to spoliation. Both of those rulings, which were issued before the commencement of trial, clearly indicated that the court intended to severely restrict, if not entirely preclude, evidence and arguments relating to the defendants' destruction of Lehr's files.

[27] The plaintiff raises two ancillary arguments warranting brief attention. First, the plaintiff argues that the trial court's decision to instruct the jury that an adverse inference was permissible as a matter of law merely relieved her of the burden of proving spoliation. That ruling, the plaintiff argues, should have done nothing to prevent her from informing the jury of the defendants' unlawful destruction of evidence. This argument ignores the fact that presenting such evidence to the jury would necessitate the very same "trial within a trial" that the court's decision to give an adverse inference instruction was, itself, expressly designed to avoid. Second, the plaintiff argues that the restrictions imposed by the trial court run contrary to a "strong public policy . . . of seeking to deter spoliation by product liability defendants." We find this argument unpersuasive because the trial court, in fact, granted the plaintiff's requested form of relief for spoliation in the present case.

[28] This conclusion is a relatively narrow one. This case does not require this court to determine whether a spoliation instruction was required, or

II

The plaintiff next claims that the trial court improperly excluded certain portions of a video recorded deposition of Christopher Corsico, the defendants' senior vice president for clinical development, from her case on rebuttal. The defendants respond by arguing, inter alia, that the trial court's ruling was correct because the proffered testimony did not contradict testimony presented by their expert witnesses. We agree with the defendants.

The following additional facts are relevant to our discussion of this claim. During their case-in-chief, the defendants called two expert witnesses, Stanley Schneller, a cardiologist, and Michelle Anderson, a gastroenterologist, to testify on the issue of causation. Schneller testified that the decedent's gastrointestinal bleed had resolved three days after she arrived at the hospital and that a "multiplicity of other coexisting medical problem[s]" had caused her death. Specifically, Schneller testified that "acute kidney injury, chronic kidney disease, retroperitoneal fibrosis, and occult neoplasia" directly caused the decedent's death, and that those conditions were unrelated to her use of Pradaxa or her gastrointestinal bleed. See footnote 3 of this opinion. Anderson's testimony supported the same conclusion.

After the defendants rested, the plaintiff sought to introduce, as rebuttal, a brief segment from Corsico's February, 2014 video recorded deposition. During that deposition, Corsico was asked: "[D]o you understand that there can be a series or a cascade of events that

whether the instruction ultimately provided to the jury was proper. See footnote 6 of this opinion. Simply put, we only conclude that, in light of the representations made to the trial court in seeking an instruction in the present case, the plaintiff cannot prevail on her claim that the trial court improperly precluded evidence and arguments related to spoliation.

can ultimately lead to one's demise that may be precipitated by a gastrointestinal bleed?" Corsico answered in the affirmative. The defendants' counsel objected, arguing that the admission of that testimony as rebuttal would be improper because it did not conflict with testimony from either Schneller or Anderson. In response, the plaintiff's counsel argued that Corsico's testimony undercut Schneller and Anderson's conclusion that, because the decedent's gastrointestinal bleed had stopped, it did not cause her death.

The trial court ultimately sustained the defendants' counsel's objection, aptly noting: "I just don't see how . . . Corsico's testimony . . . rebuts testimony by either . . . Schneller or . . . Anderson because . . . Corsico, in this [question and answer], was not specifically asked about a [gastrointestinal] bleed that had ended; nor were [either] Schneller [or] Anderson asked [whether it is] possible that a [gastrointestinal] bleed can lead to a cascade of events that ultimately led to one's death."

"It is well settled that the admission of rebuttal evidence lies within the sound discretion of the trial court." *Gomeau* v. *Gomeau*, 242 Conn. 202, 208, 698 A.2d 818 (1997); see also Practice Book § 15-5 (3). "The issue on appeal is not whether any one of us, sitting as the trial court, would have permitted the disputed testimony to be introduced. The question is rather whether the trial court . . . abused its discretion in not allowing the rebuttal testimony . . . ." (Internal quotation marks omitted.) Id., 209. "[R]ebuttal evidence is that which refutes the evidence [already] presented . . . rather than that which merely bolsters one's case." (Internal quotation marks omitted.) *State* v. *Wood*, 208 Conn. 125, 139, 545 A.2d 1026, cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988). "There is no requirement that a rebuttal witness must respond to every alternate theory offered by the defendant . . . a gen-

eral contradiction of the testimony given by the defendant is considered permissible rebuttal testimony."[29] *State* v. *Gray*, 221 Conn. 713, 728, 607 A.2d 391, cert. denied, 506 U.S. 872, 113 S. Ct. 207, 121 L. Ed. 2d 148 (1992); see also 1 K. Broun, McCormick on Evidence (7th Ed. 2013) § 4, p. 16 ("the plaintiff . . . is confined to testimony refuting the defense evidence, unless the trial judge in her discretion permits him to depart from the regular scope of rebuttal").

We agree with the trial court's conclusion that the proffered question and answer from Corsico's deposition was not proper rebuttal because Corsico was not discussing a situation in which a person's gastrointestinal bleed had resolved prior to his or her death. The isolated colloquy from Corsico's deposition establishes only a single, generic proposition: that a gastrointestinal bleed can lead indirectly to death. Such a broad statement does not generally contradict Schneller's and Anderson's more precise testimony that, in this particular case, the decedent's death was caused by other medical conditions and not the gastrointestinal bleed, which had resolved more than two weeks before her death.[30] In essence, the experts were asked different hypothetical questions, the answers to which were not necessarily contradictory.[31] As a result, we conclude

[29] The plaintiff argues that the trial court's ruling was based on the erroneous legal conclusion that rebuttal evidence must *directly* contradict testimony presented by the defendants. Our independent review of the record has, however, located no support for the contention that such a standard was applied in the present case.

[30] The plaintiff does not argue that she was prohibited from calling additional expert witnesses to rebut the testimony from Schneller and Anderson on either the decedent's unrelated medical conditions or the results of the decedent's gastrointestinal bleed.

[31] The plaintiff asserts that Corsico's recognition that a gastrointestinal bleed can lead to a fatal cascade was relevant and, indeed, crucial to proving her case. Specifically, the plaintiff argues that such testimony (1) would have helped to bolster her own evidence on causation, (2) would have precluded the defendants from making certain arguments in closing, and (3) was clearly important in light of the jury's ultimate verdict. None of these arguments, however, relate to whether the trial court erred by declining

that the trial court did not abuse its discretion by excluding Corsico's testimony from the plaintiff's case on rebuttal.

III

The plaintiff's third claim is that the trial court improperly granted the defendants' motion for summary judgment on a design defect claim related to the defendants' failure to develop and market a reversal agent for Pradaxa, pursuant to the impossibility preemption doctrine. In response, the defendants assert that the trial court's preemption analysis was correct because marketing a reversal agent would have required independent approval by the FDA. We agree with the defendants.

The following additional facts and procedural history are relevant to our consideration of this claim. The FDA approved Pradaxa in 2010. Five years later, after the decedent's death, the defendants obtained approval from the FDA to sell idarucizumab, a chemical reversal agent for Pradaxa marketed under the brand name Praxbind. Because Praxbind was not available at the time of the decedent's gastrointestinal bleed, kidney dialysis was required to remove dabigatran etexilate, the active ingredient in Pradaxa, from her bloodstream. As a result, the decedent's gastrointestinal bleed took three days to stop.

to admit Corsico's testimony *as rebuttal*. See, e.g., *DiMaio* v. *Panico*, 115 Conn. 295, 298, 161 A. 238 (1932) ("The rule upon this subject is a familiar one. When, by the pleadings, the burden of proving any matter in issue is thrown upon the plaintiff, he must, in the first instance, introduce all the evidence upon which he relies to establish his claim. He cannot, as said by Lord Ellenborough, go into half his case, and reserve the remainder." (Internal quotation marks omitted.)). Finally, the plaintiff argues that the trial court should have admitted Corsico's testimony because presentation of that evidence would not have taken much time. Although the trial court may well have been entitled to weigh that fact in reaching its decision; see *Gomeau* v. *Gomeau*, supra, 242 Conn. 211; we decline to find an abuse of discretion on that basis alone.

In the present case, the plaintiff sought to advance a claim that the defendants could have brought Praxbind to market earlier and that, because they did not do so, the decedent's gastrointestinal bleed was prolonged. The plaintiff claimed, in particular, that the defendants had defectively designed Pradaxa by failing to seek concurrent approval for a reversal agent. The defendants subsequently filed a motion for summary judgment, arguing that, because the FDA had not approved Praxbind before the decedent's death, the plaintiff was foreclosed from pursuing a design defect claim predicated on its absence. Specifically, the defendants argued that the reasoning set forth in *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U.S. 472, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013), and *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011), clearly established that such claims are preempted by federal law. The trial court reached the same conclusion and, accordingly, granted the defendants' motion for summary judgment on that claim.[32]

"The standard of review on summary judgment is well established. Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal

[32] The trial court also concluded that the defendants were also entitled to summary judgment on this claim because Praxbind was a "different product as a matter of law and not a design element of Pradaxa." Because we conclude that the trial court properly granted the defendants' motion for summary judgment on federal preemption grounds, we need not consider this aspect of the trial court's ruling.

quotation marks omitted.) *NetScout Systems, Inc.* v. *Gartner, Inc.*, 334 Conn. 396, 408, 223 A.3d 37 (2020); see also *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 447, 102 A.3d 32 (2014) ("[w]hether state causes of action are preempted by federal statutes and regulations is a question of law over which our review is plenary").

The supremacy clause of the United States constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. The dictates of that provision require state law to yield to the extent that it conflicts with federal law. See, e.g., *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). Such a conflict is implicit where, for example, it is "impossible for a private party to comply with both state and federal requirements . . . ." (Internal quotation marks omitted.) Id. There is, however, "a strong presumption against federal preemption of state and local legislation." (Internal quotation marks omitted.) *Murphy* v. *Darien*, 332 Conn. 244, 249, 210 A.3d 56 (2019), cert. denied sub nom. *Metro North Commuter Railroad Co.* v. *Murphy*, U.S. , 140 S. Ct. 847, 205 L. Ed. 3d 468 (2020).

We begin our analysis of whether such a conflict exists in the present case with a brief review of three decisions from the United States Supreme Court examining the question of impossibility preemption in the pharmaceutical context. The plaintiff in *Wyeth* v. *Levine*, 555 U.S. 555, 558, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), brought an action in a state court alleging, among other things, that she would have benefited from certain additional warnings in the label for a particular brand-name drug. After extensively reviewing federal law relating to drug labeling, the United States Supreme

Court concluded that the plaintiff's state law claim was not preempted because a particular federal regulation, in fact, would have permitted the defendant to unilaterally add such additional warnings to the drug's label, while remaining in compliance with federal law. Id., 568–72, citing 21 C.F.R. § 314.70 (c) (6) (iii) (2008).[33]

The plaintiffs in *PLIVA, Inc.* v. *Mensing*, supra, 564 U.S. 608–609, also alleged the absence of adequate warning labels. The defendants in that action argued on appeal that, as manufacturers of generic drugs, they could not make unilateral changes to the labels of generic drugs. Id., 610. The United States Supreme Court agreed, concluding that the plaintiffs' claim was preempted because FDA regulations required manufacturers of generic drugs to simply mirror the labeling of their brand-name counterparts.[34] Id., 614, 624. In reach-

[33] The court noted that the FDA retained authority to retrospectively reject such unilateral changes to the warnings but declined to find impossibility preemption on that ground in the absence of "clear evidence" that the FDA would have done so. *Wyeth* v. *Levine*, supra, 555 U.S. 571. The plaintiff in the present case asserts that a recent United States Supreme Court case explaining that particular standard, *Merck Sharp & Dohme Corp.* v. *Albrecht*, U.S. , 139 S. Ct. 1668, 203 L. Ed. 2d 822 (2019), stands for the broad proposition that impossibility preemption "only applies when a defendant can affirmatively show that it attempted to get the FDA to allow the safer alternative proposed by the plaintiff and the FDA affirmatively and officially rejected it." (Footnote omitted.) We disagree. The clear evidence standard in *Wyeth* applies only when a defendant seeks to prove that compliance with a state law obligation remains impossible *notwithstanding its ability to act unilaterally under federal law*. See *Gibbons* v. *Bristol-Myers Squibb Co.*, 919 F.3d 699, 708 (2d Cir. 2019) (describing "clear evidence" standard). The brand-name drug manufacturers in *Albrecht* and *Wyeth*, for example, could have satisfied their state law obligation to provide a label with an adequate warning by unilaterally making label amendments. See 21 C.F.R. § 314.70 (c) (6) (iii). No similar federal law would have permitted the defendants in the present case to market Praxbind unilaterally and, as a result, *Albrecht* is inapposite.

[34] The court reasoned as follows: "To be sure, whether a private party can act sufficiently independently under federal law to do what state law requires may sometimes be difficult to determine. But this is not such a case. Before the [defendants] could satisfy state law, the FDA—a federal agency—had to undertake special effort permitting them to do so. To decide

ing that conclusion, the court specifically rejected the plaintiffs' argument that proving impossibility would require the defendants to affirmatively demonstrate that the FDA would have rejected stronger warnings if they had been proposed. Id., 620. The relevant inquiry, the court held, was whether the defendants "could *independently* do under federal law what state law requires . . . ." (Emphasis added.) Id.[35]

The United States Supreme Court extended this reasoning to a state design defect claim two years later in *Mutual Pharmaceutical Co.* v. *Bartlett*, supra, 570 U.S. 472. The plaintiff in that case took a generic drug, sulindac, and suffered a severe adverse reaction that was not mentioned in the drug's warning label. Id., 477–78.[36] The plaintiff subsequently brought an action, alleging that sulindac was " 'unreasonably dangerous' " under state law and obtained a verdict in her favor. Id., 479, 486. On appeal, the United States Supreme Court noted that, to satisfy the obligation imposed by state tort law, the defendant would have had to either (1) alter sulin-

these cases, it is enough to hold that when a party cannot satisfy its state duties without the Federal Government's *special permission and assistance*, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes." (Emphasis added.) *PLIVA, Inc.* v. *Mensing*, supra, 564 U.S. 623–24.

[35] Accepting the plaintiffs' argument, the court concluded, "would render conflict pre-emption largely meaningless because it would make most conflicts between state and federal law illusory. We can often imagine that a third party or the Federal Government *might* do something that makes it lawful for a private party to accomplish under federal law what state law requires of it. . . . If these conjectures suffice to prevent federal and state law from conflicting for Supremacy Clause purposes, it is unclear when, outside of express pre-emption, the Supremacy Clause would have any force." (Emphasis in original.) *PLIVA, Inc.* v. *Mensing*, supra, 564 U.S. 620; cf. footnote 33 of this opinion.

[36] As a result of a comprehensive review commenced in 2005, the year after the plaintiff in *Bartlett* was prescribed sulindac, the FDA recommended the inclusion of such a warning in sulindac's label. See *Mutual Pharmaceutical Co.* v. *Bartlett*, supra, 570 U.S. 478–79.

dac's composition or (2) strengthen the warning label. Id., 483–84. The court found that the defendant was legally foreclosed from redesigning sulindac as a generic manufacturer and that, in any event, such alterations were physically impossible in light of sulindac's simplistic composition. Id. The court, citing its decision in *Mensing*, also concluded that the defendant, as a generic manufacturer, was prohibited by federal law from strengthening the warnings in sulindac's label. Id., 486. As a result, the court concluded that the plaintiff's state tort claim was preempted. Id., 486–87.

Our review of these decisions compels us to conclude in the present case that the trial court properly granted the defendants' motion for summary judgment as to the plaintiff's design defect claim. In order to cure the design defect alleged by the plaintiff, the defendants would have had to bring Praxbind to market before the decedent's gastrointestinal bleed in 2014. Because there is no dispute that Praxbind was not approved by the FDA until 2015, the defendants could not have satisfied their alleged state law duty to the decedent without marketing an unapproved drug in violation of federal law. In light of that conflict, the trial court correctly concluded that the plaintiff's design defect claim based on the absence of a reversal agent for Pradaxa was preempted. See *PLIVA, Inc.* v. *Mensing*, supra, 564 U.S. 623–24 ("when a party cannot satisfy its state duties without the [f]ederal [g]overnment's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for [preemption] purposes").

The plaintiff claims that the test for preemption set forth in *Mensing* and *Bartlett* is inapplicable to present case because those cases do not involve brand-name drugs. We disagree. Although the different levels of control afforded to brand-name and generic manufac-

turers by federal labeling regulations informed the court's *analysis* in those cases, the nature of the underlying test remained consistent: whether the defendant "could *independently* do under federal law what state law requires . . . ." (Emphasis added.) Id., 620. Because the claim relating to the development and marketing of Praxbind in the present case does not relate to labeling, the plaintiff's attempt to rely on the distinctions between generic and brand-name manufacturers discussed in *Mensing* and *Bartlett* is unavailing. See *Yates* v. *Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 808 F.3d 281, 296–97 (6th Cir. 2015) ("contrary to [the plaintiff's] contention that the impossibility preemption in *Mensing* and *Bartlett* is limited to generic drugs, we view *Levine*, *Mensing*, and *Bartlett* as together stating the same test for impossibility preemption").

The plaintiff's remaining arguments against preemption do not warrant a different result. First, the plaintiff's assertion that it was *technologically* feasible to develop Praxbind before the decedent's death is insufficient to preclude preemption. Although such practical considerations may sometimes *limit* the options available to a manufacturer; see *Mutual Pharmaceutical Co.* v. *Bartlett*, supra, 570 U.S. 484; that fact is inapposite to the question of whether marketing Praxbind in 2014 would have required the FDA's "special permission and assistance . . . ."[37] *PLIVA, Inc.* v. *Mensing*, supra, 564 U.S. 623–64. For similar reasons, we are also unpersuaded that the FDA's subsequent approval of Praxbind in 2015 is dispositive. The possibility that the FDA would have looked favorably on an earlier application does nothing to alter the fact that, at the time of the decedent's death, the defendants were prevented from unilaterally marketing Praxbind under federal law. See footnote 35 of this opinion. Indeed, the United States

[37] We likewise reject the plaintiff's arguments relating to evidentiary admissibility and general foreseeability because they do not inform this analysis.

Supreme Court found that the plaintiff's failure to warn claim in *Bartlett* was preempted notwithstanding the fact that, shortly after her injuries, the FDA agreed with her assessment that sulindac's label should include a stronger warning. See footnote 36 of this opinion.

For the foregoing reasons, we agree with the trial court's assessment that the plaintiff's design defect claim relating to Praxbind was preempted by federal law.[38] As a result, we conclude that trial court properly granted the defendants' motion for summary judgment on that claim.

IV

The plaintiff's final claim is that the trial court committed reversible error by issuing a curative instruction to the jury after closing arguments. Specifically, the plaintiff claims that the trial court abused its discretion by instructing the jury that it could not hold the defendants liable for failing to conduct tests described in a particular exhibit. In response, the defendants contend that the trial court's instruction was merited because

[38] We note that courts in other jurisdictions considering related cases have reached the same conclusion. See *Ridings* v. *Maurice*, Docket No. 15-00020-CV-W (JTM), 2019 WL 4888910, *6 (W. D. Mo. August 12, 2019) (holding that plaintiffs' design defect claims were preempted "insofar as they are premised on the failure of Boehringer to develop, seek and obtain approval for and/or market a reversal agent for Pradaxa sooner that it did" and noting that issue of feasibility was "immaterial"); *Chambers* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, Docket No. 4:15-CV-00068 (CDL), 2018 WL 849081, *13 (M. D. Ga. January 2, 2018) ("Regardless of when Boehringer started the process, Praxbind approval still required the FDA's 'special permission and assistance.' Boehringer could not unilaterally offer Praxbind to physicians. Therefore, initiating the process that *may* have led to Praxbind's approval does not enable Boehringer to comply with both federal and state law. Further, Boehringer was not required to cease production of Pradaxa until Praxbind was approved to comply with federal and state law. . . . Therefore, [the] [p]laintiff's design defect claim is also preempted. [Citation omitted; emphasis in original.]); but see *In re Xarelto (Rivaroxaban) Products Liability Litigation*, Docket No. 2592 (EEF), 2017 WL 1395312, *3 (E.D. La. April 13, 2017).

the plaintiff improperly used that exhibit to advance a preempted failure to test claim in closing argument. We review this claim for an abuse of discretion. See, e.g., *State* v. *Northrop*, 213 Conn. 405, 422 n.13, 568 A.2d 439 (1990). Applying that standard to the arguments and record before us, we find no reversible error.

The following additional facts and procedural history are relevant to our analysis of this claim. Before the commencement of trial, the court granted in part a motion in limine filed by the defendants seeking to "exclude evidence, testimony, or argument regarding [a] 110 [milligram] dose" of Pradaxa. In that ruling, the trial court acknowledged that such evidence might be relevant to the plaintiff's claim that the defendants had failed to adequately warn physicians about the risk of bleeding associated with the 150 milligram dose prescribed to the decedent and, accordingly, deferred ruling on the admissibility of the evidence for that purpose until trial. The court also concluded, however, that such evidence could not be used to prove that the defendants negligently failed "to test, study, investigate, or pursue the various action items identified by the FDA in order to secure approval of the 110 [milligram] dose in the United States" because such a failure to test claim would be preempted by federal law.[39] During trial, the court consistently applied this dichotomy when ruling

[39] The plaintiff contends, in a conclusory fashion, that the trial court's legal conclusion on preemption was incorrect and that, as a result, the trial court improperly excluded evidence regarding certain correspondence between the defendants and the FDA discussing a 110 milligram dose of Pradaxa. Specifically, the plaintiff argues that, because the information contained within those documents shows that the defendants could have continued to pursue FDA approval of that lower dose, the trial court incorrectly concluded that the plaintiff's related, failure to test claim was preempted. For the reasons discussed previously in this opinion, this argument lacks merit. See footnote 35 of this opinion. To the extent that the plaintiff's brief implies evidentiary error on different grounds, we find those claims to have been inadequately briefed. See, e.g., *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008).

on objections relating to evidence discussing a 110 milligram dose.

The defendants' counsel gave the following closing argument on the plaintiff's failure to test claim:[40] "The failure to test, you've literally not been given the nature of a test that should be done. Instead what you've been told is we did do a lot of study of this issue, we went as far we could, we went further than others did, and we came to the view that we couldn't go farther, a view that the FDA echoed. A failure to test, no." Notwithstanding the trial court's previous ruling, the plaintiff's counsel responded by drawing the jury's attention to a document, admitted into evidence as exhibit 23, discussing in particular detail a "potential path forward" for the 110 milligram dose previously proposed by the FDA. The trial court concluded that the plaintiff's counsel's argument had improperly suggested to the jury that the defendants could be held liable for failing to pursue a 110 milligram dose and, as a result, gave the following curative instruction: "[M]embers of the jury, sometimes in closing arguments things are said by one or more lawyers that needs correction by the court. It's not uncommon for that to happen. . . . [I]t was suggested that you look at exhibit 23 during your deliberations. I am instructing you that you may not hold [the defendants] liable for a failure to conduct the testing outlined in exhibit 23."

The plaintiff's principal argument is that her use of exhibit 23 was proper because the defendants had

[40] The trial court aptly summarized the failure to test claims ultimately presented to the jury in its instructions as follows: "The plaintiff claims that [the defendants] failed to adequately test, study, and investigate Pradaxa's safety issues, specifically, that [the defendants]: (1) failed to study, test, and investigate plasma concentrations so as to maximize stroke prevention and minimize risk of bleeding relating to Pradaxa and, (2) failed to study, test, and investigate Pradaxa's relationship to gastrointestinal issues and gastrointestinal bleeding."

"opened the door" to it during their own closing argument. We disagree. This defendants' closing argument only broadly discussed the plaintiff's failure to test claim. See footnote 40 of this opinion. The "potential path forward" described in exhibit 23, by contrast, discusses the prospect of FDA approval for a 110 milligram dose. As a result, the defendants did not open the door to the plaintiff's use of that exhibit in closing.

The plaintiff also argues that the trial court instructed the jury to "disregard" a full exhibit and that doing so infringed on her right to use that evidence in support of her claims. The trial court's instruction, however, only precluded the jury from considering a single exhibit to support a particular claim that it had determined was preempted under federal law. Such a restriction was not improper. Finally, the plaintiff claims that she was unfairly prejudiced because the trial court had singled out her argument before the jury as doing "something wrong . . . ." Again, we disagree. The trial court's instruction was brief, contained no explicit reprimand, and was conveyed using reasonably measured language. In fact, the court described such instructions as "not uncommon . . . ." Under these circumstances, we decline to conclude that the trial court abused its discretion by issuing the challenged curative instruction to the jury.

The judgment is affirmed.

In this opinion the other justices concurred.

ORDERS

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WACHOVIA MORTGAGE, FSB *v.* PAWEL TOCZEK ET AL.

The defendant Aleksandra Toczek's petition for certification to appeal from the Appellate Court, 196 Conn. App. 1 (AC 41851), is denied.

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

Aleksandra Toczek, self-represented, in support of the petition.

J. Patrick Kennedy and *David M. Bizar*, in opposition.

Decided October 27, 2020

ROBERT W. LEMANSKI *v.* COMMISSIONER OF MOTOR VEHICLES

The plaintiff's petition for certification to appeal from the Appellate Court, 196 Conn. App. 901 (AC 41871), is denied.

Robert W. Lemanski, self-represented, in support of the petition.

Robert L. Marconi, assistant attorney general, in opposition.

Decided October 27, 2020

STATE OF CONNECTICUT *v.* ROBERT H.

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 276 (AC 36742/AC 37544), is denied.

Naomi T. Fetterman, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided October 27, 2020

PACK 2000, INC. *v.* EUGENE C. CUSHMAN

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 428 (AC 41350/AC 41351), is denied.

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

Ralph J. Monaco and *Thomas J. Londregan*, in support of the petition.

Eric W. Callahan, in opposition.

Decided October 27, 2020

SARAH A. MOYHER *v.* PAUL J. MOYHER III

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 334 (AC 41795), is denied.

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

James Nealon, in support of the petition.

Matthew G. Berger, in opposition.

Decided October 27, 2020

PIOTR BUDZISZEWSKI *v.* CONNECTICUT JUDICIAL BRANCH, COURT SUPPORT SERVICES DIVISION, ADULT PROBATION SERVICES

The petitioner Piotr Budziszewski's petition for certification to appeal from the Appellate Court, 199 Conn. App. 518 (AC 41867), is denied.

Vishal K. Garg, in support of the petition.

Ronald G. Weller, senior assistant state's attorney, in opposition.

Decided October 27, 2020

JOSEPHINE TOWERS, L.P., ET AL. *v.*
DIANA KELLY

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 829 (AC 41920), is denied.

Sally R. Zanger, in support of the petition.

Lee N. Johnson, in opposition.

Decided October 27, 2020

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25 GRANT STREET, LLC *v.* CITY
OF BRIDGEPORT ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 199 Conn. App. 600 (AC 42155), is denied.

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

Devin W. Janosov, in support of the petition.

James J. Healy and *Bruce L. Levin*, in opposition.

Decided October 27, 2020

STATE OF CONNECTICUT *v.* DHATI COLEMAN

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 172 (AC 42157), is denied.

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

Tamar R. Birckhead, assigned counsel, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided October 27, 2020

WILLIAM MALDONADO ET AL. *v.* KELLY C. FLANNERY ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 200 Conn. App. 1 (AC 43154), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court had abused its discretion in ordering additurs in favor of both of the plaintiffs?"

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

Philip F. von Kuhn, in support of the petition.

Jack G. Steigelfest, in opposition.

Decided October 27, 2020

IN RE ELIZABETH W. ET AL.

The petition by the respondent father for certification to appeal from the Appellate Court, 200 Conn. App. 901 (AC 43905), is denied.

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

Benjamin M. Wattenmaker, in support of the petition.

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

Decided October 27, 2020

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. *v.* ETHAN BOOK, JR., ET AL.

The named defendant's petition for certification to appeal from the Appellate Court's decisions on the defendant's motions (AC 193971 and AC 202071) is denied.

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

Ethan Book, Jr., self-represented, in support of the petition.

David F. Borrino, in opposition.

Decided October 27, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 201

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ELANA GERSHON *v.* RONALD BACK
(AC 42778)

Lavine, Bright and Beach, Js.*

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved pursuant to a foreign judgment of dissolution, appealed to this court from the judgment of the trial court dismissing her motion to open the judgment for lack of subject matter jurisdiction. Prior to their marriage in New York, the parties entered into a prenuptial agreement, which the New York dissolution court determined was valid. During the dissolution proceedings, the parties entered into a stipulation that provided, inter alia, that it superseded the prenuptial agreement, that it was incorporated but not merged into the dissolution judgment and that it was to be governed by New York law. Following the dissolution of their marriage, the parties both moved to Connecticut, and the plaintiff registered the New York dissolution judgment in Connecticut pursuant to statute (§ 46b-71). In her motion to open, the plaintiff sought to have the trial court open the dissolution judgment, vacate the stipulation and order

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

a new trial, claiming that the judgment was obtained through the defendant's fraudulent conduct in that he made material misrepresentations and failed to disclose certain assets in his sworn financial statement at the time the stipulation was negotiated. Following a hearing, the trial court, applying New York law, dismissed the plaintiff's motion to open, concluding that to challenge the validity of the stipulation, which was incorporated but not merged into the dissolution judgment, the plaintiff was required to bring a plenary action. *Held* that, although the trial court improperly dismissed the plaintiff's motion to open the dissolution judgment for lack of subject matter jurisdiction because that court had jurisdiction to consider the motion pursuant to the applicable statutes (§§ 46b-1 and 46b-71 (b)), this court concluded that, contrary to the plaintiff's contention, the trial court properly determined that the plaintiff was required to bring a plenary action to vacate the stipulation, as the New York rule requiring a party to challenge a separation agreement that is not merged into the dissolution judgment through a plenary action is substantive and, as such, § 46b-71 and the stipulation required the trial court to apply that rule to the motion to open; accordingly, the trial court should have denied the motion to open rather than dismissed it, and the case was remanded with direction to render judgment denying the plaintiff's motion to open.

Argued May 20—officially released November 10, 2020

Procedural History

Motion by the plaintiff to open a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Michael E. Shay*, judge trial referee, dismissed the plaintiff's motion, and the plaintiff appealed to this court. *Improper form of judgment; judgment directed.*

Alexander J. Cuda, for the appellant (plaintiff).

Joseph T. O'Connor, for the appellee (defendant).

Opinion

LAVINE, J. The present appeal concerns the judgment rendered by the trial court when it dismissed the motion to open the 2011 New York judgment of marital dissolution (motion to open) filed by the plaintiff, Elana Gershon, some years after she registered the judgment in

Connecticut. The plaintiff claims on appeal that the trial court improperly dismissed her motion to open for lack of subject matter jurisdiction by applying New York procedural rules, rather than Connecticut procedural rules, when it dismissed the motion.[1] We conclude that the court properly determined that New York law governed the plaintiff's rights with respect to the parties' stipulation, but we agree with the plaintiff that the court improperly dismissed the motion to open for lack of subject matter jurisdiction. The form of the judgment is improper. We, therefore, reverse the judgment of dismissal and remand the case with direction to render judgment denying the motion to open.

The record discloses the following contentious and protracted litigation history between the plaintiff and her former husband, the defendant, Ronald Back.[2] In

[1] In addition, the plaintiff claims that the court (1) improperly addressed the merits of the motion to open after determining that it lacked subject matter jurisdiction, (2) abused its discretion by failing to grant her motion for a continuance after her counsel disclosed that she intended to withdraw her appearance, and (3) erred in finding that the plaintiff had failed to demonstrate probable cause for postjudgment discovery under *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 540 A.2d 713 (1988), or comparable New York law. We need not address these claims as we conclude that, pursuant to New York law, the trial court properly determined that the plaintiff was required to raise her claims with respect to the parties' stipulation by means of a plenary action.

The plaintiff's additional claims are subsumed within her principal claim that the court improperly dismissed her motion to open. As we explain in the body of this opinion, the court properly determined that all matters regarding the stipulation are governed by New York law and that the plaintiff was required to bring a plenary action to challenge her rights under the stipulation. Although the trial court held a hearing to determine whether the plaintiff had more than a mere suspicion of fraud to permit postjudgment discovery and made certain factual findings in that regard, it later determined that it improperly had entertained the motion to open because the plaintiff had not commenced a plenary action to vacate the stipulation.

[2] Since 2014, when the plaintiff registered the New York dissolution judgment in Connecticut, more than 280 entries have been made on the trial court docket.

August, 1997,[3] prior to their marriage, the parties entered into a prenuptial agreement.[4] The plaintiff was

[3] The trial court found that the prenuptial agreement is undated. The defendant signed it on August 14, 1997, and the plaintiff, then known as Elana Horowitz, signed it on August 12, 1997.

[4] We set forth portions of the parties' prenuptial agreement to provide context for the issues in the present appeal. The trial court found that § 10, "PAYMENT UPON OPERATIVE EVENT," is the provision germane to the plaintiff's motion to open.

"WHEREAS, a marriage is about to be solemnized between the parties . . . [and] the parties desire to fix . . . certain of their respective rights . . . that shall or may accrue to each of them in certain real and personal property; and

". . . both parties acknowledge that they understand their respective rights . . . as provided for in [New York] Domestic Relations Law [§] 236-B and that they make this Agreement with the understanding that they are hereby settling the prospective terms . . . of the marriage relationship with respect to matters of property rights, and they further understand that this Agreement is in lieu of their prospective rights to litigate such matters before a court of competent jurisdiction; and

". . . both parties have discussed the terms . . . implications and monetary considerations involved between themselves, [and] they desire to set forth their agreement in writing, without any duress . . . and they do fully and voluntarily enter into this Agreement. . . .

"1. FINANCIAL DISCLOSURE

"[Each of] the parties . . . has furnished the other with a copy of [his or her] 1996 Federal Income Tax Return . . . and . . . they have each had the opportunity to review same.

"[The defendant] has . . . filed . . . Corporate and Partnership Tax Returns for those items of separate property . . . which are deemed to be confidential due to the interest of . . . parties not in privity [with this] Agreement. Although [the plaintiff has requested them, she] has not been furnished with copies of such documents, and is executing this Agreement despite her lack of access to [them].

"In lieu of providing copies of such Corporate and Partnership Tax Returns, [the defendant] has [represented to the plaintiff] . . . the value of the businesses as set forth in Schedule 'A.' Similarly, [the plaintiff has represented to the defendant] the value of assets listed on Schedule 'B.' Both parties acknowledge that they are relying upon such representations . . . regarding the financial . . . circumstances of the other party, in executing this Agreement. . . .

"5. OWNERSHIP AND DIVISION OF PROPERTY

"In the event of a . . . judicial dissolution of the marriage, each party shall retain his or her separate property to his or her exclusive ownership and use. . . .

"7. INTENTION OF AGREEMENT

"This Agreement is solely intended to make provision for the ownership, division and distribution of marital and separate property. . . .

"10. PAYMENT UPON OPERATIVE EVENT

"If an operative event . . . occurs . . . [the defendant] shall pay to [the plaintiff] . . . in full . . . settlement of . . . all claims . . . that [the

a school psychologist, and the defendant was a businessman with a substantial interest in a family business. The parties married on August 16, 1997, resided in New York state, and had two children together. As the dissolution judgment, reciting the parties' stipulation, states: "[c]ertain unhappy and irreconcilable differences [arose] between the parties, as a result of which they . . . separated and have been living apart from each other since in or about February 6, 2009 . . . ." On or about the date of separation, the plaintiff, then known as Elana Back, commenced an action for divorce in the New York Supreme Court, county of Westchester (New York court). During the course of the divorce proceedings, the parties engaged in extensive litigation, discovery, and negotiations regarding the prenuptial agreement, which the plaintiff sought to invalidate. The New York

plaintiff] may have against [the defendant] for a distributive award for any contribution . . . of whatever kind . . . to the appreciation of separate property, including but not limited to: Essential Oils, Inc.; Flavormatic, Inc.; or R & R Realty or any subsidiary or derivative endeavor. . . .

"C. If an operative event first occurs after . . . the seventh anniversary . . . but not later than the twelfth anniversary . . . of the marriage, then as a property settlement [the defendant] shall pay [the plaintiff a] sum equal to twenty . . . percent of [his] adjusted gross income . . . .

" '[A]djusted gross income' shall be . . . the average of [the defendant's] adjusted gross annual income . . . for the five . . . years immediately preceding . . . the operative event, including the year of the operative event. . . .

"11. OPERATIVE EVENT, DEFINED

"[A]n operative event . . . shall mean . . . [c]ommencement of an action . . . by either party seeking a . . . dissolution of the marriage . . . .

"15. SUBSEQUENT PROCEEDINGS

"The parties agree that all . . . provisions of the Agreement shall be binding upon them upon the date of [their] marriage . . . [and] shall . . . be binding upon [them] and shall become a part of any subsequent agreement entered into between [them] . . . . The provisions of this Agreement shall . . . be *incorporated but not merged* in any judgment . . . of divorce . . . obtained by either party . . . [and] shall . . . survive the same . . . .

"19. SITUS

"*This Agreement shall be construed . . . in accordance with the laws of the State of New York.* . . .

"21. LEGAL REPRESENTATION

"The parties represent . . . that [they have been represented by counsel of their respective choice] . . . ." (Emphasis added.)

court determined that the prenuptial agreement was valid.[5] On April 11, 2011, the parties settled, for the time being, their dispute over the division of marital property. The parties signed a stipulation that provided in part that it superseded "the [p]renuptial [a]greement, [which] shall be of no further force or effect upon the effective date of this [stipulation]." The stipulation further provided, among other things, that it was to be incorporated by reference, *but not merged*, in the judgment of dissolution and that it "may be enforced independently of such decree or judgment [of dissolution]."[6]

[5] The New York court upheld the validity of the prenuptial agreement, stating in its May 4, 2010 decision: "The plaintiff has failed to establish that the represented value of the Flavormatic Companies was false at the time it was made; that the defendant knew the values to be false; and that the alleged misrepresentation of the value of the companies was made for the purpose of inducing the plaintiff to enter into the prenuptial agreement. Moreover, there is no showing that the plaintiff relied on the alleged misrepresentation or that she was injured as a result of the alleged misrepresentation. On the contrary, the plaintiff concedes that she knowingly waived any and all rights to the Flavormatic Companies. She testified unequivocally that she knew the defendant intended to keep these companies as separate property regardless of their values."

[6] Other pertinent provisions of the stipulation that underscore its contractual nature follow.

"ARTICLE XVI

"WAIVER OF EQUITABLE DISTRIBUTION

"1. The parties intend this Agreement to constitute an Agreement pursuant to [New York Domestic Relations Law] § 236 (B) (3). They intend this Agreement and its provisions to be in lieu of each of their respective rights pursuant to all aspects of [New York Domestic Relations Law] § 235 (B). Accordingly, except to the extent provided in this Agreement, the parties *mutually waive their rights and release each other from any claims for* maintenance, distribution of marital property, distributive awards, special relief or claims regarding *separate property or increase in the value thereof*. . . .

"ARTICLE XVII

"FULL DISCLOSURE

"Each party has had the opportunity to make independent inquiry into the complete financial circumstances of the other and is fully informed of the income, assets, property and financial prospects of the other. Each has had a full opportunity and has consulted at length with his or her attorney regarding all of the circumstances hereof, and acknowledges that this *Agreement has not been the result of any fraud*, duress or undue influence exercised by either party upon the other or any other person or persons upon the other. Both parties acknowledge that this Agreement has been achieved after competent legal representation and honest negotiations. . . .

The stipulation also provided that "[a]ll matters affecting the execution, interpretation, performance and enforcement of this [a]greement and *the rights of the parties hereto shall be governed by the laws of the* [*s*]*tate of New York.*"[7] (Emphasis added.) Thereafter,

"ARTICLE XXIII

"RECONCILIATION AND MATRIMONIAL DECREES

"1. This Agreement shall not be invalidated or otherwise affected by a reconciliation . . . and this Agreement shall not be invalidated or otherwise affected by any decree or judgment of separation or divorce made by any court in any action which may presently exists or may hereafter be instituted by either party against the other for a separation or divorce, and the *obligations and covenants of this Agreement shall survive any decree or judgment of separation or divorce and shall not merge therein, and this Agreement may be enforced independently of such decree or judgment.* . . .

"ARTICLE XXIV

"LEGAL INTERPRETATION

"All matters affecting the execution, interpretation, performance and enforcement of this Agreement and the rights of the parties hereto shall be governed by the laws of the State of New York. . . . Any actions or claims involving this Agreement . . . shall be governed by the Laws of the State of New York and the Supreme Court of the State of New York, Westchester County will retain jurisdiction . . . of all such issues, provided at least one party resides in Westchester County New York. . . . If both parties reside outside of New York State, any actions or claims involving this Agreement . . . *shall be brought in a court of competent jurisdiction, and with respect to any choice of laws, the Laws of the State of New York shall be applied and govern in all respects.*" (Emphasis added.)

[7] "The general rule is, that by a judgment . . . the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. By the judgment of the court, it loses all of its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining legal liability is transferred to the judgment or decree. Once becoming merged in the judgment, no further action at law or suit in equity can be maintained on the instrument." (Internal quotation marks omitted.) 30 R. Lord, Williston on Contracts (4th Ed. 2004) § 76:50, p. 237.

"However, the *parties may agree that certain contractual rights will survive the entry of a judgment. This is particularly likely in the case of separation agreements in divorce cases.* Thus, it has been said: 'If parties who are dissolving their marriage wish to retain contractual remedies as well as the remedies that are available under the dissolution judgment, then they may do so by entering into an agreement and identifying which, if any, of the terms of their agreement they wish to have the court incorporate into the judgment, and which terms they wish to have survive as separate agreements.' " (Emphasis added.) Id., 239.

"Contract clauses which require the application of the laws of other states upon breach or dispute are recognized as proper in Connecticut. . . . The ordinary rule is that where a cause of action arising in another [s]tate is asserted in our courts, we look to the laws of that [s]tate to determine all

the New York court rendered a judgment of dissolution of the parties' marriage on May 11, 2011.

The plaintiff remarried three days following her divorce from the defendant and moved with the parties' children to Greenwich. The defendant eventually moved to Connecticut, as well. The plaintiff registered the dissolution judgment in the Superior Court in the judicial district of Stamford-Norwalk on October 27, 2014, pursuant to General Statutes § 46b-71 (a). On November 24, 2014, the plaintiff filed a motion to modify child support (motion to modify) as permitted by the dissolution judgment.[8] The parties again engaged in extensive discovery with respect to the defendant's finances. On April 26, 2017, pursuant to New York Domestic Relations Law,[9] the trial court granted the plaintiff's motion to modify, increased the defendant's monthly child support obligation and awarded the plaintiff attorney's fees.[10] In a seprate order, the court awarded the defendant a credit in

matters of substance involved in it, but that matters of procedure are governed by our own law . . . ." (Citation omitted; internal quotation marks omitted.) *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012); see also General Statutes § 46b-71 (b).

[8] The stipulation provided that following the sale of the marital home, the defendant was to pay the plaintiff base child support in the amount of $5000 per month. The judgment of dissolution states in relevant part: "Each party has a right to seek a modification of the child support order upon a showing of: (I) a substantial change in circumstances; or (II) that three years have passed since the order was entered, last modified or adjusted; or (III) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out [of] subparagraph (II) or (III) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply."

[9] The court's application of New York Domestic Relations Law was in keeping with § 46b-71 (b), which provides in relevant part that, in modifying a foreign matrimonial dissolution judgment, the substantive law of the foreign jurisdiction shall be controlling.

[10] The court ordered the defendant to pay the plaintiff $10,190 per month in child support until the older of the parties' two children attained the age of twenty-one years. The modified support order was made retroactive, resulting in an arrearage of $145,320. The court ordered the defendant to pay the arrearage to the plaintiff in three installments. The court also awarded the plaintiff $50,000 in attorney's fees.

light of his having paid a portion of the college room and board expenses of the parties' older child.

On September 5, 2018, the plaintiff filed the motion to open that is the subject of the present appeal. In that motion, the plaintiff sought to have the court open the dissolution judgment, vacate the stipulation, and order a new trial,[11] "as the judgment was obtained through the fraudulent conduct of the [defendant] and there is a reasonable probability that the result of the *settlement* would have been different had the defendant not made material misrepresentations of fact to the court and to the plaintiff in his sworn financial statement provided at the time of settlement."[12] (Emphasis added.) In con-

[11] It is perplexing why the plaintiff filed a motion to open the judgment of dissolution and requested a new dissolution trial because she remarried three days after divorcing the defendant. The parties agreed pursuant to the stipulation that the plaintiff may enforce the stipulation independently without disturbing the judgment of dissolution. As the trial court stated, the plaintiff was required to bring a plenary contract action, rather than attack the judgment of dissolution.

[12] In her motion to open, the plaintiff averred in part:

"2. Prior to their marriage, the parties entered into a prenuptial agreement [pursuant to which], plaintiff waived her interest in defendant's separate property, including his business interests. At the time, defendant was a 50 [percent] owner of Flavormatic Industries, Essential Oil Suppliers and R & R Realty, of which entities defendant's brother was his partner. Defendant's financial disclosure for purposes of the prenuptial agreement consisted of his 1996 personal income tax return reflecting $41,000 in wages and $11,157 in rental income, a schedule listing his business interests and the values of his bank and brokerage accounts . . . and a statement from his accountant of the fair market value of his business interests. Plaintiff specifically waived any further discovery in executing the prenuptial agreement. . . .

"4. Plaintiff commenced a divorce action on February 2, 2009. During the divorce proceedings, plaintiff unsuccessfully challenged the prenuptial agreement on the basis of defendant's fraud . . . and, as a result, the Court limited discovery and plaintiff was not permitted access to documents related to defendant's business interests . . . .

"5. The parties started a divorce trial on April 4, 2011 [but] *settled and executed a* [*stipulation*] *dated April 11, 2011, which was subsequently incorporated into the divorce judgment.*

"6. In connection with the trial, defendant had submitted to plaintiff and to the Court a sworn Statement of New Worth . . . dated April 1, 2011.

"7. On his [statement of net worth] under GROSS INCOME, defendant wrote '0.00.' Defendant then wrote 'See Attached 2010 income information' . . . [and] attached . . . documents relative to the prior year's income . . . .

nection with her motion to open, the plaintiff sought

"8. Defendant indicated total expenses on his [statement of net worth] of $12,096 per month . . . not including any support to be paid towards plaintiff and the parties' two children.

"9. On his [statement of net worth], defendant [listed his assets] . . . .

"10. . . . According to defendant at the time of the parties' divorce, other than the value of his business (which he stated was N/A), his other cash and retirement assets totaled $131,215 . . . which he claimed was his 'separate property' under the parties' prenuptial agreement except for [a] . . . brokerage account and the cash value of his life insurance policy.

"11. Based upon defendant's 'disclosures' on his sworn financial statement, relied upon by plaintiff, the parties entered into [a] settlement, which set forth that their [stipulation] superseded the Prenuptial Agreement:

"a. Child Support:

"- Defendant to pay child support to plaintiff in the amount of $5000 per month, based upon defendant's gross income of $265,000 in 2009 . . .

"- Defendant to pay 80 [percent] of statutory add-ons for the children; and

"- Defendant to pay 60 [percent] of college [costs] for the children with a [State University of New York] cap.

"b. Alimony: Plaintiff waived her right to alimony. . . .

"12. . . . [P]laintiff [received] cash assets from the marriage totaling $488,776 . . . .

"15. On November 21, 2014 . . . after domesticating the New York Judgment of Divorce in Connecticut, plaintiff filed a motion to modify . . . on the ground that under New York law, defendant's income had increased by at least [15] percent since the Judgment of Divorce resulting in a substantial change in circumstances requiring an upward modification . . . .

"18. It was only during the discovery process on the [motion to modify] did plaintiff begin to learn that defendant's April, 2011 statement of net worth . . . contained false statements and material omissions intended to mislead plaintiff and the Court, and misrepresent his actual income and the parties' marital assets. . . .

"20. Defendant lied on his [statement of net worth] about his available and true compensation as the owner of Flavormatic, listing his 2011 income as '0.00' and his 2010 income as $150,000, and then each year starting with the year of his divorce taking compensation ranging from $950,000 to $1,900,000 . . . .

"21. Defendant stockpiled money in his corporation in order to avoid equitable distribution of marital assets and to avoid paying alimony and child support . . . .

"25. Defendant hid the income [he earned] during the marriage, which would have resulted in significant nonbusiness assets subject to equitable distribution, stockpiling those sums in his businesses, because he knew that plaintiff would not have access to the information by virtue of the trial court upholding the enforceability of the prenuptial agreement. Defendant intentionally omitted this information on his [statement of net worth] for

postjudgment discovery of the defendant's financial records. The defendant opposed both the plaintiff's motion to open and her request for postjudgment discovery. The parties filed numerous motions, objections, and memoranda with respect to the motion to open and request for discovery.

On October 26, 2018, counsel for the parties appeared before the court at which time the court ruled on several of the parties' outstanding motions and objections not at issue here. At the time, the court stated that, in Connecticut, postjudgment discovery generally is not permitted in the absence of a demonstration by the plaintiff that she has more than a "mere suspicion" of fraud on the part of the defendant in his conduct relating to the execution of the stipulation. The court specifically referenced *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988).[13] To determine whether the plaintiff could demonstrate more than a mere suspicion of the defendant's alleged fraud,[14] the court ordered the parties to appear for an *Oneglia* hearing on Decem-

the purpose of fraudulently inducing plaintiff [to enter] into a [stipulation] which was egregiously inequitable. Defendant's misconduct was wilful, malicious and unlawful, as a result of which this Court should vacate the parties' April, 2011 [stipulation], open the divorce judgment and order a new trial.

"26. Had defendant been truthful on his [statement of net worth], there is a reasonable possibility that . . . the settlement would have been different [in that plaintiff would not have waived alimony, would not have agreed to $5000 per month in child support, would have demanded counsel fees, would not have agreed to limit the defendant's obligation to pay for the children's college expenses at the State University of New York cap, would not have agreed to pay 40 percent of the children's college expenses, would not have agreed to leave the marriage with less than $500,000, and would have demanded higher life insurance coverage for child support and for alimony]." (Emphasis altered; footnote omitted.)

[13] "*Oneglia* and its progeny are grounded in the principle of the finality of judgments." *Brody* v. *Brody*, 153 Conn. App. 625, 631, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014).

[14] In *Oneglia*, the plaintiff wife filed a motion to open the judgment of dissolution, claiming that the defendant husband fraudulently had misrepresented his finances with respect to the parties' separation agreement. *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 268. The wife asked the court to open the judgment and to allow " 'complete discovery.' " Id. The trial court

ber 4, 2018. Furthermore, because the parties had agreed that the stipulation was to be governed by New York law, the court ordered counsel for the parties to file simultaneous memoranda of law two weeks prior to the start of the *Oneglia* hearing to address "the standard in New York for opening a matrimonial judgment. And . . . under all the facts and circumstances of this case is there either res judicata or was there accord and satisfaction, or whatever that would militate against this particular motion, in other words, would support a motion to dismiss [the motion to open]. That's what I'm looking for."[15]

The court conducted an *Oneglia* hearing on December 4, 5, and 6, 2018. Both parties testified at the hearing, as well as the plaintiff's forensic accountant, Lee Sanderson. On December 21, 2018, counsel for the parties appeared for final arguments. Counsel for the plaintiff argued that the evidence demonstrated that the defendant had failed to disclose significant assets at the time the

deferred a decision on the issue of discovery until it had conducted a hearing to determine whether the wife "possessed enough preliminary evidence on the question of fraud to justify a full-blown discovery process." Id. Following the hearing, the court found that the wife "had not put forth sufficient indicia of fraud to justify an opening of the judgment and further discovery." Id., 269. The wife appealed, claiming that she had a right to conduct discovery and to compel the husband to testify. Id. This court disagreed and affirmed the judgment of the trial court, stating that the wife's premise was incorrect in that our rules of practice and statutes do not provide for postjudgment discovery. Id. The trial court's position was straightforward: "If the [wife] was able to substantiate her allegations of fraud *beyond mere suspicion*, then the court would open the judgment for the limited purposes of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held." (Emphasis added.) Id., 269–70.

[15] At the conclusion of the October 26, 2018 hearing, counsel for the defendant informed the court that the defendant wanted to address the court personally. The defendant then stated to the court that he wanted the proceedings to be expedited because he had been diagnosed with glioblastoma, a brain tumor. His desire was to resolve the litigation to put his affairs in order and to not burden his family and his estate.

stipulation was negotiated. Counsel for the defendant argued that eight years after the plaintiff had received the benefits of the stipulation, she was precluded from relitigating the parties' divorce on the grounds of collateral estoppel, ratification, and lack of evidence to sustain the allegation of fraud. Counsel for the defendant also argued that the *plaintiff could not challenge the stipulation by way of a motion to open the judgment; rather, she had to file a plenary action sounding in contract*; but that the statute of limitations had run on such an action. Counsel further argued that, given the validity of the prenuptial agreement, the plaintiff would have received far less under the prenuptial agreement than she received under the stipulation and, therefore, she could not argue credibly that she had sustained any damages.[16]

At the conclusion of the arguments, the court explained that, under *Oneglia*, if the evidence demonstrated that the plaintiff had more than a mere suspicion of fraud, the discovery process would begin, and thereafter the court would hold a hearing to determine whether the dissolution judgment should be opened. If the court found that the plaintiff had no more than a mere suspicion of fraud, there would be no discovery regarding the defendant's finances. Without additional discovery, the plaintiff would have to decide whether to pursue her motion to open with the evidence she had presently.

On January 31, 2019, the court issued a memorandum of decision regarding the *Oneglia* hearing, the outcome of which determined whether the plaintiff could conduct discovery of the defendant's finances. As a preliminary matter, the court stated that two facts were critical

[16] Counsel for the defendant also argued that the court should dismiss the motion to open because the plaintiff had failed to make out a prima facie case of fraud on the part of the defendant. Although the court found that the plaintiff failed to make out a prima facie case of fraud, it did not dismiss the motion to open on that basis.

to its decision, to wit: (1) *the stipulation was incorporated in, but not merged into, the dissolution judgment and* (2) *the stipulation provided that all matters related to it were to be governed by New York law*. The court recounted the relevant facts and procedural history of the case and that it previously had ruled on the plaintiff's motion to modify and the defendant's motion for child support credit. The court then stated that the present matter came before the court by way of the plaintiff's motion to open.

As it did at the October 26, 2018 proceeding, the court stated that Connecticut's rules of practice do not permit postjudgment discovery unless the plaintiff can show that there is more than a "mere suspicion" of fraud on the part of the defendant in his conduct related to the execution of the stipulation. See *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 269–70. The court noted that it had conducted the *Oneglia* hearing and argument over four days in December, 2018, and recounted its order that, because "the parties had agreed that New York law would be controlling, prior to the hearing [it had] ordered each counsel to submit a memorandum of law addressed to the holdings of New York law regarding the opening of a matrimonial judgment based upon an unmerged stipulation, and whether or not there were facts in this case that would support a *motion to dismiss the motion to open*." (Emphasis added.) Having reviewed the memoranda of law submitted by counsel and the relevant New York law, the court concluded that the parties had arrived at their choice of law decision without fraud or duress, with the advice of counsel, and that their choice of New York law should be given effect, citing *Elgar* v. *Elgar*, 238 Conn. 839, 848, 679 A.2d 937 (1996) (court should give effect to express choice of law by parties to contract provided it was made in good faith). The court also concluded that an

established body of New York law relating to postjudgment discovery in matrimonial cases was controlling and *not Oneglia*.

The court cited the New York law it had considered in reaching its decision, stating that "[t]here is a clear societal benefit in reliance upon the finality of judgments, particularly in family relations matters, where the judgment is based upon an agreement of the parties. It is the general policy of the courts in New York to uphold settled domestic relations judgments. *Rainbow* v. *Swisher*, 72 N.Y.2d 106, 110–11, 527 N.E.2d 258, 531 N.Y.S.2d 775 (1988). To that end, the courts have drawn a distinction between actions to overturn such judgments as opposed to enforcing their provisions. *It is well settled that a party to a stipulation that is incorporated, but not merged, into a judgment of divorce cannot challenge the enforceability of the stipulation by way of motion but, rather, must do so by commencement of a plenary action.* Conversely, a party seeking to enforce the terms of such a stipulation may do so either by motion to enforce the judgment or by a plenary action. *Anderson* v. *Anderson*, 153 App. Div. 3d 1627, 1628, 61 N.Y.S.3d 405 (2017) . . . . In fact, *it is error for a court to entertain such a motion on its merits. Spataro* v. *Spataro*, 268 App. Div. 2d 467, 468, 702 N.Y.S.2d 342 (2000)." (Citations omitted; emphasis added; internal quotation marks omitted.) In light of the law and under the circumstances, the court stated that it found "it appropriate to consider a motion *to dismiss*." (Emphasis added.)

The court continued, stating, "[i]n general, financial disclosure is inappropriate unless and until the existing separation agreement is set aside. *Rupert* v. *Rupert*, 190 App. Div. 2d 1027, 594 N.Y.S.2d 663 (1993). Referring to a new operative standard set forth in [New York]

Domestic Relations Law § 236 (B), a [New York] Appellate Division court held that . . . to permit such discovery would require an affirmative, factual showing, at least prima facie that the agreement was unfair or unreasonable when executed or unconscionable at the time of the entry of final judgment. That lacking, the court disallowed the request for discovery. *Oberstein* v. *Oberstein*, 93 App. Div. 2d 374, 377–79, 462 N.Y.S.2d 447 (1983)."[17] (Emphasis omitted; internal quotation marks omitted.) The court in the present case also recognized the " 'sensitive balancing' " permitted under New York Civil Practice Law and Rules 3102 (c) and

[17] In *Oberstein*, the defendant wife sought by way of counterclaims to reform the parties' separation agreement at the time the plaintiff husband commenced an action for dissolution of marriage. *Oberstein* v. *Oberstein*, supra, 93 App. Div. 2d 375. The court set forth the rule of law in that regard as follows: "It has been established law in this [s]tate that where there is an existing separation agreement, which controls the respective support obligations of the parties, in a subsequent matrimonial action for divorce neither alimony nor support is in issue unless and until the support terms of the separation agreement are set aside. On this basis, the courts have regularly denied any financial disclosure in such an action, as long as the support terms of the separation agreement remain in effect." Id., 376. "However, so much of defendant's notice to take plaintiff's oral deposition as requests information regarding his present financial condition is premature. Plaintiff's present financial circumstances are not relevant to the defendant's claim, inter alia, that she was deceived regarding the true extent of her husband's income at the time that the separation agreement was entered into and will not become an issue unless and until the separation agreement or its support provisions have been vacated or set aside on the grounds of fraud, duress or overreaching, etc." (Internal quotation marks omitted.) Id., 376–77, quoting *Potvin* v. *Potvin*, 92 App. Div. 2d 562, 563, 459 N.Y.S.2d 313 (1983).

"The equitable distribution statute . . . continued, in effect, the prior rule which directed compulsory financial disclosure where alimony, maintenance or support is in issue. . . . However, where, as here the support or maintenance obligations of the parties are fixed by an agreement, neither support nor maintenance is 'in issue' unless there is a real and legitimate presentation to vacate the support terms of the agreement on the basis of the criteria explicitly set forth in the statute. Thus, in such cases, it is necessary to review the factual predicate which has been set forth to ascertain whether, in fact, the underlying circumstances establish a proper basis to modify the agreement." *Oberstein* v. *Oberstein*, supra, 93 App. Div. 2d 379–80.

utilized in *Moore* v. *Moore*, Docket No. 2013/995, 2015 WL 4530304 (N.Y. Sup. July 9, 2015) (decision without published opinion, 48 Misc. 3d 1214 (A), 22 N.Y.S.3d 138 (2015)). The court stated: "In [*Moore*], a subpoena duces tecum was served in connection with a motion to vacate a [dissolution] judgment, the provisions of which stemmed from an agreement, incorporated but not merged in the judgment, and was therefore subject to dismissal, there being no pending plenary action on the underlying agreement."

The court continued, stating that, given the circumstances of the present case and under the standard articulated by the New York courts, "even applying a sensitive balancing, the plaintiff had failed to meet her burden with at least a prima facie showing either that the stipulation was unfair or unreasonable when negotiated, or unconscionable when the dissolution judgment was entered, or that the defendant's action amounted to wilful fraud or fraudulent concealment. Moreover, [the plaintiff] has not established that, even if the judgment were to be opened and the stipulation were to be set aside, that the resulting judgment would likely be substantially different."[18] The court denied the plaintiff's request for discovery and ordered that the "matter

[18] In *Moore*, the New York trial court balanced the need to respect the finality of separation agreements with the need for accurate disclosure and permitted postjudgment discovery. *Moore* v. *Moore*, supra, 2015 WL 4530304, *5–8. *Moore* is factually and procedurally distinguishable from the present case. *Moore* concerned the *application* of a former husband seeking to subpoena financial records from his former spouse in order "to frame [a] complaint to challenge a two-year old separation agreement." Id., *1. The court stated that New York Civil Practice Law and Rules 3102 (c) "contains no preconditions to pre-complaint disclosure—[it] seems to obviate the need to have an already vacated separation agreement as a predicate to disclosure. Instead, as interpreted by the New York courts, [it] simply requires a party seeking such disclosure to articulate the elements of a cause of action." Id., *5. In balancing the need for accurate disclosure and the finality of separation agreements, the court noted that "[t]he parties expressly agreed that further disclosure to enforce the [a]greement would be permissible at any time either party had an obligation to the other." Id., *7. "In concluding that the sensitive balance of the intrusiveness of the requested discovery when

shall be set down for argument as to show cause as to why the plaintiff's motion to open . . . should not be *denied* consistent with New York law."[19] (Emphasis added.)

The parties and their counsel appeared in court on March 19, 2019. The court commenced the proceeding by stating: "I think that since the matter started with a hearing with regard to postjudgment discovery and was not per se a hearing on the merits, I believe that the appropriate course of action is to dismiss . . . because it's jurisdictional and jurisdiction . . . always in this particular instance . . . implicates the subject matter, [which] can [be] raise[d] . . . at any time and even by the court and that's Practice Book [§] 10-33 . . . ." The court then explained that the judgment was subject to New York law and that the gravamen of the motion to open was the prenuptial agreement. Prior to the dissolution of the parties' marriage, the court noted, a New York court had determined that the prenuptial

weighed against the nature of the claim makes disclosure permissible, this court is not conducting any pre-screening of the merits of the husband's claim. Any such determination would await the filing of a complaint, an answer and further proceedings." Id. The court further concluded that to the extent the husband wished to "invalidate the agreement incorporated [but] not merged into a judgment of divorce, he must do so by a plenary action." Id., *8.

In the present case, the stipulation contained no provision for further disclosure to enforce or to vacate it. Furthermore, the plaintiff's motion to open is not the equivalent of a New York Civil Practice Law and Rules 3102 (c) application for preaction discovery, which can be pursued in Connecticut through an equitable bill of discovery. See Practice Book § 13-18. Finally, the plaintiff's motion to open seeks to avoid the plenary action to challenge the stipulation that the court in *Moore* said was the complaining party's sole method to challenge the separation agreement. Under the procedural posture of this case, if the court had permitted discovery, the plaintiff would not have been required to commence such an action in which to allege fraud.

[19] The court also set forth in detail its legal analysis, including eight specific factual findings. Because we conclude that the trial court properly determined that, pursuant to New York substantive law, the plaintiff was required to bring a plenary action to challenge the stipulation, we need not address her remaining claims. See footnote 1 of this opinion.

agreement was valid and that there was no fraud on the part of the defendant. The trial court then reviewed and analyzed the evidence that supported the New York court's decision regarding the absence of fraud. The court concluded: "[T]he bottom line, when all is said and done, is that *New York law says you cannot attack the* [*judgment*] *based on a motion to open. It must be done by a plenary action, a contract action, and that is why I am going to dismiss this action immediately*."[20] (Emphasis added.) See *Spataro* v. *Spataro*, supra, 268 App. Div. 2d 468 ("Supreme Court erred in entertaining defendant's motion on merits, as motion is not proper vehicle for challenging a separation agreement incorporated but not merged into divorce judgment. Rather, defendant should have commenced plenary action seeking vacatur or reformation of the agreement.").

On April 5, 2019, the plaintiff appealed from the judgment of dismissal, raising numerous claims. Of the plaintiff's several claims, the determinative one is whether the court improperly dismissed the motion to open on the ground that it lacked subject matter jurisdiction.[21] We agree with the plaintiff that the court improperly dismissed the motion to open on the ground that it

[20] It appears that the court may have used the terms "deny" and "dismiss" interchangeably. The order the court issued on January 31, 2019, stated that the "matter shall be set down for argument as to show cause as to why the plaintiff's motion to open . . . should not be *denied* consistent with New York law." (Emphasis added.) At the commencement of the hearing on March 19, 2019, the court stated: "I think that since the matter started with a hearing with regard to postjudgment discovery and was not per se a hearing on the merits, I believe that the appropriate cause of action is to dismiss and to the extent that my memorandum, although I think in two places one place I think I said deny/dismiss and just—I type my own decisions so—but in any event that's the appropriate remedy because it's jurisdictional and jurisdiction is always in this particular instance because it implicates the subject matter, you can raise it at any time and even by the court and that's Practice Book [§] 10-33 is a motion to dismiss . . . ."

[21] On appeal, the defendant argues that the stipulation exists independently of the dissolution judgment and governs the parties' marital rights. We agree that the stipulation is independent of the dissolution judgment.

lacked subject matter jurisdiction but conclude that the court properly determined that the plaintiff was able to challenge the stipulation only by bringing a plenary action. In other words, the court should have denied the plaintiff's motion to open, hence, the form of the judgment is improper.

We begin our analysis with the applicable standard of review. "[A] determination regarding a court's subject matter jurisdiction is a question of law . . . ." *Rathblott* v. *Rathblott*, 79 Conn. App. 812, 816, 832 A.2d 90 (2003). The plenary standard of review applies to questions of law. See *Pond View, LLC* v. *Planning & Zoning Commission*, 288 Conn. 143, 155, 953 A.2d 1 (2008). "[T]he question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002). "Once the question of lack of jurisdiction of a court is raised . . . [t]he court must fully resolve it before proceeding further with the case. . . . Whenever a court finds that it has no jurisdiction, it must dismiss the case . . . ." (Citation omitted; internal question marks omitted.) *Rathblott* v. *Rathblott*, supra, 817.

"[E]very presumption favoring jurisdiction should be indulged." *Connecticut Light & Power Co.* v. *Costle*, 179 Conn. 415, 421 n.3, 426 A.2d 1324 (1980). "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." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999).

As we noted previously, the plaintiff registered the New York judgment of dissolution in Connecticut in

October, 2014, pursuant to § 46b-71, which provides in relevant part: "(a) Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final, has not been modified, altered, amended, set aside or vacated and that the enforcement of such judgment has not been stayed or suspended . . . .

"(b) Such foreign matrimonial judgment *shall become a judgment of the court of this state* where it is filed and *shall be enforced and otherwise treated in the same manner as a judgment of a court of this state* . . . . A foreign matrimonial judgment so filed shall have the same effect and may be enforced or satisfied in the same manner as any like judgment of a court of this state and is subject to the same procedures for modifying, altering, amending, vacating, setting aside, staying or suspending said judgment as a judgment of a court of this state; provided, *in modifying, altering, amending, setting aside, vacating, staying or suspending any such foreign matrimonial judgment in this state the substantive law of the foreign jurisdiction shall be controlling*." (Emphasis added.)

Under General Statutes § 46b-1 (4), "the Superior Court is vested with plenary and general subject matter jurisdiction over legal disputes in family relations matters . . . ." (Internal quotation marks omitted.) *Reinke* v. *Sing*, 328 Conn. 376, 389, 179 A.3d 769 (2018). "With subject matter jurisdiction established, the trial court's task is to apply the statute to the facts of a particular case, indeed, interpreting statutes and applying the law to the facts before it [fall within] the traditional province of the trial court. . . . Upon review of the trial court's actions, therefore, [our] role is to review the trial court's

exercise of its authority to act." (Internal quotation marks omitted.) Id., 390.

Section 46b-71 provides that the Superior Court where the foreign dissolution judgment is registered has jurisdiction to modify the judgment, provided that it applies the substantive law of the foreign jurisdiction. See *Vitale* v. *Krieger*, 47 Conn. App. 146, 148–49, 702 A.2d 148 (1997). The record, in fact, discloses that the trial court previously exercised its jurisdiction over the parties' dissolution judgment when it granted the plaintiff's motion to modify. We, therefore, conclude that the court improperly determined that it lacked subject matter jurisdiction over the plaintiff's motion to open.

As the court stated in its January 31, 2019 memorandum of decision, two facts were critical to its decision: (1) the stipulation was incorporated but not merged in the dissolution judgment and (2) the stipulation provided that all matters related to it were to be governed by New York law.

Nevertheless, because the issue of whether New York substantive law precluded the court from granting the plaintiff the relief she requested raises a question of law, we consider whether the court should have denied the plaintiff's motion to open. "A stipulated judgment is not a judicial determination of any litigated right. . . . It may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction. . . . [It is] the result of a contract and its embodiment in a form which places it and the matters covered by it beyond further controversy. . . . The essence of the judgment is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has entered judgment conforming to the terms of the agreement." (Internal quotation marks omitted.) *Barber* v. *Barber*,

114 Conn. App. 164, 168, 968 A.2d 981, cert. denied, 292 Conn. 915, 973 A.2d 661 (2009). The court found that the parties bargained in good faith for New York law to apply to their stipulation. Although the plaintiff moved to open the judgment of dissolution, in reality, it is the stipulation that is at issue in the present matter, not the judgment of dissolution. Had the plaintiff commenced a plenary contract action to vacate the stipulation, the trial court would have had jurisdiction to adjudicate the action by applying the substantive law of New York.[22] See *Wayne* v. *Wayne*, Superior Court, judicial district of Litchfield, Docket No. FA-94-0549968 (February 17, 1999) (when certain provisions in New York agreement do not merge into judgment, they retain contractual significance).

Although the court conducted an *Oneglia* hearing in December, 2018, in its January 31, 2019 memorandum of decision, it recognized that *Oneglia* did not control postjudgment discovery and applied New York law to the evidence presented at the hearing. The court further recognized that a stipulation that is incorporated, but not merged, into a New York dissolution judgment may not be challenged by way of a motion to open the dissolution judgment, but only by the commencement of a plenary action seeking to undo the stipulation itself. See *Anderson* v. *Anderson*, supra, 153 App. Div. 3d 1628. The court also recognized that it is error for a court to entertain a motion to open such a judgment on its merits when the underlying stipulation has not

[22] "Contract clauses which require the application of the laws of other states upon breach or dispute are recognized as proper in Connecticut. . . . The ordinary rule is that where a cause of action arising in another [s]tate is asserted in our courts, we look to the laws of that [s]tate to determine all matters of substance involved in it, but that matters of procedure are governed by our own law . . . ." (Citation omitted; internal quotation marks omitted.) *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012).

been set aside. See *Spataro* v. *Spataro*, supra, 268 App. Div. 2d 468.[23]

The plaintiff argues that the court improperly applied New York procedural law rather than Connecticut procedural law, because the rule requiring a plenary action

[23] In her brief on appeal, the plaintiff argued that failure to commence a plenary action for reformation or rescission of a stipulation is not a fatal defect in New York. She cited the following cases to support her position: *MacDonald* v. *Guttman*, 72 App. Div. 3d 1452, 1455–56, 900 N.Y.S.2d 177 (2010) (malpractice action; stipulated agreement is independent contract obligation modifiable by plenary action; under certain circumstances court may reform agreement to conform to parties' intent); *Banker* v. *Banker*, 56 App. Div. 3d 1105, 1107, 870 N.Y.S.2d 481 (2008) (court did not exceed authority by reforming stipulation where there was mutual mistake, rendering portion of stipulation impossible or impracticable to carry out); *Brender* v. *Brender*, 199 App. Div. 2d 665, 666, 605 N.Y.S.2d 411 (1993) (relevant stipulation provision set aside where there was mutual mistake regarding insurance availability); *Gaines* v. *Gaines*, 188 App. Div. 2d 1048, 592 N.Y.S.2d 204 (1992) (postdissolution modification of agreement requires plenary action but modification on motion affirmed because it was granted after full hearing tantamount to plenary trial). In the present case there is no claim of mutual mistake, technical defect or agreement of the parties to proceed on a motion to modify or open the judgment.

The defendant, however, has pointed out that the New York cases cited by the plaintiff are distinguishable from the present case because the motions at issue were grounded in mistake, omission, defect, irregularity or a technical defect. The defendant argues that those cases teach that where the issue is not in dispute, e.g., inability to subdivide real property, no health insurance available, or that securities should have been included in equitable distribution, and both parties request that the court correct a mistake in the agreement, the Appellate Division of the New York Supreme Court will not reverse the trial court's judgment. Where the issue is in dispute, however, the issue must be bought pursuant to a plenary action to reform or to vacate the agreement. See New York Civil Practice Law and Rules 2001, which provides: "At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided than any applicable fees shall be paid." We agree with the defendant that the cases are distinguishable from the facts of the present case in which there is no mutual mistake, impossibility, or impracticality.

to challenge a stipulation not merged into the judgment of dissolution is procedural and not substantive. She also argues that discovery, which is what she sought in the trial court, is inherently procedural. She further contends that the fact that § 46b-71 sets forth the procedure for enforcing foreign matrimonial judgments in Connecticut confirms that the New York rule is procedural. Finally, the plaintiff posits that the court, up until the time it improperly applied New York procedural law to deny her discovery request, recognized the procedural nature of the issues before it and applied Connecticut's procedural rules under *Oneglia*.

The defendant argues that the New York rule requiring that the validity of a stipulation be challenged in a plenary action is substantive and that the trial court properly applied it. He also contends that the New York rule is predicated on public policy that recognizes that the valid substantive contractual rights of the parties take precedence over inchoate and previously waived statutory rights. We agree with the defendant that the New York rule requiring a plenary action to challenge the terms of a settlement agreement, incorporated but not merged into the judgment of dissolution, is substantive.

"The judicial rule of thumb, that in a choice of law situation the forum state will apply its own procedure . . . brings us to the vexing question of which rules are procedural and which substantive. These terms are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, substance and procedure are the same keywords to very different problems." (Citation omitted; internal quotation marks omitted.) *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, 22 Conn. App. 640, 650, 579 A.2d 545, cert. denied, 216 Conn. 820, 581 A.2d 1055 (1990).

"The ordinary rule is that where a cause of action arising in another [s]tate is asserted in our courts, we look to the laws of that [s]tate to determine all matters of substance involved in it, but that matters of procedure are governed by our own law . . . ." *Broderick* v.*McGuire*, 119 Conn. 83, 101, 174 A. 314 (1934). "While there is no precise definition of either [substantive orprocedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a pro-cedural law prescribes the methods of enforcing such rights or obtaining redress. . . . Where the [law] is not substantive, i.e., not directed to the right itself, but rather to the remedy, it is generally considered a distinctly procedural matter." (Internal quotation marks omitted.) *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, 119 Conn. App. 423, 449–50, 988 A.2d 351 (2010). In *Weber* v. *U.S. Sterling Securities, Inc.*, 282 Conn. 722, 735–41, 924 A.2d 816 (2007), our Supreme Court addressed whether a New York rule that prohibited class actions was procedural or substantive in nature. The court concluded that "[i]t is clear that [New York Civil Practice Law and Rules] § 901 (b) [McKinney 2006] is substantive because it abridges the rights of individuals to bring class action claims in New York state. We have determined that statutes, like § 901 (b), that affect an individual's cause of action clearly are substantive in nature. See *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 219, 901 A.2d 673 (2006) ([i]t is beyond dispute that [General Statutes] § 1-1d is substantive in nature because it generally gives persons . . . legal capacity, rights, powers, privileges, duties, liabilities)." (Internal quotation marks omitted.) *Weber* v. *U.S. Sterling Securities, Inc.*, supra, 739.

Consequently, we must examine whether the New York rule at issue in this case, i.e., that the validity of a stipulation must be challenged by means of a plenary action, defines rights under New York law or merely

provides a remedy for enforcing rights. Under New York law, a stipulation of settlement that is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation. See, e.g., *D'Sa* v. *D'Sa*, 182 App. Div. 3d 535, 536, 122 N.Y.S.3d 344 (2020); *Campello* v. *Alexandre*, 155 App. Div. 3d 1381, 1382, 65 N.Y.S.3d 348 (2017); *Anderson* v. *Anderson*, supra, 153 App. Div. 3d 1628. A stipulation of settlement not merged into the judgment is independently binding on the parties, and New York courts may not impair the parties' contractual rights under the agreement by modifying the divorce judgment. See *Fine* v. *Fine*, 191 App. Div. 2d 410, 594 N.Y.S.2d 309 (1993); see also *Lambert* v. *Lambert*, 142 App. Div. 2d 556, 558, 530 N.Y.S.2d 223 (1988) ("while a judgment of divorce can be attacked pursuant to [New York Civil Practice Law and Rules] 5015, the separation agreement will remain unimpeached unless challenged in a plenary action").[24] For example, in *Pellot* v. *Pellot*, 305 App. Div. 2d 478, 479–80, 759 N.Y.S.2d 494, (2003), the court held that the trial court incorrectly concluded that the defendant could not enforce her right to the amount of child support set forth in the parties' separation agreement because the family court had made a downward modification of the plaintiff's child support obligation in the judgment of dissolution. The court concluded: "[T]he [defendant] is entitled to enforce [the child support] provisions of the stipulation and to recover the difference between the amount of child support agreed to in the stipulation and the reduced amount set by the [f]amily [c]ourt." Id., 480. Thus, it is clear to us that, under New York law, the parties to a separation agreement that is not merged into a dissolution judgment have contractual rights that, in many

[24] Pursuant to New York Civil Practice Law and Rules 5015, New York trial courts may relieve a party from the terms of a judgment on the grounds of fraud or misrepresentation.

instances, cannot be undone by modifying the judgment of dissolution.

It is for this reason that under New York domestic relations law, "financial disclosure in support of a claim to overturn a separation agreement is inappropriate until the existing separation agreement is set aside. . . . The only exception to this rule requires the moving party to establish a 'legitimate factual predicate' for setting aside the existing agreement. . . . The spouse seeking discovery about the other spouse's finances—after execution of an agreement—must adduce sufficient factual support constituting a legitimate basis to warrant modification or vacatur of the support provisions of the separation agreement . . . . The Fourth Department has adopted this requirement for a legitimate factual predicate before allowing discovery by a party to overturn a separation agreement." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Moore*, supra, 2015 WL 4530304 *2; see footnote 17 of this opinion. Significantly, such discovery, even where permitted, cannot be used to support a motion to open the judgment of dissolution. Instead, any challenge to whether the separation agreement was procured by fraud, as claimed by the plaintiff in the present case, must be brought in a plenary action. See id., *8.[25] There is simply no *right* under New York law to challenge the validity of a separation agreement through a motion

[25] In *Moore*, the court relied on New York Civil Practice Law and Rules 3102 (c) to conclude that the plaintiff was entitled to preaction discovery. *Moore* v. *Moore*, supra, 2015 WL 4530304, *8. New York Civil Practice Law and Rules 3102 (c), which applies to all civil matters, provides: "Before action commenced. Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony." In Connecticut, preaction discovery may be obtained by means of an equitable bill of discovery. See *Berger* v. *Cuomo*, 230 Conn. 1, 5–6, 644 A.2d 333 (1994). The plaintiff in the present case has not pursued an equitable bill of discovery.

to open the dissolution judgment. The New York rule affects the very existence of the cause of action. Consequently, we conclude that the New York rule requiring a party to challenge a separation agreement through a plenary action is substantive and not procedural. As such, § 46b-71 and the parties' stipulation required that the trial court apply this New York substantive rule to the plaintiff's motion to open.

In the present case, after conducting an *Oneglia* hearing, the court found that the plaintiff had failed to meet her burden with at least a prima facie showing either that the stipulation was unfair or unreasonable when negotiated or unconscionable when the dissolution judgment was entered, or that the defendant's actions amounted to wilful fraud or fraudulent concealment, or that, if the judgment were set aside, the resulting judg ment would be different. The court, however, determined that it erred in entertaining the merits of the plaintiff's discovery motion, which was ancillary to the motion to open, because a motion to open is not the proper vehicle to challenge a stipulation incorporated, but not merged, into a judgment of dissolution. See *Spataro* v. *Spataro*, supra, 268 App. Div. 2d 468. To challenge the validity of the stipulation that was not merged into the dissolution judgment, New York substantive law requires a party to bring a plenary action. Id.; see also *Moore* v. *Moore*, supra, 2015 WL 4530304, *8; *Marshall* v. *Marshall*, 124 App. Div. 3d 1314, 1317, 1 N.Y.S.3d 622 (2015); *Brody* v. *Brody*, 82 App. Div. 3d 812, 812, 918 N.Y.S.2d 383 (2011); *Lepe* v. *Rodriguez*, 73 App. Div. 3d 710, 710–11, 899 N.Y.S.2d 856 (2010); *Barany* v. *Barany*, 71 App. Div. 3d 613, 614, 898 N.Y.S.2d 146 (2010). In March, 2019, the court recognized that the plaintiff had to bring a plenary action to challenge the stipulation. We agree with the court's conclusion that, under New York substantive law, the plaintiff was required to bring a plenary action.

We disagree, however, with the court's conclusion that it lacked subject matter jurisdiction. The court had jurisdiction to consider the motion to open pursuant to §§ 46b-1 and 46b-71 (b), and, therefore, it should have denied, rather than dismissed, the motion to open.

The form of the judgment is improper, the judgment dismissing the plaintiff's motion to open is reversed and the case is remanded with direction to render judgment denying the motion to open.

In this opinion the other judges concurred.

RAUL DIAZ *v.* COMMISSIONER OF CORRECTION (AC 39651)

Elgo, DiPentima and Bear, Js.

Syllabus

The petitioner, who had been convicted, on a guilty plea, of the crime of home invasion, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. On appeal, he claimed that the habeas court incorrectly concluded that his trial counsel's failure to file a motion to dismiss the home invasion charge, to which the petitioner had pleaded guilty pursuant to *North Carolina* v. *Alford* (400 U.S. 25), did not constitute ineffective assistance. *Held* that the petitioner could not prevail on his claim of ineffective assistance of counsel, as he failed to demonstrate that he was prejudiced by his trial counsel's alleged deficient performance; there was no evidence in the record showing that, but for his trial counsel's alleged deficient performance, the petitioner would have insisted on going to trial, and there was nothing to indicate that the dismissal of the home invasion charge would have resulted in any meaningful reduction in the petitioner's exposure to a lengthy period of incarceration.

Submitted for disposition October 15—officially released November 10, 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, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court, *DiPentima*, *C. J.*, and *Elgo* and *Bear*, *Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to the Supreme Court, which reversed the judgment of this court and remanded the case to this court for further proceedings. *Affirmed*.

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *David M. Carlucci*, assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. This case returns to this court on remand from our Supreme Court. The petitioner, Raul Diaz, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The sole question presented by the petitioner on appeal is "[d]id the habeas court erroneously conclude that trial counsel's failure to file a motion to dismiss the charge of home invasion did not constitute ineffective assistance under *Strickland* v. *Washington* [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]?" The petitioner had pleaded guilty to that charge pursuant to the *Alford* doctrine.[1]

This court, however, affirmed the judgment of the habeas court, after raising, sua sponte, the issue of whether the petitioner had waived his right to raise a

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *State* v. *Webb*, 62 Conn. App. 805, 807 n.1, 772 A.2d 690 (2001).

claim of ineffective assistance of counsel and deciding that the petitioner did in fact waive that right by pleading guilty under the *Alford* doctrine. *Diaz* v. *Commissioner of Correction*, 185 Conn. App. 686, 689, 198 A.3d 171 (2018), rev'd, 335 Conn. 53, 225 A.3d 953 (2020). The petitioner then appealed the judgment of this court to our Supreme Court, alleging that this court "improperly raised and decided the unpreserved issue of waiver without first providing the parties with an opportunity to be heard on that issue . . . ." *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 54, 225 A.3d 953 (2020). Our Supreme Court granted the petition for certification to appeal, "limited to the following issue: 'Did the Appellate Court properly affirm the judgment of the habeas court on a legal ground that was not raised or decided in the habeas court and never raised or briefed by the parties in the Appellate Court?' " Id., 57. Our Supreme Court answered that question in the negative and remanded the case to this court with the following rescript: "The judgment of the Appellate Court is reversed and the case is remanded to that court for further proceedings in accordance with this opinion." Id., 62. The rescript of our Supreme Court presents this court with two possible courses of action. The first is to proceed "in a manner . . . consistent with [its] decision in *Blumberg* [*Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 143, 84 A.3d 840 (2014)]" with respect to the waiver issue. *Diaz* v. *Commissioner of Correction*, supra, 335 Conn. 61. The second is to decide the petitioner's appeal on the basis of his ineffective assistance of counsel claim, which previously has been briefed and argued by the parties. We take the latter course of action and affirm the judgment of the habeas court.

The following factual and procedural background is relevant to our resolution of the petitioner's appeal on

remand.[2] On October 27, 2011, the petitioner entered the Ellington home of the seventy-seven year old victim when the victim was not present. While the petitioner was still in the home, the victim returned. The petitioner asked the victim to step aside so that he could flee the home, but the victim refused. The petitioner then struck the victim with a jewelry box, which resulted in a laceration on his head, as well as a broken nose and cheekbone. After taking the victim's wallet and car keys, the petitioner fled in the victim's car and later was apprehended.

The petitioner was charged in a substitute information with two counts of home invasion in violation of General Statutes § 53-100aa,[3] two counts of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) and (2), one count each of larceny in the third degree in violation of General Statutes § 53a-124, larceny in the fourth degree in violation of General Statutes § 53a-125, assault in the second degree in violation of General Statutes § 53a-60b, and robbery in the first degree involving a dangerous instrument in violation of General Statutes § 53a-134 (a) (3). On April 26, 2013, after the petitioner entered into a plea agreement with the state, he pleaded guilty under the *Alford* doctrine to one count of home invasion in violation of § 53a-100aa (a) (2). After a thorough canvass, the court accepted the plea, rendered a judgment of conviction, and sentenced the petitioner in accordance with the plea agreement to twenty-five years of imprisonment. The petitioner did not appeal from the judgment of conviction.

[2] The facts are as recited by the state during the plea canvass of the petitioner.

[3] The second of the home invasion charges was added by the state immediately prior to the petitioner's anticipated trial, which did not take place. All references herein to the home invasion charge are to the first home invasion charge to which the petitioner pleaded guilty.

Thereafter, the petitioner commenced this habeas action. On February 25, 2016, the petitioner filed an amended petition for a writ of habeas corpus, alleging, among other claims, that his trial counsel had rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge on the ground that it was duplicative of the burglary in the first degree charge. After a trial, the habeas court denied the petition for a writ of habeas corpus. In its memorandum of decision, the court concluded that the petitioner had failed to establish both that his trial counsel deficiently performed by not filing a motion to dismiss the home invasion charge and that there was prejudice to him as result of trial counsel's decision not to file such a motion. The court found that, although the petitioner's trial counsel had agreed with the state's assessment that the petitioner had violated the home invasion statute, he nonetheless argued, although unsuccessfully, to the court and the prosecutor that the home invasion charge should be dropped and that, in any event, the petitioner should be allowed to plead to the burglary in the first degree charge instead of the home invasion charge. Moreover, the court agreed with the testimony of the petitioner's trial counsel that there was no good faith basis on which to bring a motion to dismiss the home invasion charge in the trial court. After the court rendered its judgment denying the habeas petition, the petitioner filed a petition for certification to appeal to this court, which the habeas court granted.

In addressing the petitioner's sole claim on appeal, we first set forth the applicable standard of review. Although "[t]he underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous"; (internal quotation marks omitted) *Mozell* v. *Commissioner of Correction*, 87 Conn. App. 560, 564–65, 867 A.2d 51, cert. denied, 273 Conn. 934, 875 A.2d 543 (2005); "the effectiveness of an attorney's representation of a criminal defendant is

a mixed determination of law and fact that . . . requires plenary review . . . .'' (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). ''To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong.'' (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). When reviewing a claim of ineffective assistance of counsel, a ''court can find against a petitioner on *either* ground, whichever is easier.'' (Emphasis added.) *Valeriano* v. *Bronson*, 209 Conn. 75, 86, 546 A.2d 1380 (1988). To satisfy the prejudice prong of *Strickland*, ''a claimant must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' '' *Ledbetter* v. *Commissioner of Correction*, supra, 458, quoting *Strickland* v. *Washington*, supra, 694. However, in the context of a guilty plea, our Supreme Court has determined that, ''[u]nder the test in *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)], in which the United States Supreme Court modified the prejudice prong of the *Strickland* test for claims of ineffective assistance when the conviction resulted from a guilty plea, the evidence must demonstrate that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.'' [4] (Internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 833, 950 A.2d 1220 (2008).

[4] The petitioner did not mention the *Hill* prejudice prong in his appellate brief. The respondent, the Commissioner of Correction, in his appellate

On appeal, the petitioner argues that his trial counsel provided ineffective assistance by failing to file a motion to dismiss the home invasion charge to which he had ultimately pleaded guilty. There was no evidence before the habeas court, however, showing that, but for his trial counsel's alleged deficient performance, the petitioner would have insisted on going to trial. Furthermore, there is nothing in the habeas record indicating that the dismissal of the home invasion charge would have resulted in any meaningful reduction in the petitioner's exposure to a lengthy period of incarceration. The petitioner's initial exposure was, without enhancements, eighty-one years. After additional charges were added, including a second home invasion charge, the petitioner's exposure became 121 years, without enhancements. As the petitioner himself concedes, "even without the home invasion charge, [he] was charged with enough offenses to enable the court to impose what could effectively be a life long sentence. Removing the home invasion's potential . . . sentence . . . would not have denied the state the significant sentence it was seeking." For this reason, and because there is no evidence in the record to establish that, but for his trial counsel's allegedly deficient performance, the petitioner would have insisted on going to trial, the petitioner's claim of ineffective assistance of counsel cannot succeed because of his failure to demonstrate that he was prejudiced by any failure of his trial counsel. See *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 833.

This conclusion is further supported by the petitioner's appellate brief, in which his arguments focus on the inapplicability of the home invasion statute and the structure of the plea agreement, instead of on the *Hill*

brief, set forth the *Hill* prejudice prong as the standard to be applied in this appeal. The petitioner, in his reply brief, did not dispute the applicability of the *Hill* prejudice prong to this appeal.

requirement that, but for counsel's deficient performance, he would have insisted on going to trial. Specifically, the petitioner claims in his brief, without any factual support in the habeas court record, that, but for his trial counsel's alleged deficient performance, he would have "been afforded the opportunity to plead guilty to . . . a class B felony carrying a minimum sentence of five years rather than a class [A] felony carrying a minimum sentence of ten years." Thus, even if his trial counsel had filed a motion to dismiss the home invasion charge and that motion had been granted, the petitioner has failed to demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Accordingly, the petitioner has failed to satisfy the prejudice prong of the *Hill* test, and his claim of ineffective assistance of counsel fails.

The judgment is affirmed.

In this opinion the other judges concurred.

PAMELA BEVILACQUA *v.* JOHN BEVILACQUA
(AC 42518)

Elgo, Moll and Pellegrino, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and entering related financial orders. He claimed that the court abused its discretion in denying his request for a continuance of the trial, erred by ordering him to pay periodic alimony to the plaintiff, contrary to the parties' prenuptial agreement, and erred by awarding certain real property to him in its distribution order. *Held*:

1. The trial court's denial of the defendant's motion for a continuance of the trial was not an abuse of discretion; although the delays in the trial caused by the illness of the defendant's counsel and by the lack of an available judge were outside of the parties' control, by the time of the defendant's motion, the matter had been pending for more than 1000 days and involved the custody of minor children, and the defendant's

unsubstantiated claim that he required a continuance because could not miss additional days of work was unavailing.

2. The trial court properly concluded that the enforcement of the parties' prenuptial agreement would be unconscionable and properly awarded the plaintiff alimony; the defendant was responsible for his absence from the trial, which he claimed prevented him from contradicting the plaintiff's testimony regarding her capabilities or her employability, and there was evidence in the record that injuries the plaintiff sustained in a motor vehicle accident impaired her ability to work full-time and to achieve the earning capacity she had at the time she signed the prenuptial agreement, which represented a dramatic change in her financial circumstances.

3. The trial court properly determined the ownership and value of certain real properties and properly awarded those properties to the defendant; the defendant had listed the properties and assigned values to the properties in his prenuptial disclosure, there was evidence that the defendant had received mail regarding the properties from a taxing authority and the defendant did not appear at trial to challenge his ownership of the properties, and, because the defendant did not provide the court with a financial affidavit or other evidence of the value of the properties at the time of the dissolution, the court properly determined the value of those properties on the basis of the evidence that was available to it.

Argued September 22—officially released November 10, 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 referred to the Regional Family Trial Docket at Middletown, where the matter was tried to the court, *Hon. Gerald I. Adelman*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

John Bevilacqua, self-represented, the appellant (defendant).

John J. Mager, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. The self-represented defendant, John Bevilacqua, appeals from the judgment of the trial

court dissolving his marriage to the plaintiff, Pamela Bevilacqua, and entering related financial orders. On appeal, the defendant claims that the court (1) abused its discretion in denying his request for a continuance of the trial, (2) erred by ordering him to pay periodic alimony to the plaintiff,[1] and (3) erred by awarding certain real property to him in its property distribution order. We affirm the judgment of the trial court.

The following facts and procedural history, as set forth by the trial court in its memorandum of decision or otherwise gleaned from the record, are relevant to the defendant's claims on appeal. The parties were married on August 9, 2003. Prior to their marriage, the parties executed a prenuptial agreement (agreement) that provided that the defendant would not be obligated to pay spousal support in the event of a separation or divorce. After the plaintiff consulted with an attorney, she signed the agreement. The plaintiff also completed a financial affidavit that was attached to the agreement. The defendant similarly completed a financial affidavit in connection with the agreement, in which he disclosed his interest in two pieces of real property in the Bahamas valued at $40,000 and $60,000, respectively. The parties executed the agreement on their wedding day.

The court found that the marriage was troubled from its beginning. The parties have two minor children, who lived almost exclusively with the plaintiff during the pendency of this action. After the birth of the parties' first child, their relationship suffered due to the stresses of young parenthood. In 2005, the plaintiff commenced

[1] The defendant phrases his second claim differently, arguing that the "court erred in failing to establish and quantify the plaintiff's earning capacity in fashioning financial orders, resulting in a finding of 'unconscionability' of the parties' prenuptial agreement." The effect of that unconscionability holding, however, was that the court awarded the plaintiff alimony that would otherwise have been precluded by the parties' prenuptial agreement.

an action for dissolution of marriage, but she subsequently withdrew that action in an attempt to save the marriage. The parties attended marriage counseling and "were able to enjoy several good years of marriage, during which time their second [child] was born in late 2005."

In 2012, the parties were involved in a motor vehicle accident (accident). As of June, 2015, the plaintiff's treating neurologist diagnosed her as suffering from prolonged post-concussion syndrome caused by a mild traumatic brain injury. As a result of her injuries, the plaintiff has been unable to return to her profession as a teacher. She presently performs clerical work part-time in her brother's chiropractic office. The defendant also was injured in the accident, but his injuries did not affect his ability to remain in his profession as a school counselor. The plaintiff's inability to do certain things as a result of her injuries created significant tension between her and the defendant, and she again commenced a dissolution of marriage action in 2013. The plaintiff withdrew that second dissolution action for the sake of the parties' children and because "she felt that she had to work to try to save the family relationship." Her efforts were not successful.

The plaintiff commenced the present dissolution of marriage action on November 25, 2015. A three day trial followed, at which both parties were represented by counsel. The defendant, however, did not appear at trial and did not respond to his counsel, who, while the trial was in progress, had attempted to reach him on multiple occasions. As a result, the defendant also failed to file a financial affidavit with the court at the time of trial. Following the trial, the court issued a forty-four page memorandum of decision, ordering, among other things (1) sole custody of the children to the plaintiff, (2) that the defendant pay periodic alimony to the plaintiff, and

(3) an award of the Bahamian properties to the defendant. This appeal followed.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case, such as demeanor and attitude of the parties at the hearing. . . . The test is whether the court could reasonably conclude as it did . . . indulging every presumption in its favor. . . . A trial court's conclusions are not erroneous unless they violate law, logic, or reason or are inconsistent with the subordinate facts in the finding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Ehrenkranz* v. *Ehrenkranz*, 2 Conn. App. 416, 420–21, 479 A.2d 826 (1984).

"Review of a trial court's exercise of its broad discretion in domestic relations cases is limited to whether that court correctly applied the law and whether it could reasonably conclude as it did. . . . The trial court must consider all relevant statutory criteria in a marital dissolution action but it does not have to make express findings as to the applicability of each criteria. . . . The trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case." (Citations omitted; internal quotation marks omitted.) *Mathis* v. *Mathis*, 30 Conn. App. 292, 293, 620 A.2d 174 (1993).

"In general the same sorts of [criteria] are relevant in deciding whether [an alimony] decree may be modified as are relevant in making the initial award of alimony. . . . More specifically, these criteria, outlined

in [General Statutes] § 46b-82, require the court to consider the needs and financial resources of each of the parties . . . as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties. . . .

"Although financial orders in family matters are generally reviewed for an abuse of discretion . . . this court applies a less deferential standard when the decision of the trial court is based not on an exercise of discretion but on a purported principle of law. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citation omitted; internal quotation marks omitted.) *Rubenstein* v. *Rubenstein*, 172 Conn. App. 370, 375–76, 160 A.3d 419 (2017).

I

The defendant first claims that the court abused its discretion by denying his motion for a continuance of the trial. We disagree.

The following facts are relevant to this issue. The trial originally was scheduled to take place in March, 2018, but it was continued when one of the attorneys fell ill. The matter was continued a second time in August, 2018, due to the lack of an available judge, and it was rescheduled for October 1, 2018. On September 17, 2018, the defendant filed a motion for a continuance of the trial. In that motion, he stated "party not available" and that he "is a high school counselor . . . . He has . . . missed about [thirty] days from work for this matter and cannot miss more days. Case was scheduled for trial in [August] 2018, but was cancelled by the court." The defendant listed a series of dates on which he would be available, each of which corresponded

with typical school vacation periods, including Christmas Eve. The court summarily denied the defendant's motion, stating: "No parties present. No counsel present."[2] In its November 27, 2018 decision, the court stated, with respect to the denial of the motion for a continuance, that "[b]ecause the trial had been scheduled since August [2018] and the matter had been pending before the court for over two years, that request . . . was denied."[3]

The defendant argues that the court did not afford him the opportunity to be heard on the motion and that there was nothing in the record to support the court's denial. He relies on this court's decision in *Mensah* v. *Mensah*, 167 Conn. App. 219, 143 A.3d 622, cert. denied, 323 Conn. 923, 150 A.3d 1151 (2016), in which we outlined various factors that a trial court should consider when reviewing a motion for a continuance.[4] The defendant argues that the court ignored those factors, acted arbitrarily and in an abuse of its discretion, and thereby deprived him of his right to participate in the trial and to defend himself.

[2] Although the defendant takes issue with this language, we note that it is boilerplate language available, when applicable, in the judges' order entry system.

[3] The court also stated: "As of the start of the trial, this matter had been pending for over 1000 days. The court makes every effort to resolve custody matters within the first year after filing . . . . This matter has been on the docket . . . for nearly three times the normal length of most cases. . . . It is crucial that the matter be resolved as soon as possible. Whenever custody is in dispute, the court views the children involved as being at risk. A resolution and a stable parenting situation are necessary to eliminate such a risk."

[4] "Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the [movant's] personal responsibility for the timing of the request . . . ." (Internal quotation marks omitted.) *Mensah* v. *Mensah*, supra, 167 Conn. App. 223.

The plaintiff argues that the defendant's claim is meritless because this matter had been pending for more than 1000 days and involved the custody of two children. The plaintiff states that the defendant provided no evidence in support of his motion that his employment was at risk, and he had two months to get his affairs in order at work so that he could actively participate in the trial.

We begin with our standard of review. "Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances. . . . An abuse of discretion must be proven by the appellant by showing that the denial of the continuance was unreasonable or arbitrary." (Internal quotation marks omitted.) *Robelle-Pyke* v. *Robelle-Pyke*, 81 Conn. App. 817, 823, 841 A.2d 1213 (2004). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Internal quotation marks omitted.) *O'Connell* v. *O'Connell*, 101 Conn. App. 516, 526, 922 A.2d 293 (2007).

This court has held that it is not an abuse of discretion to deny a motion for continuance in factual circumstances similar to those in the present case. In *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 485 A.2d 1362 (1985), the respondent mother appealed from a termination of her parental rights. As part of her appeal, she argued that the trial court's denial of her motion for continuance, predicated on her assertion that she could not leave her place of employment, constituted a violation of due process. Id., 187. The trial court denied the motion "[i]n view of the long pendency of this case, the well-documented notices that were sent of [the]

. . . trial dates, and the nature of the reason given for seeking the continuance." (Internal quotation marks omitted.) Id. This court affirmed, concluding that, "[i]n view of the long history of these proceedings and the respondent's minimal economic reason for the continuance, we hold that the . . . trial court's denial of the continuance was well within its discretion." Id., 190.

The trial delays in the present case were outside of the parties' control. Nevertheless, the long pendency of the case was still a proper factor for the court to consider when ruling on the defendant's motion for a continuance of the trial. The defendant's unsubstantiated claim in support of his motion, that he could not miss more days of work, is no more compelling than the respondent's claim in *In re Juvenile Appeal (85-2)*. Accordingly, under these circumstances the trial court did not abuse its discretion in denying the defendant's motion for a continuance of trial.

II

The defendant's second claim is that the court erred by awarding periodic alimony to the plaintiff on holding that enforcement of the parties' prenuptial agreement would be unconscionable. We disagree.

The following facts are relevant to this issue. The agreement provides in relevant part: "Each party hereby waives any right he or she might otherwise have or acquire to seek any alimony or spousal support from the other in any action for a divorce, dissolution of marriage, legal separation or annulment. The parties intend that this waiver shall apply to claims either might otherwise have for temporary or pendente lite alimony or spousal support during the pendency of the action as well as to claims for alimony or spousal support to be awarded in connection with any final judgment in such action." The court concluded that, in light of the injuries the plaintiff suffered as a result of the accident,

it is unlikely that she will be able to return to her profession and earn a salary commensurate with her training and experience. The court stated that this created a factual scenario "far beyond the contemplation of the parties when they executed the [agreement]. The fact that . . . the plaintiff cannot earn what she disclosed her income to be in 2003 makes the enforcement of the prohibition to seek spousal support unconscionable."

In support of his claim, the defendant raises two arguments. He first claims that he was not able to provide testimony of his personal knowledge and observations of the plaintiff's capabilities or to offer evidence as to her employability, in violation of § 46b-82. The defendant also argues that the court erred by relying solely on the plaintiff's current employment without any evidence that her earning capacity is limited to such employment due to her health. In response, the plaintiff argues that the defendant's inability to provide testimony was due to his failure to appear at trial, and, in the alternative, that the court properly ordered the defendant to pay alimony because the totality of the evidence demonstrated that the agreement was unconscionable and unenforceable.

Prenuptial agreements are governed by General Statutes § 46b-36a et seq., also known as the Connecticut Premarital Agreement Act. Those statutes codified our Supreme Court's decision in *McHugh* v. *McHugh*, 181 Conn. 482, 485–86, 436 A.2d 8 (1980), which provided that prenuptial agreements "are generally enforceable where three conditions are satisfied: (1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice." With respect to the third prong,

which is central to this appeal, General Statutes § 46b-36g (a) (2) clarifies that "[a] premarital agreement or amendment shall not be enforceable if the party against whom enforcement is sought proves that . . . [t]he agreement was unconscionable when it was executed *or when enforcement is sought* . . . ." (Emphasis added.)

Whether the trial court erred by ordering the defendant to pay alimony to the plaintiff depends on whether it properly determined that the agreement was unconscionable at enforcement. It is well established that "[t]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case. . . . Thus, our [appellate review] is unlimited by the clearly erroneous [or abuse of discretion] standard. . . . This means that the ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and that the trial court's determination on that issue is subject to a plenary review on appeal." (Internal quotation marks omitted.) *Crews* v. *Crews*, 295 Conn. 153, 163–64, 989 A.2d 1060 (2010).

The defendant first claims that the court erred by determining that the prenuptial agreement was unconscionable because he was not able to contradict the plaintiff's testimony at trial. His absence at trial, however, was a matter of his own doing. He moved for a continuance of the trial, provided nothing to the court in support of that motion, and upon receiving the court's denial, he did not explore additional options or communication with the court or even with his attorney, who, during the course of the trial, diligently sought his participation and additional financial information. This court has held that "[w]here a party's own wrongful conduct limits the financial evidence available to the court, that party cannot complain about the resulting calculation of a monetary award." (Internal quotation

marks omitted.) *Rosenfeld* v. *Rosenfeld*, 115 Conn. App. 570, 581, 974 A.2d 40 (2009).

The defendant also argues that the court relied "solely on the amount of the plaintiff's current part-time employment without any evidence that her earning capacity is limited to such employment due to health or medical disability," and that "the reports entered into evidence clearly and unambiguously state that the plaintiff is capable of all daily activities . . . ." The report authored by neurologist Thomas Toothaker, however, states that the plaintiff "retained [the] ability to perform all activities *of daily living*," not that the plaintiff was capable of performing all activities in general or those pertaining to full-time employment. (Emphasis added.) Additionally, Toothaker's report highlights several symptoms and issues the plaintiff continued to experience several years after the accident, which he opined were a result of "prolonged post-concussion syndrome as a result of [a] mild traumatic brain injury."[5] The report from James Connolly, a psychologist, identified similar persistent issues.[6]

In its decision, the court cited *Bedrick* v. *Bedrick*, 300 Conn. 691, 705–708, 17 A.3d 17 (2011). In *Bedrick*, the court held that enforcement of the parties' postnuptial

[5] Toothaker's report identifies the plaintiff's symptoms as "continued pressure-like headaches and cognitive issues" and "forgetting what she was saying and difficulty helping with her children's homework" and further notes that "her neuropsychological evaluation was intact except for some variable performance with executive functioning and visual memory which were . . . consistent with post-concussion syndrome"; "she would become easily distressed and feel overwhelmed"; she had "difficulty with concentration and multitasking"; and she was still suffering from tension and migraine headaches and fatigue.

[6] Connolly's evaluation identifies the plaintiff's symptoms as "memory difficulties, headache and nausea"; "feelings of confusion"; "some ongoing level of mild impairment"; "[somewhat elongated] processing time on . . . tests and answering some questions"; "occasional irritability"; "anxiety and depression"; and "difficulties concentrating and problems with becoming easily fatigued."

agreement would have been unconscionable because the financial circumstances of the parties had changed dramatically since the agreement was modified. Id., 706–708. Specifically, the court concluded that the fact that the parties had had a child together and that the husband's business had alternately prospered and deteriorated during the marriage constituted a sufficient change in their financial circumstances to render the agreement unconscionable and unenforceable. Id., 707–708.

The standards for determining whether prenuptial or postnuptial agreements are unconscionable at enforcement are analogous: "[T]he question of whether enforcement of a *prenuptial* agreement would be unconscionable is analogous to determining whether enforcement would work an injustice. . . . Thus, the trial court's finding that enforcement of the *postnuptial* agreement would work an injustice was tantamount to a finding that the agreement was unconscionable at the time the defendant sought to enforce it."[7] (Citation omitted; emphasis added.) Id., 707–708.

In the present case, there was evidence in the record that the accident impaired the plaintiff's ability to work full-time and, as a result, she was forced to obtain part-time employment at a salary far lower than the one she earned at the time the agreement was executed. Additionally, with the exception of several selectively chosen excerpts from the expert reports in evidence, the defendant cites to no evidence contradicting the

[7] In *Bedrick*, the court articulated the test for enforceability predicated on both § 46b-36g and the three-part test set forth in *McHugh* v. *McHugh*, supra, 181 Conn. 485–86. The third prong of that test—whether "the circumstances of the parties at the time the marriage is dissolved [are] so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice"; id.—informed the court's conclusion that "the question of whether enforcement of a prenuptial agreement would be unconscionable is analogous to determining whether enforcement would work an injustice." *Bedrick* v. *Bedrick*, supra, 300 Conn. 707.

plaintiff's position. In light of the plaintiff's injuries and her reduced earning capacity, we conclude, on the basis of our review of the law and record, that the court properly concluded that enforcement of the agreement would be unconscionable, and that it properly awarded the plaintiff alimony.

III

The defendant's last claim is that the court improperly awarded him two pieces of real property in the Bahamas. We disagree.

The following facts are relevant to this issue. With respect to the defendant's ownership interest in the two Bahamian properties, the court determined that "[t]here was no clear testimony as to whether said properties were owned by the defendant." Although the properties were included among the defendant's assets disclosed in connection with the agreement, he denied ever owning any property in the Bahamas during his deposition for the dissolution matter. The plaintiff, however, offered two letters from the Bahamian taxing authority that were mailed to the defendant's aunt on December 21, 2017, "in care of [the defendant]." The court concluded that the "evidence strongly suggests that the defendant has been less than candid about any ownership interest he may have in real estate in the Bahamas" and that "[h]is deposition testimony . . . is replete with vague answers and incomplete information and certainly places his credibility in question." Thus, the court awarded those two properties to the defendant, and valued them at $40,000 and $60,000 respectively—the same value the defendant had provided for them on his prenuptial disclosure.

In support of his claim on appeal, the defendant argues that (1) the court was not provided with any certified deeds or instruments that established his ownership of the Bahamian properties, and (2) the court

should have applied the "long settled principle" in this state that property is valued as of the date of dissolution. We do not agree.

This court "will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action . . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Powers* v. *Hiranandani*, 197 Conn. App. 384, 394–95, 232 A.3d 116 (2020).

With respect to ownership of the Bahamian properties, the court awarded those properties to the defendant on the basis of his prenuptial financial disclosure and the letters from the Bahamian taxing authority. The defendant never provided the court with evidence of a transfer of ownership of the properties, and he did not appear at trial to contradict the plaintiff's evidence or otherwise challenge his ownership of the properties. Accordingly, the court did not err by awarding him those properties.

With respect to valuation, the value assigned to property in a dissolution proceeding should generally be calculated at the time of dissolution. See id., 407. In the present case, however, the defendant did not provide the trial court with a financial affidavit. In a dissolution proceeding, both parties "are required to itemize all of their assets in a financial affidavit and to provide the court with the approximate value of each asset." (Internal quotation marks omitted.) Id.

In *Powers*, the defendant did not provide the court with the value of certain real property on his financial

affidavit. As a result, the trial court relied on testimony and other financial affidavits to determine the value of the property in dispute. Id., 406–407. On appeal to this court, the *Powers* defendant argued that the trial court abused its discretion by "equitably distributing property between parties without properly determining the value of the real property." (Internal quotation marks omitted.) Id., 406. This court rejected that argument and held that if parties fail to provide the approximate value of each asset on their financial affidavits in a dissolution proceeding, then "*the equitable nature of the proceedings precludes them from later seeking to have the financial orders overturned on the basis that the court had before it too little information as to the value of the assets distributed.*" (Emphasis in original; internal quotation marks omitted.) Id., 407. Accordingly, this court concluded that, without evidence of the value of the disputed property, the trial court did not abuse its discretion. Id., 408. The same is true in the present case.

We therefore conclude that the trial court properly determined the ownership and value of the Bahamian properties on the basis of the evidence that was available to it.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL GASTON
(AC 43499)

Elgo, Moll and Pellegrino, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed, claiming that the trial court committed plain error pursuant to the applicable rule of practice (§ 60-5) when it permitted W, the key witness against him, to testify instead of accepting W's invocation of his fifth amendment right against self-incrimination.

W previously had been charged with felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree in connection with the victim's death. A different trial court found no probable cause with respect to the felony murder charge against W and, after a trial, found him not guilty of robbery in the first degree and conspiracy to commit robbery in the first degree. When W invoked his fifth amendment privilege at the start of the state's direct examination of him, the court instructed counsel who had represented W during the proceedings in W's case to advise W of his rights. W then testified against the defendant, who did not object to or seek to preclude W's testimony. *Held* that this court lacked subject matter jurisdiction over the defendant's appeal, as he lacked standing to challenge the trial court's rejection of W's invocation of his fifth amendment privilege against self-incrimination; that right is a personal privilege that adheres to the person and not to information that may incriminate him, and, accordingly, the appeal was dismissed.

Argued September 22—officially released November 10, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder, robbery in the first degree, conspiracy to commit robbery in the first degree and felony murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo*, *J.*; verdict of guilty of murder, robbery in the first degree and felony murder; thereafter, the court vacated the verdict as to robbery in the first degree and felony murder, and rendered judgment of guilty of murder, from which the defendant appealed. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Michael Gaston, appeals from the judgment of conviction, rendered after a jury

trial, of murder in violation of General Statutes § 53a-54a. The threshold issue in this appeal is whether the defendant has standing to challenge the trial court's initial decision refusing to accept a key state witness' invocation of his fifth amendment right against self-incrimination and, following the witness' consultation with counsel, permitting the witness to testify. We conclude that the defendant does not have standing to raise this claim and, accordingly, we dismiss this appeal.

The following procedural history and facts are relevant to our resolution of this appeal. On June 7, 2016, the defendant was arrested in connection with a robbery and an assault that occurred on May 16, 2016, resulting in the death of the victim, Marshall Wiggins. By way of a substitute long form information dated May 31, 2018, the defendant was charged with murder in violation of § 53a-54a, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), and felony murder in violation of General Statutes § 53a-54c. The defendant pleaded not guilty to the charges and elected to be tried by a jury. The trial began on May 31, 2018.

At trial, the state called as its key witness Laurence Washington, who was the sole witness to the underlying incident called by the state. In connection with the same incident, Washington previously had been charged with felony murder in violation of § 53a-54c, robbery in the first degree in violation of § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134 (a) (2). After a probable cause hearing, the trial court, *Crawford*, *J.*, made a finding of no probable cause with respect to the felony murder charge against Washington. Following a court trial conducted in 2017, Washington was found not guilty of the

charges of robbery in the first degree and conspiracy to commit robbery in the first degree.

Thereafter, during the defendant's trial, at the start of the state's direct examination of Washington, Washington almost immediately invoked his fifth amendment privilege against self-incrimination. Although the trial court, *D'Addabbo*, *J.*, informed Washington that he no longer had charges pending against him, and, therefore, he had nothing for which he could incriminate himself, Washington continued to assert the privilege. The court then stated: "[B]efore anything happens, I think it would be appropriate if we let you speak to an attorney." The court located an attorney, Dennis McMahon, in the courthouse to advise Washington of his rights and then instructed the attorney to remain in the courtroom in the event Washington desired to speak with him. Attorney McMahon had represented Washington in the aforementioned probable cause hearing and robbery trial. After speaking with counsel, Washington returned to the witness stand. Upon his return to the witness stand, the court asked Washington a series of questions, including if the attorney "answer[ed] all [of] the questions that [Washington] had for him . . . ." The court also asked Washington if he "need[ed] any more time to answer any questions . . . ." Last, the court asked if Washington would "be answering questions" once he returned to the witness stand. Washington answered each of the preceding questions, the first and last in the affirmative, and the second in the negative, and then proceeded to testify against the defendant. At no time did the defendant object to or otherwise seek to preclude Washington's testimony.

On June 6, 2018, the jury found the defendant guilty of murder in violation of § 53a-54a, robbery in the first degree in violation of § 53a-134 (a) (2), and felony murder in violation of § 53a-54c, and not guilty of conspiracy to commit robbery in the first degree in violation of

§§ 53a-48 and 53a-134 (a) (2). On July 25, 2018, pursuant to *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), the trial court vacated the conviction of robbery in the first degree and felony murder, subject to reinstatement in the event that "there is a reversal on appeal and a retrial," and sentenced the defendant on the murder conviction to fifty years of incarceration, with a mandatory minimum term of incarceration of twenty-five years. This appeal followed.

Relying on Practice Book § 60-5, the defendant's sole claim on appeal is that the trial court committed plain error by failing to accept Washington's invocation of his fifth amendment right against self-incrimination and thereafter permitting him to testify after he had consulted with counsel.[1] The defendant asserts that the court should have excused Washington after he had invoked his fifth amendment privilege. In response, the state argues, as an initial matter, that the defendant lacks standing to challenge the court's decision in that regard, and, therefore, this court lacks subject matter jurisdiction to entertain the defendant's claim. We agree with the state.

We begin by reviewing the well established principles of standing. "Generally, standing is inherently intertwined with a court's subject matter jurisdiction. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *State* v. *Brito*, 170 Conn. App. 269, 285, 154 A.3d 535, cert. denied, 324 Conn. 925, 155 A.3d 755 (2017). "A determination regarding standing concerns a question of law over which we

[1] The defendant concedes that this claim was not preserved for appellate review, and he does not seek review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), because he characterizes his claim as an evidentiary, nonconstitutional claim.

exercise plenary review." *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, 197 Conn. App. 269, 273, 231 A.3d 386 (2020).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he 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. . . . The question of standing does not involve an inquiry into the merits of the case. It merely requires the party to make allegations of a colorable claim of injury to an interest which is arguably protected or regulated by the statute or constitutional guarantee in question." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 664, 881 A.2d 1005 (2005).

Relying on, inter alia, *State* v. *Williams*, 206 Conn. 203, 536 A.2d 583 (1988), the state argues that the defendant lacks standing to challenge the court's rejection of Washington's invocation of his fifth amendment right against self-incrimination because it is a personal privilege. The defendant contends that he has standing because he is an aggrieved party challenging what he characterizes as an evidentiary ruling made by the trial court. More specifically, he asserts that he has an interest in whether Washington could testify after invoking his fifth amendment right and that he has suffered an injury because the court allowed Washington, the state's key witness, to testify against him. We agree with the state and reject the defendant's contentions.

Courts have routinely held that "the [f]ifth [a]mendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him." (Emphasis omitted.) *Couch* v. *United States*, 409 U.S. 322, 328, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973). "By its very nature, the privilege [against compulsory

self-incrimination] is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." Id., 327.

In *State* v. *Williams*, supra, 206 Conn. 203, our Supreme Court applied the "general principle that a defendant does not have standing to challenge the method by which a witness against him has been immunized." Id., 207. In *Williams*, the chief court administrator appointed the Honorable Anthony V. DeMayo, a judge of the Superior Court, to conduct an inquiry into allegations of professional gambling and municipal corruption in the city of Torrington. Id., 205. During the course of the inquiry, the court granted immunity, under General Statutes § 54-47a, to a witness who had previously invoked his fifth amendment privilege against self-incrimination. Id. The defendant filed a motion seeking to bar the admission of the witness' testimony on the basis of that grant of immunity. Id. The trial court found that the prior grant of immunity was invalid because it was Judge DeMayo who acted on the earlier application for immunity, and he could not, in essence, "wear two hats . . . ." (Internal quotation marks omitted.) Id., 206. Nevertheless, after the state had applied for another grant of immunity so that the witness would testify in the hearing on that motion, the court granted the second application. Id. The witness then testified in accordance with the court's order in such a manner as to implicate the defendant in the crimes charged. Id.

"The trial court concluded that, although the general rule of standing would forbid the vicarious assertion of fifth amendment rights, this case called for an exception because, in its view, the grant of immunity had been made without authority." Id. It reasoned that because the grant of immunity by Judge DeMayo was " 'clearly illegal,' " the circumstances demanded an exception to the general rule that a party has no standing to assert

a privilege belonging to another. Id., 207. The trial court later suppressed the testimony. Id., 206.

On appeal, our Supreme Court concluded that the circumstances of the case did not warrant a departure from the general principle that a defendant does not having standing to challenge the method by which a witness against him has been immunized. Id., 207. In deciding *Williams*, our Supreme Court relied on the well settled principle that "the right to be free from testimonial compulsion is a personal one that may not be asserted vicariously." Id., 208, citing *Fisher* v. *United States*, 425 U.S. 391, 398–99, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), and *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610–11, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); see also *State* v. *Pierson*, 208 Conn. 683, 686–89, 546 A.2d 268 (1988) (defendant lacks standing to challenge witness' waiver of psychiatrist-patient privilege), cert. denied, 489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989); *State* v. *Pierson*, supra, 689 ("[l]ike the marital privilege or *the privilege against self-incrimination* an erroneous denial of the psychiatrist-patient privilege does not infringe upon the right of any person other than the one to whom the privilege is given" (emphasis added)).

We conclude that the defendant's particular challenge in *State* v. *Williams*, supra, 206 Conn. 203—i.e., to the postinvocation grant of immunity pursuant to § 54-47a to a witness who testified against him—is substantially similar to the sole claim raised in the present appeal—i.e., that Washington should not have been permitted to testify after he initially invoked his fifth amendment privilege against self-incrimination. In light of the similarity between such claims, we align our analysis with the standing principles applied in *Williams* by which we are bound and conclude that the defendant in the present case lacks standing to challenge the trial court's

rejection of Washington's invocation of his fifth amendment privilege against self-incrimination.[2] Accordingly, we lack subject matter jurisdiction over this appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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[2] We recognize that there are numerous cases in which our Supreme Court and this court have addressed the merits of a defendant's challenge to a trial court's *allowance* of a witness' invocation of his fifth amendment right against self-incrimination. See, e.g., *State* v. *Simms*, 170 Conn. 206, 207–10, 365 A.2d 821 (concluding that defendant's right to compulsory process under sixth amendment to federal constitution was not violated by trial court's allowance of witness' invocation of fifth amendment privilege against self-incrimination), cert. denied, 425 U.S. 954, 96 S. Ct. 1732, 48 L. Ed. 2d 199 (1976); *State* v. *Luther*, 152 Conn. App. 682, 697–701, 99 A.3d 1242 (concluding that defendant's constitutional right to present defense was not violated by trial court's allowance of witness' invocation of fifth amendment privilege against self-incrimination), cert. denied, 314 Conn. 940, 108 A.3d 1123 (2014); *State* v. *Ayuso*, 105 Conn. App. 305, 309–15, 937 A.2d 1211 (concluding that defendant's right to compulsory process under sixth amendment to federal constitution was not violated by trial court's allowance of witness' invocation of fifth amendment privilege against self-incrimination), cert. denied, 286 Conn. 911, 944 A.2d 983 (2008); *State* v. *Mourning*, 104 Conn. App. 262, 275–77, 934 A.2d 263 (same), cert. denied, 285 Conn. 903, 938 A.2d 594 (2007); *State* v. *Brown*, 22 Conn. App. 521, 524–27, 577 A.2d 1120 (same), cert. denied, 216 Conn. 825, 582 A.2d 204 (1990).

As an initial matter, we note that, in those cases, the courts did not address the question of standing. More significantly, however, the claims addressed on the merits in those cases involved the trial court's *acceptance* of a witness' invocation of his fifth amendment privilege against self-incrimination, which may conflict with the accused's constitutional rights to compel testimony and/or to present a defense, whereas, in the present case, the defendant challenges the court's *rejection* of Washington's invocation of such privilege, akin to the claim in *Williams*. Accordingly, we perceive no conflict between the merits discussions in the aforementioned cases and our holding herein.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 201

STEVEN K. STANLEY *v.* ANGELA MACCHIARULO
(AC 42862)

Alvord, Prescott and DiPentima, Js.

Argued October 26—officially released November 10, 2020

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

Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* ROY L., SC 20152
Judicial District of Hartford

Criminal; Whether Forensic Interview of Victim Properly Admitted Under Medical Treatment Exception to Hearsay Rule; Whether Prosecutor Engaged in Impropriety during Closing Argument; Whether Evidence Sufficient to Support Convictions; Whether First Degree Sexual Assault and Risk of Injury Statutes are Unconstitutionally Vague as Applied. Following a trial to the court, the defendant was convicted of sexual assault in the first degree, sexual assault in the fourth degree and risk of injury to a minor stemming from his inappropriate touching of his ten year old daughter. The victim claimed that, on multiple occasions, the defendant instructed her to lie down on his bed after she took a shower and that he would then then rub her genital area with a wash cloth. The victim claimed that she told the defendant that his conduct made her uncomfortable and asked him to stop, but that he refused. The Department of Children and Families (DCF) had investigated allegations of similar misconduct by the defendant when the victim was three years old. The defendant had claimed at the time that the victim had a skin condition that necessitated the use of his purported cleaning procedure. A physical examination, however, showed that the victim had no skin condition on her genital area. The defendant subsequently acknowledged that his cleaning procedure was not necessary and agreed to follow the cleaning practices recommended by the victim's pediatrician. The defendant claims that he did not touch the victim's genital area following the conclusion of DCF's investigation. In this appeal from his conviction, the defendant argues that the trial court improperly used a "de minimus" standard in determining the admissibility of a recording of a forensic interview of the victim and that, even under the proper standard, the recording should not have been admitted because the interview had no medical purpose. The defendant also argues that he was deprived of a fair trial because, during closing argument, the prosecutor mischaracterized testimony by the defendant's girlfriend concerning whether she witnessed the defendant's conduct. The defendant also argues that there was insufficient evidence that he intended to humiliate or degrade the victim or that he gained sexual gratification by touching her to support his conviction of sexual assault in the fourth degree. The defendant additionally argues that

the statutes under which he was convicted of risk of injury to a minor and sexual assault in the first degree, General Statutes §§ 53-21 and 53a-70, respectively, are unconstitutionally vague as applied to him because he did not have fair warning that his conduct was criminal.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

HELEN ZIEGLER BENJAMIN, AS TRUSTEE OF THE WILLIAM ZIEGLER, III FAMILY IRREVOCABLE TRUST *v.* ISLAND MANAGEMENT, LLC, SC 20501
Judicial District of Stamford-Norwalk at Stamford

Limited Liability Companies; Disclosure of Records; Whether Trial Court Properly Concluded That Plaintiff Member Was Entitled to Disclosure of Defendant Company's Financial Records under Both Disclosure Statute (§ 34-255i (b)) and Company's Operating Agreement. The William Ziegler, III Family Irrevocable Trust (Trust) owns a one-sixth membership interest in the defendant limited liability company. Section 5.7 of the defendant's operating agreement provides: "Upon request, each Member . . . shall have the right . . . to inspect and copy any and all of the books and records of the Company." The plaintiffs, as trustees of the Trust, brought this action, claiming that the defendant's refusal to make certain of its financial records available for inspection violated both the operating agreement and General Statutes § 34-255i (b). That statute confers on a member of a "manager-managed limited liability company" the right to inspect and copy any record maintained by the company regarding its "activities, affairs [and] financial condition . . . to the extent the information is material to the member's rights and duties," provided that (1) the purpose for seeking the information is "reasonably related to the member's interest as a member," (2) the information sought is described with "reasonable particularity" in the demand for disclosure, and (3) the information sought is "directly connected to the member's purpose." The plaintiffs sought disclosure of, inter alia, the "general ledger" containing a record of all financial transactions conducted by the defendant and the records containing the salaries of the defendant's managers, officers and employees. The plaintiffs sought disclosure of the defendant's financial records in order to determine the value of the Trust's membership interest in the defendant and to investigate potential wrongdoing by the defendant's managers and officers. The trial court rendered judgment in favor of the plaintiffs, concluding that

the plaintiffs satisfied the criteria of § 34-255i (b) for obtaining the disclosure of the subject records and that the disclosure of the subject records was required under the clear and unambiguous language of § 5.7 of the operating agreement. The defendant appeals and claims, among other things, that the trial court improperly granted the plaintiff's statutory disclosure claim based on wholly unsupported mismanagement allegations and that it erred in not analyzing that claim under the "credible basis" standard. Under that standard, which has been adopted by the Delaware courts, a member seeking inspection of a limited liability company's records must present some evidence to suggest a "credible basis" from which a court can infer that mismanagement or wrongdoing may have occurred. In addition, the defendant claims that the court's analysis of the plaintiffs' statutory disclosure claim was flawed under § 34-255i (b) because the court failed to make findings that satisfied the "directly connected" and "reasonable particularity" criteria of the statute. Finally, contrary to the trial court's determination, the defendant claims that § 5.7 of the operating agreement cannot serve as an independent basis for ordering the disclosure of the subject records because none of the plaintiffs' disclosure demands invoked § 5.7 and the complaint sought to enforce the demands as they were made.

ROCHDI MAGHFOUR *v.* CITY OF WATERBURY, SC 20502
Judicial District of Waterbury

Interpleader; Retroactivity; Whether City Has Valid Lien under General Statutes § 7-464 on Proceeds of Plaintiff's Personal Injury Action Against Third Party Tortfeasor. The plaintiff brought this action seeking resolution of a dispute concerning a lien that his employer, the city of Waterbury, claimed on settlement proceeds that he received from a personal injury action against a third party tortfeasor. Prior to the settlement, the city had provided the plaintiff with notice that it was asserting the lien pursuant to General Statutes § 7-464, as amended by No. 17-165 of the 2017 Public Acts, in order to recover the amount that it paid to cover the medical expenses that the plaintiff incurred as a result of the accident. The act amended the statute by adding a provision giving self-insured municipalities that provide health insurance benefits to its employees "a lien on that part of a judgment or settlement that represents payment for economic loss for medical, hospital and prescription expenses incurred by its employees and covered dependents and family members when such expenses result from the negligence or recklessness of a

third party." The trial court rendered summary judgment in favor of the plaintiff, finding that the city does not have a valid statutory lien on the settlement proceeds because the personal injury action was filed on July 14, 2017, and the act does not apply retroactively to settlements reached or judgments rendered in connection with litigation commenced before its effective date of October 1, 2017. The court explained that its conclusion was compelled by the fact that there is no express language in the act unambiguously providing that it applies retroactively and by the statutory dictates of General Statutes §§ 1-1 (u) and 55-3. Section 1-1 (u) provides that "[t]he passage . . . of an act shall not affect any action then pending," while § 55-3 provides that "[n]o provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person . . . shall be construed to have a retrospective effect." Because, the court found, the act imposed a new obligation on plaintiffs in personal injury actions to reimburse municipalities for medical expenses paid, it could not be applied retroactively. The city appeals from the judgment, claiming that its lien is valid regardless of whether the act applies retroactively because the settlement of the plaintiff's personal injury action occurred on October 23, 2018, long after the effective date of the act, and the plain language of the statute gives the city a lien on the settlement, not on the underlying legal action.

THE METROPOLITAN DISTRICT *v.* CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, SC 20507

Judicial District of Hartford

Sovereign Immunity; Whether Action Barred by Sovereign Immunity Because Claims for Declaratory Relief Actually Sought Monetary Relief; Whether Sovereign Immunity Impliedly Waived in Charter Giving Plaintiff Power to Provide Sewer System; Whether Plaintiff Required to Exhaust Administrative Remedies. The plaintiff, The Metropolitan District, is a municipal corporation chartered by the Connecticut General Assembly in 1929 to provide drinking water and sewer services to the Hartford area. The plaintiff operates a sewer system that collects wastewater and sewage from residential, commercial and industrial properties through a system of pipes that flow to one of several treatment facilities. The defendant, the Connecticut Department of Energy and Environmental Protection, is responsible for the maintenance of the Hartford Landfill, which is no longer in operation but still produces a large amount of leachate that is discharged into the plaintiff's sewer system. In 2016, the plaintiff

notified the defendant that it had been improperly charging the defendant the ordinary domestic sanitary sewage rate instead of the higher remediated groundwater fee. The defendant refused to pay the higher rate. As a result, the plaintiff brought this action seeking a declaratory judgment that it has the authority under its charter to charge the defendant the remediated groundwater fee, to increase the amount of that fee, and to refuse to accept discharges from the Hartford Landfill into its sewer system. The trial court dismissed the action on the ground that it is barred by the doctrine of sovereign immunity. The trial court found that the ultimate goal of the litigation was to get the defendant to pay a higher rate and that, as such, the plaintiff's claims seeking declaratory relief are actually claims for monetary relief that cannot be brought against the state without permission from the claims commissioner or a statutory waiver of sovereign immunity by the legislature. The plaintiff appeals, arguing that the trial court's finding that its claims are for monetary, rather than declaratory, relief is not supported by the allegations of the complaint. The plaintiff also claims that the trial court erred in finding that the legislature did not impliedly waive sovereign immunity in the charter that gave the plaintiff broad powers over the operation and maintenance of the sewer system, including the power to sue. The plaintiff additionally claims that the trial court improperly found that it was required to exhaust its administrative remedies by bringing its claims before the claims commissioner, where its claims are for declaratory relief and the claims commissioner has jurisdiction only over claims for monetary relief against the state.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Deputy Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-AC: Physician Fee Schedule Update – Rate Increase for Specified Long-Acting Reversible Contraceptive (LARC) Device

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after December 1, 2020, SPA 20-AC will amend Attachment 4.19-B of the Medicaid State Plan to increase the rate for Healthcare Common Procedural Coding System (HCPCS) code J7307- Etonogestrel implant system (a code for Nexplanon, which is an implantable, long-acting reversible contraceptive [LARC] device) on the physician office and outpatient fee schedule. This code will be priced at $981.56.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule. This SPA is necessary in order to reflect a recent increase in the acquisition cost for this LARC device and ensure continued access to this device.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $100 in State Fiscal Year (SFY) 2021 and $200 in SFY 2022.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-AC: Physician Fee Schedule Update – Rate Increase for Specified Long-Acting Reversible Contraceptive (LARC) Device.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than November 25, 2020.

NOTICES

NOTICE OF PENDENCY OF REINSTATEMENT APPLICATION

In accordance with Section 2-53 of the Connecticut Practice Book, notice is hereby given that the following individual has filed an application for reinstatement to the bar:

Lawrence Dressler

The Standing Committee on Recommendations for Admission to the Bar of Fairfield County will commence a hearing on the above application on Friday, December 4, 2020 at 10:00 am at Bridgeport Superior Court, 1061 Main Street, Bridgeport, CT 06604 and such future dates as are necessary to conclude the matter.

Please contact Kathleen M. Dunn, Chairperson (203-375-1433) for further information regarding the matter or if you have an objection to the application.

NOTICE OF PENDENCY OF REINSTATEMENT APPLICATION

In accordance with Section 2-53 of the Connecticut Practice Book, notice is hereby given that the following individual has filed an application for reinstatement to the bar:

John Wang

The Standing Committee on Recommendations for Admission to the Bar of Fairfield County will commence a hearing on the above application on Friday, December 11, 2020 at 10:00 am at Bridgeport Superior Court, 1061 Main Street, Bridgeport, CT 06604 and such future dates as are necessary to conclude the matter.

Please contact Kathleen M. Dunn, Chairperson (203-375-1433) for further information regarding the matter or if you have an objection to the application.