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CONNECTICUT REPORTS

Vol. 334

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* LAMONT EDWARDS (SC 19899)

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

Syllabus

Convicted of, among other crimes, murder, conspiracy to commit murder, assault in the first degree, and conspiracy to commit assault in the first degree in connection with an incident in which two men opened gunfire on a car and killed a fifteen year old victim and seriously injured two other victims, the defendant appealed to this court, claiming, inter alia, that the trial court improperly had admitted certain out-of-court statements by two witnesses, T and M, identifying the defendant as the shooter and improperly instructed the jury on third-party culpability by omitting the names of certain potential third-party culprits. On the day of the shooting, the defendant was attending a social gathering at which numerous other individuals were present, including F, T, C, M and H. The defendant had driven F and an unidentified man wearing a do-rag or a hat to the social gathering in a car that the defendant had been renting for approximately three weeks, but F was separated from the defendant shortly after arriving. At some point thereafter, two armed men approached a black car that was stopped in the vicinity and began shooting into the vehicle. The shooters then ran toward the defendant's parked car, entered it, and fled the scene, at which point a nearby driver recorded its license plate number. The following day, the defendant spoke to T and C and told them that he had "done it" but that the driver of the black car had been the intended target, not the fifteen year old victim. Subsequently, M came forward and stated to the police that he had seen the defendant by the driver's side of the black car during the shooting and that the defendant was one of the shooters. The defendant thereafter was arrested while attempting to flee Connecticut for California. At the defendant's trial, the state questioned M on direct examination regarding his statements to the police, but M maintained that he could not recall making those statements or the events surrounding the shooting. The trial court admitted into evidence a portion of a transcript of testimony that M previously had given to a federal grand jury in which M stated that he observed the shooter on the driver's side of the black car wearing clothes similar to clothing the defendant had been wearing earlier on the day of the shooting and that he also observed the shooters run to the defendant's car. During redirect examination, the trial court twice overruled defense counsel's hearsay objection and permitted the state to question M regarding his statements to the police. The state subsequently questioned W, a detective with the New Haven Police Department, about what M had told W about the shooting, but defense counsel objected to that line of questioning on hearsay grounds, and

the trial court sustained the objection. The state then objected when defense counsel asked W, on cross-examination, about his interviews of two eyewitnesses to the shooting who had been unable to identify the defendant as the shooter. The trial court overruled the state's objection but cautioned that the door would be open for the state to question W, during its redirect examination, regarding who had identified the shooter. During redirect examination, the state then asked W how many people had identified the defendant as the shooter, and defense counsel objected, not on the basis of hearsay but because the testimony would be cumulative. The court overruled counsel's objection, and W testified that M, H, and T, who did not testify at the defendant's trial, had identified the defendant as one of the shooters. Thereafter, the defendant submitted a request to charge the jury with a third-party culpability instruction that named six individuals as potential culprits, including F and J, who was a friend of the defendant, whose fingerprints and DNA were found in the defendant's car, and who had been arrested on unrelated charges while in possession of a mask similar to one identified by witnesses as being worn by one of the shooters. At a charge conference, the trial court granted the defendant's request for a third-party culpability instruction but determined that there was sufficient evidence to require the charge only as to J. Defense counsel countered that there was sufficient evidence to require a third-party instruction as to F, and the court responded that it would either give a general instruction without naming anyone or one that named only J. Following closing arguments, the court held a second charge conference, at which it reiterated that it would either name only J or refer generally to a third party, and, after the defendant repeated his preference for naming both F and J, the court gave an instruction that omitted the names of the potential third-party culprits. On appeal from the judgment of conviction, *held*:

1. The defendant's claim that the trial court improperly admitted hearsay evidence by allowing W to testify that M and T had identified the defendant as one of the shooters was unpreserved and, accordingly, was unreviewable: although defense counsel objected on hearsay grounds to W's testimony during the state's direct examination regarding M's out-of-court statements to the police, including M's identification of the defendant as one of the shooters, counsel's sole stated basis for objecting to W's testimony, during redirect examination, regarding M's and T's statements identifying the defendant as one of the shooters was that it was cumulative, and, accordingly, counsel failed to apprise the trial court that he continued to object to the admission of the challenged out-of-court statements on the basis of hearsay.
2. The defendant could not prevail on his claim that the admission, through W's testimony, of T's out-of-court statement identifying the defendant as the shooter violated his right to confrontation because, even if the admission of that statement violated the defendant's right to confrontation, any such error was harmless: the state satisfied its burden of

proving that any error in admitting T's statement was harmless beyond a reasonable doubt, as that statement, which was cumulative of other evidence and which the state did not rely on or refer to during closing argument, was inconsequential in light of the overwhelming, independent evidence of the defendant's guilt, including testimony from numerous witnesses placing the defendant at the crime scene and demonstrating that he drove there in the car in which the shooters later fled, testimony from multiple witnesses that the defendant was one of the shooters, testimony from two witnesses that the defendant admitted that he was involved in the shooting, evidence establishing that the defendant was motivated by revenge against the driver of the black car, who previously had flirted with the defendant's girlfriend, K, and whose friends had been involved in an altercation with K's son several months before the shooting, and evidence of the defendant's consciousness of guilt, including evidence that the defendant returned the rental car the morning after the shooting, K's testimony that the defendant had denied hearing about the shooting the night it occurred but later devised and implemented a plan to flee to California in K's car, and evidence that the defendant was apprehended with $1000 in cash and a California address programmed in a navigation device in K's car.

3. The trial court did not abuse its discretion in declining to include the names of J and F in its third-party culpability instruction to the jury: although the trial court did not provide the jury with the exact instruction that the defendant sought due to that court's determination that there was sufficient evident to support a third-party culpability instruction as to J only, the court included the substance of the requested instruction, namely, that evidence had been presented that a third party may have committed the crimes for which the defendant was charged, which was consistent with the court's indication at two charge conferences that it would name only J in the instruction or refer generally to third parties, and with the defendant's stated preference that he did not want to omit F from the instruction; moreover, there was little evidence supporting a direction connection between F and the offenses with which the defendant was charged, and, even if this court had concluded that the trial court was required to identify J by name in the instruction, it was not reasonably possible that the jury was misled by the omission of J's name, as the court's instruction required the jury to consider the evidence presented implicating any third party, which necessarily included J, the defendant presented evidence implicating J, and defense counsel referred to J's possible culpability during closing argument, and, accordingly, the court's instruction provided the jury with sufficient guidance to allow it to consider all of the third-party culpability evidence and to determine the defendant's guilt in light of such evidence.

Argued September 19, 2019—officially released February 25, 2020

Procedural History

Substitute information charging the defendant with two counts each of the crimes of assault in the first degree and conspiracy to commit assault in the first degree, and one count each of the crimes of murder, conspiracy to commit murder, carrying a pistol without a permit and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, where the charges of assault in the first degree, conspiracy to commit assault in the first degree, murder, conspiracy to commit murder and carrying a pistol without a permit were tried to the jury before *B. Fischer*, *J.*; verdict of guilty of two counts of assault in the first degree and one count each of conspiracy to commit assault in the first degree, murder, conspiracy to commit murder and carrying a pistol without a permit; thereafter, the charge of criminal possession of a firearm was tried to the court; finding of guilty; judgment in accordance with the jury's verdict and court's finding of guilt, from which the defendant appealed to this court. *Affirmed.*

Vishal K. Garg, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Seth R. Garbarsky*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Lamont Edwards, appeals[1] from the trial court's judgment of conviction of various crimes in connection with his involvement in a shooting on a crowded New Haven street in which a fifteen year old boy died and two individuals were seriously

[1] The defendant appealed to this court pursuant to General Statutes § 51-199 (b) (3), which authorizes a direct appeal to this court "in any criminal action involving a conviction for a . . . class A felony . . . for which the maximum sentence which may be imposed exceeds twenty years . . . ."

injured.[2] The defendant claims that the trial court improperly admitted the out-of-court statements of two witnesses identifying him as the shooter in violation of the hearsay rule and that the admission of one of those two statements, made by a witness who did not testify at trial, also violated his constitutional right to confront the witnesses against him. The defendant also claims that the trial court's third-party culpability instruction improperly omitted the names of the potential third-party culprits. As to the admission of the two out-of-court statements, the state responds that this court should decline to review the defendant's challenge to their admission because the defendant failed to preserve his evidentiary challenge and the record is inadequate to review his constitutional challenge. In the alternative, the state contends that the defendant (1) opened the door to that evidence, and (2) even if the admission was improper, this court should nonetheless affirm the trial court's judgment on the basis that any evidentiary error was not harmful and any constitutional error was harmless beyond a reasonable doubt. In response to the defendant's challenge to the trial court's third-party culpability instruction, the state argues that the instruction was sufficient because the law does not require that the court include the name or names of the alleged third-party culprits. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the evening of August 8, 2014, fifteen year old Jacob Craggett was with his brother Joshua Craggett

[2] The defendant was convicted of murder in violation of General Statutes (Rev. to 2013) § 53a-54a, conspiracy to commit murder in violation of General Statutes (Rev. to 2013) § 53a-54a and General Statutes § 53a-48 (a), two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), conspiracy to commit assault in the first degree in violation of §§ 53a-59 (a) (5) and 53a-48, carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and criminal possession of a firearm in violation of General Statutes (Rev. to 2013) § 53a-217.

and their cousins, Timothy Jones (TJ) and Jerray Jackson, in front of their grandmother's home at 21 Vernon Street in New Haven. They had arrived there sometime after 5:30 p.m. Between fifteen and twenty people were outside on Vernon Street that evening, smoking marijuana, talking and listening to music. Others present that evening included the defendant, who goes by the street name "Duce," Christopher Hudson, Tora Moss, Richard Foster, Matthew Mitchell, Sonjay Gallimore and Jessica Carter.

A number of those present on Vernon Street, including Carter, Foster, Moss and the defendant, had been at a dice game at Chapel Park earlier that day. After leaving Chapel Park, Foster encountered mechanical problems with his car and called the defendant, who came to pick him up. When Foster entered the defendant's car, there was a third person there, a stranger who wore a do-rag or a hat. The three men drove to Vernon Street, and, when they arrived, the defendant parked his rental car on Davenport Avenue, near the intersection of Vernon and Davenport. At first, Foster, the defendant and the stranger were walking down Vernon Street together, greeting everyone there. At some point, however, the defendant said he had to go "holler" at someone, and he and Foster became separated. Foster recalled that the defendant walked toward the rear of the parking lot of 23 Vernon Street—that was the last that Foster saw of the defendant that evening. He could not be certain whether the stranger remained with the defendant. About five or ten minutes later, as Foster was commiserating with Moss about their respective monetary losses at the dice game, he heard the sound of gunshots.

Shortly before the shooting started—a bit before 9 p.m.—TJ, Joshua, Jacob and Jerray decided to leave Vernon Street. TJ offered them a ride in his car. The side and rear windows of TJ's Volkswagen Jetta were darkly tinted, and the front passenger door was broken

and could be opened only from the outside. TJ drove down Vernon Street toward Davenport Avenue. Joshua sat in the front passenger seat, Jacob was behind him in the backseat and Jerray was in the backseat on the driver's side behind TJ.

TJ came to the stop sign at the corner of Vernon and Davenport and waited while traffic passed. Within moments, TJ and his passengers heard gunshots and the sound of bullets hitting the car. Joshua and Jacob were each shot. Jacob did not survive his injuries. Mitchell was standing near 23 Vernon Street at the time of the shooting, which was not far from the corner of Vernon and Davenport. As the gunshots were ringing out, Mitchell saw a man running down the street, shouting: "What is [Duce] doing? Josh is in the car." From his location, Mitchell could see that there were two shooters, and that at least one of them was standing on the driver's side of the Jetta. He could see that one of the shooters—he could not recall where this person was standing in relation to the Jetta—wore clothing similar to what the defendant had been wearing when Mitchell saw him at the dice game at Chapel Park earlier that day. Mitchell later told the police that he had been able to identify the defendant as one of the shooters.

Hudson, Jerray's brother, was standing in front of 23 Vernon Street when the Jetta came to the intersection of Vernon and Davenport. When the Jetta came to a stop, Hudson saw two black males running toward the car. They stood on both sides of the car, then started shooting into the front of the passenger compartment. Hudson was unable to identify the shooter on the passenger side of the Jetta, but he identified the defendant as the shooter on the driver's side. After Jacob was shot, Hudson saw the shooters run toward the defendant's car, which was parked in front of the home of Moss' mother at 122 Davenport Avenue. The defendant had to run past the front of the Jetta to get to his car.

The shooters then entered the defendant's car and drove down Davenport Avenue in the direction of the hospital. Joshua attempted to walk down Vernon Street, asking people for help, but he soon passed out.

When she heard the sound of gunshots coming from behind her, Kristen Constantopoulos was in her car on Davenport Avenue, stopped at a traffic light at the intersection of Howard Avenue and Davenport Avenue, headed downtown. In her rearview mirror, Constantopoulos saw someone run to a silver car that was parked on Davenport Avenue at the corner of Vernon Street and jump into the passenger side. The car then started traveling down Davenport Avenue toward her, speeding so fast that she thought it would collide with her car. As the traffic light turned green, the car swerved around her and continued to the next traffic light. As the car passed her, Constantopoulos made note of the New York license plate number and recorded the plate number in her phone. When Detective Michael Wuchek of the New Haven Police Department ran the plate number provided by Constantopoulos, he discovered that it belonged to a gray Kia Optima that was registered to Avis, a rental car company. The defendant had rented the Kia on July 14, 2014, and returned the car to Avis the day after the shooting, on August 9, 2014.[3]

The night of the shooting, Keisha Hodges, the defendant's girlfriend, was sleeping when her children woke her and told her that the defendant was at the door. Although Hodges could not recall specifically the time of the defendant's visit, she did recall that he said that he had just come from Vernon Street, where he had been drinking with friends, including Moss. He did not mention that there had been a shooting on Vernon Street

[3] Several witnesses testified that the defendant had been driving a rental car in the weeks preceding the shooting. Descriptions of the car varied—some reported that it was silver, others said it was bronze, and most witnesses recalled that the car was a Hyundai.

that night. While the defendant was at her home, however, Hodges saw coverage of the shooting on the news and asked him what had happened. He told her that he did not know.

The day after the shooting, Moss contacted Carter, Jerray's sister, and asked her to meet him that evening in the parking lot outside her home on Vernon Street. When they met, they spoke together about the shooting for a few minutes, after which Moss offered to make a phone call to the defendant. He spoke to the defendant briefly, then placed the phone on speaker and had Carter come close so she could hear the conversation. She heard the defendant say, "[d]amn, Jess." She asked, "what the hell happened out there?" The defendant responded that he had been there the night before and he had "done it" but that he had not known "the kids were in the car." He expressed remorse and explained that the shooting "wasn't meant for the kids; it was meant for TJ." He observed, however, that "what's done is done," and, he added, he could not "take it back."

Sometime during the weekend following the shooting, the defendant told Hodges that he wanted to go to California to stay with her brother until he "cleared his name." On Monday, the defendant asked Hodges to marry him, and they were married that day at city hall in New Haven. The following day they left for California, with plans to stop first in New York. The defendant was apprehended when the state police stopped Hodges' car somewhere between Stamford and Greenwich. The defendant initially gave his brother's name to the police but, when confronted, said, "[a]h, you got me." The defendant was arrested and Hodges' car was towed to the New Haven police garage.

The state charged the defendant in an eight count information with murder, conspiracy to commit murder, two counts of assault in the first degree, two counts of conspiracy to commit assault in the first degree,

carrying a pistol without a permit, and criminal possession of a firearm. See footnote 2 of this opinion. The charge for criminal possession of a firearm was tried to the court; the remaining counts were tried to the jury. The defendant was found not guilty of one count of conspiracy to commit assault. He was convicted of the remaining seven counts. The trial court subsequently sentenced the defendant to a total effective sentence of eighty-five years.[4] This appeal followed.

I

ADMISSION OF OUT-OF-COURT IDENTIFICATIONS

The defendant challenges the admission of the out-of-court statements of two witnesses, Moss and Mitchell, identifying the defendant as one of the shooters. The defendant claims that both statements were admitted in violation of the hearsay rule. The defendant additionally contends that the admission of the statement of Moss, who did not testify at the defendant's trial, violated his constitutional right to confront the witnesses against him. We address each of these claims in turn.

A

Hearsay

The defendant first claims that the admission of both statements violated the rule against hearsay. The state contends that, because defense counsel did not object to the admission of the out-of-court identifications on the basis of hearsay at the time that Wuchek testified to the identifications and, instead, objected on the basis that the testimony was cumulative, the defendant

[4] The defendant was sentenced as follows: fifty years on count one for murder; fifteen years on count two for assault in the first degree, to run consecutive to count one; fifteen years on count three for assault in the first degree, to run consecutive to counts one and two; twenty years on count four for conspiracy to commit murder, to run concurrently with count one; fifteen years on count six for conspiracy to commit assault in the first degree, to run concurrently with counts one and four; five years on count seven for carrying a pistol without a permit, to run consecutive to counts one, two and three; and five years on count eight for criminal possession of a firearm, to run concurrently with counts one, four, six and seven.

failed to preserve this claim. The defendant responds that, because defense counsel previously objected on the basis of hearsay to testimony regarding Mitchell's out-of-court identification of the defendant during both Mitchell's and Wuchek's testimony, counsel was not required to reiterate that objection in order to preserve it.[5] In the event that we were to conclude that the claim is unpreserved, the defendant asserts that it was plain error.[6] We conclude that the defendant failed to preserve this claim.

The following additional facts and procedure are relevant to this claim. We begin with a general overview. The state met with limited success when it attempted to elicit testimony from Mitchell that he previously had identified the defendant as the shooter.[7] The state first

[5] In his initial brief, the defendant relies solely on his hearsay objection to Mitchell's testimony. Only in his reply brief does the defendant claim that he adequately apprised the trial court of the basis of his objection to Wuchek's testimony regarding the out-of-court statements during Wuchek's direct examination.

[6] As to the defendant's claim that the admission of the out-of-court statements is reversible under the plain error doctrine, we conclude that the defendant has failed to demonstrate that the alleged error "is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 552, 212 A.3d 208 (2019). As we repeatedly have emphasized, "[an appellant] cannot prevail . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). The defendant has not satisfied this stringent standard.

[7] During the state's direct examination, Mitchell initially suggested that his memory of the events surrounding the shooting may have been affected by the fact that he had been prescribed the medication Seroquel sometime around 2012 or 2013. When the state followed up, however, and asked him whether his memory was "fuzzy," Mitchell responded: "I had some problems so went to a doctor and therapist that, you know, probably around . . . probably 2012, [2013], and first was prescribed Seroquel." The following colloquy ensued:

"[The Prosecutor]: That wasn't the question, sir. The question is, your memory about [August 8, 2014] is fuzzy?

"[The Witness]: I wouldn't say that particular day but my memory about days are fuzzy."

Subsequently, on cross-examination, Mitchell denied taking Seroquel on the night of the shooting, as the following colloquy demonstrates:

questioned Mitchell regarding his prior testimony to a federal grand jury. When Mitchell testified that he was unable to recall that testimony, the state questioned him regarding statements he had made to the police, but Mitchell said that he did not recall making those statements. The state subsequently questioned Wuchek regarding Mitchell's statements to the police. Wuchek's testimony—that, in Mitchell's statement to the police, Mitchell claimed that he saw the defendant standing on the driver's side of the Jetta during the shooting—is the testimony that the defendant challenges as improper hearsay.

The details of Mitchell's and Wuchek's testimony, as well as the arguments of counsel and rulings of the trial court, provide helpful context for our consideration of whether the defendant properly apprised the trial court of the basis of defense counsel's objection. Mitchell acknowledged in his testimony that he was at Vernon Street on the night of the shooting and that, prior to the shooting, he was at the dice game at Chapel Park. He denied, however, that he saw the defendant at Chapel Park or at Vernon Street, and, when the state pressed, he stated he did not recall whether he had seen the defendant. On the basis of Mitchell's repeated testimony that he could not recall the events of the night of the shooting, the state sought permission to treat him as a hostile witness, which the court denied. The state next unsuccessfully attempted to use the transcript of Mitchell's prior testimony before a federal grand jury to refresh his recol-

"[Defense Counsel]: Okay. Okay. And on August 8, 2014, being diagnosed with bipolar, and having it, whether prescribed or not, had you taken it that day?

"[The Witness]: I don't remember.

"[Defense Counsel]: Okay. Is it possible you may have taken it that day?

"[The Witness]: No.

"[Defense Counsel]: It's possible or it's not?

"[The Witness]: No."

No evidence or expert testimony was offered regarding the effects of Seroquel.

lection, asking him a series of questions about his testimony and establishing that, as to the bulk of that testimony, Mitchell could not recall it.[8] The trial court denied the state's request during direct examination to admit Mitchell's testimony contained in the prior grand jury transcript pursuant to this court's decision in *State* v. *Whelan*, 200 Conn. 743, 753–54, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). The trial court indicated that it would consider it after cross-examination and subsequently granted the state's motion to admit some portions of the transcript of Mitchell's grand jury testimony as a full exhibit.

During cross-examination, Mitchell testified that he never stated in his testimony to the grand jury that he saw the defendant shooting at the Jetta. He also testified during cross-examination that he told neither the grand jury nor the police what either of the shooters was wearing. On redirect examination, the state questioned Mitchell regarding statements he had made to the police shortly after the shooting. The court overruled defense counsel's hearsay objection on the basis that "this is what [Mitchell's] telling the police." The state then went through a detailed set of questions regarding Mitchell's statements to the police, asking with respect to each individual statement whether Mitchell recalled making it. Each time, Mitchell responded that he did not recall making the statement. Most significant, over defense counsel's objection on the basis of hearsay, the state was permitted to ask Mitchell if he recalled telling the police that he saw the defendant on the driver's side of the Jetta

[8] Specifically, the state elicited testimony that Mitchell could not recall telling the grand jury that he saw two individuals running up to a vehicle before the gunshots were fired, he was standing at a fence and facing Vernon Street when the shooting occurred, he had seen the shooters earlier that day, he observed the position of the shooters relative to the targeted vehicle, the shooters had two different types of guns, someone was running down the street shouting, "what is Duce doing? Josh is in the car," and that the clothing that the defendant wore earlier that day was similar to the clothing worn by one of the shooters.

during the shooting. This question was permitted after the witness had been asked and testified on cross-examination that he had never told the grand jury that he saw the defendant shooting at the Jetta. In overruling defense counsel's objection, the court explained that defense counsel would have the opportunity to address Mitchell's identification during recross-examination. Mitchell responded to the question by testifying, however, that he did not recall making that statement to the police.

When the state subsequently questioned Wuchek, he testified that, two days after the shooting, he met with Mitchell, who had come forward as a "concerned citizen." The state then asked Wuchek: "What did [Mitchell] tell you in regard to this investigation?" Defense counsel objected to the "entire line" of questioning on the basis of hearsay. The state responded that it did not seek to introduce the testimony for its truth but to impeach Mitchell because he had denied making all of the statements to the police. Outside the presence of the jury, the state proffered the line of questions it intended to ask Wuchek regarding numerous statements that Mitchell had made to him on August 10, 2014, including Mitchell's statement that he "recalled seeing [the defendant] on the driver's side of the Jetta during the shooting." Defense counsel reiterated his objection on the basis of hearsay. The court sustained defense counsel's objection and observed that the statements Mitchell had made to the police covered "the same topics that were reviewed in the grand jury testimony for the most part."

During cross-examination, defense counsel questioned Wuchek regarding his interviews of two persons who, although present at Vernon Street on the night of the shooting, were unable to identify the shooters. Specifically, during direct examination, Wuchek testified that he had interviewed both Deja Antrum and T'Naisha Brown, neither of whom testified at trial. On cross-examination, defense counsel elicited testimony, over the state's objection on the basis of hearsay, that Antrum

and Brown had been unable to identify the shooters. The state argued that, if the court allowed defense counsel to elicit these hearsay statements, it would seek to introduce the out-of-court statements of "other witnesses [who] did make [identifications]." When defense counsel claimed the question for purposes of exploring the scope of the state's investigation, the court stated: "So, then, on redirect, he could go into the [witnesses] who allegedly did [identify] other people. Is that . . . ." Defense counsel reiterated his position that, because Wuchek had testified during direct examination that he had interviewed the two witnesses, his questions regarding what those witnesses said during the interviews went to the scope of Wuchek's investigation. The court allowed the line of questioning but cautioned counsel that, if he pursued it, the court might allow the state to inquire about witnesses who were able to identify the defendant as a shooter.

Defense counsel asked Wuchek whether Antrum and Brown had identified the defendant as one of the shooters. Wuchek answered that neither of them had. Wuchek then acknowledged that the defendant regularly frequented the Vernon Street area and, therefore, that he was known to people in that neighborhood.

The following day, on redirect examination, the state asked Wuchek: "How many people identified the defendant as the shooter?" Defense counsel objected, but not on the basis of hearsay. Instead, defense counsel claimed that the testimony would be cumulative, stating: "There's testimony with respect to identification of this defendant already." The court overruled that objection, and Wuchek testified that Hudson, Moss and Mitchell had identified the defendant as one of the shooters. Moss did not testify at trial.[9]

[9] On the second day of trial, December 9, 2016, the state informed the court that it would delay the testimony of Moss, who had been scheduled to testify that morning, until the afternoon because his attorney had a scheduling conflict. The state subsequently informed the court that it had determined not to call Moss until December 12, 2016.

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013). "We have explained that these requirements are not simply formalities." *State* v. *Miranda*, 327 Conn. 451, 465, 174 A.3d 770 (2018). "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). "Thus, because the essence of preservation is fair notice to the trial court, the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Miranda*, supra, 465; see also Practice Book § 5-5 ("[w]henever an objection to the admission of evidence is made, counsel shall state the grounds upon which it is claimed or upon which objection is made, succinctly and in such form as he or she desires it to go upon the record, before any discussion or argument is had").

Our review of the trial transcripts persuades us that defense counsel did not adequately apprise the trial

court that he continued to object on the basis of hearsay to Wuchek's testimony regarding the statements of Moss and Mitchell. Although defense counsel had objected to that testimony on that basis when the state tried to elicit it during its direct examination of Wuchek, defense counsel's sole stated ground for the objection, on redirect examination the following day, was that the testimony would be cumulative. The trial court cannot reasonably be expected to anticipate that defense counsel intended —in addition to the presently stated ground—to reiterate his previously stated ground for objecting to the identifications. A trial is a fluid process, and parties adapt their strategies in light of procedural developments. Trial courts are not required to inquire whether a party's failure to raise a prior ground for objection is an inadvertent omission as opposed to an evolving strategy. In the present case, for example, it would have been possible for defense counsel, after successfully introducing the out-of-court statements of Antrum and Brown over the state's hearsay objection and after the court's caution that his questioning may open the door to similar questions by the state on redirect, to view his hearsay objection as no longer viable. If defense counsel arrived at that conclusion, a reasonable strategy would be to attempt to circumvent that issue by relying on an entirely different basis for objecting to Wuchek's testimony regarding witnesses who did identify the defendant. It is incumbent on the parties, not the court, to properly articulate the present basis for an objection. Defense counsel's hearsay objection was not preserved.

B

Confrontation Clause

Pursuant to this court's decision in *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), the defendant seeks review of his claim that the admission of the out-of-court identification of the defendant by Moss, who did not tes-

tify at the defendant's trial, violated his constitutional right to confront the witnesses against him.[10] The state responds, first, that the record is inadequate to review the defendant's claim and, second, that there was no violation of the defendant's right to confrontation because defense counsel opened the door to the testimony regarding Moss' statement. Third, in the event that this court concludes that the testimony violated the defendant's right to confrontation, the state argues that any error was harmless beyond a reasonable doubt. We agree with the state's third contention. Assuming without deciding that the admission of Moss' out-of-court identification of the defendant violated his right to confrontation, we conclude that any error was harmless beyond a reasonable doubt.

We first address the state's contention that the defendant's claim is unreviewable.[11] Under *Golding*, the defendant can prevail "only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject

[10] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." This right applies to the states through the due process clause of the fourteenth amendment to the federal constitution. See, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); see also Conn. Const., art. I, § 8.

[11] The state does not rely on its claim that the defendant "opened the door" to argue that the defendant's *Golding* claim is unreviewable. See, e.g., *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 723–24, 200 A.3d 1118 (2019) (observing that "*Golding* review is not available when the claimed constitutional error has been induced by the party claiming it"). Instead, the state argues that defense counsel's cross-examination of Wuchek opened the door to Wuchek's testimony that Moss identified the defendant as one of the shooters, necessitating the conclusion that the defendant's right to confrontation was not violated. The state therefore relies on its "opening the door" theory to argue that the defendant cannot prevail on the merits of the confrontation claim.

to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*). The state contends that, because the record does not disclose whether Moss' statement was admitted for its truth or simply to show the extent of the police investigation, the record is inadequate for review. We disagree. It is undisputed that no limiting instruction was given to the jury as to this testimony. In the absence of any such limiting instruction, the jury was entitled to consider the evidence for its substance. See, e.g., *State* v. *Adams*, 327 Conn. 297, 309–10, 173 A.3d 943 (2017) ("in the absence of a limiting instruction, the finder of fact is entitled to draw any inferences from the evidence that it reasonably would support" [internal quotation marks omitted]). Accordingly, the record is adequate for review.

We conclude that, even if the admission of the testimony regarding Moss' out-of-court identification of the defendant violated his constitutional right to confront the witnesses against him, any error was harmless beyond a reasonable doubt. Accordingly, the defendant's claim fails on the fourth prong of *Golding*.

This court has long recognized that "a violation of the defendant's right to confront witnesses is subject to harmless error analysis . . . . In undertaking this analysis, the test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained. . . . In addition, [w]hen an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 420, 64 A.3d 91 (2013).

"This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Internal quotation marks omitted.) *State* v. *Artis*, 314 Conn. 131, 159, 101 A.3d 915 (2014). Additional factors that we have considered in determining whether an error is harmless in a particular case include the importance of the challenged evidence to the prosecution's case, whether it is cumulative, the extent of cross-examination permitted, and the presence or absence of corroborating or contradicting evidence or testimony. See *State* v. *Smith*, 289 Conn. 598, 628, 960 A.2d 993 (2008).

We must determine whether the state has demonstrated beyond a reasonable doubt that the introduction of Moss' out-of-court identification of the defendant did not contribute to the defendant's conviction. We first consider the strength of the state's case. The evidence of guilt was compelling. The state's case was comprised of the following components: witnesses (other than Moss) who placed the defendant at the scene; witnesses who identified the defendant as the shooter; two witnesses to whom the defendant admitted his guilt; testimony and evidence establishing that the shooters fled from the scene in the defendant's rental car, which was parked at the corner of Vernon Street and Davenport Avenue at the time of the shooting; testimony establishing that the defendant's motive for the shooting was vengeance against TJ; and consciousness of guilt evidence.

Multiple witnesses—Mitchell, in his statement to the police, and Foster, Hodges, Gallimore, and Hudson —placed the defendant at Vernon Street at the time of the shooting. The testimony of Foster, Gallimore and Hodges, taken together, established that the defendant went from Chapel Park to Vernon Street, then to Hodges' home after the shooting. Foster testified that he and the defendant both were at the dice game at Chapel Park earlier that day and that the defendant gave him a ride to Vernon Street after Foster had mechanical problems with his car.[12] Foster said that the defendant parked his car in the vicinity of the home of Moss' mother at 122 Davenport Avenue, and that he, the defendant and a person unknown to Foster, who had been in the car with them, walked down Vernon Street. Foster also testified that the shooting started within five to ten minutes after he lost sight of the defendant and the stranger. Although she did not see who was shooting at the Jetta, Gallimore recalled that, immediately after the shots were fired, she saw the defendant at the corner of Vernon Street and Davenport Avenue, heading down Davenport in the direction of the hospital. Hodges testified that, when she saw the defendant later that evening, he told her he had just come from Vernon Street.

The state also presented evidence that both Hudson and Mitchell identified the defendant as one of the shooters. Both witnesses knew the defendant prior to the shooting. Hudson testified that he saw the defendant standing on the driver's side of the Jetta and shooting at it. He then saw the defendant run in front of the Jetta toward his rental car, which was parked in front of the home of Moss' mother. Hudson saw the defendant get into the driver's side of the vehicle; the other shooter got into the passenger side, and they drove down Davenport Avenue in the direction of the hospital.

[12] Mitchell, in his grand jury testimony, and Carter confirmed that the defendant had been at the Chapel Park dice game prior to the shooting.

Although Hudson had given two previous statements in which he claimed he could not see who the shooter was, both Foster and Mitchell corroborated his testimony that he saw the defendant shooting at the Jetta. Specifically, Foster testified that, during the shooting, Hudson was running down Vernon Street, shouting, "is that Duce . . . why are they wilding?" "Why did Duce do that?" In his testimony to the federal grand jury, a portion of which was admitted as a full exhibit, Mitchell confirmed that, during the shooting, a person was running down Vernon Street shouting, "what is Duce doing? Josh is in the car." During trial, Hudson explained that the reason he did not initially identify the defendant as the shooter was because he feared for the safety of his family.

As we discussed in part I A of this opinion, Wuchek testified that, two days after the shooting, Mitchell came forward as a concerned citizen and identified the defendant as one of the shooters. Additionally, Mitchell's grand jury testimony corroborated some of the details of Hudson's testimony: that the defendant was on the driver's side of the Jetta and that the shooters ran to the defendant's car, then drove off. Specifically, in his grand jury testimony, Mitchell recalled that the shooter who was on the driver's side of the Jetta wore clothing similar to what the defendant had been wearing at the dice game. He also testified to the grand jury that, after the shooters stopped firing, they ran down Davenport Avenue toward the home of Moss' mother.

The state also presented evidence that, on two separate occasions, the defendant admitted to the shooting. Carter testified that, on the day after the shooting, the defendant told her that he did it, and that the intended victim was TJ, not "the kids." The state also presented the testimony of a jailhouse informant, Chamar Vick, who stated that he knew the defendant and that, at some point after the shooting, he and the defendant were in

court at the same time. Although he did not expressly admit to Vick that he was one of the shooters, the defendant told Vick: "Wrong time, wrong place. It was meant for somebody else." The defendant told Vick that the bullet had not been meant for Jacob, and that the intended target was a person named Noone, an associate of TJ. The defendant also told Vick that the reason for the shooting had to do with Hodges and her son, Tyeshon Johnson, known as Mook.[13]

The state also presented evidence demonstrating that the defendant drove his rental car, a Kia Optima, to Vernon Street on the night of the shooting, parked the Kia in front of 122 Davenport Avenue, near the corner of Vernon and Davenport, and that, when the shooters stopped firing, they ran to the defendant's Kia, got in and drove down Davenport in the direction of the hospital.[14] Witness testimony and evidence established that, in the weeks leading up to the shooting, the defendant had been driving a gray Kia Optima with New York plates that he rented from Avis. Foster's testimony established that the defendant drove the Kia from Chapel Park to Vernon Street that evening and parked the car in front of 122 Davenport Avenue. Mitchell, Hudson, Gallimore and Constantopoulos provided testimony that established that the shooters ran to the Kia, got in and drove down Davenport. Through the testimony of Constantopoulos, the state proved that the fleeing vehicle had a

[13] During cross-examination of Vick, the defendant highlighted Vick's status as an incarcerated jailhouse informant and suggested that Vick was testifying in the hope of getting a deal. The state elicited testimony from Vick that, on the morning of Vick's testimony, the defendant told Vick to say nothing. The defendant told Vick that he knew where Vick's family lived and correctly gave Vick his family's address.

[14] In light of the overwhelming evidence presented by the state that the defendant parked his rental car, a gray Kia Optima with New York plates, in front of 122 Davenport Avenue, and that the car was used by the shooters to flee the scene, we consider it immaterial that many witnesses were unable to recall the make, model and color of the vehicle. See footnote 3 of this opinion.

New York license plate number of GRB3413. Carter testified that the defendant's rental car had New York plates. The state produced a rental agreement between the defendant and Avis, which demonstrated that the defendant rented from Avis a gray Kia Optima, with a New York license plate number of GRB3413. The rental agreement indicates that the defendant picked up the Kia on July 14, 2014, and that he returned the car to Avis the morning after the shooting, at 10:21 a.m. on August 9, 2014. Hodges testified that she never saw anyone other than the defendant drive the Kia.

The state also presented evidence of the defendant's possible motive for the shooting. The state's theory was that TJ was the target of the shooting, and the defendant sought revenge against TJ for two reasons: TJ's friends had been involved in an altercation with Hodges' son, Mook, several months before the shooting, and TJ had "hit on" Hodges. Carter testified that the defendant told her that TJ was the intended target of the shooting. Vick testified that the defendant told him the reason for the shooting was because Mook "wasn't getting the job done." TJ and Hodges testified regarding the altercation between TJ's friends and Mook. TJ also acknowledged that he knew Hodges and, when asked if he had tried to "mess around" with her, responded: "She's a pretty decent looking woman, of course I tried, why wouldn't I?"

The state presented evidence of consciousness of guilt as well, most notably the defendant's attempt several days after the shooting to leave the state. Hodges' testimony established that, within days after the shooting, the defendant formulated and implemented a plan to travel to California and to stay with Hodges' brother, who lived there. Hodges testified that, at some point during the weekend following the shooting, the defendant asked her to contact her brother in San Bernardino, California, to ask if they could visit him there for a few days.

The defendant told Hodges that he wanted to go to California, "[u]ntil he cleared his name." She testified that they planned to leave Tuesday morning to drive to California, and that, before they left, she entered her brother's address in the GPS system that she placed in her car along with a notepad on which she had written her brother's address and contact information. In support of Hodges' testimony, the state produced as evidence items that were seized from the passenger compartment of Hodges' car when the police stopped Hodges and the defendant somewhere between Stamford and Greenwich. Specifically, the state produced the GPS and notepad. The notepad indicates the address of Hodges' brother, along with his telephone number. The GPS screen shows a search entered into the device for that address. The state also produced as evidence items seized from the trunk of the car—the bags and clothing that Hodges and the defendant had packed for the trip. Wuchek testified that, when they apprehended the defendant, the police also recovered more than $1000 in cash from him.

The defendant's behavior at the time that he was apprehended provided further evidence of consciousness of guilt. David Acosta, an officer with the New Haven Police Department, who was working with the United States Marshal Service Violent Fugitive Task Force at the time of these events, testified that, when the state police stopped Hodges' car close to the New York border, the defendant initially gave the name of his brother, James Edwards. As a result, Acosta had to approach the vehicle and identify the defendant. When Acosta asked the defendant if he was "done playing games now," the defendant responded by putting his hands up and saying, "[a]h, you got me."

As additional evidence of the defendant's consciousness of guilt, the state elicited testimony from Hodges establishing that, when he arrived at her home on the night of the shooting, the defendant was less than forth-

coming about what had happened while he was at Vernon Street that evening. She testified that he told her that he had just come from drinking with friends at Vernon Street. He said nothing, however, about the shooting that had taken place on Vernon Street that evening. When Hodges saw the news about the shooting on television and asked him what happened, the defendant stated that he did not know. Other evidence of consciousness of guilt included evidence that the defendant returned the Kia Optima to Avis on the morning following the shooting and Vick's testimony that the defendant told him to say nothing.

We consider it significant that, although the state alluded in its closing argument to the fact that Moss did not testify, it did not rely on or even refer to Moss' out-of-court identification of the defendant. Instead, the state focused on the evidence outlined in this opinion, namely, the identifications by Hudson and Mitchell, Foster's testimony placing the defendant and his car at the scene, Carter's and Vick's testimony that he admitted his guilt, the attempted flight to California, and Constantopoulos' testimony regarding the defendant's license plate. It is also significant that Moss' out-of-court identification was not an important part of the state's case against the defendant. Instead, the evidence was cumulative, and Moss' identification was corroborated by the independent identifications by Hudson and Mitchell. See *State* v. *Smith*, supra, 289 Conn. 628. In light of the fact that the state did not rely on Moss' identification, and, considering Moss' identification of the defendant in the context of the overwhelming evidence presented by the state, particularly the two independent identifications of the defendant as one of the shooters, we conclude that, even if the admission of Moss' out-of-court identification violated the defendant's right to confrontation, any error was harmless beyond a reasonable doubt.

II

THIRD-PARTY CULPABILITY CHARGE

We next address the defendant's claim that the trial court's third-party culpability instruction improperly omitted the names of Roy Jones III and Foster, and instead stated: "There has been evidence that *a third party*, not the defendant, committed the crimes for which the defendant is charged." (Emphasis added.) The defendant contends that the charge was improper because it differed in substance from the charge that he had requested and was inadequately adapted to the issues before the jury. The state responds that the trial court's failure to give a charge in exact conformance to the defendant's request did not render the charge improper because the charge as given by the court was sufficient. We agree with the state.

The following additional procedural facts are relevant to our resolution of this claim. In the court's first charge conference, it began by confirming that both the state and defense counsel had reviewed the court's proposed charge to the jury. The court then ran through the proposed charges, asking the parties whether they had any objections to them. In his request to charge, the defendant had listed six individuals with respect to whom he believed there was sufficient evidence to require a third-party culpability instruction. The court informed the parties that, pursuant to its review of the record, it agreed that there was sufficient evidence to require the charge, but only as to Jones; the court suggested that it did not believe that there was sufficient evidence to justify the charge as to the remaining five individuals.[15] When defense counsel argued

[15] The state objected to the third-party culpability charge on the ground that, because its theory of the case was that there were two shooters, the fact that there may be sufficient evidence to implicate Jones as one of the shooters did not entitle the defendant to a third-party culpability charge. The state explained that, even if the jury were to find that Jones was one of the shooters, it could find that the defendant was his coconspirator or

that there was also sufficient evidence to require a third-party culpability instruction as to Foster, the court offered to give the instruction without mentioning any names. Defense counsel responded that he would prefer to have the court name the potential third-party culprits. The court reiterated its ruling that it would name only Jones in the instruction. The court then added: "Listen, you obviously have the right . . . in your closing argument to go through what you say with all these other people. There's no limitations on that."

In defense counsel's closing argument, he referenced Jones once, in connection with the other individuals he had identified as potential third-party culprits: "Then there's different possibilities of who could be involved in this. We heard the name Roy Jones, James Edwards whose fingerprints are in the car, James Asti Butler fingerprints, Tyshaun Johnson who has a motive, Calvin Moss, Michael Singletary, Tavares Johnson, and the detective's testimony was it—I ruled everyone out. He testified he couldn't rule people out." Defense counsel referred to Foster a number of times during closing argument, suggesting that the jury should question whether to credit his testimony. He pointed out that Foster had been granted immunity in connection with his testimony and emphasized that Foster's white t-shirt and do-rag were consistent with a description of one of the shooters.

When the court held a second charge conference following closing arguments, the court initially stated that it would name both Jones and Foster in its third-party culpability instruction. After the parties reviewed the revised proposed charge during a break, the state took exception to the third-party culpability charge and reminded the court that it had offered the defense a

accessory. Having heard argument on the issue, the trial court agreed with the defendant that—as to Jones—a third-party culpability instruction was justified because the evidence was sufficient to establish a direct connection between Jones and the crime.

choice between a charge that named only Jones, or one that simply referred to "third parties." Defense counsel recalled the first charge conference differently, and stated his belief that the court had earlier determined that it would name both Foster and Jones. The court agreed with the state that its earlier ruling was that it would either name only Jones in the charge or refer generally to "third parties," and inquired of defense counsel which he would prefer. After defense counsel indicated his preference for retaining the charge naming both Foster and Jones, the court stated that it would modify the charge to refer generally to "third parties," without naming any individual third parties.

The trial court charged the jury as follows: "I next want to talk to you about third-party culpability. There has been evidence that a third party, not the defendant, committed the crimes for which the defendant is charged. This evidence is not intended to prove the guilt of the third party but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt. It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect a third party to the crimes with which the defendant is charged. If, after a full and fair consideration and comparison of all the evidence you have left in your minds a reasonable doubt indicating that an alleged third or alleged third parties may be responsible for the crimes, the defendant is charged—is charged with committing, then it would be your duty to render a verdict of not guilty as to the [defendant]."

"We begin with the well established standard of review governing the defendant's challenge[s] to the trial court's jury instruction. Our review of the defendant's claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a

request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Additionally, we have noted that [a]n [impropriety] in instructions in a criminal case is reversible . . . when it is shown that it is reasonably possible for [improprieties] of constitutional dimension or reasonably probable for nonconstitutional [improprieties] that the jury [was] misled." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 808–809, 91 A.3d 384 (2014).[16]

The defendant's claim that he was entitled to have the court name Foster and Jones in the third-party culpability charge is squarely governed by the principle that, "[i]f a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal." (Internal quotation marks omitted.) Id., 809. The defendant requested a charge instructing the jury that evidence had been presented that a third party may have committed the crime with which

[16] Citing to *State* v. *Inglis*, 151 Conn. App. 283, 296–97, 94 A.3d 1204, cert. denied, 314 Conn. 920, 100 A.3d 851 (2014), cert. denied, 575 U.S. 918, 135 S. Ct. 1559, 191 L. Ed. 2d 647 (2015), the state claims that the "reasonably probable" standard for nonconstitutional improprieties applies when a defendant challenges the omission of a third-party culpability charge or claims that the charge given was improper. Notwithstanding the Appellate Court's decision in *Inglis*, this court's decision in *Baltas* controls. In *Baltas*, we applied the constitutional standard to review the defendant's challenge to the trial court's denial of his request for a third-party culpability instruction. See *State* v. *Baltas*, supra, 311 Conn. 808.

the defendant was charged. The trial court gave that charge in substance but did not give the charge exactly as requested by the defendant due to the trial court's finding that, of the six persons as to whom the defendant requested the third-party culpability charge, there was sufficient evidence only as to Jones to support giving the charge. For that reason, the court offered the defendant a choice between two alternatives: the charge would name Jones—and only Jones—individually, or the charge would refer to "parties" and refrain from naming any specific individuals. Because defense counsel indicated that he did not want to omit Foster from consideration as a potential third-party culprit, the court did not refer to any individuals by name. That approach was consistent with the court's statement to defense counsel during the first charge conference, prior to closing argument, that he was free to pursue his third-party culpability defense as to any and all of six individuals the defendant had named in his original request to charge.

The court's ruling also was consistent with its earlier determination that there was sufficient evidence only as to Jones to support giving the charge. That determination, which is subject to review for abuse of discretion; see, e.g., *State* v. *Jackson*, 304 Conn. 383, 424, 40 A.3d 290 (2012); precluded the trial court from granting defense counsel's request to name Foster in the third-party culpability charge. It is well established that "[a] request to charge [that] is relevant to the issues of [a] case and [that] is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, *the trial court has a duty not to submit it to the jury*. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence." (Emphasis added; internal quotation marks omitted.) *State* v. *Baltas*, supra, 311 Conn. 810.

Our review of the record persuades us that the trial court's determination that the evidence supported naming Jones, but not Foster, in the third-party culpability instruction was not an abuse of discretion. In the context of a third-party culpability charge, the trial court's determination of relevance turns on the distinction between a "direct connection" between the third party and the crime as opposed to a "bare suspicion . . . ." *State* v. *Arroyo*, 284 Conn. 597, 610, 935 A.2d 975 (2007); see id. ("if the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed the crime, a trial court has a duty to submit an appropriate charge to the jury"). The trial court, in determining that the evidence was insufficient to support naming Foster in the third-party culpability charge, implicitly found that, although the evidence was sufficient to establish a direct connection between Jones and the crime, it did not rise to the same level with respect to Foster.

The record supports the trial court's determination. Evidence presented at trial linking Jones to the crime was sufficient to rise above a "bare suspicion" and included Wuchek's testimony that, during the course of his investigation of the shooting, he identified Jones, who was friends with Foster, Moss and the defendant, as a suspect. Wuchek also testified that Jones' fingerprints and DNA were found in the defendant's Kia Optima. When Wuchek followed up on the alibi that Jones provided, he was unable to verify it. Finally, some witnesses at the scene of the shooting described one of the shooters as having worn a mask.[17] When Jones was subsequently taken into custody in a separate mat-

[17] As the defendant emphasizes on appeal, witnesses provided diverging accounts of the clothing worn by the perpetrators. Those descriptions included a white tank top, black cargo shorts and a do-rag or mask, khaki shorts and white t-shirts.

ter, the police seized from his vehicle a mask that was similar to the one described by witnesses to the shooting.

As to Foster, there was little evidence supporting a direct connection between him and the crime. He admitted that he wore a white t-shirt and a do-rag on the night of the shooting, which was consistent with a witness' description of what one of the shooters was wearing. He also admitted that he arrived at Vernon Street with the defendant in the defendant's car. The defendant also points to inconsistencies between Foster's account of his whereabouts during the shooting, which placed him in front of 23 Vernon Street and away from the intersection with Davenport Avenue, and the accounts of others, who did not recall seeing Foster immediately prior to or after the shooting. On this record, we conclude that it was not an abuse of discretion for the court to decline to name Foster in the third-party culpability charge.

Finally, even if we were to conclude that the trial court was required to identify Jones by name in the charge, we conclude that there is no reasonable possibility that the jury was misled by the omission of Jones' name.[18] The defendant had presented evidence implicating Jones, and defense counsel referred to Jones' possi-

[18] We reject the defendant's assertion that, in this court's decision in *State* v. *Arroyo*, supra, 284 Conn. 597, we implicitly recognized "that a third-party culpability charge naming a particular third-party culprit had some substance not contained within the standard jury instructions concerning identity, the presumption of innocence, and the burden of proof." We first observe that, in contrast to the present case, the trial court in *Arroyo* gave *no* third-party culpability instruction, and the defendant's requested instruction named only one third-party culprit, the victim's father. *State* v. *Arroyo*, supra, 607 and n.8. More important, the issue presented in *Arroyo* was not whether the trial court was required to deliver the exact charge requested by the defendant but whether the trial court improperly declined to deliver a third-party culpability charge. Id., 607.

We also reject the defendant's suggestion that we have established a distinction between what the defendant denotes "an *Arroyo* instruction" from "a *Berger* instruction." In *State* v. *Berger*, 249 Conn. 218, 234, 733 A.2d

ble culpability during closing argument.[19] By directing the jury to consider evidence that had been presented implicating a "third party," the court's charge required the jury to consider evidence implicating *any* third party, including both Jones *and* Foster.[20] The court's instruction, therefore, provided the jury with sufficient guidance to allow it to consider all of the third-party culpability evidence and to determine the defendant's guilt in light of such evidence.

The judgment is affirmed.

In this opinion the other justices concurred.

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156 (1999), this court addressed the question of whether "the trial court improperly denied [the defendant's] request for a specific instruction on the relationship between [third-party] culpability evidence and the concept of proof beyond a reasonable doubt." The issue in the present case, whether a trial court must name potential third-party culprits in its charge to the jury, was not presented in *Berger* or in *Arroyo*, and we have not drawn a distinction between different types of third-party culpability charges based on those two decisions.

[19] The defendant's contention that he suffered harm because defense counsel, believing that the trial court would name Jones in the third-party culpability instruction, failed to provide a more detailed discussion in closing argument of the evidence implicating Jones, is belied by the court's clear notice to counsel that he was free to argue third-party culpability as to any individual and make the arguments he deemed appropriate.

[20] The court's charge arguably provided the defendant with an advantage, particularly when the undisputed evidence was that there were two shooters at the scene. That is, notwithstanding the trial court's determination that there was sufficient evidence to establish a direct connection between Jones and the crime but not Foster, the court's use of the term "a third party" left the jury free to consider the evidence as to any and all third parties claimed or identified by the defendant in determining whether to return a verdict of not guilty.

CASEY LEIGH RUTTER *v.* ADAM JANIS ET AL.

NANCY BEALE, ADMINISTRATRIX (ESTATE OF LINDSEY BEALE) *v.* LUIS MARTINS ET AL.

JASON FERREIRA *v.* LUIS MARTINS ET AL. (SC 20122)

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

Syllabus

Pursuant to statute (§ 14-60 (a) (3)), a motor vehicle dealer may loan a dealer license plate to a person who "has purchased a motor vehicle from such dealer, the registration of which is pending," for a period of "not more than thirty days in any year," and a dealer that has complied with the requirements of § 14-60 (a) is not liable for damages caused by an insured operator of the motor vehicle while the dealer license plate is displayed within that thirty day period.

The plaintiffs, in three separate actions, sought to recover damages from the defendant D Co., a motor vehicle dealer, among others, for personal injuries sustained in an automobile accident involving a vehicle driven by the defendant M and displaying D Co.'s dealer license plate. On May 9, 2013, at approximately 7 p.m., M executed an agreement with D Co. in connection with his purchase of the vehicle from D Co., and D Co. loaned M a dealer license plate pursuant to § 14-60 (a) while the vehicle registration process was pending. The accident occurred on June 8, 2013, at approximately 3 p.m. The plaintiffs alleged, inter alia, that D Co. was liable for the damages resulting from the accident because it occurred beyond the thirty day period set forth in § 14-60 (a). D Co. filed a motion for summary judgment in each action, claiming that it was not liable because the accident had occurred within the statutory thirty day period and it otherwise had complied with the requirements of the statute. In granting D Co.'s motions for summary judgment and rendering judgments thereon for D Co., the trial court concluded, inter alia, that the June 8, 2013 accident occurred on the thirtieth day after D Co. loaned M the dealer license plate on May 9, 2013, because the day on which the loan of the dealer license plate occurred did not count

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

for purposes of the statute. The trial court thus concluded that the accident occurred within the thirty day period. The plaintiffs appealed to the Appellate Court, which affirmed the judgments of the trial court, concluding, inter alia, that the trial court properly excluded the day on which the loan of the plate was made in calculating whether the accident occurred within the thirty day time limit of § 14-60 (a). On the granting of certification, the plaintiffs filed a joint appeal with this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had properly excluded May 9, 2013, the date on which D Co. loaned the dealer license plate to M, for purposes of calculating the thirty day period under § 14-60 (a), and, because May 10, 2013, was the first day of that period and the accident occurred on June 8, 2013, the accident occurred within the thirty day limitation period of § 14-60 (a): applying relevant principles of statutory construction to § 14-60 (a), which does not define the word "days" or specify how the thirty day period is to be computed, this court concluded that, in the absence of any explicit textual evidence to the contrary, the legislature intended the term "days" in § 14-60 (a) to be interpreted consistently with its established legal meaning as an indivisible calendar day that runs for a twenty-four hour period from midnight to midnight rather than a fraction of a day, and, because D Co. loaned the dealer license plate to M at approximately 7 p.m. on May 9, 2013, and, therefore, not for a full calendar day on May 9, 2013, that date must be excluded for purposes of computing the thirty day period under § 14-60 (a); moreover, such a construction is consistent with the well established rule that, in the absence of statutory language requiring otherwise, the day of the act from which a future time is to be ascertained is to be excluded from the calculation, and this court uniformly has adhered to that rule as a matter of policy in order to ensure uniformity and predictability in the computation of statutory deadlines.
2. The plaintiffs could not prevail on their claim that a genuine issue of material fact existed as to whether the parties intended the date of the loan of the dealer license plate to be included in computing the thirty day period under § 14-60 (a), as the evidence on which the plaintiffs relied, including the terms of the loan agreement, related only to when the parties intended the loan agreement to begin running, and, as a matter of law, the intent of the parties does not bear on the issue of whether the date of the loan is to be excluded from the thirty day period, which is a question of statutory construction that depends instead on the intent of the legislature.

Argued September 23, 2019—officially released February 25, 2020

Procedural History

Actions, in the first and third cases, to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and action, in the second case, to recover damages for the wrongful death

of the plaintiff's decedent as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Waterbury, where the cases were consolidated; thereafter, the court, *Brazzel-Massaro*, *J.*, granted the motions for summary judgment filed by the defendant Danbury Fair Hyundai, LLC, in each case and rendered judgments thereon, from which the plaintiff in each case appealed to the Appellate Court, *Keller*, *Elgo* and *Bear*, *Js.*, which consolidated the appeals and affirmed the trial court's judgments; subsequently, on the granting of certification, the plaintiff in each case filed a joint appeal with this court. *Affirmed.*

James J. Healy, with whom were *Joel T. Faxon* and *Alinor C. Sterling*, and, on the brief, *J. Craig Smith*, *Cynthia C. Bott* and *Nathan C. Nasser*, for the appellants (plaintiff in each case).

James F. Shields, with whom was *David M. Houf*, for the appellee (defendant Danbury Fair Hyundai, LLC).

Opinion

MULLINS, J. Subject to certain requirements, General Statutes § 14-60 (a) permits motor vehicle dealers to temporarily loan a dealer license plate to, inter alia, the purchaser of one of their vehicles while that purchaser's registration is pending, but "for not more than thirty days in any year . . . ."[1] The dispositive issue in this certified appeal is whether, for purposes of calculat-

[1] General Statutes § 14-60 (a) provides in relevant part: "No dealer or repairer may loan a motor vehicle or number plate or both to any person except for (1) the purpose of demonstration of a motor vehicle owned by such dealer, (2) when a motor vehicle owned by or lawfully in the custody of such person is undergoing repairs by such dealer or repairer, or (3) when such person has purchased a motor vehicle from such dealer, the registration of which is pending, *and in any case for not more than thirty days in any year*, provided such person shall furnish proof to the dealer or repairer that he has liability and property damage insurance which will cover any damage to any person or property caused by the operation of the loaned motor vehicle, motor vehicle on which the loaned number plate is displayed or both. Such person's insurance shall be the prime coverage. If the person to whom the dealer or repairer loaned the motor vehicle or the number plate

ing that thirty day period, the "first day" is the date on which the dealer loans the plate to the purchaser or the first full calendar day thereafter.

Following a fatal motor vehicle accident, the plaintiffs in this joint appeal, Casey Leigh Rutter, Nancy Beale, as administratrix of the estate of Lindsey Beale, and Jason Ferreira, each commenced an action against the defendant Danbury Fair Hyundai, LLC,[2] a motor vehicle dealer whose dealer license plate was displayed on one of the vehicles involved in the accident. The trial court concluded that the accident occurred on the last day of the thirty day limitation period of § 14-60 (a) because the day during which the defendant loaned the plate was not included in the calculation of the thirty day period. The Appellate Court agreed and affirmed the judgments of the trial court; see *Rutter* v. *Janis*, 180 Conn. App. 1, 5, 182 A.3d 85 (2018); and we granted certification, limited to the issue of whether the Appellate Court correctly excluded the date of the loan when calculating the thirty day loan period. See *Rutter* v. *Janis*, 329 Conn. 904, 185 A.3d 594 (2018).

We agree with the Appellate Court that the day of the loan does not count toward the thirty day limitation

did not, at the time of such loan, have in force any such liability and property damage insurance, such person and such dealer or repairer shall be jointly liable for any damage to any person or property caused by the operation of the loaned motor vehicle or a motor vehicle on which the loaned number plate is displayed. . . ." (Emphasis added.)

We note that § 14-60 (a) was amended by the legislature subsequent to the date of the events underlying the present case. See Public Acts 2013, No. 13-271, § 22. That amendment, however, has no bearing on the merits of this appeal. For the sake of simplicity, we refer to the current revision of the statute.

[2] Each plaintiff also named as defendants Luis Martins, Jorge Martins, Adam Janis, and Eagle Electric Service, LLC, and, in addition, Rutter named State Farm Automobile Insurance Company as a defendant. The claims against those defendants were not a subject of the motion for summary judgment in the consolidated appeals to the Appellate Court, and are not at issue in this certified appeal. Accordingly, we refer to Danbury Fair Hyundai, LLC, as the defendant and to the other defendants by name.

period of § 14-60 (a). In particular, we conclude that the legislature's unqualified use of the term "days" —a term that has a well established legal meaning in our jurisprudence—indicates that it intended the thirty day period to be measured in terms of full calendar days. Therefore, because the day of the loan was a "fraction" of a day rather than a full calendar day, it must be excluded. This construction is consistent with this court's long recognized policy that, when calculating statutory and other deadlines, "the day of the act from which a future time is to be ascertained . . . is to be excluded from the calculation . . . ." *Weeks* v. *Hull*, 19 Conn. 376, 382 (1849). This court established, and has consistently adhered to, this rule as a matter of policy in order to ensure uniformity and predictability in the computation of deadlines, and we see no reason why it should not be applied to § 14-60 (a). Accordingly, we affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following undisputed facts. "On May 9, 2013, Luis Martins and his father, Jorge Martins, purchased a 2013 Hyundai Veloster automobile from the defendant. Because the defendant had not received the automobile manufacturer's certificate of origin, the parties could not complete the transfer of Luis Martins' motor vehicle registration from his previous vehicle . . . to the new vehicle. The defendant loaned a dealer number plate to Luis Martins while the registration process was pending. The defendant and Luis Martins signed [a "Temporary Loan of Motor Vehicle" agreement (loan agreement)] at approximately 7 p.m. on May 9, 2013.[3]

"On June 8, 2013, at approximately 3 p.m., Luis Martins, while driving the Hyundai Veloster automobile,

[3] "Although Jorge Martins, who is described in the court's memorandum of decision as Luis Martins' father, did not sign the loan agreement, it is undisputed that he was a co-owner of the 2013 Hyundai Veloster automobile that was the subject of that agreement." *Rutter* v. *Janis*, supra, 180 Conn. App. 4 n.3.

was involved in a motor vehicle accident in Danbury. As a result of the accident, his passengers, Lindsey Beale, Casey Leigh Rutter and Jason Ferreira, sustained traumatic injuries; Beale died from her injuries. At the time of the accident, the Hyundai Veloster automobile displayed the dealer number plate belonging to the defendant." (Footnote added.) *Rutter* v. *Janis*, supra, 180 Conn. App. 5.

In separately filed complaints, the plaintiffs asserted a number of claims in support of their theory that the defendant was liable for the damages resulting from the June 8, 2013 accident, and Rutter included a claim that the defendant had loaned the dealer plate to Luis Martins in violation of § 14-60. Thereafter, the defendant filed a substantially similar motion for summary judgment in each case, asserting that it was not liable because its loan of the dealer plate met the requirements of § 14-60, and that the accident occurred "twenty-nine days and [twenty] hours after the plates were loaned out, and thus well within the thirty day period of time required by [§ 14-60 (a)]." Each plaintiff filed a substantially similar opposition, asserting, inter alia, that there were genuine issues of material fact as to whether the defendant complied with the requirements of § 14-60 (a), and also that the loan agreement exceeded the thirty day time limit because it permitted Luis Martins to return the plate as late as June 9, 2013, which was, "at a minimum, thirty-one days" after the defendant loaned the plate.[4]

The trial court granted each of the defendant's motions and rendered judgment in each case for the defendant, concluding that the defendant complied with § 14-60. In reaching its conclusion, the trial court rea-

[4] The plaintiffs also asserted that the defendant had failed to plead § 14-60 (a) as a special defense and that the defendant was ineligible to claim the protections of § 14-60 (a) because Luis Martins' registration was not "pending" at the time the defendant loaned the dealer plate to him. See General Statutes § 14-60 (a) (3).

soned that the date on which the defendant loaned the plate to Luis Martins—May 9, 2013—did not count toward the thirty day limit. Therefore, using May 10 as "day one," and measuring the thirty days against the date of the accident,[5] the court concluded that the accident on June 8, 2013, occurred on the thirtieth day after the defendant loaned the plate, within the thirty day time limit of § 14-60 (a). Rejecting the plaintiffs' other arguments in opposition to summary judgment, the court ruled that the defendant "complied with [§] 14-60 . . . and is protected from liability for the accident."

The plaintiffs appealed from the judgments of the trial court to the Appellate Court, which affirmed those judgments, concluding, inter alia, that the court properly excluded the day on which the loan was made when computing the thirty day time limit under § 14-60 (a).[6] See *Rutter* v. *Janis*, supra, 180 Conn. App. 14. Counting May 10, 2013—the day after the loan agreement was executed—as the first day, the Appellate Court concluded that "[t]he accident on June 8, 2013, occurred not more than thirty days following the loan agreement and, therefore, was within the statutory time limit set forth in § 14-60 (a)."[7] Id.

[5] In a footnote, the court rejected the plaintiffs' argument that the relevant cutoff date for purposes of calculating the thirty days was the return date specified in the loan agreement, as opposed to the date of the accident, stating that "[t]his argument is contrary to the intent of [§ 14-60]" and that, "although [the loan agreement] refers to a June 9, 2013 date, that is not the return date consistent with the claim by the defendant . . . ." The court provided no further explanation.

[6] The Appellate Court also rejected the plaintiffs' other claims on appeal that the defendant was not entitled to summary judgment under § 14-60 (a), including that the defendant failed to establish that it loaned the plate to Luis Martins while his registration was pending. See *Rutter* v. *Janis*, supra, 180 Conn. App. 14–18.

[7] We granted the plaintiffs' petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude, under the circumstances of this case, that the thirty day loan period of . . . § 14-60 did not, as a matter of law, include the first day of the loan period?" *Rutter* v. *Janis*, supra, 329 Conn. 904.

On appeal to this court, the plaintiffs claim that the Appellate Court incorrectly excluded the date of the loan from the computation of the thirty day period under § 14-60 (a) because (1) the text of § 14-60 (a) indicates that the legislature intended it to be included, and (2) the parties to the loan agreement—that is, Luis Martins and the defendant—intended for the loan period to begin running on the date the loan agreement was executed, May 9, 2013. We find neither argument persuasive.

We begin with our standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820–21, 116 A.3d 1195 (2015).

I

The plaintiffs first claim that the Appellate Court incorrectly failed to count the date on which the defendant loaned the plate to Luis Martins as the first day of the thirty day limitation period because the plain terms of § 14-60 (a) require that date to be included. We disagree.

Because resolution the plaintiffs' claim requires us to construe § 14-60 (a), we begin with the general principles of statutory construction that guide our analysis. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019). "Issues of statutory construction . . . are also matters of law subject to our plenary review." (Internal quotation marks omitted.) *Plato Associates, LLC* v. *Environmental Compliance Services, Inc.*, 298 Conn. 852, 862, 9 A.3d 698 (2010).

"In the construction of statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." General Statutes § 1-1 (a). Of particular relevance in the present case is the principle that "words having a determined meaning at common law generally are given that same meaning in a statute." *State* v. *Dupigney*, 295 Conn. 50, 59, 988 A.2d 851 (2010).

"[L]egal terms . . . absent any legislative intent shown to the contrary, are to be presumed to be used in their legal sense. . . . Words with a fixed legal or

judicially settled meaning must be presumed to have been used in that sense. . . . *In ascertaining legislative intent* [*r*]*ather than using terms in their everyday sense*, [*t*]*he law uses familiar legal expressions in their familiar legal sense*." (Emphasis added; internal quotation marks omitted.) Id.; see also *Police Dept.* v. *State Board of Labor Relations*, 225 Conn. 297, 301 n.6, 622 A.2d 1005 (1993) ("[w]here a statute does not define a term, it is appropriate to look to the common understanding expressed in the law and in dictionaries" (internal quotation marks omitted)).

We next turn to the text of the statute, which provides in relevant part: "No dealer . . . may loan a . . . number plate . . . to any person except . . . when such person has purchased a motor vehicle from such dealer, the registration of which is pending, and in any case *for not more than thirty days in any year* . . . ." (Emphasis added.) General Statutes § 14-60 (a) (3). The statute does not define the term "days" or specify how the thirty day period is to be computed. Nevertheless, our case law, dating back 200 years, demonstrates that the word "day" has acquired a common legal usage that illuminates our construction of § 14-60 (a). This case law highlights two related concepts that lead us to conclude that the legislature intended the date on which the dealer loans the plate to the customer not to be counted toward the thirty day limit.

First, this court has long recognized that, when left unqualified in a statute, the word "day" refers to a calendar day, that is, a twenty-four hour period that runs from midnight to midnight. See *Secretary of Office of Policy & Management* v. *Employees' Review Board*, 267 Conn. 255, 265–66, 837 A.2d 770 (2004) ("[C]ourts generally have construed the word day, when left unqualified, to mean a calendar day. . . . [A] calendar day is the space of time that elapses between two successive midnights. . . . Therefore, the fact that the leg-

islature did not qualify the term day . . . suggests that a day [for purposes of an employment benefits statute] represents an entire twenty-four hour period . . . .'' (Citations omitted; footnote omitted; internal quotation marks omitted.)); *Miner* v. *Goodyear Glove Mfg. Co.*, 62 Conn. 410, 411, 26 A. 643 (1892) (''The current of authorities is substantially unvarying to the effect that when the word 'day' is used in a statute . . . it will, unless it is in some way restricted, be held to mean the whole twenty-four hours. Thus, when the statute . . . fixes [a] period of . . . days, it must be taken to mean days in the sense of the law.''); *Fox* v. *Abel*, 2 Conn. 541, 542 (1818) (''It is a [well-known] rule of the common law, that a day comprises twenty-four hours, extending from midnight to midnight . . . . When a day is spoken of in law, it comprehends that period of time.''); see also *The Pocket Veto Case*, 279 U.S. 655, 679, 49 S. Ct. 463, 73 L. Ed. 894 (1929) (''[t]he word 'days,' when not qualified, means in ordinary and common usage calendar days'').[8] Accordingly, the legislature's provision of a certain number of ''days'' in a statute suggests, in the absence of textual evidence to the contrary, that it intended to measure time in terms of full calendar days, each consisting of a twenty-four hour period that runs from midnight to midnight.

Second, and relatedly, the law does not recognize ''fractions'' of a day; rather, a day is considered an indivisible unit of time. As this court explained when construing the word ''days'' as used in a statute requiring encumbrances to be perfected ''within sixty days next preceeding'' the commencement of insolvency proceed-

[8] The common usage of an undefined term may also be established by reference to its dictionary definition. See *Police Dept.* v. *State Board of Labor Relations*, supra, 225 Conn. 301 n.6. ''A 'day' is defined [in the dictionary] as: 'the time of light or interval between one night and the next [or] . . . the period of the earth's rotation on its axis ordinarily divided into [twenty-four] hours . . . .' '' *Secretary of Office of Policy & Management* v. *Employees' Review Board*, supra, 267 Conn. 265. This definition is ''[c]onsistent with'' the common usage of the word ''day'' as established by case law. See id.

ings, "[i]n the sense of the law a day includes in it the whole twenty-four hours, the law generally rejecting all fractions of a day, in order to avoid disputes. . . . The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referable to one than to any other portion of it; but the act and the day are [coextensive], and therefore the act cannot be said to be passed till the day is passed." (Citations omitted; internal quotation marks omitted.) *Miner* v. *Goodyear Glove Mfg. Co.*, supra, 62 Conn. 411.

In other words, because "the day and the act [are] coterminous and of equal length, nothing could precede the act that did not also precede the day. . . . The act and the day would begin and end together. Nothing could be after the act that was not also after the day." Id., 411–12; see also *Sands* v. *Lyon*, 18 Conn. 18, 26 (1846) (noting "well established maxim of law . . . that there is no fraction of a day; it being considered an indivisible point of time"); *Brown* v. *Hartford Ins. Co.*, 3 Day (Conn.) 58, 67 (1808) ("[i]t is true, generally, that the law disregards the fractions of a day").

Because we assume that the legislature intended the word "days" to be interpreted consistently with this established legal meaning, the legislature's use of the phrase "not more than thirty days" in § 14-60 (a) suggests that it intended to provide motor vehicle dealers with thirty full, twenty-four hour calendar days within which to loan their plates to customers. As we construe the statute to provide for thirty full and *indivisible* calendar days, the date on which the dealer loans the plate to the customer must be excluded. This is because, on the date of the loan, the dealer does not loan the plate for a full calendar day. Rather, because the loan necessarily is made after 12 a.m.—in the present case, 7 p.m.—the plate is loaned for less than twenty-four hours on that date. Thus, the date of the loan is merely a fraction of a day and does not count as a "day," i.e., a full twenty-four hour period for purposes of computing the thirty day limit of § 14-60 (a).

If the date of the loan were counted, motor vehicle dealers would not receive the thirty full calendar days contemplated by the statute; they would receive only twenty-nine full calendar days. To be sure, because the law rejects fractions of a day, excluding the date of the loan does not provide dealers with more than the thirty calendar days provided by § 14-60 (a). Indeed, even though excluding the date of the loan results in dealers being allowed to loan the plates for several hours beyond thirty days, i.e., whatever time was remaining on the day of the loan, such a fraction of a day is not a "day" as that term is understood in the law. Consequently, despite the extra hours, dealers are not thereby afforded an extra day.

On the basis of the foregoing, we conclude that the legislature's unqualified use of the phrase "thirty days" indicates that the legislature intended to count only full calendar days, which requires the date of the loan to be excluded. Had the legislature intended for a more limited construction of the word "days" for purposes of computing the thirty day period, or for the statutory time clock to begin on the date of the loan, it would have said so explicitly. "[I]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Citation omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012); see also *King* v. *Volvo Excavators AB*, 333 Conn. 283, 296, 215 A.3d 149 (2019) ("[o]ur case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent" (internal quotation marks omitted)). Indeed, the legislature has provided for "portions" or "fractions" of days in numerous other statutes, indicating that it knows how to require fractions of days to

be counted when it intends to do so.[9] Because § 14-60 (a) contains no such language, "[w]e will not impute to the legislature an intent to limit [a] term where such intent does not otherwise appear in the language of the statute." (Internal quotation marks omitted.) *Secretary of Office of Policy & Management* v. *Employees' Review Board*, supra, 267 Conn. 274.

Moreover, our interpretation of the text of § 14-60 (a), requiring the date of the loan to be excluded, is consistent with the well established principle that, in the absence of statutory language requiring otherwise, "the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded from the calculation . . . ." *Weeks* v. *Hull*, supra, 19 Conn. 381. This court recognized this rule in *Weeks* in 1849 in response to the "considerable uncertainty and confusion as to the manner of computing time" that had arisen as a result of prior decisions applying different computation methods to statutes and contracts. Id., 380. Such lack of uniformity, this court explained, was

[9] See, e.g., General Statutes § 10-151 (a) (6) (A) (iii) ("only the student school days worked that year by such teacher shall count towards tenure and shall be computed on the basis of eighteen student school days *or the greater fraction thereof* equaling one school month" (emphasis added)); General Statutes § 12-666 (a) ("[t]he surcharge . . . shall be at a rate of one dollar for each day, *or portion thereof*, up to thirty days" (emphasis added)); General Statutes § 16-244z (a) (1) (B) ("the authority shall establish the period of time that will be used for calculating the net amount of energy produced by a facility . . . and such period of time shall be either (i) in real time, (ii) in one day, (*iii*) *in any fraction of a day not to exceed one day*" (emphasis added)); General Statutes § 19a-403 (a) (providing that members of Office of Chief Medical Examiner shall be paid witness fee of $500 "for each day or portion thereof" that they are required to attend court); General Statutes § 31-222 (a) (1) (D) (ii) (defining "[e]mployment" to mean service performed for organization with "one or more employees in employment for *some portion of a day* in each of thirteen different weeks" (emphasis added)); General Statutes § 31-223 (a) (3) (B) (providing that employers shall become subject to unemployment statutes if, after date certain, they employed at least one individual "for some portion of a day in each of twenty different calendar weeks"); General Statutes § 42a-4-104 (a) (3) (" 'banking day' means the *part of a day* on which a bank is open to the public" (emphasis added)).

"of no practical use, but [was] well calculated to mislead." Id.; see also id., 381 (noting that "diversity of computation was both unnecessary and perplexing"). As a result, this court settled what it called "the true rule," namely, that the date of the act does not count. Id. This rule was to be applicable to contracts, wills, and "all other instruments," as well as to the "construction of statutes," for the purpose of establishing uniformity and predictability in the calculation of deadlines.[10] Id.; see also *Blackman* v. *Nearing*, 43 Conn. 56, 60 (1875) ("Instead of making distinctions in cases so nearly identical, the effect of which must be to perplex and mislead, we think it far preferable to have one uniform rule, and make that applicable, generally, to all contracts and obligations of every description, wills, and other legal instruments, statutes, and all proceedings under them. The day of the date, and the day of the act from which a future time is to be ascertained, should be excluded.").

Weeks thus established a rule of general applicability that this court uniformly has adhered to when calculating statutory and other deadlines. See, e.g., *Commissioner of Transportation* v. *Kahn*, 262 Conn. 257, 264, 811 A.2d 693 (2003); *DeTeves* v. *DeTeves*, 202 Conn. 292, 297 n.7, 520 A.2d 608 (1987); *Lamberti* v. *Stamford*, 131 Conn. 396, 397–98, 40 A.2d 190 (1944); *Austin, Nichols & Co.* v. *Gilman*, 100 Conn. 81, 84, 123 A. 32 (1923); *Miner* v. *Goodyear Glove Mfg. Co.*, supra, 62 Conn. 411–12; *Blackman* v. *Nearing*, supra, 43 Conn. 60. But cf. *Krajniak* v. *Wilson*, 157 Conn. 126, 129–30, 249 A. 2d 249 (1968) (holding that *Weeks* rule did not apply to employment statute because statutory regulation requiring probationary work period to begin "on the date of . . . appointment" "render[ed] inapplicable our usual rule"

[10] In recognizing this rule in *Weeks*, this court expressly disavowed "earlier cases, elsewhere, [that] suggest[ed] a different rule"; *Weeks* v. *Hull*, supra, 19 Conn. 382; including *Arnold* v. *United States*, 13 U.S. (9 Cranch) 104, 119, 3 L. Ed. 671 (1815), in which the United States Supreme Court suggested that, "[w]here the computation is to be made from an act done, the day, on which the act is done, is to be included."

that date of precipitating act is not counted). In applying the rule established in *Weeks* to a statute requiring that notice of an intent to sell commodities must be recorded "not less than fourteen nor more than thirty days prior to [the] sale"; General Statutes (1918 Rev.) § 4749; this court explained in *Austin, Nichols & Co.* that, "[u]nless settled practice or established custom, or the intention of the parties, or the terms of a statute, have included in the computation the date or act of accrual, it is to be excluded from the computation. This is not only our established rule, but the rule established by modern authority, applicable to all kinds of instruments, to statutes, and to rules and orders of court."[11] *Austin, Nichols & Co.* v. *Gilman*, supra, 84.

We see no reason to depart from the *Weeks* rule in the present case. As we have explained, the language of § 14-60 (a)—specifically, the unqualified use of the term "days"—suggests that the legislature intended to provide dealers with thirty full calendar days within which to loan their plates and, therefore, to exclude the date on which the loan was made. If this court were to dispense with the *Weeks* rule under these circumstances, it would undermine the uniformity and predictability that the rule was meant to establish.[12] See *Weeks*

[11] The *Weeks* rule also is consistent with the approach taken in federal courts. See Fed. R. Civ. P. 6 (a) (1) (A) (providing that, "in any statute that does not specify a method of computing time . . . [w]hen the period is stated in days or a longer unit of time . . . exclude the day of the event that triggers the period").

[12] We note that our conclusion that only full calendar days count toward the thirty day time limit of § 14-60 (a) may produce scenarios not contemplated or intended by the legislature. For instance, if a dealer loaned a motor vehicle to a customer in the morning on a particular day while the dealer repairs that customer's vehicle, and the customer returned the vehicle the following day in the afternoon, the dealer would not be regarded as having loaned the vehicle for a "day" as we have construed that term in the present case, despite the fact that more than twenty-four hours have passed. Although this result is somewhat counterintuitive, we do not believe that it justifies departing from the plain language of the statute or the *Weeks* rule. We leave to the legislature the question of whether to address this scenario by amending § 14-60 (a) to provide for the counting of a fraction of a day.

v. *Hull*, supra, 19 Conn. 381; see also *Blackman* v. *Nearing*, supra, 43 Conn. 60.

We do not find the plaintiffs' arguments against excluding the date of the loan persuasive. First, the plaintiffs argue that, although the law regards a "day" as indivisible and does not recognize fractions of a day, this principle does not require the time remaining on the date of the loan to be disregarded but, rather, to be counted as a full calendar day. The plaintiffs cite no authority to support this proposition. To the contrary, "it is well settled that in computing the time prescribed by law within which to perform an act, only whole days, not fractions thereof, are considered." *Postlethwaite & Netterville, APAC* v. *Royal Indemnity Co.*, 857 So. 2d 590, 596 (La. App. 2003), writ denied, 870 So. 2d 299 (La. 2004), and writ denied, 870 So. 2d 299 (La. 2004); see also *Miner* v. *Goodyear Glove Mfg. Co.*, supra, 62 Conn. 411 (holding that, because days are indivisible units of time, date of precipitating act did not count toward sixty day statutory time limit); *Sands* v. *Lyon*, supra, 18 Conn. 27–28 (excluding date of testator's death when calculating deadline set forth in his will because counting "remaining portion" of that day as one full day would violate established principle that there are no fractions of days); *Pederson* v. *Moser*, 99 Wn. 2d 456, 463, 662 P.2d 866 (1983) ("[w]e hold that fractions of days were properly ignored in the present case" for purposes of calculating statutory deadline).

Second, the plaintiffs contend that excluding the day of the loan for purposes of calculating the thirty day period would create an inconsistency with another clause in § 14-60 (a) that requires dealers to retain records of the plates and vehicles that they loan "for a period of six months from the date on which the number plate or motor vehicle or both were loaned . . . ." The plaintiffs assert that this language indicates that the legislature intended for the day of the loan to be counted in the computation of this six month period, and that the thirty day clause should be similarly construed.

Even if this language suggests that the legislature intended that the first day of this six month period is the day on which the loan was made—a proposition that is itself unclear—it would cut against rather than in favor of the plaintiffs' position because it would suggest that the legislature's omission of similar language in reference to the computation of the thirty day period was intentional. "As we often have stated, when a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal quotation marks omitted.) *Saunders* v. *Firtel*, 293 Conn. 515, 527, 978 A.2d 487 (2009). Accordingly, we will not "supply" to the thirty day clause of § 14-60 (a) "statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 605, 996 A.2d 729 (2010).[13]

II

The plaintiffs also contend that the trial court improperly granted the defendant's motions for summary judgment because there was a genuine issue of material fact as to whether the parties intended the day of the loan to be counted in the thirty day calculation. The plaintiffs rely on the terms of the loan agreement, as well as excerpts from the deposition transcript of Wil-

[13] The plaintiffs also cite to a number of statutes that use the phrase "days in any year" or similar language and argue that, because the legislature clearly intended to include the day of the act for purposes of these statutes, it must have had a similar intent with respect to § 14-60 (a). See General Statutes § 12-408 (1) (E) (ii); General Statutes § 12-411 (1) (D) (ii) (I); General Statutes § 14-15a (a); General Statutes § 14-59; General Statutes § 45a-42. The plaintiffs cite no case law interpreting any of these statutes, and it is hardly obvious, as the plaintiffs suggest, that any of them would include the day of the act in their time computations, particularly when doing so would require counting fractions of days as whole days. We therefore disagree that these statutes, on their face, provide any persuasive justification for departing from the otherwise plain text of § 14-60 (a) or the *Weeks* rule.

liam Sabatini, the defendant's chief financial officer, in which Sabatini testified that the first day of the loan period was May 9, 2013, and that the loan was for "more than thirty days." We are not persuaded.

The evidence submitted by the plaintiffs relates only to the parties' intent for *the loan agreement* to begin on May 9, 2013. The dispositive question in the present case, however, is whether the *thirty day period under § 14-60 (a)* began to run on that date. The plaintiffs have not adduced any evidence that the parties intended for this statutory period to begin running on May 9, 2013.

Moreover, as a matter of law, the intent of the parties does not bear on the question of whether the date of the loan counts as one of the thirty days under § 14-60 (a), which is a question of statutory construction that turns entirely on the intent of the legislature. See *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 46. Although, as the plaintiffs note, this court observed in *Austin, Nichols & Co.* v. *Gilman*, supra, 100 Conn. 84, that the date or act of accrual is excluded "[u]nless settled practice or established custom, or the intention of the parties" indicate otherwise, this allusion to the parties' intent, viewed in context, was merely a reference to the *Weeks* rule as it applies to contracts, wills, and other instruments. See id. (noting that rule is "applicable to all kinds of instruments, to statutes, and to rules and orders of court"); *Blackman* v. *Nearing*, supra, 43 Conn. 60 (*Weeks* rule is "applicable, generally, to all contracts and obligations of every description, wills, and other legal instruments"). With respect to these types of instruments, the intent of the parties may dictate whether the date of the occurrence of the relevant act counts toward the time limitation so as to overcome an application of the *Weeks* rule. See, e.g., *Sands* v. *Lyon*, supra, 18 Conn. 28.

Statutes are different with respect to matters of intent. Indeed, a closer examination of the quote from

Austin, Nichols & Co. demonstrates that only the language of the statute can dictate whether the legislature intended for a rule other than the general rule of excluding the date of the act to apply: "Unless settled practice or established custom, or the intention of the parties, *or the terms of a statute, have included in the computation the date or act of accrual*, it is to be excluded from the computation." (Emphasis added.) *Austin, Nichols & Co.* v. *Gilman*, supra, 100 Conn. 84. Statutes must be interpreted according to their plain terms, and that interpretation cannot be altered by the intent of the parties in a given case. See General Statutes § 1-2z ("[t]he meaning of a statute shall . . . be ascertained from the text of the statute itself"). Thus, although the text of the statute or an applicable regulation may render the *Weeks* rule inapplicable; see *Krajniak* v. *Wilson*, supra, 157 Conn. 130; the intent of the parties cannot.

Accordingly, we agree with the Appellate Court that the day on which the defendant loaned the dealer plate to Luis Martins—May 9, 2013—did not count toward the computation of the thirty day period. Using May 10, 2013, as the first day, it is undisputed that the accident on June 8, 2013, occurred on the thirtieth full calendar day after the parties executed the loan agreement and, therefore, within the thirty day limitation period of § 14-60 (a).[14]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[14] Because we conclude that the accident occurred within the thirty day time limit of § 14-60 (a), we need not address whether the loan agreement violated the thirty day limit by specifying a return date of June 9, 2013. See *Rutter* v. *Janis*, supra, 180 Conn. App. 14. As the plaintiffs acknowledged in their brief, "[i]f the loaned car or plate is involved in a collision during the thirty day period, then the dealer will not be liable, as long as the conditions of the statute are met. However, if a crash occurs after the thirty day period, then the dealer can be liable . . . ."

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Felony murder; attempt to commit robbery first degree; conspiracy to commit robbery first degree; criminal possession of firearm; prior inconsistent statements; statutory (§ 54-47a) immunity from prosecution in exchange for testimony during state's case-in-chief; fifth amendment right against self-incrimination; motion for reconsideration in light of this court's decision in State *v.* Dickson *(322 Conn. 410), pursuant to which in-court identification that has not been preceded by successful identification during nonsuggestive identification procedure must be prescreened by trial court; certification from Appellate Court; claim that defendant's rights to due process and to compulsory process were violated when state declined to extend immunity that it had granted under § 54-47a to certain witnesses during state's case-in-chief to their testimony during defendant's case-in-chief; whether state's alleged violation of § 54-47a was constitutional in nature; defendant's failure to establish that testimony that he was prevented from offering owing to state's decision not to extend immunity beyond its case-in-chief was not cumulative; whether state's purported revocation of immunity or trial court's warnings to witnesses regarding lack of clarity of law regarding whether immunity extended to their testimony as defense witnesses was so threatening or coercive as to drive those witnesses from witness stand; claim that defendant's right to due process was violated, pursuant to* Dickson, *when two witnesses purportedly gave first time in-court identification testimony about him; scope of rule announced in* Dickson, *discussed; whether defendant's identity as shooter was at issue with respect to criminal charges against him for purposes of determining whether purported first time in-court testimony of two witnesses violated defendant's right to due process; whether admission of such testimony was harmless beyond reasonable doubt.*

State *v.* Crewe (Order) 901

State *v.* DeJesus (Order) 909

State *v.* Edwards 688

Murder; conspiracy to commit murder; assault first degree; conspiracy to commit assault first degree; claim that trial court improperly admitted, in violation of hearsay rule, out-of-court statements of two witnesses identifying defendant as shooter; whether defendant properly preserved his hearsay claim; claim that

admission of out-of-court statement of witness who did not testify at trial violated defendant's right to confrontation; whether any error in admission of witness' out-of-court statement was harmless; claim that trial court improperly instructed jury on third-party culpability by omitting names of alleged third-party culprits.
State *v.* Gomes (Order) 902
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Felony murder; home invasion, conspiracy to commit home invasion; criminal possession of firearm; claim that trial court improperly overruled defendant's objection, pursuant to Batson *v.* Kentucky *(476 U.S. 79), to prosecutor's use of peremptory challenge to excuse prospective African-American juror; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court had properly overruled defendant's* Batson *objection; whether prosecutor's explanation for exercising challenge was race neutral; claim that this court should overrule* State *v.* King *(249 Conn. 645) and its progeny, holding that distrust of police and concern regarding fairness of criminal justice system constitute race neutral reasons for exercising peremptory challenge; shortcomings of* Batson *in addressing implicit bias and disparate impact that certain race neutral explanations for peremptory challenges have on minority jurors, discussed;* Batson *reform in Connecticut, including convening of Jury Selection Task Force to study issue of racial discrimination in selection of juries and to propose necessary changes, discussed.*
State *v.* Joseph (Order) 915
State *v.* Lebrick 492
Felony murder; home invasion; conspiracy to commit home invasion; burglary first degree; attempt to commit robbery first degree; assault first degree; certification from Appellate Court; claim that Appellate Court incorrectly concluded that defendant's constitutional right to confrontation was not violated; claim that admission of witness' former testimony violated defendant's right to confrontation; standard of review for determination of whether witness was unavailable to testify for purposes of confrontation clause, discussed; whether state demonstrated that it undertook reasonable, diligent and good faith effort to procure attendance of unavailable witness at defendant's trial; whether defendant's right to confrontation was violated by admission of expert witness' testimony about ballistic evidence that was based in part on ballistic report prepared and photographs generated by former employee of state's forensic laboratory who was unavailable to testify because he had died before defendant's trial.
State *v.* Mekoshvili (Order) 923
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State *v.* Moore 275
Murder; certification from Appellate Court; claim that trial court improperly denied defendant's motion to strike venire panel; whether Appellate Court correctly concluded that data pertaining to entire African-American population in Connecticut and New London county did not constitute probative evidence of underrepresentation of African-American males in jury pool; claim that Appellate Court should have exercised its supervisory authority over administration of justice to require jury administrator to collect and maintain prospective jurors' racial and demographic data in accordance with statute (§ 51-232 [c]) concerning the issuance of questionnaires to prospective jurors; certification improvidently granted.
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State *v.* Palumbo (Order) 909
State *v.* Patel (Order) 921
State *v.* Pernell (Order) 910
State *v.* Ramos (Order) 923
State *v.* Raynor 264
Assault first degree as accessory; conspiracy to commit assault first degree; certification from Appellate Court; whether Appellate Court correctly concluded that record was inadequate to review defendant's challenge under Batson *v.* Kentucky *(476 U.S. 79) to prosecutor's exercise of peremptory challenge to strike prospective juror; adoption of Appellate Court's well reasoned opinion as proper statement of certified issue and applicable law concerning that issue.*
State *v.* Salters (Order) 913
State *v.* Sentementes (Order) 902
State *v.* Turner 660
Felony murder; robbery first degree; conspiracy to commit robbery first degree; certification from Appellate Court; claim that Appellate Court incorrectly deter-

mined that defendant was not entitled to review under State *v.* Golding *(213 Conn. 233), as modified by* In re Yasiel R. *(317 Conn. 773), of his unpreserved claim, based on this court's recent decision in* State *v.* Edwards *(325 Conn. 97) that trial court violated his federal due process right to fair trial by admitting testimonial and documentary evidence concerning location of defendant's cell phone without first conducting hearing pursuant to* State *v.* Porter *(241 Conn. 57); whether unpreserved claim regarding trial court's failure to hold* Porter *hearing was constitutional in nature; claim that trial court's failure to conduct* Porter *hearing constituted plain error; claim that this court should adopt federal plain error standard under which determination of whether error was clear is made on basis of law existing at time of appeal rather than time of trial; request that this court exercise its supervisory authority over administration of justice to review defendant's unpreserved claim.*

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Limited liability companies; breach of fiduciary duty; motion to open; claim that trial court improperly exercised subject matter jurisdiction over plaintiff's claims because her alleged injuries were derivative of harm suffered by limited liability companies of which she and certain defendants were members; certification from Appellate Court; whether Appellate Court properly upheld determination of trial court that plaintiff had standing to sue; certification improvidently granted.

Wozniak *v.* Colchester (Order) . . . 906
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Dissolution of marriage; postnuptial agreements; purported agreement to revoke prior postnuptial agreement during divorce mediation; whether trial court correctly concluded that parties' written agreement purporting to revoke their postnuptial agreement was unenforceable; whether party seeking to have court declare revocation agreement unenforceable understood that that agreement was binding only if parties reached full and final settlement of disputed issues during mediation; whether trial court properly considered parol evidence in evaluating defendant's claim that revocation agreement was not binding without final settlement of disputed issues during mediation; claim that trial court had incorrectly determined that parties' postnuptial agreement was enforceable because it was fair and equitable at time of execution and not unconscionable at time of dissolution; whether plaintiff's decision to enter into postnuptial agreement was voluntary and not product of duress; whether trial court abused its discretion when it granted defendant final decision-making authority with respect to parties' children; claim that trial court improperly based its custody orders on testimony of guardian ad litem on ground that she testified that she had not seen children in two years.

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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WACHOVIA MORTGAGE, FSB *v.* PAWEL TOCZEK ET AL.
(AC 41851)

Elgo, Devlin and Harper, Js.

Syllabus

The plaintiff M Co. sought to foreclose a mortgage on certain real property owned by the defendants A and T following their default on a promissory note secured by the mortgage. Thereafter, W Co., which had been substituted as the plaintiff in the action following its acquisition of M Co., filed a motion for summary judgment as to liability. In support of its motion, W Co. attached an affidavit from H, the vice president of loan documentation for M Co., who attested concerning the debt owed under the note and that W Co. was the current holder of the note. H included with his affidavit a copy of both the note and the mortgage, which he referenced therein. No objection to the motion was filed. The trial court granted W Co.'s motion for summary judgment as to liability, which it treated as unopposed, concluding that H's affidavit in conjunction with the note and mortgage constituted a prima facie case for a judgment of strict foreclosure and that W Co. had met its burden of showing that it was entitled to judgment as a matter of law. Thereafter, the trial court granted W Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon. The trial court subsequently denied A's motion to reargue, and A appealed to this court. *Held*:

1. A could not prevail on her claim that the trial court lacked subject matter jurisdiction because W Co. did not have standing because it was not the holder of the subject note, which was premised on her claim that the note was a nonnegotiable instrument pursuant to the relevant statute (§ 42a-3-104 (a)) because it was not for a fixed amount of money and was governed by federal law; because A's claim challenged the validity of the note, as opposed to W Co.'s actual possession of the note or

ownership of the mortgage, it implicated the merits of the foreclosure action and, therefore, was not jurisdictional.

2. Contrary to A's claim, the trial court properly granted W Co.'s motion for summary judgment as to liability, as W Co. established its prima facie case for foreclosure by pleading that it was the holder of the note on which A had defaulted and submitting H's affidavit, which included and incorporated by reference copies of the note and mortgage, the record did not reflect any issues with regard to conditions precedent to foreclosure, and A did not attempt to rebut W Co.'s status as the holder of the note and, in fact, failed to file any opposition to the motion for summary judgment.

3. The trial court did not abuse its discretion by granting W Co.'s motion for a judgment of strict foreclosure; contrary to A's claim that W Co. failed to follow the procedures set forth in the rule of practice (§ 23-18) pertaining to proof of debt in foreclosure actions because it did not provide a preliminary statement of debt or affidavit of debt no less than five days before the hearing on the motion for a judgment of strict foreclosure, W Co. complied with § 23-18, as the plain language of that rule of practice only requires that the preliminary statement of the plaintiff's monetary claim be filed no less than five days prior to the hearing, and W Co. filed its preliminary statement of its monetary claim almost nine years prior to the hearing and, thereafter, filed several additional affidavits of debt, informing A as to how much she owed under the note.

4. The trial court did not abuse its discretion when it denied A's motion to reargue the judgment of strict foreclosure: A's claim that that court overlooked the fact that the requirement in the applicable rule of practice (§ 23-18) that the plaintiff's preliminary statement of debt be filed no less than five days before a hearing on a motion for a judgment of strict foreclosure was mandatory was unavailing, as the court had before it several affidavits containing a preliminary statement of W Co.'s monetary claim that were filed far in advance of five days before the June, 2018 hearing, including the preliminary statement of monetary claim filed in September, 2009; moreover, A failed to proffer any additional or new evidence separate from that which the trial court heard in the prior proceeding, nor did she demonstrate a misapprehension of facts or claims of law that the court failed to address.

Argued October 17, 2019—officially released February 25, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. filed a counterclaim; thereafter, Wells Fargo

Bank, N.A., was substituted as the plaintiff; subsequently, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the substitute plaintiff's motion for summary judgment as to liability on the complaint and as to the counterclaim; thereafter, the court, *Genuario, J.*, granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Genuario, J.*, denied the motion to reargue filed by the defendant Aleksandra Toczek, and the defendant Aleksandra Toczek appealed to this court; thereafter, the defendant Aleksandra Toczek filed an amended appeal. *Affirmed.*

Aleksandra Toczek, self-represented, the appellant (defendant).

David M. Bizar, with whom was *J. Patrick Kennedy*, for the appellee (substitute plaintiff).

Opinion

HARPER, J. The defendant Aleksandra Toczek[1] appeals from the judgment of strict foreclosure rendered in favor of the substitute plaintiff, Wells Fargo Bank, N.A.[2] On appeal, the defendant claims that the trial court (1) lacked subject matter jurisdiction because the plaintiff did not have standing, (2) improperly granted the plaintiff's motion for summary judgment as to liability, (3) improperly granted the plaintiff's motion for a judgment of strict foreclosure in violation of Practice Book § 23-18, and (4) abused its discretion when it denied the defendant's motion to reargue the judgment of strict foreclosure. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

[1] Pawel Toczek and Metro Roofing Supplies, Inc., were also named as defendants but are not involved in this appeal. We therefore refer in this opinion to Aleksandra Toczek as the defendant.

[2] The original plaintiff, Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB, was acquired on November 1, 2009, by Wells Fargo Bank, N.A., which was substituted as the plaintiff in this case on April 12, 2010. We therefore refer in this opinion to Wells Fargo Bank, N.A., as the plaintiff.

The record reveals the following facts and procedural history. On May 10, 2007, Pawel Toczek signed a promissory note (note) payable to World Savings Bank, FSB, for a principal amount of $880,000. Shortly thereafter, he and the defendant executed a mortgage in favor of World Savings Bank, FSB, on real property located at 113 Soundview Court, Stamford. The note required biweekly principal and interest payments beginning on June 11, 2007, lasting until maturation on May 28, 2037. Since July 7, 2008, neither Pawel Toczek nor the defendant has made any payments as required by the note secured by the mortgage.

On February 12, 2009, the original plaintiff, Wachovia Mortgage, FSB (Wachovia), notified both the defendant and Pawel Toczek that they were in default and that failure to cure would result in acceleration of the debt. Neither Pawel Toczek nor the defendant took steps to cure the default; thus, Wachovia elected to accelerate the sums due. Wachovia then commenced the present action and, in July, 2009, moved for a judgment of strict foreclosure and a finding of entitlement of possession. Then, on November 2, 2010, the plaintiff moved for summary judgment as to liability on the allegations of the complaint and the defendant's special defenses, as well as to the defendant's counterclaim.

In support of the motion for summary judgment, the plaintiff attached an affidavit attested to by Thomas S. Hermann (Hermann affidavit), the vice president of loan documentation for Wachovia, confirming the debt owed by the defendant and the plaintiff's possession of the note at issue. Referenced in and included with the affidavit was a copy of both the note and the mortgage. Only the plaintiff filed affidavits and exhibits with regard to the motion for summary judgment. Therefore, the trial court treated the motion for summary judgment as unopposed. Prior to the motion for summary judgment, the defendant had filed an answer, a setoff, special

defenses, and a counterclaim. The court, however, concluded that no facts were alleged, but, rather, the defendant's responses were merely conclusory and failed to state any claims. On June 21, 2011, the trial court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability on its complaint and summary judgment in the plaintiff's favor on the defendant's setoff and counterclaim. The court concluded that the contents of the Hermann affidavit in conjunction with the note and mortgage constituted a prima facie case for a judgment of strict foreclosure and that, because the defendant failed to plead facts to support any special defenses, the plaintiff met its burden of showing that it was entitled to judgment as a matter of law.

Despite having been filed in July, 2009, the motion for a judgment of strict foreclosure was heard by the court and granted on June 21, 2018. Several months later, the court issued a memorandum of decision and recognized that "there had been numerous procedural and substantive causes for delay including multiple bankruptcy filings, multiple motions to dismiss, [and] significant discovery disputes among others." Additionally, the court found the following facts: summary judgment as to liability had entered against the defendant, the plaintiff was the current holder of the note, the defendant's debt totaled $1,480,218.51, and the debt exceeded the property value by more than $800,000.

On July 11, 2018, the defendant filed a motion to reargue the court's June 21, 2018 judgment of strict foreclosure. The defendant argued that (1) because the note, by its own terms, was governed by federal law, such designation precludes the application of this state's adoption of the Uniform Commercial Code (UCC) and, thus, eliminates the plaintiff's standing, and (2) the court erred in proceeding when the most recent affidavit of debt was filed less than five days before the

June 21, 2018 hearing. The court, *Genuario*, *J.*, denied the defendant's motion, having concluded that "there is nothing inconsistent with a determination that a note is governed by federal law and the application of the principles embodied in the UCC as many federal courts have applied those principles as a body of federal common law," the plaintiff is the holder of the note, and the plaintiff complied with the timeliness requirement for filing an affidavit of debt pursuant to Practice Book § 23-18. This appeal followed.[3]

I

The defendant first contends that the court lacked subject matter jurisdiction because the plaintiff does not have standing. In particular, she argues that the plaintiff lacks standing because it is not the holder of the note, a claim premised solely on her assertion that the note is a nonnegotiable instrument pursuant to General Statutes § 42a-3-104 (a).[4] According to the defendant, the note is nonnegotiable because it is not for a fixed amount of money pursuant to § 42a-3-104 (a) and it contains conspicuous language recognizing federal law, as opposed to the UCC, as the governing law.

[3] The defendant filed an amended appeal on July 30, 2018. Her appeal form indicates that she is appealing from the following: (1) motion for a judgment of strict foreclosure, (2) motion to dismiss, (3) motion to open summary judgment, (4) motion for summary judgment, (5) discovery motions, (6) motion to reargue the judgment of strict foreclosure, and (7) motion for a protective order. In her appellate brief and in her oral argument before this court, the defendant did not address claims two, three, five, or seven; therefore, we will only address claims one, four, and six, as well as her subject matter jurisdiction claim. See *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 163, 20 A.3d 702 (2011) ("[i]t is well settled that [w]e are not required to review claims that are inadequately briefed" [internal quotation marks omitted]).

[4] General Statutes § 42a-3-104 (a) provides in relevant part: "Except as provided in subsections (c) and (d), 'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order . . . ."

The defendant's assumption that the negotiability of the note implicates standing is without support under Connecticut law. Instead, such claims go to the merits of the case and are not jurisdictional. We find this court's holding in *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014), instructive.

In *Wells Fargo Bank, N.A.*, this court stated: "The defendants make much of the maxim that standing implicates the subject matter jurisdiction of the court and may be raised at any time. The defendants, however, fail to understand that there is a difference between challenging a party's standing to maintain a cause of action and challenging the merits of the cause of action itself. 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 . . . in question. . . .

"When the defendants argued . . . that the plaintiff was not a *proper* holder of the note, their argument went to the merits of the case, that is, to whether the plaintiff should prevail. Although they called their claim a lack of subject matter jurisdiction, we do not view it as such. We view it, instead, as a claim that goes to the heart of the issues that would have had to be resolved . . . [at] trial. . . .

"To prevail in an action to enforce a negotiable instrument, the plaintiff must be a holder of the instrument or nonholder with the rights of a holder. . . . This status is an element of an action on a note. . . . The failure to plead this fact properly is challenged by a motion to strike. . . . The failure to prove such element will result in a judgment for the defendants. . . . In neither event is jurisdiction implicated. . . . [W]e conclude that [a] defendant's challenge to the *validity* of the

plaintiff's status as owner of the note and mortgage, as opposed to the plaintiff's actual possession of the note and ownership of the mortgage, implicates the merits of the . . . foreclosure action, not the plaintiff's standing to bring the action." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 399–400.

In the present case, the defendant does not dispute the plaintiff's actual possession of the note or the ownership of the mortgage. In her claim that the note is not for a fixed sum and governed by federal law, the defendant challenges the validity of the note itself which, as *Wells Fargo Bank, N.A*, provides, is a claim that goes to the merits of the foreclosure action and is not jurisdictional. Therefore, the defendant's subject matter jurisdiction claim fails.

II

Next, the defendant claims that the court erred when it granted the plaintiff's motion for summary judgment as to liability. More specifically, she argues that the plaintiff was unable to meet its burden to make a prima facie case for foreclosure because the note was nonnegotiable. The defendant, again, contends that the note is nonnegotiable because it contained conspicuous language that it was governed by federal law and that it was not for a fixed amount. Further, the defendant argues that the court failed to consider that the term "holder" means " [a] person in possession of a negotiable [note] that is payable either to bearer or to an identified person that is the person in possession . . . ." We disagree with the defendant.

We begin our analysis by setting forth the standard of review. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . [I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any

genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant [a motion for] summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Fitzpatrick*, 190 Conn. App. 773, 788–89, 212 A.3d 732, cert. denied, 333 Conn. 916, 217 A.3d 1 (2019).

"When a party files a motion for summary judgment and there [are] no contradictory affidavits, the court properly [decides] the motion by looking only to the sufficiency of the [movant's] affidavits and other proof." (Internal quotation marks omitted.) *Lefebvre* v. *Zarka*, 106 Conn. App. 30, 38–39, 940 A.2d 911 (2008). "[I]f the affidavits and the other supporting documents [of the nonmoving party] are inadequate, then the court is justified in granting the [motion for] summary judgment, *assuming that the movant has met his burden* . . . ." (Emphasis in original; internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 631, 57 A.3d 391 (2012).

In the present case, the plaintiff pleaded that it was the holder of the note on which the defendant had defaulted and the plaintiff foreclosed. The plaintiff also submitted to the court an affidavit that included and incorporated by reference copies of the note and mortgage that it has possessed since it acquired Wacho-

via. See footnote 2 of this opinion. Additionally, the record does not reflect any issues with regard to conditions precedent to foreclosure. The plaintiff, therefore, established its prima facie case. The defendant did not attempt to rebut the plaintiff's status as a holder of the note—in fact, the defendant did not file *any opposition* to the plaintiff's motion for summary judgment.

Because the plaintiff established a prima facie case that it is the holder of the note in dispute, and the defendant did not contest that showing, we reject the defendant's claim that the court erred when it granted the plaintiff's motion for summary judgment as to liability.

III

The defendant's third claim is that the court improperly granted the plaintiff's motion for a judgment of strict foreclosure in violation of Practice Book § 23-18. Specifically, she argues that the plaintiff failed to follow the procedures outlined in § 23-18, in that it did not provide a preliminary statement of debt or affidavit of debt no less than five days before the hearing. We disagree.

We first set forth our standard of review. "The standard of review of a judgment of . . . strict foreclosure is whether the trial court abused its discretion. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Gonzalez*, 187 Conn. App. 511, 514, 202 A.3d 1092 (2019).

As discussed previously in this opinion, "[i]n order to establish a prima facie case in a mortgage foreclosure

action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Fitzpatrick*, supra, 190 Conn. App. 788–89. Additionally, Practice Book § 23-18 (b) provides: "No less than five days before the hearing on the motion for judgment of foreclosure, the plaintiff shall file with the clerk of the court and serve on each appearing party, in accordance with Sections 10-12 through 10-17, a preliminary statement of the plaintiff's monetary claim."

On appeal, the defendant argues that the plaintiff's June 18, 2018 affidavit of debt was untimely because it was filed less than five days prior to the June 21, 2018 hearing on the motion for a judgment of strict foreclosure. We disagree.

The plain language of Practice Book § 23-18 (b) only requires that the preliminary statement of the plaintiff's monetary claim be filed no less than five days prior to a hearing on a motion for a judgment of strict foreclosure. In the present case, the plaintiff filed its preliminary statement of its monetary claim on September 9, 2009—almost *nine years* prior to the hearing on the motion for a judgment of strict foreclosure. Thereafter, the plaintiff filed additional affidavits of debt, informing the defendant how much she owed, including on April 8, 2010, December 31, 2013, February 17, 2017, and June 18, 2018. Therefore, the plaintiff properly complied with Practice Book § 23-18 (b), and the court did not abuse its discretion by granting the motion for a judgment of strict foreclosure.[5]

[5] In *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 433–34, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018), the parties presented similar arguments concerning the five day notice provision of Practice Book § 23-18 (b). Similar to the present appeal, the plaintiff in *Bank*

IV

Lastly, the defendant claims that the court abused its discretion when it denied the defendant's motion reargue the judgment of strict foreclosure. She asserts that the trial court "overlooked the fact that the requirement that the preliminary statement of debt be filed no less than five days [before a hearing on a motion for a judgment of strict foreclosure] in Practice Book [§] 23-18 was mandatory and that the defendant should be informed of the amount of the debt including interest to the date of the hearing." (Emphasis omitted.) We disagree.

"[I]n reviewing a court's ruling on a motion to open, reargue, vacate or reconsider, we ask only whether the court acted unreasonably or in clear abuse of its discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . . [T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Citation omitted; internal quotation marks omitted.) *Gianetti* v. *Gerardi*, 122 Conn. App. 126, 129, 998 A.2d 807 (2010).

of New York Mellon filed multiple affidavits of debt. Id. The first affidavit was filed many years before the trial court conducted its hearing on a motion for a judgment of strict foreclosure, while the most recent affidavit was filed four days prior to the hearing. Id. The issue of timeliness, however, was not raised properly before the trial court, and, thus, this court did not address "whether Practice Book § 23-18 was satisfied by the filing of the initial affidavit of debt . . . ." Id., 434.

Again, because the court had before it several affidavits containing a preliminary statement of the plaintiff's monetary claim that were filed far in advance of five days before the hearing on the motion for a judgment of strict foreclosure, including the preliminary statement filed on September 9, 2009, the court did not overlook the five day requirement of Practice Book § 23-18. See part III of this opinion. In addition, the defendant failed to proffer any additional or new evidence separate from that which the court heard in the prior proceeding, nor did she demonstrate a misapprehension of facts or claims of law that the court failed to address. Accordingly, the court did not abuse its discretion when it denied the defendant's motion to reargue the judgment of strict foreclosure.

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

In this opinion the other judges concurred.

REEM AL-FIKEY *v.* MOHAMED OBAIAH
(AC 41061)

Moll, Devlin and Beach, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and issuing certain financial orders. *Held:*

1. The trial court's finding that the defendant was at fault for the irretrievable breakdown of the marriage was not clearly erroneous; sufficient evidence supported the court's finding, including evidence that the defendant abruptly left the marital home with little explanation.
2. The trial court properly found that the defendant was intentionally underemployed when calculating his earning capacity: even though the defendant claimed that the court erred in basing his earning capacity on his prior work as an information technology consultant because he claimed his qualifications were outmoded to work in that field, this contention relied on the defendant's testimony regarding the amount and sources of his income, which the court expressly found was not credible, there was little support in the record for the defendant's claim that he could

not pursue additional employment in his field, and there was evidence that the defendant had, as recently as 2013, worked in the field of information technology, but had done little since then to improve his qualifications or pursue additional employment in the field; thus, it was not clearly erroneous for the court to to calculate its support orders on the basis of the defendant's earning capacity rather than his actual income.

3. The defendant could not prevail on his claim that the trial court improperly determined which properties were part of the marital estate; although the defendant claimed that numerous properties should not have been included in the marital estate because the plaintiff made no contribution to the acquisition of these properties and the defendant did not have title to these properties when the marriage was dissolved, the court recognized that the marital home was foreclosed because of the defendant's misconduct and, in lieu of the marital home, the court awarded the plaintiff a single property and, at the same time, awarded the defendant his current residence along with seven additional properties; the court acted within its broad discretion in dividing the properties as it did, having been confronted with a complicated record regarding the defendant's property ownership, and its decision to award the parties separate residences and to allow the defendant to retain whatever interest he possessed in seven other properties was reasonable.

Argued October 22, 2019—officially released February 25, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Tindill, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

Igor G. Kuperman, for the appellant (defendant).

Alex J. Martinez, for the appellee (plaintiff).

Opinion

DEVLIN, J. The defendant, Mohamed Obaiah, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Reem Al-Fikey. The defendant asserts that the trial court improperly (1) found him at fault for the irretrievable breakdown of the marriage, (2) found that he was intentionally underemployed

when calculating his earning capacity, and (3) determined which properties were part of the marital estate. We affirm the judgment of the trial court.

The following facts, as found by the trial court or undisputed in the record, and procedural history are relevant. On September 19, 1997, the parties were married in Cairo, Egypt. They have two daughters resulting from their union, both of whom are now adults. Shortly before the marriage, the defendant acquired a parcel of land in Egypt (Egyptian property) with the intent that it would be the parties' home if they decided to live in Egypt. During the marriage, the defendant worked for many years as an information technology consultant. In connection with his work, the parties moved from Egypt and, eventually, settled in Cos Cob in 2003, and acquired the marital home at 453 East Putnam Avenue (Cos Cob home).

In September, 2007, the defendant entered into a financial arrangement with Mohsen Shawarby regarding property located at 3570 Ellis Street, Mohegan Lake, New York (Mohegan Lake property). Shawarby did not have the credit score necessary to obtain a mortgage to complete new construction on a neighboring property, so, instead, he agreed to transfer his interest in the Mohegan Lake property to the defendant for a nominal fee. The plan was that the defendant would then obtain a mortgage for the Mohegan Lake property and Shawarby would make the mortgage payments. On September 2, 2007, the defendant and Shawarby executed a contract wherein Shawarby agreed to transfer title to the Mohegan Lake property to the defendant. Although the contract provided that the defendant would, at an unspecified date, return title to the Mohegan Lake property to Shawarby, evidence introduced at trial established that, at least as of the date of dissolution, the defendant still possessed title to the Mohegan Lake property.

In the summer of 2009, as the plaintiff was preparing to travel with her daughters to visit family in Egypt, the defendant informed her that he would not be at their marital home when she returned. When the plaintiff returned with her daughters from Egypt in August, 2009, she discovered that the defendant had, in fact, departed from their home in Cos Cob. Since the summer of 2009, the parties have remained separated, although the plaintiff has made repeated attempts to repair the relationship.

Beginning in 2011, the defendant acquired numerous properties for various purposes. For a number of these properties, the defendant received money from his mother in Egypt to purchase them in his name, in her name, or on her behalf. At times, the defendant would represent his mother's interest in various limited liability companies and exercised power of attorney on her behalf for some transactions. In Bridgeport, he either directly acquired or was involved in the acquisition of eight different properties: 96-98 Washington Terrace (Washington Terrace property), 674-676 Iranistan Avenue (674 Iranistan property), 224-228 Sheridan Street (Sheridan property), 69-71 Harral Avenue (Harral property), 97–99 Poplar Street, 1373 Iranistan Avenue (1373 Iranistan property), 525-527 Connecticut Avenue (Connecticut Avenue property), and 1526-1528 Fairfield Avenue (Fairfield Avenue property). As of the time of trial, the Washington Terrace property was the defendant's residence.

In 2012, the defendant was laid off from his job as an information technology consultant. Prior to the layoff, he was earning a salary of $117,000 per year. In 2013, he was temporarily employed with another company as an information technology consultant, earning $55 an hour. Since that time, the defendant has primarily worked in customer service and reported earnings that are far less than he was earning as an information technology consultant.

On March 10, 2013, the plaintiff commenced this dissolution action, and trial began on May 1, 2015. On October 31, 2017, following twenty-six days of trial spanning nearly two and one-half years, the court, *Tindill*, *J.*, rendered judgment dissolving the marriage. In its memorandum of decision, the court made orders regarding, inter alia, property distribution and alimony. The court found the defendant at fault for the irretrievable breakdown of the marriage. The court found that the defendant was intentionally underemployed and awarded alimony to the plaintiff on the basis of his earning capacity. With respect to the property division, the court found that the following properties were part of the marital estate: the Egyptian property, the Mohegan Lake property, the Cos Cob home, the Washington Terrace property, the 674 Iranistan property, the Sheridan property, the Harral property, the 1373 Iranistan property, the Connecticut Avenue property, the Fairfield Avenue property, and property located at 97 Iranistan Avenue in Bridgeport. The court also found that, as a result of the defendant's "intentional delay and neglect," the Cos Cob home was foreclosed prior to the dissolution judgment. On the basis of these findings of fact, the court awarded the Mohegan Lake property to the plaintiff,[1] the eight Bridgeport properties to the defendant, and ordered that each party retain his or her own ownership interest in any real estate located in Egypt. This appeal followed.

We begin by setting forth the relevant standard of review. "The standard of review in family matters is well settled. An appellate 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

[1] In the event that the defendant no longer owned the Mohegan Lake property, the court ordered him to pay to the plaintiff the fair market value of the property as of October 31, 2017.

court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017).

Moreover, insofar as the defendant challenges the trial court's determinations of credibility, we note that "[i]t is well established . . . that the evaluation of a witness' testimony and credibility are wholly within the province of the trier of fact. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . Thus, while we may review the court's underlying factual determinations under the clearly erroneous standard, our review requires us to defer to the court's evaluation of the plaintiff's credibility relative to that of the defendant." (Citation omitted; internal quotation marks omitted.) Id., 378–79.

I

The defendant first claims that the trial court erroneously concluded that he was at fault for the breakdown of the marriage. We disagree. A trial court's finding of fault in a dissolution action is reviewed under a clearly erroneous standard. See *Emerick* v. *Emerick*, supra, 170 Conn. App. 383 n.11; see also *Jewett* v. *Jewett*, 265 Conn. 669, 692–93, 830 A.2d 193 (2003). Our review of the extensive record before the trial court reveals that there was sufficient evidence to support its finding that the defendant was at fault for the irretrievable breakdown of the marriage.[2] For example, in the summer of 2009, the defendant abruptly left the marital home with little explanation and moved to Canada to live with his mother. He ultimately returned to the United States, but lived separately from the plaintiff and their children. The court's finding of fault was not clearly erroneous.

II

The defendant next claims that, when fashioning its support orders, the court erroneously concluded that he was intentionally underemployed. We disagree.

General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ." Moreover, "[i]t is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards [pursuant to General Statutes §§ 46b-82 (a)

[2] We note that the trial court did not expressly connect its finding of fault to its financial orders, nor did the defendant claim any such connection.

and 46b-86] on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health. . . . When determining earning capacity, it . . . is especially appropriate for the court to consider whether [a person] has wilfully restricted his [or her] earning capacity to avoid support obligations." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Tanzman* v. *Meurer*, 309 Conn. 105, 113–14, 70 A.3d 13 (2013). A trial court's finding of earning capacity warrants reversal only if it is clearly erroneous. See *Milazzo-Panico* v. *Panico*, 103 Conn. App. 464, 468–69, 929 A.2d 351 (2007).

On appeal, the defendant claims that his qualifications are outmoded to work currently as an information technology consultant and, thus, it was erroneous for the court to base his earning capacity on his prior work in that field. This contention, however, relies on the testimony of the defendant regarding the amount and sources of his income, which the court expressly found was "not credible." As noted, we are bound by the trial court's determinations of credibility. In the absence of the defendant's testimony on this issue, there is little support in the record for his argument that he cannot pursue additional employment in his area of expertise. Conversely, there was evidence before the court that, as recently as 2013, the defendant had been employed in the field of information technology, but has done little since then to improve his qualifications or pursue additional employment in the field. Therefore, it was not clearly erroneous for the court to conclude that the defendant was intentionally underemployed and to

calculate its support orders on the basis of his earning capacity rather than his actual income.

III

Lastly, the defendant claims that the court improperly determined which properties were part of the marital estate and subject to division. Specifically, he argues that numerous properties[3] should not have been included because (1) the plaintiff made no contribution to the acquisition of these properties, and (2) the defendant did not have title to these properties at the time the marriage was dissolved. In the court's decision, it recognized that the Cos Cob home was foreclosed on account of the defendant's misconduct. In lieu of the marital home, the court instead awarded the plaintiff a single property: the Mohegan Lake property. At the same time, the court awarded the defendant his current residence at the Washington Terrace property along with seven additional properties. We conclude that the trial court acted within its broad discretion in dividing the properties as it did. The trial court was confronted with a complicated record regarding the defendant's property ownership. Its decision to award separate residences to each party and to allow the defendant to retain whatever interest he possessed in the seven other Bridgeport properties was reasonable.

The judgment is affirmed.

In this opinion the other judges concurred.

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[3] The court's judgment reflected eleven properties in the marital estate, noting that the "properties are subject to division by the [c]ourt by virtue of the [d]efendant's interest therein . . . ." On appeal, the defendant has made no argument to challenge the court's orders regarding the Cos Cob home or the Washington Terrace property. Therefore, we need only address the validity of the court's orders concerning the remaining nine properties.

CHARLES PRESTO, EXECUTOR (ESTATE OF WILLIAM PRESTO), ET AL. *v.* TEODOZJA PRESTO ET AL.

(AC 41545)

Lavine, Devlin and Bear, Js.

Syllabus

The plaintiff, as executor of the decedent's estate and in his individual capacity, sought a declaratory judgment as to certain real property that the decedent had devised to the defendants, the decedent's widow and stepsons, and that the plaintiff's brother, in his will, later devised to the decedent's widow. The brother's will was filed in the Probate Court, and the plaintiff objected to the will on the ground that it conflicted with the decedent's will as to who was to inherit the property. The trial court granted the defendants' motion to dismiss the plaintiff's action, concluding that the plaintiff's claims were not ripe for adjudication in the Superior Court because, at the time of the filing of the complaint, they were still pending before the Probate Court. The trial rendered judgment for the defendants, from which the plaintiff appealed to this court, which dismissed that portion of the appeal filed by the plaintiff in his capacity as executor of the decedent's estate. *Held* that the judgment of the trial court was affirmed; because the trial court thoroughly addressed the arguments raised in this appeal in its memorandum of decision, this court adopted the trial court's well reasoned decision as a statement of the facts and the applicable law on the issues.

Argued December 11, 2019—officially released February 25, 2020

Procedural History

Action seeking, inter alia, a declaratory judgment that the plaintiffs are entitled to certain real property under the decedent's will, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Genuario*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court; thereafter, the court, *Genuario*, *J.*, issued an articulation of its decision; subsequently, the appeal was dismissed in part. *Affirmed.*

Charles Presto, self-represented, the appellant (plaintiff).

Peter V. Lathouris, with whom, on the brief, was *Michael P. Longo, Jr.*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff Charles Presto, in his capacity as the executor of the estate of William Presto, and in his individual capacity,[1] appeals from the judgment dismissing his declaratory judgment action against the defendants, Teodozja Presto, Andrzej Mazurek, and Stanislaus Mazurek, for lack of subject matter jurisdiction on the ground that the claims raised were not ripe for adjudication. We affirm the judgment of the trial court.

The plaintiff's complaint contains the following allegations. The plaintiff is the executor of the estate of William Presto. William Presto died on March 24, 1998, and his will was entered into probate. William Presto, who was the father of the plaintiff and Robert Presto, the husband of Teodozja Presto, and the stepfather of Andrzej Mazurek and Stanislaus Mazurek, devised certain interests in his real property located at 10 Carleton Street, Greenwich (property), to Teodozja Presto and Robert Presto. Robert Presto died on September 5, 2016, and left a will in which he devised the property. His will was filed in the Greenwich Probate Court. The plaintiff objected to Robert Presto's will on the ground that it conflicted with their father's will as to who was to inherit the property.

The plaintiff's appeal concerns the parties' rights pursuant to William Presto's will, including whether Robert Presto had the right to devise the real property to Teodozja Presto upon his death. The plaintiff also seeks to be appointed executor of Robert Presto's estate in light of Teodozja Presto's alleged bad faith and unconscionable conduct. On May 31, 2017, the defendants filed a motion to dismiss the plaintiff's declaratory judgment action. On February 14, 2018, the court issued a memorandum of decision dismissing the action. The court

[1] This court dismissed that portion of the appeal filed by the plaintiff in his capacity as the executor of the estate of William Presto; all references herein to the plaintiff are to Charles Presto in his individual capacity.

concluded that the plaintiff's claims were not ripe for adjudication in the Superior Court because, at the time of the filing of the complaint, they were still pending before the Greenwich Probate Court.

Upon examination of the record on appeal and the briefs and arguments of the parties, we conclude that the judgment of the trial court dismissing the plaintiff's action should be affirmed. Because the court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issues. See *Presto* v. *Presto*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-5016650-S (February 14, 2018) (reprinted at 196 Conn. App. 24, A.3d). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Geiger* v. *Carey*, 170 Conn. App. 459, 462, 154 A.3d 1093 (2017).

The judgment is affirmed.

APPENDIX

CHARLES PRESTO, EXECUTOR (ESTATE OF WILLIAM PRESTO), ET AL. *v.* TEODOZJA PRESTO ET AL.*

Superior Court, Judicial District of Stamford-Norwalk
File No. CV-17-5016650-S

Memorandum filed February 14, 2018

Proceedings

Memorandum of decision on defendants' motion to dismiss. *Motion granted.*

Charles Presto, self-represented, for the plaintiffs.

David D. Ryan, for the defendants.

* Affirmed. *Presto* v. *Presto*, 196 Conn. App. 22, A.3d (2020).

Opinion

GENUARIO, J.

I

INTRODUCTION

The plaintiff, Charles Presto, brings this action both in his individual capacity and in his capacity as executor of the estate of William Presto. According to the allegations of the complaint, the plaintiff is the executor of the estate of William Presto, who died on March 24, 1998. William Presto was the father of both the plaintiff and Robert Christopher Presto (Robert). The defendant Teodozja Presto (Teodozja) is the widow of William Presto and the stepmother of the plaintiff and Robert. She is also the mother of the defendants Andrzej Mazurek (Andre) and Stanislaus Mazurek (Stan). The plaintiff further pleads that William Presto left a will upon his death that was duly filed with the Greenwich Probate Court and pursuant to which the plaintiff was duly appointed as executor on March 31, 1998. There were no objections filed as to the will of William Presto by either Robert or Teodozja, but on August 14, 1998, Teodozja filed a notice of election, exercising her right to take her statutory share pursuant to General Statutes § 45a-436, as well as an application to appoint distributors. On December 6, 2005, an order was issued by the Greenwich Probate Court, a copy of which is attached to the complaint as exhibit C. A part of the order provided Teodozja with a life use of the property at 10 Carleton Street, Greenwich, subject to Robert's right to continue to live in the property. The order contained other provisions concerning the Carleton Street property as well. The plaintiff alleges that Robert left a will devising the property to Teodozja, notwithstanding the will of William Presto, which stated that ownership of the property should pass to William Presto's issue per stirpes if Robert predeceased Teodozja. Robert died on

December 5, 2016, predeceasing Teodozja, and Robert's will was filed with the Greenwich Probate Court. There is no allegation that it has been admitted to probate. The plaintiff further pleads that objections to the will of Robert were filed by himself in the Greenwich Probate Court, asserting that there is a conflict as to how 10 Carleton Street should pass between the will of William Presto and the will of Robert Presto. The plaintiff pleads that the will of William Presto is clear that title should pass to the plaintiff because even if Robert's will is declared valid it cannot devise property beyond that which he was entitled to receive pursuant to the will of William Presto. The plaintiff in both his capacity as executor and as an individual seeks a declaratory judgment of this court that title to 10 Carleton Street should pass to him pursuant to the directions of the will of William Presto, regardless of the provisions of the will of Robert.

The plaintiff further alleges that the will of William Presto contemplated Teodozja and Robert continuing to live together at 10 Carleton Street and alleges that the conduct of Teodozja between August 9, 2016, and August 16, 2016, was in bad faith and unconscionable. The plaintiff pleads that on August 9, 2016, Robert was discharged from a nursing home where he had been treated for a urinary tract infection and, at the time, he was in good condition. The plaintiff pleads in some detail, which is not necessary to repeat herein, that Teodozja and Andre conducted themselves in a way so as to cut off Robert's contact with his family, friends and the outside world. And that by August 16, 2016, Robert was transported to Greenwich Hospital in a severely dehydrated state and was placed on a do not resuscitate status by August 23, 2016, as a result of the efforts of Andre and Teodozja. The plaintiff alleges that between August 9 and August 16, Andre and Teodozja allowed Robert's health to physically deteriorate, allowing him

to become dehydrated, bedbound and uncommunicative for five days prior to calling 911. The plaintiff further alleges that though Stan was identified by the hospital as the person designated by the "family" to call the plaintiff, the plaintiff called Stan but Stan did not call back. The plaintiff alleges that Teodozja acted in an unconscionable manner and in bad faith and with reckless indifference to the life of Robert, and that such conduct hastened the death of Robert. The plaintiff alleges that the defendant Andre acted in an unconscionable manner and in bad faith with reckless indifference to the life of Robert, and that such conduct hastened the death of Robert and that the defendant Stan acted in a manner to isolate Robert by not putting the plaintiff on the list at Greenwich Hospital for purposes of contact. On September 5, 2016, Robert died from untreated pneumonia at Greenwich Hospital. He was no longer getting antibiotics.

The plaintiff seeks to have the December 6, 2005 order of the Greenwich Probate Court set aside and reevaluated, given the evidence of bad faith and unconscionable conduct of Teodozja. The plaintiff seeks to be appointed executor of the estate of Robert and to prevent anyone from the family of Teodozja Presto to become executor of Robert's estate. The plaintiff also seeks to have this court declare the will of Robert invalid, alleging facts that give rise to claims that Robert was not competent at the time he executed the will.

The defendants have moved to dismiss the complaint on the grounds that the plaintiff has not alleged a cognizable claim regarding either title to the property of Robert's estate or the validity of Robert's will or who should be the executor of Robert's estate and that said issues are not ripe for determination; that the appeal of the December 6, 2005 probate decree is outside the time period in which to file such an action pursuant to the applicable statute of limitations, General Statutes § 45a-186; and the plaintiff's allegations of bad faith and

unconscionable conduct are premised on the purported Probate Court appeals, which are not ripe for determination.

Because the court agrees that the issues raised by the plaintiff's appeal are not yet ripe for determination, the court grants the defendants' motion to dismiss this action.

II

DISCUSSION

"A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter . . . ." Practice Book § 10-30 (a). "[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013).

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Footnote omitted.) *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004). "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) Id., 568–69.

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied

that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, 111 Conn. App. 80, 82–83, 957 A.2d 536 (2008). In *Cadle Co.*, the Appellate Court affirmed the trial court's dismissal of the plaintiff's claims where the "plaintiff's injury [was] contingent on a determination of the priorities of the creditors of the decedent's estate, the final settlement of the estate and the absence of sufficient funds in the estate to satisfy the plaintiff's claim. In other words, any injury sustained by the plaintiff stemming from the allegations of the defendants' misconduct are, at this point, hypothetical." Id., 83.

In the case at bar, there is no allegation that the Probate Court has admitted the alleged will of Robert to probate, or determined its validity, there is no allegation that the Probate Court has appointed an executor, and there is no allegation that the Probate Court has made a determination that Robert owned an interest in the property located at 10 Carleton Street sufficient to allow him to convey the same property by will to Teodozja. Those issues are still properly pending before the Greenwich Probate Court and, in the first instance, need to be decided by the Greenwich Probate Court.

This case is similar to the case of *Solon* v. *Slater*, Docket No. CV-14-6023538-S, 2015 WL 3651789 (Conn. Super. May 12, 2015) (*Heller*, *J.*). In dismissing the Superior Court action, the court noted that all of the property that the plaintiff argued should have passed to her upon the decedent's death was presently subject to the jurisdiction of the Probate Court. Similar to the *Solon* case, the property which is the subject of this case, to wit, 10 Carleton Street, is currently subject to the jurisdiction of the Greenwich Probate Court. Should the Probate Court sustain the plaintiff's objection to the will of Robert and determine that the decedent died intes-

tate, the plaintiff may assert his claimed rights to the property within the Greenwich Probate Court. If the plaintiff disagrees with the decision of the Probate Court in that regard, the plaintiff may take an appeal in timely fashion, which appeal will be handled in accordance with law. If no appeal is taken, the plaintiff's claims will ultimately be barred.

Even if the will is admitted to probate, that does not necessarily mean that the Probate Court will decide that Robert inherited fee simple title to 10 Carleton Street pursuant to the December 6, 2005 order (as opposed to some lesser interest). The Probate Court may be required to review that order to determine what interest Robert inherited pursuant to the will of William Presto. Until such time as the Probate Court renders that decision, the plaintiff's claims in the Superior Court are not ripe.

Moreover, the allegations of the complaint relating the alleged bad faith and unconscionable conduct of the defendants during the periods subsequent to August 9, 2016, which allegedly hastened the death of Robert can only be construed as allegations of breaches of duties by the defendants to Robert. Until such time as an executor or other fiduciary is appointed to administer the estate of Robert, this claim by the plaintiff is not only premature and not ripe, but asserts claims that the plaintiff has no standing to make. Claims of wrongdoing and breaches of duty to the decedent must be brought by the decedent's fiduciary. The plaintiff's brother acting in his individual capacity has no standing to assert such claims. See *Freese* v. *Dept. of Social Services*, 176 Conn. App. 64, 78–79, 169 A.3d 237 (2017); *Geremia* v. *Geremia*, 159 Conn. App. 751, 781, 125 A.3d 549 (2015); *Wells Fargo Bank, N.A.* v. *Treglia*, Docket No. CV-06-5001250, 2011 WL 3672037, *3 (Conn. Super. July 25, 2011) (*Hon. Alfred J. Jennings, Jr.*, judge trial referee).

III

CONCLUSION

While the plaintiff alleges facts and proceedings which raise both interesting and litigable legal issues relating to the title of 10 Carleton Street and serious allegations of misconduct on the part of the defendants toward Robert, they are not ripe for adjudication in the Superior Court. For all these reasons, the defendants' motion to dismiss is granted.

KAROL NIETUPSKI *v.* NERIDA DEL CASTILLO
(AC 42003)

Alvord, Elgo and Devlin, Js.

Syllabus

The plaintiff sought a legal separation from the defendant, and the defendant filed a cross complaint seeking to dissolve her marriage to the plaintiff. The court thereafter entered certain orders pendente lite regarding international travel and education for the parties' minor child, M. From that judgment, the plaintiff appealed to this court. Following a trial to the court, the court rendered judgment dissolving the parties' marriage and entered certain orders, and the plaintiff filed an amended appeal. *Held*:

1. There was no merit to the plaintiff's claim that the trial court violated the free exercise clause of the first amendment to the United States constitution by rendering a judgment of marital dissolution: although the plaintiff argued that, by dissolving the parties' marriage, the court violated his right to free exercise of religion, he provided no legal authority to substantiate that assertion, and he did not allege that claim in his operative complaint or at trial; moreover, following the commencement of the plaintiff's action, the defendant filed a cross complaint seeking a judgment of dissolution pursuant to the applicable statute (§ 46b-40 (c) (1)), the constitutionality of which has previously been upheld by this court and, in light of that precedent, the plaintiff's claim failed.
2. The trial court properly entered orders regarding the education of M and his ability to travel internationally with either parent as part of its judgment of dissolution:

   a. The trial court did not abuse its discretion in permitting M to remain enrolled at a public elemenatary school in West Hartford as the record contained evidence to substantiate the court's factual findings and thus this court was not left with a firm conviction that a mistake had been made: the court found that M had made great strides in his educational

development at the West Hartford school, and the court credited certain testimony from M's guardian ad litem and the defendant that it was in M's best interest to attend the West Hartford school given its close proximity to his home, and that the testimony adduced at trial was consistent with the court's prior findings, which were made in connection with its pendente lite orders relating to M's education, including findings that the defendant had worked with special needs children for ten years as a paraprofessional and demonstrated extensive knowledge of M's issues and diagnoses.

b. The trial court did not abuse its discretion in permitting M to travel internationally on vacations with either party: the evidence supported the court's findings that, because the parties both were born in foreign lands, M was learning three languages, and the defendant wanted M to visit her country of origin, Peru, to meet his extended family and to allow him to immerse himself in her culture, and the plaintiff presented no evidence at trial indicating that the defendant intended to remain in Peru with M; moreover, the court credited the testimony of the guardian ad litem that she supported M's international travel, noting that there were no travel advisories for Peru and that Peru was a signatory to the Hague Convention, which provided the plaintiff with an avenue of redress against the defendant in the event she refused to return to the United States.

Argued November 13, 2019—officially released February 25, 2020

Procedural History

Action seeking a legal separation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant filed a cross complaint for the dissolution of the parties' marriage, and for other relief; thereafter, the court, *Prestley, J.*, entered certain orders pendente lite, and the plaintiff appealed to this court; subsequently, the matter was tried to the court, *Nastri, J.*; judgment dissolving the marriage and granting certain other relief, and the plaintiff filed an amended appeal. *Affirmed.*

Karol Nietupski, self-represented, the appellant (plaintiff).

Christina Gill, with whom were *Giovanna Shay*, and, on the brief, *Ramona Mercado-Espinoza* and *Enelsa Diaz*, for the appellee (defendant).

Opinion

ELGO, J. The self-represented plaintiff, Karol Nietupski,[1] appeals from the judgment of the trial court dissolving his marriage to the defendant, Nerida Del Castillo. On appeal, the plaintiff claims that the court (1) violated the free exercise clause of the first amendment by rendering a judgment of marital dissolution, and (2) improperly entered orders regarding the travel and education of a minor child.[2] We affirm the judgment of the trial court.

The relevant facts are largely undisputed. The plaintiff is a native of Poland and Polish is his first language. The defendant is a native of Peru and Spanish is her first language. In 2011, the parties were married in East Hartford. Their sole child, Matthew, was born in 2013. During the marriage, the parties resided in Glastonbury, where Matthew attended prekindergarten.

[1] The plaintiff was initially represented by counsel before the trial court. In this appeal, he appears in a self-represented capacity.

[2] In his principal appellate brief, the plaintiff also argues, in passing, that the court improperly entered a parenting schedule order because the plaintiff "will not see the child during major Christian holidays such as Christmas" and failed to consider a prenuptial agreement between the parties. Apart from those blanket statements, the plaintiff has not briefed those claims in any manner. They are not included in the statement of issues in his appellate brief, in contravention of Practice Book § 63-4 (a) (1). See *Rosenblit* v. *Danaher*, 206 Conn. 125, 136 n.12, 537 A.2d 145 (1988) ("[t]his claim will not be considered because it is not set out in the plaintiff's preliminary statement of issues"). The plaintiff has not provided a separate analysis of those claims, nor has he identified the applicable standard of review as required by Practice Book §§ 67-4 (e) and 67-5 (e). The plaintiff also has not provided citations to the record or legal authority to substantiate those abstract assertions. We therefore decline to review those inadequately briefed claims. See *Gorski* v. *McIsaac*, 156 Conn. App. 195, 209, 112 A.3d 201 (2015) ("We are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." [Internal quotation marks omitted.]).

In early 2018, the plaintiff commenced an action for legal separation. In response, the defendant filed an answer and a cross complaint, in which she sought a dissolution of the marriage.

Months later, the defendant filed motions for orders from the court pertaining to Matthew's education and international travel, to which the plaintiff objected and filed responses that proposed alternate orders. The court, *Prestley*, *J.*, held a hearing on the motions, at which both parties testified. The court also heard testimony from Juan Melian, principal at Charter Oak International Academy in West Hartford (Charter Oak), and Michael Litke, principal at Naubuc Elementary School in Glastonbury. In addition, the guardian ad litem for the minor child testified that (1) she had "no objection" to international travel, and (2) she believed that "either school [in West Hartford or Glastonbury] can address [Matthew's] needs adequately."

On August 9, 2018, the court issued two pendente lite orders relevant to this appeal. With respect to international travel, the court ordered that "each party shall be permitted to travel with [Matthew] to their homes of origin, in Peru and Poland, or on vacation to another country, for up to two weeks vacation time during the year." The court further ordered that Matthew shall attend Charter Oak in West Hartford.[3] From that judgment, the plaintiff timely appealed to this court.

[3] In issuing that order, the court stated: "With respect to the choice of schools issue, this court has considered the testimony of the parties, their witnesses, the testimony of the school principals and all exhibits entered. In particular, this court has considered the school rankings and finds that each of the schools are excellent and on par with one another. They each use the core curriculum and provide the services necessary for students with an [individual education plan].

"[Charter Oak] is an International Baccalaureate school. It was derived from a [United Nations Children's Fund] model designed to promote peace in the world. It is comprised of a very diverse population, and focuses on topics that celebrate its diverse culture. At least 30 percent of the students at Charter Oak are Hispanic/Latino. Their school offers Spanish and Chinese from prekindergarten on, two times per week, thirty minutes per session.

The parties thereafter entered into a parenting plan agreement, which the court adopted as an order of the court. On November 28, 2018, the plaintiff filed what he termed a "request to change child school district." In that pleading, the plaintiff sought an order requiring

They have a family academy and they celebrate their diversity by including a family component as well. They incorporate six units of study into each grade level that address topics to promote an international focus. They also have programs to address environmental and sustainability issues.

"The Naubuc School in Glastonbury is diverse as well but has a lower Hispanic/Latino population than Charter Oak (16 to 20 percent). The school offers Spanish two times per week, twenty-five minutes per session, beginning in first grade. From second grade on, Spanish is offered here three times per week. Their program does include cultural topics to some extent.

"For this particular child, who is being raised in homes where Spanish and Polish are spoken as a first language, the very diverse program at Charter Oak with its international focus would certainly do more to enhance his educational experience and serve his cultural needs.

"[Also relevant] is the extent of each parent's involvement in the child's educational plan. Although the guardian ad litem testified that she believed that both parents were and would continue to be involved in planning for this child and addressing his needs, it is clearly the mother who has taken the initiative in accessing services such as Birth to Three and therapy for this child. In her testimony, the mother indicated that she worked with special needs children for ten years as a paraprofessional and was aware of milestones that her child wasn't reaching that caused her concern. She demonstrated extensive knowledge and a real understanding of the child's issues, his diagnoses, and his programming. This court is cognizant of the fact that it is not unusual in an intact family for one parent to take the lead in accessing services for their child. And this court does not suggest that the father is any less devoted to his child than the mother. But as a practical matter, the track record of the parties in this area speaks for itself and is certainly a consideration for this court in deciding whose school system the child will attend.

"Finally, while not dispositive, this court has considered the parties' work schedules in its decision. The mother works between 9 a.m. to 4:30 p.m. with an occasional later departure as the need arises. The father was working 4:30 p.m. to 12 a.m. and has now switched his schedule to two hours later. If the child was to attend Naubuc School in Glastonbury, and the father is working from 6:30 p.m. to 2:30 a.m. in West Hartford, as a practical matter, he would not be available to take the child to evening school events. The mother would then be in the position of having to drive to Glastonbury to bring the child to those events.

"In anticipation of this hearing, the mother has met with the principals of both schools under consideration. The father has had one telephone conversation with the principal of Naubuc School. It is clear to this court that the mother has done her homework, has been the driving force behind obtaining services, has a work schedule that is more conducive to allowing this child to fully participate in the school's programs and activities and is in the best position to continue to do so. For these reasons, this court finds that it would be in the child's best interests to attend [Charter Oak] . . . ."

Matthew to attend public school in Glastonbury, which he alleged was "much higher ranked and safer" than Charter Oak in West Hartford. The defendant filed an objection to that request.

In December, 2018, the court, *Nastri*, *J.*, held a two day trial on the plaintiff's action for legal separation and the defendant's cross complaint seeking a dissolution of marriage. During his direct examination of the defendant, the self-represented plaintiff asked if she was "fine with legally separating" instead of having the marriage dissolved. The defendant answered in the negative, stating: "No, I need a divorce because [the plaintiff] has abused me emotionally and physically, not just me, but also my son. I cannot be with somebody who's harmed me." The court, as sole arbiter of credibility, was free to accept that testimony. See *Kiniry* v. *Kiniry*, 299 Conn. 308, 336–37, 9 A.3d 708 (2010).

On January 16, 2019, the court rendered judgment dissolving the parties' marriage pursuant to General Statutes § 46b-40 (c) (1), finding that it had broken down irretrievably.[4] The court thus declared "the parties single and unmarried." As part of its judgment of dissolution, the court made numerous factual findings and fashioned various orders. The court found, with respect to educational orders, that the testimony adduced at the dissolution trial "was consistent with Judge Prestley's findings and this court sees no reason to deviate from her conclusions." For that reason, the court denied the plaintiff's November 28, 2018 motion to change Matthew's school district, and instead ordered that "[t]he defendant shall determine which school Matthew attends." The court further ordered that "[e]ach party shall have two weeks exclusive vacation time with Matthew" per year, which "may include travel outside the United States."

[4] On appeal, the plaintiff does not challenge that factual finding.

On January 23, 2019, the plaintiff filed an amended appeal with this court, which indicated that he was appealing from the January 16, 2019 judgment of dissolution.[5] He filed a motion for reargument and reconsideration in the trial court that same day, which the court subsequently denied.[6]

I

We first consider the plaintiff's claim that the court violated the free exercise clause of the first amendment to the United States constitution by rendering a judgment of marital dissolution pursuant to § 46b-40 (c) (1).[7] That contention is without merit.

In his principal appellate brief, the plaintiff alleges that "[c]ivil laws granting divorce . . . are morally wrong because the state therein usurps an authority to

[5] We note that "the nature of a pendente lite order, entered in the course of dissolution proceedings, is such that its duration is inherently limited because, once the final judgment of dissolution is rendered, the order ceases to exist." *Sweeney* v. *Sweeney*, 271 Conn. 193, 202, 856 A.2d 997 (2004); see also *Cunniffe* v. *Cunniffe*, 150 Conn. App. 419, 435 n.11, 91 A.3d 497 ("once a final judgment enters, the pendente lite orders cease to exist because their purpose has been extinguished at the time the dissolution judgment is entered" [internal quotation marks omitted]), cert. denied, 314 Conn. 935, 102 A.3d 1112 (2014). For that reason, an appeal challenging a pendente lite order becomes moot once the marriage is dissolved and a final judgment is rendered. See *Altraide* v. *Altraide*, 153 Conn. App. 327, 332, 101 A.3d 317, cert. denied, 315 Conn. 905, 104 A.3d 759 (2014). In this appeal, the plaintiff does not contest the propriety of the pendente lite orders, but rather challenges the judgment of dissolution and accompanying orders entered by the court on January 16, 2019.

[6] The plaintiff has not appealed from the judgment of the trial court denying his motion for reargument and reconsideration.

[7] In his reply brief, the plaintiff also invokes the protections of article seventh of the Connecticut constitution, in violation of "the well settled principle that claims may not be raised for the first time in a reply brief." *Haughwout* v. *Tordenti*, 332 Conn. 559, 567 n.12, 211 A.3d 1 (2019). He further has failed to provide this court with an independent state constitutional analysis in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), rendering any claim with respect to our state constitution abandoned. See *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

which it has no right whatsoever. It is obvious that the state unlawfully invades an area of religious liberty in which it has no competence when it claims the power to dissolve a marriage lawfully contracted by two baptized persons such contract is a sacrament. Marriage belongs to God." By dissolving the parties' marriage, the plaintiff argues, the court violated his right to free exercise of religion.

The plaintiff has provided no legal authority that substantiates his bald assertion.[8] In his principal appellate brief, the plaintiff alleges that he sought a judgment of legal separation because "divorce is [a] great offense" to his religious beliefs. No such allegation was contained in his operative complaint or advanced at trial. Moreover, the record plainly indicates that, following the commencement of the plaintiff's action, the defendant filed a cross complaint, in which she sought a judgment of dissolution pursuant to § 46b-40 (c) (1).

This court previously has rejected a first amendment challenge in such circumstances. As we explained: "The United States Supreme Court has consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). . . . [Section] 46b-40 (c) (1) is a valid and neutral law of general applicability. The statute does not in any manner infringe on

[8] The plaintiff's reliance on *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, U.S. , 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018), is misplaced, as that case involved first amendment speech rights that were implicated by an individual's religious beliefs. See id., 1728 (appellant's claim was "that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation [which allegedly] has a significant [F]irst [A]mendment speech component and implicates his deep and sincere religious beliefs"). Moreover, in that decision, the United States Supreme Court adhered to established precedent that the "right to the free exercise of religion [may be] limited by generally applicable laws." Id., 1724.

the defendant's right to exercise his religious beliefs merely because it permits the plaintiff to obtain a divorce from him against his wishes." (Citation omitted; internal quotation marks omitted.) *Grimm* v. *Grimm*, 82 Conn. App. 41, 45, 844 A.2d 855 (2004), rev'd in part on other grounds, 276 Conn. 377, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); see also *Joy* v. *Joy*, 178 Conn. 254, 256, 423 A.2d 895 (1979) (upholding constitutionality of § 46b-40 (c) (1) generally). This court thus concluded that the rendering of a judgment of dissolution pursuant to § 46b-40 (c) (1) "does not violate [a party's] right to exercise his religious beliefs." *Grimm* v. *Grimm*, supra, 46. In light of that precedent, the plaintiff's claim fails.

II

The plaintiff also challenges certain orders entered by the court pursuant to General Statutes § 46b-56 as part of its judgment of dissolution. Specifically, he claims that the court abused its discretion in permitting Matthew (1) to remain enrolled at Charter Oak and (2) to travel internationally. We disagree.

We begin by noting that "[t]he standard of review in family matters is well settled. An appellate 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. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly

erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

A

As the court below observed, whether Matthew would attend school in West Hartford or Glastonbury was a major dispute between the parties. In its memorandum of decision, the court found that, although Matthew was "the least prepared student in his kindergarten class" when he enrolled at Charter Oak, he "has made great strides in his educational development with the individual attention he is receiving and now is almost functioning at grade level." The court expressly credited the testimony of the guardian ad litem, who "recommended that Matthew continue [to attend Charter Oak], primarily because it would not be in Matthew's best interests to uproot him from his current circumstances." The court also credited testimony from the defendant and the guardian ad litem that it was in Matthew's best interests to attend Charter Oak given its close proximity to his West Hartford home.[9] The court further noted that both Glastonbury and West Hartford have "excellent, comparable school systems . . . ."

In addition, the court reiterated Judge Prestley's August 9, 2018 findings that the defendant had "worked with special needs children for ten years as a paraprofessional and was aware of milestones that her child

[9] At trial, the guardian ad litem testified in relevant part: "I think [Glastonbury and West Hartford are] both high-end towns as far as Connecticut. I think they're both towns with very good schools and I think that a child would do well in either of the towns. . . . I think that [because Matthew] sleeps every school night at his mother's home [in West Hartford] I think it would be a hardship for him to have four transitions a day if he were to go to [a] Glastonbury school."

wasn't reaching that caused her concern. She demonstrated extensive knowledge and a real understanding of the child's issues, his diagnoses, and his programming." The court then stated that "[t]he testimony at trial was consistent with Judge Prestley's findings and this court sees no reason to deviate from her conclusions."[10]

The record before us contains evidence to substantiate the court's factual findings and we are not left with a firm conviction that a mistake has been made. Those findings, therefore, are not clearly erroneous. The court's findings provide an adequate basis for the court

[10] The plaintiff also alleges that Charter Oak is an unsafe school and thus jeopardizes Matthew's well-being. The court's memorandum of decision is silent as to that issue. At trial, the plaintiff testified that the doors to Charter Oak "are being left open" and unmonitored. The court heard contrary testimony from Charter Oak Principal Juan Melian, who testified that the school had implemented safety plans that were approved by the director of security for the West Hartford school system in conjunction with the West Hartford Police Department. Melian further testified that monitors always are present at the school's doors and that "[e]veryone" who enters the school "is required to be monitored." As trier of fact, the court was entitled to credit Melian's testimony and reject that offered by the plaintiff. See, e.g., *Leddy* v. *Raccio*, 118 Conn. App. 604, 616, 984 A.2d 1140 (2009) (decision to credit one party's testimony over testimony offered by opposing party "is solely the province of the trier of fact, and we will not interfere with that credibility assessment on appeal" [internal quotation marks omitted]).

It is well established that the appellate courts of this state "do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017). Because it permitted the defendant to continue Matthew's enrollment at Charter Oak as part of its orders, we presume that the court implicitly found that Matthew's attendance at Charter Oak did not pose a risk to his well-being. In this regard, we are mindful that the court, in dissolving the parties' marriage and entering those educational orders, expressly denied the plaintiff's motion to change Matthew's school district, which was predicated in part on safety concerns. See *Blum* v. *Blum*, 109 Conn. App. 316, 330 n.13, 951 A.2d 587 (trial court's denial of motion "includes implicit findings that it resolved any credibility determinations and any conflicts in testimony in a manner that supports its ruling"), cert. denied, 289 Conn. 929, 958 A.2d 157 (2008). We therefore conclude that the court's memorandum of decision contains an implicit finding that Matthew's continued enrollment at Charter Oak does not imperil his safety. Such a finding is supported by evidence adduced at trial and, thus, is not clearly erroneous.

to conclude that attending Charter Oak was in Matthew's best interest. In light of the foregoing, the court did not abuse its discretion in fashioning its educational orders in the present case.

B

The plaintiff also challenges the propriety of the court's order permitting international travel.[11] At trial, the plaintiff claimed that travel to Peru is unsafe and that, if Matthew visited that South American country with the defendant, there was a risk they would not return to the United States. He renews those claims on appeal.

It is undisputed that both the plaintiff and the defendant were born in foreign lands. It also is undisputed, as the court found, that Matthew "is learning three languages at the same time—English, Spanish, and Polish" as a result of that heritage. At trial, the defendant testified that she wanted Matthew to visit Peru to "get to know his roots . . . to know who he is as a Hispanic person" and to meet his extended family. The plaintiff presented no evidence at trial indicating that the defendant harbored any intent to remain in Peru with Matthew.

In her testimony, the guardian ad litem stated that she was "in support of Matthew being able to travel internationally." She also testified that there currently were "no travel advisories" for Peru and emphasized that Peru, like the United States, is a signatory to the Hague Convention, which she considered "a protection against [the defendant] just moving to Peru and staying there."[12]

[11] In its orders, the court stated in relevant part: "Each party shall have two weeks exclusive vacation time with Matthew during the year. Said vacation time may—but does not necessarily have to—be taken in consecutive weeks. . . . Vacations may include travel outside the United States."

[12] As our Supreme Court has explained, "[t]he Hague Convention . . . establishes the legal rights and procedures for the prompt return of minor children wrongfully removed or kept from their country of habitual residence. Under the Hague Convention, a parent, or other individual or institu-

That evidence supports the court's findings that the defendant wanted to take Matthew to Peru "to meet her extended family and to allow him to immerse himself in her culture." The court credited the recommendation of the guardian ad litem, who was in favor of permitting Matthew to travel internationally with his parents. The court further found that Peru's status as a signatory to the Hague Convention provided the plaintiff with an avenue of redress in the event that the defendant refused to return to the United States.

Travel orders involving minor children rest in the sound discretion of the trial court. See *Stancuna* v. *Stancuna*, 135 Conn. App. 349, 354–57, 41 A.3d 1156 (2012). We conclude that the court in the present case did not abuse its discretion in permitting Matthew to travel outside the United States on vacations with either party.

The judgment is affirmed.

In this opinion the other judges concurred.

COMPASS BANK *v.* JEFFREY S. DUNN ET AL.
(AC 42026)

DiPentima, C. J., and Alvord and Flynn, Js

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants J and D. Following its motion for judgment of strict foreclosure, the plaintiff filed a demand for disclosure of defense under the applicable rule of practice (§ 13-19). J and D timely responded with a disclosure of defense. The trial court thereafter granted the plaintiff's motion for default for failure to disclose a "proper defense"

tion, who claims that a child has been wrongfully removed may seek assistance from the 'Central Authority' of any signatory nation in securing the voluntary return of the child. . . . As an alternative, under those circumstances wherein the abducting parent refuses to cooperate, the party seeking the child's return may commence judicial proceedings to obtain an order for the child's return." (Citation omitted.) *Turner* v. *Frowein*, 253 Conn. 312, 332–33, 752 A.2d 955 (2000).

as a means to delay the action and overruled J and D's objection. The court granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which J and D appealed to this court. *Held* that the trial court improperly granted the plaintiff's motion for default and, accordingly, the judgment of the trial court was reversed; J and D properly complied with the requirements of § 13-19 by timely disclosing their defense, stating their counsel's belief that the defense was bona fide and setting forth the nature or substance of the defense, and the court made no findings as to the good faith and intentions of the defendants' counsel in filing the defense as required by *Jennings* v. *Parsons* (71 Conn. 413).

Argued September 24, 2019—officially released February 25, 2020

Procedural History

Action to foreclose a mortgage on certain of the real property of the named defendant et al., brought to the Superior Court in the judicial district of Middletown, where the court, *Aurigemma*, *J.*, granted the plaintiff's motion for default for failure to disclose a defense; thereafter, the court denied the motion of the named defendant et al. to reargue and granted the motion of the named defendant et al. for clarification; subsequently, the court, *Domnarski*, *J.*, rendered judgment of strict foreclosure, and the named defendant et al. appealed to this court. *Reversed; further proceedings.*

David Lavery, with whom was *Jeffrey Gentes*, for the appellants (named defendant et al.).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. Practice Book § 13-19 is a rule not often considered by either this court or the Supreme Court. We examine it in this appeal, because the defendants Jeffrey S. Dunn and Diane C. Dunn[1] claim that, despite their counsel's compliance with § 13-19, the trial court erroneously granted the motion for default for failure to disclose a defense filed by the plaintiff, Compass Bank. We agree with the defendants and reverse the judgment of the trial court.

[1] There were other defendants named in the complaint but the only defendants appearing in this appeal are Jeffrey S. Dunn and Diane C. Dunn. For clarity, we will refer to Jeffrey S. Dunn and Diane C. Dunn as the defendants.

The record reveals the following procedural history. These proceedings began with a foreclosure action on March 30, 2017, when the summons and complaint were served on the defendants. On June 28, 2017, the plaintiff filed a motion for a default judgment against the defendants for failing to appear. The motion for default, having been granted, was set aside pursuant to Practice Book § 17-20 (d) when the defendants filed appearances. On August 18, 2017, the plaintiff filed a motion for judgment of strict foreclosure. On August 30, 2017, the defendants filed an answer. On October 4, 2017, the plaintiff filed a demand for disclosure of defense, pursuant to Practice Book § 13-19.[2] The defendants timely responded with a "Disclosure of Defense" on October 11, 2017. In the disclosure, the defendants' counsel stated that the "[p]laintiff has not shown that it is the legal owner of the [n]ote with standing to enforce the [n]ote through these proceedings. That the [defendants have] no knowledge or information concerning the material allegations of [p]aragraph 5 of the [c]omplaint sufficient to form a belief, specifically, who is the current, actual holder of the [n]ote and [m]ortgage that are the subject of this action. The plea of 'no knowl-

[2] Practice Book §13-19 provides: "In any action to foreclose or to discharge any mortgage or lien or to quiet title, or in any action upon any written contract, in which there is an appearance by an attorney for any defendant, the plaintiff may at any time file and serve in accordance with Sections 10-12 through 10-17 a written demand that such attorney present to the court, to become a part of the file in such case, a writing signed by the attorney stating whether he or she has reason to believe and does believe that there exists a bona fide defense to the plaintiff's action and whether such defense will be made, together with a general statement of the nature or substance of such defense. If the defendant fails to disclose a defense within ten days of the filing of such demand in any action to foreclose a mortgage or lien or to quiet title, or in any action upon any written contract, the plaintiff may file a written motion that a default be entered against the defendant by reason of the failure of the defendant to disclose a defense. If no disclosure of defense has been filed, the judicial authority may order judgment upon default to be entered for the plaintiff at the time the motion is heard or thereafter, provided that in either event a separate motion for such judgment has been filed. The motions for default and for judgment upon default may be served and filed simultaneously but shall be separate motions."

edge' is in effect the same as pleading a denial; *Newtown Savings Bank* v. *Lawrence*, 71 Conn. 358, 362, 41 A. 1054 (1899); and a denial is a defense." On April 6, 2018, the plaintiff filed a motion for default for failure to disclose a defense on the basis that the defendants failed to disclose a "proper defense" as a means to delay the action. The defendants filed an objection to the plaintiff's motion on April 9, 2018. The trial court, *Aurigemma*, *J.*, granted the plaintiff's motion for default and overruled the defendants' objection on April 23, 2018.

On May 10, 2018, the defendants filed both a motion to reargue the motion for default for failure to disclose a defense and a motion for clarification of the court's order. The court denied the motion to reargue on May 11, 2018. The court granted the motion for clarification on May 29, 2018, stating that "[t]he defendants did not interpose a valid defense to a foreclosure action." After determining that it was bound by the law of the case[3] to adhere to Judge Aurigemma's entry of default, the court, *Domnarski*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure on July 30, 2018. This appeal followed.

The sole issue on appeal is whether the court incorrectly granted a motion for default for failing to disclose a defense on the ground that no "valid" defense was asserted. Because the issue on appeal concerns the interpretation of a rule of practice, our review is plenary. See, e.g., *Wells Fargo Bank, N.A.* v. *Treglia*, 156 Conn. App. 1, 9, 111 A.3d 524 (2015). We apply the rules

[3] "[The law of the case] doctrine refers to the binding effect of a court's prior ruling in the same case. Traditionally the doctrine held that until reversed the ruling would bind the parties and could not again be contested in that suit. . . . In essence it expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge." (Citation omitted; internal quotation marks omitted.) *Bowman* v. *Jack's Auto Sales*, 54 Conn. App. 289, 292–93, 734 A.2d 1036 (1999).

of statutory interpretation when interpreting rules of practice. See, e.g., *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018); id. ("The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . In seeking to determine [the] meaning [of a statute or a rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . When [the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Citations omitted; internal quotation marks omitted.)).

Practice Book § 13-19 provides in relevant part: "In any action to foreclose . . . in which there is an appearance by an attorney for any defendant, the plaintiff may file and serve . . . a written demand that such attorney present to the court, to become part of the file in such case, a writing signed by the attorney stating whether or not he or she has reason to believe and does believe that there exists a bona fide defense to the plaintiff's action and whether such defense will be made, together with a general statement of the nature or substance of such defense . . . ." Failure to file a responsive disclosure within ten days subjects the defendant to a default and judgment thereon. See footnote 2 of this opinion. From as far back as 1890, the rule focused on the conduct of the attorney in representing to the court the existence of a bona fide defense.

See Rules of Practice (1890) c. II, part IV, § 6, in 58 Conn. 561, 577 (1890).[4]

There are only two cases of precedential value that address the issue before us. The seminal case interpreting the rule is *Jennings* v. *Parsons*, 71 Conn. 413, 42 A. 76 (1899). In that case, the defendant, in his answer, sought to set off the full amount of the plaintiff's claim for money owed on promissory notes with money that the plaintiff owed him. Id., 413–14 (preliminary statement of facts and procedural history). The plaintiff moved to strike the answer and the trial court ordered the defendant to make a disclosure of defense. Id., 414 (preliminary statement of facts and procedural history). The defendant's counsel then orally disclosed that the defendant did not have a defense to the notes contained within the complaint but that the defendant had a set off action against the plaintiff. Id. (preliminary statement of facts and procedural history). In making this disclosure, the defendant's counsel stated that he disclosed a defense and that, in his opinion, it was a good defense. Id. (preliminary statement of facts and procedural history). The trial court ruled in favor of the plaintiff on the motion. Id. (preliminary statement of facts and procedural history). On appeal, our Supreme Court determined that, although "technically a set-off . . . is not a defense, it is in effect one, either in whole or in part." Id., 416. The court then examined the text of the rule and stated that "[t]he express language of this rule gives the court power to render judgment for the plaintiff only in two contingencies: (1) if the attorney shall refuse to disclose as required; or (2) if he shall not satisfy the court that the defense will be made, or trial had." Id.

[4] In fact, until 1978, the rule contained the following language: "[A]nd if such attorney shall intentionally or recklessly make a false statement with a view to procure the continuance or postponement of an action, the court may suspend him from practice as attorney in said court for such time as it shall deem proper." Practice Book (1963) § 176.

The court found that the defendant had complied with the rule by disclosing the defense and demonstrating that the defense would be made at trial. Id. In reversing the trial court, our Supreme Court explained that it was improper for the trial court to find that, although the defendant had complied with the rule, the defense was not a legal one or available to the defendant. Id., 418. It reasoned that the rule does not empower the court to "pass upon the legal sufficiency of the proposed defense and to render judgment in favor of the plaintiff, if the court found the defense to be legally insufficient." Id., 416. The court explained that "[o]ne of the purposes of the rule is to enable the plaintiff, at an early stage of the proceedings, to ascertain whether a defense is claimed in good faith to exist, and is honestly intended to be made, or whether it is a mere sham defense to be interposed merely for delay. To this end it provides a speedy, informal, and summary way of probing the conscience of the counsel for the defendant with respect to this matter . . . ." Id., 416–17. Accordingly, "[i]f [the defendant] has complied with the rule, that is, has disclosed as required, and satisfied the court of his belief and good faith and intention to make the defense, then the truth or legal sufficiency of it should be left to be tried and determined in the ordinary and regular way." Id., 417. The court clarified that if a disclosed defense is "clearly and palpably untruthful, or irrelevant, or utterly frivolous, it would indicate bad faith on the part of the counsel, and might warrant the court in holding that it was not satisfied either the attorney believed that a bona fide defense existed, or that he intended to make it . . . ." Id., 418.

In this case, in clarifying its entry of default for failure to disclose a defense, the court did not find that the defendants had failed to comply with Practice Book § 13-19, but simply stated: "The defendant[s] did not interpose a valid defense to a foreclosure action." It

made no determinations as to the good faith and intentions of the defendants' counsel, as *Jennings* holds it must.

The second case that offers guidance in resolving this appeal is *A.D.C. Contracting & Supply Corp.* v. *Thomas J. Riordan, Inc.*, 176 Conn. 579, 409 A.2d 1027 (1979). In that case, the plaintiff filed a motion for disclosure of defense. In response, the defendants filed a disclosure alleging that there was a lack of privity between the parties as a defense. Id., 579. The defendants later agreed that a lack of privity was not a valid defense to the action and that a default could enter. Id. Subsequently, the defendants filed an untimely motion to open the default judgment, which was denied. On appeal, the defendants argued that the court erred in ordering a default because it improperly examined "the truth or legal sufficiency" of the defense. Id., 580. Our Supreme Court found no error because the court entered default judgment against the defendants "not because it questioned the legal sufficiency of the defense but because the defendants agreed the defense put forth was not a valid defense." Id. As to the denial of the motion to open the default, the court found no abuse of discretion.[5] Id., 581.

Unlike the defendants in *A.D.C. Contracting & Supply Corp.*, the defendants here objected to the plaintiff's

[5] The majority of Superior Court judges who have addressed the issue of the legal sufficiency of defenses in the context of Practice Book § 13-19 have relied on *Jennings* to decline to consider the legal sufficiency of the disclosures. See, e.g., *Banco Popular, North America* v. *Ren*, Superior Court, judicial district of Windham, Docket No. CV-09-6000935-S (April 9, 2011); *Geha* v. *Lake Road Trust, LLC*, Superior Court, judicial district of Windham, Docket No. CV-03-0071065 (May 25, 2004); *Bank of America Illinois* v. *Bogardus*, Superior Court, Docket No. CV-97-0060598-S (October 14, 1998); *Norwich Savings Society* v. *Hunter*, Superior Court, judicial district of New London at Norwich, Docket No. 108808 (January 26, 1996); *Citicorp Mortgage, Inc.* v. *Skoronski*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-94-0543129-S (July 11, 1995); *Dohn* v. *Simone*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-93-0129505 (July 20, 1993) (9 Conn. L. Rptr. 425).

motion for default in which the plaintiff argued that "[a] challenge to standing does not create a defense to a foreclosure action. Special defenses asserted by a defendant must address the making, validity, or enforcement of the note and/or mortgage in order to be valid special defenses." Accordingly, it argued, the disclosure of defense was filed "as a means to delay this action." There was no argument that the defense was untruthful, frivolous or made in bad faith.

The court in *Jennings* instructs us that Practice Book § 13-19 should not be read to allow trial courts to "pass on the legal sufficiency of the proposed defense." *Jennings* v. *Parsons*, supra, 71 Conn. 416. Thus, whether a challenge to standing is a defense to a foreclosure action is not at issue in a § 13-19 motion. Rather, the purpose is "to enable the plaintiff, at an early stage of the proceedings, to ascertain whether a defense is in good faith claimed to exist, and is honestly intended to be made, or whether it is a mere sham defense to be interposed merely for delay." Id., 416–17. The court here simply stated that the defendants "did not interpose a valid defense to a foreclosure action"; it made no findings as to the good faith of defense counsel in making the defense or whether the defense was a "mere sham" made merely for delay.

Accordingly, the defendants properly complied with the requirements of Practice Book § 13-19 by timely disclosing their defense, stating their counsel's belief that the defense was a bona fide one and setting forth the "nature or substance of the defense."

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

In this opinion the other judges concurred.

ALYSSA PETERSON *v.* CITY OF TORRINGTON ET AL.
(AC 41966)

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

Syllabus

The plaintiff sought, inter alia, a declaratory judgment as to a tax sale of real property, and for other relief. Pursuant to the system to collect taxes unique to the defendant city of Torrington, the defendant R, the tax collector for the city, conducted a tax sale in which he sold certain real property of the plaintiff to collect unpaid property taxes. In response, the plaintiff commenced an action against the city, R, and the defendants W and S, the purchasers of the property at the tax sale. The trial court granted the motion to intervene as a party defendant filed by H Co., a lender that held a mortgage on the property. H Co. sought, inter alia, a declaratory judgment as to the title to the real property, and for other relief. Subsequently, the trial court granted the motions for summary judgment filed by the city, R, and W and S, and rendered judgment thereon, from which H Co. appealed to this court. *Held* that H. Co.'s appeal was moot because there was an unchallenged, alternative ground for affirming the judgment of the trial court; accordingly, because this court could not grant H Co. any practical relief with respect to its claims, this court was without subject matter jurisdiction over H Co.'s appeal.

Argued November 12, 2019—officially released February 25, 2020

Procedural History

Action seeking, inter alia, a declaratory judgment as to a tax sale of certain of the plaintiff's real property, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *J. Moore*, *J.*, granted the motion to intervene as a party defendant filed by Homeowners Finance Co.; thereafter, the intervening defendant filed a cross complaint for, inter alia, a declaratory judgment seeking to quiet title to certain real property, and for other relief; subsequently, the court, *J. Moore*, *J.*, granted the motions for summary judgment filed by the named defendant et al., and rendered judgment thereon, from which the intervening defendant appealed to this court. *Appeal dismissed.*

Matthew S. Carlone, for the appellant (intervening defendant).

James C. Graham, for the appellee (defendant Robert Crovo).

Opinion

SULLIVAN, J. This appeal arises out of a system to collect and pay property taxes unique to the defendant city of Torrington (city). See 21 Spec. Acts 7, No. 4 (1931). Pursuant to the system, the defendant tax collector, Robert Crovo (tax collector), conducted a tax sale in which he sold the real property of the plaintiff, Alyssa Peterson, to collect unpaid property taxes. In response, Peterson commenced an action against the city, the tax collector, and the purchasers of the property at the sale, the defendants William Gilson and Sharon Gilson (purchasers). Subsequently, Homeowners Finance Company (lender), the first mortgage holder on the plaintiff's property, intervened as a defendant, in an attempt to void the sale of the property.[1] All six parties filed motions for summary judgment. Ultimately, the trial court, after concluding that there was no genuine issue as to any material fact, granted summary judgment in favor of the defendants and denied summary judgment as to Peterson and the lender. Peterson and the lender filed separate appeals.[2] We dismiss the lender's appeal.

The trial court's memorandum of decision sets forth the following facts, which are necessary to the resolution of this appeal. Since at least the late 1800s, the city has maintained a private system of property tax collection. In the 1920s, the legislature first authorized the city's use of a private tax collector. See 19 Spec. Acts 479, No. 374, §§ 50 through 52 (1923). Under this

[1] On appeal, the city and the purchasers have adopted the brief of the tax collector.

[2] Peterson's appeal was dismissed after she failed to timely file a brief and appendix. She, therefore, is not a party to this appeal.

system, the city enters into a contract with an individual who is authorized to collect city taxes.[3] Pursuant to contract, Crovo was the city's tax collector from 1999 until May 31, 2015. At the time Crovo's contract was terminated, the city's 2013 grand list[4] was subject to the terms of Crovo's contract.

Under this system, the city issues property tax assessments of personal and real property, and establishes the tax rate. The tax collector then collects the payments for property taxes and deposits them with the city's treasurer. The tax collector then personally pays, in a lump sum, any balance of property taxes that remains unpaid to the city. In exchange, the tax collector is authorized to continue to collect and personally retain the outstanding property taxes, as well as interest and fees due thereon. He additionally receives a commission on the total amount of property taxes collected. This system guarantees that the city collects 100 percent of the assessed property taxes in the year in which they are due.

Prior to the property tax sale at issue, Peterson owed substantial property taxes running through the 2013 grand list. The tax collector, therefore, made a demand for payment of the property taxes. Peterson did not make payment in response to the demand. The tax collector, therefore, issued an alias tax warrant[5] for collection of the property taxes due.

[3] "[T]he board of finance and the board of councilmen shall meet in a joint session and shall choose for the position of tax collector . . . . The person so chosen as tax collector shall hold office for a period of four years . . . . Said tax collector shall make and file for record in the land records of the town of Torrington tax liens for all unpaid taxes, as provided by the general statutes, within one year from the date such taxes shall become due and payable." 21 Spec. Acts 7, No. 4, § 4 (1931); 20 Spec. Acts 280, No. 253, § 2 (1927); 22 Spec. Acts 8, No. 5 (1935); 24 Spec. Acts 88, No. 134, § 5 (1943).

[4] The grand list is a listing of the assessed values of all property located within the city. See General Statutes § 12-55 (a).

[5] An alias tax warrant may be issued by the tax collector after a demand for such taxes has already been made, to collect unpaid taxes. See General Statutes § 12-162 (b) (1). Section 12-162 (a) provides the tax collector, in

To effect collection of the unpaid taxes on the real property, the tax collector scheduled a tax sale and the real property was subsequently sold. Although proper notice of the redemption period was provided to Peterson and the lender, neither exercised their right of redemption within the statutory six month period. Peterson, however, filed the present action and sought and received an ex parte restraining order that restrained the recording of the tax sale deed. After a hearing, the restraining order was dissolved. The tax collector then recorded the deed in the city's land records.

Peterson commenced the present action against the city, the tax collector, and the purchasers. The operative complaint alleged, inter alia, that (1) the temporary restraining order prevented the tax collector from taking actions so as to render the tax sale void, and (2) the tax sale was voidable and the deed was invalid under General Statutes §§ 12-157[6] and 12-159.[7] The

the execution of tax warrants, with the same authority a state marshal has in executing the duties of office, and he may serve warrants for the collection of unpaid taxes.

[6] General Statutes § 12-157 (c), which guides the sale of real estate for delinquent taxes, provides: "At the time and place stated in such notices, or, if such sale is adjourned, at the time and place specified at the time of adjournment as aforesaid, such collector (1) may sell at public auction to the highest bidder all of said real property, to pay the taxes with the interest, fees and other charges allowed by law, including, but not limited to, those charges set forth in section 12-140, or (2) may sell all of said real property to his municipality if there has been no bidder or the amount bid is insufficient to pay the amount due."

[7] General Statutes § 12-159 provides in relevant part: "Any deed, or the certified copy of the record of any deed, purporting to be executed by a tax collector and similar, or in substance similar, to the above, shall be prima facie evidence of a valid title in the grantee to the premises therein purported to be conveyed, encumbered only by the lien of taxes to the municipality which were not yet due and payable on the date notice of levy was first made, easements and similar interests appurtenant to other properties not thereby conveyed, and other interests described therein and of the existence and regularity of all votes and acts necessary to the validity of the tax therein referred to, as the same was assessed, and of the levy and sale therefor . . . . No act done or omitted relative to the assessment or collection of a tax, including everything connected therewith, after the vote of the community laying the same, up to and including the final collec-

lender intervened, and in its cross complaint, alleged, inter alia, that (1) the tax collector's deed did not convey title to the purchasers, (2) Peterson is the owner of record of the property, and (3) the lender's mortgage remains an enforceable lien on the property.

After its review of the facts before it, the trial court granted the motions for summary judgment filed by the tax collector, the city, and the purchasers, and denied the motions for summary judgment filed by Peterson and the lender. This appeal followed.

On appeal, the lender claims that the trial court improperly granted summary judgment in favor of the tax collector, the city, and the purchasers because (1) the tax collector failed to comply with § 12-157 (c) and, (2) the tax collector's deed transferring interest in the property to the purchasers did not convey title, and, thus, conveyed no interest in the property. The tax collector argues that, because the lender failed to challenge all of the independent grounds for the trial court's adverse ruling, specifically the trial court's decision that § 12-159 independently validated the tax collector's sale, its appeal is moot. We agree with the tax collector that this court lacks subject matter jurisdiction. Accordingly, we dismiss the appeal.

We first set forth the legal principles that guide our disposition of this matter. Our review of a trial court's decision granting a motion for summary judgment is well established. Practice Book § 17-49 provides that the "judgment sought shall be rendered forthwith if

tion thereof or sale of property therefor, shall in any way affect or impair the validity of such tax as assessed, collected or sought to be collected or the validity of such sale, unless the person seeking to enjoin or contesting the validity of such sale shows that the collector neglected to provide notice pursuant to section 12-157, to such person or to the predecessors of such person in title, and who had a right to notice of such sale, and that the person or they in fact did not know of such sale within six months after it was made, and provided such property was by law liable to be sold to satisfy such tax. . . ."

the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . .

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . .

"The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 164–65, 204 A.3d 717 (2019).

First, we must decide if the lender's claims are moot. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . We begin with the four part test for justiciability established in *State* v. *Nardini*, 187 Conn. 109, 445 A.2d 304 (1982). . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) *that the determination of the controversy will result in practi-*

cal relief to the complainant. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; emphasis altered; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009). "Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

In its appellate brief, the lender does not challenge the trial court's decision that, irrespective of any purported noncompliance with § 12-157, the tax collector's sale of the real property to the purchasers was independently validated by § 12-159.[8] Instead, its argument is limited to (1) an alleged noncompliance with § 12-157 (c), and (2) a claim that the tax collector's deed transferring interest in the property to the purchasers did not convey title because (a) the grantor was improperly identified in the deed and (b) the tax collector did not strictly comply with General Statutes (Rev. to 2015) § 12-158. Our review of the record reveals that the trial court granted the motions for summary judgment in favor of the tax collector, the city, and the purchasers on two

[8] The lender made only an isolated reference to § 12-159 in a footnote in its brief. Moreover, during oral argument, counsel for the lender admitted that he did not brief § 12-159 because he fundamentally rejected the argument and premise that § 12-159 "even comes into play" with this issue on appeal.

independent grounds. First, the trial court determined that there was no genuine issue of material fact that the tax collector substantially complied with § 12-157. Second, the trial court determined that "under § 12-159, the proffered tax collector's deed serves as prima facie evidence that the tax sale was valid and entirely effective to pass unencumbered title to the [purchasers]."

We need not reach the merits of the lender's claims because we conclude that the claims are moot. "[W]here alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the [lender]." *Green* v. *Yankee Gas Corp.*, 120 Conn. App. 804, 805, 993 A.2d 982 (2010). Thus, even if we were to agree with the lender that the tax collector did not comply with § 12-157, which we do not, there is an unchallenged, alternative ground for affirming the judgment of the trial court, namely § 12-159. Accordingly, because we cannot grant the lender any practical relief with respect to the claims it raised, we are without subject matter jurisdiction over its appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

JASON DICKAU *v.* LAWRENCE MINGRONE
(AC 42256)

Keller, Elgo and Devlin, Js.

Syllabus

The plaintiff, who had purchased certain residential real property in New Haven from the defendant, brought an action seeking damages for, inter alia, breach of contract for the defendant's failure under the contract to deliver a property that contained three legal dwelling units. The defendant purchased the property in 1979, and had used it as a three

unit residence during his ownership. In 2011, the city building department sent a letter to the defendant, informing him that the department's records indicated that the property was a two unit residence, and that it may have been altered without approval from the building department. Thereafter, the defendant spoke with the building department's director, and the defendant believed that the matter was resolved. Subsequently, the defendant represented in a real estate listing that the property was a three unit residence and sold the property to the plaintiff in 2015, without informing the plaintiff of the 2011 letter. Thereafter, the plaintiff became aware of the 2011 letter upon inspecting the records of the building department on an unrelated matter. The trial court rendered judgment for the defendant, from which the plaintiff appealed, claiming, inter alia, that the trial court erred in finding that the city building department had not made a determination that the plaintiff's property contained only two residential units. *Held*:

1. The trial court did not err in finding that the city building department had not made a determination regarding the use and occupancy status of the property; contrary to the plaintiff's claim that the building department had determined that the property contained a two unit residence, there was sufficient evidence in the record to support the trial court's finding, as the building department official testified that no determination regarding the number of legal units had been made, no code violations regarding the number of legal units had been communicated to the defendant, and no further action had been taken after the issuance of the 2011 letter; moreover, although the plaintiff was correct in asserting that the record contained some contradictory evidence regarding the building department's determination, the mere existence of such evidence was insufficient to undermine the finding of the trial court.
2. The plaintiff could not prevail on his claim that the trial court erred in not finding that the plaintiff established the existence of damages, as the defendant cannot be liable for damages if, pursuant to the court's findings, he was not liable for the underlying causes of action.

Argued November 19, 2019—officially released February 25, 2020

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Markle, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Russell Bonin, with whom was *Stuart A. Margolis*, for the appellant (plaintiff).

Albert J. Oneto IV, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Jason Dickau, appeals from the trial court's judgment in favor of the defendant, Lawrence Mingrone, on the plaintiff's complaint, which alleged breach of contract, negligent misrepresentation, intentional misrepresentation, and innocent misrepresentation, relating to the defendant's sale of real property to the plaintiff.[1] On appeal, the plaintiff claims that the court's findings that (1) the Office of Building Inspection and Enforcement for the City of New Haven (building department) had not made a determination that the number of legal units in the property was less than three, and (2) the plaintiff had failed to establish the existence of damages as to each of his claims were clearly erroneous.[2] We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The record and the trial court's memorandum of decision reveal the following pertinent facts. From approximately December, 1979, until July 24, 2015, the defendant owned property located at 46 Ruby Street in New Haven (property). The defendant used the dwelling on the property as a three unit residence for the duration

[1] On November 19, 2016, prior to trial, the court, *Wilson, J.*, granted the defendant's motion to strike count five of the plaintiff's complaint, in which the plaintiff alleged that the defendant violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. That ruling is not a subject of this appeal.

[2] In his brief, the plaintiff asserts that the trial court was clearly erroneous "(1) . . . in its finding that the [building department] had not made a determination that the number of legal units in the property was less than three," "(2) . . . in its finding that each of the plaintiff's claims relied on a possible future event, rather than an existing fact," "(3) . . . in its findings that the plaintiff failed to establish the existence of damages as to each of his claims," and "(4) . . . in its finding that the plaintiff only offered speculative evidence as to the existence and extent of his damages on each of his claims." We have combined the plaintiff's second, third, and fourth claims, as they appear in his brief, into one damages claim, and, as explained later in this opinion, we reject the damages claim in light of our resolution of the first claim.

of his ownership. The property consisted of a ground level unit,[3] first floor unit, and second floor unit.

The building department enforces the provisions of the State Building Code.[4] On May 24, 2011, the building department sent a letter to the defendant, informing him that the building department's records indicated that the property was a two unit dwelling, but that the dwelling may have been altered through the use of the ground level space as an additional dwelling unit "without the required permits, approvals or a [c]ertificate of [u]se and [o]ccupancy" (2011 letter).[5] The 2011 letter directed the defendant to contact the building department to schedule an inspection of the property. Subsequently, the defendant contacted the building department via telephone and spoke to the director at the time, Andrew Rizzo. At the conclusion of the conversation, the defendant "was confident that [the] matter had been resolved and [that] the letter was sent in error and [that he] was to disregard it." Following the phone conversation, the building department did not follow up with the defendant, inspect the property, issue fines, or take any further action regarding the 2011 letter.

In 2012, a tree fell on the property during a storm and a representative from the building department, John

[3] Although the building department refers to the lowest level unit of the property as the "basement" unit, throughout this opinion we refer to the lowest level unit as the "ground level" unit because the unit is level with the ground.

[4] General Statutes § 29-253 (a) provides: "The State Building Code, including any amendment to said code adopted by the State Building Inspector and Codes and Standards committee, shall be the building code for all towns, cities and boroughs."

[5] The 2011 letter specifically cited a potential violation under § 110.1 of the 2005 State Building Code, which states: "Pursuant to [General Statutes § 29-265 (a)], no building or structure erected or altered in any municipality after October 1, 1970, shall be occupied or used, in whole or in part, until a certificate of occupancy has been issued by the building official, certifying that such building or structure or work performed pursuant to the building permit substantially complies with the provisions of the State Building Code."

Raffone, inspected the property, including the ground level unit. Following the inspection, the building department did not issue notification of any code violations with respect to the use and occupancy of the property, nor did the building department require the defendant to make any changes to the ground level unit. Additionally, the defendant visited the building department and met with Raffone and Rizzo regarding the immediate displacement of his tenants following the damage caused by the tree. During this meeting, the building department representatives did not raise any concerns regarding code violations with respect to the use and occupancy of the property.

Further, in 2013, the defendant filed a residential rental license renewal application with Livable City Initiative (LCI).[6] In this application, the defendant listed the property as consisting of three residential units. On December 9, 2013, a representative from LCI performed an inspection of the property and did not report any code violations. Following the property's successful inspection, LCI issued a residential rental license to the defendant for three units, which was valid from December 10, 2013 until June 28, 2016.

In 2015, the defendant posted an advertisement for the sale of the property on an online marketplace, where he listed the property as consisting of three, one bedroom units. The advertisement also listed the property's annual rental income as $35,000. On May 19, 2015, the defendant entered into a written contract to sell the property to the plaintiff and, on July 24, 2015, the parties closed on the property. At the closing, the defendant provided the plaintiff with a comprehensive seller's affidavit in which the defendant affirmed that he

[6] Pursuant to chapter 17 of title III of the New Haven Code of Ordinances, LCI issues residential rental licenses to landlords who own two or more units within a dwelling. If a property is in violation of a building code, then LCI cannot issue a residential rental license until the violation has been rectified.

had "no knowledge of any violation of any covenants, restrictions, agreements, conditions or zoning ordinances affecting said premises." The defendant also provided the plaintiff with an income and expense statement, which listed gross income for the rental of the property's three residential units. The defendant did not notify the plaintiff of the 2011 letter prior to or at the time of the closing.

In late 2015, the plaintiff, then the owner of the property, went to the building department because a tree branch damaged a power line on the property. It was at this time that the plaintiff first became aware of the 2011 letter in the building department's file for the property. Upon finding the 2011 letter, the plaintiff believed that the property contained only two legal units and that significant monetary expenses would be required to convert the property to three units. Thereafter, the plaintiff initiated the present action against the defendant. On April 18 and 19, 2018, a two day trial in the matter was heard by the court, *Markle*, *J.* The court rendered judgment for the defendant as to the remaining four counts of the complaint. See footnote 1 of this opinion. The court rested its judgment on its finding that the building department never made a determination that the property contained less than three units and, therefore, the defendant neither breached the contract with the plaintiff by providing a property with less than three units, nor falsely represented to the plaintiff that the property legally contained three units. This appeal followed.

I

The plaintiff first claims that the court's finding that "the building department [had] not made any determination" with respect to the designation of the property's occupancy status was clearly erroneous. Specifically, the plaintiff claims that the building department had determined that the property legally contained two

units. We disagree with the plaintiff and conclude that the court was not clearly erroneous in finding that the building department had not made a determination regarding the use and occupancy status of the property.

We begin by setting forth the applicable standard of review. "[I]t is axiomatic that [t]he trial court's [factual] findings are binding upon [an appellate] court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 132, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Further, "the mere existence in the record of evidence that would support a different conclusion, without more, is not sufficient to undermine the finding of the trial court. . . . [T]he proper inquiry is whether there is enough evidence in the record to support the finding that the trial court made." (Emphasis omitted.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

The plaintiff's breach of contract claim was dependent on a finding that the defendant failed to perform under the contract by delivering a property with less than three legal units. The plaintiff's three misrepresentation claims[7] were dependent on a finding that the defendant falsely represented to the plaintiff that the

[7] The plaintiff's misrepresentation claims are negligent misrepresentation, intentional misrepresentation, and innocent misrepresentation.

"[A]n action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact, (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." *Nazami* v. *Patrons Mutual Ins. Co.*, 280 Conn. 619, 626, 910 A.2d 209 (2006).

property contained three legal units. Therefore, as the parties acknowledge, if the court properly found that the building department did not make a determination that the property contained less than three legal units, that finding would be fatal to all four of the plaintiff's claims.

Upon careful review of the record, we conclude that the court's finding that the building department had not made a determination that the property was less than a legal three unit residence is supported by facts in the record. In making its finding, the court credited the testimony of the director of the building department, James Turcio. In particular, Turcio testified that he had "never given an opinion on [the] property . . . ."[8] The court also relied on the fact that, following the issuance

"The essential elements of an action in [common-law] fraud, as we have repeatedly held, are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010).

"The elements of innocent misrepresentation are (1) a representation of material fact (2) made for the purpose of inducing the purchase, (3) the representation is untrue, and (4) there is justifiable reliance by the plaintiff on the representation by the defendant and (5) damages." *Frimberger* v. *Anzellotti*, 25 Conn. App. 401, 410, 594 A.2d 1029 (1991).

[8] Turcio's testimony that he never gave an opinion on the property occurred at trial during the cross-examination of Turcio conducted by the defendant's counsel:

"Q. Why did the building department look at a 1963 Price and Lee [telephone] directory in assessing whether this property was a two-family versus a three-family property?

"A. I can't speak to a past building official's judgment.

"Q. Did you yourself rely on the 1963 Price and Lee [telephone] directory when you gave your opinion that the property was a two-family property?

"A. I have never given an opinion on this property and the day I took over, I took the Price and Lee and threw it out.

"Q. And why did you throw it out?

"A. [Because] there's nothing in the building code that tells me I could determine occupancy of a house based on how many phones they have in it.

"Q. So . . . if [Rizzo] relied on the Price and Lee [telephone] directory when he indicated that records from this department show that the [property] is a two-family dwelling, that's not based on information that the building code permits him to consider?

"A. Correct."

of the 2011 letter, the building department did not follow up on the potential code violation or issue any notices of code violations to the defendant. The following exchange at trial during the cross-examination of Turcio by the defendant's counsel is especially illustrative:

"Q. So isn't it fair to say that the letter is not really a finding that the property—that the . . . first level apartment is not in violation of the building code but it's merely an inquiry of the defendant asking him to contact the city?

"A. Basically it's asking . . . to contact an inspector so he could do an inspection to confirm whether it is an illegal unit or not.

"Q. Correct. And . . . because . . . Rizzo did not order him to cease using the basement apartment as a dwelling, it means that this letter did not make a finding that the [ground level] apartment was in violation of the building code?

"A. Was even there, yes."

The following additional exchange at trial between the defendant's counsel and Turcio highlights that the building department's actions were inconsistent with the building department's having made a determination that the property contained less than three units:

"Q. In . . . 2011, when . . . Rizzo was the building director, if he believed there was an ongoing violation after the [2011 letter] was sent, he was required under the building code to send a cease and desist letter for use of the [ground level] apartment. Correct?

"A. Yes.

"Q. And is there anything in the building department file to indicate that . . . Rizzo ever issued an order to [the defendant] to cease using the [ground level] apartment as a dwelling?

"A. No.

"Q. And, in fact, there is a letter from 2012, which indicates that the property was reinspected by . . . Raffone in the year 2012. Correct?

"A. Yes.

"Q. And that letter from 2012 made no mention of any issue under the building code with regard to the [ground level] apartment being in violation of the certificate of use and occupancy requirement. Correct?

"A. Yes."

The court further reasoned that the building department's actions following the aforementioned 2012 inspection supported the finding that the building department had not determined that the property contained less than three legal residential units. Specifically, there was evidence that, subsequent to the inspection, Raffone referred the defendant to several of the property's building code violations with respect to damage caused by the fallen tree. None of these code-violations, however, referenced improper use and occupancy of the property, despite the fact that the property's use, as a three unit residence, would have been evident at the time of the inspection.

In making its finding, the court also reasoned that, although the building department is the sole entity responsible for making a determination regarding housing code violations and following up on such code violations, the building department's communication, or lack thereof, with LCI regarding the contents of the 2011 letter, supported the finding that the department had not a made a determination as to the property's occupancy status. In 2013, LCI issued a three year residential permit for the property to the defendant, for three rental units. The director of LCI, Rafael Ramos, testified that the 2011 letter was not in LCI's file for the property in question. Ramos further testified that the building

department traditionally follows protocol to communicate code violations with LCI and that if LCI had knowledge of the issues outlined in the 2011 letter, then it would have been required not to issue the license to the defendant until having received a certificate of occupancy from the building department.

The plaintiff is correct in his assertion that the record contains some contradictory evidence regarding the building department's determination as to the property's use and occupancy status.[9] As stated previously, however, the mere existence of such evidence is not enough to undermine the finding of the trial court when the record contains sufficient evidence to support the court's finding. See, e.g., *In re Jayce O.*, supra, 323 Conn. 690. Here, the trial court's finding is adequately supported by evidence in the record and it is not within this court's province to question that finding.

On the basis of the foregoing, we conclude that, because the court's finding that the building department had not made a determination that the property contained less than three legal units was based on sufficient evidence in the record, the court properly ruled in favor of the defendant as to the plaintiff's breach of contract count, as well as the plaintiff's three misrepresentation counts.

II

Next, the plaintiff claims that the court's finding that the plaintiff failed to establish the existence of damages

[9] The plaintiff points to a particular exchange at trial between the court and Turcio during cross-examination conducted by counsel for the defendant to support his assertion that the building department had, in fact, made a determination that the property contained less than three units:

"Q. So just to clarify, so you as an official from the city have determined that it is now, for lack of a better term, a legal two-family? I mean you've accepted that?

"A. For lack of a better term, yes.

"Q. And the city accepts that, that it's a two?

"A. Yes.

"Q. But you don't accept that it's a three?

"A. I do not accept that it's a three."

as to each of his counts was clearly erroneous. On the basis of our resolution of the claim discussed in part I of this opinion,[10] we reject the plaintiff's claim that the trial court was clearly erroneous in finding that the plaintiff failed to establish the existence of damages because the defendant cannot be liable for damages if, pursuant to the court's findings, he is not liable for the underlying causes of action.

The judgment is affirmed.

In this opinion the other judges concurred.

MARCUS BORDIERE *v.* CIARCIA CONSTRUCTION, LLC, ET AL.
(AC 41145)

DiPentima, C. J., and Keller and Harper, Js.

Syllabus

The plaintiff, M, brought an action against the defendant C, alleging, inter alia, that C had failed to make payments due on a mortgage note held by M. In May, 2009, after a trial, the trial court rendered judgment in favor of M. In July, 2013, M died and, subsequently, in July, 2017, his wife, P, as executrix of his estate, filed a motion to open the judgment and to substitute herself as the plaintiff, which the court denied. In October, 2017, P again filed a motion to substitute herself as the plaintiff, which the court granted. The court also vacated its prior order denying the July, 2017 motion to open and C appealed to this court. *Held* that P should not have been substituted as the plaintiff, as the trial court erred in premising its decision to open the judgment and to substitute P as the plaintiff on a statute (§ 52-107) which is inapplicable in instances in which a case has reached final judgment: the statutory language of § 52-107 clearly and unambiguously conveys the meaning that it is applicable only in cases in which an action is presently pending before the court, and not in cases in which a final judgment has been rendered, and, in the present case, there was no action pending before the court at the time it relied on § 52-107 to grant P's motion to substitute herself as the plaintiff, as P's motions were filed approximately four years after the death of M and eight years after final judgment was rendered in the

[10] At oral argument, counsel for both the plaintiff and the defendant agreed that, if the plaintiff's first claim fails, then the plaintiff cannot prevail on the second claim.

present case; moreover, although P claimed that the right of survival statute (§ 52-599) provided the court with broad discretion to grant her untimely motion to substitute herself as the plaintiff on a showing of good cause, the record failed to support the plaintiff's claim that the court must have considered § 52-599 and conducted a good cause analysis, as it was clear from the language of the court's articulation, which did not cite to § 52-599, that it, instead, considered and relied on the standards provided in § 52-107 and our rule of practice (§ 9-18), both of which govern the intervention of nonparties, and, even if it were true that the court utilized its discretion under § 52-599 to grant P's untimely motion to open the judgment and to substitute herself as the plaintiff, neither P nor the court had pointed to any evidence that would support a finding of a reason amounting in law as a legal excuse for P's four year delay in seeking to participate in the present case.

Argued November 14, 2019—officially released February 25, 2020

Procedural History

Action to recover on a promissory note, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Pittman, J.*; judgment for the plaintiff; thereafter, the court, *Hon. Joseph M. Shortall*, judge trial referee, denied the motion filed by Patricia Bordiere, the executrix of the estate of Marcus Bordiere, to open the judgment and to be substituted as the plaintiff; subsequently, the court, *Hon. Joseph M. Shortall*, judge trial referee, vacated its prior order and granted the executrix' motion to be substituted as the plaintiff, and the defendant Michael Ciarcia appealed to this court. *Reversed*; *judgment directed.*

Michael Ciarcia, self-represented, the appellant (defendant).

John C. Matulis, Jr., for the appellee (substitute plaintiff).

Opinion

HARPER, J. The self-represented defendant Michael Ciarcia[1] appeals from the judgment of the trial court

[1] The complaint also named as defendants Ciarcia Construction, LLC, and ALC Realty, LLC. Since the judgment in favor of Marcus Bordiere was rendered in 2009, Ciarcia Construction, LLC, and ALC Realty, LLC, have been dissolved by the secretary of the state and have not participated in

granting the motion of Patricia Bordiere, the executrix of the estate of Marcus Bordiere, to open a prior judgment rendered in favor of the plaintiff, Marcus Bordiere, and to substitute herself as the plaintiff for purposes of enforcing the prior judgment by pursuing an after-discovered asset of the defendant. Specifically, the defendant claims that the trial court erred in relying on General Statutes § 52-107 to grant the executrix' motion to substitute herself as the plaintiff, as there was no case pending at the time she filed her motion to substitute and, thus, no case in which she could participate. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On December 20, 2007, the plaintiff filed a complaint against the defendant, alleging, inter alia, that the defendant had failed to make payments due on a mortgage note held by the plaintiff. On May 19, 2009, after trial, the trial court rendered judgment in favor of the plaintiff (judgment case). Subsequently, on July 11, 2013, the plaintiff died and, on August 7, 2013, his wife, Patricia Bordiere, was appointed as the executrix of his estate (executrix). Between May 19, 2009 and July 17, 2017, there were no postjudgment proceedings relevant to the judgment case.

The executrix filed an application in the Probate Court, dated April 13, 2017, to open the estate of the decedent in order to pursue an after-discovered asset owned by the defendant, to which the defendant objected.[2] The Probate Court granted her motion to open the estate on May 23, 2017.

this appeal. We use the term the defendant in this opinion to refer to Michael Ciarcia in his individual capacity only.

[2] In an effort to protect the interest of the estate of Marcus Bordiere in the May 19, 2009 judgment, a judgment lien for the amount of the judgment was placed on the title to a Rocky Hill property that is considered to be an after-discovered asset owned by the defendant. The judgment lien is dated November 29, 2016, and is recorded at volume 667, pages 312–14 of the Rocky Hill land records.

Soon thereafter, on July 17, 2017, the executrix filed a motion in the Superior Court to open the judgment case and to substitute herself as the plaintiff. The defendant objected to this motion on July 19, 2017. On July 31, 2017, the court denied the motion to open the judgment case and to substitute the plaintiff, stating that: "The [executrix] cites no authority and the court knows of none that would permit the court to open this judgment [rendered] in 2009."

The executrix filed a new motion to substitute herself as the plaintiff, dated October 4, 2017, in which she stated: "The [executrix] is *not* seeking to open the judgment here—merely to be substituted as the party plaintiff for the [plaintiff], pursuant to her obligations as the executrix of his estate." (Emphasis in original.) The defendant objected to this motion on October 20, 2017. On November 6, 2017, the court granted the October 4, 2017 motion and also, under a separate order, vacated its prior order denying the July 17, 2017 motion to open the judgment filed by the executrix. The court's order granting the October 4, 2017 motion provided: "The parties having failed to appear for argument at 9:30 a.m. today, as ordered by the court (*Wiese*, *J.*), the court has considered the matter on the [papers]. The motion is [granted]." The court's order vacating its prior order provided: "The court vacates its prior order and grants the motion to open for the limited purpose of substituting the executrix." The defendant filed a motion to reargue on November 16, 2017, which the court denied on November 21, 2017. This appeal followed.

On December 12, 2017, the defendant filed a motion for articulation in the trial court. On January 12, 2018, the court provided the following articulation: "The court granted the motion to open for the purpose of substituting [the executrix] as the party plaintiff because the action of the Probate Court in June, 2017, reopening the

estate upon the petition of [the executrix] made it apparent that a 'complete determination' of the controversy before this court could not be had without the presence of [the executrix] as a party. See General Statutes § 52-107; Practice Book § 9-18."[3] The defendant filed a motion for further articulation on January 19, 2018, which was thereafter denied by the court on January 26, 2018.

On appeal, the defendant claims that the court erred in granting the executrix' October 4, 2017 motion and in vacating its prior denial of the July 17, 2017 motion filed by the executrix. The defendant essentially makes two distinct arguments in support of his claim on appeal that require us to conduct an inquiry into the language of our General Statutes.[4] First, the defendant argues that the court erred in premising its decision to open the judgment and to substitute the executrix as the plaintiff on § 52-107, which he argues is inapplicable in instances in which a case has reached final judgment. Second, the defendant argues that if the executrix wanted to substitute herself as the plaintiff, a timely motion pursuant to General Statutes § 52-599,[5] our right

[3] Practice Book § 9-18 provides: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party. (See General Statutes § 52-107 and annotations.)"

[4] In addition, the defendant argues that the second motion of the executrix, seeking to substitute herself as the plaintiff in the judgment case should have been barred on res judicata grounds. Because the defendant did not raise res judicata before the trial court, we decline to address this claim. See *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 618, 64 A.3d 1251 (2013) ("to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party" (internal quotation marks omitted)).

[5] General Statutes § 52-599 provides in relevant part: "(a) A cause 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.

of survival statute, was the proper vehicle by which to do so. The defendant contends that, because the executrix' motion to substitute was filed outside the six month period provided for by the right of survival statute, the executrix effectively abandoned her ability to substitute as of right. The defendant further argues that the court's January 12, 2018 articulation did not provide a good cause analysis as contemplated by § 52-599 and, therefore, that the court could not utilize its discretion to grant the executrix' untimely motion on the basis of a showing of good cause. We address these two arguments in turn.

We first set forth the applicable standard of review. "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the

"(b) 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 plaintiff dies, his executor or administrator may enter within six months of the plaintiff's death or at any time prior to the action commencing trial and prosecute the action in the same manner as his testator or intestate might have done if he had lived. . . ."

legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 650–51, 931 A.2d 142 (2007).

The statute relevant to the defendant's first argument in support of his claim on appeal is § 52-107, which provides: ''The court may determine *the controversy as between the parties before it*, if it can do so without prejudice to the rights of others; but, *if a complete determination cannot be had* without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment *will affect*, the court, on his application, shall direct him to be made a party.'' (Emphasis added.) The phrase ''determine the controversy as between the parties before it'' makes clear that, in order for this statute to have effect, the case in which a party seeks to intervene must be pending before the court at the time the court considers the motion to intervene pursuant to § 52-107. Additionally, the statute's use of the present tense form of the verb ''determine,'' along with the phrase, ''if a complete determination cannot be had,'' makes clear that, at the time the court considers the motion to intervene, the issues before it must not have already been determined, and, therefore, a judgment must not have been rendered. Further, the phrase, ''which the judgment will affect,'' contemplates interests which the judgment, once it is rendered, will affect *in the future*. In no instance does the text of § 52-107 discuss the possibility of intervening after a case has been resolved. In sum, the statutory language clearly and unambiguously conveys the meaning that § 52-107 is applicable only in cases in which an action is presently pending before the court, and not in cases in which a judgment has been rendered. Therefore, we need not construe the statute by reference to its legislative history or purpose.

In the present case, there was no action pending before the court at the time it relied on § 52-107 to grant the executrix' motion to substitute herself as the plaintiff. The executrix' motions to substitute herself as the plaintiff were filed on July 17 and October 5, 2017—approximately four years after the death of the plaintiff and eight years after the judgment was rendered in the case. During the eight years between the rendering of judgment and the executrix' motions, there was no case pending in the Superior Court. The last action in the judgment case—the rendering of judgment in favor of the plaintiff on May 19, 2009—was a final disposition as to all parties involved. The issues between the original parties, namely, the liability of the defendant and the amount owed to the plaintiff, had been determined and a final decree had been entered. Accordingly, on the basis of our interpretation of the clear and unambiguous language of § 52-107, as applied to the facts of the present case, we conclude that the executrix should not have been permitted to substitute as the plaintiff by way of intervening pursuant to § 52-107.

The defendant's second argument in support of his claim on appeal is that the proper vehicle for substituting as the plaintiff in this case would have been a motion to substitute pursuant to § 52-599, filed by the executrix within six months of the death of the plaintiff. According to the defendant, had the executrix filed a motion pursuant to § 52-599 within the prescribed time frame, she would have been able to revive the judgment case and to substitute as the plaintiff.[6] As the defendant explains, however, the executrix' motion—

[6] In his brief on appeal, the defendant states: "Section 52-599 . . . is the sole remedy for the representatives of a deceased sole plaintiff or defendant to revive the original action. . . . [T]he death of [the plaintiff] did not defeat the right of the [e]xecutrix to pursue the judgment, but to avail herself of that right, she was required to take the necessary steps to timely revive the judgment case by making a timely § 52-599 motion for substitution in the judgment case."

filed four years after the plaintiff's death—was untimely and, therefore, not in compliance with the right of survival statute.

In opposition, despite never having pleaded good cause in either of her motions filed in the trial court, the executrix contends that § 52-599 provided the court with broad discretion to grant her untimely motion on a showing of good cause. She argues that the court was aware of the revival of suit statute when it made its decision and, therefore, must have concluded that good cause existed to grant her motion. The defendant, however, argues that the court's articulation of its decision does not satisfy the requisite good cause analysis and, indeed, makes no reference to § 52-599 whatsoever. We agree with the defendant.

Our case law recognizes "good cause" in the context of § 52-599 as being defined as "a substantial reason amounting in law to a legal excuse for failing to perform an act required by law [and] [l]egally sufficient ground or reason." (Internal quotation marks omitted.) *Warner* v. *Lancia*, 46 Conn. App. 150, 155, 698 A.2d 938 (1997). Additionally, "the language of § 52-599 . . . has been construed to mean that the fiduciary may be substituted as a matter of right within the time prescribed by the statute, but the court in its discretion may permit the fiduciary to be substituted after the time prescribed for good cause shown." *Negro* v. *Metas*, 110 Conn. App. 485, 498, 955 A.2d 599, cert. denied, 289 Conn. 949, 960 A.2d 1037 (2008). We follow, as we must, this long-standing judicial interpretation of the statute.

Contrary to the assertion of the executrix, the notion that the court must have considered § 52-599 and conducted a good cause analysis is unsupported by the record. "As an appellate court, we are limited to the record before us in deciding the merits of an appeal." *In re Amanda A.*, 58 Conn. App. 451, 461, 755 A.2d 243

(2000). Therefore, "it is not an appropriate function of this court to speculate as to the trial court's reasoning . . . ." *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 763, 49 A.3d 1003 (2012). As is set forth previously, the court's articulation of its reason for granting the executrix' motion states in its entirety: "The court granted the motion to open for the purpose of substituting [the executrix] as the party plaintiff because the action of the Probate Court in June, 2017, reopening the estate upon the petition of [the executrix] made it apparent that a 'complete determination' of the controversy before this court could not be had without the presence of [the executrix] as a party. See General Statutes § 52-107; Practice Book § 9-18." It is clear from the language of the court's articulation that it considered and relied on the nearly identical standards provided in § 52-107 and Practice Book § 9-18, both of which govern the intervention of nonparties. The court's articulation did not cite to § 52-599; therefore, we cannot speculate that the court ever considered § 52-599 in granting the executrix' motion to substitute herself as the plaintiff.

Finally, even if it were true, as the executrix contends, that the court utilized its discretion under § 52-599 to grant her untimely motion to open the judgment and to substitute as the plaintiff, neither the executrix nor the court has pointed to any evidence that would support a finding of a reason amounting in law as a legal excuse for the executrix' four year delay in seeking to participate in the judgment case. Therefore, any reliance on § 52-599 in the present case, without more, would be misplaced.

The judgment is reversed and the case is remanded with direction to deny the motion to open and the motion to substitute the executrix as the plaintiff.

In this opinion the other judges concurred.

STARBOARD RESOURCES, INC. *v.* CHARLES HENRY III ET AL.
(AC 41922)

Lavine, Prescott and Moll, Js.

Syllabus

The plaintiff sought an interlocutory judgment of interpleader to determine the rights of the defendants, certain individuals and companies (Group I defendants, Group H defendants and Group S defendants), to certain shares of the plaintiff's common stock. The Group H defendants had commenced two actions, which were consolidated with the interpleader action, against the Group I defendants and the plaintiff, claiming, inter alia, fraud and breach of fiduciary duty, and seeking injunctive relief and monetary damages in connection with the investment by the Group H defendants in three limited liability partnerships. Thereafter, the Group H defendants' actions were referred to an arbitrator, who issued an award in favor of the Group H defendants, which the trial court confirmed. Subsequently, in the interpleader action, the Group H defendants filed a motion for an interlocutory judgment of interpleader, asserting that, pursuant to the arbitration award, they were the rightful owners of the disputed shares of stock. The Group H defendants also filed a motion to remand in which they requested that, if the trial court found that the arbitration award was ambiguous as to the ownership of the shares, the court remand the matter to the arbitrator for clarification regarding that issue. The defendant G Co. thereafter file a motion to dismiss the interpleader action on the ground that it was moot. Following a hearing, the trial court denied G Co.'s motion to dismiss, granted the Group H defendants' motions to remand and for an interlocutory judgment of interpleader, and rendered judgment thereon. On the Group I defendants' appeal to this court, *held*:

1. The Group I defendants' claim that the trial court lacked subject matter jurisdiction over the interpleader action on the ground that the plaintiff lacked standing because its transfer agent, who was not a party to the action, allegedly was holding the subject shares on behalf of the plaintiff was unavailing; there was no appellate authority that supported the proposition that an interpleader action is jurisdictionally defective if the property at issue is held by a nonparty transfer agent of a named party.
2. The Group I defendants' could not prevail on their claims that the trial court improperly denied G Co.'s motion to dismiss and improperly rendered the interlocutory judgment of interpleader; although the Group I defendants asserted that the interpleader action was moot because the Group S defendants did not have a viable adverse claim to the subject shares, it was premature, at the current stage of the proceedings, for this court to consider the merits of any of the parties' purportedly adverse claims to the shares.

3. The trial court properly granted the Group H defendants' motion to remand the matter to the arbitrator: contrary to the Group I defendants' claim that by remanding the matter to the arbitrator, that court improperly opened and vacated the arbitration award, the court properly exercised its authority to remand the matter to the arbitrator to clarify the arbitration award as to the ownership of the subject shares; moreover, the court did not violate the doctrine of functus officio, as the varying positions of the Group I defendants and Group S defendants regarding whether the arbitrator had determined the ownership of the shares demonstrated that the arbitration award was susceptible to more than one reasonable interpretation.

Argued October 18, 2019—officially released February 25, 2020

Procedural History

Action for interpleader to determine the defendants' rights to certain shares of common stock of the plaintiff, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket, where the court, *Genuario*, *J.*, granted the motion to stay the proceedings pending arbitration filed by the defendant Gregory Imbruce et al.; thereafter, the court, *Lee*, *J.*, denied the motion to dismiss filed by the defendant Giddings Investments, LLC, granted the motion to remand the matter to the arbitrator filed by the defendant Charles Henry III et al., granted the motion for an interlocutory judgment of interpleader filed by the defendant Charles Henry III et al. and rendered judgment thereon, from which the defendant Gregory Imbruce et al. appealed to this court. *Affirmed.*

Richard S. Gora, with whom, on the brief, was *Nicole O'Neil*, for the appellants (defendant Gregory Imbruce et al.).

David W. Rubin, with whom, on the brief, was *Jonathan D. Jacobson*, for the appellees (Bradford Higgins et al.).

Opinion

MOLL, J. In this interpleader action, the Imbruce parties[1] appeal from the trial court's interlocutory judgment of interpleader. On appeal, the Imbruce parties claim that the trial court (1) does not have subject matter jurisdiction over this interpleader action because the plaintiff, Starboard Resources, Inc., lacks standing, (2) erroneously denied the defendant Giddings Investments, LLC's motion to dismiss this interpleader action as moot, (3) improperly rendered the interlocutory judgment of interpleader, and (4) erroneously granted a motion to remand the matter to the arbitrator who had entered an award in an arbitration involving the Imbruce parties and the SOSventures parties.[2] We affirm the judgment of the trial court.

The following facts, as found by the trial court, *Genuario, J.*, in a memorandum of decision dated April 11, 2016, as set forth by this court in a prior appeal, and/or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. This interpleader action "arise[s] out of the . . . investment [by Charles Henry III, Ahmed Ammar, John P. Vaile, John

[1] The following defendants filed this appeal: Gregory Imbruce; Giddings Investments, LLC; Giddings Genpar, LLC; Hunton Oil Genpar, LLC; ASYM Capital III, LLC; Glenrose Holdings, LLC; and ASYM Energy Investments, LLC (Imbruce parties). All other parties in the trial court at the time of the decisions from which this appeal was taken are therefore deemed appellees. See Practice Book § 60-4. Of that group, the following defendants filed a joint appellees' brief: SOSventures, LLC; Bradford Higgins; Edward M. Conrads; and Robert J. Conrads (SOSventures parties). The remaining appellees, who are not participating in this appeal, include the sole plaintiff, Starboard Resources, Inc., and the following defendants: Charles Henry III; Ahmed Ammar; John P. Vaile; John Paul Otieno; William Mahoney; William F. Pettinati, Jr.; Giddings Oil & Gas, L.P.; Hunton Oil Partners, L.P.; ASYM Energy Fund III, L.P.; Nicholas P. Garofolo; Sigma Gas Barbastella Fund; and Sigma Gas Antrozous Fund.

[2] For ease of discussion, we address the Imbruce parties' claims in a different order than they are set forth in the Imbruce parties' principal appellate brief.

Paul Otieno, William Mahoney, Giddings Oil & Gas, L.P., Hunton Oil Partners, L.P., ASYM Energy Fund III, L.P., SOSventures, LLC, Bradford Higgins, Edward M. Conrads, and Robert J. Conrads (Henry parties)][3] in three limited partnerships: Giddings Oil & Gas, L.P. (Giddings, L.P.), Hunton Oil Partners, L.P. (Hunton, L.P.), and ASYM Energy Fund III, L.P. (ASYM, L.P.). [The Henry parties] are investors and limited partners in each of these limited partnerships. Each of the limited partnerships had a general partner [that] is a limited liability company: Giddings Genpar, LLC (Giddings Genpar), Hunton Oil Genpar, LLC (Hunton Genpar), and ASYM [Capital] III, LLC (ASYM Genpar), respectively. Each of the limited liability companies that served as a general partner of a limited partnership had a manager; the manager of Giddings Genpar was Giddings Investments, LLC, the manager of Hunton Genpar was Glenrose Holdings, LLC, and the manager of ASYM Genpar was ASYM Energy Investments, LLC." (Footnote added; internal quotation marks omitted.) *Henry* v. *Imbruce*, 178 Conn. App. 820, 823–24, 177 A.3d 1168 (2017).

In July, 2012, the Henry parties commenced two actions,[4] which were later consolidated, against the Imbruce parties and the plaintiff. See *Henry* v. *Imbruce*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket Nos. X08-CV-12-5013927-S and X08-CV-12-6014987-S (Henry actions).[5] "The [Henry parties] in their complaint alleged that

[3] The SOSventures parties are comprised of a portion of the Henry parties.

[4] William F. Pettinati, Jr., a defendant in this interpleader action, initially was a plaintiff in the Henry actions, but he subsequently withdrew his claims therein.

[5] In *Henry* v. *Imbruce*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-12-5013927-S, the Henry parties filed, inter alia, an application for a prejudgment remedy. Thereafter, the Henry parties mistakenly commenced a second action—*Henry* v. *Imbruce*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-12-6014987-S. The Henry parties filed a motion to consolidate the two actions, which was granted.

. . . Gregory Imbruce . . . exercised complete control over the managers and therefore over the general partners and over the limited partnerships. . . . In their second amended complaint[6] . . . the [Henry parties] alleged various fact patterns pursuant to which they asserted that the . . . [Imbruce parties had] made misrepresentations in the marketing of the investments, that the . . . [Imbruce parties had] violated the provisions of the Connecticut Uniform Securities Act (CUSA), [General Statutes § 36b-2 et seq.], and that the . . . [Imbruce parties had] wrongfully diverted assets of the various limited partnerships to their own purposes or accounts. The second amended complaint sound[ed] in [eleven] counts [that] [sought] both injunctive relief and monetary damages, alleging counts that sound[ed] in fraud, breach of fiduciary duty, conversion, civil theft, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b et seq., among other theories of relief. The prayer for relief in the second amended complaint [sought] both equitable relief and monetary damages." (Footnote in original; internal quotation marks omitted.) *Henry* v. *Imbruce*, supra, 178 Conn. App. 824.

In August, 2012, pursuant to General Statutes § 52-484,[7] the plaintiff commenced this interpleader action.

[6] "The [Henry parties] filed their second amended complaint on July 31, 2012, and a third amended complaint by consent on June 6, 2013. These pleadings, however, [were] superseded for the purposes of [the prior appeal] by the [Henry parties'] counterclaims as respondents in the arbitration." *Henry* v. *Imbruce*, supra, 178 Conn. App. 824 n.4.

[7] General Statutes § 52-484 provides: "Whenever any person has, or is alleged to have, any money or other property in his possession which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader, to any court which by law has equitable jurisdiction of the parties and amount in controversy, making all persons parties who claim to be entitled to or interested in such money or other property. Such court shall hear and determine all questions which may arise in the case, may tax costs at its discretion and, under the rules applicable to an action of interpleader, may allow to one or more of the parties a reasonable sum or sums for counsel fees and disbursements, payable out of such fund or property; but no such allowance shall be made unless it has been claimed by the party in his complaint or answer."

In its complaint, the plaintiff alleged that a dispute had arisen between the various defendants regarding who was entitled to the ownership of certain common stock shares of the plaintiff (shares). The plaintiff further alleged that it had no beneficial interest in the shares and that it was willing to disburse the shares to whomever lawfully was entitled to receive them. As relief, the plaintiff sought an interlocutory judgment of interpleader, a discharge of its liabilities upon disbursement of the shares, and attorney's fees.

"On July 11, 2014, the court granted [a] motion of the . . . [Imbruce parties] to stay [the Henry actions and this interpleader action] pending completion of arbitration proceedings, some of which had already begun. . . . Consistent with the court order staying [the actions], the parties proceeded to arbitration and by subsequent agreement broadened the arbitration beyond that which they had previously agreed to in their limited partnership agreements. The parties proceeded with the arbitration before a single arbitrator.

"On September 10, 2015, the arbitrator rendered an award in favor of the [Henry parties], who as respondents in the arbitration proceeding had filed a counterclaim, including allegations similar in nature to the allegations of the second amended complaint previously described. The award consisted of declaratory awards, monetary damages, awards of [attorney's] fees, interest, injunctive relief requiring an accounting, postjudgment interest, as well as awards of arbitration fees and costs.

"On September 14, 2015, the [Henry parties] filed a motion in the trial court to confirm the arbitration award. On October 13, 2015, the [Imbruce parties] filed an objection to the [Henry parties'] motion to confirm the award and a cross motion to vacate the award accompanied by scores of exhibits. A flurry of procedural and substantive filings followed, until, on February 8, 2016, the court held a hearing on the parties' respective motions. The court, after further briefing,

rendered judgments in accordance with the arbitrator's decision on April 11, 2016, confirming the arbitral award." (Footnote omitted; internal quotation marks omitted.) Id., 825–26. The Imbruce parties appealed from the judgments confirming the arbitration award, which this court affirmed on December 26, 2017. Id., 844.

On November 29, 2017, in this interpleader action, the Henry parties filed a motion for an interlocutory judgment of interpleader. Predicated on their belief that, pursuant to the arbitration award, they were the rightful owners of the shares, the Henry parties sought, inter alia, an interlocutory judgment of interpleader and an order granting a separate motion filed by the Henry parties for leave to effect a sale of the shares. The same day, the Henry parties filed a separate motion requesting that, in the event that the trial court construed the arbitration award to be ambiguous as to the ownership of the shares, the court remand the matter to the arbitrator for clarification regarding the ownership of the shares (motion to remand). The Imbruce parties objected to both motions.

On December 29, 2017, Giddings Investments, LLC, filed a motion to dismiss this interpleader action[8] on the ground that it had become moot because, in its view, the arbitrator had denied the Henry parties' claim to the ownership of the shares and, therefore, no adverse claim to the shares existed. The Henry parties objected to the motion.

On July 24, 2018, after having heard argument from the parties on July 20, 2018, the trial court, *Lee*, *J.*, issued orders (1) denying Giddings Investments, LLC's motion

[8] Giddings Investments, LLC, is identified in the motion to dismiss as the sole movant. On appeal, the Imbruce parties, who are all represented by the same attorney, indicate that they collectively filed the motion to dismiss. We will refer to the motion to dismiss as having been filed by Giddings Investments, LLC.

to dismiss, (2) granting the Henry parties' motion for an interlocutory judgment of interpleader, and (3) granting the Henry parties' motion to remand. This appeal followed.[9] Additional facts and procedural history will be set forth as necessary.[10]

I

We first address the Imbruce parties' claim that the trial court lacks subject matter jurisdiction to entertain this interpleader action because the plaintiff lacks standing. More specifically, the Imbruce parties assert that the plaintiff's transfer agent,[11] a nonparty, is in possession of the shares, thereby depriving the plaintiff of standing to maintain this interpleader action. We are not persuaded.

As a preliminary matter, we note that the Imbruce parties are raising this standing claim for the first time on appeal. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine

[9] On September 20, 2018, a number of the Henry parties filed a motion to dismiss this appeal for lack of a final judgment. On October 31, 2018, the SOSventures parties filed a separate motion to dismiss this appeal for lack of a final judgment. On December 5, 2018, this court denied both motions to dismiss.

[10] On August 24, 2018, the Imbruce parties filed a notice pursuant to Practice Book § 64-1 (b) asserting that the trial court had not filed a memorandum of decision with respect to its decisions denying Giddings Investments, LLC's motion to dismiss, granting the Henry parties' motion for an interlocutory judgment of interpleader, and granting the Henry parties' motion to remand. By way of an order dated December 21, 2018, the trial court, inter alia, determined that its orders adequately set forth the reasons underlying its rulings; nevertheless, in the December 21, 2018 order, the court further expounded on its decisions.

[11] A transfer agent is "[a]n organization (such as a bank or trust company) that handles transfers of shares for a publicly held corporation by issuing new certificates and overseeing the cancellation of old ones and that usually also maintains the record of shareholders for the corporation and mails dividend checks. Generally, a transfer agent ensures that certificates submitted for transfer are properly indorsed and that the right to transfer is appropriately documented." Black's Law Dictionary (11th Ed. 2019) p. 81.

the cause. . . . [A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . . Because the . . . claim implicates the trial court's subject matter jurisdiction, we conclude that it is reviewable even though [it has been] raised . . . for the first time on appeal. . . . The issue of whether a party had standing raises a question of law over which we exercise plenary review. . . .

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Citations omitted; internal quotation marks omitted.) *Premier Capital, LLC* v. *Shaw*, 189 Conn. App. 1, 5–6, 206 A.3d 237 (2019).

The following additional facts and procedural history are relevant to our resolution of this claim. In its interpleader complaint, the plaintiff alleged in relevant part that, "[o]n behalf of [the] plaintiff, the plaintiff's transfer agent is holding the [shares] in book entry form . . . . The plaintiff has and claims no beneficial interest in the [shares], and is willing to disburse the same over to such person as is lawfully entitled to receive the same, and [the] plaintiff is ready, willing and able to pay or instruct its transfer agent to book the [shares] into the court or to whichever defendant the court may order or direct." During the July 20, 2018 hearing, the Imbruce parties' attorney represented that "there's no dispute that the shares are registered and held in book entry form at [the plaintiff's] transfer agent . . . ."

We reject the Imbruce parties' assertion that the plaintiff lacks standing on the ground that its transfer

agent allegedly is holding the shares on the plaintiff's behalf. Section 52-484, pursuant to which the plaintiff commenced this interpleader action, provides in relevant part that "[w]henever any person has, or is alleged to have, any money or other property in his possession which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader . . . making all persons parties who claim to be entitled to or interested in such money or other property. . . ." The plaintiff, as the principal of its transfer agent, maintains constructive possession of the shares held by its transfer agent, and there is no indication in the record that the plaintiff does not have the authority to direct its transfer agent to transfer or otherwise to take action with regard to the shares. See *Lee* v. *Duncan*, 88 Conn. App. 319, 324, 870 A.2d 1 ("[a]n essential factor in an agency relationship is the right of the principal to direct and control the performance of the work by the agent" (internal quotation marks omitted)), cert. denied, 274 Conn. 902, 876 A.2d 12 (2005). The Imbruce parties have provided no appellate authority, and we are aware of none, supporting the proposition that an interpleader action is jurisdictionally defective if the property at issue is held by a nonparty transfer agent of a named party. Accordingly, the Imbruce parties' standing claim is unavailing.[12]

II

We next address the Imbruce parties' intertwined claims that the trial court improperly (1) denied Giddings Investments, LLC's motion to dismiss this interpleader action as moot and (2) rendered the interlocutory judgment of interpleader. Specifically, the Imbruce

[12] The Imbruce parties also note that the plaintiff claims no interest in the shares. As a disinterested possessor of the shares, the plaintiff has standing to maintain this interpleader action. See *Millman* v. *Paige*, 55 Conn. App. 238, 242–43, 738 A.2d 737 (1999) (noting that "[t]he classic interpleader action existing in equity, prior to the enactment of the statute, was brought by a disinterested stakeholder to establish the undivided ownership of money

parties assert that the arbitrator denied a request for ownership of the shares made by the SOSventures parties and the other Henry parties, and, as a result, the SOSventures parties do not have a viable adverse claim to the shares. Without such a viable adverse claim, the Imbruce parties posit, this interpleader action is moot and the court erred in rendering the interlocutory judgment of interpleader. We conclude that the court did not err in denying the motion to dismiss and rendering the interlocutory judgment of interpleader.

At the outset, we observe that we exercise plenary review over claims challenging a court's decision on a motion to dismiss and an interlocutory judgment of interpleader. See *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010) ("The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.));[13] *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, 318 Conn. 476, 490, 122 A.3d 242 (2015) ("the appropriate standard of review for an interlocutory judgment of interpleader is de novo").

The crux of the Imbruce parties' claims is that the SOSventures parties do not have a viable adverse claim to the shares. It is premature, however, for us to consider the merits of any of the parties' purportedly adverse claims to the shares. As our Supreme Court has explained, "[a]ctions pursuant to § 52-484 involve

or property claimed by two or more entities or individuals" but that "[a]fter the passage of the forerunner to § 52-484 in 1893, the rule that an interpleader action be maintained only by a stakeholder with no interest in the disposition of the fund was relaxed").

[13] Additionally, "[o]ur review of the question of mootness is plenary." *Wozniak* v. *Colchester*, 193 Conn. App. 842, 852, 220 A.3d 132, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

two distinct parts . . . . In the first part, the court must determine whether the interpleader plaintiff has alleged facts sufficient to establish that there are adverse claims to the fund or property at issue. . . . If the court considers interpleader to be proper under the circumstances, then the court may render an interlocutory judgment of interpleader. . . . Only once an interlocutory judgment of interpleader has been rendered may the court hold a trial on the merits, compelling the parties to litigate their respective claims to the disputed property." (Citations omitted; internal quotation marks omitted.) *Trikona Advisors Ltd.* v. *Haida Investments Ltd.*, supra, 318 Conn. 483–84; see also Practice Book § 23-44.[14]

Here, the Imbruce parties do not claim on appeal that the plaintiff failed to allege adequate facts in its interpleader complaint demonstrating that there are facially competing claims to the shares; rather, they contend that the SOSventures parties are without a *viable* adverse claim to the shares. Therefore, at this juncture, it is premature to consider the merits of the parties' purportedly adverse claims to the shares. "It [is] not the role of the trial court, nor is it the function of this court on appeal, to consider the merits of the purportedly competing claims at this preliminary stage of the . . . interpleader action." *Trikona Advisors Ltd.* v. *Haida Investments Ltd.*, supra, 318 Conn. 493. Accordingly, the Imbruce parties' claims that the court erred in denying Giddings Investments, LLC's motion to dismiss this interpleader action[15] and in rendering the interlocutory judgment of interpleader fail.

[14] Practice Book § 23-44 provides: "No trial on the merits of an interpleader action shall be had until (1) an interlocutory judgment of interpleader shall have been entered; and (2) all defendants shall have filed statements of claim, been defaulted or filed waivers. Issues shall be closed on the claims as in other cases."

[15] Following the rendering of an interlocutory judgment of interpleader in an interpleader action, we perceive no bar to a party moving to dispose of the action on the ground that no viable adverse claims to the property at issue exist. It is improper, however, to raise that issue before an interlocutory judgment of interpleader has been rendered.

III

Finally, we turn to the Imbruce parties' claim that the trial court erroneously granted the Henry parties' motion to remand. Specifically, the Imbruce parties assert that, by remanding the matter to the arbitrator, the court (1) improperly opened and vacated the arbitration award and (2) violated the doctrine of functus officio[16] because the arbitrator unambiguously had determined that the Henry parties were not entitled to ownership of the shares and, therefore, the remand order, in effect, required the arbitrator to redetermine an issue that already had been decided. We are not persuaded.

We begin by setting forth the applicable standard of review. The Imbruce parties' claim requires us to interpret (1) the trial court's order granting the motion to remand and (2) the arbitration award. Therefore, our review is plenary. See *In re Jacklyn H.*, 162 Conn. App. 811, 830, 131 A.3d 784 (2016) ("[t]he construction of an order is a question of law for the court, and the court's review is plenary"); *Windham* v. *Doctor's Associates, Inc.*, 161 Conn. App. 348, 356, 127 A.3d 1082 (2015) ("The standard of review applied to the construction of an arbitration award is the same as that applied to the construction of a judgment. . . . The construction of an arbitration award, therefore, is a question of law subject to plenary review." (Internal quotation marks omitted.)).

The following additional facts and procedural history are relevant to our disposition of this claim. In the

[16] " 'Functus officio' has been defined as 'having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force of authority.' . . . As one court has observed: 'The policy which lies behind this [doctrine] is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he [or she] has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.' " (Citation omitted.) *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 271 Conn. 474, 484 n.9, 857 A.2d 893 (2004), cert. denied, 544 U.S. 974, 125 S. Ct. 1826, 161 L. Ed. 2d 723 (2005).

arbitration award, the arbitrator entered an award in favor of the Henry parties (as the respondents/counterclaim claimants) and against the Imbruce parties (as the claimants/counterclaim respondents). The award included, inter alia, declaratory relief and monetary damages. The final paragraph of the award provided: "This award is in full settlement of all claims and counterclaims submitted to this [a]rbitration. All claims not expressly granted herein are hereby denied." The award made no explicit mention of the shares, notwithstanding that, in the damages analysis filed by the Henry parties in the arbitration setting forth their claimed damages and set-offs in relation to their counterclaim, certain Henry parties sought "[100] percent . . . of the shares . . . ." In its memorandum of decision confirming the arbitration award, the trial court, *Genuario*, *J.*, made reference to this interpleader action but did not otherwise discuss the ownership of the shares.

In the motion to remand, the Henry parties reiterated their position that the arbitrator had determined that they were the rightful owners of the shares. In the event that the court concluded that the arbitration award was ambiguous as to the ownership of the shares, however, the Henry parties requested that the court remand the matter to the arbitrator to clarify the arbitration award's effect on the ownership of the shares. In the July 24, 2018 order granting the motion to remand, the court, *Lee*, *J.*, stated that it was remanding the matter to the arbitrator "for further proceedings to determine the ownership of the [shares] . . . ." Subsequently, in the December 21, 2018 order issued in response to the Imbruce parties' Practice Book § 64-1 (b) notice, the court further stated that its decision granting the motion to remand "reflected the consensus of the parties and the court that the [a]rbitrator was in the best position to clarify her award as to the . . . shares" and that the order was "simply remanding an issue to the [a]rbitrator for clarification of her [a]ward."

In *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 271 Conn. 474, 484–85, 857 A.2d 893 (2004), cert. denied, 544 U.S. 974, 125 S. Ct. 1826, 161 L. Ed. 2d 723 (2005), our Supreme Court explained: "[A]s a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes functus officio and lacks any power to reexamine that decision. . . . Courts also have recognized, however, that the doctrine has limitations and contains three exceptions that allow an arbitrator's review of a final award. . . . The three exceptions to the rule of functus officio include: (1) [where] an arbitrator can correct a mistake which is apparent on the face of his [or her] award . . . such as clerical mistakes or obvious errors in arithmetic computation; . . . (2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his [or her] function and it remains open to him [or her] for subsequent determination; and (3) [w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify."[17] (Citations omitted; footnotes omitted; internal quotation marks omitted.)

[17] In *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, supra, 271 Conn. 478, 480, our Supreme Court analyzed a trial court's order remanding a case to an arbitration panel for a rehearing to clarify an arbitration award. Our Supreme Court applied the Federal Arbitration Act (arbitration act), 9 U.S.C. § 1 et seq., and examined federal case law discussing the functus officio doctrine to conclude that the trial court had the legal authority to remand, without vacating, the arbitration award. Id., 482–93. In concluding that the arbitration act applied, our Supreme Court explained: "The United States Supreme Court expressly has held that Congress 'intended [the arbitration act] to apply in state and federal courts,' pursuant to the exercise of its commerce clause powers. *Southland Corp.* v. *Keating*, 465 U.S. 1, 15, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984); accord *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 271–72, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *Hottle* v. *BDO Seidman, LLP*, 268 Conn. 694, 702, 846 A.2d 862 (2004) (discussing applicability of arbitration act to states as set forth in United States Supreme Court precedent). Thus, where parties have entered into 'a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction'; 9 U.S.C. § 2; the arbitration act applies." *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at*

"In examining arbitration awards, courts have noted that an award is ambiguous if it is susceptible to more than one interpretation." (Internal quotation marks omitted.) *All Seasons Services, Inc.* v. *Guildner*, 94 Conn. App. 1, 10, 891 A.2d 97 (2006). "When faced with an ambiguous award, a court usually will remand to the arbitrator for clarification." Id., 13; see also *Marulli* v. *Wood Frame Construction Co., LLC*, 124 Conn. App. 505, 517, 5 A.3d 957 (2010) (noting that trial court "had the discretion to remand for clarification to the arbitrator" if court was unclear as to whether arbitrator had adequately addressed arbitration issue), cert. denied, 300 Conn. 912, 13 A.3d 1102 (2011). "[W]hen a court remands an arbitration award for clarification, the resolution of such an ambiguity is not within the policy which forbids an arbitrator to redetermine an issue which he [or she] has already decided, for there is no opportunity for redetermination on the merits of what has already been decided. . . . On remand, the arbitrator is limited in his [or her] review to the specific matter remanded for clarification and may not rehear and redetermine those matters not in question." (Citation omitted; internal quotation marks omitted.) *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, supra, 271 Conn. 486.

We discern no error in the court's granting of the motion to remand. A trial court may "remand without

Lloyd's & Cos. Collective, supra, 483. Our Supreme Court proceeded to determine that "the contract between the parties, which authorizes the parties to institute arbitration proceedings in the event of a dispute, arises from a transaction involving commerce." Id.

In the prior appeal involving the Imbruce parties and the SOSventures parties, this court stated that the trial court had found, and the parties had agreed, that the arbitration act applied "because the underlying contracts involve interstate commerce." *Henry* v. *Imbruce*, supra, 178 Conn. App. 826. More specifically, this court observed that the matter involved "speculators in California, Connecticut, Illinois and Texas [who had] invested capital in Delaware companies (headquartered in Connecticut and Texas) that exploit mineral rights in Texas and Oklahoma." Id., 826 n.6. In light of the foregoing, we conclude that the arbitration act applies insofar as the Imbruce parties claim that the trial court improperly granted the Henry parties' motion to remand and, therefore, we rely on the legal principles set forth in *Hartford Steam Boiler Inspection & Ins. Co.* in resolving this claim.

vacating a case to an arbitrator for clarification of a final award . . . .'' Id., 485. Thus, contrary to the Imbruce parties' assertion, the court did not open and vacate the arbitration award; rather, it exercised its authority to remand the matter to the arbitrator to clarify the arbitration award as to the ownership of the shares.

Additionally, the court did not violate the doctrine of functus officio. Ownership of the shares was an issue raised during the arbitration. The arbitrator did not discuss the ownership of the shares in the arbitration award; nevertheless, the Imbruce parties and the SOSventures parties maintain that the arbitrator implicitly determined the ownership of the shares in their respective favors. Specifically, the Imbruce parties argue that, during the arbitration, the Henry parties expressly requested that the arbitrator award them ownership of the shares and that the arbitrator, by not explicitly awarding them the same and by stating that ''[a]ll claims not expressly granted [in the arbitration award] are hereby denied,'' necessarily denied the Henry parties' request for ownership of the shares. Conversely, the SOSventures parties argue that the arbitrator ruled against the Imbruce parties and in favor of the Henry parties with respect to all of their respective claims in the arbitration, including the Henry parties' claim sounding in civil theft, such that the arbitrator implicitly awarded the Henry parties ownership of the shares. We conclude that these positions demonstrate that the award is susceptible to more than one reasonable interpretation. Accordingly, the court acted properly in remanding the matter to the arbitrator to clarify her award with respect to the ownership of the shares.[18]

The judgment is affirmed.

In this opinion the other judges concurred.

[18] We note that in the July 24, 2018 order granting the motion to remand, the trial court stated that it was remanding the matter to the arbitrator ''to *determine* the ownership of the [shares] . . . .'' (Emphasis added.) In the

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Alvord, Prescott and Beach, Js.

Syllabus

The plaintiffs, who held a warranty deed to real property in a subdivision and a quitclaim deed to an undivided one-forty-eighth interest in a beach that was subject to certain restrictive covenants, brought an action against the defendants, who also owned real property in the subdivision, seeking a declaration that a 2011 modification to the restrictive covenants of the beach deed was null and void. In 2014, a modification that contained an extensive revision of the restrictive covenants governing the use of the beach was filed in the land records, causing the plaintiffs A and B to amend the complaint to seek a declaratory judgment that the 2014 modification was null and void. The case was tried to the court, which rendered judgment in part in favor of the defendants, declaring that the 2011 modification was null and void but that the 2014 modification was valid and in full force and effect. A and B thereafter filed a motion for attorney's fees and costs, which the court denied. A and B appealed to this court, which, inter alia, reversed the trial court's judgment in favor of the defendants on the declaratory judgment count with respect to the 2014 modification, concluding that the 2014 modification was not valid and in full force and effect, and affirmed the court's judgment in favor of the defendants on A and B's claim for attorney's fees and costs. The trial court, on remand, rendered judgment declaring the 2014 modification invalid. Subsequently, A and B filed postjudgment motions for equitable relief and for fees and costs and a motion to open the judgment, which the court denied. On A and B's appeal to this court, *held*:

1. The claim of A and B that the trial court improperly denied their postjudgment motion for equitable relief because this court's order of remand in the first appeal required the trial court to address their claims for quiet title and injunctive relief was unavailing, as the relief sought by A and B was beyond the scope of this court's remand: the rescript in the first appeal, as interpreted in conjunction with the entirety of the

subsequent December 21, 2018 order, however, the court stated that the arbitrator "was in the best position to *clarify* her award as to the [shares]" and that the July 24, 2018 order "was simply remanding an issue to the [a]rbitrator for *clarification* of her [a]ward." (Emphasis added.) We construe these orders to mean that the court remanded the matter to the arbitrator to clarify the arbitration award with regard to the ownership of the shares, not to decide an unresolved claim or to reconsider a claim that already had been adjudicated.

opinion, conveyed to the trial court that the claims of A and B for quiet title were beyond the scope of the mandate, as this court, having identified all of the claims that A and B advanced in the first appeal and having noted which of those claims would not be addressed in its opinion, communicated to the parties that each claim was given its due consideration before this court and ultimately concluded that it was unnecessary to address the quiet title claims, this court's favorable rulings on the declaratory judgment counts of A and B obviated the need to address their quiet title counts, which sought the same relief as the declaratory judgment counts, and this court made no mention in its rescript of the quiet title claims of A and B, despite acknowledging that they had raised those claims; moreover, A and B could not prevail on their claim that the trial court improperly declined to provide injunctive relief on remand, as this court, having declared the 2011 and 2014 modifications null and void under the declaratory judgment counts, invalidated the modifications' attack on the original beach deed's restrictive covenants by returning title to the beach to what it was prior to the enactment of those modifications, and, therefore, A and B were not entitled to any further relief.

2. A and B could not prevail on their claim that the trial court improperly denied their postjudgment motion for fees and costs as to their successful challenges to the 2011 modification, as that court was correct that its consideration of the postjudgment motion for fees and costs as to that modification was beyond the scope of the remand in the first appeal because this court affirmed the trial court's denial of attorney's fees and costs with respect to the 2011 modification and did not indicate in its rescript that the issue warranted further consideration; nevertheless, the trial court improperly denied the postjudgment motion for fees and costs without reaching the merits of that motion as to the 2014 modification, as it was appropriate for A and B to seek postjudgment fees and costs with respect to the 2014 modification on remand because their entitlement under that modification to attorney's fees and costs had not been considered before a judgment was rendered in their favor on the 2014 modification by this court's reversal of the trial court, and the postjudgment motion for fees and costs as to that modification was not barred by the doctrines of res judicata or collateral estoppel because it had not been considered by either the trial court or this court in the first appeal.

3. The claim of A and B that, even assuming that this court's mandate in the first appeal did not encompass their claims to quiet title, equitable relief, and fees and costs, the trial court improperly denied their motion to open to provide them with their requested relief, was unavailing; the trial court considered the issues raised by A and B by way of their postjudgment motions to have been litigated and reviewed, and the claim of A and B that the trial court and this court failed to rule on the claims raised in their postjudgment motions was incorrect, as those claims were raised in the first appeal and either rejected or not addressed.

4. A and B could not prevail on their claim that the trial court violated several of their state and federal constitutional rights by failing to hear or grant their postjudgment motions to correct the record and clear the cloud on their title caused by both the 2011 and 2014 modifications, provide them with damages and injunctive relief inherent thereto, and protect their rights and their title against further violations; that court interpreted the scope of the remand correctly when it denied the claims of A and B to quiet title, to injunctive relief, and to attorney's fees and costs as to the 2011 modification, and the court's denial of those claims did not amount to a violation of the constitutional rights of A and B.

Argued October 22, 2019—officially released February 25, 2020

Procedural History

Action seeking a judgment declaring, inter alia, that a certain modification to a beach deed was null and void, and for other relief, brought to the Superior Court in the judicial district of New London, where the plaintiff Craig L. Barrila withdrew from the action and Beth Jepsen was added as an additional plaintiff; thereafter, the named plaintiff et al. filed a third amended complaint and the matter was tried to the court, *Bates*, *J.*; judgment in part for the defendants, from which the named plaintiff et al. appealed to this court, *Lavine*, *Sheldon* and *Elgo*, *Js.*; subsequently, the court, *Bates*, *J.*, denied the motions for attorney's fees and costs and to reargue filed by the named plaintiff et al., and the named plaintiff et al. filed an amended appeal with this court, which reversed in part the trial court's judgment and remanded the case to that court with direction to render judgment in part for the named plaintiff et al.; thereafter, the court, *Calmar*, *J.*, rendered judgment in accordance with this court's remand order; subsequently, the court, *S. Murphy*, *J.*, denied the motions for equitable relief, for fees and costs, and to open the judgment filed by the named plaintiff et al., and the named plaintiff et al. appealed to this court; thereafter, the court, *S. Murphy*, *J.*, issued articulations of its decision. *Affirmed in part*; *reversed in part*; *further proceedings*.

Beth A. Steele, for the appellants (named plaintiff et al.).

Mark S. Zamarka, with whom, on the brief, was *Edward B. O'Connell*, for the appellees (named defendant et al.).

Christine S. Synodi, for the appellees (defendant Savas S. Synodi et al.).

Opinion

ALVORD, J. The plaintiffs Anders B. Jepsen and Beth Jepsen[1] appeal from the denial of their postjudgment motions for equitable relief, for attorney's fees and costs, and to open the judgment rendered by the trial court following a remand by this court. See *Jepsen* v. *Camassar*, 181 Conn. App. 492, 187 A.3d 486 (*Jepsen I*), cert. denied, 329 Conn. 909, 186 A.3d 12 (2018). On appeal, the plaintiffs claim that (1) the trial court failed to provide them with relief that was encompassed within the mandate of *Jepsen I* when it denied their claims to equitable relief and attorney's fees and costs, (2) even assuming that the mandate did not encompass the relief sought by the plaintiffs, the trial court improperly declined to open the judgment to provide the plaintiffs with their desired relief, and (3) the trial court violated the plaintiffs' constitutional rights by failing to provide them with their desired relief on remand. We agree in part with the plaintiffs' claim to attorney's fees and costs, reverse the judgment of the trial court limited to that issue and remand the case for further proceedings consistent with this opinion.

The following relevant facts are set forth in this court's decision in *Jepsen I*. The plaintiffs and the defendants,[2] at all relevant times, owned real property in a

[1] The original plaintiffs in the present action were Anders B. Jepsen and Craig L. Barrila. On August 19, 2013, a withdrawal was filed on behalf of Barrila by his attorney. On March 3, 2014, Beth Jepsen was cited in as an additional plaintiff. We will refer to Anders B. Jepsen and Barrila as the original plaintiffs and to Anders B. Jepsen and Beth Jepsen as the plaintiffs.

[2] See footnote 4 of this opinion for a complete list of the defendants in the present action.

subdivision in New London (subdivision). Id., 495. In addition to residential parcels, the subdivision is comprised of a 250 foot strip of beachfront property known as Billard Beach (beach). Id., 496. "Each owner of real property in the subdivision is the holder of two deeds relevant to this dispute: a warranty deed that conveyed ownership rights in fee simple to his or her individual parcel of subdivision property (warranty deed) and a quitclaim deed that conveyed an 'undivided one-forty-eighth (1/48th) interest' in the beach (beach deed)." Id. The beach deed contains restrictive covenants on the use of the beach and expressly provides a mechanism for the modification of the restrictive covenants. Id., 496–98. The beach deed is subject to an express condition subsequent that the beach deed would revert back to the grantor, its successors or assigns "if the same is aliened separately and apart from the land" in the warranty deed.

In 2011, a dispute arose among some of the property owners regarding guest access to the beach. In response to this dispute, a modification to the restrictive covenants of the beach deed (2011 modification) was filed on the New London land records. See *Jepsen I*, supra, 181 Conn. App. 502. The 2011 modification prompted the original plaintiffs to commence a declaratory judgment action seeking to have the 2011 modification declared null and void. Id. After the filing of the action, "the parties engaged in prolonged discussions, including mediation, seeking to resolve the issues raised in the legal action, while still trying to respond to the concerns of the [Billard Beach] [A]ssociation [association] members regarding uncontrolled [guest] use of the beach. . . . In the course of these negotiations, the proponents of the modification, working with the [e]xecutive [c]ommittee of the [a]ssociation, developed and proposed the Amended and Restated Covenants and Restrictions Regarding Billard Beach, New London, Connecticut (2014 modification). The 2014 modification

contained an extensive revision of the restrictive covenants governing the use of the beach." (Footnote omitted; internal quotation marks omitted.) Id., 502–503. The 2014 modification was filed on the New London land records, causing the plaintiffs to amend their complaint to seek a declaratory judgment that the 2014 modification is null and void. Id., 509. In their third amended complaint (complaint), the plaintiffs pleaded six counts in total: counts of declaratory judgment, quiet title, and slander of title, as to both the 2011 and 2014 modifications.

A trial was held in December, 2015. Id. In a memorandum of decision dated May 20, 2016, the trial court, *Bates*, *J.*, "ruled in favor of the defendants on the slander of title counts of the . . . complaint," "rendered judgment in favor of the plaintiffs on the first count of their complaint [seeking declaratory judgment], declaring that '[t]he 2011 modification by agreement of the parties is deemed null and void,' " and "rendered judgment in favor of the defendants on the fourth count of the . . . complaint, stating that '[t]he 2014 modification is declared valid and in full force and effect.' " Id., 510–12. Judge Bates noted that " '[c]laims for attorney's fees and costs, if any, have been reserved by agreement of the parties for posttrial motions.' The plaintiffs thereafter filed a motion for attorney's fees and costs pursuant to General Statutes § 52-245 and Practice Book § 13-25, predicated on the defendants' special defense that the plaintiffs possessed knowledge of the modifications to the beach deed but refused to participate. . . . The [trial] court declined that request, concluding that such an award was not warranted." (Footnotes omitted.) Id., 534. The plaintiffs appealed to this court, claiming that "the [trial] court improperly (1) concluded that the [2014 modification] was properly enacted, (2) concluded that they had not met their burden in establishing slander of title, and (3) declined to render an award of attorney's fees in their favor." Id., 495.

In *Jepsen I*, this court reversed the trial court's judgment in favor of the defendants on the declaratory judgment count with respect to the 2014 modification, concluding that the 2014 modification was not "approved by owners of a majority of properties in the subdivision" and, thus, was not " 'valid and in full force and effect.' " Id., 529. We affirmed the trial court's judgment in favor of the defendants on the plaintiffs' slander of title counts and their claim to attorney's fees and costs. Id., 533, 535. The following rescript was issued in *Jepsen I*: "The judgment is reversed only as to the fourth count of the plaintiffs' complaint and the case is remanded with direction to render judgment declaring the 2014 modification invalid. The judgment is affirmed in all other respects." Id., 535.

On remand, on May 7, 2018, the trial court, *Calmar*, *J.*, rendered judgment in favor of the plaintiffs on the fourth count of their complaint, declaring the 2014 modification invalid. The plaintiffs thereafter filed a petition for certification to appeal to our Supreme Court, which was denied. See *Jepsen* v. *Camassar*, 329 Conn. 909, 186 A.3d 12 (2018).

On July 9, 2018, the plaintiffs filed two postjudgment motions: (1) a motion captioned "claim for equitable relief pursuant to [General Statutes §] 47-31, [Practice Book §§] 10-27 and 11-21 and for alternative relief pursuant to [Practice Book] § 10-25" (postjudgment motion for equitable relief); and (2) a motion captioned "motion for fees and costs pursuant to . . . § 52-245 and [Practice Book] § 13-25 and for alternative relief pursuant to . . . [§] 47-31 and [Practice Book] § 10-25" (postjudgment motion for fees and costs).[3]

On July 20, 2018, the defendants represented by Synodi & Videll, LLC, and the defendants represented by

[3] We refer in this opinion to the postjudgment motion for equitable relief and the postjudgment motion for fees and costs, collectively, as the postjudgment motions.

Waller, Smith & Palmer, P.C.,[4] separately filed objections to the plaintiffs' postjudgment motions. Therein, those defendants argued that the plaintiffs' postjudgment motions were improper because a judgment had been rendered in the case and no motion to open that judgment had been filed. The defendants further argued that the plaintiffs' claims in the postjudgment motions exceeded the scope of this court's mandate in *Jepsen I*. The Synodi defendants claimed that the plaintiffs had "filed frivolous motions which [were] an abuse of process" and sought to have the plaintiffs foreclosed from filing other similar motions. The WSP defendants claimed that the plaintiffs' postjudgment motions had "no basis in law or fact" and were "blatant and baseless attempts to relitigate issues already ruled [on]," and requested an award of costs and attorney's fees for defending against the plaintiffs' "vexatious claims." On July 25, 2018, the trial court, *S. Murphy*, *J.*, summarily denied the plaintiffs' postjudgment motions and summarily sustained the defendants' objections thereto.

[4] In this appeal, Synodi & Videll, LLC, represented the defendants Christine Synodi, George Synodi, Savas S. Synodi and Maria S. Synodi (Synodi defendants). Waller, Smith & Palmer, P.C., represented the defendants Mary B. Roland, Richard L. Thibeault, Beth M. Camassar, Rubin Levin, Lenore Levin, Theresa Tuthill, David Eder, Ronald J. Wofford, Jeffrey R. Seidel, Bethany R. F. Seidel, Eunice Greenburg, trustee, Daniel S. Firestone, Hope H. Firestone, Leonard T. Epstein, Sandra R. Epstein, Eric Parnes, Marilyn Parnes, John A. Spinnato, Janine Stavri, Sophocles Stavri, Robert McLaughlin, Jr., Roberta McLaughlin, Stanley Banks, Elaine Banks, Jerry C. Olsen, Vivian C. Stanley, David M. Goebel, Earline B. Goebel, Ronald E. Beausoleil, Pamela Beausoleil, Marilyn Simonson, Barry Weiner, Cynthia C. Weiner, Barbara Sinclair, Richard Sinclair, Michael P. Shapiro, Elaine P. Shapiro, Miriam Levine, John Oliva, Nancy Krant, Mary Margaret Kral, trustee, Edwin J. Roland, Michael J. Raimondi, Hugh F. Lusk, Anne Marie Lizarralde, Manuel Lizarralde, Paul Burgess and Deborah Burgess (WSP defendants).

The defendants Estella C. Kuptzin, Emily S. King, Anthony C. Polcaro, Joanne L. Polcaro, Shirley Gottesdiener, trustee, Marian E. Dippel, Debra B. Gruss, Kenneth C. Wimberly, Dawn Hickey Thibeault, James J. Correnti, Willa M. Correnti, Arnold D. Seifer, Judith A. Pickering, Anne Marie Mitchell and Frank Pezzello were not represented by either counsel.

Hereinafter in this opinion, the Synodi defendants, the WSP defendants and the unrepresented defendants will be referred to collectively as the defendants.

On July 23, 2018, in response to arguments raised in the defendants' objections and while awaiting the trial court's ruling on their postjudgment motions, the plaintiffs filed a motion to open the judgment (motion to open). The plaintiffs sought to have the court open Judge Calmar's May 7, 2018 judgment and award attorney's fees and costs, and equitable relief. The Synodi defendants and the WSP defendants objected, and Judge Murphy summarily denied the plaintiffs' motion to open. The plaintiffs thereafter filed this appeal of the trial court's denial of their postjudgment motions and their motion to open.[5] Additional facts will be set forth as necessary.

I

The plaintiffs claim that the trial court improperly denied their (1) postjudgment motion for equitable

[5] After filing their appeal, the plaintiffs filed a motion for articulation on September 11, 2018, directed at Judge Murphy's summary denial of the plaintiffs' postjudgment motions and their motion to open, and her decision sustaining the defendants' objections to the plaintiffs' postjudgment motions. Judge Murphy issued a "memorandum of decision on the motion for articulation" on October 3, 2018, in which she stated that "the matters raised by the plaintiffs by way of postjudgment motions to this court are hereby considered to have been litigated, decided, reviewed, and left undisturbed, with no direction [on] remand to this court to entertain any such issues by way of relitigation."

On October 16, 2018, the plaintiffs moved for review of Judge Murphy's articulation to this court. On December 5, 2018, this court granted review of the plaintiffs' motion but denied the relief requested therein. We also ordered, sua sponte, that Judge Murphy articulate "(1) whether in sustaining the defendants' objections to the plaintiffs' [postjudgment] motion for fees and costs and their claim for equitable relief . . . [she] granted the affirmative requests for relief contained in those objections, wherein the defendants sought to have the trial court foreclose the plaintiffs from filing other similar motions . . . and award them costs and attorney's fees for defending against the plaintiffs' 'vexatious claims' . . . and (2) the factual and legal basis for [her] decision."

On December 13, 2018, in response to this court's order, Judge Murphy issued an articulation of her orders sustaining the defendants' objections to the plaintiffs' postjudgment motions. Judge Murphy stated that she had denied the defendants' two affirmative requests for relief seeking to have the court foreclose the plaintiffs from filing other similar motions and award the defendants costs and attorney's fees.

relief and (2) postjudgment motion for fees and costs. We will consider each claim in turn.

A

The plaintiffs claim that this court's order of remand in *Jepsen I* required the trial court to address their claims for quiet title and injunctive relief. The defendants argue that the relief sought by the plaintiffs was beyond the scope of this court's remand. We agree with the defendants.

We first set forth the principles of law and the standard of review by which we evaluate this claim. "In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . .

"Our remand orders, however, are not to be construed so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Citation omitted; internal quotation marks omitted.) *TDS Painting & Restoration, Inc.* v. *Copper Beech Farm, Inc.*, 73 Conn. App. 492, 515–16,

808 A.2d 726 (*TDS Painting*), cert. denied, 262 Conn. 925, 814 A.2d 379 (2002). "Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 791–92, 43 A.3d 567 (2012).

As previously set forth, this court's rescript in *Jepsen I* stated that "[t]he judgment is reversed only as to the fourth count of the plaintiffs' complaint and the case is remanded with direction to render judgment declaring the 2014 modification invalid. The judgment is affirmed in all other respects." *Jepsen I*, supra, 181 Conn. App. 535. In two separate footnotes, this court stated that, in light of its decisions to affirm the trial court's determination that the 2011 modification was null and void and to reverse the trial court by declaring the 2014 modification null and void, it was unnecessary to reach any of the plaintiffs' other claims for relief, including their request for quiet title. Id., 495 n.1, 529–30 n.49. This court stated that "[t]he plaintiffs also have raised claims concerning a reverter clause in the beach deed, their request to quiet title to the property in question, the applicability of the Common Interest Ownership Act, General Statutes § 47-200 et seq., and various constitutional rights under the state and federal constitutions that allegedly have been violated by the modification of the beach deed. *In light of our resolution of the principal issue in this appeal, we do not address those contentions*." (Emphasis added.) Id., 495 n.1. Later in the opinion, this court "acknowledge[d] that the plaintiffs' complaint also sought to have the court quiet title to the beach. In its memorandum of decision, the trial court did not address that request. See *NPC Offices, LLC* v. *Kowaleski*, 320 Conn. 519, 534, 131 A.3d

1144 (2016). In light of the trial court's declaration that the 2011 modification is null and void, and our conclusion that the 2014 modification likewise is invalid, *further consideration of the plaintiffs' quiet title request is unnecessary.* As a result of our decision today, title to the beach remains as it was prior to the enactment of the 2011 and 2014 modifications." (Emphasis added.) *Jepsen I*, supra, 529–30 n.49.

We conclude that the rescript in *Jepsen I*, as interpreted in conjunction with the entirety of the opinion, particularly the two footnotes recited in the preceding paragraph, conveyed to the trial court that the plaintiffs' claims for quiet title were beyond the scope of the mandate.

First, this court identified all of the claims that the plaintiffs advanced on appeal and noted which of these claims would not be addressed in its opinion. This included the plaintiffs' quiet title claims. See id., 495 n.1, 529–30 n.49. In so doing, this court communicated to the parties that each claim was given its due consideration before this court and ultimately concluded that, in light of its determination on other claims presented in the appeal, it was unnecessary to address the quiet title claims. In this way, this court's direction in *Jepsen I* is distinguishable from other appellate cases in which a remand was found *not* to have proscribed the trial court from considering certain issues on remand because those issues had not been raised in the appeal. See, e.g., *State* v. *Brundage*, 320 Conn. 740, 750, 135 A.3d 697 (2016) ("In *Brundage* . . . the Appellate Court did not have before it the question of whether the state could file, subsequent to a reversal of the defendant's judgments of conviction, a substitute information bringing different charges against the defendant. That question was completely outside the scope of the issues presented in the appeal, and to impose a rule that presumes that a reviewing court would address

such an issue would require the reviewing court to act with a degree of prescience that cannot reasonably be expected, and, therefore, is completely inconsistent with the role played by a reviewing court."); *Beccia* v. *Waterbury*, 192 Conn. 127, 131, 133, 470 A.2d 1202 (1984) (concluding that constitutionality defense that was raised to trial court on remand was not beyond scope of remand because it was not before our Supreme Court in first appeal); *Behrns* v. *Behrns*, 124 Conn. App. 794, 814–15, 817, 6 A.3d 184 (2010) (concluding that trial court did not exceed its authority on remand when it ordered defendant to pay interest on arrearages because "[a]t the time of our remand . . . neither the trial court nor this court had addressed the plaintiff's entitlement to interest on the money owed by the defendant"); *TDS Painting*, supra, 73 Conn. App. 514–18 (holding that trial court and attorney trial referee were not barred on remand from considering issue of post-judgment attorney's fees and costs because they were not part of earlier appeal). This court's acknowledgment of the plaintiffs' quiet title claims and its conclusion that it need not address them was interpreted correctly by the trial court as an indication that no further consideration was owed to these claims on remand.

Second, as noted in footnotes 1 and 49 of *Jepsen I*; see *Jepsen I*, supra, 181 Conn. App. 495 n.1, 529–30 n.49; this court's favorable rulings on the plaintiffs' declaratory judgment counts obviated the need to address their quiet title counts, as the plaintiffs sought the same relief under both sets of counts. In the plaintiffs' second and fifth counts of their complaint, in which they sought to quiet title, the plaintiffs' claim for relief was a "[j]udgment determining the rights of the parties in and to the property and settlement [of] the title thereto by declaring the modification to be null and void," and "[s]uch other relief as in equity may appertain." Under the first and fourth counts, seeking

a declaratory judgment, the plaintiffs likewise sought, inter alia, that the 2011 and 2014 modifications be declared null and void. Because this court provided the plaintiffs with their requested relief under their declaratory judgment counts—declaring both modifications null and void—it would have been superfluous for this court to address their quiet title counts, which also sought that the modifications be declared null and void. It would have been similarly redundant for the trial court to interpret this court's mandate as requiring it to consider the same issue that this court declined to address. The trial court correctly refrained from doing so.

In footnote 49 of *Jepsen I*, this court stated that "the plaintiffs' complaint also sought to have the court quiet title to the beach. In its memorandum of decision, the trial court did not address that request." *Jepsen I*, supra, 181 Conn. App. 529 n.49. Although this factual statement arguably could be seen as an observation by this court that Judge Bates had failed to rule on the plaintiffs' quiet title counts, we do not share in that interpretation. Rather, we read this statement as a simple recognition that Judge Bates did not separately analyze or set forth his ruling on the plaintiffs' quiet title counts.

Instead, Judge Bates implicitly disposed of the plaintiffs' quiet title counts because those counts sought the same relief that was requested by the plaintiffs under their declaratory judgment counts and his analysis of the validity of the 2011 and 2014 modifications corresponded to both sets of those counts. The plaintiffs' requested relief under both sets of counts—that the modifications be invalidated—required Judge Bates to analyze whether the modifications to the beach deed were created in accordance with the beach deed's express mechanism for modifying its restrictive covenants. Judge Bates performed this analysis with respect to the 2011 modification, as evidenced by his conclusion that "a 'vote' requires more formality than just obtaining signatures" and that "the [2011] modification

appears to have been a legal nullity." Judge Bates likewise performed this analysis with regard to the 2014 modification, as exhibited by his conclusion that "a 'vote' occurred regarding the [2014] modification." With respect to the applicability of a quiet title claim to the 2014 modification, Judge Bates found that the valid modification did not create any interest adverse to the plaintiffs' interest, which precluded the need "for a full determination of the rights of the parties in" the beach deed. *Lake Garda Improvement Assn.* v. *Battistoni*, 155 Conn. 287, 293, 231 A.2d 276 (1967). Judge Bates' conclusion is best illustrated by his finding that "[n]one of [the] changes [provided by the 2014 modification] affected the 'ownership' of beach rights; rather, the changes more precisely described and to some degree expanded those rights. Instead of severing the beach lot from the house lot—as alleged by the plaintiff[s]—the changes clarified and defined the rights of lot owners and their tenants to use the beach." Because of Judge Bates' rulings on the validity of both modifications, and in light of his finding that no adverse interests were created as a result of the 2014 modification, the quiet title claims effectively were adjudicated.

Third, this court made no mention in its rescript of the plaintiffs' quiet title claims, despite acknowledging that the plaintiffs had raised these claims and, nevertheless, declining to address them. If this court wanted the trial court to address the plaintiffs' quiet title claims on remand, it would have said so explicitly. See *Barlow* v. *Commissioner of Correction*, 328 Conn. 610, 613–14, 182 A.3d 78 (2018) (stressing need for "clarity and consistency between the opinion and the rescript"). This court did not do so.

NPC Offices, LLC v. *Kowaleski*, supra, 320 Conn. 519, is illustrative of circumstances in which our Supreme Court provided the trial court with explicit instructions to address certain claims in a new trial. In that case, a dispute arose over the legal effectiveness of an express easement that provided the grantee-plaintiff the right

to use the driveway of the grantor-defendants to access a parking area behind the parties' abutting real properties. Id., 522–23. The easement was conditioned on the plaintiff's property being used for purposes of residential or professional offices. Id., 522. When the defendants constructed an iron fence behind the buildings along the parties' common boundary, resulting in restricted access to and maneuverability in the parking area behind the plaintiff's property, the plaintiff brought an action, claiming fraudulent transfer, entry and detainer, and the creation of prescriptive and implied easements, and sought quiet title and an injunction. Id., 523. The trial court concluded that the plaintiff's property was not being used as " 'professional offices,' " as those terms in the easement had been interpreted by the trial court, and, thus, that the easement was terminated. Id., 524. Our Supreme Court reversed. Id., 533. The court recognized that, "[a]s a result of the trial court's determination that the easement had terminated, there [were] several claims that the trial court did not independently address," including quiet title, injunctive relief, and entry and detainer. Id., 533–34. Our Supreme Court remanded the case to this court with direction to reverse the trial court's judgment and to remand the case to the trial court for a new trial and provided the trial court with explicit directions to address those claims in a new trial. Id., 534–35.

The plaintiffs maintain that this court's citation to *NPC Offices, LLC*, in footnote 49 of *Jepsen I*; see *Jepsen I*, supra, 181 Conn. App. 529–30 n.49; is a "clear direction" by this court that the plaintiffs' quiet title claims be considered on remand. We disagree. *NPC Offices, LLC*, is distinguishable from the present case and, thus, cannot be used as the plaintiffs suggest. In *NPC Offices, LLC*, the trial court concluded that the easement was terminated and, for that reason, did not consider the plaintiff's claims for quiet title, injunctive relief, and entry and detainer, all of which related to the defendants' construction of an iron fence along the parties'

common boundary. Upon reversal, however, our Supreme Court noted that, because the easement was not terminated, meaning that the plaintiff's right to access the defendants' driveway remained effective, the plaintiff could be entitled to further relief under its additional claims relating to the defendants' iron fence. See *NPC Offices, LLC* v. *Kowaleski*, supra, 320 Conn. 534. Conversely, in the present case, when, in *Jepsen I*, we affirmed the trial court's ruling that the 2011 modification was null and void and reversed the trial court as to the 2014 modification, finding it null and void, there was no need to consider the plaintiffs' quiet title claims because the plaintiffs were already given the relief they sought, namely, a declaration that both modifications are null and void.[6] Accordingly, unlike *NPC Offices, LLC*, in the present case there was no lingering impediment, physical or otherwise, to the plaintiffs' beach deed after both modifications were declared null and void. We reiterate that, if this court wanted the trial court to consider the plaintiffs' quiet title counts on remand, it would have done so explicitly in its rescript rather than by oblique citation to *NPC Offices, LLC*, within a footnote.

The plaintiffs also argue that the trial court improperly declined to provide injunctive relief on remand.[7]

[6] The plaintiffs argue that their title is clouded, despite the 2011 and 2014 modifications having been determined null and void, which necessitated consideration of their quiet title claims and an award of injunctive relief on remand. The plaintiffs had advanced this argument in *Jepsen I*. This court, aware of the plaintiffs' argument that a cloud would remain over their title even if both modifications were deemed null and void, was not persuaded to address the plaintiffs' claims. *Jepsen I*, supra, 181 Conn. App. 495 n.1, 529–30 n.49. The disinclination in *Jepsen I* to discuss the plaintiffs' claims, and their related argument of clouded title, supports the conclusion in this appeal that the remand did not envision the trial court's addressing of those same claims.

[7] The plaintiffs requested that "the restrictive covenants (including the reverter) in the parties' mutual [beach] deed be enforced." The reverter clause is triggered if the beach deed is "aliened separately and apart from the land" in the warranty deed. In *Jepsen I*, this court affirmed Judge Bates' judgment that the 2011 modification was invalid and reversed Judge Bates' judgment that the 2014 modification was valid. We determined in *Jepsen I*

The plaintiffs argue that "injunctive relief is essential to implementing and protecting [this court's] decision [in *Jepsen I*] to invalidate the modifications' attack on the original deed's restrictive covenants." This court, by declaring the 2011 and 2014 modifications null and void under the plaintiffs' declaratory judgment counts, had already "invalidate[d] the modifications' attack on the original deed's restrictive covenants," by returning "title to the beach . . . [to what it] was prior to the enactment of the 2011 and 2014 modifications." *Jepsen I*, supra, 181 Conn. App. 530 n.49. As a result, the plaintiffs were not entitled to any further relief.[8]

The trial court interpreted correctly this court's mandate as not requiring that the plaintiffs' claims for quiet title and injunctive relief be addressed.[9]

that the 2014 modification was void, a conclusion that, as a matter of logic, means that the beach deed has not been separately aliened. Accordingly, by virtue of our conclusion that the 2014 modification was void, no further proceedings were required regarding this issue.

[8] The plaintiffs cite *Grady* v. *Schmitz*, 21 Conn. App. 111, 572 A.2d 71, cert. denied, 215 Conn. 806, 576 A.2d 537 (1990), for the proposition that "injunctive relief is within the scope of a remand when restrictive covenants are violated." We disagree. In the underlying action, the plaintiffs sought only an injunction to enforce a restrictive covenant. See *Grady* v. *Schmitz*, 16 Conn. App. 292, 294, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988). The trial court rendered judgment in favor of the defendants; id., 293; which this court found erroneous on appeal and, accordingly, remanded "with direction to render judgment for the plaintiffs." Id., 303. In the second appeal, the trial court was found to have interpreted correctly the remand as a directive to render a judgment of injunctive relief in favor of the plaintiffs, but erred with regard to the "breadth of the injunction . . . ." *Grady* v. *Schmitz*, supra, 21 Conn. App. 114. Those cases are limited to their facts and do not establish the general principle advanced by the plaintiffs. See id. ("[t]he trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein" (emphasis omitted; internal quotation marks omitted)). Injunctive relief was within the scope of the remand in *Grady* v. *Schmitz*, supra, 21 Conn. App. 111, because it was the only relief sought by the plaintiffs. Here, however, the plaintiffs sought and received a declaratory judgment that invalidated the 2011 and 2014 modifications and, therefore, were not also entitled to injunctive relief.

[9] The defendants argue that the plaintiffs' claims to quiet title and for equitable relief are barred by the doctrines of res judicata and collateral estoppel. Because we conclude that the plaintiffs' claims are beyond the scope of this court's remand in *Jepsen I*, we do not consider this argument.

B

The plaintiffs next claim that the trial court improperly denied their postjudgment motion for fees and costs as to their successful challenges to both the 2011 and 2014 modifications. The defendants respond that *Jepsen I* affirmed Judge Bates' denial of attorney's fees and costs, and, thus, the trial court would have gone beyond the scope of the remand were it to revisit that issue. The defendants further argue that the plaintiffs' postjudgment motion for fees and costs is barred by the principles of res judicata and collateral estoppel. We agree with the plaintiffs that the trial court improperly denied their postjudgment motion for fees and costs without reaching the merits of the motion as to the 2014 modification. We affirm the trial court's denial of that motion as to the 2011 modification.

The following additional facts are relevant to our analysis of this issue. In his May 20, 2016 memorandum of decision, Judge Bates stated that "[c]laims for attorney's fees and costs, if any, have been reserved by agreement of the parties for posttrial motions." On June 6, 2016, the plaintiffs moved for attorney's fees and costs with respect to prevailing on the 2011 modification under § 52-245[10] and Practice Book § 13-25.[11] The plaintiffs argued that certain "defendants have continuously maintained special defenses that the plaintiffs

[10] General Statutes § 52-245 provides: "In any case in which an affidavit has been filed by the defendant, or a statement that he has a bona fide defense has been made to the court by his attorney, and the plaintiff recovers judgment, if the court is of the opinion that such affidavit was filed or statement made without just cause or for the purpose of delay, it may allow to the plaintiff, at its discretion, double costs, together with a reasonable counsel fee to be taxed by the court."

[11] Practice Book § 13-25 provides: "If a party fails to admit the genuineness of any document or the truth of any matter as requested herein, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, such party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The judicial authority shall make the order unless it finds that such failure to admit was reasonable."

had notice of the 2011 modification and refused to participate in meaningful discussions regarding it,'' but that those defendants lacked just cause to plead those defenses and refused to respond to the plaintiffs' requests to admit with regard to them. Because the plaintiffs did not prevail with respect to the 2014 modification, they did not seek attorney's fees and costs as to the 2014 modification. On September 7, 2016, Judge Bates denied the plaintiffs' motion for fees and costs relative to the 2011 modification. Judge Bates cited General Statutes § 52-243[12] and held that, ''[g]iven [the] dynamics between the parties and the good faith efforts of the defendants to work with the plaintiffs, the awarding [of] fees for a partial verdict—the invalidation of the initial bylaw changes—is not appropriate, and the motion is denied.''

On appeal in *Jepsen I*, the plaintiffs argued that Judge Bates ''abused [his] discretion in declining to render an award of attorney's fees in their favor due to the allegedly frivolous filing of . . . special defense[s] by certain defendants.'' *Jepsen I*, supra, 181 Conn. App. 533. This court noted that those defendants raised those special defenses with respect to the 2011 and 2014 modifications. Id. Ultimately, this court concluded that, ''[o]n our thorough review of the record, we cannot say that the [trial] court abused its discretion in denying the plaintiffs' request for attorney's fees and costs in the present case.'' Id., 535. The case was remanded, and Judge Calmar rendered judgment in favor of the plaintiffs on the fourth count of their complaint on May 7, 2018. The plaintiffs filed a postjudgment motion for fees and costs as to both the 2011 and 2014 modifications, to which the defendants filed objections. Judge Murphy

[12] General Statutes § 52-243 provides: ''If a verdict is found on any issue joined in an action in favor of the plaintiff, costs shall be allowed to him, though on some other issue the defendant should be entitled to judgment, unless the court which tried the issue is of the opinion that the defendant had probable cause to plead the matter found against him.''

summarily denied the plaintiffs' motion and summarily sustained the defendants' objections and, in an articulation, reasoned that in *Jepsen I* this court "addressed [Judge Bates'] ruling [on attorney's fees and costs] and, after consideration, left it unchanged . . . ."

We begin our analysis by setting forth the standard of review and the controlling principles of law. "Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 791–92. "Connecticut case law follows the general rule, frequently referred to as the American Rule, that attorney's fees are not allowed to *the prevailing party* as an element of damages unless such recovery is allowed by statute or contract." (Emphasis added; internal quotation marks omitted.) *TDS Painting*, supra, 73 Conn. App. 516; see id., 516–17 (holding that plaintiff's entitlement to attorney's fees was not available until plaintiff received favorable judgment, postappeal).

The trial court was correct that its consideration of the plaintiffs' postjudgment motion for fees and costs as to the 2011 modification was beyond the scope of the remand in *Jepsen I*.[13] When Judge Bates denied the plaintiffs' June 6, 2016 motion for attorney's fees and costs, he did so with respect to the 2011 modification because that is the modification that the plaintiffs successfully challenged. Thus, in *Jepsen I*, when this court affirmed Judge Bates' denial of attorney's fees and costs after concluding that he did not abuse his discretion,

[13] In light of our conclusion that the plaintiffs' postjudgment motion for fees and costs as to the 2011 modification is beyond the scope of the remand, we do not consider the defendants' argument that the plaintiffs' motion is barred by the doctrines of res judicata and collateral estoppel.

it did so only as to the challenge to the 2011 modification. This court did not indicate in its rescript that the issue warranted further consideration. Therefore, the trial court correctly interpreted this court's mandate because the mandate did not direct that any further action be taken on the plaintiffs' request for attorney's fees and costs as to the 2011 modification.[14]

The trial court, however, improperly concluded that it would have exceeded the scope of the remand had it considered the plaintiffs' entitlement to attorney's fees and costs with respect to the 2014 modification. In *Jepsen I*, this court granted the plaintiffs the reversal they were seeking on the trial court's determination that the 2014 modification was " 'valid and in full force and effect' . . . ." *Jepsen I*, supra, 181 Conn. App. 529. Before a judgment was rendered in the plaintiffs' favor on the 2014 modification by this court's reversal of the trial court, their entitlement under that modification to attorney's fees and costs had not been considered. Therefore, it was appropriate for the plaintiffs to seek postjudgment fees and costs on remand. See *TDS Painting*, supra, 73 Conn. App. 516–17. Moreover, because the plaintiffs' postjudgment motion for fees and costs as to the 2014 modification had not been considered by either the trial court or this court in *Jepsen I*, it

[14] The plaintiffs argue that Judge Murphy "erred in failing to recognize that the plaintiffs only prevailed on [count one with respect to the 2011 modification] after the Appellate Court so articulated, and erred in failing to recognize that [Judge Bates'] prior analysis and the Appellate Court's affirmance of it was made pursuant to . . . § 52-243." The plaintiffs are mistaken. Judge Bates considered the plaintiffs' motion for attorney's fees and costs under § 52-243 because that statute allows a plaintiff to recover attorney's fees and costs after securing a partial verdict. Judge Bates did provide the plaintiffs with a partial verdict when he rendered judgment in the defendants' favor on the 2014 modification and on the plaintiffs' slander of title counts as to both modifications, and in the plaintiffs' favor on the 2011 modification. The fact that Judge Bates considered the plaintiffs' 2016 motion for attorney's fees and costs prior to the plaintiffs' appeal in *Jepsen I* is proof that Judge Bates rendered judgment in their favor on the 2011 modification.

would not be barred by the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion). See *Rocco* v. *Garrison*, 268 Conn. 541, 554, 848 A.2d 352 (2004) ("[C]laim preclusion prevents a litigant from reasserting a claim that *has already been decided* on the merits. . . . [I]ssue preclusion . . . prevents a party from relitigating an issue that *has been determined* in a prior suit." (Emphasis added; internal quotation marks omitted.)). The trial court's denial of the plaintiffs' postjudgment motion for fees and costs is reversed as to the 2014 modification and affirmed as to the 2011 modification.

II

The plaintiffs next claim that, even assuming that the mandate in *Jepsen I* did not encompass their claims to quiet title, equitable relief, and fees and costs, the trial court improperly denied their motion to open to provide them with their requested relief. The plaintiffs argue that the trial court "used the language of [*Jepsen I*] as a shield against exercising its discretion . . . ." The plaintiffs further argue that a good and compelling reason to open the judgment was "predicated [on] the fact that both the trial court and [this court] failed to rule on the quiet title counts of the . . . complaint" and that the plaintiffs "are entitled to compensation for their exhaustive efforts to protect the rights of themselves, their invited family and all owners in the subdivision." The defendants argue that the plaintiffs "have not been able to meet their burden to show an abuse of the trial court's discretion" because they "have not cited to any authority which supports [opening] a judgment for the sole purpose of relitigating issues previously litigated and disposed of." We are not persuaded by the plaintiffs' arguments.

"The principles that govern motions to open or set aside a civil judgment are well established. Within four months of the date of the original judgment, Practice

Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . . The exercise of equitable authority is vested in the discretion of the trial court . . . to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Internal quotation marks omitted.) *Newtown* v. *Ostrosky*, 191 Conn. App. 450, 468, 215 A.3d 1212, cert. denied, 333 Conn. 925, 218 A.3d 68 (2019).

With respect to the plaintiffs' motion to open, the trial court stated in its October 3, 2018 articulation that, "in reviewing [this court's] opinion [in *Jepsen I*], [it] considers the issues raised by the plaintiffs by way of [their] postjudgment motions to have been litigated and reviewed. There is nothing in [this court's] opinion, when read in conjunction with the direction on remand, that leads [the trial] court to believe [that] there is good cause or a compelling reason to relitigate any issues concerning the present case." The plaintiffs do not offer any good and compelling reason for opening the judgment other than their position that the trial court and this court failed to rule on the claims raised in their postjudgment motions. The plaintiffs' position is incorrect. As discussed in part I of this opinion, the plaintiffs' claims of quiet title, to injunctive relief and to attorney's fees and costs as to the 2011 modification were raised in *Jepsen I* and either rejected or not addressed. As such, the trial court did not abuse its discretion by declining to open the judgment so as to resurrect these claims.[15]

[15] Because we conclude that consideration of the plaintiffs' postjudgment motion for fees and costs as to the 2014 modification is not beyond the scope of the remand; see part I B of this opinion; it is unnecessary to address that portion of the plaintiffs' motion to open that asserts a claim to attorney's fees and costs with regard to the 2014 modification.

III

The plaintiffs argue that by failing to hear or grant their postjudgment motions to "correct the record and clear the cloud [on] their title caused by [the 2011 and 2014] modifications, provide them with damages and injunctive relief inherent thereto, and protect their rights and their title against further violations," the trial court violated several of their state and federal constitutional rights. Specifically, the plaintiffs claim that the trial court "has involved the state in sanctioning, allowing and enforcing baseless litigation, enforcing private discrimination, invading privacy, taking the [plaintiffs'] property . . . [and] in interfering with their right of association." We disagree.

Our standard of review when interpreting a mandate of this court is as set forth in parts I A and B of this opinion. In part I A of this opinion, we concluded that the plaintiffs' claims to quiet title and injunctive relief were beyond the scope of the remand. In part I B of this opinion, we concluded that the plaintiffs' claim to attorney's fees and costs as to the 2011 modification also was beyond the scope of the remand.[16] Because the trial court interpreted the scope of the remand correctly when it denied the plaintiffs' aforementioned claims, we reject the plaintiffs' assertion that the trial court's sound denial amounted to a violation of their state and federal constitutional rights.

The judgment is reversed only as to the denial of the plaintiffs' postjudgment motion for fees and costs as to the 2014 modification and the case is remanded for further proceedings limited to that issue; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[16] In part I B of this opinion, we concluded that the trial court incorrectly interpreted the remand as barring consideration of the plaintiffs' claims to attorney's fees and costs as to the 2014 modification. The plaintiffs have not demonstrated, however, that the trial court's error rises to the level of a constitutional violation. Accordingly, we consider these claims meritless, and they warrant no further discussion.

JACK E. TUREK ET AL. *v.* ZONING BOARD OF APPEALS OF THE CITY OF MILFORD (AC 41824)

Alvord, Devlin and Pellegrino, Js.

Syllabus

The defendant zoning board of appeals appealed from the judgment of the trial court sustaining the appeal filed by the plaintiff landowners. After a hurricane destroyed their home, the plaintiffs sought to construct a new home on their property. The plaintiffs filed an application for a variance from the building height requirements of certain zoning regulations. The board denied the application, and the plaintiffs appealed to the trial court, alleging that the board acted illegally, arbitrarily and in abuse of its discretion by ignoring certain legal hardships unique to the property. The trial court sustained the plaintiffs' appeal, concluding that the plaintiffs demonstrated an unusual hardship on the basis of the destruction of their previous home and the need to comply with applicable federal and state flood elevation requirements, and that their proposal qualified under the narrow exception to the hardship requirement set forth in *Adolphson* v. *Zoning Board of Appeals* (205 Conn. 703), because the proposed house would reduce nonconformities in relation to the previous house. Thereafter, this court granted the board's petition for certification to appeal to this court, and this appeal followed. *Held*:

1. The trial court incorrectly concluded that the plaintiffs demonstrated a legally cognizable hardship: an applicant for a variance must show that, because of some peculiar characteristic of his property, a strict application of the zoning regulation would produce an undue hardship, and the plaintiffs here failed to carry their burden of demonstrating a legally cognizable harship as the record of the proceedings before the board contained no evidence of hardship originating in the zoning ordinance because the evidence merely established that the plaintiffs could not, in the absence of a variance, build the type of house that they desired while conforming to flood elevation requirements; although the plaintiffs' proposed home did not increase substantially the square footage when compared to their prior home, the plaintiffs' alleged hardship arose out of their desire to build a certain type of home, which was appropriately characterized as personal disappointment.
2. The trial court erroneously determined that the plaintiffs' proposal qualified under the *Adolphson* exception to the hardship requirement: although the plaintiffs argued that the board should have granted a variance because it would reduce other nonconformities, the plaintiffs' proposed new construction would create a height nonconformity where none previously existed, and the plaintiffs provided this court with no authority suggesting that the board was required to grant the requested

variance from the height limitation, which would create a new nonconformity, on the basis of a proposed reduction or elimination of other nonconformities and compliance with flood regulations.

Argued November 18, 2019—officially released February 25, 2020

Procedural History

Appeal from the decision of the defendant denying the plaintiffs' application for a variance from the city of Milford's zoning regulations, brought to the Superior Court in the judicial district of Hartford, Land Use Litigation Docket, and tried to the court, *Hon. Marshall K. Berger*, judge trial referee; judgment sustaining the appeal, from which the defendant, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Kevin J. Curseaden, for the appellees (plaintiffs).

Matthew B. Woods, for the appellant (defendant).

Opinion

ALVORD, J. The defendant, the Zoning Board of Appeals of the City of Milford (board), appeals from the judgment of the trial court sustaining the appeal filed by the plaintiffs, Jack E. Turek and Donna Weaver, and reversing the decision of the board that the plaintiffs were not entitled to a variance. On appeal, the board claims that the trial court erroneously sustained the appeal, and causes us to consider (1) whether the plaintiffs demonstrated a legally cognizable hardship, and (2) whether the plaintiffs' proposal qualifies under the exception to the hardship requirement set forth in *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 710, 535 A.2d 799 (1988), and its progeny.[1] We reverse the judgment of the trial court.

[1] The board also claims on appeal that the requested variance would affect substantially the city of Milford's comprehensive zoning plan. Because we conclude in part I of this opinion that the plaintiffs failed to establish unusual hardship and in part II of this opinion that the plaintiffs' proposal does not qualify under the *Adolphson* exception, it is unnecessary to reach the board's claim that the plaintiffs' requested variance would affect substantially the comprehensive zoning plan. See *Rural Water Co.* v. *Zoning Board of Appeals*,

The relevant facts and regulatory background are as follows. The plaintiffs own property located at 59 Hillside Avenue in Milford (property). The property measures approximately 4076 square feet and is situated between Long Island Sound to the east and Hillside Avenue to the west. The property, which is narrow in shape,[2] slopes downward from 13 feet above sea level at Hillside Avenue to between 8.3 and 8.9 feet above sea level at the shore. The property was originally created in 1901. The city of Milford (city) first enacted zoning regulations (regulations) in 1930. The property is located within the R-5 residential zone. The regulations require a minimum of 5000 square feet of land on each building lot located in an R-5 zone.[3] See Milford Zoning Regs., art. III, § 3.1.4.1. Accordingly, the lot is a legal nonconforming lot. See Milford Zoning Regs., art. XI, § 11.2. The regulations also specify that in an R-5 zone the maximum building height permitted is thirty-five feet and the maximum lot coverage permitted is 65 percent. Milford Zoning Regs., art. III, § 3.1.4.1. Building height is defined in the regulations in part as "[t]he vertical distance measured in feet from the average existing level of the ground surrounding the building or addition thereto and within ten (10) feet thereof up to the midpoint height of a pitched roof or up to the level of the highest main ridge or peak of any other type of structure, or the total number of stories in a building including basements and/or half-stories."[4] Milford Zoning Regs., art. XI, § 11.2.

287 Conn. 282, 296 n.12, 947 A.2d 944 (2008) (declining to address whether proposed residence would affect substantially comprehensive zoning plan in light of conclusion that no unusual hardship existed); see also *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 18 n.1, 966 A.2d 722 (2009).

[2] After noting a slight discrepancy between the plaintiffs' measurements and the measurements on the Zoning Location Survey submitted to the board, the court included in its memorandum of decision the plaintiffs' measurements of the lot as "approximately 113 feet long [and] 28.2 feet [wide] along the shore of the Long Island Sound to the east and with 32 feet of frontage on Hillside Avenue to the west."

[3] The zoning regulations also require a minimum lot width of fifty feet and lot depth of seventy feet. Milford Zoning Regs., art. III, § 3.1.4.1.

[4] Exempted from the height computation are roof parapets and turrets of less than three feet, cupolas and domes that do not exceed 15 percent of

"Building Height Within A Flood Hazard Area" is separately defined in the regulations as "[t]he building height as defined above, but including all portions of a building situated below the regulatory flood protection elevation and all portions of basements or cellars that extend above the finished grade adjacent to the building." Milford Zoning Regs., art. XI, § 11.2. The average elevation of the property is 10 feet and 8.4 inches above sea level.

Prior to Hurricane Sandy in late October, 2012, there existed on the property a single-family residence. The two-story residence, which was more than 100 years old, measured 1500 square feet. There were two other structures, a detached garage and a shed, on the property. Hurricane Sandy destroyed the residence, which was later demolished, and since that time the lot has remained vacant.

The entire property, which is split between the AE Flood Zone and the VE Flood Zone, is within a special flood hazard area. The regulations incorporate by reference the areas of special flood hazard identified by the Federal Emergency Management Agency (FEMA) and the accompanying Flood Insurance Rate Maps (FIRM).[5] Milford Zoning Regs., art. V, § 5.8.2.[6] The Code of Federal Regulations (code) defines "[a]rea of special flood hazard" in relevant part as "the land in the flood plain within a community subject to a 1 percent or greater chance of flooding in any given year. . . ." 44 C.F.R.

the roof area, among other restrictions, and church spires and chimneys. Milford Zoning Regs., art. XI, § 11.2.

[5] The Code of Federal Regulations defines "Flood Insurance Rate Map" as "an official map of a community, on which the Federal Insurance Administrator has delineated both the special hazard areas and the risk premium zones applicable to the community. . . ." 44 C.F.R. § 59.1; see also Milford Zoning Regs., art. XI, § 11.2 (containing similar definition).

[6] Section 5.8.2 of the zoning regulations provides, in relevant part: "The areas of special flood hazard identified by [FEMA] in its Flood Insurance Study (FIS) for New Haven County, Connecticut, dated December 17, 2010, and accompanying Flood Insurance Rate maps (FIRM), dated December 17, 2010, and other supporting data applicable to the [city], and any subsequent revisions thereto, are adopted by reference and declared to be a part of this regulation."

§ 59.1. The regulations also identify the VE Flood Zone as a coastal high hazard area. Milford Zoning Regs., art. V, § 5.8.2, and art. XI, § 11.2. The code defines "coastal high hazard area" as "an area of special flood hazard extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources." 44 C.F.R. § 59.1; see also Milford Zoning Regs., art. XI, § 11.2 (containing similar definition and stating that "[t]he area is designated on a FIRM as Zone VE or V").

The regulations provide that "[a]reas of special flood hazard are determined utilizing the base flood elevations (BFE) provided on the flood profiles in the Flood Insurance Study (FIS)[7] for a community. BFEs provided on a [FIRM] are only approximate (rounded up or down) and should be verified with the BFEs published in the FIS for a specific location." (Footnote added). Milford Zoning Regs., art. V, § 5.8.2. "Base flood" is defined in both the code and the regulations as "the flood having a one percent chance of being equaled or exceeded in any given year." 44 C.F.R. § 59.1; see also Milford Zoning Regs., art. XI, § 11.2. "Base flood elevation" is defined in the regulations as "[t]he elevation of the crest of the base flood or 100-year flood. The height in relation to mean sea level expected to be reached by the waters of the base flood at pertinent points in the floodplains of coastal and riverine areas."[8] Milford Zoning Regs., art. XI, § 11.2. The base flood elevation for both the AE Flood Zone and VE Flood Zone where the property is located is thirteen feet.

[7] The code's definition of "Flood Insurance Study" refers to "[f]lood elevation study," which is defined as "an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards." 44 C.F.R. § 59.1.

[8] The code defines "[f]lood elevation determination" as "a determination by the Federal Insurance Administrator of the water surface elevations of the base flood, that is, the flood level that has a one percent or greater chance of occurrence in any given year." 44 C.F.R. § 59.1.

The National Flood Insurance Program, administered by FEMA, "makes federal flood insurance available to communities that impose a minimum standard of floodplain management regulation, generally imposed through zoning ordinances. Every Connecticut municipality participates in the [program]. . . . Under the [program], participating municipalities *must* create land use ordinances that *require* habitable portions of new *or substantially improved* residential structures within the Special Flood Hazard Area to be elevated to or above the Base Flood Elevation . . . shown on Flood Insurance Rate Maps . . . ." (Emphasis in original; internal quotation marks omitted.) *Mayer-Wittmann* v. *Zoning Board of Appeals*, 333 Conn. 624, 635, 218 A.3d 37 (2019), quoting W. Rath et al., "Height Restrictions on Elevated Residential Buildings in Connecticut Coastal Floodplains," Municipal Resilience Planning Assistance Project: Law & Policy White Paper Series (2018) p. 2, available at https://circa.uconn.edu/wp-content/uploads/sites/1618/2018/03/Height-Restrictions-on-Elevated-Buildings.pdf (last visited February 18, 2020). Specifically, the code requires that "all new construction and substantial improvements of residential structures within Zones A1–30, AE and AH zones on the community's FIRM have the lowest floor (including basement) elevated to or above the base flood level . . . ." 44 C.F.R. § 60.3 (c) (2). Under the regulations, the board may not accept any application to perform new construction of a residence "with a lowest floor elevation below the regulatory flood protection . . . ." Milford Zoning Regs., art. IX, § 9.2.3 (3). Additionally, § 25-68h-2 of the Regulations of Connecticut State Agencies, addressing floodplain management standards, requires an additional one foot of freeboard,[9] specifically mandating that new

[9] The code defines "[f]reeboard" as "a factor of safety usually expressed in feet above a flood level for purposes of flood plain management. 'Freeboard' tends to compensate for the many unknown factors that could contribute to flood heights greater than the height calculated for a selected size

structures designed for human habitation located within the floodplain be "elevated with the lowest floor one foot above the level of the base flood."

With that factual and regulatory background in mind, we turn to the procedural history of the present case. After Hurricane Sandy destroyed their home, the plaintiffs sought to construct a new home on the vacant property. On May 26, 2015,[10] the plaintiffs filed an application for variances from the building height and setback requirements of the regulations[11] and submitted plans for the proposed residence. The proposed 1600 square foot house would be four stories, with a garage located on the lowest level and storage and utilities located on the highest level. The proposed house would be set further back from Long Island Sound than the previous house and would be entirely removed from the VE Flood Zone. It also would cover less of the lot than the previous structures.

As noted previously, building height as provided for in the regulations is measured from "the average existing

flood and floodway conditions, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed." 44 C.F.R. § 59.1.

As the trial court noted in its memorandum of decision, the plaintiffs originally contended that state regulations required two additional feet of freeboard. They later argued that only one foot of freeboard was required. On appeal, the parties agree that only one foot of freeboard is required.

[10] The plaintiffs filed a previous variance application, which was denied by the board without prejudice in December, 2014.

[11] Specifically, the plaintiffs' requested variances included a "[r]eduction in the (south) side yard setback from 10 feet to 8.46 feet . . . [r]eduction in the (south) deck stairs setback from 8 feet to 4.4 feet . . . [i]ncrease in number of stories from three to four and . . . [i]ncrease in height from 35 feet to 39.5 feet . . . ." (Internal quotation marks omitted.)

As the trial court noted and as the plaintiffs represent in their brief to this court, the requested variance of the number of stories became moot as of a change in the regulations permitting four stories, which became effective in March, 2016. Additionally, the board's counsel recognized before the trial court that the board "had no problem with the first two requested setback variances." (Internal quotation marks omitted.) Thus, the only issue before the trial court and this court is the board's denial of the requested variance as to the height of the proposed structure.

level of the ground surrounding the building," in this case, 10 feet and 8.4 inches above sea level, to the midpoint of the pitched roof. Milford Zoning Regs., art. XI, § 11.2. As the trial court noted, were the proposed house not required to be elevated, the proposed building, when measured from the average elevation to the midpoint of the pitched roof, would have been 34 feet and 11.5 inches high. FEMA regulations, however, require residences in an AE-13 Flood Zone to be elevated to base flood elevation (thirteen feet above mean sea level), and state regulations require an additional one foot of freeboard. See footnote 9 of this opinion. With the base of the proposed building located at fourteen feet above sea level, the proposed house, when measured from the average elevation, would be 38 feet and 3.1 inches high. Thus, the plaintiffs sought a variance from the thirty-five foot height restriction.

The board held a public hearing on the plaintiffs' application on June 9, 2015. Counsel for the plaintiffs summarized the claimed hardship, including the topography of the property and applicable federal and state elevation requirements. He highlighted other communities' amendments to zoning regulations to take into account base flood elevations in determining building height. He also argued that the proposed house would reduce nonconformities in relation to the previous house and submitted photographs of neighboring properties in support of his argument that the proposed house would not be out of character. Three neighboring residents spoke in opposition to the application, and four written statements of opposition were received. Following the conclusion of the public hearing, the board held the following discussion:

"Chairman [Joseph Tuozzola]: Okay, this hearing's closed. What are your thoughts, lady and gentlemen?

"[Board member Sarah] Ferrante: We did hear tonight that the slope of the land is similar to the others in the

neighborhood so it's not really a unique lot in that regard and what applies here would apply to all is something to consider.

"[Board member Howard] Haberman: Yeah, I think what I struggle with is the fact that the property and the way that the grade, mean grade is measured in our, by the regs, it doesn't just affect this particular lot, it affects a lot of lots down there on the shoreline and in granting this variance for that height we're in essence amending the regulations and I don't think that's the purpose of this Board. If it were just [this] particular . . . lot alone, then I get it, there's a peculiarity, a hardship but I think it extends beyond just this lot and I think again, by granting that piece of the variance, the request would be, in essence, amending the regs and I don't think, again, I don't think that's the purpose of this board.

"[Tuozzola]: Mr. Soda.

"[Board member William] Soda: Well, I kind of feel the same way, it's not unique to this lot, the contours on the adjacent lots, and, I mean, as bad as I feel for these people and would love to see them get their house going, I mean, you know, I can't see it.

"[Tuozzola]: Yeah, I'm also sorry that this has been going on so long and, you know, but I do again feel that because it's a new house there are ways to adjust this and we can't speculate on how the regulations or variances might change. So, right now we know what's in front of us and we can debate what the actual house, height of the house would be and we're saying the height might be different because the house is built in a lower spot so that's what's really changing it, but I think there's still room for improvement here. Any other comments? I need [a] motion.

"[Haberman]: I have a question about the motion in terms of the other part of the application, obviously I

have no problem with the other variances they have requested because given the size of the lot it's okay to approve, so I'm wondering whether without prejudice again or do we split the vote, split the—

"[Tuozzola]: All right so what you're saying, do you want to split some things on here and allow some variances."

"[Haberman]: Or deny [without] prejudice to give them the opportunity.

"[Soda]: Well what if we give them the other variances, then if they conform to the height they can, is that possible Stephen.

"[Zoning Enforcement Officer Stephen] Harris: It's unusual but possible, you can grant some variances but not others.

"[Tuozzola]: Well the height is really the issue, so I don't know how we can do the other things without addressing that. How are you going to start building a house with the variances and the height is still not addressed. It's still going to be up for debate.

"[Ferrante]: I'm also hesitant to grant some variance and not to grant some variances without [an] overall plan, we're allowing something without knowing what we're getting at that point.

"[Soda]: We would know what we're getting except for the height.

"[Ferrante]: Right, I mean, but it is a brand new house and it could be redesigned another way.

"[Haberman][12]: I guess Mr. Haberman's questions was how many times can you deny without prejudice, again, I would think you could.

[12] Although the verbatim meeting minutes attribute this remark to board member Haberman, it appears that another board member was speaking.

"[Harris]: That's up to the board. You can deny with waivers to reapply as often as you would like.

"[Haberman]: I move to make a motion to deny without prejudice.

"[Soda]: I'll second that.

"[Haberman]: Reason for the motion obviously the height is an issue for us but other parts of the application are okay, there's room to change the application." (Footnote added.)

The board then unanimously voted to deny the plaintiffs' requested variances. The plaintiffs filed an appeal of that decision with the trial court. In their July 2, 2015 complaint, the plaintiffs alleged, inter alia, that the board, in denying the requested variances, acted illegally, arbitrarily, and in abuse of its discretion when it ignored evidence on the record of hardship that FEMA, state, and local regulations require residences in an AE-13 Flood Zone to be built at thirteen feet above mean sea level plus an additional one foot of freeboard,[13] and that the FEMA and state regulations "do not account for how building height is measured in the regulations." They further alleged that the board ignored evidence of the legal hardships unique to the property, including the elevation of the property, which situated it across the AE 13 and VE 13 Flood Zones; the narrow width of the property, having only 35.6 feet of frontage where fifty feet is required; the location of the property bordering Long Island Sound; and the topography of the property, in that it slopes downward from the street to the shore. The plaintiffs also alleged that the board failed to consider evidence that "overall nonconformities on the property would be reduced if the application were approved . . . ."

After receiving the parties' written briefs, the court held a hearing on the matter on August 9 and December

[13] See footnote 9 of this opinion.

5, 2017. In its April 4, 2018 memorandum of decision, the court found that the requested variance would not "negatively [impact] the comprehensive plan." Specifically, the court concluded that "the board's denial based solely upon the aesthetic height requirement—which the plaintiffs' proposed structure arguably meets—does not consider the nuances and immediacy of flood hazard or sea level rise and the elevation requirements in the plan and is thus contrary to law and logic." Turning to the hardship requirement, the court found that the plaintiffs had established unusual hardship, which was not self-imposed, on the basis of "the total destruction of the previous home by Hurricane Sandy and the need to comply [with] applicable elevation requirements." It further concluded that the plaintiffs' proposal qualified under the narrow exception to the hardship requirement set forth in *Adolphson* v. *Zoning Board of Appeals*, supra, 205 Conn. 710, in that the proposed house would reduce nonconformities. For those reasons, the court sustained the plaintiffs' appeal. The board thereafter filed a petition for certification to appeal. This court granted the petition, and this appeal followed.

Before turning to the claims on appeal, we set forth the applicable law governing variances and our scope and standard of review. General Statutes § 8-6 authorizes municipal zoning boards of appeals, inter alia, to "vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured,

provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed."

"[A] variance constitutes authority extended to the owner to use his property in a manner forbidden by the zoning enactment. . . . It is well established . . . that the granting of a variance must be reserved for unusual or exceptional circumstances. . . . An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone. . . . Accordingly, we have interpreted . . . § 8-6 to authorize a zoning board of appeals to grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance." (Citation omitted; internal quotation marks omitted.) *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 678–79, 111 A.3d 473 (2015).

In reviewing a decision of a zoning board of appeals, "[c]ourts are not to substitute their judgment for that of the board . . . and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing. . . . Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons. . . . We, in turn, review the action of the trial court. . . . The burden of proof to demonstrate that the board acted improperly is upon the [plaintiff]." (Internal quotation

marks omitted.) *Mayer-Wittmann* v. *Zoning Board of Appeals*, supra, 333 Conn. 639; see also *Richardson* v. *Zoning Commission*, 107 Conn. App. 36, 42, 944 A.2d 360 (2008) ("Trial courts defer to zoning boards and should not disturb their decisions so long as honest judgment has been reasonably and fairly exercised after a full hearing. . . . The trial court should reverse the zoning board's actions only if they are unreasonable, arbitrary or illegal." (Internal quotation marks omitted.)). "Because the plaintiffs' appeal to the trial court is based solely on the record, the scope of the trial court's review of the board's decision and the scope of our review of that decision are the same." (Internal quotation marks omitted.) *Mayer-Wittmann* v. *Zoning Board of Appeals*, supra, 639.[14]

In order to determine whether the board properly denied the subject variance, we first must consider whether the board gave reasons for its action. "It is well settled that [w]hen a zoning board states the reasons for its action, the question for the court to pass on is simply whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the commission is required to apply under the zoning regulations. . . . The court should not go behind the official statement of the board. . . . In the *absence* of a statement of purpose by the zoning [agency] for its actions, it [is] the obligation of the trial court, and of this court upon review of the trial court's decision, to search the entire record to find a

[14] Our Supreme Court recently issued a decision addressing the unusual hardship required to be shown by an applicant for a variance. See *Mayer-Wittmann* v. *Zoning Board of Appeals*, supra, 333 Conn. 624. While the majority opinion stated that "the tests for unusual hardship and inverse condemnation are one and the same;" id., 642; it did not alter the hardship analysis as it would be applied to this case. The parties had the opportunity, during oral argument before this court, to argue the applicability of *Mayer-Wittmann* to the present appeal, and neither contended that it was controlling.

basis for the [agency's] decision. . . . Our inquiry begins, therefore, with the question of whether the board rendered a formal, official, collective statement of the reasons for its action. . . .

"That analysis is guided by certain established precepts. First, individual reasons given by certain members of the [zoning agency do] not amount to a formal, collective, official statement of the [agency] . . . and are not available to show the reason[s] for, or the ground[s] of, the [zoning agency's] decision. . . . Second, the remarks of a board member in moving to grant a variance do not constitute a collective statement of the basis for the board's action. . . . Third, it is not appropriate for a reviewing court to attempt to glean such a formal, collective statement from the minutes of the discussion by . . . members *prior to the* [*zoning agency's*] *vote*. . . .

"Fourth, our Supreme Court has explained that the cases in which [it] held that the agency rendered a formal, official, collective statement involve circumstances wherein the agency *couples its communication of its ultimate decision with express reasons behind that decision*." (Citations omitted; emphasis in original, footnote omitted; internal quotation marks omitted.) *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 672–74.

In reviewing the meeting minutes, as set forth previously, we note that, although certain individual board members offered their thoughts on whether the plaintiffs had established a hardship prior to voting on the application, that discussion does not constitute a formal, official, collective statement of reasons for its action. See *Amendola* v. *Zoning Board of Appeals*, 161 Conn. App. 726, 736, 129 A.3d 743 (2015) ("although board members discussed the characteristics of the property and conditions for granting the proposed variances, the record does not contain a collective statement of the board's reasons for granting the variances").

Board member Haberman's statement, in moving to deny the application, that "obviously the height is an issue for us," which the trial court relied on as forming an official reason for the decision, is likewise not sufficient. See *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 674 ("the remarks of a board member in moving to grant a variance do not constitute a collective statement of the basis for the board's action"); see also *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 208–209, 209 n.12, 658 A.2d 559 (1995) (board's discussion of reasons supporting variance before vote and chairman's remarks in moving to grant variance did not constitute collective statement of basis for board's decision granting variance). Accordingly, we must search the record as a whole to determine whether the evidence supports the board's decision to deny the subject variance.

I

The board's first claim on appeal is that the court erroneously concluded that the plaintiffs had established a hardship. The board maintains that the hardship claimed by the plaintiffs was self-created because "if the plaintiffs eliminated one story in the new structure, or otherwise reduced the structure's height by 4.5 feet, they would not need a height variance." We agree with the board that the plaintiffs failed to establish the existence of a legally cognizable hardship and the trial court erred in concluding to the contrary.

As noted previously, "[a] variance constitutes permission to act in a manner that is otherwise prohibited under the zoning law of the town. . . . It is well established, however, that the granting of a variance must be reserved for unusual or exceptional circumstances. . . . An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact

which the regulation has on other properties in the zone. . . . Accordingly, we have [concluded that a zoning board of appeals may] grant a variance only when two basic requirements are satisfied: (1) the variance must be shown not to affect substantially the comprehensive zoning plan, and (2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan. . . . Proof of exceptional difficulty or unusual hardship is absolutely necessary as a condition precedent to the granting of a zoning variance. . . . Zoning boards of appeals are authorized to grant variances in cases in which enforcement of a regulation would cause unusual hardship in order to [furnish] elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory and, consequently, unconstitutional . . . manner." (Citation omitted; internal quotation marks omitted.) *Mayer-Wittmann* v. *Zoning Board of Appeals*, supra, 333 Conn. 640.

The board argues that this court's decision in *Jaser* v. *Zoning Board of Appeals*, 43 Conn. App. 545, 545–46, 684 A.2d 735 (1996), controls. In *Jaser*, after a house was destroyed by a fire, the owner sought a variance of the setback requirement in order to build a new house on the property. Id., 546. Prior to submitting their variance application, however, the plaintiffs submitted an application to the zoning board of appeals to have the lot declared a nonconforming building lot, and they submitted a survey that showed that a house could be built on the property within the applicable setback requirements. Id. The board denied the variance application, stating the following as its reason: "It was felt by those in opposition that there was no evidence presented to establish a hardship and noted that approval was granted for the nonconforming lot on the basis that a structure to be built would comply with setback requirements." (Internal quotation marks omitted.) Id.,

547. After the trial court sustained the plaintiffs' appeal, this court reversed the judgment of the trial court, concluding that "a hardship was not shown because the plaintiffs admitted that a house, even though not the type that they desired, could have been built on the lot while conforming to the setback requirements." Id., 547–48.

In the present case, the federal and state mandated minimum flood elevation requirements combined with the local height limitation have the effect of limiting the height of the home that the plaintiffs seek to build on their property. The plaintiffs maintain that the multiple requirements "severely [restrict] what can be built." They do not argue that they cannot build a single-family residence on their property in the absence of a variance from the building height regulation. Cf. *Mayer-Wittmann* v. *Zoning Board of Appeals*, supra, 333 Conn. 648–49 (applicant established that unusual hardship would result from strict enforcement of height limitation, which would deprive applicant of right to continue using existing, legally nonconforming accessory structure, where such structure could not be rebuilt in absence of either variance from building height regulations or minimum flood elevation requirement). Instead, as the board emphasizes, "the need [for a variance] arises from the plaintiffs' desire to construct a new three-story, 1600 square foot house to replace a two-story, 1500 square foot house."

"A variance is not a tool of convenience, but one of necessity. . . . They are not to be granted when a reasonable use already is present, or plainly is possible under the regulations, but an owner prefers otherwise." *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 716. Moreover, a property owner's personal disappointment in the use of his property does not constitute the legal hardship necessary for the granting of a variance. See *Amendola* v. *Zoning Board of Appeals*, supra, 161 Conn. App. 746 ("[The applicant's] proposed

additions reflect personal preference, not hardship, and could be achieved through alternative construction plans that comply with the regulations. Indeed, the mere fact that a conforming structure could be built without the need for a setback variance transforms an alleged hardship into personal disappointment."); *Green Falls Associates, LLC* v. *Zoning Board of Appeals*, 138 Conn. App. 481, 494, 53 A.3d 273 (2012) (plaintiff "failed to show that the inability to build its desired house as a result of the denial of the variance application is anything beyond a disappointment"); *Michler* v. *Planning & Zoning Board of Appeals*, 123 Conn. App. 182, 187, 1 A.3d 1116 (2010) (applicant's "disappointment in the use of the subject property, namely, the inability to build a larger structure," constituted personal hardship and did not form proper basis for board's finding of hardship (emphasis omitted)).

We agree with the board that the record contains no evidence demonstrating that, in the absence of a variance from the height limitation, the plaintiffs cannot build a home on their property that conforms with the federal and state mandated minimum flood elevation requirements.[15] See *Verrillo* v. *Zoning Board of Appeals*,

[15] During the public hearing, board member Soda repeated a suggestion that he had made with respect to the plaintiffs' prior application; see footnote 10 of this opinion; that a change in the type of roof could bring the proposed house within the height limitation. Specifically, he suggested that the proposed shed roof could be changed to a gable roof. Counsel for the plaintiffs represented that he had explored this possibility with Joe Griffith, the chief building inspector for the city, but that it was not permitted under the state building code because of wind concerns.

Aside from the preceding discussion regarding the roof, the only evidence in the record of the effect of the denial of the requested variance is a statement in a document titled "59 Hillside Ave Height [F]acts," in which the plaintiffs represented: "Unless zoning approves a hardship due to the lot size, slope and location in a flood zone they will require us to remove [five feet] from the structure. This will remove one floor from the design which is not forced on any other Milford resident that is not in a flood zone." This representation alone is not sufficient evidence of hardship.

supra, 155 Conn. App. 696–97 (record did not substantiate finding that hardship arose from inability to comply with fire or building codes where applicant submitted no evidence showing that proposed expansion of existing structure was necessary, rather than preferable, course to achieve compliance with code requirements). In sum, the record lacked evidence of hardship originating in the zoning ordinance because the plaintiffs' evidence submitted to the board merely established that they could not build the type of house that they desired while conforming to the height limitation. Thus, although the plaintiffs' proposed home did not increase substantially the square footage when compared to their prior home, the plaintiffs' alleged hardship arises out of their desire to build a certain type of home; see *Jaser* v. *Zoning Board of Appeals*, supra, 43 Conn. App. 548; which is appropriately characterized as personal disappointment.

To obtain the requested variance, the plaintiffs bore the burden of demonstrating, on the record of the proceeding before the board, a legally cognizable hardship. See *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 719–20; see also *Amendola* v. *Zoning Board of Appeals*, supra, 161 Conn. App. 738–39 (applicant has burden of proving existence of sufficient hardship).[16] We conclude that the plaintiffs failed to carry their burden of demonstrating a legally cognizable hardship and, therefore, the board acted properly in denying the variance.

II

The board's second claim on appeal is that the trial court erroneously concluded that the plaintiffs' proposal qualifies under the exception to the hardship

[16] In its principal appellate brief, the board argues that the plaintiffs failed to prove that their hardship was unique because "virtually every lot on Hillside Avenue shares the same characteristics . . . ." The plaintiffs challenge that position by arguing that "[t]he correct standard is whether other properties in the same zone are similar, not other properties in the same

requirement set forth in *Adolphson* v. *Zoning Board of Appeals*, supra, 205 Conn. 710. Specifically, it argues that "[t]he *Adolphson* exception does not apply to the height variance request, because the proposed new structure does not propose to lessen the structure's nonconformity as to height. . . . *Adolphson* does not stand for the proposition that the reduction in one nonconformity allows as a tradeoff the increase in, or creation of, another nonconformity." (Internal quotation marks omitted.) We agree with the board that the present case does not qualify under the *Adolphson* exception to the hardship requirement.[17]

"In cases in which an extreme hardship has not been established, the reduction of a nonconforming use to a less offensive prohibited use may constitute an independent ground for granting a variance." *Vine* v. *Zoning*

neighborhood." (Emphasis omitted.) Because we conclude that the plaintiffs failed to demonstrate the existence of a sufficient hardship, we need not address whether any claimed hardship is unique.

[17] Before the board, the plaintiffs' counsel argued as follows: "[T]he first sheet of the plans we have submitted shows the proposed dwelling. When you compare that to sheet 2 which showed the prior development on the property you can see glaringly that the building area and the lot coverage especially is going to be reduced. The prior development with the shed, the garage and the residence on the property showed the lot coverage being over 70 percent of the property. Our regulations in the R-5 zone permit no more than 65 percent lot coverage and that is going to be what the proposed dwelling will be. So actually right [from] the outset we're reducing or eliminating a nonconformity on the structure, I mean a nonconformity on the property with the proposed structure. Secondly, the other point I wanted to make is that by centering the lot we are requesting side yard variances. I noticed fro[m] the record and the minutes of the prior meeting that didn't pose a great problem to the board when you were considering the application, but I did want to note and make it part of the record that the proposed residence is now going to be centered basically in the middle of the property. It removes a residence that is closer some side yard setback before was 3.6 feet. It had a shed, it was basically right on the property line. It had a garage which encroached upon the twenty foot front yard setback that's required in the zone. So, I think that the overall plan of development for this new residence really cleans the property up and quite honestly reduces and eliminates some prior nonconformities with the plan. So really it all comes down to the height of the building . . . ."

The board implicitly rejected this argument in denying the variance.

Board of Appeals, 281 Conn. 553, 562, 916 A.2d 5 (2007). In *Adolphson* v. *Zoning Board of Appeals*, supra, 205 Conn. 705, the applicants had purchased property located in an industrial district 1 zone, on which property the prior owners had operated an aluminum casting foundry, which was a nonconforming use. The applicants purchased the property with the intention of using it as an automobile repair shop, and sought variances in order to do so, despite the fact that such use was prohibited by the town's zoning regulations in that industrial zone. Id., 705–706. The zoning board of appeals granted the requested variances, and neighboring property owners appealed to the Superior Court, which dismissed the appeal on the ground that "the proposed use for the subject property operating under current regulations as to air pollution and the like would be far less offensive to the surrounding residents than a foundry." (Internal quotation marks omitted.) Id., 706. Our Supreme Court affirmed the judgment of the trial court on the ground that "nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit—[i]n no case should they be allowed to increase. . . . The accepted method of accomplishing the ultimate object is that, while the alien use is permitted to continue until some change is made or contemplated, thereupon, so far as is expedient, advantage is taken of this fact to compel a lessening or suppression of the nonconformity." (Citations omitted; internal quotation marks omitted.) Id., 710.

In *Stancuna* v. *Zoning Board of Appeals*, 66 Conn. App. 565, 567, 569–71, 785 A.2d 601 (2001), the lot at issue, which predated town zoning regulations, contained a single-family residence in a commercial zone. The applicant intended to construct a new commercial building on the property and sought a variance of the zoning regulation requiring a twenty foot side yard setback, which the zoning board of appeals granted. Id.,

566–67. On appeal to this court following the trial court's dismissal of the appeal, this court recognized the following, citing *Adolphson*: "That a variance will eliminate a nonconforming use constitutes independent grounds for sustaining the granting of a variance." Id., 572. Noting that the variance would eliminate the nonconforming residential use of the property and would permit construction of a building for commercial use in a commercial zone, this court affirmed the judgment of the trial court. Id. In *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. 559, our Supreme Court applied *Adolphson* and *Stancuna*, in concluding that a zoning board's decision to grant a variance was proper because it reduced a preexisting nonconforming use of the property to a less offensive use.

The plaintiffs argue that the facts presented in *Hescock* v. *Zoning Board of Appeals*, 112 Conn. App. 239, 962 A.2d 177 (2009), are most similar to those in the present appeal. In *Hescock*, the applicants sought to raze the house located on their property and to construct a new house. Id., 242. They sought a variance of the regulation requiring that new construction "be located 100 feet landward of the reach of the mean high tide." (Internal quotation marks omitted.) Id. The existing house was located forty-four feet from the mean high tide, and the proposed new house would be located forty-seven feet from the mean high tide. Id. The new house would be compliant with all other flood regulations, including the standards concerning base flood elevation levels, and would replace the existing home below the base flood elevation. Id., 242–43, 260. The board approved the variance, stating that the application "as presented—will diminish existing non-conformity and will address and improve flood zone issues." (Internal quotation marks omitted.) Id., 251. On appeal, this court concluded that the board's determination that the new construction would lessen nonconformities was substantially supported by the evidence

presented at the hearing, including that the new house would be set farther from the mean high tide than the existing one. Id., 260. It further concluded that the law as set forth in *Vine*, *Adolphson*, and *Stancuna* was applicable to the circumstances, in that there was "substantial evidence that the new construction would reduce and eliminate existing nonconformities and present less of a hazard in case of a flood . . . ." Id., 260–61. Accordingly, the elimination and reduction of nonconformities presented an independent basis for granting a variance.[18] Id., 261.

The plaintiffs argue that they are entitled to the requested height variance under *Adolphson*, *Stancuna*, *Vine*, and *Hescock*, on the basis that their proposed residence would reduce "nonconformities from the previous structure." Specifically, they maintain that the previous nonconformities included the detached garage in the front yard setback,[19] the shed structure on the property line in violation of the side yard setback, the residence in violation in the side yard setback, portions of the residence in the VE 13 Flood Zone which made it more susceptible to serious flooding, and a finished floor elevation below the flood line. They argue that "[t]he proposed plan consolidated all of the nonconforming structures on the property into one structure, which is to be built flood compliant with federal, state, and Milford regulations." We disagree.

[18] We note that *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. 555, *Adolphson* v. *Zoning Board of Appeals*, supra, 205 Conn. 710, *Hescock* v. *Zoning Board of Appeals*, supra, 112 Conn. App. 261, and *Stancuna* v. *Zoning Board of Appeals*, supra, 66 Conn. App. 572, in contrast with the present case, all involved a reviewing court's decision to sustain a *board's granting* of a variance.

[19] The board correctly maintains that "the proposed elimination of the detached garage cannot be considered a reduction of a nonconformity because there is no minimum front yard setback for accessory structures, and therefore no violation." See Milford Zoning Regs., art. XI, § 11.2 (defining accessory building in relevant part as "[a] building which is clearly incidental or subordinate customarily in connection and located on the same lot with the principal building or use"); see Milford Zoning Regs., art. III, § 3.1.4 (containing only side and rear setback requirements for accessory structures).

In each of the cases cited by the plaintiff, the applicants sought a variance and their proposal included the elimination of a nonconforming use or conversion to a less offensive nonconforming use; see *Adolphson* v. *Zoning Board of Appeals*, supra, 205 Conn. 710 (variance from regulation prohibiting operation of automobile repair shop justified because such use was less offensive than prior nonconforming use of foundry); *Stancuna* v. *Zoning Board of Appeals*, supra, 66 Conn. App. 569–71 (variance from setback requirement was proper because variance eliminated nonconforming residential use and allowed for conforming commercial use); or the variance the applicant sought itself constituted a reduction or elimination of a presently existing nonconformity. See *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. 571–72 (variance from minimum square footage requirement justified because building two houses on two lots constituted reduction in nonconformity of three houses on three lots); *Hescock* v. *Zoning Board of Appeals*, supra, 112 Conn. App. 260–61 (variance from setback requirement for proposed new construction justified by reduction in existing noncompliance with setback requirement and elimination of noncompliance with all remaining flood regulations).

In the present case, however, the plaintiffs' proposed new construction would *create* a height nonconformity where none previously existed. These circumstances distinguish the present case from *Adolphson*, *Stancuna*, *Vine*, and *Hescock*. Cf. *Verrillo* v. *Zoning Board of Appeals*, supra, 155 Conn. App. 728 (applicants' proposed expansion would not result in lesser nonconformity on applicants' property and, therefore, *Adolphson* exception was not applicable). The plaintiffs have provided this court with no authority suggesting that the board was required to grant the requested variance from the height limitation, *which would create a new nonconformity*, on the basis of a proposed reduction or elimination of other nonconformities and compliance

with flood regulations. Thus, we conclude that the present case does not qualify under the *Adolphson* exception to the hardship requirement. Accordingly, the trial court improperly sustained the plaintiffs' appeal.

The judgment is reversed and the case is remanded with direction to render judgment dismissing the plaintiffs' appeal.

In this opinion the other judges concurred.

THE CARABETTA ORGANIZATION, LTD., ET AL. *v.* CITY OF MERIDEN ET AL. (AC 41688)

Alvord, Devlin and Pellegrino, Js.

Syllabus

The plaintiffs brought this action claiming that the defendant city of Meriden and the defendant T Co. conspired to secure the defeat of the plaintiffs' effort to obtain approval of a certain leaseback agreement for a fifty-two acre portion of certain real property that the plaintiffs had sold to P Co., which sought to build a power plant on the property. The lease agreement was to be granted subject to its being approved by the Connecticut Siting Council as part of the power plant project. After P Co. sold the property to another entity, the Connecticut Siting Council approved the power plant project but rejected the leaseback agreement and conditioned approval of the project on the transfer of the fifty-two acres to the city, which thereafter redesignated the fifty-two acres as open space. The plaintiffs previously had brought four unsuccessful actions against, inter alia, T Co. and the city in federal and state court seeking to effectuate the lease. The trial court granted the defendants' motion for summary judgment, concluding that the plaintiffs' claims were barred by the doctrine of res judicata. The court determined that the lease was the same one involved in the plaintiffs' prior lawsuits against the city, in which the plaintiffs tried to force the city to recognize the lease, and that the only new claim against T Co. was that it orchestrated the defeat of the plaintiffs' effort to obtain approval from the Connecticut Siting Council. The court rendered judgment for the defendants, and the plaintiffs appealed to this court, claiming that the trial court improperly concluded that res judicata barred their claims. *Held* that the trial court properly rendered summary judgment for the defendants, as the plaintiffs' claims stemmed from the same agreement pertaining to the lease and sought redress on the basis of the same underlying factual predicate, which was the Connecticut Siting Council's

rejection of their efforts to effectuate the lease, and, despite the plaintiffs' assertion that their claims were founded on different types of conduct by different defendants and the different effects of that conduct, they had ample opportunity to bring their claims in any or all of the four prior actions they brought against multiple entities under multiple theories of liability that allegedly resulted in or stemmed from the plaintiffs' failure to acquire the lease of the fifty-two acres.

Argued November 18, 2019—officially released February 25, 2020

Procedural History

Action to recover damages for, inter alia, the defendants' alleged violation of state antitrust law, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden and transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Moukawsher*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Dominic J. Aprile, for the appellants (plaintiffs).

Katherine E. Rule, with whom, on the brief, were *Thomas R. Gerarde* and *Dominick Caruso*, for the appellees (named defendant et al.).

John R. Fornaciari, pro hac vice, with whom, on the brief, were *Daniel J. Krisch* and *Carl R. Ficks*, *Jr.*, for the appellees (defendant Tilcon, Inc., et al.).

Opinion

DEVLIN, J. In this case arising from a dispute that originated more than twenty years ago, the plaintiffs, The Carabetta Organization, Ltd., Summitwood Development, LLC (Summitwood), and Nipmuc Properties, LLC (Nipmuc), appeal from the summary judgment rendered by the trial court in favor of the defendants, the city of Meriden, Dominick Caruso, Tilcon, Inc., and Tilcon Connecticut, Inc. (Tilcon). The plaintiffs claim that the court erred in concluding that their claims were

barred by the doctrine of res judicata. We affirm the judgment of the trial court.[1]

The trial court set forth the following relevant factual and procedural history: "Twenty-five years ago, [the plaintiffs][2] owned a large piece of land in Meriden. [They] wanted to dig gravel out of it prior to developing the land. [They were] allowed to begin but then excavation was blocked when a series of private lawsuits overturned local zoning decisions. [The plaintiffs] believed [that] the lawsuits were the handiwork of [their] gravel competitor and one of the defendants in this case, Tilcon. In the name of a company called Meadow Haven, [the plaintiffs] sued Tilcon in a federal [Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.] and antitrust lawsuit, claiming there, as [they do] here, that Tilcon orchestrated a conspiracy to keep [the plaintiffs] out of the gravel business. [The plaintiffs] lost. [See *A. Aiudi & Sons* v. *Tilcon Connecticut, Inc.*, Docket No. 3:94 Civ. 1895 (AVC), slip op. 1 (D. Conn. March 21, 1996) (adopting recommended ruling, slip op. 21–24 (D. Conn. September 22, 1995)), aff'd, Docket No. 96-7460, 1997 WL 50010 (2d Cir. January 17, 1997)].

"[The plaintiffs] then sold the 845 acre property to a company called PDC-El Paso Meriden [El Paso] under

[1] Because we agree with the trial court that the plaintiffs' claims were barred by res judicata, we need not reach their additional claim that the court erred in concluding that the defendants were entitled to judgment as a matter of law because the plaintiffs failed to present sufficient evidence to establish a prima facie case. For that same reason, we do not reach the defendants' claimed alternative grounds for affirmance, namely, that the plaintiffs' claims were barred by the statute of limitations, the *Noerr-Pennington* doctrine; see *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); their lack of antitrust standing, and the lack of the requisite statutory notice on their request for indemnification.

[2] The trial court stated that, "because all of the [plaintiff] companies share common leadership and management within the [Carabetta] family," it would refer to the plaintiffs collectively. For ease of reading, we do the same.

an agreement that allowed [the plaintiffs] to lease back fifty-two acres. The lease was to be granted subject to one condition: that the Connecticut Siting Council [Siting Council] approved the lease as part of the power plant project [that] El Paso hoped to build and the Siting Council had to approve under General Statutes § 16-50g et seq. El Paso ultimately sold the land subject to the lease deal to a company called Meriden Gas Turbines.

"[The plaintiffs] pressed [their] rights . . . [and] asked the . . . Siting Council to approve the leaseback. Ultimately, the Siting Council approved the power plant in 2001 but rejected the leaseback, conditioning approval instead on the fifty-two acres being given to Meriden.

"The [plaintiffs] have been suing over the lease ever since, and this case is another instance. Having failed to get the lease effectuated by suing Meriden, El Paso, and Meriden Gas Turbines,[3] [the plaintiffs] now [sue] Meriden and Tilcon for the loss of the lease and the redesignation of the land on Meriden's plan of development. [The plaintiffs claim that] there was a conspiracy headed by Tilcon and acted on by Meriden to secure, among other things, [the plaintiffs'] Siting Council defeat. The lease at issue here is the same one involved

[3] The trial court referred to and summarized three previous cases that the plaintiffs had filed in state court as follows: "*Summitwood Development, LLC* v. *Roberts*, 130 Conn. App. 792, 25 A.3d 721, cert. denied, 302 Conn. 942, 29 A.3d 467 (2011), cert. denied, 565 U.S. 1260, 132 S. Ct. 1745, 182 L. Ed. 2d 530 (2012), where Summitwood sued the company that promised the lease and its agents for failing to provide it;

"*Nipmuc Properties, LLC* v. *PDC-El Paso Meriden, LLC*, 103 Conn. App. 90, 927 A.2d 978, cert. denied, 284 Conn. 932, 934 A.2d 247 (2007), where Nipmuc sued Meriden and others for a court order declaring the lease to be in effect and requiring the lease to be delivered to Nipmuc; [and]

"*Nipmuc Properties, LLC* v. *Meriden*, 130 Conn. App. 806, 25 A.3d 714, cert. denied, 302 Conn. 939, 28 A.3d 989 (2011), cert. denied, 565 U.S. 1246, 132 S. Ct. 1718, 182 L. Ed. 2d 253 (2012), where Nipmuc, along with Summitwood, again sued to enforce the lease and to quiet the title of the land to recognize the lease."

in the prior lawsuit against Meriden, and the only thing different here from the prior federal lawsuit against Tilcon is the additional claim that Tilcon orchestrated the Siting Council defeat, too.

"With the possible exception of newer claims about Meriden's adoption of a development plan redesignating the fifty-two acres for open space, the claims made now against Meriden about the lease could have been brought in the prior lawsuit against the city when [the plaintiffs] tried to force Meriden to recognize the lease. They arise from the same transaction. And [the plaintiffs have] offered allegations, but no evidence, that shows [that] some form of fraud or concealment prevented [the plaintiffs] from knowing of Tilcon's alleged interactions with the city. Far from it—[the plaintiffs'] claims about Tilcon's behind-the-scenes efforts were the focus of [their] prior federal lawsuit. [The plaintiffs have] always alleged [that] Tilcon conspired against [them], as [they do] now. [The plaintiffs'] exhibits show [that] essentially the same witnesses and the same activities are in play here as they have been time and again in this multidecade assault. The only thing new is the claim about the Siting Council against Tilcon and the development plan in Meriden. Therefore, under the detailed analysis of the Appellate Court's 2011 . . . decision [in *Nipmuc Properties, LLC* v. *Meriden*, 130 Conn. App. 806, 25 A.3d 714 (*Nipmuc II*), cert. denied, 302 Conn. 939, 28 A.3d 989 (2011), cert. denied, 565 U.S. 1246, 132 S. Ct. 1718, 182 L. Ed. 2d 253 (2012), the claims against Meriden and Caruso concerning the Siting Council are barred here by the doctrine of claim preclusion." (Footnotes added; footnotes omitted.) Accordingly, the court granted the defendants' motion for summary judgment, and this appeal followed.

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . Additionally, the applicability of res judicata . . . presents a question of law over which we employ plenary review. . . .

"The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or *which might have been made*. . . .

"We have adopted a transactional test as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time,

space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . In applying the transactional test, we compare the complaint in the second action with the pleadings and the judgment in the earlier action." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 811–13.

"Res judicata, or claim preclusion, bars not only subsequent relitigation of a claim previously asserted, but subsequent relitigation of any claims relating to the same cause of action . . . which might have been made. . . . [T]he appropriate inquiry with respect to [claim] preclusion is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding* . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 815.

As noted, the conflict that gives rise to the current action, and this appeal, has already been the subject of three decisions by this court. In the most recent decision, *Nipmuc II*, on which the trial court here relied in rendering summary judgment, this court concluded that the plaintiffs had been afforded the opportunity to litigate their claims regarding the lease at issue and were thus precluded from doing so again. In *Nipmuc II*, this court compared the complaint in that case to the operative complaint in the earlier case of *Nipmuc Properties, LLC* v. *PDC-El Paso Meriden, LLC*, 103 Conn. App. 90, 927 A.2d 978 (*Nipmuc I*), cert. denied, 284 Conn. 932, 934 A.2d 247 (2007), and concluded that the claims asserted in both actions arose out of the same transaction or series of transactions, namely, the plaintiffs' purported leasehold interest in the same fifty-two acre parcel of land. Id., 813. The court in *Nipmuc II* explained: "It is apparent from our review of the record that the plaintiffs' claims in the present action, seeking to effectuate the turnover of their purported leasehold interests, and their claims in *Nipmuc I*, seeking the release of the lease from escrow, stem from

the same agreement pertaining to that lease and seek redress on the basis of the same underlying factual predicate, namely, the [S]iting [C]ouncil's decision rejectjying the plaintiffs' efforts to obtain the release of the lease from escrow and ordering the transfer of the fifty-two acre parcel to the defendant. Similarly, the plaintiffs' claim that the parties to the underlying lease agreement intended for the lease to have operative effect regardless of physical possession of the lease document arises from the same common nucleus of facts as set forth in the *Nipmuc I* action. . . . The *Nipmuc I* action provided the plaintiffs ample opportunity to raise their claim to an independent leasehold interest, separate and apart from the escrowed lease document considered in *Nipmuc I*, against Meriden Gas Turbines, the defendant's predecessor in interest to the fifty-two acre parcel. . . . Moreover, a pragmatic view of the record convinces us that the *Nipmuc I* action and the present matter form a convenient trial unit, involving a significant overlap of potential witnesses and evidence, and that treatment as a unit would conform to the parties' expectations and business understanding. Accordingly, because the plaintiffs' present claims arise from the same common nucleus of operative facts as the claims raised in *Nipmuc I*, and because the plaintiffs could have raised their present claims in the *Nipmuc I* action, they are now precluded from raising such claims in the present matter. Therefore, the court properly rendered summary judgment in this case." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 815–16.

Here, as in *Nipmuc I* and *Nipmuc II*, the plaintiffs' claims again "stem from the same agreement pertaining to [the] lease [at issue] and seek redress on the basis of the same underlying factual predicate, namely, the [S]iting [C]ouncil's decision rejecting the plaintiffs' efforts to obtain the release of the lease from escrow and ordering the transfer of the fifty-two acre parcel

to [Meriden]." Id., 815. To the extent that the plaintiffs argue that their claims in this action "are founded on different types of conduct by different defendants and the different effects of that conduct," they cannot escape the trial court's conclusion that, as this court reasoned in *Nipmuc II*, they have had ample opportunity to bring their claims in any or all of their four prior court actions.[4] As the trial court aptly found, the plaintiffs have already complained in court—state and federal—against multiple entities under multiple theories of liability that allegedly resulted in or stemmed from their failure to acquire the lease of the fifty-two acres at issue. Accordingly, we agree with the trial court that the plaintiffs' claims are barred by res judicata and, thus, that the court properly rendered summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

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[4] In an apparent attempt to challenge the trial court's conclusion that Caruso was not in privity with the Meriden defendants in the prior actions, the plaintiffs have done nothing more than set forth legal authority that not all employees are in privity with their employers. In the absence of any supporting analysis that is specific to this case or their claims against Caruso, this claim fails.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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MEMORANDUM DECISIONS

ROBERT W. LEMANSKI *v.* COMMISSIONER OF MOTOR VEHICLES (AC 41871)

Prescott, Moll and Eveleigh, Js.

Argued February 4—officially released February 25, 2020

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Hon. Henry S. Cohn*, judge trial referee.

Per Curiam. The judgment is affirmed.

VIC HOGFELDT *v.* BOARD OF EDUCATION OF THE CITY OF WEST HAVEN (AC 42726)

Elgo, Moll and Bishop, Js.

Argued February 11—officially released February 25, 2020

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Abrams, J.*

Per Curiam. The judgment is affirmed.

ANTHONY THOMPSON *v.* COMMISSIONER OF CORRECTION (AC 42370)

DiPentima, C. J., and Prescott and Bear, Js.

Argued February 13—officially released February 25, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson, 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.* JEFFREY SMITH, SC 20187

Judicial District of New London/Norwich

Criminal; Whether Rule Established in *State* v. *Polanco* Requiring Vacatur as Remedy for Cumulative Convictions in Violation of Double Jeopardy Protections Applies Retroactively. The defendant was convicted of felony murder and manslaughter in the first degree resulting from the killing of a single victim. The trial court merged the convictions and sentenced the defendant to sixty years of imprisonment. The defendant filed a motion to correct illegal sentence, claiming that the trial court improperly merged the two convictions instead of vacating one of them as required by *State* v. *Polanco*, 308 Conn. 242 (2013), and *State* v. *Miranda*, 317 Conn. 741 (2015). In *Polanco*, the Supreme Court exercised its supervisory authority to establish that the proper remedy for a defendant convicted of greater and lesser included offenses in violation of double jeopardy protections is vacatur of one of the convictions and not merger of the convictions. In *Miranda*, the Supreme Court extended the rule of *Polanco* to cases involving cumulative homicide convictions arising from the killing of a single victim. The trial court denied the defendant's motion to correct illegal sentence, and the Appellate Court (180 Conn. App. 371) affirmed that judgment. The Appellate Court noted that the defendant's conviction had long been final at the time when the rules in *Polanco* and *Miranda* were established and that, on the basis of well-established principles of retroactivity, those rules did not apply retroactively to the defendant's sentence because both *Polanco* and *Miranda* involved the exercise of our Supreme Court's supervisory authority and announced rules that were based strictly on policy considerations that did not carry constitutional implications. The defendant was granted for certification to appeal, and the Supreme Court will consider whether the Appellate Court properly determined that the holding in *Polanco* requiring vacatur as a remedy for a cumulative conviction that violates double jeopardy protections does not apply retroactively.

STATE *v.* CHRISTOPHER S., SC 20247
Judicial District of Hartford

Criminal; Whether Statement Taken in Violation of Electronic Recording Statute, § 54-1o, Admissible Under Exception for Voluntary and Reliable Statements; Whether Supreme Court Should Exercise Supervisory Authority to Require Jury Instruction that Noncompliance with § 54-1o may be Considered in Determining Weight to be Afforded Statement. The defendant was convicted of strangulation in the second degree and assault in the third degree. He appealed, claiming that the trial court erred in granting the state's motion to admit into evidence a written statement he had given to the police during an unrecorded custodial interrogation at the police station. The defendant claimed that the admission of that evidence violated the electronic recording statute, General Statutes § 54-1o, which creates a presumption of inadmissibility of statements from persons under investigation for certain crimes that were made as a result of custodial interrogation at a place of detention unless an electronic recording is made of the custodial investigation. The Appellate Court (186 Conn. 197) rejected that claim and affirmed the defendant's conviction. First, the Appellate Court rejected the defendant's argument that the admission of the statement has constitutional implications, holding that the claim was instead purely evidentiary in nature. The Appellate Court then held that the trial court had properly determined that the defendant's statement was admissible pursuant to § 54-1o (h). Section 54-1o (h) provides that the presumption of inadmissibility "may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances." In finding that the record supported the finding that the defendant's statement was voluntarily made, the Appellate Court noted, among other things, that (1) the defendant was thirty-eight years old and was not intoxicated or otherwise incapacitated during the interrogation; (2) there was no evidence of trickery, threats or coercion by the police; (3) the defendant was advised of his *Miranda* rights twice before the statement was taken, signed a notice of rights form and did not request an attorney or request to remain silent; and (4) the defendant read, made changes to, and signed the statement on each of its three pages, which specifically provided that it was voluntarily given and that the defendant was read, knew and understood his rights. The defendant was granted certification to appeal, and the Supreme Court will consider (1) whether the Appellate Court properly upheld the trial court's determination concerning the admissibility of the defendant's statement; and (2) whether the Supreme Court should exercise its supervisory authority over the

administration of justice to require that juries be instructed that they may consider noncompliance with the electronic recording statute in determining the weight to accord a statement that is the product of an unrecorded custodial interrogation.

STATE *v.* GREGORY L. WEATHERS, SC 20297
Judicial District of Fairfield

Criminal; Whether Trial Court Properly Rejected Insanity Defense Where the Only Expert Witnesses Testified That Defendant, as Result of Mental Disease, Lacked Substantial Capacity to Appreciate the Wrongfulness of his Conduct. The defendant was charged with murder and weapons violations after he shot and killed a man at a construction site. He was tried before a three-judge panel. At trial, the defendant presented the testimony of two expert witnesses in support of his affirmative defense that he was not guilty by reason of mental disease or defect. Both experts testified that the defendant suffered from a psychotic disorder that rendered him unable to control his conduct within the requirements of the law at the time of the shooting. The trial court convicted the defendant, determining that he had failed to establish that, as a result of his psychosis, he lacked the substantial capacity to appreciate the wrongfulness of his conduct. The defendant appealed, and the Appellate Court (188 Conn. App. 600) affirmed his conviction, holding that the defendant's claim that the trial court arbitrarily rejected the opinions of his experts that he lacked substantial capacity to control his conduct was unavailing. The Appellate Court noted that the trial court did not merely find that the defendant had failed to prove that he lacked substantial capacity as a result of his psychosis but also that the defendant was acting under the influence of a multitude of stressful and emotional hurdles in his life that were not of a psychiatric nature and that the defendant shot the victim because he felt brushed aside after inquiring about employment opportunities, and not because he was laboring under any delusional beliefs. The Appellate Court found that the trial court, as the finder of fact, was entitled to adopt that non-psychiatric explanation for the defendant's conduct and reject the experts' opinions. The Appellate Court further found that, given the experts' reliance on the defendant's own account of his symptoms and the events surrounding the shooting, it was reasonable for the trial court to conclude that their opinions were undermined by its finding that the defendant intentionally had either embellished or fabricated psychiatric symptoms over time. Finally, the Appellate Court determined that the trial court's findings that the defendant shot the victim

out of frustration and anger and that the defendant either fabricated or embellished his symptoms were not clearly erroneous and were supported by evidence in the record. The defendant was granted certification to appeal, and the Supreme Court will consider whether the Appellate Court properly affirmed the trial court's rejection of the defendant's insanity defense when the only two expert witnesses testified at trial that the defendant, as the result of a mental disease, lacked the substantial ability to conform his conduct to the requirements of the law.

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777 RESIDENTIAL, LLC *v.* THE METROPOLITAN DISTRICT COMMISSION, SC 20339
Judicial District of Hartford

Municipalities; Sewerage; Whether § 7-249 Limits Supplemental Sewer Assessments to Methodology Used in Original Assessment; Whether Defendant has Authority to Impose Supplemental Assessment Following Interior Improvements to Existing Building. The defendant provides water and sewer service for the city of Hartford. Under General Statutes § 7-249, the defendant may levy benefit assessments upon the owners of the lands and buildings in the municipality which, in its judgment, are especially benefitted by the sewerage system. When buildings or structures are constructed or expanded after the initial assessment, the defendant may levy a supplemental assessment as if such buildings had existed at the time of the initial assessment. The defendant may consider the area, frontage, grand list valuation, present use of benefitted properties and any other relevant factors in levying assessments. The plaintiff owns property located at 777 Main Street in Hartford. In 1849, when the property was first connected to the sewer system, the owner paid $215 for the initial benefit assessment based on the property's frontage. In 2012, the building located on the property was converted into a common interest residential community with 265 units, and the defendant levied a supplemental assessment against the plaintiff in the amount of $473,000, based on the number of residential units. The plaintiff paid the assessment under protest and appealed to the Superior Court pursuant to General Statutes § 7-250. The plaintiff claimed that the defendant lacked the authority to levy a supplemental assessment against it under § 7-249, because the plaintiff did not construct a new building or structure. The plaintiff also claimed that the defendant improperly calculated the supplemental assessment based on the number of residential units in the building rather than on the property's frontage, where the statute requires that the defendant assess the

property as if it existed at the time of the initial assessment. The trial court rejected the plaintiff's claim that the defendant lacked authority to levy a supplemental assessment, concluding that the residential units built within the existing building constituted new "structures" as contemplated by § 7-249, such that the defendant had authority to levy the supplemental assessment. The court, however, ruled that, because § 7-249 provides that the defendant may levy a supplemental assessment against a newly constructed building "as if such building had existed at the time of the initial assessment," the defendant was required to use the same methodology used to calculate the original assessment. The defendant appeals, challenging the trial court's holding that § 7-249 limits supplemental assessments to the methodology used in the original assessment. The plaintiff cross appeals, claiming that the trial court erred in concluding that the defendant had authority to impose a supplemental sewer assessment following interior improvements made to an existing building.

STATE *v.* YASHIRA ESPINO, SC 20428
Judicial District of Hartford

Criminal; Search and Seizure; Whether Police Authorized to Detain Passenger of Car Parked in an Apartment Building's Parking Lot as Police Were Executing a Search Warrant for an Apartment in the Building. After conducting an investigation into suspected drug trafficking by Richard Rivera, the police obtained a warrant to search Rivera's apartment at 12-14 South Street in Hartford and a warrant for his arrest. The police planned to execute the warrants on January 31, 2017, and throughout that day they engaged in street camera surveillance of the building's parking lot. During the surveillance, the police observed Rivera drive into the lot, get out of his car and speak with Richard Rolon, who had exited the apartment building and approached Rivera's car. After a brief exchange, both men got into their cars, and Rolon was joined by the defendant, his girlfriend. Both men drove out of the lot. Later that day, Rivera was arrested on Franklin Avenue and, on learning of his arrest, a team of police convened near 12-14 South Street and prepared to execute the search warrant for Rivera's apartment. Just before the police arrived at 12-14 South Street, Rolon returned to the lot and parked his car. Before Rolon or the defendant could exit the car, the police drove their vehicles into the driveway of 12-14 South Street, and four or five police officers exited their vehicles and approached Rolon's car. The police detected the smell of marijuana as they reached the car, and they observed a marijuana cigarette and what appeared to be bags of heroin

in plain view in the vehicle. The defendant and Rolon were taken into custody, and the police learned that the defendant was the tenant of an apartment in 12-14 South Street and that Rolon often resided with her there. The police obtained a warrant to search the defendant's apartment, and the search yielded evidence of illegal drug activity. The defendant and Rolon were arrested and charged with multiple drug crimes. The defendant filed a motion to suppress the drug evidence, claiming that her initial detention by the police violated her fourth amendment rights because the police did not have a reasonable and articulable suspicion that she was engaged in criminal activity under *Terry* v. *Ohio*, 392 U.S. 1 (1968). The trial court denied the motion to suppress, concluding that, while the police did not have a reasonable and articulable suspicion that the defendant was engaged in criminal activity, her initial detention was nonetheless constitutional under *Michigan* v. *Summers*, 452 U.S. 692 (1981), which held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." The trial court determined (1) that the parking lot was in the "immediate vicinity" of the premises to be searched; (2) that the defendant was a "person in the immediate vicinity of [the] search whom the police ha[d] an articulable basis to connect to the premises to be searched, or to the residents of those premises"; and (3) that the defendant's initial detention had been "limited, in both time and manner, to the minimum intrusion necessary for officers to reasonably ensure their safety." The defendant appeals after entering a conditional plea of nolo contendere. The Supreme Court will decide whether the trial court properly denied the defendant's motion to suppress on the ground that her detention was legal under *Michigan* v. *Summers* where she argues that she was neither in the "immediate vicinity" of the premises to be searched nor an "occupant" of the premises as contemplated by *Summers*.

STATE *v.* BOBBY GRIFFIN, SC 20439
Judicial District of New Haven

Criminal; Search and Seizure; Whether Coercive Interrogation Rendered Defendant's Confession Involuntary; Whether Trial Court Properly Deemed Warrantless Search Justified Under Exigent Circumstances Doctrine. In 2013, Nathaniel Bradley was shot and killed during an attempted robbery in New Haven. An informant told the police that the defendant was involved in the murder and that he was trying to sell the rifle used to kill the victim. The informant went to the defendant's home at the direction of the police

and confirmed that the rifle was there. While awaiting a search warrant, the police decided to conduct a search of the defendant's home, and the police found the rifle used in Bradley's murder in the attic of the home. A search warrant issued two hours later, and the defendant was then arrested and brought to the police station in the early morning hours, where he confessed to the murder during a recorded interview. Prior to trial, the defendant moved to suppress his confession as involuntary and unreliable, claiming that the police used coercive tactics during the interview, including interviewing him while he was sleep deprived, lying about evidence, promising him leniency, and threatening his family. He also moved to suppress the rifle, claiming that it was illegally obtained in a warrantless search. The trial court denied both motions. It rejected the defendant's claim that his confession was involuntary, concluding that the police did not employ coercive tactics to induce his confession. The court also noted that the recording indicated that the defendant was calm and collected during the interview and that he was not impaired due to his lack of sleep. As to the rifle, the court found that exigent circumstances justified the warrantless entry into the defendant's home because the police reasonably believed that immediate action was necessary to prevent the defendant's flight and the destruction of evidence and to ensure the safety of the police and members of the public. The court further determined that the evidence was admissible under the inevitable discovery and independent source doctrines, finding that the search warrant that issued was supported by probable cause. After a jury trial, the defendant was convicted of murder and robbery. The defendant appeals, claiming that his due process rights under the state and federal constitutions were violated by the admission of the rifle and his confession. In particular, he claims that his confession was obtained under highly coercive conditions, and he urges the Supreme Court to limit or overrule its decision in *State* v. *LaPointe*, 237 Conn. 694, 732 (1996), where it determined that the use of false evidence ploys by police did not render the defendant's confession involuntary. The defendant also contends that the exigent circumstances exception to the warrant requirement should not apply here because, he claims, the actions taken by the police prior to the search created the very exigency that the trial court deemed as justifying the warrantless search.

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

John DeMeo
Chief Staff Attorney

NOTICES

Superior Court Operations

Small Claims/Motor Vehicle Magistrate Appointments

The Judicial Branch is now accepting applications for Small Claims/Motor Vehicle Magistrate appointments pursuant to C.G.S. § 51-193*l*. Attorneys interested in being considered for appointment for the term beginning July 1, 2020 should complete and email an application and supporting materials to magistrate matters at Magistrate.Matters@jud.ct.gov. Fillable PDF versions of the forms are available at www.jud.ct.gov. Applications will be considered on a rolling basis.

DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF STAMFORD/NORWALK

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Stamford/Norwalk (PCN 4867). The successful applicant shall hold office from the date of appointment through June 30, 2026, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position please visit our website at:
https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at:
https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to: The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Stamford/Norwalk JD (PCN 4867) and must be postmarked no later than **March 3rd, 2020**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on June 11, 2019, in Docket No. HHD-CV18-6097436-S, Richard Paul Savitt, Juris No. 402799 of New York, NY was suspended from the practice of law for a period of three (3) years, retroactive to April 26, 2018, and subject to any further orders of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York.

The Respondent shall comply with all the terms and conditions of Practice Book § 2-47B (Restrictions on the Activities of Deactivated attorneys.)

Any application for reinstatement shall be made pursuant to the provisions of Practice Book § 2-53; however, the Respondent shall not be eligible to apply for reinstatement unless and until such time as he is eligible for reinstatement to the bar in the State of New York.

David Sheridan
Presiding Judge

Notice of Reprimand of Attorneys

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

Reviewing Committee Reprimands

November 29, 2019: Jonathan Craig Newman, Madison, Connecticut – 413296

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

Attest:

Michael P. Bowler
Statewide Bar Counsel