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Table of Contents

CONNECTICUT REPORTS

Nash *v.* Roland Dumont Agency, Inc. (Order), 336 C 917 31
State *v.* Joseph A., 336 C 247 3
Assault of disabled person third degree; disorderly conduct; certification from Appellate Court; whether Appellate Court correctly concluded that trial court had not abused its discretion in determining that defendant's waiver of right to counsel during pretrial stage of proceedings was knowing, intelligent and voluntary; whether trial court abused its discretion in determining that defendant understood nature of charges against him; claim that defendant's waiver of right to counsel was constitutionally inadequate because trial court did not make him aware of dangers and disadvantages of self-representation during canvass; claim that trial court's failure to canvass defendant regarding right to counsel during arraignment and plea negotiations was structural error; whether alleged error concerning failure to canvass defendant regarding right to counsel during arraignment and plea negotiations was harmless.
State *v.* Williams (Order), 336 C 917 31
Vogue *v.* Administrator, Unemployment Compensation Act (Order), 336 C 918 32
Wittman *v.* Intense Movers, Inc. (Order), 336 C 918 32
Volume 336 Cumulative Table of Cases 33

CONNECTICUT APPELLATE REPORTS

Anderson *v.* Bloomfield, 203 CA 182 . . . . . 96A
Contracts; third-party beneficiary; motion to dismiss; whether trial court properly determined that plaintiff lacked standing because she was not third-party beneficiary of contract.
Bouffard *v.* Lewis, 203 CA 116 . . . . . 30A
Dissolution of marriage; postjudgment modification of alimony and child support; motion for contempt; whether automatic stay pursuant to rule of practice (§ 61-11 (c)) was applicable; whether trial court's imposition of automatic stay on orders to make payments of alimony and child support in connection with judgment finding party in contempt was improper.
Derblom *v.* Archdiocese of Hartford, 203 CA 197 . . . . . 111A
Motion to dismiss; standing; constructive trust; whether trial court properly granted defendant's motion to dismiss for lack of standing; whether trial court erred in construing bequest as outright gift rather than charitable trust; whether trial court erred in concluding that special interest exception to rule that attorney general has exclusive authority to bring action to enforce charitable gifts is limited to actions involving charitable trusts.
Pascola-Milton *v.* Millard, 203 CA 172 . . . . . 86A
Negligence; underinsured motorist benefits; arbitration; motion for summary judgment; whether trial court erred in denying plaintiff's demand for trial de novo following voluntary arbitration; whether plaintiff's claims were barred by two year statute of limitations (§ 52-584).
South Windsor *v.* Lanata, 203 CA 89 . . . . . 3A
Zoning; claim that cease and desist order premised on alleged zoning violation was unconstitutionally vague; whether trial court abused its discretion in ordering fines during period in which defendant was under orders not to disturb property;

(continued on next page)

claim that trial court improperly assessed fines for wilful violation of zoning regulations pursuant to statute (§ 8-12).
State *v.* Hall-George, 203 CA 219 . . . . . 133A
Robbery in second degree; whether evidence was sufficient to prove beyond reasonable doubt that defendant threatened use of what he represented by his words or conduct to be deadly weapon or dangerous instrument pursuant to statute (§ 53a-135 (a) (1) (B)).
State *v.* Russaw, 203 CA 123 . . . . . 37A
Manslaughter in second degree; evading responsibility; motion to suppress; whether trial court properly denied motion to suppress statements defendant made to police during custodial interrogation after defendant was not readvised of his Miranda *rights before starting new line of questioning; whether interrogation of defendant on multiple subject matters comprised one continuous interview; whether* Miranda *rights are offense specific; whether waiver of* Miranda *rights was voluntary; whether admission of statements into evidence, if assumed to be improper, would have resulted in harmless error.*
U.S. Bank National Assn. *v.* Doe, 203 CA 218 . . . . . 132A
Summary process; whether appeal was moot following defendants' dispossession of property.
Velez *v.* Commissioner of Correction, 203 CA 141 . . . . . 55A
Habeas corpus; whether habeas court abused its discretion in dismissing, pursuant to statute (§ 52-470 (e)), successive petition for writ of habeas corpus for failure to show good cause for delay in filing petition beyond deadline for successive petitions set forth in § 52-470 (d) (2); claim that habeas court improperly determined that petitioner failed to prove that his mental deficiencies, as described in 2005 neuropsychological report, contributed to his delay in filing second habeas petition and, thus, failed to rebut presumption of unreasonable delay set forth in § 52-470 (d).
Village Mortgage Co. *v.* Veneziano, 203 CA 154 . . . . . 68A
Declaratory judgment; mootness; motion to dismiss; jurisdiction; claim that trial court erred in its interpretation of parties' stipulation; whether defendant's appellate claims were moot; whether defendant could be afforded practical relief on appeal; whether outcome of appeal had collateral estoppel and res judicata effects as to when plaintiff acquired defendant's stock; whether defendant's ability to bring action for vexatious litigation or fraud in future against plaintiff was dependent on appeal being heard on its merits.
Volume 203 Cumulative Table of Cases 146A

NOTICE OF CONNECTICUT STATE AGENCIES

Dept. of Housing—List of Municipalities Exempt from the Affordable Housing Appeals Procedure 1B

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CONNECTICUT REPORTS

Vol. 336

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* JOSEPH A.*
(SC 20125)

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

Syllabus

Convicted of the crimes of assault of a disabled person in the third degree and disorderly conduct, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court had violated his constitutional right to counsel when it permitted him to represent himself during the pretrial stage of the proceedings without obtaining a valid waiver of that right. The Appellate Court affirmed the defendant's conviction, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in determining that the defendant's waiver of his right to counsel during the pretrial stage of the proceedings was knowing, intelligent and voluntary: the trial court did not abuse its discretion in determining that the defendant understood the nature of the charges against him, as the court, during its canvass of the defendant, ascertained that he was literate and had graduated high school, recited each of the charged offenses and the minimum and maximum penalties associated with them, and asked the defendant whether he understood the charges and penalties, to which he replied in the affirmative; moreover, the defendant could not prevail on his claim that his waiver was constitutionally inadequate because the trial court did not make him aware of the dangers and disadvantages of self-representation, as the court pointedly questioned the defendant regarding his familiarity with the laws and rules of procedure for criminal trials, and explained that it would not be able to advise him if he proceeded as a self-represented party and that he would be expected to follow all of the rules and procedures applicable to attorneys, and the defendant acknowledged that he had

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

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

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, Kahn and Ecker. Although Justice Mullins was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of oral argument prior to participating in this decision.

the education, experience and skill to represent himself, and insisted on exercising his right to do so.

2. Contrary to the defendant's claim, the trial court's failure to canvass him regarding his right to counsel during arraignment and plea negotiations was not structural error and, therefore, was subject to harmless error analysis, and any error on the part of the trial court in failing to so canvass the defendant was harmless beyond a reasonable doubt: there was no structural error, as the defendant's rejection of the state's plea offer during negotiations prior to his being canvassed by the court did not affect the framework within which the trial proceeded, the alleged error, which occurred during a distinct portion of the proceedings and was readily identifiable, did not pervade the trial or otherwise affect the deliberations of the jury, the defendant did not contend that anything occurred during the approximate five month period between his arraignment and his eventual, proper canvass that was used against him at trial or that he made any irreversible decisions regarding trial strategies during these stages of the proceedings, and, because the state was open to negotiation even after the defendant was properly canvassed, the defendant's ability to enter into a plea agreement was not irretrievably lost; moreover, any error was harmless beyond a reasonable doubt, as the record demonstrated that the defendant had the opportunity to continue plea negotiations with the state after validly waiving his right to counsel, and, because the defendant never asked the state if he could still accept its prior plea offer, his rejection of that offer without the benefit of counsel or a proper canvass did not contribute to the verdict obtained.

Argued October 18, 2019—officially released July 15, 2020***

Procedural History

Substitute information charging the defendant with the crimes of assault of a disabled person in the third degree, interfering with an emergency call, and disorderly conduct, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *Klatt*, *J.*; verdict and judgment of guilty of assault of a disabled person in the third degree and disorderly conduct, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Bear*, *Js.*, which affirmed the trial

*** July 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Mary A. Beattie, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James Dinnan*, senior assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Joseph A., appeals from the judgment of the Appellate Court, which affirmed his conviction of one count of assault of a disabled person in the third degree in violation of General Statutes § 53a-61a, and one count of disorderly conduct in violation of General Statutes § 53a-182 (a) (1). In this certified appeal, the defendant claims that the Appellate Court incorrectly concluded that he knowingly, intelligently and voluntarily waived his right to counsel on February 23, 2012, during the pretrial stage of the proceedings. He also argues that the Appellate Court incorrectly concluded that he had waived his claim that he was denied his right to counsel at arraignment and during plea negotiations, prior to February 23, 2012, because he raised that claim for the first time in his reply brief.[1]

[1] We granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly determine that the defendant waived the issue of whether the trial court was required to canvass him regarding his right to self-representation prior to February 23, 2012?" (2) "If the answer to the first question is no, did the trial court improperly fail to canvass the defendant regarding his right to self-representation prior to February 23, 2012?" And (3) "[d]id the Appellate Court properly conclude that the trial court's February 23, 2012 canvass was sufficient and that the defendant effectively waived his right to counsel?" *State* v. *Acampora*, 329 Conn. 903, 903–904, 184 A.3d 1215 (2018).

Because our resolution of the sufficiency of the February 23, 2012 canvass impacts our analysis of whether the trial court's alleged failure to properly canvass the defendant prior to February 23, 2012, was structural, thereby affecting the entire framework of the trial, or was an error limited to a distinct, identifiable portion of the trial and, thus, subject to harmless error analysis, we address the third certified question first.

We conclude that the trial court's canvass on February 23, 2012, was sufficient and that the defendant knowingly, intelligently and voluntarily waived his right to counsel. We also conclude that, even if we assume arguendo that the defendant had not waived the claim that he was denied his right to counsel at arraignment and during plea negotiations, and that the trial court erred in failing to canvass him, any such error was harmless. Accordingly, we affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following facts, which the jury reasonably could have found. "The defendant and the victim . . . are brothers. The victim has cerebral palsy. In August, 2011, they shared an apartment in a multifamily house with their mother. At approximately 11:40 a.m. on August 3, 2011, the defendant entered the victim's bedroom and grabbed him. The defendant accused the victim's friend of putting a hole in the windshield of his van when they were setting off fireworks the night before. The defendant slapped and punched the victim in the face and head, and dragged him about the apartment. When the victim grabbed his phone, the defendant took it from him and threw it, causing the battery to fall out. Thereafter, the defendant called the Wallingford Police Department to report that his van had been vandalized, and the victim called the police to report the assault after he located and replaced his phone's battery.

* * *

"Thereafter, the defendant was charged with assault of a disabled person in the third degree, disorderly conduct, and interfering with an emergency call. After a jury trial, at which the defendant represented himself, the defendant was found guilty of assault of a disabled person in the third degree and disorderly conduct. The defendant was found not guilty of interfering with an

emergency call. The court sentenced the defendant to a total effective sentence of one year of imprisonment." *State* v. *Acampora*, 176 Conn. App. 202, 205–206, 169 A.3d 820 (2017).

The defendant appealed from his conviction to the Appellate Court. On appeal, he claimed that the trial court violated his right to counsel under the sixth and fourteenth amendments to the United States constitution when it permitted him to represent himself with out obtaining a valid waiver of his right to counsel. Id., 204. Specifically, relevant to this appeal, the defendant asserted that the trial court's canvass on February 23, 2012, was inadequate, and, thus, the trial court abused its discretion in determining that he knowingly, intelligently and voluntarily waived his right to counsel on that date. Id., 206. The defendant also claimed that the trial court violated his right to counsel when it allowed him to represent himself at the pretrial stages of arraignment and plea negotiation without obtaining a valid waiver of his right to counsel. Id.

The Appellate Court disagreed, concluding that the trial court's canvass on February 23, 2012, was constitutionally sufficient. Id. The Appellate Court also concluded that the defendant waived his claim that the trial court had violated his right to counsel when it allowed him to represent himself at the pretrial stages of arraignment and plea negotiation because he had not alleged in his opening brief that he clearly and unequivocally invoked his right to counsel prior to February 23, 2012. Id., 214–16. This appeal followed.[2]

I

The defendant claims that the Appellate Court incorrectly concluded that the trial court sufficiently canvassed him on February 23, 2012, and that he knowingly, intelligently and voluntarily waived his right to counsel

[2] See footnote 1 of this opinion.

at that time. Specifically, he asserts that the trial court's canvass on February 23, 2012, was inadequate because the trial court failed to properly explain (1) the charges that he was facing, and (2) the dangers and disadvantages of self-representation. We disagree.

The following additional facts and procedural history are relevant to the defendant's claim. "On February 23, 2012, the court, *McNamara, J.*, canvassed the defendant concerning his waiver of his right to counsel and invocation of his right to self-representation. In relevant part, the court engaged in [a] colloquy with the defendant concerning the charges pending against him . . . ."[3]

[3] "The Court: All right. Do you understand the charges that you are facing, sir?

"[The Defendant]: Yes, I do.

"The Court: You are facing the charge of assault in the third degree—is it a victim over sixty—of a victim over sixty?

"[The Prosecutor]: It's on a disabled person. Correct.

"The Court: A disabled person.

"[The Prosecutor]: Correct.

"The Court: Interfering with an emergency call and disorderly conduct. Do you understand that?

"[The Defendant]: Yes, I do.

"The Court: Do you understand the minimum and maximum penalties of these charges?

"[The Defendant]: Do I understand the minimum—

"The Court: —and maximum penalties in these charges.

"[The Defendant]: What are they? I don't think they were told to me.

"The Court: All right. For the assault on a person, disabled person—

"[The Prosecutor]: It's a one year minimum, one year maximum.

"The Court: —is a one year minimum, mandatory minimum, which means that if you were convicted you would do a minimum time of one year in jail for that charge alone. All right. For the charge of interfering with an emergency call, you would—that would be a [class] C mis—let me see—that would be a [class] A misdemeanor. You can get another year in jail, plus a $2000 fine. And disorderly conduct is ninety days and [a] $500 fine. So, now you understand the penalties involved. Is that right?

"[The Defendant]: Yes, I do, Your Honor." (Internal quotation marks omitted.) *State* v. *Acampora*, supra, 176 Conn. App. 217–18.

"The court also canvassed the defendant concerning his education and experience with the law, as well as his obligation to educate himself on the relevant law and procedure and to comply with the same rules that govern attorneys during trial:

"The Court: And how far have you gone in school?

"[The Defendant]: I graduated high school.

"The Court: Can you read?

Id., 216–17. "After completing its canvass, the court found, inter alia, that the defendant knowingly, intelli-

"[The Defendant]: Yes, Your Honor.

"The Court: All right. You know you have a right to counsel?

"[The Defendant]: Yes, Your Honor.

"The Court: All right. Have you ever been involved in a criminal trial before?

"[The Defendant]: In a trial? No, Your Honor.

"The Court: All right. Have you ever been the subject of a competency evaluation?

"[The Defendant]: No, Your Honor.

"The Court: Did you represent yourself during any cases at all?

"[The Defendant]: Criminally, no.

"The Court: Any cases at all, I said.

"[The Defendant]: Um, up at the appellate division in Hartford. Yes. Back in last year. Yes, I did. . . .

"The Court: All right. Are you familiar with the laws and rules of procedure regarding evidence, pretrial motions, voir dire for criminal trials?

"[The Defendant]: Um, no, Your Honor.

"The Court: All right. Are you familiar with the rules of discovery for criminal matters, sir?

"[The Defendant]: No, Your Honor.

"The Court: Do you realize that, if you represent yourself, the judge will be impartial and cannot advise you on the procedures, [substantive] issues in the case?

"[The Defendant]: I understand that now.

"The Court: All right. Are you familiar with plea bargaining?

"[The Defendant]: Yes, I am.

"The Court: Can you do that yourself?

"[The Defendant]: Yes. I believe I could.

"The Court: Okay. Are you—do you have access to a library to learn these things that you need to understand before you go to trial?

"[The Defendant]: Yes, I do, ma'am.

"The Court: Can you conduct yourself at a trial?

"[The Defendant]: I believe so.

"The Court: All right. So, you feel you possess the training, education, and experience and skill to represent yourself and to try the case yourself. Is that true, sir?

"[The Defendant]: Yeah. Yes . . . Your Honor.

"The Court: All right.

"[The Defendant]: I believe I can.

"The Court: You understand that you can't have an attorney and represent yourself? You either represent yourself, or you have an attorney represent you. You understand that, sir?

"[The Defendant]: Yes, I do.

"The Court: All right.

"[The Defendant]: But I have one question.

"The Court: And, at trial, you will be at the counsel table all by yourself. You understand that?

gently, and voluntarily waived his right to counsel." Id., 221.

It is well established that "[w]e review the trial court's determination with respect to whether the defendant knowingly and voluntarily elected to proceed pro se for abuse of discretion." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 610, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

"The right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in

"[The Defendant]: Yes.

"The Court: You'll be sitting there presenting your case on your own. Now, when you have a criminal trial, you're expected to follow the rules and procedures that we make the lawyers follow.

"[The Defendant]: Okay. Can I have one of my—if someone decides to, can I have an attorney present in the courtroom while it's being—

"The Court: —You can't have the attorney sit with you at the table.

"[The Defendant]: I can't have anyone even sit—I don't want to have my—

"The Court: He—if he—he can sit—

"[The Defendant]: I'm sorry. Okay.

"The Court: —he can sit in the courtroom—

"[The Defendant]: That's fine. That's fine.

"The Court: —if you—

"[The Defendant]: He can hear the case.

"The Court: —he can sit in the courtroom, but—

"[The Defendant]: Excellent.

"The Court: —if you decide you want the attorney to represent you, that attorney would file an appearance and be present. You understand that?

"[The Defendant]: Yeah. No. I want to represent myself.

"The Court: All right. So, is it your wish today to proceed to trial and represent yourself?

"[The Defendant]: Yes, it is, Your Honor.

"The Court: Is this your decision?

"[The Defendant]: This is my decision in full.

"The Court: Are you making it voluntarily and of your own free will?

"[The Defendant]: Yes. Yes, ma'am.

"The Court: And no one has found—has threatened you or promised you. Is that right?

"[The Defendant]: That's correct." (Internal quotation marks omitted.) Id., 218–21.

each, but [because] the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel." (Internal quotation marks omitted.) *State* v. *Henderson*, 307 Conn. 533, 546, 55 A.3d 291 (2012).

"[A] defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . . Rather, a record that affirmatively shows that [he] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will sufficiently supports a waiver. . . . The nature of the inquiry that must be conducted to substantiate an effective waiver has been explicitly articulated in decisions by various federal courts of appeals." (Internal quotation marks omitted.) Id., 546–47.

"Practice Book § [44-3] was adopted in order to implement the right of a defendant in a criminal case to act as his own attorney . . . . Before a trial court may accept a defendant's waiver of counsel, it must conduct an inquiry in accordance with § [44-3], in order to satisfy itself that the defendant's decision to waive counsel is knowingly and intelligently made. . . . Because the § [44-3] inquiry simultaneously triggers the constitutional right of a defendant to represent himself and enables the waiver of the constitutional right of a defendant to counsel, the provisions of § [44-3] cannot be construed to require anything more than is constitutionally mandated." (Internal quotation marks omitted.) Id., 546.

"The multifactor analysis of [Practice Book § 44-3], therefore, is designed to assist the court in answering

two fundamental questions: first, whether a criminal defendant is minimally competent to make the decision to waive counsel, and second, whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion. . . . As the United States Supreme Court [has] recognized, these two questions are separate, with the former logically antecedent to the latter. . . . Inasmuch as the defendant's competence is uncontested, we proceed to whether the trial court abused its discretion in concluding that the defendant made the waiver decision in a knowing, voluntary, and intelligent fashion." (Internal quotation marks omitted.) Id., 547.

In the present case, the defendant appealed to the Appellate Court, claiming that "the court's canvass on February 23, 2012, was constitutionally inadequate because the court failed to explain to him in sufficient detail the nature of the charges and to advise him of specific dangers and disadvantages of self-representation." *State* v. *Acampora*, supra, 176 Conn. App. 216. In a well reasoned opinion, the Appellate Court rejected the defendant's claim. Id. First, the Appellate Court concluded that, "[o]n the basis of this record, the court reasonably could have concluded that the defendant was literate, competent, that he possessed sufficient understanding of the duties of self-representation, and that he was voluntarily exercising his informed free will by waiving his right to counsel and invoking his right to self-representation." Id., 224.

Second, the Appellate Court rejected the defendant's claim that his waiver of his right to counsel was constitutionally inadequate because the trial court did not engage in a "comprehensive discussion" with him concerning the elements of each pending charge. (Internal quotation marks omitted.) Id. Instead, the Appellate Court concluded that a discussion of each element of the pending charges was not necessary and that the trial court did not abuse its discretion in concluding

"that the defendant understood the nature of the charges pending against him sufficiently to render his waiver of the right to counsel knowing and intelligent." Id., 226. We detect no error in the Appellate Court's reasoning or conclusion.

As this court has previously explained, it is not required "that a defendant must be specifically informed of the particular elements of the crimes charged before being permitted to waive counsel and proceed pro se. . . . [P]erfect comprehension of each element of a criminal charge does not appear to be necessary to a finding of a knowing and intelligent waiver. . . . A discussion of the elements of the charged crimes would be helpful, and may be one of the factors involved in the ultimate determination of whether the defendant understands the nature of the charges against him. A description of the elements of the crime is not, however, a sine qua non of the defendant's constitutional rights in this context. Indeed, in our cases, we have approved of a defendant's assertion of the right to proceed pro se in a case in which the record did not affirmatively disclose that the trial court explained the specific elements of the crimes charged to the defendant as long as the defendant understood the nature of the crimes charged." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 611–12.

Here, the defendant was charged with one count of assault of a disabled person in the third degree and one count of disorderly conduct. He was undoubtedly aware that the facts involved in each of the charges stemmed from the alleged assault of his brother. And, as the Appellate Court reasoned, "[t]he elements of each of those charges are relatively straightforward and align with the statutory names of the offenses." *State* v. *Acampora*, supra, 176 Conn. App. 225.

Additionally, in its canvass, the trial court ascertained that the defendant was literate and had graduated high

school. The court also recited each of the charged offenses and the minimum and maximum penalties associated with them. When the court asked if the defendant understood the charges and their penalties, the defendant replied, "Yes, I do, Your Honor." Accordingly, we cannot conclude that the trial court abused its discretion in determining that the defendant understood the nature of the charges against him.

The defendant fares no better with respect to his contention that the waiver of his right to counsel was constitutionally inadequate because the court did not make him aware of the dangers and disadvantages of self-representation. The court pointedly questioned the defendant regarding his familiarity with the laws and rules of procedure regarding evidence, pretrial motions, voir dire and discovery for criminal trials, including whether he had any experience with criminal trials. When the defendant replied that he was not familiar with these rules and had no such experience, the court explained to the defendant that, if he represented himself, the court would not be able to advise him on procedures and other issues in the case. The court further explained that, despite his lack of knowledge, the defendant still would be expected to follow all of the rules and procedures applicable to attorneys in the courtroom. Notwithstanding being advised of these serious disadvantages, the defendant insisted on exercising his right to represent himself. Furthermore, in response to the court's questioning, he acknowledged that he had the education, experience and skill to do so, and had access to a library.

On the basis of the foregoing, the record affirmatively reflects that the defendant was literate, competent and understood that he was voluntarily exercising his free will to waive counsel and to represent himself. Thus, we conclude that the trial court did not abuse its discretion in determining that the defendant's waiver of his right to counsel was knowing, intelligent and voluntary.

The defendant relies on several cases from this court and the Appellate Court, claiming that he should have been warned of the specific dangers of self-representation. See, e.g., *State* v. *Collins*, supra, 299 Conn. 567; *State* v. *Fowler*, 102 Conn. App. 154, 926 A.2d 672, cert. denied, 284 Conn. 922, 933 A.2d 725 (2007). Although the canvasses in those cases included specific warnings of the dangers of self-representation—a practice that we encourage—and were deemed constitutionally adequate; see *State* v. *Collins*, supra, 608–10, 612–13; *State* v. *Fowler*, supra, 163–64 and n.7; the fact that the canvass the defendant received in the present case was different from the canvasses in those cases is not dispositive. As the Appellate Court explained, "[t]he defendant . . . does not possess a constitutional right to a specifically formulated canvass . . . . His constitutional right is not violated as long as the court's canvass, whatever its form, is sufficient to establish that the defendant's waiver was voluntary and knowing." (Internal quotation marks omitted.) *State* v. *Acampora*, supra, 176 Conn. App. 227, quoting *State* v. *Diaz*, 274 Conn. 818, 831, 878 A.2d 1078 (2005).

The court's canvass was sufficient to make the defendant aware of the dangers of self-representation; nothing more was constitutionally mandated. As noted previously, after the defendant admitted that he was unfamiliar with the terrain of criminal law and had never tried a criminal case, the court explained that, if he represented himself, the court would not be able to advise him on procedure and other issues in the case. The court also explained that he also would be expected to follow all the rules attorneys follow and would not be able to receive assistance from an attorney while he was trying the case as a self-represented party.[4] Accordingly, the Appellate Court correctly concluded that the trial

[4] It is important to note that, at the time of trial, the trial court appointed standby counsel for the defendant.

court had not abused its discretion in determining that the defendant's waiver was knowing, intelligent and voluntary.

II

The defendant next asserts that the Appellate Court improperly declined to review his claim that he clearly and unequivocally invoked his right to represent himself prior to February 23, 2012, and that the trial court violated his right to counsel by not canvassing him prior to that date. Having reviewed the briefs filed in the Appellate Court, we conclude that the defendant's claim in his opening brief to that court that his right to counsel was violated by the trial court's failure to canvass him prior to arraignment and engaging in plea negotiations, arguably included the claim that he had clearly and unequivocally invoked his right to represent himself prior to February 23, 2012. Accordingly, we will review the defendant's claim that the trial court improperly failed to canvass him regarding his right to counsel during arraignment and plea negotiations, prior to February 23, 2012.

The following additional facts and procedural history set forth in the Appellate Court opinion are relevant to this claim. ''On September 14, 2011, the defendant appeared for arraignment unrepresented by counsel. Because the case involved allegations of domestic violence, a discussion was held concerning whether family services, part of the Court Support Services Division, was going to be involved in the case, whether a protective order needed to be put in place, and what the conditions of that order should be because the defendant and the victim lived together. The defendant declined the assistance of family services, and the court, *Scarpellino*, *J.*, ultimately agreed to permit the defendant to return to the apartment that he shared with the victim. The court continued the matter for one week so that fam-

ily services could contact the victim and obtain more information. The following week, on September 21, 2011, family services indicated that it had still been unable to contact the victim, and the court granted another continuance.

"Between September 28, 2011, and November 29, 2011, the defendant requested and received four continuances so that he could retain counsel. At the hearing on November 29, 2011, the following colloquy occurred:

"[The Prosecutor]: [The defendant] is asking for a continuance to hire an attorney.

"[The Defendant]: Still going.

"The Court: One week.

"[The Defendant]: One week.

"The Court: Well, how many times do you want me to continue? You know—

"[The Defendant]: —well, listen, I'm not the one pursuing the case. You guys are coming after me, so—

"The Court: Yeah, well—

"[The Defendant]: —I mean—

"The Court: —you can get a public defender—

"[The Defendant]: —I don't—I'll represent myself, Your Honor.

"The Court: Did you apply for a public defender?

"[The Defendant]: I, I got too much unemployment. I get just enough not to get it, and—

"The Court: All right. What was the offer on this?

"[The Prosecutor]: There hasn't been one because he wanted to retain the services of counsel.

"The Court: Once you tell the prosecutor you want a lawyer, the prosecutor is going to—

"[The Defendant]: Well, no. I did not tell him that.

"The Court: All right.

"[The Defendant]: They told me to get a lawyer, Your Honor. So—

"The Court: All right, well, because, so, so, then give him—send it back and then give him an offer." (Internal quotation marks omitted.) *State* v. *Acampora*, supra, 176 Conn. App. 206–208.

"Thereafter, the defendant interjected that the case was 'ridiculous . . . .' The court explained to the defendant that 'the charge that's there . . . carries a mandatory year in jail. You, you need to get an attorney . . . .' The defendant proceeded to argue about why the case was 'based on a bunch of crap' and stated: 'And now, you—I, I . . . if you want a big trial thing about it, then I'd rather represent myself, and I'll do my own investigation. . . . Because, honestly, from what I see of attorneys, I believe I can do a better job myself.' The court said, '[a]ll right,' and the defendant asked, '[s]o, we'll give it one week again?' The court instructed the defendant to talk to the prosecutor about his case first. When the defendant's case was recalled, the prosecutor indicated that he was unable to have a 'cogent conversation' with the defendant and stated that the defendant 'really needs an attorney to help him out.' The court therefore granted the defendant's motion for a continuance.

"On December 13, 2011, after the defendant's case was called, the prosecutor noted that '[t]his is a matter that's been continued since September 14 [2011], at the request of the defendant each time to hire counsel. The state's made an offer.' The court asked the defendant how his efforts to retain counsel were proceeding. The

defendant responded: 'Saving up [for an attorney]. I got, like, $500 saved, and the lowest I got they want is, like, $800. So, I'm unemployed. So, I've been unemployed. So, plus, I pay my rent. I mean, I only get so much from unemployment.' The court agreed to continue the case so that the defendant could continue his efforts to retain counsel. Between December 29, 2011, and February 16, 2012, the court continued the case five additional times so that the defendant could retain counsel.

"On February 23, 2012, the [prosecutor] explained to the court, *McNamara*, *J.*, that the defendant's case had been continued several times so that the defendant could retain counsel. The court asked the defendant whether he had in fact retained an attorney. The defendant replied: 'No. Um, well, I'm on unemployment. The person was my brother. I called the police. I don't believe I need a lawyer. I don't want a lawyer. I don't have the money to afford a lawyer.' When the court mentioned Judge Scarpellino, the defendant interjected: 'I asked him to go on the jury trial.' The court asked the defendant whether he had asked for more time to retain an attorney, and the defendant indicated that he had. The defendant explained that he had been saving money over the last several weeks for an attorney, and he stated that, 'if I need to represent myself, I will, Your Honor, I will. . . . I don't believe I really need to . . . sacrifice . . . not paying my rent to hire an attorney for . . . for a junk case.'

"'The court engaged in a discussion with the defendant concerning his attempts to retain counsel. The defendant stated: 'They offered me forty-five days, which I will not accept. So, the next move would have to be trial. So, if we can start picking and maybe I'll have to—if I lose trial, I'll . . . maybe I'll . . . I'll save my money for the appeal.' The court asked the [prosecutor] whether an offer had been made, and the [prosecutor] responded that one had been made in December,

2011. The defendant confirmed that he was rejecting that offer. The court stated that it would place the case on the firm trial list and canvassed the defendant concerning his waiver of the right to counsel and invocation of his right to self-representation. After completing its canvass, the court found, inter alia, that the defendant knowingly, intelligently and voluntarily waived his right to counsel." (Footnote omitted.) Id., 208–10.

The defendant asserts that the trial court's failure to canvass him regarding his right to counsel during the critical stage of plea negotiations is a structural error and, therefore, is not subject to harmless error analysis. We conclude that, under the facts of this case, the trial court's failure to canvass the defendant during arraignment and plea negotiations did not constitute structural error and, therefore, is subject to harmless error analysis.

"Most constitutional violations do not require automatic reversal of a conviction but must instead be reviewed to determine whether they were harmless. . . . [T]he [harmless error] doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. . . . To find a constitutional violation harmless, the reviewing court must be convinced beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Citations omitted; internal quotation marks omitted.) *State* v. *Cushard*, 328 Conn. 558, 569, 181 A.3d 74 (2018).

"Some violations, however, so undermine the integrity of the proceedings that they cannot be reviewed for harmlessness. . . . These so-called structural errors tend to by their very nature cast so much doubt on the fairness of the trial process that, as a matter of

law, they can never be considered harmless. . . . These are structural defects in the constitution of the trial mechanism, which defy analysis by [harmless error] standards. . . . Instead, structural errors require reversal of the defendant's conviction and a new trial. . . . Constitutional violations have been found to be structural, and thus subject to automatic reversal, only in a very limited class of cases." (Citations omitted; internal quotation marks omitted.) Id., 570.

"Determining whether an error is structural requires a review of the nature of the right at issue and the effect of its denial on the proceeding. An error is generally structural when it affects the framework within which the trial proceeds . . . such that the error always results in fundamental unfairness." (Citation omitted; internal quotation marks omitted.) Id. "In addition, an error may be deemed structural when the effects of the error are simply too hard to measure . . . ." (Internal quotation marks omitted.) Id., 571.

"In contrast, an error is usually subject to harmless error review when it does not pervade or undermine the fairness of the trial. . . . An error subject to review for harmlessness usually occurs during a distinct portion of the trial, and, thus, its scope is readily identifiable." (Citation omitted; internal quotation marks omitted.) Id. As this court and the United States Supreme Court have recognized, the lack of counsel at a preliminary hearing involves less danger to the integrity of the truth seeking process of trial than the lack of counsel at the trial itself. See id., 573; see also *Adams* v. *Illinois*, 405 U.S. 278, 282–83, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1972).

This court recently explained that "[t]he denial of counsel only during pretrial proceedings may . . . rise to the level of structural error if the court or the defendant made decisions affecting the fundamental fairness

of the defendant's trial." *State* v. *Cushard*, supra, 328 Conn. 572. "For most pretrial denial of counsel claims, however, an alleged violation is usually not considered structural and is subject to harmless error review. In those instances, courts may review the record to determine whether anything occurred during the pretrial proceedings that ultimately harmed the defendant at trial." Id., 572–73. We have explained that the denial of counsel at pretrial proceedings is not structural error when "the extent of the harm is discrete and discernable from a review of the record . . . because the court can look at the record to determine whether anything transpired that impacted the outcome of the trial." (Citation omitted.) Id., 573.

The defendant asserts that the failure of the trial court to canvass him at the plea negotiation stage of the proceedings irretrievably eroded the fundamental fairness of the trial. Specifically, the defendant asserts that the fundamental fairness of the trial was eroded because he rejected the state's plea offer without knowing all of the consequences of that offer, including the mandatory minimum sentence for the charge of one year in jail. Furthermore, the defendant asserts that there is no way to determine what the defendant would have done if he had been given a proper canvass prior to engaging in plea negotiations with the state. We disagree.

Even if we assume for purposes of this appeal that the trial court improperly failed to canvass the defendant regarding his right to self-representation prior to his engagement in plea negotiations with the state, we cannot conclude that such an error irretrievably eroded the fundamental fairness of the trial. The defendant's decision to reject the plea offer prior to beginning the trial in this matter did not affect the framework within which the trial proceeded. Indeed, the defendant does not point to, and we do not find, any aspect of the trial proceeding that was impacted by the defendant's self-

representation during the initial plea negotiation with the state.

The defendant's only claim is that if he had been properly canvassed prior to engaging in plea negotiations with the state, he would not have rejected the plea offer and proceeded to trial. Even if this were true,[5] this alleged error did not pervade the trial or otherwise affect the deliberations of the jury. Instead, the scope of the error alleged by the defendant occurred during a distinct portion of the proceedings, prior to trial, and "its scope is readily identifiable." (Internal quotation marks omitted.) Id., 571, quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978).

Our recent decision in *Cushard* is instructive regarding when an error is structural. See *State* v. *Cushard*, supra, 328 Conn. 572–73. In *Cushard*, we rejected a claim of structural error when a defendant was improperly denied the right to counsel during a portion of the pretrial stage of the case. See id., 578–82. In that case, there was a failure to adequately canvass the defendant prior to the probable cause hearing, but, subsequently, there was a valid canvass prior to trial. Id., 579. In deciding whether the error was structural, this court examined the four month period between the failure to adequately canvass and the proper canvass to determine whether anything occurred during that time period that infected and contaminated the entire criminal proceeding. Id. Because we did not find that anything occurred during that four month period that impacted the trial, and because there was a proper canvass before trial, we concluded that the error was not structural. Id., 579–82.

Similarly, in the present case, there was a period of approximately five months between the defendant's arraignment in September, 2011, and the court's proper

[5] The defendant repeatedly asserted that he would not plead guilty or accept any plea offer except a nolle.

canvass on February 23, 2012. The defendant does not contend that anything that occurred during this five month period was used against him later at trial, including statements that he might have made to the prosecutor during the pretrial process, or that he made any irreversible decisions regarding trial strategy during those stages of the proceedings.[6] The defendant focuses on the fact that he rejected an offer for a plea agreement of forty-five days of incarceration without the benefit of counsel and prior to being canvassed in February, 2012. Contrary to the defendant's contentions, deprivation of counsel at the pretrial stages does not automatically result in structural error. Instead, *Cushard* makes clear that such a deprivation is not structural when that deprivation occurs during a distinct portion of the pretrial proceedings, is readily identifiable, and when no decision was made during the relevant time period that had an effect on the subsequent trial. See id., 572–73. That is precisely the case we have here.

A review of the record in the present case reflects that, although the defendant rejected the state's plea offer one time, the state was open to negotiation even after he was properly canvassed. Therefore, the defendant's ability to enter into a plea agreement was not irretrievably lost by rejecting the plea agreement prior to being canvassed. Accordingly, we cannot conclude that, even if there was a failure to canvass the defendant at arraignment and plea negotiations, such failure amounted to structural error. Therefore, we must determine whether the state has established that any error was harmless.

"With respect to harmless error analysis, we have observed that, [i]f the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt."

[6] We take this opportunity to express that, if a trial court refers a self-represented party to speak with a prosecutor, the court should also remind the self-represented party of the possible pitfalls of having such an uncounseled conversation.

(Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 506, 131 A.3d 1132 (2016). In order to conclude that the presumed error is harmless, we must be "persuaded 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State* v. *Cushard*, supra, 328 Conn. 582, quoting *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); see also *State* v. *Brown*, 279 Conn. 493, 513, 903 A.2d 169 (2006).

Applying this standard, we conclude that any presumed error was harmless beyond a reasonable doubt. The defendant asserts that he was harmed by rejecting the state's offer of forty-five days of incarceration because he received a longer sentence after trial. Specifically, he claims that he rejected the forty-five day plea offer without understanding the consequences of that decision because he did not have counsel and had not been properly canvassed regarding that decision prior to rejecting the offer. We disagree.

As this court explained in *State* v. *Cushard*, supra, 328 Conn. 558, "the extent to which the verdict could be attributed to the defendant's self-representation at trial is not the result of his earlier, invalid waiver. Having been fully warned of the consequences of a conviction, the dangers of self-representation, and the benefits of having counsel, the defendant nevertheless made a knowing and voluntary choice to proceed to trial as his own representative . . . ." Id., 582. In the present case, the defendant validly waived his right to counsel in February, 2012, at which time he was specifically advised that a conviction carried a mandatory one year sentence. Therefore, "any harm that flowed from that decision . . . thus resulted from his own voluntary actions." Id.

Our harmless error analysis in this case must focus specifically on whether the defendant's rejection of the plea without the benefit of counsel or a canvass in

the period between September, 2011, and February, 2012, had any impact on his trial. The defendant does not point to any specific aspect of his trial that was impacted by his rejection of the forty-five day offer but instead asserts, in conclusory fashion, that his rejection of the forty-five day offer without the benefit of counsel or a valid canvass impacted his trial because the sentence that he received after trial was longer than the sentence he would have received under the forty-five day offer he rejected. We believe that it is obvious on this record that the defendant's decision to reject the forty-five day offer without the benefit of counsel or a valid canvass did not contribute to the trial outcome. See id. (applying harmless error analysis requires determination of whether we are persuaded "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (internal quotation marks omitted)).

The record reveals that the defendant was given a plea offer by the state in December, 2011. Thereafter, the defendant returned to court almost every week and requested continuances of the trial on the basis that he was attempting to hire an attorney. When the defendant returned to court on February 23, 2012, he informed the court that the state "offered me forty-five days, which I will not accept." The prosecutor confirmed that the state had made the defendant an offer. The trial court then asked the defendant: "Are you accepting the state's offer, sir?" The defendant responded, "[n]o, Your Honor." The trial court then said: "All right. The offer is rejected." Thereafter, the trial court proceeded to canvass the defendant and determined that his waiver of his right to counsel was knowing, intelligent and voluntary.

There is nothing in the record to demonstrate that, after the valid waiver of his right to counsel on February 23, 2012, the defendant ever asked the state if he could

still accept the offer of forty-five days of incarceration. On April 22, 2015, approximately three years after he was canvassed and waived his right to counsel, the state still seemed open to the defendant's accepting the offer. Indeed, the prosecutor represented the following to the court: "My understanding is that [the defendant] was given an offer. He does not wish to do so, and he wishes to have his matter go on the trial list." The defendant made clear that he would not accept any offer from the state except a nolle prosequi. The prosecutor responded that the state was not offering a nolle, but the prosecutor did not represent that the state was not willing to consider other plea agreements. Thus, although the state was not willing to enter a nolle, the defendant never asked to accept the forty-five day offer, and the state never rejected such a request. Indeed, the defendant expounded simply that he was "not pleading guilty to something [he] didn't do."

This record demonstrates that, even after receiving a proper canvass and validly waiving his right to counsel, the defendant was not willing to accept a plea agreement with the state that involved his pleading guilty to the charges. At no point after December, 2011, did the defendant request to accept the previously offered forty-five day sentence. In addition, neither the state nor the court stated that the offer was not only rejected but also off the table and unavailable. Because the record demonstrates that the defendant had the opportunity to continue plea negotiations with the state after validly waiving his right to counsel, and because he never requested to accept the forty-five day plea offer, we conclude that his rejection of the forty-five day offer without the benefit of counsel or a proper canvass did not contribute to the verdict obtained.

Therefore, even if we assume, without deciding, that the defendant's right to counsel was violated by engaging in plea negotiations with the state, prior to February 23,

2012, without a proper canvass and waiver of the right to counsel, the record is devoid of any indication that the defendant was harmed by the presumed constitutional violation. Accordingly, we conclude that the trial court's failure to canvass the defendant at the plea negotiation stage, prior to February 23, 2012, was harmless beyond a reasonable doubt. See, e.g., *State* v. *Cushard*, supra, 328 Conn. 582; see also *State* v. *Brown*, supra, 279 Conn. 513 ("[b]ecause the record is devoid of any indication that the defendant was harmed by the constitutional violation, we conclude that the deprivation of counsel at the probable cause hearing was harmless beyond a reasonable doubt").

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 336

THOMAS NASH *v.* ROLAND DUMONT AGENCY, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 201 Conn. App. 906 (AC 43417), is denied.

Thomas Nash, self-represented, in support of the petition.

Kyle J. Zrenda, in opposition.

Decided February 23, 2021

STATE OF CONNECTICUT *v.* DIANE WILLIAMS

The defendant's petition for certification to appeal from the Appellate Court, 202 Conn. App. 355 (AC 40953), is denied.

Raymond L. Durelli, assigned counsel, in support of the petition.

Brett R. Aiello, deputy assistant state's attorney, in opposition.

Decided February 23, 2021

VOGUE *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT

The plaintiff's petition for certification to appeal from the Appellate Court, 202 Conn. App. 291 (AC 42845), is granted, limited to the following issue:

"Did the Appellate Court properly affirm the trial court's judgment dismissing the plaintiff's appeal from the decision of the Board of Review of the Employment Security Appeals Division that the defendant had correctly determined that the plaintiff was liable for unpaid unemployment compensation contributions because an on-premises tattoo artist was an employee rather than an independent contractor under General Statutes § 31-222 (a) (1)?"

Santa Mendoza, in support of the petition.

Krista D. O'Brien, assistant attorney general, in opposition.

Decided February 23, 2021

MATTHEW WITTMAN ET AL. *v.* INTENSE MOVERS, INC., ET AL.

The petition of the defendants Alexander Leute and William R. Leute III for certification to appeal from the Appellate Court, 202 Conn. App. 87 (AC 43027), is denied.

Michael J. Mauro and *Emanuel Kataev*, in support of the petition.

Richard S. Order and *Valerie M. Ferdon*, in opposition.

Decided February 23, 2021

Cumulative Table of Cases
Connecticut Reports
Volume 336

(Replaces Prior Cumulative Table)

Bank of New York Mellon *v.* Mercier (Order) . . . 913
Bank of New York Mellon *v.* Ruttkamp (Order) . . . 902
Borelli *v.* Renaldi . . . 3
Negligence; high speed police pursuit; summary judgment; governmental immunity; whether trial court correctly concluded that statute (§ 14-283 (d)) governing operation of emergency vehicles, as well as defendant town's police pursuit policy, imposes discretionary, rather than ministerial, duty on police officers to drive with due regard for safety of all persons and property; whether defendants were immune from liability in connection with pursuit of fleeing motorist; whether plaintiff failed to demonstrate that identifiable person-imminent harm exception to discretionary act immunity applied in present case.
Brown *v.* State (Order) . . . 904
Budrawich *v.* Budrawich (Order) . . . 909
Cole *v.* Commissioner of Correction (Order) . . . 908
Corley *v.* Commissioner of Correction (Order) . . . 913
CT Freedom Alliance, LLC *v.* Dept. of Education (Order) . . . 914
Davis *v.* Commissioner of Correction (Order) . . . 916
Doe *v.* Flanigan (Order) . . . 901
E. I. du Pont de Nemours & Co. *v.* Chemtura Corp. . . . 194
Breach of contract; whether trial court properly rendered judgment for defendant on claim alleging breach of commercial contract governed by New York law when plaintiff failed to strictly comply with notice provision; whether New York law requires strict compliance with notice provision of commercial contract when other party to contract receives actual notice and is not prejudiced by lack of strict compliance.
Gomez *v.* Commissioner of Correction . . . 170
Habeas corpus; certification from Appellate Court; claim that habeas counsel rendered ineffective assistance by failing to raise claim of due process violation in petitioner's earlier habeas case; whether petitioner's due process rights were violated under Napue *v.* Illinois *(360 U.S. 264) and* Giglio *v.* United States *(405 U.S.150) when prosecutor knowingly failed to correct false testimony of state's key witnesses at petitioner's criminal trial regarding their cooperation agreements with state, even though defense counsel had actual or constructive knowledge of those agreements; whether disclosure to defense counsel that witness has given false testimony, by itself, necessarily cures any violation of criminal defendant's due process rights under* Napue *and* Giglio.
Hamm *v.* Commissioner of Correction (Order) . . . 913
Haydusky's Appeal from Probate (Order) . . . 915
Henderson *v.* Commissioner of Correction (Order) . . . 916
Heyward *v.* Leftridge (Orders) . . . 902, 903
Ingram *v.* Commissioner of Correction (Order) . . . 916
In re D'Andre T. (Order) . . . 902
In re Ja'La L. (Order) . . . 909
In re Ja'Maire M. (Order) . . . 911
In re Josiah D. (Order) . . . 915
Kaminski *v.* Commissioner of Correction (Order) . . . 915
Kelsey *v.* Commissioner of Correction (Order) . . . 912
Kondjoua *v.* Commissioner of Correction (Order) . . . 907
Leonova *v.* Leonov (Order) . . . 906
Nash *v.* Roland Dumont Agency, Inc. (Order) . . . 917
Osborn *v.* Waterbury (Order) . . . 903
Pearson *v.* Commissioner of Correction (Order) . . . 914
Pierce *v.* Commissioner of Correction (Order) . . . 914
Schuler *v.* Commissioner of Correction (Order) . . . 905
Speer *v.* Skaats (Order) . . . 910

Stanley *v.* Commissioner of Correction (Order) . . . 901
Stanley *v.* Commissioner of Correction (Order) . . . 912
State *v.* Freeman (Order) . . . 907
State *v.* Hazard (Order) . . . 901
State *v.* Joseph A. . . . 247
Assault of disabled person third degree; disorderly conduct; certification from Appellate Court; whether Appellate Court correctly concluded that trial court had not abused its discretion in determining that defendant's waiver of right to counsel during pretrial stage of proceedings was knowing, intelligent and voluntary; whether trial court abused its discretion in determining that defendant understood nature of charges against him; claim that defendant's waiver of right to counsel was constitutionally inadequate because trial court did not make him aware of dangers and disadvantages of self-representation during canvass; claim that trial court's failure to canvass defendant regarding right to counsel during arraignment and plea negotiations was structural error; whether alleged error concerning failure to canvass defendant regarding right to counsel during arraignment and plea negotiations was harmless.
State *v.* Knox (Orders) . . . 905, 906
State *v.* Lemanski (Order) . . . 907
State *v.* Mansfield (Order) . . . 910
State *v.* Qayyum (Order) . . . 911
State *v.* Ruiz-Pacheco . . . 219
Assault first degree as principal; assault first degree as accessory; double jeopardy; certification from Appellate Court; whether Appellate Court correctly concluded that defendant's convictions of assault in first degree as principal and assault in first degree as accessory as to each victim did not violate double jeopardy clause of United States constitution; proper inquiry, for double jeopardy purposes, when defendant is convicted of multiple violations of same substantive criminal statute, discussed; whether legislature intended to punish individual acts separately or to punish course of action that they constitute under first degree assault statute (§ 53a-59 (a) (1)) under which defendant was convicted; whether defendant's assaultive acts against victims were part of same continuing course of conduct.
State *v.* Schimanski (Order) . . . 903
State *v.* Williams (Order) . . . 917
Tunick *v.* Tunick (Order) . . . 910
Vaccaro *v.* Loscalzo (Order) . . . 908
Vogue *v.* Administrator, Unemployment Compensation Act (Order) . . . 918
Wahba *v.* JPMorgan Chase Bank, N.A. (Order) . . . 909
Wittman *v.* Intense Movers, Inc. (Order) . . . 918
Wright *v.* Commissioner of Correction (Order) . . . 905
Young *v.* Commissioner of Correction (Order) . . . 904

CONNECTICUT APPELLATE REPORTS

Vol. 203

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TOWN OF SOUTH WINDSOR ET AL. *v.* KRISTIN LANATA ET AL.
(AC 42973)

Alvord, Prescott and DiPentima, Js.

Syllabus

The plaintiffs, the town of South Windsor and its zoning enforcement officer, sought injunctive relief and fines against the defendant, who operated a salvage business out of her residential property in the town. The plaintiffs alleged that the defendant violated the town's blight ordinance and zoning regulations in storing materials on her property that created a junkyard. Prior to the commencement of the action, the enforcement officer had issued several notices to the defendant, beginning in 2014, which alleged that the defendant that was in violation of the town's regulations. In December, 2016, a fire occurred at the property and, thereafter, an arson investigation commenced, which ultimately disproved a claim of arson. On February 24, 2017, the defendant was notified again that she was in violation of the blight ordinance, was directed to

remove the debris, and was informed that she had the right to appeal. The defendant also received, concurrently, a cease and desist order identifying a zoning violation and she was directed to cease the deposition of discarded material on the property. The notice further stated that she had the right to appeal and that should she fail to address the issues, the defendant would be subject to further statutory (§ 8-12) proceedings and penalties. The defendant did not appeal from either notice. The plaintiffs commenced an action in effort to compel the defendant to comply with the notices. The trial court determined that the defendant was operating a salvage business on her property in violation of the town's zoning regulations and the blight ordinance. The court also found that the defendant had wilfully violated the town's zoning regulations since at least February 24, 2017, the date of the cease and desist order, and imposed a fine pursuant to § 8-12 of $175 per day, running from February 24, 2017, to the date of the court's decision, for a total sum of $125,000, and the defendant appealed to this court. *Held*:

1. The defendant's unpreserved claim that the February 24, 2017 cease and desist order premised on her alleged zoning violation was unconstitutionally vague could not be reviewed pursuant to the bypass doctrine because, even if the defendant had presented her claim to the trial court, that court would have lacked jurisdiction over it on the basis that she failed to exhaust her administrative remedies; the defendant did not appeal the February 24, 2017 cease and desist order to the zoning board of appeals, she did not argue that she was prevented from doing so, and she did not raise before the trial court any constitutional defect in the regulations whose enforcement was at issue; rather, the defendant's challenge was to the actions of the enforcement officer in issuing the cease and desist order, which challenge would be beyond the narrow purview of the constitutional exception to the exhaustion requirement.
2. The trial court abused its discretion in imposing fines beginning on February 24, 2017, the date of the cease and desist order for a zoning violation, for the time period during which the defendant was under orders not to disturb the property: the record contains undisputed evidence, and the plaintiffs' counsel acknowledged, that the defendant was prohibited for some time following February 24, 2017, by her insurer and the police from removing items from the property, as the property was under an arson investigation at the time the February 24, 2017 order was issued; furthermore, the daily fine of $175, imposed on the basis of the trial court's determination that the defendant wilfully had violated the town's zoning regulations, was improper, as the record was devoid of any suggestion, and the plaintiffs did not contend, that the defendant had been convicted of any offense in a criminal proceeding, as a criminal prosecution was a predicate for the imposition of fines for a wilful violation pursuant to § 8-12, and the court was not authorized under § 8-12 to impose the same penalties in a civil proceeding that it could impose in a criminal proceeding.

Argued November 10, 2020—officially released March 9, 2021

Procedural History

Action seeking, inter alia, an injunction ordering the defendants to take certain corrective actions to bring their real property into compliance with town ordinances and zoning regulations, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant Michael Lanata was defaulted for failure to plead; thereafter, the matter was tried to the court, *Moukawsher*, *J.*; judgment for the plaintiffs, from which the named defendant appealed to this court. *Reversed in part*; *new trial.*

Edward C. Taiman, for the appellant (named defendant).

Richard D. Carella, with whom was *Adam B. Marks*, for the appellees (plaintiffs).

Opinion

ALVORD, J. The defendant Kristin Lanata[1] appeals from the judgment of the trial court rendered in favor of the plaintiffs, the town of South Windsor (town) and its zoning enforcement officer, Pamela Oliva.[2] On appeal, the defendant claims (1) that a February 24, 2017 cease and desist order was unconstitutionally vague as to the conduct to which it applied, (2) that the court erred in failing to conclude that she was justified in not complying with the February 24, 2017 cease and desist order on the basis that she had been instructed by both the police and her insurer not to touch or remove any of the personal property located in the backyard of her property, and (3) that the court misapplied General Statutes § 8-12 in assessing a fine for wilful violation of the town's

[1] Michael Lanata was also named as a defendant in this action. On February 11, 2019, Michael Lanata was defaulted for failure to plead. He is not participating in this appeal, and we therefore refer to Kristin Lanata as the defendant.

[2] For clarity, in this opinion we refer to the town and Oliva collectively as the plaintiffs and individually by name.

zoning regulations.[3] We conclude that the court abused its discretion in imposing a fine for a zoning violation that covered a time period during which she was under orders not to disturb the property.[4] Accordingly, we reverse the decision of the trial court as to count two of the plaintiffs' complaint, which alleges the zoning violation, and remand for a new trial on that count.[5]

The following facts and procedural history are relevant to our resolution of the defendant's claims. The defendant, who operates a business in which she is hired by lenders to clean personal property out of homes on which they have foreclosed, is the owner of property located at 460 Miller Road in South Windsor (property). For years, the defendant used the property to sort, store, and dispose of salvage she obtained in her business. By letter dated May 2, 2014, Oliva notified the defendant that she had investigated a recent complaint regarding

[3] In her principal appellate brief, the defendant asserts five claims of error. For ease of discussion, we discuss the defendant's first three claims in a different order than they appear in the defendant's appellate brief.

The defendant's fourth claim asserts that the court erred in issuing an injunction that exceeded the scope of the relief sought by the plaintiffs. See footnote 19 of this opinion. The defendant's fifth claim asserts that the court's award of a fine in the amount of $125,000 and attorney's fees in the amount of $51,674 violates the excessive fines clause of the eighth amendment to the United States constitution. We resolve this appeal in favor of the defendant on the basis of her claim that the court improperly imposed fines for some period of time during which she was under orders not to disturb the property. See part II of this opinion. In light of this resolution, we need not resolve the defendant's fourth and fifth claims.

[4] As to the defendant's claim that the court misapplied § 8-12 in assessing a fine for the wilful violation of zoning regulations, we address this claim because it is likely to arise on remand. See part III of this opinion.

[5] Neither party has challenged on appeal the court's ruling as to count one of the complaint, which alleges violation of the town's blight ordinance. As to that count, the court concluded that "the defendant . . . was running a salvage business which violated the South Windsor blight ordinance, but that the town's ordinances were unclear how a blight fine is imposed and with no provision for adequate notice of it being imposed . . . ." Accordingly, the court did not grant the plaintiffs relief under count one. Because neither party challenges on appeal the court's ruling on count one of the complaint, our remand is limited to a new trial on count two only.

the maintenance of the property. Specifically, she drove by the property and "observed a large amount of debris in the front and side yard, within the public view." The letter stated that this condition met the definition of blight under the blight ordinance.[6] The letter directed the defendant to remove the accumulated debris by May 19, 2014, "to avoid [an] enforcement action and potential daily penalties of [$100]" by Oliva's office. The letter stated that "[y]ou have the right to appeal this action to a Hearing Officer within ten (10) days after service of this notice on you, in accordance with the Anti-Blight Ordinance of the [town]." The defendant did not appeal.[7] In October, 2014, the defendant installed a fence that mostly, but not entirely, hid the piles of salvage and equipment located on the right side of the property. Around the side of the fence, however, the items could still be viewed.

Also in October, 2014, Oliva mailed to the defendant a cease and desist order that identified a zoning violation on the property. Specifically, the order identified

[6] The ordinance in effect at the time of the May 2, 2014 letter included in its definition of blighted property, a "residential or commercially zoned property . . . . containing accumulated debris . . . ." South Windsor Code of Ordinances, No. 195, § 3 (f) (1) (2012). The ordinance defined debris as "[m]aterial which is incapable of immediately performing the function for which it was designed including, but not limited to abandoned, discarded, or unused objects, junk comprised of equipment such as automobiles, boats, and recreation vehicles which are unregistered and missing parts, not complete in appearance and in an obvious state of disrepair; parts of automobiles, furniture, appliances, cans, boxes, scrap metal, tires, batteries, containers, and garbage which are in the public view." South Windsor Code of Ordinances, No. 195, § 3 (2012).

[7] In September, 2014, a certificate of blight lien was recorded in the land records. It stated: "The lien created by this certificate will secure payment of a debt resulting from a Blight Violation pursuant to Blight Ordinance No. 195 (the 'Ordinance') and the cost associated with remediation at the property by the Town of South Windsor. The principal amount of said lien as of September 9, 2014 is $2,000.00, together with any other costs and reasonable attorney fees, and said principal amount will increase by $100 for each day the violation continues, and will remain due on the property and have a priority over all other liens (except real property taxes) pursuant to the [o]rdinance and . . . General Statutes §§ 7-148aa and 52-351a."

the zoning violation as "[s]torage of discarded or second-hand material, creating a junkyard in violation of Table 3.1.1A Permitted Uses in Residential Zones."[8] The order stated that the corrective action required was to "[r]emove all of the material stored at [the property]." The defendant testified that she did not receive this letter, and Oliva testified that the town did not receive a return receipt. The defendant did receive, however, a November 7, 2014 letter informing her that the town planning department "has placed a Caveat in the land records stating that a zoning violation exists on this property . . . ." The letter also notified the defendant that "[t]he site history has been forwarded to the Town Attorney for possible legal action." In April, 2016, after giving the defendant one day's notice, town officials entered the property and removed items from the defendant's lawn. The entry is the subject of a civil rights lawsuit filed in federal District Court. The Superior Court in the present case discussed the town's removal of the items, noting that it had a bearing on its decision "only as a consideration concerning appropriate equitable relief, in terms of whether to run any violation period back to the original 2014 violation notice or some later date, and in setting the amount of any fine that might be imposed."

A fire occurred at the property on December 6, 2016. At the time of the fire, the house was not safe for the firefighters to enter, as the house had been included on a "hoarder list," utilized to warn firefighters of the dangers of entering. As a consequence of the fire, the

[8] Oliva testified that the property is zoned rural residential. Article 3, § 3.1.1 of the South Windsor Zoning Regulations (regulations) provides in relevant part that "[u]ses within residential zones shall be governed by Table 3.1.1A." According to Table 3.1.1A, neither a junkyard nor a salvage operation is permitted in a rural residential zone. Article 10, § 10.3, of the regulations defines a junkyard as "[a]ny place in or on which old metal, glass, paper, cordage, or other waste or discarded or second-hand material, which has not been a part of, or is not intended to be a part of, any motor vehicle, is stored or deposited."

house was reduced to a burned out shell, and the back lawn of the property was strewn with salvage from the inside of the house. The fire marshal for the town made an accusation that the fire was the result of arson, which claim, following an investigation, was ultimately disproven.

By notice of violation dated February 24, 2017, Oliva informed the defendant that the property was in violation of the town's blight ordinance, specifically the sections defining a blighted structure, dangerous structure, and nuisance.[9] The notice directed the defendant to

[9] The provisions of the ordinance cited by Oliva are as follows:

"Blighted structure shall mean any building or structure or any part of a building or structure, including, but not limited to, a separate unit attached or connected thereto, as well as the land, parking areas and other improvements to the real property where the building or structure is located, in which at least one of the following conditions exist as determined by the Town Manager or Zoning Enforcement Officer:

"(a) Failure to maintain the building or structure (including the land, parking areas and other improvements to the real property where the building or structure is located); factors that may be considered to determine whether a property is being maintained include, but are not limited to, missing or boarded windows or doors; collapsing or missing walls, roof or floor; siding that is seriously damaged or missing; fire damage; a foundation that is structurally faulty; improperly stored garbage, trash, debris or abandoned or junk vehicles located thereon; dilapidation such that the property is deteriorated to the extent that it would not receive a certificate of occupancy if applied for.

"(b) Attraction of illegal activity or attractive nuisance.

"(c) Fire hazard or fire damage that has not been corrected or repaired for a period of 60 days.

"(d) Existence or use that creates a substantial and unreasonable interference with the reasonable and lawful use and enjoyment of other space within the building or of other properties within the neighborhood as documented by neighborhood complaints or by the cancellation of insurance on other properties in the neighborhood. . . .

"(g) One or more unregistered motor vehicles (including trailers) in the public view, pursuant to Section 14-150a of the Connecticut General Statutes;

* * *

"Dangerous structure shall mean any building or structure or any part of a building or structure, including, but not limited to, a separate unit attached or connected thereto, including, but not limited to, a separate unit attached or connected thereto, as well as the land, parking areas and other improvements to the real property where the building or structure is located, in which at least one of the following conditions exist as determined by the Town Manager or Enforcement Officer:

"[r]emove the debris and unregistered vehicles from the property and correct all damage to the building, including but not limited to the roof, exterior walls, windows and supporting structures . . . ." The notice stated: "You have the right to request a hearing before the Blighted Property Appeals Board within (15) days after receipt of this notice, in accordance with Section 7 (a) of the Town Ordinance. Failure to address these issues can result in daily penalties of one hundred dollars ($100.00)." The defendant did not appeal the notice, but testified that she had asked town officials how to appeal, and they did not respond.Oliva also issued, and the defendant received, a February 24, 2017 cease and desist order identifying a zoning violation at the property. The order identified the violation as "[s]torage of discarded or second-hand material, creating a junkyard in violation of Table 3.1.1A Permitted Uses in Residential Zones." The order directed the defendant to "[i]mmediately cease the deposition of discarded and/or second-hand material on the property." The order stated

"(a) Conditions that pose a serious or immediate danger to occupants, users or the public that puts their health, safety and welfare at risk. . . .

"(d) Damage caused by fire, wind or a natural cause to the extent that the structure no longer provides shelter from the elements and is dangerous to the health, safety and welfare of its occupants or users or the public.

"(e) Dilapidated, decayed, unsafe, unsanitary or vermin-infested conditions that are likely to cause sickness or disease or injury to the occupants or users or the public.

* * *

"Nuisance shall mean:

"(a) A blighted structure as defined herein where there exists any condition that is a danger to the health, safety and welfare of the public;

"(b) A dangerous structure as defined herein where there exists any condition that is a danger to the health, safety and welfare of the public; or

"(c) Any other vacant or improved real property where there exists any condition that is a danger to the health, safety and welfare of the public, including, but not limited to: . . .

"(4) The accumulation of debris in such manner as may adversely affect the health, safety and welfare of the public. . . ." South Windsor Code of Ordinances, c. 50, art. IV, § 50-93 (2016).

The ordinance was amended in 2016 to remove from the definition of debris the requirement that it be "in the public view." South Windsor Code of Ordinances, No. 207, § 3 (f) (1) (2012). See footnote 6 of this opinion.

that "[y]ou have the right to appeal this action to the South Windsor Zoning Board of Appeals within 30 days after service of this order on you, in accordance with . . . [§] 8-12." It additionally stated: "If you fail to comply, you may be subject to further enforcement proceedings and penalties in accordance with [§] 8-12." The defendant did not appeal. See part I of this opinion.

The plaintiffs instituted this action on October 30, 2017. The plaintiffs filed an amended two count complaint dated January 25, 2019 (operative complaint). The first count alleges that the defendant violated the blight ordinance, codified in Chapter 50, article IV, § 50-93, of the South Windsor Code of Ordinances (blight ordinance). Specifically, the plaintiffs allege that the defendant "ha[d] not complied with the town's notices" and had "continue[d] to accumulate more debris and materials" at the property. In the second count, the plaintiffs allege that the defendant violated § 3.1.1A of the South Windsor Zoning Regulations (regulations), by storing "discarded or second-hand material creating a junkyard." In their request for relief, the plaintiffs sought "[a]n injunction ordering the [defendant] to perform immediately the corrective action pursuant to the notices of violation and cease and desist order to bring the property in compliance with the blight ordinance and zoning regulations." The plaintiffs additionally sought, inter alia, "[a] fine of $100 per day" as provided for in the blight ordinance,[10] "[a] fine of $100 per day as provided

[10] Chapter 50, art. IV, § 50-99, of the South Windsor Code of Ordinances provides: "(a) *Penalties*: (1) Each violation of this article shall be considered a separate municipal offense. (2) Each day any violation continues shall constitute a separate offense. (3) Each separate offense under this ordinance shall be punishable by a fine of $100.00 payable to the Town of South Windsor.

"(b) *Enforcement*: (1) The town manager, enforcement officer, or any police officer in the Town of South Windsor is authorized to issue a citation or summons for a violation of this ordinance. (2) In addition thereto, the town manager is authorized to initiate legal proceedings in the superior court for the immediate correction of the violation(s), collection of any penalties, and the recovery of all costs including costs of remedial action,

for in . . . § 8-12," relative to violations of zoning regulations, and attorney's fees and costs. The defendant filed an answer and special defenses on January 31, 2019. The plaintiffs filed their reply on February 1, 2019.

The trial on this matter was held from February 6 through 8, 2019. The plaintiffs' witnesses included: Oliva; Heather Oatis, the registered sanitarian for the town; James Donnelly, a site manager with All American Waste, which performs bulky waste pickup for the town; and four town residents who live near the property. The defendant also testified and called no further witnesses, and the court heard closing arguments on February 8, 2019.

On February 14, 2019, the court issued its memorandum of decision. It first found that "for around five years [the defendant] has been using her residentially zoned home in South Windsor to run a junk or salvage business." It stated that, although the defendant takes some personal property that she cleans out of foreclosed homes to storage facilities, she also takes material to her property and sorts it on her lawn. She then "sells some, discards some, and keeps some." The court found that, "[o]ver the years, the front and right side of her house have been regularly strewn with things and parts of things that appear to come and go." The court stated that although the defendant no longer lives at the property, she continues to be there most days and that she stores equipment and sorts salvage there.

The court found that the defendant had been using her property for years to operate her business in violation of Table 3.1.1A of the regulations, which identifies

court and the reasonable attorney's fees incurred by the Town of South Windsor to enforce this ordinance. Further, the town manager or enforcement officer are authorized to take such immediate action as may be provided herein. (3) All fines, court costs, costs of remedial action, and attorney's fees, as ordered by the court, shall constitute a lien on the subject premises, provided the owner, lessee, or occupant of said premises has been notified of the violations as herein provided."

the permitted uses of a residential property. The court stated that whether one considered her use of the property as running a junkyard or a salvage operation, neither use is permitted in a residential zone.

As to the blight allegations, the court found that the defendant's property was in violation of the blight ordinance, in that "[h]er house has been a ruin since 2016, and the lawn has been strewn with not just her commercial salvage but with piles of her personal property." The court found that, although the blight ordinance authorizes $100 fines for each separate offense, the ordinance does not set up a procedure "that makes clear how to impose the $100 fine nor do they say that 'per offense' means that every day a problem continues is a new offense." The court concluded that "without a mechanism making clear how the blight fine is imposed and with no provision for adequate notice of it being imposed, allowing it to be imposed here under these circumstances can't be squared with a prudent exercise of the court's discretion and the basic notion that [the defendant] is owed some due process before the government fines her." Accordingly, the court declined to impose any fines under the blight ordinance.

The court did impose fines for the defendant's violation of the zoning regulations. It declined to impose fines dating back to the October 10, 2014 notice, given the evidence suggesting that the defendant had not received that notice. The court found that the defendant wilfully had violated the town's zoning regulations since at least February 24, 2017, the date of the cease and desist order. The court credited testimony of neighbors that the defendant continued to deposit and sort material at the property even up to the date of trial, and it found not credible the testimony of the defendant that she had not brought any new material to the property since the 2016 fire.

Pursuant to § 8-12, the court "cho[se] a per diem fine of $175 per day,[11] running from February 24, 2017, to [the] date [of its memorandum of decision] and round[ed] the total to an even $125,000."[12] (Footnote added.) In setting the amount of the daily fine, the court considered the following: the defendant's "lack of candor and the length of time since 2017 in which she has violated the peace of this residential neighborhood," the loss of the defendant's home and her claims of financial hardship, the defendant's claim "that she has been financially handicapped by the town's claim against her insurance proceeds and what proved to be baseless accusations by the fire marshal of arson on her property." The court found that the hardship faced by the defendant in cleaning up the property did not justify her continuing to operate part of her business on the property.

The court also enjoined the defendant from "parking overnight or storing for any period of time, commercial vehicles, machinery, tools or other equipment she uses for business purposes . . . unloading, sorting, storing, or disposing of any salvage or other personal property except that she may store there personal property that is currently being used for the sole purpose of maintaining that property . . . [and] maintaining on the lawns of the property any personal property not currently being used for its intended purpose." The court indicated that

[11] It is unclear from the court's memorandum of decision why, when the plaintiffs had requested fines of $100 per day pursuant to § 8-12, the court awarded nearly double that amount, $175 per day.

[12] On February 21, 2019, the defendant filed a motion to reargue and for reconsideration, asking the court to vacate the fine assessed against her. She argued that the $125,000 fine was excessive and disproportionate to the wrong at issue, citing *Timbs* v. *Indiana*, U.S. , 139 S. Ct. 682, 693, 203 L. Ed. 2d 11 (2019). On March 5, 2019, the plaintiffs filed an objection to the defendant's motion to reargue and for reconsideration, arguing that the motion was not properly before the court in that the court had not yet rendered judgment in the case and that the motion "simply rehashed the unsuccessful arguments that she previously made." On March 18, 2019, the court denied the motion, stating that "[e]ven if properly filed the motion reflects mere disagreement with the size of the fine."

it would "separately entertain a motion for attorney's fees as provided by the statute for wilful violations." It stated that it would not enter judgment until the resolution of any attorney's fees motion.

On February 22, 2019, the plaintiffs filed an application for attorney's fees and attached an affidavit in which Attorney Morris R. Borea averred to counsel fees in the amount of $51,674 and expenses in the amount of $1039.18. On March 8, 2019, the defendant filed an objection to the plaintiffs' application for attorney's fees. On April 24, 2019, the court held a hearing on the application for attorney's fees. That same day, the court awarded the plaintiffs attorney's fees and costs as requested. This appeal followed.[13]

I

We first turn to the defendant's claim that the February 24, 2017 cease and desist order premised on her alleged zoning violation is unconstitutionally vague, in that it "was not clear as to the conduct [the] defendant must cease." We first conclude that the defendant's claim

[13] At oral argument before this court, the plaintiffs' counsel argued that because the defendant has "cleaned up" the property, three of the defendant's claims on appeal—that the cease and desist order was unconstitutionally vague, that the defendant was justified in not complying with the cease and desist order, and that the injunction was overbroad—are moot. "Mootness is a question of justiciability that . . . implicates [this] court's subject matter jurisdiction. . . . Mootness . . . rais[es] a question of law over which we exercise plenary review. . . . 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 practical relief to the complainant. . . . A case is considered moot if an appellate court cannot grant the appellant any practical relief through its disposition of the merits." (Citation omitted; internal quotation marks omitted.) *Wilcox* v. *Webster Insurance, Inc.*, 294 Conn. 206, 221–22, 982 A.2d 1053 (2009).

We fail to see how "cleaning up" the property renders any of the defendant's claims on appeal moot. Because her claims on appeal all foundationally relate to the February 24, 2017 cease and desist order and the fines and injunction emanating therefrom, counsel's assertion of mootness fails.

is unpreserved because she did not raise it before the trial court. Furthermore, we do not review her unpreserved claim pursuant to our bypass doctrines[14] because, even had she presented her claim to the trial court, the trial court would have lacked jurisdiction over it on the basis that she failed to exhaust her administrative remedies.

The following additional facts and procedural history are relevant to the defendant's claims on appeal. As noted previously, the defendant did not appeal the February 24, 2017 cease and desist order to the zoning board of appeals. In response to the filing of the complaint in this enforcement action, the defendant filed an answer and special defenses, in which she asserted, inter alia, that "[t]he notice of violations at issue are unconstitutionally vague in that they do not state whether or not [the] defendant is actually being penalized on a daily basis or in what amount."[15] The defendant did not assert as a special defense the claim that she raises before this court on appeal, which is that the

[14] See Practice Book § 60-5; *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)..

[15] The defendant asserted seven special defenses, including that "[a]ll of [the] plaintiffs' claims which originate on or before the filing of her petition for relief [under chapter 7 of the Bankruptcy Code] have been discharged and are in violation of her order of discharge"; "[t]he plaintiff failed to follow [General Statutes] § 8-12a because no citation has ever been issued to this defendant by the plaintiff"; "it was legally impossible for the defendant to comply with any order or notice from the plaintiff to repair or otherwise rebuild the fire damaged home or to remove any of the personal property set out on the lawn outside" due to the pendency of the arson investigation; the bank holding the mortgage on the defendant's home "refused to tender any of the insurance proceeds over to the defendant while claims of arson were being investigated, thereby making it impossible for the defendant to repair the fire damaged home"; "[t]he blight liens are void because [the] plaintiff failed to comply with [General Statutes § 49-73b (b) for failure to give notice to the defendant in the manner as provided in [General Statutes] § 49-34 and [the] plaintiff failed to record said liens in a timely manner as also required by § 49-73b"; and "[t]he complaint fails to state a claim upon which relief can be granted."

February 24, 2017 cease and desist order was unconstitutionally vague in that it "was not clear as to the conduct [the] defendant must cease." Nor did she identify an issue with respect to the constitutionality of the cease and desist order in the parties' trial management report.[16] The defendant testified at trial as to her understanding that the cease and desist order "relat[ed] to the fire and the debris from the fire" and that "I don't know what [the order is] talking about, secondhand material. Anything that's on my property has been damaged by the fire or is my own personal property." There is nothing in her testimony or her counsel's closing argument evidencing that a claim of unconstitutional vagueness was raised before the trial court. Therefore, we conclude that her claim is unpreserved.

Moreover, we need not reach her unpreserved constitutional claim through any of our bypass doctrines because we conclude that, even if she had raised this claim before the trial court, it would have lacked subject matter jurisdiction over the claim. The doctrine of exhaustion of administrative remedies "implicates the subject matter jurisdiction of the Superior Court . . . ." *Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 624, 203 A.3d 645, cert. denied, 331 Conn. 907, 202 A.3d 1022 (2019). "It is well established that [w]hen a party has a statutory right of appeal from the decision of an administrative officer or agency, he [or she] may not contest the validity of the order if [the administrative] officials seek its enforcement in the trial court after the alleged violator has failed to appeal." (Internal quotation marks omitted.) *Sams* v. *Dept. of Environmental Protection*,

[16] In the parties' trial management report, the defendant identified, as disputed issues: "1. Is the defendant liable for violations of the blight ordinance? 2. Is it equitable for the court to compel the defendant to remediate a fire damaged home when the insurance proceeds are tied up in litigation as a result of the plaintiffs' actions? 3. Was the defendant properly cited for violations alleged in the complaint? 4. Is the plaintiff acting in good faith? 5. Did the defendant already comply by cleaning up the subject property?"

308 Conn. 359, 397, 63 A.3d 953 (2013); see also *Gelinas* v. *West Hartford*, 225 Conn. 575, 595, 626 A.2d 259 (1993) ("[W]hen a party has a statutory right of appeal from the decision of an administrative officer or agency, he may not, instead of appealing, bring an independent action to test the very issue which the appeal was designed to test. . . . Likewise, the validity of the order may not be contested if zoning officials seek its enforcement after a violator has failed to appeal." (Citations omitted; internal quotation marks omitted.)). "The exclusive remedy to object to a cease and desist order is an administrative appeal to a zoning board of appeals and potentially to the Superior Court, pursuant to General Statutes §§ 8-6, 8-7 and 8-8." *Ammirata* v. *Zoning Board of Appeals*, 81 Conn. App. 193, 202, 838 A.2d 1047, cert. denied, 268 Conn. 908, 845 A.2d 410 (2004). Section 8-6 (a) (1) provides that the zoning board of appeals shall have the power "[t]o hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement" of the zoning regulations. See also *Piquet* v. *Chester*, 306 Conn. 173, 185, 49 A.3d 977 (2012) ("[w]hen a landowner receives notice from a zoning compliance officer that the landowner's existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation constitutes a decision from which the landowner can appeal to the local zoning board of appeals pursuant to § 8-7 and, when applicable, pursuant to local zoning regulations").

On appeal, the defendant seeks to challenge the February 24, 2017 cease and desist order by claiming that it is unconstitutionally vague because the parties disagreed as to the conduct to which it applied. The defendant states that the plaintiffs' counsel "apparently thought it pertained to the debris strewn backyard from when the state police ordered her to empty the contents of her shed onto her lawn . . . [the] defendant thought

it pertained to the debris from the fire which meant her burnt down house and personal property blown through the windows of the second floor of her house by powerful fire hoses [and] the court thought it pertained to her depositing personal property she recovered from cleaning out foreclosed homes because it fined her for the same." We conclude that the broad grant of power in § 8-6 (a) (1) would have conferred on the zoning board of appeals the power to decide the validity and application of the cease and desist order. The defendant thus would have been required to exhaust that administrative remedy before raising such a claim in this enforcement action. See *Wethersfield* v. *PR Arrow, LLC*, supra, 187 Conn. App. 627 (court lacked jurisdiction over defendant's claim that zoning enforcement officer exceeded authority in issuing cease and desist order on basis of failure to exhaust administrative remedies where defendant appealed from cease and desist order to zoning board of appeals but withdrew the appeal). It is undisputed that the defendant did not appeal the February 24, 2017 cease and desist order identifying a zoning violation at the property.

Although the defendant testified at trial to the effect that she was prevented from appealing the February 24, 2017 notice of violation *with respect to the town's blight ordinance*, her testimony was specific to that notice, in that she maintained that town officials had informed her that the town had a new blight appeal board that would be taking appeals but was not in place yet.[17] She made no such claim as to the February 24, 2017

[17] The following exchange occurred between the plaintiffs' counsel and the defendant:

"Q. All right. And when you received this letter dated February 24th of 2017—

"A. Yes.

"Q. —did you refer to the blight ordinance to see the citations that are in the letter as to what they meant?

"A. I actually went into the town to fill out an appeal when I received that letter. And Pam Oliva, I think that's how you pronounce that last name, she was not in, and I spoke with Michelle Lipe and Chris Dougan. Because

cease and desist order based on her zoning violation. In closing argument before the trial court, the following exchange occurred:

"[The Plaintiffs' Counsel]: So with regard to that, they didn't file a zoning appeal. The law is clear. They're stuck with that violation. The facts support the violation and it's existed until today.

"The Court: Let me ask [the defendant's counsel] to respond on the zoning matter purely.

"[The Defendant's Counsel]: Okay.

"The Court: So if the thing says you're in violation of the zoning, and let's say you do, you're [a] reasonable person, you claim there's a hardship because your place is burned out, you're waiting for the insurance proceeds.

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of the new ordinance they said they had a new blight appeal board that would be taking any appeals. They didn't think that it was in place yet; they didn't know what forms to give me; there was no form included with that letter to appeal. Nobody knew how to appeal it. They said Pam would have to get back to me when she came in; I think she was coming in the following week; she was out. They never got back to me. I sent a letter requesting that I had never heard back from anybody for the appeal, and then I received a letter from the town saying it's too late, I could not appeal it.

"Q. All right. So you got this letter, you were aware of what was in the blight ordinance because you had reviewed it and, in fact, you attempted to appeal this notice. Is that correct?

"A. Well, I did because it's virtually—it's impossible—the investigation started with the fire with the arson claim in January, and they determined it was the pellet stove in February. And then on February 2nd the town of South Windsor, Corporal Michael Thompson called and said absolutely not, it's arson, we're not agreeing to this; you need to continue the investigation. So I was under a criminal investigation that continued into 2018, and I could not do anything at the property while it was considered a crime scene at the time. Mind you, the arson—was found that it wasn't arson, but it took to 2018. It was impossible for me to comply with that blight order when you had just started a criminal investigation on me and the property.

"Q. All right. So that's what your testimony is. So you did not attempt to comply with it because it was impossible for you to comply with.

"A. Well, that was going to be my appeal.

"Q. That was going to be the basis of the appeal.

"A. The appeal.

"Q. But you understand—tried to file it too late?

"A. They didn't have the forms at the town to do it and they didn't have—they didn't know who the antiblight board was and [Oliva] was not in."

Wouldn't the proper thing to do would be to go to the ZBA and appeal and claim a hardship for the zoning part, not the blight?

"[The Defendant's Counsel]: Yes, I understand, Your Honor. But you have to understand, first of all, she lost everything, the house burned down, she's living in a motel, she has no insurance proceeds. She doesn't have the—whatever access she has to the Internet is extremely limited, has just the clothes on her back when she walked out of that house. And in addition, Your Honor, the property is a crime scene. She was not allowed to touch anything. So I don't know how she could—

"The Court: You're missing the question. I want you to go back to the question.

"[The Defendant's Counsel]: Yes.

"The Court: Which is what reasons should be excused from appealing? And what you're telling me is, in other words, is that this was a terrible time in her life and she should be excused from it for that reason.

"[The Defendant's Counsel]: She made—you know, all I can say is she made a reasonable attempt to appeal it and it seems—

"The Court: I'm sorry. She made a reasonable attempt to appeal the zoning thing? The zoning thing says you appeal and there's a process to do it. And she seeks—

"[The Defendant's Counsel]: I'm thinking of the blight, Your Honor.

"The Court: That's my point. I understand the argument on the blight. I'll take notice of that."

Accordingly, the defendant did not argue that she was prevented from filing an appeal of the February 24, 2017 cease and desist order identifying a zoning violation.[18]

[18] In her principal brief on appeal, the defendant states that she "attempted to appeal the zoning notice but was thwarted by the plaintiff who had yet to install a blight board or procedures for an appeal."

We acknowledge that "[o]ur Supreme Court has recognized a narrow exception for claims of constitutional dimension . . . that applies when the challenge is to the constitutionality of the statute or regulation under which the board or agency operates, rather than to the actions of the board or agency. . . . That exception to the exhaustion requirement also applies when a defendant raises the constitutional validity of a municipal [zoning] ordinance [as a defense to] an action to enforce its provisions against [the defendant]." (Citations omitted; internal quotation marks omitted.) *Wethersfield* v. *PR Arrow, LLC*, supra, 187 Conn. App. 629.

In the present case, the defendant has not alleged any constitutional defect in the regulations whose enforcement is at issue. Rather, the defendant's challenge is to the actions of Oliva in issuing the cease and desist order, which challenge would be beyond the narrow purview of the constitutional exception. See id., 630 (special defense alleging that cease and desist order issued by zoning enforcement officer was unconstitutional and impermissibly vague constituted challenge to action of enforcement officer in issuing the order and did not qualify under constitutional exception to exhaustion requirement). Accordingly, the defendant would have been required to exhaust her administrative remedies before raising in this enforcement action her claim challenging the cease and desist order, which she indisputably did not do. Thus, the trial court would have lacked subject matter jurisdiction over such a claim, and, therefore, we do not reach her unpreserved claim.

II

We next turn to the defendant's claim that the court erred in failing to conclude that she was justified in not cleaning the property following her receipt of the February 24, 2017 cease and desist order on the basis that she "had been instructed by both the Connecticut State Police and her insurance carrier not to touch or

remove any of the personal property located in the backyard . . . .'' The entirety of the plaintiffs' argument in response is that they ''strongly [disagree] that [the defendant] had 'legal justification' to ignore the [cease and desist] letter.'' They maintain, however, that if this court accepts that the defendant cannot be held liable for violations during the pendency of the investigation, ''such investigation cannot excuse her violations for the other years of noncompliance.''

The defendant's claim essentially challenges the trial court's imposition of fines for the time period during which she was under orders not to disturb the property. ''Our question in reviewing a decision regarding . . . daily fines pursuant to § 8-12 is whether the court abused its discretion.'' (Internal quotation marks omitted.) *Stamford* v. *Stephenson*, 78 Conn. App. 818, 824–25, 829 A.2d 26, cert. denied, 266 Conn. 915, 833 A.2d 466 (2003). ''[Section] 8-12 does not require a court to impose fines and to award attorney's fees. . . . Although § 8-12 provides in relevant part that '[t]he owner or agent of any building or premises where a violation of any provision of [the zoning] regulations has been committed . . . shall be fined not less than ten nor more than one hundred dollars for each day that such violation continues,' this court has held that the use of 'shall' in § 8-12 does not create a mandatory duty to impose fines. . . . Rather, a court has discretion to impose such fines, as the circumstances require.'' (Citation omitted.) Id., 825–26. ''Our review of the trial court's exercise of its discretion is limited to questions of whether the court correctly applied the law and could reasonably have concluded as it did. . . . Every reasonable presumption will be given in favor of the trial court's ruling. . . . It is only when an abuse of discretion is manifest or where an injustice appears to have been done that a reversal will result from the trial court's exercise of discretion.'' (Internal quotation marks omitted.) Id., 825.

The following additional facts and procedural history are relevant to our consideration of this claim. The defendant asserted as a special defense "legal impossibility" in that she was instructed by the state police "to remove certain personal property from the improvements and place the same on the lawn outside while the [arson] investigation continued for the next [eighteen] months." She further asserted that her insurer "specifically instructed the defendant not to touch any of the personal property either inside or outside of the structures, or to touch the structures themselves, while their investigation continued." The plaintiffs denied the defendant's special defense.

The following evidence was presented at trial in support of the defendant's defense that she was unable to remediate the zoning violation at the property. The defendant testified that, following the fire on December 6, 2016, an arson investigation continued into 2018. She additionally testified that she was instructed not to touch *anything* on the property for a few months during the police investigation. She testified that "after that was concluded my insurance company told us not to touch it because they had to determine what property was damaged and what they were going to pay. So they had to see the whole contents and everything that was being claimed, so we were not to remove anything."

This testimony was supported by written claim comments prepared by representatives of her insurer (claim comments), which were entered into evidence as a full exhibit without objection from the plaintiffs. Those claim comments indicate that town officials had contacted the defendant's insurer to communicate their belief that the fire was set intentionally. For example, a December 13, 2016 entry provided: "Deputy Fire Marshal believes [the fire] may be incendiary and needs

a[n] origin and cause to review."[19] Another entry dated December 28, 2016, states that "Mauldin believes the fire was intentionally set; he does not know who started the fire." A February 3, 2017 entry states that "the fire marshal and . . . Thompson have concluded the fire is arson."[20]

The claim comments suggest that it was not until May 1, 2017, that the insurer determined that "the fire damage is a covered loss under this policy."[21] Moreover, an October 31, 2017 e-mail from an attorney representing the defendant's insurer to the defendant's counsel requested that the defendant "not discard any unusable and/or damaged possessions [she is] claiming in this matter." The e-mail also advised that the insurer "will be scheduling a reinspection shortly."

Despite evidence in the record that certain town officials believed the fire was a result of arson and had communicated that belief to the defendant's insurer, the two town officials who testified at trial, Oliva and Oatis, both stated that they were unaware that the property was a crime scene. Specifically, Oliva testified that she had "no knowledge" that the property became a crime scene, and Oatis testified that she was not aware that the property was declared a crime scene. Moreover, Oliva testified that she "d[id] not know" when the fire investigation was concluded, and she had "no knowl-

[19] A previous entry, also on December 13, 2016, states that "David M—deputy fire marshal" called to speak to the adjuster regarding the claim. A subsequent entry refers to David Mauldin as the deputy fire investigator.

[20] Thompson is elsewhere referred to in the claim comments as "the city fire investigator Mike Thompson."

[21] At oral argument before this court, the plaintiffs' counsel referred the court to an April 19, 2017 entry, which summarizes the findings of the cause and origin report, including that the cause classification of the fire was determined to be accidental. The plaintiffs' counsel acknowledged that the April 19, 2017 entry did not state that the information was communicated to the defendant but he represented that a subsequent entry in May, 2017, suggested that payment instructions regarding the loss payment were communicated to the defendant.

edge of" a fire marshal having made an allegation of arson. At oral argument before this court, the plaintiffs' counsel acknowledged that an arson investigation was conducted and that the defendant was told not to touch the crime scene for a period of time, which time period he believed extended to April, 2017.

Following its conclusion that the defendant had been violating the zoning regulations since February 24, 2017, the court, in setting penalties, acknowledged and considered the defendant's "claim that she has been financially handicapped by the town's claim against her insurance proceeds and what proved to be baseless accusations by the fire marshal of arson on her property." It did not, however, factor into its penalties assessment the effect of the arson investigation on the defendant's ability to comply with the February 24, 2017 cease and desist order. By way of that order, the defendant was directed to "cease the deposition of discarded and/or second-hand material on the property." Because the record contains undisputed evidence, and the plaintiffs' counsel acknowledges that the defendant was prohibited for some period of time following February 24, 2017, by her insurer and the police from removing items from the property, we conclude that the court abused its discretion in imposing fines beginning on February 24, 2017. "It is axiomatic that this court, as an appellate tribunal, cannot find facts." *Welsh* v. *Martinez*, 191 Conn. App. 862, 884, 216 A.3d 718 (2019). We therefore are not at liberty to resolve the question of precisely what date the defendant regained control of her property following the conclusion of the police and insurance investigations. Accordingly, a remand to the trial court for a new trial on the zoning violation is necessary.

Because the attorney's fees award and injunction flow from the judgment in favor of the town, both neces-

sarily are reversed together with the judgment.[22] See General Statutes § 8-12 ("[i]f the court renders judgment for such municipality and finds that the violation was wilful, the court shall allow such municipality its costs, together with reasonable attorney's fees to be taxed by the court").

III

It is appropriate for us to give guidance on issues that are likely to recur on retrial because of our conclusion that this case must be remanded for a new trial. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009). We therefore

[22] The defendant claims on appeal that the court's injunction exceeded the scope of the relief sought by the plaintiffs. Specifically, she challenges the court's order enjoining her from using her property to "[park] overnight or [store] for any period of time, commercial vehicles, machinery, tools or other equipment she uses for business purposes." Because we have reversed the judgment and remanded for a new trial, we need not address this argument.

We note briefly, however, that the defendant has raised serious concerns about the scope of the injunction. In the plaintiffs' complaint, they sought "[a]n injunction ordering the defendants to perform immediately the corrective actions pursuant to the notices of violation and cease and desist order to bring the property in compliance with the blight ordinance and zoning regulations." The February 24, 2017 cease and desist order identifies the type of zoning violation as "[s]torage of discarded or second-hand material, creating a junkyard in violation of Table 3.1.1A Permitted Uses in Residential Zones." The corrective action required in the February 24, 2017 letter is to "immediately cease the deposition of discarded and/or second-hand material on the property."

In its memorandum of decision, the trial court stated: "South Windsor is on firm footing with its zoning regulations. It doesn't need the blight ordinance to win an injunction here. Nevertheless, *for penalty purposes* the court finds [the defendant] in violation of the town's blight ordinance." (Emphasis added.) Accordingly, the injunction issued by the court was specific to the zoning violation. We note that nowhere in the February 24, 2017 cease and desist order did the town order the defendant to cease parking overnight any commercial vehicles. Although we need not address whether the court abused its discretion in enjoining the defendant from parking overnight any commercial vehicles, we merely note our serious concerns with respect to the scope of the injunction.

will address the defendant's claim that the court improperly assessed a fine for the wilful violation of zoning regulations pursuant to § 8-12. Specifically, citing *Gelinas* v. *West Hartford*, supra, 225 Conn. 575, the defendant argues that because she was not convicted of any criminal offense, the court's imposition of a $175 daily fine was improper. We agree.

Section 8-12 provides in relevant part: "The owner or agent of any building or premises where a violation of any provision of such regulations has been committed or exists . . . or the owner . . . who maintains any building or premises in which any such violation exists, shall be fined not less than ten dollars or more than one hundred dollars for each day that such violation continues; but, if the offense is wilful, the person convicted thereof shall be fined not less than one hundred dollars or more than two hundred fifty dollars for each day that such violation continues, or imprisoned not more than ten days for each day such violation continues not to exceed a maximum of thirty days for such violation, or both . . . ."

Our Supreme Court in *Gelinas* v. *West Hartford*, supra, 225 Conn. 593, stated: "Section 8-12 unambiguously provides for both civil and criminal remedies. It does not, however, authorize a court to impose the same penalties in a civil proceeding that it could impose in a criminal proceeding." The court emphasized "the necessity for a criminal prosecution as a predicate for the imposition of fines for a 'wilful violation.' "[23] Id. This

[23] In their brief, the plaintiffs argued that the trial court had "discretion to issue a civil fine within the $100-$250 range." At oral argument before this court, however, the plaintiffs' counsel conceded that *Gelinas* provides that in order to impose a fine greater than $100 per day, there needs to be a criminal conviction as a predicate fact. Although we note the plaintiffs' apparent disagreement with *Gelinas*, we are bound by our Supreme Court's interpretation of § 8-12 therein. "[I]t is axiomatic that this court, as an intermediate body, is bound by the decisions of our Supreme Court." *109 North, LLC* v. *Planning Commission*, 111 Conn. App. 219, 232 n.9, 959 A.2d 615 (2008).

court subsequently added to that discussion. "As the statute states, for violations of the regulations, a person shall be fined not less than $10 nor more than $100 for each day that the violation continues. That portion of the provision refers to a civil proceeding, one that does not require a finding of wilfulness or a criminal conviction. . . .

"On the other hand, the statute provides that if an offense is wilful and the person *is convicted thereof*, the amount of the fine is to be more than $100 per day, but not more than $250 for each day. According to Black's Law Dictionary (6th Ed. 1990), to convict means '[t]o find a person guilty of a criminal charge, either upon a criminal trial, a plea of guilty, or a plea of nolo contendere. . . .' The use of the word 'convicted,' demonstrates that the legislature distinguished between civil and criminal proceedings. The imposition of an elevated fine upon conviction manifests the legislature's intent to impose a different and greater penalty on those 'convicted' in a criminal proceeding." (Emphasis added.) *Gelinas* v. *West Hartford*, 65 Conn. App. 265, 280, 782 A.2d 679, cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001).

In the present case, the court imposed a fine of $175 per day on the basis of its determination that the defendant wilfully had violated the town's zoning regulations. There is nothing in the record to suggest, and the plaintiffs do not contend, that the defendant had been convicted of any offense in a criminal proceeding. Accordingly, the daily fine of $175 was improper.

The judgment is reversed as to count two alleging a zoning violation and the case is remanded for a new trial consistent with this opinion on that count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KRISTY L. BOUFFARD *v.* JAMIE G. LEWIS
(AC 44174)

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

Syllabus

The defendant, whose marriage to the plaintiff had previously been dissolved, appealed from the trial court's denial of his motion to modify alimony and child support and from the granting of the plaintiff's motion for contempt relating to the defendant's failure to make alimony and child support payments. The trial court ordered the defendant to make payments of the alimony and child support arrearages in granting the motion for contempt. The defendant claimed that his obligation to make the payments was stayed by filing an appeal. Thereafter, the trial court ordered an appellate stay on the defendant's obligation to make the payments, and the plaintiff filed a motion for review to this court, claiming that the court's imposition of a stay was improper. *Held* that the trial court's orders to the defendant to make payments of periodic alimony and child support arrearages were not subject to an automatic appellate stay both by virtue of the relevant rule of practice (§ 61-11 (c)) and because the orders were issued in connection with a judgment finding the defendant in contempt.

Considered December 16, 2020—officially released March 9, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *M. Murphy*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Egan*, *J.*, denied the defendant's motion for modification of alimony and child support and granted the plaintiff's motion for contempt, and the defendant appealed to this court; subsequently, the court, *Egan*, *J.*, ordered a stay of the defendant's obligation to pay alimony and child support arrearages, and the plaintiff filed a motion for review with this court. *Motion for review granted*; *relief granted.*

Alexander Copp, with whom, on the brief, was *Jocelyn B. Hurwitz*, for the appellant (defendant).

Sheila S. Charmoy, with whom, on the brief, was *Scott M. Charmoy*, for the appellee (plaintiff).

Opinion

SUAREZ, J. The defendant, Jamie G. Lewis, appeals from the March 4, 2020 postjudgment orders of the trial court denying his motion for modification of alimony and child support and granting the motion of the plaintiff, Kristy L. Bouffard, for contempt relating to his failure to pay alimony and child support. On October 30, 2020, the trial court issued an order wherein it found that its March 4, 2020 orders were automatically stayed pursuant to Practice Book § 61-11 (c). Before this court is the plaintiff's motion asking this court to review the trial court's October 30, 2020 order. The plaintiff argues that there is no automatic stay on orders of periodic alimony and child support. The defendant argues in opposition to this motion for review that lump sum alimony and support payments are subject to an automatic appellate stay. Because we agree that there is no automatic appellate stay, we grant the plaintiff's motion for review and grant the relief requested in that the court's October 30, 2020 order is vacated.

The following undisputed facts are pertinent to our consideration of the issues presented by the plaintiff's motion for review. The marriage of the parties was dissolved on July 31, 2017. Included in the parties' separation agreement, which was incorporated into the judgment of dissolution, were provisions requiring the defendant to make monthly payments of $4729 as alimony for seven years from the date of dissolution and monthly payments of $1398 as child support until the parties' child attains the age of twenty-one. The agreement further provided that, during the seven year term of the defendant's monthly alimony obligation, the defendant also would make annual payments of unallo-

cated alimony and child support in a sum equal to 30 percent of any gross income from his employment that exceeds $175,000 per year.

On March 8, 2019, the defendant filed a postjudgment motion for modification of his monthly alimony and child support obligations, in which he claimed that his income had decreased substantially. On June 5, 2019, the plaintiff filed a motion for contempt, alleging that the defendant had not remained current on his monthly alimony and child support obligations since April, 2019, and that the defendant owed an amount for unallocated alimony and child support based on a percentage of his 2018 gross income.The trial court, *Egan*, *J.*, held a hearing on the parties' motions, and, on March 4, 2020, the court denied the defendant's motion for modification and granted the plaintiff's motion for contempt. The trial court found that the defendant owed arrearages of $8684 in child support and $37,832 in alimony, plus an additional $82,397 in unallocated alimony and child support based on his 2018 gross income. Additionally, the court found the defendant in contempt for his failure to pay alimony and child support, and awarded the plaintiff $13,500.50 in attorney's fees in connection with prosecuting the motion for contempt. The court ordered the defendant to pay the $8684 child support arrearage, the $82,397 in unallocated alimony and child support, and the $13,500.50 in attorney's fees within thirty days of the court's order. The court ordered the defendant to pay the $37,832 alimony arrearage within sixty days of the court's order. The court's orders required the defendant to make each of the payments for the alimony and child support arrearages as a lump sum.

The defendant filed a timely motion to reargue the trial court's March 4, 2020 orders. The trial court denied that motion to reargue on July 1, 2020. This appeal followed.

The plaintiff filed an additional motion for contempt with the trial court on April 13, 2020, on the basis of the

defendant's failure to make the payments required by the court's March 4, 2020 orders and his alleged failure to remain current with his monthly alimony and child support payments since November, 2019. That motion for contempt was scheduled to be heard by the trial court on October 30, 2020. Prior to the scheduled hearing, the plaintiff filed a motion in limine to preclude the defendant from calling his accountant as a witness. The defendant filed an objection to that motion in limine, in which he argued, in part, that there was an automatic appellate stay of the trial court's March 4, 2020 orders. The plaintiff filed an amended motion for contempt on October 29, 2020, arguing that the trial court's March 4, 2020 orders were not stayed by this appeal.

On October 30, 2020, the court issued the following order, which is the subject of this motion for review: "In the court's memorandum of decision dated [March 4, 2020] . . . the defendant was ordered to pay lump sum arrearages of $8684 in child support and $37,832 in alimony, plus the lump sum of $82,397 in unallocated alimony and child support, and $13,500.50 in attorney's fees. The defendant appealed [from] the court's orders on July 21, 2020. After a remote hearing on the record during which both parties were present and represented by counsel, the court finds that pursuant to . . . Practice Book [§] 61-11 (c) and the relevant case law, the defendant's obligation to pay is stayed pending appeal."

The plaintiff filed a timely motion for review pursuant to Practice Book §§ 61-14 and 66-6 on November 9, 2020, asking that this court reverse the trial court's order finding that its March 4, 2020 orders were subject to an automatic appellate stay. The plaintiff claims that the trial court's March 4, 2020 orders are not stayed, because (1) orders to pay alimony and child support arrearages are not subject to an automatic appellate stay, and (2) orders of civil contempt and the penalties ordered in connection therewith are not subject to an automatic appellate stay. We agree with the plaintiff.

Our review of the trial court's October 30, 2020 order requires us to construe Practice Book § 61-11, particularly subsections (a) and (c). The interpretation and application of provisions of the rules of practice involves a question of law over which our review is plenary. See *Deutsche Bank National Trust Co.* v. *Fraboni*, 182 Conn. App. 811, 821, 191 A.3d 247 (2018).

Practice Book § 61-11 governs stays of execution. Section 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . ." In family matters, however, orders of periodic alimony and orders of child support are specifically exempt from the automatic stay provisions of Practice Book § 61-11. "Unless otherwise ordered, no automatic stay shall apply . . . to orders of periodic alimony, support, custody or visitation in family matters . . . ." Practice Book § 61-11 (c); see also *Wolyniec* v. *Wolyniec*, 188 Conn. App. 53, 55 n.2, 203 A.3d 1269 (2019) (order requiring party to pay alimony and child support arrearage is not automatically stayed by filing of appeal); *Schull* v. *Schull*, 163 Conn. App. 83, 99, 134 A.3d 686 (no automatic stay for orders of support in certain family matters), cert. denied, 320 Conn. 930, 133 A.3d 461 (2016).

Practice Book § 61-11 (c), however, makes clear that any party may move to terminate or to impose a stay, before or after judgment, based on the existence or expectation of an appeal. "The judge hearing such motion may terminate or impose a stay of any order, pending appeal, as appropriate, after considering (1) the needs and interest of the parties, their children and any other persons affected by such order; (2) the potential prejudice that may be caused to the parties, their children and any other persons affected, if a stay is entered, not

entered or is terminated; (3) if the appeal is from a judgment of dissolution, the need to preserve, pending appeal, the mosaic of orders established in the judgement; (4) the need to preserve the rights of the party taking the appeal to obtain effective relief if the appeal is successful . . . and (6) any other factors affecting the equities of the parties." Practice Book § 61-11 (c).

Here, the defendant has not moved for a stay pursuant to Practice Book § 61-11 (c). Rather, he argues that "lump sum payments (for alimony, child support, or arrearages) are stayed pending appeal." In support thereof, he cites *Lowe* v. *Lowe*, 58 Conn. App. 805, 816, 755 A.2d 338 (2000).

The factual and procedural history in *Lowe*, however, is significantly different from that underlying the present appeal. We note that *Lowe* did not involve a challenge to an order to pay an alimony and support *arrearage*. The plaintiff in *Lowe* was challenging a new lump sum alimony order issued after the trial court had vacated the alimony order issued in the original dissolution judgment.[1] Id., 807–10. In *Lowe*, the Appellate Court similarly reviewed a motion to review, and it reversed the trial court's granting of the plaintiff's motion for a stay of judgment which claimed that the alimony order was exempt from the automatic stay provision of Practice Book § 61-11 (c). The court in *Lowe* reasoned that its "vacation of the order of the court indicates our determination that the alimony order was lump sum in nature and subject to an automatic stay." Id., 816.

In the present case, the court addressed a motion for contempt for failure to pay *periodic* alimony and child support. In doing so, the court simply calculated the amount of past due periodic alimony and child support that the defendant failed to pay and made a factual

[1] There was no order to pay periodic or lump sum child support being challenged in *Lowe*.

finding of the amount of periodic alimony and child support the defendant owed in arrearage. The court then ordered that arrearage to be paid in a lump sum amount. Unlike in *Lowe*, the lump sum order in the present case was not a new order, but, rather, a calculation of past, unpaid periodic alimony and child support. Therefore, we conclude that the March 4, 2020 orders are not automatically stayed pursuant to Practice Book § 61-11 (c).

In addition to her argument that alimony and support orders are not automatically stayed, the plaintiff asserts that there was no automatic stay of execution of the trial court's March 4, 2020 orders requiring the defendant to make payments for past due alimony and child support and the plaintiff's attorney's fees because the trial court issued those orders in connection with a judgment finding the defendant in contempt. We agree.

"We . . . recognize that [a]lthough [a] court does not have the authority to modify a property assignment, [the] court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [A]n order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Citations omitted; internal quotation marks omitted.) *Nappo* v. *Nappo*, 188 Conn. App. 574, 596, 205 A.3d 723 (2019).

The court's contempt power, "to be effectual, must be immediate and peremptory, and not subject to suspension at the mere will of the offender. . . . It is for this reason that an appeal from a civil contempt judgment does not automatically stay its execution. . . . Indeed, the conditional and coercive nature of civil contempt would be rendered virtually meaningless were the trial court's power automatically stayed by an appeal." (Citations omitted; internal quotation marks omitted.)

Papa v. *New Haven Federation of Teachers*, 186 Conn. 725, 731, 444 A.2d 196 (1982). Guided by these principles, and in light of the fact that the court issued the orders requiring the defendant to make payments for past due alimony and child support and the plaintiff's attorney's fees in connection with a judgment finding the defendant in contempt, we conclude that those orders were not automatically stayed.

The motion of the plaintiff, filed November 9, 2020, for review, having been presented to the court, it is hereby ordered that review is granted and the relief requested therein is granted in that the October 30, 2020 order of the trial court, *Egan*, *J.*, is vacated as the trial court's March 4, 2020 orders are not subject to an automatic appellate stay both by virtue of Practice Book § 61-11 (c) and because the orders were issued in connection with a judgment finding the defendant in contempt. The matter is remanded to the trial court for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DEYKEVIOUS RUSSAW (AC 43084)

Alvord, Prescott and DiPentima, Js.

Syllabus

Convicted of the crimes of manslaughter in the second degree and evading responsibility in connection with an incident in which he struck two pedestrians while operating a stolen vehicle and then fleeing the scene, the defendant appealed to this court. One of the pedestrians died as a result of her injuries. The day after the incident, the police brought the defendant to the Hartford Police Department, placed him in an interview room, and advised him of his rights under *Miranda* v. *Arizona* (384 U.S. 436). The defendant signed a form waiving these rights. The police then questioned the defendant about an unrelated shooting until he requested a lawyer. The police ceased their questioning and processed the defendant, informing him that he was being booked for murder. After hearing this, the defendant told the police that he was willing to continue speaking to them without the presence of an attorney. The

police again advised the defendant of his *Miranda* rights and he signed another form waiving the same. The police then resumed questioning the defendant regarding the shooting, before switching topics to discuss the motor vehicle incident. The police did not readvise the defendant of his *Miranda* rights prior to discussing the motor vehicle incident. During the interrogation, the defendant admitted that he was the operator of the vehicle that struck the two pedestrians and he signed a written statement to that effect. Prior to trial, the defendant filed a motion to suppress his statements made during the interrogation, which the trial court denied. On appeal, the defendant claims that the trial court erred in denying the motion to suppress because his statements were obtained in violation of his constitutional rights under *Miranda*. *Held*:

1. The trial court did not err in denying the defendant's motion to suppress his statements:

   a. The defendant's claim that the police were required to administer a new set of *Miranda* warnings prior to questioning him about the motor vehicle incident was unavailing because the entirety of the questioning comprised one continuous interview and *Miranda* rights are not offense specific: the defendant was advised of and waived his *Miranda* rights twice, prior to any questioning relating to the motor vehicle incident and prior to making any inculpatory statements; moreover, the questioning regarding the shooting and the questioning regarding the motor vehicle incident were separated by a period of only approximately fifteen minutes and the police told the defendant at the outset of the interview that they wanted to discuss multiple matters with him; furthermore, *Miranda* warnings are broad and explicit and, as such, the police were not required to readminister the warnings prior to asking the defendant questions about a new incident during the same interview.

   b. The defendant's claim that the waiver of his *Miranda* rights was involuntary is unavailing: the defendant was advised of his rights two separate times during the interview and his waivers of those rights were not the result of any pressure applied by the police, as they were made prior to the making of any inculpatory statements; moreover, the defendant was aware that the motor vehicle incident was a possible subject of the interrogation and he expressed a willingness to speak with the police regarding the matter.

2. Even if the trial court had erred in denying the defendant's motion to suppress and in admitting his statements into evidence, the defendant could not have prevailed on his claim because the error would have been harmless: the state produced ample evidence, independent of his statements, from which the jury reasonably could have concluded that the defendant was guilty beyond a reasonable doubt, including a video of the incident and the testimony of a coparticipant.

Argued November 10, 2020—officially released March 9, 2021

Procedural History

Substitute information charging the defendant with the crimes of larceny in the second degree, manslaughter in the second degree and two counts of evading responsibility, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Solomon*, *J.*; verdict and judgment of guilty of manslaughter in the second degree and one count of evading responsibility, from which the defendant appealed to this court. *Affirmed.*

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

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, executive assistant state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Deykevious Russaw, appeals from the judgment of conviction, rendered after a jury trial, of one count of manslaughter in the second degree in violation of General Statutes § 53a-56 (a) (1) and one count of evading responsibility in violation of General Statutes § 14-224 (b) (1). The defendant claims on appeal that the trial court erred by denying his motion to suppress his statements made to the police, which he alleges were obtained in violation of his constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our discussion. On July 18, 2017, Rosella Shuler and Shavoka Ceasar were standing near the corner of Ashley Street and Sigourney Street in Hartford. While operating

a stolen Toyota Highlander, the defendant struck Shuler and Ceasar. When the vehicle came to a rest after crashing into a fence, the defendant and five other individuals exited the vehicle and fled the scene. Shuler and Ceasar were transported to Saint Francis Hospital and Medical Center, where Shuler later succumbed to complications from her injuries.

On July 19, 2017, the defendant was brought to the Hartford Police Department and questioned about the motor vehicle incident and an unrelated, fatal shooting. The police questioned the defendant about the shooting first and then discussed the motor vehicle incident. Although the defendant initially denied being the operator of the vehicle that struck Shuler and Ceasar, he eventually admitted that he was the driver and signed a written statement to that effect. The interrogation ended at approximately 1 a.m. on July 20, 2017.

The defendant was charged by way of a substitute long form information with one count of larceny in the second degree in violation of General Statutes § 53a-123 (a) (1), one count of manslaughter in the second degree in violation of § 53a-56 (a) (1), one count of evading responsibility in violation of § 14-224 (b) (1), and one count of evading responsibility in violation of § 14-224 (b) (2). The defendant pleaded not guilty and elected to be tried by a jury. On January 24, 2019, the defendant moved to suppress the statements he made to the police during the July 19 and 20, 2017 interview about the motor vehicle incident.

The trial court held a hearing on the motion on February 4, 2019. At the hearing, Detective Anthony Rykowski of the Hartford Police Department, the lead investigator of the shooting incident, testified regarding the sequence of events surrounding the defendant's interview, and the state introduced into evidence several exhibits, including a video recording of the entire interrogation and signed *Miranda* waiver and parental consent forms. The court denied the motion to suppress

in an oral ruling on February 13, 2019. Trial began on February 14, 2019. The state entered into evidence and read to the jury the defendant's written statement provided to the police, in which he confessed to driving the vehicle that struck Shuler and Ceasar. On February 20, 2019, the jury found the defendant guilty of manslaughter in the second degree and of evading responsibility. The jury found the defendant not guilty of the remaining two charges. On April 24, 2019, the court sentenced the defendant to a total effective sentence of sixteen years of incarceration. This appeal followed.

On appeal, the defendant contends that the trial court erred in denying his motion to suppress his July 19 and 20, 2017 statements to the police. Specifically, the defendant argues that his statements regarding the motor vehicle incident were obtained in violation of his *Miranda* rights.[1] In the defendant's view, the interrogation regarding the motor vehicle incident was a new and separate interview from the one regarding the unrelated shooting, such that the police were required to give him a new *Miranda* advisement before questioning him about the motor vehicle incident. In response, the state argues that the police were not required to administer a new set of *Miranda* warnings after obtaining the defendant's statement about the shooting and prior to "switch-[ing] gears" and interrogating him about the motor vehicle incident. The state further argues that, even if the court erred in admitting the defendant's statements, such admission was harmless. We agree with the state that new *Miranda* warnings were not required before questioning the defendant about the motor vehicle incident.

[1] Pursuant to *Miranda* v. *Arizona*, supra, 384 U.S. 444, prior to a custodial interrogation a criminal suspect must "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

In its oral ruling denying the motion to suppress, the court found the following facts, which the defendant does not challenge in this appeal. On July 19, 2017, the defendant and his father were brought to the Hartford Police Department and were placed in an interview room.[2] At approximately 3 p.m., the defendant was advised of his *Miranda* rights, and he signed a form waiving his rights. The defendant's father was present while the defendant was being advised of his rights, and he signed a parental consent form, which allowed the police to speak with the defendant.[3]

Detective Rykowski then proceeded to interview the defendant with Detective Jeffrey Pethigal. The defendant indicated a willingness to speak with the detectives, and Detective Rykowski informed him that he would be under arrest for murder.[4] The defendant first was questioned about the shooting until 4:28 p.m. At that time, the defendant requested the presence of an attorney. The detectives ceased questioning the defen-

[2] We briefly set forth the timeline of events preceding the defendant's interview. The police received a tip that a possible suspect from the motor vehicle incident lived at 188 Sigourney Street. The police followed up on that tip, encountered the defendant and his father, and requested that the defendant accompany them to the police station for questioning about the incident. While the police were transporting the defendant and his father to the Hartford Police Department, Detective Rykowski was obtaining an arrest warrant for the defendant for the shooting and was unaware that the defendant already was being transported to the station. Detective Rykowski happened on the defendant and his father when they arrived at the station. As a consequence, although the police initially brought the defendant to the station to question him about the motor vehicle incident, they questioned him first about the shooting.

[3] The defendant's father was present while the defendant was being advised of his rights because, even though the defendant had turned eighteen years old on July 18, 2017, Detective Rykowski thought it would be safer to advise the defendant as a juvenile.

[4] Detective Rykowski also told the defendant at the outset of the interview that they had a "lot to talk about." The defendant later acknowledged that an officer had told him that there were a "couple things" that the police wanted to discuss with him. Detective Rykowski confirmed this and mentioned that the shooting was one of those topics.

dant. At 5:05 p.m., a detective entered the interview room where the defendant was being held to process him. When the defendant was informed that he was being booked for murder, he became upset and expressed a desire to continue speaking with the detectives. After the defendant was processed, he was brought back into the interview room, and he told Detective Rykowski that he was willing to speak with him without an attorney. Detective Rykowski read the defendant his *Miranda* rights again, and the defendant and his father reviewed and signed another set of rights waiver forms.

The police continued questioning the defendant following his second waiver of his *Miranda* rights. The bulk of the conversation centered on the shooting. The defendant eventually provided a written statement regarding the shooting, which he completed at 11:20 p.m. At 11:37 p.m., Detective Rykowski and Detective Candace Hendrix entered the interview room where the defendant was being held and indicated to the defendant that they were going to "totally switch gears here" and speak with him about "something else." The detectives asked the defendant where he had been and what he had done the previous day, and the defendant responded that he had seen a car accident. The detectives informed the defendant that the car accident was the matter that they wanted to discuss, and they began questioning him about the incident. Prior to questioning the defendant regarding the motor vehicle incident, Detective Rykowski did not readvise the defendant of his *Miranda* rights. Although the defendant initially denied any culpability, he later changed his statement and admitted to being the operator of the vehicle. He then provided a signed, written statement concerning his involvement in the motor vehicle incident. The interrogation relating to the incident concluded at approximately 1 a.m. on July 20, 2017.

On February 13, 2019, the court issued an oral ruling on the motion to suppress. In its oral ruling, the court noted that it had derived its findings of fact largely from the video of the interrogation. After the court made its findings of fact, it concluded that the state had met its burden of proving that the defendant had knowingly, intelligently, and voluntarily waived his *Miranda* rights. It then turned to the issue on appeal, namely, whether the police were required to again advise the defendant of his *Miranda* rights prior to questioning him about the motor vehicle incident. Citing *Colorado* v. *Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987), and *State* v. *Hermann*, 38 Conn. App. 56, 658 A.2d 148, cert. denied, 235 Conn. 903, 665 A.2d 904 (1995), the court concluded that Detective Rykowski was not required to advise the defendant of his *Miranda* rights before questioning him about the motor vehicle incident because a defendant's awareness of all possible topics of questioning in advance of an interrogation is not relevant to whether the defendant knowingly, intelligently, and voluntarily waived his rights. Accordingly, the court denied the defendant's motion to suppress.

"Under our well established standard of review in connection with a motion to suppress, we will not disturb a trial court's finding of fact unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court's memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Clark*, 191 Conn. App. 191, 195, 213 A.3d 1166 (2019).

"[T]he [f]ifth [a]mendment privilege [against self-incrimination] is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any sig-

nificant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (Internal quotation marks omitted.) *State* v. *Spence*, 165 Conn. App. 110, 116, 138 A.3d 1048 (quoting *Miranda* v. *Arizona*, supra, 384 U.S. 467), cert. denied, 321 Conn. 927, 138 A.3d 287 (2016). Accordingly, "[i]t is well established that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (Internal quotation marks omitted.) *State* v. *Sumler*, 199 Conn. App. 187, 206, 235 A.3d 576 (2020).

In the present case, it is undisputed that the police read the defendant his *Miranda* rights and that he signed a *Miranda* rights waiver form twice. Moreover, during oral argument before this court, the defendant's counsel stated that he was not challenging the legality of these *Miranda* warnings or the legality of the portion of the interview concerning the shooting. What the defendant does claim is that his *Miranda* rights were violated because the portion of the interview concerning the motor vehicle incident was a separate interview and that, as such, the police were required to administer a new set of *Miranda* warnings prior to questioning him about the incident and failed to do so. In the defendant's view, his constitutional rights were violated because *Miranda* rights are offense specific. We disagree.

The interview concerning the motor vehicle incident was not a separate interview. The United States Supreme Court has held that two periods of questioning with only a short period of time between sessions may be

viewed as one continuous interview. See *Missouri* v. *Seibert*, 542 U.S. 600, 616–17, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (two phases of questioning spaced fifteen to twenty minutes apart reasonably could be regarded as part of continuum); *Miranda* v. *Arizona*, supra, 384 U.S. 494–96 (defendant Carl Calvin Westover underwent continuous period of questioning when Federal Bureau of Investigation (FBI) commenced questioning shortly after local police had questioned defendant about separate matter).[5] Here, the defendant completed his statement regarding the shooting at 11:20 p.m., and the police resumed questioning him approximately fifteen minutes later. The short time between sessions was within the time that the United States Supreme Court has held as comprising one continuous interview. See *Missouri* v. *Seibert*, supra, 616–17; *Miranda* v. *Arizona*, supra, 494–96.

Moreover, at the outset of the interview, the detectives had informed the defendant that they had a "lot to talk about" and that the shooting was only one of the subjects they wanted to discuss with him. The defendant was thus on notice that several topics might come up during the interview. The defendant himself even suspected that the detectives would question him about the motor vehicle incident. While he was alone with his father in the interview room, the defendant, on two occasions, surmised to his father that he might have been brought in because of the motor vehicle incident. Specifically, the defendant told his father that the police were probably going to ask him about the car accident and that he thought the interview "was something about that car." In light of these considerations and the holdings of *Seibert* and *Miranda*, we conclude that the questioning regarding the motor vehicle incident comprised one continuous interview with the questioning regarding the shooting.

[5] Westover's appeal was decided in the same opinion as *Miranda* v. *Arizona*, supra, 384 U.S. 436.

Having determined that the police questioned the defendant about the shooting and the motor vehicle incident during one continuous interview, we turn to the issue of whether the police were required to administer a new set of *Miranda* warnings prior to questioning the defendant about the motor vehicle incident because it was a separate offense from the shooting. In *Colorado* v. *Spring*, supra, 479 U.S. 577, the United States Supreme Court held that "*Miranda* specifically required that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in *Miranda*, conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it. Accordingly, we hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his [f]ifth [a]mendment privilege." (Emphasis in original.)

This court reached a similar conclusion in *State* v. *Hermann*, supra, 38 Conn. App. 66. In *Hermann*, the defendant moved to suppress his tape-recorded statement. Id., 65–66. He claimed that his waiver of *Miranda* rights was not knowing and voluntary because he had not been informed that he would be questioned about a sexual assault and believed that he was being questioned only about an argument he had had with the victim's mother. Id. We rejected his claim, citing *Spring*, on the ground that "there is no requirement that the police inform an arrested person of the specific charges against him or her after they give the arrestee *Miranda* warnings." Id., 66.

Pursuant to *Spring* and *Hermann*, we conclude that the police were not required to readminister *Miranda* warnings to the defendant prior to questioning him about the motor vehicle incident. As articulated in

Spring, a *Miranda* warning is broad and explicit, in that it advises a criminal suspect that *anything* he says may be used against him. *Colorado* v. *Spring*, supra, 479 U.S. 577. *Spring* and *Hermann* also expressly hold that the police are not required to inform a suspect about all possible subjects of interrogation or of the specific charges against him. *Colorado* v. *Spring*, supra, 577; *State* v. *Hermann*, supra, 38 Conn. App. 66. *Spring* and *Hermann*, therefore, implicitly recognize that the police do not need to readvise a suspect of his or her *Miranda* rights prior to asking questions on a different topic during a single interrogation in order for a suspect's waiver of rights to be voluntary, knowing, and intelligent.

In the present case, the defendant received *Miranda* warnings twice. He thus was notified of the nature of his constitutional privilege and chose to waive his rights twice despite expressly being told of the potential consequences. See *Colorado* v. *Spring*, supra, 479 U.S. 577. Moreover, although *Spring* and *Hermann* do not require the police to inform a suspect about the possible subjects of interrogation or of the specific charges against him, the record indicates that, here, the defendant *was* aware that his involvement in the motor vehicle incident was a possible subject of interrogation. The police had informed the defendant that there were a few subjects that they wanted to discuss with him,[6] and the defendant himself even suggested to his father that he might have been brought in because of the motor vehicle incident. When the defendant told Detectives Rykowski and Hendrix that he had witnessed a motor vehicle accident, the detectives immediately informed the defendant that this was the incident that they wanted to discuss with him. It was thus readily apparent

[6] In addition to informing the defendant at the outset of the interview that there were a few things that they wanted to discuss with him, the police also reminded the defendant of this after they had finished questioning him about the shooting. Specifically, the police told the defendant that "we'd like to continue talking if you don't mind" because "there's a few other things we want to talk to you quick about."

to the defendant that the motor vehicle incident was a possible subject of interrogation throughout the interview. Pursuant to *Spring* and *Hermann*, we therefore conclude that the police were not required to readvise the defendant of his *Miranda* rights prior to questioning him about the motor vehicle incident. *Colorado* v. *Spring*, supra, 577; *State* v. *Hermann*, supra, 38 Conn. App. 66.

In the defendant's attempt to circumvent the holdings of *Spring* and *Hermann*, he cites authority that is markedly distinguishable from this case. The defendant first claims that *Miranda* v. *Arizona*, supra, 384 U.S. 494–97, stands for the proposition that he should have been advised of his rights again before being interrogated about the motor vehicle incident. We disagree.

In *Miranda*, the FBI began interrogating the defendant Westover about his involvement in two robberies shortly after the local police had questioned him about an unrelated matter. Id., 494–95. Although the FBI agents advised Westover of his constitutional rights at the outset of their interview, there was no evidence that the local police had advised Westover of his rights or procured a waiver of those rights at any point during their interrogation. Id., 495–96. Westover confessed to the FBI and was convicted of the robberies that were the subject of that interrogation. Id., 495. The United States Supreme Court reversed the conviction, concluding that, "[a]lthough the two law enforcement authorities [were] legally distinct and the crimes for which they interrogated [Westover] were different, the impact on him was that of a continuous period of questioning." Id., 496. Although the FBI agents gave Westover warnings at the beginning of their interview, the United States Supreme Court concluded that, from Westover's point of view, these warnings came at the end of the interrogation process. Id. Accordingly, the Supreme Court concluded that the FBI was the beneficiary of

the pressure applied by the local police and that, "[i]n these circumstances, the giving of warnings alone was not sufficient to protect the privilege." Id., 497.

The concerns that the United States Supreme Court had about Westover's interrogation in *Miranda* are not present here. In the present case, the defendant was advised of his *Miranda* rights prior to *any* questioning at the outset of one continuous interview rather than toward the end of an interview as in *Miranda*. Because the defendant received his *Miranda* warnings before any questioning began and prior to making any inculpatory statements, unlike in *Miranda*, he was able to make a voluntary and intelligent waiver of his rights that was not the result of any pressure applied by the police.

Next, the defendant claims that *Michigan* v. *Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), supports his proposition that he was constitutionally entitled to receive additional *Miranda* warnings. In *Mosley*, the defendant was arrested in connection with multiple robberies. Id., 97. He was brought to the police department for questioning, where he was advised of his *Miranda* rights and signed a certificate acknowledging those rights. Id. Shortly after the interview commenced, the defendant indicated that he did not want to answer any questions about the robberies. Id. More than two hours later, a different officer from a different bureau of the police department brought the defendant to another interview location to question him about a homicide. Id., 97–98, 104. The second officer advised the defendant of his rights once again and did not ask him any questions about the robberies. Id., 98. During the second interview, the defendant made a statement implicating himself in the homicide, and he was eventually convicted of murder. Id., 98–99. The United States Supreme Court upheld the admissibility of the statement the defendant made regarding the homicide because his right to cut off questioning concerning the robberies was scrupulously honored and the defendant was given

another set of full and complete *Miranda* warnings at the outset of the second interrogation. Id., 104–106.

Mosley is distinguishable from and inapplicable to the present case. In *Mosley*, the defendant had been subjected to two interviews separated by time and location. As previously observed in this opinion, the defendant here underwent one continuous interview during which he received and waived his *Miranda* rights twice. The defendant's reliance on *Mosley* is thus misplaced.[7]

For the foregoing reasons, we conclude that the defendant was not entitled to receive additional *Miranda* warnings prior to being questioned about the motor vehicle incident. Accordingly, the trial court did not err in denying the defendant's motion to suppress.

The defendant argues in the alternative that his waiver was involuntary as to the motor vehicle incident. We disagree.

"[T]he use of an involuntary confession in a criminal trial is a violation of due process. . . . The state has the burden of proving the voluntariness of the confession by a fair preponderance of the evidence. . . . [T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . ." (Internal quotation marks omitted.) *State* v. *Donald*, 325 Conn. 346, 358, 157 A.3d 1134 (2017). "Furthermore, the scope of review is plenary on the ultimate question of voluntariness, but

[7] The defendant also cites *Texas* v. *Cobb*, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001), without analysis, to support his claim that the police were required to advise him of his *Miranda* rights prior to questioning him about the motor vehicle incident. The defendant cites *Cobb* for the proposition that *Miranda* rights, specifically as to counsel, are offense specific. *Cobb*, however, examined the sixth amendment right to counsel rather than the fifth amendment right to counsel. Id., 167. Accordingly, *Cobb* is inapplicable.

the trial court's findings regarding the circumstances surrounding the defendant's questioning and confession are findings of fact that will not be overturned unless they are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 757, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

The defendant claims that his waiver was involuntary because he received no new warnings and signed no new waivers, the police benefitted from the pressure from the hours long interrogation regarding the shooting, he had no indication that the police wanted to speak with him about the motor vehicle incident until approximately 11:30 p.m., and he did not express a willingness to speak about the incident. None of these claims is persuasive. First, we have already determined that the police were not required to administer a new set of *Miranda* warnings prior to questioning the defendant about the incident because those questions were part of a single, continuous interview for which he had already received two separate warnings. Because he was advised of his rights prior to making any inculpatory statements, the defendant was able to make a voluntary and intelligent waiver of his rights that was not the result of any pressure applied by the police. See *Miranda* v. *Arizona*, supra, 384 U.S. 494–97. Second, contrary to the defendant's contention, he was aware that the motor vehicle incident was a possible subject of interrogation prior to 11:30 p.m. During the interrogation, the police indicated that they wanted to discuss a few subjects with him and, while he and his father were alone in the interview room, the defendant told his father on two occasions prior to 11:30 p.m. that he might have been brought in because of the incident. Finally, the defendant expressed a willingness to speak with the police about the incident. The defendant, in fact, mentioned that he had witnessed a car accident without any prompting when Detectives

Rykowski and Hendrix reentered the room and told him that they wanted to switch gears. When he mentioned the motor vehicle incident, the detectives immediately told him that this was the matter that they wanted to discuss with him. After they began interrogating the defendant about the motor vehicle incident, he did not, at any point, indicate that he did not want to speak any further about it. Accordingly, the totality of the circumstances surrounding the defendant's interview and statement demonstrates that he made a knowing, voluntary, and intelligent waiver of his *Miranda* rights.

Even if we were to assume that the court erred in denying the defendant's motion to suppress and admitting his July 19 and 20, 2017 statements into evidence, their admission was harmless. "If statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine." (Internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 214, 85 A.3d 627 (2014). "The improper admission of a confession is harmless error where it can be said beyond a reasonable doubt that the confession did not contribute to the conviction. . . . [Our Supreme 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." (Internal quotation marks omitted.) *State* v. *Richardson*, 66 Conn. App. 724, 735, 785 A.2d 1209 (2001). "When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was 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. *Mangual*, supra, 214–15.

Here, the state produced ample evidence independent of the defendant's statements from which the jury reasonably could have concluded that the defendant was guilty beyond a reasonable doubt. The entire motor vehicle incident was captured on video recordings, which were shown to the jury during trial. The videos, in addition to showing footage of the incident itself, also contained footage of the individuals in the vehicle fleeing the scene. Moreover, Teddy Simpson, a coparticipant, testified during trial that the defendant was driving the vehicle when the incident occurred. Although the defendant argues that Simpson's testimony was compromised because he received a reduced sentence for a separate matter in return for his testimony, these facts were presented to the jury, and it would be well within the jury's province to find Simpson's testimony credible despite his cooperation agreement with the state. See *State* v. *Michael T.*, 194 Conn. App. 598, 621, 222 A.3d 105 (2019) ("[i]t is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses" (internal quotation marks omitted)), cert. denied, 335 Conn. 982, 242 A.3d 104 (2020). Accordingly, even if we were to assume that the court erred in admitting the defendant's July 19 and 20, 2017 statements into evidence, we conclude that any such error was rendered harmless beyond a reasonable doubt due to the overwhelming independent evidence of the defendant's guilt.

The judgment is affirmed.

In this opinion the other judges concurred.

ANTHONY VELEZ *v.* COMMISSIONER OF CORRECTION (AC 42446)

Lavine, Alvord and Cradle, Js.*

Syllabus

The petitioner, who had been convicted of the crimes of murder, burglary in the first degree and criminal mischief in the first degree, filed a second petition for a writ of habeas corpus, claiming that his prior habeas counsel had provided ineffective assistance. The habeas court, upon the request of the respondent Commissioner of Correction, issued an order to show cause why the petition, which was filed in August, 2015, should be permitted to proceed in light of the fact that the petitioner had filed it beyond the October 1, 2014 deadline for successive petitions set forth in the applicable statute (§ 52-470 (d) (2)). The court conducted an evidentiary hearing, during which the petitioner presented a 2005 report of a neuropsychological evaluation of the petitioner, which described in depth his mental deficiencies. The petitioner asserted that those deficiencies established good cause for his delay in filing the second habeas petition because they prevented him from obtaining the legal assistance while he was incarcerated to file it in a timely manner. The habeas court dismissed the petition pursuant to § 52-470 (e) for lack of good cause for the delay in filing the successive petition, concluding that, although the petitioner's mental deficiencies were significant, he failed to prove that they contributed to his delay in filing the petition. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court did not abuse its discretion in dismissing the second habeas petition and properly determined that the petitioner failed to establish good cause for the delay in filing the successive petition; contrary to the petitioner's claim, that court properly determined that the petitioner failed to prove that his mental deficiencies, as described in the 2005 report, contributed to his delay in filing the second habeas petition and, thus, failed to rebut the presumption of unreasonable delay set forth in § 52-470 (d), as the record indicated that the petitioner presented no evidence of the nature of his deficiencies during the relevant time frame or how they contributed to the delay in filing the second habeas petition, and the court's determination was supported by the petitioner's having obtained a general equivalency diploma and having completed college classes and his success in filing two habeas petitions as a self-represented party, despite the alleged prevalence of his deficiencies.

Argued September 8, 2020—officially released March 9, 2021

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

Procedural History

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

Michael W. Brown, for the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Anthony Velez, appeals from the judgment of the habeas court dismissing his successive petition for a writ of habeas corpus pursuant to General Statutes § 52-470 (d) and (e).[1] On appeal,

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . .

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or,

the petitioner claims that the habeas court improperly determined that evidence of his mental deficiencies set forth in a 2005 neurological report was insufficient to demonstrate good cause within the meaning of § 52-470 (e) to overcome the statutory presumption of unreasonable delay in filing his successive habeas petition. We disagree with the petitioner and, accordingly, affirm the judgment of the habeas court.

The procedural background underlying this appeal is as follows. On July 24, 2006, after a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a, burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), and criminal mischief in the first degree in violation of General Statutes § 53a-115 (a) (1). On September 15, 2006, the trial court, *D'Addabbo*, *J.*, sentenced the petitioner to a total effective term of sixty years of incarceration. On March 24, 2009, this court affirmed the judgment of conviction on direct appeal. *State* v. *Velez*, 113 Conn. App. 347, 349, 966 A.2d 743, cert. denied, 291 Conn. 917, 970 A.2d 729 (2009). On May 6, 2009, our Supreme Court denied the petitioner certification to appeal from this court's judgment. *State* v. *Velez*, 291 Conn. 917, 970 A.2d 729 (2009).

On June 5, 2007, the petitioner, as a self-represented party, filed a petition for a writ of habeas corpus challenging his conviction (first habeas petition).[2] On January 24, 2011, following a trial on the merits, the habeas

if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

[2] In the first habeas petition, the petitioner claimed that his criminal trial counsel, Attorney Claud E. Chong, rendered ineffective assistance in that he failed to object to Judge D'Addabbo's response to a note sent out by the

court, *Fuger*, *J.*, issued a memorandum of decision denying the petition. *Velez* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-07-4001763-S (January 24, 2011).[3] The petitioner appealed to this court but withdrew the appeal on August 8, 2011.

On August 31, 2015, the petitioner, as a self-represented party, filed the present petition for a writ of habeas corpus (second habeas petition).[4] The habeas court subsequently granted the petitioner's request that counsel be appointed for him. On March 20, 2017, the respondent, the Commissioner of Correction, filed a request pursuant to § 52-470 (e), for an order directing the petitioner to appear and to show cause why the second habeas petition should be permitted to proceed in light of the fact that he filed it beyond the deadline for successive habeas petitions set forth in § 52-470 (d). In his request, the respondent argued that the petitioner's second habeas petition was untimely because the petitioner did not file it until August 31, 2015, beyond the October 1, 2014 statutory deadline, and, therefore, the rebuttable presumption that the filing of the petition has been delayed without good cause applied.[5]

jury regarding the element of intent required for a murder conviction, thereby failing to preserve the issue for appeal.

[3] Although Judge Fuger's memorandum of decision is dated January 20, 2011, it was filed on January 24, 2011.

[4] In his second habeas petition, the petitioner claimed that his prior habeas counsel, Attorney Bruce B. McIntyre, rendered ineffective assistance in that he failed (1) to present claims that the petitioner felt were the strongest, (2) to properly present evidence of a report from a clinical neurologist to establish that the petitioner suffered mental deficiencies, (3) to properly question his criminal trial counsel, Attorney Claud E. Chong, to establish that he was constitutionally ineffective, and (4) to present evidence to establish that the petitioner was medicated before, during, and after his criminal trial.

[5] The judgment rendered on the petitioner's first habeas petition was a final judgment, pursuant to § 52-470 (d), on August 8, 2011. See General Statutes § 52-470 (d) ("[i]n the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed *after the later of*

The habeas court, *Bhatt*, *J.*, issued an order to show cause and, on September 26, 2018, conducted an evidentiary hearing. At the show cause hearing, the petitioner presented one exhibit—a 2005 report of a neuropsychological evaluation of the petitioner that was conducted by Cristina L. Ciocca, a clinical neuropsychologist, at the request of the petitioner's criminal trial counsel (2005 report). The respondent presented three exhibits—Judge Fuger's memorandum of decision denying the petitioner's first habeas petition, the petitioner's form appealing from that decision, and the petitioner's form withdrawing that appeal. Neither the petitioner nor the respondent presented testimony at the show cause hearing. The court heard legal arguments from both parties.[6]

the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) *October 1, 2014*" (emphasis added)).

[6] The petitioner requests a remand for a new show cause hearing on the basis that "the parties to the proceeding were at least somewhat unclear about the proper procedure and parameters for the [show] cause hearing." The petitioner contends that, "[although] the habeas court did not specifically restrict the offering of live testimony, [it] did comment on the uncertainty about the parameters [of the show cause hearing], and did not specifically offer the opportunity to present witnesses."

At the show cause hearing, the court stated that, "pursuant to § 52-470 [(e)] . . . the petitioner shall have a meaningful opportunity to investigate the basis for delay and respond to the order. And so we're here [to do] that." The court then asked the petitioner's counsel, "so counsel . . . *what do you wish to present*?" (Emphasis added.) The petitioner did not request to present testimony. Pursuant to the court's invitation, the petitioner offered the 2005 report as an exhibit. The respondent objected to the court considering the 2005 report as a full exhibit on the basis that the 2005 report was hearsay and that the respondent was not afforded the opportunity to review it. In determining the contested admissibility of the 2005 report as an exhibit, the court noted that "the parameters of this hearing are . . . not really well defined . . . ." After hearing argument from both parties, the court decided that it "sounds like the matters contained in the [2005 report] go to the petitioner's claim that there is good cause, because it affected him in some way from being able to pursue the timely filing of the subsequent habeas petition. I'm going to admit [the 2005 report] as a full exhibit for purposes of this hearing." The court additionally allowed argument from both parties.

The 2005 report that was presented by the petitioner describes in depth the petitioner's deficiencies that were observed by Ciocca at the time of the evaluation. The 2005 report concluded, inter alia, that the petitioner, suffers from "working memory deficits, poor deployment of attention, and executive dysfunction. His difficulties breaking down complex information into more manageable units precipitated ease of becoming overwhelmed, frustration, and a tendency to withdraw in order to preserve internal integrity." The 2005 report additionally determined that "[t]hese difficulties further impacted his capacity to learn novel information, benefit from external feedback, and process directions. Concomitantly, these findings suggested evidence of neurological impairment possibly associated with Fetal Alcohol Syndrome . . . ."

Finally, before concluding the hearing, the court observed that the petitioner "wishe[d] to address the [c]ourt" and advised the petitioner's counsel, "[w]hy don't you talk to him first and see what it is he wants to say." The court then heard statements regarding what the petitioner wished to add.

In *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 721, 189 A.3d 578 (2018), our Supreme Court recognized that "§ 52-470 (e) provides [little] detail regarding the procedures by which a petitioner may rebut the presumption that there was no good cause for a delay in filing the petition." "Nothing in subsection (e) expressly addresses whether the petitioner may present argument or evidence, or file exhibits, or whether and under what circumstances the court is required to hold a hearing, if the court should determine that doing so would assist it in making its determination. The only express procedural requirement is stated broadly. The court must provide the petitioner with a 'meaningful opportunity' both to investigate the basis for the delay and to respond to the order to show cause." Id., 722. "The lack of specific statutory contours as to the required 'meaningful opportunity' suggests that the legislature intended for the court to exercise its discretion in determining, considering the particular circumstances of the case, what procedures should be provided to the petitioner in order to provide him with a meaningful opportunity, consistent with the requirements of due process, to rebut the statutory presumption." Id., 723. Because the habeas court considered all of the evidence that the petitioner presented at the show cause hearing, we conclude that it provided the petitioner with a meaningful opportunity to rebut the statutory presumption in accordance with § 52-470 (e). Therefore, we reject the petitioner's request for a remand for a new show cause hearing.

The petitioner's counsel argued that the "mental impairments and deficiencies" suffered by the petitioner, as described in the 2005 report, established good cause for the delay in filing the second habeas petition. The petitioner's counsel maintained that the petitioner suffered "debilitating mental illnesses and learning disabilities" that prevented him from seeking "the appropriate guidance and counsel while he was incarcerated to properly file the [second] habeas [petition] in a timely manner." The petitioner's counsel added that, although his psychological evaluation was prepared in 2005, "these are the same things that [the petitioner] is currently suffering from."

The respondent argued that the petitioner's filing of his first and second habeas actions as a self-represented party demonstrates that he was aware of how to file a petition for a writ of habeas corpus but failed to do so here in a timely manner.[7] The petitioner responded that he was able to file the first and second habeas petitions as a self-represented party only because he received help in drafting them. The petitioner offered no evidence as to why he was unable to obtain that same assistance in drafting and filing the second habeas petition prior to the October 1, 2014 statutory deadline.

Following the show cause hearing, on October 16, 2018, the court ordered the parties to file posthearing memoranda addressing the following question: "Do the petitioner's deficits, as outlined in [the 2005 report], rebut the presumption that there is no good cause for the delay in the filing of the [second] habeas petition?"

On October 31, 2018, both parties submitted posthearing memoranda addressing the court's order. Consistent with his argument at the show cause hearing, the peti-

[7] The respondent made no argument with respect to the 2005 report because the petitioner's counsel had provided it to the respondent only that day.

tioner argued that his "serious psychological and learning disabilities" prevented him from obtaining "the necessary legal assistance while incarcerated" to file the second habeas petition in a timely manner. He argued that the 2005 report evidenced these deficiencies and that they "still afflict him today." The respondent argued that the petitioner failed to demonstrate any connection between the "alleged deficits noted by [the] retained psychologist" in the 2005 report and his "failure to pursue habeas corpus relief during the four year period between August, 2011 and August, 2015." In addition, the respondent challenged the weight of the 2005 report because it was not current, it contained conflicting information regarding the petitioner's intelligence, and it was never subject to challenge regarding its findings and conclusions. The respondent further noted that the petitioner's history, which included speaking two languages, obtaining a general equivalency diploma, completing college classes, filing the first habeas petition as a self-represented party, and filing the second habeas petition as a self-represented party, supported the conclusion that the petitioner failed to demonstrate good cause to justify his late filing.

On November 6, 2018, the habeas court issued a memorandum of decision, in which it concluded that, although the petitioner's deficiencies were "significant,"[8] he failed to prove that those deficiencies contrib-

[8] In addressing the petitioner's deficiencies set forth in the 2005 report, the court found: "[T]he court finds that the evidence submitted plainly shows that the petitioner has experienced mental deficits since a very young age. [The 2005 report] chronicles his numerous psychiatric hospitalizations and psychological evaluations beginning at age six. He has at times reported auditory hallucinations and has been prescribed medication for it. He has, at various times over his life, been subject to IQ testing that has placed him in a variety of ranges, from borderline range of intelligence . . . to a full scale IQ of 102, which is average. . . . Testing conducted by the neuropsychologist in 2005 resulted in a full scale IQ of 88 or 94, depending on the test. . . . The petitioner's gestational development was negatively impacted by his mother's regular alcohol use during her pregnancy . . . and there are indications from his pediatrician that he had brain damage from an early

uted to his delay in filing the second habeas petition. Specifically, the court determined: "[T]he court finds . . . that the petitioner has failed to prove how his deficits affected his ability to timely file this second petition. The petitioner points to nothing in the 2005 report that shows his deficits are of such a nature that he was unable to file a second petition between August, 2011 and August, 2015.[9] Acknowledging that the petitioner likely suffers from several deficits that affect his mental capacity is not sufficient to overcome the presumption that there is no good cause for the delay. The petitioner must prove that these deficits are the reason for the delay and it is these deficits that pre-

age. There are undoubtedly general developmental delays . . . and evidence of working memory deficits, poor deployment of attention, and executive dysfunction. . . . The court accepts that his weaknesses with cognitive flexibility and problem solving make him less adept at processing information." (Citations omitted; internal quotation marks omitted.)

The habeas court found that "[t]he [2005] neuropsychological report makes reference to psychiatric illnesses and developmental disabilities. The court consider[ed] the entirety of the petitioner's deficiencies."

[9] The petitioner claims on appeal that the court erred in finding that the "four year period" between the date of final judgment on the first habeas petition (August, 2011) and the filing of the second habeas petition (August, 2015) was relevant to the determination of whether good cause exists to excuse the late filing. In its memorandum of decision, the court stated that, "[although] the untimely nature of the petition is measured against the October 1, 2014 date, the four year period since [the petitioner's] appeal was withdrawn is relevant to the determination of whether good cause exists to excuse the late filing. The petitioner had, in essence, that entire period to file a second petition for writ of habeas corpus to diligently pursue his legal rights."

We are not persuaded that the court abused its discretion in concluding that the petitioner failed to establish good cause for the delay merely because it referenced as relevant the "four year period" between the final judgment on the first habeas petition and the filing of the second habeas petition. First, the court prefaced this statement with the recognition that "the untimely nature of the petition is measured against the October 1, 2014 date . . . ." Second, the court's determination that the petitioner failed to show good cause centered on its finding that the petitioner had failed to show how the mental deficiencies set forth in the 2005 report contributed to the delay in filing the second habeas petition, a failing that is unrelated to the time period between filings.

vented him from timely filing the petition.[10] That he has not done. A review of the [2005 report] does not lead this court to conclude that any of the petitioner's deficits prohibited him from filling out the limited application for a writ of habeas corpus. Indeed, the petitioner has twice filed petitions for writ of habeas corpus.

"Thus, the court is constrained to conclude that the petitioner's deficits, while significant, have not been

[10] The petitioner claims that "[t]he habeas court erred by directly applying the test for delay that is applied by the federal courts when addressing violations of the federal statute of limitations." The petitioner maintains that, "[although] the habeas court reasonably looked to the federal habeas tolling case law for guidance, it should have done so with the understanding that the judicially created doctrine applicable to federal tolling claims would logically be more severe than the appropriate analysis to be applied to the rebuttable presumption [set forth in § 52-470 that] the habeas court faced." The respondent argues that "the habeas court [merely] analogized § 52-470 (e) to the federal statute of limitations. . . . In doing so, the habeas court noted that, in the context of mental illness, in order to satisfy the federal equitable tolling standard a petitioner was required to demonstrate an ' "extraordinary circumstance" severely impairing the ability to comply with the filing deadline, despite diligent efforts to do so.' [See *Bolarinwa* v. *Williams*, 593 F.3d 226, 231 (2d Cir. 2010).] Nevertheless, in its analysis of the petitioner's claim of good cause, the habeas court did not apply the doctrine of equitable tolling or utilize the same standard. . . . Rather, it simply concluded that the petitioner had shown no connection between his deficits and his failure to timely file." We agree with the respondent.

By "applying the *reasoning* of *Bolarinwa* . . . to § 52-470 and the facts of this case," the court derived the principle that "[t]he petitioner must prove that [his] deficits are the reason for the delay and it is these deficits that prevented him from timely filing the petition." (Emphasis added.) Ultimately, the court concluded that "the petitioner has failed to prove how his deficits affected his ability to timely file this second petition." The court's reasoning was consistent with the standard to rebut successfully the presumption of unreasonable delay in § 52-470 that this court recently set forth in *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 34, A.3d (2020), cert. granted, 336 Conn. 912, A.3d (2021) ("[w]e conclude that to rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel *caused or contributed to the delay*" (emphasis added)). We, therefore, decline to conclude that the court erred in its analysis of the petitioner's claim of good cause for delay.

proven to be the reason the petition was untimely filed and thus, do not rebut the statutory presumption [of unreasonable delay]. The petition must be dismissed." (Citations omitted; footnotes added; footnote omitted; internal quotation marks omitted.).

On November 15, 2018, the habeas court granted certification to appeal. This appeal followed.

On appeal, the petitioner claims that the habeas court improperly determined that he failed to present sufficient evidence to demonstrate good cause within the meaning of § 52-470 (e) to overcome the statutory presumption of unreasonable delay.[11] Specifically, he argues that the court's finding of "significant mental impairments . . . in areas that logically would impact the petitioner's ability to comprehend the need to act and his ability to act in accordance with that need is sufficient to find that the petitioner displayed actual difficulties that created a significant burden on the petitioner's ability to file a timely petition." The respondent contends that, although the 2005 report "documented the petitioner's mental health history, albeit only through 2005, it provides no insight into the issue of how his deficits affected his ability to timely file his [second habeas] petition" prior to the October 1, 2014 deadline. (Internal quotation marks omitted.) The respondent further argues that the petitioner has failed to meet his burden of demonstrating good cause to overcome the statutory presumption of unreasonable delay because "the petitioner adduced no other evidence supporting his claim that his delay in filing was because of his mental [deficiencies], rather than a lack of due diligence." We agree with the respondent.

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be

[11] The petitioner does not dispute that the filing of the second habeas petition was untimely under § 52-470 (d).

required to demonstrate that something outside of the control of the petitioner or habeas counsel *caused or contributed to the delay*. Although it is impossible to provide a comprehensive list of situations that would satisfy this good cause standard, a habeas court properly may elect to consider a number of factors in determining whether a petitioner has met his evidentiary burden of establishing good cause for filing an untimely petition. . . . [F]actors directly related to the good cause determination include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented." (Emphasis added.) *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 34–35, A.3d (2020), cert. granted, 336 Conn. 912, A.3d (2021).

"[A] habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony." Id., 35–36. "[W]e will overturn a habeas court's determination regarding good cause under § 52-470 only if it has abused the considerable discretion afforded to it under the statute.[12] In reviewing a claim of abuse of dis-

[12] "It is, of course, axiomatic that in applying the abuse of discretion standard, [t]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 36 n.12.

cretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . .'' (Footnote added; internal quotation marks omitted.) Id., 38.

The habeas court found that ''the petitioner point[ed] to nothing in the 2005 report that shows his deficits are of such a nature that he was unable to file a second petition between August, 2011 and August, 2015.'' Our review of the record indicates that, although the petitioner's counsel represented that the deficiencies set forth in the 2005 report ''still afflict him today,'' the petitioner presented no evidence of the nature of his deficiencies during the relevant time frame or how his deficiencies contributed to the delay in filing the second habeas petition. Rather, the court's determination that the petitioner ''failed to prove how his deficits affected his ability to timely file this second petition'' is supported by the petitioner's having obtained a general equivalency diploma and completed college classes and his success in filing two habeas petitions as a self-represented party, despite the alleged prevalence of his deficiencies. The court therefore did not err in concluding that ''the petitioner's deficits, while significant, have not been proven to be the reason [that] the petition was untimely filed and thus, do not rebut the statutory presumption [of unreasonable delay].''

We conclude that the habeas court properly determined that the petitioner failed to establish good cause for the delay in filing his successive habeas petition.

Accordingly, the habeas court did not abuse its discretion in dismissing the petitioner's second habeas petition pursuant to § 52-470 (d) and (e).

The judgment is affirmed.

In this opinion the other judges concurred.

VILLAGE MORTGAGE COMPANY *v.* JAMES VENEZIANO (AC 40701)

Prescott, Suarez and DiPentima, Js.

Syllabus

The plaintiff mortgage company sought declaratory relief related to the defendant's failure to comply with its corporate bylaws, which required the defendant to satisfy state and federal licensing requirements related to the plaintiff's mortgage loan business. The defendant was a founding shareholder and former employee, officer, and director of the plaintiff. The trial court, relying on a stipulation entered into by the parties, ordered the defendant to satisfy the licensing requirements by a certain date, or, in accordance with the plaintiff's bylaws, his stock in the plaintiff would be surrendered. After finding that the defendant had failed to comply with its order, the court rendered judgment ordering the defendant's shares to be surrendered to the plaintiff, from which the defendant appealed to this court. On appeal, the defendant claimed, inter alia, that the court erred in its interpretation of the parties' stipulation. The plaintiff subsequently filed a motion to dismiss the appeal on the ground that this court lacked subject matter jurisdiction over the appeal because the defendant's claims were moot. The plaintiff argued that during the pendency of the present appeal, it had taken the defendant's stock in satisfaction of a judgment rendered in certain prior litigation between the parties, and, therefore, the defendant was unable to demonstrate that he was entitled to any practical relief. *Held* that this court lacked subject matter jurisdiction, and, therefore, the appeal was dismissed: there did not appear to be any dispute between the parties that this court was unable to afford the defendant any direct, practical relief from the reversal of the judgment from which he appealed as the subject of the judgment in the present action was the defendant's stock in the plaintiff, which, during the pendency of the appeal, the plaintiff has taken in satisfaction of the judgment rendered in a prior action; despite the defendant's claim that this court may afford him practical relief because the issue of when the plaintiff took the stock in satisfaction of the judgment rendered in the prior action would affect

its value, the defendant did not offer any explanation of how a reversal of the trial court's judgment in the present action would affect the value of the stock, and the court in the present action did not make any findings concerning the valuation of the stock or when the plaintiff acquired it, and, although the defendant argued before this court that the outcome of the present action had collateral estoppel and res judicata effects as to when the plaintiff took his stock, he contradicted these arguments before the trial court in the prior action, claiming that the value of the stock taken by the plaintiff satisfied the entire judgment; moreover, despite the defendant's argument that his ability to bring an action for vexatious litigation in the future against the plaintiff was dependent on this appeal being heard on its merits, because the plaintiff prevailed in the present action, the defendant was unable to demonstrate that probable cause was lacking, and, thus, there was no possibility that this court's resolution of the claims raised in the appeal would have the effect of imposing liability on the plaintiff for commencing the present action; furthermore, the defendant's claim that the present appeal could affect a future action against the plaintiff for fraud was unavailing, the scope of the underlying action was narrow, there were no claims of fraud before the court, and, as a result of the defendant's conclusory analysis of this issue in his objection to the plaintiff's motion to dismiss the appeal, the factual basis of any future cause of action sounding in fraud was unknown to this court; accordingly, the defendant did not demonstrate what was reasonably possible in the future, and, therefore, this court was not persuaded that the collateral consequences on which the defendant relied were reasonably possible.

Argued October 5, 2020—officially released March 9, 2021

Procedural History

Action seeking, inter alia, a declaratory judgment with respect to the ownership of certain shares of the plaintiff corporation, brought to the Superior Court in the judicial district of Hartford, where the matter was tried to the court, *Scholl*, *J.*; judgment for the plaintiff, from which the defendant appealed to this court; subsequently, the court, *Scholl*, *J.*, denied the defendant's motion to open, and the defendant filed an amended appeal. *Appeal dismissed.*

Gregory T. Nolan, with whom, on the brief, was *Patsy M. Renzullo*, for the appellant (defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellee (plaintiff).

Opinion

SUAREZ, J. The defendant, James Veneziano, was a founding shareholder and former employee, officer, and director of the plaintiff, Village Mortgage Company. The plaintiff brought the civil action underlying this appeal seeking relief related to the defendant's failure to comply with its corporate bylaws, which required the defendant to satisfy state and federal licensing requirements pertaining to its mortgage loan business. During the course of the underlying litigation, the trial court, relying on a stipulation entered into by the parties, ordered the defendant to satisfy the licensing requirements at issue by a certain date or, in accordance with the penalty for his noncompliance set forth in the plaintiff's bylaws, his stock in the plaintiff would be surrendered to the plaintiff. Subsequently, after finding that the defendant had failed to comply with its order, the court rendered judgment ordering the defendant's shares to be surrendered to the plaintiff.

From this judgment, the defendant appeals. The defendant claims that the court erred (1) in its interpretation of the parties' stipulation, (2) by failing to apply the doctrines of substantial performance, waiver, and estoppel in its analysis of whether he satisfied the court's order, (3) in finding that the plaintiff did not breach the covenant of good faith and fair dealing, and (4) by denying his motion to open the judgment without holding a preliminary hearing related to the motion. The plaintiff argues that this court lacks subject matter jurisdiction over the appeal because the defendant's claims are moot. We agree with the plaintiff's jurisdictional argument. Accordingly, we dismiss the appeal.

The following facts, as found by the court, and procedural history are relevant to our analysis. The plaintiff commenced the underlying action in February, 2016. In its revised complaint dated March 29, 2016, it alleged

in count one that it was in the business of originating residential mortgage loans and was regulated by the federal government and the New England states in which it was licensed. The plaintiff alleged that regulations require "those who have [a 10 percent] or more ownership interest in . . . mortgage companies to [submit] to background checks, fingerprinting, credit checks, net worth compliance, surety bonds, and mandatory and timely record management and reporting on the [National Mortgage Licensing System, the system of licensure for mortgage companies and individuals seeking licensing by state and federal mortgage licensing authorities] . . . ." The plaintiff alleged that the defendant owned more than 10 percent of its stock and that his license and records "are inexorably linked to the [plaintiff's] . . . records."

The plaintiff alleged that, despite its request, the defendant had failed to comply with the regulatory requirements and his "continued failure to comply with such regulatory requirements has made it impossible for the plaintiff to meet its mandatory regulatory and reporting obligations . . . which puts [the] plaintiff at risk of potential administrative action and suspension of the plaintiff's license by respective state regulators." The plaintiff alleged that its bylaws "address the recalcitrance of the defendant and anyone else who may own [10 percent of its shares] but fails and refuses to comply with regulatory requirements," in that it may demand that such shareholder surrender his or her shares. The plaintiff alleged that, despite making such demand, the defendant refused to surrender his shares.

The plaintiff alleged that, pursuant to a prejudgment remedy in a prior action that it brought against the defendant, a state marshal was in possession of the defen-

dant's stock.[1] Nonetheless, the plaintiff alleged that "it is necessary for a court to adjudicate the rights of the plaintiff in regard to said shares and the determination ordering the surrender of same for their fair value."

In count two, the plaintiff, relying on its allegations in count one, alleged that its bylaws were enacted to protect its "federal and state licensing . . . ." The plaintiff also alleged that the bylaws should be enforced and it sought specific performance related thereto.

The parties entered into a stipulation that was reflected in an order issued by the court, *Dubay*, *J.*, on March 28, 2016. The order provided: "By stipulation, [the defendant's] stock is deemed to be surrendered to the [plaintiff] corporation pursuant to the bylaw provision requiring compliance with state and federal licensing authorities and shall be turned over by the marshal to the corporation unless the defendant fully and completely satisfies all federal and state regulatory licensing requirements for shareholders of [10 percent] or more stock in the plaintiff corporation on or before April 11, 2016."

On March 31, 2016, the defendant filed a notice of compliance with Judge Dubay's March 28, 2016 order. The following day, the plaintiff objected to the notice of compliance on the grounds that neither the plaintiff nor the applicable regulatory authorities had reviewed the filings purportedly made by the defendant or deemed them to be satisfactory. Ultimately, the matter was scheduled for a trial before the court, *Scholl*, *J.*, on February 3, 2017. Prior to the trial, the defendant filed an offer of proof in which he requested to elicit testimony from one or more of the plaintiff's attorneys with respect to

[1] The plaintiff commenced the prior action in 2012 seeking to, inter alia, recover damages under a theory that, for several years, the defendant had used his control of the plaintiff's finances to misappropriate its funds. We will discuss the prior action in greater detail later in this opinion.

the meaning of the parties' stipulation. The plaintiff objected to the defendant's request and offer of proof. The court denied the defendant's request, noting that its order was clear and unambiguous, and that its focus at the trial would be on whether the defendant had complied with the order. Following the trial, the parties sub mitted briefs to the court.

After the date of the trial, but before the court issued its decision, the defendant filed a motion to open the evidence, which the court denied on May 8, 2017. In a subsequent articulation of its denial of this motion, the court explained: "The evidence proffered in the motion was not relevant to the issue before the court. The sole issue before the court was whether the defendant had complied with the court order entered pursuant to the parties' stipulation."

In its June 6, 2017 memorandum of decision, the court stated in relevant part: "The plaintiff is a mortgage lender licensed by state regulators. It does business in a number of states. [Haley Rice, the plaintiff's chief compliance officer and general counsel] oversees licensing requirements for the plaintiff. On March 31, 2016, Rice received the defendant's alleged compliance. It was not sufficient to submit to the regulators because [the defendant's] financial statement was filled out in pencil and the representations and warranties section on the last page, in which the signatory represents that the information provided is true, correct, and complete was crossed out. A notarized document submitted was [incorrectly] dated [March 30, 1948]. Although the plaintiff did receive new financials from the defendant, other deficiencies in his package persisted. A copy of the notarized document was resubmitted which was an altered form of the original document. Rice never received a complete set of forms from [the defendant] sufficient to submit to the appropriate regulatory authorities. [The defendant] did not request a background check as the

regulatory form required. Nor did he fully explain the 'yes' answer on the forms, as required, in particular, and explanation of 'yes' to the question: 'Q. Have you ever voluntarily resigned, been discharged, or permitted to resign after allegations were made that accused you of . . . fraud, dishonesty, theft, or the wrongful taking of property?' To another 'yes' question the defendant provided inaccurate information. No package of forms acceptable to be submitted to the regulators was received from [the defendant] by the plaintiff on or before April 11, 2016.

"The defendant claims that the plaintiff breached the stipulation by not submitting the defendant's package of materials to regulators. Yet the court agrees that the plaintiff had no obligation to submit to the regulators materials that were in pencil, appeared to have been altered, or were inaccurate or incomplete.

"The defendant also claims that the parties' stipulation was not a fully integrated agreement, but included the requirements set forth [in an exhibit submitted to the court]. . . . Here, the court's order, based on the parties' stipulation, is complete in itself as to its terms. In any event, even if the court was to consider the instructions in [the exhibit] as part of the stipulation on which the order was based, the defendant did not comply with those instructions. For example, [the exhibit] required that the defendant request a background check, which he did not.

"Lastly, the defendant has not substantially complied with the stipulation and order as he claims. . . . Here, based on the facts found by the court, the defendant did not comply with the terms of the stipulation and his breach was not immaterial.

"Therefore, the court finds that the defendant . . . did not comply with the court's March 28, 2016 order and judgment shall enter in favor of the plaintiff . . . that the defendant's stock is deemed surrendered to

the [plaintiff] pursuant to the bylaw provision requiring compliance with state and federal licensing authorities and shall be turned over by the marshal to the [plaintiff].'' (Citations omitted.) Thereafter, the defendant filed a motion to reargue, to which the plaintiff objected. The court denied the motion to reargue on July 17, 2017. Thereafter, the defendant appealed. After filing the appeal, the defendant moved to open the judgment, to which the plaintiff objected. On October 13, 2017, the court denied the motion to open. On November 22, 2017, the defendant filed an amended appeal encompassing the judgment rendered by the court in favor of the plaintiff, as well as the court's denial of his motion to open the judgment.

During the pendency of the present appeal, but prior to the time of oral argument, the plaintiff, pursuant to Practice Book § 66-8, filed a motion to dismiss the appeal on the ground that it was moot.[2] The plaintiff argued in relevant part: ''[T]he fundamental issue in this action was the ownership of stock in [the] plaintiff at one time owned by [the] defendant. However, since the commencement of the [present] action, [the] plaintiff has obtained a final judgment in a separate action against [the] defendant. [The] [d]efendant's stock had been the subject [of] a prejudgment attachment during the pendency of such [prior] separate action but has now been turned over to [the] plaintiff and the value of such stock credited toward the judgment [awarded to the plaintiff in the prior action]. Regardless of the outcome of the [present] appeal, [the] plaintiff is entitled to [the] defendant's stock in satisfaction of the judgment in the [prior] action. Because [the] plaintiff

[2] Practice Book § 66-8 provides in relevant part: ''Any claim that an appeal or writ of error should be dismissed, whether based on lack of jurisdiction, failure to file papers within the time allowed or other defect, shall be made by a motion to dismiss the appeal or writ. Any such motion must be filed in accordance with Sections 66-2 and 66-3. A motion to dismiss an appeal or writ of error that claims a lack of jurisdiction may be filed at any time. . . .''

has already taken [the] defendant's stock, there is no practical relief that can be awarded by this court and the appeal is moot. Therefore, [the] defendant's appeal should be dismissed."

In support of its motion to dismiss, the plaintiff referred to the procedural history of the prior action before the trial court, this court, and our Supreme Court, which is not in dispute.[3] In 2012, the plaintiff brought the prior action against the defendant seeking to, inter alia, recover damages under a theory that, for several years, the defendant had used his control of the plaintiff's finances to misappropriate its funds. In July, 2014, the court, *Pickard*, *J.*, granted the plaintiff a prejudgment remedy permitting it to attach $1,250,000 worth of the defendant's stock in the plaintiff. In accordance with this remedy, a state marshal took possession of the defendant's stock. In January, 2016, following a court trial, the court, *J. Moore*, *J.*, awarded the plaintiff $2,080,185.09 in damages.

On January 26, 2016, the defendant filed an appeal from the judgment rendered in the prior action. On July 25, 2017, this court officially released its decision affirming the judgment of the trial court. See *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 167 A.3d 430 (2017). The defendant filed a petition for certification to appeal from this court's judgment, which our Supreme Court denied on November 8, 2017. See *Village Mortgage Co.* v. *Veneziano*, 327 Conn. 957, 172 A.3d 205 (2017). According to the plaintiff, it thereafter took

[3] We may take judicial notice of the court file in the prior action. See, e.g., *McCarthy* v. *Warden*, 213 Conn. 289, 293, 567 A.2d 1187 (1989) (appellate court may "take judicial notice of the court files in another suit between the parties"), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990); *Derderian* v. *Derderian*, 3 Conn. App. 522, 524 n.4, 490 A.2d 1108 ("[a]n appellate court can take judicial notice of court files without notifying the parties"), cert. denied, 196 Conn. 811, 495 A.2d 279 (1985), and cert. denied, 196 Conn. 810, 495 A.2d 279 (1985).

possession of the defendant's stock, cancelled the shares, and credited the value of the stock to partially satisfy the judgment it obtained in the prior action.[4]

The plaintiff argued in its motion to dismiss that the only relief it sought in the present action was the relief that it had obtained, namely, a declaration that the defendant's stock in the plaintiff was deemed to be surrendered to the plaintiff. The plaintiff relied on the fact that the court had awarded it possession of the defendant's stock in the prior action. Moreover, the plaintiff argued, during the pendency of this appeal, the defendant not only had exhausted his right to appeal from the judgment rendered in the prior action, but also that the plaintiff had taken possession of the stock in partial satisfaction of the judgment rendered in the prior action. Thus, the plaintiff argued, the defendant is unable to demonstrate that he is entitled to any practical relief in connection with the present appeal. The plaintiff asserted that, regardless of whether the judgment rendered in the present action was affirmed or reversed as a result of this appeal, the judgment rendered in the prior action provided it with an independent legal right to the stock at issue.

The defendant filed an opposition to the plaintiff's motion to dismiss the appeal. Notably, the defendant did not dispute the relevant facts on which the plaintiff relied in its motion. Instead, the defendant argued that, although this court could not provide him direct, practical relief in terms of his regaining his stock, as the plaintiff had argued, it nonetheless could afford him practical relief with respect to two collateral conse-

[4] A property execution filed by the plaintiff in the prior action on January 19, 2018, reflects that, as of that date, $673,794 of the $2,080,185.09 judgment was paid to the plaintiff in satisfaction of the judgment. In its motion to dismiss, the plaintiff stated that the amount paid reflects the value of the stock that was formerly held by the defendant.

quences attendant to the judgment rendered in the present action.[5] First, he argued that "the issue of when [the plaintiff] took [the defendant's] stock affects the value of the taken stock, and this issue may be subject to preclusion based upon the June 6, 2017 decision . . . ." In this respect, he argued that the judgment from which he appeals "may preclude further litigation of the issue of when the stock was taken by the [plaintiff], in 2012 or 2016. The value of [the plaintiff] changed dramatically between these years, thereby affecting the value of the stock taken from the [defendant] by the [plaintiff]. The issue of the value of the stock has not been litigated to a final judgment, so this issue remains in contention, especially as to whether the amount of the final judgment [awarded to the plaintiff in the prior action] has been partially or completely satisfied."

Second, the defendant argued that his ability to bring an action against the plaintiff sounding in vexatious litigation or fraud, related to the present action, was somehow dependent on his prevailing in the present appeal. The defendant argued that he had "an independent stake in obtaining a judgment in his favor for purposes of a later lawsuit for vexatious litigation and fraud." The defendant argued that several of his appellate claims concerned "the illegal, fraudulent, and vexatious ways the stock was taken in the present case . . . ." On April 11, 2018, this court denied the motion to dismiss the appeal. In the plaintiff's appellate brief, filed on May 11, 2018, the plaintiff, expressly relying on the facts and legal grounds set forth in its motion to dismiss the appeal, reasserted that this court lacks subject matter jurisdiction over the appeal because it is

[5] The defendant also argued that the motion to dismiss was untimely. We observe that the motion to dismiss, challenging the subject matter jurisdiction of this court over the appeal, was brought pursuant to Practice Book § 66-8, which provides in relevant part: "A motion to dismiss an appeal or writ of error that claims a lack of jurisdiction may be filed *at any time*. . . ." (Emphasis added.) See footnote 2 of this opinion.

moot.[6] The defendant did not address the jurisdictional issue in its reply brief. We observe that, despite the fact that this court has denied the plaintiff's motion to dismiss, we may choose to reevaluate the jurisdictional question at this juncture. See, e.g., *Governors Grove Condominium Assn., Inc.* v. *Hill Development Corp.*, 187 Conn. 509, 511 and n.6, 446 A.2d 1082 (1982), overruled on other grounds by *Morelli* v. *Manpower, Inc.*, 226 Conn. 831, 628 A.2d 1311 (1993); *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 687 n.2, 950 A.2d 1, cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008), and cert. denied, 289 Conn. 942, 959 A.2d 1008 (2008); *Rocque* v. *Sound Mfg., Inc.*, 76 Conn. App. 130, 132 n.3, 818 A.2d 884, cert. denied, 263 Conn. 927, 823 A.2d 1217 (2003); *Groesbeck* v. *Sotire*, 1 Conn. App. 66, 67–68, 467 A.2d 1245 (1983). In this circumstance, we are persuaded that it is necessary to reevaluate the jurisdictional issue.

We are guided in our jurisdictional analysis by well settled principles. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . 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

[6] As part of the jurisdictional argument set forth in its appellate brief, the plaintiff also relies on facts that arose subsequent to this court's denial of its motion to dismiss. Specifically, the plaintiff relies on a partial transcript of an April 27, 2018 postjudgment hearing before Judge Moore in the prior action. The plaintiff reproduced the partial transcript in the appendix to its brief. The transcript reflects that, at the hearing, the defendant's attorney sought a determination as to whether the judgment rendered against the defendant in the prior action had been satisfied in whole or in part. The plaintiff draws our attention to the portions of the transcript in which, on several occasions, the defendant's attorney stated that the defendant's stock had been taken by the plaintiff, but that it was necessary to ascertain its value for the purposes of determining whether the stock satisfied the judgment

result in practical relief to the complainant. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *Renaissance Management Co.* v. *Barnes*, 175 Conn. App. 681, 685–86, 168 A.3d 530 (2017).

"Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; internal quotation marks omitted.) *New Image Contractors, LLC* v. *Village at Mariner's Point Ltd. Partnership*, 86 Conn. App. 692, 698, 862 A.2d 832 (2004).

"[Our Supreme Court] has recognized, however, that a case does not necessarily become moot by virtue of the fact that . . . due to a change in circumstances, relief from the actual injury is unavailable. [Our Supreme Court has] determined that a controversy continues to exist, affording the court jurisdiction, if the actual injury suffered by the litigant potentially gives rise to a collateral injury from which the court can grant relief. . . . [F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. . . . This standard provides

the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future. The reviewing court therefore determines, based upon the particular situation, whether the prejudicial collateral consequences are reasonably possible." (Citation omitted; internal quotation marks omitted.) *State* v. *Gomes*, Conn. , , A.3d (2021).

There does not appear to be any dispute between the parties that this court is unable to afford the defendant any direct, practical relief from the reversal of the judgment from which he appeals. The subject of the judgment in the present action was the defendant's stock in the plaintiff and, during the pendency of the present appeal, the plaintiff has taken the stock in satisfaction of the judgment rendered in the prior action. Thus, we focus our analysis on the defendant's argument that we may afford him some practical relief for the two reasons that he has articulated in his opposition to the plaintiff's motion to dismiss the appeal.

The defendant's first argument is that the issue of when the plaintiff took the stock greatly affects the value of the stock and that "this issue may be subject to preclusion based upon the June 6, 2017 decision [of Judge Scholl in the underlying action] . . . ." We note that, in the prior action, the defendant maintained that the plaintiff took the stock in 2012, as a consequence of certain regulatory filings, and not in 2016, when the court rendered judgment in the prior action in favor of the plaintiff. The defendant, however, does not offer any explanation of how a reversal of the judgment in the present action would affect the value of the stock that was taken by the plaintiff as a consequence of the

judgment rendered in the prior action. The court in the present action did not make any findings concerning the valuation of the stock or when the plaintiff took it.

We also note that, although the defendant argues before this court that "[t]he outcome of [the present action] has collateral estoppel and res judicata effects as to when the [plaintiff] took [his] stock," he completely contradicted these arguments before the trial court in the prior action. In the prior action, on February 13, 2018, the defendant filed a motion for a determination that the judgment had been satisfied, in which he argued that the value of the stock taken by the plaintiff satisfied the entire judgment.[7] The plaintiff filed two objections to this motion. In a March 13, 2018 reply, the defendant argued in relevant part: "Claim preclusion, or res judicata, does [not] . . . affect this stock valuation. No court has determined the fair value of the stock taken from the defendant in satisfaction of the judgment." Specifically referring to the judgment rendered in the present action, the defendant stated: "Claim preclusion does not apply, as to stock valuation, with regard to the judgment [rendered by Judge Scholl on June 6, 2017]. In that matter, Judge Scholl did not hear any testimony regarding the value of the defendant's stock; the trial decided which party breached a stipulation. There was no determination of the stock's value, over the defendant's objection." These representations by the defendant in the prior action are consistent with our assessment of the present action.

Turning to the next collateral consequence advanced by the defendant, he argues that his ability to bring an action, related to the present action, against the plaintiff in the future is dependent on this appeal being heard on its merits. His arguments are, at times, inconsistent. He argues that "because of the [plaintiff's] misconduct,

[7] Ultimately, Judge Moore denied the defendant's motion, concluding that "the defendant presented wholly irrelevant materials and failed, miserably, to sustain his burden to prove that the judgment had been satisfied."

as discussed in [the defendant's appellate] brief, the [defendant] will seek to bring a vexatious litigation claim against the [plaintiff]. However, the [defendant] cannot sue for vexatious litigation or fraud if the underlying lawsuit has not terminated fully in [the plaintiff's] favor. Accordingly, both parties continue to have stakes in the outcome of this appeal . . . ." He also argues: "[B]ecause of the illegal, fraudulent and vexatious way the stock was taken in the present case, which remain issues on appeal, the case is not moot as the [defendant] has an independent stake in obtaining a judgment in his favor for purposes of a later lawsuit for vexatious litigation and fraud." He asserts that, if he prevails in this appeal, "the [plaintiff] will be liable for its wrongful conduct in litigating this matter."

A brief review of principles governing vexatious litigation is warranted. "The cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages. . . . In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under [General Statutes] § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. . . . In the context of a claim for vexatious litigation, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 553–54, 944 A.2d 329 (2008).

"[I]f it appears in the action for . . . a vexatious suit, that the prosecution properly ended in a judgment of conviction, or that in the civil suit judgment was properly rendered against the defendant therein, such outstanding judgment is, as a general rule, conclusive evidence of the existence of probable cause for instituting the prosecution, or the suit. . . . [I]f the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail. . . . *This is true although it is reversed upon appeal and finally terminated in favor of the person against whom the proceedings were brought.* . . . Likewise, a termination of civil proceedings . . . by a competent tribunal adverse to the person initiating them is not evidence that they were brought without probable cause." (Citations omitted; emphasis added; internal quotation marks omitted.) *Byrne* v. *Burke*, 112 Conn. App. 262, 275–76, 962 A.2d 825, cert. denied, 290 Conn. 923, 966 A.2d 235 (2009).

The foregoing authority clearly undermines the defendant's argument that the present appeal may affect the outcome of a vexatious litigation action brought by him against the plaintiff in the future. Because the plaintiff prevailed in the present action, the defendant is unable to demonstrate that probable cause was lacking, even if we were to resolve this appeal in his favor. Contrary to the defendant's arguments, there is no possibility that our resolution of the claims raised in the appeal would have the effect of imposing liability on the plaintiff for commencing the present action.

The defendant also argues that the present appeal could affect a future action against the plaintiff sounding in fraud. "The essential elements of an action in [common-law] fraud . . . 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. . . . [T]he party to whom the false representation was made [must claim] to have relied on that representation and to have suffered harm as a result of the reliance." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010).

The scope of the underlying action was narrow. The sole issue before the court was whether the defendant had complied with its March 28, 2016 order. There were no claims of fraud before the court and, in fact, the conduct of the plaintiff was not the subject of the court's decision. As a result of the defendant's conclusory analysis of this issue in his objection to the plaintiff's motion to dismiss the appeal, the factual basis of any future cause of action sounding in fraud is unknown to this court. In invoking the collateral consequences doctrine, an appellant need not demonstrate what is certain in the future, but must, through reasoned argument, demonstrate to the reviewing court what is reasonably possible in the future. See *State* v. *Gomes*, supra, Conn. . The defendant has failed to do so, and it is well settled that "speculation and conjecture . . . have no place in appellate review." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009). Accordingly, this argument is unavailing.

For the foregoing reasons, we are not persuaded that the collateral consequences on which the defendant relies are reasonably possible. We dismiss the appeal as moot and thus do not reach the merits of the claims raised therein.

The appeal is dismissed.

In this opinion the other judges concurred.

DIANA PASCOLA-MILTON *v.* LEROY MILLARD ET AL. (AC 43011)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiff D sought to recover damages from the defendant L Co., her insurer, for underinsured motorist benefits, and from the defendant M, for M's alleged negligence in connection with a motor vehicle accident involving D. D's husband, C, joined the action as a party plaintiff more than two years after D commenced the action. D entered into a voluntary arbitration agreement with L Co., and, after an evidentiary hearing, the arbitrator awarded D a certain amount of damages in underinsured motorist benefits. D filed a demand for a trial de novo with the trial court, which was denied. Additionally, M moved for summary judgment on C's claims against him on the ground that they were barred by the two year statute of limitations (§ 52-584) for negligence claims. The trial court granted M's motion for summary judgment. D and C filed a joint appeal to this court challenging the trial court's denial of D's demand for a trial de novo and the judgment for M on C's complaint. *Held*:

1. The trial court did not err in denying D's demand for a trial de novo following the arbitrator's decision on her claims against L Co., as the parties entered into a voluntary arbitration; the trial court determined that the submission was voluntary and unrestricted, and, because D voluntarily submitted her claims against L Co. to arbitration, any review of the arbitrator's decision was governed by a statute (§ 52-418) under which there was no right to a trial de novo, and the legal authority pursuant to which D argued that she had an absolute right to a trial de novo pertained to compulsory, not voluntary, arbitration.
2. The trial court did not err in rendering summary judgment in favor of M on the ground that C's claims were barred by the two year statute of limitations in § 52-584 because C suffered actionable harm on the date of the accident and he did not file his complaint against M within two years from that date; in arguing that his claims were not subject to the two year statute of limitations in § 52-584, but rather the three year statute of repose under § 52-584, C baldly asserted that he did not discover any actionable harm until two years after the accident, which was belied by C's allegation that he arrived at the scene of the accident shortly after it occurred and suffered shock viewing D's condition and the condition of the car, and it could not reasonably be disputed that

any alleged injury to C was first sustained on the date of the accident when he first observed D's injuries.

Argued November 17, 2020—officially released March 9, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of, inter alia, the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the matter was transferred to the judicial district of Danbury; thereafter, the court, *Shaban*, *J.*, granted the motion of Clive Milton to be made a party plaintiff; subsequently, the named plaintiff withdrew her action as to the named defendant; thereafter, the named plaintiff withdrew her action as to the defendant Liberty Mutual Fire Insurance Company; subsequently, the court, *D'Andrea*, *J.*, denied the named plaintiff's demand for a trial de novo; thereafter, the court, *D'Andrea*, *J.*, granted the named defendant's motion for summary judgment as to the plaintiff Clive Milton and rendered judgment thereon, and the plaintiffs filed a joint appeal to this court. *Affirmed.*

Diana Michele Pascola-Milton, self-represented, the appellant (plaintiff).

Clive Milton, self-represented, the appellant (plaintiff).

John W. Cannavino, *Jr.*, for the appellee (named defendant).

Bryan J. Haas, for the appellee (defendant Liberty Mutual Fire Insurance Company).

Opinion

CRADLE, J. In this case arising from a motor vehicle accident between the plaintiff Diana Pascola-Milton and the named defendant, Leroy Millard, Pascola-Milton appeals from the judgment of the trial court denying her demand for a trial de novo following an arbitration

award in her favor against her insurer, the defendant Liberty Mutual Fire Insurance Company (Liberty), for underinsured motorist benefits. Pascola-Milton argues that she has an absolute right to a trial de novo.[1] Clive Milton, Pascola-Milton's husband and coplaintiff, appeals from the summary judgment rendered in favor of Millard on Milton's derivative claims for loss of consortium, bystander emotional distress and negligent infliction of emotional distress.[2] Milton claims that the court erred in rendering summary judgment in favor of Millard on the ground that those claims were barred by the applicable statute of limitations because Milton's complaint

[1] In February, 2019, Pascola-Milton commenced a separate action by filing an application to vacate the arbitration award, which the trial court, *Krumeich, J.*, denied on May 16, 2019. See *Pascola-Milton* v. *Liberty Mutual Fire Ins. Co.*, Superior Court, judicial district of Danbury, Docket No. CV-19-6030164-S. In that action, she sought to subpoena the arbitrator for a hearing, but Judge Krumeich denied her request. In this appeal, she appears to challenge rulings issued in that action when she claims that the trial court erred in denying (1) her motion to vacate the arbitration award, (2) her request to enter the arbitrator's decision into evidence, and (3) her request to subpoena the arbitrator. Because those rulings were not issued in this case, Pascola-Milton's claims challenging them are not reviewable in this appeal.

[2] Milton also asserted claims against Liberty, including claims for underinsured motorist benefits, and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq. On January 17, 2019, Liberty moved for summary judgment on the ground that, because Milton's claims against Millard were time barred, so too were his claims against Liberty. On June 10, 2019, the court, *Krumeich, J.*, issued a memorandum of decision granting Liberty's motion for summary judgment. The plaintiffs filed a joint amended appeal form challenging that judgment, but the appellate clerk returned that filing as defective because it was e-filed using an incorrect document type or path. Milton never filed a corrected amended appeal form challenging the June 10, 2019 judgment for Liberty, as required by Practice Book § 61-9. Because Milton failed to amend this appeal to challenge Judge Krumeich's ruling granting summary judgment for Liberty, his claim challenging that judgment is unreviewable. See *Jewett* v. *Jewett*, 265 Conn. 669, 673 n.4, 830 A.2d 193 (2003) (declining to review defendant's claim challenging trial court's postjudgment order because defendant did not file amended appeal as required by Practice Book § 61-9); *Brown* v. *Brown*, 190 Conn. 345, 350–51, 460 A.2d 1287 (1983).

was filed more than two years after the motor vehicle accident. We affirm the judgment of the trial court.

The following procedural history is relevant to this appeal. On November 29, 2014, Pascola-Milton was injured in a two car motor vehicle accident involving Millard. On July 6, 2016, she commenced this action, asserting a negligence claim against Millard, and a claim for underinsured motorist benefits against Liberty.

On October 17, 2017, Milton filed a motion to join this action as a party plaintiff, and that motion was granted on November 30, 2017. In his operative complaint, Milton asserted claims for loss of consortium, bystander emotional distress, and negligent infliction of emotional distress against Millard. He also asserted, inter alia, claims for loss of consortium and bystander emotional distress against Liberty, in addition to claims for intentional infliction of emotional distress, underinsured motorist benefits, violations of the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., and the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[3]

On March 16, 2018, Pascola-Milton withdrew her action as to Millard after he accepted her offer of compromise. On August 20, 2018, she entered into a voluntary arbitration agreement with Liberty. An evidentiary hearing was held before the arbitrator on January 3, 2019, and Pascola-Milton withdrew her complaint against Liberty on January 14, 2019. On January 30, 2019, the arbitrator issued a decision awarding Pascola-Milton $72,635 in damages.

[3] Milton also asserted CUIPA and CUTPA claims against Millard's insurer, Government Employees Insurance Company (GEICO). GEICO did not file an appearance in this action. Milton did not move to default GEICO for its failure to appear, and there has been no judgment entered as to Milton's claims against GEICO. Accordingly, Milton's claims against GEICO are not before us in this appeal.

On February 11, 2019, Pascola-Milton filed a demand for a trial de novo, which stated: "Pursuant to [Practice Book] [§] 23-66 (c) . . . [and General Statutes §§] 52-549z and 52-549aa . . . [Pascola-Milton] hereby appeals from the arbitrator's decision and claims the matter for a trial de novo in accordance with the rules." On March 21, 2019, the trial court, *D'Andrea*, *J.*, denied her demand, finding that there was no statutory right to a trial de novo on an unrestricted voluntary submission to arbitration. On April 5, 2019, Pascola-Milton filed a motion to reargue and for reconsideration of the court's denial of her demand for a trial de novo. On April 29, 2019, the court, *Krumeich*, *J.*, denied Pascola-Milton's motion.

Meanwhile, on January 9, 2019, Millard moved for summary judgment on Milton's claims against him on the ground that those claims were barred by the two year statute of limitations set forth in General Statues § 52-584. After Milton timely objected and the court, *D'Andrea*, *J.*, heard oral argument from the parties, the court issued a memorandum of decision dated April 22, 2019, granting Millard's motion for summary judgment on all of the counts directed against him in Milton's complaint on the ground that Milton's claims were barred by the statute of limitations.

On June 3, 2019, Pascola-Milton and Milton filed this joint appeal challenging the denial of Pascola-Milton's demand for a trial de novo and the judgment for Millard on Milton's complaint.

I

Pascola-Milton claims that the trial court erred in denying her demand for a trial de novo following the arbitrator's decision on her claims against Liberty. Pascola-Milton argues that she had an "absolute right" to a trial de novo. We disagree.

In addressing Pascola-Milton's demand for a trial de novo, the trial court set forth the following additional relevant facts. "On February 11, 2019 . . . Pascola-Milton filed the present motion for a demand for trial de novo. [Pascola-Milton's] motion alleges that pursuant to Practice Book § 23-66 (c) . . . and . . . §§ 52-549z and 52-549aa, [she] is appealing the arbitrator's decision and requests the court schedule a trial de novo. By way of background, [Pascola-Milton] and [Liberty] executed a voluntary submission entitled 'Arbitration Agreement' (agreement) in August, 2018. In the opening paragraph of the agreement, it states: '[T]he parties agree to submit all claims to a final and binding arbitration before Attorney Richard Mahoney as arbitrator.' The agreement further states: '11. The parties agree that the arbiter will be asked to determine liability and fair, just and reasonable damages . . . . 13. The Arbitrator shall resolve all differences and disputes between the parties . . . . [And finally] 17. The award shall be final, binding and not subject to review or appeal, except as provided by Connecticut Arbitration Statutes.' "

The court denied Pascola-Milton's demand for a trial de novo, reasoning: "In the present matter, if the agreement was not subject to compulsory arbitration, but was a voluntary submission, a trial de novo is not warranted. The demand for trial de novo can only be made if the arbitration was compulsory pursuant to General Statutes § 52-549u. Based on the foregoing, the court finds that this agreement was clearly an unrestricted voluntary submission, and thus, not subject to an ability to seek a trial de novo. There is clearly no provision in § 52-549u that allows for a trial de novo for a voluntary submission to arbitration."

Pascola-Milton argues that she had an absolute right to a trial de novo following the arbitrator's decision on her claims against Liberty. The standard of review for

arbitration awards is determined by whether the arbitration was compulsory or voluntary. "Where the parties have voluntarily and contractually agreed to submit to arbitration and have delineated the powers of the arbitrator through their submission, then the scope of judicial review of the award is limited by the terms of the parties' agreement and by the provisions of General Statutes § 52-418. . . . Thus, in determining whether an arbitrator has exceeded his authority or improperly executed the same under § 52-418 (a), the courts need only examine the submission and the award to determine whether the award conforms to the submission. . . . Under an unrestricted submission, the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . .

"Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks of and waived objections to that decision. . . . It is clear that a party cannot object to an award which accomplishes precisely what the [arbitrator was] authorized to do merely because that party dislikes the results. . . . Thus . . . the parties should be bound by a decision that they contracted and bargained for, even if it is regarded as unwise or wrong on the merits." (Citations omitted.) *American Universal Ins. Co.* v. *DelGreco*, 205 Conn. 178, 185–87, 530 A.2d 171 (1987).

Here, the trial court determined that the submission in this case was voluntary and unrestricted. Pascola-Milton has not challenged that determination, nor could she reasonably do so because, as noted by the trial court, the parties voluntarily contracted to submit their issues to arbitration, and the arbitration agreement provided, inter alia, that the arbitrator would resolve all differences and disputes between them. The legal

authority pursuant to which Pascola-Milton argues that she had an absolute right to a trial de novo, specifically § 52-549z and Practice Book § 23-66 (c), pertains to compulsory arbitration, not voluntary arbitration. Because Pascola-Milton voluntarily submitted her claims against Liberty to arbitration, any review of the arbitrator's decision is governed by § 52-418, under which there is no right to a trial de novo. Accordingly, Pascola-Milton's challenge to the denial of her demand for a trial de novo is unavailing.

II

Milton claims that the court erred in rendering summary judgment in favor of Millard on the ground that his claims are barred by the two year statute of limitations set forth in § 52-584. He contends that his claims are subject to the three year statute of repose contained in § 52-584. We disagree.[4]

Our review of a trial court's decision granting a motion for summary judgment is well established. "Practice Book § [17-49] requires that judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A 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. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue

[4] Milton also argues that the court erred in granting summary judgment because it had previously denied "motions to dismiss and motions to strike" in which the defendants made "exactly the same argument" regarding the two year statute of limitations. It is not clear from Milton's brief whether he is referring to the summary judgment rendered in favor of Millard or Liberty. Milton has not provided any citations to the record in support of this argument. Our review of the record reveals that Milton's claim is factually inaccurate. Additionally, Milton has provided scant analysis, and no legal authority, in support of this argument, other than a reference to "res ipsa loquitur," which is clearly inapplicable to this action.

as to all material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . . The party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. See Practice Book §§ [17-44 and 17-45]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary. . . .

"Summary judgment may be granted where the claim is barred by the statute of limitations." (Internal quotation marks omitted.) *Wojtkiewicz* v. *Middlesex Hospital*, 141 Conn. App. 282, 285–86, 60 A.3d 1028, cert. denied, 308 Conn. 949, 67 A.3d 291 (2013). "The determination of which, if any, statute of limitations applies to a given action is a question of law over which our review is plenary." *Government Employees Ins. Co.* v. *Barros*, 184 Conn. App. 395, 398, 195 A.3d 431 (2018).

Here, the trial court held that the two year limitation set forth in § 52-584 applied to Milton's claims against Millard.[5] Section 52-584 provides in relevant part: "No action to recover damages for injury to the person . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

This court has explained that "this statute imposes two specific time requirements on plaintiffs. The first requirement, referred to as the discovery portion . . .

[5] In opposition to Millard's summary judgment, Milton also argued that his claims against Millard were governed by General Statutes § 52-577, which provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." The trial court rejected that argument and Milton has not resuscitated it on appeal.

requires a plaintiff to bring an action within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . . The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of. . . . The three year period specifies the time beyond which an action under § 52-584 is absolutely barred, and the three year period is, therefore, a statute of repose." (Emphasis omitted; internal quotation marks omitted.) *Wojtkiewicz* v. *Middlesex Hospital*, supra, 141 Conn. App. 286–87. "When applying § 52-584 to determine whether an action was timely commenced, this court has held that an injury occurs when a party suffers some form of actionable harm. . . . Actionable harm occurs when the plaintiff discovers . . . that he or she has been injured and that the defendant's conduct caused such injury. . . . The statute begins to run when the plaintiff discovers some form of actionable harm, not the fullest manifestation thereof. . . . The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories." (Internal quotation marks omitted.) Id., 287.

Here, the facts pertaining to the statute of limitations are undisputed. The motor vehicle accident that caused Pascola-Milton's injuries, and from which Milton's alleged injuries are derived, occurred on November 29, 2014. Although Pascola-Milton commenced this action in July, 2016, within two years of the date of the accident in this case, Milton did not seek to join it until October, 2017, beyond that two year time period. Milton argues that his claims are not subject to the two year statute of limitations set forth in § 52-584, but, rather, that they are governed by the three year statute of repose set forth in that statute.[6] In support of this contention, Milton baldly asserts that "in the exercise of reasonable

[6] Milton also seems to argue that his claims against Millard are governed by the three year statute of limitations set forth in General Statutes § 38a-

care, [he] did not discover, was unable to determine if he had actionable harm until two years after the underlying case bodily injury claim by his wife." This assertion is belied by Milton's allegation that he arrived at the scene of Pascola-Milton's accident shortly after it occurred, and "suffered shock viewing his wife's condition and the condition of the car, which he photographed before it was altered in any way." Milton's claims against Millard stem from allegations of Millard's negligent or reckless conduct that caused the accident with Pascola-Milton and derive from the personal injury sustained by Pascola-Milton. It, therefore, cannot reasonably be disputed that any alleged injury to Milton was first sustained on the date of the accident, when he first observed his wife's injuries. Because Milton suffered actionable harm on the date of the accident, and he did not file his complaint against Millard within two years from that date, his claims are barred by the statute of limitations. Accordingly, we conclude that the court properly rendered summary judgment in favor of Millard on Milton's claims against him.

The judgment is affirmed.

In this opinion the other judges concurred.

JOANN ANDERSON *v.* TOWN OF BLOOMFIELD ET AL.
(AC 42905)

Bright, C. J., and Prescott and Flynn, Js.

Syllabus

The plaintiff sought to recover damages caused by an allegedly defective roof installed by the defendant P Co. The defendant town of Bloomfield had hired P Co. to install a new roof on the plaintiff's home pursuant to a residential rehabilitation program, whereby the town offered financial

336. Because that statute pertains to actions against insurance companies for uninsured and underinsured motorist coverage, it is inapplicable to Milton's claims against Millard.

assistance for home improvements to qualified homeowners. Under the program, the town acted on behalf of the homeowner to secure appropriate contractors to do the work and entered into all necessary contracts. P Co. completed work on the plaintiff's roof in July, 2013, and was paid by the town. In October, 2013, the plaintiff noticed water entering her home and an inspection determined that P Co. had installed a defective roof. The plaintiff brought this action alleging in part that P Co. breached its contract to the town when it installed a defective roof and that she was a third-party beneficiary of the contract. The trial court granted P Co.'s motion to dismiss, and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court improperly dismissed the plaintiff's action for lack of standing, that court having improperly determined that the plaintiff was not a third-party beneficiary of the contract: because the language of the contract was ambiguous as to whether the town and P Co. intended for the plaintiff to be a third-party beneficiary of that contract, it was a question for the ultimate fact finder and, thus, the question of whether the plaintiff had standing as a third-party beneficiary could not be resolved without an evidentiary hearing and, because resolution of the factual issue is intertwined with the merits of the case, resolution of this jurisdictional question should be resolved by the ultimate fact finder as part of the trial on the merits; accordingly, this court reversed the judgment of the trial court and remanded this case for further proceedings.

Argued November 12, 2020—officially released March 9, 2021

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Gordon*, *J.*, granted the motion to dismiss filed by the defendant Plourde Enterprises, LLC, and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Jeremy S. Donnelly, for the appellant (plaintiff).

Deborah Etlinger, with whom, on the brief, was *Erin Canalia*, for the appellee (defendant Plourde Enterprises, LLC).

Opinion

BRIGHT, C. J. In this third-party beneficiary breach of contract case, the plaintiff, Joann Anderson, appeals from the judgment of the trial court dismissing her

complaint against the defendant Plourde Enterprises, LLC,[1] on the ground that she lacks standing to pursue the action. On appeal, the plaintiff claims that the court erred in concluding that she was not an intended third-party beneficiary of a contract between the defendant and the town of Bloomfield (town), to whom the defendant owed a direct obligation. She argues that the contract at issue, at the very least, was ambiguous as to the intent of the defendant and the town and, therefore, the court should have reserved this question for the fact finder. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The following relevant facts, as alleged by the plaintiff in her complaint, and procedural history are relevant to our consideration of the plaintiff's claim on appeal. The plaintiff owns a single-family home in the town, which has been her family home for twenty years. Her home was in need of a new roof, and the plaintiff investigated a number of contractors that could perform the work. She also began looking at financing options. The plaintiff learned that the town offered financial assistance for home improvements to qualified homeowner residents, at no immediate cost to the homeowner, through a residential rehabilitation assistance program (program). Under the program, the town acted on behalf of the homeowner to secure appropriate contractors to do the work. The town would enter into all necessary contracts in order to facilitate the projects, and it would be responsible for review and payment to the contractors once the work was completed. In exchange, the homeowner had to agree to a lien in the town's favor on his or her property in an amount equal to what the town paid for the work completed. The financial

[1] The plaintiff also named as a defendant the town of Bloomfield. Before the court rendered a judgment of dismissal, however, the plaintiff withdrew her claims against the town. For purposes of this appeal, we refer to Plourde Enterprises, LLC, as the defendant.

assistance offered through the program carried no interest, and no payments were due from the homeowner until he or she decided to sell or transfer title to the property.

Having recently been laid off from her employment and working only a part-time job, the plaintiff, on or about November 28, 2012, applied for the program. She provided detailed information about her income and assets, and, on January 7, 2013, the plaintiff was approved for the program. The town contracted with the defendant to install, inter alia, a new roof on the plaintiff's home. The agreement between the town and the defendant was entered into on or about May 20, 2013. The town agreed to pay the defendant $12,000 for the plaintiff's new roof.

In June, 2013, the defendant began work on the plaintiff's roof, and it completed the work the following month. The town paid the defendant the contract price. In October, 2013, the plaintiff noticed water entering her home through the walls and ceiling in her kitchen and in the basement. The plaintiff's home was inspected, and it was determined that the defendant had installed a defective roof. As a result, it was recommended that the roof be completely replaced. The plaintiff notified the town in October, 2013, through e-mail, telephone, and in person.

As water continued to enter the home because of the faulty roof installation, the walls and ceilings sustained damage, and a significant amount of mold began to grow in the attic and in other parts of the home. Damage to other parts of the home also occurred because of the excessive moisture in the walls, including the malfunction of a wall oven and the electrical wiring in the kitchen. The damage to the plaintiff's home made it uninhabitable, and the plaintiff was forced to move out of her family home.

In a complaint filed on July 17, 2018, the plaintiff claimed in relevant part that the defendant was in breach of its contract with the town and that the plaintiff was a third-party beneficiary of that contract. She alleged that when the defendant entered into its contract with the town, it assumed a direct obligation to the plaintiff to provide a serviceable roof to her home, and that the defendant knew that its failure to do so would cause direct harm to the plaintiff. She further alleged that the defendant breached its contract when it installed a defective roof, causing her to sustain damages.

On September 28, 2018, the defendant filed a motion to dismiss the plaintiff's complaint on the ground that the plaintiff did not have standing as a third-party beneficiary of the town's contract with the defendant and that the court, therefore, did not have jurisdiction over the case. The defendant's motion was accompanied by a memorandum in support and the affidavit of Jason Plourde, the defendant's managing member. Attached to Plourde's affidavit as exhibit 1 was the contract between the town and the defendant. Included as part of the contract were addenda setting forth general and supplementary conditions and the defendant's bid prices for the work described in the contract.

On April 18, 2019, the court, agreeing with the defendant, rendered judgment dismissing the plaintiff's complaint. Specifically, the court concluded that, even if the plaintiff was a foreseeable beneficiary of the contract between the defendant and the town, "that is insufficient to provide the plaintiff with standing to assert a claim against [the defendant] as a third-party beneficiary of the contract." The court reasoned that "[a] careful review of the contract between [the defendant] and the town indicates that the plaintiff is not a third-party beneficiary . . . because, although the plaintiff's home is specifically referenced in the contract, and

although the purpose of the contract includes, inter alia, performing work on the plaintiff's home, there is no expressed intent to create an obligation on the part of [the defendant] directly to the plaintiff. Instead, all of the contract terms were negotiated with the town, including the liquidated damages provision and the limitation on assignments. . . . [I]t is incumbent on the plaintiff to identify specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her. The court cannot identify any such language in the contract." This appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that she was not an intended third-party beneficiary to whom the defendant owed a direct obligation. She argues that the contract establishes that she is a third-party beneficiary because she is *the intended beneficiary* of the work that the defendant contracted to perform and because her address is listed in the contract in two places. The plaintiff "concedes that a reasonable opposing position [however] might be that the contract language is ambiguous on this point" and that "the issue [therefore] is for the fact finder." The defendant argues that the court properly determined that the plaintiff lacks standing to bring this action because the plaintiff was neither a party to the contract nor an intended third-party beneficiary under the language of the contract. We conclude that the contract is ambiguous as to whether the town and the defendant intended the plaintiff to be a third-party beneficiary to the contract and that, therefore, the issue properly cannot be resolved based on the defendant's motion and the documents attached thereto. Instead the issue requires an evidentiary hearing before the ultimate fact finder at which the fact finder can consider the parties' intent, in light of the circumstances surrounding the making of the contract, including the motives and purposes of the parties.

The standard of review on a challenge to the trial court's granting of a motion to dismiss is well established. "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Chiulli* v. *Zola*, 97 Conn. App. 699, 703–704, 905 A.2d 1236 (2006).

"It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . It is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract . . . . [W]hether a party has standing, based upon a given set of facts, is a question of law for the court . . . and in this respect the label placed on the allegations by the parties is not controlling." (Citations omitted; internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 579–80, 833 A.2d 908 (2003).

Where, as here, the motion to dismiss is supported by an affidavit and the contract central to the dispute, the court may consider supplementary *undisputed* facts contained in those documents in deciding the motion to dismiss. "If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the

plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"[Furthermore] where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties. . . . [D]efendants' states of mind and motives [are] facts that . . . are not ordinarily subject to determination on the basis of documentary proof alone." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 652–54, 974 A.2d 669 (2009); id., 654 (issue of sovereign immunity could not be resolved on motion to dismiss because state's argument "turned on [the] particular resolution of [a] factual dispute" requiring "a full trial on the merits of the action"); see *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 355 n.12, 141 A.3d 784 (2016) (when evidence necessary to court's determination of jurisdiction requires weighing by fact finder, issue may be "more appropriate for consideration at trial").

"The [third-party] beneficiary doctrine provides that [a] [third-party] beneficiary may enforce a contractual

obligation without being in privity with the actual parties to the contract. . . . Therefore, a [third-party] beneficiary who is not a named obligee in a given contract may sue the obligor for breach." (Internal quotation marks omitted.) *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 473, 52 A.3d 702 (2012). "[A] third party seeking to enforce a contract must allege and prove that the contracting parties intended that the promisor should assume a direct obligation to the third party." *Stowe* v. *Smith*, 184 Conn. 194, 196, 441 A.2d 81 (1981). "[T]he fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a [third-party] beneficiary. . . . Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary . . . no duty to him is created." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 604, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018).

"Section 302 of 2 Restatement (Second) of Contracts (1981) defines intended and incidental beneficiaries as follows:

"(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

"(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

"(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

"(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." (Internal quotation marks omitted.) Id., 604 n.5.

"The law regarding the creation of contract rights in third parties in Connecticut is . . . well settled. . . . [T]he ultimate test to be applied [in determining whether a person has a right of action as a third-party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the [third-party] [beneficiary] and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties. . . . [I]t is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed [third-party] beneficiary . . . . [T]he only way a contract could create a direct obligation between a promisor and a [third-party] beneficiary would have to be, under our rule, because the parties to the contract so intended. . . .

"The requirement that both contracting parties must intend to confer enforceable rights in a third party rests, in part at least, on the policy of certainty in enforcing contracts. That is, each party to a contract is entitled to know the scope of his or her obligations thereunder. That necessarily includes the range of potential third persons who may enforce the terms of the contract. Rooting the range of potential third parties in the intention of both parties, rather than in the intent of just one of the parties, is a sensible way of minimizing the risk that a contracting party will be held liable to one whom he neither knew, nor legitimately could be held to know, would ultimately be his contract obligee." (Citations omitted; internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 266 Conn. 580–81. Where the language of the contract is unambiguous, "a proper analysis of the language at issue is not dependent on extrinsic evidence of the parties' intent. See *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015) ('[w]hen only one interpre-

tation of the contract is possible, the court need not look outside the four corners of the contract' . . .)." *Raczkowski* v. *McFarlane*, 195 Conn. App. 402, 411 n.4, 225 A.3d 305 (2020).

In the present case, the contract between the town and the defendant is made up of the following contract documents: the agreement, the supplementary conditions, the general conditions, the addenda (if any), and the defendant's bid. The agreement provides in relevant part that the defendant "shall complete all [w]ork as specified . . . in the [c]ontract [d]ocuments,[2] including all necessary incidental work. The purpose of the project is miscellaneous residential upgrades at [four residential addresses, including the plaintiff's address]." (Footnote added.) The agreement requires that all work be completed within sixty days. It also contains a liquidated damages provision that includes a "time is of the essence" clause, requiring the defendant to pay to the town $500 each day that the work is incomplete after the sixty day time period. The agreement also provides that the town will pay the defendant $12,000 for the work to be done to the plaintiff's property, and it provides a mechanism for progress payments.

Also in the agreement are several representations of the defendant, including that the defendant has studied the contract documents and other data identified in the bidding documents, it has visited the work sites and become familiar with them, and it does not believe any further information or examination is necessary in order for it to complete the project. The agreement further provides that the rights and obligations under it

[2] Only one page of the bidding documents is in the record. This page lists each address for which the defendant was submitting a bid, and it separately lists the bid for each individual aspect of each home address. For example, for the plaintiff's address, the defendant set forth her street with the description "roof" and a bid of $12,000. For a property on Brooke Street, it listed "insulation" with a bid of $5600, and it listed "flooring" with a bid of $7800.

cannot be assigned without the consent of the other party and that the defendant and the town "each binds itself and its partners, successors, assigns, and to the other party hereto and its partners, successors and assigns in respect of all covenants, agreements, and obligations contained in the [c]ontract [d]ocuments." In the agreement, the defendant also agrees to comply with all federal, state, and local laws, and all rules, regulations, and ordinances of the town that may affect the work or services rendered by the defendant.

In the supplementary conditions, there is, inter alia, an indemnification provision that provides that the defendant will indemnify and hold harmless the town from any and all claims made against it to the extent that any claim directly and proximately results from the wrongful, wilful, or negligent performance of the defendant during its performance of the agreement. In the general conditions,[3] the defendant, among other things, is prohibited from placing a lien on any property on which it is working under the agreement.

The plaintiff argues that, although the defendant and the town were the parties to the contract, the contract was meant to benefit the plaintiff. "The town's role was only to facilitate the work and to pay the defendant from funds made available through the program. No services were provided to the town [and] the intended beneficiary was [the plaintiff] . . . ." She argues that, unlike the plaintiff in *Grigerik* v. *Sharpe*, 247 Conn. 293, 721 A.2d 526 (1998), a case relied on by the defendant and the trial court, she is not merely a *foreseeable beneficiary*, but, rather, she is "*the* beneficiary—the person to whom all obligations under the contract were owed." (Emphasis in original.) She also argues that if the intent of the contracting parties cannot be ascer-

[3] The general conditions are set forth in a document prepared by the United States Department of Housing and Urban Development.

tained from the contract alone, the court should have reserved the question for the fact finder.

In *Grigerik*, the plaintiff, who was the purchaser of a property, brought breach of contract and negligence claims against the defendants, an engineering company and its owner, who had been hired by the plaintiff's predecessor in title to test soil and design a septic system for the property. Id., 296. The plaintiff alleged that he was a foreseeable third-party beneficiary to the contract. Id. The jury found in favor of the plaintiff, concluding that he was a foreseeable beneficiary of the contract although not an intended beneficiary, and the court rendered judgment in accordance with the verdict. Id. After the Appellate Court reversed that judgment and ordered, in part, a new trial on the breach of contract count, our Supreme Court, after granting certification to appeal, held in relevant part that the fact that the plaintiff may have been a foreseeable beneficiary of the contract between the plaintiff's predecessor in title and the defendants was inconsequential to whether he was a third-party beneficiary to the contract. Id., 309–10.

Our Supreme Court specifically quoted and relied on § 302 of the Restatement (Second), which provides in relevant part: "Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." (Emphasis omitted; internal quotation marks omitted.) Id., 317. The court explained that "the language of the Restatement (Second) suggests that the right to performance in a [third-party] beneficiary is determined both by the intention of the contracting parties and by the intention of one of the parties to benefit the third party." Id. The court held, therefore, that the intent of both parties to

the contract determines whether a third party is entitled to third-party beneficiary status, and the fact that the plaintiff in that case may have been a foreseeable beneficiary of the contract was not sufficient to confer third-party beneficiary status on him because the jury specifically had found that the plaintiff was not an intended beneficiary of the contract. Id., 317–18. We agree with the plaintiff that *Grigerik* is inapposite. The issue of the intent of the town and the defendant in the present case has not been presented to a jury as it was in *Grigerik*. Rather, in the present case, the court ruled as a matter of law that the plaintiff did not have standing because there was no "specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her." Such specific language, however, is not necessary. See *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 266 Conn. 580–81.

We, instead, are guided by our Supreme Court's decision in *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 654 A.2d 342 (1995). In *Gateway Co.*, the trial court had concluded that the plaintiff, The Gateway Company (Gateway), was not a third-party beneficiary because "there was nothing to indicate either that [the original parties to the lease had] intended to *confer a benefit* upon Gateway, or that they [had] intended to give Gateway a right to sue [the defendant] DiNoia." (Emphasis in original; internal quotation marks omitted.) Id., 230. Our Supreme Court concluded that the trial court had "focused on the wrong inquiry," explaining that "[t]he proper test to determine whether a lease creates a [third-party] beneficiary relationship is whether the parties to the lease intended to create a direct obligation from one party to the lease to the third party." (Emphasis omitted.) Id., 231. The court further explained that, "[a]lthough ordinarily the question of contractual intent presents a question of fact for the ultimate fact finder," where, as in *Gateway Co.*, the language of the contract

is clear and unambiguous "it becomes a question of law for the court." (Internal quotation marks omitted.) Id., 232.

In the present case, we conclude that the trial court also misconstrued the appropriate inquiry when it determined that the plaintiff failed to establish standing simply because there was no "specific language in the contract evidencing [the defendant's] intent to create a direct obligation to her." A review of the contract documents reveals that there also is no specific language in the contract evidencing the defendant's intent that it have no direct obligation to the plaintiff. The contract did provide, however, that the defendant would install a new roof on the plaintiff's home and that the defendant would comply with applicable laws, regulations and ordinances. The identification of the plaintiff's home as the location where the work is to be done can be read as evidencing an intent that she is a third-party beneficiary of the contract. At the same time, the fact that the contract provides rights to review the work performed by the defendant and remedies for breach of the defendant's obligations solely to the town can be read as evidencing the parties' intent that the plaintiff is not a third-party beneficiary. The court failed to consider these competing interpretations when it focused its inquiry singularly on whether there was express language in the contract creating a direct obligation from the defendant to the plaintiff.

Given that it is unclear from the terms of the agreement between the town and the defendant whether they intended the plaintiff to be a third-party beneficiary of their contract, the court also failed to consider the terms of the contract "in the light of the circumstances attending its making, including the motives and purposes of the parties." (Internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra,

266 Conn. 580–81.[4] Consequently, this is not a case in which the defendant's motion to dismiss can be decided simply on the basis of the affidavit submitted by the defendant and the language of the contract. Instead, an evidentiary hearing is required to make the critical factual finding as to whether the plaintiff has standing as a third-party beneficiary. See *Conboy* v. *State*, supra, 292 Conn. 653–54. Furthermore, because resolution of this factual issue is intertwined with the merits of the case, resolution of this jurisdictional question should be resolved by the ultimate fact finder as part of the trial on the merits. Id.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

MARIA J. DERBLOM, EXECUTRIX (ESTATE OF FRED H. RETTICH), ET AL. *v.* ARCHDIOCESE OF HARTFORD (AC 42630)

Lavine, Prescott and Alexander, Js.*

Syllabus

The plaintiffs, the executrix of the estate of R, several former students of a defunct Catholic school located in Madison that was the residual beneficiary of R's estate, the students' parents, and M Co., a corporation operating a private school that is purporting to be the successor to the defunct school, brought this action for relief against the defendant. After R died in 2013, the residuary of his estate was distributed to the defunct school in accordance with his will. In 2018, the defendant announced

[4] Although the terms of the program, including the requirement that the plaintiff agree that the town could place a lien on her property in the amount that the town had paid to complete repairs to her roof, evidence circumstances strongly indicative of the town's intent to make the plaintiff an intended third-party beneficiary of the contract, whether the defendant was aware of the program and shared the same intent is less clear.

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

that, for financial reasons, it would be closing the defunct school and establishing a new school in Branford. Some of the parents of the students attending the defunct school then formed M Co., with the intent of establishing a new Catholic school in Madison. The plaintiffs alleged in their complaint that the residuary clause in R's will created a constructive trust for the benefit of the plaintiffs and that the defendant had a duty to convey the funds to M Co., as successor to the defunct school, or to return the funds to R's estate for distribution to his heirs. The defendant filed a motion to dismiss, asserting that none of the plaintiffs had standing to enforce the charitable gift. The trial court granted the motion and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held* that the trial court properly granted the defendant's motion to dismiss because the plaintiffs lacked standing: the trial court did not err in construing R's bequest as an absolute or outright gift to the defunct school instead of as an endowment that created a charitable trust benefitting the plaintiffs; the residuary clause of the will did not limit the expenditure of principal, restrict the manner in which the funds could be used, name any beneficiaries or a trustee, or include any other language evidencing an intent to form a trust or to exercise any future control over the residue of the estate; moreover, the trial court did not err in concluding that the special interest exception to the rule that the attorney general has exclusive authority to bring an action to enforce charitable gifts was inapplicable to confer standing to the plaintiffs as the exception is limited to actions involving charitable trusts and R's bequest to the defunct school constituted an outright gift, extending the exception to include charitable gifts would undermine their nature as, unlike with charitable trusts, when a donor completes a gift he immediately and irrevocably transfers and relinquishes all control over the gifted property, and the plaintiffs failed to provide any legal authority to support their assertion that the exception should be extended to completed charitable gifts.

Argued October 20, 2020—officially released March 9, 2021

Procedural History

Action, inter alia, seeking the establishment of a constructive trust, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Pierson, J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Drzislav Coric, with whom was *Cody A. Layton*, for the appellants (plaintiffs).

Kay A. Williams, with whom was *Lorinda S. Coon*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiffs—Maria J. Derblom, in her capacity as the executrix of the estate of Fred H. Rettich;[1] eleven former students of Our Lady of Mercy School (OLM), a defunct Catholic school in Madison, and their parents;[2] and Our Lady of Mercy School of Madison, Inc., which operates a private school that purports to be the successor of OLM—appeal from the judgment of the trial court granting a motion to dismiss filed by the defendant, the Archdiocese of Hartford,[3] on the ground that the plaintiffs lack standing to bring an action concerning a bequest from Rettich to OLM. According to the plaintiffs, the court improperly (1) construed Rettich's bequest as an outright gift to OLM rather than as an endowment that resulted in a constructive charitable trust and (2) concluded that the plaintiffs lack standing because the state's attorney general has the exclusive authority to bring an action to enforce Rettich's gift and that the plaintiffs' reliance on a common-law special interest exception to that exclusive authority was misplaced because the exception is limited to actions involving charitable trusts and, thus, is not applicable in the present case.[4] We disagree with the plaintiffs and affirm the judgment of the court.

[1] Derblom is the sister-in-law of Fred H. Rettich, the decedent.

[2] The minor student plaintiffs are Luke Ciocca, John Ciocca, Julia Coric, Amanda Coric, Vladimir Coric III, Mia Lombardi, Thomas Piagentini, Jack Piagentini, Kathryn Piagentini, Julianna Picard, and Alessandra Picard. The parent plaintiffs are Stephen Ciocca, Jacqueline Ciocca, Vladimir Coric, Ann Coric, Tom Lombardi, Roberta Lombardi, Joe Piagentini, Kelly Piagentini, John Picard, and Tara Picard.

[3] The complaint names the defendant as the "Archdiocese of Hartford a/k/a Hartford Roman Catholic Diocesan Corporation."

[4] The plaintiffs also claim that the court improperly determined that (1) even if the special interest exception applied in the present case, the school currently operated by the plaintiff corporation is not the successor school to OLM and (2) the plaintiffs failed to demonstrate any other basis on which to assert a special interest necessary to confer standing to bring this action. Because we agree with the trial court that the special interest exception recognized under Connecticut common law does not apply under the circumstances of the present case, we do not reach these additional claims of error.

The following facts, as alleged in the complaint or as established by uncontested evidence submitted in conjunction with the motion to dismiss, and procedural history are relevant to our resolution of this appeal. In April, 2012, Rettich executed a will that contained a residuary clause in favor of OLM "or its successor, for its general uses and purposes."[5] Beginning in 2004, OLM had become an archdiocesan school under the auspices of the defendant.

It was important to Rettich that residents of Madison be able to send their children to a Catholic school in Madison. Prior to the execution of his will leaving the residue of his estate to OLM, Rettich had donated $500,000 to OLM. OLM later sent a letter to Rettich that marked the anniversary of that donation and informed him that $200,000 of the donated funds had been used by OLM to establish an endowment to "ensure [OLM's] future." The letter stated that the money was "invested and protected by the Archdiocese of Hartford for the

The plaintiffs also argue that Derblom, in her capacity as representative of the estate, had standing apart from the remaining plaintiffs because, in the event the plaintiffs demonstrated that Rettich's bequest resulted in a constructive trust and that trust subsequently were deemed to have failed, the bequest would need to be returned to the estate for distribution to the decedent's heirs. Because we agree with the court and the defendant that Rettich's bequest properly is construed as a completed absolute gift and never resulted in any actual or constructive trust, we do not reach the merits of this additional argument.

[5] A residuary clause disposes of any remaining estate property after all other specific bequests, devises and obligations of the estate are satisfied. See *Warner* v. *Merchants Bank & Trust Co.*, 2 Conn. App. 729, 732, 483 A.2d 1107 (1984). The clause in Rettich's will provided: "All the rest, residue, and remainder of my property of every kind and description, real, personal and mixed, whatever situated (all of which is hereinafter referred to as '[r]esidue'), remaining after the payment of estate, inheritance, succession, transfer and death taxes or duties, in accordance with Article VII hereof (but excluding any property over which I may have a power of appointment at my death), I give and bequeath, in memory of Fred H. & Rosa Rettich, to [OLM], 149 Neck Road, Madison, Connecticut, or its successor, for its general uses and purposes."

exclusive use of OLM by US Trust." In his will, Rettich made no reference to his earlier donation or to any endowed funds or existing trust benefiting OLM.[6]

Rettich died on September 27, 2013. Derblom administered Rettich's estate and, in April, 2015, she filed a final accounting of the estate with the Probate Court. The Probate Court accepted the accounting and ordered distribution in accordance with it. The amount of Rettich's residual estate was $4,745,110.86. The estate remitted that amount by check to OLM.[7]

More than two years later, in January, 2018, the defendant announced that it would be closing OLM and another parish school in Branford, St. Mary School.[8] It

[6] Throughout their briefs and at oral argument before this court, the plaintiffs refer to Rettich's bequest to OLM as an "endowment." An endowment is defined as "[a] gift of money or property to an institution (such as a university) *for a specific purpose*, esp. one whose principal is kept intact indefinitely and only the interest income from that principal is used." (Emphasis added.) Black's Law Dictionary (11th Ed. 2019) p. 668. As we discuss in part I of this opinion, Rettich's residuary bequest to OLM "for its general uses and purposes" contains no other language suggesting that Rettich intended to limit OLM's use of the funds to any specific purpose or that he intended to restrict OLM's use to only interest income or some other limited portion of the total bequest. The plaintiffs' use of the term "endowment" in referring to Rettich's bequest is thus unsupported by any evidence in the record. To the extent that we use that term in setting forth the plaintiffs' arguments, our use should not be misconstrued as adopting the plaintiffs' characterization.

[7] Payment was by check dated July 8, 2015, and made payable to OLM. According to the complaint, those funds have "come under the possession and/or control of the [d]efendant . . . ." In an affidavit submitted by the defendant with its motion to dismiss, the Reverend Daniel McLearen, a diocesan priest serving at one of the two local parishes in Madison and Guilford that "jointly-sponsored" OLM, averred that the funds from Rettich's estate "were deposited in an account established by [the two parishes] in the name of [OLM]" and that McLearen is "the sole signatory on that account." It is unnecessary for purposes of this appeal for us to resolve any ambiguity in the record concerning what portion, if any, of Rettich's bequest remains under deposit or whether McLearen's affidavit created any dispute over who had legal control of the funds deposited by McLearen because those facts have no bearing on our resolution of the standing issue before us.

[8] As explained by the trial court, "[d]espite drawing students from surrounding towns, enrollment at OLM declined precipitously from 2013 to

indicated that it intended to open a new school, East Shoreline Catholic Academy (ESCA), which would be located at the former St. Mary School site in Branford. According to a press release appended to the underlying complaint, "[t]he formation of ESCA is not considered a merger, because [OLM and St. Mary School] will cease to exist and a new corporation . . . will be formed. ESCA, however, will continue to be operated by the same three parishes [that operated OLM and St. Mary School]."

On February 28, 2018, shortly after the announcement of OLM's closing, some parents of students attending OLM, including some of the plaintiff parents, formed the plaintiff corporation, Our Lady of Mercy School of Madison, Inc., with the intent to form a new Catholic school in Madison that, as alleged in the complaint, would "[keep] the current mission and vision of OLM intact."[9] The plaintiffs further alleged that "[s]ince its founding, [the plaintiff corporation] has raised over $1 million in additional pledges to augment the endowment

2018, from 228 to 140, a decrease of 39 [percent]. . . . OLM was also facing other challenges. OLM was located on property that was leased to OLM and in 2016, OLM was informed that the lease would not be extended beyond the 2017–2018 academic year. . . . Although OLM attempted to purchase the property or obtain a long-term lease, these efforts were unsuccessful," ultimately leading to the decision of the governing parishes to close and consolidate schools. (Citations omitted.)

[9] The record indicates that the plaintiff corporation has founded a new private school in Madison named Our Lady of Mercy Preparatory Academy. The plaintiff corporation asserts that that this new school is an "independent Catholic" school. The defendant disputes this characterization. In a letter from the Archbishop of Hartford to the First Selectman of Madison, the archbishop, citing canon law, explained that "no school may bear the title *Catholic school* without the consent of the competent ecclesiastical authority," that he, as that authority, had not consented to a new Catholic school in the area in question, and that, "[t]herefore, any new OLM school is not, and should not present itself, as a Catholic school." (Internal quotation marks omitted.) A copy of the letter was appended as an exhibit to the defendant's reply to the plaintiffs' opposition to the motion to dismiss. This issue is not before us on appeal.

by [Rettich], filed for 501c (3) status,[10] developed a financial plan, identified a sponsor of independent Catholic schools and developed a curriculum. Additionally, [the plaintiff corporation] is in the process of hiring a principal and teachers for the school." (Footnote added.)

In April, 2018, the plaintiffs initiated the underlying action. The complaint contained seven counts and incorporated by reference and attached a number of exhibits.[11] Count one was brought on behalf of the plaintiff students and alleged that Rettich's bequest to OLM should be viewed as an endowment that resulted in a constructive trust benefitting the plaintiff students with the defendant acting as trustee. It asserted that the defendant has an equitable duty to convey the corpus of that alleged trust to the plaintiff corporation or, alternatively, back to Rettich's estate for distribution because the defendant "would be unjustly enriched if it were permitted to retain the endowment and disseminate it at its own discretion and for purposes wholly unrelated to the operation and preservation of OLM or a rightful successor." Count two, also brought on behalf of the plaintiff students, sounded in breach of fiduciary duty premised on the defendant's having closed OLM and its alleged misappropriation of the "endowment" from Rettich. Counts three and four were brought by the plaintiff parents and effectively tracked the first two counts, sounding in constructive trust and breach

[10] Section 501 (c) (3) of title 26 of the United States Code is the provision of the Internal Revenue Code that allows for federal tax exemption for certain nonprofit organizations. Donors who make charitable contributions to § 501 (c) (3) organizations may also be entitled to a deduction for federal income tax purposes. See 26 U.S.C. § 170 (2018).

[11] Specifically, the following exhibits were attached to the complaint: (1) a copy of Rettich's will; (2) an affidavit from Derblom; (3) two letters from OLM to Rettich discussing the donation he made to OLM prior to his death; (4) a press release by the defendant about ESCA; (5) a document entitled "FAQs About [ESCA]"; and (6) a certificate of incorporation and bylaws for the plaintiff corporation.

of fiduciary duty. Counts five and six were brought by the plaintiff corporation and Derblom, respectively, and, as in the prior counts, alleged the existence of a constructive trust and an equitable duty on the part of the defendant to convey any and all funds to the plaintiff corporation for the intended beneficiaries or, alternatively, to the estate. Finally, in count seven, Derblom asserted on behalf of the estate "a legal and/or equitable interest in the endowment made to OLM, by reason of danger of loss or uncertainty" and sought a declaratory judgment "determining [1] whether the endowment shall be conveyed to [the plaintiff corporation] or some other appropriate entity for the benefit of the [p]laintiffs; [and] [2] whether the endowment to OLM has lapsed with no clear successor and all funds shall be returned to [Rettich's estate] for dissemination to his rightful heirs at law."

The defendant filed a motion to dismiss the action in its entirety in July, 2018, arguing that none of the plaintiffs had standing "to bring an action to enforce the terms of a completed charitable gift to a school" and, as a result, the court was "without subject matter jurisdiction over the claims against the defendant . . . ." The defendant filed a memorandum in support of the motion to dismiss, in which it argued that, under Connecticut law, only the attorney general has standing to bring an action to enforce a charitable gift made for a stated purpose. Attached to the memorandum were several affidavits, copies of Probate Court documents related to the administration of Rettich's estate, and a copy of the check issued by the estate to OLM.

In September, 2018, the plaintiffs filed an objection to the motion to dismiss and accompanying memorandum in support of the objection. The plaintiffs argued that the "attorney general's lack of involvement in the present matter is immaterial" because "[s]tanding is conferred on the [plaintiff students, the plaintiff parents,

and the plaintiff corporation] via the special interest exception," citing *Grabowski* v. *Bristol*, Superior Court, judicial district of New Britain, Docket No. CV-95-0468889-S (June 3, 1997) (19 Conn. L. Rptr. 623), aff'd, 64 Conn. App. 448, 780 A.2d 953 (2001).[12] With respect to Derblom, the plaintiffs argued that she had standing apart from the other plaintiffs because, in the event the court were to determine that a constructive trust in favor of the other plaintiffs failed, she would have a real legal interest as executor of the estate to ensure that any trust funds were returned to the estate for redistribution to Rettich's heirs.

The defendant filed a reply to the plaintiffs' objection. It argued, inter alia, that the common-law special interest exception relied on by the plaintiffs was inapplicable because it has been recognized in Connecticut only in the context of charitable trusts, not testamentary gifts. It also argued that, even if applicable, courts have construed the exception narrowly and the plaintiffs simply failed to establish a special interest sufficient to confer standing. The plaintiffs filed a supplemental memorandum of law rebutting the arguments of the defendant.

The motion to dismiss was argued to the court on October 22, 2018. On February 6, 2019, the court issued a memorandum of decision granting the defendant's motion to dismiss. The court concluded that the provision of Rettich's will leaving the residue of his estate to OLM constituted a testamentary gift and did not create a charitable trust. It further concluded that the exclusive power to enforce that type of gift lies with the attorney general pursuant to our common law and as codified in General Statutes § 3-125. It also concluded

[12] Attached as exhibits to the plaintiffs' memorandum in opposition were, inter alia, an affidavit from one of the plaintiffs' attorneys indicating that he had contacted the Office of the Attorney General by letter and formally requested that the attorney general join in bringing the present action. According to counsel, no action was taken on that request and the plaintiffs elected to file the action without the participation of the attorney general.

that any special interest exception to the exclusive power of the attorney general has been recognized and applied only in the context of charitable trusts, not gifts, and that enlarging the exception under the circumstances presented would undermine the nature of a gift, in which a donor immediately and irrevocably transfers and relinquishes any control over the gifted property. Finally, and in the alternative, the court concluded that, even if the exception applied in the present case, "the plaintiffs have failed to demonstrate—as is their burden in opposing a motion to dismiss—that they have a special interest in the decedent's residual gift sufficient to confer standing upon them to pursue their claims." This appeal followed.

Before turning to our analysis of the plaintiffs' claims, we first set forth our well settled standard of review applicable to the granting of a motion to dismiss. "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. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 316, 138 A.3d 257 (2016).

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . .

"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." (Internal quotation marks omitted.) Id. If "a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

Our Supreme Court has explained that "[d]ifferent rules and procedures will apply, depending on the state of the record at the time the motion [to dismiss] is filed." *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009). More specifically, a court may be called on to determine whether subject matter jurisdiction is lacking on the basis of "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." (Internal quotation marks omitted.) Id. "[I]f the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question

. . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein." (Emphasis omitted; internal quotation marks omitted.) *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 602, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018). This case falls under the second category, in which the facts as alleged in the complaint are supplemented by undisputed facts evidenced in affidavits and other documents submitted in support of the motion to dismiss.

I

The plaintiffs first claim that the court improperly construed Rettich's bequest as an absolute or outright gift to OLM rather than as an endowment that created or resulted in some type of charitable trust benefiting the plaintiffs. We disagree.

"The construction of a will presents a question of law to be determined in light of facts which are found by the trial court or are undisputed or indisputable. . . . [If] the issue before us concerns the court's legal conclusion regarding the intent of [a testator] as expressed solely in the language of [a] will, we must decide that issue by determining, de novo, whether that language supports the court's conclusion. . . . Our primary objective in construing [a] will is to ascertain and effectuate [the testator's] intent. . . . In searching for that intent, we look first to the precise wording employed by the testat[or] in [the] will . . . [because] the meaning of the words as used by the testat[or] is the equivalent of [his] legal intention—the intention that the law recognizes as dispositive. . . . The question is not what [he] meant to say, but what is meant by what [he] did say." (Citations omitted; internal quotation marks omitted.) *Canaan National Bank* v. *Peters*, 217 Conn. 330, 335–36, 586 A.2d 562 (1991); see also

Schwerin v. *Ratcliffe*, 335 Conn. 300, 310, 238 A.3d 1 (2020) ("The most inflexible rule of testamentary construction and one universally recognized is that the intention of the testator should govern the construction, and this intention is to be sought in the language used by the testator in the light of the circumstances surrounding and known to him at the time the will was executed. . . . In seeking the testator's testamentary intent, the court looks first to the will itself . . . . It studies the will as an entirety. The quest is to determine the meaning of what the [testator] said and not to speculate upon what [he] meant to say . . . ." (Internal quotation marks omitted.)).

Before turning to the will language at issue, it is helpful first to consider what distinguishes the giving of an outright gift to a charity from a gift given in trust. A charitable trust "is a fiduciary relationship with respect to property *arising as a result of a manifestation of an intention to create it*, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." (Emphasis added.) 2 Restatement (Second), Trusts § 348, p. 210 (1959). A trust "requires three basic elements: (1) a trust res; (2) a fiduciary relationship between a trustee and a beneficiary requiring the trustee to deal with the trust res for the benefit of the beneficiary; and (3) the manifestation of an intent to create a trust." *Goytizolo* v. *Moore*, 27 Conn. App. 22, 25, 604 A.2d 362 (1992).

By contrast, a gift, whether testamentary or inter vivos, "is the transfer of property without consideration . . . [in which] the donor [parts] with control of the property [that] is the subject of the gift with an intent that title shall pass *immediately and irrevocably* to the donee." (Emphasis added; internal quotation marks omitted.) *Parley* v. *Parley*, 72 Conn. App. 742, 749, 807 A.2d 982 (2002). Thus, whenever someone donates to charity without reserving any right of control or placing

limitations on the donation's use, this constitutes a gift, and the law will not recognize any resulting trust. See *Carl J. Herzog Foundation, Inc.* v. *University of Bridgeport*, 243 Conn. 1, 7–8, 699 A.2d 995 (1997); *Russell* v. *Yale University*, 54 Conn. App. 573, 578, 737 A.2d 941 (1999).

The law recognizes a distinction between a donor who expresses an intent to make a donee a trustee and one who intends to make an absolute gift. "In the case of a trust, the legal title only is in the corporation, subject to the duties imposed by the terms of the trust instrument and by the law of charitable trusts, which may be enforced by the [a]ttorney [g]eneral representing the public. In the case of the absolute gift *full ownership of the property given vests in the corporation*, subject to the duties imposed upon it by its charter or articles of incorporation [and other legal restrictions]. The [a]ttorney [g]eneral or another public official has the power, as a representative of the state and on behalf of the public, to compel the corporation to perform these duties. The authority applies to protect charitable assets, whether held in trust or corporate form." (Emphasis altered; footnotes omitted.) G. Bogert et al., Bogert's The Law of Trusts and Trustees (2020) § 324.

Turning to the present case, the residuary clause of Rettich's will states in relevant part: "All the rest, residue, and remainder of my property of every kind and description . . . remaining after the payment of estate, inheritance, succession, transfer and death taxes or duties . . . I give and bequeath, in memory of Fred H. & Rosa Rettich, to [OLM], 149 Neck Road, Madison, Connecticut, or its successor, for its general uses and purposes." The language used is not ambiguous and must be given its ordinary meaning. It clearly and expressly provides that the residue of the estate is "give[n]" to OLM, without placing any restriction on OLM's use. This language reasonably can be construed

only as manifesting an intent to convey full control over the residue of his estate to OLM as an outright gift. Rettich did not use any qualifying language that would suggest that he intended to give the residue only "in trust" or use any other language indicative of an intent to create a trust of any kind. Rettich placed no limit on the expenditure of the principal. No beneficiary or trustee is named in the will. Although it is true that courts may recognize the formation of a testamentary charitable trust even in the absence of precise language; see, e.g., *O'Leary* v. *McGuinness*, 140 Conn. 80, 84, 98 A.2d 660 (1953) (will bequeathing legal title to property to testator's executors but giving beneficial interest to charities to be selected by those executors created trust despite word "trust" not appearing in will); courts will not read terms into a will that are not otherwise implied and will not recognize the formation of a trust in the absence of some manifestation of intent to do so, which simply does not exist in Rettich's will. See *Winchester* v. *Cox*, 129 Conn. 106, 111, 26 A.2d 592 (1942) ("[if] property is conveyed to a charitable corporation, simply with the requirement that it be used for one of its authorized purposes, this is not in itself sufficient to establish a trust"); *Lyme High School Assn.* v. *Alling*, 113 Conn. 200, 204, 154 A. 439 (1931) (holding that bequest to school containing no provision requiring that funds be held in trust or restricting manner in which funds may be managed or used is not trust).

The plaintiffs would have us interpret Rettich's use of the language "or its successor" in his bequest to OLM as manifesting something more than an intent to make an outright gift to OLM. The plaintiffs imply that those words convey that it was Rettich's intent that, in the event OLM closed or otherwise ceased to exist under its current name *after* the residue of the estate passed, any unspent funds must pass to whichever school is deemed OLM's successor. We are not persuaded, how-

ever, by this argument. Rather, we construe the language "or its successor" as only commonplace testamentary verbiage intended to avoid a potential failure of the residuary bequest in the event that OLM had ceased to exist or changed its name *before* Rettich died and before he had an opportunity to amend his will. The language by itself, with no other indicia of any intent to exercise future control over the residue of the estate or to convey it in trust, does not undermine the trial court's construction of the residual clause as effectuating an absolute gift to OLM.[13] We agree with the trial court's construction of the will and reject the plaintiffs' claim that the court improperly failed to construe Rettich's residuary clause as anything more than a gift.

II

Next, the plaintiffs claim that the court improperly concluded that a common-law special interest exception to the rule that the state's attorney general has exclusive authority to bring an action to enforce Rettich's charitable gift is limited in Connecticut to actions involving charitable trusts and, thus, was inapplicable to confer standing on the plaintiffs in the present case involving a gift. We are not persuaded.

"At common law, a donor who has made a completed charitable contribution, *whether as an absolute gift or in trust*, had no standing to bring an action to enforce

[13] Although strongly contested by the parties throughout these proceedings; see footnote 9 of this opinion; it is unnecessary for the purposes of our analysis to resolve, either as a matter of law or by divining Rettich's intent, whether ESCA or Our Lady of Mercy Preparatory Academy should be deemed a successor school to OLM. Such a designation is rendered irrelevant on the basis of our determination that Rettich's bequest of the residue of his estate to OLM was an absolute gift, completed upon the delivery of the check from his estate to OLM. Upon completion of the gift, title to those funds became absolute in OLM, and neither Rettich nor his estate retained any legal interest in what happened to those funds in the event of OLM's demise. Even if this were not true, the record contains no evidence or accounting of how OLM made use of the funds prior to closing or whether any funds remain and, if so, how much.

the terms of his or her gift or trust unless he or she had expressly reserved the right to do so. Where property is given to a charitable corporation and it is directed by the terms of the gift to devote the property to a particular one of its purposes, it is under a duty, *enforceable at the suit of the* [*a*]*ttorney* [*g*]*eneral*, to devote the property to that purpose." (Emphasis altered; footnote omitted; internal quotation marks omitted.) *Carl J. Herzog Foundation, Inc.* v. *University of Bridgeport*, supra, 243 Conn. 5–6, quoting 2 Restatement (Second), Trusts § 348, comment (f), p. 212 (1959). "Connecticut is among the majority of jurisdictions that have codified this common-law rule and has entrusted the attorney general with the responsibility and duty to represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. . . . General Statutes § 3-125." (Internal quotation marks omitted.) *Carl J. Herzog Foundation, Inc.* v. *University of Bridgeport*, supra, 7 n.3.[14] Section 3-125 contains no language evidencing any intent on the part of the legislature to qualify this responsibility or to suggest that it is a responsibility to be shared with other interested parties.[15]

"The theory underlying the power of the [a]ttorney [g]eneral to enforce gifts for a stated purpose is that a

[14] General Statutes § 3-125, which sets forth the duties of our attorney general, provides in relevant part that the attorney general "shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. . . ."

[15] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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 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.) *State* v. *O'Bryan*, 318 Conn. 621, 636, 123 A.3d 398 (2015).

donor who attaches conditions to his gift has a right to have his intention enforced. . . . The donor's right, however, is enforceable *only* at the instance of the attorney general . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 7. Thus, as this court stated in *Russell* v. *Yale University*, supra, 54 Conn. App. 573, if a "donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he *nor those claiming under him* have any standing in a court of equity as to its disposition and control." (Emphasis added; internal quotation marks omitted.) Id., 578; see also *Carl J. Herzog Foundation, Inc.* v. *University of Bridgeport*, supra, 243 Conn. 9 ("a donor [has] no standing to enforce the terms of a completed charitable gift unless the donor had *expressly* reserved a property interest in the gift" (emphasis added)). As we have determined in part I of this opinion, the bequest from Rettich to OLM became a completed charitable gift when the estate gave OLM a check for the full amount of the residue of the estate in accordance with the final accounting and closing of the estate. Here, the stated purpose of the gift was for OLM's "general uses and purposes" and, as we indicated in footnote 13 of this opinion, the record is silent as to how OLM made use of the funds prior to its closing or whether any funds remain.

Although the plaintiffs recognize that, as a matter of statutory and common law, standing to enforce the terms of a completed charitable gift lies exclusively with the attorney general, they nevertheless argue that courts in this state have recognized a so-called "special interest" exception to this general rule and claim that the trial court improperly declined to apply that exception with respect to Rettich's gift to OLM. We agree with the trial court and the defendant that the exception is inapplicable to the present case.

The special interest exception has been recognized by Connecticut courts as an exception to the rule that

the attorney general has the sole and exclusive authority to bring an action to protect any "gifts, legacies or devises" intended for a charitable purpose.[16] As noted by the defendant and the court, however, the special interest exception has been applied narrowly only in cases involving charitable trusts, not charitable gifts. See *Carl J. Herzog Foundation, Inc.* v. *University of Bridgeport*, supra, 243 Conn. 8 n.4 ("it is well established *in the context of charitable trusts* that there are others, in addition to the attorney general, who may enforce *the terms of a trust*" (emphasis added)). In fact, in urging us that the exception applies to the facts of this case, the plaintiffs have cited no case law or treatise discussing standing to enforce the terms of a completed testamentary gift without restrictions, such as the one at issue in the present case. The principal case relied on by the plaintiffs is the trial court's decision in *Grabowski* v. *Bristol*, 64 Conn. App. 448, 449, 780 A.2d 953 (2001), which itself involved "a *testamentary charitable trust* that conveyed a designated parcel of property to the city of Bristol."[17] (Emphasis added.) As the trial court noted in its decision in the present case, the appellate case law discussed by the trial court in *Grabowski* also involved issues related to charitable

[16] Although not defined in § 3-125, "charitable purpose" is defined elsewhere in our statutes as "the relief of poverty, the *advancement of education* or religion, the promotion of health, the promotion of governmental purposes and any other purpose the achievement of which is beneficial to the community"; (emphasis added) General Statutes § 45a-535a (1); and as "any benevolent, *educational*, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental conservation, civic or eleemosynary objective." (Emphasis added.) General Statutes § 21a-190a (4). Under either definition, Rettich's gift to OLM was for a charitable purpose.

[17] Although standing was not raised as an issue on appeal in *Grabowski*, this court briefly addressed the issue sua sponte indicating that the trial court had correctly determined that "the plaintiffs' complaint demonstrated that the plaintiffs had a special interest in Peck Park because, unlike members of the general public, their property adjoined Peck Park." *Grabowski* v. *Bristol*, supra, 64 Conn. App. 451. This court's opinion contained no discussion of the scope of the special interest exception outside of enforcement of a charitable trust.

trusts, not gifts. See, e.g., *Steenek* v. *University of Bridgeport*, 235 Conn. 572, 586–88, 668 A.2d 688 (1995) (declining to extend principles of trust law applicable to charitable trusts to charitable corporations and narrowly construing special interest exception); *Belcher* v. *Conway*, 179 Conn. 198, 204, 206–209, 425 A.2d. 1254 (1979) (discussing rights of minority trustees, admitted as party plaintiffs, to counsel of their choice in action concerning application of doctrine of cy pres or approximation with respect to testamentary charitable trust). In the absence of any controlling authority in this state recognizing the application of the special interest exception to completed gifts, the trial court declined "to enlarge the scope of the exception as it has been discussed by our courts." The trial court indicated that expansion of the exception in order to confer standing beyond the attorney general would be unwise. We agree with the trial court's reasoning.

First, as we already have discussed, there is a significant legal distinction, relevant to our consideration of the issue of standing, between a charitable trust and a gift. When a donor completes a gift, he gives up all control over the donated property, which is irrevocably transferred to the donee. *Parley* v. *Parley*, supra, 72 Conn. App. 749. He no longer has any legal interest in the completed gift. Thus, as stated by the trial court, "[c]onferring standing on the plaintiffs to pursue claims for constructive trust, breach of fiduciary duty, and a declaratory judgment would be wholly inconsistent with the characteristics of a gift."

Second, the plaintiffs have provided us with no legal authority supporting their assertion that the special interest exception should be expanded to include actions by third parties regarding completed charitable gifts like the bequest from Rettich to OLM. They devote only a single paragraph to this issue in their appellate brief. Our own research shows that courts in other jurisdictions have reached different conclusions regarding

the scope of the special interest exception in cases in which a donor had retained some express legal right over a charitable gift or had expressed a clear intent to restrict the use of the gift to a specific purpose. Compare, e.g., *Hardt* v. *Vitae Foundation, Inc.*, 302 S.W.3d 133, 139–40 (Mo. App. 2009) (declining to expand common-law special interest exception in action by donor to enforce restrictions on charitable gift in absence of showing that attorney general lacked ability to represent donor's interest), with *Smithers* v. *St. Luke's–Roosevelt Hospital Center*, 281 App. Div. 2d 127, 140–41, 723 N.Y.S.2d 426 (2001) (holding wife of deceased donor of charitable gift to hospital, which gift was subject to numerous restrictions agreed to by hospital, had concurrent standing with attorney general to enforce restrictions). The plaintiffs, however, have not cited or relied on these or any other out-of-state authority to support their argument, and we are disinclined to enter into any discussion of the relative merits or persuasiveness of those authorities at this time because, in our view, they are distinguishable from the matter before us, which does not involve a gift encumbered by any cognizable intent on behalf of the donor to retain any legal interest in the donation or to place any specific restrictions on the use of the gift. The gift to OLM was outright for its "general uses and purposes."

The plaintiffs have provided no compelling argument as to why, under the present circumstances, we should abandon the well established and legislatively adopted general rule that the attorney general has the exclusive power to enforce Rettich's testamentary gift to the extent it is necessary to vindicate the interests of the plaintiffs and of the general public. Because the plaintiffs lacked standing, we conclude that the court properly granted the defendant's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* JOHN DOE NO. 1 ET AL.

(AC 43466)

Alvord, Elgo and Cradle, Js.

Syllabus

The plaintiff bank sought, by way of summary process, to regain possession of certain premises from the defendants. Following the judgment of possession rendered for the plaintiff by the trial court, defendants B and F appealed, claiming that the court lacked subject matter jurisdiction over the summary process action because a final judgment had not been rendered in the foreclosure action that had resulted in the plaintiff obtaining title to the property. Thereafter, the plaintiff returned the summary process execution of possession to the court and indicated that the defendants were dispossessed of the property. *Held* that this court lacked subject matter jurisdiction over the appeal, as B and F were no longer in possession of the property.

Submitted on briefs February 9—officially released March 9, 2021

Procedural History

Summary process action brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, where the defendants were defaulted for failure to appear; thereafter the court, *Spader*, *J.*, denied the defendants' motion to dismiss and rendered judgment of possession for the plaintiff, from which the defendants Benjamin Bey and Fabiola Is Ra El Bey appealed to this court. *Appeal dismissed.*

Fabiola Is Ra El Bay, self-represented, filed a brief for the appellants (defendants Benjamin Bey and Fabiola Is Ra El Bey).

Joseph J. Cherico, filed a brief for the appellee (plaintiff).

Opinion

PER CURIAM. In this summary process action, the self-represented defendants, John Doe No. 8, also known as Benjamin Bey, and Jane Doe No. 10, also known as Fabiola Is Ra El Bey,[1] appeal from the judgment of

[1] The remaining eighteen defendants are not participating in this appeal.

possession rendered in favor of the plaintiff, U.S. Bank National Association, as Trustee, successor to Bank of America National Association, as successor by merger to LaSalle Bank National Association, as trustee for the RAMP SERIES 2007-RS I Trust. On appeal, the defendants claim that the trial court lacked subject matter jurisdiction over this action because a final judgment had not been rendered in the foreclosure action that had resulted in the plaintiff obtaining title to the property. We conclude that this appeal is moot.

On February 5, 2021, the plaintiff returned the summary process execution for possession to the trial court and indicated that the tenants were dispossessed of the property. Because the record reveals that the defendants are no longer in possession of the property, this appeal is moot. See *Renaissance Management Co.* v. *Barnes*, 175 Conn. App. 681, 686, 168 A.3d 530 (2017) ("[t]his court has consistently held that an appeal from a summary process judgment becomes moot [when] . . . the defendant is no longer in possession of the premises" (internal quotation marks omitted)). Therefore, this court lacks subject matter jurisdiction over this appeal.

The appeal is dismissed.

STATE OF CONNECTICUT *v.* CALEB T. HALL-GEORGE (AC 42574)

Alvord, Prescott and Suarez, Js.

Syllabus

Convicted, after a jury trial, of the crime of robbery in the second degree, the defendant appealed to this court. The defendant, wearing baggy clothing, including a sweatshirt, entered a bank and approached a teller station. He passed a withdrawal ticket to the teller, and told the teller to give him all the money and no one would get hurt. On the back of the withdrawal ticket was a handwritten note, which stated: "Give me

. . . all the money and no one gets hurt." It also stated: "It's in my sweatshirt." The teller complied and gave the defendant the money. The defendant then left the bank. On appeal, the defendant claimed that the evidence was insufficient to prove beyond a reasonable doubt that he threatened the use of what he represented by his words or conduct to be a deadly weapon or dangerous instrument as required by statute (§ 53a-135 (a) (1) (B)). *Held* that the evidence was sufficient for the jury reasonably to have found that the defendant represented that he had a deadly weapon or dangerous instrument in his sweatshirt and that he threatened to use it if the teller did not give him money; the defendant orally and in writing threatened to harm the bank staff if his demand for money was not met, and, immediately following the written threat of harm on the note, was the statement that "it" was in his sweatshirt, a statement that the jury reasonably could have inferred made reference to what the defendant would use to carry out the harm he threatened, namely, an object that he had concealed under his sweatshirt, it was reasonable for the jury to infer that his sweatshirt, which surveillance video and photographs showed was baggy, was capable of concealing a deadly weapon or dangerous instrument, and, given the fact that his threat was made during a bank robbery, it was reasonable for the jury to infer that he had threatened to inflict serious physical injury or death if his demands were not met.

Argued December 8, 2020—officially released March 9, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of robbery in the second degree, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty; thereafter, the court dismissed one of the two counts, and the plaintiff appealed to this court. *Affirmed.*

Adele V. Patterson, senior assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Robert Mullins*, senior assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Caleb T. Hall-George, appeals from the judgment of conviction, rendered following a jury trial, of robbery in the second degree in violation of General Statutes § 53a-135 (a) (1) (B). The defendant claims that the evidence was insufficient to prove beyond a reasonable doubt that he threatened the use of what he represented by his words and conduct to be a deadly weapon or dangerous instrument, as required by § 53a-135 (a) (1) (B). We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. At approximately 4:10 p.m. on April 28, 2017, the defendant entered a branch of Farmington Bank in New Britain. The defendant was dressed in dark, baggy clothing, including a sweatshirt with the hood pulled over his head. The defendant is approximately five feet, seven inches tall, and had a skinny build. The defendant remained in the lobby of the bank for approximately one hour, during which time he went to a workstation in the middle of the bank, where he picked up a pen and a piece of paper. He then sat in a guest chair with a magazine or brochure in his lap on which he began writing. While in the bank, during which time his activities were recorded by bank surveillance cameras, he occasionally held to his ear what appeared to be a cell phone.

Shortly after 5 p.m., the defendant approached the teller station at which Jessica Martinez, a bank supervisor, was working. The counter at the teller station was slightly taller than the defendant's waist, and rising from either side of the station were dividers about the same height as the defendant's shoulders. The dividers supported a piece of glass that separated Martinez and the defendant. The defendant positioned his head such that

he was hovering over this glass during his interaction with Martinez.

Martinez asked the defendant how she could assist him. The defendant then passed a withdrawal ticket to Martinez and mumbled, "give me all the money and no one will get hurt." The front side of the withdrawal ticket had "4-28-17" handwritten on the date line, "Anthony Springer" handwritten on the name line, and "Anthony" handwritten on the signature line. On the back side of the withdrawal ticket was a handwritten note, which stated: "Give me . . . [a]ll the money and no one gets hurt. . . . It's in my sweatshirt. Make it quick . . . 100's 50's 20's 10's 5's . . . Make it quick." Martinez, acting under the belief that "something could possibly happen" if she did not comply with the defendant's demands, gave the defendant $613 in currency. The defendant left the bank at 5:05 p.m. The police were called and arrived at the bank approximately three minutes later.

James Wozniak, an officer for the New Britain Police Department, arrived at the bank, where he found Martinez, who "appeared in shock and was emotional, crying." A state forensic laboratory analyzed the defendant's note and found both latent fingerprints and DNA on it. Analysis of the evidence supported a finding that one fingerprint matched the defendant's right index finger and two other fingerprints matched his right middle finger. The DNA found on the note was determined to be consistent with that of the defendant.

The fingerprint analysis led the police to the defendant, and they attempted to locate him at an address in Willimantic. Ivette Santiago, who was dating the defendant at the time of the robbery, lived at this address and was there when the police arrived. Two New Britain police officers spoke with Santiago, who provided the police with two cell phone numbers that she had used to communicate with the defendant. Santi-

ago identified the cell phone number that the defendant used to contact her around the time of the robbery. The police then obtained cell phone records for this phone number after executing a search warrant. These phone records showed that at 4:40 and 5:06 p.m. on the date of the robbery, the defendant's phone accessed a cellular antenna that was mounted on a New Britain church steeple that "[pointed] right toward the Broad Street area where the bank [was]" located.

The defendant was arrested on October 19, 2017. On August 22, 2018, by way of a two count, long form information, the state charged the defendant with one count of robbery in the second degree in violation of § 53a-135 (a) (1) (B) and one count of robbery in the second degree in violation of § 53a-135 (a) (2) (B). The case was tried to a jury over the course of four days, starting on September 24, 2018. The state rested on September 27, 2018, the third day of trial. Immediately thereafter, the defendant orally moved for a judgment of acquittal.[1] The court denied the motion. The defendant then rested without presenting evidence. On September 28, 2018, the court held a charging conference on the record, followed by the closing arguments of counsel. The court then delivered the charge, and the jurors began to deliberate. Later that day, the jury returned guilty verdicts as to both counts.

On October 2, 2018, the defendant filed a motion for a judgment of acquittal after the verdict pursuant to Practice Book § 42-51, asserting that the jury did not hear sufficient evidence to find beyond a reasonable doubt that the defendant committed the crimes with which he was charged. On October 4, 2018, the defendant filed an amended motion for a judgment of acquittal after the verdict, which contained the same arguments. The court denied both motions on December 3, 2018.

[1] A motion for a judgment of acquittal at the conclusion of the state's case-in-chief is permitted under Practice Book § 42-41.

On December 3, 2018, the court sentenced the defendant to a period of seven years of incarceration on each of the two counts. Immediately after sentencing, the trial court noted that "[o]ne of those counts [had] to be dismissed because you can't be guilty of the two counts of that one single act." Accordingly, the court concluded that "[t]he second count [was] dismissed pursuant to case law . . . ."[2] This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendant claims that the evidence was insufficient to prove beyond a reasonable doubt that he threatened the use of what he represented by his words and conduct to be a deadly weapon or dangerous instrument, as was required by § 53a-135 (a) (1) (B). We disagree.

"We begin our analysis by setting forth the well settled standard of review applicable to a sufficiency of

[2] The defendant has appealed from the judgment of conviction rendered on December 3, 2018, under § 53a-135 (a) (1) (B). In his appellate brief, the defendant nevertheless claims that the evidence presented at trial was insufficient to prove that all of the elements of § 53a-135 (a) (2) (B) were met. He raises this claim out of "an abundance of caution," to preserve the claim in the event that a reversal of his conviction under § 53a-135 (a) (1) (B) results in a reinstatement of the conviction under § 53a-135 (a) (2) (B).

The defendant also asserts that because the court dismissed, rather than vacated, his sentence under § 53a-135 (a) (2) (B), the conviction "cannot be revived without violating [his] constitutional protection against double jeopardy under the fifth and fourteenth amendments." The defendant notes that, although "the state did not request the dismissal, it also did not object and did not request permission to appeal." He contends that the dismissal "is a final judgment beyond the reach of this court . . . ."

The state argues that "the trial court merely misspoke when it referred to count two being dismissed." The state asserts that the court's statement that "you can't be guilty of the two counts of that one single act" is "an obvious reference to the double jeopardy concerns that were recognized and remedied via vacatur in *State* v. *Polanco*, [308 Conn. 242, 61 A.3d 1084 (2013)], and its progeny." Further, the state contends that, "had the trial court intended to enter an outright dismissal of count two, as opposed to effectuating *Polanco*, it would have had no reason to first impose a sentence thereon."

Because we affirm the defendant's conviction under § 53a-135 (a) (1) (B), we need not reach the merits of his claim regarding his conviction under § 53a-135 (a) (2) (B).

the evidence claim, wherein we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"[T]here is a fine line between the making of reasonable inferences and engaging in speculation—the jury

is allowed only to do the former. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. . . .

"Finally, on appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Hazard*, 201 Conn. App. 46, 53–55, 240 A.3d 749, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020).

Next, we identify the essential elements of the offense. Section 53a-135 (a) (1) (B) provides in relevant

part: "A person is guilty of robbery in the second degree when such person . . . commits robbery, as defined in section 53a-133,[3] and . . . in the course of the commission of the crime or of immediate flight therefrom, such person . . . displays or threatens the use of what such person represents by such person's words or conduct to be a deadly weapon[4] or a dangerous instrument[5] . . . ." (Footnotes added.) "In order for a jury to find a defendant guilty of robbery in the second degree, it would have to find that in the course of committing a larceny, the defendant used or threatened the immediate use of physical force on another person for the purpose of compelling the owner of such property to deliver up the property and in the course of the commission of the crime or of the immediate flight therefrom displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon or a dangerous instrument." *State* v. *Laws*, 36 Conn. App. 401, 409, 651 A.2d 273 (1994), cert. denied, 232 Conn. 921, 656 A.2d 671 (1995).

As to count one, the state alleged the following in the information: "[The defendant], in the course of the

[3] General Statutes § 53a-133 provides: "A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . ."

[4] General Statutes § 53a-3 (6) defines "deadly weapon" as "any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles. . . ."

[5] General Statutes § 53a-3 (7) defines "dangerous instrument" in relevant part as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ."

commission of the crime of robbery, as defined in [§] 53a-133 . . . threatened the use of what he represented through words and conduct to be a deadly weapon or dangerous instrument, *to wit*: passing a note indicating he had a deadly weapon or dangerous instrument, in his waistband to the bank teller, said conduct is in violation of [§] 53a-135 (a) (1) (B) . . . .'' (Emphasis in original.)

The state presented the following evidence to prove that the defendant had represented that he had a deadly weapon or a dangerous instrument.[6] Martinez testified that the defendant stated to her, ''give me all the money and no one will get hurt.'' The note that the defendant gave to Martinez, which was in evidence, stated in relevant part: ''Give me . . . [a]ll the money and no one gets hurt. . . . It's in my sweatshirt.'' Surveillance video and photographs of the defendant in the bank while wearing the sweatshirt were in evidence. Martinez also testified that the defendant's build was ''[s]kinny'' and that his ''clothes were really kind of baggy on him.'' Surveillance video showed that the counter at the teller station was slightly higher than the defendant's waist. Martinez testified that when the defendant came to the counter, ''he was kind of like hovered over the glass'' that separated them.

The defendant focuses on the language of the note and argues that the handwritten note to the teller was not sufficient to permit a jury to find beyond a reasonable doubt that he threatened to use what he represented was a deadly weapon or a dangerous instrument. He contends that ''the mere claim to possess an unspecified 'weapon' is insufficient to establish this essential

[6] The defendant does not dispute on appeal that the evidence was sufficient to prove beyond a reasonable doubt that he committed a robbery. He disputes only that the evidence was sufficient to prove that, in the commission of the robbery, he represented that he had a deadly weapon or a dangerous instrument.

element of the crime as charged." Further, he asserts that the jury impermissibly resorted to speculation to infer that the phrase "[i]t's in my sweatshirt" meant that he was threatening to use a deadly weapon or dangerous instrument.

The state argues that the jury reasonably could have concluded that the cumulative effect of the evidence presented at trial established guilt beyond a reasonable doubt. The state points to the following evidence as being sufficient to prove beyond a reasonable doubt that the defendant's words and actions implied that he was armed with a deadly weapon or a dangerous instrument that was capable of causing death or serious physical injury: "The defendant (1) appeared at [Martinez'] window wearing a closed-front sweatshirt; (2) was separated from Martinez by a thick counter structure and a clear partition that rose to chest/shoulder height; (3) said to Martinez, 'give me all the money and no one will get hurt'; and (4) handed Martinez a note saying, 'Give me . . . [a]ll the money and no one gets hurt. . . . It's in my sweatshirt.' "

To support this argument, the state cites *State* v. *Hawthorne*, 175 Conn. 569, 402 A.2d 759 (1978), a case in which a defendant was convicted of robbery in the first degree under General Statutes § 53a-134 (a) (4),[7] which contains language almost identical to the language of § 53a-135 (a) (1) (B). The difference between the two statutes is that § 53a-135 (a) (1) (B) covers the display or threatened use of deadly weapons and dangerous instruments, as opposed to only the display or threatened use of firearms. Because of the similarity

[7] General Statutes § 53a-134 (a) (4) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he . . . displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ."

in statutory language, *Hawthorne* provides us with some guidance. In *Hawthorne*, our Supreme Court stated that "the essential element of subsection (a) (4) . . . is the *representation* by a defendant that he has a firearm. Under this portion of § 53a-134, a defendant need not have an operable firearm; in fact, he need not even have a gun. He need only *represent* by his words or conduct that he is so armed." (Emphasis in original.) *State* v. *Hawthorne*, supra, 573; see also *State* v. *Bell*, 93 Conn. App. 650, 670, 891 A.2d 9 (quoting same language from *Hawthorne*), cert. denied, 277 Conn. 933, 896 A.2d 101 (2006). Applying that rationale to the statutory language of § 53a-135 (a) (1) (B), a defendant need only represent by his words *or* conduct that he is armed with a deadly weapon or dangerous instrument.

The state points to prior cases in which this court has held that evidence similar in nature to that presented to the jury in the present case was sufficient to prove beyond a reasonable doubt that a defendant had represented that he was armed in violation of § 53a-134 (a) (4). Although cases of this nature are inherently fact-specific, given the similarities between § 53a-134 (a) (4) and § 53a-135 (a) (1) (B), we find these cases to be instructive. In *State* v. *Bell*, supra, 93 Conn. App. 670–71, the defendant told the robbery victim that she "wouldn't get hurt" if she did what he told her to do, while holding something under his jacket that the victim testified "looked like a gun." In *State* v. *St. Pierre*, 58 Conn. App. 284, 288–89, 752 A.2d 86, cert. denied, 254 Conn. 916, 759 A.2d 500 (2000), "the defendant announced, '[t]his is a holdup,' and raised his right arm which remained hidden in his jacket from beneath the counter to counter level, while stating he was serious about holding up the store." In *State* v. *Arena*, 33 Conn. App. 468, 471, 477, 636 A.2d 398 (1994), aff'd, 235 Conn. 67, 663 A.2d 972 (1995), the defendant told the victim to "hurry up" and "nothing will happen," while pointing an object in an

opaque plastic shopping bag that the victim thought looked like a gun. In each of these cases, the defendants did not state that they had firearms on their person. The defendants' conduct *and* words, however, were sufficient for the juries to reasonably infer that the defendants wanted the victims to *think* that they had firearms. See *State* v. *Bell*, supra, 671. When weighing the sufficiency of the evidence in both *Bell* and *Arena*, this court noted that implicit in the defendants' statements were threats of harm. See id.; *State* v. *Arena*, supra, 477.

In the present case, the evidence demonstrated that, during the commission of the bank robbery, the defendant orally and in writing threatened harm to bank staff if his demand for money was not met. Immediately following the written threat of harm in the note that the defendant gave to Martinez was the statement, "[i]t's in my sweatshirt." The jury reasonably could have inferred that the note made reference to what the defendant would use to carry out the harm he threatened, namely, an object that he had concealed under his sweatshirt. It was also reasonable for the jury to infer that, in light of the fact that the defendant's threat was made during a bank robbery, he had threatened to inflict serious physical injury or death if his demands were not met. Thus, it was reasonable for the jury to find that the "it" that was under his sweatshirt was a type of object capable of inflicting such degree of harm. We are likewise mindful that Martinez' testimony and the surveillance video and photographs showed that the defendant's sweatshirt was baggy. Based on this testimony and evidence, the jury could have reasonably inferred that the defendant's sweatshirt was capable of concealing one of the deadly weapons or dangerous instruments described in General Statutes § 53a-3 (6) and (7). The jury reasonably could have found that the height of the counter and the defendant's posture while he was standing at the counter could have allowed him to further conceal whatever was in his sweatshirt.

When construing the evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found beyond a reasonable doubt that the defendant represented that he had a deadly weapon or a dangerous instrument in his sweatshirt *and* that he threatened to use it if Martinez did not give him the money he requested. Accordingly, we conclude that the evidence was sufficient for a jury to find the defendant guilty of robbery in the second degree in violation of § 53a-135 (a) (1) (B).

The judgment is affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 203

(Replaces Prior Cumulative Table)

Anderson *v.* Bloomfield 182
Contracts; third-party beneficiary; motion to dismiss; whether trial court properly determined that plaintiff lacked standing because she was not third-party beneficiary of contract.

Bank of New York Mellon *v.* Madison 8
Foreclosure; motion for judgment; motion for summary judgment; claim that trial court improperly granted plaintiff's oral motion for judgment on its reformation of mortgage claim; whether trial court improperly granted plaintiff's motion for summary judgment as to liability on its foreclosure claim; claim that plaintiff failed to establish that default notice that it had mailed to defendants complied with notice requirements of mortgage.

Bouffard *v.* Lewis 116
Dissolution of marriage; postjudgment modification of alimony and child support; motion for contempt; whether automatic stay pursuant to rule of practice (§ 61-11 (c)) was applicable; whether trial court's imposition of automatic stay on orders to make payments of alimony and child support in connection with judgment finding party in contempt was improper.

Derblom *v.* Archdiocese of Hartford 197
Motion to dismiss; standing; constructive trust; whether trial court properly granted defendant's motion to dismiss for lack of standing; whether trial court erred in construing bequest as outright gift rather than charitable trust; whether trial court erred in concluding that special interest exception to rule that attorney general has exclusive authority to bring action to enforce charitable gifts is limited to actions involving charitable trusts.

Donald G. *v.* Commissioner of Correction 58
Habeas corpus; whether trial counsel rendered ineffective assistance by failing to question witnesses about petitioner's attendance at event where some of his alleged criminal conduct occurred; whether petitioner was prejudiced by trial counsel's reference to complainant as victim or by trial counsel's failure to object or to request curative instruction when state made same reference; whether trial counsel rendered ineffective assistance by failing to investigate claim of uncharged misconduct.

Pascola-Milton *v.* Millard 172
Negligence; underinsured motorist benefits; arbitration; motion for summary judgment; whether trial court erred in denying plaintiff's demand for trial de novo following voluntary arbitration; whether plaintiff's claims were barred by two year statute of limitations (§ 52-584).

Ricketts *v.* Ricketts 1
Dissolution of marriage; jurisdiction; whether appeal from postdissolution orders of trial court denying plaintiff's motion to transfer matter to Regional Family Trial Docket and appointing guardian ad litem for parties' minor children was from final judgment.

Sieranski *v.* TJC Esq, A Professional Services Corp. 75
Wrongful termination of employment; motion to strike; whether plaintiff sufficiently pleaded facts that, if proven, would fall under public policy exception to at-will employment doctrine; whether statutes (§§ 3-94h and 53a-157b) relied on by plaintiff outline public policy against knowingly assisting affiant in submitting false statements to court; whether notary's act of notarizing affidavit that she believed to be false would violate § 3-94h, which prohibits notaries from performing any action with intent to deceive or defraud.

South Windsor *v.* Lanata 89
Zoning; claim that cease and desist order premised on alleged zoning violation was unconstitutionally vague; whether trial court abused its discretion in ordering fines during period in which defendant was under orders not to disturb property;

claim that trial court improperly assessed fines for wilful violation of zoning regulations pursuant to statute (§ 8-12).

State *v.* Hall-George 219

Robbery in second degree; whether evidence was sufficient to prove beyond reasonable doubt that defendant threatened use of what he represented by his words or conduct to be deadly weapon or dangerous instrument pursuant to statute (§ 53a-135 (a) (1) (B)).

State *v.* Russaw 123

Manslaughter in second degree; evading responsibility; motion to suppress; whether trial court properly denied motion to suppress statements defendant made to police during custodial interrogation after defendant was not readvised of his Miranda *rights before starting new line of questioning; whether interrogation of defendant on multiple subject matters comprised one continuous interview; whether* Miranda *rights are offense specific; whether waiver of* Miranda *rights was voluntary; whether admission of statements into evidence, if assumed to be improper, would have resulted in harmless error.*

U.S. Bank National Assn. *v.* Doe 218

Summary process; whether appeal was moot following defendants' dispossession of property.

U.S. Bank, National Assn. *v.* Moncho 28

Foreclosure; whether trial court erred in determining that defendants were not entitled to implied admissions on special defenses; claim that plaintiff was not proper owner of debt and therefore lacked standing; whether trial court erred in rejecting statute of limitations special defense for lack of ripeness; whether noncompliance with securitization requirements implicated plaintiff's standing; whether defendants received proper notice of default and acceleration prior to foreclosure; whether trial court abused its discretion in rejecting defendants' special defense of unclean hands; whether trial court erred in admitting payment history on note into evidence under business records exception to hearsay rule.

Velez *v.* Commissioner of Correction 141

Habeas corpus; whether habeas court abused its discretion in dismissing, pursuant to statute (§ 52-470 (e)), successive petition for writ of habeas corpus for failure to show good cause for delay in filing petition beyond deadline for successive petitions set forth in § 52-470 (d) (2); claim that habeas court improperly determined that petitioner failed to prove that his mental deficiencies, as described in 2005 neuropsychological report, contributed to his delay in filing second habeas petition and, thus, failed to rebut presumption of unreasonable delay set forth in § 52-470 (d).

Village Mortgage Co. *v.* Veneziano 154

Declaratory judgment; mootness; motion to dismiss; jurisdiction; claim that trial court erred in its interpretation of parties' stipulation; whether defendant's appellate claims were moot; whether defendant could be afforded practical relief on appeal; whether outcome of appeal had collateral estoppel and res judicata effects as to when plaintiff acquired defendant's stock; whether defendant's ability to bring action for vexatious litigation or fraud in future against plaintiff was dependent on appeal being heard on its merits.

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice of Availability of List of Municipalities Exempt from the Affordable Housing Appeals Procedure

In accordance with § 8-30-g of the Connecticut General Statutes, the Department of Housing (DOH) has prepared the list of municipalities that are exempt from the affordable housing appeals procedure and those municipalities that are not exempt. This list is effective March 1, 2021. A copy of this list is available on the agency website at www.ct.gov/doh For additional information please write to Laura Watson, Economic and Community Development Agent, Laura.Watson@ct.gov or call at (860) 270-8169.