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STATE OF CONNECTICUT *v.* MUHAMMAD A. QAYYUM

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 864 (AC 42456), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the trial court had properly admitted evidence of the defendant's lack of income?

"2. Did the Appellate Court correctly conclude that the trial court had not abused its discretion in permitting expert testimony regarding the defendant's intent to sell narcotics?"

Robert L. O'Brien, assigned counsel, in support of the petition.

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

Decided January 26, 2021

IN RE JA'MAIRE M.

The petition of the respondent father for certification to appeal from the Appellate Court, 201 Conn. App. 498 (AC 43710), is denied.

Albert J. Oneto IV, assigned counsel, in support of the petition.

Seon Bagot, assistant attorney general, in opposition.

Decided January 26, 2021

ERIC T. KELSEY *v.* COMMISSIONER OF CORRECTION

The petitioner Eric T. Kelsey's petition for certification to appeal from the Appellate Court, 202 Conn. App. 21 (AC 42932), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that 'abuse of discretion' is the appropriate standard of review for dismissals of habeas petitions pursuant to General Statutes § 52-470?

"2. Did the Appellate Court correctly determine that the petitioner had failed to establish good cause necessary to overcome the rebuttable presumption of unreasonable delay as set forth in § 52-470?"

Naomi T. Fetterman, assigned counsel, in support of the petition.

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

Decided January 26, 2021 *

* Modified May 4, 2021. See *Kelsey* v. *Commissioner of Correction*, 336 Conn. 941, 941–42, A.3d (2021).

ORDERS

CONNECTICUT REPORTS

VOL. 336

ERIC T. KELSEY *v.* COMMISSIONER
OF CORRECTION

The petitioner Eric T. Kelsey's petition for certification to appeal from the Appellate Court, 202 Conn. App. 21 (AC 42932), is granted, limited to the following issues:

"1. Did the Appellate Court correctly determine that 'abuse of discretion' is the appropriate standard of review of a habeas court's dismissal of a successive habeas petition following its determination that the petitioner had not demonstrated good cause for the untimely filing pursuant to General Statutes § 52-470?

"2. Did the Appellate Court correctly determine that the habeas court did not err in finding that the petitioner had failed to establish good cause necessary to overcome the rebuttable presumption of unreasonable delay as set forth in § 52-470?"

Naomi T. Fetterman, assigned counsel, in support of the petition.

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

Decided May 4, 2021*

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEER

The petition of the plaintiff in error, Edward Bona, for certification to appeal from the Appellate Court, 202 Conn. App. 487 (AC 43467), is denied.

Edward Bona, self-represented, in support of the petition.

Lloyd L. Langhammer, in opposition.

Decided May 4, 2021

ANTHONY VELEZ *v.* COMMISSIONER
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The petitioner Anthony Velez' petition for certification to appeal from the Appellate Court, 203 Conn. App. 141 (AC 42446), is denied.

Michael W. Brown, in support of the petition.

Sarah Hanna, senior assistant state's attorney, in opposition.

Decided May 4, 2021

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* This court modified the issues previously certified in its January 26, 2021 order in the present case. See *Kelsey* v. *Commissioner of Correction*, 336 Conn. 912, 244 A.3d 562 (2021). The petitioner Eric T. Kelsey's petition for certification to appeal is granted, limited to the issues enumerated in this order.

WENDY GEORGES *v.* COMMISSIONER OF CORRECTION

The petitioner Wendy Georges' petition for certification to appeal from the Appellate Court, 203 Conn. App. 639 (AC 43145), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

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

Decided May 4, 2021

IN RE RILEY B.

The petition of the respondent mother to appeal from the Appellate Court, 203 Conn. App. 627 (AC 43959), is denied.

Albert J. Oneto IV, assigned counsel, in support of the petition.

Elizabeth Bannon and *Evan O'Roark*, assistant attorneys general, in opposition.

Decided May 4, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 204

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JOHN M. ROBB *v.* CONNECTICUT BOARD OF VETERINARY MEDICINE ET AL.
(AC 41912)

Lavine, Prescott and Moll, Js.*

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant state board of veterinary medicine disciplining him on a finding that he was negligent pursuant to statute (§ 20-202 (2)). The plaintiff had been administering less than the prescribed dose of rabies vaccine to dogs under a certain weight in contravention of the applicable statute (§ 22-359b) and regulation (§ 22-359-1). The court dismissed the plaintiff's appeal, concluding that the board had properly construed § 22-359b

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

and § 22-359-1 of the regulations to mandate the administration of the prescribed amount of rabies vaccines to all dogs regardless of weight and properly determined that the plaintiff had committed professional negligence by failing to comply with the statute and the regulation. The court further concluded that the board's decision was supported by substantial record evidence and that the board did not exceed its authority or abuse its discretion in imposing its disciplinary order. On the plaintiff's appeal to this court, *held*:

1. The trial court did not err in concluding that the board properly construed the statute and regulation governing the standard of care for rabies vaccination in Connecticut and properly imposed disciplinary action on the plaintiff on its finding that his vaccination protocol constituted a prima facie violation of the standard of care: § 22-359b and § 22-359-1 of the regulations are plain and unambiguous in requiring that licensed rabies vaccines in Connecticut must be administered as instructed, a plain reading of both does not yield an absurd or unworkable result, and neither the statute nor the regulation conferred discretion on the plaintiff to administer the rabies vaccine in any other manner, which he did not dispute doing; moreover, this court declined to alter the statutory and regulatory scheme governing rabies vaccinations in Connecticut.
2. This court declined to review the plaintiff's claims that the trial court improperly concluded that there was substantial evidence supporting the board's finding that he had failed to receive informed consent from his client and that the board did not exceed its authority or abuse its discretion in imposing its disciplinary order, the plaintiff having failed to brief these claims adequately; the plaintiff's attempt to incorporate by reference his amended verified complaint into his principal appellate brief was not procedurally proper, and the abstract representations contained in the plaintiff's principal appellate brief, unaccompanied by substantive legal analysis or citation to legal authority, failed to satisfy the plaintiff's obligation to adequately brief his claims.

Argued June 29, 2020—officially released May 18, 2021

Procedural History

Appeal from the decision by the named defendant disciplining the plaintiff upon a finding of professional negligence, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of New Britain, where the court, *Hon. Lois Tanzer*, judge trial referee, rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Joseph P. Secola, for the appellant (plaintiff).

Tanya Feliciano DeMattia, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (named defendant).

Opinion

MOLL, J. The plaintiff, John M. Robb, a veterinarian, appeals from the judgment of the Superior Court dismissing his administrative appeal from the decision of the defendant Connecticut Board of Veterinary Medicine (board)[1] disciplining him upon a finding of professional negligence pursuant to General Statutes § 20-202 (2).[2] On appeal, we distill the plaintiff's claims to be that the court incorrectly concluded that (1) the board properly construed General Statutes § 22-359b, as well as § 22-359-1 of the Regulations of Connecticut State Agencies, in finding him to have been professionally negligent

[1] In the administrative appeal, the plaintiff named as additional defendants (1) the Connecticut Department of Public Health (department), (2) Mary A. O'Neill, Esq., as the chairperson of the board, and (3) Raul Pino, M.D., as the commissioner of the department. The board is the only defendant that has filed an appellate brief in this appeal.

[2] General Statutes § 20-202 provides in relevant part: "After notice and opportunity for hearing as provided in the regulations established by the Commissioner of Public Health, said board may take any of the actions set forth in section 19a-17 for any of the following causes . . . (2) proof that the holder of such license . . . has become unfit or incompetent or has been guilty of cruelty, unskillfulness or negligence towards animals and birds. In determining whether the holder of such license has acted with negligence, the board may consider standards of care and guidelines published by the American Veterinary Medical Association including, but not limited to, guidelines for the use, distribution and prescribing of prescription drugs . . . ."

We observe that "negligence" as used in § 20-202 (2) is not akin to the common-law tort standard. See *Lawendy* v. *Connecticut Board of Veterinary Medicine*, 109 Conn. App. 113, 119–20, 951 A.2d 13 (2008) (concluding that, unlike common-law negligence, finding of professional negligence under § 20-202 (2) does not require evidence of actual injury to animal). When referring to "negligence" under § 20-202 (2), we use the phrase "professional negligence" to differentiate it from the common-law tort standard.

under § 20-202 (2), (2) there was substantial evidence supporting the board's finding that he had failed to obtain informed consent from one of his clients with respect to his rabies vaccination protocol, and (3) the board did not exceed its authority or abuse its discretion in imposing its disciplinary order. We affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff is licensed to practice veterinary medicine in Connecticut. On August 1, 2014, the Connecticut Department of Public Health (department) submitted to the board a statement of charges[3] against the plaintiff charging him with professional negligence in violation of § 20-202 (2). The statement of charges alleged in relevant part: "From about July, 2010 through about February, 2012, while working at the [Banfield Pet Hospital in Stamford, the plaintiff] failed to meet the standard of care in one or more of the following ways: a. [the plaintiff] instructed employees to administer [one-half] doses of rabies vaccines to animals under the weight of fifty pounds; b. [the plaintiff] instructed employees to refrigerate unused [one-half] doses of rabies vaccines to be used to vaccinate another pet; c. [the plaintiff] failed to adequately document medication administration; and/or d. [the plaintiff] failed to obtain adequate informed consent from pet owners."

On November 3, 2014, the plaintiff answered the statement of charges and asserted three special defenses. The plaintiff twice amended his answer and special defenses. In his operative responsive pleading, the plaintiff alleged that he had "instructed his employees to give an appropriate dose of rabies vaccine" to his

[3] General Statutes § 20-196b provides: "The Connecticut Board of Veterinary Medicine shall (1) hear and decide matters concerning suspension or revocation of licensure, (2) adjudicate complaints filed against practitioners licensed under this chapter and (3) impose sanctions where appropriate."

clients' dogs, but he otherwise denied the material allegations set forth in the statement of charges. In addition, the plaintiff asserted six special defenses.[4]

The board held six days of administrative hearings between December 2, 2014, and February 23, 2016. On April 5, 2016, the parties submitted posthearing briefs. The record was closed on April 5, 2016, and the board conducted fact-finding on May 4 and November 2, 2016.

On February 2, 2017, the board issued a corrected memorandum of decision[5] concluding that the department had proven by a preponderance of the evidence that, between approximately July, 2010, and February, 2012, the plaintiff had committed professional negligence in violation of § 20-202 (2). First, the board found that the plaintiff did not contest the department's allegation that he had instructed his employees to administer one-half doses of rabies vaccines to his clients' dogs weighing under fifty pounds; instead, the plaintiff contended that he had exercised his discretion to adjust the doses based on the weight of the dogs. The board

[4] The plaintiff asserted the following special defenses: (1) § 22-359-1 of the Regulations of Connecticut State Agencies was an unconstitutional delegation of power in violation of article first, § 8, article second, § 1, and article third, § 1, of the Connecticut constitution; (2) requiring him to adhere to § 22-359-1 of the regulations was arbitrary or capricious on the basis of changes in federal law; (3) requiring him to adhere to § 22-359-1 of the regulations was arbitrary or capricious because, on the basis of his clinical experience, as well as advancements in medicine, his rabies vaccination protocol, which provided reduced doses of rabies vaccines to smaller pets, was justified; (4) the statement of charges was untimely pursuant to General Statutes § 20-204a and was barred under the doctrine of laches; (5) § 22-359-1 of the regulations was unconstitutionally vague as applied to him; and (6) pursuant to *North Carolina State Board of Dental Examiners* v. *Federal Trade Commission*, 574 U.S. 494, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), the board was violating antitrust laws because three of its five members were veterinarians.

[5] The board issued an original memorandum of decision on February 1, 2017. The following day, the board issued the corrected memorandum of decision, which corrected a typographical error.

concluded that, pursuant to General Statutes § 22-359b[6] and § 22-359-1 of the Regulations of Connecticut State Agencies,[7] rabies vaccines had to be administered in accordance with "licensed rabies vaccine label directions," which required the administration of one milliliter of rabies vaccine regardless of the weight of the dog, such that the plaintiff's conduct constituted a deviation from the standard of care.[8]

Next, the board determined that the department had proven its allegation that the plaintiff had instructed his employees to refrigerate unused one-half doses of rabies vaccines for later use. The board concluded that the plaintiff did not breach the standard of care by instructing his employees to refrigerate the unused one-half doses for short periods of time; however, the board reiterated its prior determination that the administration of one-half doses of rabies vaccines to dogs weighing under fifty pounds constituted a breach of the standard of care.

Last, the board determined that the department had proven its allegation that the plaintiff had failed to obtain informed consent from his clients with regard to his rabies vaccination protocol. The board stated that, "when a veterinarian deviates from the administration of a statutorily mandated recommended [vaccine]

[6] General Statutes § 22-359b provides: "A rabies vaccine used at an antirabies clinic shall be administered in accordance with the recommendations of the United States Department of Agriculture."

[7] Section 22-359-1 of the Regulations of Connecticut State Agencies provides in relevant part: "(5) 'Licensed rabies vaccine' means a vaccine against rabies for certain species of animals licensed by the United States Department of Agriculture for use in such species and marketed in the United States. . . .

"10 'Vaccinated' means an animal was vaccinated against rabies in accordance with licensed rabies vaccine label directions."

[8] The board also concluded that, pursuant to General Statutes § 22-339b (b), the plaintiff could have obtained an exemption in order to vary the rabies vaccine doses administered to dogs weighing under fifty pounds, but that there was no evidence in the record that the plaintiff had done so. Because the plaintiff has not challenged that conclusion in his principal appellate brief, we do not address it further.

dose, he or she must document and explain to the client that: there is a mandated dose, why the mandated dose was not used, and the risks of not vaccinating the recommended dose." With regard to Anne Bloomdahl, one of the plaintiff's clients, the board determined that "her testimony supported the finding that she did not receive adequate information from [the plaintiff] as to the legality of [the plaintiff's] rabies vaccine protocol. . . . Bloomdahl incorrectly believed that having her dogs vaccinated with only [one-half] doses of rabies vaccine[s] was sufficient under Connecticut law. . . . Thus, [the plaintiff] failed to receive informed consent from Bloomdahl when he administered [one-half] doses of rabies vaccine[s] to her dogs without informing her that he was statutorily required to inject her dog[s] with a full milliliter of the rabies vaccine, the reason the full dose was not used, the fact that [the plaintiff] could have obtained a rabies vaccine exemption [pursuant to General Statutes § 22-339b (b)], and about the risks associated with the failure to vaccinate . . . Bloomdahl's dog[s] fully." (Citations omitted.) Additionally, the board found the plaintiff to be "not credible" and "evasive" when questioned about whether he had received informed consent from his clients.[9]

In light of the foregoing determinations, the board concluded that disciplinary action against the plaintiff was warranted pursuant to General Statutes §§ 19a-17[10] and 20-202. In imposing its disciplinary order, the board stated: "The board finds that [the plaintiff's] misconduct of under vaccinating animals for rabies endangered their lives and those around them. The department's expert stated that under vaccination could potentially

[9] As to the department's remaining allegation that the plaintiff had failed to adequately document medication administration, the board determined that the department had not sustained its burden of proof.

[10] Pursuant to § 19a-17 (a), "upon finding the existence of good cause," the board is authorized to discipline a licensed veterinarian by, inter alia, placing his or her license to practice veterinary medicine on probation.

provide the vaccinated animals with less protection, which 'could result in the animal getting a zoonotic disease that's potentially fatal to people.' . . . In the situation when an animal is suspected of having contracted rabies, the board notes that the animal must be quarantined and may be killed in order to examine whether it did in fact contract rabies. . . . Therefore, due to the serious consequences that could result from under vaccination for rabies, and [the plaintiff's] ardent belief that under his Aesculapian authority[11] he does not have to vaccinate animals in accordance with state laws and regulations . . . the board orders that [the plaintiff's] license to practice veterinary medicine be place[d] on probation for a period of twenty-five . . . years under the terms and conditions listed [later in the corrected memorandum of decision]."[12] (Citations omitted; footnote added.)

On March 28, 2017, pursuant to General Statutes § 4-183 (a),[13] the plaintiff appealed from the decision of the

[11] During the administrative hearing held on June 15, 2015, the plaintiff testified in relevant part that "Aesculapian authority is the authority that a doctor has between each patient, being a veterinarian, being a human doctor, to make the best decision for that patient. It's an authority given by God because you're dealing with life and death. And if a veterinarian or any doctor doesn't have that authority and is forced to make a decision based on any law or regulation or statute, but he—he or she knows that it will cause injury to the pet in front of him, then he has the authority to overrule that decision. So, that's—that's an authority that only doctors have. Lawyers don't have it. Electricians don't have it. No other professional has it, but we, because we are physicians, who inject things in animals, who prescribe medications, we have the authority, the final say with every patient in front of us with what we do, what we inject, how much, this type of thing. So, the Aesculapian authority is the authority I have to formulate a vaccine protocol based on my clinical experience, my study of the scientific articles. It's a God-given authority."

[12] In addition to placing the plaintiff's license to practice veterinary medicine on probation, the board reprimanded the plaintiff's license. See General Statutes § 19a-17 (a) (4). To be clear, the board did not revoke the plaintiff's license; rather, the primary limitation imposed by the disciplinary order was that the plaintiff was prohibited from administering rabies vaccinations to animals during the probationary period.

[13] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

board to the Superior Court. On June 20, 2018, after the parties had filed their respective briefs, the court, *Hon. Lois Tanzer*, judge trial referee, issued a memorandum of decision dismissing the administrative appeal. The court summarized that "[t]he crux of the [administrative] appeal concerns [the plaintiff's] ability to use his personal rabies vaccination protocol of administering a [one-half] dose of rabies vaccine for dogs weighing less than fifty pounds instead of complying with state statutes and regulations for administering rabies vaccines. [The plaintiff] raised numerous issues before the board in his denial to the [statement of] charges and in several special defenses. He reiterates them in this [administrative] appeal. He raises essentially two challenges: (1) the board misinterpreted and misapplied the statutes and regulations governing the administration of rabies vaccines, and (2) the board did not have substantial evidence to support its findings and conclusions, and it acted illegally, arbitrarily and in abuse of its discretion. [The plaintiff] also challenges the [disciplinary] order of the board as erroneous in law and fact." The court rejected the plaintiff's contentions, concluding that (1) the board properly construed § 22-359b, as well as § 22-359-1 of the Regulations of Connecticut State Agencies, to mandate that rabies vaccines be administered in accordance with their attendant label directions, which required the administration of one milliliter of rabies vaccine to dogs regardless of weight, and properly applied the statute and the regulation to determine that the plaintiff had committed professional negligence in violation of § 20-202 (2) by failing to comply with the statute and the regulation, and (2) there was substantial evidence in the record supporting the board's decision. In addition, the court rejected the plaintiff's first through fifth special defenses[14] and determined that the board did not exceed its authority or

[14] On April 17, 2015, the plaintiff filed with the board a motion to dismiss the statement of charges predicated on his sixth special defense asserting that the composition of the board violated antitrust laws. On May 4, 2015,

abuse its discretion in imposing its disciplinary order. This appeal followed.

I

The plaintiff first claims that the court improperly concluded that the board correctly interpreted and applied § 22-359b, as well as § 22-359-1 of the Regulations of Connecticut State Agencies, in determining that he had committed professional negligence in violation of § 20-202 (2) by deviating from the requirements of the statute and the regulation regarding the administration of rabies vaccines. For the reasons that follow, we disagree.

We begin by setting forth the relevant standard of review and legal principles governing our review of this claim. "[J]udicial review of the [board's] action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"A reviewing court, however, is not required to defer to an improper application of the law. . . . It is the function of the courts to expound and apply governing

the board denied the motion to dismiss. On appeal to the Superior Court, the plaintiff did not challenge the board's denial of his motion seeking dismissal on the basis of his sixth special defense. Neither the board's denial of the motion to dismiss nor the plaintiff's sixth special defense is at issue in this appeal.

principles of law. . . . We previously have recognized that the construction and interpretation of a statute is a question of law for the courts, where the administrative decision is not entitled to special deference . . . . Questions of law [invoke] a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Because this case forces us to examine a question of law, namely, [statutory] construction and interpretation . . . our review is de novo." (Citations omitted; internal quotation marks omitted.) *Okeke* v. *Commissioner of Public Health*, 304 Conn. 317, 324–25, 39 A.3d 1095 (2012). Additionally, our appellate courts have not had occasion to interpret either the statute or the regulation. Thus, "[w]e are also compelled to conduct a de novo review because the issue of statutory construction before this court has not yet been subjected to judicial scrutiny." (Internal quotation marks omitted.) Id., 325.

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

policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 302–303, 140 A.3d 950 (2016). "Administrative rules and regulations are given the force and effect of law. . . . We therefore construe agency regulations in accordance with accepted rules of statutory construction." (Internal quotation marks omitted.) *Colonial Investors, LLC* v. *Furbush*, 175 Conn. App. 154, 169, 167 A.3d 987, cert. denied, 327 Conn. 968, 173 A.3d 953 (2017).

Before turning to the statute and the regulation at issue in this appeal, we first observe that animal vaccines are extensively regulated by the federal government. The Virus-Serum-Toxin Act, 21 U.S.C. §§ 151 through 159 (2018), "authorizes the United States Department of Agriculture (USDA) to license and regulate the preparation and sale of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals. . . . USDA has delegated this authority to its Animal and Plant Health Inspection Service (APHIS). . . . APHIS in turn has promulgated an extensive regulatory scheme governing the design, manufacture, distribution, testing, and labeling of animal vaccines." (Citations omitted; internal quotation marks omitted.) *Symens* v. *SmithKline Beecham Corp.*, 152 F.3d 1050, 1052 (8th Cir. 1998). APHIS "grants licenses for veterinary biological products which are pure, safe, potent, and efficacious *when used according to label instructions*." (Emphasis added.) Viruses, Serums, Toxins, and Analogous Products; Packaging and Labeling, 59 Fed. Reg. 43,441, 43,442 (August 24, 1994).

In Connecticut, unless exempted from vaccination requirements, "[a]ny owner or keeper of a dog or cat

of the age of three months or older shall have such dog or cat vaccinated against rabies."[15] General Statutes § 22-339b (a). Pursuant to § 22-359b, "[a] rabies vaccine used at an antirabies clinic shall be administered in accordance with the recommendations of the United States Department of Agriculture." Additionally, General Statutes § 22-359 (e) provides in relevant part that the Commissioner of Agriculture (commissioner) "shall institute such measures as the commissioner deems necessary to prevent the transmission of rabies associated with animals in public settings," and subsection (f) provides in relevant part that the commissioner "shall adopt regulations . . . to implement the provisions of subsection (e) of this section. Such regulations may include requirements for the vaccination of animals against rabies . . . ." Pursuant to that authority, the commissioner adopted § 22-359-1 of the Regulations of Connecticut State Agencies, which sets forth the following relevant regulatory definitions: "(5) 'Licensed rabies vaccine' means a vaccine against rabies for certain species of animals licensed by the United States Department of Agriculture for use in such species and marketed in the United States. . . . (10) 'Vaccinated' means an animal was vaccinated against rabies *in accordance with licensed rabies vaccine label directions*." (Emphasis added.)

Read together and in light of the federal regulatory scheme governing rabies vaccinations, § 22-359b and § 22-359-1 of the Regulations of Connecticut State Agencies are plain and unambiguous in requiring that licensed rabies vaccines in Connecticut must be administered as instructed by their accompanying label directions. Neither that statute nor that regulation confers discretion on a veterinarian to administer rabies vaccines in

[15] "'Rabies' " is defined as "an infection of the central nervous system of mammals caused by viruses in the Rhabdovirus family that typically results in death." Regs., Conn. State Agencies § 22-359-1 (8).

a manner other than as directed by the attendant rabies vaccine label directions. The sincerity of his or her belief is immaterial. In the present case, there is no dispute that the licensed rabies vaccine label directions instructed the administration of one milliliter of rabies vaccine to the dogs of the plaintiff's clients regardless of weight.[16]

In reaching its decision, the board stated that "[t]he standard of care requires that [the plaintiff] comply with the statutory and regulatory requirements for rabies vaccination of dogs. In Connecticut, the standard of care for rabies vaccination is governed by" § 22-239b and § 22-359-1 of the Regulations of Connecticut State Agencies. Upon finding that the plaintiff's rabies vaccination protocol "diverged from the rabies vaccine label instructions, which provided for the full vaccine dose of one milliliter to be administered regardless of the weight of the animal" and finding that the plaintiff had failed to obtain a rabies vaccine exemption pursuant to § 22-339b (b); see footnote 8 of this opinion; the board concluded that the plaintiff's weight dependent protocol constituted "a prima facie violation" of the statute and the regulation. Whereupon, the board determined that the plaintiff's conduct violated the standard of care and constituted grounds for disciplinary action pursuant to §§ 19a-17 and 20-202 (2). The trial court agreed with the board's statutory and regulatory interpretation and, inter alia, found that the board's findings were based on sufficient evidence.

Here, the plaintiff raises a number of arguments challenging the "mechanical" application of § 22-359b and

[16] The plaintiff contends that § 22-359b and § 22-359-1 of the Regulations of Connecticut State Agencies do not expressly set forth the dose of rabies vaccine required to be administered. The plaintiff, however, does not contest that the licensed rabies vaccine label directions instruct the administration of one milliliter of rabies vaccine. During the administrative hearing held on June 15, 2015, the plaintiff testified that "[w]e all know the package insert says that [the dose is] one milliliter per pet. That's what the vaccine insert says . . . . [The dose is] one milliliter per pet. That's [the] recommendation."

§ 22-359-1 of the Regulations of Connecticut State Agencies by the board and the court. We construe these arguments as supporting an assertion by the plaintiff that a plain reading of the statute and the regulation yields an absurd or unworkable result. Specifically, the plaintiff contends that construing the statute and the regulation to mandate strict compliance with licensed rabies vaccine label directions (1) creates a conflict with the Veterinarian's Hippocratic Oath[17] because, in his opinion, it is necessary to lower the doses of rabies vaccines provided to smaller dogs to protect their health, (2) removes the right that medical professionals, including veterinarians, have to use pharmaceuticals "off-label,"[18] (3) ignores evidence in the record demonstrating that administering the legally required doses of rabies vaccines to smaller animals increases their risk of injury, (4) ignores the lack of evidence in the record indicating that administering less than the legally required doses of rabies vaccines to his clients' dogs weighing under fifty pounds caused any harm,[19] (5) ignores changes in

[17] The record contains the following recitation of the Veterinarian's Hippocratic Oath: "Being admitted to the profession of veterinary medicine, I solemnly swear to use my scientific knowledge and skills for the benefit of society through the protection of animal health and welfare, the prevention and relief of animal suffering, the conservation of animal resources, the promotion of public health, and the advancement of medical knowledge. I will practice my profession conscientiously, with dignity, and in keeping with the principles of veterinary medical ethics. I accept as a lifelong obligation the continual improvement of my professional knowledge and competence."

[18] "Off-label" refers to the "[u]se of a licensed drug for an indication not approved by the [United States Food and Drug Administration] or other governmental regulatory body." Stedman's Medical Dictionary (28th Ed. 2006) p. 1359.

[19] To the extent that the plaintiff raises a distinct claim that the board erred in finding that he had committed professional negligence under § 20-202 (2) without evidence of actual harm to his clients' dogs, that claim is unavailing. See *Lawendy* v. *Connecticut Board of Veterinary Medicine*, 109 Conn. App. 113, 119–20, 951 A.2d 13 (2008) (concluding that evidence of actual injury to animal is not required to sustain finding of professional negligence under § 20-202 (2)).

federal law pursuant to which vaccine manufacturers are immune from liability for injuries caused by vaccinations administered in accordance with label directions whereas veterinarians remain liable therefor, and (6) ignores that the standard of care regarding the administration of rabies vaccines is in a "state of flux." We consider these various contentions, none of which is directed to the language of the statute or the regulation, to be unavailing. While all reflect the plaintiff's policy related beliefs as to why he should not have to comply with current requirements governing the administration of rabies vaccines, none leads us to conclude that a plain reading of the statute and the regulation yields an absurd or unworkable result.

What the plaintiff seeks is a change in the law. Indeed, during the administrative hearing held on November 4, 2015, the plaintiff testified: "What I'm doing is not illegal. It's not illegal, and I will show that. I will show that. I have an authority that is above any law that would make me purposely hurt an animal. I have that authority, so it's not illegal. *The law is illegal. The law is a law that's not doing what it's supposed to. It's a corrupt law and needs to be changed* . . . ." (Emphasis added.) "[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. . . . [C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (Internal quotation marks omitted.) *Castro* v. *Viera*, 207 Conn. 420, 435, 541 A.2d 1216 (1988).[20] Simply put, the plaintiff must pursue other avenues if he seeks to change the law, as it is not within this court's province to alter the statutory and regulatory scheme governing rabies vaccinations in Connecticut.

[20] Accepting the plaintiff's argument would open the door to every veterinarian utilizing his or her own personal view as to what dosages are appropriate and undermine the state's goal of enacting a coherent regulatory scheme.

Here, the board and the court correctly construed § 22-359b and § 22-359-1 of the Regulations of Connecticut State Agencies as requiring licensed rabies vaccines to be administered in accordance with their attendant label directions, which instructed the administration of one milliliter of rabies vaccine to dogs regardless of their weight. The plaintiff does not dispute that, during the time period in question, he instructed his employees to administer one half of the legally mandated dose of rabies vaccine to his clients' dogs weighing under fifty pounds. Accordingly, the court did not err in concluding that the board properly construed the statute and the regulation governing the standard of care for rabies vaccination in Connecticut, found that the plaintiff's rabies vaccination protocol constituted a prima facie violation thereof, and imposed disciplinary action on the plaintiff pursuant to §§ 19a-17 and 20-202 (2).

II

The plaintiff next claims that the court improperly determined that (1) the board's finding that he did not receive informed consent from Bloomdahl with regard to his rabies vaccination protocol was supported by substantial evidence, and (2) the board did not exceed its authority or abuse its discretion in imposing its disciplinary order. We decline to review the merits of these claims because the plaintiff has failed to brief them adequately.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited."

(Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

At the outset, we note that the plaintiff seeks to incorporate by reference his amended verified complaint filed in the Superior Court on August 25, 2017, which is sixty-six pages long and described by the plaintiff as "the foundational document upon which [his] brief is built," into his principal appellate brief. He states that he has "not repeated factual or legal arguments [in his principal appellate brief] if made adequately in the amended verified complaint." (Emphasis omitted.) The plaintiff's attempt to incorporate by reference his amended verified complaint into his principal appellate brief is not procedurally proper. As is apparent in this case, permitting legal claims to be incorporated by reference into an appellate brief would, among other things, enable litigants to circumvent the page limitations set forth in Practice Book § 67-3.[21] See, e.g., *Papic* v. *Burke*, 113 Conn. App. 198, 217 n.11, 965 A.2d 633 (2009) ("it is not permissible to use [an] appendix [to an appellate brief] either to set forth argument or to evade the thirty-five page limitation provided in Practice Book § 67-3 and already met by the [appellant's] brief"). An appellant abandons any right to review of claims cursorily raised in a principal appellate brief without adequate supporting analysis and legal citations provided therein. See id., 216–17, 217 n.11 (concluding that appellant's claim was inadequately briefed when appellant sought to incorporate by reference supporting arguments contained in appendix into appellate brief, which contained no legal analysis or citation to case law with regard to claim). Thus, we decline to review any legal claims raised in the amended verified complaint that

[21] Pursuant to Practice Book § 67-3, when no cross appeal is involved, principal appellate briefs are limited to thirty-five pages and reply briefs are limited to fifteen pages. Section 67-3 further provides that the page limitations may be increased with permission of the chief justice or chief judge.

the plaintiff has not independently and adequately briefed in his principal appellate brief.[22]

Turning now to the plaintiff's claim that the court improperly concluded that there was substantial evidence supporting the board's finding that he had failed to receive informed consent from Bloomdahl with regard to his rabies vaccination protocol, the plaintiff asserts only the following in his principal appellate brief: "[The plaintiff's] client . . . Bloomdahl testified that, not only did [the plaintiff] obtain informed consent from her to do a weight-dependent vaccination, she specifically requested it beforehand for her [dogs]. . . . How the board, affirmed by the [trial] court, could find to the contrary is inexplicable." (Citation omitted.) The plaintiff provides no substantive legal analysis or citation to legal authority in his principal appellate brief to support this claim.[23] Thus, we decline to review it.

[22] At this juncture, we further note that the plaintiff states in his principal appellate brief that he is not raising any claims on appeal regarding his first or fifth special defenses. Also, the plaintiff did not pursue any claim regarding his sixth special defense in his administrative appeal and he does not raise any such claim before this court. See footnote 14 of this opinion. The plaintiff's second and third special defenses are encompassed in his arguments addressed in part I of this opinion.

In addition, the plaintiff has not raised any claim in his principal appellate brief with regard to his fourth special defense, although he has not expressly represented that he has abandoned any such claim. To the extent that the plaintiff requests that we review any legal claim regarding his fourth special defense raised in his amended verified complaint, notwithstanding that he has failed to analyze any such claim in his principal appellate brief, we reject that request. See *Papic* v. *Burke*, supra, 113 Conn. App. 216–17, 217 n.11.

[23] In its appellate brief, the board argues that the plaintiff's informed consent claim has not been adequately briefed. The plaintiff expounds on his informed consent claim in his reply brief. The informed consent claim remains unreviewable, however, because the plaintiff cannot use his reply brief to resurrect a claim that he has abandoned by failing to adequately brief it in his principal appellate brief. See *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010) (declining to consider claim when appellant raised "vague assertion" of claim in principal appellate brief and later "amplified her discussion of the issue considerably in her reply brief").

Similarly, the plaintiff has failed to adequately brief his claim challenging the propriety of the board's disciplinary order. With respect to this claim in his principal appellate brief, the plaintiff (1) recites the court's summary of the board's disciplinary order, (2) states that, despite describing the order as " 'draconian,' " the court did not disturb it, (3) asserts that the order should be vacated on remand, and (4) represents that, if the order is vacated on remand, then he agrees to refrain from administering rabies vaccines during the pendency of any proceedings before the board or the court on remand. These abstract representations, unaccompanied by substantive legal analysis or citation to legal authority, fail to satisfy the plaintiff's obligation to adequately brief his claim of error. Accordingly, we decline to review it.[24]

The judgment is affirmed.

In this opinion the other judges concurred.

O AND G INDUSTRIES, INC. *v.* AMERICAN HOME ASSURANCE COMPANY (AC 43135)

Cradle, Alexander and Harper, Js.

Syllabus

The plaintiff, a concrete supply company, sought to recover payment under certain surety bonds issued by the defendant, claiming that it had not been paid the amount it was owed for supplying concrete and other materials to the bonds' principal, M Co. M Co. entered into a subcontractor agreement with C Co. to deliver and pour concrete for a construction

[24] In its memorandum of decision, the court described the board's disciplinary order, which, inter alia, placed the plaintiff's license to practice veterinary medicine on probation for twenty-five years, as "draconian." We do not address the propriety of the disciplinary order, as the plaintiff has abandoned his claim of error regarding it. Nevertheless, as confirmed by the board's counsel during oral argument before this court, we note that the plaintiff is entitled to petition the board to withdraw the probation. See General Statutes § 19a-17 (b) (board "may withdraw the probation if it finds that the circumstances that required action have been remedied").

project. C Co. then engaged the plaintiff to supply concrete materials to C Co. to comply with its subcontractor agreement. After receiving a joint credit agreement and lien waiver from M Co., the plaintiff began supplying concrete and sent invoices directly to M Co., which paid the plaintiff in full. C Co. was unhappy with this arrangement and, thereafter, the plaintiff opened an account with C Co., albeit for a different project. Subsequently, the plaintiff continued to provide C Co. with concrete and charged C Co. directly; however, C Co. did not pay the plaintiff. The plaintiff informed M Co. of C Co.'s nonpayment and M Co. provided payment to C Co. to forward to the plaintiff, but C Co. failed to do so. After C Co. defaulted, the plaintiff sent the defendant a notice of claim under the payment bond, and recorded a mechanic's lien against the owner of the construction project. The defendant issued a substitute bond, as a surety, which the plaintiff accepted as a substitute for its mechanic's lien. Thereafter, M Co. issued a response to the defendant in which it denied that the plaintiff's claim had any merit. The defendant refused to pay the plaintiff under the payment bond or the substitute bond, and the plaintiff brought the present action against the defendant. The defendant asserted nine special defenses against the plaintiff, alleging, inter alia, that the plaintiff acted in bad faith and was reckless in its dealings with C Co. *Held*:

1. The trial court did not err in finding that the defendant failed to sustain its burden of proof in showing that the plaintiff conducted its business with C Co. recklessly, in bad faith, or with a dishonest purpose in providing C Co. with its own account, not demanding payment immediately upon default, or bringing an action on the unpaid balance, as the court's factual findings and the evidence in the record supported the court's conclusions; the plaintiff was not a party to the payment bond agreement, the plaintiff took more protective steps than the defendant, which had failed to include any provisions in its bond agreement to require M Co., who brought C Co. into the construction project, to complete credit checks on subcontractors before bringing them onboard, the plaintiff did not act recklessly where it took reasonable steps to execute a joint check agreement with M Co., M Co. was on notice that C Co. had not been forwarding payment to the plaintiff, yet M Co. continued advancing payment for the materials directly to C Co., and there was sufficient evidence to support the court's finding that the plaintiff's conduct in continuing to supply materials to C Co. for the project did not rise to the level of common-law recklessness.
2. The defendant cannot prevail on its claim that the trial court erred in finding that the plaintiff satisfied the express condition precedent to a valid claim as delineated in the payment bond, namely, that the plaintiff provide the defendant with a copy of the plaintiff's written contract or purchase order with C Co., as the court's finding that the forty-five invoices submitted to the defendant, which set forth the relationship between C Co. and the plaintiff, were sufficient to comply with the provisions of the payment bond; there was no dispute that the plaintiff

supplied materials to C Co. for the construction project for which the plaintiff was not paid, and the plaintiff attached the invoices with its proof of claim form, indicating that C Co. and the plaintiff had an ongoing agreement for the materials to be supplied to C Co. for the benefit of the project; moreover, the payment bond failed to exclude any specific type of agreements or to indicate that proof of certain types of agreements were disallowed upon making a claim.

3. This court declined to review the merits of the defendant's claim that the trial court erred by allowing the plaintiff to recover damages in excess of the penal sum of the substitute bond; the defendant raised no objections at trial regarding the award of prejudgment or offer of compromise interest as part of the damages award, or the court's calculus of its award.

4. The trial court did not abuse its discretion by allowing the plaintiff to present rebuttal evidence after the defendant rested without introducing any evidence or testimony during its case-in-chief when the defendant pleaded special defenses and partly geared its lengthy cross-examination of the plaintiff's sole witness toward addressing those special defenses; because the court had the sound discretion as to the order of its proceedings and because the court had barred the plaintiff from addressing the defendant's special defenses in its case-in-chief on the basis that those special defenses had not yet been raised, the court properly allowed rebuttal evidence limited only to the defendant's special defenses; the plaintiff's rebuttal was not presented to bolster its case-in-chief but, rather, to refute or contradict the evidence the defendant put forth during its cross-examination of the plaintiff's witness concerning the defendant's special defenses, and the documents that the defendant admitted during that cross-examination, which as the defendant conceded, were evidence.

Argued November 9, 2020—officially released May 18, 2021

Procedural History

Action to recover damages for, inter alia, the defendant's denial of the plaintiff's claim for failure of payment by a principal under certain bonds issued by the defendant as surety, brought to the Superior Court in the judicial district of Stamford-Norwalk, where it was tried to the court, *Tierney, J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Louis R. Pepe, with whom was *Rory M. Farrell*, for the defendant (appellant).

Jared Cohane, with whom was *Timothy T. Corey*, for the plaintiff (appellee).

Opinion

HARPER, J. The defendant, American Home Assurance Company, appeals from the judgment of the trial court rendered in favor of the plaintiff, O & G Industries, Inc., finding that the plaintiff was entitled to payment under certain bonds issued by the defendant as surety, including a payment bond and a bond (substitute bond) that had been substituted for the discharge of a mechanic's lien filed by the plaintiff in connection with materials it had furnished for a construction project. On appeal, the defendant claims that the court erred by (1) failing to find that the plaintiff breached its obligation of "diligence and utmost good faith" owed to the defendant, (2) finding that the plaintiff satisfied the condition precedent to the payment bond, (3) allowing the plaintiff to recover beyond the penal sum of the mechanic's lien bond, and (4) allowing the plaintiff to put on a rebuttal case after the defendant had rested its case without calling any witnesses or introducing any evidence.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, either found by the court or undisputed in the record, and procedural history are relevant to our resolution of this appeal. The plaintiff is a producer and supplier of construction materials, including concrete, with a place of business in Torrington. A large scale, eighteen-story residential apartment building construction project (project) in Stamford commenced at 1011 Washington Boulevard, which is owned by Stamford Phase Four JV, LLC (owner). The owner and The Morganti Group, Inc. (Morganti), the general contractor, entered into a construction contract on January 28, 2016. The first executed payment bond was an agreement between the owner as the obligee, Morganti as the principal, and the defendant as the surety. The defendant

[1] See footnote 5 of this opinion.

served as surety on the payment bond and a performance bond. Those bonds were issued by the defendant, each in the penal sum of $53,690,000, naming Morganti as the bonded principal.

On January 31, 2016, Morganti entered into a written subcontractor agreement with Concrete Superstructures, Inc. (CSS), of Bloomfield. Morganti hired CSS to deliver and pour concrete for the project. The subcontract price was $3,710,000. CSS then contacted the plaintiff and requested that the plaintiff supply materials to CSS so that CSS could fulfill its obligations to Morganti under the subcontractor agreement. CSS submitted a credit application and credit agreement to the plaintiff in April, 2016, after receiving a price quotation from the plaintiff. The Redi-Mix price quotation provided CSS with a list of items for sale, their prices, and payment and billing information. The credit agreement included the billing and credit conditions that governed the agreement between CSS and the plaintiff. The plaintiff conducted a credit check on CSS and the personal guarantor, Douglas Cartelli, and decided not to extend credit to CSS for the project at that time and put the application aside. In July, 2016, Morganti sent the plaintiff a joint check agreement and lien waiver. The plaintiff then supplied the concrete and other related materials called for in the subcontract to CSS and delivered them to the site from April until September, 2016. During that time period, the plaintiff sent invoices directly to Morganti for the materials and was paid in full by Morganti for a total value of $385,988. On July 20, 2016, CSS e-mailed the plaintiff to express its displeasure with the plaintiff's choice to continue to bill Morganti directly instead of directly dealing with CSS. CSS threatened to use a different concrete supplier if the plaintiff did not open an account for CSS and bill CSS directly. The plaintiff then reconsidered CSS' credit application on August 11, 2016, and approved CSS for a credit

limit of $3000; however, the account was for a project unrelated to the Washington Boulevard project at issue. The joint check agreement previously sent to the plaintiff in July, 2016, was returned to Morganti in September, 2016, with amendments, including the redaction of the lien waiver provision. While the amended joint check agreement was under review by Morganti, the plaintiff furnished construction supplies to CSS from September 3 through December 2, 2016, for a total value of $484,919.30, but charged CSS directly instead of Morganti. Morganti informed the plaintiff on November 1, 2016, that the plaintiff's amended joint check agreement had been denied. The plaintiff also informed Morganti on or about November 1, 2016, that CSS had yet to pay for any of the materials the plaintiff had furnished for the project since September, 2016, with a total balance owed of approximately $255,512. Morganti gave CSS another $225,000 after being informed of the balance due to the plaintiff, which had been paid timely up until September, 2016. For each transaction between September and December, 2016, CSS would request payment from Morganti in order to pay the balance owed to the plaintiff for the deliveries. Although Morganti made payments to CSS that CSS was supposed to use to pay the plaintiff, CSS did not forward the payments to the plaintiff. Consequently, CSS defaulted after accruing a $484,919.30 balance that it owed to the plaintiff.

The parties also stipulated to the following facts. The materials delivered by the plaintiff to CSS from September through December, 2016, were all billed to CSS under a credit account that CSS had opened with the plaintiff on or about August 11, 2016, for a project that was taking place in Norwalk—the Wall Street Theater project.[2] The delivery tickets and invoices showed

[2] The Wall Street Theater project was a construction project unrelated to the project at issue.

that the plaintiff's supplies were sold to CSS only and were not sold or delivered to any other party. It is undisputed that CSS failed to pay the plaintiff for the materials it delivered to the project between September and December, 2016. Moreover, there is no dispute as to the quality or value of the materials that the plaintiff had delivered to CSS.

On February 2, 2017, the plaintiff mailed the defendant a notice of claim under the payment bond after CSS had defaulted. The plaintiff sent timely notice to Morganti of its intent to file a mechanic's lien. The plaintiff then proceeded to record a mechanic's lien against the owner's Washington Boulevard property on February 28, 2017, to secure payment for the materials that the plaintiff had provided to the project. There is no dispute that the mechanic's lien was filed timely. In response, on March 6, 2017, the defendant issued the substitute bond, as a surety, in the penal sum of $533,411.23, which the plaintiff accepted as a substitute for its mechanic's lien pursuant to General Statutes § 49-37.[3]

On March 16, 2017, Morganti issued a response to the defendant as to the plaintiff's claim under the payment bond, effectively denying that the plaintiff's claim had any merit. The defendant later denied the plaintiff's claim on April 6, 2017. After multiple correspondences between the plaintiff and Morganti, the defendant sent an e-mail on May 5, 2017, to the plaintiff and Morganti affirming its decision to deny the plaintiff's claim and

[3] General Statutes § 49-37 (a) provides in relevant part: "Whenever any mechanic's lien has been placed upon any real estate pursuant to sections 49-33, 49-34 and 49-35, the owner of that real estate, or any person interested in it, may make an application to any judge of the Superior Court that the lien be dissolved upon the substitution of a bond with surety, and the judge shall order reasonable notice to be given to the lienor of the application. . . . Whenever a bond has been substituted for any lien, pursuant to this section, unless an action is brought to recover upon the bond within one year from the date of recording the certificate of lien, the bond shall be void."

refused to pay the plaintiff under both the payment bond and the substitute bond.

The plaintiff then brought this action against the defendant, claiming that it had not been paid the amount owed under the substitute bond of $484,919.30. As the trial court delineated in its memorandum of decision, "[t]he operative complaint is the first amended complaint dated July 25, 2017. . . . It is a two count complaint with each count claiming damages in the same amount of $484,919.30. The first count seeks that amount of damages based upon a bond substituted for the discharge of a $484,919.30 mechanic's lien issued by the plaintiff . . . on February 28, 2017. . . . The defendant . . . supplied that bond on March 6, 2017 . . . in the amount of $533,411.23. The second count is a suit against the defendant . . . by the plaintiff . . . on [the] payment bond issued by [the defendant] as surety to the project contractor . . . [Morganti] . . . . The plaintiff claim[ed] damages on the second count in the amount of $484,919.30 plus interest, costs and attorney's fees. The operative answer is the November 20, 2017 amended answer and special defenses. . . . Nine special defenses have been asserted by [the defendant] in [its] eleven page amended answer and special defenses . . . ." (Citations omitted.)

In its nine special defenses, the defendant alleged that (1) the plaintiff's reckless conduct in how it conducted business with CSS by allowing CSS to have its own account, despite CSS being deemed not creditworthy, and by failing to demand timely payments, exposed the plaintiff, the defendant, Morganti, and the owner to an unreasonable risk that CSS would run up a large, unpaid balance, (2) the plaintiff's claims were barred by the doctrine of unclean hands as a result of the plaintiff's reckless, unreasonable, and unfair conduct, (3) the

plaintiff's claims were barred by the doctrine of avoidable consequences and/or its failure to mitigate its damages, (4) the plaintiff's claims were barred by the doctrine of estoppel, (5) the plaintiff's claims were barred by the doctrine of laches because it had failed to take action to address the inability of CSS to submit timely payments, (6) the plaintiff's claims against the defendant were barred in their entirety because both the owner and Morganti, as bond principal for the defendant, had paid in full for all of the concrete material furnished by the plaintiff to CSS for the project, (7) the plaintiff's substitute bond claim was "barred to the extent that its underlying mechanic's lien was invalid pursuant to [General Statutes] § 49-33 et seq. because the lien amount [was] overstated and because no amounts [were] due and owing [to the plaintiff] from the owner, Morganti, or [the defendant]," (8) the plaintiff's payment bond claim was barred because the plaintiff had not "submitted a valid '[c]laim' in accordance with the terms and conditions of the payment bond and, therefore, [had] not satisfied all conditions precedent to recovery under the payment bond," and (9) the plaintiff's claims were "barred, in whole or in part, because the contract that [the plaintiff was] seeking to enforce [was] an oral contract for the sale of goods in excess of $500 and, therefore, unenforceable pursuant to . . . [General Statutes] § 42a-2-201."[4] In essence, the plain-

[4] On appeal, the defendant does not contest the court's findings as to its sixth, seventh, and ninth special defenses. With respect to the defendant's sixth special defense, which alleged that the plaintiff's claims under the bonds were barred because the owner and Morganti had paid in full for the materials supplied when they paid CSS, the court found for the plaintiff because it was undisputed that the plaintiff had not received any payments from the owner, Morganti, or CSS for the $484,919.30 owed to the plaintiff for the materials it furnished and because General Statutes § 49-36 "only permits such prepayment credit to property owners, not the general contractor."

With respect to the seventh special defense, which alleged that the plaintiff's substitute bond claim was barred because neither the owner, Morganti, nor the defendant owed the plaintiff for the materials supplied, the court found for the plaintiff because the parties had stipulated to the fact that

tiff alleged in its complaint that it was not paid in full by either CSS or Morganti. The plaintiff made a claim against the defendant by reason of the defendant's issuance of the two bonds—the payment bond and the substitute bond. After a five day trial, the court concluded that the plaintiff had carried its burden and proved that it was entitled to damages for breach of the payment bond and the substitute bond, and that the defendant's first five special defenses, which were equitable in nature, were not applicable to the plaintiff's claims at law on the surety bonds. Notwithstanding that determination, the court did, in fact, examine the merits of the defendant's first five special defenses and found, in the alternative, that the defendant had failed to sustain its burden of establishing those special defenses.[5] Specifically, the court found that the defendant failed to sustain its burden of showing that the plaintiff's conduct amounted to common-law recklessness, bad faith, or unclean hands. The court also found in favor of the

the plaintiff indeed was owed $484,919.30 for materials it supplied that were used for the project.

As to the ninth special defense, the court found that the plaintiff's claims were not barred because the oral agreement between CSS and the plaintiff fell under the "specially manufactured exception" under § 42a-2-201 (3) and, thus, was an enforceable agreement. Further, alternatively, the court found that the delivery tickets and the credit agreement signed by CSS were sufficient to satisfy the requirement for a signed writing.

[5] Although the defendant also claims on appeal that the court erred when it determined that its equitable special defenses did not apply to the surety action at law brought by the plaintiff, we need not address that claim in light of the fact that the court did, in fact, examine the merits of those equitable special defenses and determined, in the alternative, that the defendant had failed to meet its burden of proof as to those special defenses.

Moreover, in its appellate brief, the defendant contests only the court's findings as to whether the plaintiff breached the obligation of "diligence and the utmost good faith" the defendant believed it was owed, and the court's findings as to whether the plaintiff's conduct was "unreasonable" and "reckless." Because the defendant has not challenged the court's finding that the plaintiff was not barred from recovering under the bonds pursuant to the doctrine of unclean hands, we review only the court's finding that the defendant did not sustain its burden of establishing that the plaintiff breached the obligation of "diligence and the utmost good faith."

plaintiff as to the remaining special defenses. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant claims that the court erred when it found that the defendant had failed to sustain its burden of proving that the plaintiff's conduct was reckless and unreasonable, and breached the obligation of "diligence and the utmost good faith." We disagree.

We set forth the appropriate standard of review and relevant legal principles for this claim. A court's factual findings underlying its determination that a party failed to sustain its burden of proof will not be disturbed on appeal unless they are clearly erroneous. See *Schiavone* v. *Bank of America, N.A.*, 102 Conn. App. 301, 304, 925 A.2d 438 (2007); *Kelman* v. *McDonald*, 24 Conn. App. 398, 400–401, 588 A.2d 667 (1991). As such, "the court's finding that the [defendant] failed to meet [its] burden of proof" must be "supported by facts in the record and reasonable inferences drawn therefrom." *Schiavone* v. *Bank of America, N.A.*, supra, 304. "On appeal, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Citation omitted.) *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 221–22, 435 A.2d 24 (1980).

"We do not examine the record to determine whether the trier of fact could have reached a conclusion other

than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." Id., 222. "The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us." (Internal quotation marks omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 646, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005). "In reviewing the trial judge's factual findings, we give the evidence the most favorable reasonable construction in support of the judgment." (Internal quotation marks omitted.) *Kelman* v. *McDonald*, supra, 24 Conn. App. 401. Further, "the defendant bears the burden of proof on [its] special defense(s)." *Kaye* v. *Housman*, 184 Conn. App. 808, 817, 195 A.3d 1168 (2018). The defendant must prove the allegations in its special defenses by a fair preponderance of the evidence in a civil trial. See *Ramsay* v. *Camrac, Inc.*, 96 Conn. App. 190, 206, 899 A.2d 727, cert. denied, 280 Conn. 910, 908 A.2d 538 (2006).

The following facts and procedural history are relevant to our resolution of this claim. The defendant's first five special defenses alleged that the plaintiff engaged in reckless, unreasonable and unfair conduct, and that the plaintiff's claims were barred by the doctrines of unclean hands, avoidable consequences and/or its failure to mitigate its damages, estoppel and laches. Special defenses two through five incorporated the first special defense by reference. Before the commencement of trial, the court ordered the parties to file pretrial briefs addressing their legal claims and applicable law. In its pretrial brief, the defendant claimed, inter alia, that the plaintiff was not entitled to recovery under the bonds because

the plaintiff had failed to exercise "diligence and utmost good faith" by conducting business with CSS in a "commercially unreasonable" manner. The defendant also likened the requirement of "diligence and utmost good faith" to the implied covenant of good faith and fair dealing.

After a five day trial, in light of its factual findings, the court found that the defendant had failed to sustain its burden of proof as to its special defenses. In doing so, the court determined that the defendant's first five special defenses were equitable in nature and could be summarized as alleging that the plaintiff's conduct amounted to common-law recklessness, bad faith in the performance of contractual obligations amounting to a breach of the implied covenant of good faith and fair dealing, and a violation of the equitable concept of unclean hands. In its memorandum of decision, he court discussed *Aetna Bank* v. *Hollister*, 55 Conn. 188, 212, 10 A. 550 (1886), and *Wolthausen* v. *Trimpert*, 93 Conn. 260, 269, 105 A. 687 (1919), cases on which the defendant relied for its claim that the plaintiff's reckless conduct discharged the defendant of any duty to pay the plaintiff under the surety bonds.

In its analysis, the court noted that neither of the century old cases to which the defendant had cited explained what the phrase "diligence and utmost good faith" required. The court specifically noted that *Wolthausen* merely established when a party's conduct is *not* negligent under the "utmost good faith" standard. The court determined that the defendant's claim was similar to the contractual principle of the implied covenant of good faith and fair dealing enunciated in *Pacelli Bros. Transportation, Inc.* v. *Pacelli*, 189 Conn. 401, 407, 456 A.2d 325 (1983), in which our Supreme Court equated the phrase "utmost good faith" with "fair dealing."[6]

[6] As noted previously, the defendant also had asserted the same theory in its pretrial brief.

The court thereafter explained that it had to determine "what standards must be shown by the defendant to defeat the plaintiff's claim upon the bond based on the plaintiff's omissions or commissions." The court determined that it would need to assess the plaintiff's conduct through the "lens of common-law recklessness, unclean hands, and bad faith" to establish whether the plaintiff was barred from recovery because the defendant, in essence, alleged that the plaintiff's conduct discharged the defendant from any obligation to pay under the surety bonds.[7] (Internal quotation marks omitted.)

Furthermore, the court explained that, because the court in *Pacelli* likened "utmost good faith" to "fair dealing," the defendant would need to show that the plaintiff had acted in bad faith amounting to a breach of the implied covenant of good faith and fair dealing where the defendant deemed the plaintiff's conduct to be "reckless," "unfair," and "unreasonable." Thus, as it pertained to the defendant's claim that the plaintiff breached the obligation of "diligence and the utmost good faith," the court determined that the defendant had to show that the plaintiff acted in bad faith and that a contract existed, which is also required to establish a breach of the implied covenant of good faith and fair dealing.

The defendant sought to establish that the plaintiff acted in bad faith by engaging in reckless conduct in its dealings with CSS. The court interpreted the defendant's claim that the plaintiff engaged in reckless conduct as an allegation rooted in common-law recklessness. The court then concluded that the defendant failed to show that the plaintiff's conduct amounted to common-law recklessness. In support of that conclusion, the court found that, because the plaintiff played no

[7] Although the court referenced "unclean hands," we only discuss the court's findings as to bad faith and common-law recklessness. See footnote 5 of this opinion.

part in bringing the defaulting party, CSS, into the construction project, Morganti or the defendant should have conducted credit checks on CSS. Moreover, the plaintiff was not a party to a contract with the owner, Morganti, or the defendant, as CSS was the party that sought out the plaintiff, which sold and delivered the materials and supplies to CSS only, and requested that the plaintiff supply materials to CSS. Therefore, the plaintiff had no contractual obligations to the defendant outside of what it was required to submit for a valid claim against the payment bond. Additionally, the court found that the plaintiff's failure to institute an action against CSS was not unreasonable because there was a compelling and reasonable inference created from the evidence produced at trial that CSS was judgment proof at the time its contract was terminated and thereafter. Thus, the court found that the defendant failed to sustain its burden of proof as to the allegations of common-law recklessness and bad faith by the plaintiff. In essence, the court found that, because the defendant failed to show that the plaintiff's conduct amounted to common-law recklessness, it failed to sustain its burden of proof that the plaintiff acted in bad faith.

On appeal, the defendant claims that the court committed reversible error when it found that the plaintiff's conduct did not bar the plaintiff from recovering under the surety bonds. The defendant relies on *Aetna Bank* v. *Hollister*, supra, 55 Conn. 212, and *Wolthausen* v. *Trimpet*, supra, 93 Conn. 269, in asserting that the plaintiff breached the standard of care owed to the defendant. The defendant claims that the plaintiff's reckless conduct should discharge the defendant, as the surety, from its obligation to pay the plaintiff under the surety bonds because the court in *Aetna Bank* proclaimed that "diligence and the utmost good faith are required to be observed by a party claiming against a surety." *Aetna Bank* v. *Hollister*, supra, 212. The plaintiff counters that the cases cited by the defendant to buttress its argument

are more than a century old and were decided before the development of modern construction suretyship law. The plaintiff distinguishes *Aetna Bank* by demonstrating that the court in *Aetna Bank* rejected the surety's argument that it should be discharged from any indemnity obligations for lack of notice when the bank waited years before deciding to bring an action on the bond The court in *Aetna Bank* rejected the surety's argument and found for the bank because the bond contained no express notice requirement, and, thus, it could not be said that the bank failed to adhere to a "duty of diligence and utmost good faith." Id. In the present case, the court determined that the defendant's reference to a duty of "diligence and the utmost good faith" is comparable to the implied covenant of good faith and fair dealing. We agree with the court's well reasoned analysis.

Because the defendant's bad faith claim hinges on whether the plaintiff's conduct amounts to "unreasonable" and reckless conduct, we first determine whether the evidence in the record supports the court's finding that the plaintiff's conduct did not amount to common-law recklessness.

With regard to common-law recklessness, "[u]nder Connecticut common law, [r]ecklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable [person], and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . [W]e have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from

conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . The result is that . . . reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Emphasis omitted; internal quotation marks omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 693–94, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017).

As the court in the present case noted, the blame the defendant assigns to the plaintiff is misplaced. There was sufficient evidence to support the court's finding that the plaintiff took more protective steps than the defendant, who had failed to include any provisions in its bond agreement to require Morganti, who brought CSS into the fold, to complete credit checks on subcontractors before bringing them onto the project. The evidence shows that Morganti also had sent the plaintiff a joint check agreement in July, 2016, which included a provision stating that it would not give the plaintiff any right "to file or maintain a lien or claim for alleged nonpayment for any labor, materials or services performed on the [p]roject, against the [o]wner . . . or the [c]onstruction [m]anager or its sureties." That provision, as found by the court, implicated the plaintiff's right to file a mechanic's lien, which contravenes General Statutes § 42-158*l*.[8] The plaintiff amended the joint check agreement, redacted the portion of it that implicated the plaintiff's right to file a mechanic's lien, and

[8] General Statutes § 42-158*l* (a) provides: "Any provision in a construction contract or any periodic lien waiver issued pursuant to a construction contract that purports to waive or release the right of a contractor, subcontractor or supplier engaged to perform services, perform labor or furnish materials under the construction contract to (1) claim a mechanic's lien, or (2) make a claim against a payment bond, for services, labor or materials which have not yet been performed and paid for shall be void and of no effect."

returned the agreement to Morganti in September, 2016, but Morganti refused to enter into the joint check agreement with the plaintiff unless the plaintiff accepted the redacted provision in the agreement.

The evidence in the record supports the finding that the plaintiff did not act recklessly when the plaintiff took reasonable steps to execute a joint check agreement with Morganti. The joint check agreement would have required Morganti to issue a check with both the plaintiff and CSS identified as payees. Moreover, as the testimony at trial established, Morganti was on notice that CSS had not been forwarding payments to the plaintiff by the fall of 2016, yet Morganti continued advancing payment for the materials directly to CSS. Accordingly, there was sufficient evidence to support the court's finding that the plaintiff's conduct in continuing to supply materials to CSS for the project did not rise to the level of common-law recklessness.

Likewise, the evidence supports the court's finding that the defendant failed to sustain its burden of showing that the plaintiff acted in bad faith. "[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. . . .

"To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith.

. . . Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose. . . .

"Accordingly, because the covenant of good faith and fair dealing only requir[es] that neither party [to a contract] do anything that will injure the right of the other to receive the benefits of the agreement, it is not implicated by conduct that does not impair contractual rights." (Citation omitted; internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 794–95, 67 A.3d 961 (2013). "[T]he existence of a contract between the parties is a necessary antecedent to any claim of breach of the duty of good faith and fair dealing." *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 793, 749 A.2d 1144 (2000).

The defendant relies on the plaintiff's decision to provide CSS with its own account and not to demand payment immediately or to bring an action on the balance as indicia that the plaintiff failed to act in good faith. That claim fails because, as the court noted, the defendant had no contract with the plaintiff, nor did the court find any facts to support the defendant's claim that the plaintiff acted in bad faith or with a dishonest purpose.[9]

[9] The defendant must establish that a contract existed between it and the plaintiff, and that the plaintiff acted in bad faith in carrying out its obligations under the contract in order to sustain a claim that the plaintiff acted in bad faith amounting to a breach of the implied covenant of good faith and fair dealing. As the court found, "[a]ll material suppliers had the right to make a claim upon the payment bond simply by meeting the terms of § 16.1 [of the payment bond]. No other conditions were set forth in the payment bond for any material supplier to make a claim that they had not been paid for materials furnished to them to this construction project. The payment bond did not require any material supplier to perform credit checks on the subcon-

In summary, the court's factual findings supporting its conclusions that the defendant failed to show that the plaintiff conducted its business with CSS recklessly, in bad faith or with a dishonest purpose, and that the plaintiff was not a party to the payment bond agreement are fully supported by evidence in the record. Thus, we agree with the court's finding that the defendant failed to sustain its burden of proof in showing that the plaintiff's conduct was reckless and in bad faith. Accordingly, the defendant's claim must fail.

II

The defendant next claims that the court erred in finding that the plaintiff satisfied the express condition precedent to a valid claim as delineated in the payment bond, namely, that the plaintiff provide the defendant with a copy of the plaintiff's written contract or purchase order with the subcontractor, CSS. We are not persuaded.

We begin by setting forth the standard of review and relevant legal principles. To the extent that we interpret any of the payment bond provisions, "[i]f a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . In interpreting contract items, we have repeatedly stated that the intent of the parties is to be ascertained by a fair and reasonable

tractor who hired them. The payment bond makes no mention of [the plaintiff] by name. [The plaintiff] did not sign, guarantee or otherwise participate in a modification or amendment of the payment bond. . . . When CSS proposed in September, 2016, to charge [the plaintiff's] materials to CSS' account, [Morganti] did not object nor did it or the defendant offer certain protective tools to verify that CSS would in fact pay [the plaintiff] in full and timely."

construction of the written words and that the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Winthrop* v. *Winthrop*, 189 Conn. App. 576, 581–82, 207 A.3d 1109 (2019).

"Whether the language is ambiguous is itself a question of law, upon which our review on appeal is de novo. . . . In determining whether a contract is ambiguous, the words of the contract must be given their natural and ordinary meaning. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . Contract language is unambiguous when it has a definite and precise meaning about which there is no reasonable basis for a difference of opinion." (Citation omitted; internal quotation mark omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 187, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016).[10]

Moreover, the determination that the plaintiff satisfied all of the conditions precedent to the payment bond is a factual finding, "and it is axiomatic that [t]he trial court's [factual] findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394, 417, 211 A.3d 20 (2019).

The following additional facts are relevant to this claim. Section 16 of the payment bond agreement sets

[10] The defendant does not contest the court's interpretation of the payment bond's provisions on appeal.

out relevant definitions applicable to the payment bond. Section 16.1 defines what constitutes a valid claim under the payment bond and what is minimally required to make a valid claim.[11] The plaintiff sent the defendant a notice of claim under the payment bond on February 2, 2017. On February 23, 2017, a representative for the defendant sent the plaintiff a proof of claim form for the plaintiff to complete in order to submit its claim. The proof of claim form required, inter alia, information about the claimant, a description of the services or materials provided for the project, the dates of the deliveries or services provided, the name of the contractor or subcontractor that was furnished the services or materials, a copy of invoices and delivery tickets, and the amount due to the claimant. The plaintiff submitted the proof of claim form on March 2, 2017. The plaintiff's proof of claim form also included, inter alia, an attachment of forty-five unpaid invoices, which showed that it had not been paid for the materials it had delivered to CSS. Morganti disputed the claim by way of a letter sent to the defendant's claims representative on March 16, 2017, stating that the plaintiff's bond claim was without merit and that neither the defendant nor Morganti was liable to the plaintiff for any unpaid balances. Specifically, Morganti's response indicated that the plaintiff's claim should not be paid because the plaintiff

[11] Section 16.1 of the payment bond provides that a valid claim must include a written statement by the claimant and include, at minimum, (1) "the name of the claimant"; (2) "the name of the person for whom the labor was done, or materials or equipment furnished"; (3) "a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the [c]onstruction [c]ontract"; (4) "a brief description of the labor, materials or equipment furnished"; (5) "the date on which the [c]laimant last performed labor or last furnished materials or equipment for use in the performance of the [c]onstruction [c]ontract"; (6) "the total amount earned by the [c]laimant for labor, materials or equipment furnished as of the date of the [c]laim"; (7) "the total amount of previous payments received by the [c]laimant"; and (8) "the total amount due and unpaid to the [c]laimant for labor, materials or equipment furnished as of the date of the [c]laim."

failed to include a copy of any contract or purchase order between the plaintiff and CSS; therefore, it could not be ascertained if the amount included on the form submitted by the plaintiff was an accurate reflection of the balance owed. The defendant thereafter denied the plaintiff's claim in a letter dated April 6, 2017, asserting that it was denying the plaintiff's claim because it was "not in a position to intercede [to] make payment of the amounts claimed" because there appeared to be "legitimate issues of controversy between Morganti and the [plaintiff]." The plaintiff sent the defendant a letter dated April 10, 2017, contesting the bases set forth in Morganti's March 16, 2017 letter. Morganti then sent the defendant's claims representative a letter dated May 3, 2017, reiterating the reasons it believed the plaintiff's claim must be denied. The defendant confirmed its denial of the plaintiff's claim in an e-mail sent to the plaintiff and Morganti on May 5, 2017.

At trial, Robert Jonke, the plaintiff's credit manager and sole testifying witness, testified that there was a signed credit agreement between CSS and the plaintiff, along with signed delivery tickets, invoices, and a price quotation. Jonke also stated that each verbal order CSS placed was confirmed by written delivery tickets, which included a list of the materials ordered.

The court looked to the terms of the payment bond and found that there was no condition in the agreement stating that oral agreements were unacceptable, nor was there a requirement that the agreement or contract be executed in one single document. The court found that the plaintiff had satisfied all of the conditions of the payment bond. Particularly, the court found that exhibit 51, which included the notice of claim, satisfied "items 1, 2, 4, 5, 6, 7, and 8 of § 16.1 of the payment bond." Moreover, the court found that item 3 of § 16.1 of the payment bond, which called for the submission of a copy of an agreement or purchase order, was satisfied by exhibit 67, which included the signed delivery

tickets and invoices on the plaintiff's business letterhead. Additionally, the court found that the documents contained in exhibits 5 and 6, which included the Redi-Mix price quotation and materials price quotation, and the credit agreement executed by CSS and the plaintiff, also satisfied item 3 of § 16.1.[12] The defendant claimed that only invoices were submitted. Nevertheless, the court found that the plaintiff established by a preponderance of the evidence that there was indeed an agreement between CSS and the plaintiff, and the documents the plaintiff provided satisfied the condition precedent of § 16.1 of the payment bond.

On appeal, the defendant claims that the court erred in finding that the plaintiff fulfilled the prerequisite to receiving payment under the payment bond.[13] The defendant contends that the plaintiff failed to furnish any agreements or purchase orders between CSS and the plaintiff. The defendant claims that § 16.1 of the payment bond agreement requires all claimants, such as the plaintiff, to submit at least a "copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in performance of the [c]onstruction [c]ontract . . . ." According to the defendant, the plaintiff did not submit a written document detailing the agreement between the plaintiff and CSS for purchase of the materials, and the documents relied on by the court were not indicative of an

[12] On appeal, the defendant challenges only the court's finding that the documents furnished by the plaintiff satisfied item 3 of § 16.1 of the payment bond. The defendant does not contest the court's findings that the plaintiff satisfied items 1, 2, 4, 5, 6, 7, and 8 of § 16.1 of the payment bond.

[13] We note that the plaintiff was not a party to the payment bond agreement or contract but merely a claimant as defined in § 16.2 of the payment bond, which provides in relevant part that a claimant is an "individual or entity having a direct contract with the [c]ontractor or with a subcontractor of the [c]ontractor to furnish labor, materials or equipment for use in the performance of the [c]onstruction [c]ontract. The term [c]laimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien . . . ."

agreement. The defendant claims that neither the Redi-Mix price quotation nor the materials price quotation relied on by the court was signed by CSS. Moreover, the defendant argues that many delivery tickets were unsigned by CSS and the signed delivery tickets included no terms and conditions of the sale so as to constitute a written agreement. The defendant further contends that the bulk of the documents on which the court relied to establish a contractual relationship or agreement between CSS and the plaintiff were never submitted to the defendant. The defendant identifies this as an indispensable condition precedent that bars the plaintiff's ability to recover because the defendant is entitled to review the agreement between a subcontractor and a supplier, such as the plaintiff. Finally, the defendant takes issue with the fact that the agreement between CSS and the plaintiff was "only an oral agreement" and the plaintiff sent invoices instead of a written agreement or purchase order.

"Whether the performance of a certain act by a party to a contract is a condition precedent to the duty of the other party to act depends on the intent of the parties as expressed in the contract and read in the light of the circumstances surrounding the execution of the instrument." (Internal quotation marks omitted.) *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 676–77, 89 A.3d 869 (2014). "A condition is an event, not certain to occur, which must occur . . . before performance under a contract becomes due. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence." (Citation omitted; internal quotation marks omitted.) *Feinberg* v. *Berglewicz*, 32 Conn. App. 857, 860, 632 A.2d 709 (1993).

Jonke testified at trial that each order placed by CSS was orally agreed to and memorialized or confirmed by invoices and delivery tickets. Item 3 of § 16.1 of the payment bond calls for a copy of an agreement or purchase order that evidences the labor, materials or

equipment furnished for use in the project. It can reasonably be inferred that the purpose of item 3 is for the defendant to be provided with evidence that there existed an agreement between the claimant and a contractor or subcontractor to provide materials, labor, or equipment for the project. The information in the invoices identified CSS as the party receiving the labor, materials or equipment; provided an itemized list with a description of the services, materials or supplies delivered to CSS; and included the total price, the invoice date, and where the delivery took place. The invoices were also on the plaintiff's letterhead. The invoices submitted by the plaintiff set out exactly what materials the plaintiff agreed to furnish to CSS. Item 3 of § 16.1 of the payment bond makes no mention of a requirement of a written agreement being necessary for the claim to be deemed valid.

There is no dispute that the plaintiff supplied materials to CSS for the project for which the plaintiff was not paid. The plaintiff provided the defendant with forty-five invoices with its proof of claim indicating that CSS and the plaintiff had an ongoing agreement for the materials to be supplied to CSS for the benefit of the project. The defendant acknowledges that there was such an agreement between the plaintiff and CSS but, nevertheless, challenges the form in which the plaintiff supplied proof of that agreement. The payment bond failed to exclude any specific type of agreements or to indicate that proof of certain types of agreements was disallowed upon making a claim.

Because we agree with the court's conclusions concerning the interpretation of the payment bond, we conclude that the court's finding that the forty-five invoices submitted to the defendant, which set forth the relationship between CSS and the plaintiff, were sufficient to comply with item 3 of § 16.1 of the payment bond was supported by the evidence. Thus, there was no error.

III

The defendant next claims that the court erred by allowing the plaintiff to recover damages in excess of the penal sum of the substitute bond.[14] For the reasons that follow, we decline to review the merits of this claim.

The following facts and procedural history are relevant to this claim. As noted previously, the plaintiff had recorded a mechanic's lien against Morganti for the balance owed on account of the materials it had supplied to the project. Thereafter, the plaintiff, Morganti, and the defendant executed the substitute bond agreement whereby the plaintiff agreed to discharge the mechanic's lien and transfer the mechanic's lien to a substitute bond, which the defendant posted as surety. Morganti and the defendant agreed to be bound to the plaintiff for up to $533,411.23, which covered the mechanic's lien of $484,919.30 and included an additional $48,491.93, the amount included for costs and interest pursuant to § 49-37. In May, 2018, the plaintiff filed an offer of compromise with the court offering to settle all of its claims against the defendant if the defendant paid the plaintiff $460,000. The defendant failed to respond to, or to take action on, the plaintiff's offer of compromise.

After finding that the $484,919.30 amount due to the plaintiff had been wrongfully withheld by the defendant, the court rendered judgment on both counts of the complaint in favor of the plaintiff and awarded the plaintiff a total of $628,403, with attorney's fees to be determined after a postjudgment hearing.[15] The court's

[14] We note that the defendant is not contesting the court's decision as to the amount awarded under count two of the complaint, in which the plaintiff sought relief under the payment bond that had a penal sum of approximately $53 million.

[15] We note that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." (Internal quotation marks omitted.) *Doyle Group* v. *Alaskans for Cuddy*, 164 Conn. App. 209, 218, 137 A.3d 809, cert. denied, 321 Conn. 924, 138 A.3d 284 (2016). Moreover, "[w]hether the claim for

calculus included the $484,919 damages owed to the plaintiff, $57,930 in prejudgment interest, and $85,554 in offer of compromise interest.

With respect to the prejudgment interest, the court, in its discretion, awarded the plaintiff prejudgment interest of 5 percent per annum pursuant to General Statutes § 37-3a, which provides in relevant part that, "[e]xcept as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten percent a year, and no more, may be recovered and allowed in civil actions . . . including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ." The court also awarded the plaintiff offer of compromise interest pursuant to General Statutes § 52-192a (c), which authorizes the court to add interest of 8 percent per annum if "the plaintiff made an offer of compromise which the defendant failed to accept," and the plaintiff recovers "an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise . . . ." The court then indicated that a postjudgment hearing would take place in order for the parties to address issues concerning the calculation of attorney's fees, offer of compromise interest and prejudgment interest. The court also allowed the parties to "file a timely procedurally correct motion to reargue concerning the determination of interest in any form and the calculation thereof." Neither party submitted a motion to reargue regarding the damages award nor did either party raise any objections as to the court's calculations.[16]

attorney's fees is based on statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal." (Internal quotation marks omitted.) Id., 220.

[16] We do not consider whether the defendant was required to file a motion to reargue in order to preserve this claim. The defendant's claim, however, is waived because it failed to file or raise any objections at trial regarding the court's award.

The defendant's claim is waived because it raised no objections at trial regarding the award or the court's calculus. "Generally, to preserve an issue for review, a party must . . . object or otherwise assert such issue. A party cannot preserve a claim through inaction but, instead, must engage in affirmative conduct at an appropriate time." *MBNA America Bank, N.A.* v. *Bailey*, 104 Conn. App. 457, 467, 934 A.2d 316 (2007). "[T]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Ed Lally & Associates, Inc.* v. *DSBNC, LLC*, 145 Conn. App. 718, 729, 78 A.3d 148 (2013)

Thus, because the defendant failed to raise any objections at trial concerning the court's award of prejudgment and offer of compromise interest as part of its damages award, this claim is waived and an analysis of its merits is not warranted.

IV

The defendant next claims that the court erred in allowing the plaintiff to put on a rebuttal case after the defendant rested its case without calling any witnesses or introducing any evidence. We disagree.

We first set forth the standard of review for this claim. "It is well settled that the admission of rebuttal evidence lies within the sound discretion of the trial court." (Internal quotation marks omitted.) *Boone* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, 335 Conn. 547, 573, 239 A.3d 1175 (2020). "Our standard of review of the [defendant's] claim is that of whether the court abused its discretion in allowing this . . . testimony. . . . Discretion 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. . . . It goes without saying that the term abuse of discretion . . . means that the ruling appears to have been made on untenable grounds.

. . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Citation omitted; internal quotation marks omitted.) *Cafro* v. *Brophy*, 62 Conn. App. 113, 118–19, 774 A.2d 206, cert. denied, 256 Conn. 933, 776 A.2d 1149 (2001). "This court will affirm a trial court's admission of rebuttal evidence which would have been normally presented as part of the case-in-chief unless the party claiming error sustains his burden of establishing harmful error." *State* v. *Lisella*, 187 Conn. 335, 337–38, 445 A.2d 922 (1982).

At trial, the defendant rested without calling any witnesses regarding its special defenses; however, the defendant did cross-examine Jonke, the only witness presented at trial by the plaintiff. The defendant cross-examined Jonke for several days and also admitted various documents as exhibits concerning its special defenses during the plaintiff's case-in-chief. The court did not allow the plaintiff to submit evidence to rebut the defendant's special defenses in its case-in-chief. Instead, after the defendant rested and over the defendant's objection, the court allowed the plaintiff to call Lawrence Rosati as a rebuttal witness based on the defendant's cross-examination. Rosati served as Morganti's project executive on the construction project in question. The court also allowed the plaintiff, over the defendant's objection, to introduce e-mail correspondence between CSS and Morganti, as well as spreadsheets created by CSS for billing requests submitted to Morganti, in order for the plaintiff to establish that Morganti continued to give CSS money even after Morganti was on notice that CSS had not been paying the plaintiff. The spreadsheets purportedly showed that there was a sum due to the plaintiff in early fall of 2016. Before determining that the plaintiff was allowed to put forth the rebuttal witness, the court heard the parties' arguments as to whether the plaintiff was permitted to proceed with its witness. The plaintiff posited that it was

calling the rebuttal witness "[b]ecause there was evidence produced during cross-examination" by the defendant addressing the defendant's special defenses. The plaintiff also argued that it should be allowed to put on the rebuttal witness because the court barred the plaintiff from putting on any evidence in its case-in-chief to address the defendant's special defenses. The defendant countered by asserting that the law does not allow a party to submit rebuttal testimony where the opposing party has not presented any evidence in its case-in-chief because there is no case to rebut, irrespective of whether evidence concerning the defendant's special defenses was proffered by the defendant during the plaintiff's case-in-chief.

The court noted that the defendant offered evidence during its extensive cross-examination of the plaintiff's sole witness, and the defendant also "proffered some documents in evidence." The court also indicated that the defendant did not have to put forth any evidence in its direct case in order to sustain its burden of proof on the special defenses because the defendant could sustain its burden by the evidence the plaintiff put before the court. While primarily resting its reasoning on the findings in *State* v. *Lisella*, supra, 187 Conn. 335, the court asserted that the threshold question is whether the plaintiff's proffered evidence "could have been introduced at an earlier stage in the proceedings." The court allowed the plaintiff's rebuttal evidence on the basis of its discretion as provided under Practice Book § 15-5 and also because it had denied the plaintiff the opportunity to present evidence to rebut the defendant's special defenses during the plaintiff's case-in-chief.[17] Before allowing the plaintiff to put forth the

[17] Practice Book § 15-5 (a) provides in relevant part: "Unless the judicial authority for cause permits otherwise, the parties shall proceed with the trial and argument in the following order:

"(1) The plaintiff shall present a case-in-chief.

"(2) The defendant may present a case-in-chief.

"(3) The plaintiff and the defendant may present rebuttal evidence in successive rebuttals, as required. The judicial authority for cause may permit

evidence, the court iterated to the parties that the scope of the plaintiff's rebuttal evidence was limited only to the defendant's nine special defenses. The plaintiff was not allowed to submit rebuttal evidence in support of its case-in-chief.

"[R]ebuttal evidence is that which refutes the evidence [already] presented . . . rather than that which merely bolsters one's case." (Internal quotation marks omitted.) *Boone* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, supra, 335 Conn. 573. "[A] general contradiction of the testimony given by the defendant is considered permissible rebuttal testimony." (Internal quotation marks omitted.) Id., 573–74. The court in *Boone* also cited to 1 K. Broun, McCormick on Evidence (7th Ed. 2013) § 4, p. 16, for the proposition that a plaintiff is "confined to testimony refuting the defense evidence," unless the court, in its discretion, permits a party to "depart from the regular scope of rebuttal." (Internal quotation marks omitted.) Id., 574.

"[T]he policy behind restrictions on the presentation of rebuttal testimony is that a plaintiff is not entitled to a second opportunity to present evidence that should reasonably have been presented in [its] case-in-chief." (Internal quotation marks omitted.) *Cafro* v. *Brophy*, supra, 62 Conn. App. 120. In *Cafro*, we determined that the trial court abused its discretion when it allowed the plaintiffs to call a witness at the last minute after the plaintiffs had rested their case-in-chief and the witness testified about a highly contested issue. Id. The distinction in the present case, however, is that the plaintiff was specifically barred by the trial court from introducing any evidence to rebut the defendant's special defenses during its case-in-chief, even after the defendant submitted evidence concerning the special defenses. The court indicated that it had barred the plaintiff from

a party to present evidence not of a rebuttal nature, and if the plaintiff is permitted to present further evidence in chief, the defendant may respond with further evidence in chief. . . ."

presenting such evidence because it believed it to be improper to allow the plaintiff to put on a rebuttal case during its case-in-chief where, at the time the plaintiff initially presented the evidence, the issue of the special defenses had not yet been raised.

The defendant's sole contention on appeal related to this issue is that the plaintiff should not be allowed to submit rebuttal evidence because the defendant did not present any evidence or testimony during the defendant's case-in-chief. The record shows that the defendant engaged in a lengthy cross-examination of the plaintiff's sole witness and admitted evidence during the plaintiff's case-in-chief, and, as the defendant conceded at trial, cross-examination is indeed evidence. The plaintiff's rebuttal was not presented to bolster its case-in-chief but, rather, to refute or contradict the evidence the defendant put forth during the defendant's cross-examination of Jonke concerning the defendant's special defenses, and the documents that the defendant admitted during that cross-examination. Thus, the argument advanced by the defendant is untenable.

As our Supreme Court has observed, the trial court has the sound discretion as to the order of the proceedings. See *Boone* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, supra, 335 Conn. 573; see also Practice Book § 15-5. We cannot conclude that the court abused its discretion by allowing the plaintiff's rebuttal evidence after the defendant rested without putting forth any evidence in its case-in-chief where, as here, the defendant pleaded special defenses in its pleadings and, partly, geared its cross-examination of the plaintiff's witness toward addressing those special defenses. Additionally, the court barred the plaintiff from addressing the defendant's special defenses in its case-in-chief. Accordingly, the court did not abuse its discretion in allowing the plaintiff's rebuttal evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

LINDA YOFFE SOLON *v.* JOSEPH M. SLATER ET AL.
(AC 42931)

Alvord, Elgo and Alexander, Js.

Syllabus

The plaintiff sought damages from the defendants, the son of her deceased husband, M, and M's attorney, J, for, inter alia, tortious interference with contractual relations relating to an antenuptial agreement executed by the plaintiff and M and tortious interference with her right of inheritance from M's estate. The plaintiff and M entered into the antenuptial agreement a few days prior to their marriage. Approximately six months later, M was diagnosed with cancer and told that he had less than one year left to live. Before undergoing palliative surgery in 2013, M signed a will that was prepared by J. The plaintiff alleges that she and M discussed amending the antenuptial agreement to provide that certain of M's assets, including their marital home, would be transferred to the plaintiff at the time of his death and that M memorialized the intended changes in a handwritten note the day after he signed the 2013 will. Although the plaintiff and M both engaged attorneys to represent them in negotiations pertaining to the modification of the antenuptial agreement, it was never amended. In early 2014, M signed a second will that was prepared by an estate planning attorney. It did not reflect the discussed modifications to the antenuptial agreement and instead left his residuary estate to a trust benefitting his two adult children from a prior marriage, including his son. Following M's death, J submitted an application to the Probate Court for the admission of the 2014 will. The plaintiff objected, claiming that, at the time of its execution, M lacked testamentary capacity and was under the undue influence of the defendants. The Probate Court held an evidentiary hearing and determined that there was insufficient evidence to prove either of the plaintiff's claims. The plaintiff then commenced the present action, claiming that the defendants manipulated M to prevent him from amending the antenuptial agreement and the 2014 will. The defendants filed motions for summary judgment arguing that the plaintiff's claims were barred by the doctrines of res judicata and collateral estoppel because they previously had been adjudicated and decided by the Probate Court. On the basis of the collateral estoppel effect of the Probate Court decree, the trial court granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly rendered summary judgment in favor of the defendants on the basis of the doctrine of collateral estoppel with respect to the plaintiff's tortious interference claims because the claims presented issues identical to those actually litigated

and necessarily determined by the Probate Court: following a full evidentiary hearing, the Probate Court admitted the 2014 will over the plaintiff's objection because it determined that there was insufficient evidence to show that the disposition of the estate in the 2014 will was the result of undue influence; moreover, the plaintiff's tortious interference claims that were raised in the trial court relied on the same factual predicate offered in support of her undue influence claim in the Probate Court, namely, whether the defendants' alleged conduct rose to a level of impropriety sufficient to support a finding of tortious conduct; furthermore, because the plaintiff did not appeal from the Probate Court decree, it was considered a final judgment for the purposes of collateral estoppel.

Argued January 7—officially released May 18, 2021

Procedural History

Action to recover damages for, inter alia, tortious interference with contractual relations, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted the defendants' motions for summary judgment with respect to certain counts of the complaint; thereafter, the plaintiff withdrew the remaining counts of the complaint; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Eric D. Grayson, for the appellant (plaintiff).

William N. Wright, with whom, on the brief, was *John W. Cannavino*, for the appellees (defendants).

Opinion

ALVORD, J. This appeal arises out of an action by the plaintiff, Linda Yoffe Solon, in which she alleges that the defendants, Joseph M. Slater and Joshua Solon, tortiously interfered with (1) contractual relations regarding an antenuptial agreement executed by the plaintiff and her deceased husband, Michael Solon (decedent), and (2) the plaintiff's right of inheritance from the decedent's estate.[1] On appeal, the plaintiff claims that the trial court erred in rendering summary judgment in favor

[1] See footnote 9 of this opinion.

of the defendants on the basis that her claims were barred by the doctrine of collateral estoppel by virtue of a prior decree of the Probate Court. We disagree and, accordingly, affirm the judgment of the trial court.[2]

The following facts and procedural history are relevant to this appeal. The plaintiff and the decedent first met in December, 2010. In May, 2013, they were married. At the time of the marriage, the decedent had two adult children from a previous marriage: a son, Joshua Solon, and a daughter, Carly Solon. Slater was both a longtime friend and attorney of the decedent.

On or about May 22, 2013, just prior to getting married, the plaintiff and the decedent executed an antenuptial agreement. The antenuptial agreement provided, inter alia, for the plaintiff to have a life estate interest in the real property located at 49 Alexandra Drive in Stamford (Stamford home). The antenuptial agreement further provided that the decedent's estate would be responsible for paying the mortgage, property taxes, utilities, and associated expenses and repairs at the Stamford home.

In November, 2013, approximately six months after the plaintiff's marriage to the decedent, the decedent was diagnosed with pancreatic cancer. The prognosis was that he had less than one year left to live. The decedent elected a surgical course of treatment. Prior to surgery, he met with Slater concerning the preparation of a last will and testament. On November 8, 2013,

[2] The plaintiff additionally challenges the propriety of the trial court's denial of her November 21, 2016 motion for an order of compliance and/or to compel and for sanctions. That motion sought to compel the production of documents, primarily, e-mails and their attachments, that the defendants withheld or redacted under a claim of privilege. Because we conclude that the court properly rendered summary judgment in favor of the defendants on the basis of collateral estoppel, we need not address the question of whether the court abused its discretion in denying the plaintiff's motion to compel.

the decedent signed a last will and testament prepared by Slater (2013 will).

After undergoing the surgery, the decedent met with an estate planning attorney, Howard S. Tuthill III, concerning his estate plan. On February 6, 2014, Tuthill prepared a second will for the decedent (2014 will).

Shortly after the decedent's early November diagnosis, the plaintiff and the decedent discussed amending their antenuptial agreement. The plaintiff alleged that the decedent provided her with a handwritten note dated November 9, 2013 (November note), the day after the decedent executed the 2013 will, which purportedly memorialized the intended changes to the antenuptial agreement. The November note indicated: "I want to leave the house to [the plaintiff]—[the plaintiff] will get the 200k plus annuity[,] [the plaintiff] will get [the] ETrade acct[,] [the plaintiff] will get approx 90–110k dollars."

Thereafter, in early 2014, the decedent engaged Attorney Edward Nusbaum to represent him in negotiations pertaining to modifying the antenuptial agreement. The plaintiff was represented in the negotiations by Attorney Arnold Rutkin. Although Nusbaum and Rutkin discussed the proposal set forth in the November note,[3]

[3] The plaintiff alleged in her operative complaint that, on January 10, 2014, Nusbaum sent Rutkin an e-mail confirming the handwritten instructions in the November note. The January 10, 2014 e-mail stated in relevant part: "It is my understanding that [the decedent] wishes to convey the property at 49 Alexandra Drive in Stamford to [the plaintiff], in which title will be held as joint tenants with rights of survivorship. Upon [the decedent's] death, the mortgage on that residence will be paid off by the estate in full within three months provided there are no complications in probating the estate. Until such time as the mortgage is retired, the regular monthly payments on the house will be the responsibility of the estate. [The decedent] will also transfer his current E-Trade brokerage account from his sole name to [the decedent and the plaintiff], as joint tenants with rights of survivorship. [The plaintiff] will also receive the proceeds from [the decedent's] annuity currently held by American Legacy in the amount of $240,500. The Webster Bank checking account, presently held jointly by [the plaintiff] and [the decedent], will become hers with a guarantee of $100,000 upon his death."

the negotiations ultimately failed and the plaintiff and the decedent never amended their antenuptial agreement.

On March 13, 2014, the decedent left the Stamford home to reside at the home of his former wife, Lori Solon, on Long Island (Long Island home). The plaintiff characterized his departure as "essentially a kidnapping" by the defendants, such that the decedent was "forcibly removed" from the Stamford home, in the "complete control and custody" of the defendants, and "subject to undue influence and manipulation" by them. The defendants produced evidence to the effect that the decedent's departure from the Stamford home was volitional.

From March 13, 2014, until the date of his death, the decedent resided at the Long Island home. During that time, he communicated with the plaintiff on a few occasions by e-mail, text message, and telephone; these communications were primarily initiated by the plaintiff.[4] The decedent died on April 19, 2014.

On or about June 4, 2014, Slater submitted an application to the Probate Court for the admission of the 2014 will.[5] The plaintiff filed an objection to its admission, claiming that the decedent executed the 2014 will under the defendants' undue influence[6] and also that the dece-

[4] In her operative complaint, the plaintiff relied on the alleged infrequency of her communications with the decedent to support her argument that the decedent's departure from the Stamford home was involuntary. The plaintiff further relied on the purported content of an April 19, 2014 telephone call between the plaintiff and the decedent, in which the decedent allegedly ended the conversation by saying, "I have to go—they are coming." The defendants produced evidence to the effect that the decedent had the ability to communicate with the plaintiff during this time, as well as other evidence to the effect that the decedent's departure from the Stamford home was voluntary.

[5] The decedent had designated Slater as executor under the 2014 will. As a result of the anticipated delay in administering the decedent's estate, the Probate Court, *Caruso*, *J.*, appointed Slater as temporary administrator.

[6] In the present action, the plaintiff testified in her deposition that the basis for her claim in the Probate Court was that Slater exercised undue influence over the decedent "[b]ecause he was giving [the decedent] advice."

dent had lacked testamentary capacity to execute the documents.

On October 6, 2014, while the Probate Court proceedings were still pending, the plaintiff commenced an action in the Superior Court against the defendants, both individually and in Slater's fiduciary capacity as administrator of the decedent's estate (first action). *Solon* v. *Slater*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-14-6023538-S (May 12, 2015). Her complaint set forth the following five counts, all sounding in tort: (1) tortious interference with contractual relations; (2) tortious interference with right of inheritance; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) negligence. Specifically, the plaintiff alleged that the defendants, by way of manipulation, prevented the decedent from amending the antenuptial agreement or revising his will for the benefit of the plaintiff. As relief, the plaintiff sought the total value of the assets of the decedent's estate that were listed in the November note: $850,000, representing the value of the title to the Stamford home; $240,500, representing the proceeds of an annuity held by the decedent; $100,000 from an E-Trade account held by the decedent; $100,000 from the decedent's bank account; and $5,000,000, representing the decedent's 50 percent ownership interest in his family's business, B&F Electric Motors, Inc. (Solon estate assets).

The defendants moved to dismiss the first action on the ground that the Probate Court had not yet ruled on the admission of the 2014 will and, therefore, there was no justiciable controversy. By memorandum of decision dated May 12, 2015, the court, *Heller*, *J.*, dismissed the first action against the defendants for lack of subject

The plaintiff further testified that Joshua Solon exercised undue influence over the decedent because he "arrange[d] the appointment" with Tuthill pertaining to the decedent's estate plan and attended that appointment with the decedent.

matter jurisdiction. The court explained that the Solon estate assets were subject to the jurisdiction of the Probate Court: "All of the property that the plaintiff argues would have passed to her on the decedent's death, but for the defendants' improper conduct, is presently subject to the jurisdiction of the Probate Court. . . . [S]hould the Probate Court admit the February, 2014 will to probate over the plaintiff's objection, finding that the decedent was not subject to the defendants' undue influence, the Probate Court's order will be a final judgment for res judicata purposes, if no appeal is taken, and the plaintiff's claims in this action will be barred."

On June 17, 2015, the Probate Court, *Fox*, *J.*, held an evidentiary hearing concerning the plaintiff's objections to the admission of the 2014 will. On August 20, 2015, the Probate Court issued a decree admitting the 2014 will to probate over the plaintiff's objections (Probate Court decree). The Probate Court first determined that "the will was properly executed in accordance with [General Statutes] § 45a-251[7] and that there is insufficient evidence to show that the decedent did not have the testamentary capacity to make the subject will at the time of its execution in accordance with [General Statutes] § 45a-250."[8] (Footnote added.) Next, the Probate Court determined that "there is insufficient evidence to show that the disposition of the decedent's estate in his [2014 will] was a result of undue influence." The plaintiff did not appeal the Probate Court decree.

In making its determination, the Probate Court considered the following evidence with respect to the dece-

[7] General Statutes § 45a-251 provides: "A will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence; but any will executed according to the laws of the state or country where it was executed may be admitted to probate in this state and shall be effectual to pass any property of the testator situated in this state."

[8] General Statutes § 45a-250 provides: "Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will."

dent's estate planning. The decedent's 2014 will pours his residuary estate into a revocable trust, naming his children, Joshua Solon and Carly Solon, as the sole beneficiaries. The decedent provided for the plaintiff under the antenuptial agreement. The plaintiff testified that she knew that the decedent was reviewing estate planning documents with his attorney in the period from January 14 through February 6, 2014. She was working during the day and, therefore, did not accompany him to these meetings. However, Joshua Solon and Slater took the decedent to four or five meetings that he had with Tuthill.

The Probate Court considered the following evidence with respect to the decedent's marriage to the plaintiff and their antenuptial agreement. The decedent and the plaintiff first met in December, 2010, and then married on May 23, 2013. The day before the marriage, the decedent and the plaintiff entered into an antenuptial agreement. The plaintiff testified that the decedent repeatedly told her he would " 'take care of her for life,' " and that he intended to change the antenuptial agreement to give her, inter alia, the Stamford home as well as two generous bank accounts. To support her allegations, the plaintiff provided the Probate Court with the November note. The plaintiff testified that, in January and February, 2014, she and the decedent had consulted with divorce attorneys to amend their antenuptial agreement to conform to the terms of the November note. This amended agreement, however, never was finalized.

The Probate Court considered the following evidence with respect to the decedent's diagnosis, treatment, and overall health. The plaintiff testified that in November, 2013, six months after her marriage to the decedent, the decedent received the diagnosis of late stage pancreatic cancer. The decedent had palliative surgery, after which he was prescribed strong pain alleviating drugs. The plaintiff contended that the decedent was very sick and heavily medicated.

The Probate Court considered the following evidence with respect to the plaintiff's and the defendants' care of and visitation with the decedent. Prior to March 13, 2014, the plaintiff testified that Joshua Solon often took care of the decedent during the day when the plaintiff was at work. Slater also frequently visited the decedent at the Stamford home. The plaintiff further testified that on March 13, 2014, when she came home from work, the decedent was gone. Joshua Solon and Carly Solon had taken him from the Stamford home. The plaintiff stated that she was not allowed to see the decedent or to " 'say goodbye.' " Joshua Solon and Carly Solon did not inform her of the decedent's death on April 19, 2014.

On September 2, 2015, the plaintiff commenced the present action. On February 9, 2016, she filed a revised complaint (operative complaint), which set forth the same five tort counts contained in the first action: (1) tortious interference with contractual relations; (2) tortious interference with right of inheritance; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; and (5) negligence.[9] Specifically, with respect to counts one and two of the plaintiff's operative complaint, the plaintiff alleged that the decedent "was preparing either by [amendment to the antenuptial agreement] or by will, to leave [the plaintiff the Solon estate assets that were listed in the November note]." The plaintiff maintained that the decedent's 2014 will was executed "under the influence and control" of the defendants. The plaintiff further maintained that the reason that the antenuptial agreement was not modified was because on March 13, 2014, the defendants, "acting individually and in concert, forcibly removed and essentially kidnapped [the decedent] from

[9] The complaint in the present action was nearly identical to the complaint filed in the first action but for the fact that, in the first action, the plaintiff also had sued Slater in his fiduciary capacity as administrator of the decedent's estate.

the marital home . . . so [that the decedent] would be in their complete control and custody and under their influence and manipulation." The plaintiff asserted that the defendants, "[b]y using their undue influence and manipulation prior to the time [that] they took [the decedent] from [the Stamford] home and thereafter, while he was kept at an undisclosed location . . . and incommunicado from [the plaintiff], the defendants . . . interfered with [her] contractual relations and expectancies, in that the terms of the [amendments to the antenuptial agreement], which had been agreed to, were never reduced to writing."

On April 20, 2017, the defendants separately moved for summary judgment on the grounds that the plaintiff's claims were barred by the doctrines of res judicata and collateral estoppel because those claims had been "previously adjudicated and decided by the Probate Court." On July 7, 2017, the plaintiff filed a pleading captioned "Plaintiff's limited objection to the portion of the defendants' summary judgment motion dealing with collateral estoppel." On July 10, 2017, the court heard argument on the pending motions for summary judgment. On July 24, 2017, both parties submitted supplemental memoranda addressing the potential for the preclusive effect of a Probate Court decree based on collateral estoppel.

On January 8, 2018, the trial court, *Povodator*, *J.*, issued a memorandum of decision, in which it rendered summary judgment in favor of the defendants on counts one and two of the plaintiff's complaint, tortious interference with contractual relations and tortious interference with the right of inheritance, based on the collateral estoppel effect of the Probate Court decree.[10] The court determined that the doctrine of res judicata did

[10] The court denied the motions for summary judgment with respect to counts three through five of the plaintiff's complaint, finding that neither res judicata nor collateral estoppel applied to those claims and that the defendants' argument that there was no evidence to support the emotional distress and negligence claims was premature.

not bar the plaintiff's claims.[11] In its memorandum of decision, the court found that "[t]he first two claims—tortious interference with contractual relations and with a right of inheritance—are dependent on a level of impropriety that is foreclosed by the Probate Court order. There needs to be tortious conduct that interferes with some right of the plaintiff, and the contractual and inheritance-based claims seem to be necessarily dependent on the claimed wrongfulness of conduct directed to the [antenuptial] agreement and operative will." The court observed that the plaintiff's claims asserted in the Superior Court rested on "the same factual predicate" as the plaintiff's claims in the Probate Court. Accordingly, the court held that, in light of the Probate Court's determination that the 2014 will "was not the product of undue influence or lack of testamentary capacity . . . [and] the interrelationship between the [antenuptial] agreement and the will with respect to the ultimate disposition of the decedent's estate, the claim [in this action] of some wrongfulness [concerning the disposition of the decedent's estate] cannot survive the determination by the Probate Court that the will properly reflected the final wishes of the decedent." This appeal followed.[12]

The plaintiff filed a motion to reargue the defendants' motions for summary judgment with respect to counts one and two of the plaintiff's complaint. In a memorandum of decision dated April 2, 2018, the court denied the plaintiff's motion to reargue.

The plaintiff subsequently withdrew counts three through five as against Slater and Joshua Solon, respectively.

[11] On appeal, the defendants argue that the trial court's judgment should be affirmed on the alternative ground that counts one and two of the plaintiff's complaint are barred by the doctrine of res judicata on the basis of the Probate Court's admission of the 2014 will over the objections of the plaintiff. Because we affirm the court's dismissal of counts one and two on the ground of collateral estoppel, we need not address the defendants' alternative ground for affirmance.

[12] On May 13, 2019, the plaintiff filed an appeal from the court's rendering of summary judgment in favor of Slater on counts one and two. On May 31, 2019, the plaintiff filed an appeal from the court's rendering of summary judgment in favor of Joshua Solon on counts one and two, which was treated as an amended appeal by this court.

Before addressing the plaintiff's claim on appeal, we note the applicable standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]he scope of our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary. . . . Additionally, the applicability of the doctrine of collateral estoppel presents a question of law, over which this court's review is also plenary." (Citation omitted; internal quotation marks omitted.) *Doyle* v. *Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 13–14, 178 A.3d 445 (2017).

"The fundamental principles underlying the doctrine are well established. Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was *actually litigated* and *necessarily determined* in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been *fully and fairly litigated in the first action.* It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is *necessarily determined* if, in the absence of a determination of

the issue, the judgment could not have been validly rendered. . . . To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding. . . . In order for collateral estoppel to bar the relitigation of an issue in a later proceeding, the issue concerning which relitigation is sought to be estopped *must be identical* to the issue decided in the prior proceeding." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Kimberly C.* v. *Anthony C.*, 179 Conn. App. 856, 861, 182 A.3d 106 (2018).

On appeal, the plaintiff claims that the trial court erred in rendering summary judgment with respect to the two tortious interference counts on the basis of collateral estoppel barring the relitigation of issues decided by the Probate Court decree. Specifically, the plaintiff argues that she "did not have a full and fair opportunity to litigate her tort claims seeking money damages before the Probate Court, which only had jurisdiction to decide the questions of testamentary capacity and undue influence [as] to the execution of the February 2014 will." The plaintiff maintains that "since the Probate Court . . . did not have jurisdiction, exclusive or otherwise over . . . count [one], tortious interference with a contractual expectancy or count [two], tortious interference with the expectation of an inheritance, there can be no collateral estoppel as a matter of law . . . ."[13] (Internal quotation marks omitted.) In

[13] We note that the plaintiff blurs the distinction between the doctrine of res judicata, which concerns claim preclusion, and the doctrine of collateral estoppel, an aspect of res judicata that concerns issue preclusion. See *Heussner* v. *Day, Berry & Howard, LLP*, 94 Conn. App. 569, 573–74, 893 A.2d 486 ("The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel means simply that when an *issue of ultimate fact* has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties

response, the defendants contend that "[i]n both the Probate Court proceeding and the Superior Court action, the plaintiff claimed that . . . the defendants engaged in wrongful conduct that constituted undue influence in order to prevent the decedent from [amending the antenuptial agreement] and cause him to execute the [2014 will], thereby preventing the plaintiff from receiving the Solon estate assets" that were listed in the November note. The defendants further maintain that "[t]his alleged wrongdoing is the dispositive issue that is common to both the Probate Court proceeding and this action. It was decided against the plaintiff in the Probate Court following a full evidentiary hearing. Consequently . . . the Probate Court decree precludes the plaintiff's tortious interference claims in the Superior Court action." We agree with the defendants.

We begin by determining what facts were necessarily determined in the Probate Court. See *Kimberly C.* v. *Anthony C.*, supra, 179 Conn. App. 861. The Probate Court, after a full evidentiary hearing with respect to the issue of whether the defendants exerted undue influence over the decedent, admitted the decedent's 2014 will over the plaintiff's objection, determining, inter alia, that "there is insufficient evidence to show that the disposition of the decedent's estate in his [2014 will] was a result of undue influence."

"Undue influence is the exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised. . . . It is stated generally that there are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence;

in any future lawsuit." (Emphasis added; internal quotation marks omitted.)), cert. denied, 278 Conn. 912, 899 A.2d 38 (2006).

and (4) a result indicating undue influence." (Citation omitted; internal quotation marks omitted.) *Dinan* v. *Marchand*, 279 Conn. 558, 560 n.1, 903 A.2d 201 (2006). The party claiming undue influence must show by a fair preponderance of the evidence that the influence was undue. See *Vaicunas* v. *Gaylord*, 196 Conn. App. 785, 803 n.5, 230 A.3d 826 (2020); Connecticut Civil Jury Instructions 4.2-15, available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited April 29, 2021).

"The levels of susceptibility and pressure needed to prove undue influence have been fully summarized by [our Supreme Court]." *Stanton* v. *Grigley*, 177 Conn. 558, 565, 418 A.2d 923 (1979). "Pressure of whatever character, whether acting on the fears or hopes—if so exerted as to overpower volition without convincing the judgment—is a species of constraint under which no will can be made. Importunity or threats, such as the [testator] has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the [testator's] judgment, discretion, or wish, is overborne, will constitute undue influence, though no force was either used or threatened. . . . [Undue influence] is shown by all the facts and circumstances surrounding the [testator], the family relations, the will, [his] condition of mind, and of body as affecting [his] mind, [his] condition of health, [his] dependence upon and subjection to the control of the person influencing, and the opportunity of such person to wield such an influence. Such an undue influence may be inferred as a fact from all the facts and circumstances aforesaid, and others of like nature that are in evidence in the case, even if there be no direct and positive proof of the existence and exercise of such an influence." (Internal quotation marks omitted.) *Lee* v. *Horrigan*, 140 Conn. 232, 238–39, 98 A.2d 909 (1953). Furthermore, "[t]here

must be proof not only of undue influence but that its operative effect was to cause the testator to make a will which did not express his actual testamentary desires." *Lancaster* v. *Bank of New York*, 147 Conn. 566, 573–74, 164 A.2d 392 (1960); *Vaicunas* v. *Gaylord*, supra, 196 Conn. App. 804.

In its decree, the Probate Court reviewed the evidence submitted by the plaintiff in support of her claim of undue influence. Specifically, the Probate Court described the plaintiff's evidence pertaining to her marriage to the decedent, the decedent's diagnosis, treatment, and overall health, as well as the defendants' care and visitation of the decedent. In addition, the Probate Court discussed the plaintiff's evidence pertaining to the antenuptial agreement, the decedent's 2014 will, the November note, the negotiations to amend the antenuptial agreement, the defendants' involvement with the decedent's estate planning, as well as the events surrounding the decedent's departure from the Stamford home. Considering all of the aforementioned evidence, the Probate Court necessarily determined that this factual predicate presented by the plaintiff did not rise to a level of impropriety by the defendants, "of whatever character," such as to affect the disposition of the decedent's estate. (Internal quotation marks omitted.) *Lee* v. *Horrigan*, supra, 140 Conn. 238; see *Lancaster* v. *Bank of New York*, supra, 147 Conn. 573–74.

We next assess whether the plaintiff is attempting to relitigate in the present action the facts that were necessarily determined in Probate Court. See *Kimberly C.* v. *Anthony C.*, supra, 179 Conn. App. 861. In the present case, the plaintiff maintains two counts of tortious interference against the defendants: (1) tortious interference with contract and (2) tortious interference with right of inheritance.

"[F]or a plaintiff successfully to prosecute . . . an action [for tortious interference,] it must prove that the

defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously. . . . The burden is on the plaintiff to plead and prove at least some improper motive or improper means . . . on the part of the [defendant]. . . . The plaintiff in a tortious interference claim must demonstrate malice on the part of the defendant, not in the sense of ill will, but intentional interference without justification." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Calco Construction & Development Co.*, 141 Conn. App. 40, 51, 60 A.3d 983 (2013); see also *Hart* v. *Hart*, Superior Court, judicial district of Windham, Docket No. CV-14-6007918-S (May 11, 2015) (60 Conn. L. Rptr. 399) ("[g]iven the established elements of a cause of action for tortious interference with contractual or beneficial relationships, the anticipated elements of a claim for tortious interference with an expectancy of inheritance are as follows . . . (3) tortious conduct by the defendant, such as fraud or undue influence"). The plaintiff has the burden of proving tortious interference by a preponderance of the evidence. *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 105, 920 A.2d 357, cert. denied, 284 Conn. 901, 931 A.2d 261 (2007).

In support of her claims of tortious interference, the plaintiff relies on the same factual predicate that she offered in support of her undue influence claim in Probate Court. Namely, the plaintiff alleges that the decedent's 2014 will was executed "under the influence and control" of the defendants. The plaintiff further maintains that the reason that the antenuptial agreement was not modified was because the defendants, on March 13, 2014, "acting individually and in concert, forcibly removed and essentially kidnapped [the decedent] from the marital home . . . so [that the decedent] would be in their complete control and custody and under their

influence and manipulation." The plaintiff asserts that the defendants, "[b]y using their undue influence and manipulation prior to the time [that] they took [the decedent] from [the Stamford] home and thereafter . . . the defendants . . . interfered with [her] contractual relations and expectancies, in that the terms of the [amendments to the antenuptial agreement] . . . were never reduced to writing."

Common to a successful prosecution of both of the plaintiff's tortious interference claims is the issue of whether the defendants' alleged conduct rises to a level of impropriety that is sufficient to support a finding of tortious conduct. The Probate Court, however, already has determined that the aforementioned factual predicate on which the plaintiff relies to support her tortious interference claims does not rise to a level of impropriety, of whatever character, by the defendants such as to affect the disposition of the decedent's estate. In the Probate Court proceedings and in the present action, the plaintiff had the burden of proving the impropriety of the defendants' conduct by a preponderance of the evidence. See *Vaicunas* v. *Gaylord*, supra, 196 Conn. App. 803 n.5; Connecticut Civil Jury Instructions, supra, instruction 4.2-15. Furthermore, as our Supreme Court has recognized that the legal theories of tortious interference and undue influence both encompass a broad range of behavior; see *Lee* v. *Horrigan*, supra, 140 Conn. 238; *American Diamond Exchange, Inc.* v. *Alpert*, supra, 101 Conn. App. 91; the plaintiff was not precluded in the Probate Court proceedings from presenting evidence of the defendants' improper conduct that would be relevant to her claims in the present action.

The Probate Court, after a full evidentiary hearing with respect to the issue of whether the defendants exerted undue influence over the decedent, admitted the decedent's 2014 will over the plaintiff's objection. The defendants' conduct that was alleged by the plaintiff in the Probate Court to constitute undue influence

is the same conduct that was alleged by the plaintiff in the present action to constitute tortious interference. The plaintiff did not appeal from the Probate Court decree. The Probate Court decree, therefore, is a final judgment for the purpose of the doctrine of collateral estoppel. See General Statutes § 45a-24 ("[a]ll orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud"); *Heussner* v. *Day, Berry & Howard, LLP*, 94 Conn. App. 569, 576, 893 A.2d 486 ("our case law is clear that Probate Court decrees are final judgments for the purpose of the doctrines of res judicata and collateral estoppel"), cert. denied, 278 Conn. 912, 899 A.2d 38 (2006).

Our review of the record indicates that the plaintiff presents the identical issue in the present action that was actually litigated and necessarily determined by the Probate Court. We conclude that the plaintiff is attempting to relitigate the propriety of the defendants' conduct with respect to the disposition of the decedent's estate, and, therefore, the court properly applied the doctrine of collateral estoppel with respect to counts one and two of the plaintiff's complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSE DEJESUS *v.* R.P.M. ENTERPRISES, INC.
(AC 44111)

Bright, C. J., and Moll and Young, Js.

Syllabus

The defendant employer, R Co., and its owner, M, appealed to this court from the decisions of the Compensation Review Board affirming the finding of the Workers' Compensation Commissioner that the Workers' Compensation Commission had jurisdiction over the plaintiff's claim

for workers' compensation benefits and that the plaintiff employee had sustained a compensable injury. The plaintiff sustained injuries when a car he was working on at R Co.'s junkyard fell on his shoulders and the back of his head. The plaintiff failed to file a notice of claim within one year of the date of his injury as required by statute (§ 31-294c), and R Co. and M argued that the commission lacked jurisdiction over the plaintiff's claim. The commissioner bifurcated the issues, deciding the jurisdictional question first before holding a hearing on the issue of compensability. After the first hearing, the commissioner found that the medical care exception in § 31-294c (c) applied. The commissioner further found that an employer-employee relationship existed between R Co. and/or M. Thus, the commissioner found that the commission had jurisdiction over the matter. R Co. and M filed a petition for review with the board, which affirmed the commissioner's finding of jurisdiction in a decision issued in 2017. In 2019, a hearing was held before the commissioner to address the issue of compensability. No additional evidence or testimony was presented and the parties agreed that record from the prior hearing would be incorporated by reference and constitute the record for purposes of the new hearing. The commissioner concluded that the plaintiff's injury was compensable and that R Co. and M, as alter egos, were jointly and severally liable. The board affirmed the decision of the commissioner in part, and R Co. and M appealed both decisions of the board to this court. *Held*:

1. Although the board erred in affirming the 2019 decision of the commissioner on the basis of collateral estoppel, it properly applied, in the alternative, the law of the case doctrine and, thus, properly affirmed the decision of the commissioner that the plaintiff had sustained a compensable injury and was entitled to workers' compensation benefits.
2. The board properly affirmed the commissioner's determination that jurisdiction over the plaintiff's claim existed.

   a. The board's decision affirming the commissioner's finding that the requirements of the medical care exception in § 31-294c (c) had been satisfied resulted from a correct application of the law to the subordinate facts and the inferences reasonably drawn from them: testimony and evidence credited by the commissioner showed that, after the car had fallen on the plaintiff and he could not feel his legs, he was placed on a wet mattress by M, who then directed an agent of R Co. to drive the plaintiff to a hospital, where he received medical treatment; moreover, any claim by R Co. and M that they lacked notice that the plaintiff suffered an injury was belied by the record and the fact that, within one year following the incident, M provided the plaintiff with money to purchase an electric wheelchair, purchased and/or provided a wheelchair accessible ramp for the plaintiff's home, and paid him $500 per week subsequent to his injury.

   b. This court declined to consider R Co. and M's claim that the board improperly affirmed the commissioner's finding that the plaintiff was an employee of R Co. and not an independent contractor because R

Co. and M failed to file a motion to correct that factual finding in the commissioner's 2017 decision; moreover, the board's determination that the commissioner's finding of jurisdiction was proper was based on a correct application of the law to the subordinate facts found by the commissioner relating to the employment relationship of the parties, including that the plaintiff was an employee of R CO. on the date of the incident that caused his injuries and that he was subject to the direction and control of R Co. and M.

3. The board improperly affirmed the commissioner's findings that the plaintiff was an employee of M, that M was the alter ego of R Co., and that he was jointly and severally liable for the award of benefits to the plaintiff: it was undisputed that the plaintiff never filed a notice of claim alleging that M was his employer, and the commissioner acted beyond the scope of the Workers' Compensation Act (§ 31-275 et seq.) by bringing M into the action in his personal capacity and deciding the issue of whether M, as the principal of the employer of the injured employee, should be held personally accountable for the plaintiff's injuries, as the commissioner was without jurisdiction to pierce the corporate veil of R Co.; moreover, there is a remedy pursuant to statute (§ 31-355 (c)) for the Second Injury Fund to recover amounts paid by the fund, and, in such a civil action, the fund could seek to pierce the corporate veil of R Co.

Argued February 9—officially released May 18, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Second District finding that the Workers' Compensation Commission had jurisdiction over the plaintiff's claim for workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision; thereafter, the commissioner found that the plaintiff had sustained a compensable injury and awarded, inter alia, certain disability benefits; subsequently, the commissioner denied the motion to correct filed by the defendant and Robert Marion; thereafter, the defendant and Robert Marion appealed to the Compensation Review Board, which affirmed the commissioner's decision, and the defendant and Robert Marion appealed to this court. *Affirmed in part*; *reversed in part*; *decision directed.*

Robert M. Fitzgerald, for the appellants (defendant and Robert Marion).

Lori M. Comforti, for the appellee (plaintiff).

Patrick G. Finley, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (Second Injury Fund).

Opinion

YOUNG, J. This appeal is brought by the defendant employer, R.P.M. Enterprises, Inc. (R.P.M.), and its owner, Robert Marion (Marion), from the decisions of the Compensation Review Board (board) affirming the finding of the Workers' Compensation Commissioner (commissioner) that the Workers' Compensation Commission (commission) had jurisdiction over this matter, and affirming, in part, the findings and award of the commissioner that the plaintiff, Jose DeJesus, had sustained a compensable injury for which he was entitled to temporary total disability benefits and payment for medical bills.[1] Because R.P.M. did not carry workers' compensation insurance, the defendant Second Injury Fund (fund) was cited in as a party to the action pursuant to General Statutes § 31-355.[2] On appeal, R.P.M. and Marion claim that the board erred in affirming (1) the commissioner's rulings that the plaintiff's claim for benefits was not time barred pursuant to General Statutes

[1] The commissioner also imposed a civil penalty pursuant to General Statutes § 31-288 (c) for the employer's failure to carry workers' compensation insurance. The board remanded the matter to the commissioner with respect to the fine imposed.

[2] General Statutes § 31-355 (b) provides in relevant part: "When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. The commissioner, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund. . . ."

§ 31-294c[3] and that the plaintiff was an employee of R.P.M. and/or Marion, (2) the award of compensation by the commissioner against Marion at the request of the fund when no claim was brought against Marion, and (3) the decision of the commissioner that he had jurisdiction to make a finding that R.P.M. and Marion were the same entity for the purposes of piercing the corporate veil. We reverse, in part, the decisions of the board.

The following facts, as found by the commissioner, and procedural history are relevant to this appeal. Because the issue of lack of jurisdiction was raised by R.P.M. at the beginning of the proceedings,[4] the commissioner agreed to bifurcate that issue and to decide the jurisdictional issue first, after which an additional hearing would be held to decide the remaining issues. Formal hearings regarding the issue of jurisdiction were held on April 12, September 27 and November 22, 2016. In a decision dated June 16, 2017 (2017 decision), the commissioner found that the plaintiff was born in Puerto Rico and came to the mainland when he was three or four years old. He was hired by Russell Adams, the office manager for R.P.M., which operates a junkyard, to work Monday through Saturday. For one year prior to the date of his injury, he earned $100 for a full day of work, and $50 for his work on Saturdays, and he had received a $600 Christmas bonus for many years. His work duties included taking parts off cars, changing

[3] Subsequent to the plaintiff's injury and the commencement of these proceedings, § 31-294c was amended by No. 16-112, § 1, of the 2016 Public Acts, and by No. 17-141, § 1, of the 2017 Public Acts. Because those amendments added provisions that are not relevant to the claims on appeal, we refer to the current revision of the statute.

[4] Specifically, R.P.M. claimed that, because the plaintiff did not file a notice of claim within one year from the date of his injury and no exceptions to that one year notice requirement applied, the commission lacked jurisdiction over the plaintiff's claim for workers' compensation benefits. R.P.M. also asserted that the plaintiff was an independent contractor, not an employee, of R.P.M., depriving the commission of jurisdiction.

oil, fixing the loader, changing tires and picking up cars. The plaintiff also performed work at properties owned by Marion such as cutting grass or shoveling snow. The tools he used to perform his work for R.P.M. were owned by R.P.M., and his work activities at R.P.M. were directed by Adams, Marion, or Marion's son, Robert Marion II (Bobby).[5] If the plaintiff did not do something the right way, Adams would direct him how to do it correctly.

The plaintiff testified before the commissioner that, on December 9, 2013, he was directed by Adams and Bobby "to work taking off parts and have cars ready," and when that task was completed, he was directed by Bobby to remove the converter on a car that was propped up on its side by a pipe. When the plaintiff was kneeling on the ground facing the car, trying to cut off the bottom bolts, the car fell on his shoulders and the back of his head. He testified that he felt the car "crushing him down and . . . felt something in his back cracking and breaking . . . ." After Adams and Bobby lifted the car off of the plaintiff, he fell on his back and could not feel his legs. The plaintiff further testified that, at that time, Marion "came around the corner and asked what happened," and the plaintiff told him that the car fell on him. Marion then told Adams to get a piece of wood so that he could lay the plaintiff on it, but, when one could not be located, the plaintiff was placed on a wet mattress. Thereafter, at Marion's direction, Adams drove the plaintiff to a hospital in his van, with Bobby following behind them. Neither Adams nor Bobby went into the hospital with the plaintiff.

Marion testified before the commissioner that he had no knowledge that the plaintiff was injured at R.P.M.

[5] Although, in the decisions of the commissioner and the board, Marion's son is referred to as Robert Marion, Jr., at the formal hearing before the commissioner on November 22, 2016, Marion stated to the plaintiff's counsel that his son's correct name is Robert Marion II. Throughout that hearing, in his testimony Marion referred to his son as Bobby. For clarity, we refer to Marion's son in this opinion as Bobby.

on December 9, 2013, that he was not at the job location that day, and that he was "pretty sure" that the business was closed on that day. Marion testified further that he was the owner of R.P.M. from 1984 until at least November 22, 2016, that the plaintiff was an independent contractor and not an employee of R.P.M., that R.P.M. had one bank account, and that he was the only person authorized to sign checks from that account. Marion did acknowledge that, following the accident that caused the plaintiff's injuries, he paid the plaintiff $500 per week, purchased an electric wheelchair for the plaintiff, and built a wheelchair ramp at the plaintiff's home to accommodate the plaintiff's wheelchair.

In addressing the question of jurisdiction, the commissioner found that the plaintiff did not file a written notice of claim within one year of the date of injury as required by § 31-294c, nor did he request a hearing within that time period. Instead, the plaintiff filed a Form 30C notice of claim on May 4, 2015, and an amended notice on September 10, 2015. As a result, R.P.M. claimed that the commission lacked jurisdiction over the plaintiff's claim for workers' compensation benefits. The plaintiff countered that an exception to the one year notice requirement applied because, inter alia, R.P.M. and Marion had knowledge of the injury on the date of its occurrence and directed Adams, their agent, to transport the plaintiff to the hospital for medical treatment.

On the basis of the testimony and exhibits, the commissioner found the testimony of the plaintiff mostly credible, despite some discrepancies. In contrast, the commissioner found the testimony of Marion neither credible nor persuasive. Specifically, the commissioner found that R.P.M. and Marion, through their agent, Adams, provided transportation to bring the plaintiff to the hospital on the day of the incident and, thus, that the plaintiff had satisfied the medical care exception

to the one year notice requirement set forth in § 31-294c (c), thereby tolling the statute. Furthermore, the commissioner found that the plaintiff was an employee of R.P.M. and/or Marion, and not an independent contractor, because the plaintiff was "subject to specific control and direction" of R.P.M. and/or Marion. Accordingly, because the medical care exception to the one year notice requirement was satisfied, and because an employer-employee relationship existed between the plaintiff and R.P.M. and/or Marion, the commissioner found that the commission had jurisdiction over the matter.

Following the commissioner's determination regarding jurisdiction over the matter, R.P.M. filed a petition for review with the board, which, on November 8, 2018, issued a decision (*DeJesus I*) affirming the commissioner's finding of jurisdiction and determining that it was "supported by sufficient facts and properly applie[d] the pertinent law." After reviewing the findings of the commissioner, the board noted that neither R.P.M. nor Marion filed a motion to correct those findings,[6] which "constrained . . . [the board's] ability to challenge factual findings." The board first addressed and rejected the claim that the commissioner improperly bifurcated the proceeding and decided the jurisdictional claim first. Next, it found no error in the commissioner's decision to allow the fund to appear and litigate issues at the formal hearing, rather than in a collection action, as alleged by R.P.M. and Marion.

In addressing a claim raised by Marion that "he was deprived of due process because the trial commissioner ordered relief against him although he was not originally named as a party in the case," the board, relying on *Mosman* v. *Sikorsky Aircraft Corp.*, No. 4180, CRB 4-00-1 (March 1, 2001), recognized that "a party may be apprised that a given claim is at issue by other means,

[6] See footnote 8 and part II of this opinion.

such as the statements of the parties at trial, the evidence they have introduced, or the papers they have filed." (Internal quotation marks omitted.) The board further stated: "In the present case, we note that Marion . . . was in attendance at the initial session of the formal hearing on April 12, 2016, and his company had retained legal counsel for this hearing. At that formal hearing, counsel for the [f]und specially moved to add Marion . . . to the case in his individual, personal capacity. . . . Counsel for R.P.M. offered no objection.

"We further note that at the September 27, 2016 session of the formal hearing, the trial commissioner indicated on the record that hearing notices had been sent to Marion . . . in his personal capacity, the [f]und had served Marion . . . with a subpoena, counsel for R.P.M. had withdrawn from the case, and Marion . . . (or someone else on his behalf) had sent a text message to the [c]ommission acknowledging the scheduling of the hearing but stating that medical issues would preclude his attendance. . . . Marion . . . attended and extensively testified at the November 22, 2016 hearing, at which the inquiry largely focused on the manner in which Marion . . . managed the finances of R.P.M. Under the totality of the circumstances, we are persuaded that Marion . . . had ample reason to believe he was potentially facing personal liability. . . . As a result, we do not find that the trial commissioner's decision to attribute personal liability to Marion . . . constituted a due process violation." (Citations omitted; internal quotation marks omitted.)

The board then turned to the primary issue of jurisdiction and found that the evidence in the record supported the commissioner's conclusion that the medical care exception in § 31-294c (c) was satisfied. Specifically, the board found that the evidence in the record determined to be reliable by the commissioner supported the finding that R.P.M. and Marion, through their agent,

Adams, provided transportation to the plaintiff to the hospital on the date of the incident. Although R.P.M. and Marion claimed that "merely transporting an employee to a hospital is an inadequate basis for establishing that the medical care exception has been satisfied," and that they "lacked actual knowledge of the nature of the injury," the board determined that "[t]he evidence credited by the trial commissioner is utterly inconsistent with th[at] position."

With respect to the finding by the commissioner that the plaintiff had established the existence of an employer-employee relationship, R.P.M. and Marion claimed that the commissioner "should have enforced . . . independent contractor agreements" that they had executed with the plaintiff. The board explained that the determination of employment status is a factual issue that is entitled to "a significant level of deference on review." (Internal quotation marks omitted.) The board concluded that the plaintiff's testimony that R.P.M. and Marion controlled his activities "provided a sufficient basis for the trial commissioner to conclude that an employer-employee relationship existed, notwithstanding the provisions of the independent contractor agreements."

Finally, the board addressed the issue of whether the record contained sufficient evidence to support the decision of the commissioner to pierce the corporate veil and to find Marion responsible in his individual capacity. The board explained that, although it would have been beneficial for the commissioner to have made specific findings concerning the issue of piercing the corporate veil, the absence of such findings was "harmless error, particularly as there was no motion to correct." Given the testimony on the record showing that Marion would pay the plaintiff in cash and, after the plaintiff's injury, issued checks drawn on R.P.M. to the plaintiff's wife, that the plaintiff worked on property owned by Marion, as well as the home of Marion's

mother, and that Marion was the owner of R.P.M., which did not have a separate bank account, paid the plaintiff for the work performed on his personal residence and used the funds of R.P.M. to pay for his personal expenses, the board concluded that "the commissioner reasonably inferred that R.P.M. and Marion . . . were essentially alter egos and, as such, Marion . . . could not rely upon the protection of the corporate veil as a defense against liability."

On March 13, 2019, a formal hearing was held before the commissioner[7] to address the issue of compensability, at which no additional evidence or testimony was presented or entered into the record. Moreover, the parties had agreed that the record of the prior proceedings before the commissioner would be incorporated by reference and constitute the record for purposes of the new hearing concerning compensability. In a decision dated April 23, 2019 (2019 decision), the commissioner found, on the basis of the evidence in the record, that R.P.M. and Marion "were alter egos" and that the plaintiff was their employee on December 9, 2013, when the plaintiff sustained a catastrophic injury to his spinal cord while performing work at his place of employment. Accordingly, the commissioner concluded that the plaintiff's injury, which rendered him permanently and totally disabled, was compensable and that R.P.M and Marion, as alter egos, were jointly and severally liable for the plaintiff's reasonable and necessary medical expenses. R.P.M. and Marion were ordered to pay the plaintiff temporary total disability benefits, to continue to pay for all reasonable and medically necessary medical treatment provided by an authorized treating physician, to reimburse the plaintiff for certain expenses he had incurred, and to pay a civil penalty of $50,000 to the

[7] We note that the 2017 decision was made by Commissioner Ernie R. Walker, who, thereafter, retired from the commission. Therefore, the 2019 hearing was held before Commissioner Peter C. Mlynarczyk.

fund for their failure to carry workers' compensation insurance.

Thereafter, R.P.M. and Marion filed a motion to correct, which the commissioner denied, and R.P.M. and Marion filed a petition for review with the board. In a decision dated April 29, 2020 (*DeJesus II*), the board affirmed the decision of the commissioner except with respect to the fine imposed and remanded the matter for a hearing regarding the amount of the fine. The board first noted that many of the issues raised on appeal by R.P.M. and Marion were merely rearticulations of issues heard and decided in *DeJesus I*. The board, thus, agreed with the plaintiff's claim that R.P.M. and Marion were barred, under the doctrine of collateral estoppel, from challenging issues that were heard and decided in the 2017 decision of the commissioner and by the board in *DeJesus I*. In making that determination the board explained that, although a party aggrieved by a decision of the board has the right to file an appeal, if no appeal is taken, "the decision of the . . . [b]oard is final within twenty days. Any issues heard and decided in *DeJesus I*, for which [R.P.M. and Marion] believed appellate review was appropriate, should have been appealed and presented to our Appellate Court. Therefore, [R.P.M. and Marion] are collaterally estopped from review of any issues previously heard and decided in *DeJesus I*." The board also found that the record supported the finding that the plaintiff sustained a compensable injury. R.P.M. and Marion have appealed to this court challenging the board's decisions in *DeJesus I* and *DeJesus II*. Additional facts and procedural history will be set forth as necessary.

We first set forth our standard of review applicable to workers' compensation appeals. "The commissioner has the power and duty, as the trier of fact, to determine the facts . . . and [n]either the . . . board nor this court has the power to retry the facts. . . . The conclusions drawn by [the commissioner] from the facts found

[also] must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Woodbury-Correa* v. *Reflexite Corp.*, 190 Conn. App. 623, 627, 212 A.3d 252 (2019). "The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . The review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is [obligated] to hear the appeal on the record and not retry the facts. . . . On appeal, the board must determine whether there is any evidence in the record to support the commissioner's [decision]. . . . Our scope of review of [the] actions of the [board] is [similarly] . . . limited. . . . [However] [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Internal quotation marks omitted.) *Dombrowski* v. *New Haven*, 194 Conn. App. 739, 748, 222 A.3d 533 (2019), cert. denied, 335 Conn. 908, 227 A.3d 1039 (2020).

"[Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and the board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Furthermore, [i]t is well established that, in resolving issues of statutory construction under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.], we

are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Woodbury-Correa* v. *Reflexite Corp.*, supra, 190 Conn. App. 627–28; see also *Gould* v. *Stamford*, 331 Conn. 289, 303–304, 203 A.3d 525 (2019).

I

Before we address the issues raised by R.P.M. and Marion on appeal, we must first address the issue raised by the plaintiff that R.P.M. and Marion are precluded, under the doctrine of collateral estoppel, from raising issues on appeal that previously were heard and decided in *DeJesus I*, including issues concerning the commissioner's finding that the plaintiff was an employee of R.P.M. and/or Marion, and his determination that the medical care exception in § 31-294c (c) applied and excused the plaintiff's failure to file a timely notice of claim within one year from the date of his injury. The plaintiff raised his collateral estoppel claim before the board in *DeJesus II*, which agreed with the plaintiff and determined that R.P.M. and Marion were "collaterally estopped from review of any issues previously heard and decided in *DeJesus I*." We disagree and conclude that collateral estoppel is not applicable under the circumstances of this case.

The following additional facts are necessary to this claim. At the beginning of the formal hearing held on April 12, 2016, R.P.M. raised an issue regarding the

commissioner's jurisdiction over the matter. Thereafter, the parties agreed to bifurcate the proceedings and to have the commissioner decide the issue of jurisdiction first. After the commissioner issued his 2017 decision finding jurisdiction, R.P.M. and Marion[8] appealed to the board, which affirmed the commissioner's 2017 decision in *DeJesus I*. A formal hearing was then held on March 13, 2019, before the commissioner for a determination of the remaining issues, including whether the plaintiff sustained a compensable injury and, if so, the amount of compensation and benefits to which the plaintiff was entitled. The commissioner issued a finding and award on April 23, 2019, from which R.P.M. and Marion appealed to the board, which affirmed the commissioner's decision in *DeJesus II*. In *DeJesus II*, the board agreed with the plaintiff that R.P.M. and Marion were precluded by the doctrine of collateral estoppel from seeking review of issues that were determined in the 2017 decision of the commissioner and affirmed by the board in *DeJesus I*.

"Whether the [board] properly applied the doctrine of collateral estoppel is a question of law for which our review is plenary. . . . The fundamental principles underlying the doctrine are well established. Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined *in a prior action* between the same parties upon a different claim." (Emphasis added; internal quotation

[8] Although R.P.M. and Marion did not file a motion to correct the commissioner's factual findings at that time, which limited the scope of review applied by the board to any challenges related to those findings; see *Conroy* v. *Stamford*, 161 Conn. App. 691, 701–702, 129 A.3d 137 (2015), cert. denied, 320 Conn. 917, 131 A.3d 1154 (2016); that issue is separate from the issue of whether, as alleged by the plaintiff in connection with his collateral estoppel claim, R.P.M. and Marion were required to file an appeal to this court from the board's decision in *DeJesus I*. We address the failure of R.P.M. and Marion to file a motion to correct in part II of this opinion.

marks omitted.) *Rinaldi* v. *Enfield*, 82 Conn. App. 505, 516, 844 A.2d 949 (2004). "An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 773, 770 A.2d 1 (2001). "[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the [rule] of . . . [collateral estoppel], subject to the same exceptions and qualifications, as a judgment of a court." (Internal quotation marks omitted.) *Sellers* v. *Sellers Garage, Inc.*, 110 Conn. App. 110, 115, 954 A.2d 235 (2008).

The crux of the plaintiff's claim, with which the board agreed, is that when R.P.M. and Marion failed to appeal to this court following the decision in *DeJesus I*, that decision of the board became final, and, thus, R.P.M. and Marion were collaterally estopped from raising any issues previously heard and decided in *DeJesus I*. In support of that claim, the plaintiff relies on General Statutes § 31-301a, which provides in relevant part: "[A]ny decision of the . . . [b]oard, in the absence of an appeal therefrom, shall become final after a period of twenty days has expired from the issuance of notice of the rendition of the judgment or decision." He also relies on General Statutes § 31-301b, which provides in relevant part: "Any party aggrieved by the decision of the . . . [b]oard upon any question or questions of law arising in the proceedings *may* appeal the decision of the . . . [board] to the Appellate Court, whether or not the decision is a final decision . . . ." (Emphasis added.)

In their reply brief, R.P.M. and Marion claim that, under the procedural posture of this case, they are not

precluded by collateral estoppel from raising claims related to issues that were decided in *DeJesus I*. They claim that, because the commissioner's 2017 decision did not include any findings regarding whether the plaintiff's injury arose out of or in the course of employment, or what benefits, if any, were due, neither R.P.M. nor Marion was found responsible to pay workers' compensation benefits to the plaintiff at the time *DeJesus I* was decided; accordingly, they had no reason to appeal to this court at that time. In light of the permissive language in § 31-301b stating that a party "may" appeal the decision of the board, and the absence in that statute of mandatory language requiring that an appeal *must* be filed, they claim that they had the choice to see the case through to its conclusion and then to file an appeal to resolve all of the issues in the case.

The commissioner's 2019 decision indicates that "[n]o additional evidence or testimony was entered into the record on March 13, 2019. The parties agreed that the record in the prior proceedings before [the] [c]ommissioner . . . would be the record for purposes of the findings made herein and would be incorporated by reference." At oral argument before this court, the parties were asked whether the record shows that R.P.M. and Marion could introduce additional evidence at the March 13 hearing concerning the lack of an employer-employee relationship and the applicability of the medical care exception. The plaintiff's counsel responded that there was an opportunity for anyone to present additional evidence but no one actually did present additional evidence, and that R.P.M. and Marion thus could have presented evidence but did not do so.

We conclude that collateral estoppel does not apply to this case. Collateral estoppel, or issue preclusion, applies to prevent the relitigation of an issue when that issue was actually litigated and necessarily determined *in a prior action* between the same parties. See *Rinaldi*

v. *Enfield*, supra, 82 Conn. App. 516. The proceedings in the present case, however, were all part of the same action. The commissioner simply bifurcated the proceedings and decided the issue of jurisdiction first, with the issue of compensability to be decided at a subsequent hearing, at which the parties could present additional evidence.

The board reasoned in *DeJesus II* that § 31-301b, when read together with § 31-301a, indicates that "an aggrieved party has the right to file an appeal but, if an appeal is not taken, the decision of the . . . [b]oard is final within twenty days." As a matter of statutory interpretation, however, it would lead to an absurd, unworkable result to apply that statute in such a manner under the circumstances here, where the proceedings had been bifurcated. Because the commissioner, in 2017, first made a finding regarding jurisdiction over the matter and, following a separate hearing at which the parties could present additional evidence, would determine if the plaintiff's injury was compensable, the proceedings were ongoing at the time the board heard the appeal of the jurisdictional issue in *DeJesus I*. "[B]ecause the existence of a final judgment is a jurisdictional prerequisite to an appeal"; (internal quotation marks omitted) *Levarge* v. *General Dynamics Corp.*, 282 Conn. 386, 390, 920 A.2d 996 (2007); an appeal to this court at that time would have been subject to dismissal. See id., 390–91; see also *Dechio* v. *Raymark Industries, Inc.*, 299 Conn. 376, 399–400, 10 A.3d 20 (2010) (explaining that there is a final judgment requirement "with respect to appeals from the board to the Appellate Court pursuant to . . . § 31-301b, notwithstanding the lack of a final judgment requirement in the text of that statute"). Therefore, under the circumstances here, the failure of R.P.M. and Marion to appeal to this court from the decision in *DeJesus I* did not render that decision final as to the issues raised therein.

Furthermore, neither the parties nor the commissioner, at the March 13, 2019 hearing, took the position that R.P.M. and Marion were collaterally estopped from presenting additional evidence on the jurisdictional issues. To the contrary, the commissioner specifically asked them if they wanted to present additional evidence and they declined to do so. If R.P.M. and Marion had presented additional evidence at the March 13, 2019 hearing, the commissioner would have had to make new findings that could have been challenged on an appeal to the board, which further supports our conclusion that there was no requirement for R.P.M. and Marion to have filed an appeal to this court from the decision of the board in *DeJesus I*. See *Pokorny* v. *Getta's Garage*, 219 Conn. 439, 446–48, 447 n.8, 594 A.2d 446 (1991) (rejecting claim that, because issues of compensability and amount of plaintiff's medical bills were not appealed to board, decision of commissioner was final as to those issues, and concluding that, because language of commissioner's decision gave parties right to petition for additional hearings on issue of defendants' obligation to pay for plaintiff's medical bills, defendants were not limited to appealing decision concerning payment of medical bills within statutory time limitation of General Statutes § 31-300, which provides that decisions of commissioner not appealed within twenty days "shall be final"); see generally *Levarge* v. *General Dynamics Corp.*, supra, 282 Conn. 390 (when further proceedings before commissioner are necessary following remand from board, "if such further proceedings are merely ministerial, the decision is an appealable final judgment, but if further proceedings will require the exercise of independent judgment or discretion and the taking of additional evidence, the appeal is premature and must be dismissed" (internal quotation marks omitted)).

Because the plaintiff bases his collateral estoppel claim on his assertion that R.P.M. and Marion should

have appealed to this court following the decision in *DeJesus I*, which we have rejected, the claim fails. Accordingly, the board's determination that R.P.M. and Marion were collaterally estopped from raising issues during the appeal in *DeJesus II* related to issues that were heard and decided in *DeJesus I* resulted from an incorrect application of the law to the facts of the case.

Nevertheless, in *DeJesus II* the board also stated: "Assuming for the sake of argument that the doctrine of issue preclusion is not appropriate . . . we believe that the doctrine of the law of the case applies to the findings and conclusions set out in the 2017 finding and relied on in the [2019] findings and conclusions at issue here." The board found the doctrine of the law of the case particularly relevant to the 2017 finding of the commissioner that the plaintiff was an employee of R.P.M. on December 9, 2013, when he was injured while performing mechanical work on a car at R.P.M.'s place of business. Accordingly, the board concluded that the evidentiary record before the commissioner in 2017, which was the same as the one before the commissioner in 2019, contained evidence supporting the conclusion that the plaintiff sustained a compensable injury that arose out of and in the course of his employment with R.P.M.

"The application of the law of the case doctrine involves a question of law, over which our review is plenary. . . . The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . [When] a matter has previously been ruled [on] interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge]

becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Citations omitted; internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013); see also *Bowman* v. *Jack's Auto Sales*, 54 Conn. App. 289, 290–91, 734 A.2d 1036 (1999) (affirming decision of board applying law of case doctrine to award of benefits by commissioner).

We conclude that the law of the case doctrine, rather than collateral estoppel, is applicable to this case. Although the board erred in applying collateral estoppel in its decision, the board, nevertheless, properly applied the law of the case doctrine, in the alternative, and affirmed the 2019 decision of the commissioner that the plaintiff had sustained a compensable injury for which he was entitled to workers' compensation benefits. We find no error in that decision of the board.

II

R.P.M. and Marion claim that the board improperly affirmed the 2017 decision of the commissioner finding that the commission had jurisdiction over the plaintiff's claim for workers' compensation benefits. Specifically, R.P.M. and Marion challenge the commissioner's (1) determination that the plaintiff's claim for benefits was not time barred under § 31-294c and that the plaintiff satisfied the medical care exception set forth in § 31-294c (c), which excused the plaintiff's failure to file a timely written notice of claim, and (2) finding the plaintiff was an employee, and not an independent contractor, of R.P.M.[9] We conclude that the board properly

[9] The commissioner also found that the plaintiff was an employee of Marion. We address the finding as it relates to Marion in part III of this opinion.

affirmed the commissioner's determination that jurisdiction over the plaintiff's claim existed and address each of these claims in turn.

We first note that our review of the claims of R.P.M. and Marion is limited by the procedural posture of this case. Because R.P.M. and Marion did not file a motion to correct[10] the factual findings that formed the basis for the commissioner's determination of jurisdiction in the commissioner's 2017 decision,[11] they cannot now challenge those factual findings. See *Sellers* v. *Sellers Garage, Inc.*, 80 Conn. App. 15, 19, 832 A.2d 679, cert. denied, 267 Conn. 904, 838 A.2d 210 (2003); see also Regs., Conn. State Agencies § 31-301-4. "A party seeking to challenge a finding of the commissioner as incorrect or incomplete must first do so by filing a motion to correct the challenged findings." *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, 180 Conn. App. 355, 367, 183 A.3d 670 (2018). When a party fails to do so, however, the board must "accept the validity of the facts found by the trial commissioner and its review [is] limited to how the trial commissioner applied the law." *Conroy* v. *Stamford*, 161 Conn. App. 691, 702, 129 A.3d 137 (2015), cert. denied, 320 Conn. 917, 131 A.3d

[10] Although R.P.M. was represented by counsel at the first formal hearing held on April 12, 2016, that counsel withdrew from the case, and R.P.M. and Marion proceeded as self-represented parties throughout the remainder of the proceedings. We acknowledge that "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Sellers* v. *Sellers Garage, Inc.*, 80 Conn. App. 15, 19 n.2, 832 A.2d 679, cert. denied, 267 Conn. 904, 838 A.2d 210 (2003).

[11] The record does show that R.P.M. and Marion filed a motion to correct the factual findings in the commissioner's 2019 decision, which the commissioner denied. In *DeJesus II*, the board concluded that the commissioner did not err in denying the motion to correct.

1154 (2016). Therefore, our review on appeal is limited to a determination of "whether the board's conclusions on the basis of those facts result[ed] from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . In other words, [t]hese conclusions must stand unless they could not reasonably or logically be reached on the subordinate facts." (Internal quotation marks omitted.) *Samaoya* v. *Gallagher*, 102 Conn. App. 670, 675, 926 A.2d 1052 (2007).

A

R.P.M. and Marion challenge the commissioner's determination that the plaintiff's claims were not time barred under § 31-294c. Specifically, they claim that there was no finding or proof that they furnished medical care with the knowledge that it was exposing them to liability under the act, and that the commissioner's finding that Adams provided transportation to the plaintiff to the hospital on the date of the incident was not sufficient to satisfy the medical care exception. We disagree.

We first set forth our standard of review and the general principles that guide our analysis of this claim. Because this claim challenges the commissioner's application of the law governing the medical care exception and not the underlying facts found by the commissioner in support of that determination, we must determine whether the board's conclusion that the commissioner properly applied the law "result[ed] from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) Id.

Subject matter jurisdiction "is the power . . . to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to

adjudicate a particular type of legal controversy. . . . This concept, however, is not limited to courts. Administrative agencies [such as the commission] . . . are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power . . . . [A] determination regarding [an agency's] subject matter jurisdiction is a question of law . . . ." (Citations omitted; internal quotation marks omitted.) *Marroquin* v. *F. Monarca Masonry*, 121 Conn. App. 400, 406–407, 994 A.2d 727 (2010). "The existence of an employer-employee relationship . . . and the proper initiation of a claim in the first instance under § 31-294c . . . are jurisdictional facts." (Citations omitted.) *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 335, 49 A.3d 211, cert. granted on other grounds, 307 Conn. 915, 54 A.3d 179 (2012) (appeal withdrawn September 25, 2013).

Section 31-294c (a) provides in relevant part that "[n]o proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident . . . ." "[T]he written notice intended is one which will reasonably inform the employer that the employee is claiming or proposes to claim compensation under the . . . [a]ct." (Internal quotation marks omitted.) *Pernacchio* v. *New Haven*, 63 Conn. App. 570, 575, 776 A.2d 1190 (2001). "Written notice of the injury within one year is necessary to give the commissioner jurisdiction to hear the claim unless the case falls within one of the exceptions" set forth in subsection (c) of § 31-294c. *Gesmundo* v. *Bush*, 133 Conn. 607, 611, 53 A.2d 392 (1947). Under those exceptions, the failure to provide a timely notice of a claim is not a bar to proceedings if there has been "a timely hearing or a written request for a hearing or an assignment for a hearing . . . the timely submission of a voluntary agreement . . . or . . . the furnishing of appropriate medical care by the employer to the

employee for the respective work-related injury." (Citations omitted; internal quotation marks omitted.) *Izikson* v. *Protein Science Corp.*, 156 Conn. App. 700, 708, 115 A.3d 55 (2015); see also General Statutes § 31-294c (c).

The present case involves the medical care exception to the one year notice of claim requirement set forth in § 31-294c (c), which provides in relevant part that no defect in a notice of claim shall be a bar to the maintenance of proceedings "if within the applicable period an employee has been furnished, for the injury with respect which compensation is claimed, with medical or surgical care . . . ." "The exception [in § 31-294c (c) to the notice requirement] is, no doubt, based upon the fact that if the employer furnishes medical treatment he must know that an injury has been suffered which at least may be the basis of such a claim."[12] *Gesmundo* v. *Bush*, supra, 133 Conn. 612; see also *Pernacchio* v. *New Haven*, supra, 63 Conn. App. 576–77. "Any interpretation of the scope of § 31-294c (c), accordingly, must be consistent with the principle that the employer's provision of medical care demonstrates that it was on notice that the claimant had suffered a compensable injury." *Carter* v. *Clinton*, 304 Conn. 571, 580, 41 A.3d 296 (2012). The burden is on the claimant to demon-

[12] In their appellate brief, R.P.M. and Marion cite *Gesmundo* for the proposition that an employer "must know that an injury has been suffered," and claim that because the commissioner made no such express finding, there was no finding on the record that they "furnished medical care within the meaning of the statute." An examination of *Gesmundo*, however, reveals that R.P.M. and Marion have taken that statement out of context. Our review of the full statement of the court in *Gesmundo*—that the exception is based on the fact that "if the employer furnishes medical treatment he must know that an injury has been suffered which at least may be the basis of such a claim"—demonstrates that the court was explaining an inference that can be drawn from an employer's conduct in furnishing medical treatment. *Gesmundo* v. *Bush*, supra, 133 Conn. 612. There is no support in *Gesmundo* for the claim of R.P.M. and Marion that the commissioner had to make an express finding that they furnished medical care knowing that it might subject them to liability under the act.

strate that the medical care exception applies. See id., 579.

In *Gesmundo* v. *Bush*, supra, 133 Conn. 611–13, our Supreme Court addressed the applicability of the medical care exception. In that case, an employee of the defendant employer sustained an injury and reported it to the defendant's superintendent. Id., 612. The superintendent then sent the employee to a doctor, who provided medical care to injured employees of the defendant. Id. The commissioner found that "the superintendent had authority to take that action," and that "[t]he act of the superintendent was in effect the act of the employer." Id. Our Supreme Court determined that the doctor's examination and "giving of instructions to the plaintiff constituted 'medical treatment' as those words are used in the statute. To 'furnish' means to 'provide' or 'supply.' Webster's New International Dictionary (2d Ed.). That the plaintiff saw fit to pay the doctor does not alter the situation; it is the fact that the defendant, through its superintendent, made provision for medical treatment that makes unnecessary the formal notice. The commissioner could properly hold that the defendant furnished such treatment within the meaning of the exception in the statute." *Gesmundo* v. *Bush*, supra, 612–13.

Likewise, in *Pernacchio* v. *New Haven*, supra, 63 Conn. App. 572–73, the plaintiff firefighter filed a claim against his employer, the city of New Haven, for heart and hypertension benefits following an incident in which he experienced dizziness, light-headedness, and nausea at the firehouse. In connection with that incident, a paramedic assigned to an emergency medical response unit that was stationed at the firehouse responded to the plaintiff's request for assistance. Id., 572. The paramedic tested the plaintiff's blood pressure and obtained a high reading, called for an emergency unit to transport the plaintiff to the hospital, and

remained in contact with medical staff at the hospital while the plaintiff was being transported there, where the plaintiff underwent testing. Id.

On appeal to this court in *Pernacchio*, the defendant argued that "the plaintiff's transportation to the hospital by the defendant's ambulance service, which was staffed by the defendant's emergency medical technicians, who monitored the plaintiff's blood pressure and also remained in contact with the hospital until the ambulance arrived there, [did] not constitute providing 'a competent physician or surgeon to attend the injured employee' or furnishing 'any medical and surgical aid or hospital and nursing service . . . as the physician or surgeon deems reasonable or necessary' as required by [General Statutes] § 31-294d." Id., 577. This court agreed with "the commissioner and the board that the defendant had notice of the blood pressure incident because the plaintiff was transported to the hospital in an ambulance staffed with the defendant's fire department paramedics, who monitored his condition on the way to the hospital, and through [an] investigative report of the defendant's workers' compensation division." Id. We further explained that whether "the ride in the ambulance while attended by paramedics qualifies as a medical service, the commissioner also found that the plaintiff underwent a series of tests at the hospital for which the hospital submitted a bill . . . [which was] an obligation of the defendant. It can hardly be disputed that the tests performed by the hospital were medical services." Id. Accordingly, we concluded that the medical care exception in § 31-294c (c) applied "because the defendant, immediately after the accident, furnished the plaintiff with medical and hospital care . . . ." Id., 577–78.

In the present case, the commissioner found, in his 2017 decision, that R.P.M. and Marion, through their agent, Adams, provided the plaintiff with transportation

to the hospital immediately following the incident. On the appeal to the board in *DeJesus I*, the board determined that the commissioner's finding that the requirements for the medical care exception had been met was supported by the evidence in the record, which included the plaintiff's detailed testimony regarding the events that had transpired on the date of the incident, as well as medical records from the hospital indicating that the plaintiff had been driven to the hospital by a friend because he could not move. With respect to the claim of R.P.M. and Marion that "merely transporting the plaintiff to the hospital" was insufficient to establish that the requirements of the medical care exception have been satisfied, and that "they lacked actual knowledge of the nature of the injury," the board stated: "The evidence credited by the trial commissioner is utterly inconsistent with th[at] position." We find no error in the board's conclusion.

This court has stated: "In the event that a representative or agent of the employer, authorized to send the employee to a physician, does so, that constitutes furnishing medical treatment for purposes of the exception. . . . It is clear that the [employer was] not ignorant of the injury, and [did] not claim to be prejudiced in any way. Even if the employer did not pay for the medical treatment furnished by a physician selected by him, he has 'furnished' such treatment within the meaning of the statute if he has sent the claimant for medical treatment, thereby authorizing it." (Citation omitted.) *Infante* v. *Mansfield Construction Co.*, 47 Conn. App. 530, 535–36, 706 A.2d 984 (1998). In the present case, the testimony and evidence credited by the commissioner show that, after the car fell on the plaintiff and he could not feel his legs, the plaintiff was placed on a wet mattress by Marion, who then directed Adams to drive the plaintiff to a hospital, where he received medical

treatment. Under these circumstances, R.P.M. and Marion can hardly claim a lack of notice that the plaintiff suffered a compensable injury, and any claim to the contrary is belied by the record and the facts that, within one year following the incident, Marion provided the plaintiff with money to purchase an electric wheelchair, purchased and/or provided a wheelchair accessible ramp for the plaintiff's home, and paid him $500 per week subsequent to his injury.[13] The board's decision affirming the commissioner's finding that the requirements of the medical care exception have been satisfied resulted from a correct application of the law to the subordinate facts and the inferences reasonably drawn from them. See *Mankus* v. *Mankus*, 107 Conn. App. 585, 592, 946 A.2d 259, cert. denied, 288 Conn. 904, 953 A.2d 649 (2008).

B

R.P.M. and Marion next claim that the board improperly affirmed the commissioner's finding that the plaintiff was an employee, and not an independent contractor, of R.P.M. To the extent that R.P.M. and Marion are challenging the commissioner's factual finding that the plaintiff was an employee of R.P.M., we decline to consider this claim as a result of the failure of R.P.M. and Marion to file a motion to correct that factual finding in the commissioner's 2017 decision. See *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, supra, 180 Conn. App. 368 (declining to consider claim that board improperly affirmed finding of commissioner that claimant was employee where party challenging finding did not file motion to correct).

[13] We also note that the commissioner did not find credible Marion's testimony that he was not present at the time of the plaintiff's injury. We cannot disturb that finding. See *Schiano* v. *Bliss Exterminating Co.*, 57 Conn. App. 406, 415, 750 A.2d 1098 (2000) (commissioner's "authority to find the facts entitles the commissioner to determine the weight of the evidence presented and the credibility of the testimony offered").

Moreover, to the extent that R.P.M. and Marion are challenging the commissioner's determination that jurisdiction exists, we conclude that the board's determination that the commissioner's finding of jurisdiction was proper was based on a correct application of the law to the subordinate facts found by the commissioner relating to the employment relationship of the parties.

"A jurisdictional prerequisite to the applicability of the act is the existence of an employer-employee relationship." *Bugryn* v. *State*, 97 Conn. App. 324, 328, 904 A.2d 269, cert. denied, 280 Conn. 929, 909 A.2d 523 (2006). "The determination of the status of an individual as an independent contractor or an employee is often difficult . . . and, in the absence of controlling circumstances, is a question of fact." (Internal quotation marks omitted.) *Rodriguez* v. *E.D. Construction, Inc.*, 126 Conn. App. 717, 727, 12 A.3d 603, cert. denied, 301 Conn. 904, 17 A.3d 1046 (2011). "Our courts have long recognized that independent contractors are not within the coverage of the . . . [a]ct. . . . The fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work. . . . It is the totality of the evidence that determines whether a worker is an employee under the act, not subordinate factual findings that, if viewed in isolation, might have supported a different determination. . . . For purposes of workers' compensation, an independent contractor is defined as one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." (Citations omitted; internal quotation marks omitted.) Id., 728. In other words, "[o]ne is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in

the means to be employed in its accomplishment as well as in the result to be attained. . . . The controlling consideration in the determination of whether the relationship of master and servant exists or that of independent contractor exists is: Has the employer the general authority to direct what shall be done and when and how it shall be done—the right of general control of the work?" (Emphasis omitted; internal quotation marks omitted.) *Compassionate Care, Inc.* v. *Travelers Indemnity Co.*, 147 Conn. App. 380, 391, 83 A.3d 647 (2013).

Our Supreme Court has stated that "[i]t is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or his agent." (Internal quotation marks omitted.) *Tianti* v. *William Raveis Real Estate, Inc.*, 231 Conn. 690, 697, 651 A.2d 1286 (1995). Moreover, "the fact that a worker did not have any significant investment in the materials or tools necessary to perform the job and that the necessary equipment or materials were furnished by the employer are factors that weigh in favor of a determination that [an employer-employee] relationship [exists] . . . and not that of an independent contractor." *Nationwide Mutual Ins. Co.* v. *Allen*, 83 Conn. App. 526, 536, 850 A.2d 1047, cert. denied, 271 Conn. 907, 859 A.2d 562 (2004).

In the present case, the commissioner found, on the basis of the totality of the evidence, that the plaintiff was an employee of R.P.M. on the date of the incident that caused his injuries and that he was subject to the specific control and direction of R.P.M. and Marion, its owner.[14] On appeal in *DeJesus I*, the board first noted

[14] R.P.M. and Marion take issue with the fact that the commissioner found that the plaintiff was "subject to specific direction and control" of R.P.M. and Marion, and did not use the specific words "right to control." In essence, they claim that the commissioner did not apply the law correctly. This claim has no merit. Our Supreme Court has held that "[t]he fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the *right to control* the means and method of

that employment status involves a factual issue that "is subject to a significant level of review," and stated that it had to "determine whether the testimony of the [plaintiff], deemed credible by the trial commissioner, provided a sufficient basis for the trier's conclusion that [R.P.M. and Marion] exercised a right of general control over the [plaintiff's] work activities." (Internal quotation marks omitted.) The board then summarized the testimony before the commissioner in support of his finding: "The [plaintiff] testified that he was paid cash by [R.P.M. and Marion] and could not leave the premises unless someone gave him a ride. . . . He was not given a Form 1099 at year's end . . . and, on the day of his injury, he was under Adams' direction regarding which tasks to perform. . . . Adams and [Bobby] had set up the car on which the [plaintiff] was working on the date of the injury. . . . The [plaintiff] testified that he did not earn wages working for other employers during the period in which he worked for R.P.M. . . . On cross-examination, the [plaintiff] clarified that he had not worked as a mechanic elsewhere but had earned money performing housework for an uncle. He also partici-

work." (Emphasis in original; internal quotation marks omitted.) *Hunte* v. *Blumenthal*, 238 Conn. 146, 154, 680 A.2d 1231 (1996). Although courts have referred to this as the right to control test, R.P.M. and Marion have not cited any authority, nor have we found any, that required the commissioner to use the specific words "right to control." Moreover, this court has determined previously that "[i]t is the totality of the evidence that determines whether a worker is an employee"; *Rodriguez* v. *E.D. Construction, Inc.*, supra, 126 Conn. App. 728; and that the controlling consideration in determining the existence of an employer-employee relationship is whether "the employer [has] the general authority to direct what shall be done and when and how it shall be done . . . ." (Emphasis omitted; internal quotation marks omitted.) *Compassionate Care, Inc.* v. *Travelers Indemnity Co.*, supra, 147 Conn. App. 391. If an employee is subject to the direction and control of his employer, it necessarily follows that the employer has the right to control the actions of the employee while at work. The commissioner's finding that the plaintiff was "subject to specific direction and control" of R.P.M. and Marion, as well as his subordinate findings concerning the nature of the employment relationship between the plaintiff and R.P.M. and Marion, were sufficient for the commissioner to make a determination that the plaintiff was an employee.

pated in unpaid volunteer activities at events at Gillette Stadium. . . . He further testified that he worked a set schedule . . . and he would occasionally travel with Marion . . . or Adams to pick up cars or work at their homes. He indicated that he was paid cash daily by either Marion . . . or Adams . . . and he did not use his own tools when stripping cars at R.P.M." (Citations omitted.) Moreover, the plaintiff also testified before the commissioner that Marion, Adams, and Bobby all directed him with regard to his work duties and the control over those duties, and that Adams would correct him and direct him how to do something if he did not do it correctly.

The board concluded in *DeJesus I* that the plaintiff's testimony, which the commissioner deemed more credible, provided a sufficient basis to support the commissioner's finding of an employer-employee relationship between the plaintiff and R.P.M., which formed the basis of the commissioner's finding of jurisdiction. We conclude that the board properly affirmed the commissioner's decision regarding jurisdiction over this matter.

III

Marion next maintains that the commissioner had (1) no jurisdiction to find him liable to pay compensation under the act because the plaintiff "never made a claim for compensation against [Marion]" and (2) "no authority to apply . . . the equitable doctrine of 'piercing the corporate veil' to make him liable for payment of compensation." Therefore, Marion claims that the board improperly affirmed the award of compensation by the commissioner against him at the request of the fund when no claim was brought against him, and when the commissioner had no jurisdiction to make a finding that R.P.M. and Marion were the same entity for the purposes of piercing the corporate veil. Because these issues are related, we address them together.

In support of his claim that the commissioner lacked jurisdiction to enter an order requiring him, personally, to pay workers' compensation benefits to the plaintiff, Marion points to the fact that no notice of claim naming him as an employer had ever been filed. He further argues that the commissioner lacked "subject matter jurisdiction to make a finding that Marion was an alter ego [of R.P.M.] so as to allow him [to] 'pierce the corporate veil' and make an award against a nonparty."[15]

The fund counters that because Marion was added at the onset of the first formal hearing, when he was present and could have objected but failed to do so, he had adequate notice of the issues to be addressed and was not denied due process. The fund also claims that the commissioner had jurisdiction to pierce the corporate veil of R.P.M. and hold Marion personally liable. In support of this assertion, the fund does not cite to any appellate authority in this state governing this issue and, instead, relies on administrative decisions of the board in prior cases. Moreover, at oral argument before this court, the attorney for the fund, after acknowledging that there is no specific statute that permits a commissioner, as the trier of fact, to pierce the corporate veil, argued that this court should consider General Statutes §§ 31-278 and 31-298 as support for the fund's claim, even though the fund did not brief the applicability of those statutes.

The following additional facts are necessary for a resolution of the claim. The amended Form 30C notice of claim filed by the plaintiff on September 10, 2015, listed only R.P.M. as the plaintiff's employer. On April 12, 2016, the first day of the formal hearing before the

[15] In connection with this claim, Marion alleges that there is nothing in the act that permits the fund to decide the identity of a claimant's employer. In light of our determination that the commissioner had no jurisdiction under the act to bring Marion into the case in his personal capacity or to pierce the corporate veil of R.P.M. to hold Marion personally liable for the payment of benefits to the plaintiff, we need not address this claim.

commissioner, the attorney for the fund stated to the commissioner that she wanted to "add" Marion "as a respondent, individual, personal capacity." In response, the commissioner asked Marion if he was the owner of R.P.M., to which Marion replied, "Yes." Thereafter, the commissioner stated: "Okay, and I'm adding you, personally, to the notice . . . ." No objection was raised to that statement of the commissioner. It is undisputed that the plaintiff never filed a notice of claim alleging that Marion was his employer

In the list of issues to be determined in the commissioner's 2017 decision, there is no reference to any issue related to whether the plaintiff was an employee of Marion or whether Marion should be held liable in his individual capacity. A review of the transcripts of the three days of hearings held in 2016 reveals questions and testimony related to how Marion ran R.P.M. and his level of control over, and relationship with, the plaintiff, which could be construed to relate to the issue of whether an employer-employee relationship existed between the plaintiff and R.P.M. In fact, the first time we find reference in the record to piercing the corporate veil of R.P.M. is when the fund filed its trial brief on February 24, 2017, after the conclusion of the formal hearings, claiming that the commissioner should pierce the corporate veil of R.P.M. and "Marion should be held liable to [the plaintiff] for any benefits he is awarded."

In the 2017 decision, the commissioner found that the plaintiff was an employee of R.P.M. "and/or" Marion. On the appeal to the board in *DeJesus I*, the board stated: "The final issue for our consideration, having affirmed the trial commissioner's determination that the commission has jurisdiction over the present matter, is whether the evidentiary record provided a sufficient basis for the trial commissioner to 'pierce the corporate veil' and find Marion . . . responsible in an individual

capacity. Marion . . . argues that the subordinate facts do not support the commissioner's finding of liability against him in his individual capacity. Although we concede that specific findings by the trial commissioner with regard to piercing the corporate veil would have been beneficial, we deem their absence harmless error, particularly as there was no motion to correct." After reviewing the legal standard and evidence in the record, the board concluded that "the commissioner reasonably inferred that R.P.M. and Marion . . . were essentially alter egos and, as such, Marion . . . could not rely upon the protection of the corporate veil as a defense against liability." In the commissioner's 2019 decision, the commissioner found, on the basis of the record from the prior proceedings, that R.P.M. and Marion "were alter egos" and, as such, they were "jointly and severally liable as to the orders contained [therein]." In *DeJesus II*, the board did not address this issue in a substantive manner because it found that R.P.M. and Marion were collaterally estopped from raising issues related to the prior proceedings.

We begin by setting forth the relevant standard of review. "Administrative agencies . . . are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power . . . ." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 103 Conn. App. 571, 577, 930 A.2d 739, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). "[A] determination regarding [an agency's] subject matter jurisdiction is a question of law . . . ." (Internal quotation marks omitted.) Id., 576. Although our scope of review of the actions of the board in a workers' compensation appeal is limited, this court invokes a broader standard of review when a question of law is involved. See *Izikson* v. *Protein Science Corp.*, supra, 156 Conn. App. 707. We, therefore, afford plenary review to this claim. See id.

This court has observed previously that "the workers' compensation commission, like any administrative body, must act strictly within its statutory authority . . . . It cannot modify, abridge, or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power. . . . [I]t is settled law that the commissioner's jurisdiction is confined by the [act] and limited by its provisions. . . . The commissioner exercises jurisdiction only under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . The parties cannot confer jurisdiction upon the commissioner by agreement, waiver or conduct. . . . The [act] is not triggered by a claimant until he brings himself within its statutory ambit. . . . Although the [act] should be broadly construed to accomplish its humanitarian purpose . . . its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries." (Internal quotation marks omitted.) *Nationwide Mutual Ins. Co.* v. *Allen*, supra, 83 Conn. App. 532; see also *Kuehl* v. *Koskoff*, 182 Conn. App. 505, 524, 190 A.3d 82, cert. denied, 330 Conn. 919, 194 A.3d 289 (2018). Our Supreme Court has stated that a "commissioner's . . . jurisdiction is limited to adjudicating claims *arising under the act*, that is, claims by an injured employee seeking compensation from his [or her] employer for injuries arising out of and in the course of employment." (Emphasis added.) *Stickney* v. *Sunlight Construction, Inc.*, 248 Conn. 754, 762, 730 A.2d 630 (1999). If jurisdiction exists for the commissioner to find Marion liable, personally, as an employer and alter ego of R.P.M., "such authority must be found within the act." *Byrd* v. *Bechtel/Fusco*, 90 Conn. App. 641, 645, 878 A.2d 1162, cert. denied, 276 Conn. 919, 888 A.2d 87 (2005).

It is unclear from the record as to what the commissioner was referring when he stated at the April 12,

2016 formal hearing that he was adding Marion, "personally, to the notice . . . ." Nevertheless, even if we assume, without deciding, that the commissioner intended to and did bring Marion into the case in his personal capacity, we are not aware of, nor have the parties alerted us to, any authority[16] that allows the commissioner to cite into the matter an individual who was not named, or to designate a person or entity as an employer when the employee has not identified that person or entity as his or her employer.[17] The board's analysis of this issue centered on whether Marion's due process rights had been violated, not the issue at hand, namely, whether the commissioner's actions were

[16] Pursuant to the act, the claimant has the burden of proving certain jurisdictional facts. *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 270, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012). First, the claimant must properly initiate a claim under § 31-294c by filing a written notice of claim, which may be given to the employer or any commissioner. See id.; see also General Statutes § 31-294c. The standard Form 30C notice of claim form, like the one filed by the plaintiff in the present case, requires information regarding the injured worker, the nature of the injury, and the name and address of the employer from whom the injured worker is seeking benefits. The claimant also "has the burden of proving that he is an employee of *the employer from whom he seeks* compensation." (Emphasis added.) *Gamez-Reyes* v. *Biagi*, supra, 270. Once those jurisdictional facts are established, and if the claimant and his employer fail to reach an agreement concerning compensation under the act, a formal hearing will be held before a commissioner, in which the commissioner will make findings regarding whether there was a work-related injury that arose out of and in the course of the claimant's work for the employer. See id.; see also General Statutes § 31-297.

[17] We recognize that Marion, as the principal and owner of R.P.M., was involved in the proceedings and had notice that the plaintiff was seeking workers' compensation benefits from R.P.M. However, the fact that a principal is on notice that a party is seeking workers' compensation benefits from the principal's business does not necessarily mean that the principal is aware that he or she may be held personally liable for an award of benefits made to an employee of that business. That is especially true where, as here, the principal acted as a self-represented party throughout most of the proceedings, a review of the transcripts of the three days of formal hearings did not reveal any clear statement of a party or the commissioner that the commissioner was being asked to decide whether Marion, in addition to R.P.M., was the plaintiff's employer, and the commissioner did not list Marion's personal liability as an issue in his 2017 decision.

authorized under the act. Additionally, although Marion did not file a motion to correct the commissioner's finding that the plaintiff was an employee of Marion, that is not fatal to his challenge to that finding on appeal under the circumstances here, where the commissioner lacked jurisdiction to make that finding in the first place. As we have stated previously, "[u]nless the [a]ct gives the [c]ommissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct." (Internal quotation marks omitted.) *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 269, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012). The commissioner acted beyond the scope of the act in bringing Marion into the action in his personal capacity and deciding the issue of whether Marion, as the principal of the employer of the injured employee, should be held accountable, personally, for the plaintiff's injuries. Thus, the board's decision affirming the commissioner's finding as to Marion resulted from an incorrect application of the law and was improper.

Likewise, the board's determination that the commissioner properly pierced the corporate veil of R.P.M. and held Marion jointly and severally liable also founders for the same reason. Because this issue has not yet been addressed by the appellate courts of this state, we briefly discuss the general principles that support our determination.

Under the doctrine of piercing the corporate veil, "[c]ourts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor. . . . We have affirmed judgments disregarding

the corporate entity and imposing individual stockholder liability when a corporation is a mere instrumentality or agent of another corporation or individual owning all or most of its stock." (Internal quotation marks omitted.) *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 759, 49 A.3d 1003 (2012). "The concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule, however, as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case. . . . Ordinarily the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice. . . . The improper use of the corporate form is the key to the inquiry, as [i]t is true that courts will disregard legal fictions, including that of a separate corporate entity, when they are used for fraudulent or illegal purposes. Unless something of the kind is proven, however, to do so is to act in opposition to the public policy of the state as expressed in legislation concerning the formation and regulation of corporations." (Internal quotation marks omitted.) Id., 759–60.

Two tests have been recognized for disregarding a corporate structure of a defendant: the instrumentality rule and the identity rule. See *Cohen* v. *Meyers*, 175 Conn. App. 519, 541, 167 A.3d 1157, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017). Under the instrumentality rule, proof of three elements is required: "(1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal

duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." (Internal quotation marks omitted.) Id. Pursuant to the identity rule, "[i]f [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 232, 990 A.2d 326 (2010). Moreover, "the fact that a sole stockholder of a corporation is in exclusive control of the company's finances and business practices, standing alone, is an insufficient basis in itself to pierce the corporate veil. While control is a factor, [o]f paramount concern is how the control was used, not that it existed." (Internal quotation marks omitted.) *Cohen* v. *Meyers*, supra, 541–42.

No appellate court of this state has yet determined whether the commissioner has jurisdiction under the act to determine if the corporate veil of an employer obligated to pay workers' compensation benefits should be pierced. In its brief, the fund cites to administrative decisions of the board that have addressed this issue and determined that a trial commissioner appropriately could pierce the corporate veil of an employer. See *Barbieri* v. *Comfort & Care of Wallingford, Inc.*, No. 5794, CRB 8-12-10 (September 26, 2013); *Diaz* v. *Capital Improvement & Management, LLC*, No. 5616, CRB 1-11-1 (January 12, 2012); *Caus* v. *Hug*, No. 5392, CRB 4-08-11 (January 22, 2010). These decisions, however, do not appear to be time-tested. Appellate courts generally

afford deference to an agency's time-tested interpretation of a statute, for example, "but only when the agency has consistently followed its construction over a long period of time . . . ." (Internal quotation marks omitted.) *Marone* v. *Waterbury*, 244 Conn. 1, 9, 707 A.2d 725 (1998). An agency's interpretation is time-tested when it is applied on a consistent basis, to multiple decisions, over an extended period of time. See *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 448, 984 A.2d 748 (2010); see also *Connecticut Assn. of Not-for-Profit Providers for the Aging* v. *Dept. of Social Services*, 244 Conn. 378, 390 n.18, 709 A.2d 1116 (1998) (four years did not constitute time-tested agency interpretation). Moreover, "[w]hen a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Marone* v. *Waterbury*, supra, 10. Therefore, we do not defer to the board's determination of this issue and exercise plenary review. See *Dechio* v. *Raymark Industries, Inc.*, supra, 299 Conn. 389.

At oral argument before this court, the attorney for the fund acknowledged that there is no specific statute that expressly provides that the trier of fact can pierce the corporate veil but requested this court to consider §§ 31-278 and 31-298. Specifically, the fund's counsel argued that the wide discretion granted to the commissioner under those statutes permitted the actions of the commissioner in the present case, but he also conceded that the applicability of those statutes was not briefed in the fund's appellate brief. Marion counters that § 31-355 of the act provides a specific mechanism by which the fund can recover moneys paid for benefits in a case where no insurance is involved. He also claims that, if the commissioner is allowed to decide the piercing the corporate veil claim, he would lose his right to a jury

trial. See *Sellner* v. *Beechwood Construction Co.*, 176 Conn. 432, 433, 437, 407 A.2d 1026 (1979) (jury returned verdict piercing corporate veil of defendant construction company); see also *American Protein Corp.* v. *AB Volvo*, 844 F.2d 56, 59 (2d Cir.) (rejecting claim that court should have decided piercing of corporate veil claim and holding that issue of piercing corporate veil "is generally submitted to the jury"), cert. denied, 488 U.S. 852, 109 S. Ct. 136, 102 L. Ed. 2d 109 (1988). We agree with Marion.

"[A] claim must be raised and briefed adequately in a party's principal brief, and . . . the failure to do so constitutes the abandonment of the claim." *State* v. *Elson*, 311 Conn. 726, 766, 91 A.3d 862 (2014). "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 735–36, 209 A.3d 1 (2019).

Nevertheless, even if we consider the statutes on which the fund relies, they do not provide a basis for authorizing the commissioner to pierce the corporate veil of R.P.M. Section 31-278, which sets forth the powers and duties of the commissioner, provides in relevant part: "Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, docu-

ments, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. . . .'' Our Supreme Court interpreted that statute in *Stickney* v. *Sunlight Construction, Inc.*, supra, 248 Conn. 762, stating that § 31-278 is ''[t]he primary statutory provision establishing the subject matter jurisdiction of the commission,'' and that ''[a] plain reading of [the] language [in § 31-278] suggests that the commissioner's subject matter jurisdiction is limited to adjudicating claims arising under the act, that is, claims by an injured employee seeking compensation from his employer for injuries arising out of and in the course of employment.'' Thus, ''for a commissioner to have jurisdiction over a claim, that claim must fit within the existing jurisdictional provisions of [the act].'' (Internal quotation marks omitted.) *Del Toro* v. *Stamford*, 270 Conn. 532, 545–46, 853 A.2d 95 (2004). Our review of the language of § 31-278 demonstrates that the statute does not confer jurisdiction on the commissioner to pierce the corporate veil of a defendant employer.

Similarly, § 31-298 does not provide support for the fund's claim. That statute, titled ''Conduct of hearings,'' provides in relevant part: ''In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the

substantial rights of the parties and carry out the provisions and intent of this chapter. . . .'' Although § 31-298 ''grants broad authority to a commissioner to carry out the provisions of the . . . [a]ct''; *Bailey* v. *State*, 65 Conn. App. 592, 604, 783 A.2d 491 (2001); this court has determined that the statute ''does not engraft equitable doctrines . . . onto all aspects of the act.'' *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 108, 144 A.3d 530 (2016). Moreover, ''[o]ur Supreme Court has interpreted § 31-298 'to cover only the manner in which hearings are conducted.' '' Id.

The fund claims in its brief that ''[w]hen a business is found to be an employer of a claimant and the issue of piercing the corporate veil of said business has been raised, the commissioner must decide that issue in order to resolve the issue of [an] employer/employee relationship.'' We disagree. The determination of whether an employer-employee relationship exists is a jurisdictional prerequisite to making an award under the act, whereas the issue of piercing the corporate veil concerns whether the corporate structure of the defendant employer should be disregarded and applies to situations ''in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor.'' (Internal quotation marks omitted.) *Atelier Constantin Popescu, LLC* v. *JC Corp.*, supra, 134 Conn. App. 759. That issue is fundamentally different from establishing the existence of an employer-employee relationship in the first instance.

Our determination is supported by the language of the statutory framework governing the fund. Section 31-355 governs hearings, awards and payments from the fund as a result of an employer's failure to comply with an award, and provides for a civil action against the employer by the fund to seek reimbursement. Specifically, § 31-355 provides in relevant part: ''(a) The commissioner shall give notice to the Treasurer of all

hearing of matters that may involve payment from the . . . [f]und, and may make an award directing the Treasurer to make payment from the fund.

"(b) When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the . . . [f]und. The commissioner, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund. . . .

"(c) The employer and the insurer, if any, shall be liable to the state for any payments made out of the fund in accordance with this section or which the Treasurer has by award become obligated to make from the fund, together with cost of [attorney's] fees as fixed by the court. If reimbursement is not made, or a plan for payment to the fund has not been agreed to by the Treasurer and employer, not later than ninety days after any payment from the fund, the Attorney General shall bring a civil action, in the superior court for the judicial district where the award was made, to recover all amounts paid by the fund pursuant to the award, plus double damages together with reasonable attorney's fees and costs as taxed by the court. . . ."

This court previously has explained: "Although the fund became a part of our workers' compensation statutory scheme during World War II, essentially for the purpose of enticing employers to hire returning disabled war veterans, the legislature has, in the intervening years, altered the fund's statutory parameters. At present, the fund's essential purpose is to provide compensation for an injured [plaintiff] when the employer fails

to pay. . . . For the fund to fulfill this purpose, a supplemental order must issue from a commissioner directing the fund to make payment to a plaintiff. Under our workers' compensation statutory framework, the prerequisites to an order [issuing from a commissioner] to the fund to make payment [to a plaintiff] are that: (1) the substantive and procedural requirements of the . . . act have been met; (2) an award against the employer has been entered; and (3) the employer and its insurer have failed to pay. . . . Only when these prerequisites—a finding and award properly entered against an employer and an employer's or insurer's failure to pay—have been satisfied, may a commissioner issue a supplemental order directing the fund to compensate a plaintiff in accordance with . . . § 31-355." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Dechio* v. *Raymark Industries, Inc.*, 114 Conn. App. 58, 60, 968 A.2d 450 (2009), aff'd, 299 Conn. 376, 10 A.3d 20 (2010).

Pursuant to the plain language of § 31-355 (c), not later than ninety days after any payment from the fund, a civil action may be brought by the fund in the Superior Court to recover all amounts paid by the fund pursuant to the award. If the fund brings such an action in connection with the present case, it can raise a claim that the corporate structure of R.P.M. is a fiction, such that its corporate veil should be pierced and liability for the workers' compensation benefits paid to the plaintiff should rest with Marion, as the alter ego of R.P.M. In such an action, Marion would also be afforded the possibility of a jury trial. See General Statutes § 52-218 ("[u]pon the application of either party, the court may order any issue or issues of fact in any action demanding equitable relief to be tried by a jury of six"). Section 31-355 (c), thus, provides a means by which the fund can address its claim in a separate action.

Accordingly, we conclude that the board properly affirmed the commissioner's determination regarding

jurisdiction over the plaintiff's claim seeking worker's compensation benefits for the injuries he sustained while working for R.P.M., as well as the commissioner's findings, made in connection therewith, that the plaintiff was an employee of R.P.M. and that the medical care exception in § 31-294c (c) was satisfied. The board, however, improperly affirmed the commissioner's findings that the plaintiff was an employee of Marion, that Marion was the alter ego of R.P.M., and that he was jointly and severally liable for the award of benefits to the plaintiff, as the commissioner did not have jurisdiction under the act to make an award against Marion or to pierce the corporate veil of R.P.M. and hold Marion liable.

The decisions of the Compensation Review Board are reversed only as to the determinations that Marion could be held liable in his personal capacity and that the commissioner properly pierced the corporate veil of R.P.M., and the case is remanded to the board with direction to remand the case to the commissioner with direction to vacate the finding and award as to Marion; the decisions are affirmed in all other respects.

In this opinion the other judges concurred.

FRANCIS ANDERSON *v.* COMMISSIONER OF CORRECTION
(AC 43455)

Bright, C. J., and Elgo and Abrams, Js.

Syllabus

The petitioner, who had been convicted of various crimes, sought a writ of habeas corpus, claiming that he was entitled to certain presentence confinement credit. While serving an aggregate ten year sentence for previous convictions, the petitioner was charged with various crimes after he assaulted a correction officer and was eventually deemed not guilty by reason of insanity. After being transferred to the Whiting Forensic Hospital, he assaulted residents and staff, and was charged with

various new crimes. During the ensuing criminal proceedings on those new crimes, the petitioner did not post bond, and was transferred to the Northern Correctional Institution. After he was convicted of the charges stemming from the assaults at Whiting, he was sentenced to another term of imprisonment to be served consecutively to the ten year sentence he was already serving. In his petition for a writ of habeas corpus, the petitioner claimed that he was entitled to a certain number of days of presentence confinement credit on the sentence for the Whiting crimes for the time that he spent as a pretrial detainee at Northern. The habeas court rendered a judgment of dismissal, concluding that the petition failed to state a claim on which relief could be granted, and denied the petition for certification to appeal. On the petitioner's appeal to this court, *held* that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, the petitioner having failed to present an issue that was debatable among jurists of reason, that could be resolved in a different manner or that deserved encouragement to proceed further, as his claim did not present an issue of first impression in Connecticut appellate courts; the habeas court properly recognized that, as a sentenced prisoner in the custody of the respondent Commissioner of Correction, the petitioner was being held at Northern both pursuant to judgment mittimuses for his aggregate ten year sentence and for his failure to make bond imposed as a result of the assaults at Whiting, and, as a sentenced prisoner, he was not entitled to have the jail credits earned on his aggregate ten year sentence applied to any other sentence; moreover, pursuant to statute (§ 18-98d), presentence confinement credit is earned when the failure to make bond is the sole reason the petitioner is held at a correctional facility, and it is settled law in Connecticut that § 18-98d does not allow a petitioner to earn jail time credit and presentence confinement credit simultaneously.

Argued March 8—officially released May 18, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

James P. Sexton, assigned counsel, with whom, on the brief, were *Meryl R. Gersz*, assigned counsel, and *Emily Graner Sexton*, assigned counsel, for the appellant (petitioner).

Janelle R. Medeiros, assistant attorney general, with whom were *Steven R. Strom*, assistant attorney general, and, on the brief, *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (state).

Opinion

BRIGHT, C. J. The petitioner, Francis Anderson, appeals from the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus on the ground that it failed to state a claim upon which relief could be granted. The petitioner claims that the habeas court erred in denying his petition for certification to appeal because his underlying claim for presentence confinement credit presented an issue of first impression that had merit, and the court could have granted relief. We dismiss the appeal.

The following procedural history is relevant to our consideration of the petitioner's appeal. In 2008, the petitioner received a total sentence of five years of incarceration for four separate convictions. In 2011, he received an additional five year sentence for convictions arising from his criminal conduct while in prison for the previous convictions. The trial court ordered the 2011 sentence to be served consecutively to the petitioner's 2008 sentence. While serving the aggregate ten year sentence, the petitioner was charged with various crimes after he assaulted a correction officer in July, 2012. During the related criminal proceedings, he was deemed not guilty by reason of insanity, and, in 2013, he was committed to the custody of both the respondent, the Commissioner of Correction, and the Psychiatric Security Review Board.

After being transferred to the Whiting Forensic Hospital (Whiting), the petitioner assaulted residents and staff, and, as a result, he was charged with various new

crimes (Whiting charges). During the ensuing criminal proceedings, the state requested that the court impose a monetary bond on the petitioner, and the court granted that request, setting the bond at $100,000. The petitioner did not post bond, and, after his arraignment on August 25, 2014, he was transferred to the Northern Correctional Institution (Northern). On April 29, 2016, the petitioner was convicted of the Whiting charges, and, on September 12, 2016, he was sentenced to a seven year term of imprisonment, execution suspended after five and one-half years, with two years of probation. The court ordered that sentence to be served consecutively to the ten year aggregate sentence the petitioner already was serving.

On July 7, 2017, the petitioner filed a petition for a writ of habeas corpus claiming that he was entitled to 750 days of presentence confinement credit on the sentence for the Whiting charges for the time, between August 25, 2014, and September 12, 2016, that he spent at Northern while awaiting trial on the Whiting charges. On July 1, 2019, the habeas court sent notice to the parties that it would be holding a hearing to determine whether the petition failed to state a claim upon which habeas relief could be granted. Following the hearing, the court, on August 16, 2019, rendered a judgment of dismissal, concluding that the petition failed to state a claim upon which relief could be granted. The petitioner thereafter filed a petition for certification to appeal from the court's judgment, which the court denied. This appeal followed.

The petitioner claims that the habeas court erred in denying his petition for certification to appeal because his underlying claim for presentence confinement credit was an issue of first impression in Connecticut appellate courts, that it had merit, and that it was a claim upon which relief could have been granted by the habeas court. We disagree.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that [1] the issues are debatable among jurists of reason . . . [2] [the] court could resolve the issues [in a different manner] . . . or . . . [3] the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification . . . we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Internal quotation marks omitted.) *Torres* v. *Commissioner of Correction*, 175 Conn. App. 460, 467–68, 167 A.3d 1020 (2017), cert. denied, 328 Conn. 912, 179 A.3d 1271 (2018). Previously, this court has concluded that issues of first impression in Connecticut appellate courts must meet one or more of the three criteria. See, e.g., id. (habeas court abused discretion in denying petition for certification to appeal because issues of whether General Statutes § 18-98e gives pretrial detainees opportunity to earn risk reduction earned credits to be applied retroactively to sentences, and whether failure to do so would be violation of pretrial detainees' right of equal protection, presented two issues of first impression in Connecticut); see also

Small v. *Commissioner of Correction*, 98 Conn. App. 389, 391–92, 909 A.2d 533 (2006) (petitioner's claim deserves encouragement to proceed further when no appellate case has decided precise issues), aff'd, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); *Graham* v. *Commissioner of Correction*, 39 Conn. App. 473, 476, 664 A.2d 1207 (petitioner's claim regarding appropriate jail time credit under unique circumstances not considered previously by any appellate court in Connecticut was one of first impression and, therefore, was debatable among jurists of reason and court could resolve issue in different manner), cert. denied, 235 Conn. 930, 667 A.2d 800 (1995).

In the present case, after conducting a review of the petitioner's claim, we are not persuaded that his claim presents an issue of first impression for any Connecticut appellate court. Rather, it presents a unique and, for the reasons set forth in this opinion, wholly unpersuasive interpretation of the relevant statutes and of our Supreme Court's decision in *State* v. *Anderson*, 319 Conn. 288, 127 A.3d 100 (2015). We, thus, proceed to examine the merits of the petitioner's claim that, pursuant to the plain language of General Statutes § 18-98d and other related statutes, he was entitled to presentence confinement credit toward his sentence on the Whiting charges for the time he was held at Northern awaiting trial on those charges.

The petitioner contends that the only reason he was transferred to Northern, rather than being allowed to remain at Whiting, which is not a correctional facility, was because he was unable to post bond, and, therefore, pursuant to § 18-98d, he should have been given presentence confinement credit toward his sentence on the Whiting charges, in addition to the credit he was being given toward the aggregate ten year sentence he already was serving. We are not persuaded.

"[I]ssues of statutory construction raise questions of law, over which we exercise plenary review. . . . 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. . . . A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation. . . . Additionally, statutory silence does not necessarily equate to ambiguity. . . . If the language of the statute is clear and unambiguous, it is assumed that the words themselves express the intention of the legislature and there is no room for judicial construction." (Citations omitted; internal quotation marks omitted.) *Torres* v. *Commissioner of Correction*, supra, 175 Conn. App. 470.

Section 18-98d provides: "(a) (1) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial

of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. In the case of a fine, each day spent in such confinement prior to sentencing shall be credited against the sentence at a per diem rate equal to the average daily cost of incarceration as determined by the Commissioner of Correction.

"(2) (A) Any person convicted of any offense and sentenced on or after October 1, 2001, to a term of imprisonment who was confined to a police station or courthouse lockup in connection with such offense because such person was unable to obtain bail or was denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence in accordance with subdivision (1) of this subsection equal to the number of days which such person spent in such lockup, provided such person at the time of sentencing requests credit for such presentence confinement. Upon such request, the court shall indicate on the judgment mittimus the number of days such person spent in such presentence confinement.

"(B) Any person convicted of any offense and sentenced prior to October 1, 2001, to a term of imprisonment, who was confined in a correctional facility for such offense on October 1, 2001, shall be presumed to have been confined to a police station or courthouse lockup in connection with such offense because such person was unable to obtain bail or was denied bail and shall, unless otherwise ordered by a court, earn a reduction of such person's sentence in accordance with the provisions of subdivision (1) of this subsection of one day.

"(C) The provisions of this subdivision shall not be applied so as to negate the requirement that a person convicted of a first violation of subsection (a) of section 14-227a and sentenced pursuant to subparagraph (B) (i) of subdivision (1) of subsection (g) of said section serve a term of imprisonment of at least forty-eight consecutive hours.

"(b) In addition to any reduction allowed under subsection (a) of this section, if such person obeys the rules of the facility such person may receive a good conduct reduction of any portion of a fine not remitted or sentence not suspended at the rate of ten times the average daily cost of incarceration as determined by the Commissioner of Correction or ten days, as the case may be, for each thirty days of presentence confinement; provided any day spent in presentence confinement by a person who has more than one information pending against such person may not be counted more than once in computing a good conduct reduction under this subsection.

"(c) The Commissioner of Correction shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person's sentence; provided in no event shall credit be allowed under subsection (a) of this section in excess of the sentence actually imposed."

The petitioner also directs us to General Statutes § 17a-561, which provides: "The Whiting Forensic Hospital shall exist for the care and treatment of (1) patients with psychiatric disabilities, confined in facilities under the control of the Department of Mental Health and Addiction Services, including persons who require care and treatment under maximum security conditions, (2) persons convicted of any offense enumerated in section 17a-566 who, after examination by the staff of the diagnostic unit of the hospital as herein provided, are determined to have psychiatric disabilities and be dangerous

to themselves or others and to require custody, care and treatment at the hospital, (3) inmates in the custody of the Commissioner of Correction who are transferred in accordance with sections 17a-512 to 17a-517, inclusive, and who require custody, care and treatment at the hospital, and (4) persons committed to the hospital pursuant to section 17a-582 or 54-56d."

The petitioner argues that "a reading of the relevant statutes renders their meaning 'plain and unambiguous' and 'does not yield absurd or unworkable results.' . . . A reading of the relevant portions of . . . § 18-98d states that an individual is entitled to receive credit for presentence confinement at a 'community correctional center or correctional institution' if the 'sole reason for such person's presentence confinement' is 'an inability to obtain bail or the denial of bail.' . . . Further, General Statutes § 53a-168 (1) defines '[c]orrectional institution' as 'the facilities defined in section 1-1 and any other correctional facility established by the Commissioner of Correction.' Pursuant to General Statutes § 1-1 (w), ' "[c]orrectional institution", "state prison", "community correctional center" or "jail" means a correctional facility administered by the Commissioner of Correction.' . . . Therefore, the plain and unambiguous meaning of § 18-98d is that if an individual is confined at a correctional institution as a pretrial detainee, and the only reason for such confinement is because the individual did not obtain or was denied bail, then that individual is entitled to receive credit for the time spent as a pretrial detainee [toward] a subsequently imposed sentence." (Citations omitted.)

The petitioner further argues that he "was found [not guilty by reason of insanity] for crimes he committed while he was incarcerated, and, on August 15, 2013, he was subsequently committed to the custody of the Commissioner of Mental Health and Addiction Services and transferred to Whiting. On August 25, 2014, the

petitioner was removed from Whiting and transferred to the custody of the Commissioner of Correction and placed at Northern because he failed to post bond imposed as a result of assaults he committed while he was at Whiting. The petitioner was held at Northern as a pretrial detainee from August 25, 2014, through his sentencing on September 12, 2016. Given this background, a plain reading of the relevant statutes supports his assertion that he is entitled to presentence credit for the time he spent as a pretrial detainee [toward] his sentence imposed on September 12, 2016. The sole reason the petitioner was removed from Whiting and placed at Northern, a correctional institution, is due to his failure to post bond. If the petitioner had posted bond on August 25, 2014, he would have remained at Whiting and would not have been placed at a correctional institution. Therefore, pursuant to § 18-98d, the petitioner is entitled to presentence credit for the time he spent at Northern before the imposition of his September 12, 2016 sentence."

The crux of the petitioner's argument is that Whiting is not a correctional facility, and the only reason he was removed from Whiting and sent to Northern was because he could not post the bond ordered by the trial court. Therefore, he argues, his placement at Northern was a presentence confinement on the Whiting charges. Had he posted bond, he argues, he would have remained at Whiting, a noncorrectional facility. The petitioner, however, ignores the fact that he also was a sentenced prisoner, still serving his ten year aggregate sentence, although placed at Whiting, and he was earning credit against that aggregate ten year sentence during the time he was at Whiting and then at Northern. Nonetheless, the petitioner asserts that he is entitled to credit twice, first going toward the remainder of his aggregate ten year sentence and next going toward the Whiting charges. We disagree.

As this court has explained previously: "By its very terms . . . § 18-98d is directed at offsetting the length of a prison sentence by the period of presentence confinement. Credits are properly applied to reduce the number of days of sentenced confinement to reflect days spent in presentence confinement . . . . Once presentence confinement credit has been fully utilized to reduce a sentence, it cannot be applied again to reduce another sentence." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Bernstein* v. *Commissioner of Correction*, 83 Conn. App. 77, 81–82, 847 A.2d 1090 (2004).

In *King* v. *Commissioner of Correction*, 80 Conn. App. 580, 836 A.2d 466 (2003), cert. denied, 267 Conn. 919, 841 A.2d 1191 (2004), the petitioner, Eric King, had been charged by information on May 18, 1995, and was held in lieu of bond for 264 days until February 6, 1996, when he was sentenced to nine months imprisonment on that charge. Id., 582. The respondent applied the 264 days of presentence confinement to advance the release date of the sentence to February 15, 1996. Id. On June 15, 1995, however, while King was being held in presentence confinement under the May 18, 1995 information, he was arrested and held in lieu of bond under a second information. Id. Thus, he was held in presentence confinement for 236 days under two different informations. Id. After King was sentenced under the second information to an eighteen year term of imprisonment, the respondent refused to apply the 236 days of presentence confinement to the sentence stemming from the June 15, 1995 information because it already had been applied to advance the release date on the sentence stemming from the May 18, 1995 information. Id., 582–83. King then filed a petition for a writ of habeas corpus. Id., 583.

In affirming the habeas court's judgment of dismissal, this court explained: "Once a day of presentence confinement has been credited to reduce the term of sen-

tenced confinement under one information, it cannot be credited again to reduce the term of sentenced confinement under another information." Id., 587. In *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 860 A.2d 715 (2004), our Supreme Court discussed this court's decision in *King*, cited it with approval, and concluded that it contained an accurate interpretation of § 18-98d. Id., 828–29.

In *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 802, 950 A.2d 1220 (2008), our Supreme Court explained that, in *Harris*, it "announced for the first time [its] conclusion that § 18-98d (a) prohibits the respondent from crediting multiple sentences, imposed on different days, with the same presentence confinement when a prisoner had been imprisoned simultaneously in multiple dockets." It further explained and reaffirmed its holding in *Cox* v. *Commissioner of Correction*, 271 Conn. 844, 852, 860 A.2d 708 (2004), that, "once the respondent has applied presentence confinement credit to a prisoner's first imposed sentence, the credit has been fully utilized." *Washington* v. *Commissioner of Correction*, supra, 802–803.

Although recognizing the very clear holdings that credit cannot be applied twice, the petitioner contends that, pursuant to the plain language of § 18-98d, his case is different because the "sole reason" he was transferred to Northern from a noncorrectional facility was because he did not pay the court-ordered bond. He contends that this fact distinguishes his case from cases similar to those cited previously in this opinion. The respondent argues that the petitioner's failure to pay his bond was not the "sole reason" for his confinement at Northern. We agree with the respondent.

Pursuant to § 18-98d (a) (1) (B), "[a]ny person who is confined to a . . . correctional institution . . . because such person is unable to obtain bail . . . shall, if subsequently imprisoned, earn a reduction of such

person's sentence equal to the number of days . . . such person spent in such facility . . . provided . . . the provisions of this section shall only apply to a person for whom the existence of . . . an inability to obtain bail . . . *is the sole reason for such person's presentence confinement* . . . ." (Emphasis added.)

In the present case, the habeas court recognized that, as a sentenced prisoner in the custody of the respondent, the petitioner, although found not guilty by reason of insanity for the crimes he committed in July, 2012, and sent to Whiting, nevertheless, simultaneously was being held pursuant to judgment mittimuses for his ten year aggregate sentence. The court held, therefore, that the petitioner was not confined at Northern solely on the basis of his failure to pay the court ordered bond. The court explained: "[T]he entire time [the petitioner] was at Whiting, he was receiving jail credits under [his aggregate ten year] sentence and so that sentence still existed . . . . [O]ther than the fact that the Whiting commitment was involved, [the petitioner] is no different than any other prisoner who is serving a sentence [when he] picks up new criminal charges and, even though [he already is] serving a prison sentence, a court determines that some bond . . . should be imposed. It still, again, does not remove the ultimate fact that [the petitioner], as a sentenced prisoner, was not entitled to the credits on any other sentence . . . . It's not the sole reason he was in custody, nor is he entitled to use that credit twice." We agree with the reasoning of the habeas court.

The petitioner contends that the sole reason *he was transferred* to Northern was his failure to make bond. Even if we were to agree, for the sake of argument, that the sole reason for the petitioner's transfer was his failure to make bond, the reason for the petitioner's *transfer* from Whiting is not a consideration of § 18-98d. The statute requires that the failure to make bond

be the sole reason the petitioner *is held* at a correctional facility. In the present case, the petitioner was a sentenced prisoner, serving a ten year aggregate sentence, in the custody of the respondent, when, in July, 2012, he committed new crimes. In subsequent criminal proceedings, he was found not guilty by reason of insanity, and he was sent to Whiting. The mittimuses for his aggregate ten year sentence continued to exist, however, and the petitioner was receiving credit on those sentences for the days he was at Whiting, where he simultaneously was held in the custody of the respondent and the Psychiatric Security Review Board. His commitment to the respondent did not dissolve simply because he was found not guilty by reason of insanity for later crimes and sent to Whiting. Had that commitment to the Psychiatric Security Review Board ended, the petitioner would have been required to serve the remainder of his aggregate ten year sentence at a correctional facility. When he failed to make bond and was ordered to Northern, he was held there both as a person who failed to make bond *and* as a sentenced prisoner serving an aggregate ten year sentence. Section 18-98d (a) (1) (B) requires that the failure to make bond be "the sole reason for such person's presentence confinement . . . ." The statute says nothing about the reason for the person's *transfer* to the correctional facility. In the present case, the petitioner both failed to make bond and was a sentenced prisoner still serving an aggregate ten year sentence for which he was earning credit. His confinement at Northern was not "solely" due to his inability to make bond. Our law is clear—a prisoner cannot "earn *presentence* confinement credit while *serving a sentence*." (Emphasis in original.) *Bernstein* v. *Commissioner of Correction*, supra, 83 Conn. App. 81.

In an attempt to avoid this well settled principle of law, the petitioner argues in his reply brief that he was "an insanity acquittee in the custody of the Psychiatric

Security Review Board" and that he "lost his designation as sentenced prisoner (even for his 2011 convictions) once he became an insanity acquittee who could no longer be punished." He further argues, relying on his interpretation of *State* v. *Anderson*, supra, 319 Conn. 314 n.37, that, "once [he] became an insanity acquittee, *he could no longer be punished*, which is why he was serving his 2011 sentence at Whiting (i.e., a nonpunitive hospital) and why he had to be designated as a pretrial detainee, rather than as a previously sentenced inmate, when he was detained at Northern prior to being convicted and sentenced for his 2014 assaults at Whiting." (Emphasis added.) During oral argument before this court, the petitioner also argued that, in *Anderson*, our Supreme Court held that the petitioner was a pretrial detainee and that "it is mutually exclusive [that] you are not both a pretrial detainee and a sentenced inmate. Either you are a pretrial detainee, in the sense that you are entitled to bail, which a sentenced inmate is not, or—and that you would be entitled to preconfinement credit, which a sentenced inmate would not, or you're not a pretrial detainee, you're a sentenced inmate."

The petitioner's arguments are without merit and ignore reality. Although the petitioner had been found not guilty by reason of insanity on the July, 2012 charges, he, nevertheless, still was serving an aggregate ten year sentence for prior convictions when that acquittal occurred. His prior convictions and his ten year aggregate sentence did not vanish, as the petitioner suggests, simply because he was found not guilty by reason of insanity on other subsequent charges. In his reply brief, the petitioner attempts to portray himself simply as an insanity acquittee, rather than as an insanity acquittee who also was serving a simultaneous sentence for convictions that occurred before he was found not guilty by reason of insanity on later charges.

Indeed, if we accepted the petitioner's interpretation of *Anderson*; see *State* v. *Anderson*, supra, 319 Conn.

314 n.37; taken to the extreme, it could mean that (1) a person (P) could commit multiple dangerous felonies and effectively be ordered to serve multiple life sentences; (2) P, several years into his sentence, could commit additional crimes while incarcerated, even relatively minor crimes; (3) P then could be found by the jury to have been insane at the time he committed the additional crimes several years into his sentence for multiple dangerous felonies; (4) P would be relieved of his multiple life sentences, although he was not insane at the time he committed the multiple dangerous felonies; (5) after some time, P no longer fits the insanity designation; and (6) P cannot be sent back to prison because "he could no longer be punished." We are not convinced that *Anderson* or anything in our law supports such an absurd outcome.

Accordingly, we conclude that a convicted prisoner, who subsequently is sent to Whiting after being found not guilty by reason of insanity on new criminal changes, and who then commits additional crimes while at Whiting and who thereafter fails to make bond on the Whiting charges, cannot earn double credit pursuant to § 18-98d; he is not being held at the correctional facility "solely" due to his failure to make bond, but, rather, he is being held at that correctional facility both for a failure to make bond *and* as a prisoner already sentenced to the custody of the respondent, for which he is earning jail time credit. In other words, it is settled law in Connecticut that § 18-98d does not allow a petitioner to earn jail time credit and presentence confinement credit simultaneously.[1] See *Bernstein* v. *Commis-*

[1] We do not mean to suggest that there could not be a situation where a petitioner's jail time credit could not be *converted* to presentence confinement credit. See *James* v. *Commissioner of Correction*, 327 Conn. 24, 47, 170 A.3d 662 (2017) ("[s]ection 18-98d (a) (1) (B) . . . contemplates circumstances where time in prison could be converted to presentence confinement credit"); see generally *Boyd* v. *Lantz*, 487 F. Supp. 2d 3 (D. Conn. 2007). That is not the petitioner's claim in this case.

sioner of Correction, supra, 83 Conn. App. 81. The petitioner has failed to present an issue that is debatable among jurists of reason, that could be resolved in a different manner, or that deserves encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion when it denied the petition for certification to appeal from the judgment dismissing the petitioner's petition for a writ of habeas corpus.

The appeal is dismissed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 204

THE BANK OF NEW YORK MELLON v. ANDREA M. CRONIN ET AL.
(AC 43824)

Prescott, Moll and Lavery, Js.

Argued May 10—officially released May 18, 2021

Appeal by the defendant Kevin A. Williams from the Superior Court in the judicial district of Stamford-Norwalk, *Kavanewsky*, *J.*; *Lee*, *J.*

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

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NOTICE OF CONNECTICUT STATE AGENCIES

State of Connecticut

Connecticut State Board of Chiropractic Examiners
Notice of Declaratory Ruling Proceeding

Pursuant to Conn. Gen. Stat. § 4-176, the Connecticut State Board of Chiropractic Examiners hereby gives notice of its intention to issue a declaratory ruling on the request for declaratory ruling filed by Alan H. Siegel, DC on the following issue:

Whether the use of the Emsculpt Neo medical device is within the scope of practice for a licensed chiropractor in the State of Connecticut.

The Connecticut State Board of Chiropractic Examiners (''the Board'') has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Connecticut General Statute § 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

All persons seeking status to participate must petition the Board by June 4, 2021. All requests seeking status to participate in this matter shall be submitted in writing in accordance with § 4-176(d) of the Connecticut General Statutes and § 19a-9-26 through § 19a-9-28 of the Regulations of Connecticut State Agencies. All filings to be submitted to the Board shall be sent by email to the Department of Public Health, Public Health Hearing Office at phho.dph@ct.gov. It is anticipated that the Board will rule on petitions for status by June 17, 2021. A hearing will be held on August 19, 2021.

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing, and may also be utilized by the Connecticut State Board of Chiropractic Examiners, on a case by case basis, in future proceedings before it.

Candito Carroccia, DC
Chairman
Connecticut State Board of Chiropractic Examiners
May 5, 2021

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 22-0001: Renewal of the State Plan Home and Community-Based Services (HCBS) Option Pursuant to Section 1915(i) of the Social Security Act Portion of the Connecticut Home Care Program for Elders (CHCPE) Program (CHCPE)

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

Changes to Medicaid State Plan

Effective on or after February 1, 2022, this SPA will amend Attachments 3.1-i and 4.19-B of the Medicaid State Plan to renew the home and community-based services (HCBS) Medicaid State Plan option pursuant to section 1915(i) of the Social Security Act portion of the Connecticut Home Care Program for Elders (CHCPE) program for an additional five-year period and make the technical updates described below, which are routine operational changes.

This SPA includes various technical and wording updates, including: updating the title of the care transitions service category, updating the projected number of individuals to be served by this benefit, updating the description of the state's compliance with the federal HCBS settings rule, updating the description and name of the state's universal assessment for HCBS programs, and updating the description of the state's use of consumer satisfaction surveys to reflect the use of the Consumer Assessment of Healthcare Providers Survey (CAHPS). This SPA also adds the standard CMS effective date language to the fee schedule cross-reference in the reimbursement page, with an effective date of February 1, 2022, incorporating the updated version of the Connecticut Home Care Program fee schedule and also clarifies the description of the payment methodology for care transitions to refer to the Connecticut Home Care Program fee schedule.

DSS is submitting this SPA in order to renew this benefit for another five-year period and to make the technical updates described above.

Fiscal Impact

Based on the information that is available at this time, DSS anticipates that this SPA will not significantly change annual aggregate expenditures in State Fiscal Year (SFY) 2022 and SFY 2023 because it is not making any substantive changes to the benefit other than extending the program for another five-year period and incorporating the standard CMS effective date language to the fee schedule that incorporates the current Connecticut Home Care Program fee schedule methodology. Total program annual aggregate expenditures for section 1915(i) CHCPE HCBS, accounting for projected trends, are anticipated to be approximately $4.6 million in in the first twelve-month period in which this SPA is effective and $4.7 million for the second twelve-month period in which this SPA is effective.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 22-0001: Renewal of CHCPE 1915(i)''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than June 17, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-O: Medical Equipment, Devices and Supplies (MEDS) – Reduced Rates for Diabetic Test Strips and Lancets and Quantity Limit Changes for Specified MEDS Items

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

Changes to Medicaid State Plan

Effective on or after July 1, 2021, SPA 21-O will amend Attachment 4.19-B of the Medicaid State Plan in order to make the changes described below. First, this SPA will revise the reimbursement for diabetic test strips and lancets when billed by Medical Equipment, Devices, and Supplies (MEDS) providers. The following procedure codes for lancets and blood glucose test strips are being decreased to 100% of the current Medicare rate in order to remain consistent with Section 17b-262-719(e) of the Regulations of Connecticut State Agencies.

Procedure Code	Procedure Description	Current Rate	New Rate
A4253	Blood glucose test or reagent strips for home blood glucose monitor, per 50 strips	$31.40	$8.32
A4259	Lancets, per box of 100	$10.25	$1.42

These diabetic items are also covered by Medicaid when provided by pharmacy providers under the Medicaid Preferred Product List. The Department is making this change both to ensure that these items are not paid at rates higher than Medicare and also to foster increased provision of these items by pharmacy providers.

In addition, effective on or after July 1, 2021 the Department is establishing quantity limits for certain procedure codes within the medical surgical supplies; durable medical equipment (DME) and orthotic and prosthetic devices fee schedules. Establishing quantity limits for certain MEDS items is necessary in order to be more in line with the use, durability, and general sustainability of the item and to help prevent unnecessary utilization. These limitations can all be exceeded with prior authorization based on medical necessity.

The list of DME, Medical Surgical Supplies and O & P procedure codes impacted by this change can be found on the Connecticut Medical Assistance Program Web site at www.ctdssmap.com. From this page, go to ''Provider'', then to ''Provider Fee Schedule Download'', then click on ''Click here for the Fee Schedule Instruc-

tions''. The list of procedure codes will be found at the end of this section, entitled Table 19, ''MEDS Procedure Codes - Quantity Limitation Determinations.''

Finally, effective on or after July 1, 2021, the quantities for the medical surgical supply procedure codes below are being revised as follows:

Code	Procedure Code Description	Current Quantity	New Quantity
A4310	Insert tray w/o bag/catheter	10	4
A4311	Catheter w/o bag 2-way latex	8	4
A4312	Catheter w/o bag 2-way silicone	8	4
A4313	Catheter w/bag 3-way	8	4
A4314	Catheter w/drainage 2-way latex	8	4
A4315	Catheter w/drainage 2-way silicone	8	4
A4316	Catheter w/drainage 3-way	8	4
A4320	Irrigation tray with bulb or piston syringe any purpose	31	10
A4322	Irrigation syringe bulb or piston each	20	8
A4326	Male external catheter with integral collection chamber	31	8
A4338	Indwelling catheter; foley type two-way latex	10	4

continued...

A4340	Indwelling catheter; specialty type	31	4
A4344	Indwelling catheter foley type two-way all silicone each	10	4
A4354	Insertion tray with drainage bag but without catheter	8	4
A4357	Bedside drainage bag day or night	10	4
A4358	Urinary drainage bag leg or abdomen vinyl	31	4
A6023	Collagen dressing sterile size more than 48 sq. in. each	16	10
A7045	Exhalation port with or without swivel used with accessories for positive airway replacement only	1	1 per 6 months
A9273	Cold or hot water bottle, ice cap or collar wrap any type	1	1 per year
T4521	Adult sized disposable incontinence product brief/diaper small,each	250	216

continued...

T4522	Adult sized disposable incontinence product brief/diaper medium, each	250	216
T4523	Adult sized disposable incontinence product brief/diaper large, each	250	216
T4524	Adult sized disposable incontinence product brief/diaper extra large, each	250	216
T4525	Adult sized disposable incontinence product protective underwear/ pull-on small, each	250	216
T4526	Adult sized disposable incontinence product protective underwear/ pull-on medium, each	250	216
T4527	Adult sized disposable incontinence product protective underwear/ pull-on large, each	250	216

continued...

T4528	Adult sized disposable incontinence product protective underwear/ pull-on extra large, each	250	216
T4543	Adult sized disposable incontinence product protective brief/diaper above extra large, each	250	216
T4544	Adult sized disposable incontinence product protective underwear/ pull-on above extra large, each	250	216

These limit changes are being made in order to be more in line with the use, durability, and general sustainability of the item and to help prevent unnecessary utilization.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

DSS estimates that the reimbursement decrease to the diabetic test strips and lancets on the DME fee schedule will reduce annual aggregate expenditures by approximately $2.6 million in State Fiscal Year (SFY) 2022 and $3.0 million in SFY 2023.

DSS estimates that the quantity limit changes to the DME, Orthotic and Prosthetic and Medical Surgical Supplies fee schedules will reduce annual aggregate expenditures by approximately $3.0 million in SFY 2022 and $3.3 million in SFY 2023.

Compliance with Federal Access Regulations

In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced or where payment rates or methodologies are being restructured in a manner that may affect access to

services. As described above, this SPA is making various changes to MEDS, including reducing the rates for diabetic blood glucose test strips and lancets to 100% of the current Medicare rate.

Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to the applicable MEDS services as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 21-O: Medical Equipment Devices and Supplies (MEDS) Reduced Rates for Diabetic Test Strips and Lancets and Quantity Limit Changes for Specified MEDS Items.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than June 17, 2021.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in March and April 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Arcari, Jared Ishimaru of New York, NY
Boris, Laina Rose of New York, NY
Chumley, Nathaniel B. of Albany, NY
Clements, Olivia Helen of Ridgefield, CT
Conaty, Brian Patrick of Monticello, NY
Coombs, Emily Carol of Portland, ME
Fanelli III, Mark S. of Norwalk, CT
Fox, Lacey Bennett of New York, NY
Lathouris, Maria of New Canaan, CT
McDonald, Brittani Raulerson of Stamford, CT
Patrick, Kathryn Marie of Upton, MA
Qu, Xiang of Malden, MA
Ross III, Johnny of Hartford, CT
Shields, Courtney Alex Lord of Milford, CT
Troisi, John Thomas of East Rockaway, NY
Williamson, Evan Scott of New Rochelle, NY

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in March and April 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Aicher, Anne R. of Ridgefield, CT
Andreacchi, Steven Augustine of New York, NY
Cardosi, Matthew Peter of Boston, MA
Goldstein, Stephanie Lindsay of Elmsford, NY
Gorelick, Steven D. of Maplewood, NJ
Haas, G. William of New York, NY
Hirsch, Jacob of Lawrence, NY
Kelly, Michael Patrick of Merrick, NY
Moore, Julie A. of Wellesley, MA
Smith, Eon Ryan of Hartford, CT
Thompson, Tara Elizabeth of Stamford, CT

Notice of Disbarment of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on April 19, 2021, in Docket Number HHD-CV21-6139230-S, Musa P Sebadduka, Juris No. 425881, of West Hartford, CT is hereby disbarred from the practice of law for a period of twelve (12) years pursuant to § 2-47A of the Connecticut Practice Book, commencing April 16, 2021.

On or before May 14, 2021 the Respondent shall make restitution.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The Respondent shall apply for reinstatement pursuant to the provisions of § 2-53 of the Connecticut Practice Book. However, the Respondent shall not be eligible to apply for reinstatement unless he has made restitution or has reimbursed the Client Security Fund, if applicable.

David Sheridan
Presiding Judge