CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXII No. 48 June 1, 2021 151 Pages

Table of Contents

CONNECTICUT REPORTS

Couloute *v.* Board of Education (Order), 336 C 946 4
South Windsor *v.* Lanata (Order), 336 C 945. 3
Turner *v.* Commissioner of Correction (Order), 336 C 945 3
Volume 336 Cumulative Table of Cases 5

CONNECTICUT APPELLATE REPORTS

Antonio A. *v.* Commissioner of Correction, 205 CA 46 . . . . . 34A
Habeas corpus; request for order to show cause pursuant to statute (§ 52-470 (d) and (e)); claim that habeas court erred in failing to afford petitioner's counsel reasonable opportunity to investigate cause of delay in filing second habeas petition; whether habeas court was obligated to delay its consideration of respondent's request for order to show cause because petitioner's counsel represented to court that it was possible that, in future, petitioner could pursue actual innocence claim in amended petition; whether habeas court abused its discretion in refusing to afford petitioner any additional time prior to acting on respondent's request for order to show cause; whether petitioner's counsel was on notice of purpose of hearing on respondent's request; claim that habeas court erred in denying petitioner's motion for reconsideration; whether habeas court abused its discretion in treating motion for reconsideration as motion to open judgment; claim that habeas court erred in denying petition for certification to appeal; claim that habeas court erred in denying motion for permission to file late amended petition for certification to appeal and for reconsideration of denial of petition for certification to appeal; claim that habeas court erred in dismissing petitioner's third habeas petition; whether habeas court's dismissal of third habeas petition under rule of practice (§ 23-29 (3)) during its preliminary consideration of petition and prior to issuing writ of habeas corpus was procedurally improper; whether proper remedy was for habeas court to issue writ and, following appointment of counsel, petitioner be given opportunity to rectify any pleading deficiencies.
Fairfield Shores, LLC *v.* DeSalvo, 205 CA 96. . . . . 84A
Landlord-tenant; alleged damages to rental property in excess of security deposit; whether appeal was moot on basis that defendants did not challenge all independent bases for trial court's judgment; claim that trial court improperly rendered judgment for plaintiff on basis of statutory (§ 47a-2) exemption for certain housing arrangements incidental to educational services from application of title 47a of General Statutes to security deposit; whether judgment correctly was rendered for plaintiff on defendants' second amended counterclaim when defendants made certain judicial admission in joint stipulation of facts concerning security deposit.
Goshen Mortgage, LLC *v.* Androulidakis, 205 CA 15 . . . . . 3A
Foreclosure; claim that trial court improperly determined that plaintiff had standing to commence foreclosure action; claim that trial court improperly granted motion to substitute plaintiff; claim that trial court improperly denied motions to dismiss; claim that trial court improperly granted motion for summary judgment as to liability; claim that trial court improperly rendered judgment of strict foreclosure; claim that trial court improperly denied motion to open judgment.
Marco *v.* Starr Indemnity & Liability Co., 205 CA 111 . . . . . 99A
Breach of contract; duty to defend; law of case doctrine; claim that trial court erred in ordering court trial on matter of insurer's duty to defend following denial of

(continued on next page)

summary judgment on same issue; claim that trial court improperly deprived plaintiff of right to jury trial on duty to defend issue; claim that trial judge should have recused himself to avoid appearance of impropriety due to his involvement in pretrial settlement negotiations.
Ortiz *v.* Torres-Rodriguez, 205 CA 129 . . . . . 117A
Termination of employment; recklessness; intentional infliction of emotional distress; libel; whether trial court properly granted defendant's motion for summary judgment; adoption of trial court's memorandum of decision as proper statement of relevant facts, issues and applicable law.
Volume 205 Cumulative Table of Cases 133A

NOTICES OF CONNECTICUT STATE AGENCIES

CAA—Notice of Intent to Adopt Policy & Procedures 1B
CFIC—Notice of Address Change 1B
DSS—Notice of Proposed Medicaid SPA 2B

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

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

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

RICHARD J. HEMENWAY, *Publications Director*

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

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

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

ORDERS

CONNECTICUT REPORTS

VOL. 336

COREY TURNER *v.* COMMISSIONER OF CORRECTION

The petitioner Corey Turner's petition for certification to appeal from the Appellate Court, 201 Conn. App. 196 (AC 42437), is denied.

Corey Turner, self-represented, in support of the petition.

Decided May 18, 2021

TOWN OF SOUTH WINDSOR ET AL. *v.* KRISTIN LANATA ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 203 Conn. App. 89 (AC 42973), is granted, limited to the following issue:

"Did the Appellate Court improperly reverse the trial court's judgment and remand for an entirely new trial when it determined only that the trial court erred in awarding (1) fines for a period of time for which the named defendant had provided evidence in support of her special defense of 'legal impossibility,' and (2) statutory fines in excess of those authorized by statute?"

Richard D. Carella, in support of the petition.

Decided May 18, 2021

GABRIEL COULOUTE ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF GLASTONBURY ET AL.

The named plaintiff's petition for certification to appeal from the Appellate Court, 204 Conn. App. 120 (AC 43375), is denied.

Irving J. Pinsky, in support of the petition.

Keith R. Rudzik, in opposition.

Decided May 18, 2021

Cumulative Table of Cases
Connecticut Reports
Volume 336

(Replaces Prior Cumulative Table)

A & R Enterprises, LLC *v.* Sentinel Ins. Co., Ltd. (Order) . . . 921
Allan *v.* Commissioner of Correction (Order) . . . 939
Bank of America, National Assn. *v.* Sorrentino (Order) . . . 922
Bank of New York Mellon *v.* Mercier (Order) . . . 913
Bank of New York Mellon *v.* Ruttkamp (Order) . . . 902
Barker *v.* All Roofs by Dominic . . . 592
Workers' compensation benefits; determination by Workers' Compensation Commissioner that defendant city was plaintiff's principal employer pursuant to statute (§ 31-291); certification from Appellate Court; whether Appellate Court properly upheld decision of Compensation Review Board, which had affirmed commissioner's decision; whether city was principal employer of plaintiff, who was employed by city's uninsured subcontractor and who suffered compensable injury while performing repairs to roof of city's transfer facility; whether Massolini *v.* Driscoll *(114 Conn. 546), should be overruled insofar as it applies principal employer liability, for purposes of workers' compensation law, to municipalities.*
Borelli *v.* Renaldi . . . 3
Negligence; high speed police pursuit; summary judgment; governmental immunity; whether trial court correctly concluded that statute (§ 14-283 (d)) governing operation of emergency vehicles, as well as defendant town's police pursuit policy, imposes discretionary, rather than ministerial, duty on police officers to drive with due regard for safety of all persons and property; whether defendants were immune from liability in connection with pursuit of fleeing motorist; whether plaintiff failed to demonstrate that identifiable person-imminent harm exception to discretionary act immunity applied in present case.
Boutilier *v.* Commissioner of Correction (Order) . . . 935
Brown *v.* State (Order) . . . 904
Budrawich *v.* Budrawich (Order) . . . 909
Buie *v.* Commissioner of Correction (Order) . . . 940
CT Freedom Alliance, LLC *v.* Dept. of Education (Order) . . . 914
Coccomo *v.* Commissioner of Correction (Order) . . . 943
Cohen *v.* King (Order) . . . 925
Cole *v.* Commissioner of Correction (Order) . . . 908
Coleman *v.* Commissioner of Correction (Order) . . . 922
Collins *v.* Commissioner of Correction (Order) . . . 931
Commissioner of Public Health *v.* Colandrea (Order) . . . 930
Cordero *v.* Commissioner of Correction (Order) . . . 926
Corley *v.* Commissioner of Correction (Order) . . . 913
Couloute *v.* Board of Education (Order) . . . 946
Davis *v.* Commissioner of Correction (Order) . . . 916
DeLeo *v.* Equale & Cirone, LLP (Order) . . . 927
Derblom *v.* Archdiocese of Hartford (Order) . . . 938
Doe *v.* Flanigan (Order) . . . 901
Dovenmuehle Mortgage, Inc. *v.* Janniello (Order) . . . 922
Dwyer *v.* Commissioner of Correction (Order) . . . 931
E. I. du Pont de Nemours & Co. *v.* Chemtura Corp. . . . 194
Breach of contract; whether trial court properly rendered judgment for defendant on claim alleging breach of commercial contract governed by New York law when plaintiff failed to strictly comply with notice provision; whether New York law requires strict compliance with notice provision of commercial contract when other party to contract receives actual notice and is not prejudiced by lack of strict compliance.
Fay *v.* Merrill . . . 432
Congressional elections; action brought pursuant to statute (§ 9-323) allowing any elector or candidate who claims that he is aggrieved by any ruling of any election official in connection with election for, among other public offices, representative

in Congress, to file complaint with justice of Supreme Court; motion to dismiss; claim that application for absentee ballot adding COVID-19 as reason for absentee voting was unconstitutional and based on erroneous interpretation of governor's executive order; whether this court lacked subject matter jurisdiction over plaintiff's action under § 9-323.

Featherston *v.* Katchko & Son Construction Services, Inc. (Order) . . . 923
Felder *v.* Commissioner of Correction (Order) . . . 924
Feliciano *v.* State . . . 669

Negligence; action to recover damages from state for personal injuries plaintiff sustained when uninsured motor vehicle struck vehicle in which she was passenger; motion to dismiss; whether trial court had subject matter jurisdiction over plaintiff's action; whether state's waiver of sovereign immunity in statute (§ 52-556) for claims arising from state employee's negligent operation of state owned and insured motor vehicle extends to litigant, such as plaintiff, who is state employee; whether plaintiff's action against state was barred by workers' compensation exclusivity provision (§ 31-284 (a)); whether state's waiver of sovereign immunity pursuant to § 52-556 precluded it from raising defense to liability under § 31-284 (a); improper form of judgment.

Figueroa *v.* Commissioner of Correction (Order) . . . 926
Garcia *v.* Cohen (Order) . . . 944
Georges *v.* Commissioner of Correction (Order) . . . 943
Godbout *v.* Freedom of Information Commission (Order) . . . 936
Godfrey *v.* Commissioner of Correction (Order) . . . 931
Gomez *v.* Commissioner of Correction . . . 170

Habeas corpus; certification from Appellate Court; claim that habeas counsel rendered ineffective assistance by failing to raise claim of due process violation in petitioner's earlier habeas case; whether petitioner's due process rights were violated under Napue *v.* Illinois *(360 U.S. 264) and* Giglio *v.* United States *(405 U.S.150) when prosecutor knowingly failed to correct false testimony of state's key witnesses at petitioner's criminal trial regarding their cooperation agreements with state, even though defense counsel had actual or constructive knowledge of those agreements; whether disclosure to defense counsel that witness has given false testimony, by itself, necessarily cures any violation of criminal defendant's due process rights under* Napue *and* Giglio.

Gould *v.* Commissioner of Correction (Order) . . . 921
Hamm *v.* Commissioner of Correction (Order) . . . 913
Haydusky's Appeal from Probate (Order) . . . 915
Henderson *v.* Commissioner of Correction (Order) . . . 916
Heyward *v.* Leftridge (Orders) . . . 902, 903
In re Ava W. . . . 545

Termination of parental rights; request for posttermination visitation; whether respondent mother was aggrieved by trial court's order declining to order posttermination visitation with her child; claim that issue of posttermination visitation was rendered moot by virtue of trial court's termination of respondent's parental rights; claim that respondent lacked standing to appeal from trial court's order because she did not appeal from or seek or obtain stay of termination judgment; whether trial court correctly concluded that it lacked authority to order posttermination visitation; whether trial court correctly relied on applicable statute (§ 17-112a (b) through (h)) to deny request for posttermination visitation; claim that trial court's denial of posttermination visitation should be upheld on alternative ground that court correctly determined that such visitation would not be in child's best interest; remand for dispositional hearing at which trial court is to consider merits of ordering visitation.

In re D'Andre T. (Order) . . . 902
In re Ja'La L. (Order) . . . 909
In re Ja'Maire M. (Order) . . . 911
In re Josiah D. (Order) . . . 915
In re Kameron N. (Orders) . . . 926, 927
In re Marcquan C. (Order) . . . 924
In re Phoenix A. (Order) . . . 932
In re Probate Appeal of Concannon (Order) . . . 937
In re Riley B. (Order) . . . 943
In re Zakai F. . . . 272

Petition for reinstatement of guardianship rights pursuant to statute (§ 45a-611); certification from Appellate Court; whether parent seeking reinstatement of

guardianship rights is entitled to rebuttable, constitutional presumption that reinstatement is in best interests of child once parent has established that cause for removal no longer exists; whether third party seeking to rebut presumption that reinstatement of guardianship is in child's best interests must do so by clear and convincing evidence; weighing of factors set forth in Mathews *v.* Eldridge *(424 U.S. 319) for purpose of determining proper standard of proof in reinstatement of guardianship proceedings.*

Ingram *v.* Commissioner of Correction (Order) . . . 916
International Investors *v.* Town Plan & Zoning Commission (Order) . . . 928
Jacques *v.* Commissioner of Energy & Environmental Protection (Order) . . . 938
Jan G. *v.* Semple (Order) . . . 937
JPMorgan Chase Bank, National Assn. *v.* Essaghof . . . 633

Strict foreclosure; trial court order requiring defendant mortgagors to reimburse plaintiff mortgagee for certain taxes and homeowners insurance premiums that were to be paid by plaintiff while defendants' appeal from foreclosure judgment was pending and while defendants were occupying property subject to foreclosure; certification from Appellate Court; whether Appellate Court improperly upheld trial court's order; whether trial court's order was proper; reviewability of claim that trial court should have been disqualified on ground of certain statements calling into question court's impartiality.

Kaminski *v.* Commissioner of Correction (Order) . . . 915
Kelsey *v.* Commissioner of Correction (Order) . . . 912
Kelsey *v.* Commissioner of Correction (Order) . . . 941
Kondjoua *v.* Commissioner of Correction (Order) . . . 907
Lafferty *v.* Jones . . . 332

Invasion of privacy; special motions to dismiss under anti-SLAPP statute (§ 52-5196a); interlocutory appeal pursuant to statute (§ 52-265a) involving matter of substantial public interest; first amendment; sanctions; whether trial court violated defendants' first amendment rights by imposing sanctions for named defendant's extrajudicial speech harassing and threatening plaintiffs' counsel; whether trial court abused its discretion in imposing sanctions for discovery order violations and named defendant's extrajudicial speech; whether trial court violated defendants' due process rights by failing to afford them sufficient notice and meaningful opportunity to be heard before imposing sanctions.

Leonova *v.* Leonov (Order) . . . 906
Mecca *v.* Mecca (Order) . . . 940
Morales *v.* Commissioner of Correction (Order) . . . 930
Nash *v.* Roland Dumont Agency, Inc. (Order) . . . 917
Nationstar Mortgage, LLC *v.* Zanett (Order) . . . 919
Northeast Builders Supply & Home Centers, LLC *v.* RMM Consulting, LLC (Order) . . . 933
OneWest Bank, N.A. *v.* Ceslik (Order) . . . 936
Osborn *v.* Waterbury (Order) . . . 903
Osbourne *v.* Commissioner of Correction (Order) . . . 937
Palmer *v.* Commissioner of Correction (Order) . . . 924
Pascola-Milton *v.* Millard (Order) . . . 934
Pearson *v.* Commissioner of Correction (Order) . . . 914
Pierce *v.* Commissioner of Correction (Order) . . . 914
Praisner *v.* State . . . 420

Indemnification pursuant to statute ((Rev. to 2013) § 53-39a); whether Appellate Court correctly determined that state university's special police force was not local police department for purposes of § 53-39a; whether 2017 amendment to § 53-39a was clarifying legislation applicable to plaintiff.

Pringle *v.* Pattis (Order) . . . 944
Pryor *v.* Brignole (Order) . . . 933
Pryor *v.* Brignole (Order) . . . 941
Reliable Mechanical Contractors, LLC *v.* Ricketts (Order) . . . 932
Rispoli *v.* East Haven (Order) . . . 927
Roberts *v.* Commissioner of Correction (Order) . . . 920
Rose *v.* Commissioner of Correction (Order) . . . 920
St. Louis *v.* Commissioner of Correction (Order) . . . 919
St. Pierre *v.* Commissioner of Correction (Order) . . . 940
Schuler *v.* Commissioner of Correction (Order) . . . 905
Seaport Capital Partners, LLC *v.* Speer (Order) . . . 942

Seramonte Associates, LLC *v.* Hamden (Order) 923
Shoreline Shellfish, LLC *v.* Branford 403
Breach of contract; right of first refusal to lease shellfishing grounds in defendant town; whether trial court improperly granted town's motion for summary judgment; whether genuine issue of material fact existed as to whether shellfishing ground plaintiffs sought to lease was owned by town within meaning of applicable provision (§ 88-8) of town code; whether town's Shellfish Commission had authority to lease shellfishing ground to plaintiffs under § 88-8 of town code.
Solek *v.* Commissioner of Correction (Order) 935
South Windsor *v.* Lanata (Order) 945
Speer *v.* Skaats (Order) 910
Stanley *v.* Commissioner of Correction (Order) 901
Stanley *v.* Commissioner of Correction (Order) 912
State *v.* Ashby 452
Capital felony; murder; felony murder; sexual assault first degree; kidnapping first degree; burglary first degree; sixth amendment right to counsel; claim that state violated defendant's sixth amendment right to counsel by engaging jailhouse informant to deliberately elicit incriminating statements from defendant; whether informant acted as agent of state in eliciting incriminating statements from defendant; claim that there was insufficient evidence to establish that defendant remained unlawfully in victim's apartment for purpose of his conviction of first degree burglary; defendant's invitation to overrule State *v.* Allen *(216 Conn. 367); stare decisis; whether trial court abused its discretion in declining to give third-party culpability instruction to jury in light of existence of unidentified person's DNA in and on victim's body and on doorframe of victim's bedroom.*
State *v.* Capasso (Order) 939
State *v.* Edwards (Order) 920
State *v.* Ferrazzano-Mazza (Order) 928
State *v.* Freeman (Order) 907
State *v.* Hall-George (Order) 934
State *v.* Hazard (Order) 901
State *v.* Joseph A. 247
Assault of disabled person third degree; disorderly conduct; certification from Appellate Court; whether Appellate Court correctly concluded that trial court had not abused its discretion in determining that defendant's waiver of right to counsel during pretrial stage of proceedings was knowing, intelligent and voluntary; whether trial court abused its discretion in determining that defendant understood nature of charges against him; claim that defendant's waiver of right to counsel was constitutionally inadequate because trial court did not make him aware of dangers and disadvantages of self-representation during canvass; claim that trial court's failure to canvass defendant regarding right to counsel during arraignment and plea negotiations was structural error; whether alleged error concerning failure to canvass defendant regarding right to counsel during arraignment and plea negotiations was harmless.
State *v.* Knox (Orders) 905, 906
State *v.* Lemanski (Order) 907
State *v.* Mansfield (Order) 910
State *v.* Qayyum (Order) 911
State *v.* Ramon A. G. 386
Assault third degree; claim that trial court improperly declined to instruct jury on defense of personal property with respect to assault charge; whether Appellate Court correctly concluded that defendant failed to preserve his claim of instructional error; whether Appellate Court correctly concluded that defendant waived his unpreserved claim of instructional error.
State *v.* Ruiz-Pacheco 219
Assault first degree as principal; assault first degree as accessory; double jeopardy; certification from Appellate Court; whether Appellate Court correctly concluded that defendant's convictions of assault in first degree as principal and assault in first degree as accessory as to each victim did not violate double jeopardy clause of United States constitution; proper inquiry, for double jeopardy purposes, when defendant is convicted of multiple violations of same substantive criminal statute, discussed; whether legislature intended to punish individual acts separately or to punish course of action that they constitute under first degree assault

statute (§ 53a-59 (a) (1)) under which defendant was convicted; whether defendant's assaultive acts against victims were part of same continuing course of conduct.
State *v.* Russaw (Order) . . . 933
State *v.* Sayles (Order) . . . 929
State *v.* Schimanski (Order) . . . 903
State *v.* Sebben (Order) . . . 919
State *v.* Williams (Order) . . . 917
Stephenson *v.* Commissioner of Correction (Order) . . . 944
Trust *v.* Bliss (Order) . . . 938
Tunick *v.* Tunick (Order) . . . 910
Turner *v.* Commissioner of Correction (Order) . . . 945
U.S. Bank, National Assn. *v.* Moncho (Order) . . . 934
Vaccaro *v.* Loscalzo (Order) . . . 908
Velez *v.* Commissioner of Correction (Order) . . . 942
Vitti *v.* Milford . . . 654
Hypertension or heart disease benefits; claim that Compensation Review Board improperly affirmed Workers' Compensation Commissioner's decision to award plaintiff statutory (§ 31-308 (b)) permanent partial disability benefits of 23 percent on basis of functional capacity of plaintiff's transplanted heart; whether award of permanent partial disability benefits for loss of use of organ, following successful transplant surgery, is based on 100 percent loss of native organ or on functional capacity of transplanted organ; claim that transplanted heart was comparable to prosthetic device, thereby entitling plaintiff to disability award for 100 percent loss of function of organ.
Vogue *v.* Administrator, Unemployment Compensation Act (Order) . . . 918
Wahba *v.* JPMorgan Chase Bank, N.A. (Order) . . . 909
Wittman *v.* Intense Movers, Inc. (Order) . . . 918
Wright *v.* Commissioner of Correction (Order) . . . 905
Young *v.* Commissioner of Correction (Order) . . . 904

CONNECTICUT APPELLATE REPORTS

Vol. 205

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

GOSHEN MORTGAGE, LLC *v.* ANDREAS D. ANDROULIDAKIS ET AL.
(AC 43002)

Elgo, Alexander and DiPentima, Js.

Syllabus

The plaintiff G Co. sought to foreclosure a mortgage on certain real property owned by the defendant J. The defendant A, J's now former husband, had executed a note for a loan that was used to purchase the property that secured the mortgage, and that loan was now in default. Prior to the commencement of the foreclosure action, A quitclaimed his interest in the property to J as part of a separation agreement. G Co. alleged in its complaint that it was the holder of the note and mortgage. G Co. thereafter filed a motion to substitute T Co. as the plaintiff, explaining that, since the commencement of the action, it had assigned the note

and mortgage to T Co. Four days prior to commencing the foreclosure action, however, G Co. assigned the mortgage to T Co. J objected to the motion, claiming that G Co. lacked standing to litigate the action because it had not proven that it was the holder of the note at the time it commenced the action. The trial court granted the motion to substitute. Thereafter, J filed two motions to dismiss arguing that G Co. lacked standing to initiate the foreclosure because the note and mortgage had been assigned before the commencement of the action, which the court denied. Subsequently, T Co. filed a motion for summary judgment as to liability only, which the court granted, and, thereafter, the court rendered a judgment of strict foreclosure. J filed a motion to open the judgment, which the court denied, and J appealed to this court. *Held*:

1. This court found unavailing J's claim that G Co. lacked standing to initiate the foreclosure action: G Co. was in possession of the note, endorsed in blank, when it commenced the action and, therefore, had standing to do so; the trial court correctly determined that the note was endorsed in blank, and G Co. alleged in its complaint that it was the holder of the note and, although the mortgage was assigned prior to the commencement of the action, there is no indication in the record that the note itself changed hands, as the only evidence before the court indicated that G Co. was in possession of the note when the action was commenced, and it was of no consequence that the mortgage was assigned before the action commenced.
2. The trial court did not abuse its discretion in granting the motion to substitute T Co. as the plaintiff: although the court mischaracterized the nature of the assignment in granting the motion to substitute when it stated that G Co. assigned both the note and mortgage after the commencement of the action, the substitution had no substantive effect on the proceedings because the note, endorsed in blank, remained in possession of G Co., and, thus, the cause of action itself was not assigned to a legally distinct party, the substitution only having served to clarify that G Co. was bringing the foreclosure action in its capacity as trustee for T Co., and in no way prejudiced J's ability to make payments or defend against the claims brought; moreover, the court correctly determined that, contrary to J's claim, the rule of practice (§ 9-20) that allows for the substitution of a plaintiff when an action has been commenced in the name of the wrong plaintiff to cure the lack of standing of the original plaintiff, was inapplicable because G Co. had standing as holder of the note, and it was not the wrong plaintiff.
3. The trial court properly denied J's motions to dismiss; the court made an express factual finding that G Co. held the note endorsed in blank at the time the action commenced and J failed to submit any evidence in support of her motions to dismiss that called into question G Co.'s status as holder of the note.
4. The trial court properly granted T Co.'s motion for summary judgment:
   a. T Co. established a prima facie case for foreclosure; the supporting documentation submitted by T Co. in support of its motion for summary

judgment established that it was the holder of the note and assignee of the mortgage as well as the terms of the note and mortgage, that A and J were in default, and that T Co. or its predecessor were in compliance with the condition precedent to the institution of the action and, J failed to provide an affidavit or exhibit that raised a genuine issue of material fact to counter T Co.'s documentation.

b. J's alleged special defenses were without merit and did not rebut T Co.'s prima facie case; contrary to J's claim, this court has rejected arguments that trust documents or pooling and servicing agreements are relevant to the issue of standing, and, although it may not have been entirely accurate for G Co. to state that it had assigned the mortgage *since* the commencement of the action, the assignment had no substantive effect on the litigation, and it was not an abuse of the trial court's discretion to decline to characterize this statement as wilful misconduct, the court properly concluded that no statute of limitations applied to the action, and the court properly concluded that a divorce decree between A and J, which stated that J was not assuming any liability on the mortgage, had no effect on the mortgage, which J signed, and was a contract between J and G Co.

5. J's claim that the trial court improperly rendered a judgment of strict foreclosure because it never resolved the issue of standing and should have held an evidentiary hearing to determine when G Co. acquired the note was unavailing, this court having previously determined that G Co. was the holder of the note at the time the foreclosure action was commenced and had standing.

6. The trial court did not abuse its discretion in denying J's motion to open the judgment as the grounds put forth in the motion have been resolved in favor of T Co.

Argued January 20—officially released June 1, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant Jameela Androulidakis, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant was defaulted for failure to appear; thereafter, Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1, was substituted as the plaintiff; subsequently, the court, *Genuario*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability; thereafter, the court, *Genuario*, *J.*, rendered judgment of strict foreclosure; subsequently, the court denied the motion to open filed by the defendant Jameela

Androulidakis, and the defendant Jameela Androulidakis appealed to this court. *Affirmed.*

Jameela Androulidakis, self-represented, the appellant (defendant).

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

Opinion

DiPENTIMA, J. The self-represented defendant, Jameela Androulidakis,[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1. On appeal, the defendant claims that the court improperly (1) determined that the plaintiff, Goshen Mortgage, LLC,[2] had standing to bring the foreclosure action, and thus erred by granting the plaintiff's motion to substitute and denying the defendant's motion to dismiss, (2) granted the substitute plaintiff's motion for summary judgment, (3) rendered a judgment of strict foreclosure for the substitute plaintiff, and (4) failed to grant the defendant's motion to open the judgment.[3] We affirm the judgment of the trial court.

[1] The complaint named as defendants Jameela Androulidakis and her erstwhile husband Andreas D. Androulidakis (Andreas). Jameela Androulidakis received title to the property in question as part of a divorce decree in 2009. Andreas never appeared and the court granted a motion for default for failure to appear as to Andreas on June 2, 2017. He is not involved in this appeal. As subsequent encumbrancers of the property, Hop Energy, LLC and Petro, Inc., also were named as defendants but are not involved in this appeal. Therefore, we refer to Jameela Androulidakis as the defendant throughout this opinion.

[2] This action was commenced by the plaintiff, Goshen Mortgage, LLC. On October 13, 2017, Goshen Mortgage, LLC, filed a motion to substitute, claiming that it had assigned the mortgage and note to Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1. The court granted the motion to substitute. In this opinion, we refer to Goshen Mortgage, LLC, as the plaintiff, and to Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1, as the substitute plaintiff.

[3] At oral argument before this court, the defendant also argued that service of process was insufficient. This issue was not raised before the trial court

The following facts, viewed in the light most favorable to the defendant, and procedural history are relevant to our resolution of the defendant's appeal. In July, 2007, Andreas D. Androulidakis (Andreas) executed and delivered to Chase Bank USA, N.A. (Chase Bank), a note for a loan in the original principal amount of $649,999. The loan was used to purchase property located at 73 Devils Garden Road in Norwalk (property). Only Andreas signed the note for the loan. On the same date, Andreas *and* the defendant executed and delivered to Chase Bank a mortgage on the property. The mortgage subsequently was recorded on the land records of the town of Norwalk. On October 9, 2009, ownership of the property was transferred to the defendant from Andreas by quitclaim deed as part of a separation agreement. The terms of that agreement stated that "transfer of the property to the [defendant] shall not result in her assumption of any liability of the mortgage securing the property." Andreas thereafter failed to make payments on the mortgage and eventually declared bankruptcy.

Chase Bank assigned the mortgage to JP Morgan Chase Bank, N.A. (JP Morgan), on September 3, 2009, and assigned the note to JP Morgan by way of an allonge affixed to the note dated November 4, 2009.[4] JP Morgan subsequently endorsed the note in blank. The note and mortgage were then transferred multiple times between

nor was it briefed on appeal. We therefore decline to review it. "We generally do not consider claims raised for the first time at oral argument." *Zenon* v. *Mossy*, 114 Conn. App. 734, 736 n.2, 970 A.2d 814 (2009); see also *Alexander* v. *Tyson*, 122 Conn. App. 493, 494 n.1, 999 A.2d 830 (declining to review issues "that were not considered or decided by the trial court"), cert. denied, 298 Conn. 928, 5 A.3d 488 (2010). Further, any claim of lack of jurisdiction over the person or insufficiency of service of process is waived if not raised by a motion to dismiss filed within thirty days of filing an appearance. See Practice Book § 10-32.

[4] An allonge is defined as "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." Black's Law Dictionary (11th Ed. 2019), p. 95.

2009 and 2016, before ultimately being transferred to the plaintiff on June 29, 2016.[5]

On October 28, 2016, the plaintiff commenced this foreclosure action, naming both the defendant and Andreas, and alleged that the defendant was the owner of the property. In its complaint, the plaintiff alleged, inter alia, that it was the holder of the note and mortgage, that the note was in default, and that it was electing to accelerate the balance due on the note and to foreclose on the mortgage securing the note. Further, the plaintiff alleged that the defendant had been provided written notice of the default and had failed to cure the default.

Four days before this foreclosure action was commenced, however, the plaintiff assigned the mortgage to the substitute plaintiff and the assignment subsequently was recorded on March 27, 2017. The plaintiff then filed a motion to substitute the plaintiff on October 13, 2017, explaining that "since the commencement of the above entitled action, it has assigned the subject mortgage deed and note, and the cause of action, to Goshen Mortgage, LLC, as Separate Trustee for GDBT I Trust 2011-1 by written instrument . . . ." The plaintiff attached as an exhibit to the motion the notarized assignment of mortgage, bearing a seal indicating that the document had been recorded with the town clerk of Norwalk. The defendant objected to the substitution, arguing that the plaintiff had not proven adequately that it was the holder of the note at the time of commencement of the action and, thus, did not have standing to litigate the action. The court granted the motion to substitute.[6]

[5] The plaintiff provided the complete chain of title in its complaint; the substitute plaintiff also provided the complete chain of title in an affidavit provided with its motion for summary judgment, and in exhibits provided with the motion for summary judgment.

[6] The court initially granted this motion and several others without explanation. On July 1, 2019, after filing her appeal, the defendant filed several notices pursuant to Practice Book § 64-1 requesting a memorandum of deci-

The defendant then filed a motion to dismiss on December 4, 2017, arguing again that the plaintiff lacked standing to initiate the foreclosure action because the note and mortgage had been assigned before the commencement of the action. The court denied the motion. The defendant filed a second motion to dismiss on April 24, 2018, arguing, again, that the plaintiff lacked standing to pursue the action, and specifically claiming that the plaintiff was not the owner of the note. The court denied the second motion to dismiss.

On July 31, 2018, the substitute plaintiff filed a motion for summary judgment as to liability under the note and mortgage, attaching as exhibits the note endorsed in blank and each of the prior assignments of the mortgage. In response, the defendant argued, inter alia, that (1) the plaintiff was not registered with the Securities and Exchange Commission (SEC), (2) a statute of limitations prevented the plaintiff from initiating the action,

sion for several of the court's rulings. In response to the defendant's § 64-1 notices, the court subsequently issued memoranda of decision as to the order granting the motion to substitute the plaintiff, the order denying the defendant's first motion to dismiss, the order granting the substitute plaintiff's motion for summary judgment as to liability, and the order granting the substitute plaintiff's motion for judgment of strict foreclosure. We refer to these articulated orders when reviewing the court's rulings throughout this opinion.

The defendant's notices filed pursuant to Practice Book § 64-1 also sought a memorandum of decision regarding her second motion to dismiss. The court issued an order stating that the denial of the defendant's second motion to dismiss was not within the scope of § 64-1. On August 9, 2019, the defendant filed a motion for review, in which she requested that this court order the trial court to issue a memorandum of decision as to the order denying her second motion to dismiss. This court granted the defendant's motion for review, but denied the relief requested therein, agreeing with the trial court that the denial of the motion to dismiss was not within the scope of § 64-1, as it did not represent a final judgment. See *Sasso* v. *Aleshin*, 197 Conn. 87, 90, 495 A.2d 1066 (1985). Regardless, given that the defendant made identical arguments in her first and second motions to dismiss and the court has issued a memorandum of decision as to the order denying the first motion to dismiss, our ability to properly review these rulings is not impeded. See part I C of this opinion.

(3) the plaintiff was not in possession of the note "at the time it brought this current suit" and thus the substitute plaintiff lacked standing to pursue the suit brought by the plaintiff, (4) the foreclosure suit should be pursued against "the nonappearing defendant, Andreas" and (4) her due process rights had been violated. The court granted the motion for summary judgment on October 3, 2018, concluding that "the affidavit and attachments in support of the motion establish that the [substitute] plaintiff is the holder of the note and the assignee of the mortgage, as well as the terms of the note and mortgage." The court subsequently rendered a judgment of strict foreclosure, setting a law day of July 9, 2019.

On March 21, 2019, the defendant filed a motion to open the judgment, which she amended on April 24, 2019, arguing, again, that the statute of limitations barred the plaintiff's action and that the plaintiff did not have possession of the mortgage and note at the time that it brought this action. The substitute plaintiff filed an objection to the motion to open the judgment, which the court sustained. The court thus denied the motion to open the judgment. This appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's claims regarding standing. Specifically, the defendant claims that the court erred in finding that the plaintiff had standing to bring this foreclosure action against her and, thus, that it had subject matter jurisdiction over the action.[7] She

[7] In its brief, the substitute plaintiff construed the defendant's claim as an attack on this court's jurisdiction over the appeal. While neither party explicitly argues that this court lacks jurisdiction, we note that the trial court's judgment of strict foreclosure is an appealable final judgment and the defendant is aggrieved by that judgment. Consequently, this court has jurisdiction over the defendant's appeal under General Statutes § 52-263. Further, an appellate court has jurisdiction to determine whether the trial court had subject matter jurisdiction to hear the case, and a determination that the trial court lacked jurisdiction does not deprive an appellate court of its jurisdiction over an appeal. See *State* v. *Martin M.*, 143 Conn. App.

further contends, as a result of that alleged lack of standing, that the court improperly granted the plaintiff's motion to substitute and improperly denied her first and second motions to dismiss. We reject the defendant's arguments.

The following undisputed facts are relevant to these claims. The note in question was endorsed in blank by JP Morgan. The plaintiff alleged in its complaint, dated October 24, 2016, that it had been assigned the mortgage on June 29, 2016, and that it "is the holder of said note." That same day, the plaintiff assigned the mortgage to the substitute plaintiff. Service was then effectuated on October 28, 2016, thus commencing the action.[8] Almost one year later, the plaintiff represented in its motion to substitute, dated October 13, 2017, that "since the commencement of the above entitled action, it has assigned the subject mortgage deed and note, and the cause of action, to [the substitute plaintiff] by written instrument, a copy of which is attached hereunto as Exhibit A."

A

We first address whether the plaintiff had standing to initiate the foreclosure action, as many of the defendant's claims on appeal revolve around the argument that the plaintiff lacked standing to do so. The defendant argues that because the mortgage was assigned *prior* to October 28, 2016, the date this action was commenced, the plaintiff lacked standing to commence the action. We are not persuaded.

We begin by setting forth the law of standing in the context of foreclosure actions. "Standing is the legal right

140, 143–44 n.1, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013); *Gemmell* v. *Lee*, 42 Conn. App. 682, 684 n.3, 680 A.2d 346 (1996); *Augeri* v. *Planning & Zoning Commission*, 18 Conn. App. 722, 728 n.6, 560 A.2d 985 (1989).

[8] "It has long been the law in this state that an action is deemed to be commenced on the date service is made on the defendant." *Stingone* v. *Elephant's Trunk Flea Market*, 53 Conn. App. 725, 729, 732 A.2d 200 (1999).

to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of this question of law is plenary." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property. . . . The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Kydes*, 183 Conn. App. 479, 487, 193 A.3d 110, cert. denied, 330 Conn. 925, 194 A.3d 291 (2018).

"The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer. If the foreclosing party shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing

party is the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must *prove* that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis in original; footnote omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150, 125 A.3d 262 (2015).

In the present case, the court determined that the note was endorsed in blank. The evidence in the record before us supports this finding. The defendant repeatedly claims that JP Morgan is the party entitled to enforce the note because the allonge is on the last page of the note: "this alleged blank endorsement is not the current endorsement because there is a subsequent special endorsement made specially to JP Morgan by Chase Bank . . . by way of an allonge permanently affixed to the end of the note." This argument is unavailing. The document clearly demonstrates that the note was specially endorsed *to* JP Morgan then subsequently endorsed in blank *from* JP Morgan. The court correctly determined that the note was endorsed in blank.[9]

[9] The defendant also argues that the court never actually inspected the note to determine whether it was endorsed in blank. While the court did not explicitly state that it had examined the note in the memorandum granting the motion to substitute, the court later stated during a hearing on the motion for a judgment of strict foreclosure that "[t]he court has reviewed the original note as well as its endorsements and allonges, finds that the plaintiff is the holder of the note. The court has also reviewed certified copies of the mortgage and six assignments and finds that the plaintiff is the assignee of the mortgage."

Accordingly, whether or not the plaintiff had standing to initiate the action depends on whether it had physical possession of the note on October 28, 2016. "When an instrument is endorsed in blank, it becomes payable to bearer and may be negotiated by transfer of possession alone. . . . General Statutes § 42a-3-205 (b)." (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 577, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010). Regardless of the timing of the assignment of the *mortgage*, the undisputed facts demonstrate that the plaintiff possessed the note at the time of the commencement of this action.

Prior to the commencement of the action, the plaintiff assigned the mortgage to the substitute plaintiff, and this assignment was not recorded until March 27, 2017, but the note itself never changed hands. Because the plaintiff transferred the note *to itself* as trustee,[10] the physical possession of the note never changed.

[10] Because the defendant's arguments on appeal are largely based on the plaintiff's status as a trustee for a loan pool, we provide a summary of loan pools and the role of trustees. "Typically, mortgage loans are placed into asset pools or 'securities' based upon various criteria. Loan pools are formed based upon certain factors, including credit ratings, loan-to-value ratios, conforming and non-conforming loans, and other indicia of volatility. One major advantage of placing mortgage loans into pools sold as mortgage-backed securities is that these securities are designed to reduce or reallocate certain risks inherent in the assets, thereby making them less volatile and more appealing to investors. . . . A servicing agent, either a bank or a mortgage company, operates to collect loan payments, escrows for taxes and insurance, and to communicate with the borrower. The servicers and trustees of the pools are then rated on the quality of servicing and the application of various credit enhancements to guard against risk and to maintain stability within the pool. [The] levels and layers of entities can involve multiple parties, including the trustee of the pooling and servicing agreement, a servicer of the pooling agreement, and sometimes a sub-servicing entity . . . ." (Footnote omitted.) D. Caron & G. Milne, Connecticut Foreclosures (9th Ed. 2019) § 30-2, pp. 458–59. "The borrower, however, is not a party to the pooling and servicing agreement, commonly referred to as a 'trust' document. The parties to a pooling and servicing agreement are usually: (1) the trustee, who acts on behalf of the bondholders, (2) a master servicer, who collects payments for the trust, and (3) the initial depositor that establishes the trust." Id., p. 470.

It is well established that the holder of a note has standing to enforce a mortgage even if the mortgage is not assigned to that party. "General Statutes § 49-17 permits the holder of a negotiable instrument that is secured by a mortgage to foreclose on the mortgage even when the mortgage has not yet been assigned to him. . . . The statute codifies the common-law principle of [long-standing] that the mortgage follows the note, pursuant to which only the rightful owner of the note has the right to enforce the mortgage. . . . Our legislature, by adopting § 49-17, has provide[d] an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Fequiere*, supra, 119 Conn. App. 576–77. "This principle is intended to address the situation in which ownership of the note and ownership of the mortgage rest in different hands at the time the foreclosure action commenced." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 323.

The plaintiff alleged in its complaint that it was the holder of the note and in possession of the mortgage. Before the action actually was commenced, the mortgage was assigned to the substitute plaintiff, but there is no indication that possession of the note changed. A plaintiff that "alleged that it possessed the note at the time it commenced [the] action, [is] entitled to rely upon that allegation unless the defendant present[s] facts to the contrary . . . ." *Bank of America, N.A.* v. *Kydes*, supra, 183 Conn. App. 489. The only evidence before the court indicated that the plaintiff was in possession of the note when the present action was commenced. The defendant has not pointed us to any evidence that disputes the court's conclusion that the plaintiff was the holder of the *note* at the time the foreclosure action was commenced, other than the fact that the *mortgage* had been assigned prior to the commencement, which has no bearing on possession of the note.

See *HSBC Bank USA, N.A.* v. *Navin*, 129 Conn. App. 707, 711–12, 22 A.3d 647 (plaintiff had standing to commence foreclosure action where defendant offered no evidence contesting plaintiff's affidavit asserting that note endorsed in blank was delivered to plaintiff prior to commencement of action), cert. denied, 302 Conn. 948, 31 A.3d 384 (2011). Additionally, we note that counsel for both the plaintiff and the substitute plaintiff, which remained the same throughout the proceedings, repeatedly represented to the court, both before and after the motion to substitute had been granted, that it had possession of the note at all relevant times. See *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 132–33, 74 A.3d 1225 (2013) (explaining that "it [is] proper for [a] court . . . to rely on the representation of the plaintiff's counsel that the note he produced . . . was the note that the plaintiff held at the time of the commencement of the action . . . [and that] [i]n the absence of any fact based challenge to counsel's representation, such reliance was proper . . . because the plaintiff's counsel is an officer of the court").

The defendant's principal argument is that the mortgage had been assigned before commencement of the action, and that the substitution of the plaintiff did not occur until October, 2017. Because the plaintiff was the holder of the note when the action began, it is of no consequence to an analysis of standing that the mortgage was assigned before the proceeding commenced.[11] "It is well settled that the holder of a note secured by a mortgage has standing to commence a foreclosure action, regardless of whether it also holds the mortgage." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App.

[11] Additionally, we note that it would have been legally permissible for the plaintiff to bring the action in the name of Goshen Mortgage, LLC, notwithstanding the assignment of the mortgage, as General Statutes § 52-106 allows a trustee plaintiff to sue or be sued without joining the persons represented by him and beneficially interested in the action. See *Chase Home Finance, LLC* v. *Fequiere*, supra, 119 Conn. App. 579 (explaining that trustee has statutory right to bring action in its own capacity where trustee has legal title to trust res).

165, 174, 73 A.3d 742 (2013). "The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Kydes*, supra, 183 Conn. App. 487. Put another way, that the named plaintiff on the complaint does not match the name on the assignment of mortgage at the time of commencement does not affect whether the plaintiff is entitled to foreclose on the mortgage. The plaintiff was in possession of the note, endorsed in blank, when it commenced the present foreclosure action and therefore it had standing to do so. Accordingly, the court had subject matter jurisdiction to adjudicate the action, and the defendant's claim fails.

B

Having resolved the plaintiff's standing to initiate the action, we next address whether the court erred in granting the plaintiff's motion to substitute. The defendant argues that the court made erroneous findings of fact and relied on an incorrect rule of practice in granting the motion. We are not persuaded.

On October 13, 2017, pursuant to Practice Book § 9-16,[12] the plaintiff filed a motion to substitute the plaintiff. The defendant objected, arguing that Practice Book § 9-20[13] was the applicable rule of practice because the mortgage had been assigned prior to commencement of the action and hence the plaintiff lacked standing to

[12] Practice Book § 9-16 provides: "If, pending the action, the plaintiff assigns the cause of action, the assignee, upon written motion, may either be joined as a coplaintiff or be substituted as a sole plaintiff, as the judicial authority may order; provided that it shall in no manner prejudice the defense of the action as it stood before such change of parties."

[13] Practice Book § 9-20 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the judicial authority may, if satisfied that it was so commenced through mistake and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

initiate the action. The court granted the motion, explaining that the plaintiff "assigned the mortgage deed and note . . . after commencement of the foreclosure action. . . . [The] [d]efendant claims that Practice Book [§] 9-20 applies. That section provides that the court may allow a substitute plaintiff only if the 'wrong plaintiff' was named in the first instance. The original plaintiff is not the 'wrong plaintiff.' [Practice Book §] 9-16 rather than [§] 9-20 applies. Additionally, the defendant alleges no facts inviting prejudice to [her] defense."

We first set forth the applicable standard of review. "Practice Book § 9-16 confers authority on a trial court judge to substitute a new plaintiff as the sole plaintiff in a pending action as long as the substitution does not prejudice the defense of the action. The decision whether to grant a motion for the [substitution] of a party to pending legal proceedings rests generally in the sound discretion of the trial court. . . . Our review is limited to a determination of possible abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Trevek Enterprises, Inc.* v. *Victory Contracting Corp.*, 107 Conn. App. 574, 578–79, 945 A.2d 1056 (2008). "In reviewing the trial court's exercise of that discretion, every reasonable presumption should be indulged in favor of its correctness . . . and only if its action discloses a clear abuse of discretion is our interference warranted." (Internal quotation marks omitted.) *Joblin* v. *LaBow*, 33 Conn. App. 365, 367, 635 A.2d 874 (1993), cert. denied, 229 Conn. 912, 642 A.2d 1207 (1994).

"Our rules of practice . . . permit the substitution of parties as the interests of justice require." *Federal Deposit Ins. Corp.* v. *Retirement Management Group, Inc.*, 31 Conn. App. 80, 84, 623 A.2d 517, cert. denied, 226 Conn. 908, 625 A.2d 1378 (1993). "As long as [the] defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added." (Internal quotation

marks omitted.) *Rana* v. *Terdjanian*, 136 Conn. App. 99, 110, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012).

In the present case, the court stated that "[the plaintiff] assigned the mortgage deed and note in the captioned matter to [the substitute plaintiff] after commencement of the foreclosure action." The defendant argues that the assignment of mortgage is dated before the commencement of the action, so the court's factual findings are clearly erroneous and Practice Book § 9-16 was inapplicable to the facts of the case. Although the court may have mischaracterized the nature of the assignment, we conclude that the court did not abuse its discretion in granting the motion to substitute.

Practice Book § 9-16 "provides for the substitution of a plaintiff when the *cause of action itself* is assigned to a different party." (Emphasis added.) *Hudson City Savings Bank* v. *Hellman*, 196 Conn. App. 836, 847, 231 A.3d 182 (2020). In that case, the original plaintiff merged into the substitute plaintiff approximately two years after a foreclosure action had been initiated. Id., 841. The original plaintiff, Hudson City Savings Bank (HCSB), commenced the foreclosure action on December 4, 2013. Id., 839. HCSB then moved for summary judgment as to liability on August 4, 2017, which the court subsequently granted. Id., 839–41. Then, on November 28, 2017, HCSB filed a motion to substitute Manufacturers and Traders Trust Company (M&T) as the plaintiff, revealing that HCSB had merged into M&T as of November 1, 2015, twenty-one months before HCSB had filed the motion for summary judgment. Id., 841. The motion to substitute was predicated, in part, on Practice Book § 9-16. Id., 847. This court, however, found that no assignment of the underlying cause of action had actually occurred, because no assignment was necessary, as HSBC's assets, including the note and the cause of action, automatically had vested in M&T by operation

of law as a result of the merger. Id. This court concluded that even though no assignment of the cause of action had occurred, the substitution "had no substantive effect" because, irrespective of the substitution, the surviving entity subsumes all claims and assets of the other party to the merger. Id., 845–47. This court thus concluded that § 9-16 was an appropriate vehicle to allow substitution. Id., 842–47. Similarly, in the present case, because the note, which was endorsed in blank, remained in the possession of the plaintiff, the cause of action itself was not assigned to a legally distinct party. See part I A of this opinion. The substitution here, much like the one in *Hudson City Savings Bank*, "had no substantive effect" on the proceedings. *Hudson City Savings Bank* v. *Hellman*, supra, 846.

Additionally, the defendant claimed in her objection to the motion that Practice Book § 9-20 should have applied to the motion to substitute. Section 9-20 is intended to "[cure] the lack of standing of the original plaintiff"; (internal quotation marks omitted) *Fairfield Merritview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 553, 133 A.3d 140 (2016); and "allow[s] a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the *wrong* person as [the] plaintiff." (Emphasis added; internal quotation marks omitted.) Id., 552. Because the plaintiff had standing, as holder of a note endorsed in blank, it was not the *wrong* plaintiff. The court correctly determined that § 9-20 was inapplicable to the facts of the case.

Finally, Practice Book § 9-16 provides that substitution should not be granted if it would "prejudice the defense of the action as it stood before such change of parties." The court correctly stated that that the defendant failed to allege any facts that would prejudice her defense. The defendant maintains on appeal that "because [§ 9-16] is inapplicable [the defendant] did not need to allege prejudice." Even if the defendant was not required to allege prejudice, we agree with the court

that the defendant did not suffer any prejudice from the substitution. The substitution only served to clarify that the plaintiff was bringing the foreclosure action in its capacity as trustee for GDBT I Trust 2011-1. This, in no way, prejudiced the defendant's ability to make payments on the mortgage or to defend against the claims brought. See *Hudson City Savings Bank* v. *Hellman*, supra, 196 Conn. App. 846–48 (granting substitution under § 9-16 after merger involving plaintiff as merger would have no substantive effect on proceedings).

We iterate that granting a motion to substitute should be found improper only if there is a clear abuse of discretion and that "every reasonable presumption should be indulged in favor of its correctness . . . ." (Internal quotation marks omitted.) *Joblin* v. *LaBow*, supra, 33 Conn. App. 367. It was not a clear abuse of discretion for the court to allow the substitution.[14]

[14] "Even assuming that Practice Book § 9-16 was not the appropriate basis to bring about the substitution, we underline the wide discretion afforded to courts for the substitution of parties given our state's policy of ensuring that a real party of interest is added as a party to the underlying action." *Hudson City Savings Bank* v. *Hellman*, supra, 196 Conn. App. 847 n.8.

To support her argument that Practice Book § 9-16 was not an appropriate vehicle to allow substitution, the defendant repeatedly cites *Ion Bank* v. *J.C.C. Custom Homes, LLC*, 189 Conn. App. 30, 35 n.3, 206 A.3d 208 (2019), in which this court stated that "[b]ecause the plaintiff assigned the note to [the substitute plaintiff] prior to the commencement of the action, rather than during its pendency as contemplated by Practice Book § 9-16, this rule is inapplicable." In *Ion Bank*, this court held that the trial court appropriately denied the plaintiff's efforts to substitute the assignee as plaintiff. Id., 41–42. Because the efforts to substitute the plaintiff were ineffectual, this court agreed with the trial court's ultimate determination "that the plaintiff lacked standing to bring the action because, *prior to commencing it*, the plaintiff had assigned its interest in the underlying promissory note to [the substitute plaintiff]." (Emphasis added). Id., 33. The note in *Ion Bank*, however, was not endorsed in blank, and thus had to be expressly assigned to the substitute plaintiff. Id., 34. The plaintiff assigned the note one day before the action was commenced. Id. As such, there was a clear assignment of the cause of action occurring before commencement—the exact opposite of the situation contemplated by § 9-16. In the present case, the note was endorsed in blank and payable to the possessor, and the note never changed hands.

C

We next address the defendant's two motions to dismiss. The defendant maintains that the court improperly denied her motions to dismiss because the plaintiff lacked standing to initiate the foreclosure action, the substitute plaintiff improperly was allowed to maintain the action, the court failed to inspect the note, and the court should have conducted an evidentiary hearing to determine when the plaintiff obtained possession of the note. We are not persuaded.

We first set forth the standard of review for a motion to dismiss. "In ruling [on] whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . If . . . the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." (Citation omitted; internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 550, 23 A.3d 1176 (2011).

Because the lack of standing implicates the trial court's subject matter jurisdiction, it properly is raised by way of a motion to dismiss. See *May* v. *Coffey*, 291 Conn. 106, 113, 967 A.2d 495 (2009). "Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] 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. . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Simoulidis*, 161 Conn. App. 133, 135–36, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016).

After the court granted the motion to substitute, the defendant filed a revised motion to dismiss on December 4, 2017, arguing that the plaintiff lacked standing to initiate the action. The substitute plaintiff objected to the motion, stating that "[t]he plaintiff attests that it and/or its agents have been in possession of the original note, dated July 23, 2007, and have been since before the inception of this action. The note is endorsed in blank." The substitute plaintiff included a copy of the note with the objection. The court denied the motion, concluding that "[t]he defendant is unable to show that the plaintiff did not have standing. . . . At the time the action commenced on October 28, 2016, the plaintiff held the note endorsed in blank. The defendant is unable to rebut the presumption that the holder of the note is also the owner of the debt and entitled to enforce the note." The defendant filed a second motion to dismiss on April 24, 2018, arguing, again, that the plaintiff lacked standing to initiate the action and that the substitute plaintiff lacked standing to maintain the action.[15] The court denied the second motion to dismiss.

We have determined previously that the plaintiff, as possessor of a note endorsed in blank, had standing to initiate the action and that it was proper for the court to allow substitution. The defendant, again, contends that there is no evidence that the court ever examined the note to determine if it was endorsed in blank. The note, however, was provided with the substitute plaintiff's objection to the motion to dismiss and the court appropriately concluded that the note was endorsed in blank. We will not presume that the court came to this conclusion without examining the note. See *State* v.

[15] The defendant included several other arguments in both motions to dismiss, including that the plaintiff was not registered to do business in the state, the statute of limitations should have barred the action, and the plaintiff had committed numerous violations of the federal Truth in Lending Act. These arguments have not been advanced on appeal and are deemed abandoned.

Mills, 80 Conn. App. 662, 670, 837 A.2d 808 (2003), cert. denied, 268 Conn. 914, 847 A.2d 311 (2004).

The defendant also claims that the court should have conducted an evidentiary hearing to determine when the plaintiff obtained possession of the note, pursuant to *LaSalle Bank, N.A.* v. *Bialobrzeski*, 123 Conn. App. 781, 783, 3 A.3d 176 (2010), in which this court held that it could not rule on the issue of standing without a finding from the trial court as to when the plaintiff acquired the note. This court remanded the case for a hearing to determine whether the plaintiff held the note when the action was commenced, explaining that "[w]e cannot review this claim because the court made no factual finding as to when the plaintiff acquired the note. Without that factual determination, we are unable to say whether the court improperly denied the defendant's motion to dismiss." Id., 788. Unlike *LaSalle Bank, N.A.*, in the present case the court made an *express* factual finding that the plaintiff held the note endorsed in blank at the time the action commenced. The defendant can point to no facts or evidence that rebut this finding, other than her repeated contention that the note was assigned prior to commencement. As we explained, the record contains no evidence of such an assignment.

Our review of the record confirms that the defendant failed to submit any evidence in support of her motions to dismiss that called into question the plaintiff's status as the holder of the note. We conclude, therefore, that the court properly denied the defendant's motions to dismiss.

II

Next, we address the defendant's claim that the court improperly granted the substitute plaintiff's motion for summary judgment. The substitute plaintiff responds that the documents provided with its motion for summary judgment appropriately demonstrated the absence of any genuine issue of material fact and that the defendant failed to present any evidence that adequately

rebutted the substitute plaintiff's prima facie case. We agree with the substitute plaintiff and, accordingly, reject the defendant's claim.

We first set forth the standard of review for summary judgment in a foreclosure action. "Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 175. "[I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted.) Id.

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Citations omitted.) Id., 176.

A party opposing summary judgment "must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." (Emphasis omitted; internal quotation marks omitted.) *Little* v. *Yale University*, 92 Conn. App. 232, 234, 884 A.2d 427 (2005), cert. denied, 276 Conn. 936, 891 A.2d 1 (2006). In other words, "[d]emonstrating a genuine issue [of material fact] requires a showing of evidentiary facts or substantial evidence outside the

pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a [dispute as to a] material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact . . . . The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Citations omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Roina*, 38 Conn. App. 240, 244–45, 659 A.2d 1226, cert. denied, 235 Conn. 915, 665 A.2d 609 (1995).

A

We first address the defendant's claim that the substitute plaintiff failed to establish an undisputed prima facie case. Specifically, the defendant argues that JP Morgan is the party entitled to enforce the note, based on the allonge attached to the last page of the note, and, again, that the plaintiff lacked standing at the commencement of the action. As discussed previously in this opinion, these arguments are meritless. The note was endorsed in blank and possessed by the original plaintiff at the time of commencement and then by the substitute plaintiff after the motion to substitute was granted. See part I A of this opinion. The substitute plaintiff attached an affidavit from its loan servicing agent to its motion for summary judgment that set forth the status of the note and the various transfers of the mortgage. The court appropriately relied on this document and concluded that there was no genuine issue of material fact, stating: "In the instant action the affidavit and attachments in support of the motion establish

that the [substitute] plaintiff is the holder of the note and the assignee of the mortgage, as well as the terms of the note and mortgage. They also establish the defendants' default and the [substitute] plaintiff's (or its predecessor's) compliance with the condition precedent to the institution of this action. The defendant, while filing a memorandum, has provided nothing to counteract the import of the [substitute] plaintiff's affidavit and exhibits. The defendant does not provide an affidavit or exhibit which raises a genuine issue of material fact." The substitute plaintiff's supporting documentation, which was not countered by the defendant, was sufficient to establish its undisputed prima facie case.

B

We next address the defendant's argument that the court improperly concluded that her special defenses did not apply. Specifically, the defendant claimed that the plaintiff was not registered with the SEC, and thus lacked standing, that the doctrine of unclean hands should have barred summary judgment, that a statute of limitations barred the plaintiff's action, and that the defendant could not be liable for the debt pursuant to a divorce decree.[16] The court did not explicitly address any of the special defenses, but explained that "[the defendant] [did not] file any affidavit or exhibits supporting the allegations that she set forth in her special defenses" and declined to explicitly discuss the special defenses. We agree with the court that all of the alleged special defenses are without merit.

1

The defendant first argues that the court erred in failing to consider her argument that the plaintiff "is

[16] The defendant also argued in her objection to the substitute plaintiff's motion for summary judgment, that the plaintiff was not registered to do business in the state of Connecticut and that her due process rights had been violated by the plaintiff not complying with "federal and state laws regarding notification of assignments . . . and service of process." These arguments have not been advanced on appeal and are deemed abandoned.

not registered as a trustee with the [SEC] . . . .'' In support of this claim the defendant attached attestations from the SEC that the plaintiff did not appear in a search of their records. This court has rejected arguments from defendants that trust documents or pooling and servicing agreements are relevant to the issue of standing.[17]

As this court has explained, a foreclosure plaintiff is not required ''to produce evidence of ownership deriving from a pooling and servicing agreement in making its prima facie case . . . . The relevance of securitization documents [to] a lender's standing to foreclose a mortgage is questionable. Simply put, a borrower has a contract—the note and mortgage—with the owner or holder of the loan documents. The borrower, however, is not a party to the pooling and servicing agreement, commonly referred to as a trust document. . . . It is a basic tenet of contract law that only parties to an agreement may challenge its enforcement. . . . [C]lose scrutiny of trust documents and challenges to their veracity appear to offer little benefit to the court in determining the owner or holder of a note in a particular case. If admissible evidence of holder status has been presented, a borrower must then challenge those facts by competent evidence addressed to the delivery of the loan documents. In most instances, a borrower's challenge to the content of trust documents or other borrower claims appear to have little relevance to the issue of standing.'' (Citation omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 443, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018). ''A fundamental problem with the examination of standing is the confusion resulting from a failure to

[17] ''A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors.'' (Internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 313 n.4; see footnote 10 of this opinion.

distinguish the loan documents being enforced from the securitization documents that are not directly involved in the foreclosure. To have standing in a mortgage foreclosure, the plaintiff must have some interest in the note secured by the mortgage. Possession of the original note . . . can provide a basis to confer standing." (Footnote omitted.) D. Caron & G. Milne, Connecticut Foreclosures (9th Ed. 2019) § 30-3, pp. 467–68. Accordingly, the court did not err in declining to address the defendant's arguments concerning the plaintiff's status with the SEC.

2

The defendant next claims that the doctrine of unclean hands should have barred summary judgment because the plaintiff was misleading when it stated that the mortgage had been assigned since commencement of the action. "Our Supreme Court has recognized that the [a]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action. . . . Whether the trial court properly interpreted the doctrine of unclean hands, however, is a legal question distinct from the trial court's discretionary decision whether to apply it." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Lorson*, 183 Conn. App. 200, 221, 192 A.3d 439, cert. granted on other grounds, 330 Conn. 920, 193 A.3d 1214 (2018). "The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of

public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) Id., 222–23.

The defendant devoted one sentence in her objection to the motion for summary judgment to her argument that unclean hands should bar summary judgment and offered no evidence or exhibits demonstrating wilful misconduct on the part of the plaintiff other than the claim that "[the plaintiff] explicitly stated an untruth, i.e., that the assignment of mortgage had occurred 'since' its suit had 'commenced,' when in fact it had occurred prior to it." As discussed previously, it may not have been entirely accurate for the plaintiff to state that it had assigned the mortgage *since* commencement of the action, but it was not an abuse of the court's broad discretion to decline to characterize this statement as wilful misconduct, particularly because the assignment had no substantive effect on the litigation and resulted in no prejudice to the defendant.

3

The defendant next argues that the statute of limitations set forth in General Statutes § 42a-3-118 should have barred enforcement of the mortgage. This court previously has rejected the argument that § 42a-3-118 applies to a mortgage foreclosure. See *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 814–15, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005); see also D. Caron & G. Milne, supra, § 32-3:14, p. 622 ("[s]ince a foreclosure is an action sounding in equity, there is no statute of limitations defense to a mortgage foreclosure"). Accordingly, the court correctly concluded that no statute of limitations applied to the action.

4

Lastly, the defendant argues that the plaintiff could not bring a foreclosure action against her because she was

not personally liable for the debt secured by the mortgage pursuant to a divorce decree. The divorce decree, a copy of which the defendant included in her objection to the motion for summary judgment, states in relevant part: "As part of the division of property, the [h]usband shall execute a [quitclaim] deed to [the defendant] of [the property] within ten days of the date hereof. . . . The transfer of the property to [the defendant] shall not result in her assumption of any liability of the mortgage securing the property."

Although the defendant did not sign the note, her argument fails because she is the record owner of the property and she signed the mortgage above the line marked "borrower." The first page of the document states that " '[b]orrower is Andreas D. Androulidakis and [the defendant]. . . . Borrower is the mortgagor . . . ." The mortgage states on the signature page: "By signing below, [b]orrower accepts and agrees to the terms and covenants contained in this [s]ecurity [i]nstrument . . . ." "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing [of] any other act. . . . Black's Law Dictionary defines mortgagor as '[o]ne who, having all or some part of the title to property, by written instrument pledges that property for some particular purpose such as security for a debt. That party to a mortgage who gives legal title or a lien to the mortgagee to secure the mortgage loan.' Black's Law Dictionary (5th Ed. 1979). Also '[o]ne who mortgages property; the mortgage-debtor, or borrower.' . . .

"It has long been established at common law that [t]he mortgage is an incident only to the debt, which is the principal; it cannot be detached from [the debt]; distinct from the debt, it has no determinate value; and the assignee must hold it, at the will and disposal of the creditor, who has the note or bond, for which it is a collateral security." (Citations omitted; internal quota-

tion marks omitted.) *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 249, 199 A.3d 57 (2018), cert. denied, 331 Conn. 903, 202 A.3d 373 (2019). The defendant may not be personally liable for the note, but her status as a mortgagor of the property entitles the plaintiff to bring a foreclosure proceeding against her. The court correctly concluded that the divorce decree, which incorporated a contract between the defendant and Andreas, has no effect on the mortgage, which is a contract between the plaintiff and the defendant. See id., 249–50.

III

The defendant next claims that the court improperly rendered a judgment of strict foreclosure in favor of the substitute plaintiff. We do not agree.

"We review a judgment of strict foreclosure to determine whether the trial court abused its discretion. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Tarzia*, 150 Conn. App. 660, 664, 92 A.3d 983, cert. denied, 314 Conn. 905, 99 A.3d 635 (2014).

The defendant's grounds for this claim are that the issue of the substitute plaintiff's standing was never resolved by the court and that the court should have conducted an evidentiary hearing to determine when the plaintiff acquired the note. Because we have resolved these issues in favor of the substitute plaintiff, we conclude that the court properly rendered a judgment of strict foreclosure.

IV

Lastly, the defendant claims that the court improperly denied her motion to open the judgment of strict fore-

closure because she was not a party to the note.[18] Specifically, the defendant claimed that the foreclosure proceedings violated her due process rights because "as a non-obligor on the note" she could not properly challenge the standing of the plaintiff. The defendant's actions at the trial court and on appeal belie her argument. The defendant raised multiple challenges to the plaintiff's standing and each challenge was addressed by the court.

Further, because a motion to open a judgment is reviewed for an abuse of discretion, we only consider the arguments that were placed before the court. "A motion to open a judgment of strict foreclosure is addressed to the discretion of the trial court . . . and unless that discretion was abused or was based upon some error in law, the denial of the motion must stand." (Internal quotation marks omitted.) *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 848–49, 158 A.3d 405 (2017). The defendant advanced two grounds in her motion to open the judgment, claiming that "the original plaintiff filed this foreclosure suit . . . after the expiration of the statute of limitations . . . [and] the original plaintiff did not have possession of the mortgage and note at the time that it brought the suit." We have resolved these issues in favor of the plaintiff. Accordingly, the court did not abuse its discretion in denying the defendant's motion to open the judgment.

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

In this opinion the other judges concurred.

[18] The defendant, again, claims that the court should have granted her motion because the issue of the plaintiff's standing was never resolved. Additionally, the defendant repeats her argument that she was not the proper party for the foreclosure action due to the divorce decree and the fact that only Andreas signed the note. We decline to address these issues again.

ANTONIO A. *v.* COMMISSIONER OF CORRECTION*
(AC 42466)
(AC 42618)

Moll, Suarez and DiPentima, Js.

Syllabus

The petitioner, who previously had been convicted of the crimes of sexual assault in the first degree and risk of injury to a child and was found to be in violation of his probation, sought, as a self-represented party, a second writ of habeas corpus using a state supplied form. Thereafter, the habeas court granted the petitioner's request the appointment of counsel, and counsel entered an appearance on the petitioner's behalf. The respondent Commissioner of Correction, pursuant to statute (§ 52-470 (d) and (e)), filed a request for an order to show cause why the second petition should be permitted to proceed when the petitioner had filed it more than two years after the judgment on his prior petition was final. The petitioner filed an objection in which he argued that an order to show cause was premature because he needed additional time to determine whether he met the requirements of § 52-470 (d) (3) or if good cause existed for the delay and that the court should wait until an amended petition is filed before deciding whether to issue an order. In addition, the petitioner's counsel represented that she needed additional time to fully investigate and to respond to the respondent's request. The respondent filed a reply arguing that the petitioner's counsel had eight months to determine the cause for the petitioner's delay in filing the petition and requesting that the court issue the order to show cause. Thereafter, the court held an evidentiary hearing during which the petitioner's counsel did not attempt to demonstrate that good cause for the delay in filing the petition existed or to argue that she needed additional time to inquire into the cause of the delay but, rather, argued that the court should deny the respondent's request because she needed additional time to inquire into a potential actual innocence claim and to file an amended petition on the petitioner's behalf. The court dismissed the petition, and the petitioner filed a motion for reconsideration in which he argued that the court's dismissal of the petition was in error because he intended to present evidence of a longtime medical condition as cause for his delay in filing the petition. The court, treating the motion as a motion to open the judgment, denied it, and, on the granting of certification, the petitioner appealed to this court. Prior to filing an

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

appeal from the judgment on his second petition, the petitioner, as a self-represented party, filed a third habeas petition, which appeared to be a photocopy of the second petition, except for the addition of the statement "I am innocent" in the space on the form provided for reasons why his conviction was illegal and in the space provided for reasons why his incarceration/sentence was illegal. The habeas court, on the basis of its determination that the third petition was an exact copy of the second petition, rendered judgment dismissing the third petition pursuant to a rule of practice (§ 23-29) on the grounds that that the court lacked jurisdiction to consider the third petition, the third petition failed to state a claim on which relief could be granted and res judicata precluded the court from affording the petitioner relief. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court.

With respect to the petitioner's appeal in Docket No. AC 42466, held:

1. The petitioner could not prevail on his claim that the habeas court erred in failing to afford his counsel a reasonable opportunity to investigate the cause of the delay in filing the second habeas petition: there was no authority to support the petitioner's argument that the court was obligated to delay its consideration of the respondent's request for an order to show cause because the petitioner's counsel represented to the court that it was possible that, in the future, the petitioner could pursue an actual innocence claim in an amended petition, as the proper inquiry into the issue of good cause focuses only on the claims in the operative petition; moreover, the court did not abuse its discretion in refusing to afford the petitioner any additional time prior to acting on the respondent's request, as the petitioner failed to demonstrate that his counsel lacked sufficient time in which to ascertain, investigate and present to the court a reason for the delay, and this court was not persuaded that the petitioner's counsel was not on notice of the purpose of the hearing on the respondent's request.

2. The habeas court did not abuse its discretion in treating the petitioner's motion for reconsideration as a motion to open or in denying that motion: a review of the motion revealed that it was an attempt by the petitioner to establish good cause for the delay in filing his second petition by means of facts related to his alleged medical condition that were not presented at the hearing on the respondent's request for an order to show cause, and the petitioner did not attempt to demonstrate that those facts were newly discovered or that, in the exercise of due diligence, they could not have been submitted at the hearing; moreover, the petitioner's contention that the habeas court was statutorily compelled by § 52-470 (e) to consider any information presented to it establishing good cause in ruling on an order to show cause was without merit, as the court afforded the petitioner an opportunity to present evidence of good cause at the hearing and thereafter properly applied

the rules of practice to prevent him from waiting until after a judgment was rendered to establish good cause for the delay in filing the petition.

With respect to the petitioner's appeal in Docket No. AC 42618, held:

1. The habeas court abused its discretion in denying the petition for certification to appeal; the petitioner demonstrated that his claim of error relating to that court's dismissal of his third habeas petition pursuant to Practice Book § 23-29 on the ground that it failed to state a claim on which relief could be granted was debatable among jurists of reason and that the question raised was adequate to deserve encouragement to proceed further.
2. The appeal as to the petitioner's claim that the habeas court erred in denying his motion for permission to file a late amended petition for certification to appeal and for reconsideration of the denial of the petition for certification to appeal was dismissed; the petitioner failed to appeal from that court's ruling in accordance with § 52-470 (g) and our rules of practice by seeking certification to appeal from that ruling and then filing an appeal or amending his existing appeal, which deficiency was substantive in nature warranting dismissal of that portion of the appeal.
3. The habeas court's dismissal of the third habeas petition under Practice Book § 23-29 during its preliminary consideration of the petition and prior to issuing the writ of habeas corpus was procedurally improper: once that court concluded that any of the reasons set forth in the applicable rule of practice (§ 23-24) applied, it should have declined to issue the writ rather than dismissing the petition; moreover, this court was not persuaded that the proper remedy was to remand the case to the habeas court with direction to render judgment declining to issue the writ, as the habeas court's grounds for dismissing the third petition were based on its erroneous determination that the third petition was an exact copy of the second petition, and, because the allegations of innocence by the self-represented petitioner in the third petition were ambiguous and may constitute his attempt to set forth a claim of actual innocence, this court concluded, in accordance with *Gilchrist* v. *Commissioner of Correction* (334 Conn. 548), that the proper remedy was for the habeas court to issue the writ and, following the appointment of counsel, the petitioner be given the opportunity to rectify any pleading deficiencies.

Argued November 12, 2020—officially released June 1, 2021

Procedural History

Petition, in the first case, 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 petitioner's motion for reconsideration, and the

petitioner, on the granting of certification, appealed to this court; and petition, in the second case, 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; subsequently, the court, *Newson*, *J.*, denied the petitioner's motion for permission to file a late amended petition for certification to appeal and for reconsideration of the denial of the petition for certification to appeal. *Affirmed in Docket No. AC 42466*; *appeal dismissed in part*; *reversed*; *judgment directed in Docket No. AC 42618*.

Michael W. Brown, for the appellant in both cases (petitioner).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee in Docket No. AC 42466 (respondent).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, was *Gail P. Hardy*, former state's attorney, for the appellee in Docket No. AC 42618 (respondent).

Opinion

SUAREZ, J. In the present appeals, the petitioner, Antonio A., challenges the judgments rendered by the habeas court dismissing his second and third petitions for a writ of habeas corpus. In the judgment under review in Docket No. AC 42466, the habeas court dismissed the petitioner's second petition for a writ of habeas corpus pursuant to General Statutes § 52-470 on the ground that the petitioner had failed to show good cause for his delay in bringing the petition more than two years following a final judgment denying his

first petition for a writ of habeas corpus. In AC 42466, the petitioner claims that the court erred in (1) failing to afford his counsel a reasonable opportunity to investigate the cause of the delay, and (2) denying his motion for reconsideration of its ruling. In AC 42466, we affirm the judgment of the habeas court. In the judgment under review in Docket No. AC 42618, the habeas court dismissed the petitioner's third petition for a writ of habeas corpus pursuant to Practice Book § 23-29 on multiple grounds. In AC 42618, the petitioner claims that the court erred in (1) denying his petition for certification to appeal, (2) denying his motion for permission to file a late amended petition for certification to appeal and for reconsideration of the denial of his petition for certification to appeal, and (3) dismissing the habeas petition. In AC 42618, we dismiss the portion of the appeal in which the petitioner claims that the court erred in denying the motion and reverse the judgment dismissing the habeas petition.

The following facts and procedural history are relevant to the present appeals. In 2003, following a jury trial, the petitioner was convicted of two counts of risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (2) and two counts of sexual assault in the first degree in violation of General Statutes (Rev. to 2001) § 53a-70 (a) (2).[1] In addition, the trial court found the petitioner to be in violation of his probation

[1] This court has previously set forth the factual basis for the conviction as follows: "On the evening of August 12, 2001, the [petitioner] returned home from work. His daughter, the victim, who had become eight years old on the previous day, was sleeping in the living room. The [petitioner] inserted his finger into the victim's vagina two times. The victim later told her mother, who did not live with the [petitioner], what had happened and said that her vaginal area had become painful. Her mother took her to a physician, who discovered that the victim had a vaginal injury consistent with digital penetration." *State* v. *Antonio A.*, 90 Conn. App. 286, 289, 878 A.2d 358, cert. denied, 275 Conn. 926, 833 A.2d 1246 (2005), cert. denied, 546 U.S. 1189, 126 S. Ct. 1373, 164 L. Ed. 2d 81 (2006).

related to a prior narcotics conviction. As a result of this finding, the petitioner's probation was revoked, and he was resentenced to four years of incarceration. This sentence was consecutive to the sentence imposed for his conviction of sexual assault and risk of injury to a child. The petitioner was sentenced to a total effective term of incarceration of forty-four years, execution suspended after twenty-four years, followed by ten years of probation and lifetime registration as a sex offender. On direct appeal, this court affirmed the judgment of conviction, and both our Supreme Court and the Supreme Court of the United States denied subsequent petitions for certification to appeal from this court's judgment affirming his conviction. *State* v. *Antonio A.*, 90 Conn. App. 286, 878 A.2d 358, cert. denied, 275 Conn. 926, 833 A.2d 1246 (2005), cert. denied, 546 U.S. 1189, 126 S. Ct. 1373, 164 L. Ed. 2d 81 (2006).

In October, 2009, the petitioner filed an amended petition for a writ of habeas corpus (first petition) in which he claimed that his criminal trial attorney had rendered ineffective assistance in a variety of ways. Following a trial, the habeas court denied the petition. Following a grant of certification to appeal, on March 18, 2014, this court affirmed the judgment of the habeas court. *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 87 A.3d 600, cert. denied, 312 Conn. 901, 91 A.3d 907 (2014). On May 21, 2014, our Supreme Court denied the petitioner's petition for certification to appeal from this court's judgment. *Antonio A.* v. *Commissioner of Correction*, 312 Conn. 901, 91 A.3d 907 (2014).

On October 6, 2017, the petitioner, in a self-represented capacity, filed a second petition for a writ of habeas corpus (second petition). The petitioner utilized a state supplied form. In responding to question five on the form, in which the petitioner was invited to specify why his "conviction is illegal," the petitioner wrote that his sentencing was illegal because the "court found

[him] guilty on falsified information and improper/fictitious evidence" and that his criminal trial counsel did not render proper representation in that "prior counsel ignored mitigating evidence, did not investigate the state's case, did not protect [the petitioner] from the prejudice, malicious, intentional conduct." As additional grounds for challenging the conviction, the petitioner alleged: "[W]as not given appropriate interpreter (Spanish); jury was forced to find me guilty; there is no physical evidence supporting unstable statements; contradictory statements."

In response to question six on the form, in which the petitioner was permitted to specify why his "incarceration/sentence is illegal," the petitioner wrote: "Because of misconduct of all counsel involved in my case: Intentional, malicious, prejudicial, discriminatory (but is not limited to)." In box seven on the form, the petitioner alleged that the claims raised in the second petition had not been previously raised at trial, in a direct appeal, or in a previous habeas petition. He explained: "New evidence: Prior counsel did not present everything he was shown and or told or support [the petitioner] when the judge himself forced the jury to get a conviction; ineffective assistance of defense counsel; conflict of interest across the board (state attorney, defense attorney, judicial authority)."

The habeas court granted the petitioner's request for the appointment of counsel. On December 21, 2017, the Law Office of Christopher Duby, LLC, entered an appearance on the petitioner's behalf.

On August 9, 2018, the respondent, the Commissioner of Correction, pursuant to § 52-470 (d) and (e), filed a request for an order to show cause why the petitioner should be permitted to proceed with the second petition after having filed it more than two years after the judgment denying the first petition became final on May 21,

2014, when our Supreme Court denied the petitioner's petition for certification to appeal.[2] According to the respondent, the petitioner brought the second petition three years, four months, and fifteen days after the judgment denying the first petition became final and he did not rely on "the retroactive application of a new constitutional right . . . ." Thus, the respondent argued, the rebuttable presumption in § 52-470 (d), that the petition had been delayed without good cause, was implicated in the present case.

On August 13, 2018, the petitioner, through his counsel, filed an objection to the respondent's request. The

[2] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

petitioner acknowledged that he filed the second petition "more than three years after [the] prior petition became final" but argued that an order to show cause under § 52-470 would be "premature." The petitioner stated that he needed additional time to determine whether he met the requirements of § 52-470 (d) (3) or if good cause existed. In this regard, the petitioner argued that his counsel was not "tied" to the claims set forth in his second petition and that the court "should wait until [an] amended petition is filed to determine whether there is such a violation requiring an order to show cause." In the petitioner's objection, his counsel represented that, because she had not yet received case files from *all* of the petitioner's prior attorneys, she was "not able to properly investigate the petitioner's claims to determine whether a constitutional claim under § 52-470 (d) (3) or good cause exists. Therefore, the court should grant [counsel] additional time to fully investigate and respond to the respondent's request to show cause."

The respondent filed a reply in which he argued that, although § 52-470 (e) affords a petitioner "a meaningful opportunity to investigate the basis for the delay" in bringing a subsequent petition, that provision was "not a license to spend years exploring the merits of untimely claims." The respondent argued that the petitioner's counsel had eight months to determine why the petitioner waited so long to bring the second petition and requested that "the court issue the order to show cause and grant the petitioner no more than three months to respond to that order. At that time, if the court finds that the petitioner is likely to establish good cause for his delay, it can order that he be given additional time."

On the basis of the respondent's request and the petitioner's objection thereto, the court, *Newson*, *J.*, scheduled an evidentiary hearing on the request for September 12, 2018. At the hearing, the petitioner's

counsel altered the focus of the objection to the respondent's request. At that time, she did not attempt to demonstrate that good cause for the delay in filing the second petition existed or to argue that she needed additional time to inquire into the cause of the delay. Instead, she argued that the court should deny the respondent's request because, under the existing circumstances, it would be appropriate for the respondent to assert the issue of impermissible delay under § 52-470 as a basis for dismissal, if at all, in its return as a special defense to the petition, and only after she had an opportunity to file an amended petition on the petitioner's behalf. The petitioner's counsel agreed with the court that, like other motions to dismiss, the respondent's request was supposed to be evaluated on the basis of the operative petition before the court at the time the motion to dismiss is filed. Nonetheless, the petitioner's counsel argued that, because the petitioner had not admitted his guilt in prior proceedings, a claim of actual innocence, which could be raised *at any time*,[3] was "a potential claim" that counsel could raise on his behalf in a future amended petition, despite the fact that the petitioner, while a self-represented litigant, failed to include such a claim in his petition. The petitioner's counsel argued: "This is a circumstance where . . . I just received the files from some of his original counsel, and I still do not know if an actual innocence claim is actually available. However, from talking to [the petitioner], it appears that actual innocence is on the table as a potential claim, but, as of right now, I do not have the information and the evidence to indicate that it's true." The petitioner's counsel stated that it was important for her to have all of trial counsel's files "to determine whether there is new evidence" on which she could rely in advancing an actual innocence claim.

[3] General Statutes § 52-470 (f) provides in relevant part: "Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence . . . ."

At the hearing, the respondent disagreed that the request for an order to show cause should be denied because an amended petition had not yet been filed on the petitioner's behalf by his assigned counsel. The respondent's counsel, focusing on the fact that the petitioner's counsel had merely viewed a claim of actual innocence as a *potential* claim, argued: "If counsel is able to represent as an officer of the court that she has a good faith basis to pursue an actual innocence claim, the court may exercise its discretion and give her time to investigate that. But just to say, well, he said he's not guilty, and, therefore, [the court] can't dismiss [the petition under § 52-470] because we may in the future raise an actual innocence claim is vastly different from making a good faith representation. So we will ask the court to proceed."

In its memorandum of decision of November 7, 2018, the court rejected the petitioner's argument that the respondent's request was premature. The court relied on *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 721, 189 A.3d 578 (2018), for the proposition that "a hearing under § 52-470 [e] may be held at any time, at the discretion of the court, and that there is no requirement that pleadings be closed before a hearing is held." The court observed that a request brought under § 52-470 (e) did not require the court to assess "the substance or legal viability of the claims in the petition, but only whether there was good cause for commencing the habeas action beyond the statutory deadline." (Internal quotation marks omitted.) Thus, the court reasoned, the petitioner's arguments concerning a potential actual innocence claim or the fact that counsel had not yet amended his self-represented petition were immaterial to the court's analysis.

The court also rejected the petitioner's argument that his counsel did not have a meaningful opportunity to respond to the respondent's request. The court, relying

on relevant case law, stated that it had to "determine whether the petitioner has had an opportunity that would comport with due process to investigate whether there was a substantial reason for [the petitioner's] having failed to file this petition within two years from May 21, 2014." The court carefully considered the length of time that the petitioner's counsel had been involved in the case. Particularly, the court observed that the petitioner's counsel had filed an appearance on December 21, 2017, nine months prior to the hearing on the respondent's request and that the court held a hearing on the respondent's request five weeks after it was filed. The court stated that, in light of the narrow issue to be addressed at the hearing, the petitioner's counsel "was unable to offer a single reason for the delay in filing the present habeas petition." The court relied on the representations of the petitioner's counsel that she had received case files from only some of the petitioner's prior counsel. In particular, the court deemed it significant that, in February, 2018, the petitioner's counsel had received the case file related to the first petition. As the court stated, "[s]urely, having received cooperation from the lawyer who immediately preceded her in representing the petitioner some seven months prior to the request to show cause hearing provided [the] petitioner's counsel with a fair opportunity to complete, or at least an obvious location to start, an investigation into the reasons for the delay of more than two years in filing the present petition."

The court concluded its analysis: "In summary, the court finds that the petitioner had a 'meaningful opportunity' to investigate whether any 'good cause' for filing the present petition more than two years after the judgment in his prior habeas case became final. . . . Despite that, the petitioner has offered no 'good cause,' no 'substantial reason,' in fact, no reason at all, for filing the present petition more than three years after the

decision in his prior habeas [case] became final on May 21, 2014. . . . As such, the petitioner has failed to rebut the presumption that the delay of more than two years was without good cause." (Citations omitted.) The court dismissed the second petition.

On November 14, 2018, the petitioner, through counsel, filed a motion, titled "motion for reconsideration," in which he argued that the court's dismissal of his second petition was in error because he intended to present evidence of a longtime medical condition as cause for his delayed petition. In an order dated November 20, 2018, the court treated the motion for reconsideration as a motion to open the judgment and denied it on the ground that the petitioner had been afforded an opportunity to advance reasons in support of his objection to the request for an order to show cause, and, in the present motion to open, he was relying on reasons that were within his personal knowledge but were not disclosed by him at the September 12, 2018 hearing related to the respondent's request and his objection thereto.

Thereafter, on December 4, 2018, the court granted the petitioner's petition for certification to appeal. See General Statutes § 52-470 (g). On January 9, 2019, the petitioner, through counsel, filed the appeal in AC 42466.

Meanwhile, on December 18, 2018, the petitioner, in a self-represented capacity, filed a third petition for a writ of habeas corpus (third petition), the dismissal of which is the subject of AC 42618. With two exceptions, the third petition appears to be a photocopy of the second petition.[4] In the space provided for question five on the state supplied form, in which the petitioner was

[4] In question seven on the state supplied form, the petitioner was asked to specify whether any of the claims raised in this petition had "been previously raised at trial, direct appeal or in any previous habeas petition . . . ." Despite having filed the second petition, the petitioner checked the box marked, "No."

invited to specify reasons why his "conviction is illegal," the petitioner added "I am innocent" to the information previously set forth therein. In the space provided for question six on the form, in which the petitioner was asked to set forth reasons that his "incarceration/sentence is illegal," the petitioner added "I am innocent" to the information previously set forth therein.

On December 24, 2018, the court, *Newson*, *J.*, dismissed the third petition pursuant to Practice Book § 23-29.[5] The court's notice of dismissal stated in relevant part: "The petition for a writ of habeas corpus is dismissed pursuant to Practice Book § 23-29 (a) (1) in that this court lacks jurisdiction to consider this petition and the allegations therein on the grounds that this court's November 7, 2018 decision dismissing an exact copy (literally) of the present petition . . . is currently being appealed (see Practice Book § 61-11 (a) (rules on automatic stay)), and (2) the petition fails to state a claim upon which this court could grant relief, given [the] pendency of an appeal from the prior identical petition and automatic stay required while the appeal is pending (Practice Book § 61-11 (a)), and (3) res judicata, in that the present petition presents the identical grounds as a prior petition and fails to state new facts or offer new information not reasonably available at the time of the prior petition."

On January 11, 2019, the petitioner, as a self-represented litigant, filed a petition for certification to appeal from the court's judgment dismissing the third petition.

[5] Practice Book § 23-29 provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; (4) the claims asserted in the petition are moot or premature; (5) any other legally sufficient ground for dismissal of the petition exists."

The petitioner set forth the grounds for the appeal on his "application for waiver of fees, costs, and expenses and appointment of counsel on appeal" form: "Whether the court abused its discretion when it states [that] the petition fails to state a claim upon which this court could grant relief; such other errors as are revealed upon review of the transcript." The court denied the petition on that same day.[6] The petitioner, through counsel, thereafter filed an appeal, AC 42618, from the court's denial of his petition for certification to appeal and the judgment dismissing the third petition.

On July 11, 2019, the petitioner, through counsel, filed a motion for permission to file a late amended petition for certification to appeal and for reconsideration of the denial of his petition for certification to appeal, in which he argued that the court should grant the amended petition in the interest of justice. The amended petition, which was attached to the motion, set forth five grounds.[7] The motion also stated: "The claims that undersigned counsel has identified appear to be implicit in the petition for certification to appeal that was filed by the petitioner in his initial petition for certification to

[6] The court, however, granted the petitioner's request for counsel.

[7] The proposed amended petition set forth the following legal claims: "(1) The habeas court erred by dismissing the petitioner's [self-represented third] petition as [being] 'identical' to the [second] petition that was dismissed as untimely . . . because the [self-represented third] petition included claims of innocence that were not included in the [self-represented second] petition . . . .

"(2) The habeas court erred by dismissing without a hearing, counsel, or the opportunity to amend, a [self-represented] petition that includes a plain assertion of actual innocence . . . .

"(3) The habeas court erred by dismissing the [self-represented third] petition on the grounds that the petition fails to state a claim upon which this court could grant relief . . . .

"(4) The habeas court erred by concluding that the petitioner's claims and/or finding of untimeliness in [connection with the second petition] were subject to res judicata; and,

"(5) The habeas court erred by relying upon the automatic stay provisions of Practice Book § 61-11 in dismissing the petitioner's amended petition."

appeal, but the petitioner, acting as a [self-represented] litigant without the assistance of counsel, may have under articulated the nature of the claims to be raised on appeal.'' On July 15, 2019, the court, *Newson*, *J.*, denied the petitioner's motion. Thereafter, the petitioner did not attempt to appeal from the ruling. Additional facts will be set forth as necessary in the context of the claims raised on appeal.

I

AC 42466

A

The first claim raised by the petitioner in AC 42466 is that the court erred in failing to afford his counsel a reasonable opportunity to investigate the cause of the delay in filing the second petition.[8] We disagree.

As we will explain in greater detail in this part of the opinion, the court's determination of when it should act on a request brought by the respondent for an order to show cause why an untimely petition should be permitted to proceed is reviewed under the abuse of discretion standard of review. See *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 724. ''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. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . It goes without saying that the term abuse of discretion does not imply

[8] As a preface to his analysis of this claim, the petitioner states that the court violated his right to due process under the federal and state constitutions by virtue of the procedures it followed and its ultimate dismissal of his second petition. The petitioner's appellate brief, however, does not contain an analysis of the claim under the constitutional provisions he has cited in his brief. Accordingly, this aspect of the claim is deemed abandoned. A bald assertion of error without more is insufficient to warrant appellate review. See, e.g., *State* v. *Franklin*, 20 Conn. App. 96, 99, 563 A.2d 1383 (1989).

a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds. . . . In determining whether there has been an abuse of discretion, much depends upon the circumstances of each case." (Citations omitted; internal quotation marks omitted.) *State* v. *Arbour*, 29 Conn. App. 744, 748, 618 A.2d 60 (1992).

First, the petitioner argues that the court's ruling reflected an abuse of its discretion because the respondent, in his reply to the petitioner's objection to the request for an order to show cause, urged the court to "issue the order to show cause and grant the petitioner no more than three months to respond to that order." As stated previously, the petitioner, in his objection to the respondent's request for an order to show cause, stated that he needed "additional time" to determine if he satisfied § 52-470 (d) (3) or if good cause existed. Our review of the respondent's reply indicates that the respondent's suggestion was an attempt to balance between the petitioner's right to have an opportunity to investigate the basis of the delay and the fact that the petitioner seemingly sought an open-ended period of time in which to determine the answer to a discrete issue, namely, why there was a delay. The respondent, noting the length of time that had already passed, did not concede that an order to show cause was premature. Even assuming that the respondent made such a concession at trial, however, the petitioner has not presented this court with any authority to support his argument that it would have been binding on the habeas court. As we will discuss in greater detail, the petitioner's principal objection to the timing of the hearing was his flawed belief that the habeas court was obligated to wait for the petitioner's counsel to file an amended petition. Moreover, the petitioner failed to demonstrate that his counsel lacked sufficient time in which to ascertain, investigate and present a reason for his delay in filing the second petition. For these reasons, we are

not persuaded that the court's failure to agree with the respondent's proposal reflected an abuse of discretion.

Second, the petitioner argues that any potential claim of actual innocence "should have been sufficient to delay or overcome the good cause stage." According to the petitioner, because of the representation of his counsel that it was possible that she would pursue an actual innocence claim in an amended petition in the future, the court was obligated to delay the timing of the hearing and to afford counsel "sufficient time to determine whether they have a good faith basis to present such a weapon to survive possible dismissal."[9]

This argument presents an issue of statutory interpretation over which we exercise plenary review in accordance with the plain meaning rule codified in General Statutes § 1-2z.[10] See, e.g., *State* v. *Peters*, 287 Conn. 82,

[9] According to the petitioner, it is imperative that such a representation by counsel "pause the show cause proceedings" because (1) "the state provided [self-represented] petition for a writ of habeas corpus form does not provide a place for petitioners to indicate that they wish to raise a claim of actual innocence" and (2) "without the ability of habeas counsel to make a representation as an officer of the court that an actual innocence claim may be forthcoming, serious ethical difficulties arise." With respect to the second consideration, the petitioner argues that it was "problematic" for counsel to state to the court that the petitioner has expressed his belief in his innocence and that she had not fully investigated the claim. The petitioner argues that, "[f]or obvious reasons, this is problematic in that it not only requires privileged communications to be offered to avoid dismissal, [but] it also exposes strategic matters that should be protected until the petitioner files an amended petition and proceeds to a trial on the merits of his claims."

These considerations are unpersuasive. For the reasons set forth in our analysis, our proper focus is on the claims raised in the petition before the habeas court, whether the petitioner has demonstrated good cause for the delay in bringing the petition, and whether additional time was necessary to investigate the cause of the delay in filing the claims in the petition, not on whether counsel needed additional time to investigate whether other claims not alleged in the petition might exist.

[10] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from 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."

87–88, 946 A.2d 1231 (2008). By its terms, § 52-470 (d) applies "[i]n the case of *a petition filed* subsequent to a judgment on a prior petition challenging the same conviction," and it gives rise to "a rebuttable presumption that the filing of *the subsequent petition* has been delayed without good cause if *such petition* is filed" after the occurrences specified therein. (Emphasis added.) Pursuant to § 52-470 (e), "[i]n a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why *the petition* should be permitted to proceed." (Emphasis added.) Moreover, the statute provides that, "[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss *the petition*." (Emphasis added.) General Statutes § 52-470 (e).

As the emphasized language reflects, once the respondent relies on the rebuttable presumption in § 52-470, the court's good cause inquiry is properly focused not on a hypothetical petition that the petitioner may file in the future but on the petition that has been filed by the petitioner. In the present case, it is not in dispute that the second petition neither invoked a retroactive constitutional or statutory right under § 52-470 (d) (3) nor asserted a claim of actual innocence.

Our Supreme Court's interpretation of the relevant statutory provisions provides additional guidance. In *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 712, our Supreme Court considered whether "§ 52-470 divests the habeas court of discretion to determine when it should act on a motion by the respondent . . . for an order to show cause why an untimely petition should be permitted to proceed." The court, rejecting the habeas court's determination that the statute deprived it of discretion to act on the respondent's motion until the close of all pleadings, explained: "In

§ 52-470 (e), the legislature outlined the procedure by which the respondent may rely on the rebuttable presumption established by § 52-470 (c) and (d) that no good cause exists for a delay in filing the petition. . . . We begin with two observations about § 52-470 (e). First, in contrast to the court's inquiry as to whether good cause exists for trial, which the court may undertake either on its own motion or by the motion of any party; General Statutes § 52-470 (b) (1); the court's duty to inquire whether there is good cause for a delay is triggered only upon the request of the respondent. If the respondent makes such a request, the court shall issue an order to show cause. Second, and more important, nothing in the language of § 52-470 (e) expressly clarifies or limits the *timing* of that order. As opposed to the language of § 52-470 (b), which specifically and expressly requires that the court wait until after the close of all pleadings to address whether there is good cause for trial, § 52-470 (e) contains no such time limit. If the legislature had intended to incorporate a time constraint into § 52-470 (e), it could have done so. . . .

"Notably, as compared to the procedures available under § 52-470 (b) to demonstrate that good cause exists for trial, § 52-470 (e) provides significantly less detail regarding the procedures by which a petitioner may rebut the presumption that there was no good cause for a delay in filing the petition. Specifically, § 52-470 (e) merely provides in relevant part that [t]he petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section.

"Nothing in subsection (e) expressly addresses whether the petitioner may present argument or evidence, or file exhibits, or whether and under what circumstances the court is required to hold a hearing, if the court should determine that doing so would assist it in making its determination. The only express procedural requirement is stated broadly. The court must provide the petitioner with a meaningful opportunity both to investigate the basis for the delay and to respond to the order to show cause. General Statutes § 52-470 (e). The phrase meaningful opportunity is not defined in the statute. That phrase typically refers, however, to the provision of an opportunity that comports with the requirements of due process. . . . The lack of specific statutory contours as to the required meaningful opportunity suggests that the legislature intended for the court to exercise its discretion in determining, considering the particular circumstances of the case, what procedures should be provided to the petitioner in order to provide him with a meaningful opportunity, consistent with the requirements of due process, to rebut the statutory presumption.

"We envision that, in the majority of cases, the question of whether a petitioner has demonstrated good cause for delay will not require that the habeas court engage in an inquiry that is similar in scope to the one required for the screening of meritless petitions pursuant to § 52-470 (b). The absence of detailed procedural requirements in § 52-470 (e), as compared with those identified in § 52-470 (b), is consistent with that general expectation. In many cases, the habeas court will likely be able to resolve the question of whether there was good cause for delay soon after the respondent files a motion requesting an order to show cause. In some instances, however, the basis for a delay may be inextricably intertwined with the merits of the petition. Under such circumstances, the court will be required

to engage in a more substantive inquiry, which will more closely resemble the type of inquiry contemplated under § 52-470 (b). Section 52-470 (e) expressly recognizes that possibility by stating good cause for delay may include the discovery of new evidence *which materially affects the merits of the case* and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section. . . .

"In the absence of any language in [§ 52-470 (e)] cabining the discretion of the habeas court with respect to the timing of the issuance of an order to show cause for delay, we conclude that the legislature intended that the court exercise its discretion to do so when the court deems it appropriate given the circumstances of the case. This conclusion strikes the appropriate balance between the principles of expediency and due process. . . . Our conclusion that the habeas court is not required to wait until the close of all pleadings to issue an order to show cause why the petition should be permitted to proceed when there is a rebuttable presumption of delay is consistent with the purpose underlying [Public Acts 2012, No. 12-115, § 1]—to screen out meritless and untimely petitions in an expeditious manner. . . . Our conclusion also protects the petitioner's right to due process by giving proper effect to the requirement in § 52-470 (e) that the habeas court provide the petitioner with a meaningful opportunity to rebut the presumption that he lacked good cause for the delay. As we have explained, in some instances, the provision of such meaningful opportunity will require the habeas court to determine whether, under the particular circumstances of the case, the basis for delay is intertwined with the merits of the petition.

"Our statutory construction is also consistent with the bedrock principle that [t]he trial court possesses inherent discretionary powers to control pleadings,

exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . Finally, we observe that the rules of practice expressly recognize the habeas court's discretion over scheduling. . . .

"The habeas court's exercise of its discretion to manage the case remains the best tool to guarantee that the case is disposed of as law and justice require; General Statutes § 52-470 (a); as the habeas judge is in the best position to balance the principles of judicial economy and due process." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 720–26.

Thus, as we observed previously, in *Kelsey*, our Supreme Court concluded that the habeas court had discretion to determine when it should act on a request brought by the respondent for an order to show cause why an untimely petition should be permitted to proceed. Id, 724. It rejected the view that, under § 52-470, the court lacked the discretion to act on the request until the pleadings in the case were closed. Id. In light of the interpretation of the statute set forth previously, informed by *Kelsey*, we reject the petitioner's argument that the habeas court in the present case lacked the discretion to act on the respondent's request because the petitioner's counsel stated that it was possible that the petitioner could bring an amended petition, including a claim of actual innocence, in the future. There is no authority in support of the petitioner's view that the court was obligated to delay its consideration of the respondent's request.[11]

[11] The petitioner also argues that the court's subsequent dismissal of his third petition, which we address in part II of this opinion, "displays the error of the habeas court in denying the petitioner a further opportunity to investigate and respond to the show cause order because . . . between the two proceedings in this matter . . . the habeas court has essentially closed the courthouse doors to the petitioner's claim of innocence, which is expressly prohibited by . . . § 52-470 (f)." The petitioner has failed to dem-

Third, the petitioner argues that the court's determination, that his counsel had sufficient time in which to respond to the state's request, was flawed and that the court acted arbitrarily in denying his counsel's request for "a continuance" in this matter. The petitioner argues that it was overly simplistic for the court to suggest that counsel needed to determine only whether the second petition was untimely but that counsel also needed to determine whether there was good cause for the delay and whether "the petitioner was pursuing a claim that was exempt from the timeliness questions." The petitioner also argues that the court failed to give proper weight to the fact that the files of previous counsel that had not yet been made available to the petitioner could have contained evidence to support a claim of actual innocence.

In the petitioner's objection to the respondent's request for an order to show cause, he primarily argued that the request was premature because the issue could not be resolved until an amended petition was filed. The petitioner thereby linked the inquiry into good cause for the delay with the filing of an amended petition. In addition, the petitioner's counsel argued that additional time was needed to investigate the issue of whether the petitioner, in bringing the second petition, had acted with good cause. Our careful review of the arguments advanced by the petitioner's counsel at the September 12, 2018 hearing reveals that counsel did not argue that a continuance was necessary to investigate whether good cause existed for the delay in bringing the second petition. Rather, counsel argued that additional time was needed in which to investigate whether a claim could be brought that fell outside of the two year time limit in § 52-470. Presently, the petitioner's argument is not that the court failed to afford counsel sufficient

onstrate how the court's dismissal of the third petition is relevant to our analysis of its judgment dismissing the second petition.

time to investigate the basis for the delay in bringing the petition that was before the court but that the court failed to afford counsel additional time in which to investigate claims that were not part of the operative petition before the court.

For the reasons discussed previously in this opinion, the petitioner's argument is legally flawed because the proper good cause inquiry focuses on the operative petition before the court, not on claims that are not part of the operative petition. Here, as we have observed, the operative petition did not set forth a claim of actual innocence. Moreover, as our previous discussion of *Kelsey* reflects, in most cases, an inquiry into good cause will not require an evaluation of the merits of a petition, but "the habeas court will likely be able to resolve the question of whether there was good cause for the delay soon after the respondent files a motion requesting an order to show good cause." *Kelsey* v. *Commissioner of Correction*, supra, 329 Conn. 723.

The operative second petition was untimely, and, therefore, the proper inquiry into the issue of good cause is based only on the reasons for the petitioner's delay in bringing the second petition. The court properly focused on the time that had passed between the time at which counsel was appointed to represent the petitioner and the hearing on the respondent's request. The court also focused on the time that had passed between the date the respondent had filed his request for an order to show cause and the date of the hearing on the request. At no time has the petitioner demonstrated that his counsel lacked sufficient time in which to ascertain, investigate, and present a reason for the delay to the court. Accordingly, we are not persuaded that the court abused its discretion in refusing to afford any additional time to the petitioner prior to acting on the respondent's request.

Fourth, the petitioner argues that the court erred by issuing a ruling on the substantive issue raised by the

respondent, namely, whether good cause existed. The petitioner argues that his counsel objected to the timing of the hearing but that she did not present "a substantive response to the order to show cause before the habeas court issued its memorandum of decision because [his counsel] had not had a meaningful opportunity to complete [an] investigation into whether there was good cause for the petitioner's apparent delay in filing the [second] petition." The petitioner argues that, at the hearing, the court did not indicate that it was affording the petitioner his "only opportunity to offer substantive evidence or information in support of an attempt to overcome the presumption of delay."

This argument is belied by the notice of the hearing that was sent to the parties in response to the respondent's request for an order to show cause. In its order, the court stated that it was scheduling an "evidentiary hearing" on the respondent's request. Moreover, as we have stated previously, at the hearing, the petitioner's counsel did not argue that she needed additional time in which to investigate the reasons for the delay in bringing the second petition but argued that the court was precluded from acting on the respondent's request for an order to show cause unless and until an amended petition was filed on the petitioner's behalf. The court neither suggested that counsel should limit her presentation to the reasons why the court should not act on the request nor precluded counsel from presenting any argument or evidence with respect to the issue of good cause for the delay. Accordingly, we are not persuaded that counsel was not on notice of the purpose of the hearing.

B

Next, the petitioner claims that the court erred in denying his motion for reconsideration of its ruling. We disagree.

As we stated in our discussion of the procedural history, the court dismissed the second petition on November 7, 2018. On November 14, 2018, the petitioner, through counsel, filed a motion for reconsideration in which he stated that "[the] dismissal was in error, as the petitioner's counsel intended to, in the absence of the court's decision regarding the petitioner's objection to [the] respondent's motion for cause and request for additional time, present evidence of the petitioner's longtime medical condition as cause for his delayed petition." The motion stated in relevant part that, "during the approximately three years between his prior habeas [action] and filing [the second] petition, [the] petitioner was focused solely on his survival. Once he became healthy enough to file his petition, he did so in October, 2017." Attached as exhibits to the motion were a document titled "Petitioner's Offer of Proof"[12] and a signed affidavit of the petitioner, submitted "as evidence that his delayed petition was as a result of his ongoing medical conditions and their related treatments."

As we have explained, the court treated the motion for reconsideration as a motion to open brought under General Statutes § 52-212a[13] and Practice Book § 17-4.[14]

[12] The "[o]ffer of [p]roof" consisted of sixteen proposed findings in support of a determination by the habeas court that good cause existed for the petitioner's delay in bringing the second petition. The proposed findings are generally related to the procedural history of his second petition, the petitioner's health issues, and the effects of those health issues.

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

[14] Practice Book § 17-4 (a) provides: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court."

In denying the motion, the court stated: "Counsel for the petitioner first filed an appearance in the file on December 21, 2017. The petitioner was provided with advance notice by way of the request for an order to show cause filed by the respondent on August 7, 2018, as well as the order and notice of hearing provided by the court. A hearing was held before the court on September 12, 2018, where the petitioner was provided with an opportunity to advance reasons in support of [his] objection to the respondent's motion. The court did not issue a written decision on the matter until November 7, 2018. The petitioner now offers reasons that were wholly within the petitioner's personal knowledge as a basis to [open] the judgment. Under these facts, the court finds no good and compelling reason to modify or vacate the judgment." (Internal quotation marks omitted.)

According to the petitioner, "[t]he habeas court made a legal error when it interpreted the petitioner's motion for reconsideration as a motion to [open]. Because the petitioner filed the motion for reconsideration within the [twenty] day period for reargument provided by Practice Book § 11-12, the habeas court was compelled to treat it as a motion to reargue, and was without basis to consider the motion as a motion to [open] the judgment." The petitioner also argues that the court improperly penalized him for his counsel's failure to present the reasons set forth in the motion at the hearing on the respondent's request for an order to show good cause. The petitioner argues: "Seemingly, the habeas court's analysis that it was not compelled by the petitioner's medical issues sufficiently to find them to be a good and compelling reason to modify or vacate the judgment was based entirely on a critique of counsel's handling of the petitioner's matter, and not on a substantive review of the information and materials presented." (Internal quotation marks omitted.) The petitioner

asserts that "[t]he language of § 52-470 (e) makes clear that, if the habeas court is presented with information establishing good cause for delay, it must consider it in ruling on an order to show cause."

The petitioner's claim rests on the legally unfounded assertion that, because he could have timely filed a motion for reconsideration at the time at which he filed the motion at issue and he titled the motion a "motion for reconsideration," the court was obligated as a matter of law to treat the motion as a motion for reconsideration. Our decisional law provides that "[t]he nature of a motion, however, is not determined by its title alone. A court has broad discretion to treat a motion for clarification of a judgment or a motion to reargue a judgment as a motion to open and modify the judgment . . . ." (Internal quotation marks omitted.) *Silver* v. *Silver*, 200 Conn. App. 505, 520, 238 A.3d 823, cert. denied, 335 Conn. 973, 240 A.3d 1055 (2020); see also *Drahan* v. *Board of Education*, 42 Conn. App. 480, 489, 680 A.2d 316 ("[w]hen a case requires this court to determine the nature of a pleading filed by a party, we are not required to accept the label affixed to that pleading by the party"), cert. denied, 239 Conn. 921, 682 A.2d 1000 (1996).

Motions for reargument and motions for reconsideration are nearly identical in purpose.[15] "[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . A reconsideration implies reexamination and possibly a different decision by the [court] which initially decided it. . . . While a modification hearing entails the presentation of evidence of a substantial change in circumstances, a reconsideration

[15] We observe that, in his appellate brief, the petitioner cites case law governing motions for reargument and argues that this court should "remand this matter with instructions to grant the motion to *reargue* . . . ." (Emphasis added.)

hearing involves consideration of the trial evidence in light of outside factors such as new law, a miscalculation or a misapplication of the law." (Citations omitted; internal quotation marks omitted.) *Jaser* v. *Jaser*, 37 Conn. App. 194, 202–203, 655 A.2d 790 (1995). "[T]he purpose of reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 47 n.13, 231 A.3d 297, cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020); see also *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001).

In contrast, a motion to open affords a litigant a narrow window through which to present evidence that could not have been known and with reasonable diligence offered at the time of trial. Practice Book § 17-4 (a) provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. . . ." "The principles that govern motions to open or set aside a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good

and compelling reason for its modification or vacation." (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 94, 952 A.2d 1 (2008). "One of the essential requirements for the granting of [a motion to open] is that the evidence which the party seeks to offer could not have been known and with reasonable diligence produced at trial." *Corbin* v. *Corbin*, 179 Conn. 622, 626, 427 A.2d 432 (1980), citing *Stocking* v. *Ives*, 156 Conn. 70, 72, 238 A.2d 421 (1968); see also *Fortin* v. *Hartford Underwriters Ins. Co.*, 139 Conn. App. 826, 843–44, 59 A.3d 247 (materials submitted to court in connection with motion to reargue must be shown to be "newly discovered or that, in the exercise of due diligence, they could not have been submitted earlier"), cert. granted, 308 Conn. 905, 61 A.3d 1098 (2013) (appeal withdrawn November 26, 2014).

We conclude that the court did not abuse its broad discretion in treating the petitioner's motion for reconsideration as a motion to open.[16] A review of the motion reveals that it was an attempt by the petitioner to supplement the record of what was presented at the September 12, 2018 hearing on the respondent's request for an order to show cause. In other words, the petitioner's motion was an attempt to establish good cause by means of facts that were not presented to the court at the hearing. In the motion, the petitioner did not attempt to demonstrate that the facts on which the motion was

[16] We note that, even if the court improperly treated the motion for reconsideration as a motion to open, the petitioner has failed to demonstrate that he was thereby prejudiced. Relying on the authorities previously set forth in our analysis of this claim, we observe that a motion for reargument or reconsideration does not afford an opportunity to present new evidence. The purpose of the petitioner's motion, regardless of how it was titled, was not based on a misapprehension of law or fact but was to establish good cause by means of facts that were known to the petitioner at the time of the hearing, but not presented to the court at the hearing. Accordingly, the petitioner was not entitled to relief even if the court should have treated the motion in accordance with the manner in which he titled it, as a motion for reconsideration..

based were newly discovered or that, in the exercise of due diligence, they could not have been submitted at the hearing. To the contrary, the facts on which the motion was based, relating to alleged ailments of the petitioner, certainly were known to the petitioner prior to the hearing.

"Habeas corpus is a civil proceeding. . . . The principles that govern motions to open or set aside a civil judgment are well established. A motion to open and vacate a judgment . . . is addressed to the [habeas] court's discretion, and the action of the [habeas] court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 163 Conn. App. 556, 563, 134 A.3d 1253, cert. denied, 323 Conn. 909, 149 A.3d 980 (2016); see also *Gillis* v. *Gillis*, 214 Conn. 336, 340, 572 A.2d 323 (1990) (abuse of discretion standard of review applies to rulings on motions to open). For the reasons previously discussed, we readily conclude that the petitioner is unable to demonstrate that the court's ruling on the motion to open reflects an abuse of discretion.

The petitioner argues that the court was "statutorily compelled" by § 52-470 (e) to consider any information presented to it establishing good cause. He argues that the court "must consider it *in ruling on an order to show cause*." (Emphasis added.) The problem with the petitioner's argument is that the ruling at issue is not a ruling following an order to show cause but, rather, a motion for reconsideration that we have concluded was properly viewed by the court as a motion to open the judgment dismissing the second petition. Neither § 52-470 (e) nor our case law interpreting the statute permits a petitioner to circumvent the rules of practice. The court afforded the petitioner an opportunity to present evidence of good cause at the hearing that took place on September 12, 2018, and the court thereafter

properly applied the rules of practice to prevent the petitioner from waiting until after a judgment was rendered to prove the reasons for his delay in bringing his untimely second petition.

Accordingly, in AC 42466, we affirm the judgment of the court.

II

AC 42618

A

The first claim raised by the petitioner in AC 42618 is that the court erred in denying his petition for certification to appeal. We agree with this claim.

Section 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

"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 the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . 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." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 811, 975 A.2d 42 (2009); see also *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994) (adopting factors identified by United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as appropriate standard for determining whether habeas court abused its discretion in denying certification to appeal).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 573, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

For the reasons set forth in part II C of this opinion, we conclude that the petitioner has demonstrated that the claim of error relating to the court's dismissal of his third petition pursuant to Practice Book § 23-29 on the ground that it fails to state a claim on which relief could be granted is debatable among jurists of reason and that the question raised is adequate to deserve encouragement to proceed further. Accordingly, we conclude that the court abused its discretion in denying the petition for certification to appeal.

B

We next address the petitioner's claim that the court erred in denying his motion for permission to file a late amended petition for certification to appeal and for reconsideration of the court's denial of his petition for certification to appeal. We dismiss this portion of the appeal.

As we stated in our discussion of the procedural history, six months after the court denied the petition for certification to appeal from the dismissal of the third petition, the petitioner filed a motion for permission to file a late amended petition for certification to appeal and for reconsideration of the denial of his petition for certification to appeal.[17] Therein, he raised five grounds on which he sought to appeal. On July 15, 2019, the court denied the motion. The petitioner did not, however, file a petition for certification to appeal from the court's July 15, 2019 denial of his motion or attempt to appeal from that ruling in accordance with § 52-470 (g).

The petitioner set forth the present claim in the portion of his brief in which he analyzed the claim that we addressed in part II A of this opinion. As a preliminary matter, we observe that the petitioner has merely claimed error with respect to the court's denial of his motion. He has analyzed the propriety of the court's denial of his petition for certification to appeal but has not provided this court with a distinct analysis of the separate and distinct ruling at issue. Our Supreme Court repeatedly has 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

[17] As stated previously in this opinion, on February 20, 2019, the petitioner filed the present appeal from the denial of his petition for certification to appeal and the judgment dismissing the third petition.

to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003).

More importantly, we recognize that the claim is not properly before this court as it is not part of the appeal taken from the denial of the petition for certification to appeal and the judgment dismissing the third petition. It is well settled that "an appeal following the denial of a petition for certification to appeal from the judgment denying a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous." *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216, 72 A.3d 1162, cert. denied, 301 Conn. 928, 78 A.3d 145 (2013). The ruling that is the subject of the appeal was framed by the court's denial of the petition for certification to appeal, and, in light of the *denial* of such petition, the petitioner may not enlarge the scope of the appeal to encompass new issues that arose at a later date. "The right to an appeal is not a constitutional one. It is but a statutory privilege available to one who strictly complies with the statutes and rules on which the privilege is granted." (Internal quotation marks omitted.) *Brown* v. *Brown*, 190 Conn. 345, 350, 460 A.2d 1287 (1983).

Setting aside the issue of whether the habeas court had jurisdiction to grant the petitioner the relief that he sought in his motion in light of the fact that the present appeal was pending at the time that he filed the motion, we observe that the petitioner failed to appeal

from the ruling at issue in accordance with § 52-470 (g) and our rules of practice by taking appropriate steps to seek certification to appeal from that ruling and then bringing an appeal or amending his existing appeal. "In accordance with our policy not to exalt form over substance, we have been reluctant to dismiss appeals for technical deficiencies in an appellant's appeal form." *Rocque* v. *DeMilo & Co.*, 85 Conn. App. 512, 527, 857 A.2d 976 (2004). The deficiency at issue in the present case involves a failure to appeal from the ruling sought to be appealed; it can hardly be said that the petitioner's existing appeal of February 20, 2019, apprised this court or the respondent that the petitioner intended to appeal from the court's subsequent July 15, 2019 ruling. Thus, the deficiency at issue is of a substantive nature warranting dismissal of this portion of the appeal.

C

Finally, the petitioner claims that the court erred in dismissing his third petition. We agree.

As we stated previously in this opinion, the court dismissed the third petition on three grounds. The court stated: "The petition . . . is dismissed pursuant to Practice Book § 23-29[18] (1) in that this court lacks jurisdiction to consider this petition and the allegations therein on the grounds that this court's November 7, 2018 decision dismissing an exact copy (literally) of the present petition . . . is currently being appealed (see Practice Book § 61-11 (a) (rules on automatic stay)), and (2) the petition fails to state a claim upon which this court could grant relief, given [the] pendency of an appeal from the prior identical petition and automatic stay required while the appeal is pending (Practice Book § 61-11 (a)), and (3) res judicata, in that the present petition presents the identical grounds as a prior petition and fails to state new facts or offer new information not reasonably available at the time of the prior petition." (Footnote added.)

[18] See footnote 5 of this opinion.

The petitioner argues that "[e]ach of the habeas court's reasons for dismissing [his self-represented third] petition was in error. The habeas court erred by concluding [that] the [third] petition was identical to a prior [self-represented] petition, and the habeas court erred in concluding that the [self-represented third] petition failed to state a claim upon which relief could be granted. The habeas court wrongly concluded that the dismissal of the prior [self-represented] petition, and the pending appeal challenging that dismissal, barred the filing of a new, modified [self-represented third] petition . . . . The habeas court incorrectly applied the doctrine of res judicata to the new, materially different, [self-represented third] petition. Finally, the automatic stay provisions of Practice Book § 61-11 are irrelevant to the petitioner's ability to proceed on a new [self-represented third] petition . . . and the habeas court erred by relying on those provisions as a basis for dismissal. This matter should be returned to the habeas docket where the petitioner can be appointed counsel and present evidence in support of his claim of innocence."

Most of the petitioner's arguments rest on the proposition that, unlike the second petition, which had been dismissed and was the subject of a pending appeal, the third petition twice set forth a claim of actual innocence because the petitioner twice added the statement "I am innocent" to the allegations of the second petition. The petitioner states that the second and third petitions "are mostly the same, except that the [third] petition . . . includes two statements of innocence." Although the petitioner acknowledges that this additional language in the third petition was "not a model of clarity," he urges us to conclude that "it sufficiently states a claim of innocence."

The petitioner does not appear to claim that, in dismissing the third petition, the court erroneously dis-

missed the identical claims raised in the second petition. Indeed, the petitioner states that "[t]he main error that [he] complains of is that the habeas court sua sponte dismissed his newly raised claim of innocence." We therefore must first resolve the issue of whether an actual innocence claim was raised in the third petition.

Basing his appellate arguments on the existence of a claim of actual innocence, the petitioner argues that the court erred in its determination that the third petition was identical to the second petition. The petitioner argues that the claim of actual innocence shielded the third petition from dismissal under § 52-470 (d), even if it was filed more than two years after a final decision was rendered with respect to his first petition. He also argues that, as a matter of law, a claim of actual innocence is a claim on which relief may be granted and argues that the court was "compelled to accept that representation [of actual innocence] as true when considering whether dismissal was appropriate." The petitioner further argues that the court's summary dismissal of his third petition was procedurally improper because, upon his assertion of a claim of actual innocence in his self-represented third petition, he was entitled at a minimum to "counsel and . . . an opportunity to amend the petition before any hearing on dismissal can take place." The petitioner asserts that the court's dismissal of the third petition under Practice Book § 23-29, prior to issuing the writ, was procedurally improper. According to the petitioner, "[p]reliminary sua sponte dismissal is never appropriate under Practice Book § 23-29, especially where a petitioner makes a claim of innocence." (Emphasis omitted.)

Moreover, arguing, in part, that the claim of actual innocence in the third petition distinguished it from the second petition, the petitioner argues that the court improperly relied on the doctrine of res judicata. Finally, the petitioner argues that, even if the third petition was

identical to the second petition, the court erroneously relied on the appellate stay provision, codified in Practice Book § 61-11, in dismissing the petition.

"Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary." *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020). We will focus our analysis on the petitioner's argument that the court's dismissal of his third petition under Practice Book § 23-29 was procedurally improper.

It is necessary to begin our analysis by focusing on the basis of the habeas court's dismissal, which was the result of its interpretation of the third petition. The court stated that the second and third petitions were "identical" and that the third petition was an "exact copy" of the second petition. This interpretation of the third petition was incorrect. It appears that the court failed to note, as we discussed previously, that the statement "I am innocent" was added to the third petition. The court also stated that the third petition failed to state a claim on which relief could be granted because the petitioner's appeal from the "identical" second petition was pending. Because the petitions were not identical, the court's characterization of the third petition, and thus its reliance on Practice Book § 61-11, was incorrect.

The petitioner argues that he adequately pleaded a claim of actual innocence and that the claim constituted a claim on which relief could be granted. The petitioner and the respondent disagree with respect to whether the addition of the statement "I am innocent" to the third petition was sufficient to plead a claim of actual innocence, a claim on which relief could be granted.[19]

[19] As stated previously in this opinion, in seeking certification to appeal, the petitioner set forth as a ground for the appeal whether the court properly determined that the third petition failed to state a claim on which relief could be granted.

"In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Internal quotation marks omitted.) *Abdullah* v. *Commissioner of Correction*, 123 Conn. App. 197, 202, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010).

This court has explained that, "[t]o obtain relief through a habeas petition, the petitioner *must plead facts that, if proven, establish that the petitioner is entitled to relief*. . . . Practice Book § 10-1 . . . makes this pleading requirement clear: Each pleading shall contain a plain and concise statement *of the material facts on which the pleader relies, but not of the evidence by which they are to be proved*, such statement to be divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation. . . . Further, if the [petitioner] allege[s] separate and distinct [claims], [he] should . . . [assert] them in separate counts pursuant to Practice Book § 10-26. The burden is on [the petitioner] to plead his case clearly and not to expect the court or his opposing counsel to have to wade through a poorly drafted [petition] to glean from it the [petitioner's] theories of relief. . . .

"Our case law has recognized only one situation in which a court is not legally required to hear a habeas petition [before dismissing the petition]. . . . Specifically, [i]f a previous [petition] brought on the same grounds was denied, the pending [petition] may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing. . . . Although [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims . . . practical considerations suggest that a habeas court is not legally required to hear a habeas petition that itself is legally infirm." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Coleman* v. *Commissioner of Correction*, 137 Conn. App. 51, 57, 46 A.3d 1050 (2012).

Thus, a petitioner's pleading burden is to plead *material facts* that entitle him to relief. See, e.g., *Dinham* v. *Commissioner of Correction*, 191 Conn. App. 84, 93–94, 213 A.3d 507 (habeas court properly dismissed claim pursuant to Practice Book § 23-29 for failure to state claim on which relief could be granted because "[t]he petitioner failed to plead in his . . . petition any factual basis upon which his claim relies"), cert. denied, 333 Conn. 927, 217 A.3d 995 (2019). In the context of a claim of actual innocence, the material facts must give rise to a belief that the petitioner will present at trial affirmative proof that he did not commit the crime. As our Supreme Court has explained, "[h]abeas corpus relief in the form of a new trial on the basis of a claim of actual innocence requires that the petitioner satisfy the two criteria set forth in *Miller* v. *Commissioner of Correction*, [242 Conn. 745, 747, 700 A.2d 1108 (1997)]. Under *Miller*, the petitioner [first] must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the

habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom . . . no reasonable fact finder would find the petitioner guilty of the crime. Id.

"As to the first prong, we emphasized in *Miller* that the clear and convincing standard . . . is a very demanding standard and should be understood as such, particularly when applied to a habeas claim of actual innocence, where the stakes are so important for both the petitioner and the state. . . . [That standard] should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory. . . . [The standard requires] extraordinarily high and truly persuasive demonstration[s] of actual innocence. . . .

"Moreover, actual innocence [must be] demonstrated by *affirmative proof* that the petitioner did not commit the crime. . . . Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime . . . that a third party committed the crime, or that no crime actually occurred. . . . Clear and convincing proof of actual innocence does not, however, require the petitioner to establish that his or her guilt is a factual impossibility. . . . In part for these reasons, we emphasized in *Miller* that truly persuasive demonstrations of actual innocence after conviction in a fair trial have been, and are likely to remain, extremely rare." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 518–19, 217 A.3d 609 (2019).

Also, we observe that "[t]his court has stated that [a] claim of actual innocence must be based on newly discovered evidence. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a prepon-

derance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Outing* v. *Commissioner of Correction*, 190 Conn. App. 510, 540, 211 A.3d 1053, cert. denied, 333 Conn. 903, 214 A.3d 382 (2019), cert. denied, U.S. , 140 S. Ct. 1166, 206 L. Ed. 2d 212 (2020).

Mindful of these principles, we look more closely at the third petition. The first point at which the petitioner inserted the statement "I am innocent" was in box five of the petition, in which he also alleged as reasons his conviction was illegal: "[W]as not given appropriate interpreter (Spanish); jury was forced to find me guilty; there is no physical evidence supporting unstable statements; contradictory statements." The second point at which the petitioner inserted the statement "I am innocent" was in box six of the petition, in which he also alleged as a reason his "incarceration/sentence" was illegal: "Because of misconduct of all counsel involved in my case: Intentional, malicious, prejudicial, discriminatory (but is not limited to)." The statement "I am innocent," when viewed in isolation, is ambiguous. It may be viewed as a bare conclusory statement of the petitioner's belief in his innocence and not necessarily as an allegation of material fact that, if proven, would entitle the petitioner to relief on the ground of actual innocence. Without more, the statement does not suggest that affirmative proof exists that the petitioner did not commit the crime. Moreover, the allegations that precede the statement "I am innocent" similarly lack any reference to material facts in support of a claim of actual innocence. To the contrary, the other allegations reflect the petitioner's belief that, for several reasons, he should not have been convicted, but none of these reasons rises to affirmative proof that he could not have

committed the crime, that a third party committed the crime, or that no crime actually occurred.[20] It bears repeating that "[a]ctual innocence is not demonstrated merely by showing that there was insufficient evidence to prove guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *Carmon* v. *Commissioner of Correction*, 178 Conn. App. 356, 371, 175 A.3d 60 (2017), cert. denied, 328 Conn. 913, 180 A.3d 961 (2018).

Our interpretation of the newly inserted language in the third petition is based on the lack of material facts contained therein in support of a claim of actual innocence; it is not the result of the petitioner's failure to use the specific phrase "actual innocence." It is well settled that courts do not interpret pleadings so to require the use of talismanic words and phrases. See, e.g., *Delgado* v. *Commissioner of Correction*, 114 Conn. App. 609, 616, 970 A.2d 792, cert. denied, 292 Conn. 920, 974 A.2d 721 (2009). "In Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly

[20] In box seven of the form, which pertained to whether the claims raised in the petition had been raised previously, the petitioner wrote: "New evidence: Prior counsel did not present everything he was shown and or told or support [the petitioner] when the judge himself forced the jury to get a conviction; ineffective assistance of defense counsel; conflict of interest across the board (state attorney, defense attorney, judicial authority)." Although this response mentioned "[n]ew evidence," it cannot reasonably be construed to refer to newly discovered evidence or material facts concerning affirmative proof that the petitioner did not commit the crime.

means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 778, 905 A.2d 623 (2006). For the reasons we have discussed, the third petition, when construed broadly and realistically, does not clearly raise a claim of actual innocence.

Having interpreted the allegation in the third petition at issue in this claim, we turn to the procedural argument advanced by the petitioner, namely, that the court erred in relying on Practice Book § 23-29 in its preliminary review of the third petition prior to issuing the writ. The petitioner repeatedly refers to the fact that he filed the third petition in a self-represented capacity. He also asserts that the state supplied form that he utilized in drafting the third petition "does not include any questions about the nature of any evidence to support a claim of actual innocence, or question when such evidence was discovered. [Self-represented] litigants such as the petitioner must simply do the best they can to communicate their claims of innocence and await the appointment of counsel for assistance in presenting their claims in a legally sufficient manner."[21] The petitioner urges us to afford him additional leeway in pleading his claim because he did so in a self-represented capacity.[22]

[21] Any alleged deficiency with respect to the state supplied form that the petitioner utilized to file his third petition does not alter our analysis of what the petitioner actually stated in the petition. Nonetheless, we observe that the state supplied form afforded the petitioner an opportunity to state "other" reasons in addition to those suggested on the form. The form also stated in relevant part: "*You must state facts supporting each claim.* Use additional pages if necessary." (Emphasis added.)

[22] Indeed, in his reply brief, the petitioner states that his self-represented status "is more than enough reason to not hold [him] to a requirement that he properly plead all of the elements and evidence of his innocence claim on a state provided form that does not include any specific place for such answers."

With respect to the petitioner's procedural argument, our Supreme Court's recent decision in *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 548, is instructive. In *Gilchrist*, our Supreme Court clarified the proper role of the habeas court in screening habeas petitions as well as the proper application of Practice Book §§ 23-24[23] and 23-29, both of which authorize the habeas court to dismiss a habeas petition on the basis of pleading deficiencies. Id., 553–63. The court explained that, "[*b*]*efore* [a habeas] petition is served on the respondent, the petitioner is required to file the petition in court for review by a judge. The current review procedure is set forth in Practice Book § 23-24 (a), which requires the judicial authority to 'promptly review any petition for a writ of habeas corpus to determine *whether the writ shall issue*.' . . . The rule goes on to instruct that '[t]he judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available.' Practice Book § 23-24 (a). If any of these three enumerated circumstances exist, then the writ never issues in the first place, and the judicial authority is required 'to notify the petitioner [that] it declines to issue the writ.' Practice Book § 23-24 (b). Section 23-24 thus reverses the usual sequence followed in the ordinary civil case; the habeas petition is first filed with the court, and the writ issues and service of process occurs only if the court determines, after a preliminary review of the petition, that the petition pleads a nonfrivolous claim within the court's jurisdiction upon which relief can be granted." (Emphasis in original; footnote omitted.) Id., 556–57.

[23] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

After discussing the proper application of Practice Book § 23-24 in a habeas court's preliminary review of a habeas petition prior to the issuance of the writ of habeas corpus and prior to the commencement of the action, the court explained that Practice Book § 23-29, the provision on which the habeas court in the present case relied in dismissing the third petition, "contemplates the dismissal of a habeas petition *after the writ has issued* on any of the enumerated grounds. It serves, roughly speaking, as the analog to Practice Book §§ 10-30 and 10-39, which, respectively, govern motions to dismiss and motions to strike in civil actions. It is true that § 23-29 states that the judicial authority may take action under its authority 'at any time,' but the 'time' it references necessarily is defined by the time at which the rule itself becomes operative which is *after* the habeas court issues the writ and the action has commenced." (Emphasis added.) Id., 561.

As we have explained, in the present case, the court dismissed the third petition under Practice Book § 23-29 during its preliminary consideration of the petition and prior to issuing the writ.[24] Thus, *Gilchrist* leads us to conclude that the court's reliance on § 23-29 was procedurally improper. Instead, if the court concluded that any of the reasons set forth in Practice Book § 23-24 applied, it should have declined to issue the writ rather than dismissing the petition. We are not, however, persuaded that the proper remedy is to remand the case to the habeas court with direction to render

[24] The manner of dismissal in this case is virtually identical to that in *Gilchrist*, in which our Supreme Court concluded that the habeas court dismissed the petition before issuing the writ. See *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 563. In both cases, the petition was docketed in the habeas court, the court granted the petitioner's application for a waiver of fees and costs, and then dismissed the petition within a week of when it was filed, without any indication that the petition was served on the respondent. See id., 551–52.

judgment declining to issue the writ.[25] On the basis of its erroneous determination that the third petition was an exact copy of the second petition, the court concluded that it lacked jurisdiction to consider the third petition, the third petition failed to state a claim on which relief could be granted, and res judicata precluded it from affording the petitioner relief. Although, for the reasons set forth previously, we are not persuaded that the new allegations in the third petition sufficiently state a claim of actual innocence, as the petitioner argues, we nonetheless conclude that the allegations concerning innocence, set forth by a self-represented petitioner, are ambiguous and may constitute the petitioner's attempt to present a claim of actual innocence. Although the petitioner has not yet alleged material facts that would give rise to a claim of actual innocence, *Gilchrist* guides us to the conclusion that the writ should issue, and, following the appointment of counsel, the petitioner, prior to presenting evidence in support of his claim, will have the opportunity to rectify pleading deficiencies that are raised by the respondent or the court.

This remedy is consistent with *Gilchrist*, in which our Supreme Court provided additional insight into the proper screening function that the habeas court should apply in determining whether to issue the writ: "To be clear, the screening function of Practice Book § 23-24 plays an important role in habeas corpus proceedings, but it is intended only to weed out obviously and

[25] We recognize, and the respondent argues, that a petitioner does not invoke the jurisdiction of the habeas court unless and until he states a claim on which relief may be granted. As this court has stated, "a petition that fails to state a claim would be subject to dismissal under [Practice Book § 23-24 (a) (1)] for lack of jurisdiction." *Coleman* v. *Commissioner of Correction*, 111 Conn. App. 138, 140 n.1, 958 A.2d 790 (2008), cert. denied, 290 Conn. 905, 962 A.2d 793 (2009). Nonetheless, in light of our conclusion that the third petition is ambiguous in terms of the allegation of innocence, we conclude that the proper remedy is for the writ to issue and for any pleading deficiencies to be addressed following the issuance of the writ.

unequivocally defective petitions, and we emphasize that [b]oth statute and case law evince a strong presumption that a petitioner for a writ of habeas corpus is entitled to present evidence in support of his claims. . . . Screening petitions prior to the issuance of the writ is intended to conserve judicial resources by eliminating obviously defective petitions; it is not meant to close the doors of the habeas court to justiciable claims. Special considerations ordinarily obtain when a petitioner has proceeded [as a self-represented party]. . . . [I]n such a case, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. . . . The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners. . . . Thus, when borderline cases are detected in the preliminary review under § 23-24, the habeas court should issue the writ and appoint counsel so that any potential deficiencies can be addressed in the regular course after the proceeding has commenced." (Citations omitted; internal quotation marks omitted.) Id., 560–61.

The judgment in Docket No. AC 42466 is affirmed; the appeal in Docket No. AC 42618 is dismissed in part with respect to the denial of the motion for permission to file a late amended petition for certification to appeal and for reconsideration, the judgment dismissing the petitioner's petition for a writ of habeas corpus is reversed and the case is remanded with direction to issue the writ of habeas corpus.

In this opinion the other judges concurred.

FAIRFIELD SHORES, LLC *v.* PETER M. DESALVO ET AL.
(AC 42969)

Moll, Alexander and Devlin, Js.

Syllabus

The plaintiff lessor sought to recover damages from the defendant university students and their parents for alleged damage to its rental property in connection with a lease entered into between the plaintiff and the defendant students, for which the defendant parents were guarantors. The rental rate for the period of the lease was $100,000 with a $10,000 security deposit. After the defendant students vacated the premises at the end of the lease term, the plaintiff claimed that they had caused damage to the premises that exceeded the amount of the $10,000 security deposit. In response, the defendants filed a counterclaim, alleging, inter alia, that the plaintiff violated the applicable security deposit statute (§ 47a-21), and that the $100,000 prepayment of rent constituted a security deposit for purposes of § 47a-21. Subsequently, the parties filed a signed, joint stipulation of facts with the trial court, which stated that, pursuant to the lease, the total security deposit was $10,000. Following a trial, the court rendered judgment in favor of the plaintiff, and the defendants appealed to this court. *Held*:

1. The plaintiff could not prevail on its claim that the appeal was moot on the basis that the defendants did not challenge all independent bases for the trial court's judgment; because this court could provide meaningful relief to the defendants by remanding the matter for a consideration of their claim that the $100,000 prepayment of rent constituted a security deposit and, therefore, should have been held in escrow in an interest bearing account, the appeal was not moot.
2. The trial court improperly rendered judgment in favor of the plaintiff on the basis of the application of the exemption in the statute (§ 47a-2) for certain lease arrangements incidental to housing for educational services from application of title 47a of the General Statutes when the plaintiff never pleaded the exemption and no evidence was presented at trial in support thereof: the plaintiff simply denied the allegations of the defendants' special defenses and counterclaim, and, in its special defenses, it never claimed an exemption under § 47a-2; moreover, there was no reference or claim by the plaintiff at trial that it was exempt from complying with the provisions of title 47a, nor was there any testimony or evidence relating to whether the lease was incidental to the educational residence of the defendant students, as found by the court; accordingly, the defendants did not have sufficient notice at any time prior to the judgment, of any claim pertaining to the exemption in § 47a-2 concerning housing incidental to educational purposes.

3. Although the trial court improperly considered § 47a-2, judgment correctly was rendered in favor of the plaintiff on the defendants' second amended counterclaim; the parties filed a signed, joint stipulation of facts with the court that stated that the total security deposit was $10,000, and, because during the trial the defendants did not seek to withdraw, explain, or modify the stipulation, they were bound by their judicial admission, such that their claim that the $100,000 prepayment of rent also should have been treated as a security deposit necessarily failed.

Argued March 1—officially released June 1, 2021

Procedural History

Action to recover damages for alleged damage to rental property in excess of the security deposit, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the Housing Session at Bridgeport, where the defendants filed a counterclaim; thereafter, the court, *Rodriguez*, *J.*, granted in part the plaintiff's motion to strike the defendants' answer, special defenses and counterclaim; subsequently, the parties filed a joint stipulation of facts; thereafter, the matter was tried to the court, *Spader*, *J.*; judgment for the plaintiff on its complaint and on the defendants' counterclaim, from which the defendants appealed to this court. *Affirmed.*

Abram Heisler, for the appellants (defendants).

Raymond W. Ganim, for the appellee (plaintiff).

Opinion

DEVLIN, J. The defendants[1] appeal from the judgment of the trial court rendered in favor of the plaintiff landlord, Fairfield Shores, LLC. On appeal, the defendants claim that the court improperly rendered judgment in favor of the plaintiff on the basis of its finding that the

[1] This action was commenced against four former students of Fairfield University, the defendants Peter M. DeSalvo, Gary T. Davies, Jordan T. Greenfield, and Alexander Case Cramer (defendant students), along with their parents, the defendants Peter DeSalvo, Jean DeSalvo, Tom Davies, Sue Davies, Keith Greenfield, Tina Greenfield, and Peter J. Cramer (defendant parents). In this opinion, we refer to these parties collectively as the defendants, and individually by name or by group where necessary.

plaintiff was exempt, pursuant to General Statutes § 47a-2,[2] from application of General Statutes (Rev. to 2013) § 47a-21,[3] the statute governing security deposits, because it provided housing incidental to the education of the defendant students. Although we conclude that the court improperly considered § 47a-2, we, nevertheless, affirm the judgment of the court.

The following factual and procedural history is necessary to our resolution of the claim on appeal. The plaintiff owns property located at 1027 Fairfield Beach Road in Fairfield, on which a three-story, single-family beachfront home (premises) is situated. On February 29, 2012, the defendant students entered into a lease with the plaintiff for the rental of the premises for their senior year, with the lease term running from September 3, 2013, until May 20, 2014, or the day after graduation. The rental rate for the period of the lease was $100,000, and that amount was to be paid in two installments prior to the commencement of the lease: the sum of $50,000 was to be paid on November 1, 2012, and another $50,000 on January 15, 2013. The lease also required a $10,000 security deposit. The defendant parents signed the lease as guarantors.

The plaintiff commenced the present action at the end of the tenancy, on May 18, 2014, claiming that the defendant students had caused damage to the premises that exceeded the amount of the security deposit. Thereafter, the plaintiff provided the defendants with a list

[2] General Statutes § 47a-2 exempts certain arrangements from application of title 47a of the General Statutes, which pertains to landlords and tenants. Section 47a-2 (a) provides in relevant part: "Unless created to avoid the application of this chapter and [section] 47a-21 . . . the following arrangements are not governed by this chapter and [section] 47a-21 . . . (1) Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling or religious service, or any similar service . . . ."

[3] Our references in this opinion to § 47a-21 are to the 2013 revision of the statute.

of damages, which they disputed. The defendants subsequently filed an amended answer, special defenses, and counterclaim. The court then granted the plaintiff's motion to strike as to the second and third special defenses, leaving the first special defense, which alleged that the claimed damages existed prior to the defendant students' tenancy, and the fourth special defense, which alleged that the plaintiff had failed to comply with certain local and state health and safety requirements. The amended counterclaim alleged, in count one, a violation of the security deposit statute, § 47a-21; in count two, that the plaintiff had failed to comply with municipal and state codes by failing to obtain a certificate of apartment occupancy and by renting the premises to more students than what is permitted by the zoning regulations; and, in count three, a violation of the Connecticut Unfair Trade Practices Act (CUTPA), § 42-110a et seq. The plaintiff denied the allegations of all three counts of the amended counterclaim.

On February 18, 2016, the defendants filed a second amended counterclaim, which alleged, in addition to the claims raised in their amended counterclaim, that the $100,000 prepayment of rent constituted a security deposit for purposes of § 47a-21. On November 18, 2016, the parties filed a signed, joint stipulation of facts with the court. In the stipulation, the parties agreed to certain facts, including, inter alia, that the plaintiff had entered into a tenancy agreement with the defendant students for the rental of the premises for a term commencing on September 3, 2013, and ending on May 20, 2014; that, pursuant to the rental agreement, the total security deposit was $10,000; that the defendant students took possession of and vacated the property per the agreement; that the security deposit was not returned because the plaintiff claimed to have sustained damages exceeding the amount of the security deposit; and that the par-

ties disagreed as to the damages. On December 13, 2018, the plaintiff filed its reply to the defendants' special defenses and its answer to the defendants' second amended counterclaim, denying that the prepaid rent constituted a security deposit and asserting, as one of its special defenses, that the counterclaim was barred by the doctrine of res judicata to the extent that it contradicted the stipulation.

The matter was tried to the court on December 14, 2018. At the trial, Paul Ganim, who testified that he is the owner and manager of the plaintiff, testified regarding the lease agreement and the extent of the damages to the premises that allegedly were caused by the defendant students.[4] Ganim testified that he put the $10,000 security deposit into a security deposit bank account at Webster Bank and that the amount of the security deposit was not sufficient to cover the damages to the premises. The plaintiff also offered testimony from a builder and a painting contractor in support of its claim of damages. After the plaintiff rested, the defendants called one of the defendant parents, Tom Davies, as a witness. He testified regarding a video he took that showed the condition of the premises at the time when his son moved in.

Following the trial, the parties filed posttrial briefs. In their brief, the defendants claimed that most of the alleged damages to the property were preexisting when the defendant students took occupancy and, thus, that

[4] The claimed damages to the premises included the following: the wood floors needed to be refinished; the granite countertop in the kitchen was cracked; the kitchen faucet was broken; the kitchen sink was dislodged from the granite; the microwave was taped together with duct tape; kitchen cabinet doors were missing and cabinet drawers were broken; screens were ripped and torn; a sink drain in an upstairs bathroom was damaged and leaking; there were holes in the walls; the ceilings had marks all over them; some doors and doorjambs were broken; various bedrooms had broken things in them; the walls needed to be repainted; a toilet was clogged and needed to be cleared out; and some of the spindles on the stair rail needed repair.

the plaintiff had failed to establish that any of the claimed damages were caused by the defendants. Second, they argued that the $100,000 advance rental payment constituted a security deposit under § 47a-21, which required the plaintiff, under § 47a-21 (h), to escrow that payment. Thus, they claimed that the plaintiff's failure to do so violated § 47a-21, and that the plaintiff had violated several other statutes. In contrast, the plaintiff argued in its posttrial brief that the defendants had failed to meet their burden of demonstrating any statutory violations by the plaintiff. The plaintiff also requested that the court take judicial notice of a lease purportedly used by the University of Connecticut with respect to on campus housing.[5]

In a memorandum of decision dated May 6, 2019, the court rendered judgment in favor of the plaintiff. The court made the following additional findings in its decision. The defendant students had "obtained approval from Fairfield University to utilize the plaintiff's premises as their school housing accommodations for their senior year. The [defendant students] took possession of the premises a few days prior to the commencement of the lease for the agreed upon rate of an additional $1000. Zoning ordinances of the town of Fairfield prohibit more than four unrelated persons to occupy the premises. While the [lease] is only between the plaintiff and four students, without permission of the plaintiff, on August 30, 2013, at least six students moved into the premises.

"The plaintiff had rented the premises for the summer season prior to the [defendant students'] tenancy and did not fully clean, paint, or prepare the premises for the students' possession. The defendants were aware that this upkeep had not occurred, but they had . . .

[5] The court did not act on the plaintiff's late request and did not comment on it in its memorandum of decision.

activities [prior to the start of school] they needed to attend to necessitating early possession and so they agreed to take possession of the premises 'as is.' Further, the defendants did not notify the plaintiff of any damage to the premises that they believed [to be] present prior to their taking possession.

"The premises hosted activities typical of what would be expected by Fairfield University seniors living in a beach house. Damages [occurred] early on in the tenancy, which prompted [the] defendants to apply new coating to the floor and patch and paint the walls. By the end of the leasehold, damages occurred that required repairs in an amount less than that claimed by the plaintiff, but more than believed to be due by the defendants." The court further noted that the plaintiff, which alleged that the premises incurred damages in the amount of $20,788.24, sought the amount of damages sustained in excess of the security deposit, plus attorney's fees and costs.

In finding that additional damage to the premises had occurred, the court explained: "Certainly, damage existed to the property prior to the defendants taking possession. There were damages that occurred early on during their tenancy and there was damage caused on their way out. The defendants knew of this damage. During their tenancy, the parents paid to refinish hardwood floors, repair a ceiling hole and repaint. Near the end of the tenancy, [the] defendants employed Merry Maids to clean two rooms whose level of dirtiness proved to surpass the abilities of the students' mothers' cleaning brigade. After the students vacated, Tom Davies testified that he walked through the house and patched up walls with compound.

"While the defendants' efforts to remedy the damages indicates an awareness on the part of the defendants in contributing to existing damage and the need for repairs, the plaintiff did not substantiate its claim of

over $20,000 in damages. The plaintiff's witnesses did, however, establish damages in excess of the $10,000 security deposit." The court found damages in the amount of $10,967.44, which included costs for repainting, refinishing the floors and replacing the countertop, as well as the cost of a water bill that was supposed to have been paid by the defendant students. After accounting for the $10,000 security deposit and interest on the security deposit in the amount of $27.82, the court rendered judgment in favor of the plaintiff in the amount of $939.62.[6]

The court rejected the defendants' request to treat their prepayment of $100,000 in rent for the lease term as a security deposit or an advance rental payment under § 47a-21, as the court found that statute to be inapplicable to the specific rental agreement in this case. Specifically, the court stated: "Pursuant to . . . § 47a-2, certain lease arrangements are exempted from the applications of title 47a. Such agreements are ones including 'residence at an institution, public or private, if incidental to . . . the provision of medical, geriatric, educational, counseling or religious service . . . .'

"While [the] plaintiff certainly is *not* Fairfield University and does not pretend to be, Fairfield University counts the plaintiff among its providers of housing for students in their senior year. There is a student lottery to be placed in off campus housing that includes the plaintiff's premises. Without housing stock such as the plaintiff's being available to the university, it could not provide adequate accommodations for its student population. In the university's student recruitment materials, it prominently advertises the opportunity of living on

[6] With respect to the claims of alleged zoning and housing code violations, the court found that the plaintiff did not authorize the defendants to violate the Fairfield zoning regulations under the lease, nor did the defendants meet their burden of establishing that the premises were uninhabitable under General Statutes § 47a-7.

Fairfield Beach in senior year to attract potential students.

"It is true that the plaintiff also rents this beach house during nonacademic times, however, it sets the premises aside specifically for Fairfield University's academic year to rent to students. The court finds that the prepayment portion of the lease is incidental to the [defendant students'] educational residence and is not a security deposit as defined under . . . § 47a-21." (Emphasis in original.) From the judgment rendered in favor of the plaintiff, the defendants appealed to this court. Additional facts will be set forth as necessary.

I

Before we address the merits of the defendants' claim on appeal, we first address the plaintiff's claim that the appeal is moot. Specifically, the plaintiff claims that because the defendants, on appeal, challenge only the court's application of the exemption in § 47a-2 and do not challenge the court's finding that they did not meet their burden to prove that the plaintiff failed to deposit the security deposit funds into an escrow account, or its finding that the defendants had the burden to establish that the exemption in § 47a-2 did not apply, the appeal is moot. In essence, the plaintiff's mootness claim is premised on its assertion that the defendants did not challenge all independent bases for the court's judgment. We conclude that the appeal is not moot.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526, 153 A.3d 647 (2017). "A determination regarding . . . [this court's] subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary." (Internal quotation marks omitted.) *Lyon* v. *Jones*, 291 Conn. 384, 392, 968 A.2d 416 (2009). "[I]t is

not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . [W]hen an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Lester*, supra, 526–27.

Although the trial court found that the defendants did not prove that the plaintiff failed to escrow the $10,000 security deposit, the court made no finding as to the defendants' claim that the plaintiff violated the security deposit statute by failing to escrow the $100,000 prepayment of rent, which the defendants alleged should have been considered a security deposit. The court never reached that claim in light of its determination that the exemption in § 47a-2 applied. Moreover, contrary to the plaintiff's assertion, the court made no express finding that the defendants had the burden to prove that the exemption did not apply. In its memorandum of decision, the court stated: "[T]he court finds the statutory scheme set forth under [title] 47a to be inapplicable to this specific rental agreement. Further, the defendants fail to point to any Connecticut case authority to prove otherwise." That statement is ambiguous and can hardly be said to be a finding that the defendants had to prove that the exemption did not apply. At a minimum, it is difficult to see how the defendants could refute the application of the exemption when, based on the pleadings and the evidence, they were not put on notice that an exemption under § 47a-2 was an issue to be tried.

Accordingly, because this court could provide meaningful relief to the defendants by remanding the matter

for a consideration of whether the $100,000 prepayment of rent constituted a security deposit and, therefore, should have been held in escrow in an interest bearing account, the appeal is not moot. We, therefore, address the merits of the defendants' appeal.

II

The defendants claim that the court improperly rendered judgment in favor of the plaintiff on the basis of the exemption in § 47a-2 when the plaintiff never pleaded the exemption and no evidence was presented at trial in support thereof. We agree.

We first set forth our standard of review. "The interpretation of pleadings presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 802, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016). "It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of [its] complaint." (Internal quotation marks omitted.) *Covey* v. *Comen*, 46 Conn. App. 46, 49, 698 A.2d 343 (1997). "The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . A complaint should fairly put the defendant on notice of the claims against him. . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow

recovery." (Internal quotation marks omitted.) *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, supra, 802–803.

Pursuant to Practice Book § 10-57, a "[m]atter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply." See also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 317 n.8, 77 A.3d 726 (2013). Moreover, pursuant to Practice Book § 10-3 (a), "[w]hen any claim made in a complaint . . . special defense, or other pleading is grounded on a statute, the statute shall be specifically identified by its number." Our courts, however, "have recognized that the rule embodied in . . . § 10-3 is directory and not mandatory. . . . As long as the defendant is sufficiently apprised of the nature of the action . . . the failure to comply with the directive of . . . § 10-3 (a) will not bar recovery." (Citations omitted; internal quotation marks omitted.) *Ramondetta* v. *Amenta*, 97 Conn. App. 151, 162, 903 A.2d 232 (2006). This court has recently stated that the failure of a party to plead a specific statute may be overlooked "if the issue is otherwise put before the trial court and no party is prejudiced by the lapse in pleading." (Internal quotation marks omitted.) *Stilkey* v. *Zembko*, 200 Conn. App. 165, 173, 238 A.3d 78 (2020).

Our review of the allegations of the amended complaint demonstrates that the court decided the case on the basis of an issue that was not pleaded by the plaintiff. The plaintiff simply denied the allegations of the defendants' special defenses and counterclaim, and, in its special defenses, the plaintiff never claimed an exemption under § 47a-2 in response to the defendants' second amended counterclaim, which alleged a violation of § 47a-21. Furthermore, our examination of the transcript of the proceedings before the trial court does not reveal any reference or claim by the plaintiff at trial that it was exempt from complying with the provisions

of title 47a of the General Statutes, nor does it show any testimony or evidence relating to whether the lease was incidental to the educational residence of the defendant students, as found by the court. In fact, there is no evidence in the record that supports the court's findings regarding Fairfield University and how the university relies on the plaintiff to provide housing for its students.

On the basis of the record, we cannot conclude that the defendants had sufficient notice, at any time prior to the judgment, of any claim pertaining to the exemption in § 47a-2 concerning housing incidental to educational purposes. This court has stated that "[t]he concept of notice concerns notions of fundamental fairness, affording parties the opportunity to be apprised when their interests are implicated in a given matter." (Internal quotation marks omitted.) *Michalski* v. *Hinz*, 100 Conn. App. 389, 399, 918 A.2d 964 (2007). In the present case, the defendants had no warning that the case would be decided on the basis of the exemption when it had not been pleaded, argued or briefed.[7] See *Prime Locations*

[7] The plaintiff claims that "the exclusion was fully litigated at trial without objection by the defendants." The plaintiff bases this claim on the facts that the plaintiff rented the premises to the defendant students of Fairfield University and that the tenancy under the lease was for the academic school year. The plaintiff also points to the failure of the defendants to challenge, on appeal, the court's findings regarding Fairfield University's use of the plaintiff as a provider of housing for its students and that the university advertises the opportunity for seniors to live on Fairfield Beach as a recruitment tactic to attract students. We are not persuaded. First, we already have concluded that there was no evidence in the record to support the court's findings regarding Fairfield University and the university's use of the plaintiff as a provider of housing. In fact, the plaintiff's attorney acknowledged at oral argument before this court that there was insufficient evidence before the trial court to support its findings regarding Fairfield University and its lottery system and marketing. We also cannot conclude that the defendants were alerted to the issue that the plaintiff was exempt from application of the security deposit statute simply because the plaintiff entered into a lease with college students for a term that covered the students' senior year, especially when the plaintiff did not present any evidence of its alleged affiliation with the university, and the arguments and evidence at trial focused on the damage to the property and whether the $100,000 prepayment of rent was proper and constituted a security deposit

of CT, LLC v. *Rocky Hill Development, LLC*, supra, 167 Conn. App. 808. Because the exemption in § 47a-2 was not raised at any stage of the proceedings, it was improper for the court to consider the exemption and base its decision thereon. See *Michalski* v. *Hinz*, supra, 394 (defendant was not sufficiently apprised that statute was at issue where plaintiff never alleged violation of statute at any stage of proceedings); *Covey* v. *Comen*, supra, 46 Conn. App. 50–51 (plaintiff was prejudiced where court rendered judgment for defendants on basis of theory that was not pleaded in counterclaim).[8]

Although we have determined that the court improperly applied the exemption in § 47a-2 in rendering judgment for the plaintiff, that does not end our inquiry, as we must examine whether the judgment in favor of the plaintiff is, nevertheless, proper, without application of the exemption. This court has long held that "[a]n appellate court may affirm the judgment of the trial court although it may have been grounded on a wrong reason. See *Geremia* v. *Geremia*, 159 Conn. App. 751, 779, 125 A.3d 549 (2015); see also Practice Book § 10-33." *Jobe* v. *Commissioner of Correction*, 181 Conn. App. 236, 237–38 n.3, 186 A.3d 1219 (2018), aff'd, 334 Conn. 636, 224 A.3d 147 (2020). We conclude that the court reached the proper judgment, notwithstanding its improper application of the exemption in § 47a-2.

for purposes of § 47a-21. This case simply does not present a situation where we can conclude that, despite the pleading deficiencies, the defendants were sufficiently apprised that the applicability of § 47a-2 was at issue. The plaintiff's reliance on *Parente* v. *Pirozzoli*, 87 Conn. App. 235, 241, 866 A.2d 629 (2005), for the proposition that, "when a matter required to be specially pleaded by a party is fully litigated at trial without objection from the opposing party, [any] objection to the special pleading requirement is deemed to have been waived" is, therefore, misplaced.

[8] We express no view as to whether the lease for the plaintiff's premises would constitute residence at an institution incidental to the provision of educational services. See General Statutes § 47a-2 (a) (1) and footnote 2 of this opinion.

The defendants have limited[9] their appeal from the court's judgment to the portion of their second amended counterclaim alleging a violation of § 47a-21 as a result of the plaintiff's failure to treat the $100,000 prepayment of rent as a security deposit that was required to be escrowed. The court, in rejecting this claim, determined that the parties' rental agreement was not subject to the requirements of § 47a-21 because the prepayment portion of the lease was incidental to the educational residence of the defendant students and, thus, was exempt from application of the security deposit statute under § 47a-2. Although the court's rejection of this claim in the second amended counterclaim on the basis of the exemption under § 47a-2 was improper, we agree with the plaintiff's proffered alternative ground for affirmance as follows.

As the plaintiff notes in its appellate brief, on November 18, 2016, the parties filed a signed, joint stipulation of facts with the court. Among the facts agreed to in the stipulation was that, "[p]ursuant to the rental [a]greement, *the total* [s]ecurity [d]eposit was $10,000." (Emphasis added.) "A formal stipulation of facts by the parties to an action constitutes a mutual judicial admission and under ordinary circumstances should be adopted by the court in deciding the case. . . . A party is bound by a judicial admission unless the court, in the exercise of a reasonable discretion, allows the admission to be withdrawn, explained or modified." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 83 n.8, 144 A.3d 1075 (2016). During the trial, the defendants did not seek to withdraw, explain, or modify the stipulation. We agree with the plaintiff that, because the defendants are bound by their judicial

[9] We note that, in this appeal, the parties have not challenged the court's findings as to the damages incurred or its determination that the defendants had failed to establish their special defenses, as well as the other allegations of their second amended counterclaim.

admission that the total amount of the security deposit was $10,000, their claim that the $100,000 prepayment of rent also should have been treated as a security deposit necessarily fails. Accordingly, judgment correctly was rendered in favor of the plaintiff on the defendants' second amended counterclaim. See *Amsden* v. *Fischer*, 62 Conn. App. 323, 327, 771 A.2d 233 (2001) (this court "may affirm a trial court's decision that reaches the right result, albeit for the wrong reason" (internal quotation marks omitted)).

The judgment is affirmed.

In this opinion the other judges concurred.

LINDSEY MARCO *v.* STARR INDEMNITY AND LIABILITY COMPANY
(AC 43376)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages for breach of contract from the defendant insurer. The plaintiff was awarded damages for personal injuries she sustained when a large fight broke out while she was at a bar owned by C Co., the defendant's insured. C Co. assigned its rights under its general liability insurance policy to the plaintiff. The defendant, however, declined to defend or indemnify C Co. with respect to the plaintiff's injuries because the insurance policy contained an exclusion for any injuries arising out of assault or battery, and the plaintiff commenced this action. The defendant filed a motion for summary judgment on the ground that it did not owe C Co. a duty to defend because the plaintiff's claim was barred by the insurance policy's assault and battery exclusion. The court, *Swienton*, *J.*, denied the motion, finding that genuine issues of material fact existed, including relating to the cause of the plaintiff's injuries. The court, *J. Moore*, *J.*, then granted the plaintiff's motions to quash and for a protective order in which she argued that the defendant should not be allowed to take her deposition because the only evidence that should be considered in determining the case were the complaint and the insurance policy. Following that decision, the defendant filed a motion to strike the plaintiff's claim for a jury trial on the ground that there were no factual issues for a jury to decide, as the duty to defend was purely a legal question to be resolved by the court.

After hearing oral argument on the matter, Judge Moore issued an order to bifurcate the trial, with the issue of the duty to defend to be considered first by the court. He requested that the initial stage of the trial be assigned to another judge because he had been involved in the parties' pretrial settlement discussions, and the matter was assigned to Judge Aurigemma. Both parties filed briefs on the issue and waivers of oral argument, asking the court to decide the matter on the papers. Judge Aurigemma concluded that the defendant did not have a duty to defend C Co. because the insurance policy did not permit recovery for injuries sustained from an assault. After requesting additional briefs on the matter and scheduling oral argument, which the parties waived, Judge Moore found that Judge Aurigemma's decision was dispositive of all of the issues in the case and rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. *Held*:

1. The trial court did not err in ordering a court trial on the legal issue of the duty to defend following its denial of summary judgment on that issue: in denying summary judgment, the court did not find that the plaintiff was entitled to judgment on the matter but only that genuine issues of material fact existed, which precluded the court from finding that the defendant was entitled to judgment as a matter of law; moreover, no genuine issue of material fact existed as to whether the defendant owed a duty to defend C Co. because that question was purely a legal issue to be decided by the court; furthermore, the law of the case doctrine did not preclude Judge Moore from concluding that the duty to defend question was a legal matter to be decided before a jury trial could be held to address any remaining factual issues, despite the court's prior denial of summary judgement on the matter, as, under the doctrine, a trial judge may reach a contrary conclusion on an issue of law previously decided if the judge was convinced that the prior ruling was wrong.
2. The trial court did not improperly deprive the plaintiff of a jury trial on the issue of whether the defendant had a duty to defend C Co. because the plaintiff was not entitled to a jury trial on the matter: both the interpretation of pleadings and the question of whether an insurer owes a duty to defend are issues of law, which must always be decided by the court.
3. There was no merit to the plaintiff's claim that Judge Moore should have recused himself to avoid the appearance of impropriety due to his involvement in the pretrial settlement negotiations: Judge Moore did not play a role in deciding the issues of liability or damages in the case, he only made the determination that Judge Aurigemma's ruling was dispositive of all of the issues, which decision was administrative in nature; moreover, despite the fact that the parties were aware that the matter would appear before Judge Moore following Judge Aurigemma's decision, the plaintiff did not raise the issue of a potential appearance of impropriety until after she received an adverse decision, and such a decision alone is insufficient to form the basis of a claim of judicial

bias; furthermore, the plaintiff failed to provide any legal or factual analysis supporting her argument for recusal in her brief and, therefore, failed to set forth a factual basis on which a reasonable person might have questioned Judge Moore's impartiality.

Argued February 16—officially released June 1, 2021

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *J. Moore*, *J.*, ordered the trial to be bifurcated; thereafter, the matter was tried, in part, to the court, *Aurigemma*, *J.*; judgment for the defendant; subsequently, the court, *J. Moore*, *J.*, determined that the judgment was dispositive of all of the issues in the case and rendered judgment for the defendant on all counts, from which the plaintiff appealed to this court. *Affirmed.*

Joseph Mulshine, for the appellant (plaintiff).

Melissa Brill, pro hac vice, and *Raymond J. Carta*, with whom, on the brief, were *Laura Dowgin*, pro hac vice, and *John W. Cannavino*, *Jr.*, for the appellee (defendant).

Opinion

CRADLE, J. The plaintiff, Lindsey Marco, appeals from the judgment rendered in favor of the defendant, Starr Indemnity and Liability Company, on the ground that the defendant had no duty to defend its insured, Copa Entertainment Group, LLC (Copa Entertainment), the owner and operator of Zen Bar (bar), the location where the plaintiff had sustained injuries for which she had been awarded damages by an arbitrator in a separate action (underlying action). On appeal, the plaintiff claims that the trial court (1) erred in ordering a court trial on the legal issue of whether the defendant had a duty to defend Copa Entertainment when summary judgment previously had been denied on that

issue, (2) improperly deprived her of a jury trial on the issue of whether the defendant had a duty to defend its insured, and (3) should have recused itself from this case to avoid the appearance of impropriety after it was involved in pretrial settlement negotiations. We affirm the judgment of the trial court.[1]

The following procedural history is relevant to the plaintiff's claims on appeal. On June 23, 2014, the plaintiff filed an action against, inter alia, Copa Entertainment, seeking to recover damages for injuries that she sustained on May 31, 2013, while she was a patron at the bar. In her initial complaint, the plaintiff alleged that, on that night, "numerous altercations broke out in various places inside [the bar] and eventually the altercations grew and spilled out of the building and into the parking lot surrounding [the bar], where the plaintiff . . . was viciously and severely physically assaulted, punched, kicked and dragged so as to cause her to suffer extensive personal injuries . . . ." In that complaint, the plaintiff specifically named four individuals and one John Doe, who, she alleged, "repeatedly struck [her], about the head, face and body, thereby knocking her to the ground, rendering her unconscious and causing her to suffer severe and permanent personal injuries." On October 25, 2015, the plaintiff

[1] In the statement of issues contained in her appellate brief, the plaintiff purports to set forth nine enumerated issues on appeal. In the table of contents of her brief, the plaintiff sets forth eight claims. The corresponding page numbers that are listed for each claim are inaccurate. In addition, the majority of the plaintiff's claims are inadequately briefed or briefed in an obscure manner and devoid of any supporting legal authority. Our recitation of the claims set forth herein is based on a very generous interpretation of her brief. See *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 31, 223 A.3d 75 (2019) ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.)).

amended her complaint, alleging that she had sustained her injuries when she was "negligently impacted by a person, persons or object and/or viciously and severely trampled, physically assaulted, punched, kicked and dragged . . . ." The names of the specific individuals who allegedly injured the plaintiff were omitted from the amended complaint.

The plaintiff's claims against Copa Entertainment, which sounded in negligent security and recklessness, were submitted to an arbitrator. The arbitrator found that the plaintiff's injuries were "proximately caused by . . . Copa Entertainment" and awarded her $131,500 in damages. The arbitration award was thereafter confirmed by the Superior Court.

After the arbitration award was confirmed, Copa Entertainment assigned to the plaintiff its rights under its insurance policy issued by the defendant. The general liability policy that the defendant issued to Copa Entertainment contained an exclusion for injuries arising out of assault and battery. The defendant relied on that exclusion in declining to defend or indemnify Copa Entertainment in the underlying action.

On July 17, 2017, the plaintiff commenced this action against the defendant, based on the defendant's failure to defend or indemnify Copa Entertainment in the underlying action, alleging breach of the insurance contract, breach of the covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq., and common-law bad faith. On May 22, 2018, the defendant filed a motion for summary judgment on the ground that it did not owe Copa Entertainment a duty to defend because the plaintiff's claim was barred by the assault and battery exclusion of the insurance policy. The plaintiff filed an opposition

to the defendant's motion for summary judgment, and the court, *Swienton*, *J.*, heard argument from the parties.

On May 22, 2018, Judge Swienton denied the defendant's motion for summary judgment. The court explained, inter alia: "The motion for summary judgment at this stage is a substitute for the declaratory judgment action which the defendant declined to pursue. [The defendant] now is asking the court to make a determination based upon a number of police reports—which the court notes have not been authenticated—that the incident in which the plaintiff was injured is not covered under the policy insuring [Copa Entertainment]. The court has reviewed the entire record presented and finds that there remain genuine issues of material fact in the present case. One of these issues is whether [the defendant] has a contractual obligation to indemnify [Copa Entertainment] in the first action based upon whether the injuries the plaintiff sustained resulted only from an assault and battery. The court cannot decide these disputed factual issues on a motion for summary judgment."

On September 27, 2018, the plaintiff filed a motion to quash and a motion for protective order, seeking to prevent the defendant from deposing her in this case on the ground that, "in the present contract action, the only pieces of evidence to be considered by the jury are the complaints and the insurance policy in effect at the time of loss." On October 15, 2018, the court, *J. Moore*, *J.*, heard oral argument from the parties on these motions and other discovery motions, and the plaintiff reiterated her contention that only the complaint and the insurance policy should be considered in this case. The defendant agreed. Accordingly, Judge Moore issued the following order: "Based upon the representations of the plaintiff's counsel made today during the hearing on this and related motions, the discovery at issue is

not reasonably calculated to lead to the discovery of admissible evidence at trial. If the presentation of the plaintiff's case later involves an attempt to introduce factual evidence outside of the evidence discussed during the hearing today, e.g., evidence consisting of both underlying, operative complaints and the insurance policy at issue, the defendant's attorney shall reclaim this motion and the court will seriously reconsider this motion."

On November 23, 2018, the defendant filed a motion to strike the plaintiff's claim for a jury trial, which she had filed on September 6, 2017, on the ground that there were no factual issues for the jury to decide, as the duty to defend was purely a legal question for resolution by the court. The plaintiff filed an objection, arguing that the court had denied summary judgment on the defendant's claim that it had no duty to defend on the ground that issues of fact existed and that she was entitled to have a jury trial on those factual issues. In her objection, the plaintiff also argued that she was entitled to a directed verdict on the duty to defend issue based on the prior denial of summary judgment. Specifically, she argued: "The defendant, by way of the court's denial of [its] motion for summary judgment, has lost on that issue and that issue should not be allowed to be relitigated by anyone and judgment on that issue should be directed to the plaintiff with a finding that the defendant breached its duty to defend . . . ." The court heard oral argument on December 10, 2018.[2]

On December 12, 2018, the court entered the following order: "Practice Book § 15-1 provides that in all cases, whether claimed as jury cases or court cases, the court may order that one or more of the issues be tried before the others. Practice Book § 16-9 provides that, even where

[2] The plaintiff did not provide the transcript of the December 10, 2018 hearing to this court.

[there] are mixed questions of law and fact, the court 'shall decide all issues of law and all questions of law . . . .' Our Supreme Court has held that the 'question of whether an insurer has a duty to defend its insured is purely a question of law . . . .' *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 395, [757 A.2d 1074 (2000)].

* * *

"Despite the plaintiff's arguments to the contrary, even though the defendant raised both the duty to defend and the duty to indemnify in its motion for summary judgment, Judge Swienton did not decide whether the defendant breached its duty to defend in the underlying case. First, the plaintiff did not move for summary judgment itself. Second, Judge Swienton found an issue of fact in denying the defendant's motion for summary judgment and cited the defendant's duty to indemnify. As set forth above, our Supreme Court has held clearly that an insured's duty to defend is a purely legal question, e.g., one that could not have involved a question of fact. For the reasons set forth above, the court orders that this trial . . . be staged so that the purely legal question of the defendant's duty to defend its insured in the underlying case is considered first by the court. The allegations of the operative complaint at the time of the award and judgment must be compared to the language of the policy by a court. . . . Since this court has attempted to settle this case at a pretrial, this court will request the presiding civil judge to assign it to another judge for the initial determination of whether the defendant had a duty to defend its insured." (Citation omitted.)

On December 19, 2018, the plaintiff filed a motion to reconsider on the ground that "[t]his matter has been fully, exhaustively litigated in its entirety." In support of that argument, the plaintiff referred to the prior denial of the defendant's motion for summary judgment

and the defendant's failure to appeal from that ruling. In her motion, she reasserted her argument that she was entitled to a jury trial but also argued that the duty to defend should not be "relitigated" because it already had been decided by Judge Swienton when she denied the defendant's motion for summary judgment.

The next day, Judge Moore denied the plaintiff's motion to reconsider, explaining: "[T]he underlying order, which is the subject of this motion to reargue or reconsider, did not, as the [plaintiff] appears to believe, strike the plaintiff's jury claim. Rather, [it] simply ruled that the issue of the duty to defend, which had not been decided in the summary judgment ruling, shall be staged first. Since the issue of the duty to defend is a purely legal one, it will be heard by the court. If the plaintiff succeeds on this threshold issue of the duty to defend, the defendant will be estopped from challenging the amount of the underlying judgment. What the [plaintiff] needs to understand is that the order on the defendant's motion for summary judgment, which was decided on the basis that there were outstanding issues of fact, cannot have decided the issue of the defendant's duty to defend its insured, for the following reasons. A court's decision on the duty to defend is a purely legal question that involves comparing the allegations of the operative complaint to the policy language through the lens of Connecticut law on how the duty to defend shall be interpreted. Since the judge who denied summary judgment did so on the basis of outstanding genuine issues of fact, she did not decide the issue of the duty to defend, which is a purely legal issue. Moreover, although the defendant raised the issue of a defense duty in its summary judgment motion, the court that ruled on the summary judgment motion did not decide that duty in its decision. Finally, the plaintiff did not move for summary judgment when opposing the defendant's motion for

summary judgment and the court's findings when denying the motion for summary judgment cannot be used at this time to support judgment for the plaintiff."

On January 16, 2019, following a trial management conference, Judge Moore issued another order: "The court has concluded that the sole issue to be taken up during the first stage of this trial shall be whether the defendant breached its duty to defend its insured in the underlying case. Based upon what this court has found, both previously and also in this order, this is a legal question to be decided by the court. This court, since it attempted to settle this case, will ask the civil presiding judge to assign the first stage of this trial to another judge for a hearing in the near future. The parties should take up the issue of briefing—whether to, and when to—with the judge to whom the hearing is assigned after the matter has been set down for a hearing."

The matter was thereafter assigned to the court, *Aurigemma*, *J.*, for trial of the issue of whether the defendant owed a duty to Copa Entertainment in the underlying action. The parties filed briefs in support of their respective positions. Both parties also filed written waivers of oral argument and asked the court to decide the issue on the papers. By way of a memorandum of decision dated April 16, 2019, Judge Aurigemma concluded that the defendant had no duty to defend Copa Entertainment because the applicable insurance policy did not permit recovery for injuries sustained from an assault.

On May 7, 2019, Judge Moore issued the following order: "The court orders counsel to brief the issue of whether this decision is dispositive of all of the issues in the case and whether, as a result, judgment shall enter. The briefs shall be filed on or before 6/4/19 at 5 p.m., and shall indicate whether or not argument is requested." Judge Moore then supplemented his order

as follows: "The court schedules oral argument on the issues raised in this order and in the briefs filed pursuant to this order on 7/31/19 at 9:30 a.m." Both parties filed briefs, as ordered, wherein the plaintiff argued that Judge Aurigemma's decision was not dispositive of all of the issues in this case, and the defendant argued that it was dispositive. In their respective briefs, both parties expressly waived oral argument, so Judge Moore considered this issue on the briefs.

On July 30, 2019, Judge Moore issued an order concluding that Judge Aurigemma's decision on the duty to defend disposed of all of the issues in the case, and he rendered judgment in favor of the defendant on all of the counts of the plaintiff's complaint.

On August 19, 2019, the plaintiff filed a motion to reargue on the ground that Judge Moore should not have heard this case after he pretried it. She argued that Judge Moore had acknowledged the potential of an appearance of impropriety in his bifurcation order, when he ordered the duty to defend to be assigned to a different judge. The plaintiff asserted: "If the judge suspected the appearance of impropriety, having unsuccessfully pretried the case numerous times, then the avoidance of the appearance of impropriety by this judge should extend to the bifurcation and the final ruling on duty to defend and the entire case as well past the pretrials." On that ground, the plaintiff argued: "[T]his case should have what the court believes are its operative rulings negated and the matter should be set down for a trial de novo to a jury as was the direction this case was headed before the bifurcation by the judge who later sought to avoid the appearance of impropriety."

On August 22, 2019, Judge Moore denied the plaintiff's motion to reargue. He first concluded that the motion "fail[ed] to articulate any . . . [valid legal reason] that

would permit the court to allow reargument or to reconsider its decision . . . holding that Senior Judge Aurigemma's decision on the duty to defend is dispositive of all of the issues in this case." Judge Moore also addressed the plaintiff's recusal argument and explained: "The reason that this court asked another judge to decide the defense duty issue was that this court had made statements to counsel about the relative strength and/or weaknesses of the parties' arguments on the defense duty issue in depth both in private and public sessions during the pretrial settlement conference.[3] The court denies the instant motion for the following reasons. This court, *J. Moore*, *J.*, made it clear to the parties that it would be the judge deciding the issues set forth in [its] order [in docket entry] #172 [that determined whether Judge Aurigemma's decision on the duty to defend was dispositive]. It was this court, *J. Moore*, *J.*, who invited briefing from the parties in [docket entry] #167. This court discussed its vacation schedule with the parties in attempting to set down oral argument in [its] order [in docket entry] #170.01. This court indicated that it would take the issues discussed in the parties' briefs, [docket entries] ##168 and 169, on the papers in [its] order [in docket entry] #171.01. It was eminently clear to counsel for both parties, long prior to the court issuing [its] order [in docket entry] #172, that this court, *J. Moore*, *J.*, would decide whether Senior Judge Aurigemma's defense duty decision was dispositive of all issues in this case. Counsel for the plaintiff had ample opportunity to raise any perceived conflicts with this court deciding this issue prior to this issue being decided. Counsel for the plaintiff never raised this issue in writing and waived oral argument. To raise such claims of judicial conflict at this point is a classic case

[3] "Conversely, the court did not present any substantive previews or opinions as to whether a decision on the duty to defend would be dispositive of all issues in the case during pretrial settlement discussions."

of seeking a second bite at the apple." (Footnote in original.) This appeal followed.

I

The plaintiff first claims that the trial court erred when it "ordered" the defendant's claim that it had no duty to defend Copa Entertainment "to be relitigated" because "the court should have accepted the ruling of the court, *Swienton*, *J.*," "on the first summary judgment."[4] We disagree.

We construe the plaintiff's argument in this regard as pertaining to the law of the case doctrine. "The law of the case doctrine provides that when a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, *if it is of the opinion that the issue was correctly decided*, in the absence of some new or overriding circumstance. . . . The law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Emphasis added; internal quotation marks omitted.) *Barnes* v. *Connecticut Podiatry Group, P.C.*, 195 Conn. App. 212, 231 n.16, 224 A.3d 916 (2020).

"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

[4] We note that the record reflects that only one motion for summary judgment was filed and heard in this case.

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. . . . From the vantage point of an appellate court it would hardly be sensible to reverse a correct ruling by a second judge on the simplistic ground that it departed from the law of the case established by an earlier ruling. . . . In an appeal to this court [in which] views of the law expressed by a judge at one stage of the proceedings differ from those of another at a different stage, the important question is not whether there was a difference but which view was right.'' (Citation omitted; internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn. App. 686, 703, 138 A.3d 951 (2016).

The plaintiff's argument that the trial court erred in not applying the law of the case doctrine and was bound by the earlier denial of summary judgment on the duty to defend fails for two reasons. First, in denying summary judgment, Judge Swienton held only that genuine issues of fact existed that precluded it from holding that the defendant was entitled to judgment as a matter of law. In denying summary judgment, Judge Swienton did not, as the plaintiff seems to argue, conclude that the plaintiff was entitled to judgment on that issue.[5] Because the denial of summary judgment is not a final judgment; see *First Merchants Group Ltd. Partnership* v. *Fordham*, 138 Conn. App. 220, 224, 50 A.3d 963, cert. denied, 307 Conn. 937, 56 A.3d 716 (2012); the duty to defend issue was not resolved on summary judgment and further proceedings were required for its resolution.

Moreover, as explained herein, the law of the case doctrine recognizes that a trial judge may choose to reach a contrary conclusion on an issue of law previously decided if the judge is convinced that the prior

[5] In fact, Judge Swienton did not expressly address the issue of whether the defendant had a duty to defend Copa Entertainment. Judge Swienton expressly referenced only the defendant's duty to indemnify.

ruling was wrong. See *Brown* v. *Otake*, supra, 164 Conn. App. 703. That is precisely what occurred in this case. Judge Moore noted that Judge Swienton concluded that genuine issues of material fact existed that precluded her from granting the defendant's motion for summary judgment, but he disagreed because, as our Supreme Court has held, the question of whether the defendant owed a duty to defend was purely a legal issue to be decided by the court. We agree. See *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000) (question of whether insurer has duty to defend its insured is purely question of law). Accordingly, the law of the case doctrine did not preclude Judge Moore from concluding that the legal question of the existence of a duty to defend needed to be decided before a jury trial could be held to address any remaining factual issues.

II

The plaintiff also claims that the trial court improperly deprived her of her right to a jury trial on the issue of whether the defendant had a duty to defend Copa Entertainment in the underlying action. We disagree.

General Statutes § 52-216 provides in relevant part: "The court shall decide all issues of law and all questions of law arising in the trial of any issue of fact; and, in committing the action to the jury, shall direct them to find accordingly. The court shall submit all questions of fact to the jury, with such observations on the evidence, for their information, as it thinks proper, without any direction as to how they shall find the facts. . . ." See also Practice Book § 16-9.

Although the plaintiff failed to provide this court with the transcript of the hearing on this issue, which was held on December 10, 2018, we note that she strenuously had argued against having her deposition taken on the ground that the only evidence necessary to resolve the issues presented in this case were the opera-

tive complaint and the subject insurance policy. When asked during oral argument before this court which facts remained at issue for a jury to decide in this case, the plaintiff's counsel responded that the jury needs to interpret the pleadings. It is well settled that "[t]he interpretation of pleadings is always a question of law for the court . . . ." (Internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 366, 241 A.3d 133 (2020). Likewise, as noted herein, the issue of whether an insurer owes a duty to defend is also a legal issue to be determined by the court. *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 409. Accordingly, the plaintiff was not entitled to a jury trial on the issue of whether the defendant had a duty to defend Copa Entertainment.

III

Finally, the plaintiff claims that Judge Moore should have recused himself from this case to avoid the appearance of impropriety after he was involved in pretrial settlement negotiations. Specifically, the plaintiff argues that "[t]he trial court erred when *J. Moore*, *J.* did not remain recused after prior recusal on account of having unsuccessfully pretried the case." In so arguing, the plaintiff essentially challenges the impartiality of the court. Despite the gravity of such a claim, the plaintiff's brief is devoid of any citations to the trial court record that reflect when Judge Moore pretried the case or his alleged recusal from it. The plaintiff's brief also lacks any legal authority to support her assertions.

Despite the deficiencies of the plaintiff's brief,[6] our review of the record reveals that the plaintiff raised the

[6] In her brief to this court, the plaintiff argues: "Perhaps it is only merely by prudence or custom that Superior Court judges always recuse themselves from being triers in cases which they have actively pretried. Most commonly judges become privy to facts and other information in the settlement efforts of a pretrial that would not be admissible at trial. As well, judges will sometimes tip their hand as to how they will rule on a matter in the setting of a pretrial as it could facilitate settlement and judges don't sit on cases

issue of a potential appearance of impropriety in her August 19, 2019 motion to reargue Judge Moore's determination that Judge Aurigemma's ruling on the duty to defend issue was dispositive of all of the plaintiff's claims against the defendant in this case. The plaintiff did not cite any legal authority in support of this argument in her motion to reargue, nor has she done so in her brief to this court. As noted herein, prior to deciding that Judge Aurigemma's decision was dispositive of all of the plaintiff's claims, the parties were afforded, by Judge Moore, the opportunity to file briefs in support of their respective positions. The plaintiff did not, in her brief to Judge Moore, raise the issue that he should be recused from this case, nor did she, at any point prior to her receipt of Judge Moore's ruling, suggest that he not be involved in this case.

To be sure, "[w]hen a judge engages in a pretrial settlement discussion in a court case, he should automatically disqualify himself from presiding in the case in order to eliminate any appearance of impropriety and to avoid subtle suspicions of prejudice or bias." *Timm* v. *Timm*, 195 Conn. 202, 204, 487 A.2d 191 (1985). That principle, however, is founded on the notion that "[w]hen . . . a judge engages in [discussions] looking to the settlement of a case . . . in which he will be called upon to decide the issues of liability and damages . . . [i]t is . . . impossible to avoid questions as to whether the judge can disregard . . . matters disclosed in the conference . . . and whether a preliminary judgment, formed at the conference and predicated on unsubstantiated claims of proof, may have some subtle influence on a final judgment after a full

they pretry. For these and other obvious reasons it was at least imprudent for [Judge Moore] to pretry this case various times over a long period of time and following that [to] make an assignment out to another judge to reconsider a prior judge's ruling on a motion for summary judgment and then to rule himself on the remaining issues in the case. The appearance at least of impartiality should be afforded this plaintiff." This comprises the entirety of the plaintiff's claim.

hearing. . . . It is inevitable that the basis is laid for suspicion, no matter how unfounded or unjustified it may be, and that failure to concur in what the judge may consider an adequate settlement may result in the imposition, upon a litigant or his counsel, of some retributive sanction or the incurrence of judicial displeasure." (Internal quotation marks omitted.) *Carvalhos Masonry, LLC* v. *S & L Variety Contractors, LLC*, 180 Conn. App. 237, 240–41, 183 A.3d 697 (2018).

Judge Moore did not play any role in deciding the issues of liability or damages in this case. Judge Aurigemma decided the issue of liability and, having found that the defendant was not liable, there was no issue of damages to be decided. Judge Moore did not, as the plaintiff contends, "rule himself on the remaining issues in the case" after Judge Aurigemma determined that the defendant had no duty to defend the plaintiff. Because Judge Moore did not, in any way, perform the role of a "trier" of the issues of liability or damages in this case, there was no danger of him using any information to which he may have become privy during settlement negotiations against the plaintiff. Rather, Judge Moore's conclusion that Judge Aurigemma's ruling was dispositive of all of the issues in this case was administrative in nature. Accordingly, Judge Moore was not required to recuse himself from this case.

Moreover, as noted herein, Judge Moore rejected the plaintiff's argument that he should have recused himself on the ground that the parties had been made aware that the matter would appear before Judge Moore following Judge Aurigemma's decision but the plaintiff did not raise the issue of a potential appearance of impropriety until after she received a decision that was adverse to her.[7] It is clear that the plaintiff's claim that Judge Moore should have recused himself from this case arises solely

[7] Although the plaintiff raises this claim in her motion to reargue, she has not appealed from this ruling, either by citing it on her appeal form or by briefing it in any meaningful way.

from the adverse ruling entered against her, which may not form the basis for a claim of judicial bias. See, e.g., *Tracey* v. *Tracey*, 97 Conn. App. 278, 284–85, 903 A.2d 679 (2006) ("it is clear that adverse rulings by the judge do not amount to evidence of bias sufficient to support a claim of judicial disqualification" (internal quotation marks omitted)).

We finally note that "[s]peculation is insufficient to establish an appearance of impropriety. . . . [A] factual basis is necessary to determine whether a reasonable person, knowing all of the circumstances, might reasonably question the trial judge's impartiality. . . . Vague and unverified assertions of opinion, speculation and conjecture cannot support a motion to recuse . . . ." (Internal quotation marks omitted.) *McKenna* v. *Delente*, 123 Conn. App. 137, 144, 1 A.3d 260 (2010). Because the plaintiff's brief is bereft of any legal or factual analysis supporting her argument that Judge Moore should have recused himself, she has failed to set forth a factual basis on which a reasonable person might reasonably have questioned his impartiality.

The judgment is affirmed.

In this opinion the other judges concurred.

PABLO ORTIZ, JR. *v.* LESLIE TORRES-RODRIGUEZ (AC 44118)

Elgo, Suarez and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, the acting superintendent of schools for the Hartford public school system, in connection with the termination of his at-will employment as a high school football coach for alleged misconduct. When the termination of the plaintiff's employment became public, the defendant issued a statement in response to inquiries from the news media. The plaintiff thereafter brought this action, alleging recklessness, intentional infliction of emotional distress and libel. The trial court granted the defendant's motion for summary judgment and rendered judgment for the

defendant. On appeal to this court, the plaintiff claimed that the trial court improperly granted the motion as to all three counts of his complaint. *Held* that the trial court properly granted the defendant's motion for summary judgment, and, as that court properly resolved the issues, this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the relevant facts, issues and applicable law on those issues.

Argued April 8—officially released June 1, 2021

Procedural History

Action to recover damages for, inter alia, the defendant's alleged reckless conduct, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Pablo Ortiz, *Jr.*, self-represented, the appellant (plaintiff).

Channez M. Rogers, with whom, on the brief, was *David S. Monastersky*, for the appellee (defendant).

Opinion

PER CURIAM. The self-represented plaintiff, Pablo Ortiz, Jr., appeals from the summary judgment rendered by the trial court in favor of the defendant, Leslie Torres-Rodriguez. On appeal, the plaintiff claims that the court improperly granted the defendant's motion for summary judgment on all three counts of his operative complaint. We affirm the judgment of the trial court.

The record, viewed in the light most favorable to the plaintiff; see *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009); reveals the following facts. At all relevant times, the defendant was the acting superintendent of schools for the Hartford Board of Education. In 2010, the plaintiff was hired as an at-will employee to coach the varsity football program at Bulkeley High School in Hartford.

In January, 2017, the defendant received a complaint that the plaintiff had engaged in misconduct toward former and current players, assistant coaches, and parents. Soon thereafter, the plaintiff's employment was terminated. When that termination became public, the defendant issued a statement in response to news media inquiries,[1] in which she stated: "The first priority of the Hartford [p]ublic [s]chools is to ensure student safety. As [a]cting [s]uperintendent of [s]chools, I will not allow any unacceptable staff behavior during my tenure. In the unfortunate event that, despite our best efforts to the contrary, individuals engage in inappropriate interactions with students, with their families, with staff or with any of the visitors who come to our schools and events, such individuals will be dealt with swiftly in accordance with the policies established by the Hartford Board of Education."

The plaintiff commenced the present action seven months later. His operative complaint contained three counts sounding in recklessness, intentional infliction of emotional distress, and libel. In response, the defendant filed an answer and seven special defenses. On December 3, 2018, the defendant filed a motion for summary judgment that was accompanied by three sworn affidavits.[2] The plaintiff filed an opposition to that motion, and the court heard argument from the parties on February 3, 2020. On May 14, 2020, the court issued a memorandum of decision rendering summary judgment in favor of the defendant on all counts. From that judgment, the plaintiff now appeals.

[1] The record indicates that multiple news organizations contacted the defendant's office and requested disclosure of materials regarding the termination of the plaintiff's employment pursuant to the Freedom of Information Act, General Statutes § 1-200 et seq.

[2] Those affidavits were from Natasha Banks, the executive director of human resources for the Hartford public schools who made the decision to terminate the plaintiff's employment; Milly Ramos, the labor relations specialist for the Hartford public schools who conducted a preliminary investigation of the complaint against the plaintiff; and the defendant.

Our plenary review of the pleadings, affidavits, and other proof submitted, as well as the briefs and arguments of the parties, persuades us that the judgment should be affirmed. The issues properly were resolved in the trial court's thorough and well reasoned memorandum of decision. See *Ortiz* v. *Torres-Rodriguez*, Superior Court, judicial district of Hartford, Docket No. CV-17-6081625-S (May 14, 2020) (reprinted at 205 Conn. App. 132, A.3d). We therefore adopt that memorandum of decision as a proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

APPENDIX

PABLO ORTIZ, JR. *v.* LESLIE TORRES-RODRIGUEZ*

Superior Court, Judicial District of Hartford
File No. CV-17-6081625-S

Memorandum filed May 14, 2020

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

Pablo Ortiz, Jr., self-represented, the plaintiff.

Channez M. Rogers and *David S. Monastersky*, for the defendant.

* Affirmed. *Ortiz* v. *Torres-Rodriguez*, 205 Conn. App. 129, A.3d (2021).

Opinion

NOBLE, J. Before the court is the motion of the defendant, Leslie Torres-Rodriguez, for summary judgment. For the following reasons the motion is granted.

In his revised complaint filed September 19, 2018, the plaintiff, Pablo Ortiz, Jr., alleges the following facts. The defendant was at all times relevant to the complaint acting in her capacity as the interim superintendent of schools for the Hartford Board of Education. In 2010, the plaintiff was hired by the then superintendent to coach the Bulkeley High School football and basketball varsity programs.[1] On January 25, 2017, the defendant received a letter from an assistant football coach in which he complained about the plaintiff's coaching temperament, and referenced similar complaints from former players and a parent. On January 27, 2017, the defendant terminated the plaintiff by letter. The plaintiff claims that the defendant failed to follow school protocols and policies in one or more of the following ways: the termination occurred prior to the completion of an investigation by the Department of Children and Families (DCF); the school protocols and policies required deference to the DCF investigation and findings; the protocols and policies required the provision of due process in any investigation; and school policy limited the defendant's authority to discipline the plaintiff, during a DCF investigation of suspected abuse, to suspension with pay pending the outcome of the investigation.

The plaintiff further alleges that, one day after the plaintiff's termination became public, the defendant issued a press statement in response to questions about the plaintiff's termination, stating: "The first priority of the Hartford [p]ublic [s]chools is to ensure student

[1] Bulkeley High School is one of the schools within the Hartford public school system.

safety. As [a]cting [s]uperintendent of [s]chools, I will not allow any unacceptable staff behavior during my tenure. In the unfortunate event that, despite our best efforts to the contrary, individuals engage in inappropriate interactions with students, with their families, with staff or with any of the visitors who come to our schools and events, such individuals will be dealt with swiftly in accordance with the policies established by the Hartford Board of Education." At some point, DCF initiated an investigation of the plaintiff for abuse. In March or April, 2017, DCF concluded its investigation. The investigation cleared the plaintiff of any wrongdoing, specifically finding that there were no valid claims of abuse or neglect by him. The defendant, after DCF concluded its investigation, did not rehire the plaintiff or retract her earlier statement.

The plaintiff alleges in count one of his complaint that the defendant was reckless, largely in her conduct in terminating the plaintiff, but also by making inaccuracies in the press statement. The plaintiff claims injury therefrom related to loss of his reputation, loss of job, emotional distress and lost wages. Count two alleges intentional infliction of emotional distress based on the conduct alleged in count one and sets forth identical injuries. Count three alleges a claim for libel based on the press statement issued the day after the plaintiff's termination that indicated he was guilty of unacceptable behavior, was a danger to students, needed to be dealt with swiftly and terminated pursuant to the investigatory protocols of the [Hartford public schools] (HPS) system. The plaintiff claims no specific damages but alleges merely libel done to severely stigmatize the plaintiff in order to enhance the defendant's job prospects, public standing and financial well-being.

In support of the defendant's motion for summary judgment, she offers the affidavits of Natasha Banks, executive director of human resources for HPS; Milly

Ramos, labor relations specialist for HPS; and her own affidavit. Banks' affidavit undercuts the factual theme of the plaintiff's claims. In her affidavit, Banks sets out that the plaintiff's employment with HPS was that of an at-will employee. She avers that, as executive director of human resources for HPS, she oversees the hiring and termination of athletic coaches such as the plaintiff, and so it was she, and not the defendant, who terminated the plaintiff. She did so after becoming aware of a complaint from an assistant coach as well as complaints from twenty-eight former and current players regarding the plaintiff's conduct. The defendant had no role in the plaintiff's termination, was not consulted about it and was informed of Banks' decision only after he was terminated.

Ramos testified in her affidavit that, in her capacity as a labor relations specialist for HPS, she investigated the complaints from the assistant coach, and former and current players. The complaints addressed physical and verbal altercations with student athletes, parents and other coaches, name-calling, bullying, and unethical practices related to paying assistant coaches who had not been hired by HPS. Banks reported the complaints to DCF in accordance with HPS' obligation as a mandated reporter. Ramos never completed her investigation because Banks elected to terminate the plaintiff's at-will employment. She did learn, however, that some HPS personnel had received information that a student may have been "mentally bullied" and "jacked up and thrown on the ground" by an athletic coach but had failed in their obligation to report this information to DCF. Ramos lastly asserted that the defendant had no involvement in her investigation of the plaintiff or whether personnel had failed to make a mandated reporting.

The defendant's affidavit outlines her employment as acting superintendent at the times relevant to the

plaintiff's complaint, that she had no authority to terminate athletic coaches, she did not consult in his termination, did not participate in the investigation and did not terminate the plaintiff; rather, it was Banks who terminated the plaintiff. The defendant further provides in her affidavit that the statement she released to the press was only a general policy statement and was not specifically related to the plaintiff.

The defendant argues in her summary judgment motion that, because much of the plaintiff's claims center on his termination by the defendant, she is entitled to summary judgment as to these claims. Moreover, the defendant argues that the plaintiff is unable to establish the extreme or outrageous conduct necessary to support a claim for intentional infliction of emotional distress. Lastly, the defendant asserts that she is entitled to judgment on the libel claim because the statement was not defamatory and it did not identify the plaintiff.

The plaintiff offers no factual basis to dispute that he was an at-will employee or that, contrary to the allegations in his complaint, the defendant had no role in his termination. Instead, the plaintiff asserts that his recklessness claim "really has nothing to do with the decision terminating him from his employment, or failing to follow the abuse and neglect policy, but, rather, has to do with the conscious decision to utilize his termination as a platform for advancing [the defendant's] own agenda." Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p. 23. In the plaintiff's view, the defendant was reckless "by insinuating that he was guilty of child abuse . . . ." Id. Similarly, the plaintiff claims that the defendant misconstrues his intentional infliction of emotional distress claim as being predicated on his termination per se but, rather, it is actually predicated on the press statement issued by the defendant. Lastly, the plaintiff asserts that the defendant's statement, in light of publicity related to

his termination, was clearly about him and was clearly false.

STANDARD

"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." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018).

"[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"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." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191, 177 A.3d 1128 (2018). "It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence

properly presented to the court under Practice Book § 380 [now § 17-45]." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019). "To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 165, 204 A.3d 717 (2019). Last, "[o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment." (Internal quotation marks omitted.) *Nash* v. *Stevens*, 144 Conn. App. 1, 15, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013).

DISCUSSION

I

Recklessness

The plaintiff's argument to the contrary, his complaint does assert that the defendant fired him. The complaint alleges in count one that the defendant was reckless in that: "(a) *she failed to follow any of the Hartford school system's protocols on investigation and/or discipline* . . . (b) in press statements, the defendant made it appear that the protocols had been followed when they had not; (c) in press statements, she concluded that the plaintiff had engaged in unacceptable behavior when no investigation had been done by her or anyone else and no findings had been formally made; (d) in press statements, the defendant indicated that such allegations should be dealt with swiftly despite a policy that required DCF deference and due process for the accused; (e) *she terminated the plaintiff without giving him any opportunity to be heard*; (f) she chose not to defer to the DCF investigation results *prior to terminating the plaintiff*; (g) *she chose not to suspend the plaintiff during the investigation as*

required by the protocols; (h) she utilized the wrongful termination of the plaintiff to further her interests in becoming the permanent superintendent in that she actively publicized to the Board of Education, the public and the press that the plaintiff's termination demonstrated how she would change the culture of not complying with DCF reporting requirements; and/or (i) she utilized the wrongful termination of the plaintiff to further her career interests in that she utilized mere allegations against the plaintiff to discipline another candidate for the permanent superintendent's job for the Hartford school system, thereby eliminating the third finalist from competing for the job she herself wanted." (Emphasis added.)

A review of these allegations reveals that subparagraphs (a), (e), (f) and (g) clearly allege conduct related to the manner in which the defendant terminated the plaintiff. Subparagraphs (b), (c) and (d) refer to inaccuracies in the press statements, and subparagraphs (h) and (i) refer to the defendant's motivation in utilizing the "wrongful termination" of the plaintiff. "The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Internal quotation marks omitted.) *Raffone* v. *Industrial Acceptance Corp.*, 119 Conn. App. 261, 268, 987 A.2d 1059 (2010).

Disposition of these claims involves two legal principles. "Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability." (Internal quotation marks omitted.) *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 520, 142 A.3d 363, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016). When an employee is employed at will, then either the employee or the employer can terminate "the employment at any time with or without just cause

. . . .'' *Kwasnik* v. *Community Action Committee of Danbury, Inc.*, 43 Conn. App. 840, 844, 686 A.2d 526 (1996).

''[R]ecklessness is a serious or extreme departure from ordinary or reasonable care, and requires a conscious choice of a course of action involving serious dangers to others, either with knowledge of that serious danger, or with knowledge of facts which a reasonable person would recognize as being a serious danger to others.'' (Internal quotation marks omitted.) *Matthiessen* v. *Vanech*, 266 Conn. 822, 833–34, 836 A.2d 394 (2003).

With these principles in mind, the court grants summary judgment as to count one. As to those allegations that rely on the defendant's wrongful conduct in the manner in which the plaintiff was terminated, not only has the plaintiff offered no evidence to rebut the evidence submitted by the defendant that she had nothing to do with his termination, the plaintiff has expressly abandoned such a claim in his brief. The court finds that, with respect to the claimed inaccuracies in the press statement, there is no evidence of an extreme departure from ordinary or reasonable care, with or without a conscious choice of a course of action involving serious dangers to others. Because the plaintiff was an at-will employee, proper protocols were followed with respect to his termination and any investigation. Even if the defendant's statement had made it appear that the plaintiff had engaged in unacceptable behavior, there is nothing, especially in light of the unrebutted evidence of the complaints against him, to demonstrate that it was a serious or extreme departure from an ordinary or reasonable standard of care. Last, because of the plaintiff's status as an at-will employee the last two subparagraphs alleging inappropriate utilization of his ''wrongful termination,'' for whatever motivation, must also fail. Summary judgment is therefore granted as to count one.

II

Intentional Infliction of Emotional Distress

"In order for the plaintiff to prevail in a case for liability under . . . [the intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress, or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, 200 Conn. 243, 253, 510 A.2d 1337 (1986).

"Liability has been found only [when] the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Internal quotation marks omitted.) *Carnemolla* v. *Walsh*, 75 Conn. App. 319, 332, 815 A.2d 1251, cert. denied, 263 Conn. 913, 821 A.2d 768 (2003). "Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine." *Appleton* v. *Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000). The conduct at issue must be "beyond all possible bounds of decency . . . atrocious, and utterly intolerable in a civilized community." (Internal quotation marks omitted.) Id., 211.

The court grants summary judgment as to count two. The statement made by the defendant is not sufficiently extreme and outrageous to constitute intentional infliction of emotional distress as a matter of law. The statement that the plaintiff cites as the basis of his complaint is: "The first priority of the Hartford [p]ublic [s]chools is to ensure student safety. As [a]cting [s]uperintendent of [s]chools, I will not allow any unacceptable staff behavior during my tenure. In the unfortunate event that, despite our best efforts to the contrary, individuals engage in inappropriate interactions with students, with their families, with staff or with any of the visitors who come to our schools and events, such individuals will be dealt with swiftly in accordance with the policies established by the Hartford Board of Education." The plaintiff contends that this statement labeled the plaintiff as "an abuser of children, and publicly insinuat[ed] that his termination was due to his indiscretions . . . ." Plaintiff's Opposition to Defendant's Motion for Summary Judgment, p. 26.

What the plaintiff contends the statement says is not supported by the statement itself. The statement does not mention the plaintiff, it does not mention his termination and it does not mention child abuse. Although the timing of the statement is suspicious, coming soon after the plaintiff's termination and as a response to questions concerning the plaintiff's termination, the statement itself does not rise to the level of arousing the resentment of an average member of the community against the plaintiff, leading to an exclamation of, Outrageous! See Exhibit S; *Carnemolla* v. *Walsh*, supra, 75 Conn. App. 332. The statement makes reference only to "unacceptable staff behavior" and "inappropriate interactions with students." Even if the defendant were found to have been referring to the plaintiff, such comments do not rise to the level of being beyond all possible bounds of decency, or atrocious or utterly intolerable. See *Appleton* v. *Board of Education*, supra, 254

Conn. 211. Summary judgment is therefore granted as to count two.

III

Libel

"In an action for defamation, a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he proves by clear and convincing evidence that the falsehood was published with actual malice. . . . The state of mind that constitutes actual malice has been defined as with knowledge that it was false or with reckless disregard of whether it was false or not." (Citations omitted; internal quotation marks omitted.) *Kelley* v. *Bonney*, 221 Conn. 549, 580, 606 A.2d 693 (1992).

The press statement that the plaintiff claims libeled him again provides: "The first priority of the Hartford [p]ublic [s]chools is to ensure student safety. As [a]cting [s]uperintendent of [s]chools, I will not allow any unacceptable staff behavior during my tenure. In the unfortunate event that, despite our best efforts to the contrary, individuals engage in inappropriate interactions with students, with their families, with staff or with any of the visitors who come to our schools and events, such individuals will be dealt with swiftly in accordance with the policies established by the Hartford Board of Education." The plaintiff does not claim that the press statement is intrinsically false. As previously mentioned, the plaintiff advances the view that this statement insinuates that he was a child abuser. The plaintiff argues that the press statement must be taken in the context of newspaper articles related to his firing, which, when read in conjunction with the press statement, provides the nexus for the child abuse insinuation. In support of this argument, the plaintiff includes an article from the Hartford Courant published May 19, 2017, which provides: "Bulkeley was again in the news when the

district fired the school's head football coach after a group of players accused him of harsh treatment"; a Fox 61 news post that the plaintiff was fired and under investigation by DCF; and a news post by NBC that he was fired with a quote from a former player who had seen him "put his hands on my teammate once, but . . . he was vocally, like he'd abuse people" and that reported that the plaintiff was under investigation by DCF. None of these articles, extrinsic to the four corners of the press statement, support any claim, read in conjunction with it or not, that the plaintiff was a child abuser. Summary judgment is therefore granted as to count three.

For the foregoing reasons, the court grants the motion of the defendant, Leslie Torres-Rodriguez, for summary judgment as to the entirety of the plaintiff's complaint.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 205

(Replaces Prior Cumulative Table)

Antonio A. *v.* Commissioner of Correction. 46
Habeas corpus; request for order to show cause pursuant to statute (§ 52-470 (d) and (e)); claim that habeas court erred in failing to afford petitioner's counsel reasonable opportunity to investigate cause of delay in filing second habeas petition; whether habeas court was obligated to delay its consideration of respondent's request for order to show cause because petitioner's counsel represented to court that it was possible that, in future, petitioner could pursue actual innocence claim in amended petition; whether habeas court abused its discretion in refusing to afford petitioner any additional time prior to acting on respondent's request for order to show cause; whether petitioner's counsel was on notice of purpose of hearing on respondent's request; claim that habeas court erred in denying petitioner's motion for reconsideration; whether habeas court abused its discretion in treating motion for reconsideration as motion to open judgment; claim that habeas court erred in denying petition for certification to appeal; claim that habeas court erred in denying motion for permission to file late amended petition for certification to appeal and for reconsideration of denial of petition for certification to appeal; claim that habeas court erred in dismissing petitioner's third habeas petition; whether habeas court's dismissal of third habeas petition under rule of practice (§ 23-29 (3)) during its preliminary consideration of petition and prior to issuing writ of habeas corpus was procedurally improper; whether proper remedy was for habeas court to issue writ and, following appointment of counsel, petitioner be given opportunity to rectify any pleading deficiencies.
Fairfield Shores, LLC *v.* DeSalvo 96
Landlord-tenant; alleged damages to rental property in excess of security deposit; whether appeal was moot on basis that defendants did not challenge all independent bases for trial court's judgment; claim that trial court improperly rendered judgment for plaintiff on basis of statutory (§ 47a-2) exemption for certain housing arrangements incidental to educational services from application of title 47a of General Statutes to security deposit; whether judgment correctly was rendered for plaintiff on defendants' second amended counterclaim when defendants made certain judicial admission in joint stipulation of facts concerning security deposit.
Goshen Mortgage, LLC *v.* Androulidakis 15
Foreclosure; claim that trial court improperly determined that plaintiff had standing to commence foreclosure action; claim that trial court improperly granted motion to substitute plaintiff; claim that trial court improperly denied motions to dismiss; claim that trial court improperly granted motion for summary judgment as to liability; claim that trial court improperly rendered judgment of strict foreclosure; claim that trial court improperly denied motion to open judgment.
Marco *v.* Starr Indemnity & Liability Co. 111
Breach of contract; duty to defend; law of case doctrine; claim that trial court erred in ordering court trial on matter of insurer's duty to defend following denial of summary judgment on same issue; claim that trial court improperly deprived plaintiff of right to jury trial on duty to defend issue; claim that trial judge should have recused himself to avoid appearance of impropriety due to his involvement in pretrial settlement negotiations.
Ortiz *v.* Torres-Rodriguez. 129
Termination of employment; recklessness; intentional infliction of emotional distress; libel; whether trial court properly granted defendant's motion for summary judgment; adoption of trial court's memorandum of decision as proper statement of relevant facts, issues and applicable law.
State *v.* Coltherst 1
Motion to correct illegal sentence; whether trial court properly dismissed motion to correct illegal sentence; whether defendant was entitled to resentencing because trial court imposed effective life sentence without having first considered defend-

ant's age and hallmark characteristics of youth; claim that sentencing proceeding was merely academic exercise that contravened intent of legislature in eliminating availability of capital felony for juvenile defendants; claim that State *v.* Delgado *(323 Conn. 801) was inapplicable because it could be presumed that sentencing court knew defendant previously had been sentenced to life imprisonment without possibility of release.*

NOTICE OF CONNECTICUT STATE AGENCIES

NOTICE OF INTENT TO ADOPT POLICY AND PROCEDURES

In accordance with Section 1-121 of the Connecticut General Statutes, notice is hereby given that the Connecticut Airport Authority (CAA) proposes to adopt a Bradley Airport Plane Spotting Policy.

Summary of Written Procedures:

The CAA has received requests from members of the community to enhance access for the recreational plane spotter community. The CAA has developed a policy to designate certain areas for plane spotter use and establish an annual permitting process for individuals who wish to engage in plane spotting at Bradley International Airport.

Statement of Purpose:

The proposed policy establishes a structured program for individuals who wish to engage in plane spotting at Bradley International Airport, while maintaining safe and convenient airport operations.

Copies of the proposed policy are available at the Connecticut Airport Authority between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday, by contacting Sharon Traficante at 860-292-2073 or straficante@bradleyairport.com. All interested parties may submit comments in connection with the proposed policy, within thirty days following publication of this notice, to Sharon Traficante, Connecticut Airport Authority, Bradley International Airport Office, 3rd Floor Admin, Terminal A, Windsor Locks, CT 06096.

Connecticut Freedom of Information Commission

Notice of Address Change

Pursuant to the Regulations of Connecticut State Agencies § 1-21j-4, the Connecticut Freedom of Information Commission hereby gives notice of its new official address and principal office.

Effective June 1, 2021, the Commission's official address and principal office shall be:

165 Capitol Avenue, Suite 1100
Hartford, Connecticut, 06106

Such notice to be published in the Connecticut Law Journal on June 1, 2021.

Colleen M. Murphy, *Executive Director*
Connecticut Freedom of Information Commission

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

Clarification to Previously Published Notice for 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).

Clarification to Initial Notice

On May 18, 2021, a public notice for this SPA was published in the Connecticut Law Journal. Except as clarified below, the May 18, 2021 notice remains fully in effect. Specifically, this notice makes one clarification to that notice as follows:

Clarification: The quantities displayed for the medical surgical supply procedure codes on that notice are monthly quantities. That notice failed to indicate the timeframe in which the quantities applied (e.g., daily, monthly or annual). In addition, the catheters referenced in the notice are indwelling catheters.

Changes to Medicaid State Plan

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 (Monthly unless Otherwise Noted)	New Quantity (Monthly unless Otherwise Noted)
A4310	Insert tray w/o bag/catheter	10	4
A4311	Indwelling catheter w/o bag 2-way latex	8	4
A4312	Indwelling catheter w/o bag 2-way silicone	8	4
A4313	Indwelling catheter w/bag 3-way	8	4
A4314	Indwelling catheter w/drainage 2-way latex	8	4

continued...

A4315	Indwelling catheter w/drainage 2-way silicone	8	4
A4316	Indwelling 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	6
A4326	Male external catheter with integral collection chamber	31	6
A4338	Indwelling catheter; foley type two-way latex	10	4
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 . . . each	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
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

continued...

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
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 continues to estimate the same fiscal impact as set forth in the May 18, 2021 public notice. In particular:

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 July 1, 2021.