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CONNECTICUT REPORTS

Vol. 338

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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MARY FAY ET AL. *v.* DENISE W. MERRILL, SECRETARY OF THE STATE (SC 20486)

Robinson, C. J., and Mullins, Kahn, Ecker and Moll, Js.

Syllabus

Pursuant to article sixth, § 7, of the Connecticut constitution, "[t]he general assembly may provide by law for voting in the choice of any officer to be elected . . . by qualified voters of the state who are unable to appear at the polling place on the day of election . . . because of sickness or physical disability . . . ."

The plaintiffs, Republican Party candidates in the August, 2020 primary election for the office of United States representative for Connecticut's First and Second Congressional Districts, brought the present action pursuant to statute (§ 9-329a), seeking relief in connection with the issuance by the defendant, the Secretary of the State, of an application for absentee ballots that added "COVID-19" as a category for absentee voting. The defendant had issued the application pursuant to an executive order issued by the governor in response to the ongoing coronavirus disease 2019 (COVID-19) global pandemic. The executive order modified the statute (§ 9-135) setting forth the reasons an eligible voter may vote by absentee ballot by adding COVID-19 as a reason why a voter may be unable to appear at his or her polling place on the day of the election. The plaintiffs sought a judgment declaring that the application was unconstitutional and based on an erroneous interpretation of the governor's executive order and § 9-135. The plaintiffs also sought an injunction precluding the defendant from mailing or distributing copies of the application to any Connecticut voters and directing the defendant to recall any copies already mailed or distributed. After a hearing, the trial court rejected the defendant's claim that the plaintiffs lacked standing

because they were not aggrieved by the defendant's decision to issue the application, but the court nevertheless concluded that the plaintiffs' claim that the application unconstitutionally expanded the use of absentee ballots beyond those reasons specified in article sixth, § 7, failed on the merits. Specifically, the trial court concluded that the defendant properly issued the application pursuant to the executive order, insofar as the executive order was not unconstitutional because the phrase "because of sickness," as used in article sixth, § 7, encompassed the public health emergency presented by the COVID-19 pandemic. The court also rejected the plaintiffs' claim that the executive order was a violation of the separation of powers because article sixth, § 7, permits only the General Assembly to act with respect to absentee ballots. The court rendered judgment for the defendant, and the plaintiffs, upon certification by the Chief Justice pursuant to statute (§ 52-265a) that a matter of substantial public interest was involved, appealed to this court. Thereafter, while this appeal was pending, the General Assembly passed legislation (Spec. Sess. P.A. 20-3, § 16), which the governor subsequently signed into law, that ratified the executive order. *Held*:

1. The trial court correctly determined that the plaintiffs were aggrieved by the executive order and, therefore, had standing to seek declaratory relief; the plaintiffs specifically pleaded their interest as candidates as well as that of electors, and their status as candidates in a primary election affected by the executive order gave them a personal interest in the executive order that was distinct from that of an ordinary voter, particularly given the potential effect of widespread absentee voting on the plaintiffs' respective campaign strategies.
2. This court declined to address whether the trial court's judgment could be upheld on the alternative ground that the plaintiffs' action was untimely and, therefore, barred by the equitable doctrine of laches; in light of its determination that the plaintiffs' constitutional claims failed on the merits, the trial court did not address the defendant's laches defense, which is intensely factual in nature, and the record, therefore, was not sufficiently developed with respect to whether the plaintiffs' delay in filing the present action until six weeks after the governor issued the executive order and slightly more than one month before the August, 2020 primary was reasonable.
3. The plaintiffs' claim that the executive order was void as a matter of law on the ground that article sixth, § 7, committed the authority over absentee voting solely to the General Assembly was rendered moot during the pendency of this appeal by virtue of the legislature's passage of Spec. Sess. P.A. 20-3, § 16, which ratified the executive order in its entirety; accordingly, this court dismissed the appeal with respect to the plaintiffs' separation of powers claim.
4. The plaintiffs could not prevail on their claim that the executive order was unconstitutional on the ground that the phrase "unable to appear . . . because of sickness," as used in article sixth, § 7, is limited to an

illness personally suffered by the individual voter that renders him or her physically incapable of travelling to the polling place and does not encompass the existence of a specific disease, such as COVID-19: this court employed the multifactor approach set forth in *State* v. *Geisler* (222 Conn. 672) for construing state constitutional provisions and considered the text and constitutional history of article sixth, § 7, relevant Connecticut, federal and sister state precedent, and this state's public policies, as expressed by the political branches through the governor's executive order and the General Assembly's subsequent ratification of that order, concerning the expansion of absentee voting in order to protect public health and suffrage rights during the exceptional circumstances of a pandemic, in concluding that the language of article sixth, § 7, was sufficiently capacious to include the particular disease of COVID-19; moreover, construing "sickness" to encompass not only an illness suffered personally by a voter but also a pandemic generally was consistent with the state's exercise of its police power to protect the fundamental right to vote and this court's approach of construing absentee balloting statutes liberally in furtherance of the right to vote.

Argued August 6, 2020—officially released February 11, 2021*

Procedural History

Action seeking, inter alia, an order rescinding the application for absentee ballot for the August, 2020 primary elections prepared by the Secretary of the State, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Moukawsher*, *J.*; judgment for the defendant, from which the plaintiffs, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was at issue, appealed to this court. *Appeal dismissed in part*; *affirmed.*

Proloy K. Das, with whom were *Matthew A. Ciarleglio* and, on the brief, *Rachel Snow Kindseth*, for the appellants (plaintiffs).

Michael K. Skold, assistant attorney general, with whom were *Clare Kindall*, solicitor general, and, on

* February 11, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the brief, *William Tong*, attorney general, and *Maura Murphy Osborne* and *Alayna M. Stone*, assistant attorneys general, for the appellee (defendant).

William M. Bloss filed a brief for the Connecticut Democratic Party et al. as amici curiae.

Opinion

ROBINSON, C. J. The principal issue in this public interest appeal is whether Governor Ned Lamont's Executive Order No. 7QQ,[1] which was later ratified by the legislature; see Public Acts, Spec. Sess., July, 2020, No. 20-3, § 16 (Spec. Sess. P.A. 20-3); and which modi-

[1] Executive Order No. 7QQ provides in relevant part: "1. Absentee Voting Eligibility During COVID-19 Pandemic. [General Statutes §] 9-135 . . . is modified to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, an eligible elector may vote by absentee ballot for the August 11, 2020 primary election if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19. For purposes of this modification, a person shall be permitted to lawfully state he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the August 11, 2020 primary election, there is no federally approved and widely available vaccine for prevention of COVID-19. It shall not constitute a misrepresentation under subsection (b) of [§] 9-135 . . . for any person to communicate the provisions of this modification to any elector or prospective absentee ballot applicant.

"2. Notice of Modification Required on Inner Envelope. [General Statutes §] 9-137 . . . is modified to provide that it shall not constitute a false statement for an elector to represent his or her eligibility to vote by absentee ballot pursuant to the modifications of [§] 9-135 in [§] 1 of this order, and the inner envelope described in [§] 9-137 shall contain a notice describing the modification in [§] 1 of this order.

"3. Authority for Secretary of the State to Modify Absentee Ballot Applications, Envelopes, and Printed Materials Regarding Eligibility. Notwithstanding any provision of [t]itle 9 of the . . . General Statutes or any other law or regulation to the contrary, the Secretary of the State shall be authorized to modify any required notice, statement, or description of the eligibility requirements for voting by absentee ballot on any printed, recorded, or electronic material in order to provide accurate information to voters about the modifications to absentee voter eligibility and related requirements of this order. . . ."

fied General Statutes (Rev. to 2019) § 9-135[2] by adding "COVID-19" as a permissible reason for absentee voting, violates article sixth, § 7, of the Connecticut constitution.[3] The four plaintiffs, who were candidates for the Republican Party's nomination for United States Congress for Connecticut's First and Second Congressional Districts,[4] appealed directly pursuant to General Stat-

[2] General Statutes (Rev. to 2019) § 9-135 provides: "(a) Any elector eligible to vote at a primary or an election and any person eligible to vote at a referendum may vote by absentee ballot if he or she is unable to appear at his or her polling place during the hours of voting for any of the following reasons: (1) His or her active service with the armed forces of the United States; (2) his or her absence from the town of his or her voting residence during all of the hours of voting; (3) his or her illness; (4) his or her physical disability; (5) the tenets of his or her religion forbid secular activity on the day of the primary, election or referendum; or (6) the required performance of his or her duties as a primary, election or referendum official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than his or her own during all of the hours of voting at such primary, election or referendum.

"(b) No person shall misrepresent the eligibility requirements for voting by absentee ballot prescribed in subsection (a) of this section, to any elector or prospective absentee ballot applicant."

Hereinafter, all references to § 9-135 are to the 2019 revision.

[3] Article sixth, § 7, of the Connecticut constitution provides: "The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness or physical disability or because the tenets of their religion forbid secular activity."

[4] The plaintiffs are Mary Fay, an elector and candidate for United States Representative for the First Congressional District, Thomas Gilmer, an elector and candidate for United States Representative for the Second Congressional District, Justin Anderson, an elector and candidate for United States Representative for the Second Congressional District, and James Griffin, an elector and candidate for United States Representative for the First Congressional District.

We note that Fay and Anderson subsequently prevailed in the primary election held on August 11, 2020, and received the Republican Party's nominations for the offices of United States Representative for the First and Second Congressional Districts, respectively. See M. Pazniokas, "Recount Gives GOP Nomination to Justin Anderson in CT-2," The Connecticut Mirror, August 18, 2020, available at https://ctmirror.org/2020/08/18/recount-gives-gop-nomination-to-justin-anderson-in-ct-2/ (last visited February 9, 2021); M. Pazniokas, "The Connecticut Primary: A Perfunctory Contest for President, and a Long Wait for Others," The Connecticut Mirror, August 11, 2020, avail-

utes § 52-265a[5] from the judgment of the trial court in favor of the defendant, Denise W. Merrill, Secretary of the State, in this action seeking declaratory and injunctive relief with respect to the defendant's change of the absentee ballot application for the August 11, 2020 primary election (August primary) to add coronavirus disease 2019 (COVID-19) as a new reason for requesting an absentee ballot pursuant to Executive Order No. 7QQ. Following deliberations after an expedited oral argument held on August 6, 2020, we ruled from the bench that (1) the plaintiffs were aggrieved and had standing to bring the declaratory judgment action, (2) we could not consider, for the first time on appeal, the defendant's special defense of laches as an alternative ground for affirming the judgment of the trial court, and (3) Executive Order No. 7QQ does not violate article sixth, § 7, because the phrase "unable to appear at the polling place on the day of election because of . . . sickness," as used in that constitutional provision, is not limited to an illness suffered by the individual voter that renders that person physically unable to travel to the polling place. Accordingly, we affirmed the judgment of the trial court and indicated that a written opinion would follow. This is that opinion.

able at https://ctmirror.org/2020/08/11/the-connecticut-primary-a-perfunctory-contest-for-president-and-a-long-wait-for-others (last visited February 9, 2021).

[5] On July 23, 2020, Chief Justice Robinson granted the plaintiffs' application for permission to file an expedited public interest appeal pursuant to § 52-265a. See General Statutes § 51-199 (b) (9) ("[t]he following matters shall be taken directly to the Supreme Court . . . any matter brought to the Supreme Court pursuant to section 52-265a"). After Chief Justice Robinson ordered an expedited briefing schedule culminating in an oral argument held remotely on August 6, 2020, we granted the motion of the Connecticut Democratic Party, Kate Farrar and Sherry Haller for permission to appear as amici curiae and to file a brief.

We thank all counsel for their professionalism during the briefing and argument of this appeal. This high level of professional conduct is particularly noteworthy given the unique exigencies posed by the ongoing COVID-19 pandemic, which were compounded by the severely damaging effects of Tropical Storm Isaias two days before oral argument in this case.

The pleadings and the record reveal the following undisputed facts and procedural history. On March 10, 2020, Governor Lamont declared a public health and civil preparedness emergency "throughout the [s]tate . . . as a result of the [COVID-19] outbreak in the United States and Connecticut . . . ." COVID-19 is a "respiratory disease that spreads easily from person to person and may result in serious illness or death," and "public health experts have indicated that persons infected with COVID-19 may not show symptoms, and transmission or 'shedding' of the coronavirus that causes COVID-19 may be most virulent before a person shows any symptoms . . . ." The United States Centers for Disease Control and Prevention have "recommended that people with mild symptoms consistent with COVID-19 be assumed to be infected with the disease," and "public health experts have recommended that, to prevent transmission of COVID-19, and in light of the risk of asymptomatic transmission and a significant rate of false negative tests, everyone should assume they can be carrying COVID-19 even when [they] have received a negative test result or do not have symptoms . . . ."

Given the greater danger of COVID-19 to "elderly registered voters [who] consistently demonstrate the highest rate of voter turnout" and the "significant portion of poll workers and volunteers [who] are [sixty years old] or older," Governor Lamont determined that "providing an alternative to [in person] voting could be particularly helpful in reducing the risk of transmission during voting among this population . . . ." Accordingly, on May 20, 2020, he issued Executive Order No. 7QQ pursuant to his powers under General Statutes § 28-9 (b) (1)[6] to provide that alternative to in person voting for the August primary.

[6] General Statutes § 28-9 (b) (1) provides in relevant part: "Following the Governor's proclamation of a civil preparedness emergency pursuant to subsection (a) of this section or declaration of a public health emergency

Specifically, Executive Order No. 7QQ, inter alia, "modified [§ 9-135] to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, an eligible elector may vote by absentee ballot for the [August primary] if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19. *For purposes of this modification, a person shall be permitted to lawfully state he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the* [*August primary*]*, there is no federally approved and widely available vaccine for prevention of COVID-19.* It shall not constitute a misrepresentation under subsection (b) of [§] 9-135 . . . for any person to communicate the provisions of this modification to any elector or prospective absentee ballot applicant." (Emphasis added.)

In late June, 2020, the defendant, acting pursuant to her general supervisory authority over elections in Connecticut, issued the application for absentee ballots for the August primary (application). The application added "COVID-19" as a new, seventh reason for requesting an absentee ballot; it is listed first among

pursuant to section 19a-131a, *the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health.* The Governor shall specify in such order the reason or reasons therefor and any statute, regulation or requirement or part thereof to be modified or suspended and the period, not exceeding six months unless sooner revoked, during which such order shall be enforced. Any such order shall have the full force and effect of law upon the filing of the full text of such order in the office of the Secretary of the State. . . . *Any statute, regulation or requirement, or part thereof, inconsistent with such order shall be inoperative for the effective period of such order.* Any such order shall be communicated by the Governor at the earliest date to both houses of the General Assembly." (Emphasis added.)

the reasons for "expect[ing] to be unable to appear at the polling place during the hours of voting,"[7] with an adjacent notation in bold print that "[a]ll voters are able to check this box, pursuant to Executive Order [No.] 7QQ."[8] (Emphasis omitted.)

As previously stipulated by the parties, "[t]he defendant anticipate[d] a significant increase in the use of absentee ballots this year and, working with a third-party mailing vendor (vendor), ha[d] mailed 1,274,414 applications to active registered voters between June 26 and July 1, 2020.[9] As of July 15, 2020, more than 100,000 voters ha[d] completed and returned their applications to local election officials for processing; 107,743 applications ha[d] been processed as of that date. The information contained in each application [was] then downloaded by the defendant's office onto a computer

[7] The other six reasons provided on the application are (1) "[m]y active service in the Armed Forces of the United States," (2) "[m]y absence from the town during all of the hours of voting," (3) "[m]y illness," (4) "[m]y religious tenets forbid secular activity on the day of the election, primary or referendum," (5) "[m]y duties as a primary, election or referendum official at a polling place other than my own during all of the hours of voting," and (6) "[m]y physical disability."

[8] The "special instructions" at the bottom of the application provide in relevant part: "The [s]tate . . . via Executive Order [No.] 7QQ, as interpreted by the [defendant] pursuant to [General Statutes § 9-3], has determined [that] (1) . . . having a [preexisting] illness allows you to vote by absentee ballot because your [preexisting] *illness* would prevent you from appearing at your [designated] polling place or (2) . . . absent a widely available vaccine, the existence of the COVID-19 virus allows you to vote by absentee ballot if you so choose for your own safety. To receive your absentee ballot please complete and sign this application (be sure to check 'Illness' for reason (1) or 'COVID-19' for reason (2) above) and return it to your [t]own [c]lerk using the enclosed postage prepaid envelope. . . ." (Emphasis in original.)

[9] "Ordinarily, 3 to 5 percent of voters vote by absentee ballot; the experience of similar jurisdictions indicates that between 50 and 80 percent of Connecticut voters will apply for, and likely use, absentee ballots for the August primary. The printing and mailing of the applications cost the state approximately $850,000." *Fay* v. *Merrill*, 336 Conn. 432, 439 n.11, 246 A.3d 970 (2020).

file, which was provided to the vendor approximately every other day beginning on July 17, 2020. The vendor was scheduled to mail the appropriate absentee ballots to the approved voters once those ballots were finalized after July 21, 2020." (Footnote in original.) *Fay* v. *Merrill*, 336 Conn. 432, 439, 246 A.3d 970 (2020).

On July 1, 2020, the plaintiffs filed a petition and complaint with a single Supreme Court justice pursuant to General Statutes §§ 9-323, 52-29 and 52-471, claiming that the application was a "ruling of an election official" that violated article sixth, § 7, as well as a violation of Executive Order No. 7QQ and § 9-135. After a hearing held on July 20, 2020, Chief Justice Robinson granted the defendant's motion to dismiss that proceeding for lack of subject matter jurisdiction, concluding that § 9-323 does not apply to primaries, including those for federal congressional office. See *Fay* v. *Merrill*, supra, 336 Conn. 436.

That same day, the plaintiffs brought the present action in the trial court pursuant to General Statutes §§ 9-329a, 52-29 and 52-471. The plaintiffs first claimed that Executive Order No. 7QQ violates article sixth, § 7, of the Connecticut constitution because (1) the constitutional provision "expressly commits the prescription of absentee voting procedure to the General Assembly—not to the governor," and (2) the executive order "broadens the use of absentee ballots, in contravention of the strict reasons for which absentee ballots may be used in Connecticut elections as set forth in article sixth, § 7."[10] Second, the plaintiffs claimed that the defendant's "decision to expand absentee voting based on Executive Order No. 7QQ, rather than [to] limit absentee voting in accordance with the restrictions set forth by the legislature in . . . § 9-135, was a ruling

[10] The plaintiffs also pleaded that "[t]here is no COVID-19 exception in the Connecticut constitution."

of an election official" that violated the Connecticut constitution because (1) the defendant "lacks the constitutional authority to alter the parameters of who is entitled to vote by absentee ballot," (2) "[t]he reasons that electors may vote by absentee ballot are strictly limited by the Connecticut constitution and can . . . be expanded [only] by the electorate," and (3) the application "expands the use of absentee ballots for reasons beyond [the six] specifically prescribed in article sixth, § 7, of the state constitution."[11] Claiming to be aggrieved as candidates and electors by these various violations, the plaintiffs sought a judgment declaring that the application is unconstitutional and based on an erroneous interpretation of Executive Order No. 7QQ and § 9-135. They also sought an ex parte prohibitory injunction precluding the defendant from mailing or distributing copies of the application to any Connecticut voters and an ex parte mandatory injunction directing her to recall any copies already mailed or distributed to any Connecticut voters.

On July 22, 2020, after a hearing, the trial court issued a memorandum of decision concluding that the defendant properly issued the application pursuant to Executive Order No. 7QQ, insofar as the executive order did not violate article sixth, § 7, because the phrase "because of sickness," as used therein, encompassed "a sickness of a nearly unique character," namely, the public health emergency presented by the COVID-19 pandemic. The court described Executive Order No.

[11] The plaintiffs also claimed that the defendant's "decision to add a new category called 'COVID-19' and her failure to include the restrictions contained in Executive Order No. 7QQ concerning that reason—i.e., the voter being unable to appear and the unavailability of a vaccine—constitute a ruling of an election official" that "ignored the important qualification" to that effect in the executive order. The trial court did not address this issue given the parties' apparent concession that the "case would live or die by [the court's] ruling" as to the constitutionality of Executive Order No. 7QQ, and it is not before us in this appeal.

7QQ as "far from saying [that] the law means any sickness, anywhere, anytime," with fatality statistics demonstrating that "COVID-19 is the scourge of the earth" and a "sickness of a lethality and ubiquity unknown for [one] hundred years."[12] The court further rejected the plaintiffs' claim that Executive Order No. 7QQ was unconstitutional under article sixth, § 7, because that provision permits only the General Assembly to act with respect to absentee ballots. The court deemed that argument inconsistent with the governor's emergency powers as delegated by the legislature under § 28-9 (b) (1), the constitutionality of which the plaintiffs did not question.

Although it reached the merits of the constitutional issues, the trial court also rejected several jurisdictional and procedural defenses advanced by the defendant. First, the court determined that any lack of jurisdiction over the constitutional claims under § 9-329a, the primary contest statute, was immaterial because, "at a minimum, the court has jurisdiction under . . . § 52-29, the declaratory judgment statute." Second, the trial court rejected the defendant's claim that the plaintiffs were not aggrieved, reasoning that they "are not ordinary voters. They are candidates for office with direct interests at stake and with immediate conduct—encouraging or discouraging absentee ballots—hanging in the balance." Finally, given its decision on the merits, the trial court deemed the defendant's laches defense moot. Accordingly, the trial court rendered judgment for the defendant. This public interest appeal followed. See footnote 5 of this opinion.

During the pendency of this appeal, the General Assembly passed Spec. Sess. P.A. 20-3, "An Act Con-

[12] The trial court noted: "Suffice it to say that cold and flu season [would not] be enough. Those circumstances would leave the exception of absentee balloting swallowing the rule of in person voting. This is a far case from that."

cerning Absentee Voting and Reporting of Results at the 2020 State Election, Expanding Election Day Registration and Ratifying Certain Provisions of an Executive Order that Relate to the August 11, 2020, Primary," which Governor Lamont signed into law on July 31, 2020. Spec. Sess. P.A. 20-3, inter alia, extends the COVID-19 provisions of Executive Order No. 7QQ to the state election scheduled for November 3, 2020. See Spec. Sess. P.A. 20-3, §§ 1 and 2.[13] It also ratifies Execu-

[13] Spec. Sess. P.A. 20-3 provides in relevant part: "Section 1. Section 9-135 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

"(a) Any elector eligible to vote at a primary or an election and any person eligible to vote at a referendum may vote by absentee ballot if [he or she] such elector or person is unable to appear at [his or her] such elector's or person's polling place during the hours of voting for any of the following reasons: (1) [His or her] Such elector's or person's active service with the armed forces of the United States; (2) [his or her] such elector's or person's absence from the town of [his or her] such elector's or person's voting residence during all of the hours of voting; (3) [his or her] such elector's or person's illness; (4) [his or her] such elector's or person's physical disability; (5) the tenets of [his or her] such elector's or person's religion forbid secular activity on the day of the primary, election or referendum; [or] (6) the required performance of [his or her] such elector's or person's duties as a primary, election or referendum official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than [his or her] such elector's or person's own during all of the hours of voting at such primary, election or referendum; or (7) for the state election in 2020, the sickness of COVID-19. As used in this section, 'COVID-19' means the respiratory disease designated by the World Health Organization on February 11, 2020, as coronavirus 2019, and any related mutation thereof recognized by said organization as a communicable respiratory disease.

"(b) No person shall misrepresent the eligibility requirements for voting by absentee ballot prescribed in subsection (a) of this section, to any elector or prospective absentee ballot applicant.

"Sec. 2. Section 9-137 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

"(a) Each absentee ballot shall be returned to the municipal clerk, inserted in an inner envelope which shall be capable of being sealed and which shall have printed on its face a form containing the following statements:

" 'I hereby state under the penalties of false statement in absentee balloting that I am eligible to vote at the primary, election or referendum in the municipality in which this absentee ballot is to be cast and that I expect to be unable to appear at my polling place during the hours of voting at such primary, election or referendum for one or more of the following reasons:

tive Order No. 7QQ in its entirety. See Spec. Sess. P.A. 20-3, § 16;[14] see also Office of Legislative Research, Bill Analysis, HB 6002 (as amended by House "A" and "D"), An Act Concerning Absentee Voting and Reporting of Results at the 2020 State Election and Election Day Registration (2020) p. 2, available at https://www.cga.ct.gov/2020/BA/PDF/2020HB-06002-R01SS1-BA.PDF (last visited February 9, 2021). As we previously noted, after an expedited oral argument held on August 6, 2020, we rendered judgment affirming the judgment of the trial court, indicating that this written opinion would follow.

I

AGGRIEVEMENT

Because it implicates our subject matter jurisdiction, we begin with the defendant's contentions that the

(1) My active service in the armed forces; (2) my absence from the town in which I am eligible to vote during all of the hours of voting; (3) my illness or physical disability; (4) the tenets of my religion which forbid secular activity on the day of the primary, election or referendum; or (5) my duties as a primary, election or referendum official.

" 'Date . . . .

" '. . . . (Signature)'

"(b) Notwithstanding the provisions of subsection (a) of this section, for the state election in 2020, each inner envelope in which an absentee ballot is returned to the municipal clerk shall have printed on its face a form containing the following statements:

" 'I hereby state under the penalties of false statement in absentee balloting that I am eligible to vote at the primary, election or referendum in the municipality in which this absentee ballot is to be cast and that I expect to be unable to appear at my polling place during the hours of voting at such primary, election or referendum for one or more of the following reasons: (1) My active service in the armed forces; (2) my absence from the town in which I am eligible to vote during all of the hours of voting; (3) my illness or physical disability; (4) the tenets of my religion which forbid secular activity on the day of the primary, election or referendum; (5) my duties as a primary, election or referendum official; or (6) the sickness of COVID-19.

" 'Date . . . .

" '. . . . (Signature)' "

We note that the additions to the statute made by the act are underlined and the deletions are in brackets.

[14] Spec. Sess. P.A. 20-3, § 16, provides: "(*Effective from passage*) Notwithstanding any provision of the general statutes, any provisions of sections 1

plaintiffs lack standing because they are not aggrieved and that, "if they are aggrieved, any relief in this case should be limited to the specific primary races in which they are candidates."[15] Relying on this court's recent decision in *Lazar* v. *Ganim*, 334 Conn. 73, 220 A.3d 18 (2019), and the Pennsylvania Supreme Court's decision in *Kauffman* v. *Osser*, 441 Pa. 150, 271 A.2d 236 (1970), the defendant contends that the plaintiffs have failed to explain how Executive Order No. 7QQ has "harmed them or their candidacies" beyond the "abstract assertion that [it] has changed the essential character of the elections in which the plaintiffs are candidates" and their "general interests in having a fair and honest election . . . ." (Emphasis omitted; internal quotation marks omitted.)

In response, the plaintiffs argue that the trial court correctly determined that they were "personally aggrieved" because all four of them are candidates in the August primary, and two will be candidates in the November 3 general election, which gives them "an interest in knowing who is eligible to vote and the manner in which those votes may be cast." The plaintiffs further contend that the anticipated significant increase in absentee voting; see footnote 9 of this opinion and accompanying text; will change "the essential character" of the election as one from a "snapshot" of the primary voting day with 95 percent of the votes cast in person to one in which 80 percent of the votes will be cast by mail over a three week period. The plaintiffs

to 5, inclusive, of Executive Order No. 7QQ of Governor Ned Lamont, dated May 20, 2020, that relate to the August 11, 2020, primary, are ratified."

[15] We note that, in his order granting the § 52-265a petition; see footnote 5 of this opinion; Chief Justice Robinson directed the parties "to address the following issues in their briefs: (1) the extent to which the plaintiffs are aggrieved by Executive Order No. 7QQ and the defendant's issuance of the [application]; and (2) the appropriate remedy, including whether the issue of aggrievement may limit the scope of relief that can be granted to the primary election in which the plaintiffs are candidates."

further rely on this court's "broad jurisdiction" over declaratory judgment actions under § 52-29. With respect to remedies, the plaintiffs cite, among other cases, *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 15 A.3d 601 (2011), and argue that a declaratory judgment in their favor will do nothing more than declare the expansion of absentee voting under Executive Order No. 7QQ to be unconstitutional; they posit that no additional relief is required at this time, acknowledging that, under *Lighthouse Landings, Inc.*, additional proceedings for specific relief may well take place. We agree with the plaintiffs and conclude that, as candidates in an affected primary election, they were sufficiently aggrieved by Executive Order No. 7QQ to have standing to bring this declaratory judgment action.

"It is a basic principle of our law . . . that the plaintiffs must have standing in order for a court to have jurisdiction to render a declaratory judgment. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. . . . [Because] [s]tanding requires no more than a colorable claim of injury . . . a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Put differently, an action for a declaratory judgment, valuable as it has become in modern practice, is not a procedural panacea for use on all occasions. . . . In providing statutory authority for courts to grant declara-

tory relief, the legislature did not intend to broaden their function so as to include issues which would not be such as could be determined by the courts in ordinary actions. . . . The declaratory judgment procedure consequently may be employed only to resolve a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement. . . . A party pursuing declaratory relief must therefore demonstrate, as in ordinary actions, a justiciable right in the controversy sought to be resolved, that is, contract, property or personal rights . . . as such will be affected by the [court's] decision. . . . A party without a justiciable right in the matter sought to be adjudicated lacks standing to raise the matter in a declaratory judgment action. . . .

"Thus, [s]tanding is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a [well settled] twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected. . . .

"Finally, it is well settled that [i]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.

. . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Citations omitted; internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 727–29, 95 A.3d 1031 (2014).

This court's decision in *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 6 A.3d 726 (2010), is instructive on the issue of aggrievement. In *Bysiewicz*, this court held that a declared candidate for the Office of the Attorney General had standing to bring a declaratory judgment action seeking construction of General Statutes § 3-124 and a determination of that statute's constitutionality. Id., 759; see id., 760 (noting that candidate's "declared intention to run for the [O]ffice of [the] [A]ttorney [G]eneral and her particular interest in avoiding the great effort and expense of running for that office if her qualifications to serve in that office could be successfully challenged upon her election are sufficient to confer standing on her to bring this action"). The court observed that, although a challenge to the candidate's qualifications via "a quo warranto action would not be ripe until the plaintiff actually took office, [o]ne great purpose [of a declaratory judgment action] is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds . . . . In light of the potential injury to the plaintiff's interests if her claims are not adjudicated until after the election, *as well as the potential injury to the public's interest in avoiding voter confusion and disruptions in the election process*, including the possibility of a vacancy in the [O]ffice of [the] [A]ttorney [G]eneral, we conclude that the

action was ripe when it was brought even though the plaintiff had not yet been nominated or elected to the [O]ffice of [the] [A]ttorney [G]eneral." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 760–61; see also *Corren* v. *Sorrell*, 151 F. Supp. 3d 479, 491–92 (D. Vt. 2015) (concluding that strategic campaign considerations give prospective candidate standing to challenge public election finance laws); *George* v. *Watertown*, 85 Conn. App. 606, 614–15, 858 A.2d 800 (noting that party need not actually seek relief under subdivision regulation to have standing to challenge its constitutionality by declaratory judgment action), cert. denied, 272 Conn. 911, 863 A.2d 702 (2004).

The defendant attacks the plaintiffs' standing based on our decision in *Lazar* v. *Ganim*, supra, 334 Conn. 73, which involved a challenge to the Bridgeport mayoral primary based on alleged improprieties in the handling of absentee ballots. Id., 76–77. In *Lazar*, we concluded that the plaintiffs, who were several registered voters, were not "aggrieved by the ruling of an election official" under § 9-329a (a) (1) "because they had no specific personal interest that was affected by the improprieties complained of." Id., 91–92. In so concluding, we observed that "[t]he only harm that the [voters] have claimed is that the election was unfair as a result of the improprieties, and an unfair election affects every voter," thus implicating the "well established" rule "that a claim of injury to a general interest that all members of the community share is not sufficient to establish standing." (Internal quotation marks omitted.) Id. We stated that, "if an elector were improperly denied his right to vote, the elector would have standing to bring an action pursuant to § 9-329a (a) (1) and could ask the court to correct the results to include his vote. Moreover, we find it unlikely that the legislature intended to create the situation in which, after every primary election,

thousands of potential plaintiffs would have standing to seek a new primary based on the rulings of an election official that did not personally affect them. It is more likely that the legislature intended that the proper party to seek that particular form of relief would be a losing *candidate* who could establish that the improper ruling of an election official had rendered the results unreliable." (Emphasis in original.) Id., 88–89; see id., 89–90 (distinguishing cases brought by candidates). The defendant's reliance on *Lazar* is misplaced. In contrast to *Lazar*, the plaintiffs in the present case specifically pleaded their interest as candidates as well as electors.[16] This candidate status gives them a personal interest that is distinct from that of an ordinary voter, particularly given the potential effect of widespread absentee voting on their campaign strategies. See *Corren* v. *Sorrell*, supra, 151 F. Supp. 3d 491–92. Accordingly, we conclude that the trial court correctly determined that the plaintiffs were aggrieved for purposes of this declaratory judgment action.[17]

[16] We similarly find distinguishable two other cases relied on by the defendant, namely, *Kauffman* v. *Osser*, supra, 441 Pa. 152–53, 157, which held that voters lacked standing to bring a constitutional challenge to Pennsylvania's absentee ballot statute, and *Paher* v. *Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020), in which the court held that registered voters who claimed injury by vote dilution lacked standing to challenge Nevada's all mail primary created in response to the COVID-19 pandemic. Both of these cases are distinguishable because they were not brought by candidates.

[17] At oral argument before this court, we discussed with the parties whether a grant of a declaratory judgment for the plaintiffs would have an immediate effect on the August primary, for either the Republican Party primary in which they were running, or the simultaneously conducted Democratic Party primary. As the plaintiffs pointed out, this court addressed the preclusive effects of declaratory judgments in *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 300 Conn. 325, which observed: "Under § 33 of the Restatement (Second) of Judgments, '[a] valid and final judgment in an action brought to declare rights or other legal relations *of the parties is conclusive in a subsequent action between them as to the matters declared*, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.' 1 Restatement (Second), [Judgments] § 33 [p. 332 (1982)]." (Emphasis added.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 352.

II

LACHES

Relying on *Price* v. *Independent Party of CT—State Central*, 323 Conn. 529, 147 A.3d 1032 (2016), along with federal district court cases considering recent challenges to the expansion of absentee balloting during the COVID-19 pandemic; see *Curtin* v. *Board of Elections*, 463 F. Supp. 3d 653 (E.D. Va. 2020); *Paher* v. *Cegavske*, Docket No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301 (D. Nev. May 27, 2020); the defendant contends that this action is untimely under the equitable defense of laches.[18] The defendant specifically argues that the plaintiffs unreasonably and purposefully delayed filing this action given that they did not bring the § 9-323 proceeding to this court until July 1, 2020, which was six weeks after the issuance of Executive Order No. 7QQ and slightly more than one month before the August primary, and they "then wasted another three weeks pursuing [that] baseless action" before fil-

We stated that "a declaratory judgment, in and of itself, has no res judicata effect on any other claims brought, or to be brought, in a separate action." Id., 354. "[A] plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment. This further relief may include damages which had accrued at the time the declaratory relief was sought . . . ." (Internal quotation marks omitted.) *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 337, 179 A.3d 201 (2018), quoting *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 361 (*Palmer, J.*, dissenting); accord 1 Restatement (Second), supra, § 33, comment (c), p. 335. Accordingly, we agree with the plaintiffs that, if they had prevailed in this appeal, further proceedings would have been necessary to determine what effect, if any, a declaratory judgment for the plaintiffs would have had on the August primary, either in this action with respect to the Republican Party primary or in a separate proceeding with respect to the Democratic Party primary. See footnote 21 of this opinion.

[18] We address the special defense of laches before addressing the constitutional issues in this case because of the "general rule that [c]onstitutional issues are not considered unless absolutely necessary to the decision of a case." (Internal quotation marks omitted.) *State* v. *Apt*, 319 Conn. 494, 526, 126 A.3d 511 (2015).

ing the present action. Given the intensely factual nature of the laches defense and the lack of necessary factual development on the trial court record, we decline to consider the defendant's laches claim for the first time on appeal as an alternative ground on which to affirm the judgment of the trial court.

By way of background, we note that "(1) [l]aches consists of an inexcusable delay [that unduly] prejudices the defendant, and (2) [t]he burden is on the party alleging laches to establish that defense." (Internal quotation marks omitted.) *Price* v. *Independent Party of CT—State Central*, supra, 323 Conn. 544. "A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made [as a matter of law], unless the subordinate facts found make such a conclusion inevitable . . . . The defense of laches, if proven, bars a plaintiff from seeking equitable relief . . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the [opposing party] . . . as where, for example, the [opposing party] is led to change his position with respect to the matter in question."[19] (Internal quotation

[19] For examples of the application of the doctrine of laches in the context of elections law cases during the COVID-19 pandemic, see *Curtin* v. *Board of Elections*, supra, 463 F. Supp. 3d 659 ("The limited record here supports the conclusion that [the] [p]laintiffs had an incentive to file suit as soon as these injuries became apparent in order to rectify the perceived wrong prior to the actual commencement of the absentee ballot period. The disputed COVID-19 [g]uidance was issued to local registrars on March 16, 2020, and to the public on March 17, 2020, and the absentee ballot period began May 8 or 9, 2020, yet, [the] [p]laintiffs did not file suit until May 13, 2020. Ultimately, the [c]ourt finds that [the] [p]laintiffs failed to demonstrate the requisite diligence."); *Paher* v. *Cegavske*, supra, 2020 WL 2748301, *5 (finding timing of request for preliminary injunctive relief unreasonable when brought twenty-six days before primary and after "[mail in] ballots [had] been sent to Nevada voters and a substantial number of eligible voters . . . [had] already sent in their [mail in] ballots," and "[t]he state [had] also made significant monetary investments and efforts to implement the [primary plan] and on media and marketing campaigns to inform Nevada voters of how to exercise their right to vote via mail").

marks omitted.) *Glastonbury* v. *Metropolitan District Commission*, 328 Conn. 326, 341–42, 179 A.3d 201 (2018).

We decline to apply the doctrine of laches in the first instance on appeal as an alternative ground on which to affirm the judgment of the trial court. Although the defendant filed affidavits[20] establishing the potential prejudice in the event that the trial court issued orders affecting the August primary,[21] the plaintiffs have not

[20] Largely reflecting the rapid speed at which this case was filed and decided in the trial court, we note that the defendant did not file an answer that properly raised laches as a special defense subject to reply by the plaintiffs. See, e.g., Practice Book §§ 10-50 and 10-56; *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 397–98, 119 A.3d 462 (2015).

[21] As was discussed at oral argument before this court, the actual enforcement of any declaratory judgment that could have been rendered in the plaintiffs' favor with respect to the August primary would have raised significant practical issues for consideration by a trial court in the first instance. Consideration of these issues presumably would implicate the factors identified by the United States Supreme Court in *Purcell* v. *Gonzalez*, 549 U.S. 1, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006), which held that a court considering injunctive relief in an election law matter is "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. *Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.*" (Emphasis added.) Id., 4–5; see *Veasey* v. *Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (reconciling stay decisions of United States Supreme Court under *Purcell* and observing that "the common thread is clearly that the decision [being stayed] would change the rules of the election too soon before the election date").

The *Purcell* principle remains applicable in the context of COVID-19. See, e.g., *Republican National Committee* v. *Democratic National Committee*, U.S. , 140 S. Ct. 1205, 1206–1208, 206 L. Ed. 2d 452 (2020) (staying District Court order that would have required Wisconsin to count absentee ballots postmarked after its primary election day on April 7, so long as they were actually received by municipal clerks by extended deadline of April 13, because that order "fundamentally alters the nature of the election," given need for potentially unworkable subsequent orders enjoining "the public release of any election results for six days after election day" because "information . . . released during that time . . . would gravely affect the integrity of the election process" and result in "judicially created confusion"); *Paher* v. *Cegavske*, supra, 2020 WL 2748301, *5–6 (denying request for injunc-

had the opportunity to establish the reasonableness of the timing of their filings as a matter of fact because the trial court declined to address the laches issue. Given the procedural circumstances of this case, we decline to consider the intensely factual defense of laches in the first instance as an alternative ground on which to affirm the judgment of the trial court. See *Deane* v. *Kahn*, 317 Conn. 157, 182–83, 116 A.3d 259 (2015) (declining to consider easement by implication as alternative ground for affirming erroneous judgment of easement by necessity because "[w]e decline to surmise whether the trial court would have made any additional factual findings if it had rendered judgment on other counts of the plaintiff's complaint, especially in light of the fact that this opinion clarified what evidence is probative of the parties' intent with respect to the scope and use of an easement"); *Doe* v. *West Hartford*, 168 Conn. App. 354, 359 n.4, 147 A.3d 1083 (2016) (whether to consider alternative grounds for affirmance not ruled on by trial court is discretionary decision for appellate court), aff'd, 328 Conn. 172, 177 A.3d 1128 (2018). Accordingly, we now turn to the merits of the plaintiffs' constitutional claims.

III

CONSTITUTIONAL CLAIMS

The plaintiffs contend that Executive Order No. 7QQ violates article sixth, § 7, because (1) neither the defendant nor the governor has the power to expand absentee voting, and, therefore, the executive order "usurp[ed] a power reserved for the electorate and the General Assembly," and (2) the "sickness" referred to in article

tive relief in federal constitutional challenge brought twenty-six days before primary to decision of two Nevada counties to make mail in ballots more accessible to registered voters in light of COVID-19 pandemic because "the election [was] days away and Nevadans [were] already exercising their right to vote" via early voting, and grant of injunctive relief would "completely upend the June [p]rimary").

sixth, § 7, does not encompass a pandemic involving an infectious disease such as COVID-19 without regard to the "individual health circumstances" of a particular voter, including with respect to whether that voter is physically "unable to appear" at the polls in person.[22]

In considering the plaintiffs' challenge to Executive Order No. 7QQ, we apply the same presumption of constitutionality and burden of proof that applies to challenges to statutes, particularly given its subsequent ratification by the legislature. See, e.g., *Ex parte Endo*, 323 U.S. 283, 299–300, 65 S. Ct. 208, 89 L. Ed. 243 (1944); *Ritchie* v. *Polis*, 467 P.3d 339, 342 (Colo. 2020); *Straus* v. *Governor*, 459 Mich. 526, 534, 592 N.W.2d 53 (1999); *Stroup* v. *Kapleau*, 455 Pa. 171, 177, 313 A.2d 237 (1973). Thus, "[d]etermining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in

[22] We note that, in their reply brief, the plaintiffs raise an additional claim that the "constitutional provision for absentee voting . . . applies [only] to an 'election,' not a primary." They argue that the language of article sixth, § 7—referring to " 'voting in the choice of any officer to be elected'—makes the same distinction between an election and a primary that the defendant already successfully argued to this court" in connection with its subject matter jurisdiction under the election contest statutes, namely, that an "[e]lection," as defined by General Statutes § 9-1 (d), is an election for officers, as compared to a "primary," the plain meaning of which is restricted to a preliminary election to choose candidates. See *Fay* v. *Merrill*, supra, 336 Conn. 449 ("the plain and unambiguous language of the election contest statutes, § 9-329a, which required the plaintiffs to initiate this action in the Superior Court, governs challenges in the primary context, and this court lacks jurisdiction under § 9-323, which applies only to general elections for federal officials"). We decline to reach the merits of this claim, as it is a new claim raised for the first time in a reply brief. See, e.g., *Haughwout* v. *Tordenti*, 332 Conn. 559, 567 n.12, 211 A.3d 1 (2019).

favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015).

"In *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we enumerated the following six factors to be considered in construing the state constitution: (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. . . .

"The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party . . . can respond; and they encourage a principled development of our state constitutional jurisprudence. Although in *Geisler* we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven. . . . [N]ot every *Geisler* factor is relevant in all cases. . . . Moreover, a proper *Geisler* analysis does not require us simply to tally and follow the decisions favoring one party's state constitutional claim; a deeper review of those decisions' underpinnings is required because we follow only persuasive decisions." (Internal quotation marks omitted.) *Feehan* v. *Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019); see *State* v. *Purcell*, 331 Conn. 318, 351–52, 203 A.3d 542 (2019) (rejecting previous approach under

Geisler that "generally . . . assumed that the federal precedent factor weighs against the defendant if the United States Supreme Court has squarely decided the issue to the contrary under the federal constitution . . . or the federal courts are unanimous that the court would reach such a decision" in favor of approach that "consider[s] the merits of the on point decision itself," particularly "[w]hen . . . the issue to be decided is largely policy driven," based on departure from previous Supreme Court precedents, or "if the factual assumptions or legal underpinnings of a prior decision have been materially undermined by events since the Supreme Court considered the matter"). The *Geisler* analysis applies to cases in which the state constitution has no federal analogue, as well as those in which the claim is that the state constitution provides greater protection than does the federal constitution. See, e.g., *Feehan* v. *Marcone*, supra, 449–50. Accordingly, we now turn to the plaintiffs' specific constitutional claims.

A

Challenge to Governor's Authority To Issue Executive Order No. 7QQ

The plaintiffs first argue that the text of article sixth, § 7, solely and squarely commits authority over absentee voting to the General Assembly, which renders Executive Order No. 7QQ void as a matter of law. See, e.g., *Caldwell* v. *Meskill*, 164 Conn. 299, 306–307, 320 A.2d 788 (1973) (governor's partial veto power is limited to "distinct items of appropriation"); *State* v. *Stoddard*, 126 Conn. 623, 626–27, 633, 13 A.2d 586 (1940) (holding that legislature improperly delegated its authority over regulation of sale of milk products to executive branch agency by failing to prescribe applicable standards and principles). In response, the defendant claims, inter alia, that the plaintiffs' separation of powers challenge to Executive Order No. 7QQ was rendered moot during

the pendency of this appeal by Spec. Sess. P.A. 20-3, § 16, which legislatively ratified Executive Order No. 7QQ.[23] See footnote 14 of this opinion. We agree with the defendant and conclude that the legislature's ratification of Executive Order No. 7QQ rendered the plaintiffs' separation of powers claim moot.

A separation of powers challenge to executive action is rendered moot by legislative ratification of the challenged executive action. See *We the People of Connecticut, Inc.* v. *Malloy*, 150 Conn. App. 576, 581–82, 92 A.3d 961 (2014) (separation of powers challenge to governor's executive orders allowing personal care attendants to bargain collectively was rendered moot by passage of legislation that "entirely replaced" executive orders); *Fletcher* v. *Commonwealth*, 163 S.W.3d 852, 859 (Ky. 2005) (challenge to governor's emergency budget action as violating legislature's appropriations power was rendered moot by legislature's enactment of bill ratifying governor's actions but reaching issue as capable of repetition, yet evading review); see also *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301–302, 57 S. Ct. 478, 81 L. Ed. 659 (1937) ("[i]t is well settled that Congress may, by enactment not otherwise inappropriate, ratify . . . acts which it might have authorized . . . and give the force of law to official action unauthorized when taken" (citation omitted; internal quotation marks omitted)). Accordingly, we conclude that the legislature's ratification in its entirety

[23] The defendant further contends that Executive Order No. 7QQ was legislatively authorized by the governor's broad emergency power under § 28-9 (b) (1) to "modify . . . any statute . . . ." See footnote 6 of this opinion. In response, the plaintiffs argue that § 28-9 (b) cannot be read to allow that modification because the first clause of the absentee ballot amendment textually commits control over absentee balloting to the legislature. Given the ratification of Executive Order No. 7QQ by § 16 of Spec. Sess. P.A. 20-3, we need not consider whether § 28-9 (b), which expressly shares legislative power with the executive branch on a temporary emergency basis, rendered the executive order constitutional.

of Executive Order No. 7QQ via Spec. Sess. P.A. 20-3, § 16, rendered moot any claim that Governor Lamont usurped the legislative power over absentee balloting.[24] Accordingly, we dismiss the plaintiffs' separation of powers claim as moot and do not reach its merits.[25]

B

Whether "Sickness" Encompasses COVID-19 Without Regard to Circumstances of Individual Voter

Finally, we turn to the plaintiffs' claim that the word "sickness," as used in article sixth, § 7, does not permit the extension of a blanket exemption for COVID-19 for any and all voters but, instead, requires that the individual voter be actually "unable to appear" at the polling place because of that voter's personal sickness or individual risk of susceptibility to COVID-19. Observing that there is no stand-alone federal constitutional right to an absentee ballot; see, e.g., *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809–10, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969); the plaintiffs cite the

[24] The plaintiffs argue in their reply brief that a live controversy remains as to the constitutionality of Executive Order No. 7QQ after its ratification by the legislature, but they do not respond to the defendant's specific argument that the ratification cured any defect in the governor's specific authority to address the topic of absentee voting. The plaintiffs do, however, ask us to apply the doctrine of vacatur to the trial court's decision should we deem the separation of powers challenge moot. Outside of a single citation to *State* v. *Singleton*, 274 Conn. 426, 876 A.2d 1 (2005), the plaintiffs do not explain why they are entitled to the "extraordinary remedy" of vacatur. *In re Emma F.*, 315 Conn. 414, 431, 107 A.3d 947 (2015). Accordingly, we deem this request inadequately briefed and decline to consider it further. See, e.g., *State* v. *McCleese*, 333 Conn. 378, 424, 215 A.3d 1154 (2019).

[25] In ruling from the bench after oral argument, we initially affirmed the judgment of the trial court in its entirety. Given the jurisdictional implications of our conclusion that the plaintiffs' separation of powers claim is moot, the rescript of this opinion has been corrected to indicate that the appeal is dismissed with respect to that claim. See, e.g., *State* v. *Campbell*, 328 Conn. 444, 463–66, 180 A.3d 882 (2018) (dismissing penalty phase challenge in death penalty appeal as rendered moot by abolition of death penalty and unripe by virtue of fact that defendant had not yet been resentenced).

Texas Supreme Court's recent decision in *In re State*, 602 S.W.3d 549, 560 (Tex. 2020), holding that the lack of COVID-19 immunity is not a " 'physical condition' " under that state's absentee voting statute, along with the interpretation of the word "sickness" in an insurance policy in *Rocci* v. *Massachusetts Accident Co.*, 226 Mass. 545, 116 N.E. 477 (1917), to contend that the plain meaning of the word "sickness" in article sixth, § 7, refers to an individual voter's condition of being sick. They cite case law from this court; see, e.g., *Keeley* v. *Ayala*, 328 Conn. 393, 406–407, 179 A.3d 1249 (2018); along with public hearing testimony from members of the Connecticut Town Clerks Association urging the legislature to reject all mail or "no excuse" absentee balloting in arguing that expanded absentee balloting raises the risk of fraud and mistakes leading to potential disenfranchisement.[26] They also view as "particularly telling" the failure of any of the speakers in support of the House Resolution that was ratified as article sixth, § 7, to mention the global 1918 influenza pandemic that had occurred approximately one decade before.

In response, the defendant contends that the COVID-19 exemption in Executive Order No. 7QQ is constitutional under article sixth, § 7. The defendant first relies on dictionary definitions of the word "sickness" that refer broadly to "a specific disease" without reference to an individual person's condition, observing that such clause of article sixth, § 7, is worded differently from

[26] To this end, the plaintiffs observe that there have been numerous failed attempts to amend the state constitution to expand the use of absentee ballots, including the electorate's rejection in 2014 by a 40,000 vote margin of an amendment that would have "remove[d] restrictions concerning absentee ballots and . . . permit[ted] a person to vote without appearing at a polling place on the day of an election"; K. Sullivan; Office of Legislative Research, Ballot Question and Explanatory Text for Proposed Constitutional Amendment, August 19, 2014, p. 1; and the 2019 failure in the legislature of an attempt to put no excuse absentee voting on the ballot as a constitutional amendment. See Substitute House Joint Resolution No. 161 (2019).

the religious tenets language in the same constitutional provision that is plainly and unambiguously linked to the practice of a specific voter. The defendant argues that the broader definition of "sickness" to include an illness not suffered by the voter personally is supported by the Arkansas Supreme Court's decision in *Forrest* v. *Baker*, 287 Ark. 239, 698 S.W.2d 497 (1985), and posits that the Texas Supreme Court's recent decision in *In re State*, supra, 602 S.W.3d 549, is based on distinguishable statutory language. Beyond those Connecticut cases establishing principles of constitutional interpretation, particularly that the state constitution is "a living document" that is an "instrument of progress"; (internal quotation marks omitted) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 156, 957 A.2d 407 (2008) ; the defendant also relies heavily on the Superior Court's construction of the phrase "unable to appear" in *Parker* v. *Brooks*, Superior Court, judicial district of New Haven, Docket No. CV-92-0338661-S (October 20, 1992) (7 Conn. L. Rptr. 492). The defendant deems the history of article sixth, § 7, to be less than instructive, insofar as the remarks in the history of the House Resolution that was enacted as article sixth, § 7, are the speakers' "anecdotal personal experiences that prompted them to support absentee voting," none of which "express[es] an opinion about the full scope of that constitutional language or whether it could include the circumstances at issue here." With respect to federal case law, the defendant cites several federal district court decisions invalidating certain limitations on absentee voting in light of the COVID-19 pandemic. She also argues that the United States Supreme Court's venerable compulsory vaccination decision in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 26–27, 25 S. Ct. 358, 49 L. Ed. 643 (1905), "strongly counsels" in support of sustaining Executive Order No. 7QQ, which was an exercise of the police power intended to protect, rather than to restrict, the

fundamental right to vote during the COVID-19 pandemic, which, as of the time this appeal was argued, had already taken more than 4300 lives in Connecticut alone. We agree with the defendant's reading of article sixth, § 7, and conclude that the word "sickness," as used therein, encompasses the existence of a specific disease such as the COVID-19 pandemic addressed by Executive Order No. 7QQ and is not limited to an illness suffered by an individual voter.

1

Constitutional Language

We begin with the text of article sixth, § 7, which provides: "The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are *unable to appear at the polling place* on the day of election because of absence from the city or town of which they are inhabitants or *because of sickness* or physical disability or because the tenets of their religion forbid secular activity." (Emphasis added.) The plaintiffs raise two significant points as to the constitutional language. First, they argue that "unable," for purposes of "unable to appear," means "helpless" or "incompetent," which would constitute a complete inability to get to the polls. Second, they argue that "sickness" narrowly refers to a condition personal to the voter rather than an infectious disease affecting the community at large like COVID-19.

"In dealing with constitutional provisions we must assume that infinite care was employed to couch in scrupulously fitting language a proposal aimed at establishing or changing the organic law of the state. . . . Unless there is some clear reason for not doing so, effect must be given to every part of and each word in the constitution. . . . Moreover, we do not supply constitutional language that the drafters intentionally

may have chosen to omit." (Citation omitted; internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 273, 990 A.2d 206 (2010) (plurality opinion); see *Sheff* v. *O'Neill*, 238 Conn. 1, 26–27, 678 A.2d 1267 (1996) (considering education clause in article eighth, § 1, of Connecticut constitution in light of prohibition of segregation in article first, § 20). As with statutes, we consult dictionaries to determine the ordinary meaning of state constitutional provisions. See, e.g., *State* v. *Damato-Kushel*, 327 Conn. 173, 186, 173 A.3d 357 (2017); *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 279; *Stolberg* v. *Caldwell*, 175 Conn. 586, 594, 402 A.2d 763 (1978), appeal dismissed sub nom. *Stolberg* v. *Davidson*, 454 U.S. 958, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

Turning to the plaintiffs' first argument, we note that the word "unable" is broadly defined as "lacking the necessary power, competence, *etc.*, to accomplish some specified act . . . ." (Emphasis added.) Dictionary.com, available at https://www.dictionary.com/browse/unable# (last visited February 9, 2021); see also American Heritage College Dictionary (4th Ed. 2007) pp. 3, 1490 (defining "unable" as opposite of "[h]aving sufficient power or resources"); Webster's Third New International Dictionary (2002) p. 2481 (defining "unable" as "not able" and synonymous with "unqualified," "incompetent,""inefficient," "impotent," or "helpless"). Read in context, the text of article sixth, § 7, suggests that *physical* inability to get to the polling place on election day is not the sine qua non for rendering a voter "unable to appear" there. Instead, that determination of ability is squarely within the individual voter's control or judgment. For example, a voter who requests an absentee ballot because of the tenets of his or her religion may well be physically able to get to the polling place but has nevertheless made the personal decision to adhere

to religious tenets that would forbid the act of in person voting. Second, a strict reading of "unable" does not account for the voter who may be physically able to get to the polling place, but only after a great deal of exertion or obtaining assistance from others. See *Parker* v. *Brooks*, supra, 7 Conn. L. Rptr. 494. The plaintiffs' purely physical focus in reading the term "unable" is inconsistent with the fact that it is entirely subject to the individual actions and motivations of the voter.[27]

This brings us to the plaintiffs' contention that the word "sickness" encompasses solely a condition personal to the voter rather than an infectious disease affecting the community at large like COVID-19. One dictionary defines "sickness" in relevant part as "[t]he condition of being sick; illness," or "[*a*] *disease*; a malady." (Emphasis added.) American Heritage College Dictionary, supra, p. 1287. Another dictionary defines it as "a particular disease or malady," or "the state or an instance of being sick; illness." Dictionary.com, available at https://www.dictionary.com/browse/sickness# (last visited February 9, 2021).

These definitions tend to support the defendant's interpretation of article sixth, § 7. First, the word "sickness" has a second meaning beyond a particular voter's "condition of being sick," insofar as it encompasses a "disease" or "a particular disease or malady."[28] This is

[27] As was discussed at oral argument before this court, using the example of a Hartford area voter attending a pool party on the shoreline for a full day on election day, a voter may create his or her inability to appear at the polling place that day merely by absenting him or herself from town.

[28] We note that the plaintiffs rely on the defendant's March 2, 2012 testimony before the Government Administration and Elections Committee in support of a constitutional amendment that would have amended article sixth, § 7, "to remove the current barriers . . . that allow voting by absentee ballot for only specified reasons," which would then enable the "General Assembly . . . to consider other ways to cast a ballot without appearing in person at [the] poll on election day." Conn. Joint Standing Committee Hearings, Government Administration and Elections Committee, Pt. 1, 2012 Sess., pp. 213–14, testimony of Secretary of the State Denise W. Merrill. This amendment would have allowed the legislature to study and implement

particularly so when it is read in juxtaposition with the religious tenets reason, which, in contrast to the word "sickness" standing alone, uses language that is personal to the specific voter by referring to "the tenets of *their* religion [that] forbid secular activity." (Emphasis added.) Conn. Const., art. VI, § 7. The presence of this language tying religious observance to the voter personally, in the absence of similar words so limiting "sickness," strongly suggests that the term "sickness" is capacious enough to include an identified illness such

modern measures such as "voting by mail, early voting, regional voting or what we call [no excuse] absentee balloting, where [a voter] wouldn't . . . need a specific reason to use an absentee ballot . . . ." Id., p. 214. The defendant suggested that a constitutional amendment was necessary, citing as an example the blizzard in October, 2011, when residents who were located in their towns but unable to get to their polling places because of blocked roadways could not vote by absentee ballot because, "under our current [absentee ballot] laws, these kinds of emergencies don't qualify as one of the reasons in our statutes or [state] constitution for someone to vote absentee." Id., p. 216. The defendant then went on to state: "In fact, a spouse who is a caregiver to the husband or wife who doesn't want to leave the ailing spouse's bedside is not even allowed to vote by absentee ballot, because you have to be disabled yourself in order to get an absentee ballot. These are the kinds of restrictions that I think need to change. The only way to do it is to remove this language from the [state] constitution . . . ." Id.

We agree with the plaintiffs that the interpretation of an elections law provision by the secretary of the state, who is the state's chief elections official, may be a persuasive indication of the provision's meaning, albeit one not binding on us. See, e.g., *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 488–89 n.21, 55 A.3d 251 (2012); accord *State* v. *Santiago*, 318 Conn. 1, 71, 122 A.3d 1 (2015) ("it is noteworthy that [the] [c]hief [s]tate's [a]ttorney . . . who heads the Division of Criminal Justice and represents the state in this matter, has himself publicly taken the position that, following a prospective repeal, any efforts to execute those already on death row would be unlikely to pass constitutional muster"). At oral argument before this court, however, counsel for the defendant contended that we should not consider her 2012 testimony in interpreting article sixth, § 7, because it (1) did not address the context of a public health emergency like COVID-19, and (2) was vague with respect to whether she had referred to the constitution *or* the statutes as imposing the applicable limitations. We agree with the defendant and do not consider her 2012 testimony before the legislature to be a persuasive interpretation of article sixth, § 7, as applied in the context of a pandemic.

as COVID-19 that has created a public health emergency.

Although the text of article sixth, § 7, is supportive of the defendant's reading, the plaintiffs' reading is also reasonable, which renders the provision sufficiently ambiguous so as not to render the textual factor dispositive of this issue. Accordingly, "we necessarily must continue with our review of the other *Geisler* factors." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 279.

2

Constitutional History

We now consider the history of absentee voting under the Connecticut constitution. Approximately seventy years prior to the adoption of article sixth, § 7, the 1818 constitution was temporarily amended to allow soldiers serving in the Civil War to vote in the 1864 election by absentee ballot. See W. Horton, The Connecticut State Constitution (2d Ed. 2012) p. 161. This temporary amendment was a response to this court's decision in *Opinion of the Judges of the Supreme Court*, 30 Conn. 591 (1862), which had declared unconstitutional a statute that allowed soldiers fighting in the Civil War to vote for state officers by absentee ballot; the court relied on existing constitutional language requiring that voters cast their votes in their towns on election day. See id., 600–601; see also id., 594–96 (contrasting provisions of Pennsylvania constitution and concluding that Connecticut constitution was "explicit in its direction" as to place of election, namely, "an 'electors' meeting,' composed of the electors in the respective towns qualified to vote in the town" (emphasis omitted)).

Nearly seventy years later, in 1932, the electorate adopted article sixth, § 7, as article XXXIX of the amend-

ments to the 1818 constitution.[29] See W. Horton, supra, pp. 160–61. Proponents of the proposed amendment reported wide, popular support from their towns for absentee voting and observed that Connecticut was one of the few states that did not provide for absentee voting at the time. See Conn. Joint Standing Committee Hearings, Constitutional Amendments, 1929 Sess., pp. 2–4. The discussion of the term "sickness" was very brief and limited to supporters' anecdotes about their ill or infirm relatives who had not been able to vote in person.[30] Id., p. 3. Although we agree with the plaintiffs that it is somewhat curious that none of the speakers' remarks mentioned the 1918 global influenza pandemic, which took place approximately one decade before, we do not draw any inferences from their silence on that point, given the limited nature of the discussion and the lack of opposition on the record before the committee. Accordingly, the very limited history of article sixth, § 7, does not shed light on whether the provision's framers intended for it to encompass an illness not suffered by the voter personally, such as a pandemic generally, and we move on to the next *Geisler* factor.

3

Connecticut Case Law

Beyond this court's 1862 decision in *Opinion of the Judges of the Supreme Court*, supra, 30 Conn. 591, the

[29] The portion of article sixth, § 7, providing "or because the tenets of their religion forbid secular activity" was added in 1964 by article XII of the amendments to the 1955 constitution. See W. Horton, supra, p. 160. We note that there was no recorded debate with respect to that provision. See id.

[30] One member of the public speaking in support of the amendment stated: "I would like to illustrate an instance in my own family—my father is [seventy-eight] years old and he has always voted, and [has] taken a great deal of interest in voting the Republican ticket. On account of illness he has to go to Florida or California, or some other warm climate. In order to have the privilege of voting he has in the past had to go to a [s]ummer camp in Maine and register there. For the last [ten] or [twelve] years he has voted there.

"I also have an [u]ncle who is [t]reasurer of the [t]own of Wethersfield and a short time ago he was seriously ill, and has since died. During the

most significant Connecticut authority on point is the Superior Court's decision by then Judge Vertefeuille in *Parker* v. *Brooks*, supra, 7 Conn. L. Rptr. 494, interpreting § 9-135, which is worded similarly to article sixth, § 7. In *Parker*, the court rejected a claim that numerous elderly and disabled voters, who had conditions such as heart disease, diabetes, and arthritis and lived in a New Haven apartment building, were not "unable to appear" for purposes of § 9-135 because they could venture out of their apartments at times, some with assistance. Id., 493–94. Citing this court's decision in *Wrinn* v. *Dunleavy*, 186 Conn. 125, 440 A.2d 261 (1982), Judge Vertefeuille found that the construction of § 9-135 urged in *Parker* was "not consistent with a liberal interpretation designed to further the right of suffrage," as required by this court's decision in *Wrinn* v. *Dunleavy*, supra, 142, and certain sister state cases. See *Parker* v. *Brooks*, supra, 494. The court relied on its observations of "the tenant-absentee voters as they testified in this matter. Although not bedridden or limited to the confines of their apartments, many of them are frail and walk or move about *only with difficulty*. If they were deprived of the right to cast absentee ballots, many of them would not vote at all rather than going to the polls. A liberal construction of the absentee voting statute is necessary to preserve their right to vote." (Emphasis added.) Id.; see id. (noting that voter's representation on his or her absentee ballot application reflects "the voter's expectations" rather than his or her physical capabilities on day of election). *Parker*, then, supports the defendant's contention that a voter's ability to appear is uniquely subjective and should be

past election he was made seriously ill from the fact that he could not vote. The doctor would not allow him to go to town to vote." Conn. Joint Standing Committee Hearings, Constitutional Amendments, 1929 Sess., p. 3.

liberally construed in favor of the right to vote,[31] although it does not shed any light on the meaning of "sickness."

4

Federal Case Law

This case differs from those involving the typical *Geisler* analysis because there are no federal cases directly on point, given the lack of a federal constitu-

[31] The plaintiffs, relying on a decision by the State Elections Enforcement Commission, disagree with the Superior Court's application of a liberal construction of § 9-135 in *Parker*. See *In re DeCilio*, State Elections Enforcement Commission, File No. 2017-057 (March 23, 2018). In *In re DeCilio*, the elections agency determined that absentee balloting under § 9-135 constitutes an exception to the "default rule . . . in Connecticut" of in person voting, cited this court's decision in *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 222, 939 A.2d 541 (2008), for the general proposition that statutory exceptions are strictly construed, and then strictly construed § 9-135 in concluding that an "unofficial" or "party checker" is not an "elections official" entitled to cast an absentee ballot under § 9-135. We reject the approach of the elections commission in *In re DeCilio* because it is inconsistent with decisions of both this court and the majority of our sister states, which construe absentee balloting statutes liberally in furtherance of the right to vote; these cases hold only that "substantial," rather than "strict," compliance is necessary with the statutory provisions governing absentee balloting in order to protect the sanctity of the vote by preventing fraud. See, e.g., *Erickson* v. *Blair*, 670 P.2d 749, 754 (Colo. 1983); *Wrinn* v. *Dunleavy*, supra, 186 Conn. 141–42; *Dombkowski* v. *Messier*, 164 Conn. 204, 209, 319 A.2d 373 (1972); *Boardman* v. *Esteva*, 323 So. 2d 259, 264 (Fla. 1975); *Adkins* v. *Huckabay*, 755 So. 2d 206, 218 (La. 2000); *McCavitt* v. *Registrars of Voters*, 385 Mass. 833, 844, 434 N.E.2d 620 (1982); *Shambach* v. *Bickhart*, 577 Pa. 384, 392, 845 A.2d 793 (2004); see also M. Dransfield, Annot., "Construction and Effect of Absentee Voters' Laws," 97 A.L.R.2d 257, 266–67, § 5 (1964) (discussing national split in authority).

These cases, however, are of limited persuasive value insofar as they consider the effect of a voter's failure to comply strictly with the technical requirements of absentee balloting, as opposed to the different and more fundamental question of whether a voter should be permitted to vote absentee in the first place. Our independent research has identified one case extending this principle of liberal construction to the interpretation of a state constitution's absentee ballot clause, which we find persuasive given the purpose of article sixth, § 7, namely, to make the fundamental right to vote more accessible to qualified voters. See *In re Lawrence*, 353 Mo. 1028, 1034, 185 S.W.2d 818 (1945) (applying liberal construction "in aid of the

tional analogue to article sixth, § 7. A brief review of federal case law nevertheless provides important context for Executive Order No. 7QQ. The United States Supreme Court's 1905 decision in *Jacobson* v. *Massachusetts*, supra, 197 U.S. 26–27, which upheld compulsory vaccination laws, has long been cited for the proposition that a state has broad police powers in the area of public health, which may include the restriction of personal liberties through measures such as quarantines. See, e.g., *South Bay United Pentecostal Church* v. *Newsom*, U.S. , 140 S. Ct. 1613, 1614, 207 L. Ed. 2d 154 (2020) (Roberts, C. J., concurring in denial of application for injunctive relief) (rejecting church's first amendment free exercise challenge to California executive order imposing 25 percent occupancy cap on worship services because of COVID-19); *Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F.3d 341, 346–47 (7th Cir. 2020) (rejecting church's first amendment free exercise challenge to Illinois executive order limiting public gatherings to ten people due to COVID-19), petition for cert. filed, 89 U.S.L.W. 3148 (U.S. October 22, 2020) (No. 20-569); *Bayley's Campground, Inc.* v. *Mills*, 463 F. Supp. 3d 22, 35 (D. Me. 2020) (considering state's powers under *Jacobson* in light of significant burden on fundamental right to travel and denying motion for preliminary injunction of governor's fourteen day quarantine order because "[i]t is not at all clear that there are any less restrictive means for the

right of suffrage" in concluding that state constitution's absentee ballot clause did not require "mere physical presence within the state on the day of election as a condition of eligibility to vote a civilian absentee ballot" (internal quotation marks omitted)); cf. *State ex rel. School District of the City of Jefferson, Cole County* v. *Holman*, 349 S.W.2d 945, 947 (Mo. 1961) (applying liberal construction to statute in resolving question of "at what elections may a voter who comes within the provisions of the absentee voting laws cast an absentee ballot" and distinguishing that issue from strict construction historically applied to voters' obligations under absentee ballot laws).

state to . . . meet [its] goal of curbing COVID-19," with such measures being "matters of public policy to be implemented by politicians and to be evaluated by voters, not by unelected judges"), aff'd, 985 F.3d 153 (1st Cir. 2021). But see *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, U.S. , 141 S. Ct. 63, 66–67, 208 L. Ed. 2d 206 (2020) (applying strict scrutiny and enjoining enforcement of executive order capping attendance at religious services held in "red" or "orange" COVID-19 zones because order was not narrowly tailored, and religious institutions were treated much more strictly than either essential or nonessential businesses in those zones, which did not have similar caps).

Beyond the state's police power under *Jacobson*, Executive Order No. 7QQ, which was intended to protect the fundamental right to vote, is consistent with the United States constitution's grant of "broad powers" to the "[s]tates . . . to determine the conditions under which the right of suffrage may be exercised . . . absent of course the discrimination [that] the [c]onstitution condemns." (Citations omitted.) *Lassiter* v. *Board of Elections*, 360 U.S. 45, 50–51, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959); see *Texas Democratic Party* v. *Abbott*, 961 F.3d 389, 407 (5th Cir. 2020) (observing that article one, § 4, of United States constitution "gives the states authority over [t]he Times, Places and Manner of holding Elections for Senators and Representatives . . . which power is matched by state control over the election process for state offices" (citation omitted; internal quotation marks omitted)). But see *Democratic National Committee* v. *Wisconsin State Legislature*, U.S. , 141 S. Ct. 28, 34 n.1, 208 L. Ed. 2d 247 (2020) (Kavanaugh, J., concurring in denial of application to stay) (concluding that text of article two of United States constitution means that "the state courts do not have a blank check to rewrite state election laws for

federal elections" and that, as matter of federal constitutional law, "a state court may not depart from the state election code enacted by the legislature"); *Bush* v. *Gore*, 531 U.S. 98, 112–13, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) (Rehnquist., C. J., concurring) (stating that article II, § 2, of United States constitution, governing appointment of presidential electors, presents "[an] exceptional [case] in which the [c]onstitution imposes a duty or confers a power on a particular branch of a [s]tate's government," namely, state legislatures, giving "the text of the election law itself, and not just its interpretation by the courts of the [s]tates . . . independent significance"). There is no independent federal constitutional right to vote by an absentee ballot so long as all eligible voters are provided with the right to vote. See *McDonald* v. *Board of Election Commissioners*, supra, 394 U.S. 808–10 (state was not required to provide pretrial detainees incarcerated in their home counties with absentee ballots, even though detainees held outside their home counties would qualify for absentee ballots, given lack of proof that those detained in their home counties had been barred from voting). States may, however, make rational classifications as to who may receive an absentee ballot, but they may not impose discriminatory, undue or irrational burdens on their use, particularly in a way that constitutes an outright denial of the franchise. See *O'Brien* v. *Skinner*, 414 U.S. 524, 530, 94 S. Ct. 740, 38 L. Ed. 2d 702 (1974) (proof of complete denial of right to vote to pretrial detainees held in home counties was equal protection violation when "they are simply not allowed to use the absentee ballot and are denied any alternative means of casting their vote although they are legally qualified to vote"); *McDonald* v. *Board of Election Commissioners*, supra, 807 (concluding that, "once the [s]tates grant the franchise, they must not do so in a discriminatory manner," particularly with respect to suspect classifica-

tions, including race and wealth); *Price* v. *Board of Elections*, 540 F.3d 101, 112 (2d Cir. 2008) (denial of absentee ballot in party county committee elections was unconstitutionally arbitrary given "that the state's proffered reasons have such infinitesimal weight that they do not justify the burdens imposed"); see also footnote 36 of this opinion (discussing *Anderson-Burdick* framework for evaluating election laws that burden right to vote).

Indeed, concerns attendant to COVID-19 have not diminished federal deference to state officials' control over the election process, including expanded access to absentee voting, as long as those innovations do not impose irrational, undue, or discriminatory burdens on the right to vote.[32] One notable example is *Texas Democratic Party* v. *Abbott*, supra, 961 F.3d 389, in which the United States Court of Appeals for the Fifth Circuit

[32] Numerous cases challenging a variety of state restrictions in the context of COVID-19 illustrate the proposition that, once a state provides for absentee voting, it may not impose irrational or undue burdens on the exercise of that right. These decisions invalidated restrictions such as witnessing requirements, signature matching, and voter paid postage as undue burdens on the exercise of the right to vote via absentee ballot as not justified by their minimal levels of effectiveness in advancing the state's interest in preventing election fraud. See *People First of Alabama* v. *Merrill*, 467 F. Supp. 3d 1179, 1211–19 (N.D. Ala. 2020), appeal dismissed, United States Court of Appeals, Docket No. 20-12184-GG (11th Cir. July 17, 2020); *Thomas* v. *Andino*, Docket Nos. 3:20-cv-01552-JMC and 3:20-cv-01730-JMC, 2020 WL 2617329, *21 (D.S.C. May 25, 2020); *League of Women Voters of Virginia* v. *Virginia State Board of Elections*, 458 F. Supp. 3d 442, 452–54 (W.D. Va. 2020); *Lewis* v. *Hughs*, 475 F. Supp. 3d 597, 615–16 (W.D. Tex. 2020), aff'd, Docket No. 20-50654, 2020 WL 5511881 (5th Cir. September 4, 2020), order withdrawn, Docket No. 20-50654, 2020 WL 6066178 (5th Cir. October 2, 2020). But see *Democracy North Carolina* v. *North Carolina State Board of Elections*, 476 F. Supp. 3d 158, 207–208 (M.D.N.C. 2020) (concluding, inter alia, that single witness requirement and voter identification requirement for absentee ballots were not undue burden on right to vote during COVID-19 pandemic, given factual findings that those activities could be accomplished safely while maintaining social distancing and using other precautions such as masks, particularly given state's interest in maintaining election integrity, as highlighted by recent high profile instance of absentee ballot fraud).

followed *McDonald* and held that the equal protection clause and the twenty-sixth amendment to the United States constitution did not require Texas "to give everyone the right to vote by mail" in light of the COVID-19 pandemic. Id., 409. Specifically, the court held that a Texas statute that afforded voters sixty-five years old and older the right to vote by mail did not violate the equal protection rights of younger voters. Id., 402; see also *Texas Democratic Party* v. *Abbott*, 978 F.3d 168, 192–93 (5th Cir. 2020) (merits decision holding that extension of privilege to older voters was not abridgement of younger voters' rights under twenty-sixth amendment). Applying rational basis review because age is not a suspect class, and observing that Texas had implemented other safety measures to protect in person voters, such as social distancing, protective masks for poll workers, and enhanced sanitizing of facilities and equipment, the court held that there was no evidence that the absentee balloting rules or other state action "absolutely prohibited" the younger voters from exercising their right to vote. (Internal quotation marks omitted.) *Texas Democratic Party* v. *Abbott*, supra, 961 F.3d 404. The Fifth Circuit emphasized that "[rational basis] review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (Internal quotation marks omitted.) Id., 407; see *Tully* v. *Okeson*, 977 F.3d 608, 613–17 (7th Cir. 2020) (following *McDonald* and upholding denial of motion for preliminary injunction because plaintiffs could not show likelihood of success on their claim that, because of effects of COVID-19, equal protection clause or twenty-sixth amendment required Indiana to extend statutorily limited absentee voting to all voters for upcoming general election, particularly given alternatives state provided to in person voting on election day, such as early voting); *Black Voters Matter Fund* v. *Raffensperger*, 478 F. Supp. 3d 1278, 1285, 1315, 1323–24

(N.D. Ga. 2020) (denying motion for preliminary injunction on basis of conclusion that requiring voters to purchase stamps for application and ballot was not poll tax, with state's fiscal interest outweighing moderate burden created by obtaining postage), appeal filed sub nom. *Black Voters Matter Fund* v. *Secretary of State*, United States Court of Appeals, Docket No. 20-13414 (11th Cir. September 9, 2020); *Democracy North Carolina* v. *North Carolina State Board of Elections*, 476 F. Supp. 3d 158, 217–18 (M.D.N.C. 2020) (declining to "rewrite North Carolina's election law" by issuing injunctive relief that would, inter alia, expand "voter registration via online portals," "[establish] contactless drop boxes for absentee ballots," and "[establish] mechanisms to cure deficient absentee ballot requests and absentee ballots"). See generally E. Williams, Annot., "COVID-19 Related Litigation: Challenges to Election and Voting Practices During COVID-19 Pandemic," 54 A.L.R. Fed. 3d 383 (2020).

Viewed through the lens of the federal case law, Executive Order No. 7QQ is consistent with the state's exercise of its police power to protect the fundamental right to vote, along with its responsibility under the United States constitution to superintend elections within Connecticut. That federal case law, however, sheds no light on whether Executive Order No. 7QQ is consistent with Connecticut's own state constitutional restrictions on the use of absentee balloting.

5

Sister State Cases

Our research does not reveal any sister state case law on point as a matter of state constitutional interpretation.[33] Though not involving a constitutional provi-

[33] The defendant suggests that this paucity of sister state case law is largely the result of the vast majority—thirty-four states and the District of Columbia—offering no excuse absentee or all mail voting before the pandemic, with fourteen more—Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, New Hampshire,

sion, perhaps the most instructive authority is the Arkansas Supreme Court's decision in *Forrest* v. *Baker*, supra, 287 Ark. 239, which considered whether "sickness in the family"; id., 243; was a legally sufficient reason for absentee voting under a statute that allows absentee voting by " '[a]ny person who, *because of illness* or physical disability will be unable to attend the polls on election day.' " (Emphasis added.) Id., 240. The court concluded that "two different voters should [not] be disenfranchised, as a matter of law, because their application recited 'sickness in the family' "; id., 243; observing that "the complaint [did] not allege that the application was false or that the sickness in the family was such that the voter was able to attend the polls. . . . A voter can have sickness in his family [that] renders him unable to attend the polls." Id., 243–44. Although *Forrest* supports the proposition that the sickness need not be that of the voter personally under statutory language similar to that of article sixth, § 7, it is not especially persuasive because it is written in a conclusory manner without a thorough textual or historical analysis.

Analytical shortcomings aside, *Forrest* nevertheless is more instructive than the Texas Supreme Court's recent decision in *In re State*, supra, 602 S.W.3d 549, on which the plaintiffs rely heavily.[34] That case held

New York, South Carolina, Tennessee, and West Virginia—expanding the right in some fashion because of the pandemic. See E. Kamarck et al., Brookings Institute, Voting by Mail in a Pandemic: A State-by-State Scorecard (last modified November, 2020), available at https://www.brookings.edu/research/voting-by-mail-in-a-pandemic-a-state-by-state-scorecard/ (last visited February 9, 2021); National Conference of State Legislatures, [Voting Outside the Polling Place]: Table 1: States with No-Excuse Absentee Voting (May 1, 2020), available at https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx (last visited February 9, 2021).

[34] We note that the discussion of sickness in *Rocci* v. *Massachusetts Accident Co.*, supra, 226 Mass. 545, on which the plaintiffs also rely, is inapposite. In that case, there was no question that the policyholder himself was sick with a respiratory illness. See id., 549–50. The question before the court concerned whether he had been "necessarily and continuously confined

that a voter's lack of COVID-19 immunity is not by itself a "physical disability" under § 82.002 (a) of the Texas Election Code, which provides for voting by mail for "disability" if "[a] qualified voter . . . *has a sickness or physical condition* that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." (Emphasis added; internal quotation marks omitted.) Id., 557, 560. The Texas court emphasized that "physical condition" must be understood in the "light" of the ordinary meaning of " 'disability,' " which "is the same word the [l]egislature has used consistently since 1935," and " '[d]isabled' normally means 'incapacitated by or as if by illness, injury, or wounds.' " Id., 560. Observing that "[i]n no sense can a lack of immunity be said to be such an incapacity," the Texas court held that "a lack of immunity to COVID-19 is not itself a 'physical condition' " under that state's absentee balloting statute.[35] Id. In our view, *In re State* is inapposite because it did not consider the breadth of the meaning of the word "sickness" and because it is based on statutory language distinguishable from article sixth, § 7, as more directly linked to the "qualified voter."

within the house" for purposes of benefits under his sickness indemnity policy when he had been removed from his own house to other dwellings during the benefit period. (Internal quotation marks omitted.) Id., 552; see id., 552–53.

[35] In so concluding, the Texas court determined that allowing the phrase "physical condition" to mean "physical state of being" would "swallow the other categories of voters eligible for [mail in] voting. A voter's location during an election period is certainly a physical state of being. So are age, incarceration, sickness, and childbirth, even participation in a program. To give 'physical condition' so broad a meaning would render the other [mail in] voting categories surplusage. Further, such an interpretation would encompass the various physical states of the entire electorate. Being too tired to drive to a polling place would be a physical condition. The phrase cannot be interpreted so broadly consistent with the [l]egislature's historical and textual intent to limit [mail in] voting." *In re State*, supra, 602 S.W.3d 559.

Finally, we consider *Fisher* v. *Hargett*, 604 S.W.3d 381 (Tenn. 2020), a recent decision from the Tennessee Supreme Court that rejected a state constitutional challenge to the election procedures in the Tennessee Election COVID-19 Contingency Plan (Tennessee plan). The Tennessee plan anticipated an increase in absentee voting but "[did] not expressly provide . . . for any expansion of those persons who are eligible to vote absentee by mail pursuant to the [state's] statute," which included persons "unable to appear at the person's polling place" because they are "hospitalized, ill or physically disabled," along with the caretakers of such persons. (Internal quotation marks omitted.) Id., 387, quoting Tenn. Code Ann. § 2-6-201 (5) (C) (Supp. 2019). The court first agreed with the state's concession that "persons with special vulnerability to COVID-19 or who are caretakers of persons with special vulnerability to COVID-19 are eligible to vote absentee by mail pursuant to the statutory eligibility requirements" and deemed injunctive relief unnecessary on that point. Id., 393–94. Turning to those persons without a special vulnerability to COVID-19, the court applied the *Anderson-Burdick* balancing framework utilized by the United States Supreme Court to assess incursions on voting rights[36]

[36] Under the *Anderson-Burdick* framework, it is understood that "[e]lection laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as [the] petitioner suggests, would tie the hands of [s]tates seeking to [en]sure that elections are operated equitably and efficiently. . . . Accordingly, the mere fact that a [s]tate's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny. . . .

"Instead . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the [f]irst and [f]ourteenth [a]mendments that the plaintiff seeks to vindicate against the precise inter-

and determined that the exclusion from absentee voting was a "moderate" one for the voters without special vulnerabilities given that the Tennessee plan provided for social distancing, screening, and personal protective equipment at polling places. Id., 402–403. The court concluded, however, that the moderate burden on voters who neither had special vulnerabilities to COVID-19 nor were the caretakers of such voters was outweighed by the state's prophylactic interest in preventing election fraud, along with fiscal and administrative considerations. Id., 403–404. Deeming itself "constrained by the [Tennessee] [c]onstitution's delegation to the [l]egislature of the power to regulate the conduct of . . . elections," the court emphasized that the statutory scheme's "preference for [in person] voting . . . represents a policy choice" that extended to those "made with respect to the conduct of elections during the COVID-19 pandemic. These policy choices will be judged by history and by the citizens of Tennessee. We, however, properly may not and will not judge the relative merits of them, regardless of our own views."[37]

ests put forward by the [s]tate as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. . . .

"Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [f]irst and [f]ourteenth [a]mendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. . . . But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the [f]irst and [f]ourteenth [a]mendment rights of voters, the [s]tate's important regulatory interests are generally sufficient to justify the restrictions." (Citations omitted; internal quotation marks omitted.) *Burdick* v. *Takushi*, 504 U.S. 428, 433–34, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); see *Anderson* v. *Celebrezze*, 460 U.S. 780, 788–89, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983).

[37] Given that it decided *Fisher* on the eve of Tennessee's own August primary, the Tennessee Supreme Court "recogniz[ed] that absentee ballots already have been cast for the August 6, 2020 election consistent with the trial court's temporary injunction, and mindful of the goal of avoiding alterations to election rules on the eve of an election . . . the absentee ballots of all Tennessee registered voters who timely requested and submit-

Id., 404–405. Accordingly, we now turn to our examination of the public policy issues considered by our state's political branches in the promulgation and ratification of Executive Order No. 7QQ.

6

Economic and Sociological Considerations

With respect to the economic and sociological considerations factor, which is in essence a public policy analysis, the plaintiffs rely on the perceived shortcomings of absentee balloting, including statements in decisions from this court that it is a process that is potentially more susceptible to election irregularities such as mistakes and fraud. See, e.g., *Keeley* v. *Ayala*, supra, 328 Conn. 406–407; *Wrinn* v. *Dunleavy*, supra, 186 Conn. 142–44. Similarly, they cite legislative committee testimony from representatives of the Connecticut Town Clerks Association objecting to proposed constitutional amendments in 2013 and 2020 that would have expanded vote by mail opportunities on the ground that mailing delays and irregularities such as missing signatures and other errors could disenfranchise more voters. See Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 1, 2020 Sess., pp. 287–88, written testimony of Mark H. Bernacki, Legislative Committee Chair of the Connecticut Town Clerks Association (supporting in person early voting by tabulator but objecting to "expanding the current absentee voting process to include no excuse absentee voting that relies on [mail] delivery"); Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 3, 2013 Sess., pp. 918–19, written testimony of Antoinette C. Spinelli, Chair

ted an absentee ballot by mail for the August 6, 2020 election pursuant to the trial court's temporary injunction and which absentee ballots otherwise meet the requirements of the absentee voting statutes shall be duly counted." *Fisher* v. *Hargett*, supra, 604 S.W.3d 385.

of the Connecticut Town Clerks Association (endorsing legislation, following proposed amendment to state constitution, which would support early in person voting and arguing against no excuse absentee balloting based on mailing delays and voter errors, while "recogniz[ing] a need to expand the existing categories of those eligible to vote by absentee ballot to include caregivers and emergency relief workers"). The plaintiffs contend that recent failures of prospective constitutional amendments that would have allowed no excuse absentee voting, one in 2014 before the electorate and one in 2019 that did not receive support from three-fourths of each of the houses of the legislature, evince the common understanding that article sixth, § 7, does not presently permit no excuse absentee voting.

The defendant, however, counters these concerns by relying on the public policies of "protecting public health and saving lives," along with "ensuring that voters are able to safely exercise their fundamental right to vote." The defendant argues that her construction of article sixth, § 7, is "consistent with the public policy that states across the nation have adopted, both before and during the pandemic," with thirty-four states that "permit all mail or no excuse absentee voting during normal times" and fourteen more that have "changed their absentee ballot laws during the pandemic to permit some form of expanded absentee voting." See footnote 32 of this opinion.

From a public policy perspective, this case presents the opposite side of the coin of *Texas Democratic Party* v. *Abbott*, supra, 961 F.3d 389, and *Fisher* v. *Hargett*, supra, 604 S.W.3d 381, insofar as our state's political branches, first Governor Lamont through Executive Order No. 7QQ, and later the legislature through its ratification of that executive order in Spec. Sess. P.A. 20-3, § 16, have seen fit to expand absentee voting in response to the COVID-19 pandemic. "Given the reason-

able policy concerns that support the parties' respective state constitutional arguments, in interpreting our state's constitution, we must defer to the legislature's primary responsibility in pronouncing the public policy of our state." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 438; see, e.g., *State* v. *McCleese*, 333 Conn. 378, 406, 215 A.3d 1154 (2019) (concluding that state constitution did not require remedy beyond new legislation affording parole hearing to defendant sentenced in violation of *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and stating that "we do not believe that we are better situated than the legislature to strike an appropriate balance among these competing policies, particularly in an area that is traditionally within the purview of the legislature"); *State* v. *Skok*, 318 Conn. 699, 718–19, 122 A.3d 608 (2015) (rejecting defendant's claim that recording of phone conversation with consent of only one party violated her reasonable expectation of privacy under state constitution and concluding that statute providing for civil cause of action for failure to obtain consent to record by all parties to conversation, with "multiple, wide-ranging exceptions," "does not reflect a sweeping policy against recording all private telephone conversations . . . but rather demonstrates that the legislature has carefully balanced the concern for protecting citizens' privacy against multiple other countervailing policy interests"); *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 436–38 (considering legislative balancing of concerns of stale evidence and delayed disclosure in upholding expansion of statute of limitations to revive lapsed sexual abuse claims); *State* v. *Lockhart*, 298 Conn. 537, 574–75, 4 A.3d 1176 (2010) (The court declined to adopt a state constitutional rule requiring the recording of custodial interrogations because, although that rule would likely be beneficial, "[d]eter-

mining [its] parameters . . . requires weighing competing public policies and evaluating a wide variety of possible rules. . . . In [the court's] view, such determinations are often made by a legislative body because it is in a better position to evaluate the competing policy interests at play . . . ." (Citation omitted.)).

In sum, having considered the *Geisler* factors, we conclude that the plaintiffs have not established beyond a reasonable doubt that Executive Order No. 7QQ, as ratified by the legislature in Spec. Sess. P.A. 20-3, § 16, violates article sixth, § 7, of the Connecticut constitution. We observe most significantly that the constitutional language of "unable to appear" and "sickness" is sufficiently capacious to include the particular disease of COVID-19. Although the plaintiffs have identified concerns of election security and disenfranchisement that might arise from hypothetical lapses on the part of election officials or the voter during the absentee ballot process, Executive Order No. 7QQ nevertheless represents a considered judgment by our political branches that the limited expansion of absentee voting is an appropriate measure to protect public health and suffrage rights during the exceptional circumstance of a pandemic, the likes of which have not been seen in more than one century. Put differently, our political branches acted to protect the critical constitutional right to vote while accommodating public health directives not to congregate, an act that was consistent with the text of article sixth, § 7, the plain language of which permits absentee balloting for far less serious reasons, such as voluntary absences from town for leisure activities. We conclude, therefore, that Executive Order No. 7QQ does not violate article sixth, § 7, of the Connecticut constitution.

The appeal is dismissed with respect to the plaintiffs' separation of powers claim; the judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JEFFREY SMITH (SC 20187)

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

Syllabus

Pursuant to this court's decision in *State* v. *Polanco* (308 Conn. 242), the proper remedy for a double jeopardy violation arising out of cumulative convictions is to vacate one of the convictions rather than merging them.

The defendant, who had been convicted of felony murder and manslaughter in the first degree, among other crimes, appealed from the trial court's denial of his motion to correct an illegal sentence. The sentencing court had merged the defendant's felony murder and manslaughter convictions and sentenced him to sixty years' incarceration in connection with the felony murder conviction. In his motion to correct, the defendant claimed, inter alia, that the constitutional prohibition against double jeopardy was violated because, under *Polanco*, which was decided after the defendant was convicted, the sentencing court had incorrectly merged the felony murder and manslaughter convictions instead of vacating the manslaughter conviction. The trial court denied the defendant's motion to correct, concluding that the rule announced in *Polanco* did not apply retroactively to the defendant's case because this court decided *Polanco* pursuant to its supervisory authority over the administration of justice. The Appellate Court affirmed the trial court's denial of the motion to correct, and the defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly affirmed the trial court's denial of the defendant's motion to correct an illegal sentence because the trial court should have dismissed that motion for lack of subject matter jurisdiction rather than having denied it: the defendant did not claim that his sentence was affected in any manner by the allegedly cumulative convictions, the sentencing court did not impose any sentence on the merged manslaughter conviction, and the only remedy that the defendant sought, namely, vacatur of the manslaughter conviction, would have had no effect on the length, computation or structure of his sentence; accordingly, because the defendant did not allege that the purported double jeopardy violation had any impact on his sentence, he sought to modify his conviction and not his sentence, and the trial court, therefore, lacked jurisdiction to entertain his motion to correct.

Argued May 1, 2020—officially released February 11, 2021**

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

** February 11, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with two counts of the crime of kidnapping in the first degree, and with one count each of the crimes of capital felony, murder, felony murder and robbery in the first degree, brought to the Superior Court in the judicial district of New London and tried to the jury before *Schimelman*, *J.*; verdict and judgment of guilty of two counts of kidnapping in the first degree, and of one count each of felony murder, robbery in the first degree and the lesser included offense of manslaughter in the first degree; thereafter, the court, *Strackbein*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court; subsequently, the case was transferred to the Appellate Court, *DiPentima*, *C. J.*, and *Lavine* and *Bishop*, *Js.*, which affirmed the trial court's denial of the motion to correct, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

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

Melissa Patterson, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, former state's attorney, for the appellee (state).

Opinion

VERTEFEUILLE, J. The dispositive issue in this appeal is whether the trial court had subject matter jurisdiction to entertain a motion to correct an illegal sentence when the defendant, Jeffrey Smith, claimed that the sentencing court improperly failed to follow *State* v. *Polanco*, 308 Conn. 242, 255, 61 A.3d 1084 (2013), in which this court exercised its supervisory power to hold that the proper remedy for cumulative convictions that violate the double jeopardy clause is to vacate one of the convictions. In 2005, the defendant was con-

victed, after a jury trial, of felony murder and manslaughter in the first degree, among other crimes. The trial court, *Schimelman*, *J.*, merged the conviction for manslaughter with the felony murder conviction and sentenced the defendant to sixty years in prison on the felony murder charge. In 2015, the defendant filed a motion to correct an illegal sentence in which he contended that the sentence was illegal under the *Polanco* supervisory rule because the court merged the convictions instead of vacating the conviction on the manslaughter charge. The trial court, *Strackbein*, *J.*, concluded that, because *Polanco* was decided pursuant to this court's supervisory authority, it did not apply retroactively. Accordingly, the trial court denied the defendant's motion. The defendant appealed, and the Appellate Court affirmed the judgment of the trial court. See *State* v. *Smith*, 180 Conn. App. 371, 384, 184 A.3d 831 (2018). We then granted the defendant's petition for certification to appeal to this court, limited to the following issue: "Does this court's holding in *State* v. *Polanco*, [supra, 255], readopting vacatur as a remedy for a cumulative conviction that violates double jeopardy protections, apply retroactively?" *State* v. *Smith*, 330 Conn. 908, 193 A.3d 559 (2018).[1] In its brief to this court, the state claims for the first time that the trial court lacked subject matter jurisdiction to entertain the defendant's motion to correct an illegal sentence because the motion sought only to modify the defendant's conviction, not his sentence. We agree with the

[1] After oral argument before this court, we ordered the parties to submit supplemental briefs on the following question: "Is this court's holding pursuant to its supervisory authority in *State* v. *Polanco*, [supra, 308 Conn. 255], that vacatur is the proper remedy for a cumulative conviction that violates double jeopardy protections, as that holding was expanded and clarified by this court's decision in *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015), constitutionally mandated under the double jeopardy clause of the United States constitution or is merger of the cumulative convictions a constitutionally permissible remedy?" Because we conclude that the trial court lacked jurisdiction over the defendant's motion to correct an illegal sentence, we need not address this question.

state's jurisdictional claim, and, accordingly, we conclude that the form of the Appellate Court's judgment affirming the judgment of the trial court was improper. We reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court with direction to dismiss the defendant's motion to correct an illegal sentence.

The record reveals the following facts, which were found by the trial court, and procedural history. In 2001, the defendant was charged with capital felony in violation of General Statutes (Rev. to 1997) § 53a-54b (5), murder in violation of General Statutes (Rev. to 1997) § 53a-54a, felony murder in violation of General Statutes (Rev. to 1997) § 53a-54c, two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) and (B), and robbery in the first degree in violation of General Statutes § 53a-134 (a) (1), in connection with the August, 1998 death of James Connor. The jury returned a verdict of guilty on the felony murder charge, the lesser included offense of manslaughter in the first degree in violation of General Statutes § 53a-55, both kidnapping counts and the robbery count. The defendant was found not guilty of the charges of capital felony and murder.

Thereafter, the trial court, *Schimelman*, *J.*, merged the manslaughter conviction with the felony murder conviction and sentenced the defendant to sixty years in prison on the felony murder conviction. The court also sentenced the defendant to twenty-five years on each kidnapping count and twenty years on the robbery count, all concurrent with each other but consecutive to the felony murder sentence. The total effective sentence was eighty-five years imprisonment.

On August 6, 2015, the defendant, representing himself,[2] filed a motion to correct an illegal sentence pursu-

[2] The Office of the Public Defender filed a report determining that the petitioner's claims were without merit and requested permission to withdraw

ant to Practice Book § 43-22. Thereafter, he filed an amended motion. The defendant claimed, among other things, that the sentencing court had incorrectly merged the convictions of manslaughter and felony murder because, under *State* v. *Polanco*, supra, 308 Conn. 242, and *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015), the court should have vacated the manslaughter conviction. Although the precise nature of the defendant's claim was somewhat unclear, he also contended that this sentencing procedure violated his double jeopardy rights. The state contended that, because the holding of this court in *State* v. *Polanco*, supra, 255, that vacatur is the proper remedy for a cumulative conviction that violates double jeopardy protections was based on the court's supervisory authority, the holding was not retroactive. The trial court, *Strackbein*, *J.*, agreed with the state and, after rejecting the defendant's other claims, denied his motion to correct.[3] The defendant, still representing himself, appealed, and the Appellate Court affirmed the judgment of the trial court. *State* v. *Smith*, supra, 180 Conn. App. 373, 384.

This certified appeal followed. The defendant, now represented by counsel, claims that, although the holding of *State* v. *Polanco*, supra, 308 Conn. 255, was decided pursuant to this court's exercise of its supervisory authority, public policy militates in favor of applying the *Polanco* supervisory rule retroactively to cases that were final before the case was decided. The state contends that, to the contrary, there is no reason to create an exception for this court's holding in *Polanco* to the general rule that a supervisory rule does not

from representing the defendant in connection with his motion to correct an illegal sentence. The court granted the request, and, thereafter, the defendant represented himself. See *State* v. *Casiano*, 282 Conn. 614, 627–28, 922 A.2d 1065 (2007); see also *State* v. *Francis*, 322 Conn. 247, 267–68, 140 A.3d 927 (2016).

[3] All subsequent references to the trial court in this opinion are to Judge Strackbein.

apply to cases in which the judgment was final before the rule was adopted. The state also contends that the trial court lacked jurisdiction over the defendant's motion to correct because the defendant sought only to modify his conviction, not his sentence. Although the state raises this claim for the first time in its brief to this court, it is well established that a jurisdictional claim may be raised at any time. See, e.g., *Waterbury* v. *Washington*, 260 Conn. 506, 527, 800 A.2d 1102 (2002). We agree with the state's unpreserved jurisdictional claim and, therefore, conclude that the trial court should have dismissed the defendant's motion to correct an illegal sentence.

We begin with a review of the legal principles governing motions to correct an illegal sentence. Practice Book § 43-22 provides in relevant part that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . ." "It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment [only] before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the [C]ommissioner of [C]orrection and begins serving the sentence. . . . Without a legislative or constitutional grant of continuing jurisdiction . . . the trial court lacks jurisdiction to modify its judgment." (Internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 778, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

"Because the judiciary cannot confer jurisdiction on itself through its own rule-making power, [Practice Book] § 43-22 is limited by the common-law rule that a trial court may not modify a sentence if the sentence was valid and its execution has begun. . . . Therefore, for the trial court to have jurisdiction to consider the

defendant's claim of an illegal sentence, the claim must fall into one of the categories of claims that, under the common law, the court has jurisdiction to review." (Internal quotation marks omitted.) Id., 778–79.

"[A]n illegal sentence is essentially one [that] . . . exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . In accordance with this summary, Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable." (Internal quotation marks omitted.) Id., 779.

This court has recognized that "a claim is cognizable in a motion to correct an illegal sentence if it is a challenge specifically directed to the punishment imposed, even if relief for that illegal punishment requires the court to in some way modify the underlying convictions, such as for double jeopardy challenges." Id., 781. In support of this proposition, we cited *State* v. *Cator*, 256 Conn. 785, 804–805, 781 A.2d 285 (2001). In *Cator*, "[t]he trial court found the defendant guilty of murder and felony murder and initially sentenced him to a total effective sentence of fifty-five years, suspended after fifty years, with a five year period of probation at the conclusion of that sentence. Later, pursuant to the state's motion to correct the sentence, the trial court merged the defendant's [cumulative] convictions for murder . . . and felony murder and imposed a total effective sentence of fifty years without a period of

probation." Id., 803. This court rejected the defendant's claim that the trial court lacked jurisdiction to entertain the state's motion to correct an illegal sentence "because otherwise the constitutional prohibition against double jeopardy would have been violated." Id., 804–805.

Similarly, in *State* v. *McGee*, 175 Conn. App. 566, 570–71, 573–74 n.6, 168 A.3d 495, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017), the Appellate Court concluded that the trial court had jurisdiction to entertain a motion to correct an illegal sentence when the defendant alleged that the sentencing court had imposed concurrent sentences for convictions that were cumulative, in violation of double jeopardy principles. The court observed that "the defendant [had] not challenged, in any way, the validity of his convictions . . . or of the guilty verdicts upon which they rest. He [had] not claimed any infirmity with the state's information; he [had] not advanced any claims of insufficiency with respect to the state's evidence against him, or of evidentiary error, instructional error, prosecutorial impropriety, or any other type of error upon which the legality of trial proceedings or of the verdicts and judgments they result in are routinely challenged. Rather, he claimed that, at sentencing, the court should have vacated one of his two [cumulative] convictions and sentenced him only on one of those convictions." Id., 574 n.6

We note that Judge Bishop authored a dissenting opinion in *McGee* in which he argued that allowing an attack on a conviction "through the guise of a Practice Book § 43-22 motion, nominally assailing a sentence . . . vitiate[s] the limited purpose of § 43-22, and unreasonably expand[s] the court's postconviction jurisdiction beyond its common-law bounds." Id., 595 (*Bishop*, *J.*, dissenting). Judge Bishop observed that there is conflicting case law on the question of whether a claimed double jeopardy violation involving cumulative convic-

tions can provide a proper basis for a motion to correct an illegal sentence. Id., 588–94 (*Bishop*, *J.*, dissenting).[4]

In *State* v. *Evans*, supra, 329 Conn. 781 n.13, we acknowledged Judge Bishop's concerns regarding the confusion in our case law on the question of the trial court's jurisdiction to entertain a motion to correct an illegal sentence when the motion only nominally attacks the sentence. We further acknowledged that this confusion "is particularly acute with respect to the second category of illegal sentences, namely, double jeopardy violations for multiple punishments, which by definition challenge convictions rather than the sentences for those convictions." Id. We concluded, however, that the trial courts may rely on "the presumption in favor of jurisdiction in cases in which the defendant has made

[4] Specifically, Judge Bishop compared *State* v. *Wright*, 107 Conn. App. 152, 156–57, 944 A.2d 991 (trial court did not have jurisdiction to entertain motion to correct illegal sentence alleging that defendant's conviction as accessory to murder after being " 'acquitted' " as principal to murder violated double jeopardy clause because "the defendant's claim, by its very nature, presuppose[d] an invalid conviction," not any illegality in sentence), cert. denied, 289 Conn. 933, 958 A.2d 1247 (2008), with *State* v. *Cator*, supra, 256 Conn. 803–804 (trial court had jurisdiction to entertain defendant's motion to correct illegal sentence claiming that his convictions and sentences for both murder and felony murder violated double jeopardy clause), and *State* v. *Santiago*, 145 Conn. App. 374, 379–80, 74 A.3d 571 (trial court had jurisdiction to entertain defendant's motion to correct illegal sentence alleging that convictions of both assault in first degree and risk of injury to child, and imposition of consecutive sentences for those convictions, violated double jeopardy clause), cert. denied, 310 Conn. 942, 79 A.3d 893 (2013). See *State* v. *McGee*, supra, 175 Conn. App. 588–94 (*Bishop*, *J.*, dissenting).

The majority in *McGee* concluded that *Wright* was distinguishable because the defendant in that case "claimed that the sentence imposed [on] him as an accessory to murder was illegal because he was never charged as an accessory. That claim, [although] styled [as] a double jeopardy claim, was actually based [on] the defendant's contention that he could not be found guilty of a crime with which he had not properly been charged." Id., 573 n.6; see also *State* v. *Wright*, supra, 107 Conn. App. 157 (concluding that defendant had no colorable double jeopardy claim). Thus, *Wright* "involved [a challenge] to the proceedings that underlay [the] guilty [verdict]," not a challenge to the legality of the sentence. *State* v. *McGee*, supra, 175 Conn. App. 574 n.6.

a colorable—however doubtful—claim of illegality affecting the *sentence*, rather than the underlying conviction." (Emphasis in original.) Id. We also cited the Appellate Court's majority opinion in *McGee* with approval in *Evans*. See id., 781–82. It is therefore clear that, under *Evans*, when cumulative convictions affect a *sentence* in any manner, the trial court has jurisdiction to entertain a motion to correct an illegal sentence.

In the present case, the state relies on a number of federal cases holding that a claim that a sentence violated the United States Supreme Court's holding in *Rutledge* v. *United States*, 517 U.S. 292, 301–303, 306–307, 116 S. Ct 1241, 134 L. Ed. 2d 419 (1996), that the imposition of concurrent sentences for cumulative convictions violates double jeopardy principles because the existence of the cumulative conviction itself may give rise to collateral consequences, cannot be raised by way of a motion to correct an illegal sentence under federal law because such a claim attacks the underlying conviction. See *United States* v. *Little*, 392 F.3d 671, 678–79 (4th Cir. 2004); *United States* v. *Canino*, 212 F.3d 383, 384 (7th Cir. 2000). These cases take the approach advocated by Judge Bishop in his dissenting opinion in *McGee* but are inconsistent with this court's holding in *Evans* that the trial courts may presume jurisdiction over a motion to correct an illegal sentence when the challenged action has affected the sentence in any manner, even if the remedy will require modifying the judgment of conviction. We need not consider here whether *Evans* and *McGee* were incorrectly decided under state law, however, because, even if, contrary to the state's suggestion, they were correctly decided, the defendant has not claimed that his *sentence* was affected *in any manner* by the allegedly cumulative convictions. No sentence was imposed on the defendant's merged manslaughter conviction, and it is undisputed that the only remedy sought by the defendant, namely, vacatur of

that conviction, will have no effect on the length, computation or structure of his sentence. The defendant has not cited, and our research has not revealed, any case in which this court or the Appellate Court has held that trial courts have jurisdiction to correct an illegal sentence under Practice Book § 43-22 when the alleged double jeopardy violation had no impact whatsoever on the sentence imposed.[5] We conclude, therefore, that the trial court lacked jurisdiction to entertain the defendant's motion to correct an illegal sentence.

The defendant contends that the state's position that he must raise his *Polanco* claim in a habeas proceeding is inconsistent with this court's holding in *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 779 A.2d 80 (2001), that, "before seeking to correct an illegal sentence in the habeas court, a defendant either must raise the issue on direct appeal or file a motion pursuant to [Practice Book] § 43-22 with the trial court." Id., 38. We disagree. *Cobham* sheds no light whatsoever on the scope of the trial courts' jurisdiction to entertain a motion to correct an illegal sentence, which is the issue before us. Having concluded that the trial court lacked jurisdiction over the defendant's § 43-22 motion because there was no illegal sentence for the court to correct, we conclude that *Cobham* simply does not apply. We note, however, that the cause and prejudice standard that we applied to the petitioner's claim in *Cobham*; see id., 39–40 (petitioner who failed to seek to correct

[5] We note that, at oral argument before this court, the state effectively abandoned its jurisdictional claim when it conceded that, if this court were to conclude that the trial court's failure to apply *Polanco*'s supervisory rule to the defendant's convictions constituted a double jeopardy violation, the trial court would have jurisdiction to entertain the defendant's motion to correct an illegal sentence. We have concluded, however, that the state is not correct on this point, and it is well settled that "[t]he parties cannot confer subject matter jurisdiction on the court, either by waiver or by consent." (Internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002).

illegal sentence pursuant to § 43-22 before filing petition for writ of habeas corpus was required to demonstrate good cause for his failure to do so and actual prejudice from claimed impropriety); is the same standard that applies to habeas claims challenging a *conviction* on grounds that the petitioner did not raise at trial or on direct appeal. See id., 40. To the extent that the defendant contends that he should not have to satisfy this standard before he can seek a modification of his *convictions* pursuant to the *Polanco* supervisory rule in a habeas proceeding, we reject any such claim as being completely unsupported.[6]

As we have indicated, the Appellate Court affirmed the judgment of the trial court denying the defendant's motion to correct an illegal sentence on the merits. Accordingly, we reverse the judgment of the Appellate Court, as that court should have concluded that the form of the trial court's judgment was improper and remanded the case to the trial court with direction to dismiss the motion.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court with direction to dismiss the defendant's motion to correct an illegal sentence.

In this opinion the other justices concurred.

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[6] We, of course, express no opinion on the question of whether the defendant could meet this standard or prevail on his claim that the trial court improperly had failed to apply the *Polanco* supervisory rule retroactively in a habeas proceeding.

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CONNECTICUT APPELLATE REPORTS

Vol. 207

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

NOROTON HEIGHTS SHOPPING CENTER, INC. *v.* PHIL'S GRILL, LLC
(AC 44042)

Prescott, Moll and Lavery, Js.

Syllabus

The plaintiff landlord brought a summary process action seeking to gain possession of certain property in a shopping center occupied by the defendant tenant pursuant to the parties' commercial lease. The lease contained a relocation clause, which provided the plaintiff with the ability to require the defendant to vacate the property upon the offer of reasonably similar substitute premises, and to terminate the lease if the defendant refused the substitute location, should the plaintiff elect to redevelop the property. The relocation clause further provided that the plaintiff would be responsible for furnishing the substitute premises and that the defendant would be responsible for performing work in the substitute premises to prepare it for prompt occupancy. After the planning and zoning commission approved the plaintiff's plan for redevelopment of the shopping center, the plaintiff sent a substitution notice to the defendant, including plans showing the proposed substitute premises, which had not yet been built. The defendant did not receive this notice and did not become aware of it until more than one year later, at which point the plaintiff informed the defendant that it had waived its relocation rights by not responding to the substitution notice. Thereafter, the plaintiff served the defendant with a notice to quit and filed the summary process action. The trial court found that the defendant had refused to negotiate with the plaintiff and violated the express language of the lease by refusing to act in good faith with the plaintiff's relocation plan, and it rendered a judgment of immediate possession for the plaintiff. On appeal, the defendant claimed that the court improperly interpreted the lease's relocation clause. *Held* that the trial court's finding that the defendant breached the lease by violating the terms of the relocation clause was clearly erroneous: the language of the relocation clause was clear and unambiguous and provided that the plaintiff was permitted to terminate the lease pursuant to the relocation clause only if the defendant refused to relocate to the substitute premises after receiving valid notice from the plaintiff, and no language in the relocation clause required the defendant to negotiate the terms of relocation or to accept or to reject, in writing, proposed substitute premises before it was built; moreover, the relocation clause implicitly provided that the substitute premises was required to be in existence as a condition precedent to the plaintiff's ability to give the defendant a valid notice of substitution, as an interpretation to the contrary would yield absurd results because the defendant could be required to quit possession of

the property and close its business for an indefinite period of time while the substitute premises was constructed and waive its ability to seek damages from the plaintiff for lost profits during that period, which contradicted the clear terms of an amendment to the lease providing that the plaintiff would reasonably cooperate with the defendant and, in good faith, minimize any material or adverse impact of its redevelopment on the conduct of the defendant's business; furthermore, the notice of substitution that the plaintiff provided to the defendant was not valid, as it was undisputed that the substitute premises had not been constructed at the time that the notice of substitution was issued, thus, a condition precedent to issuing a valid notice of substitution was not fulfilled, and the defendant's duty to perform under the relocation clause was never triggered.

Argued May 10—officially released September 7, 2021

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, and tried to the court, *Spader*, *J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Reversed; judgment directed.*

Scott C. DeLaura, for the appellant (defendant).

Abram Heisler, for the appellee (plaintiff).

Opinion

LAVERY, J. In this summary process action, the defendant tenant, Phil's Grill, LLC, appeals from the trial court's judgment of possession rendered in favor of the plaintiff landlord, Noroton Heights Shopping Center, Inc. On appeal, the defendant claims that the trial court was incorrect in finding that the defendant violated the relocation clause of a commercial lease executed by the parties. We agree with the defendant and, accordingly, reverse the court's judgment of immediate possession in favor of the plaintiff.

The following facts and procedural history are relevant to this appeal. The plaintiff is the owner of Noroton Heights Shopping Center (shopping center) in Darien.

On November 12, 2010, the plaintiff entered into a commercial lease with the defendant for retail space (demised premises) located within the shopping center. The lease was for an initial term of five years, commencing on October 1, 2010, and continuing through September 30, 2015, and contained three renewal options. At the time the lease was entered into, the plaintiff was contemplating the redevelopment of the shopping center. As a result, the lease contained a relocation clause. Subsection A of the relocation clause provides in relevant part that "[t]he Landlord may, at its option, before or after the Commencement Date, and during any option renewal period pursuant to Section 40 hereof, elect by notice to the Tenant to require the Tenant to vacate and surrender the Demised Premises, and to substitute for the Demised Premises other reasonably similar space elsewhere in the Shopping Center (the 'Substitute Premises') designated by the Landlord (provided that the Substitute Premises contains at least the same square foot area as the Demised Premises) and to move the Tenant to the Substitute Space. Landlord's notice shall be accompanied by a plan of the Substitute Premises, which such notice shall set forth the square foot area of the Substitute Premises. The Tenant shall vacate and surrender the Demised Premises and shall occupy the Substitute Premises promptly (and in any event not later than fifteen [15] days after the Landlord has substantially completed any work to be performed in the Substitute Premises pursuant to [subsection] B hereof). . . . Should the Tenant refuse to relocate to the Substitute Space, the Landlord may, at its option, by notice to the Tenant, elect to terminate this Lease, which such termination shall be effective thirty (30) days after the date of such termination notice."

Subsection B of the relocation clause further provides in relevant part that "the Landlord shall, at the Landlord's expense, do the following, (i) furnish and install

in the Substitute Premises fixtures, improvements and appurtenances at least equal in kind and quality to those contained in the Demised Premises at the time such notice of substitution is given by the Landlord . . . . The Tenant agrees to cooperate with the Landlord so as to facilitate the completion by the Landlord of its obligations under this Section and the prompt surrender of the Demised Premises, and further agrees to promptly perform in the Substitute Premises any work to be performed therein by the Tenant to prepare the Substitute Premises for the Tenant's occupancy."

Thereafter, the defendant opened a restaurant at the demised premises. On February 29, 2016, the parties renewed the lease and extended it through September 30, 2020. The first amendment to indenture of lease further referenced the possible redevelopment of the shopping center. Section 6 of the amendment, titled "Shopping Center Redevelopment," provides in relevant part that "Tenant acknowledges that Landlord intends to redevelop the Noroton Heights Shopping Center (the 'Shopping Center'), in which the Rental Premises (as defined in the Lease) are located. Without limiting Landlord's relocation right set forth in Section 39 of the Lease or Landlord's rights or ability to perform such redevelopment in general, Landlord agrees to reasonably cooperate with Tenant in good faith to the extent reasonably practical during any redevelopment of the Shopping Center to minimize any material and adverse impact of such redevelopment on the conduct of Tenant's business at the Rental Premises during the hours when the restaurant operated by Tenant is customarily open in the ordinary course of business . . . . In the event Tenant's business is materially and adversely impacted by Landlord's redevelopment activities at the Shopping Center, the parties agree to mutually explore alternative avenues of reducing such material and adverse impact to the extent feasible, and, if

not feasible or commercially prudent under the then-prevailing circumstances, Tenant shall have the right, as its sole and exclusive remedy, to terminate the Lease upon ten (10) business days' prior written notice to Landlord. Tenant shall not be entitled under such circumstances, and hereby waives, all claims against Landlord for any compensation or loss of use of the Rental Premises occasioned by such redevelopment activities." (Emphasis omitted.) Apart from Section 6, the amendment to the lease did not further address the relocation clause and provided that the lease, "as amended by this Amendment, will continue in full force and effect in accordance with its terms."

In 2017, the plaintiff obtained approval from the Planning and Zoning Commission of the Town of Darien (zoning commission) for the phased redevelopment of the shopping center. Pursuant to the phased plan, the plaintiff would redevelop the shopping center by razing a building, building a new building in its place, moving an existing tenant into the new building, and then razing the building that the tenant previously had occupied. In December, 2017, after the phased plan was approved, representatives for the plaintiff met with representatives for the defendant to discuss potential substitute premises. During the meeting, the defendant expressed interest in one of the proposed substitute premises and indicated to the plaintiff that it would be willing to move into that spot.

On April 4, 2018, the plaintiff sent a letter to James Calcagnini, the sole member of the defendant, regarding the proposed substitute premises (notice of substitution). The letter served "as formal notice to you of Landlord's election to require you to vacate and surrender your current leased space and the substitution of other reasonably similar space in the redeveloped Shopping Center as your new leased premises." Attached to the notice of substitution were two plans showing the

location of the proposed substitute premises. The letter further requested that Calcagnini confirm in writing no later than April 19, 2018, that the proposed substitute premises was acceptable and that the plaintiff would assume that the defendant was unwilling to relocate to this space if no response was received by that date. The notice of substitution was sent to Calcagnini's principal place of residence via United Parcel Service (UPS) overnight delivery. Calcagnini, however, never received the notice of substitution.

On July 2, 2019, James Palmer, a principal of the plaintiff, met with Calcagnini. During the meeting, Palmer gave Calcagnini a bullet point list of topics to discuss. One of the bullet points stated that Calcagnini "waived his relocation rights by not responding to April 4, 2018 letter sent by [Palmer] via UPS showing proposed substitute space." This meeting was the first time that Calcagnini became aware of the notice of substitution. The July 2, 2019 meeting ended unsuccessfully, and Calcagnini mentioned getting an attorney involved after seeing the contents of the bullet points.

On July 31, 2019, the zoning commission approved an amended plan for the redevelopment of the shopping center. Under the new plan, the redevelopment would be conducted in a single phase rather than in multiple phases. That same day, Palmer hand delivered a termination of lease letter to the defendant at the demised premises. The termination of lease referenced the notice of substitution, stated that the defendant had failed to accept the proposed substitute premises identified in that notice, and stated that, as a result, the plaintiff was electing to terminate the lease pursuant to the relocation clause.

On August 30, 2019, the plaintiff served the defendant with a notice to quit. The plaintiff's notice to quit stated that it was electing to terminate the defendant's lease

"for failure to accept a substitute premises which was offered to you on April 4, 2018." On September 23, 2019, the plaintiff filed a three count summary process complaint alleging (1) termination of lease by express stipulation, (2) lapse of time, and (3) occupancy by one who originally had a right or privilege but such right or privilege has terminated. In response to the plaintiff's summary process complaint, the defendant asserted three special defenses: failure to perform a condition precedent, impossibility or impracticability, and unclean hands.[1] Trial was held over the course of two days on January 23 and February 14, 2020.

The court rendered judgment in favor of the plaintiff. In its memorandum of decision, the court found that, although the defendant had the right to possess the demised premises through September 30, 2020, the parties knew at the time of the execution of the lease and its amendment that the plaintiff was planning to redevelop the entire shopping center and that they contracted for this eventuality. The court also found that the "plaintiff continually attempted to involve the defendant in its relocation plans and at all times wished to provide the defendant with a substitute premises under the lease. In return for [its] good faith, the court believes [it] received the runaround, slowing down its attempted redevelopment. It is undisputed that the substituted premises was never 'completed' or ready for move in, in fact, to date, it has not yet been constructed. The

[1] The defendant also filed a four count counterclaim, alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The plaintiff moved to dismiss the defendant's counterclaim on the ground that the claims alleged therein may not be asserted in a summary process action. The court granted the motion to dismiss, concluding that "the defendant can pursue these claims in a separate cause of action, but not as counterclaims in the limited jurisdiction housing session of the Superior Court." The court's dismissal of the counterclaim is not at issue in this appeal.

plaintiff, after unsuccessfully negotiating in excess of a year with the defendant, gave up on its 'phased in' redevelopment plan and decided to redevelop the shopping plaza all at once. Certainly, it is doing so at a seven figure savings from the phased in plan, but the court believes that had the [defendant] ever expressed a desire to proceed with a move, the plaintiff would never have reached this business decision.

"By refusing to act in good faith as to the relocation plan, the [defendant] violated the express language of the lease and left the plaintiff with no option other than to terminate the lease and proceed with this action. . . . The defendant's refusal to fairly negotiate was akin to a refusal to relocate to the proposed substitute space, and as such, the plaintiff properly terminated the lease by the July 31, 2019 letter." Finally, the court found that the defendant had failed to meet its burden of proving its special defenses because "the notices given under the lease [were] proper and . . . the plaintiff acted in good faith in its negotiations and performed all conditions precedent to maintain this action." Accordingly, the court found for the plaintiff on counts one and three of its summary process complaint[2] and rendered a judgment of immediate possession for the plaintiff. This appeal followed.

The defendant claims on appeal that the court improperly interpreted the relocation clause of the lease. Specifically, the defendant contends that the court erred in finding that (1) the plaintiff could require it to accept a proposed substitute premises before it was constructed, (2) the defendant was required to issue a written response to accept or reject a proposed substitute premises before it was built, (3) failure to respond in writing within fifteen days of the date of

[2] The court did not find for the plaintiff on count two of its complaint, which alleged a claim for lapse of time.

the notice of substitution constituted a rejection of the substitute premises to be built in the future and constituted a default supporting termination of the lease, (4) the defendant was required to negotiate the relocation of the demised premises and to accommodate the plaintiff's redevelopment plan, and (5) the notice of substitution was valid and that all conditions precedent to the plaintiff's ability to exercise its rights under the relocation clause were satisfied. In response, the plaintiff contends that the lease does not contain any language that required it to have completed construction of the substitute premises prior to giving notice of relocation and that the lease contemplated that work on the substitute premises would not be completed at the time that notice was given. We agree with the defendant that the court improperly interpreted the relocation clause.

To resolve the defendant's claims on appeal, we first must interpret the relocation clause of the lease. In doing so, we are guided by the following relevant legal principles. "The defendant's claim presents a question of contract interpretation because a lease is a contract, and, therefore, it is subject to the same rules of construction as other contracts. . . . The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Sproviero* v. *J.M. Scott Associates, Inc.*, 108 Conn. App. 454, 468–69, 948 A.2d 379, cert. denied, 289 Conn. 906, 957 A.2d 873 (2008).

"When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . If a contract is unambiguous

within its four corners, intent of the parties is a question of law requiring plenary review. . . . [If] the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . Accordingly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . .

"[W]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . [If] the language is unambiguous, we must give the contract effect according to its terms. . . . [If] the language is ambiguous, however, we must construe those ambiguities against the drafter. . . . Moreover, in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citations omitted; internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 358, 166 A.3d 800 (2017). Thus, the "contract must be viewed in its entirety, with each provision read in light of the other provisions . . . . We will not construe a contract's language in such a way that it would lead to an absurd result." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198, 118 A.3d 675, cert. denied, 318 Conn. 905, 122 A.3d 634 (2015).

"In construing a written lease . . . three elementary principles must be [considered]: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances

surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; [and] (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible." (Internal quotation marks omitted.) *Elliott Enterprises, LLC* v. *Goodale*, 166 Conn. App. 461, 469, 142 A.3d 335 (2016).

In the present case, we first conclude that the language of the relocation clause is clear and unambiguous and, therefore, the intent of the parties is a question of law. The relocation clause contains definitive contract language that clearly enumerates the obligations of the parties. Subsection A of the relocation clause provides that the plaintiff "may, at its option . . . elect by notice to the Tenant to require the Tenant to vacate and surrender the Demised Premises, and to substitute for the Demised Premises other reasonably similar space elsewhere in the Shopping Center . . . designated by the Landlord . . . and to move the Tenant to the Substitute Space. . . . The Tenant *shall vacate and surrender the Demised Premises and shall occupy the Substitute Premises promptly* . . . . Should the Tenant refuse to relocate to the Substitute Space, the Landlord may, at its option, by notice to the Tenant, elect to terminate the Lease . . . ." (Emphasis added.)

Pursuant to the plain and unambiguous language of subsection A of the relocation clause, the plaintiff could elect, after notifying the defendant, to have the defendant vacate the demised premises and to move the defendant into a substitute premises. If the plaintiff made such an election, then the defendant was required to move into the substitute premises. See *Boreen* v. *Boreen*, 192 Conn. App. 303, 321, 217 A.3d 1040 (use of word " 'shall' " connotes requirement), cert. denied, 333 Conn. 941, 218 A.3d 1046 (2019). No language in the relocation clause expressly provides that the defendant

was required to negotiate the terms of relocation with the plaintiff, including negotiating the location of the substitute premises or accommodating the plaintiff's redevelopment plans. There also is no language that obligates the defendant to accept or reject, in writing, a proposed substitute premises before it was built.[3] Instead, pursuant to the unambiguous language of the relocation clause, the defendant was required to vacate the demised premises and to move into the substitute premises after the plaintiff provided it with valid notice regarding the same. If the defendant refused to relocate to the substitute premises after receiving notice from the plaintiff, then, and only then, was the plaintiff permitted to terminate the lease pursuant to the relocation clause.

Moreover, the relocation clause implicitly provides that, as a condition precedent to the plaintiff's ability to give the defendant a valid notice of substitution, the substitute premises was required to be in existence at the time notice was given. "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. . . . Whether a provision in a contract is a condition the nonfulfillment of which excuses

[3] Section 21 of the lease provides: "Oral Agreements Excluded. It is further agreed between Landlord and the Tenant that this Lease embodies the entire agreement between them, and that no amendments or modifications hereto shall become effective except by appropriate written endorsement hereof or separate written agreement supplemental hereto." (Emphasis in original.)

We agree with the defendant that the trial court was incorrect in finding that the defendant was obligated to negotiate in good faith with respect to the relocation plans of the plaintiff and to accommodate the plaintiff's relocation plans. Such findings contradict the express terms of the relocation clause of the lease.

performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 360.

In the present case, subsection A of the relocation clause provides that, after the defendant received a notice of substitution, the defendant "shall vacate and surrender the Demised Premises and *shall occupy the Substitute Premises promptly* (and in any event not later than fifteen [15] days after the Landlord has substantially completed any work to be performed in the Substitute Premises pursuant to [subsection] B hereof)." (Emphasis added.) Subsection A thus implicitly presupposes that the substitute premises already would be in existence at the time notice of substitution is issued. An interpretation to the contrary would render the "shall occupy the Substitute Premises promptly" language superfluous, as it would be impossible for the defendant to vacate the demised premises and then occupy promptly a substitute premises that had not yet been constructed. See *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 358 ("in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous" (internal quotation marks omitted)); *Elliott Enterprises, LLC* v. *Goodale*, supra, 166 Conn. App. 469 ("the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible" (internal quotation marks omitted)).

Although the relocation clause does not contain any language expressly providing that the substitute premises had to be constructed prior to the plaintiff's ability

to issue a valid notice of substitution, such an interpretation is implicit because an interpretation to the contrary would yield absurd results. See *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, supra, 158 Conn. App. 198 ("[w]e will not construe a contract's language in such a way that it would lead to an absurd result"). In the plaintiff's view, the substitute premises did not need to be in existence at the time that notice of substitution was issued. If the relocation clause were construed in this manner, however, then the defendant, upon receiving a notice of substitution, would be required to close its business for an indefinite amount of time while the demised premises was razed and the substitute premises was constructed. The amendment to the lease also expressly provides that the defendant waives "all claims against Landlord for any compensation or loss of use of the Rental Premises occasioned by such redevelopment activities." The defendant, therefore, not only would be unable to make any money from its business if the plaintiff could force it to vacate the demised premises prior to the construction of the substitute premises, but it also would be unable to seek any damages from the plaintiff for its lost profits. This scenario, which would be possible under the plaintiff's interpretation of the relocation clause, creates an absurd and bizarre result, as we hardly can imagine that the defendant would agree to such terms. See *Grogan* v. *Penza*, 194 Conn. App. 72, 79, 220 A.3d 147 (2019) ("we presume that the parties did not intend to create an absurd result" (internal quotation marks omitted)); *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, supra, 199 ("contractual documents are to be read as a whole and bizarre results are to be avoided").

Such a result also is bizarre because it contradicts the clear terms of the amendment to the lease. The amendment to the lease provides that the plaintiff agreed to "reasonably cooperate with Tenant in good

faith to the extent reasonably practical during any redevelopment of the Shopping Center to minimize any material and adverse impact of such redevelopment on the conduct of Tenant's business . . . ." If the plaintiff could compel the defendant to vacate the demised premises before the substitute premises was built, then the defendant's business undisputedly would be materially and adversely impacted, as it would be unable to operate its restaurant while the substitute premises was being constructed. In light of these considerations, and the absurd results that the plaintiff's interpretation of the relocation clause would produce, the relocation clause is more reasonably construed to require the existence of the substitute premises at the time a notice of substitution is issued. Accordingly, we conclude that the existence of the substitute premises was a condition precedent to the plaintiff's ability to issue a valid notice of substitution under the relocation clause.

Having interpreted the relocation clause of the lease, we next determine whether the court incorrectly found that the defendant breached the lease by violating the relocation clause. Whether a lease was breached presents a question of fact. See *Lynwood Place, LLC* v. *Sandy Hook Hydro, LLC*, 150 Conn. App. 682, 687, 92 A.3d 996 (2014). "Factual findings are subject to a clearly erroneous standard of review. . . . It is well established that [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . . Our authority, when reviewing the findings of a judge, is circumscribed by the deference we must give to decisions of the trier of fact, who is usually in a superior

position to appraise and weigh the evidence. . . . The question for this court . . . is not whether it would have made the findings the trial court did, but whether in view of the evidence and pleadings in the whole record it is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id.

On the basis of the record before us, and in light of our interpretation of the relocation clause, we conclude that the court's finding that the defendant breached the lease by violating the terms of the relocation clause was clearly erroneous. In its memorandum of decision, the court found that, "[b]y refusing to act in good faith as to the relocation plan, the [defendant] violated the express language of the lease and left the plaintiff with no option other than to terminate the lease and proceed with this action. . . . The defendant's refusal to fairly negotiate was akin to a refusal to relocate to the proposed substitute space, and as such, the plaintiff properly terminated the lease by the July 31, 2019 letter." The relocation clause, however, contains no language that expressly requires the defendant to negotiate the terms of relocation, to participate in the process of identifying a substitute premises, or to give the plaintiff written acceptance or rejection of a proposed substitute premises that had not yet been constructed.[4] Instead,

[4] We are mindful that subsection B of the relocation clause provides that the "Tenant agrees to cooperate with the Landlord so as to facilitate the completion by the Landlord of its obligations under this Section and the prompt surrender of the Demised Premises, and further agrees to promptly perform in the Substitute Premises any work to be performed therein by the Tenant to prepare the Substitute Premises for the Tenant's occupancy." We do not interpret this clause, however, to require the defendant to negotiate the terms of relocation with the plaintiff, to participate in the selection of the proposed substitute premises, and to accept it *prior to its construction*. In context, this clause clearly is referring to the defendant's obligations to assist the plaintiff with furnishing and installing fixtures, improvements, and appurtenances in the substitute premises and to assist the plaintiff with its other responsibilities related to facilitating the defendant's move into the substitute premises. Nothing in this clause, or in the rest of the relocation

the relocation clause simply obligated the defendant to surrender the demised premises and to move into the substitute premises upon receiving a valid notice of substitution from the plaintiff.

The notice of substitution that the plaintiff issued to the defendant, however, was not valid. As previously observed, the existence of the substitute premises was a condition precedent to the plaintiff's right to issue a notice of substitution to the defendant. It is undisputed that the substitute premises had not yet been constructed at the time that the notice of substitution was issued. A condition precedent to issuing a valid notice of substitution thus was not fulfilled. As a result, the defendant's duty to perform under the relocation clause was never triggered because the plaintiff's right to enforce it had not yet come into existence.[5] See *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 360. Accordingly, we conclude that the court's

clause, indicates that the defendant was required to cooperate with the plaintiff in identifying and accepting the substitute premises before it was built. We will not import such an obligation into the lease in the absence of any language indicating that the parties intended to impose this duty on the defendant. See *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 199 Conn. App. 642, 657, 237 A.3d 3 (2020) ("[I]t is well settled that we will not import terms into [an] agreement . . . that are not reflected in the contract. . . . A court simply cannot disregard the words used by the parties or revise, add to, or create a new agreement. . . . A term not expressly included will not be read into a contract unless it arises by necessary implication from the provisions of the instrument." (Citation omitted; internal quotation marks omitted.)).

[5] We are unpersuaded by the plaintiff's argument that the notice of substitution was valid because the lease actually contemplated that work on the substitute premises would not be fully completed at the time that notice was given. Although the relocation clause does provide that work on the substitute premises did not have to be completed at the time that notice of substitution was given, it does not contemplate that the substitute premises would not even have been constructed at such time. The relocation clause limits the work to be completed at the time that notice of substitution is given to the furnishing and installation of fixtures, improvements, and appurtenances in the substitute premises. Accordingly, the plaintiff's argument fails.

finding that the defendant breached the lease by violating the terms of the relocation clause is unsupported by the record and, therefore, is clearly erroneous.[6] See *Lynwood Place, LLC* v. *Sandy Hook Hydro, LLC*, supra, 150 Conn. App. 687.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

IAN WRIGHT *v.* JAMES DZURENDA ET AL.
(AC 43888)

Prescott, Suarez and Vertefeuille, Js.

Syllabus

The plaintiff, an incarcerated individual, sought a declaratory judgment and punitive damages against the defendant B, an employee of the Department of Correction, claiming that B had retaliated against him for filing a grievance against her for allegedly denying him access to type legal documents on the facility's typewriter, which he claimed was a denial of access to the courts in violation of the federal constitution. In B's answer, she asserted the special defense of failure to exhaust administrative remedies, pursuant to federal statute (§ 42 U.S.C. § 1997e (a)). At B's request, the trial court held an evidentiary hearing, prior to the start of trial, regarding B's defense of failure to exhaust. The trial court granted B's motion to dismiss, concluding that because the plaintiff had failed to exhaust his administrative remedies under the department's grievance system, it lacked subject matter jurisdiction pursuant to § 42 U.S.C. § 1997e (a). On the plaintiff's appeal to this court, *held*:

1. This court declined to review the plaintiff's unpreserved claim that the trial court erred in determining that he had failed to exhaust his administrative remedies by not filing a second grievance regarding B's alleged retaliatory conduct pursuant to the department's grievance procedure, as this claim was not raised before the trial court: moreover, this court declined the plaintiff's request to review his unpreserved claim under

[6] The defendant also argues that the plaintiff's notice of substitution was invalid because the plaintiff did not send the notice in a manner in which proof of receipt was required as contemplated by the notice provisions of the lease. In light of our conclusion that the notice of substitution was invalid because a condition precedent to its issuance was not fulfilled, we need not address this issue.

the plain error doctrine, as the plaintiff failed to demonstrate that there was an error so clear and obvious as to warrant the extraordinary remedy of reversal, and beyond the plaintiff's unsupported assertions that the circumstances of his case were extraordinary because the trial court and B overlooked controlling case law, the plaintiff provided little to no analysis of this unpreserved claim under the plain error doctrine.

2. The plaintiff could not prevail on his claim that the trial court erred in considering B's special defense that the plaintiff had failed to exhaust his administrative remedies because B had waived that special defense by failing to raise it in her pretrial motions to dismiss and her motion for a summary judgment; contrary to the plaintiff's claim, B, under the relevant rule of practice (§ 10-60) was not required to raise her special defenses in her pretrial motions to dismiss, and, because exhaustion under § 42 U.S.C. § 1997e (a) was an affirmative defense, the plaintiff was not required to factually plead in his complaint that he had exhausted his administrative remedies, and, thus, it was not until the plaintiff provided B with a list of the exhibits three days before trial was it confirmed that the plaintiff had not exhausted his administrative remedies for his retaliation claim.

Argued April 14—officially released September 7, 2021

Procedural History

Action, inter alia, seeking a judgment declaring that denying access to a typewriter to an incarcerated individual constitutes a denial of access to the courts, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the trial court, *Brazzel-Massaro*, *J.*, granted the motion to dismiss count four of the complaint filed by the defendant Bonnie Hakins and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ian Wright, self-represented, the appellant (plaintiff).

Thomas J. Davis, *Jr.*, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant Bonnie Hakins).

Opinion

VERTEFEUILLE, J. The self-represented plaintiff,[1] Ian Wright, appeals from the judgment of the trial court,

[1] The plaintiff was also self-represented during the proceedings before the trial court.

dismissing count four of his complaint, brought against the defendant Bonnie Hakins, a counselor for the Department of Correction (department), in her individual capacity, on the ground that the plaintiff's action is barred for failure to exhaust his administrative remedies.[2] On appeal, the plaintiff claims that the court erred (1) in determining that he had failed to exhaust his administrative remedies and (2) in considering the defendant's special defense that the plaintiff had failed to exhaust his administrative remedies because the defendant had waived that special defense. We disagree and, accordingly, affirm the judgment of the court.

The following procedural history and facts, as found by the court or as undisputed in the record, are relevant to this appeal. The self-represented plaintiff was transferred to Garner Correctional Institution (Garner) from Corrigan Radowski Correctional Center on April 22, 2014. On April 30, 2014, the plaintiff submitted form CN 9601, an inmate request form (informal form), to a prison official at Garner, indicating that he had a grievance against the defendant for her alleged refusal to allow him access to a typewriter so that he could prepare legal documents to file with this court. The plaintiff included a subject line titled, "Re Grievance Denial Access to typewriter," on the informal form. On that form, the plaintiff stated that the grievance was being filed against the defendant, who had denied him "access to [the] typewriter, which [was] necessary to prepare legal pleadings to be filed with the [Connecticut] Appellate and federal courts." The plaintiff also claimed that

[2] The plaintiff also brought this action against James Dzurenda, the former Commissioner of Correction, in his individual and official capacities, and Paolo Santilli, a treatment officer with the department. The count against Santilli was dismissed on August 31, 2016, along with another count against Hakins. The counts against Dzurenda were dismissed on August 31, 2016, and February 4, 2019, leaving Hakins as the sole remaining defendant. In this opinion, we refer to Hakins as the defendant and to Dzurenda, Santilli and Hakins collectively as the defendants.

the denial of access to the typewriter amounted to a denial of access to the court in violation of his first amendment rights under the federal constitution.

A prison official responded to the plaintiff's informal form and stated that the defendant was following Garner's policy and that the plaintiff was given access to the typewriter on May 5, 2014. Thereafter, on May 13, 2014, the plaintiff submitted form CN 9602, an inmate administrative remedy form (level one grievance form), setting forth a grievance against the defendant due to the defendant's alleged refusal to allow him access to a typewriter. Specifically, the plaintiff indicated that the grievance was being filed "for failure of the counselor . . . and the staff of the [d]epartment . . . to provide [him] with adequate use of a typewriter necessary to prepare legal document[s] to be filed with the court, which constitutes 'denial of access to the courts' in violation of the first amendment to the constitution of the United States." The plaintiff also claimed that he was subjected to an unreasonable search. The relief that the plaintiff requested to resolve his grievance entailed him being given access to the typewriter five days per week for one hour each day. His request was denied on June 11, 2014. The denial notice stated that, because Garner had only one typewriter that was afforded for use at Garner, the plaintiff should seek an extension with the courts so that he could timely submit his legal documents. The denial notice also advised the plaintiff that he could appeal the denial.

On June 13, 2014, the plaintiff submitted form CN 9604, an inmate grievance appeal form (level two grievance form), appealing the denial of his level one grievance regarding access to the typewriter, claiming that his grievance was improperly denied because he was unable to get access to the typewriter from the defendant after submitting numerous requests. His level two appeal was denied on July 1, 2014, and the denial notice

stated that his claim was denied because his allegations could not be substantiated.

On June 10, 2014, the plaintiff submitted a second informal form with a subject line titled, "Re: Access to the typewriter and unreasonable strip search 'Grievance.' " On that informal form, the plaintiff stated that it was his "second grievance with respect to not getting access to the typewriter." The plaintiff also claimed that he believed "[t]he actions of [the defendant] [were] in retaliation for [his] first grievance [that he] filed against her." Garner responded by indicating that the issue raised by the defendant already had been addressed and that he was not being denied access because he had used the typewriter on several occasions and even chose to use his recreational time to exercise in lieu of using the typewriter when he was given the opportunity to use it. He did not further pursue, administratively, his claim of retaliation.

The plaintiff thereafter commenced this action in the Superior Court on October 3, 2014. The five count complaint alleged violations of 42 U.S.C. § 1983 (2012). The fourth count of the complaint, the relevant count for purposes of the plaintiff's claims raised on appeal, alleged that the defendant retaliated against the plaintiff for filing a grievance against her by denying him access to the typewriter.[3] The plaintiff sought, inter alia, a declaratory

[3] In count one of the complaint, the plaintiff alleged that Dzurenda denied him access to the court by failing to provide him with access to the typewriter in order for him to file the required legal documents with the courts. In count two of the complaint, the plaintiff alleged that Hakins denied him access to the courts by failing to provide him with adequate access to a typewriter despite several requests. Count three of the complaint alleged that Santilli had denied him access to the courts by failing to provide him with adequate access to a typewriter. The fifth count of the complaint alleged that Dzurenda violated his constitutional rights by implementing an unreasonable policy and procedure at Garner that all inmates had to be subjected to a strip search after each time that they used the typewriter at Garner because the typewriter could be used only in the visiting area per Garner's policies and procedures. These counts are not germane to the

judgment from the court "stating that . . . the denial of a typewriter . . . constituted denial of 'access to the court,' " and punitive damages.

On March 24, 2015, the defendants filed a motion to dismiss all counts of the plaintiff's complaint, contending that the court lacked subject matter jurisdiction, to which the plaintiff filed an objection on April 23, 2015. On August 31, 2016, the court, *Ozalis*, *J.*, dismissed the plaintiff's access to the court claims under counts one, two, and three for lack of standing because the plaintiff failed to show that he suffered an actual injury. On October 16, 2018, the defendants filed a second motion to dismiss, seeking dismissal of the plaintiff's claims for declaratory and injunctive relief and count five of the complaint. On February 4, 2019, the court, *Krumeich*, *J.*, granted the defendants' motion and dismissed count five, as well as the plaintiff's claims for injunctive and declaratory relief, after determining that, because the plaintiff no longer was incarcerated at Garner, it lacked subject matter jurisdiction to afford the plaintiff the injunctive and declaratory relief requested. Moreover, the court determined that the plaintiff's claims under count five of the complaint became moot after he no longer was incarcerated at Garner.

On April 15, 2019, the defendant filed a motion for summary judgment as to count four, which was denied by the court, *Brazzel-Massaro*, *J.*, on November 20, 2019. On October 28, 2019, the defendant filed her answer to the plaintiff's complaint in which she denied the plaintiff's allegations in count four. She also raised two special defenses, claiming that she was entitled to qualified immunity for the allegations asserted under count four and that the plaintiff's action was barred

issues raised on appeal, because the plaintiff only challenges the court's disposition of count four.

by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (a) (2018),[4] because the plaintiff had failed to exhaust available administrative remedies before commencing this action in the Superior Court. On December 10, 2019, the plaintiff and the defendant exchanged their respective trial exhibits and the plaintiff also filed his list of trial exhibits with the court. On December 12, 2019, the eve of trial, the defendant filed a request to amend her answer and special defenses solely to address typographical and grammatical errors, and not to make any substantive changes. The request to amend was granted by the court on December 13, 2019. The defendant also had filed a motion for order on December 12, 2019, seeking a pretrial evidentiary hearing to determine whether the plaintiff had exhausted his administrative remedies before initiating this action. The court granted the defendant's motion after stating its concerns about the defendant's request to have the hearing on the morning of the first day of trial, December 13, 2019. The defendant indicated that, until the plaintiff had provided her with his trial exhibits on December 10, 2019, it was not clear to her that the plaintiff had failed to exhaust his administrative remedies. Notwithstanding the court's concerns about the timing of the defendant's motion, the evidentiary hearing was held that morning.

The defendant's only witness during the evidentiary hearing was Jason Olson, a correction counselor at Garner, who, at the time, was assigned as the primary administrative remedies coordinator. Olson testified that he maintained the records of grievances filed by inmates at Garner. He also explained that the inmate

[4] Title 42 of the United States Code, § 1997e (a), provides in relevant part that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

grievance procedure at Garner was governed by the department's administrative directive 9.6 (administrative directive). See Conn. Dept. of Correction, Administrative Directive 9.6 (effective August 15, 2013).[5] Olson's testimony established that the proper procedure for an inmate to file a grievance, pursuant to the administrative directive, required the inmate first to go through an informal resolution process, which required the inmate to submit an informal form. If the informal process did not address the inmate's concerns, the inmate could then file a grievance by means of a level one grievance form. If the inmate's level one grievance was denied, the inmate could thereafter seek a review by filing a level two grievance form, which is when the inmate is considered to have exhausted the administrative remedy process. Notably, Olson testified that the plaintiff exhausted his administrative remedies as it pertained to the grievance he filed on May 13, 2019, concerning access to the courts and unreasonable search claims because the plaintiff submitted an informal form, a level one grievance form, and a level two grievance form for these claims.[6] Olson also testified that the plaintiff never filed a level one grievance form after filing a second informal form on June 10, 2014, alleging retaliation.

The plaintiff did not proffer any witnesses and claimed that he did not have sufficient notice of the defendant's exhaustion claim to adequately respond to the claim. Moreover, the plaintiff asserted that the filing of the second informal form on June 10, 2014, constituted the filing of a grievance and was sufficient because

[5] We note that administrative directive 9.6 was superseded on April 30, 2021. All references to administrative directive 9.6 herein are to the directive in effect as of August 15, 2013.

[6] As we stated previously in this opinion, the trial court, nevertheless, dismissed those counts of the complaint pertaining to access to the courts and unreasonable search claims for lack of standing and for mootness.

the informal process was a part of the inmate grievance procedure set forth in the administrative directive. In response, the defendant argued that the plaintiff had enough time to prepare because her special defense of failure to exhaust administrative remedies was included in her answer that was filed on October 28, 2019. Consequently, the defendant moved for a dismissal during the evidentiary hearing, which the court granted, dismissing count four of the complaint after concluding that the plaintiff failed to exhaust his administrative remedies by failing to file a level one grievance form concerning the retaliation allegation. In particular, the court found that the evidence supported the finding that the plaintiff did not file a level one grievance form against the defendant alleging retaliation, nor was there a second level grievance filed as required by the administrative directive. Further, the court noted that, because the plaintiff was familiar with the process required for filing a grievance pursuant to the administrative directive, the fact that he was a self-represented party did not cause him hardship. This appeal followed.[7] Additional facts will be set forth as necessary.

I

On appeal, the plaintiff first claims that the court erred by determining that he had failed to exhaust his administrative remedies. Specifically, the plaintiff contends that the court's determination that he failed to exhaust his administrative remedies prior to initiating this action was improper because he sufficiently had described the defendant's retaliatory conduct in the first grievance that he had filed on May 13, 2014, and that he was not required to file a second grievance alleging retaliation because it would have been consid-

[7] On March 6, 2020, the plaintiff filed a motion for articulation, in response to which the court issued an articulation on May 1, 2020.

ered an abuse of the inmate grievance procedure.[8] We decline to review this claim for the reasons that follow.[9]

[8] The plaintiff's full May 13, 2014 grievance stated: "This grievance is being filed for failure of the counselor, [the treatment officer] and the staff of the [d]epartment . . . to provide me with adequate use of a typewriter necessary to prepare legal documents to be filed with the court, which constitutes [a] denial of access to the courts in violation of the first amendment to the constitution of the United States. I was transferred from Corrigan [Radgowski Correctional Center] to Garner and upon my arrival I requested use of the typewriter and was told by the unit counselor and [the treatment officer] that there is a [ten] day wait policy to use the typewriter. Court documents are time sensitive and [ten] days would not be adequate enough time to provide me with access to a typewriter. Other level [four] facilities offer inmates [the use of] the typewriter at least one hour a day during their recreational periods. I have [a] document which has to be filed with the courts which require [that] they be . . . [typewritten]. I was also subjected to an unreasonable search.

"Resolution: I request that I be given access to the typewriter [five] days per week for an hour during my recreation period which would under the circumstances be considered adequate access and would provide me with access to the court and not be subjected to unreasonable searches after using the typewriter." (Internal quotation marks omitted.)

[9] Because the court and the defendant insinuated during the evidentiary hearing that a failure to exhaust administrative remedies potentially implicated the court's subject matter jurisdiction, we take the opportunity to clarify whether the exhaustion requirement under the PLRA, 42 U.S.C. § 1997e (a), is jurisdictional, not only to provide guidance to the parties, but also to the trial courts, even though we recognize that the following discussion is not necessary in order to determine the proper outcome of the present case. Generally, "[i]t is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Graham* v. *Friedlander*, 334 Conn. 564, 576, 223 A.3d 796 (2020).

For cases involving the PLRA, however, "[i]n *Richardson* v. *Goord*, [347 F.3d 431 (2d Cir. 2003)], the United States Court of Appeals for the Second Circuit agreed to follow the holding of its sister circuit courts of appeal[s] that have ruled on the question of whether the exhaustion requirement of 42 U.S.C. § 1997e (a) controls subject matter jurisdiction. Those courts have concluded that the language of the statute simply governs the timing of the action and does not contain the type of sweeping and direct language that would indicate a jurisdictional bar rather than a mere codification of administrative exhaustion requirements. . . . [A]n administrative claim is not essential to a case or controversy, and 28 U.S.C. §§ 1331, 1343 supply [subject matter] jurisdiction. Section 1997e (a) does not affect the jurisdiction established by those statutes. . . . In the federal courts, a case in which a prisoner fails to exhaust the available administrative remedies may be dismissed for failure to exhaust administrative remedies under 42 U.S.C. § 1997e (a), but

The inmate grievance procedure set forth in administrative directive 9.6 § (6) provides in relevant part: "(A) An inmate must attempt to seek informal resolution prior to filing an inmate grievance. The inmate may attempt to resolve the issue verbally with the appropriate staff member or with a supervisor/manager. If the verbal option does not resolve the issue, the inmate *shall* submit a written request via CN 9601, Inmate Request Form. . . .

"(C) An inmate may file a grievance [via CN 9602] if the inmate is not satisfied with the informal resolution offered. . . .

"(K) An inmate may appeal a Level 1 disposition to Level 2 within (5) calendar days of receipt of the decision. . . . Level 2 shall be the final level of appeal for

not for lack of subject matter jurisdiction on that basis. . . . The provision does not defeat [federal court jurisdiction], it merely defers it." (Citations omitted; internal quotation marks omitted.) *Mercer* v. *Rodriquez*, 83 Conn. App. 251, 265–66, 849 A.2d 886 (2004).

The plaintiff in the present case brought this action seeking relief under 42 U.S.C. § 1983. "The United States Supreme Court has asserted that [f]ederal law is enforceable in state courts . . . because the [United States] [c]onstitution and laws passed pursuant to it are as much laws in the [s]tates as laws passed by the state legislature. . . . State courts have concurrent jurisdiction over claims brought under § 1983." (Internal quotation marks omitted.) *Sullins* v. *Rodriguez*, 281 Conn. 128, 133, 913 A.2d 415 (2007). Thus, the court had subject matter jurisdiction over the plaintiff's § 1983 claim and a failure to exhaust administrative remedies did not implicate the court's subject matter jurisdiction. See *Mercer* v. *Rodriguez*, supra, 83 Conn. App. 265–67.

There was no procedural error, however, because the court only dismissed the case after holding an evidentiary hearing and after finding that the plaintiff had failed to exhaust his administrative remedies. Because the failure to exhaust administrative remedies is a requirement to succeed, even if not jurisdictional, the court's dismissal after a hearing where the factual findings supported its conclusion that the plaintiff failed to exhaust was proper.

We also note that, although our Supreme Court in *Mangiafico* v. *Farmington*, 331 Conn. 404, 408, 204 A.3d 1138 (2019), held that a "plaintiff is not required to exhaust administrative remedies prior to filing a § 1983 claim in state court, regardless of the type of relief sought," *Mangiafico* is inapplicable to the present case because the plaintiff is a prisoner who is confined in a correctional facility or prison and brought a § 1983 claim

all grievances except as provided in . . . (L)."[10] (Emphasis added.)

During the evidentiary hearing on December 13, 2019, the plaintiff fervently argued that the filing of the June 10, 2014 informal form against the defendant alleging retaliation was sufficient because "the grievance is deemed filed" once he starts the grievance process. More particularly, he argued that because the first step in the inmate grievance procedure under the administrative directive is an informal resolution, he, in fact, had filed a grievance regarding his retaliation claim upon the submission of his June 10 informal form.

The crux of the plaintiff's retaliation claim on appeal is that the May 13, 2014 grievance that he filed was sufficient to alert prison officials of the defendant's alleged retaliatory conduct and that he was not required to file a second grievance regarding the defendant's conduct because doing so would have been an abuse of the inmate grievance procedure pursuant to § (6) (O) (3) of administrative directive 9.6. This argument was not raised before the trial court, and, therefore, we decline to review it for the first time on appeal.

"[I]t is the appellant's responsibility to present a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Dinardo Seaside Tower, Ltd.* v. *Sikorsky Aircraft Corp.*, 153 Conn. App.

concerning prison conditions. Therefore, he must exhaust his administrative remedies pursuant to the PLRA. See footnote 4 of this opinion.

[10] Administrative directive 9.6 § (6) (L) is not implicated in this case.

10, 28, 100 A.3d 413, cert. denied, 314 Conn. 947, 103 A.3d 976 (2014). Thus, because the record shows that the plaintiff did not raise this claim clearly before the court and is raising it for the first time on appeal, we decline to review it on appeal.

Alternatively, the plaintiff asks this court to review his unpreserved claim under the plain error doctrine pursuant to Practice Book § 60-5.[11] "[Section] 60-5 provides in relevant part that [t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court." (Internal quotation marks omitted.) Id., 28.

"As our Supreme Court has explained: [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . ." (Internal quotation marks omitted.) *Norwich* v. *Norwich Harborview Corp.*, 156 Conn. App. 45, 50, 111 A.3d 956 (2015).

This court "clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain

[11] Although the plaintiff asks for plain error review under "General Statutes § 60-5" in his appellate brief, we assume that he intended to seek review of his unpreserved claims under Practice Book § 60-5, not General Statutes § 60-5.

in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . We made clear . . . that this inquiry entails a relatively high standard, under which it is not enough for the [party] simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) Id., 50–51. "In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 866, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).

The plaintiff claims that the circumstances of his case are extraordinary because the court and the defendant have overlooked controlling case law. Beyond that bald assertion, the plaintiff has provided little to no analysis of this unpreserved claim under the plain error doctrine. Because the plaintiff has cursorily addressed the argument that plain error exists with respect to the briefed error, we conclude that he has failed to demonstrate that there was an error "so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." *Norwich* v. *Norwich Harborview Corp.*, supra, 156 Conn. App. 51.

II

The plaintiff next claims that the court erred in considering the defendant's special defense that he had failed to exhaust his administrative remedies because the defendant had waived that special defense by failing to raise it in her first motion to dismiss filed on March 24, 2015, her second motion to dismiss filed on October 16, 2018, or her motion for summary judgment filed on April 15, 2019. The defendant, however, contends that the defense is not waived because there is no indication in the record that she ever expressly waived the special defense, and there is no basis in the record on which an "intentional waiver may reasonably be inferred." We conclude that the defendant did not waive the special defense of exhaustion of administrative remedies.

The following additional facts are relevant to the resolution of this claim. During the evidentiary hearing, the plaintiff argued before the court that the defendant was raising the exhaustion issue despite the pleadings being closed and that the defendant had failed to challenge whether the plaintiff had exhausted his administrative remedies before the "eleventh hour." He also claimed that the defendant had ample opportunity during the five or six years that the case had been ongoing to raise the issue of exhaustion. In response to the plaintiff's claim that the defendant had ample opportunity, the court agreed with the plaintiff that it should "probably should have been addressed earlier," but asserted that the defendant had not received the plaintiff's exhibits until three days before the trial. The court then further considered the defendant's exhaustion special defense, ultimately determining that the plaintiff had failed to exhaust his administrative remedies.[12]

[12] We note that, although the plaintiff did not specifically state before the trial court that the defendant's "special defense was waived," we believe that this claim was sufficiently raised before the court when he argued that (1) he believed that the pleadings were closed, (2) the defendant had ample opportunity to raise the exhaustion claim during the five or six years that the

The United States Supreme Court has established that exhaustion under the PLRA is an affirmative defense. See *Jones* v. *Bock*, 549 U.S. 199, 211–16, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007). Additionally, Practice Book § 10-6 provides that the order of pleadings should be as follows: "(1) The plaintiff's complaint. (2) The defendant's motion to dismiss the complaint. (3) The defendant's request to revise the complaint. (4) The defendant's motion to strike the complaint. (5) The defendant's answer (including any special defenses) to the complaint. . . . (8) The plaintiff's reply to any special defenses." Although the plaintiff claims that the defendant waived her right to raise the special defense of exhaustion by not raising it in her motions to dismiss, § 10-6 suggests otherwise. By its terms, § 10-6 expressly permits the filing of special defenses after the filing of a motion to dismiss. Thus, the defendant was not required to raise her special defenses in her pretrial motions to dismiss, as the plaintiff claims.[13]

Moreover, the defendant was not *required* to raise her exhaustion defense in the summary judgment motion because, as noted previously in this opinion, the defense of exhaustion under the PLRA is an affirmative

case was ongoing, and (3) it was the defendant's responsibility to establish exhaustion, or lack thereof, and that she had failed to challenge it before the "eleventh hour."

[13] The plaintiff also claims in his appellate brief, as he did before the trial court, that he was not provided with sufficient notice of the defendant's exhaustion special defense in order to "rebut her claim," because she filed the motion for order raising the exhaustion issue on the eve of trial. In addressing the plaintiff's claim of insufficient notice, the court found that the plaintiff had been on notice of the defendant's failure to exhaust contention when she included it in her answer as a special defense, which was filed on October 28, 2019.

The record shows that the defendant filed her answer and special defenses on October 28, 2019, and not on the eve of trial as the plaintiff contends. The plaintiff's claim on appeal that he was without notice of the defendant's exhaustion claim and, consequently, could not prepare, is without merit. The defendant pleaded the exhaustion defense in her answer more than forty days before she filed the motion for order.

defense, and a defendant is permitted to plead her affirmative defenses in her answer. See Practice Book § 10-50. Furthermore, the plaintiff was not required to factually plead in his complaint that he had exhausted his administrative remedies. See *Jones* v. *Bock*, supra, 549 U.S. 216 ("failure to exhaust is an affirmative defense under the PLRA, and . . . inmates are not required to specially plead or demonstrate exhaustion in their complaints"). As such, according to the defendant, it was not until the plaintiff had provided her with a list of exhibits on December 10, 2019, three days before trial was slated to begin, that it was confirmed that the plaintiff had not exhausted his administrative remedies for his retaliation claim. Accordingly, the plaintiff's second claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

FATIMA K. DE ALMEIDA-KENNEDY *v.* JAMES KENNEDY (AC 43348)

Alvord, Elgo and Alexander, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion to dismiss the defendant's pending motions, which included a motion for modification of his alimony, child support and visitation orders, two motions for contempt, a motion for an order to prevent the plaintiff from filing additional motions without leave of the court pursuant to *Strobel* v. *Strobel* (92 Conn. App. 662), a motion to remove the guardian ad litem, and a motion to compel compliance with his discovery request, all for lack of subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (§ 46b-155 et seq.). Prior to the filing of the motion to dismiss, the defendant relocated to Florida and the plaintiff and the parties' children relocated to Tennessee. The defendant returned to Connecticut after approximately one year in Florida. While the plaintiff's motion to dismiss

was pending, the defendant filed an application for an emergency ex parte order of custody, and the trial court entered an emergency order awarding temporary custody to the defendant and also ordered a hearing on the custody issue. At the conclusion of the hearing, the trial court ordered that all existing orders regarding the custody of the parties' minor children be stayed until the plaintiff's motion to dismiss was resolved. Following a hearing on the motion to dismiss, for which the plaintiff submitted an affidavit in support of her arguments, as she was unable to attend in person, the trial court dismissed the defendant's motions for a *Strobel* order, to remove the guardian ad litem, and to compel, and one of his motions for contempt. The defendant appealed to this court and then filed a motion to reargue with the trial court. The trial court stayed consideration of the defendant's motion for modification of his alimony, child support and visitation orders, which remained pending, until the defendant's motion to reargue was resolved. The defendant then filed an amended appeal from the stay order. The trial court issued a memorandum of decision on the defendant's motion to reargue in which it, inter alia, vacated the stay and ordered dismissal of the custody proceedings, the defendant's motion for modification, and his second motion for contempt, and the defendant further amended his appeal to challenge that ruling. *Held*:

1. The defendant could not prevail on his claim that the trial court lacked a proper basis on which to grant the plaintiff's motion to dismiss: the substance of the affidavit submitted by the plaintiff, which recited details of her relocation, in addition to other documentation that she provided in connection with her motion to dismiss, including an individual education plan for her son that was prepared by his school in Tennessee and an electrical bill for a residence in Tennessee that listed the plaintiff as the account holder, undermined the defendant's claim that the plaintiff did not introduce any admissible evidence as to her residence, the length of time at her residence, the location of the children, or her financial circumstances.
2. This court declined to review the defendant's claim that the trial court abused its discretion in staying enforcement of the emergency ex parte custody order: the claim was not properly before this court because the defendant failed to file a motion for review of the stay order, which, pursuant to the applicable rule of practice (§ 66-6), was his sole remedy.
3. The trial court properly concluded that, pursuant to the applicable statute (§ 46b-115*l* (a) (1)), it did not have exclusive, continuing jurisdiction over the defendant's motions relating to custody of and visitation with the minor children and, therefore, it properly granted the plaintiff's motion to dismiss those motions: jurisdiction under § 46b-115*l* (a) (1) terminated in April, 2018, when the plaintiff and the minor children relocated to Tennessee following the defendant's relocation to Florida, as neither the parties nor the minor children continued to reside in Connecticut after that time; moreover, Connecticut did not reacquire

exclusive, continuing jurisdiction when the defendant returned to reside in the state, as § 46b-115*l* (a) (1) pertained only to continuing jurisdiction, not interrupted or intermittent jurisdiction.

4. The trial court improperly dismissed certain of the defendant's motions unrelated to the issues of child custody or visitation: the trial court's dismissal order was predicated on its conclusion that it lacked subject matter jurisdiction under the act, however, the act only concerned issues of custody or visitation and was not applicable to orders relating to child support or other monetary obligations; accordingly, although the defendant's two motions for contempt, which concerned custody and visitation with the minor children, and his motion for modification, which sought to modify the existing visitation order, were properly dismissed, the defendant's motion to modify his alimony and child support orders, along with his motions for a *Strobel* order, to remove the guardian ad litem, and to compel compliance with his discovery request, were beyond the purview of the act, as they had no relation to the issues of child custody or visitation, and, consequently, they were improperly dismissed.

5. The trial court did not abuse its discretion in deferring consideration of the defendant's motion to modify his alimony, child support, and visitation orders: the defendant's motion to reargue, which asked the trial court to reconsider and reverse its determination that it lacked subject matter jurisdiction under the act, required the deferral of consideration of the merits of his motion to modify until after the jurisdiction question was fully resolved.

Argued January 7—officially released September 7, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Gould*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Egan*, *J.*, granted the plaintiff's motion to dismiss the defendant's motions for a *Strobel* order, to remove the guardian ad litem, to compel, and for contempt and stayed the custody proceeding that was instituted by the defendant's application for an emergency ex parte order of custody, and the defendant appealed to this court; subsequently, the court, *Stewart*, *J.*, issued a stay on the defendant's motion to modify, and the defendant amended his

appeal; thereafter, the court, *Egan*, *J.*, granted the defendant's motion to reargue and amended its decision relating to the plaintiff's motion to dismiss and dismissed the custody proceedings and the defendant's motion to modify and for contempt, and the defendant amended his appeal. *Affirmed in part*; *reversed in part*; *further proceedings*.

James Kennedy, self-represented, the appellant (defendant).

J. David Griffin, for the appellee (plaintiff).

Opinion

ELGO, J. In this contentious postdissolution marital dispute,[1] the defendant, James Kennedy,[2] appeals from the judgment of the trial court granting the motion to dismiss filed by the plaintiff, Fatima K. De Almeida-Kennedy, for lack of subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (act), which has been adopted by Connecticut and codified in General Statutes § 46b-115 et seq. On appeal, the defendant claims that the court (1) lacked a proper basis on which to grant the motion to dismiss, (2) abused its discretion in staying enforcement of an ex parte custody order, (3) improperly concluded that it lacked continuing, exclusive jurisdiction pursuant to General Statutes § 46b-115*l* (a) (1), (4) improperly dismissed several motions unrelated to the issue of child custody or visitation, and (5) abused its discretion in staying consideration of his motion for modification. We affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On August 2, 2010, the trial court

[1] A review of the docket reveals approximately 350 postjudgment pleadings by the parties since 2010.

[2] The defendant is licensed to practice law in this state, as he indicated on his appeal form.

dissolved the parties' marriage. The judgment of dissolution incorporated by reference a written separation agreement, which provided, inter alia, that (1) the plaintiff was to have legal custody of the parties' two minor children, (2) the defendant was permitted supervised visits, and (3) the defendant would pay weekly unallocated alimony and child support.[3] On December 9, 2014, that judgment was modified by agreement to provide for, inter alia, a reduction to the defendant's alimony and child support obligations and joint legal custody with primary physical custody remaining with the plaintiff.

On December 28, 2015, the defendant filed a motion for modification requesting, among other things, a further reduction of his alimony and child support obligations. The court, *Wenzel*, *J.*, declined that request, the propriety of which this court affirmed on appeal. See *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 674–82, 205 A.3d 704, cert. denied, 332 Conn. 909, 210 A.3d 566 (2019). On March 10, 2016, the court, *Adelman*, *J.*, appointed a guardian ad litem to represent the minor children.

On August 30, 2017, the plaintiff filed a motion for contempt, on which the court, *Wenzel*, *J.*, scheduled a hearing for November 8, 2017. Prior to that hearing, the defendant moved to Florida in October, 2017.

At the November 8, 2017 hearing on the motion for contempt, the plaintiff's counsel and the guardian ad litem informed the court that the defendant, who was not present at the hearing, had relocated to Florida and had failed to attend a child support enforcement proceeding in Connecticut one day earlier. The court also heard testimony from the guardian ad litem in

[3] "[A]n unallocated order incorporates alimony and child support without delineating specific amounts for each component . . . ." *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012).

support of the plaintiff's motion for contempt. In its oral memorandum of decision, the court concluded that the defendant was in wilful contempt of the separation agreement and, accordingly, suspended the defendant's unsupervised visitation rights.[4] It is undisputed that the

[4] At the conclusion of the hearing, the court stated in relevant part: "[T]he court has had these parties before it on numerous occasions. Even in the past four months, we've had repeated hearings, repeated motions and cross motions, and it's becoming increasingly clear to the court that there are tremendous communication problems between the parties and that these problems are increasingly . . . impacting the welfare of the children.

"The factual basis set out in the motion for contempt is consistent with all of the evidence that had been submitted to the court previously. It appears to be supported by the investigation of our court-appointed guardian ad litem, including her home visit with the children.

"Normally, the court would be reluctant to proceed on a motion of this kind in the absence of one of the parties. It does appear that [the defendant] had notice and there is no evidence before the court to indicate that his absence from the court today was anything other than entirely voluntary and calculated.

"I do note for the record that when he was last before the court and pursuant to the agreement . . . [on September 21, 2017], I specifically indicated to [the defendant], as well as the plaintiff, that pending motions would be heard at the future scheduled hearing date with regard to all other pending motions. And this was about four weeks after the plaintiff had filed her motion for contempt, which is the subject of today's hearing. I believe that the immediate best interests of the children require the court to address the problems that increasingly plague this case and I'm not going to let [the defendant] . . . continue what I find to be his significant misconduct because he chooses not to be here.

"So I do find based on the evidence that's been presented to the court that [the defendant] is in wilful contempt of the court's judgment, which includes the separation agreement as modified from time to time by the court and the parties. And specifically, that he continues to disparage the plaintiff to communicate with the children concerning matters that are inappropriate, offensive and harmful to the children.

"In light of that contempt, it's the order of the court that on an interim basis the court suspends the right of [the defendant] to visitation with either child. Physical visitation will be allowed only with the specific consent of the [plaintiff] or the guardian ad litem. Such visitation must be supervised by a person or agency acceptable to the [guardian ad litem] or the actual presence of the [plaintiff] if she agrees to do so.

"Such visitation must take place within the state of Connecticut. Under no circumstances may [the defendant] remove or travel with either child outside the state of Connecticut or assist them in any way in leaving the

defendant has not seen the minor children in person since that judgment was rendered.

In April, 2018, the plaintiff and the minor children relocated to Tennessee. The defendant thereafter filed a series of motions in April and May, 2018, including, inter alia, a motion for modification in which he sought to reduce his unallocated alimony and support obligations and to modify his visitation order.[5] The defendant also filed an application for an emergency ex parte order of custody on May 8, 2018, which the court denied.

On November 7, 2018, the plaintiff, appearing at that time in a self-represented capacity, filed a motion to dismiss the defendant's pending motions for lack of jurisdiction under the act. In that motion, the plaintiff asked the court to "terminate jurisdiction" for various reasons, most notably the fact that she had resided in Tennessee with the minor children for more than six months.[6] While that motion to dismiss was pending, the

state of Connecticut. Should [the defendant] choose to seek modification of this order he must appear here in the state of Connecticut at a properly scheduled time and place."

[5] The defendant also filed two motions for contempt on April 4 and May 14, 2018, a May 3, 2018 motion for a *Strobel* order; see *Strobel* v. *Strobel*, 92 Conn. App. 662, 886 A.2d 865 (2005); to preclude the plaintiff from filing further postdissolution motions without leave of court, a May 3, 2018 motion to remove the guardian ad litem, and a May 3, 2018 motion to compel compliance with his discovery request.

[6] In her motion to dismiss, the plaintiff averred that she and the minor children had been living in Tennessee for the past seven months. She further alleged that "[i]t would be an extreme financial burden on the plaintiff, caring for her two children, to have her come to any and continuous court hearings and depositions related to the repetitive already denied motions filed by the defendant. . . . It is financially impossible and extremely impractical to travel literally 1000 miles to Connecticut to start or continue with the same court hearings litigated for over the past six years. . . . The plaintiff has no financial means to secure childcare nor to travel nor to afford an attorney and is in continuous growing debt, especially as a result of the [nonpayment of alimony and child support by the defendant].

* * *

[T]he defendant filed these motions when he was living in the state of Florida when both parties were [not] living [in] Connecticut. . . . The defendant was physically closer to Tennessee and the [minor] children prior to

defendant filed another application for an emergency ex parte order of custody on November 27, 2018. That same day, the court, *Gould*, *J.*, entered an emergency order awarding temporary custody to the defendant. The court also ordered a hearing to be held on the custody issue within fourteen days.

On December 11, 2018, the court held such a hearing at which the plaintiff's counsel, the defendant, and the guardian ad litem were present. At that time, the guardian ad litem apprised the court that the defendant's November 27, 2018 application for an emergency ex parte order of custody "contain[ed] misleading, incorrect, incomplete, as well as false statements." At the conclusion of that hearing, the court, *Hon. Robert J. Malone*, judge trial referee, ordered all existing orders regarding the custody of the minor children to be stayed until the plaintiff's motion to dismiss for lack of subject matter jurisdiction was resolved.

On May 1, 2019, the court held a hearing on the plaintiff's motion to dismiss. The defendant appeared at that hearing and was heard by the court. Although the plaintiff was unable to travel to Connecticut for the hearing, she submitted an affidavit in support of her motion to dismiss.

In its August 29, 2019 memorandum of decision, the court, *Egan*, *J.*, stated in relevant part: "In support of her motion [to dismiss], the plaintiff claims that she and the parties' minor children had lived in Franklin, Tennessee for at least seven months as of November 7, 2018, when the ex parte application was filed. She further claims that as of October, 2018, the defendant had lived one year in Satellite Beach, Florida after leaving Connecticut. She claims the defendant returned to Connecticut as of October 8, 2018; however, as of that

his return to Connecticut after having been living for one full continuous year in Florida." (Emphasis omitted.)

date, both parties had both been living out of . . . Connecticut for over six months and the defendant had been living out of state for a full year.

"The plaintiff further submits that she is the primary emotional, physical and financial caregiver for the children, and they have continued to reside in Tennessee since their move in [April, 2018]. The children [have been] enrolled in Williamson County Schools in Tennessee since April 22, 2018. Individual Education Plans . . . were established for them on May 7, 2018. All other aspects of their care have been transferred to Tennessee.

"The plaintiff further argues that with respect to the [Connecticut] child support order, on September 14, 2018, the Family Support Magistrate dismissed the child support case because the order was enforced in Florida. The plaintiff emphasized that while she is working in Tennessee, she has modest means. Travel to Connecticut to address motions would require her to secure childcare for the children at a steep cost to her, take the children out of school to travel with her, or find [someone to care for] them while she is away.[7] She does not have the means to afford an attorney.

"The defendant testified that he resides in Connecticut. He returned in October, 2018, from Florida. He argues that the plaintiff has gaps in her Tennessee residency and that she gave inconsistent dates of residency. Further, she admits to travel out of state.

"With respect to his relationship with the children, the defendant argues that he tried to have access to them, but he was unsuccessful due to the plaintiff's

[7] Although there is no indication that it was raised in the proceeding at trial, we note that General Statutes § 46b-115t (d) provides: "The court may order a party to pay for reasonable and necessary travel and expenses of a party to the child custody proceeding or the child who is outside the state."

actions. The defendant testified that he has no information on the care and relationship of the children.

"With respect to the ties of the minor children to Connecticut, the defendant argues that he has family here. The children have lifelong relationships here. They were only pulled out of school in March, 2018. They had medical providers in March, 2018. They would be able to receive an education and medical treatment no different than they would have in 2018. . . . At the time of the [plaintiff's November 7, 2018 motion to dismiss for lack of jurisdiction], the plaintiff and the minor children had lived in Tennessee for seven months. The defendant resided in Florida for over one year." (Footnote added.)

The court continued: "Based upon the evidence introduced and the representations of the plaintiff's counsel, the court finds that all parties no longer lived in [Connecticut] at the time of the filing of the motion to dismiss on November 7, 2018."[8] The court then concluded that "Connecticut does not have exclusive, continuing jurisdiction" under § 46b-115*l* (a) (1).[9] In addition, the court expressly declined to exercise jurisdiction over the present dispute pursuant to General Statutes § 46b-115q, finding that "Connecticut is an inconvenient forum" and that "Tennessee is a more appropriate

[8] We agree with the defendant that the court's initial finding was clearly erroneous, as there is no evidence in the record to indicate that the defendant was not living in Connecticut when the plaintiff filed her motion to dismiss on November 7, 2018. In its July 9, 2020 memorandum of decision on the defendant's motion to reargue, the court corrected that finding, stating that "[b]ased upon further review of the record . . . the defendant returned to Connecticut at the end of September, 2018."

[9] General Statutes § 46b-115*l* provides in relevant part: "(a) Except as otherwise provided in section 46b-115n, a court of this state which has made a child custody determination pursuant to sections 46b-115k to 46b-115m, inclusive, has exclusive, continuing jurisdiction over the determination until: (1) A court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state . . . ."

forum" to resolve the child custody dispute between the parties.[10] Accordingly, the court dismissed four of the defendant's pending motions.[11] In addition, the court ordered the custody proceeding that was instituted by the defendant's application for an emergency ex parte order of custody to be "stayed upon the condition that a child custody proceeding be promptly commenced in Tennessee."[12]

On September 3, 2019, the defendant filed an appeal of the court's August 29, 2019 judgment with this court. He then filed a motion to reargue with the trial court. At that time, the defendant's April 4, 2018 motion for modification of his alimony, child support, and visitation orders remained pending. On December 12, 2019, the court, *Stewart*, *J.*, stayed consideration of that motion to modify until the defendant's motion to reargue was resolved. On December 31, 2019, the defendant filed an amended appeal from that stay order.

On July 9, 2020, the court issued its memorandum of decision on the defendant's motion to reargue. The court first concluded it lacked both exclusive, continuing jurisdiction pursuant to § 46b-115*l* and initial child custody jurisdiction pursuant to General Statutes § 46b-115k. In light of that determination, the court abandoned its earlier ruling, in which it had declined to

[10] General Statutes § 46b-115q (a) provides in relevant part that "[a] court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. . . ."

[11] The motions that were dismissed were the defendant's May 3, 2018 motion for a *Strobel* order, his May 3, 2018 motion to remove the guardian ad litem, his May 3, 2018 motion to compel, and his May 14, 2018 motion for contempt.

[12] General Statutes § 46b-115q (c) provides: "If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper."

exercise its jurisdiction on the basis of an inconvenient forum pursuant to § 46b-115q.[13] As the court stated: "[T]he statutory requirements necessary for the court to assume . . . jurisdiction over the custody issues [have] not been established pursuant to . . . [§§] 46b-115k and . . . 46b-115*l*. Therefore, based upon the court's further review of the record, the memorandum of decision dated August 29, 2019, shall be amended to vacate the stay on the basis of inconvenient forum." The court also amended its prior ruling to order the dismissal of "the custody proceedings." In addition, the court entered an order dismissing two additional pending motions filed by the defendant—his April 4, 2018 motion for modification and his April 4, 2018 motion for contempt. On July 29, 2020, the defendant further amended his appeal to challenge the trial court's July 9, 2020 ruling on his motion to reargue, and this appeal followed.[14]

I

On appeal, the defendant claims that the court lacked a proper basis on which to grant the motion to dismiss filed by the plaintiff. More specifically, he claims that the plaintiff "did not introduce any admissible evidence as to her residence, the length of time at the residence, the location of the children, nor [her] financial circumstances." On our plenary review of the record before us; see *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 523, 187 A.3d 1154 (2018); *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 174, 73 A.3d 742 (2013); we disagree.

[13] A prerequisite for such action under General Statutes § 46b-115q is that "[a] court of this state . . . has jurisdiction under this chapter to make a child custody determination . . . ."

[14] This court subsequently granted permission for the parties to file supplemental briefs on the issues related to the amended appeal. The defendant filed his supplemental brief on September 9, 2020. The plaintiff did not file a supplemental brief.

The following additional facts are relevant to the defendant's claim. On January 10, 2019, the plaintiff filed a memorandum of law in support of her motion to dismiss, which was accompanied by multiple exhibits, including a copy of the individual educational program for her minor son prepared by Williamson County Schools in Franklin, Tennessee for the period beginning May 7, 2018, and an electrical bill dated June 5, 2018, that lists the plaintiff as the account holder for a "service address" located in Franklin, Tennessee. In addition, the plaintiff submitted an affidavit that recited certain details regarding her relocation to Tennessee. At the May 1, 2019 hearing on the motion to dismiss, the following colloquy occurred regarding that affidavit:

"The Court: Well, under the Practice Book the motion to dismiss requires the motion, a memorandum of law and an affidavit may—may be submitted to, I think, fill in the record—

"[The Plaintiff's Counsel]: I—I did submit an—

"The Court: —with the facts.

"[The Plaintiff's Counsel]: —affidavit.

"The Court: You did."[15]

At that time, the defendant did not dispute the existence of that affidavit. Moreover, in its August 29, 2019 memorandum of decision, the court specifically found that the plaintiff had filed an affidavit in support of her motion to dismiss.

In his subsequent motion to reargue, the defendant nevertheless claimed that the plaintiff never "supplied an affidavit" to the court. In addressing that claim, the court stated in its July 9, 2020 memorandum of decision on the motion to reargue that, during a December 4,

[15] At that hearing, the plaintiff was represented by Attorney Stacey Cox of the Victim Rights Center of Connecticut, Inc.

2019 hearing on that motion, the plaintiff's counsel "represented that she filed the plaintiff's sworn affidavit dated May 1, 2019, on the day of the hearing." The court then noted that it was "unable to locate the sworn affidavit. Counsel filed a second sworn affidavit from the plaintiff on the day of the hearing on December 4, 2019, to replace the missing affidavit. Given the volume of pleadings in the case and the potential of an administrative error, the court accepted counsel's representation regarding filing, accepted the substitute sworn affidavit, and considers counsel's statements [at the May 1, 2019 hearing] to be argument."[16]

In that affidavit, the plaintiff averred, inter alia, that "[o]n or around October, 2017, the defendant moved to Florida"; that "[i]n April, 2018, as a result of financial hardship and to be closer to family, I relocated myself and both minor children to Franklin, Tennessee"; that "[a]t the time I relocated, the defendant still resided in Florida"; that "[t]he defendant currently owes more than $107,000 in back child support, according to Connecticut Child Support Enforcement"; that the minor children "are enrolled in the Williamson County School System in Franklin, Tennessee," where they were "thriving academically and emotionally"; that "[d]ue to financial hardship, I enrolled our family in public benefits"; that "[o]n or about March 20, 2019, Tennessee began a child support action against the defendant"; and that, "[a]s of May 1, 2019, I have continuously resided in Tennessee, with our children, for more than one year."

The substance of that affidavit, along with other documentation provided in connection with the motion to dismiss, undermines the defendant's claim that the plaintiff failed to produce "any admissible evidence as

[16] On appeal, the defendant has not challenged the propriety of the court's decision to accept that substitute affidavit.

to her residence, the length of time at the residence, the location of the children, nor [her] financial circumstances." We therefore reject that claim.

II

The defendant next contends that the court abused its discretion in staying enforcement of the emergency ex parte custody order. That claim is not properly before us.[17]

As this court has explained, "[p]ursuant to Practice Book § 61-14, [t]he sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under [Practice Book §] 66-6. . . . Issues regarding a stay of execution cannot be raised on direct appeal. . . . Practice Book § 66-6 requires that [m]otions for review . . . be filed within ten days from the issuance of notice of the order sought to be reviewed. . . . If a party does not file a motion for review, that party is precluded from challenging the court's stay order by means of a direct appeal. . . . We therefore decline to review this claim because it has been improperly presented for resolution on appeal." (Citations omitted; internal quotation marks omitted.) *Clark* v. *Clark*, 150 Conn. App. 551, 575–76, 91 A.3d 944 (2014). Because the defendant failed to file a motion for review of the stay order in question, we decline to review his claim.

III

The defendant also claims that the court improperly concluded that it did not have exclusive, continuing jurisdiction pursuant to § 46b-115*l* (a) (1). We disagree.

[17] In light of that conclusion, we do not consider the question of whether the trial court, in the first instance, possessed temporary emergency jurisdiction pursuant to General Statutes § 46b-115n (a) to issue the November 27, 2018 ex parte order when the minor children indisputably were not present in this state at that time.

"At the outset, we note our well settled standard of review for jurisdictional matters. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Igersheim* v. *Bezrutczyk*, 197 Conn. App. 412, 416, 231 A.3d 1276 (2020).

"The purposes of the [act] are to avoid jurisdictional competition and conflict with courts of other states in matters of child custody; [to] promote cooperation with the courts of other states; [to] discourage continuing controversies over child custody; [to] deter abductions; [to] avoid [relitigation] of custody decisions; and to facilitate the enforcement of custody decrees of other states. . . . The [act] addresses [interjurisdictional] issues related to child custody and visitation. . . . The [act] is the enabling legislation for the court's jurisdiction." (Internal quotation marks omitted.) *Parisi* v. *Niblett*, 199 Conn. App. 761, 770, 238 A.3d 740 (2020).

The salient provision of the act is codified in Connecticut in § 46b-115*l* (a) (1), which provides in relevant part: "[A] court of this state which has made a child custody determination pursuant to sections 46b-115k to 46b-115m, inclusive, has exclusive, continuing jurisdiction over the determination until . . . [a] court of this state or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this state . . . ." In the present case, the court found that the defendant left Connecticut and relocated to Florida in October, 2017, while the plaintiff and the minor children relocated to Tennessee in April, 2018. The court further found, and the defendant does not dispute, that he did not return to Connecticut until the end of September,

2018. Thus, from April to September, 2018, neither the plaintiff, the defendant, nor the minor children "presently reside[d] in this state,"[18] a prerequisite to exclusive, continuing jurisdiction under § 46b-115*l* (a) (1). As the commentary to the act notes, "when the child, the parents, and all persons acting as parents physically leave the [s]tate to live elsewhere, the exclusive, continuing jurisdiction ceases." Unif. Child Custody Jurisdiction and Enforcement Act (1997) § 202, comment (2), 9 U.L.A. (Pt. IA) 674 (2019); see also *N.S.* v. *D.M.*, 21 Cal. App. 5th 1040, 1048, 231 Cal. Rptr. 3d 67 (2018) ("[o]nce a state makes an initial child custody determination . . . it retains exclusive continuing jurisdiction over custody matters until . . . all parties move outside the state" (citation omitted)); *Wahlke* v. *Pierce*, 392 S.W.3d 426, 431 (Ky. App. 2013) ("the relocation of both parents and the child out of this [c]ommonwealth before commencement of the modification proceeding divested the family court of exclusive, continuing jurisdiction"); *Hogan* v. *Hogan*, 308 Neb. 397, 403, 954 N.W.2d 868 (2021) ("Nebraska no longer possessed exclusive, continuing jurisdiction. This is because when the children and the parents have moved away from the issuing state, the issuing state no longer meets the jurisdictional prerequisites . . . ."); *Kar* v. *Kar*, 132 Nev. 636, 639, 378 P.3d 1204 (2016) ("[o]nce it determined that the child and the child's parents no longer resided in Nevada, the district court lost *exclusive*, *continuing* jurisdiction" (emphasis in original)); *T.D.* v. *M.H.*, 219 A.3d 1190, 1197 (Pa. Super. 2019) ("a court lacks exclusive, continuing jurisdiction if all parties move out of the [c]ommonwealth" (internal quotation marks omitted)).

[18] That undisputed fact likely explains why the trial court denied the defendant's May 8, 2018 application for an emergency ex parte order of custody.

The defendant nonetheless submits that the courts of this state reacquired "exclusive, continuing jurisdiction" on his return to Connecticut in September, 2018. He has provided no legal authority to support that novel contention. By its plain language, § 46b-115*l* pertains to the *continuing* jurisdiction of a Connecticut court, not the interrupted or intermittent jurisdiction. The defendant's claim also is contrary to the stated intent of the drafters of the act, who explained: "The phrase 'do not presently reside' is not used in the sense of a technical domicile. The fact that the original determination [s]tate still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the [s]tate.

* * *

Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the [*s*]*tate, the* [*noncustodial*] *parent returns.*" (Emphasis added.) Unif. Child Custody Jurisdiction and Enforcement Act (1997) § 202, comment (2), supra, 9 U.L.A. (Pt. IA) 674–75; accord *In re M.R.F.-C.*, 158 N.E.3d 688, 695, 697 (Ohio App. 2020) (affirming trial court's conclusion that it lacked exclusive, continuing jurisdiction when "Ohio was the children's 'home state' when the initial custody proceedings occurred . . . [but] was no longer the children's home state due to the family's relocation to Michigan" and concluding that "[m]other did not satisfy Ohio's residency requirement when she attempted to reestablish residence in Ohio shortly before filing her motion"); cf. *In re Marriage of Ruth*, 32 Kan. App. 2d 416, 421–22, 83 P.3d 1248 (2004) (concluding that Kansas trial court retained exclusive, continuing jurisdiction despite fact that mother and children moved to another state because father "has *continuously* resided in Kansas since the [parties'] divorce" (emphasis added)).

In light of the foregoing, we conclude that the trial court properly determined that it did not have exclusive, continuing jurisdiction over the defendant's November 27, 2018 motion for custody and his other motions related to custody and visitation with the minor children.[19] The court, therefore, properly granted the plaintiff's motion to dismiss those motions.

IV

We next address the defendant's claim that the court, in ruling on the plaintiff's motion to dismiss and his motion to reargue, improperly dismissed certain motions unrelated to the issue of child custody or visitation. We agree.

The court's dismissal order was predicated on its conclusion that it lacked subject matter jurisdiction under the act. The act is "the enabling legislation for the court's jurisdiction." (Internal quotation marks omitted.) *Parisi* v. *Niblett*, supra, 199 Conn. App. 770. The act, however, is limited in scope—it concerns issues of custody or visitation. Sections 46b-115k and 46b-115*l*, on which the court's decision here was predicated, expressly grant the trial court jurisdiction over

[19] In its July 9, 2020 memorandum of decision on the defendant's motion to reargue, the court also concluded that it lacked jurisdiction to make an initial child custody determination pursuant to § 46b-115k. The defendant has raised no claim regarding the propriety of that determination in this appeal.

Moreover, we note that the court, in light of its conclusion that it lacked both exclusive, continuing jurisdiction pursuant to § 46b-115*l* and initial child custody jurisdiction pursuant to § 46b-115k, expressly abandoned its earlier ruling under the forum non conveniens doctrine, as codified in § 46b-115q, and vacated the stay issued in accordance therewith. As the court stated: "[T]he statutory requirements necessary for the court to assume continuing jurisdiction over the custody issues [have] not been established pursuant to . . . [§§] 46b-115k and . . . 46b-115*l*. Therefore, based upon the court's further review of the record, the memorandum of decision dated August 29, 2019, shall be amended to vacate the stay on the basis of inconvenient forum." The defendant in this appeal has not challenged that ruling.

"child custody determination[s]."[20] Like the act, Connecticut law defines " '[c]hild custody determination' " as "a judgment, decree, or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order. *The term does not include an order relating to child support or other monetary obligation of an individual . . . .*"[21] (Emphasis added.) General Statutes § 46b-115a (3); see also Unif. Child Custody Jurisdiction and Enforcement Act (1997) § 102 (3), supra, 9 U.L.A. (Pt. IA) 658.

The critical question, then, is whether the motions dismissed by the court fall within the purview of " '[c]hild custody determination[s],' " as defined by § 46b-115a (3). The two motions for contempt filed by

[20] By its plain language, General Statutes § 46b-115k confers jurisdiction on "a court of this state . . . to make an initial child custody determination . . . ." General Statutes § 46b-115*l* similarly delineates the parameters of the "exclusive, continuing jurisdiction" of a Connecticut court when "a court of this state . . . [previously] has made a child custody determination . . . ."

[21] As one commentator remarked, "[b]y excluding proceedings involving monetary obligations, the [act] continues the idea of divided jurisdiction in matrimonial cases." R. Spector, "International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act," 33 N.Y.U. J. International L. & Pol. 251, 262 n.40 (2000); see also *MJ* v. *CR*, Docket No. CAAP-17-0000696, 2021 WL 2679556, *6 (Haw. App. 2021) (noting "bifurcated jurisdiction" over child custody and child support matters); *Stevens* v. *Stevens*, 682 N.E.2d 1309, 1312 (Ind. App. 1997) ("[A] state may have jurisdiction to enter a dissolution decree, but such does not necessarily confer jurisdiction to make a child custody determination. Rather, jurisdiction over custody matters having an interstate dimension must be independently determined by application of that state's version of the [act]"); *DeWitt* v. *Lechuga*, 393 S.W.3d 113, 118 (Mo. App. 2013) (analysis under act "may well result in bifurcated adjudications, where one state adjudicates paternity and child support and another state adjudicates custody and parenting time"); *In re Dean*, 393 S.W.3d 741, 747 (Tex. 2012) ("Whether the Texas divorce action was filed first is irrelevant in determining jurisdiction over custody matters, as the two proceedings involve different inquiries. . . . [O]ne state may have jurisdiction over custody even if the divorce is decided by another state's court." (Citations omitted.)).

the defendant on April 4 and May 14, 2018, both concerned custody and visitation with the minor children and, thus, properly were dismissed by the trial court. The court likewise properly dismissed that portion of the defendant's April 4, 2018 motion for modification that sought to modify the existing visitation order.

At the same time, the defendant's April 4, 2018 motion to modify the unallocated alimony and child support order plainly is beyond the purview of the act, as that order relates to the defendant's monetary obligations. See General Statutes § 46b-115a (3). As this court has observed, a "motion for modification concerning child support is not governed by the [act]. Financial orders, such as child support, are not governed by the [act]." *Parisi* v. *Niblett*, supra, 199 Conn. App. 771 n.9. The defendant's May 3, 2018 motion for a *Strobel* order, his May 3, 2018 motion to remove the guardian ad litem, and his May 3, 2018 motion to compel compliance with his discovery request also have no relation whatsoever to the issue of child custody or visitation. For that reason, the court improperly dismissed those motions for lack of jurisdiction under the act.

V

As a final matter, the defendant claims that the court abused its discretion in deferring consideration of his April 4, 2018 motion to modify his alimony, child support, and visitation orders. We disagree.

As our Supreme Court has explained, "[i]t is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court. . . . [A]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made." (Citations omitted.) *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991). In the present case, the court's December 12, 2019 decision to defer

consideration of the defendant's motion for modification expressly was predicated on the pendency of the defendant's motion to reargue, in which he asked the court to reconsider and reverse its determination that it lacked subject matter jurisdiction under the act. Given those circumstances, we cannot conclude that the court abused its discretion. To the contrary, the court properly deferred consideration of the merits of the defendant's motion to modify until after the jurisdictional question fully was resolved.

VI

In sum, we conclude that the court properly dismissed the defendant's November 27, 2018 motion for custody, his April 4, 2018 motion to modify the visitation order, and his April 4 and May 14, 2018 motions for contempt for lack of subject matter jurisdiction under the act. We further conclude that, because they do not relate to " '[c]hild custody determination[s],' " as that term is defined by the act, the court improperly dismissed the defendant's April 4, 2018 motion to modify his alimony and support obligations, his May 3, 2018 motion for a *Strobel* order, his May 3, 2018 motion to remove the guardian ad litem, and his May 3, 2018 motion to compel compliance with his discovery request. Because the substance of those motions is beyond the purview of the act, the court improperly concluded that it lacked jurisdiction over those pleadings.

The judgment is reversed with respect to the defendant's April 4, 2018 motion to modify the unallocated alimony and child support order, his May 3, 2018 motion for a *Strobel* order, his May 3, 2018 motion to remove the guardian ad litem, and his May 3, 2018 motion to compel compliance, and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RICHARD MALINOWSKI *v.* SIKORSKY AIRCRAFT CORPORATION ET AL.
(AC 43617)

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

Syllabus

The defendants, the employer, S Co., and its insurance carrier, A Co., appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Worker's Compensation Commissioner finding that the plaintiff's repetitive workplace activities at S Co. substantially and permanently aggravated a preexisting condition in his knee and denying the defendants' motion for articulation. The plaintiff, who suffered from degenerative arthritis stemming from a work injury he suffered in 1972, and a subsequent surgery in 1973, prior to his employment with S Co., and who ultimately required a total replacement of his left knee, submitted into evidence medical records and correspondence from his treating physician, P. The defendants claimed that the board improperly affirmed the commissioner's award because, inter alia, P's expert opinions were not expressed with reasonable medical probability. *Held*:

1. The board properly affirmed the commissioner's award.

a. The board properly affirmed the commissioner's finding that P's opinion that there was a causal relationship between the plaintiff's employment and his need for surgery was expressed with a reasonable degree of medical probability; P opined in unequivocal language that the plaintiff's 1972 injury actually had been aggravated by the plaintiff's work at S Co., pulling and pushing pallets of parts weighing 800 to 1400 pounds for shifts of 12 hours, and, although P's notes indicated that the plaintiff's overwhelming medical issue was arthritis and that his need for surgery dated back to his 1973 knee operation, these references did not render P's entire opinion speculative and were not inconsistent with an opinion that the plaintiff's workplace activities at S Co. constituted a substantial contributing factor to the plaintiff's need for surgery because they aggravated the plaintiff's preexisting condition.

b. The board properly affirmed the commissioner's finding that P's records constituted competent medical evidence from which the commissioner could find a causal relationship between the plaintiff's work activities at S Co. and his need for surgery: P's records reported the plaintiff's condition, symptoms and course of treatment and contained P's expert opinion that the plaintiff's knee injury was causally related to his work, and the defendants did not object to the admission of P's records into evidence, nor did they depose P or call him to testify at the hearing; moreover, P's opinion was not incompetent for a lack of supporting facts, as, although the plaintiff testified that he retrieved the heaviest,

1400 pound fixtures only 20 to 30 times throughout the course of his career, P's opinion was that pushing heavy carts of *up to* 1400 pounds during back-to-back 12 hour shifts contributed to the plaintiff's injury; furthermore, P's medical evidence was supported by other evidence, including the plaintiff's extensive testimony as to his workplace activities pushing carts of heavy parts on a regular basis, which the commissioner found credible.

c. The commissioner did not improperly refer to the plaintiff's work activities beyond those expressly identified in P's records; the commissioner had before him expert medical evidence that the plaintiff's work at S Co. caused his need for surgery, thus, he was not limited to consider only the activities expressly identified by P but was entitled also to consider the plaintiff's testimony, which in no way undermined the adequacy or competency of P's expert opinion.

2. The board properly affirmed the commissioner's decision to deny the defendant's request for articulation; the commissioner did not abuse his discretion in denying the request, as the finding for which the defendants sought an articulation, that the plaintiff's workplace activities had substantially and permanently aggravated his underlying and preexisting knee condition, when considered together with P's records, reflected P's opinion that the work activities aggravated the plaintiff's underlying condition.

Argued March 11—officially released September 7, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Eighth District finding that the plaintiff had sustained a compensable injury, awarding certain disability benefits, and denying the motion to correct and for articulation filed by the named defendant et al., brought to the Compensation Review Board, which affirmed the commissioner's decision, and the named defendant et al. appealed to this court. *Affirmed.*

Lucas D. Strunk, with whom was *Katherine E. Dudack*, for the appellants (named defendant et al.).

Donna Civitello, with whom was *Robert F. Carter*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant Sikorsky Aircraft Corporation[1] appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Eighth District (commissioner). On appeal, the defendant claims that (1) the board erred in affirming the commissioner's finding that the workplace activities of the plaintiff, Richard Malinowski, substantially and permanently aggravated preexisting degenerative arthritis in his left knee, resulting in the need for a total knee replacement,[2] and (2) the commissioner erred in failing to grant its motion for articulation. We affirm the decision of the board.

The following history is necessary for the resolution of this appeal. On February 24, 2012, the plaintiff, who is employed by the defendant, filed a form 30C seeking compensation for an injury to his knees. He noted the

[1] AIG Claims, Inc., the workers' compensation insurer for Sikorsky Aircraft Corporation, is also a defendant in this case. For convenience, we refer in this opinion to Sikorsky Aircraft Corporation as the defendant.

S. Marino's Honda City, the plaintiff's former employer, and its insurer, ACE USA-Chubb, were also parties in the proceedings before the workers' compensation commissioner. They are not participating in this appeal.

[2] The defendant also claims that the board erred in relying on *Garofola* v. *Yale & Towne Mfg. Co.*, 131 Conn. 572, 574, 41 A.2d 451 (1945), to conclude that expert medical evidence was not necessary to determine the role of the plaintiff's workplace activities in substantially and permanently aggravating his preexisting degenerative arthritis in his left knee, resulting in the need for a total left knee replacement. Because we conclude that the commissioner's finding of causation is supported by expert medical evidence in the record, we need not address the propriety of the board's reliance on *Garofola*.

The defendant raises an additional claim on appeal that the manner in which the board reached its conclusion is inconsistent with the board's decisions in prior cases. Specifically, he claims that the board misapplied case law with respect to the "concept of considering medical evidence along with other evidence to determine whether an injury is related to the employment." Because this issue is addressed in part I of this opinion, we need not separately address this claim. See footnote 16 of this opinion.

date of injury as January 19, 2012, and stated that "[b]oth knees swelled up during the course of work that day . . . ." The hearing before the commissioner was held on April 30, 2015, and May 17, August 10 and November 30, 2016. The commissioner heard the testimony of the plaintiff and received as exhibits, among other documents, medical records and correspondence from Ronald S. Paret, a physician who treated the plaintiff for his knee injuries, the defendant's plant medical facility reports, and deposition transcripts of the plaintiff, Christopher Lena, a physician who evaluated the plaintiff at the request of the defendant, and Sebastian Marino, the plaintiff's former employer.

On June 5, 2017, the commissioner issued his findings and award. The commissioner summarized the plaintiff's testimony as follows. The plaintiff injured his left knee in 1972 while working as a motorcycle mechanic at S. Marino's Honda City (Honda), and he underwent surgery on that knee in November, 1973. A discharge summary referenced a left meniscotomy surgery, and the plaintiff stated that he had the lateral meniscus of his left knee removed.[3] The plaintiff began working for the defendant in February, 1984. He was employed with the job title "Grinder B" for twenty-seven years before he was promoted to "Grinder Specialist."

Between the time he left employment with Honda[4] and 2012, the plaintiff did not have any medical treatment to his left knee or any other left knee injury,

[3] The plaintiff thought that he saw Richard Campbell-Jacobs, a physician, when he first injured his knee, but he did not receive any treatment until his surgery. The plaintiff did not pay for medical treatment for his left knee in 1972, nor did he lose time from work before the 1973 surgery. He does not remember whether he was paid for his time out of work after his surgery in 1973. The plaintiff asked for a scar award hearing, and it was held on August 15, 1978. The commissioner made an award of six weeks, but the plaintiff does not remember if he was paid. He does not recall receiving a disability rating from Campbell-Jacobs or being paid for any such rating.

[4] The deposition transcript of Marino, who employed the plaintiff as a mechanic in his motorcycle shop, was entered into evidence at the hearing. Marino testified that he did not recall the plaintiff having had a left knee

except for a laceration over his left kneecap that he sustained while working for a steel company. Between 1973 and 2012, the plaintiff had occasional soreness in his left knee after strenuous exercise, such as running, swimming, and playing basketball. He did not experience swelling.

For twenty-eight years, while employed by the defendant, the plaintiff worked on one of two Springfield vertical grinders, which are the defendant's largest grinders. The grinders make the main rotor parts and transmission housings for helicopters. The tables on the grinders are approximately five and one-half feet in diameter and they have dual cutting heads on them. The grinder that the plaintiff primarily operated was elevated by six stairs. Depending on the job, he climbed the stairs as often as eight times per hour. He also carried reference rings and gauges, which weighed approximately twenty-five pounds each. When the parts he was grinding weighed less than fifty pounds, he carried them by hand up and down the stairs.

Over the course of the twenty-eight years he worked the grinder, the plaintiff was required to retrieve fixtures. "The fixtures for grinding the transmission housings on the Blackhawk were the heaviest. The original fixture weighed 1400 pounds, but about [10] years ago a new and lighter one (approx[imately] 500 pounds) was made. It was the grinder operator's job to set up every job, which included placing the fixture on the grinder. In order to set up the grinder, he would have to get the fixture out of the fixture crib, which is about 100 yards away from the grinder. If he couldn't get a tow motor operator to get the fixture, he would need to do so with a pallet jack or floor jack. In [28] years

injury and that he did not receive or pay any bills on behalf of the plaintiff. He testified that if anyone had been injured on the job, he would have remembered it.

he probably needed to get the 1400 pound part about 20 [to] 30 times. . . . Most of the heavy fixtures were stored directly across the aisle from the grinder. However, the operator would need to get a pallet jack and position them so that a crane would be able to lift them onto the grinder. Depending on the job, this could happen two or three times per day."

It could take up to four hours to set up the machine, and the plaintiff spent much of that time bent over. The plaintiff also, at other times, would have to reach out to the grinding table while standing on one leg. On a regular basis, he would push carts containing heavy parts. The plaintiff lifted parts weighing sixty pounds or less by hand and heavier parts by crane.

The plaintiff did not notice any knee problems until January, 2012, when he was lifting parts and working on a gear grinder. He had worked two twelve hour shifts and "both of his knees had blown up by the third day." The plaintiff saw Paret, who drained his left knee. In March, 2012, Paret recommended bilateral knee replacements, but the plaintiff continued working and hoped that his knees would get better. The plaintiff underwent a right total knee replacement surgery on October 30, 2014,[5] and a left total knee replacement surgery on February 19, 2015.

Although Paret did not testify at the hearing, records prepared by him were entered into evidence. The commissioner quoted from a February 8, 2012 report prepared by Paret: "[The plaintiff] is a patient of Dr. Ross-Russell's with a knee swelling. He has had three weeks of left-sided knee pain. Wednesday to Friday he was

[5] The plaintiff injured his right knee while working for the defendant in 1985. In its principal appellate brief, the defendant notes that it "acknowledged compensability of replacement on the right knee because of that incident which was clearly a significant factor in subsequent degeneration." The right knee injury is not at issue in the present appeal.

working [twelve] hours a day and had gradually increasing swelling in the knee when he was pushing large heavy carts and racks of gears on the floor. He had previously a meniscectomy many, many years ago as a medial meniscectomy back in 1975 with a Dr. Campbell-Jacobs in Middletown but in the meantime he has had no issues ongoing at this point.

"IMPRESSION: This is a work injury. He previously does have substantial damage to the knee from a previous injury although he has bilateral knee arthritis. At this point the effusion is rather significant. I believe it was caused by his work-related efforts pushing very heavy racks of gears working [twelve] hours a day for several days in a row. He has moderately severe degenerative joint disease which has been aggravated now by his work-related injury." (Internal quotation marks omitted.)

The commissioner also noted Paret's further opinion on causation as expressed in a December 16, 2012 letter. The commissioner stated: "[Paret] states that an open left-sided medial meniscectomy from [1973] and arthroscopic meniscectomy on the right side are both substantial contributing factors to the [plaintiff's] progressive arthritic changes regarding both knees. [Paret] goes on to state that the original work injury from [1972] at Honda has been aggravated by his working at [the defendant] and that the [plaintiff's] activities involving the pushing and pulling of heavy pallets of engine and turbine parts are a substantial contributing factor in the aggravation of the [plaintiff's] preexisting left knee condition from a [1972] injury at Honda."

The deposition testimony of Lena, who evaluated the plaintiff at the request of the defendant, was entered into evidence during the hearing. The commissioner summarized Lena's testimony: "A procedure such as the [plaintiff's] left knee open meniscectomy leads to

significant arthritis and total knee replacement given that the meniscus absorbs 70 [to] 80 [percent] of the weight when walking, thereby increasing the load on cartilage, which wears away. . . . His review of the [plaintiff's] X-rays and MRI confirmed the existence of advanced osteoarthritis, chronic ACL deficiency and joint effusion consistent with old injury and surgery, and showing that the existence of bone on bone medial compartments was consistent with the prior injury and surgery. . . . In his opinion, the [1972] injury was a substantial contributing factor to the [plaintiff's] left knee condition and the [plaintiff] would need a total knee replacement sooner because of it. Also, the [plaintiff's] work at [the defendant] was a contributing factor, but not a substantial contributing factor."

On the basis of the testimony and documentary evidence, the commissioner made the following findings: "The [plaintiff] had a left knee meniscectomy on November 26, 1973. . . . The left knee meniscectomy in 1973 was a substantial contributing factor in the [plaintiff's] development of arthritis. . . . The [plaintiff's] repetitive work activities of climbing up and down stairs while carrying heavy parts and fixtures, setting up a grinder while reaching and leaning on one foot, extensive pushing, pulling, reaching and lifting of heavy parts, acted in substantially and permanently aggravating his underlying and preexisting left knee condition, resulting in the need for a total left knee replacement on February 19, 2015. . . . The [plaintiff's] testimony regarding his physical condition and work activities was credible and persuasive. . . . The opinions of . . . Paret were more persuasive than those of . . . Lena, especially with regard to the impact of the [plaintiff's] work activities on his ultimate need for left total knee replacement."[6]

[6] The commissioner further found: "Given the time that has passed since the [plaintiff's] alleged left knee injury at [Honda] on June 28, 1972, along with the lack of documentary evidence supporting the claim, the testimony

The commissioner ordered the defendant to reimburse the plaintiff for his claimed out-of-pocket expenses and to pay all claimed outstanding medical bills for treatment of the plaintiff's left knee. The commissioner designated Paret as the authorized treating physician for the plaintiff's left knee claim of January 19, 2012.[7] Following the issuance of the commissioner's findings and award, the defendant filed a motion to correct the commissioner's findings and request for articulation, which was denied.

The defendant thereafter appealed to the board, claiming error in the finding and award and in the commissioner's denial of its motion to correct. On appeal to the board, the defendant argued that the commissioner erroneously determined that the plaintiff's need for total left knee replacement surgery was due to repetitive work activities that aggravated his underlying preexisting degenerative changes. The defendant argued that the expert opinion on which the commissioner relied was not based on the evidence, and the commissioner's conclusions were predicated on the fact that the plaintiff performed certain repetitive activities about which the plaintiff's medical expert did not comment. The defendant also argued that the record was devoid of expert testimony that would serve to establish, within reasonable medical probability, the causal link between the plaintiff's work activities and his need for left knee replacement surgery. Finally, the defendant argued that the commissioner improperly denied its motion to correct and request for articulation.

of the [plaintiff] and . . . Marino were not at all persuasive. . . . The [plaintiff] failed to prove that he made a timely claim for the alleged June 28, 1972 injury, and also failed to prove that the commission would have jurisdiction over the claim under any of the exceptions set forth in [General Statutes §] 31-294c (c)."

[7] The commissioner stated that, "[a]lthough the [plaintiff] asks in his proposed findings that the payment of indemnity benefits be ordered, this issue was not noticed for the formal hearing. Future hearings may be held to address this issue if the parties are unable to reach a resolution."

In an August 26, 2019 decision, the board affirmed the decision of the commissioner. It first addressed the defendant's challenge to Paret's opinion. The board referred to instances in which Paret had addressed the causation of the plaintiff's left knee replacement surgery. First, it referred to Paret's February 8, 2012 report of his initial visit with the plaintiff, in which Paret attributed the swelling in the plaintiff's knee to his having pushed racks of gears for twelve hours for several days in a row. The board noted that "Paret also opined that the [plaintiff's] degenerative disease had been aggravated by the injury, but did not specifically state that the swelling episode caused the need for the total knee replacement." Second, the board referenced Paret's February 15, 2012 report in which he opined that the plaintiff suffered from severe degenerative joint disease in his left knee, and he noted that the " 'overwhelming issue is arthritis' " due to the meniscectomy in 1973. Third, the board referred to a December 16, 2012 letter authored by Paret, in which he noted that the plaintiff " 'has been responsible as a machinist for pulling very heavy loads weighing up to 1400 pounds on pull carts with no mechanical assistance, sometimes for fairly long distances of almost 100 yards.' " The board further noted Paret's opinion that the plaintiff's " 'original work injury from [1972] at Honda [was] actually aggravated by his working at [the defendant].' " Fourth, the board noted Paret's February 6, 2015 office note, which provided that the contemplated left total knee replacement " 'obviously dates back to his [1973] open meniscectomy.' "

The board recognized that, "[w]here . . . it is difficult to ascertain whether or not the disease arose out of the employment, it is necessary to rely on expert medical opinion. Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other

evidence, the commissioner cannot conclude that the disease arose out of the employment." (Internal quotation marks omitted.) *Murchison* v. *Skinner Precision Industries, Inc.*, 162 Conn. 142, 152, 291 A.2d 743 (1972). Applying this standard, the board determined that it was necessary for the commissioner to rely on expert medical testimony to determine that the plaintiff's left knee meniscectomy in 1973 was a substantial contributing factor in his development of arthritis. Citing *Garofola* v. *Yale & Towne Mfg. Co.*, 131 Conn. 572, 574, 41 A.2d 451 (1945), the board stated that in the absence of expert testimony linking the meniscectomy with the development of arthritis, " '[i]t could not be said to have been a matter of common knowledge that the symptoms described by the plaintiff as having occurred while doing his customary work were related to the injury . . . . ' "

The board was not persuaded, however, that the same analysis applied to the commissioner's conclusions as to the role of the plaintiff's workplace activities in substantially and permanently aggravating his condition, resulting in the need for a knee replacement. The board determined that, once it had been established through expert testimony that the plaintiff's medical history rendered him susceptible to arthritis, it was within the commissioner's discretion to infer that the plaintiff's work activities " 'acted in substantially and permanently aggravating his underlying and preexisting left knee condition, resulting in the need for a total left knee replacement . . . .' "

The board noted that the commissioner had before him the extensive testimony of the plaintiff. The board further considered the lack of any evidence in the record that any other activity might have contributed to the plaintiff's knee deterioration or that the plaintiff had experienced any significant medical issues with his left knee prior to January, 2012. The board determined

that the commissioner reasonably could have inferred " 'that it was much more likely that the [injury] occurred from the work in which the plaintiff was engaged, arising, as it did, during performance of the work, than that it occurred from some unknown cause.' " See *Garofola* v. *Yale & Towne Mfg. Co.*, supra, 131 Conn. 574.

The board next turned to the medical record, stating that it was "not devoid of support for the commissioner's conclusions relative to the role played by the [plaintiff's] repetitive workplace activities." Specifically, the board stated that both Lena and Paret agreed that the plaintiff's prior injury in 1972 and meniscectomy in 1973 "contributed to the deterioration of the [plaintiff's] left knee over time and his eventual need for a total knee replacement." The board acknowledged that Paret's opinion with respect to the role of the plaintiff's work activities "does appear to be primarily based on his understanding that the [plaintiff] was responsible for pushing and pulling heavy fixtures." It then explained that Lena's deposition testimony was ambiguous as to the role the plaintiff's work activities played in contributing to the deterioration. The board restated Lena's testimony that the plaintiff's employment was a " 'contributing factor, but I don't think it's a substantial contributing factor.' " The board restated Lena's testimony: " 'Is there any contributing factor from his occupation? Absolutely. But it is certainly not the main or substantial contributing factor to it.' " When asked whether the plaintiff's predisposition accelerated the knee deterioration in light of his workplace activities, Lena answered: "It is possible especially if there is a significant exciting event." Finally, when asked whether "being on your feet, walking and pushing and pulling heavy loads for a job for eight hours a day" played a role in the plaintiff's knee deterioration, he responded: "I'm actually impressed that he made it as long as he did."

The board stated that the determination of what constitutes a substantial contributing factor is a question for the commissioner, who was not required to accept Lena's opinion. Moreover, the board stated that "it could be argued that Lena's opinion actually provided a basis, albeit limited, for the commissioner's conclusion that the claimant's repetitive workplace activities did play a role in the development of the claimant's arthritis and eventual need for knee replacement surgery." Ultimately, the board concluded that the commissioner retained the discretion to make the determination regarding the plaintiff's repetitive workplace activities, "despite some limitations in the medical evidence relative to that particular issue."

Lastly, the board rejected the defendant's claim that the commissioner erred in denying its motion to correct and request for articulation. Accordingly, the board affirmed the findings and orders of the commissioner. Thereafter, the defendant filed a motion for reconsideration and reargument, which the board denied. This appeal followed.

"As a preliminary matter, we note that when the decision of a commissioner is appealed to the [board], the [board] is obligated to hear the appeal on the record of the hearing before the commissioner and not to retry the facts. . . . It is the power and the duty of the commissioner, as the trier of fact, to determine the facts. . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Neither the . . . board nor this court has the power to retry facts. . . .

"The [board] may not disturb the conclusions that the commissioner draws from the facts found unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . In other words,

[t]hese conclusions must stand unless they could not reasonably or logically be reached on the subordinate facts. . . . Our scope of review of the actions of the [board] is similarly limited. . . . The decision of the [board] must be correct in law, and must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Citations omitted; internal quotation marks omitted.) *O'Connor* v. *Med-Center Home Health Care, Inc.*, 140 Conn. App. 542, 547–48, 59 A.3d 385, cert. denied, 308 Conn. 942, 66 A.3d 884 (2013).

I

We first address the defendant's claim that the board erred in affirming the commissioner's finding that the plaintiff's need for a left total knee replacement was due to repetitive work activities that substantially and permanently aggravated the underlying preexisting degenerative changes in his knee. The defendant presents three principal arguments in support of its claim that the plaintiff failed to prove a causal relationship between his employment and his need for surgery. First, it argues that Paret's opinions were not expressed with reasonable medical probability. Second, it argues that "there is no competent medical opinion in the record tied to the plaintiff's actual job duties," where Paret's opinion incorrectly assumed that the pulling of 800 to 1400 pound parts was performed on a regular basis. Third, it contends that the commissioner improperly referenced work activities of the plaintiff that were not commented on by Paret. We examine each argument in turn.

Our review of the record reveals that the following evidence was presented before the commissioner. The plaintiff introduced office notes, reports, and correspondence, collectively records, authored by his treating physician, Paret. On February 8, 2012, Paret, following his initial meeting with the plaintiff, noted that the

plaintiff had developed bilateral knee effusion and stated: "This is a work injury. He previously does have substantial damage to the knee from a previous injury although he has bilateral knee arthritis. At this point the effusion is rather significant. I believe it was caused by his work-related efforts pushing very heavy racks of gears working [twelve] hours a day for several days in a row. He has moderately severe degenerative joint disease which has been aggravated now by his work-related injury." In his February 15, 2012 office note, Paret stated that the MRI showed that the plaintiff "really does have bone-on-bone." Paret continued: "There is some edema in the subchondral region particularly of the proximal tibial plateau and at this point although he does have significant meniscal tears, I believe his overwhelming issue is the arthritis." Paret diagnosed the plaintiff with "severe degenerative joint disease." He stated that "[a]pparently his original medial meniscectomy stemmed from a work injury which he is in the process of reactivating at this point and apparently does have an attorney involved in this situation. It is my opinion that if that medial meniscus was actually related to a [workers' compensation] injury then clearly this arthritis [is] secondary to a [w]orker's [c]ompensation episode." In a March 14, 2012 office note, Paret recorded his impression that the plaintiff has "a large effusion likely secondary to his rather severe degenerative arthritis." The note stated that the plaintiff was "considering surgical options of a total knee replacement as I think there is very little else that we can offer other than the very conservative management treatment course which has been ineffective so far."

In his March 19, 2012 office note, Paret recorded his impression that the plaintiff "has a huge effusion and a moderately severe degenerative arthritis as well as [X]-rays indicating medial joint line closure." Paret noted his recommendation of a knee replacement and

stated that the plaintiff was due to return in July, at which time Paret believed there would be "no further ability to prescribe narcotic agents as a long-term solution to knee degenerative joint disease." In a July 13, 2012 office note, Paret recorded the plaintiff's chief complaint as "[b]ilateral knee degenerative joint disease," indicated "extreme tenderness" in the plaintiff's left knee, and stated that "[r]eview of the [X]-rays show moderately severe degenerative arthritis." In an August 21, 2012 office note, Paret recorded the plaintiff's chief complaint as "[k]nee pain on the left side." Paret stated that the plaintiff "had a [work-related] injury and [is] still having significant issues with both lower extremities which are both work injuries." Paret recorded his impression of "[b]ilateral knee degenerative joint disease" and stated that the plaintiff was "considering timing of a total knee replacement which is believed will be his ultimate solution for his current situation, pain and his [workers' compensation] injury." In a November 27, 2012 office note, Paret wrote that "[t]here is a definite medial joint line narrowing, tenderness and osteophytes are palpable underneath of the skin." Paret's recommendation stated: "With bilateral knee degenerative joint disease . . . that he has elected at this point to pursue the avenue of a total knee replacement . . . ."

The commissioner also had before him Lena's medical report dated August 1, 2012. Lena described the plaintiff as having "a long-standing history of problems with his knee" and stated that the plaintiff "had prior left knee surgery done in 1973 during which he had a large open incision and an open medial meniscectomy." Lena recorded the plaintiff's description of an incident "that occurred on [January 19, 2012] where his knee appeared to just swell up on him. He describes a swelling of both the left and right knee after two [twelve] hour shifts at work. He notes that his work as a machinist

was very demanding on his knees especially as his age advanced. He describes having to pull heavy objects, bending over, kneeling often. He describes having to push large heavy carts and racks of gears on the floor." Lena stated: "After the described injury date of [January 19, 2012], he did follow up with Dr. Ronald Paret, who felt that it was a work-related injury, that although he did have significant damage to the knee from previous injury, he felt that this was an aggravation of his underlying condition." Lena reported that an MRI revealed, inter alia, "advanced tricompartmental osteoarthritis [and] large joint effusion . . . ." Lena's assessment was that the plaintiff's open meniscectomy in 1973 on the left side and the arthroscopic meniscectomy in 1985 were "significant contributing factors to his progressive arthritic changes in the knees and his need for knee replacements . . . ." Lena stated: "The right one I do believe is related [to] a work-related injury specifically the 1985 injury during which the meniscus was removed which has led to progressive deterioration and arthritic changes that he is currently experiencing, and the left one related to 1973 incident with an open medial meniscectomy the predication for a progression of arthritic changes, is he has progressed as one would expect to his bone-on-bone contact." Lena concluded: "I believe that the previous meniscectomies were the substantial contributing factor to his development for arthritic changes and has led to the chronic degenerative changes that he currently has and that is the major cause for the need for the knee replacement and not the pushing and pulling from January of 2012."

In a letter dated December 16, 2012, Paret responded to Lena's evaluation and offered his own opinions. Paret stated that the plaintiff "has been responsible as a machinist [for the defendant] for pulling very heavy loads weighing up to 1400 pounds on pull carts with no mechanical assistance, sometimes for fairly long

distances of almost 100 yards." He further described the plaintiff's work activities as "heavy pulling and pushing of pallets of engine and turbine parts weighing 800 to 1400 pounds . . . ." Paret explained that the "open left-sided medial meniscectomy from 1973 and arthroscopic meniscectomy on the right side . . . both are significant contributing factors to his progressive arthritic changes of his knee on both sides." He offered his opinion that the plaintiff's "original work injury from [1972] . . . has been actually aggravated by" his working at the defendant, stating that "I believe that this is a work injury not wholly and exclusively related to [the defendant]." Paret stated his opinion that both knees are "work-related," with the left knee "related to a Honda [workers' compensation] injury and then subsequent aggravation working" at the defendant. Paret concluded by stating: "It is in my opinion illogical to opine that the 1985 injury at [the defendant] and subsequent pulling and pushing activities are a contributing factor to his right-sided knee issue but that the same pulling and pushing is not related to his left knee degenerative arthritis which did start as a workers' compensation injury for Honda . . . ."

In a January 22, 2013 office note, Paret stated that "[e]xamination of both knees shows significant degenerative arthritic changes" and noted that the left knee had "a moderately severe effusion today." In a February 7, 2014 office note, Paret stated that the plaintiff had experienced "two weeks of significant increasing pain where he indicates he has 'a complete breakdown' of his knees." Paret stated that "[p]revious [X]-rays indicate severe bilateral degenerative changes of his knees. His left is much more severe than the right. . . . [A]t this point in time he has elected a total joint replacement . . . ."

In an April 4, 2014 office note, Paret stated that the plaintiff had "failed nonsteroidal anti-inflammatory

agents of three different varieties" and is pursuing a total knee replacement. He noted that the plaintiff "is unable to pursue his normal and usual activities because of his rather severe degenerative changes in both knees." In a February 6, 2015 office note, which was subsequent to the plaintiff's right knee replacement, Paret stated that "[h]is persisting issue is his left knee which is also due to a [w]orkers' [compensation] episode with AIG dating back to 1972 and he is having at least as much difficulty, if not more, on the left now than he is on the right." Paret stated that "X-rays of the left knee show severe degenerative arthritis of this left knee, particularly medial joint line and patellofemoral articular surface with osteophytes throughout the knee." Paret stated that the plaintiff was "strongly considering surgical intervention as soon as possible which in my opinion obviously dates back to his [1973] open meniscectomy and [w]orkers' [c]ompensation injury also at AIG as previously mentioned, which apparently surgery was done by Dr. Richard Campbell-Jacobs."

The commissioner also had before him Lena's deposition testimony. Lena testified as to the general consequences of a complete meniscectomy, stating that it normally leads to the need for a total knee replacement. He testified that if he were giving a rating following a meniscectomy, he would "include in the rating the fact that the patient would in their lifetime require a knee replacement at an earlier time frame secondary to the injury and subsequent complete meniscectomy."

When asked whether the plaintiff related to Lena any specific injuries following the 1972 and 1985 incidents, Lena replied that the plaintiff "denie[d] any other issues except for the [January 19, 2012 incident] where he just had increased swelling in the knee after working twelve hour shifts." Lena testified that the plaintiff was a candidate for knee replacement. He explained that he looks at the radiographic parameters to see whether someone

is a candidate for a knee replacement, and noted that "[s]ome people with this much arthritis have no pain and you get the X-rays and you're very surprised that they have no discomfort."[8] Lena testified that his physical examination of the plaintiff revealed the "palpable osteophytes, some swelling inside his knee, 2+ effusion on the left hand side, crepitation, which is when you wear through the lamina splendens you get grinding in the knee. And so it was basically an arthritic knee."

When asked whether the injury the plaintiff sustained in 1972, was a substantial contributing factor in the plaintiff's current condition, Lena responded: "Yes. I believe the total meniscectomy that he had in 1973, at that point in time, if I did a rating on his knee, it would have indicated that in his lifetime he would get a knee replacement at an earlier stage than if he did not have that injury." He further testified that if the plaintiff "did not have the [1972] injury and he worked a couple twelve hour shifts at [the defendant] in 2012, I do not think he would have the same arthritic changes nor a need for knee replacement." He concluded that the plaintiff's work at [the defendant] was "a contributing factor, but . . . [not] a substantial contributing factor. I think the substantial contributing factor is the [1972] injury."

When asked whether Paret believed that the plaintiff's work activities were a substantial contributing factor in the plaintiff's need for total knee replacement, Lena testified: "He's kind of going back and forth a little bit about it. If he's going to say that, then he would say that anyone in [the plaintiff's] position would therefore get a knee replacement if they're employed there for the same amount of time. . . . That's why when I say

[8] When asked whether the plaintiff told Lena what course of treatment he wanted to pursue, Lena replied: "I don't recall exactly what he said. As you know, during an employer/respondent examination, we don't discuss too much."

if someone gets a total meniscectomy, I guarantee that they'll get a knee replacement in the earlier stage. I anticipate that there are other people employed by [the defendant] in his position that are not getting knee replacements. So, for that to be the substantial contributing factor I don't think is correct." He summarized: "Is there any contributing factor from his occupation? Absolutely. But it is certainly not the main or substantial contributing factor to it."

When asked whether the plaintiff's work accelerated his need for a knee replacement, Lena stated that "[i]t is possible especially if there is a significant exciting event." He further stated that he was "actually impressed that he made it as long as he did. Because after the [1973] meniscectomy, I would have expected severe arthritis within ten years, and I guarantee he had it. But he lived with it and he still continues to live with it." In response to a question as to whether he agreed with Paret, Lena testified: "It's pretty close. He seems to feel that the significant contributing factor is just the work in between the work at [the defendant]. What he's saying is that anyone in his position will get knee replacements period. When you hire someone you put money aside for knee replacements, and I disagree with that."

The commissioner also had before him the plaintiff's testimony, both during his deposition, taken in 2012, and at the hearing, held in 2015. The plaintiff testified as to his injury in 1972, and surgery in 1973. He testified that, following his surgery, he occasionally had soreness in his left knee but no swelling until January, 2012. The plaintiff testified to his work activities at the defendant. Specifically, during his deposition, he described his work for twenty-six years on the Springfield grinder, in which position he was responsible for "cutting whatever parts they needed to be cut." The plaintiff explained the process for retrieving fixtures, which served as a base for the part. The fixtures were changed

for every job. The plaintiff described the fixtures as weighing between 500 and 1400 pounds.[9] He was responsible for retrieving the fixtures from a fixture crib located approximately 100 yards away. He testified: "If we couldn't get a tow motor operator to get it, we would go up there with a pallet jack or a floor jack and lift it up and bring it down to the machine, you know, pull it down, so." The plaintiff explained that the pallet jack, alternatively called a floor jack, pump jack, or hand truck, is a hydraulic jack that you pump with your foot. The plaintiff stated that he moved the 1400 pound fixture approximately 20 to 30 times during his career. With respect to the lighter fixtures, the plaintiff testified that, "once we got them down, we'd store them across the aisle so we wouldn't have to move them or nobody would have to get them. But in order to set up the job you would have to get a pallet jack and go get the fixture which was across the aisle because the crane couldn't get to that position to lift up the fixture." He testified that he would get the fixture from across the aisle every day, sometimes two or three times per day depending on the jobs to be performed. He explained the process of moving the fixture into place for the crane to pick it up and then setting up the machine, including putting the fixture in and loading the part.

With respect to the parts, the plaintiff testified in his deposition that "the parts would go [800 to 900] pounds," and that he would bring the part in "on a hand truck, put that in the aisle, unload that, climb up six . . . stairs, load that up onto the fixture, and adjust everything on the machine, guards and stuff, and set up and make the cut." The plaintiff confirmed that he

[9] Specifically, he testified: "On the housings, on the transmission housings on the Blackhawk, that was the heaviest fixture. That was 1400 pounds. They did make a smaller one and lighter one down to probably, down to probably 500 pounds later on, probably 10 years ago. The fixtures for the main rotors for like our largest aircraft, which was the CH53's and stuff, those fixtures were up to [1000] pound weights."

moved parts weighing 600 to 700 pounds by himself using just a hand truck, which he described as a pallet jack.

The plaintiff testified before the commissioner that his work in the gear room was a "physically demanding job." He was responsible for pushing racks of gears weighing 800 pounds from one room to another, approximately 100 yards distance. The plaintiff also explained his work with a blank checker, which he described as an approximately 1000 pound tool used to measure gears. He testified that because the wheels on the blank checker were too small and had flat spots on them, he had to exert himself to get the blank checker moving. He explained that he did have help to move the blank checker and that he also would help other people push the blank checker. Overall, the plaintiff explained that his work in the gear room was physically lighter than his work on the Springfield grinder.

The plaintiff described the incident in January, 2012, that led to his knees swelling. He testified in his deposition that he had been "moving gears from one gear room to the large gear cell. Just over the course of the night, the second night . . . both of my knees swelled up, blown up. I moved a blank checker that checks gears out of the way, moved that from one room to another. Doesn't roll very easily. It generally takes two people, but I guess I was feeling good. You know, you only get the burning sensation in your knee, you don't get the extreme pain. Moving large stacks of gears around so I could get gears to my machine to set them up and run. But by the end of—started working the [twelve hour] day on Wednesday . . . [b]y the end of Thursday night, both of my knees were swollen up." He testified that he went to see Paret on February 8, 2012, and Paret drained his left knee. When asked whether Paret told the plaintiff that the overwhelming issue was arthritis in his knees, the plaintiff responded

that Paret "explained to me that it was a bone on bone contact on both knees."

Having received the foregoing evidence, the commissioner made the following findings: "The [plaintiff] had a left knee meniscectomy on November 26, 1973. . . . The left knee meniscectomy in 1973 was a substantial contributing factor in the [plaintiff's] development of arthritis. . . . The [plaintiff's] repetitive work activities of climbing up and down stairs while carrying heavy parts and fixtures, setting up a grinder while reaching and leaning on one foot, extensive pushing, pulling, reaching and lifting of heavy parts, acted in substantially and permanently aggravating his underlying and preexisting left knee condition, resulting in the need for a total left knee replacement on February 19, 2015. . . . The [plaintiff's] testimony regarding his physical condition and work activities was credible and persuasive. . . . The opinions of . . . Paret were more persuasive than those of . . . Lena, especially with regard to the impact of the [plaintiff's] work activities on his ultimate need for left total knee replacement."

In its decision following the defendant's appeal, the board first stated that it was not persuaded that it was necessary for the commissioner to rely on expert opinion in order to determine that the plaintiff's workplace activities had substantially and permanently aggravated his left knee condition, and it performed an analysis under *Garofola* v. *Yale & Towne Mfg. Co.*, supra, 131 Conn. 574. See footnote 2 of this opinion. However, the board also stated that "the medical record is not devoid of support for the commissioner's conclusions relative to the role played by the [plaintiff's] repetitive workplace activities." It ultimately described the record as reflecting "some limitations in the medical evidence relevant to that particular issue."

A

In support of its claim on appeal that the board erred in affirming the commissioner's finding that the need for the plaintiff's knee replacement was due to repetitive work activities, the defendant first argues that Paret's opinions were not expressed with reasonable medical probability. The plaintiff responds that "Paret's opinion that the repetitive trauma caused by the plaintiff's work for the defendant, in the setting of prior bilateral meniscectomies, was a significant contributing factor to the need for arthroplasty for both knees was expressed with certainty, without expressions of conjecture or speculation." We agree with the plaintiff.

We first discuss the general requirement of causation in workers' compensation cases. "To recover under the [Workers' Compensation Act, General Statutes § 31-275 et seq.], an employee must meet the two part test embodied in . . . § 31-275, namely, that the injury claimed arose out of the employee's employment and occurred in the course of the employment. . . . [I]n Connecticut traditional concepts of proximate cause constitute the rule for determining . . . causation [in a workers' compensation case]. . . . An actual cause that is a substantial factor in the resulting harm is a proximate cause of that harm. . . . The finding of actual cause is thus a requisite for any finding of proximate cause." (Citation omitted; internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 591, 986 A.2d 1023 (2010). "[T]he determination of whether the substantial factor test has been satisfied is a question of fact. . . . If reasonable minds can disagree as to whether the [claimant] has satisfied her burden of establishing proximate cause . . . we will not disturb the commissioner's finding even if we might reach a different conclusion." (Citation omitted; internal quotation marks omitted.) *Wilson* v. *Maefair*

Health Care Centers, 155 Conn. App. 345, 355, 109 A.3d 947 (2015).

For expert medical opinion to be admissible in establishing causation, it must be based on reasonable probabilities. In *Struckman* v. *Burns*, 205 Conn. 542, 554–55, 534 A.2d 888 (1987), our Supreme Court rejected the proposition that an expert must use certain formulaic words to state an opinion and explained: "Expert opinions must be based upon reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation. . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony. . . . When reports are the substitute for testimony, the entire report should be examined, not only certain phrases or words." (Citations omitted.)

Considering Paret's records as a whole, we agree with the plaintiff that his opinion was based on a reasonable probability. Paret's opinion is most succinctly stated in his December 16, 2012 letter, referenced by the commissioner in his findings, responding to Lena's examination. Lena had concluded that the plaintiff's need for a left knee replacement was related to the 1973 open medial meniscectomy. Specifically, Lena concluded that "the previously meniscectomies were the substantial contributing factor to his development for arthritic changes and has led to the chronic degenerative changes that he currently has and that is the major cause for the need for the knee replacement and not the pushing and pulling from January of 2012." Paret responded that the plaintiff's original work injury from 1972 "has been actually aggravated by his working at [the defendant]."

He described the plaintiff's work as "subsequent heavy pulling and pushing of pallets of engine and turbine parts weighing 800 to 1400 pounds," explaining that such work was a significant contributing factor to the plaintiff's right knee injuries.[10] He then remarked that it was illogical to opine that the pulling and pushing activities were a "contributing factor" to his right knee injury but that the "same pulling and pushing is not related to his left knee degenerative arthritis . . . ."[11] Other of Paret's notes reflect his opinion as to the connection between the plaintiff's workplace activities and the aggravation of his arthritis. For example, on February 8, 2012, Paret wrote, in an office note also referenced by the commissioner in his findings, that the plaintiff's "moderately severe degenerative joint disease" had been "aggravated now by his work-related injury," and referenced the twelve hour days pushing racks of gears. Thus, we are satisfied that his opinion was based on a reasonable probability.

The defendant points to two notations in Paret's records that were not referenced by the commissioner in his findings. First, it cites Paret's February 15, 2012 notation: "[A]lthough [the plaintiff] does have significant meniscal tears, I believe his overwhelming issue is the arthritis." Second, it cites Paret's February 6, 2015 notation: "[The plaintiff] is, at this point, strongly considering surgical intervention [on his left knee] as soon as possible which in my opinion obviously dates back to his [1973] open meniscectomy . . . ."

[10] See footnote 5 of this opinion.

[11] The defendant, in its principal brief before this court, states that "[t]here is no evidence in the record that the [defendant] acknowledged repetitive trauma with respect to the right knee notwithstanding . . . Paret's comments to counsel. The rationale on the right total knee replacement is different and not relevant, and the resolution of the right knee claim should have no bearing on the analysis of the left knee claim." We note Paret's reference to the right knee only because it contextualizes his discussion of the pushing and pulling activities as aggravating the plaintiff's arthritis in his left knee.

We are not persuaded that Paret's references to arthritis as the "overwhelming issue" and the plaintiff's need for surgery as dating back to the meniscectomy render his entire opinion speculative. More specifically, Paret's references to the plaintiff's meniscectomy and resulting arthritis are not inconsistent with an opinion that his workplace activities constituted a substantial contributing factor to the plaintiff's need for surgery because they aggravated the plaintiff's preexisting condition. "It is well established that an employer takes the employee in the state of health in which it finds the employee. . . . [A]n injury received in the course of the employment does not cease to be one arising out of the employment merely because some infirmity due to disease has originally set in action the final and proximate cause of the injury. . . . If the injury is the cause of the disability, it is compensable even though such an injury might not have caused the disability if occurring to a healthy employee or even an average employee." (Citation omitted; internal quotation marks omitted.) *Wilson* v. *Maefair Health Care Centers*, supra, 155 Conn. App. 356 n.9.

The defendant relies on the decision of the board in *Ivan-Marrotte* v. *State*, No. 3599, CRB 02-97-04 (July 28, 1998), which is distinguishable from the present case. In *Ivan-Marrotte*, the plaintiff was in the course of her employment when she chased a group home client over a wall and landed on her left leg. She later claimed that she developed right leg problems as a result of the left leg injury. The commissioner concluded that the plaintiff's phlebitis in her right leg was caused by the injury to her left leg. The board reversed the decision of the commissioner, finding it unsupported by the medical evidence. The board noted that the doctor who offered an opinion on the plaintiff's condition had testified during his deposition that "there certainly is a lot of room for speculation" as to what

led up to the plaintiff's right leg symptoms, conceded that reasonable doctors trained in vascular conditions might disagree on the medical cause of the plaintiff's right leg symptoms, and stated that "[i]t would be very difficult to tell" whether jumping off the wall caused the plaintiff's right leg symptoms. In contrast with the expert's testimony in *Ivan-Marrotte*, Paret's opinion in the present case lacked the equivocal language of an opinion improperly based on speculation and conjecture. Indeed, Paret opined that the plaintiff's original work injury from 1972 "has been actually aggravated by his working at [the defendant]."

The defendant argues that "[t]he only medical opinion in the record that was expressed with reasonable medical probability was . . . Lena, who was of the opinion that [the] plaintiff's work activities were not a substantial contributing factor in permanently aggravating [the] plaintiff's degenerative disease." (Emphasis omitted.) The commissioner, however, found Paret's opinion more credible and persuasive than that of Lena. It is well established that "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal quotation marks omitted.) *Chesler* v. *Derby*, 96 Conn. App. 207, 218, 899 A.2d 624, cert. denied, 280 Conn. 909, 907 A.2d 88 (2006).

Accordingly, we conclude that Paret's opinion that there was a causal relationship between the plaintiff's employment and his need for surgery was expressed within a reasonable degree of medical probability.

B

The defendant next argues that the commissioner's causation finding was not supported by competent medical evidence because Paret incorrectly assumed that

the pulling of 800 to 1400 pound parts was performed on a regular basis. We disagree.

The following additional facts are relevant. Paret, in his December 16, 2012 letter, described the plaintiff's work activities as "heavy pulling and pushing of pallets of engine and turbine parts weighing 800 to 1400 pounds." Paret also stated, in that same correspondence, that the plaintiff "has been responsible as a machinist [for the defendant] for pulling very heavy loads weighing up to 1400 pounds on pull carts with no mechanical assistance, sometimes for fairly long distances of almost 100 yards."[12] The commissioner, in his findings, referenced the plaintiff's testimony that he retrieved the 1400 pound part approximately 20 to 30 times in his career and that when he could not get a tow motor operator to get the fixture, he would need to do so with a pallet jack or floor jack. The commissioner further referenced the plaintiff's testimony regarding his retrieval of the fixtures stored across the aisle from the grinder. Depending on the job, he would need to

[12] The parties dispute whether the plaintiff had the benefit of "mechanical assistance" in retrieving the fixtures. With respect to retrieving the fixtures from the fixture crib, the commissioner found that "if he couldn't get a tow motor operator to get the fixture, he would need to do so with a pallet jack or floor jack." With respect to retrieving the fixtures stored across the aisle, which task would be performed approximately two or three times per day, the commissioner found that the plaintiff used a pallet jack. The plaintiff further testified that he would pull parts weighing 800 to 900 pounds using a hand truck.

In his deposition, the plaintiff was asked what a hand truck is, and he responded, "A hand truck is like a pallet jack." He testified that it "lifts the pallet" and then "you pull it." He confirmed that he would move it with his own power. The defendant mentions in its brief that Paret's opinion was premised on the plaintiff pushing and pulling heavy fixtures "without mechanical assistance," however, we note that Paret's full statement provides that the plaintiff was "responsible . . . for pulling very heavy loads weighing up to 1400 pounds *on pull carts* with no mechanical assistance . . . ." (Emphasis added.) We see no conflict among Paret's opinion, the plaintiff's testimony, and the commissioner's findings with respect to the assistance available to the plaintiff to move the fixtures and parts.

retrieve the part two or three times per day and use a pallet jack to position the fixture so that a crane could lift it onto the grinder. The commissioner found the plaintiff's testimony regarding his work activities credible and persuasive.

In reviewing the defendant's argument, we consider our Supreme Court's decision in *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 588, instructive. In *Marandino*, our Supreme Court considered whether the commissioner properly relied on a medical report from the plaintiff's attending physician in determining that the plaintiff's knee injury was compensable. The defendant had contended that the report was not supported by competent evidence on which the commissioner could rely. Id. The report stated the opinion of the plaintiff's attending physician that the plaintiff's knee injury, which she sustained while falling down the stairs at her home, was caused by a previous, work-related arm injury. Id., 569–70, 588. Specifically, the record contained an April, 2002 letter authored by the plaintiff's attending physician that provided: "I am responding to your . . . correspondence regarding your client and my patient, [the plaintiff]. Please be advised that we have recommended surgery and this dates back to [February, 2002]. I talked specifically with the [plaintiff] that she had an osteochondral lesion [in her knee]. This is a direct result of her previous work-related trauma and as such is a continuation of her ongoing problems. This does not represent a new condition."[13] (Emphasis omitted; internal quotation marks

[13] The record in *Marandino* also contained a November, 2000 note authored by the plaintiff's treating physician that stated: "I feel that there is [a] direct related cause of the knee injury to the right elbow pre-existing problem." (Emphasis omitted; internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 588. This court and our Supreme Court declined to address the defendant's claim on appeal that the November, 2000 note improperly was admitted into evidence, on the basis that it was cumulative of the April, 2002 letter, to which the defendants had not objected. Id., 588 n.13.

omitted.) Id., 588. The commissioner determined that the attending physician had reported that the knee injury was caused by the arm injury and found such report, which was uncontradicted, persuasive. Id., 589–90.

On appeal, this court determined that the expert medical evidence in the record was not competent, in that it was grounded in speculation and conjecture. *Marandino* v. *Prometheus Pharmacy*, 105 Conn. App. 669, 680, 939 A.2d 591 (2008), rev'd in part, 294 Conn. 564, 986 A.2d 1023 (2010). Specifically, this court stated that there was nothing in the attending physician's reports "to suggest that the arm injury, rather than some other source, was a substantial factor in bringing about the knee injury"; id.; and that the physician's opinion regarding causation was "merely a statement devoid of a basis in fact . . . ." Id., 681.

Our Supreme Court reversed in part the judgment of this court, concluding that the attending physician's expert opinion was competent despite his failure to include supporting medical facts. *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 594. It first explained that "the facts on which an expert relies for his medical opinion is relevant to determining the admissibility of the expert opinion, but once determined to be admissible, there is no rule establishing what precise facts must be included to support an expert opinion." Id. It then stated that "[o]nce [the expert's] report was admitted into evidence, the trier of fact—the commissioner—was free to determine the weight to be afforded to that evidence." Id. The court noted that "[i]f the defendants sought to challenge the credibility or weight to be afforded to [the attending physician's] expert opinion of causation they could have done so by deposing him prior to the hearing or calling him as a witness at the hearing." Id. The defendants had done neither. Accordingly, the court determined

that the commissioner's reliance on the attending physician's expert opinion was reasonable. Id.

We conclude in the present case that the commissioner had before him competent medical evidence from which he could find a causal relationship between the plaintiff's work activities and his need for surgery.[14] Specifically, the commissioner had before him the records of the plaintiff's treating physician, Paret, in which he reported the plaintiff's condition, symptoms, and course of treatment. See *Keenan* v. *Union Camp Corp.*, 49 Conn. App. 280, 285, 714 A.2d 60 (1998) (letters and reports from treating physician that detailed plaintiff's medical condition, symptoms, and course of treatment was competent evidence to support commissioner's finding that fall down stairs at plaintiff's residence

[14] The defendant relies on *Avino* v. *Stop & Shop Supermarket Cos. LLC/Ahold USA*, No. 5820, CRB 3-13-2 (February 10, 2014) as setting forth the type of medical evidence *required* to establish work-related aggravation of preexisting arthritis such as the plaintiff had in the present case. In that case, the commissioner found that the plaintiff's preexisting osteoarthritis was " 'accelerated by the employment activity' " and, therefore, that his injury was compensable. The plaintiff had undergone medial and lateral open meniscectomies when he was a teenager, and his treating physician testified that these procedures typically lead to osteoarthritis. The plaintiff began treating forty years following the surgeries for bilateral knee pain, at which time his physician diagnosed him as suffering from bilateral end-stage degenerative joint disease of the knees. The physician testified that the heavy work performed by the plaintiff as a meat cutter had exacerbated his knee symptoms. He described the arthritic changes in the plaintiff's knees as " 'probably multifactorial,' " and opined that the plaintiff probably would have developed significant arthritis in his knees " 'whether or not he worked as a meat cutter.' " However, he further opined that the work activities of the plaintiff, particularly heavy lifting and deep squatting, likely had " 'aggravated his underlying condition and required him to have replacement earlier than he potentially would have had he had a more sedentary job.' " Another physician performed a medical examination at the request of the defendant and determined that the plaintiff's duties as a meat cutter had aggravated his osteoarthritis but were not a substantial contributing factor in its development.

The board found that the record provided "ample support" for the commissioner's conclusion that the plaintiff's job duties were a significant contributing factor to his need for knee replacement surgery.

We agree with the defendant that the medical evidence presented in *Avino* is stronger than that presented before the commissioner in the present case.

was caused by leg weakness resulting from workplace injury). Contained in those records was Paret's expert opinion that the plaintiff's knee injury was causally related to his work. The defendant did not object to the admission of Paret's records into evidence, nor did it depose Paret prior to the hearing or call him as a witness at the hearing. As in *Marandino*, once Paret's reports were admitted into evidence, "the trier of fact—the commissioner—was free to determine the weight to be afforded to that evidence." *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 594. Although the defendant sought to challenge Paret's opinion with the deposition transcript of Lena, the commissioner found Paret's opinion more persuasive. Accordingly, we cannot conclude that the commissioner's reliance on Paret's expert opinion was unreasonable.

Moreover, the defendant's contention that the plaintiff only retrieved the heaviest of the fixtures—the 1400 pound fixture—on 20 to 30 occasions over the course of his career does not necessitate a determination that Paret's opinion was incompetent. First, although the board recognized that Paret's opinion regarding causation "does appear to be primarily based on his understanding that the claimant was responsible for pushing and pulling heavy fixtures," we do not construe Paret's opinion as limited to the pushing and pulling of the *1400 pound* fixture. It is significant that Paret, in the same communication referencing the "heavy pulling and pushing of pallets of engine and turbine parts weighing 800 to 1400 pounds," also described the plaintiff's duties as pushing and pulling parts weighing *up to* 1400 pounds. Paret opined that heavy pushing and pulling contributed to the plaintiff's left knee degenerative arthritis. This opinion is consistent with Paret's initial assessment that the effusions in the plaintiff's

We disagree, however, that the medical evidence in the present case was so lacking that it could not support the commissioner's finding of causation.

knees were work-related and caused by the plaintiff pushing large heavy carts and racks of gears on the floor during back-to-back twelve hour shifts, as reported to Paret by the plaintiff. We conclude therefore, in line with *Marandino*, that Paret's opinion was not incompetent for lack of supporting facts.

In addition to the competent medical evidence supporting the commissioner's finding of causation, we also look to the other evidence in the record. Our Supreme Court in *Marandino* explained that "it is proper to consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." (Emphasis in original.) *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 595. The court determined that the plaintiff's testimony regarding the circumstances of her injury "corroborated [the expert's] medical opinion." Id. Considering the expert opinion "along with the other evidence," the court concluded that the commissioner properly determined that the plaintiff's knee injury was causally related to her employment. Id.

In the present case, the plaintiff testified extensively, both at his deposition and at the hearing, as to his workplace activities, and the commissioner referenced such testimony in his findings. Specifically, the commissioner referred to the plaintiff's testimony regarding the retrieval of the 1400 pound fixture on 20 to 30 occasions, his retrieval of other heavy fixtures stored directly across the aisle from the grinder, a task that the plaintiff might perform 2 or 3 times per day, and the pushing of carts with heavy parts on a regular basis. This testimony, found credible by the commissioner, corroborated Paret's opinion with respect to the extensive pushing and pulling of heavy parts as part of the plaintiff's workplace activities.[15] See *Glenn* v. *Stop & Shop, Inc.*,

[15] In its reply brief, the defendant contends that "[w]hile . . . Paret was of the opinion moving up to the 1400 pound parts aggravated the plaintiff's left knee condition, this is at best an undefined aggravation." It maintains

168 Conn. 413, 419, 362 A.2d 512 (1975) (commissioner's finding that repetitive heavy lifting required by employment was causally connected with degenerative disc in plaintiff's lower lumbar spine was not so unreasonable as to justify judicial interference, where treating physician testified that there was causal connection between heavy lifting and plaintiff's condition and plaintiff testified as to nature of his work, his increasing pain, and his ultimate disability).

Accordingly, we conclude that the commissioner had before him competent medical evidence in the form of Paret's records.[16]

C

We next turn to the defendant's contention that the commissioner improperly referenced work activities as

that there is no comment from Paret that the plaintiff's work activities "permanently aggravated his left knee condition." The defendant states that "a left knee effusion was present" in February, 2012, but that the effusion had resolved by the time of surgery in February, 2015. We note, however, that Paret's records indicate that he had recommended surgery as early as February, 2012, and that, by March 14, 2012, the plaintiff was considering surgical options of a total knee replacement because Paret thought that "there is very little else that we can offer other than the very conservative management treatment course which has been ineffective so far."

[16] We note here the defendant's claim on appeal that the board's decision "represents a departure from the procedure which guides all counsel within the [workers' compensation] system on a daily basis." See footnote 2 of this opinion. In support of this claim, the defendant argues that the board has "misapplied the reference in *Murchison* [v. *Skinner Precision Industries, Inc.*, supra, 162 Conn. 152] with respect to the concept of considering medical evidence along with other evidence to determine whether an injury is related to the employment. . . . The court did not suggest that an opinion expressed with reasonable medical probability as to whether the work activity was a substantial contributing cause was no longer necessary. Rather, competent and probative medical testimony is necessary which is then viewed through the lens that considers the other evidence produced in the case." (Citation omitted.) Because we conclude that the commissioner had before him competent medical evidence, we need not address the defendant's argument that it is improper to supplement incompetent medical evidence with other evidence.

"substantially and permanently aggravating [the plaintiff's] underlying and preexisting left knee condition" that were not commented on by Paret. We preface our discussion by reiterating that we already have concluded that the commissioner's ultimate determination—that the plaintiff's need for surgery was caused by his work—is supported by competent medical evidence. In light of that determination, we conclude that the commissioner's reference to the plaintiff's work activities beyond those expressly identified by Paret in his records, was not improper.

In its findings, the commissioner stated that the following repetitive work activities substantially and permanently aggravated the plaintiff's left knee injury: "[C]limbing up and down stairs while carrying heavy parts and fixtures, setting up a grinder while reaching and leaning on one foot, extensive pushing, pulling, reaching and lifting of heavy parts." The defendant argues that although the "plaintiff's testimony supports all but the last of those activities, it is emphasized that none of the actions were commented on by the plaintiff's treating physician . . . Paret."

Although the climbing, reaching, leaning, and lifting activities were not expressly identified by Paret as having aggravated the plaintiff's left knee injury, Paret's records provide the commissioner with the basis to find a causal connection between the plaintiff's work and his need for surgery. As our Supreme Court stated in *Marandino*, "there is no rule establishing what precise facts must be included to support an expert opinion." *Marandino* v. *Prometheus Pharmacy*, supra, 294 Conn. 594. Paret was not required to exhaustively chronicle every workplace activity of the plaintiff that formed the factual basis for his opinion that the plaintiff's work was a substantial contributing factor to his need for surgery. Correspondingly, the commissioner, having before him expert medical evidence that the plaintiff's

work caused his need for surgery, was not limited in his consideration to only those activities expressly identified by Paret but instead was entitled to consider the plaintiff's testimony, as set forth at length previously in this opinion. See id., 595 ("it is proper to consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment" (emphasis in original)). Moreover, the fact that the commissioner considered the plaintiff's testimony regarding his work activities in no way undermines the adequacy or competency of Paret's opinion.

Accordingly, we reject the defendant's argument that the board's affirmance of the commissioner's findings should be reversed.

II

The defendant's final claim on appeal is that the commissioner erred in failing to grant the defendant's motion for articulation.[17] Specifically, the defendant argues that articulation was needed to remedy "the lack of analysis or explanation as to how the trier was able to conclude that there was a substantial permanent aggravation of an underlying preexisting left knee condition . . . ." The plaintiff responds that the defendant's motion for articulation "was an attempt to characterize one of . . . Paret's reports in a way that [it] hoped would support [its] arguments on appeal. The commissioner obviously did not accept the [defendant's] characterization of that report, and was acting within his discretionary powers in denying the motion for articulation." We conclude that the commissioner did not abuse his discretion in denying the request for articulation.

The following additional procedural history is relevant. Following the issuance of the commissioner's

[17] The defendant does not claim on appeal that the commissioner abused his discretion in denying its motion to correct.

decision, the defendant filed a motion to correct and request for articulation. In its motion, the defendant sought fourteen corrections to the commissioner's findings, conclusions, and orders, and it requested an articulation. In its request for articulation, the defendant cited the commissioner's finding regarding Paret's February 8, 2012 office note, which referenced the plaintiff's three, twelve hour shifts pushing heavy carts and resulting swelling of his knees. The note further stated that "the effusion is rather significant. I believe it was caused by his work-related efforts pushing very heavy racks of gears working [twelve] hours a day for several days in a row. He has moderately severe degenerative joint disease which has been aggravated now by his work-related injury." The defendant requested that the commissioner "articulate or otherwise confirm that [his finding referencing Paret's February 8, 2012 note] merely illustrates that (1) the work-related activities related to pushing racks of gears caused only effusion or swelling in the left knee and (2) that the statement by . . . Paret suggests the effusion ('it') has aggravated moderately severe degenerative joint disease without any comment on the extent of [the] aggravation whether temporary or otherwise." The defendant argued that "[t]his request is necessary to clarify the commissioner's conclusion and to identify the work injury cited by the trier." The defendant maintained that Paret discussed "swelling in the knee and does not identify the nature or extent of the aggravation caused by such swelling . . . ."

On appeal to the board, the defendant argued that the commissioner improperly denied its motion to correct and request for articulation. With respect to the request for articulation, the board determined that "[i]t is clear that the finding in question merely reflects Paret's statements regarding causation as recited in his February 8, 2012 office note, which note is consistent

with Paret's opinion on causation as expressed in his other office notes and correspondence."

"[A]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. . . . In workers' compensation cases, motions [for articulation] are granted when the basis of the commissioner's conclusion is unclear." (Citations omitted; internal quotation marks omitted.) *Cable* v. *Bic Corp.*, 270 Conn. 433, 444–45, 854 A.2d 1057 (2004).

In the present case, the commissioner expressly credited and relied on Paret's opinions, particularly with regard to the impact of the plaintiff's work activities on his ultimate need for a left knee replacement. We agree with the board that the finding with respect to which the defendant sought an articulation, when considered together with Paret's office notes and communications, reflected Paret's opinion that the plaintiff's work activities aggravated his degenerative joint disease. Accordingly, we conclude that the commissioner did not abuse his discretion in denying the defendant's request for articulation and that the board did not improperly affirm that decision.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

ALAIN LECONTE *v.* COMMISSIONER OF CORRECTION (AC 43584)

Prescott, Cradle and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of several crimes in connection with three armed robberies in Norwalk, Greenwich and Stamford, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel rendered ineffective assistance by failing to investigate adequately and to present evidence that he suffered from significant mental disease that rendered involuntary an inculpatory statement regarding his involvement in the Norwalk and Greenwich robberies that he had made to a cellmate while he was incarcerated on charges related to the Stamford robbery. The petitioner asserted that evidence of his mental health issues would have led the trial court to grant his motion to suppress that statement and was necessary, after the statement was admitted into evidence, to effectively cross-examine and to discredit the state's witnesses regarding that statement. The habeas court determined both that there was no evidence that the petitioner's statement to the cellmate was not made knowingly, intelligently and voluntarily, and that the petitioner failed to present evidence that showed how his mental health affected the voluntariness of that statement. The court further determined that, during the pendency of the petitioner's criminal case, his mental health records had been reviewed by a physician who was board certified in forensic psychiatry and that another mental health professional had prepared a report that concluded that the petitioner was malingering. The court thus concluded that the petitioner failed to prove that his trial counsel performed deficiently or that he was prejudiced by his counsel's alleged failure to investigate or to present evidence about the petitioner's mental illnesses. The court therefore denied the habeas petition, and the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the petitioner failed to demonstrate that he suffered constitutionally ineffective assistance from his trial counsel: there was no evidence regarding the scope of trial counsel's investigation into the petitioner's mental health or the strategic reasons, if any, why counsel believed such an investigation was not warranted, the petitioner did not call his trial counsel or any other witness to testify regarding the extent of the investigation into the petitioner's mental health problems, and the petitioner was not asked during his testimony whether he had had discussions with or had provided information to his trial counsel regarding the state of his mental health at the time he made his inculpatory statement to the cellmate; moreover, there was a

dearth of evidence regarding whether the petitioner's mental health issues would have impacted the voluntariness of his statement to the cellmate to the extent that the trial court would have suppressed the statement, and this court declined to review the petitioner's inadequately briefed claim that evidence regarding his mental health was necessary to effectively cross-examine and to discredit the state's witnesses regarding the inculpatory statement, as his appellate brief was devoid of citations to the record or to the trial transcript bearing on this issue, it did not state which witnesses he would have cross-examined, the substance of their testimony or how the medical evidence his counsel allegedly failed to find would have impeached that testimony, and there was no merit to the petitioner's assertion that the habeas court overlooked the evidence or should have drawn certain inferences in his favor.

2. This court declined to review the petitioner's inadequately briefed claim that the habeas court improperly concluded that he did not demonstrate that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal a claim that the trial court improperly granted the state's motion for joinder of the three robbery cases; the petitioner's brief contained no discussion, analysis or application of any of the evidentiary principles that would dictate whether certain evidence in one case would be cross admissible in the other cases, it did not analyze the cross admissibility of the inculpatory statements he made to various informants or the ballistics evidence that tended to show that the gun he used in and that was recovered from the Stamford robbery was also used in the Greenwich robbery, and he failed to recognize in his brief that the application of certain factors was unnecessary if the evidence was cross admissible or to discuss substantively why the evidence was not cross admissible.

Argued February 3—officially released September 7, 2021

Procedural History

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

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's

attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Alain Leconte, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the court improperly concluded that he failed to demonstrate that (1) his trial counsel rendered ineffective assistance of counsel with respect to his efforts to suppress or to otherwise respond to evidence of an inculpatory statement he made to his cellmate, and (2) his appellate counsel rendered ineffective assistance by failing to raise on direct appeal a claim that the trial court improperly granted the state's motion to join for trial the charges against him that arose out of three separate robberies. We are not persuaded by the petitioner's first claim and decline to review the second claim because of inadequate briefing. Accordingly, we affirm the judgment of the habeas court.

The following facts, as set forth by our Supreme Court in the petitioner's direct criminal appeal, are relevant to our disposition of this appeal. "Between October and December, 2009, the [petitioner] participated in three armed robberies, each of which resulted in criminal charges against him.

"The first robbery took place on October 10, 2009. The [petitioner], together with an accomplice, entered a Shell gas station and convenience store in Norwalk and demanded that the store clerk hand over the money in the cash register, which contained approximately $1300. He then shot the clerk in the head before fleeing with his accomplice. The clerk later died from the gunshot wound.

[1] The habeas court granted the petitioner certification to appeal.

"The second robbery took place on November 21, 2009. The [petitioner] and three accomplices drove to a Mobil gas station in Greenwich. While two of the accomplices waited in the car and the third, Teran Nelson, stood outside as a lookout, the [petitioner] entered the convenience store and ordered the clerk at gunpoint to give him the money in the cash registers. After the clerk handed over approximately $638 and several boxes of cigarettes, the [petitioner] shot him in the head and drove off with Nelson. The clerk ultimately recovered from the gunshot wound.

"The third robbery occurred on December 12, 2009. The [petitioner] called and asked a friend, who also was a police informant, to give him a ride in her car. During the ride, the [petitioner] told her to stop at a certain location, where he picked up a gun, smoked marijuana, and met an accomplice, David Hackney, with whom he decided to commit a robbery. The informant then drove the [petitioner] and Hackney to a Walgreens store in Greenwich. While the two men waited in the car, the informant purchased a pair of stockings that the [petitioner] said he wanted for his mother and contacted the police by cell phone to warn of a possible robbery in Stamford. When the informant returned to the car, she drove the [petitioner] and Hackney back to Stamford and dropped them off on Vista Street. The men then walked a short distance to Adams Grocery Store. After the [petitioner] and Hackney pulled the stockings over their heads, they entered the store and the [petitioner] ordered everyone at gunpoint to get down on the floor. When the [petitioner] encountered difficulty trying to open the cash register, the store clerk offered to help. The [petitioner] then grabbed approximately $203 in cash and fled from the store with Hackney. A short time later, the police caught the [petitioner] as he was running down the street.

"The [petitioner] was detained and arrested, and various individuals who had been in Adams Grocery Store during the robbery identified the [petitioner] and Hackney as the men who had just robbed the store. Police officers who had observed the men in immediate flight also identified the [petitioner], who was wearing the same clothing he had worn during the robbery. The [petitioner] then was brought to the police station, where he provided a written statement in which he confessed to his involvement in the Stamford robbery and provided details regarding the incident. The [petitioner] subsequently was charged with two counts of robbery in the first degree in connection with this robbery.

"During the [petitioner's] incarceration for the Stamford robbery, he told Anthony Simmons, a cellmate who had agreed to be a cooperating witness for the state, that he had been involved in the Norwalk and Greenwich robberies. On the basis of this information and the evidence obtained from several other persons who also were cooperating witnesses, the [petitioner] was charged with murder, felony murder and robbery in the first degree for his participation in the Norwalk robbery and with attempt to commit murder and robbery in the first degree for his participation in the Greenwich robbery.

"The three cases were joined for trial on August 21, 2012, and a jury found the [petitioner] guilty as charged, except with respect to the two first degree robbery charges in the case involving the Stamford robbery. With respect to those charges, the jury found the [petitioner] guilty of two counts of the lesser included offense of robbery in the second degree because evidence had been admitted that the gun he had used in the Stamford robbery was inoperable. On February 13, 2013, the court rendered judgments of conviction and imposed a total effective sentence of ninety years [of]

incarceration." *State* v. *Leconte*, 320 Conn. 500, 502–505, 131 A.3d 1132 (2016).

On March 26, 2015, the petitioner initiated this habeas action. After the petitioner was appointed counsel, he filed an amended petition for a writ of habeas corpus in which he asserted various ways in which he allegedly was deprived of the effective assistance of his trial counsel, Attorney Mark Phillips, and his appellate counsel, Attorney Daniel J. Foster. Specifically, the petitioner alleged, among other things, that Phillips rendered ineffective assistance by failing to investigate adequately and to present evidence of the petitioner's mental health issues in order to persuade the trial court to suppress an inculpatory statement the petitioner made to his cellmate and, once admitted into evidence, by failing to cross-examine witnesses about the reliability of that statement. With respect to appellate counsel, the petitioner alleged that Foster rendered ineffective assistance by failing to raise on direct appeal a claim, which was preserved below, that the trial court improperly granted the state's motion for joinder of the charges relating to all three robberies.

Following a trial on the merits, the habeas court concluded that the petitioner failed to prove his claims of ineffective assistance of counsel. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court improperly concluded that he failed to prove that his trial counsel rendered ineffective assistance in his efforts to suppress or to otherwise respond to evidence of an inculpatory statement the petitioner made to his cellmate, which had been recorded. The petitioner argues that trial counsel failed to investigate adequately, and to present evidence of, the fact that he suffered

from significant mental disease that rendered involuntary any inculpatory statement he made to his cellmate. In the petitioner's view, if such evidence had been secured and presented by counsel, the trial court would have suppressed the statement. In the alternative, he contends that such evidence was necessary to "effectively cross-examine the state's witnesses in order to discredit their testimony about the recorded statements." We are not persuaded by the petitioner's argument regarding suppression of the recorded statement and conclude that his alternative contention is inadequately briefed.

The following additional facts and procedural history are relevant to this claim. After the petitioner had been arrested on charges relating to the Stamford robbery, but prior to being charged with respect to the robberies in Norwalk and Greenwich, he made inculpatory statements to Simmons, who was wearing a recording device at the request of the state, with whom he was cooperating. The inculpatory statement related to the petitioner's involvement in the Norwalk and Greenwich robberies but did not include any discussion of the Stamford robbery.

The petitioner subsequently moved to suppress the audio recording of his statement on the ground that the state had violated his sixth amendment right to counsel because, at the time he admitted his involvement in the Norwalk and Greenwich crimes to Simmons, he already was under arrest and represented by counsel with respect to the charges arising from the Stamford robbery. Following a suppression hearing at which the petitioner and Simmons, among others, testified, the trial court denied the petitioner's motion to suppress.

After the petitioner was convicted, he filed a direct appeal in which he claimed that the trial court improperly denied his motion to suppress. In that appeal, the

petitioner acknowledged "that, because the statements concerned offenses for which he was not yet represented by counsel, they were admissible with respect to the charges stemming from the Norwalk and Greenwich robberies at the time of his trial on those charges. He claim[ed], however, that, because the trial court granted the state's motion for joinder and tried the charges in all three cases in a single proceeding, the incriminating statements could have invited the jury to infer that, if the [petitioner] had committed the Norwalk and Greenwich robberies, he was likely to have committed the Stamford robbery." *State* v. *Leconte*, supra, 320 Conn. 505. By its terms, this appellate claim related solely to a challenge to the conviction of charges arising out of the Stamford robbery and did not attack his conviction of the charges relating to the Norwalk and Greenwich robberies.

Our Supreme Court rejected the petitioner's claim on the ground that, even if it assumed, without deciding, that the trial court improperly denied his motion to suppress, any error was harmless beyond a reasonable doubt because "the evidence of the [petitioner's] guilt [with respect to the Stamford robbery], even without the testimony of Simmons regarding the Norwalk and Greenwich robberies, is so overwhelming and compelling . . . ." Id., 506. As the court stated: "[T]he [petitioner] voluntarily gave a detailed statement to the police one day after the Stamford robbery confessing to his role in that incident and . . . another fellow inmate, Cheikh Seye, testified that the [petitioner] had told him in July, 2010, that he had committed the Stamford robbery. Four eyewitnesses also gave testimony regarding the Stamford robbery that corroborated the [petitioner's] description of events inside the store, and two of the eyewitnesses who had chased him down the street following the robbery not only corroborated the

[petitioner's] account of many of his actions after running out of the store but saw him apprehended by the police when he was still wearing the stocking to conceal his face. Accordingly, we conclude that the [petitioner's] convictions resulting from his participation in the Stamford robbery should not be reversed because any presumed error by the trial court in admitting the incriminating statements was harmless beyond a reasonable doubt." Id., 507.

In this habeas proceeding, the petitioner asserted that his trial counsel failed to investigate adequately his history of mental disease. The petitioner did not call his trial counsel as a witness at trial and, thus, did not present evidence regarding the scope of Phillips' investigation or the strategic choices counsel made in preparing a defense.

On the basis of the evidence presented, the habeas court made the following findings of fact with respect to this claim: "On or about April 28, 2011, the trial court, *Comerford*, *J.*, ordered that the petitioner be examined for his competency to stand trial pursuant to General Statutes § 54-56d. The petitioner subsequently was found competent to stand trial. Attorney Phillips filed several defense motions heard by the court, *White*, *J.*, on May 17, 2012. The defense motions focused on three claims: first, that Simmons was an agent of the police and that the petitioner was in custody and interrogated in violation of the fifth amendment; second, that the petitioner's sixth amendment right to counsel was violated because he had only been arrested for the Stamford robbery, and his counsel in that matter was not present; and third, that the petitioner's right to due process was violated because his statements to Simmons, allegedly an undercover police agent, were coerced. The petitioner testified in support of these claims at the May 17, 2012 hearing, but the motions were denied.

* * *

"[Dr. Tobias Wasser, an assistant professor at the Yale University School of Medicine and medical director at the Whiting Forensic Hospital, who has worked with the Department of Correction [department] since 2014, and is board certified in forensic psychiatry] reviewed the petitioner's mental health records, competency evaluation, and a report that was prepared by Dr. Eric Frazer, a mental health professional affiliated with Yale University, presumably at the request of Attorney Phillips during the pendency of the underlying criminal case. Dr. Wasser testified that, in 2010–2011, the petitioner was diagnosed with schizophrenia and schizoaffective disorder, both of which are serious mental illnesses. Symptoms of schizophrenia include hallucinations, delusions, paranoia, experiencing stimuli that are not present, and disorganization of thinking and/or behavior. There are two types of schizoaffective disorder: bipolar and depressive. Schizophrenia and schizoaffective disorder are treated with a combination of therapy and antipsychotic medications. If no medications are administered, according to Dr. Wasser, then someone suffering from schizophrenia and/or schizoaffective disorder will relapse. In the petitioner's case, he has not relapsed after the antipsychotic medications were stopped. The petitioner in 2010–2011 was also diagnosed with borderline functioning IQ, antisocial personality disorder, and post-traumatic stress disorder. The report from Dr. Frazer concluded that the petitioner's mood dysregulation, auditory hallucinations and additional psychiatric symptoms were secondary to his drug dependency. Dr. Frazer further concluded that a review of the petitioner's medical records did not support a finding that the petitioner suffered from a thought disorder. Instead, the report concluded that the symptoms exhibited by the petitioner were

consistent with the conclusion that the petitioner was malingering.

"While the review of these documents provided an informative background history, Dr. Wasser did not conduct his own evaluation of the petitioner because a present day evaluation would not be fruitful to examining the petitioner's mental health in 2010. Dr. Wasser was not presented as an expert on the petitioner's mental health and provided no opinion as to how the petitioner's mental state affected the voluntariness of the statements to Simmons.

* * *

"[T]he petitioner's medical records entered into evidence show that . . . while in [the department's] custody, [he] was diagnosed with various mental health conditions. Records dated 2014 reflect that he was diagnosed with impulse control disorder and antisocial personality disorder. Another record dated 2013 shows that [the] petitioner was diagnosed with adjustment disorder. A mental health assessment dated 2011 indicates that the petitioner's mental health history included schizoaffective disorder, impulse control, and anxiety. Yet another record from December of 2011 indicates that the petitioner was diagnosed with substance induced psychosis and borderline intellectual functioning.

"In July, 2011, a psychological evaluation concluded that the petitioner, despite his intellectual limitations, intentionally feigned impairment. This evaluation noted that the petitioner's scores indicated he is intentionally attempting to present himself in a negative light. His response pattern on the validity measure indicates he feigns illness on all clinical domains assessed, including affective disorders, memory deficits, neuropsychological impairment, low intelligence and psychosis, suggesting his overall cognitive abilities likely fall much

higher than the demonstrated [e]xtremely [l]ow range of cognitive abilities.

"The petitioner's mental health and treatment records span several hundreds of pages and encompass years prior to 2010 and thereafter. The foregoing references to specific diagnoses, although not exhaustive, illustrate the wide range of mental health issues affecting the petitioner at various times, including the two days Simmons wore a recording device to capture the petitioner's incriminating statements." (Footnote omitted; internal quotation marks omitted.)

In discussing the petitioner's arguments that trial counsel rendered deficient performance related to the petitioner's mental health, the court stated: "Although the petitioner was affected by various mental health issues while in [the department's] custody, these mental health issues varied over time. The evidence presented to this court fails to prove how he was impacted, if at all, by such illnesses when Simmons recorded the petitioner. As the testimony from Dr. Wasser and the [department's] medical records show, the petitioner was found to be malingering, which calls into question the varying diagnoses listed in the petitioner's [department] medical records. The fact that the petitioner has not experienced a relapse when he stopped receiving medications to treat schizoaffective disorder underscores the tenuous reliability of past diagnoses. This tenuousness is further amplified by attempts to assess the petitioner's mental health about a decade after the relevant dates at issue."

On the basis of its factual findings, the habeas court reached the following conclusions: "The [testimony presented] fail[s] to show that Attorney Phillips failed to investigate the petitioner's mental illnesses and consult with a doctor. First, the evidence establishes that the

petitioner's mental health was explored, as demonstrated by the report of Dr. Frazer. Second, [because] Attorney Phillips did not testify at the habeas trial, there is no evidence affirmatively proving that Attorney Phillips made tactical or strategic decisions that were unreasonable, deficient, or below the standard of reasonably competent criminal defense counsel. More importantly, the petitioner has not proven what it is exactly that he alleges Attorney Phillips should have done and how that would have made a difference in the outcome of the suppression hearing or the jury's verdict.

"There is no evidence that the petitioner's statements to Simmons were not knowing, intelligent, and voluntary. . . . It is well established that counsel is presumed to have rendered effective [assistance] unless deficient performance is affirmatively proven. . . . Furthermore, the petitioner has not presented any evidence that shows how his mental health affected, if at all, the voluntariness of his statements to Simmons. Even if the court assumes for the sake of discussion that the petitioner had mental illnesses, that alone would not prove that such mental illnesses resulted in the petitioner's statements to Simmons being coerced, involuntary, unreliable or factually untrue. The petitioner has therefore failed to rebut this strong presumption of effective assistance with evidence proving that Attorney Phillips performed deficiently.

"In addition, the petitioner cannot prove that he was prejudiced by any failure of Attorney Phillips to properly put before the trial judge and the jury his mental illnesses. As recounted previously, a reading of the transcript makes clear that the evidence against the petitioner was overwhelming even when removing his statements to Simmons from the equation. There were several other individuals to whom the petitioner admitted, or alluded to, his involvement in the offenses charged, and corroboration of the state's version of

events was provided by independent, impartial witnesses as well as through other evidence submitted to the jury. There is simply no basis from which this court can conclude that the petitioner was prejudiced."

We begin our analysis of the petitioner's first claim with a review of the law governing claims of ineffective assistance of counsel and the corresponding appellate standard of review. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Citations omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849–50, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017). On appeal, "[a]lthough the underlying historical facts found by the habeas court

may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard [of review]." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 469–70, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013).

The petitioner, in his brief on appeal, does not challenge any of the habeas court's underlying factual findings as clearly erroneous. Nor does he claim that the habeas court applied an incorrect legal standard. Instead, the petitioner simply asserts that the habeas court "overlooked the evidence" or should have drawn certain inferences in his favor from the evidence presented. This assertion is devoid of merit.

It is well established that it is the petitioner's burden to prove that his trial counsel's performance was deficient and that he was prejudiced by that deficient performance. *Strickland* v. *Washington*, supra, 466 U.S. 687. "We . . . are mindful that [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is

strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"Similarly, the United States Supreme Court has emphasized that a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he or she] did." (Citations omitted; internal quotation marks omitted.) *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 796–97, 198 A.3d 630 (2018), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019).

The petitioner, however, did not call his trial counsel or any other witness to testify at the habeas trial regarding the extent of the investigation conducted by counsel into the petitioner's mental health problems. Moreover, the petitioner, who testified at the habeas trial, was not asked about whether he had had any discussions with or had provided any information to his criminal trial counsel regarding the state of his mental health at the time he made his inculpatory statement to Simmons. As a result, there simply is no evidence in the record regarding the scope of his trial counsel's investigation into the petitioner's mental health or the strategic reasons, if any, why his trial counsel believed that such an investigation was not warranted under the circumstances. At best, the record supports an inference that the petitioner's trial counsel was aware of Frazer's report in which the petitioner was described as malingering, and that he realized that it could have been counterproductive to the petitioner's case to expose the jury to such information.

Similarly, there was a dearth of evidence presented at the petitioner's habeas trial regarding whether the petitioner's mental health issues would have impacted the voluntariness of the inculpatory statement he made

to Simmons to the extent that the trial court would have suppressed it. We agree with the habeas court's recognition that, simply because the petitioner suffered from some mental health issues does not establish, by itself, that those issues undermine the voluntariness or reliability of the inculpatory statement he made to Simmons. See, e.g., *State* v. *DeAngelis*, 200 Conn. 224, 235, 511 A.2d 310 (1986) (admissions to police are not rendered involuntary merely because defendant suffered from psychiatric disorder).

We emphasize that the petitioner does not claim that any of the factual findings made by the habeas court are clearly erroneous. Instead, the petitioner's assertion is simply that the habeas court should have credited other evidence or drawn certain inferences from certain evidence that he presented. This assertion, of course, conflicts with our long-standing recognition that it is not the province of an appellate court to retry the facts, or to pass on the credibility of witnesses or the weight to be accorded their testimony. *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 220–21, 435 A.2d 24 (1980). Accordingly, we decline the petitioner's invitation to do so.

Finally, we decline to review because of inadequate briefing the petitioner's related assertion that, even if the additional evidence regarding the petitioner's mental health would not have resulted in suppression of the inculpatory statement, it was necessary to "effectively cross-examine the state's witnesses in order to discredit their testimony about the recorded statements." "Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . . As a general matter, the dispositive question in determining whether a claim

is adequately briefed is whether the claim is reasonably discernible [from] the record . . . . 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." (Internal quotation marks omitted.) *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 578–79, 211 A.3d 72, cert. denied, 333 Conn. 902, 215 A.3d 160 (2019).

The petitioner's brief on appeal does not state which witnesses he would have cross-examined regarding the voluntariness of his inculpatory statement, the substance of those witnesses' testimony, or how the additional evidence that Phillips allegedly failed to find would have served to impeach these witnesses' testimony. Additionally, the petitioner's brief is devoid of citations to the record or the transcript of the criminal trial bearing on this issue. We therefore decline to review his claim and conclude that the habeas court properly concluded that the petitioner failed to demonstrate that he suffered constitutionally ineffective assistance from his trial counsel.

II

The petitioner also claims that the habeas court improperly concluded that he failed to demonstrate that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal a claim that the trial court improperly granted the state's motion to join the charges arising out of three separate robberies. We decline to review this claim because of inadequate briefing.

The following additional facts and procedural history are relevant to this claim. Prior to the commencement of the petitioner's criminal trial, the state moved to join the charges arising out of the Norwalk, Greenwich, and

Stamford robberies. The state asserted that the motion should be granted because, pursuant to the standard discussed in *State* v. *Payne*, 303 Conn. 538, 549–50, 34 A.3d 370 (2012), certain evidence in each case was cross admissible in the other cases, and each crime was of substantially similar severity. Specifically, as to cross admissibility, the state asserted that evidence would tend to demonstrate that the gun used by the petitioner in the Greenwich robbery was the same gun that he had used in the Stamford robbery, pieces of which were recovered by the police near the scene of the crime in Stamford. The state also asserted that the multiple informants would testify that the petitioner admitted to all three crimes.

The petitioner objected to the motion for joinder on the grounds that (1) the crimes in the three cases were not of the same severity because only the Norwalk robbery resulted in the death of a store clerk, (2) the cases involved different witnesses, and (3) there was no evidence that the gun used by the shooter in the Norwalk and Greenwich robberies was the same.

After reviewing the parties' briefs and hearing oral argument, the trial court granted the state's motion for joinder. The court found that the petitioner would not be prejudiced by joinder and that some evidence from each case was cross admissible in the other cases. Specifically, the court stated that "[t]hese crimes are all connected via either physical evidence or inculpatory admissions made by the [petitioner]."

The petitioner, represented by Foster, subsequently appealed his conviction in this case. Foster did not raise a claim on appeal that the trial court improperly granted the state's motion for joinder. Our Supreme Court affirmed the judgments of conviction. *State* v. *Leconte*, supra, 320 Conn. 519.

At his habeas trial, the petitioner did not call Foster as a witness to explain why he chose not to raise the joinder issue on appeal or why he chose to focus on the issues he did in fact raise on direct appeal. The petitioner did call an expert witness, Attorney Frank Riccio, to testify about issues that included joinder, but Riccio did not opine on the reasonableness of the decision by Foster not to challenge the court's ruling regarding joinder.

On the basis of this dearth of evidence, the habeas court concluded that the petitioner had failed to demonstrate deficient performance by Foster or that he had been prejudiced by Foster's decision not to raise the issue of joinder on appeal. Specifically, the habeas court noted the lack of evidence regarding Foster's strategic considerations in choosing to raise issues other than joinder and, thus, concluded that the petitioner had failed to overcome the well established presumption that counsel's decision was a reasonable strategic determination that falls within the bounds of competent performance. Additionally, the habeas court concluded that, because of the cross admissibility of evidence in the three cases, the petitioner failed to demonstrate a reasonable probability that the outcome of the appeal would have been different if Foster had raised the joinder issue on appeal.

The standard of review applicable to the habeas court's determinations regarding whether the petitioner received ineffective assistance from his appellate counsel is identical to the standard of review discussed in part I of this opinion regarding trial counsel, and we need not repeat it here. With respect to ineffective assistance claims brought against appellate counsel, this court recently stated: "The two-pronged test set forth in *Strickland* equally applies to claims of ineffective assistance of appellate counsel. . . . Although appellate counsel must provide effective assistance, he [or

she] is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . . Most cases present only one, two, or three significant questions. . . . The effect of adding weak arguments will be to dilute the force of stronger ones. . . . Finally, [i]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation. . . . To establish that the petitioner was prejudiced by appellate counsel's ineffective assistance, the petitioner must show that, but for the ineffective assistance, there is a reasonable probability that, if the issue were brought before us on direct appeal, the petitioner would have prevailed. . . . To ascertain whether the petitioner can demonstrate such a probability, we must consider the merits of the underlying claim." (Citations omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 354–55, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020).

We next briefly review the law of joinder of criminal charges. "[W]hen charges are set forth in separate informations, presumably because they are not of the same character, and the state has moved in the trial court to join the multiple informations for trial, the state bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. The state may satisfy this burden by proving, by a preponderance of the evidence, either that the

evidence in the cases is cross admissible or that the defendant will not be unfairly prejudiced pursuant to the *Boscarino* factors."[2] (Footnote omitted.) *State* v. *Payne*, supra, 303 Conn. 549–50.

"Importantly, although our Supreme Court rejected the presumption in favor of joinder, the court did not alter the remainder of the substantive law that Connecticut courts apply when determining whether joinder is appropriate. . . . In determining whether joinder is appropriate, it is well established that where the evidence in one case is cross admissible at the trial of another case, the defendant will not be substantially prejudiced by joinder. . . . Our case law is clear that a court considering joinder need not apply the *Boscarino* factors if evidence in the cases is cross admissible." (Citations omitted; internal quotation marks omitted.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 680–82, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019).

On appeal, the petitioner claims that the habeas court improperly rejected his claim of ineffective assistance of appellate counsel because application of the *Boscarino* factors to the facts and circumstances of this case demonstrates that he was substantially prejudiced by the joinder of his three cases. The petitioner, in his brief on appeal, however, fails to recognize that application of the *Boscarino* factors is unnecessary if evidence

[2] "In *State* v. *Boscarino*, [204 Conn. 714, 722–24, 529 A.2d 1260 (1987)], our Supreme Court first articulated the factors that a trial court must consider when deciding whether it is appropriate to join . . . separate yet factually related cases for trial *when evidence in the cases is not cross admissible.* The court determined that joinder of such cases is unduly prejudicial to the defendant and, thus, improper, if (1) the cases do not involve discrete, easily distinguishable factual scenarios, (2) the crimes in the cases were of a particularly violent nature or concerned brutal or shocking conduct on the defendant's part, and (3) the trial was lengthy and complex." (Emphasis added.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 679 n.5, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019).

from the joined cases is cross admissible or to discuss substantively why the evidence in the three cases was not cross admissible. Indeed, the petitioner's brief contains no discussion, analysis or application of any of the evidentiary principles that would dictate whether certain evidence in one case would be cross admissible in the other cases. See *Villafane* v. *Commissioner of Correction*, supra, 190 Conn. App. 579 (appellate courts are not required to review issues improperly presented through inadequate briefing). Specifically, the petitioner's brief does not analyze the cross admissibility of the inculpatory statements he made to various informants regarding his participation in all three robberies or the ballistics evidence that tended to show that the gun he used in, and that was recovered from, the Stamford robbery was also used to shoot the victim in the Greenwich robbery. Because the petitioner has failed to brief this issue, it is unnecessary to consider the arguments he makes regarding application of the *Boscarino* factors. Accordingly, we decline to review his claim that the habeas court improperly concluded that he failed to demonstrate ineffective assistance of appellate counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DEJA PASCHAL
(AC 43270)

Elgo, Cradle and Suarez, Js.

Syllabus

Convicted of attempt to commit assault of public safety personnel, the defendant appealed to this court. At a pretrial hearing, the defendant informed the trial court that he was dissatisfied with the representation provided by his public defender and requested that he be able to proceed as a self-represented party. The trial court determined that the defendant was mainly concerned with the speed at which the proceedings were progressing, denied the request without prejudice, asked the defendant

to give defense counsel another chance to effectively represent him, and told the defendant that he could reassert his request at a later time. Approximately four months later, at another pretrial hearing, the defendant again indicated that he was frustrated with his defense counsel and the speed of the proceedings. He asked the trial court if he could have new counsel and then stated that he was reasserting his sixth amendment right to self-representation. The trial court told the defendant that he needed to file a motion if he wanted to represent himself. The defendant did not file such a motion and defense counsel continued to represent him without additional complaint until approximately nine months later, when the defendant personally filed several motions. During a hearing on the defendant's motion for the removal of appointed counsel and appointment of new counsel, the defendant again asserted that his requests for self-representation and for new counsel were wrongfully denied. He asked for the appointment of a special public defender to replace defense counsel, and he further indicated that he would not object to the appointment of new counsel. Thereafter, new counsel was appointed and the trial proceeded without the defendant making any additional requests for self-representation. *Held*:

1. The defendant could not prevail on his claim that the trial court deprived him of his right to self-representation because the defendant waived that right: the trial court did not conclusively deny the defendant's initial in-court request for self-representation, as it explicitly denied the defendant's request without prejudice, granted a short continuance to provide defense counsel with additional time to obtain the evidence that the defendant was seeking, and told the defendant that he could reassert his right at any point in the future; moreover, the defendant's second in-court request for self-representation did not constitute a clear and unequivocal request, as was required to invoke the right, because it was intertwined with a request for new counsel, and the trial court expressly advised the defendant that he could file a motion if he wished to proceed as a self-represented party; furthermore, the defendant's requests set forth in his motions did not reflect clear and unequivocal assertions of the right to self-representation, as he made simultaneous requests to represent himself and for the appointment of new counsel, and the defendant explicitly told the trial court at the hearing on his motion for the removal of appointed counsel and appointment for new counsel that he would not object to the appointment of new counsel.
2. The defendant's claim that the trial court abused its discretion by admitting evidence of his prior uncharged conduct was not reviewable, the defendant having waived that claim at trial: the defendant was precluded from claiming that the trial court erred by admitting such evidence because, during the hearing on the defendant's motion to preclude evidence, defense counsel conceded that the prior instances of uncharged conduct were relevant for showing intent, motive, and a common scheme and suggested that a limited number of the instances were admissible,

and because defense counsel failed to object to any of the evidence of prior instances of misconduct at trial.

Argued March 2—officially released September 7, 2021

Procedural History

Substitute information charging the defendant with three counts of the crime of assault of public safety personnel and one count of the crime of attempt to commit assault of public safety personnel, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty of attempt to commit assault of public safety personnel, from which the defendant appealed to this court. *Affirmed.*

Laura Marie Hamilton, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Jason Germain*, senior assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Deja Paschal,[1] appeals from the judgment of conviction, rendered following a jury trial, of one count of attempt to commit assault of public safety personnel in violation of General Statutes §§ 53a-49 (a) (2) and 53a-167c (a) (5). On appeal, the defendant claims that the trial court (1) violated his constitutional right to self-representation and (2) erred by allowing the state to present evidence of uncharged misconduct. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On December 5, 2016, the defendant was incarcerated at Garner Correctional Institution. While making

[1] The defendant is now known as Kyle Lamar Paschal-Barros.

a routine inspection of the facility, Correction Officer Christopher Byars noticed that the window of the defendant's cell door had been covered with toilet paper, obstructing the officers' view of the cell. Because obstructing the officers' view of the cell is against the facility's regulations, Byars told the defendant to immediately remove the toilet paper. The defendant did not comply and Byars contacted his supervisor, Captain Thomas Kenny, to assist. On arriving, Kenny told the defendant to uncover the window. Although the defendant initially threatened to continue covering his window, the defendant removed the toilet paper.

Approximately fifteen minutes later, Byars again found the defendant's window covered with toilet paper. Byars contacted Kenny again, who told the defendant to remove the covering. When the defendant refused, Kenny determined that the defendant should be moved to a high security cell for additional supervision. In accordance with the facility's regulations, Correction Officers Byars, Anthony Blekis, Anthony Kacprzyski, John Reyes, and Peter Swan assisted in moving the defendant while Officer William Galpin videotaped the move. After the defendant was transferred, the officers conducted a strip search and attempted to apply in cell restraints to secure the defendant's ankles and hands in front of his body. While the officers were attempting to secure the defendant, he threatened to spit on them and loudly sucked in saliva. As a result of this threat, the officers covered the defendant's mouth and put a mesh safety veil designed to block the passage of saliva on his head. The defendant spit, striking two of the officers through the safety veil. The saliva struck Kacprzyski in the face and Blekis on the arms.

The defendant was charged with two counts of assault of public safety personnel in violation of § 53a-167c (a) (5); one count of assault of public safety personnel in violation of § 53a-167c (a) (3); and one count

of attempt to commit assault of public safety personnel in violation of §§ 53a-49 (a) (2) and 53a-167c (a) (5). Following a trial, a jury acquitted the defendant of the three assault counts but convicted him of attempt to commit assault of public safety personnel. On May 21, 2019, the court, *Pavia*, *J.*, sentenced the defendant to a total effective sentence of seven years of incarceration, execution suspended after three years, followed by five years of probation, to run consecutive to the defendant's existing sentence in an unrelated matter. This appeal followed.

I

The defendant first argues that the court deprived him of his right to self-representation when it improperly denied his clear and unequivocal request to represent himself without canvassing him regarding the waiver of the right to counsel. We are not persuaded.

The following legal principles guide our analysis of the defendant's claim. "The sixth amendment to the United States constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense. The sixth amendment right to counsel is made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . . In *Faretta* v. *California*, [422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)] the United States Supreme Court concluded that the sixth amendment [also] embodies a right to self-representation and that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. . . . In short, forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. . . .

"It is well established that [t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them. When the right to have competent counsel ceases as the result of a sufficient waiver, the right of self-representation begins. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel. . . .

"The inquiry mandated by Practice Book § 44-3 is designed to ensure the knowing and intelligent waiver of counsel that constitutionally is required. . . . We ordinarily review for abuse of discretion a trial court's determination, made after a canvass pursuant to . . . § 44-3, that a defendant has knowingly and voluntarily waived his right to counsel. . . . In cases . . . however, where the defendant claims that the trial court improperly failed to exercise that discretion by canvassing him after he clearly and unequivocally invoked his right to represent himself . . . whether the defendant's request was clear and unequivocal presents a mixed question of law and fact, over which . . . our review is plenary. . . .

"State and federal courts consistently have discussed the right to self-representation in terms of invoking or asserting it . . . and have concluded that there can be no infringement of the right to self-representation in the absence of a defendant's proper assertion of that right. . . . The threshold requirement that the defendant clearly and unequivocally invoke his right to proceed [as a self-represented party] is one of many safeguards of the fundamental right to counsel. . . . Accordingly, [t]he constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner. . . . In the

absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no independent obligation to inquire into the defendant's interest in representing himself . . . . [Instead] recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court. . . . Conversely, once there has been an unequivocal request for self-representation, a court must undertake an inquiry [pursuant to Practice Book § 44-3], on the record, to inform the defendant of the risks of self-representation and to permit him to make a knowing and intelligent waiver of his right to counsel. . . .

"Although a clear and unequivocal request is required, there is no standard form it must take. [A] defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to [that] request. Insofar as the desire to proceed [as a self-represented party] is concerned, [a defendant] must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made. . . . Moreover, it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious; *rather*, *the dialogue* between the court and the defendant must result in a clear and unequivocal statement. . . .

"Finally, in conducting our review, we are cognizant that the context of [a] reference to self-representation is important in determining whether the reference itself was a clear invocation of the right to self-representation. . . . The inquiry is fact intensive and should be based on the totality of the circumstances surrounding the request . . . which may include, inter alia, whether the request was for hybrid representation . . . or

merely for the appointment of standby or advisory counsel . . . the trial court's response to a request . . . whether a defendant has consistently vacillated in his request . . . and whether a request is the result of an emotional outburst . . . ." (Emphasis altered; internal quotation marks omitted.) *State* v. *Pires*, 310 Conn. 222, 230–32, 77 A.3d 87 (2013).

"When a defendant's assertion of the right to self-representation is not clear and unequivocal, recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court. . . . In the exercise of that discretion, the trial court must weigh into the balance its obligation to indulge in every reasonable presumption against waiver of the right to counsel." (Citations omitted; internal quotation marks omitted.) *State* v. *Carter*, 200 Conn. 607, 613–14, 513 A.2d 47 (1986). With these principles in mind, we turn to the defendant's claim on appeal.

The defendant claims that he first asserted his right to self-representation in court on May 4, 2017. During that court appearance, Assistant Public Defender Thomas Leaf appeared on the defendant's behalf and informed the court, *Shaban*, *J.*, that the defendant wanted to represent himself. The following colloquy took place between the court, defense counsel, and the defendant:

"[Attorney Leaf]: I . . . went to see [the defendant]. He refused to speak with me this morning and informed me through the Marshal Services that he . . . wants to go forward as a self-represented party.

"The Court: All right. Good Morning, sir.

"The Defendant: Good morning, Your Honor. We've been back to this court four times since arraignment. Attorney Leaf has not [come] for an initial interview. Attorney Leaf has failed to get the required police

reports. He has failed to obtain the video from the state prosecution. He has done nothing to assist me in my case. He's currently ineffective. I'd like to proceed pro se."

The court then asked Leaf about the status of his file and whether he had received any discovery materials. Leaf explained that he had received the police reports but was waiting to receive the video recording from the state depicting the incident. The defendant indicated that he wanted to pursue "contempt of court" because the state had not turned over the video recording, but his attorney had told him that he would file a motion to compel. The court then addressed the defendant concerning the reason for his stated desire to represent himself and said, "I assume that, by wanting to represent yourself, you believe that you'll be able to dispose of this case more quickly than it has gone up to this point. Is that a fair assumption?" The defendant answered, "[T]hat is correct . . . ." The defendant complained that the state did not have evidence to sustain an assault charge and that his attorney had not filed a motion to dismiss. The court explained to the defendant that his case will not move any faster if he proceeds as a self-represented party because he needs access to the evidence and the state has to give him the video recording of the incident. Therefore, the court stated that Leaf has "a history of working with the state's attorney's office and I think that he can effectively represent you in this matter. And so, at this point, I am—I'm going to deny your request to represent yourself without prejudice, meaning you can—you can make the request again down the road. I want to give Mr. Leaf one more opportunity here, at least, to see if he can get his hands on the tape and effectively represent you in the matter and try and achieve the goals that you're trying to achieve . . . ." The defendant pre-

served his objection on the record and the court granted the defendant a continuance of one week.[2]

On appeal, the defendant argues that he clearly and unequivocally requested to represent himself, that the court abused its discretion in failing to canvass him, and that he was, therefore, deprived of his constitutional right to self-representation. The state argues, however, that the court's subsequent inquiry revealed that the defendant may simply have been expressing frustration with his attorney and not necessarily invoking his right to represent himself. Assuming, without deciding, that the defendant's statement during his dialogue with the court on May 4, 2017, constituted a clear and unequivocal request to represent himself, we conclude that the court did not conclusively deny that request and that the defendant subsequently waived it.

"[W]hen a trial court *has not* clearly and conclusively denied a defendant's request to represent himself, the defendant may subsequently waive such a request. But, when a court has clearly and conclusively denied the request, the defendant does not waive his right to self-representation by subsequently acquiescing in being represented by counsel or by failing to reassert that right." (Emphasis added.) *State* v. *Braswell*, 318 Conn. 815, 843–44, 123 A.3d 835 (2015).

In reaching this conclusion, our Supreme Court relied on the decision of the United States Court of Appeals for the Second Circuit in *Wilson* v. *Walker*, 204 F.3d 33 (2d Cir.), cert. denied, 531 U.S. 892, 121 S. Ct. 218, 148

[2] During the next hearing on May 11, 2017, Leaf stated to the court, "Your Honor, just having discussions with my client this morning I've come to the conclusion that I have to make a motion under [General Statutes §] 54-56d to have [the defendant's] competency evaluated to determine whether or not he understands the proceedings against him or whether or not he can assist with his defense." On May 16, 2017, the court ordered an examination of the defendant's competency. The defendant was found competent to stand trial and appeared before the court again on July 6, 2017.

L. Ed. 2d 155 (2000). In *Wilson*, the Second Circuit held: "Whether or not [the trial court's] ruling . . . could be construed as a clear denial of Wilson's request to proceed [as a self-represented party] . . . it is apparent that both Wilson and [the trial court] considered the matter still open for discussion . . . . [I]n the absence of additional evidence, we are unwilling to assume that a renewal of Wilson's request would have been fruitless. . . . In view of the fact that there were two subsequent changes in the attorney appointed to represent Wilson and the question of self-representation was left open for possible further discussion, we conclude that Wilson's failure to reassert his desire to proceed [as a self-represented party] constituted a waiver . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 38.

The same reasoning applies to the present case. It is clear from the record that both the defendant and the court considered the matter of the defendant's representation still open for discussion. Although the court did not canvass the defendant in accordance with Practice Book § 44-3, it nonetheless asked the defendant what motivated his desire to represent himself, to which the defendant stated that he wanted to expedite the matter because he believed the state had no evidence on which to proceed. The court addressed the concern by explaining to the defendant that his attorney needed to obtain the video recording of the incident from the state in order to determine whether to file a motion to dismiss the charges. The court then denied the defendant's request *without prejudice* and granted a continuance of just one week to afford Leaf the opportunity to obtain the video from the state in accordance with the defendant's goals. The court did not advise the defendant that he would need to provide additional facts in support of his request if he reasserted it at a later time. Cf. *State* v. *Braswell*, supra, 318 Conn. 845

(trial court's denial was conclusive where court "conditioned its willingness to reconsider its ruling on seeing some additional support for the motion" (internal quotation marks omitted)). Because the court denied the defendant's request without prejudice, granted a short continuance to permit the defendant to obtain a critical piece of evidence that he was seeking, and explicitly told the defendant that he could reassert this right at any point in the future, his request was not conclusively denied.

The defendant contends that, even if his request to represent himself was not clearly and conclusively denied on May 4, 2017, he did not waive that right because he subsequently reasserted it in a clear and unequivocal manner. Specifically, the defendant claims that he also invoked his right to represent himself during a hearing on September 1, 2017, in four motions that he filed in June and July, 2018, and in another court hearing on July 19, 2018. After carefully considering the events on which the defendant relies, we disagree.

The record reveals that, during a proceeding on September 1, 2017, Leaf represented to the court, *Hon. Susan S. Reynolds*, judge trial referee, that he had received the video recording from the state but, because of his schedule, he had not yet reviewed it with the defendant. He requested a continuance until October 4, 2017, to afford him time to review it with the defendant. Following Leaf's request, the defendant indicated that he was frustrated that Leaf was requesting a lengthy continuance and further complained that Leaf did not file a motion to dismiss the charges. The defendant stated to the court, "[I]t's quite clear he has a lengthy case load. I need a new counsel, Your Honor." The defendant again maintained that a motion to dismiss should have been filed because the state did not have any evidence to prosecute him. The following colloquy between the defendant and the court ensued:

"The Defendant: Can I have new counsel? . . .

"The Court: [W]hen a defendant comes into this court, says he can't afford counsel, he would like me to appoint counsel for him, I do so. You happen to have one of the most competent attorneys that I appoint for defendants. . . . If you want to make a motion to have Attorney Leaf removed, you're free to do that and at the end of such a hearing, the court may remove Attorney Leaf or may order him to stay. I will tell you that this is not Stop & Shop. We don't try out one product, not like it, return it and pick another. I appointed you an extremely competent attorney. . . . If you don't want Attorney Leaf, that is your prerogative. Your other prerogative is to accept the attorney I appointed for you, to hire your own attorney or to represent yourself. . . .

"The Defendant: Your Honor, I have . . . asked for pro se and I was denied by another judge. I have asked—

"The Court: Okay. Well, then that's the end of that.

"The Defendant: —I would like to reassert that. I would like to reassert my sixth amendment right.

"The Court: You do—file whatever motions you feel appropriate. You will file a motion. . . . If you want to be pro se, file a motion. Whatever judge considered it the first time will reconsider it."

Following that dialogue, there was a discussion on the record as to which judge the defendant had previously appeared. The court then reiterated: "Well, file a motion if you want to represent yourself, and then whatever judge it comes in front of will consider it in light of that. . . . But you've got to file a motion. I can't put a motion down that doesn't exist. You tell me you want an earlier date, but I don't have a motion in the file. I can't put anything down that isn't in the file." Leaf then indicated that he would show the defendant the video prior to the next court date.

As the previous statements reflect, during the proceeding on September 1, 2017, the defendant twice requested that a new attorney be appointed. Those requests were based on his stated frustration with Leaf. After the court denied the defendant's requests for the appointment of new counsel, he told the court that he previously had sought to represent himself, that his request was denied, and that he wished to reassert his sixth amendment right to represent himself.

Because the defendant's statements concerning self-representation were intertwined with a request for new counsel, they were equivocal. As stated previously, "[i]t is well established that [t]he right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them." (Internal quotation marks omitted.) *State* v. *Pires*, supra, 310 Conn. 230. In viewing the dialogue in its entirety, in which the defendant requested both the appointment of new counsel and to represent himself, we conclude that the defendant did not clearly and unequivocally assert his right to represent himself. See *State* v. *Carter*, supra, 200 Conn. 614 ("[a] trial court, faced with the responsibility of reconciling a defendant's inherently inconsistent rights to self-representation and to counsel, is entitled to await a definitive assertion of a request to proceed [as a self-represented party]").

We also note that the court did not consider the defendant's assertion to be a clear and unequivocal request to proceed as a self-represented party. In an effort to accommodate the defendant's request, the court expressly advised the defendant that, if he wished to proceed as a self-represented party, he would be required to file a motion for that purpose and that it would be docketed specifically for a hearing before the

judge he appeared before on May 4, 2017. The defendant did not file a motion, thus, we conclude that the defendant waived his right to represent himself by "remaining silent in the face of the court's express invitation to reassert his right to self-representation." *State* v. *Braswell*, supra, 318 Conn. 843.[3]

The record reflects that from September, 2017 to May, 2018, Leaf continued representing the defendant in pretrial proceedings without further complaint from the defendant. During June and July, 2018, the defendant personally filed four motions. Specifically, on June 11, 2018, the defendant filed a handwritten letter to the clerk of court requesting the court to remove Leaf from his case. The defendant asked for "Attorney Leaf [to] be removed from [his] case and new counsel assigned." On July 2, 2018, the defendant filed a motion to dismiss pursuant to General Statutes § 54-56 and a motion to stay the proceedings, in which he asserted that he does not fully understand criminal trial procedure, the court had deprived him of his right to represent himself, and the court had refused to appoint him new counsel on request. On July 9, 2018, the defendant filed a motion for the removal of appointed counsel and appointment of new counsel in which he asserted that Leaf had provided ineffective assistance throughout the pretrial proceedings. The defendant also expressed that his "mental instability is overwhelming" as a result of a change in his medication regime.

Our careful review of these motions leads us to conclude that they did not reflect a clear and unequivocal

[3] On September 1, 2017, Judge Reynolds continued the defendant's case to September 13, 2017, but the record reflects that the defendant did not appear before the court because he had already been transported back to the correctional facility in which he was incarcerated. Leaf represented on the record that he had visited him at the correctional facility on the previous day and that both he and the defendant had been under the impression that the defendant's next court date was October 4, 2017, so the court continued the case to that date. No motions had been filed by the defendant.

assertion of the right to self-representation. Although in one of the motions, the defendant referred to the fact that the court had not permitted him to represent himself, the motion cannot reasonably be construed as a renewal of a request to represent himself. To the contrary, the motions set forth requests for the appointment of new counsel.

On July 19, 2018, the trial court, *Russo*, *J.*, held a hearing on the motion for removal of appointed counsel and appointment of new counsel. The defendant told the court, "When I asked to go pro se, I was wrongfully denied. When I asked for new appointment of counsel, I was wrongfully denied. I'm being forced with counsel with—without being requested for it. Nowhere in the world does it say I have to take counsel." Leaf told the court that he thinks "to . . . remain as [the defendant's] attorney would be to do him a disservice and be violative of his due process rights" and asked the court to appoint a special public defender to replace him based on the breakdown of the attorney-client relationship. The court asked the defendant if he would be objecting if the court removed his attorney and appointed him a new one, to which he responded, "[N]o." The court also addressed the defendant's mental health and, after hearing from the defendant, noted "I certainly believe as he sits here today in the limited amount of conversation we had that he could assist any attorney in his own defense, and I also believe he understands the charges against him . . . and I also think he can make a knowing and voluntary choice as to whether he would like Mr. Leaf to remain as his counsel." Accordingly, the court granted Leaf's oral motion to withdraw as counsel and ordered the Office of Public Defender Services to appoint a new public defender. At the next appearance, Attorney Jeff Hutcoe appeared on behalf of the defendant and represented

the defendant throughout the trial without any recorded complaint.

At the July 19, 2018 hearing, the defendant referred to the fact that, at a prior time during the proceedings, he had not been permitted to represent himself. This reference to a past ruling, however, cannot be construed as a renewal of an earlier request to represent himself or an expression of a present desire to proceed in a self-represented capacity. Our interpretation of the defendant's remarks is further supported by the fact that, later at that hearing, he explicitly told the court that he would not object to the appointment of new counsel, and new counsel thereafter was appointed without complaint from the defendant.

Because the defendant, in his motions and during the July 19, 2018 court hearing, made simultaneous requests to represent himself and to have a new attorney appointed, these instances are not clear and unequivocal assertions of the right to self-representation. See *State* v. *Pires*, supra, 310 Conn. 231–32. Moreover, during the July 19, 2019 proceeding, he clearly and unequivocally represented to the court that he did not object to having new counsel appointed on his behalf. Accordingly, the defendant was appointed new counsel who represented him throughout his trial, and, we reiterate, he never again asserted the right to self-representation.

To the extent that the defendant claims that he requested to represent himself on May 4, 2017, the court did not conclusively deny that request. During the remainder of the proceedings, the defendant did not clearly and unequivocally reassert the right to self-representation. Accordingly, the defendant waived his right to represent himself.

II

The defendant next claims that the court abused its discretion by admitting evidence of the defendant's

prior uncharged misconduct. The defendant argues that the evidence of uncharged misconduct was inadmissible because it was not relevant to show intent, motive, or the absence of mistake, and that, even if the evidence was relevant, it was unduly prejudicial. Because we conclude that the defendant waived this claim at trial, we decline to reach its merits.

The following additional facts are relevant to the resolution of this claim. On December 7, 2018, the state filed a motion for admission of other crimes, wrongs or acts evidence, seeking to introduce evidence of two past acts; the first occurring in May, 2012, and the second in October, 2013, in which the defendant spat at police and correction officers. On January 2, 2019, the defendant filed a motion in limine seeking to preclude the introduction of the evidence of the defendant's uncharged misconduct on the ground that its prejudicial effect outweighed its probative value.[4] Further, the defendant sought notice from the state regarding whether the state intended to produce any other evidence of uncharged misconduct. On January 22, 2019, the state filed a motion for admission of other crimes, wrongs or acts evidence and, again, gave notice of its intent to introduce evidence of the defendant's uncharged misconduct related to the May, 2012 and October, 2013 incidents in order to "establish intent, motive and state of mind of the defendant."

On February 8, 2019, the court, *Pavia*, *J.*, held a pretrial hearing to address the admissibility of the evidence related to instances of prior uncharged misconduct.[5] At the hearing, defense counsel stated, "I understand there's an argument to be made on relevance,

[4] The defendant filed only one motion in limine to preclude evidence related to these two prior acts.

[5] During the hearing, the parties referred to several additional instances of prior uncharged misconduct and agreed that these instances were "attached to the motion of intent to offer uncharged misconduct."

you know, the case-in-chief, where lack of mistake, intent on spitting, that does not require a door opened . . . . I agree that it's—it's relevant for the state to show that, in the past, [the defendant] has spit . . . because it goes to relevancy on . . . numerous grounds, absence of mistake, intent, motive, all these things. I get that. . . . My concern became more collateral . . . . Now, that . . . could be probably remedied by no one gets to talk about dates. . . . So, if all this stuff comes in just to establish that he will spit, it does tend to paint a bad picture of him. I'm not saying it—it's an unfair painting of it, but it's unfairly prejudicial in the context of a trial . . . . I understand the . . . argument about the need for the state to establish intent through prior incidents of spitting. . . . [M]y argument then became, if there's a limited number, the ones closest in time create the least damage . . . ." The state told the court that it was planning to introduce evidence of the May, 2012 incident, during which the defendant spat at a police officer on the street. Defense counsel responded, "Notwithstanding my concession that a . . . certain amount of them should . . . come in and are relevant, the very—the most salient concern I have is the one that involves a complete outside-of-jail incident [in May, 2012] . . . in the streets of Torrington . . . ." He continued, "[W]hile I say I have no problem with the . . . dates, I'm not saying that I think it should be four or five or six. I think maybe two would be enough for me."

The court asked the state to narrow its request to five prior acts it wanted to produce at trial. Defense counsel did not object to any of these instances other than wanting to limit the total number of past instances admitted and to exclude certain dates. The court found the evidence relating to three prior instances admissible solely to establish intent, motive, and common scheme. The court precluded misconduct evidence relevant to all other incidents, including the May, 2012 incident.

During trial, Correction Officer Michael McLeod testified that, while he was on duty at Northern Correctional Institute, the defendant attempted to spit on him through the safety trap of his cell. Correction Officer Swan testified that, during a prior incident, the defendant spat on Swan's arm. Swan further testified that he covered the defendant's mouth during the incident in question because he was aware that the defendant had a "history" of spitting. During the portion of Swan's testimony regarding the defendant's history, defense counsel stated, "Objection to—we've already discussed it . . . I'll just leave it alone." Additionally, the parties entered a stipulation detailing Correction Officer Tony Vitale's testimony that, on a different occasion while Vitale was collecting trash, the defendant spat in his direction but did not make contact with Vitale.

The defendant now argues on appeal that the trial court erred by admitting the evidence regarding the prior instances of misconduct. The state argues that the defendant waived his objection to the admission of this evidence. We agree with the state.

"[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . In determining waiver, the conduct of the parties is of great importance. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Thus, [w]aiver . . . involves the idea of assent, and assent is an act of understanding." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lynch*, 123 Conn. App. 479, 490, 1 A.3d 1254 (2010).

In the present case, defense counsel conceded at the hearing on the motion to preclude evidence that the prior instances were relevant for showing intent, motive, and a common scheme. In fact, he suggested to the court that a limited number of those instances

were admissible. Additionally, he made no objection to any of the evidence of prior instances during trial. As a result, the defendant is precluded from claiming that the trial court erred by admitting the evidence regarding the prior instances of misconduct.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

[6] The defendant also argues that the admission of the uncharged misconduct evidence constituted plain error. The request for us to find plain error is, at least, complicated by the fact that the claim itself was waived. "This court has adhered to the view that waiver thwarts a finding that plain error exists." (Internal quotation marks omitted.) *State* v. *Carrasquillo*, 191 Conn. App. 665, 704, 216 A.3d 782, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019); see also *State* v. *Bialowas*, 160 Conn. App. 417, 430, 125 A.3d 642 (2015), remanded, 325 Conn. 917, 163 A.3d 1204 (2017). Nonetheless, our Supreme Court has observed that "there appears to be some tension in our appellate case law as to whether reversal on the basis of plain error could be available in cases where the alleged error is causally connected to the defendant's own behavior." *State* v. *Darryl W.*, 303 Conn. 353, 371–72 n.17, 33 A.3d 239 (2012); see also *State* v. *McClain*, 324 Conn. 802, 805, 812, 155 A.3d 209 (2017) (waiver of claim of instructional error under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), does not "necessarily foreclose" or "preclude" reviewing court from affording relief under plain error doctrine).

Even if we should accept the defendant's invitation to conclude that plain error exists in the present case, this claim fails. First, the defendant fails to show a patent or readily discernable error on behalf of the trial court. As defense counsel correctly noted, evidence of prior uncharged misconduct may be admitted to prove "intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial persecution testimony." Conn. Code Evid. § 4-5 (c). Second, "[t]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . An appellant cannot prevail . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Cane*, 193 Conn. App. 95, 126, 218 A.3d 1073, cert. denied, 334 Conn. 901, 219 A.3d 798 (2019). In the present case, the defendant has not demonstrated that the court erred, let alone that it committed an error so clear and so harmful as to constitute a manifest injustice.

STATE OF CONNECTICUT *v.* ANTHONY SMALL
(AC 43660)

Bright, C. J., and Cradle and Bishop, Js.

Syllabus

The defendant, who had been convicted of several crimes, including capital felony, appealed to this court, claiming that the trial court erred in denying his request for the appointment of counsel to represent him on a motion to correct an illegal sentence that he had filed, as required by *State* v. *Francis* (322 Conn. 247). After the self-represented defendant filed his motion, it was reviewed by B, a public defender, who thereafter filed a report with the trial court, stating that no sound basis existed for the filing of the motion. B further stated in his report that he had notified the defendant by letter of the reasons for that conclusion and that the Office of the Public Defender would not represent him in the hearing on the motion. The trial court thereafter rejected the defendant's assertion that, as an indigent defendant, he was required to have counsel pursuant to *Francis* and denied the motion to correct. On appeal, the defendant claimed that his right to counsel was violated because, contrary to the requirement of *Francis*, B did not consult with him regarding the motion to correct or inform him or the court of the reasons underlying his conclusion that no sound basis existed for the motion. *Held* that the trial court's denial of the defendant's motion to correct an illegal sentence was reversed and the case was remanded to that court with direction to appoint counsel to represent the defendant to determine, in accordance with *Francis*, whether a sound basis exists for that motion; because B failed to inform the trial court of his reasons for concluding that no sound basis existed for the motion, the court was not able to fulfill its obligation under *Francis* to consider B's reasoning, and, if persuaded by that reasoning, to permit B to withdraw as counsel for the defendant, as B's one paragraph report simply stated that he reviewed the motion, determined that no sound basis existed for it and informed the defendant by letter of the reasons for his conclusion; moreover, although the defendant claimed that B was required to inform him in a brief of the reasons for his conclusion, *Francis* does not require counsel to file a brief but requires only that counsel inform the defendant orally or in writing as to the reasons for his conclusion, and this court had no reason to doubt B's candor that he so informed the defendant in that letter.

Argued May 11—officially released September 7, 2021

Procedural History

Substitute information charging the defendant with one count of the crime of capital felony, two counts of

the crime of felony murder and one count each of the crimes of kidnapping in the second degree and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Ford*, *J.*; verdict and judgment of guilty of one count of capital felony, two counts of felony murder and one count of conspiracy to commit robbery in the first degree, from which the defendant appealed to the Supreme Court, which reversed the trial court's judgment in part and remanded the case to that court for further proceedings; thereafter, the court, *Ford*, *J.*, resentenced the defendant; subsequently, the court, *Devlin*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Appeal dismissed in part*; *reversed*; *further proceedings*.

Anthony Small, self-represented, the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Anthony Small, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court erred in failing to follow the procedures set forth by our Supreme Court in *State* v. *Francis*, 322 Conn. 247, 140 A.3d 927 (2016), when it denied his request for the appointment of counsel on his motion to correct an illegal sentence. We agree and, accordingly, reverse the judgment of the trial court.[1]

[1] The defendant also challenges the judgment of the trial court denying his motion to correct on its merits, arguing that the court improperly concluded that the sentencing court had not relied on inaccurate information in imposing his sentence. Because we conclude that the court erred in failing to appoint counsel, we do not reach the defendant's challenge to the substance of the trial court's denial of his motion to correct.

The following undisputed facts and procedural history are relevant to this appeal.

In 1995, following a jury trial, the petitioner was convicted of one count of capital felony in violation of General Statutes (Rev. to 1989) § 53a-54b (8), two counts of felony murder in violation of General Statutes § 53a-54c, and one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2). On appeal, our Supreme Court vacated the petitioner's conviction of capital felony and instructed the trial court to resentence the petitioner. *State* v. *Small*, 242 Conn. 93, 116, 700 A.2d 617 (1997). The trial court, *Ford, J.*, thereafter imposed a total effective sentence of forty-five years of incarceration.

On June 7, 2018, the defendant, representing himself, filed a motion to correct an illegal sentence. The defendant claimed that his sentence was illegal because it was based on inaccurate information. Specifically, the defendant argued that the sentencing court based his sentence on its erroneous belief that he was parole eligible. He contended that the sentencing court's "intent at sentencing was for the defendant to be released and developing in society."

On November 16, 2018, Attorney Joseph G. Bruckmann, public defender for the judicial district of Fair-

The defendant also appeals from the denial of appellate counsel. We dismiss this portion of his appeal. See *State* v. *Jimenez*, 127 Conn. App. 706, 710, 14 A.3d 1083 (2011) ("Practice Book § 63-7 provides in relevant part that [t]he sole remedy of any defendant desiring the court to review an order concerning . . . the appointment of counsel shall be by motion for review under [Practice Book §] 66-6. The defendant did not file a motion for review of the court's denial of his application for the appointment of appellate counsel but has sought review of the ruling for the first time in this appeal. The defendant has not availed himself of his sole remedy and is unable to seek review in the present appeal. Accordingly, we dismiss that portion of the appeal concerning his claim that the court improperly denied his application for the appointment of appellate counsel." (Internal quotation marks omitted.)).

field at Bridgeport, filed with the court a document entitled, "Report re: Defendant's Motion to Correct an Illegal Sentence." The report, which consisted of a single paragraph, stated: "Pursuant to *State* v. *Francis*, [supra], 322 Conn. 247, the undersigned has reviewed the defendant's motion to correct an illegal sentence filed on June 7, 2018, and has determined that no sound basis exists for the filing of that motion or the appeal of the trial court's denial of that motion. The undersigned has notified the defendant by mail of the reasons for that conclusion and has informed the defendant that the Office of the Public Defender will not be representing him in the hearing on this motion."

On December 5, 2018, the defendant appeared before the court, *Devlin*, *J.*, by videoconference, on his motion to correct. The court explained to the defendant: "[O]ur practice here in Bridgeport is that, when an inmate files a motion to correct [an] illegal sentence, the public defender . . . reviews it to see whether or not their office is going to . . . have a lawyer appointed to represent the inmate on the motion. . . . [The public defender] has filed a document with the clerk's office indicating that they've reviewed your motion, and they decided not to have a lawyer represent you. And they indicated [that] they sent you a letter basically summarizing that. So . . . that . . . doesn't mean that your motion is denied, but it means that you have to handle it on your own."

The court then asked the defendant if he had received the letter from Bruckmann regarding his motion.[2] The defendant responded that he "got an unexpected letter" that "express[ed] that [the public defender's] office wouldn't be representing [him]." The defendant further explained to the court: "But I didn't . . . get any

[2] The record does not reflect that Bruckmann was present during any of the proceedings mentioned herein.

Anders[3] brief or anything expressing the reasons why. It was just, like, an informal letter."[4] (Footnote added.) The defendant told the court that he would like Bruckmann to file an *Anders* brief. The court told the defendant: "That's not our practice in Connecticut." The court explained: "The practice in Connecticut right now is for the public defender to determine whether, in their professional judgment, the motion [to correct] has merit. And if [they] think it has merit, then it should go forward and they should have a lawyer represent the inmate. If it does not have merit, then they're not required to file an appearance. Under our current practice, they're not required to file an *Anders* brief. [You] can disagree with that, but that's my understanding of the law now, that they are not required to file an *Anders* brief."

Finally, the court summarized: "[O]ur practice is that [Attorney] Bruckmann reviews these claims. If he thinks they have merit, a lawyer represents the person.

[3] "In *Anders* [v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)], the United States Supreme Court outlined a procedure that is constitutionally required when, on direct appeal, appointed counsel concludes that an indigent defendant's case is wholly frivolous and wishes to withdraw from representation. . . . Under *Anders*, before appointed counsel may withdraw, he or she must provide the court and the defendant with a brief outlining anything in the record that may support the appeal, and the defendant must be given time to raise any additional relevant points. . . . Thereafter, the court, having conducted its own independent review of the entire record of the case, may allow counsel to withdraw, if it agrees with counsel's conclusion that the appeal is entirely without merit." (Citations omitted.) *State* v. *Francis*, supra, 322 Conn. 250 n.3.

[4] The letter sent by Bruckmann to the defendant was not submitted to the trial court. The first page of that letter, however, is included in the appendix to the defendant's brief to this court. The first page of that letter explains the procedure by which the defendant's motion was referred to the public defender's office, in addition to the legal principles applicable to motions to correct. The record does not reflect how many pages comprised that letter, or the specific content of it, other than Bruckmann's representation in the report that he filed with the court that he had "notified the defendant by mail" of his reasons for concluding that no sound basis existed for the defendant's motion to correct.

If he doesn't think the claim has merit, and remember, this is a motion to correct [an] illegal sentence. It's a narrow . . . number of grounds that can support it. If it doesn't have merit, they don't have a lawyer represent the person, and then the person has to handle the case on their own, which you really are in your case."

The court then asked the defendant if he was prepared to proceed on his motion to correct at that time, or if he wanted to continue the matter to another date to afford him further opportunity to prepare. The defendant told the court that he was not prepared to argue on that date, and that he had several exhibits that he wanted to introduce into evidence in support of his motion. After the court set a new date for the hearing on the defendant's motion to correct, the defendant asked to address "the record concerning the *Anders* brief," and stated that he objected "to not being able to have an *Anders* brief." The court assured the defendant that his objection was noted for the record.

On January 23, 2019, the court held a hearing on the defendant's motion to correct. The defendant appeared as a self-represented party. At the conclusion of that hearing, the court, *Devlin*, *J.*, advised the parties that he was going to read the materials submitted, and that he would bring the defendant back to court on February 20, 2019, when he would issue his ruling on the defendant's motion to correct. The defendant then told the court that he had one more issue that he would like to address. The defendant argued: "As an indigent defendant, I was required to have counsel. The last time [that I was in court] . . . I had a videoconference, and I couldn't see who the judge was. . . . Under *Francis* the exact same situation happened that's happened to me. In *Francis*, no lawyer was appointed, a neutral agent of the court went and got my claim without sitting down face-to-face and discussing what my claim would be, wrote me a letter that I thought was attorney-client

privilege, hand it to the judge, said he don't think the claim has merit. He didn't file an *Anders* brief so I could respond and file an *Anders* brief and tell you that I do have merit . . . ." The court interjected, stating that "*Francis* is not our practice right now in Connecticut." The defendant continued to "object," and the court repeated, "*Francis* doesn't apply in Connecticut right now. . . . *Francis* has been overruled."

On February 20, 2019, the court, *Devlin*, *J.*, issued its ruling orally from the bench, finding that the sentencing court did not materially rely on inaccurate information when it imposed the defendant's sentence. The court therefore concluded that the defendant's sentence was not illegal and, accordingly, denied the defendant's motion to correct. This appeal followed.

On appeal, the defendant argues that the court erred in failing to follow the procedures set forth by our Supreme Court in *State* v. *Francis*, supra, 322 Conn. 247, when it denied his request for the appointment of counsel to represent him on his motion to correct. We agree.

Our analysis is guided by the following legal principles. "[I]t is axiomatic that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner . . . . A motion to correct an illegal sentence constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates. . . . Indeed, [i]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . . Therefore, the motion is directed to the sentencing court, which can entertain and resolve the challenge most expediently." (Citation omitted;

internal quotation marks omitted.) *State* v. *Francis*, supra, 322 Conn. 259–60.

Our Supreme Court first addressed the right to counsel on a motion to correct an illegal sentence in *State* v. *Casiano*, 282 Conn. 614, 619, 922 A.2d 1065 (2007). In *Casiano*, our Supreme Court analyzed whether the term "any criminal action" in General Statutes § 51-296 (a)[5] encompassed a motion to correct an illegal sentence and, thus, whether the appointment of counsel was required for indigent defendants with respect to such motions. Our Supreme Court held that, in connection with a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22, "a defendant has a right to the appointment of counsel for the purpose of determining whether a defendant who wishes to file such a motion has a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion." Id., 627–28.

[5] General Statutes § 51-296 (a) provides in relevant part: "In any criminal action, in any habeas corpus proceeding arising from a criminal matter, in any extradition proceeding, or in any delinquency matter, the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under . . . chapter [887], designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant, unless, in a misdemeanor case, at the time of the application for appointment of counsel, the court decides to dispose of the pending charge without subjecting the defendant to a sentence involving immediate incarceration or a suspended sentence of incarceration with a period of probation or the court believes that the disposition of the pending case at a later date will not result in a sentence involving immediate incarceration or a suspended sentence of incarceration with a period of probation and makes a statement to that effect on the record. If it appears to the court at a later date that, if convicted, the sentence of an indigent defendant for whom counsel has not been appointed will involve immediate incarceration or a suspended sentence of incarceration with a period of probation, counsel shall be appointed prior to trial or the entry of a plea of guilty or nolo contendere."

Subsequently, in *State* v. *Francis*, supra, 322 Conn. 259,[6] our Supreme Court concluded that it was harmful error for a trial court to fail to appoint counsel to represent the defendant "even for the limited purpose of determining whether a sound basis existed for him to file his motion [to correct an illegal sentence]." In that case, the trial court did not appoint a public defender for the purposes of sound basis review after the defendant had filed his third motion to correct an illegal sentence. Id., 252, 268. Instead, the court clerk's office alerted the public defender, who reviewed the motion and reported to the court that it was his opinion that the defendant's motion " 'does not have sufficient merit . . . .' " Id., 253. The public defender did not " '[describe] in detail to the court the substance of any discussions with the defendant about the claims he wished to make in his motion' "; id., 268; nor did he " 'explain his findings to the defendant . . . .' " Id., 269. The defendant objected and requested that the public defender state the specific grounds and reasoning on which he had formed his conclusion. Id., 255. The trial court denied the request and subsequently denied the defendant's motion. Id., 255–56.

Thereafter, the defendant appealed to this court, claiming, among other things, that the trial court had violated his right to counsel under § 51-296 (a) by denying his request for counsel without adhering to the procedure set forth in *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). See *State* v. *Francis*, 148 Conn. App. 565, 575, 86 A.3d 1059 (2014), rev'd, 322 Conn. 247, 140 A.3d 927 (2016). This court agreed with the defendant that the trial court should have followed *Anders* in denying his request for appointed counsel. Id., 569. This court reasoned that, "because the express rationale in *Casiano* for extending the statutory right to counsel . . . from appeals to

[6] *State* v. *Francis*, supra, 322 Conn. 247, has not been overruled.

motions to correct is that such motions are functionally equivalent to appeals as vehicles for challenging the legality of criminal sentences, [a criminal defendant's] right to appointed counsel on a motion to correct must be identical to, and thus be protected by, the same procedural safeguards [that are] used to protect [the] right to appointed counsel on appeal." Id., 584.

Our Supreme Court disagreed and concluded that "the *Anders* procedure is not strictly required to safeguard the defendant's statutory right to counsel in the context of a motion to correct an illegal sentence." *State* v. *Francis*, supra, 322 Conn. 251.

In so concluding, our Supreme Court adhered to its holding in *Casiano* that an indigent defendant has the right to the appointment of counsel for the purpose of determining whether a sound basis exists for the filing of a motion to correct an illegal sentence but distinguished a proceeding on a motion to correct an illegal sentence from that in a direct appeal. Id., 267. The court in *Francis* explained that a proceeding on a "postconviction motion to correct . . . bears no resemblance to a direct appeal in terms of the number and complexity of issues that may be raised, [and that] fact . . . necessarily bears on the question of whether the same procedures are required to protect the right to effective assistance of counsel in both situations." Id., 263. The court reasoned: "In stark contrast [to direct appeals], the claims that may be raised in a motion to correct an illegal sentence are strictly limited to improprieties that may have occurred at the sentencing stage of the proceeding." Id., 264. The court concluded: "In light of the limited and straightforward nature of the claims that may be raised in a motion to correct, the potential merits of such a motion will be apparent to the court and appointed counsel from a simple review of the sentencing record. . . . Accordingly, we can perceive no reason why appointed counsel, having carefully

reviewed the record for possible sentencing errors in light of governing legal principles and determined that none exist, must then be required to file an *Anders* brief identifying anything in the record that might arguably support a countervailing view, or why the trial court should then be required to undertake a full and independent review of the record to determine whether it agrees with defense counsel's assessment of the defendant's claimed sentencing error." (Citations omitted.) Id., 265–66.

With those precepts in mind, our Supreme Court in *Francis* outlined the following procedure to be used when a motion to correct an illegal sentence is filed: "[W]hen an indigent defendant requests that counsel be appointed to represent him in connection with the filing of a motion to correct an illegal sentence, the trial court must grant that request for the purpose of determining whether a sound basis exists for the motion. . . . If, *after consulting with the defendant* and examining the record and relevant law, counsel determines that no sound basis exists for the defendant to file such a motion, he or she *must inform the court and the defendant of the reasons for that conclusion*, which can be done either in writing or orally. If the court is persuaded by counsel's reasoning, it should permit counsel to withdraw and advise the defendant of the option of proceeding as a self-represented party." (Citation omitted; emphasis added; footnote omitted.) Id., 267–68. Thus, although the procedure to be undertaken by appointed counsel and the court on a motion to correct requires less scrutiny than that required on a direct appeal, the court in *Francis* maintained certain safeguards to ensure that the sound basis review and determination would not be unilateral by either appointed counsel or the court. With these principles in mind, we turn to the defendant's claims on appeal.

The defendant first argues that his right to counsel was violated because, contrary to the requirement of *Francis*, Bruckmann did not consult with him regarding his motion to correct. The defendant is correct in his contention that such a consultation by appointed counsel is required. The defendant alleged on the record to Judge Devlin that Bruckmann did not consult him regarding his motion, and Bruckmann was not present to refute the defendant's allegation. In fact, we do not find any support in the record that there was ever a consultation between Bruckmann and the defendant.

The defendant also claims that Bruckmann neither informed him nor the court of the reasons underlying his conclusion that no sound basis existed for his motion. Again, the defendant correctly asserts that *Francis* required Bruckmann to do so. In the "Report re: Defendant's Motion to Correct an Illegal Sentence" that Bruckmann filed with the court, he represented that he had notified the defendant by mail of the reasons for his conclusion that no sound basis existed for the motion to correct. The defendant acknowledged that he received a letter from Bruckmann but asserted that the letter was informal and that Bruckmann was required to inform him in a brief of the reasons for his conclusion that no sound basis existed for his motion to correct. *Francis* does not require counsel to file a brief but requires only that counsel inform the defendant orally or in writing. The defendant does not contend that the letter he received from Bruckmann did not set forth the reasons for his conclusion, and we have no reason to doubt Bruckmann's candor in his statement that he so informed the defendant in that letter.

Bruckmann did, however, fail to inform the court of the basis for his conclusion that no sound basis existed for the defendant's motion to correct. Bruckmann's report simply stated that he had reviewed the defendant's motion, that he had determined that no sound

basis existed for that motion, and that he had informed the defendant of the reasons for his conclusion. Bruckmann did not set forth the reasons for his conclusion. Although, contrary to the defendant's argument, the court was not required, under *Francis*, to conduct its own independent evaluation of the potential merits of the defendant's motion, it was required to consider the reasoning for Bruckmann's conclusion that no sound basis existed for the defendant's motion, and, if persuaded by that reasoning, permit Bruckmann to withdraw as counsel to the defendant. Because the court was not made aware of that reasoning, either orally or in writing, it was not able to fulfill its obligation to consider it, as required by *Francis*.

The appeal is dismissed with respect to the defendant's claim that he was denied appellate counsel, the judgment is reversed and the case is remanded with direction to appoint counsel to represent the defendant to determine, in accordance with the procedures set forth in *State* v. *Francis*, supra, 322 Conn. 247, whether a sound basis exists for his motion to correct an illegal sentence.

In this opinion the other judges concurred.

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that plaintiff had failed to exhaust his administrative remedies; claim that trial court erred in considering defendant's special defense that plaintiff had failed to exhaust his administrative remedies because defendant had waived that defense.

SUPREME COURT PENDING CASES

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

STATE *v.* ANGEL ARES, SC 20367
Judicial District of Hartford

Criminal; Whether Evidence Insufficient for Conviction under Act Prong of Risk of Injury to a Child in Violation of General Statutes § 53-21 (a) (1); Whether Risk of Injury Statute Unconstitutionally Vague as Applied; Whether Defendant Improperly Convicted under Situation Prong of Risk of Injury Statute For Which He Was Not Charged. The defendant was charged with four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) for intentionally setting fire to a mattress that was on the front porch of a three-story house in which he resided with family members. The defendant set fire to the mattress upon exiting the house after an argument with his stepfather who resided on the first floor. The fire traveled up from the porch to the upper floors of the house, causing extensive damage. Twelve residents, including four children, were inside the house at the time of the fire. The children were on the second floor of the house when the fire started and made it out safely. The defendant was convicted of the aforementioned charges and appeals to the Supreme Court pursuant to General Statutes § 51-199 (b) (3). He claims that there was insufficient evidence to support his conviction under the "act prong" of the risk of injury statute as charged by the state. The risk of injury statute criminalizes two distinct classes of conduct. The "situation prong" of the statute criminalizes conduct that "wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is likely to be impaired," while the "act prong" criminalizes the doing of "an act likely to impair the health or morals of such child." The defendant argues that, in order to prove that he committed risk of injury to a child under the act prong of the statute, the state had to demonstrate that he perpetrated an act directly on the person of the child and that his conviction cannot stand because the record is devoid of any evidence that he did so. The defendant also argues that his conviction violated his right to due process because the risk of injury statute is unconstitutionally vague as applied to his case. Specifically, he claims that he had inadequate notice that his particular conduct was prohibited because no prior authority has applied the act prong to conduct not perpetrated directly on the person of a child. The defendant additionally argues that his

right to due process was violated because the trial court convicted him of an offense with which he was not charged. The defendant notes that the trial court, in delivering the guilty verdict, stated that it had found proven beyond a reasonable doubt that he "had a reckless disregard for the consequences to the children" and that he had "unlawfully placed each child in a situat[ion] adverse to the child's physical, including psychological welfare, which situation was likely to injure the child's physical health." The defendant argues that the trial court's findings track the elements of the situation prong and show that the trial court convicted him under that prong, rather than under the act prong as charged by the state.

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

STATE *v.* JAMES GRAHAM, SC 20447
Judicial District of New Haven

Criminal; Whether Codefendant's Hearsay Statements Properly Admitted under Exception for Statements Against Penal Interest; Whether State Engaged in Prosecutorial Impropriety by Vouching for Witnesses' Credibility and Presenting Generic Tailoring Argument in Violation of State Constitutional Rights. The defendant was charged with felony murder, conspiracy to commit robbery in the first degree and carrying a pistol without a permit as a result of an incident in which he and two associates, Robert Moye and Brennan Coleman, robbed and gunned down a rival gang member on a Hamden bike path. Surveillance video admitted at trial showed the three men together near the scene of the crime. Additionally, the trial court allowed a witness to testify as to a conversation that he had with his friend, Moye, at Moye's home approximately one week after the shooting. The witness claimed that Moye asked him to swear that he would not tell anyone what he was about to say and that Moye then detailed the events of the shooting. The witness claimed that Moye admitted that he, Coleman and the defendant saw the victim on the bike path, asked him whether he was a member of a certain rival gang and decided to rob him. The witness claimed that Moye further stated that the victim punched Coleman, that Coleman attempted to shoot the victim but his gun jammed and that the defendant then shot the victim. The witness also testified that Moye did not say whether he was carrying a gun or whether they stole anything from the victim. The defendant was convicted of the aforementioned charges, and he

filed this appeal in the Supreme Court pursuant to General Statutes § 51-199 (b) (3). On appeal, the defendant claims (1) that the trial court improperly found that Moye's statements were admissible under the exception to the hearsay rule provided by section 8-6 (4) of the Connecticut Code of Evidence for statements against penal interest that are sufficiently trustworthy and (2) that the admission of Moye's statements violated his rights under the confrontation clause of the sixth amendment to the federal constitution. The defendant also claims on appeal that the state engaged in prosecutorial impropriety by vouching for the credibility of two witnesses when it elicited testimony from the witnesses on direct examination concerning provisions of their cooperation agreements in which they promised to provide truthful testimony and when it presented closing argument relating to those provisions. The defendant also claims that the state engaged in prosecutorial impropriety by presenting a generic tailoring argument, which occurs when a prosecutor impugns the credibility of a testifying defendant by urging the jury to infer that the defendant had the opportunity to fabricate or tailor his testimony based on the fact that he was present during the trial. The defendant acknowledges that generic tailoring arguments are permitted under the federal constitution but claims that they are improper under the heightened protections provided by our state constitution.

STATE *v.* ANASTASIA SCHIMANSKI, SC 20550
Judicial District of New Haven at G.A. 23

Criminal; Whether Appellate Court Properly Upheld Trial Court's Denial of Defendant's Motion to Dismiss Charge of Operating Motor Vehicle with Suspended License under General Statutes § 14-215 (c) (1). On September 18, 2017, the defendant was arrested and charged with operating a motor vehicle under the influence in violation of General Statutes § 14-227a. Her driver's license was suspended under General Statutes § 14-227b for forty-five days, beginning on October 18, 2017, and ending on December 2, 2017. On December 4, 2017, the defendant operated a motor vehicle without an ignition interlock device and struck another motor vehicle. She was charged with operating a motor vehicle with a suspended license in violation of General Statutes § 14-215. The defendant filed a motion to dismiss the charge on the ground that she could not have violated § 14-215 on December 4, 2017, because her forty-five day license suspension had ended on December 2, 2017. The trial court denied the motion to dismiss, holding that the installation of an ignition interlock device is a mandatory statutory requirement to restore a license that

has been suspended under §§ 14-227a and 14-227b and that the defendant's suspended license was not restored until January 2, 2018, by which time she had installed an ignition interlock device on her motor vehicle. The defendant entered a plea of nolo contendere to appeal the trial court's denial of her motion to dismiss. On appeal, she claimed that the trial court erred in denying her motion to dismiss and argued that, as a matter of statutory interpretation, her failure to install an ignition interlock device did not extend the forty-five day suspension of her license under § 14-227b, such that she could not have violated § 14-215. The Appellate Court (201 Conn App. 164) disagreed and affirmed the judgment of conviction. It noted that § 14-215 applies to an individual whose license has been suspended pursuant to § 14-227b. It then observed that § 14-227b (i) provides for a forty-five day license suspension under certain circumstances and states in relevant part that, "[a]s a condition for the restoration of such operator's license . . . such person shall be required to install an ignition interlock device on each motor vehicle owned or operated by such person and, upon such restoration, be prohibited from operating a motor vehicle unless such motor vehicle is equipped with a functioning, approved ignition interlock device" for a defined period of time. The court concluded that § 14-227b contemplates two periods of time – a license suspension period and a post-license restoration period, without an interim period during which an individual with a suspended license may lawfully operate a motor vehicle without installing an ignition interlock device. It interpreted the statute to accordingly provide that the installation of an ignition interlock device is required to move from suspension to restoration. The court further distinguished the cases on which the defendant relied, noting that they were decided prior to the amendment of the relevant statutes, and rejected her arguments relying on the rule of lenity and the equal protection clause of the federal constitution. In this certified appeal by the defendant, the Supreme Court will decide whether the Appellate Court properly upheld the trial court's denial of the defendant's motion to dismiss the charge of operating a motor vehicle with a suspended license in violation of § 14-215 (c) (1).

SERAMONTE ASSOCIATES, LLC *v.* TOWN OF HAMDEN, SC 20571
Judicial District of New Haven

Property Taxation; Rental Properties; Penalties; Whether Appellate Court Properly Construed Phrase "Who Fails To Submit Such Information" as Used in General Statutes § 12-63c (d) in Concluding That Plaintiff Failed To Timely Submit Certain Tax Forms To Defendant Town's Tax Assessor. The plaintiff owns

three parcels of rental property in the defendant Town of Hamden. In February 2016, the assessor for the defendant assessed the total value of the plaintiff's three rental properties at over $29 million. Pursuant to General Statutes § 12-63c (a), the owner of real property used primarily for the purpose of producing rental income may be required to "annually submit to the assessor not later than the first day of June" certain tax forms containing rental and expense information. Further, pursuant to § 12-63c (d), an owner "who fails to submit such information" shall be subject to a penalty "equal to a ten per cent increase in the assessed value of such property for such assessment year." Here, the plaintiff sent the required tax forms to the assessor by first class mail on May 31, 2016, and the assessor received them on June 2, 2016. Because the required tax forms were not received on or before June 1, 2016, as required by § 12-63c (a), the tax assessor imposed a 10 percent penalty pursuant to § 12-63c (d), amounting to $132,145.16, that was added to the assessments of the properties. Subsequently, the defendant's Board of Assessment Appeals (board) denied the plaintiff's appeal challenging the assessor's imposition of the 10 percent penalty. The plaintiff then appealed to the Superior Court, claiming that the board improperly upheld the assessor's imposition of the 10 percent penalty. The parties filed cross motions for summary judgment. The trial court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment, concluding that the word "submit" as used in § 12-63c means that the assessor must receive the tax forms by June 1 of each year. The plaintiff appealed to the Appellate Court (202 Conn. App. 467), challenging the trial court's grant of summary judgment in favor of the defendant. The plaintiff claimed that the word "submit" as used in § 12-63c means "to mail" and that it had complied with the statute by mailing the tax forms to the assessor prior to June 1. Alternatively, the plaintiff claimed that § 12-63c was ambiguous as to whether submitting the tax forms by mail is sufficient to comply with the statute and, therefore, § 12-63c should be construed in its favor as the taxpayer. The Appellate Court rejected the plaintiff's claims, concluding that, when viewed in the context of other tax statutes, the word "submit" as used in § 12-63c was unambiguous and meant that the assessor must receive the tax forms by June 1. The court explained that the legislature frequently includes the phrase "or postmarked" in tax statutes when it intends for the date of mailing to be considered the date of filing or submission and that the legislature's decision not to include the phrase "or postmarked" in § 12-63c (a) necessarily meant that the tax forms must be delivered to the assessor's office by June 1 in order to comply with

the statute. Accordingly, the Appellate Court affirmed the trial court's grant of summary judgment in favor of the defendant. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly construed the phrase "who fails to submit such information" as it is used in § 12-63c (d).

J. XAVIER PRYOR *v.* TIMOTHY BRIGNOLE et al., SC 20581/20583
Judicial District of Hartford

Appellate Jurisdiction; Whether Appellate Court Properly Dismissed Defendants' Appeals for Lack of Final Judgment After Trial Court Denied Their Special Motions to Dismiss Filed Pursuant to Connecticut's Anti-SLAPP Statute, General Statutes § 52-196a. The plaintiff, J. Xavier Pryor, brought this action against the defendants, Attorney Timothy Brignole and his law firm, Brignole, Bush & Lewis, LLC, alleging that they breached a contractual nondisparagement clause when defendant Brignole anonymously sent letters to various news outlets accusing the plaintiff of assaulting the plaintiff's wife in front of a child. The defendants filed separate "special" motions to dismiss pursuant to Connecticut's anti-strategic lawsuit against public participation ("anti-SLAPP") statute, General Statutes § 52-196a, claiming that the letters constituted an exercise of defendant Brignole's right of free speech on a matter of public concern and, thus, were protected under § 52-196a (e) (3). The trial court denied the special motions to dismiss. The defendants filed separate appeals from the trial court's denial of their special motions to dismiss. The plaintiff moved to dismiss both appeals on the ground that the denial of a motion to dismiss does not constitute an appealable final judgment. The Appellate Court issued orders granting the motions to dismiss. The defendants were granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly dismissed the defendants' appeals for lack of a final judgment after the trial court denied their special motions to dismiss filed pursuant to § 52-196a. The defendants argue that they have a statutory right to appeal from the denial of their special motions to dismiss under the plain language of § 52-196a (d), which states in relevant part that "[t]he court shall stay all discovery upon the filing of a special motion to dismiss" and that such stay "shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof." Alternatively, if the language of § 52-196a (d) is found to be ambiguous, the defendants argue that the legislative history and purpose of § 52-196a, namely, to protect individuals from meritless lawsuits designed

to chill free speech, support the conclusion that interlocutory appeals are permitted under the statute. In addition, the defendants argue that the denial of a special motion to dismiss constitutes an appealable final judgment under the second prong of the finality test set forth in *State* v. *Curcio*, 191 Conn. 27, 31 (1983), which states that "[a]n otherwise interlocutory order is appealable . . . (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." In *Shay* v. *Rossi*, 253 Conn. 134, 165 (2000), overruled on other grounds by *Miller* v. *Egan*, 265 Conn. 301 (2003), the Supreme Court held that the denial of a motion to dismiss based on a colorable claim of sovereign immunity constitutes a final judgment under the second prong of *Curcio* because "the state's right not to be required to litigate the claim filed against it would be irretrievably lost" without an immediate appeal. The defendants assert that § 52-196a grants a right to be protected from having to litigate a claim, akin to sovereign immunity and that a defendant's right not to be required to litigate the claim filed against it would be irretrievably lost unless it is permitted to immediately appeal from the trial court's denial its special motion to dismiss.

MARIANNA PONNS COHEN *v.* BENJAMIN H. COHEN, SC 20605
Judicial District of Stamford-Norwalk at Stamford

Dissolution; Whether Financial Orders Should Be Vacated for Judicial Bias Because Trial Court Prejudged Plaintiff's Credibility; Whether Trial Court Properly Ordered Sanctions and Awarded Legal Fees Against Plaintiff for Noncompliance with Trial Management Orders to Provide Exhibits on USB Drives. The plaintiff wife commenced this dissolution action against the defendant husband in 2014. The trial court judge to whom the action was first assigned declared a mistrial in 2016, and the action was thereafter assigned to another trial court judge, who held a trial on various dates between August 2017 and March 2018. The second trial was continued multiple times at the plaintiff's request for a variety of reasons that included health issues for which she had received accommodations under the Americans with Disabilities Act. A telephone pretrial conference was held on July 17, 2017. During a recess, the trial court's digital audio recording system recorded the trial court judge saying, "I am not just going to let that stupid woman talk." The system also recorded the trial court judge stating with respect to the plaintiff during another recess that "she's not sick" and "she's going to be a mess until we get it done." The trial court expressed further frustration during trial in

response to the plaintiff's noncompliance with its orders that the trial exhibits, due to their numerosity, be electronically submitted via Universal Serial Bus (USB) drives. The electronic exhibit issue resulted in additional posttrial orders and proceedings. In its final order on the issue, the trial court stated a court-provided USB drive contained "the official record of all electronic full and id exhibits in this case," despite any objections to the contrary, and that "plaintiff has only herself to blame for the difficulties with the disorganized, voluminous, repetitive and irrelevant exhibits in her case and her failure to provide them to the defendant and the court in an appropriate and carefully reviewed fashion." The trial court issued a memorandum of decision dissolving the parties' marriage in September 2018. The judgment in relevant part (1) awarded $65,000 in legal fees to the defendant for the posttrial electronic exhibit litigation and, (2) after finding that the plaintiff had spent $3,000,000 on legal fees, ordered that a net adjustment amount of $1,056,069 was due to the defendant "not as legal fees but as part of the overall property settlement and equitable distribution." The plaintiff filed this appeal in the Appellate Court, which the Supreme Court transferred to its docket. The Supreme Court will decided whether the financial orders entered pursuant to the dissolution judgment should be vacated due to judicial bias, where the plaintiff argues that the trial court prejudged her credibility before and maintained its negative perception of her throughout trial. The Supreme Court will also decide whether the trial court's judgment should be reversed on the ground that the trial court violated the plaintiff's due process rights by sanctioning her for conduct that occurred after trial and without holding a hearing. The Supreme Court will further decide whether the trial court's judgment should be reversed where the plaintiff argues that, even though she exhausted all of the available rectification remedies, the record is inadequate to review her claims on appeal regarding the electronic exhibits. Finally, the Supreme Court will decide whether the trial court clearly erred in making findings regarding the inoperability of the USB drives and the amounts that the plaintiff spent on legal fees for purposes of the $1,056,069 equitable distribution award.

MARJORIE GLOVER et al. *v.* BAUSCH & LOMB INC., SC 20607
United States Court of Appeals for the Second Circuit

Product Liability; CUTPA; Federal Preemption; Whether State Claims Based on Injuries Caused by Medical Device Preempted by Federal Law; Whether State Product Liability Act's Exclusivity Provision Bars Deceptive Marketing CUTPA Claim.

The Medical Device Amendments to the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 301 et seq. (FDCA), established a comprehensive scheme of regulation of medical devices by the U.S. Food and Drug Administration (FDA). In 2013, the FDA granted defendant Bausch & Lomb approval for the Trulign Toric intraocular lens (Trulign Lens), which is a prescription medical device that is surgically implanted into a patient's eye to replace a lens that has become clouded by cataracts. The following year, plaintiff Marjorie Glover underwent cataract surgery during which her physician implanted a Trulign Lens into each eye. Shortly thereafter, Glover was diagnosed with Z Syndrome, which occurs when one side of the implanted lens pulls forward while the other side remains in its normal position or is pushed backward, resulting in a "Z" shape. As a result, Glover suffers from permanent visual impairment and eye pain. Glover and her husband brought this action against Bausch & Lomb in federal court alleging negligence and failure-to-warn under the Connecticut Product Liability Act, General Statutes §§ 52-572h and 52-572q (CPLA). The Glovers claim that Bausch & Lomb was aware of a substantial risk that patients would develop Z Syndrome after Trulign Lenses were implanted and failed to inform the FDA of the extent of that risk during the approval process. The Glovers also claim that Bausch & Lomb failed to comply with certain post-approval conditions set by the FDA by failing to timely perform a study concerning the risk of Z Syndrome and by failing to inform the FDA of adverse events that occurred after approval. The United States District Court for the District of Connecticut granted Bausch & Lomb's motion to dismiss the action, finding that the claims were both expressly and impliedly preempted by the FDCA. The district court also denied the Glovers request to amend their complaint to add a CUTPA claim, finding that it would be futile because the claim would also be preempted by federal law. The Glovers appealed to the United States Court of Appeals for the Second Circuit, which determined that the preemption analysis turns on whether the Glovers have pleaded state law causes of action that exist separately from the FDCA but do not impose requirements different from, or in addition to, those imposed by federal law. Finding no binding Connecticut authority on that question of state law, the Second Circuit certified the following questions, which the Supreme Court accepted pursuant to General Statutes § 51-199b: "1. Whether a cause of action exists under the negligence or failure-to-warn provisions of the Connecticut Product Liability Act, Conn. Gen. Stat. §§ 52-572h, 52-572q, or elsewhere in Connecticut law, based on a manufacturer's alleged failure to report adverse events to a regulator like the FDA following approval of the

device, or to comply with a regulator's post-approval requirements. 2. Whether the Connecticut Product Liability Act's exclusivity provision, Conn. Gen. Stat. § 52-572n, bars a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a, et seq., based on allegations that a manufacturer deceptively and aggressively marketed and promoted a product despite knowing that it presented a substantial risk of injury."

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

Jessie Opinion
Chief Staff Attorney
