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CONNECTICUT REPORTS

Vol. 343

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

ALISON BARLOW *v.* COMMISSIONER OF CORRECTION (SC 20591)

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

Syllabus

The petitioner, who had been convicted of attempt to commit murder, among other crimes, sought a writ of habeas corpus, claiming that his trial counsel, M, had provided ineffective assistance during pretrial plea negotiations. During those negotiations, the trial court offered the petitioner a plea deal of fifteen years of incarceration, execution suspended after nine years, but the petitioner, who had indicated his preference for a six year sentence, rejected that offer. After a jury trial, at which substantial evidence was presented in support of the petitioner's conviction, the petitioner was convicted and sentenced to thirty-five years of incarceration. At the petitioner's first habeas trial, the court rejected the petitioner's ineffective assistance claim, but the Appellate Court reversed the habeas court's judgment, concluding that M's performance was deficient insofar as she did not adequately advise the petitioner regarding the trial court's nine year plea offer. The Appellate Court remanded the case for a new habeas trial on the issue of whether the petitioner had been prejudiced by M's deficient performance. After that new trial, the habeas court, crediting the petitioner's testimony at the new habeas trial, as well as the testimony of a legal expert regarding the advice reasonably competent counsel would have provided, found that the petitioner likely would have accepted the nine year offer if M had adequately advised him and thus concluded that the petitioner met his burden of establishing prejudice. Accordingly, the habeas court rendered judgment granting the petition. On the granting of certification, the respondent, the Commissioner of Correction, appealed. *Held* that the habeas court correctly determined that the petitioner had met his burden of establishing prejudice as a result of M's ineffective assistance: the habeas court's finding that the petitioner likely would have accepted the trial court's nine year plea offer if M had adequately advised him was supported by the record in view of the petitioner's testimony at

the habeas trial, the strength of the state's criminal case against the petitioner, his apparent willingness to plead guilty, the generosity of the plea offer in comparison to the thirty-five year sentence ultimately imposed, and the relatively minor difference in prison time between the plea offer and the petitioner's counterproposal; moreover, this court rejected the respondent's claim that the habeas court had improperly relied on the Appellate Court's conclusion that M's performance was deficient, as the Appellate Court's decision, which was issued nearly eight years beforehand, constituted a final determination of the legal issues presented on appeal, including the issue of whether M's performance was deficient, and, because the respondent never sought certification to appeal from the Appellate Court's judgment, the respondent could not relitigate the legal issues decided by that court; furthermore, the record contained sufficient contemporaneous evidence from the time of the underlying plea negotiations to substantiate the petitioner's after-the-fact testimony that he would have accepted the plea offer but for M's deficient performance.

Argued November 19, 2021—officially released May 17, 2022

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, *Sferrazza*, *J.*; judgment dismissing the first count of the petition and denying the second count of the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Beach*, *Bear* and *Sheldon*, *Js.*, which reversed in part the judgment of the habeas court and remanded the case for further proceedings; thereafter, the court, *Sferrazza*, *J.*, denied the petition and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Beach*, *Keller* and *West*, *Js.*, which reversed the judgment of the habeas court and remanded the case for further proceedings, and the respondent, on the granting of certification, appealed to this court, which dismissed the appeal; subsequently, the case on remand was tried to the court, *Bhatt*, *J.*; judgment granting the petition for a writ of habeas corpus, from which the respondent, on the granting of certification, appealed. *Affirmed.*

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Maureen T. Platt*, state's attorney, and *Eva Lenczewski*, former supervisory assistant state's attorney, for the appellant (respondent).

Naomi T. Fetterman, assigned counsel, for the appellee (petitioner).

Opinion

ECKER, J. The habeas court granted the petition for a writ of habeas corpus filed by the petitioner, Alison Barlow, after determining that the petitioner had suffered prejudice as a result of the ineffective assistance rendered by his trial counsel, who failed to provide the petitioner with professional advice and assistance during pretrial plea negotiations. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court, claiming that the habeas court improperly found that it was reasonably probable that the petitioner would have accepted the trial court's pretrial plea offer but for the ineffective assistance of his trial counsel. We affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. In 1997, the petitioner was charged with attempt to commit murder in violation of General Statutes (Rev. to 1997) § 53a-54a and General Statutes § 53a-49 (a) (2), conspiracy to commit murder in violation of General Statutes (Rev. to 1997) § 53a-54a and General Statutes § 53a-48 (a), two counts of assault in the first degree in violation of General Statutes (Rev. to 1997) § 53a-59 (a) (1), and alteration of a firearm identification number in violation of General Statutes (Rev. to 1997) § 29-36. Prior to trial, the state offered the petitioner a plea deal of eighteen years of incarceration, execution suspended after fourteen years. The trial court, *Damiani*, *J.*, offered the petitioner a plea deal of fifteen years of incarceration, execution suspended

after nine years. On April 21, 1997, the trial court conducted a brief, on-the-record proceeding, at which it memorialized the state's offer, the trial court's offer, and the petitioner's preference for "something after six years." The court also informed the petitioner at that time that the plea deal was available for one day only, after which his case would be placed on the trial list. The petitioner did not accept the trial court's pretrial plea offer.

The petitioner subsequently asked his trial counsel to negotiate a plea deal that would require him to serve only six or seven years of incarceration. In the meantime, notwithstanding the initial characterization of the trial court's plea deal as a one day only offer, the offer of nine years to serve remained in effect for approximately one year, until the start of trial. Prior to the start of trial, Judge Damiani repeatedly asked trial counsel if the petitioner intended to accept the court's offer and plead guilty, but the petitioner did not accept the nine year offer.

During the petitioner's criminal trial, the jury was presented with substantial evidence to support a conviction. Demetrice Chapman, the petitioner's girlfriend, and Kyle Dunn, the petitioner's friend, gave statements to the police indicating that the petitioner was in the car involved in the drive-by shooting of the victim. The state's forensic expert testified that the shell casings found at the scene of the crime matched the pistol discovered in the petitioner's car. Furthermore, as accurately described by the habeas court, "[the petitioner's] codefendants, Miguel Torres and Jose Rodriguez, gave statements to the police implicating themselves and [the petitioner]. These statements were internally consistent and also consistent with the physical evidence and the state's theory of the case. . . . Both [codefendants] cooperated with the prosecution in [the petitioner's] case but ultimately were not called to testify at [his]

trial." The jury found the petitioner guilty of the crimes charged, and the trial court, *Gill*, *J.*, sentenced him to thirty-five years of incarceration. The Appellate Court affirmed the petitioner's judgment of conviction. See *State* v. *Barlow*, 70 Conn. App. 232, 249, 797 A.2d 605, cert. denied, 261 Conn. 929, 806 A.2d 1067 (2002).

The petitioner filed two unsuccessful habeas petitions. At issue in the present appeal is the petitioner's third habeas petition, which alleges that his trial counsel—then Attorney, now Judge, Sheridan L. Moore—rendered ineffective assistance in connection with the pretrial plea negotiations.

The habeas court, *Sferrazza*, *J.*, held a trial on the petitioner's third habeas petition, at which trial counsel testified that she refrained from giving the petitioner any advice regarding the trial court's pretrial plea offer. Trial counsel stated that her practice was to inform defendants about the facts of the offer but not to recommend a specific course of action or to assist a petitioner in weighing the options. Trial counsel could not recall whether the petitioner ever told her directly that he would not accept a plea offer, but she explained that she would not have gone to trial unless the petitioner had rejected the trial court's offer. The petitioner testified that trial counsel did not advise him of the risks and benefits of accepting any of the plea bargain offers, the strengths and weaknesses of the state's case, or any potential defense strategies. He also testified that he would have pleaded guilty and accepted the trial court's offer instead of going to trial if his trial counsel had advised him that his six year counterproposal was not reasonable.

Judge Sferrazza dismissed in part and denied in part the petition after finding that trial counsel's advice did not amount to ineffective assistance of counsel. The Appellate Court reversed in part the judgment of the

habeas court, concluding that trial counsel's "performance was deficient because she did not give the petitioner her professional advice and assistance concerning, and her evaluation of, the trial court's plea offer." *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 802, 93 A.3d 165 (2014). Because the habeas court made no findings concerning prejudice under the second prong of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Appellate Court remanded the case to the habeas court "to determine whether it is reasonably likely that the petitioner would have accepted the [plea] offer had he received adequate advice from [trial counsel]." *Barlow* v. *Commissioner of Correction*, supra, 804.

On remand, Judge Sferrazza did not conduct an evidentiary hearing but, instead, concluded, on the basis of the evidence adduced at the prior habeas trial, that the petitioner had failed to prove prejudice. On the granting of certification, the petitioner appealed to the Appellate Court, which reversed the judgment of the habeas court on the grounds that Judge Sferrazza was statutorily prohibited from trying the case on remand following reversal and that a new habeas trial before a different judge was required. See *Barlow* v. *Commissioner of Correction*, 166 Conn. App. 408, 421, 431, 142 A.3d 290 (2016), appeal dismissed, 328 Conn. 610, 182 A.3d 78 (2018).

Judge Bhatt presided over the new habeas trial on the issue of prejudice. The evidence presented at this trial included the transcript of the first habeas trial before Judge Sferrazza, the testimony of a legal expert, Attorney Brian Carlow, and the testimony of the petitioner. Carlow testified that competent counsel would have advised the petitioner that the case against him was strong and that the trial court's offer of nine years of incarceration was extremely favorable given the lack of any viable defense and the petitioner's criminal record.

According to Carlow, trial counsel should have provided the petitioner with additional context to explain to him that an offer of "six or seven [years was] not on the table," that "Judge Damiani had settled in on nine years," and that, "[u]nless something new, unless something could be shown to him that he didn't already know, he was not going to reduce that nine years." Additionally, Carlow opined that trial counsel should have explained to the petitioner that, if he proceeded to trial, he ran "an exceedingly strong risk of [being sentenced to] multiples of those nine years," for example, "a sentence in the thirties or worse." Judge Bhatt determined that Carlow testified credibly about the advice a reasonably competent criminal defense attorney would have given a defendant in the petitioner's position. Judge Bhatt also found that "[a]t no time did trial counsel tell [the petitioner] that his proposal for six or seven years' incarceration was not going to be accepted by the court, [or] that, in light of all the evidence the state possessed, the offer of nine years was a favorable offer. . . . As trial counsel testified, and the Appellate Court determined, trial counsel provided no assistance, advice or guidance to [the petitioner] regarding his likelihood of success at trial or the likely potential sentence he faced if he [would have gone] to trial and whether accepting the court indicated sentence [would have been] in his best interest." (Citation omitted.)

With respect to the petitioner's testimony, Judge Bhatt found that the petitioner "testified credibly that, had counsel discussed the strengths and weaknesses of the case against him and given him advice concerning the reasonableness of the nine year offer, he would have accepted it. Had he been advised that his six year counterproposal was not feasible and that the court's offer was reasonable, he would have accepted the court's offer." Judge Bhatt further credited the petitioner's testimony that, if trial counsel had informed him

that his codefendants' statements to the police could be introduced as substantive evidence and used against him, "he would have realized the inevitability of his conviction and accepted the nine year offer." Accordingly, Judge Bhatt concluded that the petitioner had been prejudiced by the ineffective assistance rendered by trial counsel because there was a reasonable probability that the petitioner "would have accepted the court indicated sentence of nine years had he been adequately advised by trial counsel and [because] Judge Damiani would have accepted the plea." Judge Bhatt granted the petitioner's petition for a writ of habeas corpus and returned the case to the trial court for a determination of the appropriate remedy.

The respondent filed a petition for certification to appeal, which the habeas court granted. Thereafter, the respondent appealed from the judgment of the habeas court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the respondent argues that the habeas court erred in "uncritically accepting" the Appellate Court's determination that trial counsel had rendered ineffective assistance and in failing to give prominence to contemporaneous evidence "that revealed that, even in the absence of [trial counsel's] explicit advice, there were other ways the petitioner was apprised of information that enabled him, on his own, to make an informed judgment about what plea to enter." The petitioner responds that the habeas court properly found that, but for trial counsel's deficient performance, it is reasonably probable that the petitioner would have accepted the trial court's plea offer. We agree with the petitioner.

"Under the sixth amendment to the United States constitution, a criminal defendant is guaranteed the right to the effective assistance of counsel." *Skakel* v.

Commissioner of Correction, 329 Conn. 1, 29, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). "Given the centrality of plea bargaining to the efficient administration of the criminal justice system, defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the [s]ixth [a]mendment [to the United States constitution] requires in the criminal process at critical stages. Because ours is for the most part a system of pleas, not a system of trials . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 338 Conn. 330, 339–40, 258 A.3d 40 (2021). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687, by "demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 101, 111 A.3d 829 (2015).

The sole issue in the present appeal is the whether the petitioner satisfied his burden of establishing prejudice under the second prong of *Strickland*. "[T]o satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led a defendant to reject a plea offer, the habeas petitioner 'must show [1] that but for the ineffective advice of counsel there

is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [2] that the court would have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.' " *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 352, 53 A.3d 983 (2012) (quoting *Lafler* v. *Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). These factors focus "on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"; *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); and the ultimate conviction or sentence imposed. See *Missouri* v. *Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) ("[t]o show prejudice from ineffective assistance of counsel [when] a plea offer has lapsed or been rejected because of counsel's deficient performance . . . it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time").

The ultimate question of whether a habeas petitioner's sixth amendment rights have been violated "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." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 265, 112 A.3d 1 (2015); see *Strickland* v. *Washington*, supra, 466 U.S. 698 ("[the] prejudice [component] of the ineffectiveness inquiry [is a] mixed [question] of law and fact").

In the context of rejected plea offers, however, the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly erroneous. See, e.g., *United States* v. *Grammas*, 376 F.3d 433, 438 (5th Cir. 2004) ("Whether it is reasonably probable that [the petitioner's] decision to plead guilty would have been different had he been properly counseled as to his potential punishment is a question of fact. Such a determination should be left to the [habeas] court."); *Cullen* v. *United States*, 194 F.3d 401, 405 (2d Cir. 1999) ("the determination of the likelihood that [the petitioner] would have accepted the plea bargain if he had been fully informed of its terms and accurately advised of the likely sentencing ranges under the plea bargain and upon conviction after trial was, like all predictions of what might have been, a factual issue, albeit a hypothetical one"); see also *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 351 ("[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous" (internal quotation marks omitted)).

With the foregoing principles in mind, we address whether the habeas court's factual finding that the petitioner likely "would have accepted the court indicated sentence of nine years had he been adequately advised by trial counsel" was clearly erroneous. "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. . . . Because it is the [habeas] court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do

not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the [habeas] court's ruling." (Internal quotation marks omitted.) *Dickinson* v. *Mullaney*, 284 Conn. 673, 678, 937 A.2d 667 (2007). The habeas court had the opportunity to observe firsthand the "conduct, demeanor and attitude" of the witnesses, and, therefore, it "is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 643–44, 153 A.3d 1264 (2017).

At the habeas trial, the petitioner testified that, if his trial counsel had rendered effective assistance by discussing the strengths and weaknesses of the state's case against him, the reasonableness of the trial court's nine year offer, and the unreasonableness of his six year counterproposal, he would have accepted the trial court's plea offer. The habeas court found the petitioner's testimony to be credible. The habeas court pointed out that the petitioner "had a criminal record and had been previously incarcerated, so avoiding further convictions or having to be incarcerated again was not a factor in determining whether to accept or reject an offer." Additionally, acceptance of the trial court's plea offer "would have been the rational course of action" because "[t]he evidence against [the petitioner] was substantial, and there was a strong possibility that he would be convicted after trial and receive a sentence significantly [harsher] than that contemplated by either the state's offer or the court indicated sentence." The petitioner's position during plea negotiations "demonstrated that he was willing to plead guilty and [to] accept responsibility in exchange for an agreeable sentence," and the difference between the trial court's nine year offer and the petitioner's six year counterproposal was

"hardly a wide gulf . . . especially in light of the significant exposure in excess of eighty-five years faced by [the petitioner]." The habeas court was "convinced that had [the petitioner] been advised as he was entitled to be, he would have bridged that gulf" and accepted the trial court's plea offer.

The habeas court issued a thorough memorandum of decision, and we may "presume that the [habeas] court acted properly and considered all the evidence." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 690, 51 A.3d 948 (2012); see *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 611 n.16, 103 A.3d 954 (2014) ("we . . . may presume, in the absence of any indication to the contrary, that the court considered all of the evidence when assessing [a witness'] credibility"). Although there was conflicting evidence in the record; see footnote 3 of this opinion; the habeas court, as the trier of fact, was "the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [When] there is conflicting evidence . . . we do not retry the facts or pass on the credibility of the witnesses. . . . The probative force of conflicting evidence is for the trier to determine." (Citation omitted; internal quotation marks omitted.) *State* v. *James*, 237 Conn. 390, 407, 678 A.2d 1338 (1996); see *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 26, 257 A.3d 399 ("[a]lthough the petitioner testified that he would have gone to trial but for [trial counsel's] advice, the habeas court, as the sole arbiter of the credibility of witnesses and the weight to be given to their testimony, was entitled to reject his testimony in light of the other evidence presented during trial"), cert. denied, 340 Conn. 913, 265 A.3d 926 (2021); *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 53, 250 A.3d 44 (petitioner failed to prove prejudice in part because "the court clearly did not credit the petitioner's testimony that he would not

have pleaded guilty had he been advised properly [by trial counsel]"), cert. denied, 336 Conn. 948, 250 A.3d 695 (2021). In light of the petitioner's testimony, the strength of the state's case, the petitioner's apparent willingness to plead guilty, the generosity of the plea offer in comparison to the thirty-five year sentence ultimately imposed, and the relatively minor difference between the trial court's plea offer and the petitioner's counterproposal, we cannot conclude that the habeas court's factual finding that the petitioner likely would have accepted the plea but for the ineffective assistance of his trial counsel is unsupported by the record or clearly mistaken.

The respondent argues that the habeas court's factual finding is flawed in two respects. First, the respondent contends that the habeas court improperly relied on the Appellate Court's legal conclusion that trial counsel rendered deficient performance, arguing that *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 781, was wrongly decided and that he "has not yet been able to contest [the Appellate Court's] deficient performance determination" due to "the absence of a final judgment." Second, the respondent contends that the habeas court failed to comply with the dictates of *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017), which requires that "post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies" must be substantiated by "contemporaneous evidence," meaning evidence from the time of the underlying plea negotiations, to support the petitioner's after-the-fact testimony. Both arguments lack merit.

The Appellate Court's decision in *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 781, was issued nearly eight years ago, in 2014. The respondent never filed a petition for certification to appeal from the Appellate Court's judgment seeking review of the

Appellate Court's legal conclusion that trial counsel's performance was deficient. See General Statutes § 51-197f; Practice Book § 84-1.[1] As we explained in *In re Judicial Inquiry No. 2005-02*, 293 Conn. 247, 977 A.2d 166 (2009), there is a distinction between the final judgment of a trial court and the final determination of an appeal by the Appellate Court under § 51-197f. Specifically, " 'the final determination of an appeal rule looks at the finality of the appeal, not at the finality of the underlying judgment. Thus, even though a remand by the Appellate Court may vitiate the finality of the trial court's judgment, the appeal to the Appellate Court has been finally determined because that court has completed its work.' " Id., 256, quoting C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (3d Ed. 2000) § 7.2, p. 265; see *Gold* v. *East Haddam*, 290 Conn. 668, 676, 966 A.2d 684 (2009) (holding that Appellate Court's reversal of trial court's grant of summary judgment and remand for further proceedings "was a final determination of the appeal" under § 51-197f). A "final determination exists . . . under § 51-197f . . . once the Appellate Court conclusively resolves the issue or issues before it and disposes of the cause such that no further action is necessary on *its* part. In other words, the critical factor . . . is whether the decision of the *Appellate Court* represents a final determination." (Emphasis in original.) *In re Judicial Inquiry No. 2005-02*, supra, 257.

Our review of the appellate record reveals that the Appellate Court's judgment in *Barlow* v. *Commissioner*

[1] General Statutes § 51-197f provides in relevant part that, "[u]pon final determination of any appeal by the Appellate Court, there shall be no right to further review except the Supreme Court shall have the power to certify cases for its review upon petition by an aggrieved party or by the appellate panel which heard the matter. . . ." Similarly, Practice Book § 84-1 provides that "[a]n appeal may be filed with the Supreme Court upon the final determination of an appeal in the Appellate Court where the Supreme Court, upon petition of an aggrieved party, certifies the case for review."

of Correction, supra, 150 Conn. App. 781, was a final determination of the legal issues presented on appeal, including, in particular, the issue of deficient performance. Although the Appellate Court reversed the judgment of the habeas court and remanded the case to that court for further proceedings on the issue of prejudice, the Appellate Court had completed its work in connection with the legal issues raised at that time, the appeal was terminated, and "[n]othing further remained for the Appellate Court to do." *In re Judicial Inquiry No. 2005-02*, supra, 293 Conn. 257. Because the respondent failed to file a timely petition for certification to appeal from the Appellate Court's judgment, we reject the respondent's attempt to relitigate the legal issues decided by the Appellate Court.[2]

The respondent next claims that the habeas court failed to incorporate sufficient contemporaneous evidence into its prejudice analysis, in contravention of the holding of the United States Supreme Court in *Lee* v. *United States*, supra, 137 S. Ct. 1967. The respondent acknowledges that the habeas court properly considered some contemporaneous evidence, such as the generosity of the plea offer and the strength of the state's

[2] In his reply brief, the respondent claims for the first time on appeal that the habeas court "[misread] the scope of [the Appellate Court's] remand" and incorrectly concluded that it "was precluded from reassessing the Appellate Court's legal conclusion that the petitioner had satisfied the performance prong of [the *Strickland*] test . . . ." "It is axiomatic that a party may not raise an issue for the first time on appeal in [his] reply brief. . . . Our practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in [his] brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." (Citations omitted; internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 197, 982 A.2d 620 (2009). We therefore decline to address the respondent's belated claim regarding the scope of the Appellate Court's remand.

case, but argues that conflicting contemporaneous evidence "predominates over [the habeas court's] 'post hoc' credibility determination . . . ."[3] The petitioner responds that *Lee*'s contemporaneous evidence requirement is inapplicable to the present case because it applies only to *accepted* plea offers, not *rejected* plea offers. When the ineffective assistance of counsel has led a petitioner to reject a plea offer, the petitioner argues that the applicable standard for demonstrating prejudice is that set forth in *Missouri* v. *Frye*, supra, 566 U.S. 134, and *Lafler* v. *Cooper*, supra, 566 U.S. 156, not *Lee*.

In *Lee*, the petitioner, Jae Lee, pleaded guilty to a crime that subjected him to mandatory deportation on the basis of his attorney's wrongful advice that, if he pleaded guilty, he would not be deported. See *Lee* v. *United States*, supra, 137 S. Ct. 1962. On appeal, it was undisputed that Lee's counsel was ineffective and that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." (Internal quotation marks omitted.) Id., 1967. The issue was whether Lee could demonstrate prejudice "[i]n light of the overwhelming evidence of Lee's guilt" and the probability that he would have "been found guilty and received a significantly longer prison sentence, and subsequent deportation, had he gone to trial." (Internal quotation marks omitted.) Id., 1964.

The United States Supreme Court held that Lee had fulfilled his burden of demonstrating prejudice because of "the paramount importance that Lee placed on avoiding deportation." Id., 1968. The evidence demonstrated that Lee "would have rejected any plea leading

[3] The respondent relies on the following conflicting, contemporaneous evidence: the petitioner's intelligence, his prior plea bargaining experience, his criminal history, his access to witness statements, his advisement of maximum sentence exposure, his willingness to stand up for himself, and his history of risk taking behavior.

to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." Id., 1967. The court emphasized, however, that "[s]urmounting *Strickland*'s high bar is never an easy task . . . and the strong societal interest in finality has special force with respect to convictions based on guilty pleas. . . . Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (Citations omitted; internal quotation marks omitted.) Id.

Justice Clarence Thomas authored a dissenting opinion, in which he relied heavily on *Missouri* v. *Frye*, supra, 566 U.S. 134, and *Lafler* v. *Cooper*, supra, 566 U.S. 156, to support his view that a petitioner who has received the benefit of a guilty plea must demonstrate "not only that he would have [rejected the plea and] gone to trial," but also that "he would likely have obtained a more favorable result in the end," i.e., that he would have been acquitted or sentenced to a shorter period of incarceration. *Lee* v. *United States*, supra, 137 S. Ct. 1970–71 (Thomas, J., dissenting). Applying that standard, Justice Thomas concluded that "a reasonable court or jury applying the law to the facts of [Lee's] case" would have found Lee guilty and that "a higher prison sentence" would have been imposed. Id., 1974 (Thomas, J., dissenting). Because Lee "would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial," Justice Thomas found the evidence of prejudice to be insufficient. Id.

The majority responded that Justice Thomas' reliance on *Frye* and *Lafler* was misplaced because both of those "cases involved defendants who alleged that, but for their [attorneys'] incompetence, they would have *accepted* a plea deal—not . . . that they would have rejected a

plea." (Emphasis in original.) Id., 1965 n.1. The majority reasoned that "*Frye* and *Lafler* articulated a *different* way to show prejudice, suited to the context of pleas not accepted, not an *additional* element" to establish prejudice. (Emphasis in original.) Id. According to the majority, "[t]he issue [in the two different scenarios] is how the required prejudice may be shown." Id., 1966 n.1.

In light of the court's emphasis in *Lee* on the difference between accepted and rejected pleas in terms of how prejudice may be shown, the parties dispute whether the admonition in *Lee* regarding the need for "contemporaneous evidence to substantiate a defendant's expressed preferences" applies to habeas claims involving rejected plea offers under *Frye* and *Lafler*. Id., 1967. Our research reveals that the federal courts have arrived at conflicting conclusions on this issue. Compare *Anaya* v. *Lumpkin*, 976 F.3d 545, 555 (5th Cir. 2020) (declining to "export the *Lee* standard—the need for contemporaneous evidence"—to rejected guilty plea offers, which are governed by the standards articulated in *Frye* and *Lafler*), cert. denied, U.S. , 141 S. Ct. 2703, 210 L. Ed. 2d 872 (2021), with *United States* v. *Knight*, 981 F.3d 1095, 1102 (D.C. Cir. 2020) (applying *Lee*'s contemporaneous evidence standard to rejected plea offers). We need not decide whether *Lee*'s contemporaneous evidence requirement applies to rejected plea offers because, even if it does, the record in the present case contains sufficient contemporaneous evidence to substantiate the petitioner's after-the-fact testimony that he would have accepted the plea deal but for his attorney's deficient performance.

As the United States Court of Appeals for the District of Columbia Circuit observed in *Knight*, " '[t]he [United States] Supreme Court did not suggest in *Lee* that a defendant must hypothesize his counsel's advice might be erroneous and state contemporaneously that his plea decision would differ if that were so.' " *United States*

v. *Knight*, supra, 981 F.3d 1106, quoting *United States* v. *Aguiar*, 894 F.3d 351, 362 (D.C. Cir. 2018). In other words, even assuming that *Lee*'s contemporaneous evidence requirement applies to both accepted and rejected pleas, such evidence is not limited to a petitioner's statements (if any) at the time he accepts or rejects the plea offer. See *Lee* v. *United States*, supra, 137 S. Ct. 1967 (court must focus on "what an individual defendant would have done" and that individual defendant's "decisionmaking"); see also *United States* v. *Akande*, 956 F.3d 257, 264 (4th Cir. 2020) (considering counsel's statements regarding petitioner's priorities during plea process); *United States* v. *Frazier*, 805 Fed. Appx. 15, 17 (2d Cir. 2020) (considering petitioner's statements at sentencing). In addition to the petitioner's prior statements, contemporaneous evidence also includes evidence of (1) the generosity of the plea offer compared to the ultimate sentence imposed; see *United States* v. *Knight*, supra, 1103; (2) the petitioner's willingness to plead guilty; see id., 1104; and (3) the strength of the state's case. See *United States* v. *Hobbs*, 953 F.3d 853, 858 (6th Cir. 2020), cert. denied, U.S. , 141 S. Ct. 2791, 210 L. Ed. 2d 926 (2021); *Young* v. *Spinner*, 873 F.3d 282, 287 (5th Cir. 2017).[4]

In some cases, the available contemporaneous evidence might be equivocal, but "the absence of *unequivocal* contemporaneous evidence . . . [does not] mean that [a petitioner] cannot show a reasonable probability that he would have accepted the plea offer if he had been provided the effective assistance of counsel." (Emphasis added.) *United States* v. *Knight*, supra, 981 F.3d 1106. This is because a habeas petitioner is "not

[4] This list is intended to be illustrative, rather than comprehensive. There may be additional factors, depending on the facts pertinent to each individual case. Indeed, in clarifying the "standard for showing prejudice in the context of a guilty plea" in *Lee*, the United States Supreme Court "emphasiz[ed] the need for a case-by-case examination of the totality of the evidence." *Young* v. *Spinner*, supra, 873 F.3d 285.

required to show either that he wanted to accept the plea offer but was dissuaded by counsel, or that he certainly would have accepted the offer but for counsel's ineffectiveness. Instead, he need[s] to show only that there was a *reasonable probability* that he would have accepted the plea offer were it not for his counsel's inadequate assistance." (Emphasis added.) Id.

Our review of the record reveals that the petitioner's testimony as to how he would have pleaded but for the deficient performance of his trial counsel was substantiated by contemporaneous evidence. Specifically, the generosity of the trial court's nine year plea offer compared to the petitioner's thirty-five year sentence, the petitioner's willingness to plead guilty to an agreeable sentence, the relatively minor difference between the trial court's plea offer and the petitioner's counterproposal, and the strength of the state's case all corroborated the petitioner's post hoc assertions that he would not have rejected the trial court's plea offer if he had received adequate advice and professional assistance from his trial counsel. See id., 1103 (recognizing "that a disparity in sentencing exposure may suffice to show prejudice under the second prong of *Strickland*"); *Pham* v. *United States*, 317 F.3d 178, 182 (2d Cir. 2003) ("a significant sentencing disparity in combination with [a] defendant's statement of his intention [are] sufficient to support a prejudice finding" under *Strickland*). To the extent that the contemporaneous evidence was equivocal; see footnote 3 of this opinion; it was up to the habeas court, as the finder of fact, to weigh the equivocal contemporaneous evidence in assessing whether to believe all, none, or some of the petitioner's testimony. See, e.g., *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 15 n.6, 218 A.3d 1116 (The court "reiterate[d] the well settled principle that [an appellate court] must defer to the finder of fact's evaluation of the credibility of the witnesses that is based on its invalu-

able firsthand observation of their conduct, demeanor and attitude. . . . [The fact finder] is free to juxtapose conflicting versions of events and [to] determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none or some—of a witness' testimony to accept or reject." (Internal quotations marks omitted.)), cert. denied, 333 Conn. 947, 219 A.3d 376 (2019). On the present factual record, we will not second-guess the habeas court's credibility determination. See, e.g., *State* v. *Ayala*, 333 Conn. 225, 238, 215 A.3d 116 (2019) ("[the fact finder] was free to make its credibility determination, and we do not second-guess that determination"). Accordingly, the habeas court did not err in concluding that the petitioner had fulfilled his burden of establishing prejudice.

The judgment is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 212

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

AMMAR A. IDLIBI *v.* CONNECTICUT STATE DENTAL COMMISSION (AC 44331)

Prescott, Alexander and Harper, Js.

Syllabus

The plaintiff dentist appealed from the judgment of the trial court dismissing his administrative appeal from the final decision of the defendant Connecticut State Dental Commission. The plaintiff had treated a minor patient under general anesthesia for the placement of stainless steel crowns in the patient's mouth. Initially, the patient's mother was told that the treatment plan required the placement of only one steel crown and that additional teeth may need fillings, but that such treatment plan could not be finalized until after X-rays were taken during the procedure.

Thereafter, the plaintiff placed eight crowns in the patient's mouth, without the knowledge or informed consent of the patient's mother. Subsequently, she filed a complaint with the Department of Public Health, which brought a statement of charges against the plaintiff, alleging that his dental license was subject to disciplinary action pursuant to statute (§ 20-114 (a)). The commission found, inter alia, that the plaintiff failed to meet the applicable standard of care in treating the patient. On the plaintiff's appeal to this court, held:

1. The commission's claim that the trial court lacked subject matter jurisdiction to hear the plaintiff's administrative appeal was unavailing; although the plaintiff sent the appeal via certified mail to the department, rather than to the commission, as required by statute (§ 4-183), the record demonstrated that the address for both the department and the commission was essentially the same but for the name of the agency to which the mail was addressed, the commission did not claim that the appeal was untimely, that it did not have actual notice or that it was prejudiced by the plaintiff's error, the commission filed a timely appearance, and, on these bases, the plaintiff's failure to properly serve the commission was akin to a defect in the service of process, rather than a total failure to serve the agency.
2. The trial court properly determined that the commission may rely on its own expertise in assessing the evidence and reaching its conclusion that the plaintiff had breached the applicable standard of care, as the commission was granted broad discretion, pursuant to its statutory (§ 20-103a) authority, in determining the appropriate standard of care in an administrative, licensing procedure: the record revealed that the commission relied on the informed consent requirements of the American Academy of Pediatric Dentistry, testimony from various witnesses including the plaintiff, as well as its own expertise, technical competence, and specialized knowledge; moreover, the plaintiff did not cite any support for his claim that the members of the commission were required to have expertise in the specialized field of pediatric dentistry, there was no separate and distinct commission authorized to handle licensing matters concerning pediatric dentistry, and the statute (§ 52-184c) that defines what constitutes a health care expert in a particular field in medical malpractice actions was not applicable to qualifying the witnesses as experts in an administrative licensing procedure governed by statute (§ 4-178); furthermore, the court did not err in concluding that the commission properly permitted expert testimony from a dentist who was not board certified, as the credibility of the expert was for the commission to consider in its determination of the applicable standard of care in the proceedings.
3. The plaintiff could not prevail on his claim that the trial court improperly dismissed his challenge to the commission's findings that he breached the standard of care by failing to obtain informed consent for placing more than one crown on the patient's teeth, as the record contained

substantial evidence to support the commission's findings; although the patient's mother signed a standard consent form on the day of the procedure consenting to treating unforeseen conditions, she had requested to speak with the plaintiff after X-rays were taken and, because he failed to do so, his actions exceeded the consent he received from the standard written form, the commission's determination was based on its assessment of the credibility of the witnesses, and the commission was authorized to ascertain the standard of care, which meant determining the proper standard by which to obtain informed consent.

4. The commission did not act in excess of its statutory (§ 20-114 (a) (2)) authority in ordering disciplinary sanctions as a remedy for the plaintiff's violation of the standard of care; the plaintiff's claim that § 20-114 (a) (2) did not grant the commission authority to discipline him because the department did not, inter alia, allege negligence or incompetence in its charges was unavailing, as it is within the commission's authority to determine the meanings of the terms within § 20-114 (a) (2) relevant to the practice of dentistry, and the commission may take disciplinary action on the basis of a dentist falling below a standard of care, which was equivalent to a finding of incompetence or negligence under § 20-114 (a) (2).

5. The plaintiff could not prevail on his claim that the record did not support the commission's finding that the plaintiff failed to adequately chart caries and decalcifications, as the record contained substantial evidence, including the plaintiff's operative note made during his treatment of the patient, multiple X-rays of the patient, and witness testimony concerning the patient's charting; although the court misstated the commission's conclusion regarding the adequacy of the charting for the placement of additional crowns, any such error was harmless.

6. The plaintiff could not prevail on his claim that there were unresolved inconsistencies in the commission's decision, as the commission was within its authority to find that the department proved some of the charges alleged against the plaintiff, while finding that the department had failed to prove other charges, and the six charges against the plaintiff were not dependent on each other.

7. This court declined to review the plaintiff's unpreserved claim under *State* v. *Golding* (213 Conn. 233) that the trial court's decision to dismiss his appeal violated his right to fundamental fairness, the plaintiff having failed to explain what part of the proceedings allegedly constituted a violation of any constitutional right.

Argued January 12—officially released May 17, 2022

Procedural History

Appeal from the decision of the defendant concluding that the plaintiff failed to meet the applicable standard of care while treating a patient and ordering disciplinary

sanctions with respect to the plaintiff's dental license, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Ammar A. Idlibi, self-represented, the appellant (plaintiff).

Shawn L. Rutchick, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (defendant).

Opinion

HARPER, J. The self-represented plaintiff, Ammar A. Idlibi, appeals from the judgment of the Superior Court dismissing his administrative appeal from the decision of the defendant, the Connecticut State Dental Commission (commission), finding that the plaintiff had failed to meet the applicable standard of care while treating a three year old patient and ordering disciplinary sanctions with respect to the plaintiff's dental license. On appeal, the plaintiff claims that the court improperly dismissed his administrative appeal. Specifically, the plaintiff claims that the court improperly (1) determined that it was proper for the commission to rely on its own expertise in reaching its conclusion that he had breached the applicable standard of care by failing to obtain adequate informed consent; (2) concluded that the commission properly permitted certain expert testimony from a witness who was not board-certified and, as such, lacked knowledge as to the prevailing standard of care; (3) rejected his challenge to the commission's finding that he breached the standard of care by failing to obtain informed consent to place more than one stainless steel crown in the patient's mouth because (a) he did obtain informed consent and (b) the commission, in finding a deviation from the standard of care,

acted in excess of its statutory authority; (4) determined that the evidence in the record supports the commission's finding that he failed to chart caries[1] and decalcifications adequately in violation of the standard of care; (5) left unresolved inconsistences in the commission's decision; and (6) violated his right to fundamental fairness.[2] The commission contends that the court lacked subject matter jurisdiction because the plaintiff served his administrative appeal on the Department of Public Health (department) rather than on the commission.[3] We affirm the judgment of the Superior Court dismissing the plaintiff's appeal.

The following facts and procedural history are relevant to this appeal. The plaintiff is a licensed, board-certified pediatric dentist and has been a member of the American Academy of Pediatric Dentistry (AAPD) since 1990. The plaintiff provides specialized care for children under general anesthesia at the Connecticut Children's Medical Center (hospital), where he has had privileges since 2004.

After the patient was referred to the plaintiff's office by a general dentist, an associate dentist at the office,

[1] Dental caries are defined as "a destructive disease of the teeth that starts at the external surface [and] is followed . . . with subsequent cavitation and direct bacterial invasion . . . ." Stedman's Medical Dictionary (28th Ed. 2006) p. 316.

[2] We note that, in his principal appellate brief, the plaintiff sets forth eleven separate issues on appeal. For judicial convenience, we have distilled the plaintiff's arguments to the aforementioned claims.

[3] We note that the commission did not raise the issue of subject matter jurisdiction as an alternative ground for affirmance pursuant to Practice Book § 63-4 (a) (1) or file a cross appeal from the Superior Court's ruling pursuant to Practice Book § 61-8. "Nevertheless, we consider this issue on its merits because it implicates our subject matter jurisdiction and, therefore, may be raised at any time. See, e.g., *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 569, 858 A.2d 709 (2004). Moreover, the [plaintiff has] not been prejudiced by the [commission's] late raising of the . . . issue on appeal because that question was argued extensively before the [Superior Court] . . . ." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 253 n.17, 990 A.2d 206 (2010).

Joseph Guzzardi, first attempted to treat the patient on January 11, 2016. At that appointment, Guzzardi was not able to take X-rays of the patient but was able to observe the patient's teeth. On the basis of his observations, he indicated to the patient's mother that the patient would require one crown on tooth S and that two more teeth may need fillings. The mother signed multiple consent forms authorizing "treatment of diseased or injured teeth with dental restoration (filling or caps) . . . treatment as may be advisable to preserve health and life," and treatment of unforeseen conditions. She also signed a form consenting to the use of stainless steel crowns.

On January 21, 2016, the patient's mother called Guzzardi to express concern with the idea of placing a stainless steel crown on her child's tooth. Guzzardi testified that, during this phone call, he explained to her that tooth S absolutely needed a crown and that the patient may need multiple crowns. At an appointment on April 8, 2016, the mother again signed a consent form consenting to the treatment of unforeseen conditions. At that appointment, Guzzardi attempted to treat the patient in his office with the use of general anesthesia but was unsuccessful because the attending anesthesiologist was not comfortable going forward with the procedure given the patient's negative reaction to the general anesthesia.

The patient subsequently was placed on the plaintiff's schedule for treatment at the hospital. The day of the procedure was the first time that the patient and her mother had ever met the plaintiff, as they previously had communicated with, and the patient received treatment from, Guzzardi. On April 26, 2016, the plaintiff provided care to the three year old patient under general anesthesia. During the course of the procedure, the plaintiff placed eight stainless steel crowns in the patient's mouth.

The patient's mother subsequently filed a complaint with the department.[4]

On September 7, 2017, the department presented the commission,[5] as the relevant governing board, with a statement of charges against the plaintiff. The charges alleged that the plaintiff's license was subject to disciplinary action pursuant to General Statutes § 20-114 (a)[6] on the ground that the care provided to the three year old patient failed to meet the standard of care. Specifically, the department alleged that the plaintiff (1) failed to obtain adequate informed consent for placing eight stainless steel crowns in the patient's mouth, (2) placed one or more crowns without adequate justification, or without adequate documentation of such, (3) failed to make adequate attempts at treatment without general

[4] The department investigates complaints concerning the competency of licensed health care professionals pursuant to General Statutes §§ 19a-14 (b) (4) and 20-103a. If the department's investigation determines that probable cause exists, it issues a statement of charges regarding the alleged improper conduct to the appropriate board.

Moreover, we note that, although subsection (b) of § 19a-14 has been the subject of an amendment since the events underlying this appeal; see Public Acts 2018, No. 18-48, § 4; that amendment has no bearing on this appeal, and, therefore, we refer to the current revision of the statute.

[5] The commission's enabling act, General Statutes § 20-103a, provides in relevant part: "(a) The State Dental Commission shall consist of nine members . . . six of whom shall be practitioners in dentistry residing in this state who are in good standing in their profession and three of whom shall be public members. . . .

(b) . . . Said commission shall (1) hear and decide matters concerning suspension or revocation of licensure, (2) adjudicate complaints filed against practitioners and (3) impose sanctions where appropriate."

[6] General Statutes § 20-114 (a) provides in relevant part: "The Dental Commission may take any of the actions set forth in section 19a-17 for any of the following causes . . . (2) proof that a practitioner has become unfit or incompetent or has been guilty of cruelty, incompetence, negligence or indecent conduct toward patients . . . ."

Although § 20-114 (a) has been the subject of an amendment since the events underlying this appeal; see Public Acts 2016, No. 16-66, § 12; that amendment has no bearing on this appeal, and, therefore, we refer to the current revision of the statute.

anesthesia or failed to document those attempts adequately, (4) failed to chart findings of cervical decalcification[7] adequately, (5) failed to attempt treatment of cervical decalcification other than by placement of crowns, and (6) failed to adequately chart caries or other dental disease for one or more of the teeth that he crowned.

The parties were notified that hearings would be held before a duly authorized panel of commissioners (panel) comprised of Steven G. Reiss, a doctor of dental surgery; Deborah Dodenhoff, a registered nurse; and Anatoliy Ravin, also a doctor of dental surgery. The hearings took place on January 11 and 16, 2018.[8] Both the plaintiff and the department presented evidence, conducted cross-examination of witnesses, and provided argument. At the hearing, the department called Jenny Federman, a pediatric dentist, to testify as an expert. After extensive direct and cross-examination, the panel qualified Federman to testify as an expert. During the hearing, Federman testified extensively about her opinion concerning the X-rays of the patient. She stated that "[the patient] had one cavity on X-ray and came out with eight crowns." She testified that the informed consent in this case was not adequate because the patient's mother "made it very clear she didn't want eight stainless steel [crowns]. She didn't even want one, and she asked [the plaintiff] to come out after he took the X-rays. . . . It's ultimately the parent's decision." When asked whether the consent form or the conversations between the dentist and the patient to which the witness testified governed informed consent, she stated: "In my opinion, it would be the conversations."

[7] The commission explained in its final decision: "Decalcification of teeth is part of the cavities process and the initial lesion of teeth decay or infection of the tooth. It is a clinical sign of tooth decay."

[8] The panel conducted the hearing in accordance with General Statutes § 4-166 et seq., and § 19a-9-1 et seq. of the Regulations of Connecticut State Agencies.

The plaintiff called Donald Kohn, a board-certified pediatric dentist, to testify as an expert witness. Kohn testified that informed consent should be understood "[f]rom the patient's point of view." He also testified that communicating from the operating room to a patient's parent is a practice he does "frequently" to "reassure [the parent] . . . [and] when there's really been a dramatic change . . . in the treatment plan . . . ." Kohn also testified that "the standard is, what does mom understand? And we have to start to think about what is the consent giver's appreciation of what I'm going to do? And again, we really have to stress, when you go to the operating room the conundrum is you don't know what you're going to find there and so when you get something that's so drastically different from what you initially did, at what point do you do it?" He further testified: "I would say that anything that you can do to make sure that the parent knows the range of—and appreciates the range of outcomes is going to strengthen your informed consent." In response to a question regarding possible preventative measures, Kohn testified that if "all you're seeing is decalcification . . . there are some things you can do. . . . [W]e have . . . some other approaches that we didn't have even a few years ago."

In addition to those expert witnesses, the patient's mother, Guzzardi, and the plaintiff testified. The patient's mother testified emphatically that she had discussed and agreed to placing a crown on only one tooth, tooth S, and that "[n]ever, ever was there any other discussion about [any] other tooth or [other] stainless steel crowns . . . ." She also testified that she and the plaintiff had agreed that, before he did anything to the patient, he would come out of the operating room and let her know what the X-rays and the examination showed. She stated: "From my understanding, I couldn't agree or say anything until [the plaintiff] came out and let me know what my child needed."

Guzzardi testified that "[t]he last agreement that I had with [the patient's] mom when we walked into the room for using general anesthesia was that . . . tooth S definitely needs a crown. There may be further cavities. I will do my best capabilities in invasive procedure, such as a filling, but there may need to be more crowns. I will not know until I have X-rays." When asked by the department's counsel what his understanding was at the appointment that occurred on April 8, 2018, of what the patient's mother had consented to, he stated that "[she] consented to definitely needing a crown on [tooth] S and having the potential to need crowns on other teeth, based on the X-rays and what they reveal[ed]." When asked if, at any time, the mother consented to eight crowns, Guzzardi answered, "[n]o, not specifically eight."

On July 24, 2018, the panel issued a proposed final decision,[9] which the plaintiff opposed. On September 5, 2018, the commission issued a final decision finding that the plaintiff had failed to meet the standard of care. Specifically, the commission found that the plaintiff (1) failed to obtain adequate informed consent from the patient's mother to place crowns on eight of the patient's teeth, (2) placed one or more crowns without adequate justification,(3) failed to chart findings of cervical decalcification adequately, (4) failed to attempt treatment of the cervical decalcification by other means, and (5) failed to chart caries or other dental disease adequately for one or more of the teeth that was crowned. The only charge that the commission did not find against the plaintiff was the allegation that the plaintiff had failed to make adequate attempts at treatment without general anesthesia, as the commission determined there was

[9] Section 19a-9-25 of the Regulations of Connecticut State Agencies provides in relevant part: "If a hearing is held before less than a majority of the members of a board who are authorized by law to render a final decision, a majority of the members of a board shall review all rulings on dispositive motions and shall render the final decision. . . ."

insufficient evidence to support that charge. Subsequently, the commission ordered sanctions against the plaintiff, including the payment of a $10,000 civil penalty, placement of a reprimand on his license, and a three year probationary period during which his license would be subject to conditions.

On September 10, 2018, the plaintiff appealed to the Superior Court. On appeal he contended that (1) the commission's findings regarding the standard of care were not permitted under § 20-114 (a) (2); (2) the commission's findings on informed consent and the failure to chart were not permitted by § 20-114 (a) (2); (3) the commission erred in permitting Federman, a pediatric dentist who is not board-certified, to testify as an expert; (4) the commission erroneously relied on its own expertise in reaching its conclusions; (5) the chairman of the panel should have been disqualified to hear the matter; and (6) the commission improperly restricted his cross-examination at the hearing. After briefing by the parties and oral argument, on January 7, 2020, the court issued an order remanding the final decision for clarification of finding number twenty-six,[10] concerning whether the plaintiff's treatment violated the AAPD standards. The panel heard this issue on remand and issued a new proposed final decision, finding, inter alia, that "the use of stainless steel crowns was not justified, and [that the plaintiff] practiced below the standard of care in using eight stainless steel crowns." The commission subsequently considered the panel's proposed final decision and, this time, disagreed with the panel and voted to change the new proposed decision with respect to finding number twenty-six. On June 16, 2020, the commission issued a second final decision, this time

[10] Finding number twenty-six of the commission's initial decision stated: "In accordance with the [AAPD] [g]uidelines, stainless steel crowns are an appropriate treatment for interproximal multi-surface caries in primary teeth."

determining that it was not a violation of the standard of care to place eight stainless steel crowns in the patient's mouth, but that the disciplinary orders contained in the initial decision were still appropriate on the basis of the other findings concerning the allegations against the plaintiff.

On August 10, 2020, the court issued a second remand order related to the same charge. Specifically, the court ordered the commission to reconcile an inconsistency between the finding of fact that the plaintiff "did not practice below the standard of care with respect to the placement of the stainless steel crowns" with a statement in its decision that "the [department] sustained its burden of proof" with respect to this charge. The court stated, "[i]f the plaintiff was admittedly not liable at all on this charge per finding of fact [number twenty-six], and did not fall below the standard of care, the statement . . . finding that the department's burden of proof was sustained regarding lack of justification cannot stand. . . . [T]he penalty chosen by the commission must not be based on inconsistencies, leaving open questions of interpretation." (Internal quotation marks omitted.) On September 16, 2020, the commission issued a third and final decision, which is the operative decision on appeal. The final decision stated that, "[w]ith regard to the allegations . . . of the charges that [the plaintiff] placed one or more crowns without adequate justification . . . the department did not sustain its burden of proof." In addition, finding number twenty-six was amended to include further explanation of the AAPD guidelines.[11]

[11] The amended finding number twenty-six in the commission's final decision provides in relevant part: "The AAPD guideline does not establish the standard of care. It makes recommendations if certain circumstances are present based upon clinical presentation. . . . In this case, based upon the commission's review of all of the evidence, including the X-rays, and including the testimony of [Federman], the commission concludes that [the plaintiff] did not practice below the standard of care with respect to the placement of the stainless steel crowns."

On October 13, 2020, the court issued a written decision dismissing the plaintiff's appeal. The court concluded, inter alia, that the commission properly relied on its own expertise in establishing the applicable standard of care and in assessing the evidence in order to determine whether the plaintiff had met that standard. The plaintiff filed a motion to reargue, which the court denied. This appeal followed. Additional facts will be set forth as necessary.

I

Because subject matter jurisdiction is a threshold issue, we first address the commission's claim that the court lacked subject matter jurisdiction to hear the plaintiff's administrative appeal. The commission claims that the court improperly concluded that the plaintiff did, in fact, serve the commission in accordance with the service requirements of General Statutes § 4-183. The commission further argues that the "[p]laintiff's failure to timely serve any appeal papers on the [commission] as required by [§ 4-183] deprived the Superior Court of subject matter jurisdiction. . . . Failure to serve the [commission] as the agency that rendered the decision implicates the court's subject matter jurisdiction . . . ." The plaintiff responds in his reply brief that the court did have jurisdiction over this matter. We agree with the plaintiff and conclude that the court had subject matter jurisdiction over the plaintiff's administrative appeal.

The following additional facts are necessary to our resolution of this claim. On November 5, 2018, the commission filed a motion to dismiss challenging the court's subject matter jurisdiction. Specifically, the commission argued that the plaintiff did not serve the appeal on the commission as the agency that issued the final decision. On November 6, 2018, the plaintiff filed an objection. On January 15, 2019, the court held a hearing on the commission's motion to dismiss. After hearing

argument from both parties, the court stated, "I'm going to deny the motion. And let me tell you, there is this case, [*Redding* v. *Connecticut Siting Council*, 45 Conn. App. 620, 697 A.2d 698, cert. denied, 243 Conn. 920, 701 A.2d 343 (1997)]. In that case, the Department of Public Safety was served but not . . . the Connecticut Siting Council. The holding was that they were . . . totally separate agencies, [they] wanted nothing to do with the other. There was no record at all of the service being made on the Connecticut Siting Council and that would . . . [mean that] they do not have . . . subject matter jurisdiction.

"When you have an agency like [the department] that sends out a notice, this is a decision of the [commission] and it's signed by the [department], and the [commission] is part of the [department], even though they're not the—they don't render decisions, they prosecute and there's this line between what they can do and what they can't do. I cited . . . [*Gould* v. *Freedom of Information Commission*, 314 Conn. 802, 104 A.3d 727 (2014)]. There's enough of a mixture here that I think a confusion could have come about and I would cite [*Tolly* v. *Dept. of Human Resources*, 225 Conn. 13, 621 A.2d 719 (1993)]. . . . Here the fellow had his secretary serve the paper and . . . we're going to . . . find that there was sufficiently no prejudice here . . . . [See also *Kindl* v. *Dept. of Social Services*, 69 Conn. App. 563, 795 A.2d 622 (2002)]."

On February 4, 2019, the commission filed a motion to reargue, which was denied by the court. On February 16, 2021, the commission filed a motion to dismiss the plaintiff's appeal with this court, raising the same jurisdictional issues as its initial motion. This court denied that motion on March 31, 2021. The commission did not file a cross appeal from the Superior Court's decision to deny its motion to dismiss. On appeal, the commission

argues that the service that was made on the department, but not on the commission, was improper and thus deprived the court of subject matter jurisdiction over the plaintiff's administrative appeal.

Our standard of review for this claim is well established. "[Our Supreme Court has] long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . There is no absolute right of appeal to the courts from a decision of an administrative agency. . . . Appeals to the courts from administrative [agencies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed." (Citations omitted; internal quotation marks omitted.) *Markley* v. *State Elections Enforcement Commission*, 339 Conn. 96, 106, 259 A.3d 1064 (2021).

Section 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . . (c) (1) Within forty-five days after mailing of the final decision . . . a person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision

at its office or at the office of the Attorney General in Hartford . . . . Within that time, the person appealing shall also serve a copy of the appeal on each party listed in the final decision at the address shown in the decision, provided failure to make such service within forty-five days on parties other than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal. . . .''

Our Supreme Court in *Tolly* v. *Dept. of Human Resources*, supra, 225 Conn. 28–29, articulated an important distinction between a total failure to serve the agency and a defect in service upon the agency, stating: ''If there is no service at all on the agency within the forty-five day period, the court lacks subject matter jurisdiction over the appeal . . . . If, however . . . there is an arguable defect in the process that was timely served on the agency . . . rather than a failure to make service at all within the applicable time period, the court does not lack subject matter jurisdiction over the appeal. Under those circumstances, § 4-183 (d) applies, and the appeal is dismissible only upon a finding of prejudice to the agency.'' (Citation omitted.)

At the January 15, 2019 hearing, the plaintiff conceded that he sent the appeal via certified mail to the department, rather than to the commission. The record shows, however, that the address for both the department and the commission is the same, 410 Capitol Avenue, and that the only practical difference was the name of the agency to which the mail was addressed. At the hearing, the court, in a colloquy with the plaintiff, stated: ''All you had to do is put the [commission] on there and you would have been all set.'' The memorandum of decision issued by the commission was signed by Jeffrey A. Kardys, and his signature block indicated that he was an employee of the department, rather than of the commission. Additionally, the commission filed an appearance with the court within forty days, which was well

within the statutory period of the forty-five days to make service. Thus, the commission does not claim that it did not have actual notice of the appeal, or that it was untimely. Nor does it claim that it was prejudiced by the plaintiff's error in addressing the appeal to the department rather than to the commission. On this basis, we conclude that the present situation is akin to a defect in the service of process, rather than a total failure to serve the agency. Accordingly, the court had subject matter jurisdiction over the plaintiff's administrative appeal.

II

We now address the plaintiff's claims on appeal challenging the court's dismissal of his administrative appeal. Our standard of review in such cases is well settled. The plaintiff's appeal to the Superior Court was brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Judicial review of an administrative decision in an appeal under the UAPA is limited. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, 206 Conn. App. 734, 739, 261 A.3d 1182, cert. denied, 339 Conn. 915, 262 A.3d 134 (2021). "[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) Id.

"It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted

contrary to law and in abuse of [its] discretion . . . . In addition, although we have noted that [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts . . . we have maintained that [c]ases that present pure questions of law . . . invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Dept. of Agriculture*, 168 Conn. App. 255, 266, 145 A.3d 393, cert. denied, 323 Conn. 936, 151 A.3d 386 (2016).

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. . . . An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . ." (Internal quotation marks omitted.) *Towing & Recovery Professionals of Connecticut, Inc.* v. *Dept. of Motor Vehicles*, 205 Conn. App. 368, 371, 257 A.3d 978, cert. denied, 338 Conn. 910, 258 A.3d 1279 (2021).

"It is well established that it is the exclusive province of the trier of fact to make determinations of credibility, crediting some, all, or none of a given witness' testimony. . . . [A]n administrative agency is not required to believe any witness, even an expert. . . . Nor is an agency required to use in any particular fashion any of the materials presented to it as long as the conduct of the hearing is fundamentally fair. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of

the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Citations omitted; internal quotation marks omitted.) *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 830, 955 A.2d 15 (2008).

A

The plaintiff first challenges the court's determination that it was proper for the commission to rely on its own expertise in assessing the evidence and in reaching its conclusion that the plaintiff had breached the applicable standard of care. The plaintiff's claim that such a finding is improper is premised on his assertion that none of the members of the commission "is an expert in the field involved in the case, which is the field of pediatric dentistry." We disagree.

Our case law makes clear that a governing medical board is granted broad discretion, pursuant to its statutory authority, in determining the appropriate standard of care in an administrative, licensing procedure. Our Supreme Court has held that "[a]s long as the board hearing and deciding a licensing matter is composed of at least a majority of experts in the field involved in the case, the board may rely on its own expertise in evaluating charges against persons licensed by the board and the requisite standard of care by which to judge such cases." *Levinson* v. *Board of Chiropractic Examiners*, 211 Conn. 508, 525, 560 A.2d 403 (1989); see also General Statutes § 4-178 (8) (administrative "agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence").

"[M]edical examining boards have expertise in the standards of care in their professions because they are comprised of practicing members of the profession. . . . It is to be presumed that the members of the . . .

board, as composed under the statute, are qualified to pass upon questions of professional conduct and competence. . . . [E]xpert testimony on standards of care is not required in disciplinary hearings before medical examining boards. . . . If medical examining boards can rely on their own expertise on standards of care in disciplinary hearings, then they need not promulgate administrative regulations governing the standard of care. The UAPA provides that any agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence in contested cases." (Citations omitted; internal quotation marks omitted.) *Fleischman* v. *Board of Examiners in Podiatry*, 22 Conn. App. 181, 188–89, 576 A.2d 1302 (1990).

In *Pet* v. *Dept. of Health Services*, 228 Conn. 651, 665, 638 A.2d 6 (1994), the plaintiff argued on appeal, inter alia, that the medical examining board improperly relied on its own expertise in assessing the charges against him. Specifically, the plaintiff argued that "the board . . . reached unsubstantiated conclusions regarding the appropriate standard of care, contrary to the expert authority he had presented to the panel." Id., 666. Although "a person charged with professional misconduct has the right to offer expert opinions at the hearing before the [medical examining] board"; (internal quotation marks omitted) id., 666; our Supreme Court in *Pet* upheld the trial court's determination that there was no abuse of discretion by the board as to the standard of care employed in its determination and concluded: "*It was not improper for the board to utilize its own expertise in reaching its conclusions regarding the plaintiff's professional conduct.*" (Emphasis added.) Id., 667.

Applying the facts of the present case to the governing law, we agree with the court's conclusion that it was proper for the commission to rely on its own expertise

in assessing the evidence and in reaching its determination that the plaintiff had breached the applicable standard of care. In the present case, the record reveals that the commission relied on the informed consent requirements of the AAPD, testimony from multiple witnesses—including Kohn, Federman, Guzzardi, the patient's mother, and the plaintiff—as well as its own expertise in the practice of dentistry. Notwithstanding the other evidence considered, the commission properly relied on its own expertise, technical competence, and specialized knowledge in concluding that the general consent form that the plaintiff had obtained from the patient's mother was insufficient to meet the appropriate standard of care.

The plaintiff's reliance on *Jutkowitz* v. *Dept. of Health Services*, 220 Conn. 86, 596 A.2d 374 (1991), to the contrary, is misplaced. In *Jutkowitz*, the court found that the board was not composed of a majority of experts where it was composed of one public member and one chiropractor. See id., 109–12. *Jutkowitz* simply reaffirmed the rule articulated in *Levinson*. See *Levinson* v. *Board of Chiropractic Examiners*, supra, 211 Conn. 525. We already have concluded, and the plaintiff does not dispute, that the commission in the present case was composed of a majority of experts in the field of dentistry.

Rather, the plaintiff argues that the relevant field of expertise is not dentistry, but more precisely, the field of pediatric dentistry. The plaintiff cites no support for the contention that expertise in the specialized field of pediatric dentistry was required for the commission members to rely on their own expertise to determine the applicable standard of care. Indeed, there is no separate and distinct commission in the state of Connecticut authorized to handle licensing matters concerning pediatric dentistry. The commission is comprised of three public members and six practitioners

in dentistry. See General Statutes § 20-103a. The commission, as well as the panel of three of those members that conducted the hearings, was comprised of a majority of experts in the field of dentistry. "Every member of a profession is presumed to know the governing standards of practice." *Breiner* v. *State Dental Commission*, 57 Conn. App. 700, 708, 750 A.2d 1111 (2000). Thus, pursuant to our governing law, the commission was well within its statutory authority to rely on its own expertise in assessing the evidence and reaching its conclusion that the plaintiff had breached the applicable standard of care.

Additionally, the plaintiff argues that General Statutes § 52-184c is the relevant provision that legally defines what constitutes a health care expert in a particular field. Section 52-184c (a) applies only to "any civil action to recover damages resulting from personal injury or wrongful death . . . result[ing] from the negligence of a health care provider . . . ." It is part and parcel of a broader statutory scheme applicable to civil, medical malpractice actions and is not applicable to the present case, an administrative licensing procedure, which is governed by § 4-178. Thus, the statutory definition provided in § 52-184c is not applicable to this case.

B

The plaintiff next claims that the court erred in concluding that the commission properly permitted Federman to testify as an expert when Federman was not board certified and lacked knowledge concerning the prevailing standard of care. According to the plaintiff, Federman's testimony was inadmissible as to the standard of care, her opinions were "unreliable and inadmissible," and the admission of Federman's "testimony against [the] plaintiff's objection [was] unlawful." We are not persuaded.

In its memorandum of decision, the court stated: "Federman, an experienced pediatric dentist for over twenty years, had been assigned review responsibilities of various complaints by the commission for five years. Under the case law, the commission did not err in allowing her to testify as the commission's expert. See *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014). Under *Weaver*, the commission had broad discretion to qualify Federman as a witness. She had information not known to the public in general and offered to provide the commission with her helpful knowledge. The plaintiff also called . . . Kohn as his expert, and the commission made use of Kohn's testimony in its final decision as well. . . . It should be borne in mind that the commission had the authority to judge the credibility of the witnesses, and participants at the hearing, including Federman [and] Kohn . . . ."

In *Fleischman* v. *Board of Examiners in Podiatry*, supra, 22 Conn. App. 189, which involved a professional licensure proceeding, the plaintiff challenged the expert testimony presented concerning the standards of care in podiatry. Specifically, the plaintiff argued that the expert testimony presented to the board was so general that it was "virtually irrelevant." (Internal quotation marks omitted.) Id., 189. This court stated: "The probative value of the evidence was for the board to determine in the first instance, and that determination will not be disturbed on appeal unless it was arbitrary or an abuse of discretion. . . . Moreover, even supposing that [the expert's] testimony was completely irrelevant, the board was not required to hear expert testimony on standards of care in the first place." (Citation omitted.) Id. Accordingly, the credibility of Federman's testimony was for the commission to consider in its determination of the applicable standard of care in this professional licensure proceeding.

The plaintiff further claims that Federman "must be board certified as the plaintiff is, in order to testify on

the prevailing standard of care," and that because she is not board certified, she is not a " 'similar health care provider' " as defined pursuant to § 52-184c (c). As we stated previously in this opinion, § 52-184c is part of the statutory scheme that relates to medical malpractice actions and is inapplicable to our resolution of the present case. The plaintiff's claims as to Federman's testimony, therefore, fail.

C

The plaintiff next claims that the court improperly rejected his challenge to the commission's finding that he breached the standard of care by failing to obtain informed consent for placing more than one stainless steel crown on the patient's teeth because (1) he did obtain informed consent for the dental work performed and (2) the commission, in finding a deviation from the standard of care, acted in excess of its statutory authority.

1

With respect to the plaintiff's claim that he obtained informed consent for the dental work performed, the plaintiff argues that "[t]he [patient's] mother consented to the use of multiple crowns as needed, and to treating unforeseen conditions." We disagree.

Our review of this claim is governed by the substantial evidence rule. See *Nussbaum* v. *Dept. of Energy & Environmental Protection*, supra, 206 Conn. App. 739 ("[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable" (internal quotation marks omitted)).

In support of his contention that he did obtain informed consent for the dental work performed on the patient, the plaintiff relies on the standard consent form that

the patient's mother signed on the day of the procedure.[12] The commission, however, specifically found that "[t]he plaintiff's standard form of consent, [which was] silent on the mother's understanding of the procedure, [did] not govern," as the mother, at the time of signing that form, specifically had told the plaintiff that she expected to hear from him during the operation on the patient. Moreover, the commission concluded, on the basis of the testimony from the patient's mother, which it found credible, and Guzzardi, that the patient's mother had not given her consent to place the crowns but, rather, had requested that the plaintiff speak with her after obtaining X-rays. The plaintiff's expert, Kohn, even testified that if the testimony of the patient's mother was true concerning her request to speak with the plaintiff after X-rays were taken, then the plaintiff's conduct violated the standard of care because his actions exceeded the consent he received from the standard written form. The commission's determination was based on its assessment of the credibility of the witnesses, which is not for this court or the trial court to second-guess. See *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, supra, 288 Conn. 830 ("[i]t is well established that it is the exclusive province of the trier of fact to make determinations of credibility, crediting some, all, or none of a given witness' testimony"). Because the record contains substantial evidence to support the commission's finding that the plaintiff violated the standard of care by not obtaining informed consent, the plaintiff's claim fails.

The plaintiff further argues that, "[e]ven if the mother's claim is true and credible, [his failure] to entertain

[12] Specifically, the plaintiff relies on the following language in the consent form: "I understand that my child's doctor may find or discover additional conditions which in his professional judgment make it advisable to perform additional or different procedures than those planned. I authorize my doctor and his assistants, and other healthcare providers to perform such other procedures which they deem advisable in their professional judgment."

her request [was] legally insufficient to support a claim of lack of informed consent." The plaintiff, again, relies on a medical malpractice case in support of this contention. As we already have noted, in administrative licensing proceedings, the relevant medical board is authorized to ascertain the standard of care, which, in the present case, meant determining the proper standard by which to obtain informed consent. See *Levinson* v. *Board of Chiropractic Examiners*, supra, 211 Conn. 525. The plaintiff's claim, thus, lacks merit.

2

The plaintiff next claims that the commission acted in excess of its statutory authority under § 20-114 (a) (2) by ordering disciplinary sanctions as a remedy for his alleged violation of the standard of care for failing to obtain informed consent.[13] We are not persuaded.

Section 20-114 (a) (2) provides in relevant part that the commission may impose sanctions when there is "proof that a practitioner has become unfit or incompetent or has been guilty of cruelty, incompetence, negligence or indecent conduct toward patients . . . ." The plaintiff claims that the language in the statute does not grant the commission the authority to discipline him in this case because the department did not allege negligence or incompetence in its charges, and the commission's finding of lack of informed consent is not the same as a finding that he was incompetent or unskillful.

[13] The plaintiff also claims that the court improperly rejected his argument that the commission's order placing him on probation was arbitrary and unreasonable. The plaintiff has failed to brief this claim adequately, and, thus, we decline to review it. See *Canner* v. *Governor's Ridge Assn., Inc.*, 210 Conn. App. 632, 653, 270 A.3d 694 (2022) ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)).

In *Altholtz* v. *Dental Commission*, 4 Conn. App. 307, 310, 493 A.2d 917 (1985), this court affirmed the trial court's dismissal of the plaintiff dentist's administrative appeal. On appeal, the plaintiff in *Altholtz* claimed, inter alia, that § 20-114 was unconstitutionally vague. This court concluded that the statute was not vague, stating: "Terms associated with the trade or business with which a given statute is concerned should be accorded the meaning which they would convey to an informed person in that trade or business. . . . We presume that members of a professional health licensing board are competent to decide on the basis of such terms whether certain conduct is in derogation of professional standards. . . . It is also our view that what constitutes 'unprofessional conduct' and what renders a professional 'unfit' or 'incompetent' are to be determined 'by those standards which are commonly accepted by those practicing the same profession in the same territory. . . . These standards are part of the ethics of the profession, and every member of the profession should be regarded as an expert with regard to the determination of their meaning." (Citations omitted.) Id., 314–15. Thus, in light of this court's decision in *Altholtz*, it was well within the commission's authority to determine the meaning of the terms in § 20-114 (a) (2) relevant to the practice of dentistry.

In the present case, the commission determined that the plaintiff's failure to provide the patient's mother with informed consent fell below the standard of care and, as a result, it imposed disciplinary measures against the plaintiff. The court concluded that § 20-114 (a) (2) "allows the commission to take disciplinary action when there is 'proof that a practitioner has become unfit or incompetent or has been guilty of cruelty, incompetence, negligence or indecent conduct towards patients.' However, both [*Altholz* v. *Dental Commission*, supra,

4 Conn. App. 307, and *Macko* v. *State Dental Commission*, Superior Court, judicial district of New Britain, Docket No. CV-08-4016782 (January 26, 2010)] allow the commission to take disciplinary action based on a dentist falling below a standard of care. These cases find [that] the use of incompetence and/or negligence in § 20-114 (a) (2) [is] equivalent to 'standard of care.' This has been in our law in the discipline of medical professionals since at least 1949. See *Jaffe* v. *Dept. of Health*, 135 Conn. 339, 351, 64 A.2d 330 (1949)." We agree with the court. Accordingly, we conclude that the commission acted within its statutory authority to discipline the plaintiff as it did in this case.

D

The plaintiff next challenges the court's determination that the evidence in the record supports the commission's finding that he failed to adequately chart caries and decalcifications in violation of the standard of care. The plaintiff alleges, in effect, that the record does not contain substantial evidence to support this finding. We do not agree.

In its final decision, the commission concluded that the department did not sustain its burden of proof as to the charges that the plaintiff "placed one or more crowns without adequate justification, or without adequately documented justification . . . ." In its memorandum of decision, the court concluded that "the record permitted the commission to find . . . that the plaintiff failed to provide the required full details for his decision to place the additional crowns." On appeal, the defendant points to this purported discrepancy between the court's conclusion and the commission's finding as to the adequacy of the charting for the placement of additional crowns. Although we agree that the court misstated the commission's conclusion, any error was harmless given that the plaintiff was not disciplined

for failing to adequately chart the placement of the additional crowns and given that substantial evidence in the record existed to support the commission's actual finding of inadequate charting of caries and decalcifications, for which, in part, the disciplinary action was imposed.

In the present case, the commission concluded that the plaintiff had failed to meet the standard of care due to his inadequate charting. In making that finding, the commission relied on ample evidence, including the plaintiff's operative note made during his treatment of the patient, multiple X-rays of the patient, and witness testimony concerning the plaintiff's charting. In its final decision, in support of this finding, the commission explained: "Kohn testified that cervical decalcification of teeth is part of the cavities process and the initial lesion of tooth decay or infection of the tooth. . . . It has a chalky white appearance and is the first sign of clinical tooth decay. . . . Kohn also testified that, when an operative note makes a notation for multisurface caries, it could mean decalcification, part of a continuum of tooth decay. It can include decalcified lesions that are really soft and chalky, which can be just scraped away. It can also include a decalcification that is not soft, and which amounts to an actual cavity . . . . Lastly . . . Kohn testified that based on the quality of the X-ray images he could not discern any interproximal decay on the teeth except, possibly, on the distal side of tooth L and the distal side of tooth S. . . . Federman testified that she did not see any decay on the X-rays provided that warranted a crown."

"The [commission] agrees with . . . Federman's testimony that the X-rays fail to show cervical decalcifications on [various teeth] that require crowns. The [commission] also finds that the [plaintiff's] operative note fails to adequately describe the cervical decalcification

that the [plaintiff] found in his examination. The [plaintiff's] operative note does not describe whether the cervical decalcification was at the initial chalky white stage that could be scraped away or whether it amount to a cavity and therefore warranted more aggressive treatment."

On the basis of this evidence, the commission concluded that the "[d]epartment has sufficiently established . . . that the [plaintiff] failed to adequately chart findings of cervical decalcification in violation of the standard of care." We agree and conclude that the defendant's challenge to the sufficiency of the evidence in the record to support that finding is unavailing.

E

The plaintiff's next claim is that there are unresolved inconsistences in the commission's decision. Specifically, the plaintiff argues that "the final finding that the treatment provided was justified according to the record . . . is inconsistent with the finding that [the] plaintiff's charting to justify the crowns is inadequate." (Footnote omitted.)We are not persuaded.

In its final decision, the commission found that the department did not meet its burden of proving the charge that the plaintiff placed one or more crowns without adequate justification, or without adequately documented justification. The commission did find, however, as it had in its initial decision, that the department did meet its burden to prove the charges that the plaintiff failed to adequately chart findings of cervical decalcification and that the plaintiff failed to adequately chart caries or other dental disease for one or more of the teeth that he crowned. The six charges that the department alleged against the plaintiff are not dependent on one another. The commission was well within its authority to find that the department proved some of the charges alleged against the plaintiff, while finding

that the department had failed to prove other charges. See *Wolf* v. *Commissioner of Motor Vehicles*, 70 Conn. App. 76, 83, 797 A.2d 567 (2002) ("the existence of contradictory evidence and the possibility of drawing two inconsistent conclusions from the evidence does not preclude an administrative agency's finding from being supported by substantial evidence"). Accordingly, this claim fails.

F

The plaintiff's final claim is that the court's decision violates his right to fundamental fairness. We decline to review this claim.

The plaintiff acknowledges that his constitutional claim is unpreserved and seeks review of it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). His claim is predicated on his assertion that informed consent was obtained properly. In making that assertion, the plaintiff appears to be challenging the commission's assessment of the credibility of the witnesses, as well as its findings that he deviated from the standard of care by charting inadequately and failing to obtain informed consent, which we already have addressed and have determined are not improper. The plaintiff argues in conclusory fashion that his constitutional right to fundamental fairness was violated; however, his claim, essentially, is another challenge to the sufficiency of the evidence to support the finding that he deviated from the standard of care. Because the plaintiff has failed to explain what part of the proceedings allegedly constituted a violation of any constitutional right, the claim is inadequately briefed and we decline to review it. See *State* v. *Henderson*, 47 Conn. App. 542, 558, 706 A.2d 480 ("[a]nalysis, 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)), cert. denied, 244 Conn. 908, 713 A.2d 8298 (1998). Moreover, our Supreme Court repeatedly has held that "the procedures required by the UAPA exceed the minimal procedural safeguards mandated by the due process clause." (Internal quotation marks omitted.) *Pet* v. *Dept. of Health Services*, supra, 228 Conn. 661.

The judgment is affirmed.

In this opinion the other judges concurred.

W. K. *v.* M. S.*
(AC 44543)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for an order of civil protection. The court held an evidentiary hearing on the application, during which the plaintiff testified. The defendant did not testify and was not present at the hearing but was represented by counsel, Z. The court found that the defendant's position was less credible because he did not appear at the hearing. The court also took judicial notice of a summary process complaint filed against the defendant by a housing authority and concluded that the allegations of serious nuisance in the complaint buttressed the credibility of the plaintiff because the allegations were similar to the plaintiff's. The housing authority had withdrawn the summary process action prior to the evidentiary hearing. *Held*:

1. The trial court erred when it, sua sponte, took judicial notice of the contents of the summary process complaint against the defendant without giving him notice and an opportunity to be heard: although Z attempted to be heard at the evidentiary hearing on the court's decision to take judicial notice of the summary process complaint, the court did not give Z an opportunity to voice her concern with its decision, and, at the conclusion of the hearing, Z attempted to make the court aware

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

that the summary process action had been withdrawn; moreover, the court failed to inquire into the basis for the housing authority's allegations or why it withdrew the action; furthermore, the court's error was compounded by its statements that the allegations of the summary process complaint buttressed the plaintiff's credibility.

2. The trial court erred by finding the defendant less credible because he did not appear at the hearing: the court took into account the defendant's conduct, namely, his failure to appear, which was not evidence, to help it decide a substantive issue; moreover, because the defendant, who was represented by counsel, did not testify at the hearing, there was no finding to be made as to his credibility.

3. The trial court's errors resulted in harm to the defendant and, accordingly, it abused its discretion in issuing an order of civil protection: the court's decision to take judicial notice of the contents of the summary process complaint harmed the defendant because the court improperly relied on the unproven allegations of that complaint when it made its factual findings with respect to the plaintiff's credibility; moreover, in finding that the defendant's position was less credible because of his absence at the hearing, the court weighed the defendant's credibility against that of the plaintiff when there was no basis for it to do so; furthermore, the court's decision to issue the civil protection order turned on its determination that the plaintiff was credible and its determination that the defendant's absence hurt his credibility, which undermined this court's confidence in the court's fact-finding process and warranted reversal of its decision because the court's factual findings served as a significant part of the basis for the court's decision to issue the order of civil protection.

Argued February 2—officially released May 17, 2022

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of Litchfield, where the court, *J. Moore*, *J.*, granted the application and issued an order of protection, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Sally R. Zanger, for the appellant (defendant).

Opinion

LAVINE, J. The defendant, M. S., appeals from the judgment of the trial court granting an application for

a civil protection order filed by the plaintiff, W. K.[1] On appeal, the defendant claims that the court erred (1) when it, sua sponte, took judicial notice of the contents of a summary process complaint against him without giving him notice and an opportunity to be heard, (2) by finding the defendant less credible because he did not appear at the hearing, (3) when it, sua sponte, took judicial notice of and relied on a previous application for a protective order filed by the defendant against the plaintiff without giving the defendant notice and an opportunity to be heard, and (4) by finding sufficient evidence to grant the application for the order of civil protection. We agree with the defendant's first and second claims and, accordingly, reverse the judgment of the court and remand this case with direction to vacate the order of civil protection. Because we conclude that the court committed reversible error with regard to those claims, we need not address the remaining claims.

The following procedural history is relevant to this appeal. The parties are neighbors and have lived in adjoining apartment units in Torrington since July, 2020. Both parties have called the police to report various disputes between them, and the police have instructed the parties to stay away from one another. Additionally, the plaintiff reported to the police dangerous actions that the defendant allegedly had taken against other neighbors.

On January 5, 2021, the plaintiff, pursuant to General Statutes § 46b-16a, filed an application for an order of civil protection against the defendant and obtained an ex parte order of civil protection against the defendant.[2]

[1] The plaintiff, who has been self-represented throughout these proceedings, did not file a brief in this court. We therefore decide the appeal on the basis of the defendant's brief and oral argument and the record.

[2] Pursuant to General Statutes § 46b-16a (b), upon receipt of an application for a civil protection order, the court "shall schedule a hearing not later than fourteen days from the date of the application." Section 46b-16a (b) further provides in relevant part that, before a hearing is held, "[i]f the court finds that there are reasonable grounds to believe that an imminent danger

In his application, the plaintiff made the following allegations. The defendant had: "vandalized [the plaintiff's] apartment"; "made false accusations to the police trying to get [the plaintiff] arrested"; "[thrown] a rock, causing [the plaintiff] injury"; "thrown feces at [the plaintiff's] window"; "smashed [the plaintiff's] window"; "poisoned [the plaintiff's] garden with ammonia or urine, not sure which"; "[drawn] swastikas outside of [the plaintiff's] door"; "given [the plaintiff] the Nazi salute"; and made anti-Semitic remarks directed at the plaintiff. The plaintiff also alleged that, "[a]fter a failed [frivolous] attempt to get a restraining order against [the plaintiff], [the defendant] punched [the plaintiff's] car and left a note admitting to it." On a separate occasion, he alleged, a witness saw the defendant "[put six] M-90 explosives under [the plaintiff's car] . . . ."[3] The plaintiff further alleged: "There is a 911 call in which [the defendant can be heard] threatening [the plaintiff] and behaving violently . . . ." Additionally, the plaintiff stated that the defendant "is being evicted" and that the Housing Authority of the City of Torrington (housing authority) "has records of times and dates of the dozens of incidents." On January 13, 2021, the defendant filed an objection to the ex parte civil protection order.

The court held an evidentiary hearing on the plaintiff's application for a protective order on January 29, 2021. The plaintiff testified about the allegations in his application and did not offer any exhibits. The defendant did not testify and was not present at the hearing.[4] The defendant's attorney, Sally Zanger, called Officer Joseph DeGoursey of the Torrington Police Department

exists to the applicant, the court may issue an ex parte order granting such relief as it deems appropriate. . . ."

[3] A police report, which was entered into evidence as a full exhibit, indicates that an M-90 is a type of firecracker.

[4] The court attempted to locate the defendant during the hearing. The court stated: "Just so it's clear, for the record, the clerk has attempted to call [the defendant] and the call went directly to his voicemail."

as a witness to testify about police reports prepared by the department. The defendant, through Zanger, offered into evidence four police reports detailing incidents between the plaintiff and the defendant, as well as the defendant's alleged conduct toward others in the neighborhood. The reports were admitted into evidence as full exhibits.

In issuing the order of civil protection, the court stated: "In making its decision, the court . . . notes the following factors. Number one, the court is the ultimate arbiter of credibility in a courtside case. The court can also take judicial notice of its own files, both in this case and in other cases.

"That being said, the court finds that [the defendant's] position is much less credible, rendered so by the fact that [the defendant] chose not to appear today. [The defendant's] position is, also, much less credible because the court takes judicial notice of the summary process file in which lawyers, who are bound by the Rules of Professional Conduct, made allegations of serious nuisance, many of the same of which—I'm issuing my ruling, counsel, don't raise your hand—they made many of the same allegations, which buttresses some of the allegations that the [plaintiff] made today.

"The court also finds that a couple of weeks ago there was a reverse civil protective order hearing, in effect, in which [the defendant] was trying to get a protective order against [the plaintiff] and Judge Shaban decided there was not enough evidence there for that."

The court, pursuant to § 46b-16a, issued an order of civil protection against the defendant and stated: "The court has no doubt that this is a neighbor dispute. The court has no doubt that there are mental health issues involved on behalf of the [defendant]. However, the court finds that the [defendant] has thrown a rock at the [plaintiff], the [defendant] has brandished bug spray

at the [plaintiff], the [defendant] has brandished a flashlight at the [plaintiff],[5] the [defendant] has made anti-Semitic remarks against the [plaintiff].

"Therefore, the court is going to issue a civil order of protection with the following terms. The [defendant] is to surrender or transfer all firearms and ammunition; the [defendant] is not to assault, threaten, abuse, harass, follow, interfere with or stalk the protected person. I don't think I can order a stay away because their doors are right next to each other. [F]or the present time, I think that would [be] impossible to enforce." (Footnote added.)

When the court stated that it was taking notice of "the summary process file," it was referring to a summary process complaint filed by the housing authority against the defendant on August 10, 2020. On January 19, 2021, the housing authority withdrew its action against the defendant. Following the court's oral ruling granting the order of protection and as the court was transitioning to its next case, Zanger attempted to inform the court that the summary process action had been withdrawn. The following exchange occurred between Zanger and the court:

"[Zanger]: (Inaudible) matter was withdrawn.

"The Court: Thank you. I didn't hear what she said; did you?

"[The Clerk]: I don't think we wanted to."

[5] The plaintiff's application does not contain allegations about the incidents involving the bug spray and the flashlight. The plaintiff, however, testified at the hearing that, on one occasion, the defendant pointed a can of bug spray in the plaintiff's face and threatened to spray him with it if he came any closer to the defendant. One of the police reports that was entered into evidence contains the plaintiff's allegations about that incident. The plaintiff also testified that, on another occasion, the defendant "came after" him with a flashlight.

The court did not inquire further about Zanger's remarks.

On the day of the hearing, following its oral decision, the court issued a written order stating: "This order shall supplement and clarify the court's remarks from the bench in granting this civil protective order. The court did not find, as independent facts, the allegations of the summary process matter against the [defendant], which has been withdrawn. However, the court found that the allegations of serious nuisance included in that action, which were made by attorneys who are bound by the Rules of Professional Conduct, including rules 3.3 and 4.1, as well as by [§] 10-5 of the . . . Practice Book, buttress the credibility of the [plaintiff] when he testified as to threatening actions taken against him by the [defendant]." This appeal followed. Additional procedural history will be set forth as necessary.

I

The defendant claims that the court erred when it, sua sponte, took judicial notice of the contents of a summary process complaint against him without giving him notice and an opportunity to be heard. We conclude that the court's taking of judicial notice was improper both in form and in substance. We agree that the court should have given the defendant notice and an opportunity to be heard. The more concerning error, however, was the court's *reliance* on the allegations in the summary process complaint in finding the plaintiff credible in the present case. We will address that error further in part III of this opinion.

The following additional procedural history is relevant. The summary process complaint filed by the housing authority contained, among other things, the following allegations: (1) "[O]n or about July 18, 2020, the

defendant lit and threw a fire bomb (M-90s)[6] at the direction of a porch of a biracial couple who live across the street from [the] defendant's unit" (footnote added); (2) "[o]n or about July 16, 2020, the defendant placed three . . . M-90s under another tenant's car"; (3) "[o]n July 20, 2020, the defendant chased a neighboring tenant into [the] tenant's apartment and threatened [the] tenant with a flashlight"; and (4) "[o]n or about July 16, 2020, the defendant threw M-90s out of [the] defendant's unit and almost hit a child across the street from [the] defendant's unit . . . [and] [t]he local police department has been called several times." On January 19, 2021, the housing authority withdrew its action against the defendant. At the January 29, 2021 hearing in the present case, the court, sua sponte, took judicial notice of the complaint. When the court stated that it was doing so, Zanger raised her hand. The court did not permit her to speak.

"A trial court's determination as to whether to take judicial notice is essentially an evidentiary ruling, subject to an abuse of discretion standard of review. . . . In order to establish reversible error, the [defendant] must prove both an abuse of discretion and a harm that resulted from such abuse. . . . In reviewing a trial court's evidentiary ruling, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently . . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Internal quotation marks omitted.) *Rogalis, LLC* v. *Vazquez*, 210 Conn. App. 548, 556–57, 270 A.3d 120 (2022).

"The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice

[6] We reasonably can infer that the housing authority was referring to the same type of firecracker that was mentioned in the plaintiff's application and the police report. See footnote 3 of this opinion.

and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned." Conn. Code Evid. § 2-2 (b).

"Notice to the parties is not always required when a court takes judicial notice. Our own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, whose accuracy cannot be questioned, such as court files, which may be judicially noticed without affording a hearing. . . .

"Other authorities have drawn a distinction between 'legislative facts,' those which help determine the content of law and policy, and 'adjudicative facts,' facts concerning the parties and events of a particular case. The former may be judicially noticed without affording the parties an opportunity to be heard, but the latter, at least if central to the case, may not." (Citations omitted.) *Moore* v. *Moore*, 173 Conn. 120, 121–22, 376 A.2d 1085 (1977).

"Court records may be judicially noticed for their existence, content, and legal effect. *State* v. *Gaines*, 257 Conn. 695, 705 n.7, 778 A.2d 919 (2001); *Grant* v. *Commissioner of* [*Correction*], 87 Conn. App. 814, 817, 867 A.2d 145 (2005). 'Judicial notice of a court file or a specific entry in a court file does not establish the truth of any fact stated in that court file.' [Conn. Code Evid.] § 2-1 (c) (commentary); *Fox* v. *Schaeffer*, 131 Conn. 439, 447, 41 A.2d 46 (1994). For example, a court may judicially notice that certain testimony was given in a case, but not that it was true. . . . [S]ee *O'Connor* v. *Laroque*, 302 Conn. 562, 568 n.6, 31 A.3d 1 (2011) . . . ." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 2.3.4 (d), p. 107.

In the present case, the allegations in the summary process complaint can be characterized as "adjudicative facts." Furthermore, allegations, by their nature, are susceptible to contradiction. The court could have, without giving the defendant notice and an opportunity to be heard, taken judicial notice of the fact that the housing authority brought a summary process action against the defendant. The court also could have taken judicial notice of the content of the summary process complaint. The court went a step further, however, by stating that the housing authority made many of the same allegations against the defendant in its summary process complaint, and that those allegations "buttress[ed]" the plaintiff's credibility. The court's statements indicate that it relied in part on the adjudicative facts contained in the summary process complaint to help it make factual findings with respect to the plaintiff's allegations in the present case.

The hearing transcript indicates that Zanger attempted to be heard on the court's decision to take judicial notice of the summary process complaint.[7] First, immediately after the court stated that it was taking judicial notice of the complaint, Zanger raised her hand. The court did not allow Zanger to interject or give her an opportunity to voice her concern with its decision. Second, at the conclusion of the hearing, Zanger attempted to make the court aware that the summary process action had been withdrawn. Finally, the court failed to inquire into the basis for the housing authority's allegations or why it withdrew the action.

Accordingly, we conclude that the court erred by taking judicial notice of the contents of the summary process complaint without first providing the defendant

[7] Additionally, the record does not indicate that the court gave the parties notice that it intended to take judicial notice of the summary process complaint.

with notice and an opportunity to be heard. Stating that the mere allegations in the complaint "buttress[ed]" the plaintiff's credibility significantly compounded the error. In part III of this opinion, we will address the harm to the defendant caused by the court's decision.

II

The defendant claims that the court erred by finding him less credible because he did not appear at the hearing. We agree.

To reiterate, the court purported to make a credibility finding by stating that it "[found] that [the defendant's] position [was] much less credible, rendered so by the fact that [the defendant] chose not to appear" at the hearing. This statement falls outside of the purview of a typical credibility finding, in which a judge sees and hears a sworn witness testify. Thus, we are not tasked with evaluating the court's credibility determination itself, as it is the exclusive province of the finder of fact to make such determinations. *State* v. *Roy D. L.*, 339 Conn. 820, 849, 262 A.3d 712 (2021). Rather, we must consider whether the court properly considered the defendant's *absence* in making its credibility determination. This matter raises a question of law, and our review, therefore, is plenary. See *Travelers Property & Casualty Co.* v. *Christie*, 99 Conn. App. 747, 761, 916 A.2d 114 (2007) ("[a]lthough the question of relevancy, and thus admissibility, of evidence is subject to review for abuse of discretion, the question of whether an observation of the court properly can be subject to the relevancy analysis at all is a question of law, and therefore our review is plenary").

Although it is permissible for a court to draw an adverse inference from a party's failure to appear to testify at a scheduled hearing; see, e.g., *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 673, 133 A.3d 482 (2016); we are not aware of any authority that permits

a court to make findings about a party's *credibility* based on his absence. The court, however, did not state that it was drawing an adverse inference from the defendant's absence. Instead, it explicitly stated that the defendant's absence weighed against the credibility of his position. This is not merely a distinction without a difference.

In support of his argument, the defendant cites *Travelers Property & Casualty Co.* v. *Christie*, supra, 99 Conn. App. 747, which we find instructive on this issue. In *Christie*, a hearing was held to determine, among other things, the amount that the self-represented defendant owed her appraiser for assessing the amount of loss caused to the defendant's home by a storm. Id., 749–50. The court ordered that the defendant pay the appraiser a certain amount and stated that the amount was reasonable because the appraiser " 'worked under very difficult, frustrating circumstances. Apparently, he had a very uncooperative client that frustrated him on many occasions.' " Id., 761. The court then stated that the defendant had " 'demonstrated in court during this several day hearing how difficult she [could] be, and her attitude and lack of cooperation may well have caused his bill to become higher than it would have been in an ordinary situation.' " Id.

On appeal, the defendant claimed that "it was improper for the court to consider her conduct in the courtroom, when advocating her cause as evidence supporting the reasonableness of [the appraiser's] award." Id., 760. This court agreed, noting that the only question for the court to determine was the amount of funds to be distributed to the appraiser. Id., 762. This court stated that the defendant's "attitude and personality . . . was not evidence from which the court could infer that the appraiser's bill was necessarily higher than in 'an ordinary situation' . . . ." Id. Accordingly, this court held that the court's improper consideration of the

defendant's demeanor was "harmful and necessitate[d] a new trial." Id.

In the present case, as in *Christie*, the court took into account conduct of the defendant, namely, his failure to appear, which was not evidence, to help it decide a substantive issue. Because the defendant, who was represented by counsel, did not testify at the hearing, there was no finding to be made as to his credibility. Accordingly, we conclude that the court erred by making a credibility determination with respect to the nonappearing defendant.

III

We next address how the court's errors harmed to the defendant. At the hearing, the court stated in part that it "[found] that [the defendant's] position [was] much less credible" because (1) the defendant "chose not to appear" at the hearing, and (2) the summary process complaint contained many of the same allegations of serious nuisance made by the plaintiff, which "buttress[ed] some of the allegations that [the plaintiff] made" at the hearing. We conclude that each error alone warrants reversal. Taken together, given that this case essentially turned on credibility, we conclude that reversal is compelled.

First, the court's decision to take judicial notice of the summary process complaint resulted in harm to the defendant because the court relied in part on the allegations of that complaint when it made its factual findings. Although the court stated that it "did not find, as independent facts, the allegations" in the summary process complaint, it nevertheless found that "the allegations . . . *buttress*[*ed*] the credibility of the [plaintiff] . . . ." (Emphasis added.) The fact that the court relied on the allegations in the summary process complaint to buttress the credibility of the plaintiff indicates

that the court did not take judicial notice of the summary process complaint solely to note the *existence* of the complaint. Rather, the court used those allegations to substantiate the plaintiff's allegations in the present case, stating that it relied on the summary process complaint because it contained "many of the same" allegations of serious nuisance made by the plaintiff in the present case.[8] Accordingly, the court relied on the truth of unproven allegations in the summary process complaint to bolster the credibility of the plaintiff in the present case due to the similarity of the allegations in both cases.

Second, in finding that the defendant's position was less credible because of the defendant's absence, the court essentially weighed the defendant's credibility against that of the plaintiff. As we previously stated in this opinion, the defendant did not testify at the hearing, and, thus, there was no basis for the court to make a determination as to his credibility. Because the plaintiff testified about the allegations made in his application for a civil protection order, it was only his credibility that was at issue.

The record reveals that the court's decision to issue the civil protection order turned on its determination that the plaintiff was credible.[9] The court's determinations that (1) the defendant's absence hurt the credibility of his position, and (2) that the allegations in the

[8] We also disagree with the court's reliance on the fact that the allegations in the summary process complaint were made by attorneys who are bound by the Rules of Professional Conduct, including rules 3.3 and 4.1. That the allegations were made consistent with the attorneys' ethical obligations does not mean that they were true. The vast majority of cases that end in a judgment for a defendant begin with good faith allegations made by a plaintiff's attorney, consistent with the Rules of Professional Conduct.

[9] The court heard testimony from the plaintiff and DeGoursey. DeGoursey, however, only testified so that the defendant could introduce the police reports into evidence under the business records exception to the rule against hearsay contained in the Connecticut Code of Evidence. Thus, the only testimony about the alleged incidents giving rise to the issuance of the civil protection order came from the plaintiff.

summary process complaint "buttress[ed]" the plaintiff's credibility, undermine our confidence in the court's fact-finding process and warrant reversal of its decision. See *Mirjavadi* v. *Vakilzadeh*, 128 Conn. App. 61, 68, 18 A.3d 591 (2011) ("[w]here . . . some of the facts found [by the court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole" (internal quotation marks omitted)), aff'd, 310 Conn. 176, 74 A.3d 1278 (2013). Those factual findings served as a significant part of the basis for the court's decision to issue an order of civil protection against the defendant. Accordingly, we conclude that the court's determination that the defendant's absence made him less credible, combined with its reliance on the allegations in the summary process complaint, resulted in harm to the defendant. We therefore conclude that the court abused its discretion in issuing an order of civil protection.

The judgment is reversed and the case is remanded with direction to vacate the order of civil protection.

In this opinion the other judges concurred.

JAMES NARDOZZI *v.* ARMANDO PEREZ ET AL.
(AC 44539)

Elgo, Clark and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages and other relief for, inter alia, fraudulent misrepresentation in connection with an alleged conspiracy by the defendants, the city and two of its former employees, to fill the position of police chief in the defendant city's police department. The plaintiff, a former officer in the city's police department, had previously brought a separate action against the city alleging wrongful termination.

The parties reached a settlement agreement with respect to the termination action. The plaintiff thereafter filed the complaint alleging a conspiracy, and the city filed a motion to dismiss the counts of the complaint against it, which alleged fraudulent misrepresentation during settlement negotiations and computer crime, on the basis that the claims were barred by absolute immunity under the litigation privilege. The trial court denied the motion with respect to the claim of computer crime, and the city appealed to this court. *Held* that the trial court properly denied the city's motion to dismiss the count alleging computer crime on the basis of the city's failure to establish a nexus between the allegations of that count and any activity falling within the bounds of the litigation privilege; the count did not contain any allegations with respect to communications involving the city and the conduct alleged could not reasonably be construed as stemming from the plaintiff's prior action against the city, but, rather, the allegations set forth in the count concern the mechanics of how the city's employees carried out a cheating scheme using computers, not any fraud or concealment thereof that occurred during the prior settlement negotiations.

Argued January 20—officially released May 17, 2022

Procedural History

Action to recover damages for, inter alia, fraudulent misrepresentation, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Cordani*, *J.*, granted in part the motion to dismiss filed by the defendant city of Bridgeport, from which the defendant city of Bridgeport appealed to this court. *Affirmed*.

James J. Healy, for the appellant (defendant city of Bridgeport).

Eric R. Brown, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant city of Bridgeport[1] appeals from the judgment of the trial court denying in part its motion to dismiss the action of the plaintiff, James

[1] David Dunn and Armando Perez, two former employees of the defendant, were named as defendants in their individual capacities. Neither party is a participant in this appeal. For clarity, we refer to the city of Bridgeport as the defendant in this appeal and to Dunn and Perez by name.

Nardozzi. On appeal, the defendant claims that the court improperly denied its motion to dismiss the ninth count of the plaintiff's complaint on the ground of absolute immunity arising from the litigation privilege. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff, a former officer within the defendant's police department, served as the defendant's assistant police chief between November, 2012, and January, 2016. In March, 2017, the plaintiff brought an action against the defendant sounding in wrongful termination (termination action). The parties reached a settlement agreement with respect to the termination action on March 4, 2020.[2]

In May, 2018, during the pendency of the termination action, the plaintiff unsuccessfully applied for the defendant's vacant chief of police position. The position was subsequently awarded to Armando Perez.

On October 13, 2020, the plaintiff filed the present complaint "alleg[ing] a conspiracy among the [defendant, Perez and David Dunn] to rig the competitive examination process to fill the position of chief of police in the [defendant's] police department from at least March, 2018, through December, 2018."[3] On November 13, 2020, the defendant filed a motion to dismiss with respect to the fourth and ninth counts of the complaint on the ground, inter alia, that the plaintiff's claims were barred by absolute immunity under the litigation privilege.[4] The defendant argued that the fourth count of

[2] Despite the settlement agreement, the plaintiff's first action against the defendant remained pending until January 8, 2021.

[3] The court later found that, at or around the time of the complaint, Perez and Dunn had pleaded guilty to criminal charges that arose from "cheating in the . . . open competitive examination process that resulted in Perez becoming chief of police."

[4] Although Dunn and Perez filed their own motions to dismiss, neither motion was predicated on the ground that the litigation privilege conferred on them absolute immunity.

the complaint, which alleged that the defendant had fraudulently withheld information concerning the cheating scheme while negotiating a settlement with the plaintiff in the termination action, implicated its conduct during prior litigation proceedings such that absolute immunity under the litigation privilege barred the plaintiff's claim. As to the ninth count, the defendant construed the plaintiff's allegations of computer crime in violation of General Statutes § 53a-251 as a "derivative statutory claim" of the fraud alleged in the fourth count, which, in the defendant's view, merited extending absolute immunity under the litigation privilege to that claim as well. The plaintiff filed an opposition to the motion to dismiss accompanied by a memorandum of law on January 4, 2021, in which he argued, inter alia, that the litigation privilege did not extend to criminally fraudulent behavior and that dismissal with respect to the fourth count of the complaint would not further the public policy aims recognized by Connecticut courts as underlying the development of the litigation privilege. The parties appeared before the court for oral argument on the motion on January 26, 2021.

On January 27, 2021, the court granted in part the defendant's motion to dismiss. The court held that the fourth count of the plaintiff's complaint, which alleged that the defendant fraudulently failed to disclose the cheating scheme during settlement negotiations with respect to the termination action, constituted a protected communication that fell within the litigation privilege. The court further reasoned that the fourth count "is not being used to shield criminal activity" and "is instead directed to an alleged failure to provide the plaintiff with information concerning the cheating scandal during the negotiations of the settlement agreement." In order to prevent a "[direct] attack on the settlement process" of the termination action, the court

concluded that the litigation privilege warranted dismissal of the fourth count.

With respect to the ninth count, however, the court denied the defendant's motion. As the court stated: "The actions allegedly taken by Dunn and Perez were not taken in the context of a judicial proceeding. Instead, Dunn and Perez are alleged to have conspired and shared information using their work computers in furtherance of their scheme to cheat in the process of hiring a new chief of police. The allegations in count nine are not dependent upon the fraud claim in count four. The actions asserted in count nine have nothing to do with the judicial proceedings of the first lawsuit. Accordingly, the litigation privilege does not apply and count nine need not be dismissed for that reason." In support of this conclusion, the court further observed that "[t]he claim asserted in count nine is also distinct from the claims raised in the [plaintiff's] first lawsuit." This appeal followed.

On appeal, the defendant claims that the court improperly denied its motion to dismiss the ninth count of the plaintiff's complaint on the ground of absolute immunity.

Our resolution of this claim is governed by the following standard of review and legal principles. "[I]n ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because a challenge to the jurisdiction of the court presents a question of law, our review of the court's legal conclusion is plenary." (Internal quotation marks omitted.) *Scholz* v. *Epstein*, 198 Conn. App. 197, 226, 232 A.3d 1155 (2020),

aff'd, 341 Conn. 1, 266 A.3d 127 (2021); see also *Simms* v. *Seaman*, 308 Conn. 523, 530, 69 A.3d 880 (2013) (explaining that whether absolute immunity applies is question of law over which review is plenary).

"As the doctrine of absolute immunity concerns a [trial] court's subject matter jurisdiction . . . we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . The question before us is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive dismissal on the grounds of absolute immunity." (Internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 724–25, 161 A.3d 630 (2017).

"Before addressing the applicability of the litigation privilege, [w]e begin our analysis with a review of [this] doctrine . . . as set forth in *Simms* v. *Seaman*, [supra, 308 Conn. 531–40]. In *Simms*, [our Supreme Court] noted that the doctrine of absolute immunity originated in response to the need to bar persons accused of crimes from suing their accusers for defamation. . . . The doctrine then developed to encompass and bar defamation claims against all participants in judicial proceedings, including judges, attorneys, parties, and witnesses. . . . We further noted that, [l]ike other jurisdictions, Connecticut has long recognized the litigation privilege, and that [t]he general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action in slander . . . .

"[T]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak

freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine [of absolute immunity] was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Dorfman* v. *Smith*, 343 Conn. 582, 590–91, 271 A.3d 53 (2022).

"Th[e] court in *Simms*, however, explained that there are limits to the application of the litigation privilege. . . . Specifically, the litigation privilege does not bar claims for abuse of process, vexatious litigation, and malicious prosecution. . . . This is because whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests . . . .

"Specifically, *Simms* identified the following factors as relevant to any determination of whether policy considerations support applying absolute immunity to any particular cause of action: (1) whether the alleged conduct subverts the underlying purpose of a judicial proceeding in a similar way to how conduct constituting abuse of process and vexatious litigation subverts that

underlying purpose; (2) whether the alleged conduct is similar in essential respects to defamatory statements, inasmuch as the privilege bars a defamation action; and (3) whether the alleged conduct may be adequately addressed by other available remedies. . . . Assisting in our evaluation of these factors, to the extent applicable, we have considered as persuasive whether federal courts have protected the alleged conduct pursuant to the litigation privilege. . . . These factors and considerations, however, are simply instructive, and courts must focus on the issues relevant to the competing interests in each case in light of the particular context of the case. . . . We are not required to rely exclusively or entirely on these factors, but, instead, they are useful when undertaking a careful balancing of all competing public policies implicated by the specific claim at issue and determining whether affording parties this common-law immunity from this common-law action is warranted." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 592–94.

When assessing whether absolute immunity under the litigation privilege applies to a given claim, this court has consistently placed great weight on whether the claim arises from communications made during the course of legal proceedings. See *Kenneson* v. *Eggert*, 196 Conn. App. 773, 785, 230 A.3d 795 (2020) (comments made during settlement conference "were made during a judicial proceeding" and "relevant to the subject matter of the ongoing litigation" such that litigation privilege blocked claim stemming therefrom); *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 727 ("[i]t is well settled that *communications uttered or published in the course of judicial proceedings* are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy" (emphasis added; internal quotation marks omitted)); *Tyler* v. *Tatoian*, 164 Conn. App. 82, 86, 92, 137 A.3d 801 (claims of fraud against

party opponent centered on misleading deposition and trial testimony are barred by the litigation privilege), cert. denied, 321 Conn. 908, 135 A.3d 710 (2016). In the absence of such a showing, this court has held that the litigation privilege should not operate to bar a plaintiff's claim. See *Fiondella* v. *Meriden*, 186 Conn. App. 552, 562–63, 200 A.3d 196 (2018) ("Most importantly, the plaintiffs' claims focus on the alleged wrongful *conduct* engaged in by the defendants, rather than on the words uttered during a judicial proceeding. . . . We conclude that the allegations of the plaintiffs' complaint in the present case are not predicated on statements made during the course of litigation, but are based on the defendants' intentional conduct that did not occur during a judicial proceeding. The defendants, therefore, are not shielded by the litigation privilege." (Citations omitted; emphasis in original; internal quotation marks omitted.)), cert. denied, 330 Conn. 961, 199 A.3d 20 (2019).

We disagree with the defendant's assertion that the appeal before us "presents a direct application of the litigation privilege." In doing so, we find instructive the trial court's analysis of the defendant's motion with respect to the fourth count of the plaintiff's complaint, which neither party contests on appeal. As the court observed, the fourth count of the complaint explicitly pinpoints communications—the parties' discussions during settlement negotiations for the termination action—which not only pertained directly to an ongoing judicial proceeding, but directly bore on the outcome of that proceeding. It was entirely consistent with the body of appellate jurisprudence concerning the litigation privilege in this state, as established by our Supreme Court in *Simms* and elaborated on by this court in *Tyler*, *Fiondella*, and *Bruno*, for the court to determine that the defendant's statements during those negotiations were covered by the litigation privilege.

Indeed, it is well settled that communications between parties during judicial proceedings are "precisely [the] type of communication that the litigation privilege was intended to protect because the benefit of encouraging [parties] to speak candidly in judicial proceedings outweighs the risk of a defendant abusing the privilege . . . ." *Tyler* v. *Tatoian*, supra, 164 Conn. App. 92.

The same cannot be said of the ninth count of the complaint. The ninth count does not contain any allegations with respect to communications involving the defendant, nor can the conduct alleged therein reasonably be construed as stemming from the plaintiff's prior action against it.[5] Instead, the allegations set forth in the ninth count concern the *mechanics* of how the defendant's employees carried out the cheating scheme using computers, not any fraud or concealment thereof that occurred during the prior settlement negotiations. At oral argument before this court, the defendant conceded that it was not aware of any authority that extended the litigation privilege to conduct independent of litigation activity. Without such authority, we see no reason to disregard this court's precedent and extend a privilege that exists expressly to foster candor during the litigation process to conduct that occurred separately from the parties' prior litigation. See *Dorfman* v. *Smith*, supra, 342 Conn. 591.

Put simply, the defendant has failed to establish a nexus between the allegations set forth in count nine of the plaintiff's complaint and any activity that falls within the bounds of the litigation privilege. For that reason, we conclude that the court properly denied the

[5] The ninth count does incorporate prior paragraphs of the complaint which lay out a basic chronological history of the termination action. The allegations specific to the ninth count, however, do not implicate the parties' prior litigation.

defendant's motion to dismiss with respect to the ninth count of the plaintiff's complaint.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

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[6] To the extent that the defendant disputes the merits of the plaintiff's claim, we agree with the plaintiff that such an inquiry is not appropriate at this stage of the pleadings. See *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 724–25 ("[I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . The question before us is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive dismissal on the grounds of absolute immunity." (Internal quotation marks omitted.)).

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NOTICE

Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On May 24, 2022, at 2 p.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom, 231 Capitol Avenue, Hartford, for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure which are being considered by the Justices and Judges, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the April 26, 2022 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit or who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions may submit their comments to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or by forwarding their comments to the co-chairs at the following address:

Co-Chairs of the Advisory Committee on Appellate Rules

Attn: Attorney Jill Begemann

Connecticut Appellate Court

75 Elm Street

Hartford, CT 06106

All comments should be received by May 18, 2022.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail ADA.Contact@connapp.jud.ct.gov or call (860) 757-2200, ext. 3141 before May 18, 2022.

Hon. Gregory T. D'Auria

Hon. Eliot D. Prescott

Co-Chairs, Advisory Committee on Appellate Rules

NOTICE

Notice of Suspension of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on April 18, 2022, in Docket Number HHD-CV22-6153256-S, Jon C. Cooper, Juris No. 410474 of Washington, DC is suspended from the practice of law in Connecticut for a period of five and one-half ($5^1/_2$) years pursuant to § 2- 41(h) of the Connecticut Practice Book, retroactive to October 18, 2017.

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

Any application for reinstatement shall be made pursuant to the provisions of § 2-53 of the Connecticut Practice Book.

Susan Quinn Cobb
Presiding Judge