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CONNECTICUT APPELLATE REPORTS

Vol. 226

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

R. G.-R. *v.* S. R.*
(AC 45572)

Alvord, Cradle and Westbrook, Js.

Syllabus

The plaintiff, whose marriage to the defendant had previously been dissolved, appealed to this court from the judgments of the trial court resolving several postjudgment motions. On May 26, 2022, the trial court granted, inter alia, the defendant's motion to modify custody of the parties' minor child. After the plaintiff filed her appeal from the May 26, 2022 order, the trial court vacated its order of custody, and returned the minor child to the plaintiff. Subsequently, on October 26, 2022, the trial court awarded the defendant sole legal and physical custody of the minor child and ordered the plaintiff to have no contact with the minor child until further order of the court. The plaintiff amended her appeal to include the trial court's October 26, 2022 order. While this appeal was pending, the plaintiff filed a motion to modify the October 26, 2022 "custody and parenting time orders." The trial court granted the plaintiff's motion to modify as to parenting time only, leaving the custody portion of the order unchanged. The plaintiff did not amend her appeal to include the August 1, 2023 order. *Held*:

1. The plaintiff's challenges to the May 26 and October 26, 2022 custody and parenting orders were rendered moot because the orders were superseded by the custody and parenting order of August 1, 2023, and, accordingly, there was no practical relief this court could afford the plaintiff: despite the plaintiff's claims to the contrary, the August 1, 2023 order addressed both parenting time and legal custody of the minor child; moreover, the plaintiff's claim that the collateral consequences exception to the mootness doctrine applied, in that her reputation and livelihood would be threatened if those orders were left intact, was

* 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, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

belied by the fact that the May 26, 2022 order was sealed by the trial court on the day it was issued, thus, the plaintiff failed to meet her burden of demonstrating that there was a reasonable possibility that prejudicial consequences would occur if the May 26 and October 26, 2022 judgments were left intact; furthermore, the plaintiff failed to demonstrate that her claim was reviewable under the capable of repetition, yet evading review exception to the mootness doctrine as she failed to argue that there was a reasonable likelihood that the question presented in this case would arise again.

2. The trial court did not err in granting the defendant's motions for contempt alleging that the plaintiff wilfully violated court orders that required the parties to engage in family counseling with the minor child, as there was sufficient evidence in the record to support the court's findings that the plaintiff repeatedly refused to do so, and this court was not left with the conviction that a mistake has been made.

3. This court concluded that the trial court erred in denying the plaintiff's motion for contempt alleging that the defendant violated the provision of the dissolution judgment that required him to pay the minor child's private school tuition through high school, as the trial court's denial was based on the mistaken belief that the dissolution judgment did not contain such a provision; accordingly, the judgment was reversed and the case was remanded for further proceedings on the plaintiff's motion.

Argued March 13—officially released July 9, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Prestley*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Nastri*, *J.*, issued an order of temporary custody of the minor child to the Commissioner of Children and Families, granted the motions for contempt filed by the defendant and the guardian ad litem, and denied the plaintiff's motion for contempt, and the plaintiff appealed to this court; subsequently, the court, *Moukawsher*, *J.*, awarded the defendant sole legal and physical custody of the minor child; thereafter, the court, *Moukawsher*, *J.*, denied the plaintiff permission to file a motion for reconsideration, and the plaintiff filed an amended appeal. *Appeal dismissed in part*; *reversed in part*; *further proceedings*.

Brandon B. Fontaine, with whom was *Meaghan E. Collins*, for the appellant (plaintiff).

Richard A. Rochlin, for the appellee (defendant).

Opinion

CRADLE, J. In this postjudgment dissolution matter, the plaintiff, R. G.-R., appeals from the judgments of the trial court awarding the defendant, S. R., sole legal and physical custody of their minor child. On appeal, the plaintiff challenges postjudgment orders made by the court on May 26 and October 26, 2022. As to the May 26, 2022 judgment, the plaintiff claims that the court erred by granting the defendant's motion to modify custody and motions for contempt filed by the defendant and the guardian ad litem, and denying a motion for contempt that she filed. As to the October 26, 2022 judgment, she claims that her constitutional right to procedural due process was violated when the court modified custody without affording her notice and a hearing and that the court failed to base the modification on the best interest of the minor child or a substantial change in circumstances. We dismiss as moot the plaintiff's appeal from the May 26, 2022 judgment, except the portions of the appeal that challenge the court's contempt rulings, which we affirm in part and reverse in part. We also dismiss as moot the plaintiff's appeal from the October 26, 2022 judgment.

The following procedural history is relevant to our resolution of this appeal. The parties' marriage was dissolved on January 7, 2013. Pursuant to that judgment, the parties would share joint legal and physical custody of the minor child.

Beginning in June, 2016, the plaintiff began to levy accusations against the defendant claiming, inter alia,

sexual abuse by him of the minor child.[1] These allegations prompted the involvement of the police, the Department of Children and Families (department) and the court. Although the plaintiff's allegations ultimately were unsubstantiated by the department, the ensuing investigations of those allegations contributed to the alienation of the minor child from his father. In May, 2017, the court ordered reunification therapy between the defendant and the minor child.

On May 22, 2018, the parties agreed to have a clinical psychologist perform a comprehensive custody evaluation and to sign all necessary releases and to cooperate with the designated psychologist. On May 25, 2018, the court, *Simón*, *J.*, appointed Stephen Humphrey, PhD, a clinical psychologist, to perform that custody evaluation. As a result of that evaluation, Humphrey opined, inter alia, that the plaintiff's "vehement and intense antipathy toward [the defendant] . . . is the primary cause of [the minor child's] fierce and unequivocal rejection of his father."

In March, 2019, after almost three full years had elapsed without the defendant seeing the minor child, the court, *Simon*, *J.*, again ordered reunification therapy for the defendant and the minor child. At that time, the court warned that it would strongly consider removing the minor child from the plaintiff's custody if she did not fully cooperate with the reunification therapy.

In October, 2019, the parties filed competing applications for an emergency ex parte order of custody of the minor child, which were both denied. They also both

[1] The parties' parenting conflicts began before this time and the procedural history set forth herein is representative of the tumultuous history of this case. Indeed, the parties' filings became so prolific that the court issued an order pursuant to Practice Book § 25-26 (g) requiring that they request leave to file motions with the court. Even with that order in place, there have been more than four hundred docket entries in this case since the date of dissolution.

filed motions for modification seeking sole custody of the minor child. Also in October, 2019, the plaintiff sought to enjoin the defendant from having the child continue with therapy. In November, 2019, the defendant moved to hold the plaintiff in contempt for failing to bring the child to therapy.

On May 26, 2022, after seventeen days of trial, the court, *Nastri*, *J.*, issued a memorandum of decision, wherein it decided several of the parties' pending motions.[2] The court found, inter alia, that the plaintiff "hates [the defendant] with every fiber of her being. She has done everything in her power to prevent [the minor child] from having any relationship with his father. She has manipulated the court, [the department], therapists, medical providers and the police by twisting facts, telling half-truths, making threats and withholding key information, all in her single-minded effort to prevent [the defendant] from having a relationship with his son. She has also treated clear and unambiguous court orders as suggestions, completely ignoring them when it suited her purpose." The court explained: "[The minor child] has a fundamental right to have a relationship with his father. He will never have that relationship

[2] The court heard the following motions: The plaintiff's October 8, 2019 ex parte application for custody (docket entry #388.05) and motion for modification (docket entry #388.07), the defendant's October 10, 2019 ex parte application for custody (docket entry #389.00) and motion to modify custody (docket entry #390.00), the plaintiff's October 25, 2019 motion for order (docket entry #392.00), the defendant's November 19, 2019 motion for contempt (docket entry #399.00), the guardian ad litem's December 5, 2019 and January 7, 2020 motions for contempt (docket entries #403.00 and #406.00), the plaintiff's September 2, 2020 ex parte application for custody (docket entry #418.00), the defendant's September 14, 2020 motion to modify (docket entry #420.00) and December 18, 2020 motion for contempt (docket entry #430.00), the plaintiff's May 12, 2021 motion for contempt and sanctions (docket entries #433.00 and #433.01), the defendant's May 24, 2021 ex parte application for custody (docket entry #439.00) and the plaintiff's October 21, 2021 motion to expedite (docket entry #455.00).

The court's rulings on many of these motions are not relevant to this appeal. Those that are relevant to this appeal are discussed herein.

or even a chance to have it, as long as he is in [the plaintiff's] custody. It is in [the minor child's] best interest for him to be in an environment in which [the plaintiff] does not have the opportunity to manipulate him or thwart his relationship with his father." The court concluded that the minor child was in "immediate physical danger from his surroundings" and that "[c]ontinuation in [the plaintiff's] home is contrary to [his] welfare." Because the minor child had not been with the defendant in nearly six years, the court found that it would not be in his best interest to suddenly be placed in the defendant's custody and, accordingly, issued an order of temporary custody placing the minor child in the care and custody of the Commissioner of Children and Families (commissioner). The court also granted two motions for contempt filed by the defendant, finding that the plaintiff wilfully violated a clear and unambiguous order as to each motion, but declined to impose sanctions as to either contempt finding. The court also granted two motions for contempt filed against the plaintiff by the minor child's guardian ad litem. The court declined to impose sanctions as to one of those motions, but, as to the other, ordered the plaintiff to pay her portion of the guardian ad litem's fees. The court also denied a motion for contempt filed by the plaintiff.[3] The plaintiff appealed from that May 26, 2022 judgment.

On July 25, 2022, the juvenile court, *Taylor*, *J.*, vacated the May 26, 2022 order placing the minor child in the custody of the commissioner, finding that he was not at imminent risk of physical harm. The court returned the matter to the appropriate court for further action.

On July 28, 2022, the defendant filed an application for an emergency ex parte order and a motion to modify

[3] The bases of the motions for contempt and the court's findings will be discussed more fully subsequently in this opinion.

custody seeking sole custody of the minor child. On that same day, the court, *Nastri*, *J.*, granted the defendant's application for an emergency ex parte order and ordered that he would have "sole legal custody" and that the plaintiff would not have visitation. The plaintiff was granted permission to file an emergency motion to vacate that order.

On August 10, 2022, the court, *Moukawsher*, *J.*, held a hearing on the emergency motions and issued a decision the next day, wherein it found that there was no basis for an emergency order granting sole custody to the defendant and vacated the ex parte order effective August 20, 2022, when the child would be returned to the plaintiff.

On August 18, 2022, the court, *Moukawsher*, *J.*, held a hearing on the issue of where the minor child would attend secondary school. Following the hearing, the court issued a decision wherein it "rescind[ed] its order that [the child] be returned to [the plaintiff]" and ordered that the child would attend boarding school in Rhode Island and would remain in the defendant's custody until leaving for school. The court ordered that the plaintiff would have no contact with the minor child for the first five weeks of school and that the defendant would have sole legal custody of the minor child during that period. The court also ordered that the defendant not contact the minor child for those five weeks, but that the minor child could "communicate about what he needs with [the defendant] or with the [guardian ad litem] and they may respond." The court indicated that the orders were temporary and a "test of both parents." The court advised: "The court will soon issue other orders to help this along. The parties will need a plan for what happens after the first five weeks at school. The court will enter new orders in the coming weeks. In the meantime, it will be watching as best it can through the [guardian ad litem]. Any party sabotaging

[the minor child's] launch into life will have the court to answer to. Its next orders will be shaped by it."

On October 19, 2022, the court, *Moukawsher*, *J.*, ordered the plaintiff to file a proposal regarding reunification therapy and ordered the defendant to file a response. The plaintiff filed her proposal on October 25, 2022, in which she asserted that reunification therapy was unnecessary and asked for "equal parenting time during parents' weekend and beyond, and legal custody of [the minor child]." She further alleged that "reunification therapy is not required or appropriate and should not be a prerequisite in the reunification of the child and his mother, whom he has not seen in nearly three months. The plaintiff again requests this court appoint an attorney for the minor child or at least a guardian ad litem who will speak with the child as instructed and convey the thoughts and wishes to the court of the person who is the subject of this proceeding ([the minor child]), and to otherwise meet the duties of a [guardian ad litem]. As this proceeding is supposed to be about [the minor child], his voice—which has been improperly silenced—is essential to proceed further. The child told the [guardian ad litem] he misses his mother. This court should grant equal parenting time to the mother, if not more, during the upcoming parents' weekend and beyond."

On the next day, October 26, 2022, the court, *Moukawsher*, *J.*, determined that the plaintiff's proposal was made in bad faith. The court explained: "By inviting proposed orders about custody and visitation, the court gave [the plaintiff] a chance to show that she is not still playing a ceaseless and cynical game with the court in which her goal remains to frustrate [the defendant's] attempt to reunify with [the minor child]. She rejected that chance with her latest filing dated October 25, 2022. [The plaintiff's] filing suggests [that] the court wanted her to engage in therapy to reunify *her* with [the minor

child]. She and her counsel know that is not true. The only question discussed, expressly and in detail, has been her participating in the therapy intended to reunify [the minor child] *with* [*the defendant*]." (Emphasis in original.) The court awarded the defendant sole legal and physical custody of the child, ordered that the plaintiff may have no contact with the minor child until further order of the court, and ordered the defendant to continue with reunification therapy and that the parties would each be responsible for one half of the reunification therapist's charges. After being denied leave to file a motion for reconsideration, the plaintiff amended her appeal to challenge the October 26, 2022 judgment.

On June 26, 2023, while this appeal was pending, the plaintiff filed a motion to modify the court's October 26, 2022 "custody and parenting time orders."[4] On August 1, 2023, after an evidentiary hearing, the court granted the plaintiff's motion as to parenting time only and indicated that "[a]ll other orders remain in place unchanged."

On December 15, 2023, the plaintiff filed a request for leave to file a motion to modify the court's August 1, 2023 order pertaining to the legal custody of the minor child, requesting that the court order that the parties share joint legal custody. The court denied her request for leave to file the motion.

We begin by addressing the issue of whether the August 1, 2023 judgment rendered moot the plaintiff's appeal of the May 26 and October 26, 2022 custody and parenting orders. "Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the

[4] The court appointed a new guardian ad litem for the purposes of the plaintiff's motion to modify only.

province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition or affairs between the parties. . . . A case is moot when due to intervening circumstances a controversy between the parties no longer exists." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 220–21, 219 A.3d 378 (2019).

Here, the orders relating to custody and parenting time entered on May 26 and October 26, 2022, were superseded by the August 1, 2023 orders pertaining to custody and parenting time. Accordingly, there is no practical relief we can afford the plaintiff in her appeal of those earlier orders. The plaintiff nevertheless argues that her challenge to the custody and parenting time orders entered on May 26 and October 26, 2022, were not rendered moot by the August 1, 2023 orders. First, she contends that the August 1, 2023 orders address only parenting time,[5] not legal custody of the minor child. We disagree. In her motion to modify, the plaintiff sought modification of the court's October 26, 2022 "custody and parenting time orders." In stating that it was modifying parenting time only, the court seemingly acknowledged that the plaintiff was seeking a modification also of legal custody at that time and implicitly denied that requested relief. Indeed, in the motion to modify that the plaintiff sought leave to file on December 13, 2023, the plaintiff alleged that there was a substantial change in circumstances since the last court order granting sole legal custody to the defendant in

[5] The plaintiff concedes that she is not challenging the court's order regarding parenting time.

that, inter alia, the parenting schedule between the parties and the child had been successful and without significant conflict. From this allegation, it is clear that the plaintiff considered the most recent order awarding sole legal custody of the minor child to the defendant as the August 1, 2023 order, when the court implicitly denied her motion to modify as to legal custody. See *J. Y.* v. *M. R.*, 215 Conn. App. 648, 662, 283 A.3d 520 (2022) (interim custody and visitation orders became inoperative following issuance of subsequent orders wherein court " 'reiterat[ed]' " them or left them " 'largely unchanged' " and challenge to those interim orders therefore was moot and proper recourse was to challenge later orders). Insofar as the plaintiff challenges the court's legal custody order, her redress was to challenge the propriety of the August 1, 2023 order, which she has not done.

The plaintiff also argues that the July 31, 2023 hearing on her motion to modify "did not rectify the lack of a hearing in October, 2022." Even if we were to conclude that the court violated the plaintiff's right to due process without affording her a hearing before awarding the defendant sole custody of the minor child on October 26, 2022, that would not change the fact that the October 26, 2022 orders were superseded by the August 1, 2023 orders, and without a proper challenge to the August 1, 2023 orders, there is no practical relief that we may afford the plaintiff on her challenge to the October 26, 2022 judgment.

The plaintiff also contends that the "collateral consequences" exception to the mootness doctrine applies. "[T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more

probable than not." (Internal quotation marks omitted.) *Putman* v. *Kennedy*, 279 Conn. 162, 169, 900 A.2d 1256 (2006). The plaintiff argues that, "[i]f the underlying decisions are left intact, the findings and stigma from the decisions would threaten her reputation and livelihood." The plaintiff's argument in this regard is belied by the fact that the May 26, 2022 order was sealed by the court on the day it was issued.[6] On that basis, the plaintiff has not met her burden of demonstrating that there is a reasonable possibility that prejudicial consequences will occur if the May 26 and October 26, 2022 judgments are left intact.

Finally, the plaintiff argues that, even if her claim is moot, it is subject to appellate review under the "capable of repetition, yet evading review" exception to the mootness doctrine. "[F]or an otherwise moot question to qualify for review under the 'capable of repetition, yet evading review' exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must

[6] To the extent the plaintiff argues that her professional reputation may be harmed if the judgments at issue are allowed to stand because she shares a professional relationship with the department, the department has been involved with this family since 2016 when the plaintiff alleged the ultimately unsubstantiated allegations of sexual assault of the minor child by the defendant. We further note that the department investigated the plaintiff for emotional or psychological abuse of the minor child. Thus, the department is intimately aware of this family's history.

have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." *Loisel* v. *Rowe*, 233 Conn. 370, 382–83, 660 A.2d 323 (1995).

Focusing on the second prong of the exception, the analysis "entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the current litigation. A requirement of the likelihood that a question will recur is an integral component of the capable of repetition, yet evading review doctrine. In the absence of the possibility of such repetition, there would be no justification for reaching the issue, as a decision would neither provide relief in the present case nor prospectively resolve cases anticipated in the future. . . . The second prong does not provide an exception to the mootness doctrine when it is merely *possible* that a question could recur, but rather there must be a *reasonable likelihood* that the question presented in the pending case will arise again in the future . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) *J. Y.* v. *M. R.*, supra, 215 Conn. App. 663.

As to the second prong of the exception, the plaintiff's argument is limited to asserting that "the same could happen to other parties in family courts." The plaintiff has not identified "the same" to which she is referring, and she entirely has failed to argue that there is a reasonable likelihood that the question presented in this case will arise again during the pendency of the limited period of time until this child reaches the age of majority. Accordingly, she cannot demonstrate that her claim is reviewable under the capable of repetition, yet evading review exception.

Although the plaintiff's challenges to the custody and parenting orders of the May 26 and October 26, 2022

judgments are moot, her challenges to the contempt findings of the court on May 26, 2022, are not moot because "the fact that a trial court has made a finding of contempt may well affect a later court's determination of the penalty to be imposed after a future finding of contempt." *Keller* v. *Keller*, 158 Conn. App. 538, 543, 119 A.3d 1213 (2015), appeal dismissed, 323 Conn. 398, 147 A.3d 146 (2016). We therefore turn to the plaintiff's challenges to the court's contempt determinations.

We first set forth our standard of review. "First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Footnote omitted; internal quotation marks omitted.) Id., 545. "We review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Kirwan* v. *Kirwan*, 187 Conn. App. 375, 393–94, 202 A.3d 458 (2019).

The plaintiff first challenges the court's judgments granting two motions for contempt filed by the defendant. Both of those motions—the first filed on November 19, 2019, and the other filed on December 10, 2020—allege that the plaintiff wilfully violated court orders

that required the parties to engage in family counseling with the minor child in furtherance of reunification of the minor child and the defendant.[7] The court found, as to both motions, that the plaintiff wilfully violated clear and unambiguous orders of the court. The plaintiff argues that the court's factual findings were clearly erroneous in that the plaintiff did comply with the court's orders or, alternatively, had reasonable grounds not to comply. She contends that "a legitimate basis existed for any reunification issues that arose, as the issues were caused either by the defendant or by circumstances beyond either [party's] control, and not by the plaintiff." She further contends that "[t]he record shows that the plaintiff did not thwart reunification, but rather complied with the court's orders, and the delays that did occur were not caused by the plaintiff." This claim is unavailing. The orders pertaining to reunification therapy, which have been entered numerous times beginning as early as 2017, have been clear and unambiguous in requiring both parties to participate in reunification therapy and cooperate fully with the therapy provider. The record is replete with evidence that the plaintiff repeatedly refused to do so, including evidence that she wilfully refused to comply with the court's March 11, 2019 and November 9, 2020 orders pertaining to reunification of the minor child and the defendant. To the extent that there may be evidence in the record that might support a different conclusion, that does not render the court's finding erroneous.

[7] Specifically, in the November 19, 2019 motion for contempt, the defendant alleged that the plaintiff wilfully failed to comply with the court's March 11, 2019 orders that the parties participate in family intervention counseling to reunify the defendant and the minor child and that they follow all recommendations made by the therapist. In the December 10, 2020 motion for contempt, the defendant alleged that the plaintiff refused to take the minor child to therapy and thereby wilfully violated the court's November 9, 2020 order that the parties reengage the previous therapist and ensure that the minor child attends all therapy sessions and that the parties participate in the therapy at the therapist's direction.

Because there is evidence in the record to support the court's findings and we are not left with the conviction that a mistake has been made, we conclude that the court's factual findings were not clearly erroneous and, therefore, that the court did not err in granting the defendant's motions for contempt.

The plaintiff also challenges the court's judgments granting two motions for contempt filed by the guardian ad litem—one filed on December 5, 2019, in which the guardian ad litem alleged that the plaintiff wilfully violated the court's order that the parties pay the fees of the guardian ad litem or arrange a payment plan for those fees, and the other filed on January 7, 2020, in which the guardian ad litem alleged that the plaintiff wilfully failed to comply with a subpoena requiring the plaintiff to produce certain documents. The plaintiff argues on appeal that "the court did not have the authority or jurisdiction to grant the motions" for contempt filed by the guardian ad litem because "[guardians ad litem] do not have authority to file motions, particularly motions for contempt about subpoena compliance." Because the plaintiff has not cited any legal authority to support this argument, we deem this claim inadequately briefed and we decline to review it. See *Pryor* v. *Pryor*, 162 Conn. App. 451, 458, 133 A.3d 463 (2016).

Finally, the plaintiff challenges the court's denial of her motion for contempt, filed on May 12, 2021, in which she alleged that the defendant violated the provision of the dissolution judgment that required him to pay for the cost of the minor child's private school tuition through high school. The plaintiff argues on appeal, and the defendant seems to agree, as do we, that the court erroneously found that the plaintiff misrepresented the terms of the dissolution judgment in her motion. The judgment does, in fact, provide that the defendant shall "pay for [the] cost of private schooling though graduation from high school." Because the court's denial of

the plaintiff's motion for contempt was based upon its mistaken belief that the dissolution judgment did not require the defendant to pay the cost of private school for the minor child through graduation from high school,[8] the judgment must be reversed and remanded for further proceedings on the plaintiff's May 12, 2021 motion for contempt.[9]

The appeal is dismissed with respect to the plaintiff's claims regarding the custody and parenting orders entered on May 26 and October 26, 2022; the judgment denying the plaintiff's May 12, 2021 motion for contempt is reversed and the case is remanded for further proceedings; the judgments are affirmed in all other respects.

In this opinion the other judges concurred.

AUBRI E. MARTINELLI ET AL. *v.* MARTIN P. MARTINELLI ET AL.
(AC 46208)

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

Syllabus

The plaintiffs, the sole beneficiaries of the decedent's estate, appealed from the judgment of the trial court granting the motions to dismiss filed by the defendants, M and R Co. M, as executor of the decedent's estate, retained R Co., a law firm, to represent him as executor and to provide legal assistance with the administration of the estate. The plaintiffs brought an action against M for breach of fiduciary duty, alleging that M misled them as to the value of the estate's business interests and forced them to agree to a sale of those interests. R Co. represented M in the action, and, at the conclusion of the plaintiffs' case-in-chief at trial, the court rendered a judgment of dismissal pursuant to the rule

[8] We reject the plaintiff's contention that the court's erroneous finding in this regard undermined its other findings and rulings.

[9] We emphasize that the scope of the remand is limited to the issue of whether the defendant wilfully violated the provision of the dissolution judgment requiring him to pay for the cost of private school for the minor child until he graduates from high school.

of practice (§ 15-8) for failure to make out a prima facie case. Thereafter, the Probate Court removed M as executor of the estate and appointed S, a third-party attorney, as the administratrix of the estate. The plaintiffs subsequently brought the underlying action in the present case, alleging that M, without permission of the court or notice to the plaintiffs, advanced himself more than $265,000 from the estate to pay R Co. to defend him in the first action, that M's use of estate assets for his own personal legal fees constituted, inter alia, a breach of the fiduciary duty he owed to the plaintiffs as beneficiaries of the estate, and that R Co. committed legal malpractice by breaching the duty of loyalty and fidelity it owed to the plaintiffs as beneficiaries of the estate when it assisted M in converting estate assets. After the defendants filed separate motions to dismiss for lack of subject matter jurisdiction, the plaintiffs sought leave to file an amended complaint pursuant to the rule of practice (§ 10-60). The court declined to consider the plaintiffs' request for leave to amend their complaint and granted the defendants' motions to dismiss, finding that the plaintiffs lacked standing to assert their claims. *Held*:

1. The trial court correctly concluded that it lacked subject matter jurisdiction and properly dismissed the plaintiffs' complaint; because it was clear from the allegations in the operative complaint that the plaintiffs were seeking to recover for injuries to the estate and not for any direct injury to the plaintiffs, the only basis for them to recover would have been for them to allege that S, as the administratrix of the estate, improperly refused to pursue the claims against the defendants, and the absence of allegations in the plaintiffs' operative complaint that S had committed some type of fraud or bad act against the estate or that she could not or improperly refused to bring an action against the defendants on behalf of the estate was fatal to the plaintiffs' claim of standing.
2. The plaintiffs could not prevail on their claim that the trial court improperly declined to consider their request for leave to amend their complaint to include specific allegations related to S: as soon as the jurisdiction of the court was called into question by the defendants' motions to dismiss, the court was required to make a determination regarding its jurisdiction prior to all other action in the case, and, pursuant to *Gurliacci* v. *Mayer* (218 Conn. 531), the court properly considered the motions to dismiss on the basis of the operative complaint and not the plaintiffs' proposed amended complaint; moreover, even if this court concluded that the trial court should have permitted the plaintiffs to amend their complaint, the result would have been the same, as the proposed amended complaint failed to allege that S improperly refused or neglected to bring claims against the defendants, that she acted fraudulently or in bad faith, or that she was grossly negligent.

Argued March 7—officially released July 9, 2024

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Knox*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellants (plaintiffs).

Robert B. Flynn, for the appellee (named defendant).

Herbert J. Shepardson, for the appellee (defendant Reid & Riege, P.C.).

Opinion

BRIGHT, C. J. In the latest chapter in this family dispute arising out of the administration of the estate of Kevin P. Martinelli (Kevin), the plaintiffs, Aubri E. Martinelli, Zachary Martinelli, and Linzy Martinelli, who are Kevin's children, appeal from the judgment of the trial court granting the motions to dismiss filed by the defendants, Martin P. Martinelli (Martin), who is Kevin's brother and was the first executor of Kevin's estate, and Reid & Riege, P.C. (Reid & Riege), the law firm that represented Martin in the administration of Kevin's estate. The court concluded that the plaintiffs lacked standing to assert their claims of breach of fiduciary duty, common-law conversion, and statutory theft against Martin and their legal malpractice claim against Reid & Riege.[1] On appeal, the plaintiffs claim that the trial court improperly (1) concluded that they lacked

[1] The court also dismissed the counts in the plaintiffs' complaint in which the plaintiffs alleged that Reid & Riege violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and that the defendants engaged in a civil conspiracy. In their reply brief to this court, the plaintiffs expressly abandoned any claim related to the trial court's dismissal of their CUTPA claim, and, at oral argument before this court, they abandoned any claim related to the trial court's dismissal of their conspiracy claim against both defendants.

standing to assert their claims against the defendants, and (2) denied their request to amend their complaint. We are unpersuaded by either claim and, therefore, affirm the judgment of the trial court.

The following facts, either as alleged in the plaintiffs' complaint or undisputed in the record, and procedural history are relevant to our analysis. Kevin died testate on June 19, 2015. The plaintiffs are the sole named beneficiaries of Kevin's estate. In August, 2015, Martin was appointed by the Bristol-Plymouth Probate Court to act as the executor of Kevin's estate. Martin, in turn, retained Reid & Riege to represent him as executor and to provide legal assistance with the administration of the estate. Kevin, Martin, and their brother, Keith Martinelli (Keith), had joint business interests. As aptly described by the trial court in its January 13, 2023 memorandum of decision, "[a]t the time of [Kevin's] death, each brother owned a percentage of the common stock in Tri-Mar Manufacturing Company, Inc. (Tri-Mar); Kevin had a 49.82 percent ownership [interest]; Martin had a 0.36 percent ownership interest; and Keith had a 49.82 percent ownership interest. In addition, Kevin, at the time of his death, owned a 50 percent partnership interest in MKK Company (MKK) and Keith owned the remaining 50 percent partnership interest" in MKK. As executor of Kevin's estate, Martin purported to sell the estate's interest in Tri-Mar and MKK to Keith for $600,000. As recounted in their complaint in the present case, because "Martin misled them as to the value of Kevin's interests in Tri-Mar and MKK as being far lower than they believed and [because] Martin forced them to agree to the sale," the plaintiffs sued Martin for breaching the fiduciary duties he owed them. See *Martinelli* v. *Martinelli*, Superior Court, judicial district of New Britain, Docket No. CV-17-6038834-S (first action). In particular, the plaintiffs alleged in the first action that Martin breached fiduciary duties owed to them

that were "separate and independent of any duties" he owed to Kevin's estate.

Martin retained Reid & Riege to represent him in the first action. After extensive pleading and motion practice, the first action proceeded to trial before the court, *Aurigemma, J.*, on April 27, 2022. At the conclusion of the plaintiffs' case-in-chief, the court rendered a judgment of dismissal "pursuant to Practice Book § 15-8, for failure to make out a prima facie case." The plaintiffs appealed from the judgment in the first action. On June 29, 2022, however, this court dismissed the appeal due to the plaintiffs' failure to file the preliminary appellate papers required by Practice Book § 63-4 (a).[2]

In their complaint in the present action, dated March 10, 2022, the plaintiffs allege that Martin, without permission of the court or notice to the plaintiffs, advanced himself more than $265,000 from the estate to pay Reid & Riege to defend him in the first action. They further allege that, during 2019, Martin filed with the Probate Court an interim accounting requesting $94,000 from Kevin's estate to cover Martin's personal legal fees. The plaintiffs claim in their complaint that Martin's use of assets of the estate for his own personal legal fees constituted a breach of the fiduciary duty he owed to the plaintiffs as the beneficiaries of Kevin's estate, common-law conversion, and statutory theft in violation of General Statutes § 52-564.[3] They further allege

[2] This court's dismissal order was in response to Martin's June 1, 2022 motion to dismiss the appeal due to the plaintiffs' failure to comply with Practice Book § 63-4 (a). In the intervening four weeks between when that motion was filed and when this court dismissed the appeal, the plaintiffs filed neither an opposition to the motion nor the required preliminary papers. After the appeal was dismissed, this court granted Martin's motion for sanctions, which was filed with his motion to dismiss, and ordered counsel for the plaintiffs to pay attorney's fees in the amount of $4883 to Reid & Riege for fees Martin incurred in defending the appeal.

[3] In their complaint, the plaintiffs cited General Statutes § 52-56 in support of their statutory theft claim. Because that statute is inapplicable to the present action, we presume that the plaintiffs intended to cite § 52-564, which sets forth the remedy of treble damages for statutory theft.

that Reid & Riege assisted Martin in converting assets of Kevin's estate and, in doing so, committed legal malpractice by breaching the duty of loyalty and fidelity it owed to the plaintiffs as beneficiaries of the estate. On December 30, 2021, the Probate Court removed Martin as the executor of Kevin's estate and appointed Attorney Rachel Kittredge Shipman as the administratrix of the estate.

In May, 2022, the defendants filed separate motions to dismiss for lack of subject matter jurisdiction. Martin claimed that the plaintiffs lacked standing to assert their claims against him and that their claims were not ripe for review. In particular, he argued that any claims arising out of his use of estate assets to pay the fees he incurred in defending the first action belonged to Attorney Shipman as the administratrix of Kevin's estate and not to the plaintiffs as beneficiaries of the estate. Martin further argued that the plaintiffs' claims were not ripe because the "plaintiffs' alleged injury to the estate has not yet occurred," as the Probate Court had not ruled on Martin's requests for disbursements to pay his personal legal fees, which fees the plaintiffs allege "the Probate Court expressly recognized . . . could well be not reimbursable."

Reid & Riege argued that the plaintiffs lacked standing, that their claims were not ripe for review, and that the conduct giving rise to the plaintiffs' claims is protected by the litigation privilege. With respect to standing, Reid & Riege argued that the plaintiffs do not have standing to recover damages on behalf of Kevin's estate and that they cannot recover damages individually because they were neither clients of the law firm nor third-party beneficiaries of the services provided to Martin.[4]

[4] In support of its motion, Reid & Riege submitted the affidavit of one of its attorneys, Mary Miller, who was involved in the representation of Martin in the first action.

The plaintiffs filed a written opposition to Martin's motion to dismiss. In response to Martin's argument that they lack standing, the plaintiffs relied on § 107 (2) (b) of the Restatement (Third) of Trusts, which provides an exception to the general rule that trust beneficiaries lack standing to bring an action on behalf of the trust "only if . . . the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." 4 Restatement (Third), Trusts § 107, p. 102 (2012).[5] The plaintiffs argued that, as beneficiaries of Kevin's estate, they had standing to bring an action directly against Martin because the current administratrix, Attorney Shipman, was "unable, unavailable, unsuitable, or improperly failing to protect" their interests. With respect to ripeness, the plaintiffs argued that their claims are ripe because "[t]he acts complained of by the [plaintiffs] are complete. The defendants received the funds [that] were removed from Kevin's estate. The invoices were fully paid." The plaintiffs did not file a written opposition to Reid & Riege's motion.

On June 24, 2022, however, the plaintiffs sought leave of the court to file an amended complaint pursuant to Practice Book § 10-60 to address the defendants' arguments in their motions to dismiss that the plaintiffs lacked standing. The plaintiffs stated in their request: "The defendants allege a lack of standing based on the plaintiffs' failure to plead that the administratrix refused to pursue a claim against them. Beneficiaries to a trust can have standing to pursue a claim against a third party who injured the trust only if the trustee improperly failed to sue the third party. *Browning* v. *Van Brunt*,

[5] "(1) A trustee may maintain a proceeding against a third party on behalf of the trust and its beneficiaries. (2) A beneficiary may maintain a proceeding related to the trust or its property against a third party only if: (a) the beneficiary is in possession, or entitled to immediate distribution, of the trust property involved; or (b) the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." 4 Restatement (Third), supra, § 107.

DuBiago & Co., LLC, 330 Conn. 447, 460, 195 A.3d 1123 (2018). The amended complaint properly alleges that the current administratrix . . . has refused or neglected to sue the defendants named in this action." The defendants objected to the plaintiffs' request, arguing that, because the proposed amended complaint was not filed as a matter of right pursuant to Practice Book § 10-59, the court could not rule on the request to amend until after it determined that it had subject matter jurisdiction over the case.

After hearing oral argument on the motions to dismiss,[6] the court dismissed the action, concluding that the plaintiffs lack standing to assert their claims. As to Reid & Riege, the court noted, inter alia, that, "considering [that] the damages being sought in the complaint concern funds that were allegedly removed improperly from the assets of the estate by its fiduciary, only the estate has been potentially harmed by [Reid & Riege's] actions and, therefore, only the estate, by way of its legal representative, would have standing to bring an action against [it]. See *Geremia* v. *Geremia*, 159 Conn. App. 751, 783–84, 125 A.3d 549 (2015); see also *Litvack* v. *Artusio*, [137 Conn. App. 397, 403–405, 49 A.3d 762 (2012)]."

With respect to Martin, the court was unpersuaded by the plaintiffs' reliance on § 107 (2) (b) of the Restatement (Third) of Trusts. As an initial matter, the court noted that, although the present case involves an estate rather than a trust, the plaintiffs cited no authority for applying § 107 of the Restatement (Third) of Trusts to an estate. Nonetheless, the court, assuming that § 107 of the Restatement (Third) of Trusts should be applied to the plaintiffs' complaint, concluded that

[6] The court also granted the request of counsel for Reid & Riege to file a reply brief following oral argument to address cases that counsel for the plaintiffs had raised for the first time during oral argument.

the plaintiffs' allegations in their complaint were insufficient to confer standing on them because "[c]learly missing from the allegations in the operative complaint are any facts that support [the assertion] that the beneficiaries are entitled to possession or immediate distribution of estate assets, that Attorney Shipman has committed some type of fraud or bad act against the estate, or that Attorney Shipman cannot or has refused to bring an action against the defendants on behalf of the estate improperly. To be clear, there are no allegations in the operative complaint that support any inference that Attorney Shipman is 'unable, unavailable, unsuitable, or improperly failing to protect the beneficiar[ies'] interest.' 4 Restatement (Third), supra, § 107 (2) (b). In fact, the court cannot draw any reasonable inferences, as the plaintiffs ask the court to do, concerning Attorney Shipman, who is not a party to this action, as her name and/or her appointment as the administratrix of the estate is not mentioned in the complaint, and the plaintiffs' attempts to remedy these deficiencies by filing an amended complaint or by proffering the missing allegations in their brief and during oral argument are equally unsuccessful." The court explained in a footnote two reasons why the plaintiffs' attempt to cure their pleading deficiencies through their request for leave to amend failed: the plaintiffs' request did not comply with Practice Book § 10-60, and the court could not consider the request while the motions to dismiss for lack of subject matter jurisdiction were pending.

Ultimately, the court concluded, inter alia, that the plaintiffs lacked standing because any claim against the defendants could only be brought by Attorney Shipman as the administratrix of Kevin's estate. Because it concluded that the plaintiffs lacked standing to pursue their claims against the defendants, the court did not consider the defendants' argument that the plaintiffs' claims were not ripe or Reid & Riege's argument that its actions

on which the plaintiffs' claims were based were protected by the litigation privilege. This appeal followed.

I

The plaintiffs first claim that the court improperly concluded that they lacked standing to assert their claims against the defendants. We are not persuaded.

We begin our analysis with the applicable standard of review and the relevant legal principles regarding standing. "A trial court's determination of whether a plaintiff lacks standing is a conclusion of law that is subject to plenary review on appeal." (Internal quotation marks omitted.) *Jefferson Solar, LLC* v. *FuelCell Energy, Inc.*, 224 Conn. App. 710, 722, 315 A.3d 302 (2024). "The question of whether a party has standing to bring an action implicates the court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject

matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citations omitted; internal quotation marks omitted.) *Browning* v. *Van Brunt*, *DuBiago & Co.*, *LLC*, supra, 330 Conn. 454–55. "[O]nly those individuals who have suffered a direct injury would have standing." (Emphasis omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 156, 851 A.2d 1113 (2004). "It is axiomatic that a party does not have standing to raise the rights of another." *Frillici* v. *Westport*, 264 Conn. 266, 281, 823 A.2d 1172 (2003).

"[L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it 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 contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and

need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009).

In the present case, Martin's motion to dismiss was predicated solely on alleged inadequacies in the plaintiffs' complaint. Similarly, the court concluded that the plaintiffs' complaint failed to allege any personal losses attributable to Reid & Riege's actions.[7] We, therefore, review the allegations of the plaintiffs' complaint de novo to determine whether the allegations are sufficient to confer standing on the plaintiffs.

As a general rule, "[a]ctions designed to recover personalty belonging to the estate or for its use, conversion, or injury are brought by the fiduciary rather than by the beneficiaries." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, supra, 159 Conn. App. 781–82.

[7] The court also concluded that the plaintiffs did not have standing to sue Reid & Riege for malpractice because they never were clients of the law firm. In reaching this conclusion, the court relied in part on the affidavit of Attorney Mary Miller. See footnote 4 of this opinion. Because the plaintiffs do not dispute the facts set forth in that affidavit, the court properly considered it when ruling on Reid & Riege's motion to dismiss. In light of our conclusion that the plaintiffs lack standing to assert their claims against the defendants because the decision to bring such claims belongs to Attorney Shipman as the administratrix of Kevin's estate, we need not address the additional ground on which the court relied, namely, that the plaintiffs lack standing to pursue their malpractice claim against Reid & Riege. Consequently, Attorney Miller's affidavit is not relevant to our analysis.

Consistent with this rule, General Statutes § 45a-234 (18) "vests in an administrator or executor the exclusive power '[t]o compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor [of] or against the estate . . . as the fiduciary shall deem advisable . . . .' " *Geremia* v. *Geremia*, supra, 785. Section 45a-234 (18) further provides in relevant part that the administrator or executor's decision regarding the pursuit of claims on behalf of the estate "shall be conclusive between the fiduciary and the beneficiaries of the estate . . . in the absence of fraud, bad faith or gross negligence of the fiduciary. . . ."

This court applied both this general rule and the limited exception to it in *Geremia*. In that case, two beneficiaries of the decedent's estate brought an action against other beneficiaries, alleging, inter alia, claims of breach of fiduciary duty, conversion, statutory theft, and unjust enrichment arising out of the defendants' misappropriation of assets from the decedent. *Geremia* v. *Geremia*, supra, 159 Conn. App. 760–61. In their complaint, the plaintiffs alleged that "the estate of [the decedent] contains considerably less assets than would otherwise be the case because of the conduct of the defendants." (Internal quotation marks omitted.) Id., 786. In affirming the judgment of the trial court dismissing the plaintiffs' claims, this court concluded that "the counts alleging breach of fiduciary duty and unjust enrichment, as well as those alleging conversion and statutory theft with respect to property belonging to [the decedent], all plead[ed] injuries derivative of those allegedly sustained by her estate. They do not amount to colorable claims of direct injury to the plaintiffs. Accordingly, the plaintiffs lack standing to maintain those actions before the Superior Court. The court properly dismissed those counts for lack of subject matter jurisdiction." Id., 788. In reaching this conclusion, the

court held that the limited exception in § 45a-234 (18), which might allow for a direct claim by the beneficiaries, did not apply because "[a]bsent from the operative complaint is any allegation of fraud, bad faith, or gross negligence on the part of the administratrix of [the decedent's] estate." Id., 787.

The same is true in the present case. First, it is clear from the allegations of the complaint that the plaintiffs are seeking to recover for injuries to the estate. For example, in their breach of fiduciary duty count against Martin, the plaintiffs allege that Martin "converted estate funds to himself to satisfy his personal obligations to Reid & Riege" and that "Martin paid Reid & Riege directly from the assets of the estate at least $265,000 to pay his legal fees without a hearing or approval of the Probate Court and without affording the [plaintiffs] an opportunity to object." The plaintiffs further allege, as to Martin, that they were "damaged in the loss of a substantial portion of the estate to which they [were] entitled." These allegations were incorporated by reference into the plaintiffs' conversion and statutory theft counts against Martin. In addition, in the conversion count, the plaintiffs further allege that "Martin without right converted estate assets subject to his possession and control to his own personal use and contrary to Connecticut law and right or justification."

Similarly, in the legal malpractice count against Reid & Riege, the plaintiffs allege that the law firm breached the standard of care by advising Martin "to convert $250,000 of estate funds to pay his legal fees to Reid & Riege and contrary to the best interests of the [plaintiffs]." They further allege that, as a result of Reid & Riege's conduct, they have been damaged in that "the value of their interests in the estate has been diminished and legal fees have been incurred."

Second, because the complaint fails to allege any direct injury to the plaintiffs, the only basis for them to recover losses suffered by the estate would have been for them to allege that Attorney Shipman, as the administratrix for the estate, improperly refused to pursue the claims against the defendants. As the trial court noted, however, the plaintiffs' operative complaint contains no allegations that "Attorney Shipman has committed some type of fraud or bad act against the estate, or that Attorney Shipman cannot or has refused to bring an action against the defendants on behalf of the estate improperly." Our own review of the complaint confirms that the court was correct. Although the operative complaint sets forth the allegation that Martin was removed as the executor of Kevin's estate, it does not even mention Attorney Shipman by name or title. In fact, it makes no mention of the appointment of a new administratrix of Kevin's estate and consequently does not allege that the administratrix improperly refused to pursue claims against the defendants. The absence of such an allegation is fatal to the plaintiffs' claim of standing. Consequently, the court correctly concluded that it lacked subject matter jurisdiction and properly dismissed the plaintiffs' complaint.[8]

[8] The plaintiffs' reliance on § 107 (2) (b) of the Restatement (Third) of Trusts and our Supreme Court's decision in *Browning* v. *Van Brunt*, *DuBiago & Co.*, *LLC*, supra, 330 Conn. 447, is misplaced for at least two reasons. First, both § 107 (2) (b) of the Restatement (Third) of Trusts and *Browning* address the question of under what circumstances the beneficiary of a *trust* may pursue a direct claim when the trustee refuses to pursue the claim. As the trial court in the present case noted, however, this case does not involve a trust. The plaintiffs have provided us with no authority, and we are aware of none, in which a court has applied § 107 (2) (b) of the Restatement (Third) of Trusts to an estate.

Second, even if we were to assume that § 107 (2) (b) of the Restatement (Third) of Trusts applied to the plaintiffs' complaint, the result would be the same. As previously noted in this opinion, the operative complaint makes no mention of Attorney Shipman and therefore does not allege that she is unable, unavailable, unsuitable, or improperly failing to protect the plaintiffs' interests. See *Browning* v. *Van Brunt*, *DuBiago & Co.*, *LLC*, supra, 330 Conn. 458–60.

II

The plaintiffs also claim that the court improperly declined to grant their request for leave to amend their complaint to include specific allegations as to Attorney Shipman. Essentially, the plaintiffs claim that they were deprived of an opportunity to correct the jurisdictional defect that resulted in the dismissal of their complaint as discussed in part I of this opinion.

As an initial matter, we note that the court did not deny the plaintiffs' request for leave to amend. Instead, it refused to consider it for two reasons. First, the request did not comply with Practice Book § 10-60. Second, the court concluded that it could not consider the request because "the motion to dismiss the original complaint based on subject matter jurisdiction was pending." As to its second basis, the court followed the long-standing principle that "all other action in a case comes to a halt once the issue of subject matter jurisdiction has been raised . . . ." (Internal quotation marks omitted.) *Kelly* v. *Albertsen*, 114 Conn. App. 600, 608, 970 A.2d 787 (2009).

The plaintiffs, relying on our Supreme Court's decision in *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 133 A.3d 140 (2016), argue that the court had the authority to permit the amendment in response to the motion to dismiss and improperly failed to do so. We are not persuaded.

"[A]lthough we ordinarily review a court's decision on a request to amend a pleading for an abuse of discretion; see *KDM Services, LLC* v. *DRVN Enterprises, Inc.*, 211 Conn. App. 135, 140, 271 A.3d 1103 (2022); in the present case, the issue is whether the court properly concluded that it [did not have] the authority in the first instance to permit the amendment, which is a question of law over which we exercise plenary review."

Gervais v. *JACC Healthcare Center of Danielson, LLC*, 221 Conn. App. 148, 162, 300 A.3d 1244 (2023).[9]

Our Supreme Court addressed the precise question before us in *Gurliacci* v. *Mayer*, 218 Conn. 531, 590 A.2d 914 (1991). In that case, the plaintiff, a Stamford police officer, sued George Mayer, the then deputy chief of the Stamford Police Department, and the city of Stamford for injuries she claimed to have suffered when Mayer, who was driving while intoxicated, struck the rear of the plaintiff's unmarked police car. Id., 534. "On April 2, 1985, Mayer . . . moved to dismiss the action for lack of subject matter jurisdiction based on the fellow employee immunity provision of General Statutes (Rev. to 1983) § 7-465. On May 10, 1985, the plaintiff requested permission of the court to amend her complaint. The plaintiff's request was granted over Mayer's objection. On May 30, 1985, the court . . . denied the motion to dismiss for lack of subject matter jurisdiction." (Footnote omitted.) Id., 536–37. After the jury awarded the plaintiff $485,000 in compensatory damages and the trial court denied Mayer's motion to set aside the verdict, Mayer appealed. Id., 539.

On appeal, Mayer claimed, inter alia, that the trial court had improperly determined that it had subject

[9] Reid & Riege correctly notes in its appellate brief that the plaintiffs have not challenged on appeal the court's conclusion that the request for leave to amend did not comply with Practice Book § 10-60. We often have said that when a trial court's decision is based on two independent grounds, and the appellant challenges only one of those grounds on appeal, his claim is moot because we can offer no practical relief in light of the unchallenged basis for the court's decision. See, e.g., *Finley* v. *Western Express, Inc.*, 205 Conn. App. 473, 479–80, 257 A.3d 395 (2021). We conclude that that principle does not apply here because the court's determination that it lacked authority to rule on the request for leave to amend effectively precluded it from exercising its discretion to determine whether the plaintiffs' failure to comply with § 10-60 warranted denying the request. In fact, as previously noted in this opinion, the court never ruled on the request. Consequently, we limit our consideration to the questions of whether the court correctly concluded that it did not have the authority to address the request and whether any error in that regard was harmless.

matter jurisdiction over the plaintiff's claim and improperly permitted the plaintiff to amend her complaint while the motion to dismiss was pending. Id., 541–45. After the Supreme Court concluded that the plaintiff's complaint was within the trial court's subject matter jurisdiction; id., 545; it addressed Mayer's claim that the trial court had improperly ruled on the plaintiff's motion to amend her complaint before addressing Mayer's motion to dismiss. The court explained: "It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court. . . . In this case, the trial court allowed the plaintiff to amend her complaint prior to ruling on the motion to dismiss. By considering the motion to amend prior to ruling on the challenge to the court's subject matter jurisdiction, the court acted inconsistently with the rule that, as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made." (Citations omitted.) Id., 545. The court then concluded that the trial court's error was harmless because, "even had the motion to dismiss been heard prior to the amendment of the complaint, it should have been denied." Id.

This court, relying on *Gurliacci*, has concluded that a trial court, when addressing a motion to dismiss for lack of standing, "properly considered the motion to dismiss on the basis of the operative complaint and not the plaintiff's proposed amended complaint." *North Star Contracting Corp.* v. *Albright*, 156 Conn. App. 311, 315 n.5, 112 A.3d 216 (2015); see also *Cumberland Farms, Inc.* v. *Dubois*, 154 Conn. App. 448, 455 n.7, 107 A.3d 995 (2014) ("once the defendant filed his motion to dismiss on the ground that the court lacked subject matter jurisdiction, the court was required to refrain from acting on the plaintiff's request to amend its complaint"). Consequently, the trial court in the present

case properly applied this precedent by considering the defendants' motions to dismiss on the basis of the operative complaint rather than the plaintiffs' proposed amended complaint.

The plaintiffs' reliance on *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 535, is misplaced. In that case, our Supreme Court held that the addition or substitution of a real party in interest as a plaintiff, if allowed by the court, would cure any original plaintiff's lack of standing. Id., 547. Our Supreme Court, in deciding this narrow issue, concluded that such an amendment was an appropriate vehicle to cure a lack of standing because "it is a type of jurisdictional defect that our legislature, through the enactment of [General Statutes] § 52-109, has deemed amenable to correction and, therefore, not irremediably fatal to an action. That statute provides: When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff. General Statutes § 52-109.

"[Our Supreme Court] has explained that § 52-109 allow[s] a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the wrong person as [the] plaintiff, and that such a substitution will relate back to and correct, retroactively, any defect in a prior pleading concerning the identity of the real party in interest. . . . Thus, a substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run. . . . An addition or substitution is discretionary, but generally should be allowed when, due to an error, misunderstanding or misconception, an action was commenced in the name of the wrong party, instead of

the real party in interest, whose presence is required for a determination of the matter in dispute." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 552–53.

The present case does not involve a motion to add or substitute a plaintiff who is the real party in interest. To the contrary, the plaintiffs maintain that they have the right to pursue their claims *in lieu of* the true owner of those claims. Moreover, there is no statute akin to § 52-109 that suggests that a plaintiff who fails to sufficiently allege a direct injury necessary for standing should be permitted to amend her complaint to correct that deficiency after the defendant has raised the issue of standing in a motion to dismiss. Simply put, the holding in *Fairfield Merrittview Ltd. Partnership* addresses a wholly unrelated factual and legal scenario and in no way undermines the holding or reasoning of *Gurliacci* and its progeny.

Furthermore, even if we were to conclude that the court should have permitted the plaintiffs to amend their complaint, the result would be the same. In their proposed amended complaint, the plaintiffs added two new paragraphs that mention Attorney Shipman: "55. The current administratrix of the estate, Attorney Shipman, was requested by the [plaintiffs] through counsel to bring an action against the above-named defendants. The administratrix has thus far refused or neglected to do so. 56. It is believed that Attorney Shipman has or will assign the right to pursue the estate and trust's claims against the defendants to the [plaintiffs]." Although these proposed amendments allege that Attorney Shipman refused or neglected to bring the claims against the defendants, even when afforded a broad interpretation they do not allege that she did so improperly, that she acted fraudulently or in bad faith, or that

she was grossly negligent. See General Statutes § 45a-234 (18). The allegations of the proposed amended complaint do not even meet the standard set forth in § 107 (2) (b) of the Restatement (Third) of Trusts that the fiduciary is "unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." Consequently, even if the court had considered the plaintiffs' proposed amended complaint when it ruled on the defendants' motions to dismiss, the result would have been the same.

The judgment is affirmed.

In this opinion the other judges concurred.

EDGEWOOD PROPERTIES, LLC *v.* DYNAMIC MULTIMEDIA, LLC, ET AL.
(AC 46250)

Elgo, Suarez and Flynn, Js.

Syllabus

The defendants appealed to this court from the judgment of the trial court rendered for the plaintiff, who commenced this summary process eviction proceeding. The defendants entered into a written lease agreement with O with respect to certain residential property. O died and the property was sold to the plaintiff. Although the plaintiff demanded that the defendants vacate the property, the defendants refused to do so, and the plaintiff served the defendants with notices to quit. After trial commenced, the court denied the defendants' motions in limine to present evidence of an alleged settlement and to summarily enforce a settlement agreement. *Held*:

1. This court concluded that, although the trial court improperly determined that the plaintiff was entitled to a judgment of possession of the property based on lapse of time, the defendants were not entitled to relief with respect to this claim: the only evidence of a written lease agreement was the agreement between O and the defendants, an agreement that ended, pursuant to its terms, when title to the property was transferred to the plaintiff, and, accordingly, the trial court erred in finding the existence of a rental agreement between the parties and the judgment could not be sustained on the ground of lapse of time; moreover, the plaintiff was entitled to judgment in its favor on the alternative ground that the defendants' privilege or right to occupy the property had expired,

as it was undisputed that the property was sold to the plaintiff and the defendants remained in possession of the property.

2. The trial court properly denied the defendants' motion in limine to present evidence of a purported settlement agreement between the parties: although the motion in limine described the evidence the defendants wanted to present, it did not address the prejudice that could result, and the court reasonably considered this motion in light of the defendants' motion to enforce a purported settlement agreement and discussed the propriety of the defendants' decision to seek summary enforcement of a settlement agreement, the existence of which was vehemently disputed by the plaintiff, as well as the potential to disrupt the summary process trial that had already commenced; moreover, the court noted that the defendants had opportunities for settlement negotiations before trial and reasonably concluded that, had a settlement been reached, a mediation specialist would have reported the settlement to the court, that granting the motion would have prejudiced the plaintiff, and that the focus should be on the need to avoid any undue delay in adjudicating the plaintiff's action.

3. The defendants' claim that the trial court abused its discretion in denying their motion to enforce a purported settlement agreement was unavailing; although the trial court improperly relied on the rule of practice applicable to motions for summary judgment (§ 17-44), the defendants were not entitled to relief because the court properly refused to hear evidence of the alleged agreement, as the court's authority to enforce a settlement agreement may be exercised only when the terms are clear, unambiguous and undisputed, and, in the present case, the existence of a settlement agreement was in dispute, and the record did not include any evidence of an enforceable agreement.

Argued November 8, 2023—officially released July 9, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Hartford, Housing Session, where the plaintiff filed a substitute complaint; thereafter, the case was tried to the court, *Esperance-Smith, J.*; subsequently, the court, *Esperance-Smith, J.*, denied the defendants' motions in limine and for enforcement of a settlement agreement; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Thomas A. Amato, for the appellants (defendants).

Jennifer E. Mira, for the appellee (plaintiff).

Opinion

SUAREZ, J. In this summary process action, the defendants, Daniel A. Martin, Dynamic Multimedia, LLC, and Badger Entertainment, LLC, appeal from the judgment of the trial court rendered in favor of the plaintiff, Edgewood Properties, LLC. On appeal, the defendants claim that the trial court improperly (1) determined that the plaintiff was entitled to a judgment of possession of the subject property based on lapse of time, (2) denied their motion in limine to present evidence of a purported settlement agreement reached by the parties, and (3) denied their motion for summary enforcement of the purported settlement agreement. We affirm the judgment of the trial court.

The plaintiff commenced the underlying summary process action against the defendants on September 10, 2021. In its substitute complaint dated October 13, 2021, the plaintiff alleged the following facts. On or about November 21, 2018, Robert K. Olson entered into a written lease agreement with the three defendants for certain residential property in South Windsor.[1] According to the terms of the lease agreement, upon the sale of the property to a third party who was unrelated to Olson and the defendants, the defendants were obligated to vacate the property, remove their belongings therefrom, and leave the property in good and clean condition. On or about March 3, 2020, Olson died and the property became part of his estate. On or about March 5, 2021, the executor of Olson's estate sold the property to the plaintiff for $100,000 and, by virtue of an executor's deed, conveyed the property to the plaintiff. Following the conveyance, the plaintiff demanded repeatedly that the defendants vacate the

[1] At trial, Martin testified that Olson was his grandfather and that he operates Dynamic Multimedia, LLC, and Badger Entertainment, LLC, both of which are marketing companies.

property, and the defendants refused the plaintiff's demands. On August 3, 2021, the plaintiff served each of the defendants with a notice to quit, thereby informing the defendants that they were to vacate the property by September 6, 2021.[2]

In count one of the substitute complaint, the plaintiff alleged that it was entitled to possession of the property on the ground that the defendants' right or privilege to occupy the property pursuant to the lease agreement had expired following the conveyance to the plaintiff. In count two, the plaintiff alleged that, "[w]hen the defendants failed to vacate the [property] upon the termination of their lease term, the defendants' tenancy converted to a month-to-month lease" and that "[t]he month-to-month lease has been terminated by lapse of time."

In their answer, the defendants admitted that they had entered into a lease agreement with Olson, and they took possession of and continue to occupy the property. The defendants otherwise denied the allegations or left the plaintiff to its proof. By way of special defense as to both counts, the defendants alleged the plaintiff never acquired title to the subject premises and it therefore lacked standing to commence and prosecute the present action. In support of this defense, the defendants alleged that Martin, a creditor of Olson's estate, had commenced a civil action against the executor of Olson's estate challenging the "purported sale" of the property to the plaintiff. The defendants alleged that Martin's action was based on the theory that the executor had not obtained adequate consideration in the sale and set forth claims of breach of fiduciary duty, negligence, and a violation of the Connecticut Uniform

[2] The reasons provided in the notices to quit, which were attached as exhibit A to the plaintiff's substitute complaint, were "lapse of time" and "the original right or privilege to occupy has expired."

Fraudulent Transfer Act, General Statutes § 52-552a et seq. As to both counts of the substitute complaint, the defendants also alleged, by way of separate special defenses, that the plaintiff had failed to state a claim upon which relief could be granted. In its reply, the plaintiff denied the defendants' special defenses and, pursuant to Practice Book § 10-57, pleaded several matters in avoidance of the affirmative allegations in the defendants' answer.

A court trial commenced on January 24, 2023, and continued on February 3, 2023. During the plaintiff's case-in-chief, the court heard testimony from Rui Costa, the plaintiff's sole member. During the defendants' case-in-chief, the court heard testimony from Martin and Alexander W. MacDonald, a real estate appraiser. On January 31, 2023, prior to the second and final day of trial, the defendants filed a motion in limine seeking permission from the court to "permit the defendants to offer evidence regarding the formation and breach of a settlement agreement into which the parties entered one day prior to the commencement of trial . . . ." The defendants also filed a motion seeking "summary enforcement" of what they described as a settlement agreement between the parties. The court denied both motions.

Following the trial, the court issued an order in which it rendered judgment in favor of the plaintiff. In relevant part, the order stated: "A summary process trial for lapse of time was held on January 24, 2023, and February 3, 2023. At the hearing were [Costa] and [the] defendant [Martin] and counsel for both parties.

"After reviewing all the relevant pleadings, arguments, testimony and exhibits, the court finds that the plaintiff has proved by a fair preponderance of the evidence the following facts.

"The service of the notice to quit, the termination date, and service of the complaint were all timely and made according to the relevant law. . . .

"There was a rental agreement between the parties. . . . The plaintiff is the owner or lessor of the subject property. . . . The term of the written rental agreement terminated. . . . The defendant[s] [are] still in possession of the premises.

"The court finds that the defendant[s] [have] not met [their] burden of establishing [their] special defenses.

"Now, therefore, the court enters judgment of possession in favor of the plaintiff. An execution may issue immediately after the statutory stay." The court thus appears to have based its judgment on the cause of action sounding in lapse of time, not the cause of action based on the allegation that the defendants' right or privilege to occupy the property pursuant to the lease agreement had expired following the sale to the plaintiff. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

First, the defendants claim that the court improperly determined that the plaintiff was entitled to a judgment of possession of the subject property based on lapse of time. We agree with the defendants, but we conclude that the defendants are not entitled to any relief with respect to this claim.

The defendants argue that the court's decision was based upon a clearly erroneous finding of fact, namely, that there was a rental agreement between the parties.[3] The defendants further assert that the evidence demonstrated that, following the conveyance of the property

[3] In their answer to paragraph 1 of count one of the plaintiff's substitute complaint, the defendants admitted that, on or about November 21, 2018, they entered into a written lease agreement with Olson.

to the plaintiff, they continued to occupy the property as tenants at sufferance and, thus, the court erred as a matter of law in granting the plaintiff relief on the ground of lapse of time. According to the defendants, lapse of time is not a legally cognizable theory to support the termination of a tenancy at sufferance.

We begin by setting forth our standard of review and applicable legal principles. "Factual findings are subject to a clearly erroneous standard of review. . . . It is well established that [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . . Our authority, when reviewing the findings of a judge, is circumscribed by the deference we must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. . . . The question for this court . . . is not whether it would have made the findings the trial court did, but whether in view of the evidence and pleadings in the whole record it is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *J. M.* v. *E. M.*, 216 Conn. App. 814, 820–21, 286 A.3d 929 (2022). "When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record." (Internal quotation marks omitted.) *Housing Authority* v. *Neal*, 211 Conn. App. 777, 783, 274 A.3d 257 (2022).

"Summary process is a statutory remedy that enables a landlord to recover possession from a tenant upon

the termination of a lease . . . . The purpose of summary process proceedings is to permit the landlord to recover possession of the premises upon termination of a lease without experiencing the delay, loss, and expense to which he might be subjected under a common law cause of action. The process is intended to be summary and is designed to provide an expeditious remedy to a landlord seeking possession . . . . We have recognized the principle that, because of the summary nature of its remedy, the summary process statute must be narrowly construed and strictly followed. . . .

"Summary process actions are governed by General Statutes § 47a-23, which allows an owner or lessor to issue a notice to quit only under certain conditions, including: (1) when the lease terminates . . . by lapse of time . . . . In a summary process action for lapse of time, the plaintiff landlord must prove, as part of its prima facie case, that the term of the lease has expired." (Citations omitted; internal quotation marks omitted.) *Altama, LLC* v. *Napoli Motors, Inc.*, 181 Conn. App. 151, 158, 186 A.3d 78 (2018).[4] A "tenant" is defined as

[4] There are various grounds for summary process actions. In basic terms, when a landlord brings a summary process action based on "lapse of time," it must demonstrate, among other statutory requirements, that it is entitled to relief under the corresponding subparagraph of the summary process statute, § 47a-23 (a) (1) (A), because a rental agreement has expired, but the tenant remains in possession of the premises. General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor, or the owner's or lessor's legal representative, or the owner's or lessor's attorney-at-law, or in-fact, desires to obtain possession or occupancy of any land or building, any apartment in any building, any dwelling unit, any trailer, or any land upon which a trailer is used or stands, and (1) when a rental agreement or lease of such property, whether in writing or by parol, terminates . . . (A) By lapse of time . . . such owner or lessor, or such owner's or lessor's legal representative, or such owner's or lessor's attorney-at-law, or in-fact, shall give notice to each lessee or occupant to quit possession or occupancy of such land, building, apartment or dwelling unit, at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

"the lessee, sublessee or person entitled under a rental agreement to occupy a dwelling unit or premises to the exclusion of others or as is otherwise defined by law." General Statutes § 47a-1 (*l*).

"[Summary process] is preceded by giving the statutorily required notice to quit possession to the tenant. . . . Service of a notice to quit possession is typically a landlord's unequivocal act notifying the tenant of the termination of the lease. The lease is neither voided nor rescinded until the landlord performs this act and, upon service of a notice to quit possession, a [leasehold] is converted to a tenancy at sufferance." (Citation omitted.) *Housing Authority* v. *Hird*, 13 Conn. App. 150, 155, 535 A.2d 377, cert. denied, 209 Conn. 825, 552 A.2d 433 (1988).

"A tenancy at sufferance arises when a person who came into possession of [property] rightfully continues in possession wrongfully after his right thereto has terminated. . . . After a notice to quit has been served . . . a tenant at sufferance no longer has a duty to pay rent. He still, however, is obliged to pay a fair rental value in the form of use and occupancy for the dwelling unit. . . . Accordingly, use and occupancy payments . . . are paid to a landlord by a tenant at sufferance who occupies the [property] in the absence of a lease agreement. . . . They are most frequently associated with summary process proceedings to evict a tenant because, after a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance." (Citation omitted; internal quotation marks omitted.) *Housing Authority* v. *Neal*, supra, 211 Conn. App. 783–84; see *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 473 n.18, 974 A.2d 626 (2009) ("[A]fter a notice to quit possession has been served, a tenant's fixed tenancy is converted into a tenancy at sufferance.

. . . A tenant at sufferance is released from his obligations under a lease. . . . His only obligations are to pay the reasonable rental value of the property which he occupied in the form of use and occupancy payments . . . and to fulfill all statutory obligations." (Internal quotation marks omitted.)); see also General Statutes § 47a-3c ("[i]n the absence of agreement, the tenant shall pay the fair rental value for the use and occupancy of the dwelling unit"); General Statutes § 47a-26b (providing for use and occupancy payments to be made, upon motion, during pendency of summary process action).[5]

With respect to the court's finding that "[t]here was a rental agreement between the parties," the defendants argue, and our careful review of the evidence reflects, that the only evidence of a written lease agreement was the agreement entered into between Olson and the defendants on November 21, 2018. The lease agreement contains the following relevant provisions. Paragraph

[5] "The mere act of holding over does not create a new tenancy. . . . Instead, the holdover tenant becomes a tenant at sufferance with no legal right to possession." (Citations omitted; footnote omitted.) *FJK Associates* v. *Karkoski*, 52 Conn. App. 66, 68, 725 A.2d 991 (1999). "A holdover tenant will be considered either a tenant at sufferance if it merely holds over . . . or a month-to-month tenant if the lessor continues to accept the lessee's monthly rental payments following the lease's expiration." (Citation omitted.) *Platt* v. *Tilcon Connecticut, Inc.*, 196 Conn. App. 564, 581 n.11, 230 A.3d 854, cert. denied, 335 Conn. 917, 230 A.3d 643 (2020). "Connecticut law allows a holdover tenant to be considered as a tenant at sufferance . . . or as a month-to-month tenant. . . . Our law, however, does not impose the original lease terms upon parties who have not agreed that such terms apply to a holdover tenancy." (Citations omitted.) *Meeker* v. *Mahon*, 167 Conn. App. 627, 638 n.5, 143 A.3d 1193 (2016). "A tenancy at will exists only when the occupation of the property is with the landowner's consent, continuing during the tenancy." (Internal quotation marks omitted.) *669 Atlantic Street Associates* v. *Atlantic-Rockland Stamford Associates*, 43 Conn. App. 113, 121 n.3, 682 A.2d 572, cert. denied, 239 Conn. 949, 686 A.2d 126 (1996), and cert. denied, 239 Conn. 950, 686 A.2d 126 (1996). A landlord may engage in conduct, such as accepting payment of rent, that transforms a tenancy at sufferance into a tenancy at will. See, e.g., *Borst* v. *Ruff*, 137 Conn. 359, 362, 77 A.2d 343 (1950).

1 states: "The term of this lease starts on November 1, 2018, and ends on the date that title to the house is conveyed to a third party purchaser who is unrelated to the landlord and tenant by consanguinity or affinity, which act of conveyance excludes devolution of title by devise or descent." Paragraph 11 states: "When this lease ends, [the defendants] will leave the house and remove all [their] property and the property of others. [The defendants] will leave the house in good and clean condition, and [the defendants] will repair any damage that was caused by [the defendants] or others." Paragraph 15 states: "If [Olson sells] the property, [Olson] shall not have any further liability to [the defendants] under this lease for any event that happens after [the defendants] receive written notice that [Olson has] sold the property. In addition, if [Olson sells] the property, any security deposit that [the defendants have given Olson] will be assigned to the new owner of the property, and [Olson] shall not have any further liability to return the security deposit to [the defendants]." Paragraph 18 states: "This lease shall be binding upon [the defendants] and [Olson] and your and our respective successors, heirs, executors and administrators." Paragraph 20 states: "The parties intend that this lease instrument be binding on their respective heirs, beneficiaries, executors, administrators, fiduciaries and assigns." The lease agreement did not include a holdover provision.

The plaintiff argues that it "stepped into the shoes of [Olson] when it purchased the property, and therefore, the rights and obligations of the lease transferred to [the plaintiff] upon that conveyance." The plaintiff argues that paragraph 20 "demonstrates the parties' specific intent to have their future 'assigns' (i.e., purchasers) be bound to the lease terms." We conclude that the plaintiff's construction of the lease agreement is unreasonable in light of the agreement as a whole.

"In construing a written lease, which constitutes a written contract, three elementary principles must be kept constantly in mind: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; [and] (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible." (Internal quotation marks omitted.) *Middlesex Mutual Assurance Co.* v. *Vaszil*, 279 Conn. 28, 35–36, 900 A.2d 513 (2006). "[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . [T]he interpretation and construction of a written contract present only questions of law, within the province of the court . . . so long as the contract is unambiguous and the intent of the parties can be determined from the agreement's face. . . . Contract language is unambiguous when it has a definite and precise meaning about which there is no reasonable basis for a difference of opinion." (Citations omitted; internal quotation marks omitted.) *Christian* v. *Gouldin*, 72 Conn. App. 14, 20, 804 A.2d 865 (2002).

Paragraph 1 unambiguously reflects that the term of the written lease agreement between Olson and the defendants *ended* when the title of the property was transferred to the plaintiff because the uncontroverted evidence was that the plaintiff is a third-party purchaser who is unrelated to the parties to the agreement by consanguinity or affinity. In light of the plain and unequivocal meaning of paragraph 1, to the extent that other provisions of the lease agreement reflect an intent to bind "respective successors, heirs, executors and

administrators" as well as "beneficiaries . . . fiduciaries and assigns" to the terms of the lease agreement, such provisions cannot reasonably be construed so as to bind a third-party purchaser who is unrelated to the parties by consanguinity or affinity.

The evidence does not reflect that, following Olson's death and the transfer of title to the plaintiff, the parties had come to any understanding or agreement with respect to the defendants' continued possession of the property. Costa testified as to his belief that, following the sale of the property, the defendants "were to vacate the property immediately." Thus, Costa testified that, following the purchase, he demanded that the defendants leave the property and served them with notices to quit. Martin testified that he did not come to any agreement, whether oral or written in nature, with the plaintiff concerning the defendants' ongoing presence at the property. There is no evidence in the record that, after the written lease agreement ended, the parties came to any agreement with respect to a new tenancy or the payment of periodic rent. Moreover, there is no evidence that the plaintiff, as landlord, acquiesced in the defendants' continued possession of the property. For the foregoing reasons, we conclude that the court's factual finding concerning the existence of a rental agreement between the parties was in error.

The defendants argue that the court's clearly erroneous factual finding was harmful in that it led to the court's conclusion that the plaintiff was entitled to relief on the basis of lapse of time. The defendants assert, and we agree, that they became tenants at sufferance after their right to possess the property under the November 21, 2018 lease agreement had terminated and they continued to possess the property, without the plaintiff's approval. The defendants correctly argue that the court's judgment cannot be sustained on the ground

of lapse of time, for such ground is not a legally sufficient ground to terminate a tenancy at sufferance. This court has previously reasoned that a cause of action based on lapse of time depends on the existence of a lease or rental agreement between the parties codifying an allotted time frame, for "[c]ommon sense dictates that when a contractual rental agreement is no longer in place, such an agreement can no longer be violated." *Vidiaki, LLC* v. *Just Breakfast & Things!!! LLC*, 133 Conn. App. 1, 24, 33 A.3d 848 (2012); see also, e.g., *Kellish* v. *Rosenberg*, Superior Court, judicial district of Middlesex, Housing Session at Middletown, Docket No. CV-19-6024218-S (July 1, 2019) (68 Conn. L. Rptr. 781, 783) ("the defendants correctly argue that lapse of time would be an inappropriate cause of action against tenants at sufferance"); *Shough* v. *Hogan*, Superior Court, judicial district of New Haven, Housing Session, Docket No. SPNH 9702-49735 (March 21, 1997) (19 Conn. L. Rptr. 450, 450–51) ("[F]or lapse of time to be a valid reason for the issuance of a notice to quit there must [be] an underlying lease whether oral or written. Lapse of time is not a sufficient reason to terminate a tenancy at sufferance. A tenancy at sufferance does not involve a contract or a lease." (Internal quotation marks omitted.)).[6]

Although we have concluded that the court made a factual error and that its judgment based on lapse of time cannot stand, that does not end our analysis as to the proper outcome of the present case.[7] We may affirm

[6] To the extent that this court's decision in *FJK Associates* v. *Karkoski*, 52 Conn. App. 66, 67, 725 A.2d 991 (1999), stands for the contrary proposition, we observe that the court in *FJK Associates* held that lapse of time was "an adequate ground for termination *under the facts of this case*," and we deem it appropriate to limit its holding to the unique and distinguishable facts before the court in that case. (Emphasis added.)

[7] During oral argument before this court, the parties were asked to address whether this court could affirm the judgment of the trial court on different grounds if it agreed with the defendants with respect to the alleged error raised in their first claim on appeal. The plaintiff's counsel argued that the judgment could be affirmed on the alternative legal ground on which they

the judgment of the court if it "reached the right result, even if it did so for the wrong reason." *Kalas* v. *Cook*, 70 Conn. App. 477, 485, 800 A.2d 553 (2002); see also *White* v. *Dept. of Children & Families*, 136 Conn. App. 759, 767 n.5, 51 A.3d 1116 ("[w]e may affirm the judgment of the court on different grounds if we disagree with the grounds relied on by the court"), cert. denied, 307 Conn. 906, 53 A.3d 221 (2012).

As we discussed previously in this opinion, the plaintiff alleged, in count one of its substitute complaint, the ground that the defendants' privilege or right to occupy the property had expired. In support of this count, the plaintiff alleged the following facts: (1) on or about November 21, 2018, the defendants and Olson entered into a written lease agreement; (2) the terms of the lease agreement provided that the lease was to end when the property was sold to an unrelated third party; (3) the terms of the lease agreement required the defendants to vacate the property upon the sale of the property; (4) following Olson's death, the executor of his estate sold the property to the plaintiff; (5) despite the plaintiff's repeated demands, the defendants continue to occupy the property; (6) the defendants were served with notices to quit stating, in part, that their privilege to occupy the property had expired; and (7) the defendants continue in possession beyond the time designated in the notices to quit. The plaintiff alleged that, upon the sale of the premises to it, the defendants' "right or privilege to occupy the property . . . terminated . . . ."

The plaintiff, having relied in both its substitute complaint and notices to quit on the ground that the defendants' right or privilege to occupy the property had

had relied in count one of the plaintiff's substitute complaint. The defendants' counsel acknowledged that relying on this alternative ground was a possibility but did not acquiesce in that path being taken by this court.

expired, was entitled to judgment in its favor on this alternative legal ground. Although the court's findings of fact in this case are scant, it nonetheless found that "[t]he term of the written rental agreement terminated." There was only one written rental agreement in evidence, namely, the written lease agreement that Olson had entered into with the defendants, which was admitted into evidence as exhibit 2. There was no testimony concerning another rental agreement for the property. Moreover, the terms of the written rental agreement are not in dispute. We have already discussed the provisions in the lease agreement related to the term of the lease and the defendants' obligation to vacate the property upon the sale of the property to an unrelated third party. The evidence was undisputed that a sale of the property occurred, and that Olson's executor conveyed the property to the plaintiff, an unrelated third party, by means of an executor's deed. Consistent with this undisputed evidence, the court found that "[t]he plaintiff is the owner or lessor of the subject property." The evidence that the defendants remain in possession of the property beyond the time specified in the notices to quit likewise was undisputed. The court found that the defendants were "still in possession of the premises."

On the basis of those findings of the court that have not been challenged in this appeal, as well as the undisputed evidence that we have discussed in our analysis, we conclude that the plaintiff was entitled to relief under the summary process statute pursuant to the ground set forth in count one of the plaintiff's substitute complaint, namely, that the right or privilege that the defendants enjoyed pursuant to their written lease agreement with Olson had expired, but they continue to occupy the property. See General Statutes § 47a-23 (a) (3).[8] Having concluded that the court erred with

[8] General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor, or the owner's or lessor's legal representative, or the owner's or

respect to one of its factual findings and its reliance on § 47a-23 (a) (1) (A), we nonetheless conclude, on the basis of count one of the substitute complaint, that the court reached the correct result in rendering a judgment of possession in favor of the plaintiff.

II

Next, we address the defendants' remaining two claims, which are interrelated. The defendants claim that the court improperly denied their (1) motion in limine to present evidence of a purported settlement agreement between the parties and (2) motion for summary enforcement of the purported settlement agreement. We are not persuaded.

The following additional procedural history is relevant to both of these claims. On January 24, 2023, during the defendants' case-in-chief and near the conclusion of the first day of the trial, Martin was asked about his efforts to purchase the property from the plaintiff. The plaintiff's counsel objected on the ground that the question was "dangerously approaching [the subject of] settlement conversations." The defendants' counsel responded, "[o]ur purported evidence . . . is to show that there was a settlement agreement between these two parties." The court questioned why that topic was relevant. The defendants' counsel responded, "I was going to say . . . if there was a settlement agreement between the parties . . . and, if one party breaches it,

lessor's attorney-at-law, or in-fact, desires to obtain possession or occupancy of any land or building, any apartment in any building, any dwelling unit, any trailer, or any land upon which a trailer is used or stands, and . . . (3) when one originally had the right or privilege to occupy such premises but such right or privilege has terminated . . . such owner's or lessor's legal representative, or such owner's or lessor's attorney-at-law, or in-fact, shall give notice to each lessee or occupant to quit possession or occupancy of such land, building, apartment or dwelling unit, at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

that's actionable." The following colloquy then occurred:

"The Court: Do you have the agreement?

"[The Defendants' Counsel]: We . . . do have a series of email communications. . . .

"[The Plaintiff's Counsel]: Your Honor . . . this is actually, this is a problem. I suggest you stop because this is not—you're making gross misrepresentations now. There is no settlement agreement whatsoever.

"[The Defendants' Counsel]: Might I just finish my argument first, Judge?

"[The Plaintiff's Counsel]: I'm concerned for you, so that's why I'm stepping in here.

"[The Defendants' Counsel]: I'm saying, Judge, there are a series of email communications between the parties. And the submission to the plaintiff of a proposed—a written contract that reflects the terms, except for one, that were agreed upon. Which was, then, agreed upon later. And, our position is that there was a settlement agreement . . . which is actionable. . . .

"[The Plaintiff's Counsel]: You are misrepresent—I can't even believe this is happening right now. I actually can't believe this is happening. . . . This is gross misrepresentation. And I would ask that all of this be stricken from the record, Your Honor. There is zero settlement agreement. There has been nothing—zero communication between the parties, as you just indicated.

"[The Defendants' Counsel]: I think that the evidence will disclose otherwise. And I think that is a question for the court to adjudicate, whether or not there exists sufficient evidence to support a settlement agreement. If the court says no, there's not. Fine. But that's not a

situation where counsel can just argue that there's no evidence, without seeing or knowing . . . .

"[The Plaintiff's Counsel]: You're—the court is well aware that settlement discussions are privileged. You can't be discussing this right now. And all you're doing is delaying this trial . . . .

"[The Defendants' Counsel]: We're the ones that suggested coming back here and completing [Martin's] testimony [during the first day of trial]. So, don't accuse us.

"[The Plaintiff's Counsel]: Your Honor, my objection stands. If Your Honor can rule. And then we can proceed with this. I don't want to waste any more time. I'm . . . dangerously close to suggesting a motion for sanctions right now.

"[The Defendants' Counsel]: This is not a question of settlement negotiations. It is a settlement agreement. . . .

"The Court: So, if there's an agreement . . . .

"[The Plaintiff's Counsel]: There is no agreement, Your Honor. Nothing has been agreed to. Nothing has been signed. That [is] misrepresentation alone, I move for sanctions.

"[The Defendants' Counsel]: If there is an agreement, and a party breaches it, our case law supports a cause of action for that. Now, if this court wants us to, or is suggesting we bring a separate action for that and test it elsewhere? That is actionable . . . it's a cause of action.

* * *

"The Court: Is there a document that you're seeking to enter into evidence?

"[The Defendants' Counsel]: We do have a series of documents, Judge. . . .

"[The Plaintiff's Counsel]: To the extent they were part of any settlement negotiations to prevent this trial and this colossal waste of time and money on behalf of my client. Then it is completely excluded. It is precluded. I would file an oral motion in limine to preclude it. I shouldn't even need to. I can't believe this is even happening."

Thereafter, the plaintiff's counsel made an oral motion for judgment in the plaintiff's favor. The defendants' counsel objected to the motion on the basis of what he considered to be critical issues raised by way of the defendants' answer and special defenses. The court denied the plaintiff's oral motion for judgment and continued the trial to another day.

On January 31, 2023, prior to the second day of trial, the defendants filed a motion in limine asking "that the court permit the defendants to offer evidence regarding the formation and breach of a settlement agreement into which the parties entered one day prior to the commencement of trial on January 24, 2023 . . . ." On the same day, the defendants also filed a motion for "summary enforcement" of the alleged settlement agreement. That motion stated: "[D]uring the period of approximately October 20, 2022, to January 23, 2023, the parties negotiated and formed an agreement by which the plaintiff agreed to sell, and the defendant Daniel A. Martin agreed to purchase, the premises subject of this action for the price of $300,000, subject to the condition that [Martin] obtain a mortgage, with a $50,000 nonrefundable deposit and no waiver by the plaintiff of any prior use and occupancy claims that it may possess against the defendants.

"Wherefore the defendants pray that the court order the parties to execute the written contract, incorporating the terms which the court finds to which they

agreed, for the purchase and sale of the subject premises."

In the memorandum of law submitted by the defendants in support of their pending motions, they stated that, if the court had permitted Martin to respond to his attorney's inquiry concerning his efforts to purchase the property, "Martin would have testified that he and the plaintiff exchanged written communications, which, in the aggregate, would have demonstrated that the parties had consummated a written agreement for the purchase and sale of the subject premises. Such agreement would have resolved the plaintiff's claim for occupancy." The defendants also represented that, "[i]n the present case, Martin made an offer to purchase the premises, the plaintiff made a counteroffer, and the plaintiff accepted it." The defendants stated that, "[i]n the present case, the plaintiff's counsel, as the plaintiff's agent, authorized to negotiate on behalf of the plaintiff and the party to be charged, signed the several email correspondences which, in the aggregate, formed the agreement to purchase and sell the subject premises." The defendants also stated that the plaintiff had breached an agreement to settle the action, even though the agreement was not memorialized in a written contract that had been signed by both parties. The defendants argued that "[t]he mere fact that the parties still may have needed to accomplish the perfunctory tasks of printing and signing the form contract the plaintiff approved in no manner compromises the validity of the agreement."

In response, the plaintiff filed an objection to the defendants' motion to enforce the alleged settlement agreement, in which it disputed the alleged terms of any agreement. Later, the plaintiff filed an amended objection to the motion to enforce the alleged settlement agreement. Therein, the plaintiff argued that the defendants violated Practice Book § 17-44 by failing to

seek permission from the court to file the motion to enforce, which it characterized as "a motion for summary judgment." The plaintiff also argued that, if the defendants' motion to enforce was proper, it should be denied because the court did not have the authority to summarily enforce the alleged settlement agreement because the defendants had not presented a written settlement agreement that memorialized the purported agreement on which the defendants relied, and the plaintiff disputed its terms.

By order of February 2, 2023, the court denied the motion in limine. By order of the same date, the court denied the motion for summary enforcement of the alleged settlement agreement. The court noted that the motion was "[d]enied based on the defendants' failure to comply with Practice Book § 17-44. At the outset of the trial the next day, the defendants' counsel made an oral motion for a continuance on the ground that Martin was unable to attend the proceeding. After conferring with the parties' counsel in chambers and hearing argument, the court, in open court, denied the motion. The defendants thereafter did not present further evidence, and the court heard oral argument from both parties with respect to the merits of the summary process action.

After the defendants filed the present appeal, the court, in response to a motion for articulation filed by the defendants, set forth the reasoning for its denial of the motion in limine. The court stated: "This matter was scheduled for a summary process trial on January 24, 2023. The parties first met with a mediation specialist, on the same date, for the purposes of discussing settlement negotiations and possibly entering into an agreement prior to the commencement of trial. The parties failed to enter into a settlement agreement after spending a considerable amount of time in previous mediations. Therefore, the matter was scheduled for

January 24, 2023, and, due to time constraints, the matter had to be scheduled for an additional day of trial. At the conclusion of day one of trial, the [defendants' counsel] attempted to enter what he deemed to be an agreement between the parties while examining his final witness. The plaintiff's counsel objected on the basis that the [defendants' counsel] was attempting to enter settlement negotiations into evidence. The defendants' counsel stated that there was no written agreement to enter into evidence, rather, a set of emails between counsel, that, when considered together would constitute an agreement between the parties."

After describing the defendants' motion in limine, motion for summary enforcement of the alleged settlement agreement, and the memorandum of law filed in support of the motions, the court set forth law concerning summary process actions generally. The court noted, in particular, that a summary process action is designed to "secure a prompt hearing and final determination . . . ." (Internal quotation marks omitted.) The court then stated: "Practice Book § 15-3 provides that, [i]f a case has not yet been assigned for trial, a judicial authority may, for good cause shown, entertain the motion [in limine]. A motion in limine is intended to allow the trial court to rule in advance of trial on the admissibility and relevance of certain anticipated evidence. . . . Further, it is within the court's discretion whether to consider a motion in limine. [Section 15-3 additionally provides that the judicial authority may . . . deny the motion with or without prejudice to its later renewal . . . .

"In the present matter, the court denied the defendants' motion in limine after considering the multiple opportunities for negotiation the parties had before the commencement of trial on January 24, 2023, and the fact that a mediation specialist would have reported an

agreement between the parties prior to the commencement of trial on January 24, 2023. The court additionally considered the prejudice that would have resulted to the plaintiff by granting the defendants' motion in limine as a result of the defendants' inopportune timing for filing the motion in limine, as the majority of the trial evidence had already been heard by the court.

"Furthermore, on February 3, 2023, prior to the commencement of the second date of trial, the court held a status conference with the parties, where multiple trial matters were discussed, specifically, the denial of the defendants' motions and the lack of a need to have any additional hearings or delay regarding the second day of the trial. Additionally, there was discussion regarding the failure of [Martin] to appear [at the second day of the trial] and the [counsel for the] defendants' oral motion to continue, which was later denied on the record. The trial proceeded without [Martin] present on February 3, 2023.

"For all these reasons, the court denied the defendants' motion [in limine]." (Citation omitted; internal quotation marks omitted.)

A

The defendants claim that the court improperly denied their motion in limine to present evidence related to the purported settlement agreement reached by the parties. We disagree.

Motions in limine are governed by Practice Book § 15-3, which provides in relevant part: "The judicial authority to whom a case has been assigned for trial may in its discretion entertain a motion in limine made by any party regarding the admission or exclusion of anticipated evidence. . . . Such motion shall be in writing and shall describe the anticipated evidence and the prejudice which may result therefrom. All interested

parties shall be afforded an opportunity to be heard regarding the motion and the relief requested. The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision thereon until a later time in the proceeding." "[T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Finally, the standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely affected] the result. . . . Despite this deferential standard, the trial court's discretion is not absolute. Provided the defendant demonstrates that substantial prejudice or injustice resulted, evidentiary rulings will be overturned on appeal [when] the record reveals that the trial court could not reasonably conclude as it did." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 128, 956 A.2d 1145 (2008).

As the plaintiff correctly observes, the defendants' motion in limine described the anticipated evidence

they wanted to present, but the motion, and the memorandum of law accompanying the motion, did not address the prejudice that could result therefrom. The defendants' arguments in connection with their motion in limine focused on the importance of settlement agreements and the court's authority to enforce them, even in the context of an underlying action. In the present case, the court considered the motion in limine in light of the motion to summarily enforce the alleged settlement agreement, which was filed simultaneously with the motion in limine. Noting that the defendants had filed one memorandum of law in support of both motions, the court addressed the context for the motion in limine. Specifically, it discussed the propriety of the defendants' decision to seek the summary enforcement of a settlement agreement—an agreement that was vehemently disputed by the plaintiff—and the potential to significantly disrupt the summary process trial that had already commenced.[9]

This court has recognized that "[m]atters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Connecticut trial judges have inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . The [trial] court has wide latitude in docket control and is responsible for the efficient and orderly movement of cases. . . . The trial court has inherent authority to control the proceedings before it to ensure that there [is] no prejudice or inordinate delay." (Citations omitted; internal quotation marks omitted.) *Ill* v. *Manzo-Ill*, 210 Conn. App. 364,

[9] The defendants' memorandum of law, filed in support of both the motion in limine and the motion for summary enforcement of the alleged settlement agreement, itself conflated the issues raised in both of their motions.

374, 270 A.3d 108, cert. denied, 343 Conn. 909, 273 A.3d 696 (2022).

It is not surprising that the timing and circumstances surrounding the defendants' motion in limine and the motion to enforce that is inextricably related to the motion in limine are at the forefront of the court's thoughtful articulation. The court reasonably considered the fact that the defendants' counsel waited until the conclusion of the first day of the trial to attempt to introduce evidence of a purported settlement agreement. Although the defendants asserted that an agreement was reached on January 23, 2023, the defendants did not file a motion in limine and a motion to enforce until January 31, 2023, prior to the second day of trial. The court noted that the defendants had "multiple opportunities" for settlement negotiations prior to the first day of trial and reasonably concluded that, had a settlement been reached, a mediation specialist would have reported such a settlement to the court in a timely manner prior to the trial. The court also reasonably concluded that granting the motion following the presentation of evidence would have prejudiced the plaintiff, which disputed the existence of any agreement. Finally, the court observed that, during a status conference on February 3, 2023, before the second day of trial commenced, there appeared to be "the lack of a need to have any additional hearings or delay regarding the second day of the trial."

The defendants' appellate arguments challenging the court's denial do not meaningfully refute the grounds of the court's ruling. The defendants argue that, "because the court refused to consider any evidence regarding the settlement agreement, including the date or time when the parties may have reached it, the court's reliance on the timing of the motion is unsupported by any facts." This argument overlooks the fact that, in their motion for summary enforcement, the defendants

did not represent that the agreement they sought to enforce was not the product of last-minute negotiations that may have occurred during the trial itself. Instead, the defendants represented that the purported agreement had been negotiated and formed prior to the trial, specifically, "during the period of approximately October 20, 2022, to January 23, 2023 . . . ." The defendants' counsel also represented during oral argument before the court that the purported agreement was memorialized in a "series of email communications" between the parties.[10] This representation makes it more likely that any negotiated settlement was the product of a back-and-forth between the parties, rather than a single conversation that occurred after the trial had commenced. Accordingly, it was not "purely speculative," as the defendants suggest, for the court to have concluded that the parties not only had multiple opportunities for negotiation, but that an agreement, if it existed, occurred prior to the commencement of the presentation of evidence.

We note that the court, in its articulation, appropriately referred to the well settled principle that summary process "is a special statutory procedure designed to provide an expeditious remedy . . . . Summary process statutes secure a prompt hearing and final determination . . . ." (Internal quotation marks omitted.) The defendants argue, without any basis in fact or law, that "conducting a summary enforcement hearing within the context of a summary process trial should not consume so much time as to eviscerate the summary nature of such proceeding." In light of the undisputed fact that this action was commenced on September 10, 2021, and

[10] In their reply brief, the defendants represented that, "during the mediation session the plaintiff's member denied the existence of any agreement, thereby obviating the need of reporting a resolution [to the court]." This representation amounts to further support for the trial court's observation, which the defendants challenge on appeal, that the parties had ample pretrial opportunities to negotiate a settlement in this case.

the trial did not begin until January, 2023—approximately twenty-two months after the conveyance of the property to the plaintiff—the court properly focused on the need to avoid any undue delay in the adjudication of the plaintiff's action so as not to prejudice the plaintiff in obtaining the relief to which it was entitled under law. On the basis of all of the foregoing considerations, we conclude that the court correctly exercised its discretion in denying the motion in limine.

B

The defendants claim that the court improperly denied their motion for summary enforcement of the purported settlement agreement. We disagree.

According to the defendants, the court abused its discretion in denying their motion because the court incorrectly relied on Practice Book § 17-44, a rule of practice governing motions for summary judgment, not motions for summary enforcement of a settlement agreement. Moreover, the defendants argue "that, when one party raises during the pendency of litigation the matter of a putative settlement agreement among the parties, the trial court may, and the defendants contend must, conduct an evidentiary hearing to determine whether the parties formed such an agreement, and, if so, the terms thereof. If the court finds the formation of such an agreement, and the terms thereof are clear, then the court should enforce specifically such agreement . . . ." The defendants claim that the court abused its discretion in "fail[ing] to afford the defendants an evidentiary hearing, either during or separate from the summary process trial, in which they could have offered evidence concerning the establishment and terms of [the purported] settlement agreement."

The following principles govern our review of this claim. "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law

when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit. . . . Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial. . . . Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. The key element with regard to the settlement agreement in [*Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 812, 626 A.2d 729 (1993) (*Audubon*)][11] . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement. . . . The rule of *Audubon* effects a delicate balance between concerns of judicial economy on the one hand and a party's constitutional rights to a jury and to a trial on the other hand. . . . To use the *Audubon* power outside of its proper context is to deny a party these fundamental rights and would work a manifest injustice. . . .

"A settlement agreement is a contract among the parties. . . . In order to form a binding and enforceable

[11] "In *Audubon*, our Supreme Court shaped a procedure by which a trial court could summarily enforce a settlement agreement to settle litigation . . . . The court held that a trial court may summarily enforce a settlement agreement within the framework of the original lawsuit as a matter of law when the parties do not dispute the terms of the agreement. . . . [S]ee also *Reiner* v. *Reiner*, 190 Conn. App. 268, 270 n.3, 210 A.3d 668 (2019) ([a] hearing pursuant to *Audubon* . . . is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law . . .)." (Internal quotation marks omitted.) *Krasko* v. *Konkos*, 224 Conn. App. 589, 594 n.3, 314 A.3d 34 (2024).

contract, there must exist an offer and an acceptance based on a mutual understanding by the parties . . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, [i]n order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make. . . . Meeting of the minds is defined as mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation. . . . This definition refers to fundamental misunderstandings between the parties as to what are the essential elements or subjects of the contract. It refers to the terms of the contract, not to the power of one party to execute a contract as the agent of another. . . .

"A contract is not made so long as, in the contemplation of the parties, something remains to be done to establish the contractual relation. The law does not . . . regard an arrangement as completed which the parties regard as incomplete. . . . In construing the agreement . . . the decisive question is the intent of the parties as expressed. . . . The intention is to be determined from the language used, the circumstances, the motives of the parties and the purposes which they sought to accomplish. . . . Furthermore, [p]arties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated. . . .

"Finally, [t]he fact that parties engage in further negotiations to clarify the essential terms of their mutual undertakings does not establish the time at which their undertakings ripen into an enforceable agreement . . .

[and we are aware of no authority] that assigns so draconian a consequence to a continuing dialogue between parties that have agreed to work together. We know of no authority that precludes contracting parties from engaging in subsequent negotiations to clarify or to modify the agreement that they had earlier reached. . . . More important . . . [when] the general terms on which the parties indisputably had agreed . . . included all the terms that were essential to an enforceable agreement . . . [u]nder the modern law of contract . . . the parties . . . may reach a binding agreement even if some of the terms of that agreement are still indefinite. . . .

"In *Vance* v. *Tassmer*, 128 Conn. App. 101, 16 A.3d 782 (2011), appeal dismissed, 307 Conn. 635, 59 A.3d 170 (2013), this court considered whether, in summarily enforcing a settlement agreement, a trial court had exceeded the scope of the agreement . . . . In reviewing that claim, this court explained that [i]t is axiomatic that courts do not rewrite contracts for the parties. . . . In determining whether the court went beyond the scope of the settlement agreement . . . we review the court's decision for an abuse of discretion. . . . [T]he court's authority in such a circumstance is limited to enforcing the undisputed terms of the settlement agreement that are clearly and unambiguously before it, and the court has no discretion to impose terms that conflict with the agreement. . . .

"Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . Inherent in the concept of judicial discretion is the idea of choice and a determination between competing considerations. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court . . . . Under that standard, we

must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Citations omitted; emphasis omitted; footnote added; internal quotation marks omitted.) *Krasko* v. *Konkos*, 224 Conn. App. 589, 604–607, 314 A.3d 34 (2024).

We agree with the defendants that the court improperly relied on Practice Book § 17-44. By its terms, § 17-44 applies to motions for summary judgment in which a party seeks judgment as to "any claim or defense . . . ." Here, there was no motion for summary judgment before the court. The defendants' motion was captioned as a "Motion for Summary Enforcement of Settlement Agreement."[12] The substance of the motion and the memorandum of law accompanying it readily reflects that the defendants did not seek judgment as to any claim or defense in the summary process action but, rather, that the defendants brought the motion to compel compliance with a purported agreement to settle the action. Specifically, in the motion, the defendants sought an order for "the parties to execute the written

[12] The court's reliance on Practice Book § 17-44 may be attributable, in part, to an unexplained mischaracterization of the defendants' motion as a "Motion for Summary Judgment" on the Judicial Branch electronic filing system. Thereafter, the plaintiff amended its original and proper objection to the motion with a motion captioned as an "Amended Objection to Motion for Summary Judgment." It is clear from the caption and body of the defendants' motion that it was a motion for enforcement of a settlement agreement. We therefore reject the plaintiff's argument in support of affirmance to the extent that it is premised on its characterization of the defendants' motion as a motion for summary judgment.

contract, incorporating the terms which the court finds to which they agreed, for the purchase and sale of the subject premises."

We conclude, however, that the court's erroneous reliance on Practice Book § 17-44 does not entitle the defendants to relief with respect to this claim. The defendants argue that the court abused its discretion in denying their motion to enforce. They argue that the court did so without holding a hearing to determine the nature of the purported agreement and whether it should be summarily enforced. In our consideration of whether the court abused its discretion, we note that the defendants sought only an articulation of the court's denial of their motion in limine, stating in their motion for articulation with respect to the court's ruling on the motion in limine that, with respect to the denial of their motion to enforce, the court's order was "explicit enough for appellate review." Nevertheless, based upon the court's rationale for refusing to hear evidence relating to the motion for summary enforcement of the alleged settlement agreement, there is no basis for concluding that the court abused its discretion in denying the motion to enforce.

As a review of the colloquy that took place at trial reflects, the plaintiff's counsel vehemently denied that the parties had reached any mutual agreement to settle the action. In this circumstance, even if the court had decided that it would have been appropriate to consider the merits of the defendants' motion to enforce, the plaintiff's objection to the motion would have put before the court the factual issue of whether a settlement agreement existed in the first place. See, e.g., *Krasko* v. *Konkos*, supra, 224 Conn. App. 608.

For the reasons already discussed in this opinion, however, the court precluded the defendants from presenting any evidence of the purported settlement agreement. In part II A of this opinion, we upheld the court's

exercise of its discretion in that regard. As a consequence of both the defendants' trial strategy of waiting to raise the issue of a purported settlement agreement until the end of the first day of the trial and the court's ruling to preclude the defendants from presenting evidence related to the purported agreement, the record before us does not afford us a basis upon which to conclude that the court abused its discretion in denying the motion to summarily enforce the purported agreement. The court's authority to enforce a settlement agreement as a matter of law may be exercised only when the terms are clear and unambiguous and not in dispute. Here, the very existence of a settlement agreement was in dispute. The record does not include any evidence, let alone an offer of proof, with respect to the existence of an enforceable agreement that was comprised of clear and unambiguous terms. Accordingly, we conclude that the defendants have failed to demonstrate that the court abused its discretion in denying the motion to enforce.

The judgment is affirmed.

In this opinion the other judges concurred.

STANLEY WILLIAMS *v.* COMMISSIONER OF CORRECTION
(AC 46531)

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

Syllabus

The petitioner appealed to this court from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, claiming that the court erred by declining to issue a capias for a witness at his habeas trial. The petitioner, who had previously been convicted, following a jury trial, of various crimes, claimed at his habeas trial that his criminal trial counsel, K, had rendered ineffective assistance by, inter alia, failing to call J, his former girlfriend, as a witness at his criminal trial. The petitioner subpoenaed J for both days of his habeas trial, but she did

not appear on either day. On the second day of the habeas trial, the court denied the petitioner's request to issue a capias for J, finding that, although the petitioner had met the requirements for a capias for the first day of the habeas trial, he had not proved that J had actually received the subpoena for the second day, nor had he proved that J lacked a reasonable excuse for appearing in court. *Held* that the habeas court did not abuse its discretion in declining the petitioner's request for a capias; the court's denial was not unreasonable or arbitrary and it did not base its decision on improper or irrelevant factors, as it made a thorough inquiry of the petitioner's counsel to ascertain whether the statutory (§ 52-143 (e)) factors for issuing a capias had been met, and counsel was unable to provide the court with any information as to whether J had received the subpoena or whether she had a legitimate reason for her failure to appear.

Argued May 29—officially released July 9, 2024

Procedural History

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

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Kelly Masi*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CLARK, J. Following the granting of his petition for certification to appeal, the petitioner, Stanley Williams, appeals from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erred by declining to issue a capias for his former girlfriend, whom he had sought to call as a witness at

his habeas trial. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. In July 2010, the petitioner was tried on two counts each of robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), and unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), in connection with the robberies of a liquor store and outlet store in Waterbury. At trial, the petitioner was represented by Attorney Jeffrey Kestenband. His theory of defense was misidentification.

Marlyn DeJesus, an employee of the outlet store, testified at the petitioner's criminal trial. DeJesus testified that she was working in the outlet store during the robbery and that the robber had forced her at knifepoint to open the cash register. She described the robber to the police in a written statement, identified the petitioner from a photographic array, and identified him again in the courtroom at trial. During her testimony, she added that the robber had worn glasses, a detail that had not appeared in her written statement to the police. On cross-examination, Kestenband challenged her description of the robber by pointing out this discrepancy.[1]

Following DeJesus's testimony and Kestenband's cross-examination, the state—over the petitioner's objection—called as a witness James Smyth, an optometrist. Smyth testified that he or one of his associates had examined the petitioner's eyes approximately five times between 2004 and 2009, and that he had prescribed the petitioner bifocals to wear at all times.

[1] Surveillance video of both robberies depicted the perpetrator wearing glasses. The petitioner was not wearing glasses in the photographic array from which DeJesus identified him. The record indicates that the petitioner was not wearing glasses in court during his criminal trial.

On July 26, 2010, the jury convicted the petitioner of all charges and found him guilty of being a persistent dangerous felony offender in violation of General Statutes § 53a-40 (a). The court, *Crawford*, *J.*, sentenced him to twenty-five years of incarceration. This court and our Supreme Court affirmed the judgments of conviction. See *State* v. *Williams*, 146 Conn. App. 114, 117, 75 A.3d 668 (2013), aff'd, 317 Conn. 691, 119 A.3d 1194 (2015).

The petitioner filed a petition for a writ of habeas corpus on September 3, 2015, and filed the operative second amended petition on December 9, 2022. The habeas court, *Bhatt*, *J.*, held a trial on the petition on March 1 and 20, 2023. As relevant to this appeal, the petitioner claimed that Kestenband had rendered ineffective assistance by failing to call Cheryl Jackson, his former girlfriend, and Detective David McKnight of the Waterbury Police Department as witnesses at his criminal trial. During the habeas trial, the petitioner presented testimony from McKnight and Kestenband and testified on his own behalf.[2]

In a 2009 affidavit seeking an arrest warrant for the petitioner, McKnight stated that, shortly after the robberies of the liquor and outlet stores, Jackson had gone to the Waterbury Police Department to follow up on a past domestic violence case involving the petitioner. McKnight wrote that, while at the police department, Jackson was shown a surveillance photograph of the liquor store robbery and—upon seeing the robber—identified him as the petitioner.[3] However, at the habeas

[2] The petitioner also presented testimony from Attorney Lisa Vanderhoof, who had represented him in his direct appeal, in connection with a separate claim of ineffective assistance of appellate counsel, which is not at issue in this appeal.

[3] The robberies for which the petitioner was convicted occurred on May 12 and 14, 2009. McKnight's affidavit stated that Jackson identified the petitioner at the Waterbury Police Department on May 20, 2009.

trial, Kestenband testified that his own investigator, David Wallace, had obtained a signed statement from Jackson in which she denied identifying the petitioner to the police and stated that she had never known the petitioner to wear glasses.[4]

Kestenband testified that he had initially considered calling Jackson as a witness at the petitioner's criminal trial but that he decided against doing so once the state introduced evidence that the petitioner wore glasses. He explained that, at that point, "the value of . . . Jackson's favorable anticipated testimony that [the petitioner] did not wear eyeglasses went by the wayside essentially. Because there was documentary proof that [the petitioner] had [an] eyeglass prescription. And so, I didn't think that that was a battle I could win in trying to show that he didn't wear eyeglasses by having . . . Jackson come in as a defense witness to say that he didn't wear eyeglasses to her knowledge."

Kestenband added that, "[i]f I had called [Jackson] as a witness, the state would have been able to call [McKnight] to come in and impeach her testimony . . . given how jurors will typically balance credibility, although they're instructed that a police officer is not to be deemed more credible than any other witness, in a situation like that where she could be construed as being aligned with [the petitioner] given their relationship . . . I'm sure it was my decision to say that I didn't want to have her come in and testify . . . ." He explained that Smyth's testimony regarding the petitioner's eyeglasses "potentially undermined . . . Jackson's credibility in the face of medical documentary evidence that he did wear glasses. So that would have factored into my analysis as to why not to call her on whether she identified him in the video as well."

[4] Jackson's written statement to Wallace was marked for identification but was not admitted into evidence at the habeas trial. McKnight's affidavit was admitted as a full exhibit.

With respect to McKnight, Kestenband testified that, "if, in fact, his testimony would have been that . . . Jackson identified [the petitioner] as the robber, he certainly would not have been helpful in that sense. And if he had testified that . . . Jackson said that she didn't recognize [the petitioner], that—I guess my understanding, and I, you know, again, I don't have an independent recollection of this, is that his statement was that she did identify him."

The petitioner subpoenaed Jackson for both days of the habeas trial, but she did not appear on either day. Both subpoenas were served via abode service. Shortly before proceedings adjourned on the first day of the habeas trial, the court asked the petitioner's counsel, Alissa Doiron, if she had any more witnesses. Doiron stated that she had subpoenaed Jackson to appear that day, but that Jackson informed her "strongly" that she would not be appearing. The court responded, "Okay. That's just a statement for the record?" Doiron replied, "Yes, Your Honor." Following a brief discussion in which the court settled on March 20, 2023, as the next trial date, Doiron stated, "I'm going to subpoena [Jackson] again. And—and see if she appears on the twentieth as well."

At the start of proceedings on March 20, Doiron requested that the court issue a capias for Jackson. Doiron stated, "[Jackson's] been subpoenaed twice now. I don't believe that she would voluntarily appear based on my prior communications with her. We need her testimony to support the claim that her testimony was necessary in the prior—in her—in [the petitioner's] prior criminal trial. We—there is a statement that she wrote and a statement that the detective wrote. They conflict [with] each other and we need her testimony to give some clarity to that." After a brief colloquy in which it sought to clarify what Jackson's testimony would add, the court stated, "Okay. Before I can even

consider issuing a capias, I mean, there are several requirements that need to be met and this is your opportunity to meet those requirements for the issuance of a capias."

The court then sought to determine whether the requirements for a capias set forth in General Statutes § 52-143 (e)[5] and in *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 239, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017), had been satisfied. Under § 52-143 (e), in order for the court to issue a capias for a subpoenaed witness, the witness must lack a "reasonable excuse" for her failure to appear, and the party seeking a capias must prove that the person whom they have summoned was properly served with the subpoena. In *Moye*, this court clarified that proof of abode service is sufficient to warrant the issuance of a capias under § 52-143 (e), but only if the party requesting the capias can show that the absentee witness received the subpoena and knows of its contents. *Moye* v. *Commissioner of Correction*, supra, 239. The following colloquy ensued:

"The Court: Well, but—so, it's abode service. So, you know, your requirement is to show that she's aware of the contents of the subpoena. Received it and is aware of the contents of the subpoena. How do we know that?

[5] General Statutes § 52-143 (e) provides: "If any person summoned by the state, or by the Attorney General or an assistant attorney general, or by any public defender or assistant public defender acting in his official capacity, by a subpoena containing the statement as provided in subsection (d) of this section, or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than twenty-five dollars and pay all damages to the party aggrieved; and the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section, or on proof of the service of a subpoena and the tender of such fees, may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify."

"[The Petitioner's Counsel]: After she was served the first time for the March first trial date, she called me at the office, and I returned her call . . . [a]nd she explained to me that she remembered meeting with the detective. She remembered meeting with the investigator, and she has no additional information to report. She feels that her testimony wouldn't be helpful, even though I expressed to her what I was looking for and why I felt that it was necessary. And she advised that she was not going to appear. That she had no plans to appear and that she would—she would deal with whatever penalties came her way.

"The Court: What about for today?

"[The Petitioner's Counsel]: I tried to call her, and I was unable to get in contact with her. I was also unable to leave a message because of whatever type of phone service she has.

"The Court: So, I mean, I think that's part of the—that does pose a little bit of a different problem because, you know, you may have satisfied the requirements of the capias for March first. But—I mean, you have to show me that she received the subpoena and knows of the contents of this subpoena in order to appear today. I don't know that I can issue a capias based on a previous court date.

"[The Petitioner's Counsel]: If I may, Your Honor? I will add, you know, the subpoena is identical except for the date. So, she—

"The Court: I know. I know, but I know that she received the first one.

"[The Petitioner's Counsel]: Okay.

"The Court: Because she talked to you after the first one.

"[The Petitioner's Counsel]: Mhm.

"The Court: I just—I don't know that she got the second one. How do I know that she got the second one? I mean, a capias is a pretty significant thing. You're asking me to have her arrested and brought to court.

"[The Petitioner's Counsel]: Right.

"The Court: And that's why I think our law requires knowing receipt of that subpoena. There could be a legitimate reason why she's not responding. I don't know, maybe she's out of town. Maybe she's—

"[The Petitioner's Counsel]: Right.

"The Court: —in the hospital. It could be any number of reasons. I think that's part of the issue with—that's why even abode service is fine, as long as you can show that the witness received it and knows of the contents of it. I'm assuming that she would know of the contents of the subpoena, what you're asking her to show up to do, but I don't know that you can show that she received it.

"Now obviously, if she's nonresponsive, I understand that's a problem for you in being able to show that she received the subpoena. But I don't know that without some information that she—because there could be—as I said, you know. I also would have to find that—part of the court's discretion in issuing a capias is the determination of the witness'—is knowingly flaunting a legitimate court order to appear.

"So, maybe she can't get here? Or maybe her car's not working. Maybe she's out of town. Maybe she's sick. Those would—those would be legitimate reasons for not appearing. Right? And I wouldn't issue a capias, if that was the case. So, those are my thoughts."

The court then denied the petitioner's request for a capias. It stated that its "primary reason" for doing so was that it was "not convinced that the requirements

for the issu[ance] of a capias have been met." The court explained, "I just don't have any evidence that [Jackson's] actually received the subpoena. I can infer that, but I don't think that's an appropriate basis to issue a capias. So, I just don't think that the requirements have been met. And again, it—the case law is pretty clear, and the statute is pretty clear. [Section] 52-143 (e) says if any person upon whom a subpoena is served to appear—fails to appear without reasonable excuse—again, I don't know if there is a reasonable excuse. Again, you're hampered, I understand that, because of the fact that she's not responded to you."

Citing *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 239, the court further stated that "abode service of the subpoena authorizes the court to issue [a] capias only if the party requesting the capias establishes that the absentee witness is in receipt of the subpoena and knows of the contents of the subpoena. Again, I understand that it poses a difficulty for you if she's not responding. But I don't have any evidence that she received it. I can assume that she knows about it if she received it, but I don't know that she received it. And I also don't know that she has no reasonable excuse." The court noted that, "although I don't think it would have prevented me from issuing the capias, I do think the substance of [Jackson's] testimony—what it would have been is already before me to consider, but I do understand that she would be a witness that you would need to call in support of your claims."

On March 28, 2023, the habeas court denied the petitioner's petition for a writ of habeas corpus. In its memorandum of decision, the court found, inter alia, that Kestenband's decisions not to call Jackson and McKnight were reasonable tactical decisions that did not constitute deficient performance and that the petitioner had failed to prove that those decisions prejudiced him. In a footnote, the court stated, "[The petitioner] subpoenaed Jackson; however, she did not

appear on either day of trial. [The petitioner] sought the issuance of a capias to secure her attendance, however the court denied that request because [the petitioner] could not show that Jackson had received a subpoena for the second day of trial, since Jackson did not respond to counsel's attempts at contact. [The petitioner] could also not show that Jackson had no 'reasonable excuse' for not appearing." This appeal followed.

I

On appeal, the petitioner challenges the habeas court's denial of his capias request. Before we reach the merits of his claim, we begin with the standard of review. A capias is an "extraordinary measure" to compel attendance at a judicial proceeding and involves the arrest of the witness in question. (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 222 Conn. App. 855, 862 n.5, 307 A.3d 923 (2023). "In light of the gravity of such action, Connecticut law is clear that the issuance of a capias is not mandatory but, rather, rests in the sole discretion of the trial court." *State* v. *Shawn G.*, 208 Conn. App. 154, 177, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021). Though the court should issue a capias if a witness is not warranted in refusing to honor a subpoena and her absence will cause a miscarriage of justice; see *DiPalma* v. *Wiesen*, 163 Conn. 293, 298, 303 A.2d 709 (1972); "§ 52-143 does not . . . make it mandatory for the court to issue a capias when a witness under subpoena fails to appear . . . . The court has authority to decline to issue a capias when the circumstances do not justify or require it." (Footnote omitted; internal quotation marks omitted.) *Greene* v. *Commissioner of Correction*, 330 Conn. 1, 33, 190 A.3d 851 (2018), cert. denied sub nom. *Greene* v. *Semple*, U.S. , 139 S. Ct. 1219, 203 L. Ed. 2d 238 (2019). Accordingly, our review of challenges to the trial court's

denial of a capias is ordinarily governed by an abuse of discretion standard. See *State* v. *Shawn G.*, supra, 190.

The petitioner argues that in this case, however, we should be less deferential. Pointing to this court's decision in *State* v. *Burrows*, 5 Conn. App. 556, 500 A.2d 970 (1985), cert. denied, 199 Conn. 806, 508 A.2d 33 (1986), he argues that when the habeas court denied the capias for Jackson, it failed to exercise *any* discretion because it believed that it lacked the authority to do so. As such, he contends that our review should be plenary. See *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 238 ("'[if, however] the court never exercised any discretion because it believed its authority to do so was lacking [our review is plenary] . . . .' *State* v. *Burrows* [supra, 558–59]").[6] The respondent, the Commissioner of Correction, counters that the proper standard of review is abuse of discretion, arguing that "the court denied the request to issue a capias not based on some belief that it *could not* do so, but that it *would not* do so," because "it was not clear that Jackson had received the subpoena or had a reasonable excuse for not appearing . . . ." (Emphasis in original.) We agree with the respondent.

In order to assess the petitioner's claim, a discussion of this court's decision in *Burrows* is warranted. In *Burrows*, a key defense witness failed to appear in court in response to a subpoena. *State* v. *Burrows*, supra, 5 Conn. App. 557–58. The witness had refused to allow the sheriff tasked with serving him to place the subpoena

[6] The petitioner's brief cites *Moye* for this quoted proposition; *Moye* in turn derives the proposition from *Burrows*. We focus our analysis on *Burrows* because the court in *Moye* concluded that the record was inadequate to review the merits of the lower court's capias denial. *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 241. Given this threshold deficiency, the *Moye* court did not subject the habeas court's denial of a capias to *any* standard of review—plenary, abuse of discretion, or otherwise. *Moye* thus provides little, if any, guidance as to the appropriate standard of review in this case.

in his hand, so the sheriff had instead read the subpoena aloud in his presence. Id., 558. The defendant requested a capias. Id. The trial court, without reaching the question of whether the witness lacked a reasonable excuse for his absence; id., 558 n.2; determined that it lacked the authority to issue a capias under § 52-143 because the subpoena had not been served in-hand. Id., 558. Reversing the trial court, this court concluded that reading the capias statute to require in-hand service was an overly restrictive reading of the text, which "would render it virtually impossible to effect service upon a witness who is determined to be recalcitrant or determined to insulate himself from a court appearance." Id., 559. While acknowledging that the issuance of a capias was ordinarily within the trial court's discretion, the court stated that, "[i]n the present case, the court never exercised any discretion because it believed its authority to do so was lacking. It is clear that the court had the power, if the witness had actually been served and refused to appear, to issue a capias." Id., 558–59.

At bottom, *Burrows* turned on the proper interpretation of the capias statute—a question of law over which our review was plenary. See *Ugrin* v. *Cheshire*, 307 Conn. 364, 379, 54 A.3d 532 (2012) ("[i]ssues of statutory construction raise questions of law, over which we exercise plenary review" (internal quotation marks omitted)). Here, by contrast, no such question is before us. The habeas court correctly articulated and applied the requirements for the issuance of a capias set forth in § 52-143 (e) and *Moye*. It did not read additional requirements or standards into the statutory text. Instead, "it [decided], after weighing a variety of subordinate facts and legal arguments, whether a party [had] met a statutorily prescribed evidentiary threshold"—a process that we have dubbed "a classic exercise of discretionary authority." (Internal quotation marks omitted.) *Ortiz* v. *Commissioner of Correction*, 211 Conn. App. 378, 385,

272 A.3d 692, cert. denied, 343 Conn. 927, 281 A.3d 1186 (2022).[7]

Resisting that conclusion, the petitioner argues that the habeas court actually based its denial of his capias request on a *legal* determination: a belief that it had no authority to issue a capias based only on a reasonable inference that an absent witness had received a subpoena. The petitioner zeroes in on the court's statement that "I just don't have any evidence that [Jackson] actually received the subpoena. I can infer that, but I don't think that's an appropriate basis to issue a capias." From this, he concludes that the court inferred that Jackson had received the subpoena but that it nevertheless determined that this inference alone was legally insufficient to issue a capias.

Although this statement, considered in isolation, might support the petitioner's claim, his reading of the court's decision is too narrow. The record as a whole does not indicate that the court actually inferred Jackson's receipt of the subpoena. To the contrary, in its comments both prior to and in the course of its oral ruling on the capias request, the court repeatedly expressed its skepticism on this point, saying variously: "I just—I don't know that she got the second [subpoena]"; "I don't know that you can show that she received it"; "I don't have any evidence that she received it"; and "[Y]ou may have satisfied the requirements of the capias for March first . . . . [But] I don't know that I can issue a capias based on a previous court

[7] The facts of this case are similar to those in *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 1, in which our Supreme Court upheld the habeas court's denial of a capias for a witness who had failed to appear in response to a subpoena. Id., 31–34. There, as here, the habeas court declined to issue a capias after the petitioner's counsel failed to present any evidence that the witness' absence was unwarranted. Id., 32–33. Our Supreme Court—recognizing that, under "well established" law, issuance of a capias was within the trial court's discretion—reviewed the court's decision under an abuse of discretion standard. Id.

date." Moreover, in its memorandum of decision, the court stated that it had denied the petitioner's capias request because he failed to show either that Jackson had received the subpoena or that she lacked a reasonable excuse for her failure to appear. It went no further; it did not state that it nonetheless "inferred" Jackson's receipt of the subpoena, nor did it attempt to delineate the scope of its authority to issue a capias based on inference.

The court's statements indicate that it was hesitant to draw *any* conclusions as to Jackson's receipt of the subpoena, given the dearth of evidence before it. And, to the extent that the court's remark, "I just don't have any evidence that she received the subpoena. I can infer that, but I don't think that's an appropriate basis to issue a capias" creates an ambiguity as to the basis for its decision, we "read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012). We thus conclude, not that the habeas court inferred that Jackson had received the subpoena—which would contradict its stated rationale for the capias denial—but rather that it based its decision on a discretionary determination that the requirements for a capias had not been met. As such, we conclude that the proper standard of review is abuse of discretion.

II

We now turn to the question of whether the habeas court abused its discretion when it denied the petitioner's request for a capias. The respondent argues that the habeas court properly denied the petitioner's request for a capias. He further contends that, even if the court improperly denied the capias, any error was harmless. For the reasons that follow, we agree with the respondent that the habeas court did not abuse

its discretion in denying the petitioner's request for a capias. Accordingly, we need not reach the question of whether its denial of this request was harmful. See *Wiseman* v. *Armstrong*, 295 Conn. 94, 106, 989 A.2d 1027 (2010) (trial court's ruling will generally "result in a new trial only if the ruling was both wrong *and* harmful" (emphasis in original; internal quotation marks omitted)).

In determining whether a trial court has abused its discretion in denying a capias request, "the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Myers* v. *Commissioner of Correction*, 215 Conn. App. 592, 615, 284 A.3d 309 (2022), cert. denied, 346 Conn. 1021, 293 A.3d 897 (2023), and cert. denied 346 Conn. 1021, 293 A.3d 897 (2023). We must "make every reasonable presumption in favor of [the trial court's] action," and we will only disturb its judgment if it "acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *State* v. *Mitchell*, 8 Conn. App. 598, 604, 513 A.2d 1268, cert. denied, 201 Conn. 810, 516 A.2d 887 (1986). "In general, abuse of discretion exists when a court could have chosen different alternatives but decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper and irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . ." (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 38, 244 A.3d 171 (2020), aff'd, 343 Conn. 424, 274 A.3d 85 (2022).

In the present case, we cannot conclude that the habeas court's denial of the petitioner's capias request was unreasonable, that it acted arbitrarily, or that it based its decision on improper or irrelevant factors. The habeas court made a thorough inquiry of the petitioner's

counsel in an attempt to ascertain whether the requirements of § 52-143 (e) and *Moye* had been satisfied. Though Doiron represented that Jackson had refused to appear in response to the subpoena for March 1, she also stated that she had been unable to contact Jackson regarding the subpoena for March 20. She thus was unable to provide the court with any information about whether Jackson had received the subpoena pursuant to which the petitioner was requesting a capias or whether Jackson had a legitimate reason for her failure to appear. Under these circumstances, the court's determination that the petitioner had not made a sufficient showing to justify the issuance of a capias was reasonable. Accordingly, the court did not abuse its discretion in declining the petitioner's capias request.

III

The petitioner also summarily asserts that the habeas court's denial of a capias for Jackson violated his right to compulsory process under the sixth amendment to the United States constitution.[8] Though the petitioner acknowledges that he did not preserve this claim during his habeas trial, he urges us to review it under *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). We decline to do so because the petitioner has inadequately briefed his claim.[9]

[8] The sixth amendment to the United States constitution, as applied to the states through the fourteenth amendment; see *Washington* v. *Texas*, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

[9] The petitioner also claims that the denial of a capias violated his right to compulsory process under article first, § 8, of the Connecticut constitution. However, he provides no independent analysis of this claim and has therefore abandoned it. "We have repeatedly apprised litigants that we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue. . . . Without a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant's claim." (Internal quotation marks omitted.) *Barros* v. *Barros*, 309 Conn. 499, 507 n.9, 72 A.3d 367 (2013).

Under *Golding*, "[a] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, 347 Conn. 335, 356 n.11, 297 A.3d 541 (2023). *Golding* review is available in civil as well as criminal cases. See *In re Brendan C.*, 89 Conn. App. 511, 519 n.3, 874 A.2d 826, cert. denied, 274 Conn. 917, 879 A.2d 893 (2005), and cert. denied, 275 Conn. 910, 882 A.2d 669 (2005). We are "free to respond to the [petitioner's] claim by focusing on whichever *Golding* prong is most relevant," as the "inability to meet any one prong requires a determination that the defendant's claim must fail." (Internal quotation marks omitted.) *State* v. *Roberts*, 224 Conn. App. 471, 493–94, 312 A.3d 1086, cert. denied, 349 Conn. 912, 314 A.3d 602 (2024).

When an appellant alleges a constitutional violation without citing any authority, we will deem the claim inadequately briefed. See, e.g., *Gonzalez* v. *State Elections Enforcement Commission*, 145 Conn. App. 458, 470 n.6, 77 A.3d 790, cert. denied, 310 Conn. 954, 81 A.3d 1181 (2013). "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim . . . receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *State* v. *T.R.D.*, 286 Conn. 191, 213–14 n.18, 942 A.2d 1000 (2008).

Here, although the petitioner asserts that the habeas court violated his sixth amendment right to compulsory process, he has neither cited any authority for the proposition that he retains this right in postconviction proceedings nor provided any meaningful analysis on the issue.[10] Moreover, although the petitioner points to this court's statement in *Burrows* that seeking a capias is tantamount to "raising a constitutional right, the right to compulsory process"; *State* v. *Burrows*, supra, 5 Conn. App. 559; *Burrows* involved a request for a capias in the context of a criminal trial, not a habeas proceeding, and is thus inapposite. We therefore conclude that the petitioner has inadequately briefed his *Golding* claim because he has not engaged in sufficient analysis to permit us to evaluate whether his claim is "of a constitutional magnitude alleging the violation of a fundamental right." *State* v. *Golding*, supra, 213 Conn. 239.

The judgment is affirmed.

In this opinion the other judges concurred.

[10] Although the petitioner's claim is abandoned by virtue of his failure to adequately brief the issue, we note the existence of some authority indicating that the sixth amendment's guarantee of compulsory process does not apply in habeas corpus proceedings—authority that the petitioner neither discusses nor attempts to distinguish. See *Coleman* v. *Balkcom*, 451 U.S. 949, 954, 101 S. Ct. 2031, 68 L. Ed. 2d 334 (1981) (Marshall, J., dissenting from denial of certiorari) ("[a] habeas corpus proceeding is, of course, civil rather than criminal in nature, and consequently the ordinary [s]ixth [a]mendment guarantee of compulsory process . . . does not apply" (footnote omitted)); *Oken* v. *Warden*, 233 F.3d 86, 93 (1st Cir. 2000) (right under compulsory process clause to testify in one's own defense does not apply in postconviction proceedings), cert. denied sub nom. *Oken* v. *Merrill*, 532 U.S. 962, 121 S. Ct. 1494, 149 L. Ed. 2d 380 (2001); see also *Summerville* v. *Warden*, 229 Conn. 397, 423, 641 A.2d 1356 (1994) (characterizing right to compulsory process as constitutional safeguard that makes it more difficult for state to overcome presumption of innocence but holding that presumption of innocence "does not outlast the judgment of conviction at trial"). To be clear, we express no opinion here as to whether the sixth amendment's compulsory process requirements apply to postconviction proceedings; we note these authorities simply to emphasize that the scope of the compulsory process clause's application in this context requires more robust briefing than the petitioner gives it.

ZACHARY STOOR *v.* ERWIN VEHS
(AC 46268)

Alvord, Seeley and Westbrook, Js.

Syllabus

The intervening plaintiff, C, appealed, and the plaintiff cross appealed, from the judgment of the trial court awarding C damages for the services that he provided as the plaintiff's attorney. The plaintiff hired C to represent him in a negligence action against the defendant and signed a retainer agreement entitling C to 33.33 percent of the plaintiff's recovery up to the amount of $300,000. Less than one week later, C procured a settlement offer of $100,000. The plaintiff did not authorize C to accept the offer and, instead, terminated C's representation and retained another attorney. The trial court granted C's motion to intervene in the plaintiff's case against the defendant to preserve his right to recover legal fees from the plaintiff. Thereafter, the trial court rendered judgment for the plaintiff in accordance with a settlement agreement between the plaintiff and the defendant. Subsequently, a trial was held with respect to C's intervening complaint. The trial court awarded C $9000 for the reasonable value of the services he provided and denied C's claim of unjust enrichment. *Held*:

1. The trial court properly applied *Cole* v. *Myers* (128 Conn. 223) to determine the proper measure of damages to award to C: C provided no authority for his proposition that the doctrine of substantial performance applied to contingency fee agreement cases in which an attorney was discharged by his client prior to settlement, and, pursuant to *Cole*, an attorney in such a case was permitted to recover only the reasonable value of the services he performed on his client's behalf; moreover, the trial court analyzed the work performed by C under the terms of rule 1.5 of the Rules of Professional Conduct and found that an award in the amount of $9000 constituted the reasonable value of the services he performed on the plaintiff's behalf.
2. The trial court's finding that C was entitled to the reasonable value of the services he performed on the plaintiff's behalf was supported by the evidence in the record and, therefore, was not clearly erroneous.

Argued January 30—officially released July 9, 2024

Procedural History

Action to recover damages for, inter alia, personal injuries sustained by the plaintiff as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of

New Haven, where the court, *Abrams*, *J.*, granted the motion to intervene as a party plaintiff and to file an intervening complaint filed by Gregory P. Cohan; thereafter, the court, *Kamp*, *J.*, rendered judgment for the plaintiff in accordance with a stipulation of the plaintiff and the defendant; subsequently, the intervening complaint was tried to the court, *Abrams*, *J.*; judgment in part for the plaintiff, from which the intervening plaintiff appealed and the plaintiff cross appealed to this court. *Affirmed*.

Gregory P. Cohan, self-represented, the appellant-cross appellee (intervening plaintiff).

Chet L. Jackson, for the appellee-cross appellant (plaintiff).

Opinion

ALVORD, J. The intervening plaintiff, Attorney Gregory P. Cohan, appeals from the judgment of the trial court rendered after a court trial wherein the court determined that the plaintiff, Zachary Stoor, owed Cohan $9000 for his services as the plaintiff's attorney.[1] Specifically, Cohan claims that the court improperly awarded him less than the amount provided for in his contingency fee agreement with the plaintiff.[2] On cross appeal, the plaintiff claims that "the discharge of an attorney in a contingency fee case prior to settlement

[1] On June 20, 2023, the court, *Kamp*, *J.*, granted the plaintiff's motion for judgment, which enforced an April, 2021 final stipulation executed by the plaintiff and the defendant, Erwin Vehs. The court also ordered the defendant's counsel to hold in escrow a portion of the settlement funds representing attorney's fees. The defendant is not participating in this appeal.

[2] Cohan also claims on appeal that the trial court erred by not awarding him damages pursuant to the doctrine of unjust enrichment. Because we conclude that the court's finding that Cohan was entitled, pursuant to our Supreme Court's decision in *Cole* v. *Myers*, 128 Conn. 223, 230, 21 A.2d 396 (1941), to recover $9000 for the reasonable value of the services he performed on the plaintiff's behalf is not clearly erroneous, we need not reach Cohan's claim with respect to unjust enrichment.

does not constitute a breach of contract under Connecticut law and the award of damages for quantum meruit under [the breach of contract count] . . . was improper." As to both the appeal and cross appeal, we affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the appeal and cross appeal. On Saturday, July 27, 2019, the plaintiff was involved in a motorcycle accident and transported by ambulance to Yale-New Haven Hospital, where he was admitted as a patient. As a result of the accident, the plaintiff sustained serious injuries that required the amputation of part of his left leg.

On Sunday, July 28, 2019, the girlfriend of the plaintiff's father contacted Cohan regarding his possible legal representation of the plaintiff in an action against the defendant, Erwin Vehs, the driver of the other vehicle involved in the accident. That same day, Cohan arrived at the hospital and spoke with the plaintiff for at least thirty minutes. During portions of their meeting, the plaintiff's father and one other visitor were present in the plaintiff's hospital room. Also during the meeting, the plaintiff signed a retainer agreement authorizing Cohan to pursue an action on behalf of the plaintiff against the defendant. The retainer agreement entitled Cohan to 33.33 percent of any of the plaintiff's recovery up to the amount of $300,000.

Following his meeting with the plaintiff, Cohan contacted the defendant's insurance adjuster. Cohan procured an oral settlement offer of $100,000, the limit of the defendant's liability insurance policy, contingent on the plaintiff (1) accepting the offer no fewer than fifteen days after the accident, (2) executing a release, and (3) providing to the defendant's insurance company his hospital discharge summary. The plaintiff did not authorize Cohan to accept the $100,000 offer.

On August 1, 2019, Cohan again visited the plaintiff at the hospital. After the visit, the plaintiff sent a text message to Cohan terminating Cohan's representation and indicating that he would be retaining new counsel. The plaintiff stated in the text message that he was "not in a position on Sunday [July 28, 2019] to actually make any decisions." Cohan "immediately responded to [the plaintiff's] text indicating that he had received the $100,000 offer and instructing [the plaintiff] to '[p]lease tell your new lawyer that my fee is $33,333.33 plus expenses.' "

The plaintiff subsequently retained, as successor counsel, Attorney Michael Cahill. In October, 2019, the plaintiff commenced this negligence action against the defendant. On January 12, 2021, Cohan filed a motion to intervene in order "to preserve his right to recover his legal fee earned during the course of representing the plaintiff . . . ." The court, *Abrams*, *J.*, granted Cohan's motion. On April 1, 2022, Cohan filed the operative amended intervening complaint sounding in breach of contract and unjust enrichment. In his demand for relief, Cohan requested, inter alia, equitable damages. The plaintiff filed an answer and raised as a special defense that he lacked "the mental capacity to enter into any contractual commitment."

On April 16, 2021, Cahill procured a 1.5 million dollar settlement in the negligence action on the plaintiff's behalf. The judgment stated: "The parties have reached a resolution after negotiations and hereby agree to a stipulated judgment of $1,500,000. The parties further agree that within 20 days of the court's approval of this stipulation the defendant's insurer . . . will pay $100,000 of the stipulated judgment . . . ." The judgment further stated that the plaintiff would receive the remaining 1.4 million dollars from the defendant "if he has a windfall such as lottery income, an inheritance or any other financial gain . . . ." On June 20, 2023,

the court granted the plaintiff's motion for judgment and rendered judgment in favor of the plaintiff. See footnote 1 of this opinion.

A court trial was held on October 4, 2022, with respect to Cohan's intervening complaint. Both the plaintiff and Cohan entered several exhibits into evidence. Cohan testified on his own behalf that, during his July 28, 2019 meeting with the plaintiff, the plaintiff did not demonstrate an inability to answer his questions and that the plaintiff "actually went into great detail about his accident." With respect to the work that he did on the plaintiff's behalf, Cohan testified that, in addition to speaking to the defendant's insurance adjuster, he went to the accident scene, took photographs and videos of the accident scene, obtained the police report, and reviewed town records to see whether the defendant owned any property.

In addition to his own testimony, the plaintiff presented the testimony of Cahill. The plaintiff testified that he discharged Cohan on August 1, 2019, because "I realized that I wasn't comfortable. You know, I never hired this guy; I didn't know this guy. It wasn't my decision to hire him. And I was so out of it on—on Sunday on, you know, the 28th that it—it really—it wasn't my decision whatsoever . . . ." Cahill then testified, and the court interjected the question of whether he would agree "even if . . . [the plaintiff] didn't have capacity to sign the contract, that [Cohan] is due some kind of compensation for the work he did," to which Cahill responded, "I would agree that on a quantum meruit basis for his time allocated up until the time of the discharge, if [the plaintiff] had the capacity, sure, yes." Upon the conclusion of trial, the court ordered posttrial briefing on whether the plaintiff had the capacity to contract with Cohan.

On October 25, 2022, both the plaintiff and Cohan filed their posttrial briefs. In his posttrial brief, the plaintiff argued that the court should find that the contingency fee agreement was voidable because he lacked the capacity to contract with Cohan. The plaintiff argued that Cohan's recovery should be limited to the reasonable fee for the work he performed pursuant to the doctrine of quantum meruit and the guidance provided in our Supreme Court's decision in *Cole* v. *Myers*, 128 Conn. 223, 230, 21 A.2d 396 (1941). In his posttrial brief, Cohan argued that he is entitled to recover under the contingency fee agreement because the plaintiff did not prove that he lacked the capacity to contract, and, in the alternative, he is entitled to judgment pursuant to the doctrine of unjust enrichment. Cohan also filed, as an exhibit to his posttrial brief, a document representing that, between Sunday, July 28, and Thursday, August 1, 2019, he spent approximately forty-one hours working on the plaintiff's case.

On February 1, 2023, the court issued a memorandum of decision. With respect to Cohan's breach of contract claim, the court determined that the plaintiff had the capacity to contract. The court stated: "The ironic thing is that court's foregoing finding of capacity makes little to no difference in the outcome of this case as the result under either finding would be an award to [Cohan] of the reasonable value of the services he performed . . . ." The court, quoting *Cole* v. *Myers*, supra, 128 Conn. 230, recognized that, in cases where a party discharges an attorney prior to settlement, " '[o]ur rules of policy support the minority view. An attorney at law is an officer of the court; a minister of justice. He is entitled to fair compensation for his services, but since, because of the highly confidential relationship, the client may discharge him even without just cause, he should receive reasonable compensation for the work he has done up to that point, and not the agreed fee

he probably would have earned had he been allowed to continue in his employment. This rule is not unfair to the attorney. He will receive fair compensation for what he has done; his position as an officer of the court does not entitle him to receive payment for services he has not rendered.' . . . The decision in *Cole*, while over eighty years old, still appears to be controlling law on the issue of compensation for attorneys whose services have been terminated in contingency cases." (Citation omitted.)

In determining the reasonable value of the services performed by Cohan, the court applied the reasonable fee factors set forth in rule 1.5 of the Rules of Professional Conduct[3] to the work Cohan performed on the plaintiff's behalf and determined: "The evidence presented indicated that [Cohan] is a veteran attorney with experience in the field of personal injury. The activities that he detailed in his testimony regarding the work he performed on behalf of [the plaintiff] represent reasonable measures most responsible attorneys would take in relation to a serious personal injury case, including visiting the potential client in the hospital on a weekend. He promptly learned the identity of [the defendant's] insurer and initiated contact, procuring an offer within days. He also claimed that he did some research regarding additional sources of coverage and investigated the

[3] Rule 1.5 of the Rules of Professional Conduct provides in relevant part: "(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or by the circumstances; (6) The nature and length of the professional relationship with the client; (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) Whether the fee is fixed or contingent. . . ."

accident itself. The court presumes that the foregoing activity probably caused [Cohan] to put other matters aside in the short term. All these factors militate in favor of the award that exceeds what [Cohan] would recover if the court simply estimated the time he put in on [the plaintiff's] case and multiplied it by a reasonable hourly fee. If the fee involved had been fixed rather than contingent, the court would be less comfortable in taking this approach. On the other side of the ledger, while the court is impressed with [Cohan's] ability to work quickly, otherwise his efforts did not require any special skill that would not have been possessed by any attorney with experience in personal injury as the issues presented were neither novel nor complex. . . .

"As a result, in consideration of all the relevant factors contained in rule 1.5, the court awards [Cohan] a legal fee of $9000." The court then denied Cohan's claim of unjust enrichment, stating in a footnote that, "even if the court had found that the contract was invalid and [Cohan] possessed a valid unjust enrichment claim, the result in this matter would have remained unchanged as the court would have awarded [Cohan] the reasonable value of his services pursuant to rule 1.5 of the Rules of Professional Conduct." This appeal followed.

Before turning to Cohan's appeal and the plaintiff's cross appeal, we set forth the relevant standard of review and legal principles. "[W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . .

"When an attorney undertakes to represent a client in a personal injury action, the attorney and his client may provide by contract, which contract shall comply with all applicable provisions of the rules of professional conduct governing attorneys adopted by the judges of the Superior Court, that the fee for the attorney shall be paid contingent upon, and as a percentage of: (1) [d]amages awarded and received by the claimant; or (2) [the] settlement amount [received] pursuant to a settlement agreement. General Statutes § 52-251c (a)." (Citations omitted; internal quotation marks omitted.) *McCullough* v. *Waterside Associates*, 102 Conn. App. 23, 27–28, 925 A.2d 352, cert. denied, 284 Conn. 905, 931 A.2d 264 (2007).

"Our Supreme Court long ago explained that an attorney is entitled to a reasonable fee for his services. 'An attorney at law is an officer of the court; a minister of justice. He is entitled to fair compensation for his services, but since, because of the highly confidential relationship, the client may discharge him even without just cause, he should receive reasonable compensation for the work he has done up to that point, and not the agreed fee he probably would have earned had he been allowed to continue in his employment.' *Cole* v. *Myers*, [supra, 128 Conn. 230]." *Altschuler* v. *Mingrone*, 98 Conn. App. 777, 780–81, 911 A.2d 337 (2006), cert. denied, 281 Conn. 927, 918 A.2d 276 (2007), and cert. denied, 281 Conn. 927, 918 A.2d 276 (2007).

I

We first address Cohan's appeal. Cohan claims that there is insufficient evidence in the record to support the court's decision to award him $9000 rather than the $33,333.33 that he asserts he is entitled to pursuant to the contingency fee agreement. Specifically, Cohan argues that the court improperly determined that the appropriate measure of damages for the breach of the

contingency fee agreement is the reasonable value of the services he performed on the plaintiff's behalf prior to the termination of his representation pursuant to *Cole* v. *Myers*, supra, 128 Conn. 230, rather than his expectation damages pursuant to the doctrine of substantial performance. The plaintiff responds that the court properly applied *Cole* to award Cohan damages because the plaintiff discharged Cohan prior to settlement. We agree with the plaintiff.

In his principal appellate brief, Cohan relies on *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 685, 89 A.3d 869 (2014), for the proposition that he is entitled to damages in accordance with the doctrine of substantial performance because he "substantially performed his obligations pursuant to the terms of the *contingent fee agreement* . . . ." (Emphasis added.) "The doctrine of substantial performance shields contracting parties from the harsh effects of being held to the letter of their agreements. Pursuant to the doctrine of substantial performance, a technical breach of the terms of a contract is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial." (Internal quotation marks omitted.) *Pack 2000, Inc.* v. *Cushman*, supra, 675. "Substantial performance occurs when, although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, [the plaintiff] has received substantially the benefit he expected, and is, therefore, bound to [perform]." (Internal quotation marks omitted.) Id., 685.

The guidance in *Pack 2000, Inc.*, is inapposite to the present appeal, as the facts of that matter concerned a defendant who contracted to transfer the management

and, at the plaintiff's option, ownership of two automobile repair shops. Id., 664. Cohan has furnished no authority for the proposition that the doctrine of substantial performance applies in litigation seeking enforcement of a contingency fee agreement where a client discharged an attorney prior to settlement. Our research likewise has uncovered no such authority. Rather, our jurisprudence on contingency fee agreement cases allows an attorney discharged by a client prior to settlement to recover for the reasonable value of the services the attorney performed on the client's behalf. See *Cole* v. *Myers*, supra, 128 Conn. 230; see also *Altschuler* v. *Mingrone*, supra, 98 Conn. App. 782 (court awarded attorney, who was discharged prior to settlement, reasonable fee for work performed on client's underinsured motorist claim).

In the present case, the court determined Cohan's award to be "the reasonable value of the services he performed . . . ." The court analyzed the work performed by Cohan under the terms of rule 1.5 of the Rules of Professional Conduct and found that an award in the amount of $9000 constituted the reasonable value of the services he performed on the plaintiff's behalf.[4] Accordingly, we conclude that the court properly applied *Cole* v. *Myers*, supra, 128 Conn. 230, rather than the doctrine of substantial performance, in determining the proper measure of damages.[5]

[4] Cohan does not argue on appeal, nor does the plaintiff argue on cross appeal, that the trial court's award of $9000 was unreasonable. Accordingly, that issue is not before this court.

[5] Cohan also argues that he substantially performed under the contingency fee agreement because "the plaintiff did, in fact, accept the $100,000 benefit that [Cohan] had procured on his behalf." The facts found by the court indicate that the plaintiff "[a]t no time" authorized Cohan "to accept the $100,000 offer" and that the plaintiff's successor counsel obtained an offer on the plaintiff's behalf that included "the $100,000 *in addition* to the agreement of the defendant to pay additional moneys if certain criteria are met." (Emphasis added.)

II

We next address the plaintiff's cross appeal. The plaintiff claims that the court improperly determined that he breached the contingency fee agreement by discharging Cohan. The plaintiff argues that, "because the trial court held, based on its findings of fact, that the law in *Cole* v. *Myers*, [supra, 128 Conn. 230] applies and quantum meruit was the proper basis of recovery in this case . . . the trial court could not award damages for breach of contract."[6] (Citation omitted.)

The plaintiff directs our attention to case law that he claims stands for the proposition that, in a contingency fee agreement case where a client discharges an attorney prior to settlement, the client will not be held liable for breach of contract. See *Cole* v. *Myers*, supra, 128 Conn. 229–30; *McCullough* v. *Waterside Associates*, supra, 102 Conn. App. 28. That same authority, however, permits an attorney, such as Cohan, who has been discharged to "receive reasonable compensation for the work he has done up to that point . . . ." *Cole* v. *Myers*, supra, 230.[7]

In *Cole*, "[t]he plaintiff tried his case on the theory that if he failed to prove an express contract he could

[6] Cohan responds that the plaintiff's claim on cross appeal was not properly raised in the trial court and, therefore, is not appropriately before this court on appeal. Our rules of practice preclude us from reviewing claims made for the first time on appeal that were not addressed by the trial court. See *C. W.* v. *Warzecha*, 225 Conn. App. 137, 146, 314 A.3d 617 (2024). In the present case, however, the issue of whether Cohan could recover pursuant to the doctrine of quantum meruit was raised at trial, argued by the plaintiff in his posttrial brief, and discussed by the court in its memorandum of decision. The plaintiff's claim, therefore, was properly raised before and analyzed by the trial court and, accordingly, is properly before this court on appeal.

[7] At oral argument before this court, in response to a question, the plaintiff's counsel confirmed that *Cole* v. *Myers*, supra, 128 Conn. 230, is "the correct case law" and that the trial court "correctly appl[ied] *Cole* . . . ."

recover the reasonable value of his services, and produced much evidence in support of his claim on quantum meruit."[8] Id., 228. The jury, however, found that the plaintiff had proven the existence of an express contract. Id. On appeal, our Supreme Court analyzed "the question whether, where an attorney is employed on a *contingent basis*, it is an implied term of the contract that he will have a reasonable opportunity to perform, and if he is prevented from doing so by a wrongful discharge, the contract has been broken and he is entitled to recover what he would probably have earned had his employment continued." (Emphasis added.) Id., 228–29. The court concluded that, because the attorney was discharged by his client prior to settlement, he was entitled to "receive reasonable compensation for the work he has done up to that point, and not the agreed fee he probably would have earned had he been allowed to continue in his employment." Id., 230.

In the present case, the court's memorandum of decision makes clear that it awarded Cohan damages under the precedent of *Cole*. The court began by recognizing that, although the plaintiff and Cohan had entered into a valid contingency fee agreement, the appropriate remedy nevertheless is "an award to [Cohan] of *the reasonable value of the services he performed* . . . ." (Emphasis added.) The court then set forth the legal principles as espoused in *Cole* and stated that the reasonable value of the services performed by Cohan is determined by comparing the factors set forth in rule 1.5 of the Rules of Professional Conduct to the work performed on the plaintiff's behalf. See *Altschuler* v. *Mingrone*, supra, 98 Conn. App. 781. After applying the factors set forth in

[8] "Quantum meruit is a theory of contract recovery that does not depend upon the existence of a contract, either express or implied in fact. . . . Rather, quantum meruit arises out of the need to avoid unjust enrichment to a party, even in the absence of an actual agreement. . . . Quantum meruit literally means as much as he has deserved . . . ." (Internal quotation marks omitted.) *McCullough* v. *Waterside Associates*, supra, 102 Conn. App. 28 n.4.

rule 1.5, the court found that Cohan is entitled to an award of $9000 for the reasonable value of his work on the plaintiff's case. Accordingly, we conclude that the court's finding that Cohan was entitled to the reasonable value of the services he performed on the plaintiff's behalf is supported by evidence in the record and, therefore, is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

DURANTE BEST *v.* COMMISSIONER OF CORRECTION (AC 46421)

Elgo, Moll and Suarez, Js.

Syllabus

The petitioner, who previously had been convicted of, inter alia, murder, sought a writ of habeas corpus. The habeas court refused to accept for filing the petitioner's untimely amended petition. The habeas court rendered judgment dismissing the petition on its own motion pursuant to the applicable rule of practice (§ 23-29), and the petitioner appealed to this court, claiming that the habeas court erred in refusing to accept his untimely amended petition. *Held* that the appeal was dismissed as moot because there was no practical relief that this court could afford the petitioner in light of a second habeas action that the petitioner had filed, which alleged the same counts set forth in the untimely amended petition.

Argued May 28—officially released July 9, 2024

Procedural History

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

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

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Patrick James*, former deputy assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Durante Best, appeals, following the grant of his petition for certification to appeal, from the judgment of the habeas court dismissing, on its own motion pursuant to Practice Book § 23-29 (1) and (2), his petition for a writ of habeas corpus filed on October 5, 2017, which challenged only the structure of his sentence on the convictions that were affirmed by this court after his first criminal trial.[1] On appeal, the petitioner claims that the court erred, on January 11, 2023, in refusing to accept for filing his

[1] A recitation of the factual background, which is not necessary to repeat in this opinion, is set forth in *State* v. *Best*, 337 Conn. 312, 314–16, 253 A.3d 458 (2020). By way of procedural background, it suffices to state that, following the petitioner's first criminal trial, he was convicted of one count of murder in violation of General Statutes § 53a-54a (a), two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), two counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). See *State* v. *Best*, 168 Conn. App. 675, 676, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). The judgment of conviction was reversed as to one count of murder, one count of attempted murder, and one count of assault in the first degree, and the case was remanded for a new trial on those counts; the judgment was otherwise affirmed. Id., 689. Following the petitioner's second criminal trial, "the jury found the [petitioner] guilty of the crimes charged [in the remanded counts]. The trial court sentenced the [petitioner] to a total effective sentence of forty years imprisonment, to be served consecutive to the sentence imposed on the counts . . . that remained intact following his first jury trial." *State* v. *Best*, supra, 337 Conn. 316. Thereafter, our Supreme Court affirmed the judgment of conviction. Id., 325.

untimely amended petition dated January 6, 2023 (amended petition). The three count amended petition asserted claims of ineffective assistance of trial counsel, involuntary confession, and interference with the right to counsel. In March, 2023, the petitioner commenced a second habeas action, captioned *Best* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-23-5001445-S, in which the petitioner filed an amended petition dated April 16, 2024, which includes, but is not limited to, the three counts set forth in the amended petition at issue in this appeal.[2] Because there is no practical relief in the present appeal that we can afford the petitioner, we dismiss the appeal as moot. See *Hodge* v. *Commissioner of Correction*, 225 Conn. App. 343, 349–50, A.3d (2024).

The appeal is dismissed.

[2] Following oral argument before this court, we ordered, sua sponte, the parties to file supplemental memoranda addressing whether the pendency of the petitioner's second habeas action, and/or any activity occurring therein, rendered this appeal moot. Although both parties agree that the mootness doctrine applies, the petitioner maintains that the capable of repetition, yet avoiding review exception to the mootness doctrine also applies. We are unpersuaded.

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Breach of contract; unjust enrichment; quantum meruit; claim that trial court improperly rendered judgment for defendants on plaintiff's breach of contract claim; claim that trial court failed to consider judicial admissions allegedly made by defendants in original answers as to existence of alleged oral contract to sell property to plaintiff; whether trial court, in ruling on plaintiff's unjust enrichment claim, erred in finding that plaintiff's evidence of his labor at property was unreliable.

Czunas *v.* Mancini 256
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Demarco *v.* Charter Oak Temple Restoration Assn., Inc.. 335
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Finocchio Bros., Inc. *v.* 587 CTA, LLC 351
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Greenwich *v.* Freedom of Information Commission 40

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Termination of parental rights; whether trial court's reliance in adjudicatory phase of termination trial on social studies prepared by Department of Children and Families violated statute (§ 45a-717) and rule of practice (§ 35a-9); reviewability of respondent's unpreserved claim that trial court's use of social studies in adjudicatory phase of termination trial violated his due process rights; whether trial court improperly admitted hearsay evidence; whether respondent demonstrated that he was harmed by admission of alleged hearsay evidence.

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L. K. *v.* K. K. 279

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Martin *v.* Olson 392

Breach of contract; whether trial court's jury instruction regarding defendant's statute of limitations defense was harmful to plaintiff; whether trial court abused its discretion in admitting certain testimony into evidence; whether trial court abused its discretion in allowing defendant to present surrebuttal evidence during his case-in-chief.

M. C. *v.* A. W. 444

Marital dissolution; whether record was adequate to review defendant's unpreserved claim that trial judge committed error by failing to recuse herself and by demonstrating judicial bias; claim that trial court made clearly erroneous factual findings in support of its financial and property distribution orders; claim that trial court did not adequately consider plaintiff's noncompliance with court's discovery orders in entering its financial and property distribution orders; claim that trial court improperly declined to rule on certain motions for contempt; claim that trial court inequitably distributed parties' assets.

Michel *v.* Hartford 98

Employment discrimination; claim of retaliation in violation of federal statute (42 U.S.C. § 1983) for exercise of rights guaranteed by first amendment to United States constitution; claim of retaliation in violation of state statute (§ 31-51q) for exercise of rights guaranteed by article first of Connecticut constitution;

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Abuse of process; motion to dismiss; claim that trial court erred in granting defendant's motion to dismiss; claim that trial court erred in concluding that it lacked subject matter jurisdiction; whether plaintiff had standing to bring action.
Stoor *v.* Vehs 636
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NOTICE OF CONNECTICUT STATE AGENCIES

Notice of Intent to Apply for State Certificate of Affordable Housing Completion

Legal Notice

NOTICE IS HEREBY GIVEN that the Town of Waterford intends to file an application to the Commissioner of the Connecticut Department of Housing for a Certification of Affordable Housing Completion in accordance with Connecticut General Statute Section 8-30g (1)(4)(B) for a 4-year moratorium on the applicability of the affordable housing appeals procedure set forth in Connecticut General Statute Section 8-30g.

The proposed application, including all supporting documentation, is available for public inspection and comment in the Department of Planning and Development and the Town Clerk's Office at the Waterford Town Hall, 15 Rope Ferry Road, Waterford, Connecticut 06385 from 8 a.m. to 4 p.m. weekdays. Materials will also be posted to the Town Website www.waterfordct.org. Written comments may be submitted to Jonathan Mullen, Planning Director, at the Department of Planning and Development Office, 15 Rope Ferry Road, Waterford, Connecticut 06385 or by email to jmullen@waterfordct.org within 20 days of the publication of this notice on the Town website, the New London Day and the Connecticut Law Journal. A copy of all written comments received and all responses prepared by the municipality will be included as part of the application to the Department of Housing.

Office of the First Selectman
Town of Waterford

Robert J. Brule
First Selectman

NOTICES

JUDGE TRIAL REFEREE DESIGNEES ARBITRATION PROCEEDINGS - TRIAL DE NOVO

The following judge trial referees have been duly designated by Chief Justice Richard A. Robinson in accordance with subsection (b) of Connecticut General Statutes § 52-434 to hear proceedings resulting from a demand for a trial de novo pursuant to subsection (e) of Connecticut General Statutes § 52-549z, for the period July 1, 2024 through June 30, 2025:

Hon. Holly Abery-Wetstone (from 7/8/24)
Hon. Taggart D. Adams
Hon. Gerard I. Adelman
Hon. Jon M. Alander
Hon. Michael A. Albis
Hon. Stuart Bear
Hon. Thomas A. Bishop
Hon. Jon C. Blue
Hon. Barbara Brazzel-Massaro
Hon. Richard E. Burke
Hon. Patrick L. Carroll III
Hon. Patrick J. Clifford
Hon. Henry S. Cohn
Hon. Juliette L. Crawford
Hon. William T. Cremins
Hon. John F. Cronan
Hon. Frank M. D'Addabbo
Hon. Michael R. Dannehy
Hon. Maureen D. Dennis
Hon. Julia DiCocco Dewey
Hon. Alexandra D. DiPentima
Hon. Edward J. Dolan
Hon. Edward S. Domnarski
Hon. John C. Driscoll
Hon. Constance L. Epstein
Hon. Dennis G. Eveleigh
Hon. Brian T. Fischer
Hon. Joseph P. Flynn
Hon. Francis J. Foley, III
Hon. Stephen F. Frazzini
Hon. Robert L. Genuario
Hon. James P. Ginocchio
Hon. James T. Graham
Hon. Edward C. Graziani
Hon. Arthur C. Hadden
Hon. H. Gordon Hall
Hon. Lubbie Harper, Jr.
Hon. Arthur A. Hiller
Hon. William Holden
Hon. Sheila A. Huddleston
Hon. Bruce P. Hudock
Hon. Frank A. Iannotti
Hon. Edward R. Karazin, Jr.
Hon. John F. Kavanewsky, Jr.
Hon. Christine E. Keller
Hon. James G. Kenefick, Jr.
Hon. Edward T. Krumeich, II
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Hon. Joseph A. Licari, Jr.
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Hon. Flemming L. Norcott, Jr.
Hon. Thomas V. O'Keefe, Jr.
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Hon. Robert B. Shapiro
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Hon. Joseph M. Shortall
Hon. Barry K. Stevens
Hon. Lois Tanzer
Hon. Kevin Tierney
Hon. John Turner
Hon. Christine S. Vertefeuille
Hon. Gary J. White
Hon. Heidi G. Winslow

Hon. Elizabeth A. Bozzuto, Judge
Chief Court Administrator

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2024-2 June 27, 2024

Question Presented: **Whether, if appointed to the Investment Advisory Council (''IAC''), the Chief Investment Officer for Michigan State University (''MSU'') may, under a recently enacted gift exception, receive certain benefits from asset managers, which may be restricted donors, in order to attend their meetings or events as part of his MSU duties.**

Brief Answer: **Based on the facts presented and in light of the new gift exception, we conclude as follows: At meetings or events that are unrelated to lobbying and in which he is expected to participate by virtue of his MSU job responsibilities, the MSU Chief Investment Officer, if appointed as a public member of the IAC, may accept, without monetary limit, items that are usually and regularly made available by asset managers at such meetings or events, including travel expenses, lodging, food, beverage, and other items that facilitate his participation in the employment-related events at issue.**

At its June 20, 2024 meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by the Office of the Governor (specifically, Jennifer P. Bennett, Deputy General Counsel) on behalf of Philip Zecher, the MSU Chief Investment Officer, and it now issues this advisory opinion under General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code'').

Background

The petition provides, in relevant part, as follows:

> Mr. Zecher is a potential governor's appointment to the Connecticut Investment Advisory Council. Members of the CIAC are subject to the code of ethics for public officials.
>
> Mr. Zecher is the Chief Investment Officer of Michigan State University's $4 billion endowment. The university's investment office is in Stamford, CT, which is where he lives. As CIO, he has full discretion over investments, hiring and removing managers, subject to the condition of the Board of Trustee's Investment Policy.
>
> The investment office has relationships with many of the biggest asset managers in the industry, many of which overlap with investment by CT's Common Investment Pool, such as with BlackRock, Blackstone, Goldman Sachs, to name a few of the largest. The university's rules

around accommodations ''does not prohibit an Administrator from accepting meals and entertainment provided without charge to all those at meetings the administrator attends as part of his/her University duties'' and ''does not prohibit an Administrator from attending, in connection with his/her University duties, a reception that is sponsored by an . . . entity that does business or intends to do business with the University and at which food and entertainment typical to business receptions are provided without charge.''

Before the passage of Public Act 24-81, the CT ethics codes for State Officials would have prevented Mr. Zecher from attending many meetings or events that he would otherwise attend as part of his duties to MSU. One recent case was attending the dinner provided by BlackRock the night before their big institutional investor meeting, where the cost of the meal was in excess of the states limit of $50 annually. These sort of events not only allow Mr. Zecher to interact with many of the experts at BlackRock, but also are good for talking with peers at other institutions who attend. These sorts of meetings, of which there are many, are very efficient means of collecting valuable market perspectives and intelligence.

Given the passage of Public Act 24-81, is it now permissible for Mr. Zecher, were he appointed to the CIAC, to attend events and receive travel expenses, lodging, food, beverage and other benefits customarily provided in the course of employment?

Analysis

Created under General Statutes § 3-13b, the IAC, by law, includes 12 members: two ex-officio members (the Treasurer and the Secretary of the Office of Policy and Management), three representatives of ''the teachers' unions,'' two representatives of ''the state employees' unions,'' and five ''public members,'' who must be experienced in investment-related matters. Among its various roles, the IAC

- reviews and approves the Treasurer's investment policy statement, which ''set[s] forth the standards governing investment of trust funds by the Treasurer''; General Statutes § 3-13b (c) (1);
- provides ''advice and consent'' to the Treasurer concerning the latter's ''appointment of a chief investment officer''; General Statutes § 3-13a;
- reviews the Treasurer's recommendation of ''contracts for services related to the investment of . . . [trust] funds''; General Statutes § 3-13i; and
- reviews ''trust funds investments by the Treasurer'' and ''notif[ies] the Auditors of Public Accounts and the Comptroller of any unauthorized, illegal, irregular or unsafe handling or expenditure of trust funds . . . .'' General Statutes § 3-13b (c) (2).

If appointed to the IAC, Mr. Zecher will be a ''Public official,'' as defined in General Statutes § 1-79 (11),[1] and will thus be subject to the Code, including the gift prohibitions housed in subsections (j) and (m) of General Statutes § 1-84. Under § 1-84 (j), he will be barred from knowingly accepting any ''gift'' (to be defined

[1] Section 1-79 (11) defines ''Public official'' to include, among many others, ''any public member or representative of the teachers' unions or state employees' unions appointed to the Investment Advisory Council pursuant to subsection (a) of section 3-13b . . . .''

shortly) from a person known to be a ''registrant'' (i.e., a person required to register as a lobbyist with the Office of State Ethics[2]) or known to be acting on a registrant's behalf. And under § 1-84 (m), he will be barred from knowingly accepting, directly or indirectly, any ''gift'' from a person he knows or has reason to know fits in any of these categories:

(1) is doing business with or seeking to do business with *the department or agency in which . . . [he] is employed*;

(2) is engaged in activities which are directly regulated by . . . *[his] department or agency*; or

(3) is prequalified [as a contractor or substantial subcontractor] under section 4a-100.

(Emphasis added.)

For purposes of the gift prohibition in § 1-84 (m), ''the department or agency in which . . . [Mr. Zecher] is employed'' will be the Office of the Treasurer in its entirety—including the IAC. Indeed, even though the IAC is ''within the office of the Treasurer for administrative purposes only''; General Statutes § 3-13b (d); the former is so integrally linked[3] to the latter that, based on precedent, they will be considered the same agency for purposes of § 1-84 (m).[4] Which means this: that any person regulated by, doing business with, or seeking to do business with the Office of the Treasurer will be deemed a restricted donor under § 1-84 (m), not just as to employees of the Office of the Treasurer, but as to IAC members as well.

Based on the facts presented, such restricted donors would appear to include asset managers like BlackRock, Blackstone, and Goldman Sachs, and Mr. Zecher will thus be barred from knowingly accepting from those entities any ''gift,'' a term the Code defines as follows: ''anything of value, which is directly and personally received, unless consideration of equal or greater value is given in return. . . .'' General Statutes § 1-79 (5).

Despite that broad definition, § 1-79 (5) contains numerous gift exceptions, namely, a ''list of items which are not considered 'gifts' for the purpose of calculating the gift limit. . . .'' Advisory Opinion No. 97-23. That is, the items on that list are things Mr. Zecher may accept from restricted donors, without running afoul of the gift prohibitions mentioned above. The list includes, by way of brief example, the following:

- *Food/beverage exception*: ''Food or beverage or both, costing less than fifty dollars in the aggregate per recipient in a calendar year, and consumed on

[2] General Statutes §§ 1-79 (18) and 1-91 (17).

[3] For example: the IAC is staffed by employees of the Office of the Treasurer; the Treasurer is an ex officio member of the IAC and, under law, recommends an investment policy statement to the IAC setting forth the standards governing investment of trust funds by the Treasurer; the IAC is listed in the 2024 State Register and Manual as a board within the Office of the Treasurer; all statutory provisions concerning the IAC are contained within Title 3, Chapter 32, of the General Statutes, which is titled ''Treasurer''; and the two entities have significant interaction on substantive matters.

[4] Compare Advisory Opinion No. 96-17 (concluding that, for purposes of one of the Code's post-state employment provisions, the Underground Storage Tank Petroleum Clean-up Account Review Board (''Review Board'') was part of the Department of Environmental Protection (''DEP''), in part because the staff of the Review Board were employees of DEP, the DEP commissioner was a member of the Review Board, and the Review Board was listed in the 1995 State Register and Manual as a board within the DEP), with Advisory Opinion No. 91-21 (concluding that, for purposes of one of the Code's post-state employment provisions, the Commission on Hospitals and Health Care was not part of the Department of Health Services, given that the former ''essentially operates independently since there is no interaction between the two entities on any substantive issues'').

> an occasion or occasions at which the person paying, directly or indirectly, for the food or beverage, or his representative, is in attendance . . . .'' General Statutes § 1-79 (5) (I).

- *Employer exception*: ''Anything of value provided by an employer of (i) a public official, (ii) a state employee, or (iii) a spouse of a public official or state employee, to such official, employee or spouse, provided such benefits are customarily and ordinarily provided to others in similar circumstances . . . .'' General Statutes § 1-79 (5) (O).

- *Token-item exception*: ''Anything having a value of not more than ten dollars, provided the aggregate value of all things provided by a donor to a recipient under this subdivision in any calendar year does not exceed fifty dollars . . . .'' General Statutes § 1-79 (5) (P).

According to the petitioner, the list of gift exceptions that *pre-existed* Public Act 24-81 (''P.A. 24-81'') was not broad enough to cover the items that asset managers may offer Mr. Zecher, in his capacity as Chief Investment Officer of MSU, to attend ''meetings or events that he would otherwise attend as part of his duties to MSU.'' For example, the food/beverage at such events may exceed the $49.99 cap in the food/beverage exception, and the entertainment provided there may exceed the $10 cap under the token-item exception. And while the employer exception allows a public official to accept items—that are customarily and ordinarily given to others under similar circumstances—from his employer and, in certain instances, its clients, the asset managers here are neither Mr. Zecher's employer nor clients of his employer, meaning that the employer exception (outlined above) would not apply.

With the passage of P.A. 24-81, however, comes an entirely new gift exception. Under this new exception—which will be housed in subdivision (T) and effective as of July 1, 2024—the term ''gift'' will no longer capture the following:

> Travel expenses, lodging, food, beverage and other benefits customarily provided in the course of employment, when provided to a public member of the Investment Advisory Council established under section 3-13b.

P.A. 24-81, § 86. Given this new exception (hereinafter, ''IAC exception''), the question before us is whether—in relation to restricted donors[5] (such as the asset managers mentioned above)—Mr. Zecher may, if appointed as a public member of the IAC, ''attend events and receive travel expenses, lodging, food, beverage and other benefits customarily provided in the course of employment[.]''

To answer that question, we must dissect the exception into its component parts, starting with this: *Who may use the IAC exception*?

The exception applies not just to members of a single state entity, the IAC, but to a limited group of such members: namely, the IAC's ''public members.'' P.A. 24-81, § 86. The term ''Public member,'' though not defined in the Code, finds definition in the State Personnel Act as ''a member of a board or commission who does not hold any office or position in the state service.'' General Statutes § 5-196 (22). Thus, if Mr. Zecher becomes one of the IAC's ''public members'' (i.e.,

[5] If an asset manager is a *non-restricted donor*, i.e., is not a registered lobbyist or a person regulated by, doing business with, or seeking to do business with the Office of the Treasurer (including the IAC), then Mr. Zecher may accept gifts, without limit, from the asset manager, provided that the asset manager is providing the gifts by virtue of his MSU (rather than his IAC) position. See Advisory Opinion No. 98-9 (limiting benefits from non-restricted donors only when the benefits are provided by virtue of one's state office or position).

members who do not hold any other office or position in state service), then he may use the exception.

Next: *Under what circumstances may the IAC exception be used*?

The IAC exception may be used when the listed items (to be discussed later) are ''customarily provided in the course of employment . . . .'' P.A. 24-81, § 86. Neither the Code nor its regulations define any of those terms, so ''[w]e may presume . . . that the legislature intended [the terms] to have [their] ordinary meaning[s] in the English language, as gleaned from the context of [their] use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term[s] as expressed in a dictionary.'' (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 322 (2021).

Starting with the words ''customarily'' and ''provided,'' the former means ''usually, habitually, according to the customs; general practice or usual order of things; regularly.'' Black's Law Dictionary (6th ed. 1990) p. 385; see also, e.g., Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/customarily (last visited June 25, 2024) (defining ''customarily'' as ''in accordance with what is customary or usual''). And the verb ''provide'' means ''to make available; furnish . . . .'' Dictionary.com, available at https://www.dictionary.com/browse/provide (last visited June 25, 2024); see also, e.g., Merriam-Webster Online Dictionary, supra (defining ''provide'' as ''to supply or make available''). Viewed together, then, ''customarily provided'' means ''usually'' or ''regularly'' ''made available.''

To that, we must tack on the phrase ''in the *course of employment*,'' the italicized words being defined as follows: ''[e]vents that occur or circumstances that exist as part of one's employment . . . .'' Black's Law Dictionary (Deluxe 7th Ed. 1999) p. 356. To flesh out that definition a bit more, we look to the employer exception in § 1-79 (5) (O), particularly given that it uses language similar to that in the IAC exception. See General Statutes § 1-2z (directing us first to consider the text of the statute itself *and its relationship to other statutes*).

The employer exception, recall, provides as follows: ''Anything of value provided by an employer of (i) a public official, (ii) a state employee, or (iii) a spouse of a public official or state employee, to such official, employee or spouse, provided such benefits are customarily and ordinarily provided to others in similar circumstances . . . .'' General Statutes § 1-79 (5) (O). Given, then, that there is already an exception covering ''anything of value'' customarily provided by a public official's employer, the IAC exception must have been intended to cover items provided ''in the course of employment'' *by a person other than one's employer* (such as the asset managers in this instance, as opposed to MSU, Mr. Zecher's employer, from which he may already accept ''anything of value'' under the employer exception, subject, of course, to the ''customarily and ordinarily provided'' requirement).

Further, soon after the employer exception was added to the Code, the former State Ethics Commission (''Commission'') gave it some context, stating:

> The original purpose of the exception in question, as reflected in discussions between Legislative Leaders and attorneys for the State Ethics Commission, conducted at the time of the provision's enactment, was to allow a public official to attend events (e.g., annual holiday party) to which he or she was invited by reason of his or her spouse's employment, even if the employer was a registered lobbyist (e.g., insurance company, union, law firm, etc.) *In essence, the General Assembly determined that it was unnecessary, and unfair, to apply the Codes' extremely*

> *restrictive gift and entertainment provisions to occasions which were unrelated to lobbying [i.e., the employer was not lobbying the public official in his or her state capacity]; and which, in fact, the public official was expected to attend by virtue of the spouse's employment*.
>
> This *business purpose rationale* is reflected in both the language of the provision and in the legislative history. Specifically, the Senate Chairperson of the Government Administration and Elections Committee, Gary LeBeau, in explaining this provision, stated: '' . . . that's kind of a practical interpretation of what I see here, so that the reasonable and regular and customary types of things that people do in the real world would be allowed . . . .'' Senate Debate on Bill No. 8005 at p. _____ (June 23, 1997).

(Emphasis added.) Advisory Opinion No. 98-5. Thus, for the employer exception to apply, there must be a legitimate ''business purpose,'' meaning ''the activity is unrelated to lobbying and the [public official] is expected to participate by virtue of his or her job responsibilities with the [employer].'' Id.

The same ''business purpose'' rationale, we believe, underlies the IAC exception, both in its language (i.e., ''course of employment'') and in its legislative history. Indeed, the IAC exception's legislative history, though sparse, is similar to that of the employer exception, with Senator Cathy Osten, in explaining the exception's justification, stating:

> I believe that this was the treasurer's request to increase the talent of those people that are on the Investment Board and that's why they have looked at this *because in their regular day job, this happens on a more than frequent basis* and many people just would not take the job and we need that talent on the Investment Board. Through you, Madam President.

(Emphasis added.) ____ S. Proc., Pt. ____ 2024 Sess., p. 269.

Putting the foregoing together and applying it to Mr. Zecher, he may, if appointed as a public member of the IAC, accept the items listed in the IAC exception if they

- are usually and regularly made available
- by a person other than his employer, such as asset managers,
- at meetings or events that
    - o are unrelated to lobbying and
    - o in which he is expected to participate by virtue of his MSU job responsibilities.

Finally: *What items may be accepted under the IAC exception?*

The easy answer: ''[t]ravel expenses, lodging, food, beverage and other benefits . . . .'' P.A. 24-81, § 86. Just as easy is pointing out the conspicuous absence from the IAC exception of any monetary limit on those items. That is, unlike other exceptions (such as the food/beverage and token-item exceptions mentioned above), the items listed in the IAC exception have no dollar limit, meaning that the exception would not (as do a few other Code provisions) limit travel expenses to coach class, lodging to a standard room (rather than a suite), and food/beverage to what has been described as ''non-lavish.'' And to add such a limit would require us to import

words into the exception that do not exist in its original form, which is neither a function nor a privilege of this Board. See *Doe* v. *Manson*, 183 Conn. 183, 188 (1981) (''[i]t . . . is not our function to attempt to improve upon the actions of the legislature by reading into a statute what is clearly not there'' [internal quotation marks omitted]).

The more difficult question is what the legislature meant by ''other benefits.'' As for the word ''benefit,'' we previously noted that ''Black's Law Dictionary (6th Ed. 1990) defines the word 'benefit' as an '[a]dvantage; profit; fruit; privilege; gain; interest . . . .' '' (Citation omitted; internal quotation marks omitted.) Advisory Opinion No. 2020-1. Read broadly, the phrase ''other benefits'' could thus cover virtually anything, but we do not think it was intended to be so all-inclusive. Indeed, if the legislature had intended such a result, it could have borrowed the ''anything of value'' language in the employer exception, but it did not do so. And its ''use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings.'' (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc*. v. *Historic District Commission*, 284 Conn. 838, 850 (2008).

As to that different meaning,

> [t]he canon of construction known as ejusdem generis (''of the same kind'') is useful in this context because it teaches that, when ''a particular enumeration [i.e., listing of things] is followed by general descriptive words, the latter will be understood as limited in their scope to . . . things of the same general kind or character as those specified in the particular enumeration, unless there is something to show a contrary intent.''

Wind Colebrook South, LLC v. *Colebrook*, 344 Conn. 150, 184 (2022) (*Ecker*, *J*., concurring). Put a bit differently, ejusdem generis is the canon of construction ''holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.'' Black's Law Dictionary (9th ed. 2009). By way of example: ''[I]n the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*, the general language *or any other farm animals*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.'' (Emphasis in original.) Id.

Here, then, to avoid giving the IAC exception unintended breadth, we must construe the general phrase ''other benefits'' in light of the immediately preceding list, which includes ''[t]ravel expenses, lodging, food, [and] beverage . . . .'' More specifically, the general phrase ''other benefits'' must be construed to embrace only items of the same class as ''[t]ravel expenses, lodging, food, [and] beverage . . . .'' Which raises the question: what is the class to which the items on that list belong? To answer that question, we look to a couple of other Code provisions that contain similar lists.

The first is another of the Code's gift exceptions, the student exception, which excludes from the term ''gift'' the very same list of items that are in the IAC exception:

> *Travel expenses, lodging, food, beverage and other benefits* customarily provided by a prospective employer, when provided to a student at a public institution of higher education whose employment is derived from

> such student's status as a student at such institution, in connection with bona fide employment discussion . . . .

(Emphasis added.) General Statutes § 1-79 (5) (R). According to the Office of Legislative Research, this exception ''exempts student employees from . . . restrictions on expense-paid travel by allowing them to receive travel expenses, lodging, food, beverage, and other benefits customarily provided by a prospective employer in connection with bona fide employment discussions . . . .'' Office of Legislative Research, Connecticut General Assembly, Summary of Public Act 10-101. In other words, the items on the list are limited to those intended to facilitate a student's participation in legitimate employment discussions with prospective employers.

The other provision is the Code's ''necessary expenses'' provision, which provides that, when a public official or state employee actively ''participat[es] at an event'' (e.g., gives a speech, participates on a panel) in his or her ''official capacity,'' the official or employee may receive, from the event's sponsor, ''payment or reimbursement for necessary expenses . . . .'' General Statutes § 1-84 (k). The Code defines ''Necessary expenses,'' in relevant part, as follows:

> ''Necessary expenses'' means a public official's or state employee's expenses . . . *for participation at an event*, in his official capacity, which shall be limited to necessary *travel expenses*, *lodging* for the nights before, of and after the appearance, speech or event, *meals* and any related conference or seminar registration fees.

(Emphasis added.) General Statutes § 1-79 (17). Like the IAC and student exceptions, the ''Necessary expenses'' definition includes ''travel expenses,'' ''lodging,'' food, and beverage (the latter two items captured under ''meals''). And the express purpose for allowing the acceptance of those items is to facilitate the public official's or state employee's ''participation at an event . . . .''

Returning to the question at hand—to what class belong the items on a list that includes travel expenses, lodging, food, and beverage?—the answer, we believe, is this: items that facilitate one's participation in some activity, be it participating in employment discussions under the student exception, participating on a panel at an event under the ''necessary expenses'' provision, or, as relevant here, participating in employment-related events under the IAC exception. Accordingly, under the canon of ejusdem generis—which counsels that the term ''other benefits,'' as used in the IAC exception, ''must be understood by the company it keeps''[6]—we construe it as being limited to items that facilitate an IAC public member's participation in employment-related events.

To sum up and apply here, if Mr. Zecher is appointed as a public member of the IAC, the IAC exception will allow him to accept—subject to the ''customarily provided in the course of employment'' requirement discussed above—the following items, without monetary limit: travel expenses, lodging, food, beverage and other items that facilitate his participation in the employment-related events at issue.

The facts presented in the petition say little about the items that are customarily made available at meetings and events of asset managers, and we will not speculate as to what they may be. Nevertheless, the petition provides a few examples, one being: ''One recent case was attending the dinner provided by BlackRock the night before their big institutional investor meeting, where the cost of the meal was in excess of the states limit of $50 annually.'' Because the IAC exception allows for

[6] *Wind Colebrook South, LLC* v. *Colebrook*, supra, 344 Conn. 185.

the acceptance of food and beverage, regardless of its value, a meal valued more than $50 would be permissible (provided, of course, that the ''customarily provided in the course of employment'' requirement is satisfied).

The petition also mentions ''entertainment'':

> The university's [i.e., MSU's] rules around accommodations ''does not prohibit an Administrator from accepting meals and *entertainment* provided without charge to all those at meetings the administrator attends as part of his/her University duties'' and ''does not prohibit an Administrator from attending, in connection with his/her University duties, a reception that is sponsored by an . . . entity that does business or intends to do business with the University and at which food and *entertainment* typical to business receptions are provided without charge.''

(Emphasis added.) Because entertainment is not one of the items expressly listed in the IAC exception, Mr. Zecher may accept it (subject, again, to the ''customarily provided in the course of employment'' requirement) only if it constitutes an appropriate ''other benefit,'' meaning that it must facilitate his participation in the employment-related events. To do so, the entertainment must be an ''integral part'' of the event. Advisory Opinion No. 99-2.[7]

By ''integral part'' of the event, we mean that the entertainment is provided in the context of the event—rather than being separate and apart from it—and Mr. Zecher could not participate in the event without partaking of the entertainment. A few examples may help clarify:

- If an asset manager hosts a reception and hires an entertainer (e.g., comedian, magician, or band) to perform during the reception, the entertainment would be deemed an ''integral part'' of the event.
- If, during the Travelers Championship, an asset manager reserves the Greenside Club at the 18th hole for a networking event, the entertainment would be deemed an ''integral part'' of the event.
- If, as part of an event, an asset manager gives attendees tickets to a concert, theater performance, sporting event, etc., *with the understanding that they would attend on their own*, the entertainment would not be deemed an ''integral part'' of the event.

Because we cannot possibly undertake to list each and every item that would be permissible to accept under the IAC exception, we recommend that, if Mr. Zecher has any hesitation as to a specific item, he contact the Legal Division of the Office of State Ethics for further advice.

Before closing, we stress that this opinion interprets the Code only,[8] and that it does not address appearance issues, which are beyond the Code's scope. See Advisory Opinion No. 2009-7 (''[t]he Code . . . does not speak of appearances of conflict, only actualities,'' so in ''interpreting and enforcing the Code . . . [we are] limited, by statute, from addressing appearances or perceptions of conflict of interest'' [internal quotation marks omitted]).

[7] In Advisory Opinion No. 99-2, the Commission concluded, under the ''gift to the state'' exception in § 1-79 (5) (E), that, ''as long as [a registered lobbyist's] event is educational in nature and relevant to the official/employee's state duties, the Commission will sanction receipt of free conference registration, *including any meal held as an integral part of the proceedings*.'' (Emphasis added.)

[8] We stress too that, regardless of MSU's rules (e.g., its ''rules around accommodations''), Mr. Zecher will be required to comply with the Code if he becomes a member of the IAC.

Conclusion

Based on the facts presented and in light of the new IAC exception, we conclude as follows: At meetings or events that are unrelated to lobbying and in which he is expected to participate by virtue of his MSU job responsibilities, Mr. Zecher, if appointed as a public member of the IAC, may accept, without monetary limit, items that are usually and regularly made available by asset managers at such meetings or events, including travel expenses, lodging, food, beverage, and other items that facilitate his participation in the employment-related events at issue.[9]

By order of the Board,

Dated: **June 27, 2024**

/s/ Dena Castricone
Chairperson

[9] This opinion does not address disclosure requirements for purposes of the Statement of Financial Interests, as required under General Statutes § 1-83, and any questions concerning such requirements should be directed to the Office of State Ethics.

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of May 28, 2024:	
Eric Greenawalt	ESPN, Inc.
Orit Kadosh	BlueTriton Brands, Inc.
Certified as of May 29, 2024:	
Cristina Gonzalez Aleman Calleja	Avangrid Management Company
Angel Perez Sanz	Avangrid Renewables, LLC
Certified as of May 30, 2024:	
T. Drew Hickerson	Amgen
Michael S. Kozicz	Cartus Corporation
Certified as of May 31, 2024:	
Jeffrey C. Kessler	Arvinas

Hon. Elizabeth A. Bozzuto
Chief Court Administrator

Notice of Resignation of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on May 30, 2024 in docket number FBT CV23 6126041-S, Paul M. Cramer, juris number 407404, of Fairfield, CT has knowingly and voluntarily resigned from the bar of the State of Connecticut and has waived the privilege of applying for readmission to the bar at any time in the future pursuant to Practice Book § 2-53

The Court, (Welch, J.)

Notice of Reprimand of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimand ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimand

April 19, 2024: Jeffrey Hill - 102511

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel