CONCLUSION

For the foregoing reasons, the court finds for the defendants and against the plaintiff on both counts of the complaint, alleging adverse possession and prescriptive easement.

So ordered.

ERIC P. SOUSA *v.* DONNA M. SOUSA
(AC 36604)

DiPentima, C. J., and Keller and Flynn, Js.

Syllabus

The defendant, whose marriage to the plaintiff had been dissolved in 2001, appealed to this court from the trial court's denial of her two motions to vacate an order modifying the division of the plaintiff's pension benefits. The parties' separation agreement, which was incorporated into the dissolution judgment, provided that the plaintiff's pension would be divided equally between the parties via a qualified domestic relations order. In his financial affidavit, the plaintiff stated that the value of his pension was $32,698.82, which represented his contribution to the pension as of 2001. The separation agreement also provided that the plaintiff would pay periodic alimony subject to termination after five years or upon the defendant's cohabitation with another person. Approximately two years after the dissolution judgment had been rendered, the plaintiff learned that the defendant was cohabitating, informed her that she was in violation of the separation agreement, and indicated that he would seek to terminate his alimony obligation. The defendant apprised the plaintiff that she needed the continuation of the alimony payments for various reasons, and proposed to waive her one-half interest in the plaintiff's pension in exchange for the continuation of the alimony payments for the remainder of the five year term. The plaintiff agreed, and he continued to pay the alimony accordingly. Subsequently, after the five year alimony term had expired, the plaintiff filed a motion to modify the judgment and a stipulation drafted by his attorney in accordance with the parties' oral agreement regarding the plaintiff's pension. The defendant informed the court that, inter alia, she had reviewed the terms and conditions of the stipulation, that the agreement had been her idea, and that she was comfortable entering into the stipulation without the benefit of an attorney. The court then entered the stipulation as a court order, and no appeal was taken from that judgment. Four years later, the defendant filed a motion to vacate the

modification of the original judgment, alleging that the plaintiff had secured the modification through fraud by failing to fully and accurately disclose the value of his pension in his original financial affidavit. The defendant subsequently filed a second motion to vacate the modification alleging that the trial court had lacked jurisdiction to modify the original order in the underlying judgment of dissolution dividing the pension equally between the parties. The trial court denied both motions, concluding that the defendant had failed to prove the prima facie elements of fraud by clear and convincing evidence and that the parties had submitted to the jurisdiction of the court by entering into the stipulation. Thereafter, the defendant appealed to this court challenging the trial court's denial of her motions. After concluding that the trial court lacked jurisdiction to modify the dissolution judgment, this court, inter alia, vacated, as void, the trial court's denial of the defendant's first motion to vacate. The court did not address the merits of the defendant's claim related to the first motion to vacate. Our Supreme Court subsequently reversed our decision and remanded the case to this court with direction to consider the defendant's remaining claim challenging the trial court's denial of the first motion to vacate pertaining to fraud. *Held*:

1. The defendant could not prevail on her claim that the trial court erroneously concluded that she failed to prove with clear and convincing evidence that the plaintiff had fraudulently misrepresented the value of his pension in his 2001 financial affidavit, as the court's finding that the defendant failed to present clear and convincing evidence that the plaintiff knew that the disclosed value of his pension was inaccurate was not amply supported by the record and thus was not clearly erroneous: although, as claimed by the defendant, the plaintiff may have been entitled to an annual pension benefit calculated on the basis of his salary and years of service, rather than to only the refund of his contributions to the pension fund, the plaintiff repeatedly testified that, in his understanding, the amount of $32,698.82 reflected the benefit that he would have been entitled to at the time he filed his financial affidavit, and even if the contribution amount of the plaintiff's pension did not reflect an accurate valuation of his pension, the defendant failed to demonstrate that the plaintiff knowingly incorrectly listed the contribution amount rather that the actuarial value of the pension; moreover, the defendant failed to present evidence establishing the actual value of the pension at the time the plaintiff filed his affidavit, and, contrary to the defendant's assertion that the trial court's finding that she failed to demonstrate a substantial likelihood that, had the plaintiff disclosed the full value of his pension in his 2001 affidavit, the result of a new proceeding would be different, this court's review of the record disclosed no evidence suggesting that the plaintiff's alleged fraud impacted the defendant's decision to enter into the stipulation to exchange her interest in the pension for continued alimony payments or that there was a substantial probability that the trial court would have rejected the modification had

it known that the plaintiff had inaccurately valued his pension in his 2001 financial affidavit.

2. There was no merit to the defendant's claim that the plaintiff committed fraud by nondisclosure by listing only the value of his pension contributions in his financial affidavit and by failing to file a corrected affidavit prior to the modification of the dissolution judgment; fraud by nondisclosure involves the failure of a party to make a full and fair disclosure of known facts, and the trial court properly found that the defendant failed to present clear and convincing evidence that the plaintiff knew that he was entitled to more pension benefits than the amount of his contributions, and, therefore, the defendant failed to prove that the plaintiff deliberately concealed or purposely mislead her regarding the value of his pension; moreover, the record revealed that the defendant received a full and frank disclosure of the relevant attributes of the plaintiff's pension, including its value and vesting status, and, under the circumstances here, the plaintiff was not obligated to make any additional financial disclosures prior to the subject modification.

3. This court found unpersuasive the defendant's claim that her fraud claim alleged a fraud on the court, as such claims in marital dissolution cases are limited to situations in which both parties have joined to conceal material information from the trial court, and the record here disclosed no such evidence.

Argued December 5, 2016—officially released June 13, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Lenehy*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' stipulation agreement; thereafter, the court, *Resha*, *J.*, modified the judgment in accordance with the parties' stipulation; subsequently, the court, *Hon. Lloyd Cutsumpas*, judge trial referee, denied the defendant's motions to vacate and for attorney's fees, and the defendant appealed to this court, which reversed in part and vacated in part the trial court's judgment and remanded the case with direction to grant the defendant's second motion to vacate; thereafter, the plaintiff, on the granting of certification, appealed to the Supreme Court, which reversed in part and vacated in part this court's judgment, and remanded the case to this court with direction to affirm

the judgment of the trial court denying the defendant's motion to vacate alleging lack of subject matter jurisdiction, and to consider the defendant's remaining claims on appeal. *Affirmed.*

C. Michael Budlong, with whom was *Brandon B. Fontaine*, for the appellant (defendant).

William J. Ward, for the appellee (plaintiff).

Opinion

FLYNN, J. A party seeking to open a judgment beyond the passage of the four month limitation period from its rendering provided by General Statutes § 52-212a under an exception for judgments procured by fraud, bears the burden of proving fraud in all of its elements by clear and convincing evidence. At the heart of this appeal is whether the defendant, Donna M. Sousa, proved by clear and convincing evidence that the plaintiff, Eric P. Sousa, knew that the $32,698.82 he valued his pension at when the parties were divorced in 2001 was incorrect. The trial court found that the defendant failed to carry this burden. We affirm that judgment.

We first turn to the procedural history of this case, which explains how it is again before us. This appeal, which stems from a judgment modifying a prior judgment dissolving the marriage of the plaintiff and the defendant has returned to us on remand from our Supreme Court. In *Sousa* v. *Sousa*, 157 Conn. App. 587, 590, 116 A.3d 865 (2015), rev'd, 322 Conn. 757, 143 A.3d 578 (2016), this court held that the trial court, *Hon. Lloyd Cutsumpas*, judge trial referee, improperly denied the defendant's motion to vacate for lack of subject matter jurisdiction a judgment rendered by the trial court, *Resha, J.*, in accordance with a stipulation by the parties, modifying the provision of the judgment of dissolution that divided the plaintiff's pension benefits equally between the parties. Our Supreme Court

reversed that decision and remanded the case to us with direction to consider the defendant's remaining claims on appeal. *Sousa* v. *Sousa*, 322 Conn. 757, 790, 143 A.3d 578 (2016).

We next turn to the record, which discloses the following facts, which were either found by Judge Cutsumpas or are undisputed for purposes of this appeal, and procedural history. In November, 2000, after approximately fourteen years of marriage, the plaintiff filed a complaint seeking to dissolve his marriage to the defendant on the ground of irretrievable breakdown. Both parties were represented by counsel throughout the uncontested dissolution proceedings. The plaintiff, who had been employed for fourteen years as a police officer with the Naugatuck Police Department (department), filed a financial affidavit on December 18, 2000, setting forth his financial assets and expenses. Under the "deferred compensation plans" category, the plaintiff wrote "borough pension—value undetermined." Soon thereafter, the plaintiff received a document from the department indicating that, as of April 21, 2001, he had contributed $32,698.82 to the department's pension plan. Consistent with that document, the plaintiff filed a second financial affidavit on November 21, 2001, stating that his pension was valued as of April 21, 2001, at $32,698.82.

The parties were divorced on December 19, 2001. They executed a separation agreement that provided, inter alia, that the plaintiff's pension benefits would be divided equally between the parties pursuant to a qualified domestic relations order (QDRO). The separation agreement further required the plaintiff to pay periodic alimony of $130 per week for five years or until the defendant began cohabitating with another individual.

On January 3, 2002, in the course of preparing the QDRO, the defendant's counsel, Kenneth Potash,

obtained the document listing the plaintiff's contributions to the pension, fund as well as a four page document entitled "Appendix A—Pension Fund" (appendix), which set forth, inter alia, the pension plan's vesting requirements and the various formulae for calculating department employees' benefits. Section 10 of the appendix provides that department employees such as the plaintiff who have been continuously employed by the department for ten years are entitled, upon reaching retirement age, to an annual pension benefit calculated based on their earnings and years of service.[1] Attorney Potash provided the defendant with a copy of the appendix prior to completing the QDRO, although she may not have read it. Nevertheless, the defendant was aware at the time of the divorce that the plaintiff's pension was based upon his years of service and earnings.

The QDRO was executed and filed with the court on May 17, 2002. It provided that the defendant shall receive a 50 percent interest in the "marital portion" of the plaintiff's pension, with the marital period running from the date of the marriage on December 20, 1985, to the date of dissolution on December 19, 2001.

In 2003, approximately two years after the divorce, the plaintiff learned that the defendant had begun cohabitating with another individual. The plaintiff telephoned the defendant and informed her of his intention

[1] Specifically, § 10 of the appendix provides in relevant part: "Each employee who terminates his employment prior to normal retirement shall acquire a vested interest in his/her pension benefits provided that said employee has at least ten (10) continuous years of employment as a full-time employee with the Borough during which period said employee contributed toward the pension plan. Said employee shall be paid a pension benefit equal to two percent (2%) of his final three (3) years average base salary multiplied by his years of credited service. Said pension benefits shall begin when the employee reaches the retirement age referred to in the agreement and said benefit shall be limited to a maximum of sixty percent (60%) of the final three (3) year average base salary."

to seek a court order terminating the alimony payments. Sometime later, after referring to the separation agreement, the defendant acknowledged that her cohabitation provided grounds for termination of the alimony. She informed the plaintiff, however, that she needed the alimony payments to finish her education and obtain a teaching degree, higher income, and pension benefits of her own. Accordingly, the defendant offered to relinquish her 50 percent interest in the plaintiff's pension in exchange for three additional years of alimony. The plaintiff agreed and continued to make weekly alimony payments. Neither party reduced the agreement to writing at that time or sought a modification of the original judgment of dissolution.

Three years later, the plaintiff completed the additional alimony payments pursuant to his oral agreement with the defendant. The plaintiff then filed a motion to modify the judgment of dissolution, seeking to have his full pension returned to him. As the parties agreed, the plaintiff's counsel prepared the motion and accompanying stipulation, which was executed by the parties and submitted to the court for approval. The parties appeared before Judge Resha on January 2, 2007. The plaintiff was represented by counsel, and the defendant was then a self-represented litigant. Judge Resha asked the defendant if she had reviewed the terms of the stipulation with a family relations officer, and the defendant answered in the affirmative. After reading the stipulation into the record, Judge Resha asked the defendant to explain why she was entering into an agreement waiving her interest in the plaintiff's pension. The defendant admitted that, three years earlier, it was her idea to enter into an oral agreement with the plaintiff whereby she would relinquish her rights in the pension in exchange for additional alimony payments. The defendant also indicated that she understood that she could not regain her interest in the pension once she

waived it, and that she was comfortable entering into the agreement without the benefit of counsel. Judge Resha found that the stipulation was warranted, accepted it, and made it a final order of the court. No appeal was taken.

The plaintiff ultimately retired in October, 2007, after undergoing spinal fusion surgery in late 2006 to remedy a work related injury that rendered him unable to perform his duties. Thereafter, the plaintiff began receiving an annual pension benefit of $43,992.80.[2]

On March 31, 2011—four years after the 2007 modification of the dissolution judgment and nearly a decade after the plaintiff filed his November 21, 2001 financial affidavit—the defendant filed a motion to open and vacate the modification, asserting that the plaintiff had secured the modification through fraud. Specifically, the defendant claimed that the plaintiff had fraudulently undervalued his pension in the financial affidavit by listing only the value of his contribution—$32,698.82. The defendant further argued that, had the plaintiff disclosed the full value of his pension, there was a substantial likelihood that Judge Resha would have rejected the proposed modification as inequitable. A few months later, the defendant filed a second motion to vacate the modification, this time asserting that Judge Resha lacked subject matter jurisdiction to enter the modification.

Judge Cutsumpas held an evidentiary hearing on the motions on January 14, 2014. On February 25, 2014, Judge Cutsumpas issued a memorandum of decision denying both motions. In denying the defendant's first

[2] As a result of his disability, the plaintiff's pension benefits were calculated under § 9 of the appendix, which provides that employees with at least ten years of service who become unable to perform their duties, and who obtain certification from three physicians, "may be retired on a monthly allotment equal to one-half (1/2) of the average monthly pay received by him during the three (3) years immediately preceding the time of his retirement."

motion, Judge Cutsumpas found that the defendant failed to prove the prima facie elements of fraud with clear and convincing evidence. First, noting that the defendant failed to present actuarial evidence establishing the value of the plaintiff's pension at the time he filed his 2001 financial affidavit, Judge Cutsumpas found that the defendant failed to prove that the listed amount of $32,698.82 was inaccurate. Second, Judge Cutsumpas found that, even if the plaintiff had misstated the value of his pension, the defendant failed to prove that he did so knowingly. Finally, Judge Cutsumpas found that the defendant adduced "no evidence whatsoever" that, had she known the full value of the plaintiff's pension, the result of a new hearing would have been different.[3] As to the defendant's second motion to vacate, Judge Cutsumpas rejected the argument that Judge Resha lacked subject matter jurisdiction to modify the judgment of dissolution.

In her appeal to this court, the defendant challenged Judge Cutsumpas' denial of her two motions to vacate. Because we agreed with the defendant that Judge Resha lacked subject matter jurisdiction to modify the judgment of dissolution and, therefore, that Judge Cutsumpas had improperly denied her second motion to vacate, we did not reach the merits of the defendant's challenge to Judge Cutsumpas' denial of her first motion to vacate, which asserted fraud. See *Sousa* v. *Sousa*, supra, 157 Conn. App. 601. Instead, we vacated the judgment denying the defendant's first motion because it had been

[3] Judge Cutsumpas also noted that "some of the defendant's testimony" at the January 14, 2014 evidentiary hearing "was conflicting and lacked credibility," but he did not specify which portions of the defendant's testimony lacked credibility. Additionally, after noting that the doctrine of laches precludes a finding of fraud, Judge Cutsumpas stated—in passing and without making any explicit factual finding—that, "while laches was not specifically pleaded, it is worthy of note that approximately four years passed after the parties entered into the stipulation which the defendant now claims was the product of fraud." Neither party attempted to clarify these vague statements by filing a motion for articulation.

rendered without subject matter jurisdiction and, thus, was void. See id. Our Supreme Court, concluding that it was not "entirely obvious" that Judge Resha lacked subject matter jurisdiction to modify the judgment of dissolution, and that principles of finality of judgments did not support permitting the defendant to collaterally attack the modified judgment, reversed our decision and remanded the case to us with instructions to consider the defendant's remaining claim, which challenges Judge Cutsumpas' denial of her first motion to vacate on the basis of fraud. See *Sousa* v. *Sousa*, supra, 322 Conn. 790. The parties, pursuant to this court's instruction, filed supplemental briefs addressing the remaining issue of fraud in light of the Supreme Court's decision.

The defendant claims that Judge Cutsumpas improperly found that she failed to prove by clear and convincing evidence that the plaintiff obtained her stipulation, and thus the 2007 modification, by fraudulently undervaluing his pension in his 2001 financial affidavit. The defendant has not been consistent throughout these proceedings regarding the theory underlying her claim of fraud. First, the defendant argues in her appellate briefs that undisputed evidence adduced at the January 14, 2014 evidentiary hearing established that the plaintiff committed fraud by misrepresentation—that is, in 2001 he listed the value of his contribution to the pension fund despite knowing that he was entitled to benefits upon retirement that were far more substantial than his mere contribution. Second, the defendant contends that the plaintiff committed fraud by nondisclosure in that he violated his "full and frank disclosure" obligations by failing to disclose the full value of his pension in his 2001 affidavit or at any time prior to the 2007 modification. Finally, the defendant suggested during oral argument before this court that the plaintiff's conduct amounted to "fraud on the court." We find none of these arguments persuasive.

We first set forth our standard of review and the legal principles that are germane to our discussion. "Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005).

"Pursuant to General Statutes § 52-212a, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed . . . . An exception to the four month limitation applies, however, if a party can show, inter alia, that the judgment was obtained by fraud." (Internal quotation marks omitted.) *Zilka* v. *Zilka*, 159 Conn. App. 167, 174, 123 A.3d 439 (2015).

"Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed . . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . A marital judgment based upon a stipulation may be opened if the stipulation, and thus the judgment, was obtained by fraud.

. . . A court's determinations as to the elements of fraud are findings of fact that we will not disturb unless they are clearly erroneous. . . .

"There are three limitations on a court's ability to grant relief from a dissolution judgment secured by fraud: (1) there must have been no laches or unreasonable delay by the injured party after the fraud was discovered; (2) there must be clear proof of the fraud; and (3) there is a [reasonable probability] that the result of the new trial will be different. . . .

"To determine whether there was proof of fraud, we consider the evidence through the lens of our well settled policy regarding full and frank disclosure in marital dissolution actions. Our [rules of practice have] long required that at the time a dissolution of marriage, legal separation or annulment action is claimed for a hearing, the moving party shall file a sworn statement . . . of current income, expenses, assets and liabilities, and pertinent records of employment, gross earnings, gross wages and all other income. . . . The opposing party is required to file a similar affidavit at least three days before the date of the hearing . . . .

"Our cases have uniformly emphasized the need for full and frank disclosure in that affidavit. A court is entitled to rely upon the truth and accuracy of sworn statements required by . . . the [rules of practice], and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding. . . . These sworn statements have great significance in domestic disputes in that they serve to facilitate the process and avoid the necessity of testimony in public by persons still married to each other regarding the circumstances of their formerly private existence." (Citation omitted; internal quotation marks omitted.) *Weinstein* v. *Weinstein*, supra, 275 Conn. 685–86.

"[T]he principle of full and frank disclosure . . . is essential to our strong policy that the private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine. . . . That goal requires, in turn, that reasonable settlements have been knowingly agreed upon. . . . Our support of that goal will be effective only if we instill confidence in marital litigants that we require, as a concomitant of the settlement process, such full and frank disclosure from both sides, for then they will be more willing to [forgo] their combat and to settle their dispute privately, secure in the knowledge that they have all the essential information. . . . This principle will, in turn, decrease the need for extensive discovery, and will thereby help to preserve a greater measure of the often sorely tried marital assets for the support of all of the family members." (Citations omitted; internal quotation marks omitted.) *Billington* v. *Billington*, 220 Conn. 212, 221–22, 595 A.2d 1377 (1991).

I

We begin with the defendant's claim that the plaintiff fraudulently misrepresented the value of his pension in his 2001 financial affidavit. The defendant contends that Judge Cutsumpas erroneously concluded that she failed to prove with clear and convincing evidence that the plaintiff valued his pension at $32,698.82 with the knowledge that he was entitled to benefits far exceeding that amount. We disagree. We conclude that Judge Cutsumpas' finding that the defendant failed to present clear and convincing evidence that the plaintiff knew the disclosed value was of his pension inaccurate was not clearly erroneous. Moreover, we conclude that Judge Cutsumpas did not clearly err in finding that the defendant failed to proffer clear proof that, had the plaintiff disclosed the "full" value of his pension, the

outcome of a new proceeding would have been different.[4]

As a preliminary matter, we note that Judge Cutsumpas' conclusions with respect to the elements of fraud constitute findings of fact; see *Weinstein* v. *Weinstein*, supra, 275 Conn. 685; to which we must accord substantial deference. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *State* v. *Michael J.*, 274 Conn. 321, 346, 875 A.2d 510 (2005). We determine whether factual findings are clearly erroneous "in light of the evidence in the whole record. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . [O]n review by this court every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Jeisean M.*, 270 Conn. 382, 397, 852 A.2d 643 (2004).

We begin with Judge Cutsumpas' finding that the defendant failed to prove with clear and convincing evidence that the plaintiff knew that the amount he listed in his 2001 financial affidavit was inaccurate. Contrary to the defendant's claim on appeal, this finding is amply support by the record and, thus, not clearly erroneous. The plaintiff's financial affidavit, filed in connection with the dissolution proceedings on November

[4] As previously stated, Judge Cutsumpas further found that the defendant failed as a threshold matter to prove that the $32,698.82 value listed in the plaintiff's financial affidavit was inaccurate. Because the defendant failed to demonstrate other necessary elements of her fraud claim, we need not address whether this finding was clearly erroneous.

21, 2001, stated that his pension was worth $32,698.82 as of April 21, 2001. That value reflected the total amount that the plaintiff had contributed from his salary to the pension fund until that time. Although, as the defendant argues, the plaintiff was entitled when he filed his affidavit to an annual pension benefit calculated based upon his salary and years of service under § 10 of the appendix, rather than to a mere refund of his contribution, the plaintiff repeatedly testified that, in his understanding, $32,698.82 reflected the benefit he would have been entitled to had he retired on the date he filed the affidavit. Additionally, although the plaintiff admitted that he knew when filing his affidavit that his benefits were "vested,"[5] there was no evidence that he understood the *significance* of the fact that his benefits were vested. To the contrary, the plaintiff testified that the value of his contribution to the fund was "all [he] was entitled to" and that, although his benefits were vested, he "did not know" whether that entitled him to more than his contribution. In light of this evidence, Judge Cutsumpas reasonably could have found that the plaintiff was unaware that his contribution amount did not reflect an accurate valuation of his pension, and we are not left with a definite and firm conviction that a mistake has been made. Therefore, regardless of whether the plaintiff incorrectly listed his contribution amount, rather than the actuarial value as calculated under § 10 of the appendix, the defendant's fraud claim fails because she failed to demonstrate that the plaintiff did so knowingly. See, e.g., *Terry* v. *Terry*, 102 Conn. App. 215, 227, 925 A.2d 375, cert. denied, 284 Conn. 911, 931 A.2d 934 (2007).

[5] "Vested" pension benefits are "pension interests in which an employee has an irrevocable . . . right, in the future, to receive his or her account balance (under a defined contribution plan), or his or her accrued benefit (under a defined benefit plan), regardless of whether the [employment] relationship continues." (Internal quotation marks omitted.) *Krafick* v. *Krafick*, 234 Conn. 783, 788 n.12, 663 A.2d 365 (1995).

The defendant relies on *Weinstein* v. *Weinstein*, supra, 275 Conn. 685, for the proposition that "[m]isrepresentations of this magnitude cannot be attributed to mistake or miscalculation," but, rather, overwhelmingly evince the plaintiff's knowledge of the misrepresentation and intent to deceive. In *Weinstein*, the defendant stated in his financial affidavit that his interest in his company was worth $40,000 and, two months later, rejected a $2.5 million offer to purchase the company—which would have netted him $500,000 for his interest—because he thought it was too low. *Weinstein* v. *Weinstein*, supra, 688. Our Supreme Court held that the trial court clearly erred in finding that the plaintiff failed to prove that the defendant had knowingly misrepresented the value of his interest, reasoning that the $2.5 million offer served as an "independent appraisal" of the company's worth, and that the "huge disparity" between that value and the defendant's valuation "*compel*[*led*] the conclusion that the defendant knew the company and his interest therein were worth more during the dissolution trial." (Emphasis in original.) Id., 693.

We find the defendant's argument and reliance on *Weinstein* unpersuasive. Unlike in *Weinstein*, we cannot assess the "disparity" of the alleged misrepresentation because, as Judge Cutsumpas observed, the defendant failed to present actuarial evidence establishing the value of the plaintiff's pension at the time he filed his financial affidavit in November, 2001. It was the defendant's burden, as the party asserting fraud, to prove the value of the pension by clear and convincing evidence. "The task of properly valuing pension benefits is complex because such benefits may be defeasible by the death of the employee [spouse] before retirement and the amount of benefits ultimately received depends upon a number of factors that remain uncertain until actual retirement." *Krafick* v. *Krafick*, 234 Conn. 783, 799, 663 A.2d 365 (1995). "It is true that the exact amount

of the [pension] benefits to be received often will depend upon whether the employee [spouse] survives his retirement age, how long he lives after retirement and what his compensation level is during his remaining years of service. But these contingencies are susceptible to reasonably accurate quantification. . . . The present value of a pension benefit may be arrived at by using generally actuarial principles to discount for mortality, interest and the probability of the employee remaining with the employer until retirement age." (Citation omitted.) *Thompson* v. *Thompson*, 183 Conn. 96, 100–101, 438 A.2d 839 (1981).

When the plaintiff filed his affidavit in 2001, he was employed by the department and in his mid-thirties, several years short of the retirement age. Thus, the value of the plaintiff's pension under § 10 of the appendix depended on a number of uncertainties—whether he survived retirement age, his overall life expectancy, and his base salary during his last years of service—and the defendant failed to account for these uncertainties with actuarial evidence. Accordingly, there is no concrete basis for determining the pension's value in 2001, and, thus, the disparity between that value and the listed value of $32,698.82. Furthermore, although the defendant emphasizes in her appellate briefs that the plaintiff has received an annual pension benefit of $43,992.80 since retiring in October, 2007, the plaintiff's current benefits are no reliable indication of the pension's value in 2001 when the plaintiff filed the financial affidavit. The plaintiff's current benefits were determined under § 9 of the appendix, under which he became eligible as a result of remedial work related spinal fusion surgery he underwent in late 2006 that rendered him unable to perform his duties. At the time of his 2001 affidavit, however, the plaintiff qualified only under § 10, which calculates annual benefits under a different formula than § 9. See footnotes 1 and 2 of this opinion. Moreover,

the plaintiff's current benefits were determined based upon a base salary that presumably increased from between 2001 and his 2007 retirement, as well as additional, postcoverture contributions that the plaintiff had made to the pension fund since the 2001 divorce. Put simply, although the defendant contests the accuracy of the value listed in the plaintiff's financial affidavit, she has failed to present evidence establishing what the correct value was. Accordingly, her argument that the plaintiff's knowledge of the misrepresentation is inferable from the "magnitude" of the difference between the disclosed value of $32,698.82 and the actual value of the pension lacks merit.

Although the defendant's failure to establish the plaintiff's knowledge of the alleged misrepresentation is dispositive of the defendant's fraud claim, we further conclude that Judge Cutsumpas did not clearly err in finding that the defendant failed to demonstrate a substantial likelihood that, had the plaintiff disclosed the full value of his pension in his 2001 affidavit, as the defendant claims, the result of a new proceeding would be different. See *Weinstein* v. *Weinstein*, supra, 275 Conn. 671; see also A. Rutkin et al., 8A Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 52:7, p. 318 ("[o]ne must . . . be able to prove that the outcome of a new trial, untainted by the fraud, is likely to be different"). We begin by noting that the January 2, 2007 hearing, at which Judge Resha accepted the parties' stipulated modification of the pension award in the original judgment of dissolution, would never have occurred in the first place had the defendant not offered to relinquish her rights in the plaintiff's pension in exchange for additional alimony payments. Thus, in analyzing whether the defendant proved that the alleged fraud tainted the outcome of the proceeding, our inquiry focuses on the whether the defendant's decision to enter into the agreement with

the plaintiff was impacted by the purported misrepresentation, and whether a "full" disclosure of the value of the pension would have prompted Judge Resha to reject the modification as inequitable.

Our review of the record discloses no evidence suggesting that the plaintiff's disclosure of $32,698.82, rather than some greater amount, in his financial affidavit impacted the defendant's decision to exchange her interest in the plaintiff's pension for additional alimony. Significantly, we can merely speculate about the probable impact that a "full" disclosure would have had on the defendant's thinking because, as previously explained, the defendant has failed to establish the actuarial value of the pension. Additionally, the defendant's testimony reflects that her determination that it was worthwhile to give up her pension interest was based not on the value disclosed in the plaintiff's financial affidavit, but on her need for the additional alimony payments in order to complete her degree and to obtain employment, higher income, and pension benefits of her own. Finally, the defendant conceded that Attorney Potash provided her with the appendix containing the formulae for calculating pension benefits before she initiated the exchange,[6] and that, at the time of the divorce, she believed, the plaintiff's pension was based upon his years of service and earnings. Thus, even if we were to assume that the plaintiff fraudulently listed only the value of his pension contribution in the financial affidavit, the defendant has failed to present clear

[6] We also note Attorney Potash's testimony that he received the appendix on January 3, 2002. This was nine years before the defendant's motion to open. Receipt of this information by Attorney Potash is the functional equivalent of receipt by the defendant. "[N]otice to, or knowledge of, an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal. . . . An attorney is the client's agent and his knowledge is imputed to the client." (Citations omitted; internal quotation marks omitted.) *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 201, 75 A.3d 68 (2013).

and convincing evidence that the fraud impacted her decision to enter into the stipulation.

Nor does the record suggest that there is a substantial probability that Judge Resha would have rejected the modification had he known that the plaintiff inaccurately valued his pension in his 2001 financial affidavit. At no point during the modification hearing did the defendant mention the plaintiff's financial affidavit or suggest that she had relied on the representations therein. During her colloquy with Judge Resha, the defendant stated that the exchange was her idea in order to continue receiving alimony payments despite her cohabitation, that she understood that the modification of the judgment of dissolution could not be undone, and that she was comfortable entering into the agreement without the benefit of an attorney. Critically, moreover, the defendant admitted that, by that time, the plaintiff had completed the three additional years of alimony and, thus, that she had already received the benefit of her bargain. On the basis of this record, we conclude that Judge Cutsumpas did not clearly err in finding that the defendant failed to demonstrate a substantial likelihood that, but for the plaintiff's purported fraudulent conduct, the result of a new modification hearing would have been different.

II

The defendant next claims that Judge Cutsumpas clearly erred in finding that she failed to prove with clear and convincing evidence that the plaintiff committed fraud by nondisclosure. Specifically, the defendant argues that the plaintiff violated his full and frank disclosure obligations by listing only the value of his contribution in his financial affidavit. The defendant further contends that, even if the plaintiff genuinely believed

that his pension was worth $32,698.82 in 2001, he committed fraud by nondisclosure by failing to file a corrected or updated affidavit prior to the 2007 modification.[7] We are not persuaded.

"Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment. . . . In a marital dissolution case, the requirement of a duty to speak is imposed by Practice Book § [25-30], requiring the exchange and filing of financial affidavits . . . and by the nature of the marital relationship." (Citations omitted.) *Gelinas* v. *Gelinas*, 10 Conn. App. 167, 173, 522 A.2d 295, cert. denied, 204 Conn. 802, 525 A.2d 965 (1987).

We first reject the defendant's argument that the plaintiff committed fraud by nondisclosure by disclosing only the value of his contribution in his financial affidavit. Fraud by nondisclosure involves the failure to make a full and fair disclosure of *known facts* and, as explained in part I of this opinion, Judge Cutsumpas properly found that the defendant failed to present clear and convincing evidence that the plaintiff *knew* he was entitled to more than his contribution amount. Thus, the defendant failed to prove that the plaintiff "deliberately conceal[ed] or purposely mislead" her regarding the value of his pension. *Pospisil* v. *Pospisil*, 59 Conn. App.

[7] Although the defendant argues that the plaintiff's fraudulent nondisclosure "presents an example of continuing fraud" that began in 2001 at the time of the dissolution and extended until the 2007 modification, she clarified at oral argument before this court that she is not seeking to open the judgment of dissolution on the basis of fraud, only the modification.

446, 451, 757 A.2d 665, cert. denied, 254 Conn. 940, 761 A.2d 762 (2000); see also 8A A. Rutkin et al., supra, § 52:7, p. 320 ("[g]enerally, one has the obligation to disclose only 'known facts' ").

In any case, the record reveals that the defendant received a full and frank disclosure. Attorney Potash, and thus the defendant, received the appendix and document listing the plaintiff's contributions in early 2002, *before* the defendant proposed to exchange her pension rights for additional alimony. See footnote 6 of this opinion. Additionally, the appendix is only four pages long and spells out, in clear, concise, and explicit language, the requirements for obtaining vested status and the various formulae for calculating the present value of department employees' pension benefits. Therefore, unlike the cases holding that the disclosure of assets through vague references or mass documentation does not constitute full and frank disclosure; see *Weinstein* v. *Weinstein*, supra, 275 Conn. 690 n.12; *Jackson* v. *Jackson*, 2 Conn. App. 179, 191, 478 A.2d 1026, cert. denied, 194 Conn. 805, 482 A.2d 710 (1984); the defendant had been provided, through her attorney, with clear notice of the relevant attributes of the plaintiff's pension, including its value and vesting status, all the information she needed to determine years later whether to relinquish her 50 percent interest in the pension in exchange for three additional years of alimony payments.[8]

[8] We are not suggesting that the defendant's fraud claim fails because of a failure on her part to exercise due diligence. Our Supreme Court eliminated the due diligence requirement in fraud actions, reasoning that "the requirement of diligence in discovering fraud is inconsistent with the requirement of full disclosure because it imposes on the innocent injured party the duty to discover that which the wrongdoer already is legally obligated to disclose." *Billington* v. *Billington*, supra, 220 Conn. 220. Our analysis turns not on the defendant's failure to discover the information about the plaintiff's pension, but on the fact that she had received an adequate disclosure years prior to her initiation of her proposal to relinquish her rights in the pension in exchange for three additional years of alimony, which might have otherwise been ordered terminated.

Finally, citing *Weinstein* v. *Weinstein*, supra, 275 Conn. 671, the defendant asserts that the plaintiff's duty to disclose the pertinent details of his pension extended until Judge Resha entered the modification on January 2, 2007, and the plaintiff committed fraud by failing to file an updated or corrected financial affidavit prior to that time. Our Supreme Court observed in *Weinstein* that, because the value of parties' assets must be determined at the time of the dissolution, "the duty to update pertinent discovery responses and to disclose facts relevant to that determination necessarily must extend until the judgment is rendered. . . . Thus . . . the duty to disclose continued until the judgment of dissolution was final." (Citations omitted; internal quotation marks omitted.) Id., 697–98. The court further observed that, where a motion for reconsideration is filed, the finality of the judgment is suspended until the motion is acted upon. Id., 699–700. Finally, the court held that, "[i]n imploring the dissolution court [at the hearing on the motion for reconsideration] to reduce his financial obligations to the plaintiff, the defendant necessarily reignited his duty to disclose fully and frankly any new financial information because such information was directly pertinent and material to the very issue the defendant was asking the court to reconsider." (Emphasis omitted.) Id., 701.

We disagree that the plaintiff committed fraud by failing to file an updated financial affidavit prior to the 2007 modification. The judgment of dissolution became final in 2001, cutting off the plaintiff's obligation to continue to disclose financial information pertinent to the dissolution proceedings. The defendant never asked the plaintiff to file an updated financial affidavit prior to entering into the oral agreement or at any time leading up to the modification. Furthermore, unlike in *Weinstein*, the plaintiff did not "reignite" his duty to disclose additional financial information because, as

the defendant readily admitted, she was the one who proposed the exchange of her pension rights for additional alimony because she needed the alimony to continue her education and to obtain better employment and benefits. Although the plaintiff prepared the stipulation and filed the motion to modify the judgment of dissolution, he took those measures only after completing his three additional years of alimony payments in accordance with his agreement with the defendant. The defendant initiated this deal with the plaintiff, not the other way around. Accordingly, we conclude that, under these circumstances, the plaintiff was not obligated to make additional financial disclosures prior to the modification.

III

Finally, the defendant stated during oral argument before this court that her fraud claim is in the nature of "fraud on the court." Although the defendant does not utilize that term in her briefs, she does cite to *Billington* v. *Billington*, supra, 220 Conn. 222, which discusses the doctrine. In that case, our Supreme Court limited claims of fraud on the court in the marital litigation context "to situations where *both* parties join to conceal material information from the court." (Emphasis added.) Id., 225. In the present case, the record discloses no evidence that both parties joined to conceal information from Judge Resha. Indeed, any such claim would be antithetical to the defendant's central claim that she was induced into entering into the modification agreement by the plaintiff's fraud. Accordingly, the doctrine of fraud on the court is wholly inapposite.

The judgment is affirmed.

In this opinion the other judges concurred.

TIMOTHY TOWNSEND, JR. *v.* ANITA HARDY ET AL.
(AC 38262)

DiPentima, C. J., and Sheldon and Harper, Js.

Syllabus

The plaintiff, an inmate in a correctional institution, sought to recover damages, pursuant to the applicable federal law (42 U.S.C. § 1983), from the defendant prison officials, H and R, in their individual capacities, for the alleged violation of his constitutional rights. The plaintiff had alleged that he was sexually harassed on two separate occasions by R, who was a correction officer, and he filed a complaint regarding those allegations with H, a captain at the correctional institution. The plaintiff further alleged that, approximately two weeks later, he was threatened by R, and he filed another complaint with H regarding the alleged threat, claiming that he feared for his safety. The plaintiff claimed that R had threatened him in retaliation for filing the sexual harassment complaint. Subsequently, the plaintiff was moved to a restrictive housing unit while H investigated the plaintiff's complaints. While in the restrictive housing unit, the plaintiff reported R's conduct to the state police. After the plaintiff spent approximately two weeks in the restrictive housing unit, H informed him that his claims against R could not be substantiated, and he was thus transferred from restrictive housing. Three days later, the plaintiff was transferred back to the restrictive housing unit after refusing to sign a document from H stating that he no longer feared for his safety. The plaintiff alleged that H had transferred him to the restrictive housing unit in retaliation for contacting the state police regarding his claims against R. In his complaint, the plaintiff sought compensatory damages from both H and R for violating his constitutional rights. Subsequently, the trial court granted the defendants' motion for summary judgment and rendered judgment thereon, concluding that none of the plaintiff's allegations rose to the level of constitutional violations, and the plaintiff appealed to this court. *Held*:

1. The trial court did not err in rendering judgment as a matter of law in favor of R on the plaintiff's claim of sexual harassment: even if the alleged statements by R satisfied the first, subjective, element of a prisoner's eighth amendment claim for protection from cruel and unusual punishment in that R acted with the sexual motivation as alleged by the plaintiff, R's statements did not satisfy the second, objective element of being objectively harmful, as this court could not conclude that they were repugnant to the conscience of mankind, and, therefore, the statements were not sufficiently serious to reach constitutional dimensions.

2. The plaintiff could not prevail on his claim that the trial court erred in rendering summary judgment in favor of the defendants on the plaintiff's claims relating to the defendants' allegedly retaliatory conduct after the plaintiff filed his complaint for sexual harassment against R and reported R's conduct to the state police, as the plaintiff's claims were de minimis: a first amendment retaliation claim under 42 U.S.C. § 1983 requires that a prisoner establish that a defendant took adverse action against him, and the prisoner must demonstrate that the alleged retaliatory conduct would deter a similarly situated individual of ordinary firmness from exercising his constitutional rights, and the plaintiff's retaliation claim here against R failed, as a matter of law, because R's threat, that the plaintiff's "life [was] going to be short lived in the block," even if construed as a threat to the plaintiff's physical safety, was not sufficient, in isolation, to have deterred a similarly situated inmate from exercising his constitutional rights; moreover, the plaintiff's retaliation claim against H failed, as a matter of law, because it was the deputy warden of the prison, not H, who ordered that the plaintiff be remanded to the restrictive housing unit when he refused to sign the document stating that he no longer feared for his safety, and because the placement in restrictive housing for three days, out of the reach of the individual the plaintiff allegedly feared, would not deter a similarly situated inmate from exercising his constitutional rights.

Argued February 16—officially released June 13, 2017

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's federal constitutional rights, brought to the Superior Court in the judicial district of New Haven, where the court, *Frechette*, *J.*, denied the defendants' motion to dismiss; thereafter, the court, *Nazzaro*, *J.*, granted in part the defendants' motion to strike; subsequently, the court, *Blue*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the court, *Blue*, *J.*, denied the plaintiff's motion to reargue, and the plaintiff appealed to this court; subsequently, the court, *Blue*, *J.*, issued an articulation of its decision. *Affirmed.*

Timothy Townsend, Jr., self-represented, the appellant (plaintiff).

Janelle Medeiros, certified legal intern, with whom were *Steven R. Strom*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Timothy Townsend, Jr., brought this action against two prison officials, the defendants, Anita Hardy and John Riccio, pursuant to 42 U.S.C. § 1983,[1] claiming that they had violated his constitutional rights while he was confined at the Cheshire Correctional Institution. The plaintiff claims that the trial court erred in rendering summary judgment in favor of the defendants on the ground that none of their alleged misconduct rose to the level of a constitutional violation. We affirm the judgment of the trial court.

In his amended complaint dated October 24, 2012, the plaintiff alleged the following facts, which the defendants did not dispute for purposes of the court's consideration of their motion for summary judgment. At all times relevant to the plaintiff's allegations, he was an inmate at the Cheshire Correctional Institution, where Riccio was a correction officer and Hardy was a captain. The plaintiff claimed that Riccio sexually harassed him on two occasions. First, on September 25, 2010, Riccio

[1] Title 42 of the United States Code, § 1983, provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

asked the plaintiff if he wanted "some sugar," which, the plaintiff alleged, is slang for a "kiss." Then, on October 3, 2010, Riccio told the plaintiff, "I'm checking on you because I care about you" and "I still genuinely care about you." On October 6, 2010, the plaintiff filed a complaint regarding those two alleged instances of sexual harassment with Hardy.

The plaintiff also alleged that Riccio threatened him when, on October 18, 2010, Riccio told the plaintiff, "Your life is going to be short lived in this block." That same day, the plaintiff filed a complaint with Hardy and other prison officials, alleging that he had been threatened by Riccio, and that he feared for his physical safety. The plaintiff alleged that Riccio had threatened him in retaliation for his filing of a complaint about the aforementioned sexual harassment.

On October 20, 2010, the plaintiff was moved to a restrictive housing unit while Hardy investigated his complaints that Riccio had sexually harassed and threatened him. While in the restrictive housing unit, the plaintiff reported Riccio's conduct to the Connecticut State Police. On November 2, 2010, Hardy explained to the plaintiff that his complaints against Riccio could not be substantiated, and thus the plaintiff was transferred out of the restrictive housing unit. On November 4, 2010, the plaintiff was interviewed by the Connecticut State Police regarding his allegations of sexual harassment and threatening by Riccio.

On November 5, 2010, Hardy told the plaintiff to "sign this statement stating you no longer fear for your safety." The plaintiff refused to do so, and thus was transferred back to the restrictive housing unit, where he remained for three days, until November 8, 2010, when he was released back into the general population with no explanation. The plaintiff alleged that Hardy had transferred him to the restrictive housing unit in

retaliation for contacting the Connecticut State Police regarding his claims against Riccio.

On the basis of the foregoing, the plaintiff claimed that Riccio and Hardy violated his constitutional rights and, pursuant to 42 U.S.C. § 1983, sought compensatory damages from both of them in their individual capacities.

On March 3, 2015, the defendants moved for summary judgment on all of the plaintiff's claims. They argued that, even if the plaintiff's factual allegations against Riccio were true, they were not serious enough to rise to the level of constitutional violations. As for the plaintiff's allegations against Hardy, the defendants argued that they too were de minimis. The defendants also argued that Hardy had no personal involvement in the decision to send the plaintiff to the restrictive housing unit.

On July 1, 2015, the court agreed with the defendants, over the plaintiff's objection, and issued a memorandum of decision rendering summary judgment in their favor. The plaintiff thereafter asked the court to articulate its ruling on the ground that it had failed to address his claimed constitutional violations. On October 6, 2015, the court filed an articulation explaining, inter alia: "The court's July 1, 2015 . . . decision implicitly addresse[d] these claims by following the precedent of the United States Court of Appeals for the Second Circuit holding that claims like the ones presented by the [plaintiff] do not constitute cognizable claims of constitutional violation. To be explicit, however, none of the alleged actions in this case violate the [plaintiff's] rights under any of the constitutional amendments claimed." This appeal followed.

Our standard of review in an appeal from the granting of a motion for summary judgment is plenary. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 781, 105 A.3d 103 (2014).

The plaintiff first claims that the trial court erred in determining that his claim of sexual harassment against Riccio did not rise to the level of a constitutional violation. "[S]exual abuse by a corrections officer can give rise to an Eighth Amendment claim." *Crawford* v. *Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015). "The Eighth Amendment protects prisoners from cruel and unusual punishment by prison officials. . . . To state an Eighth Amendment claim, a prisoner must allege two elements, one subjective and one objective. First, the prisoner must allege that the defendant acted with a subjectively sufficiently culpable state of mind. . . . Second, he must allege that the conduct was objectively harmful enough or sufficiently serious to reach constitutional dimensions. . . . Analysis of the objective prong is context specific . . . and depends upon the claim at issue. . . . Although not every malevolent touch by a prison guard gives rise to a federal cause of action, the Eighth Amendment is offended by conduct that is repugnant to the conscience of mankind. . . . Actions are repugnant to the conscience of mankind if they are incompatible with evolving standards of decency or involve the unnecessary and wanton infliction of pain." (Citations omitted; internal quotation marks omitted.) Id., 256.

Here, the plaintiff's claim of sexual harassment against Riccio is based upon Riccio's statement asking him if he "wanted some sugar" and telling him that he cared about him. Even ascribing to those statements the sexual motivation alleged by the plaintiff, we cannot conclude that they were repugnant to the conscience of mankind. We agree with the trial court's determination that they were not sufficiently serious to reach constitutional dimensions and thus that the court did not err in rendering judgment as a matter of law in favor of Riccio on the claim that was based upon those statements.

The plaintiff also claims that the court erred in rendering summary judgment in favor of the defendants on his claims relating to the allegedly retaliatory conduct of Riccio and Hardy after he filed his complaint for sexual harassment against Riccio. We are not persuaded.

"Although prison officials may not retaliate against prisoners for exercising their constitutional rights . . . claims of retaliation must be examined with skepticism and care because they are prone to abuse because prisoners can claim retaliation for every decision they dislike. . . . Because retaliation claims can be fabricated easily, plaintiffs bear a somewhat heightened burden of proof, and summary judgment [for a defendant] can be granted if the claim appears insubstantial." (Citations omitted; internal quotation marks omitted.) *Aziz Zarif Shabazz* v. *Pico*, 994 F. Supp. 460, 467 (S.D.N.Y. 1998), vacated in part on other grounds, Docket No. 99-0223, 2000 U.S. App. LEXIS 3404 (2d Cir. February 24, 2000) (decision without published opinion, 205 F.3d 1324 [2d Cir. 2000]).

A first amendment retaliation claim under § 1983 requires that a prisoner establish three elements: "(1) that the speech or conduct at issue was protected, (2)

that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." (Internal quotation marks omitted.) *Gill* v. *Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004). "Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation. . . . Otherwise the retaliatory act is simply de minimis and therefore outside the ambit of constitutional protection. . . . In making this determination, the court's inquiry must be tailored to the different circumstances in which retaliation claims arise, bearing in mind that [p]risoners may be required to tolerate more . . . than average citizens, before a [retaliatory] action taken against them is considered adverse." (Citations omitted; internal quotation marks omitted.) *Davis* v. *Goord*, 320 F.3d 346, 353 (2d Cir. 2003), superseded in part by *Davis* v. *Goord*, Docket No. 01-0116, 2003 U.S. App. LEXIS 13030 (2d Cir. February 10, 2003).

The plaintiff claims that Riccio and Hardy retaliated against him for filing a claim against Riccio for sexual harassment and for reporting Riccio to the state police. First, the plaintiff claims that Riccio retaliated against him for filing a sexual harassment claim by threatening, "[y]our life is going to be short lived in this block." Even construed as a threat to the plaintiff's physical safety,[2] it is not likely that that statement, in isolation, would have deterred a similarly situated inmate of ordinary resolve from exercising his constitutional rights.

While Hardy investigated his claims against Riccio, the plaintiff was placed in restrictive housing for his safety. After he spent approximately two weeks in

[2] Riccio filed an affidavit indicating that his statement was not meant as a threat, but, rather, as a comment "that if [the plaintiff] continued to misbehave, he would be transferred out of the unit."

restrictive housing, Hardy told him that his claims against Riccio could not be substantiated and he was thus released from restrictive housing. Three days later, Hardy asked the plaintiff to sign a document stating that he no longer feared for his safety, or else he would be remanded to restrictive housing. When he refused to do so, he was placed back into restrictive housing for three days, allegedly in retaliation for reporting Riccio's conduct to the state police.

The plaintiff's claims against Hardy fail, as a matter of law, for two reasons. First, the record reflects that it was the deputy warden of the prison, not Hardy, who ordered that the plaintiff be remanded to restrictive housing when he refused to sign the document stating that he no longer feared for his safety. Second, the record reflects that it is routine protocol for an inmate to be placed in restrictive housing after the inmate files a complaint against a prison official and expresses fear for his safety. It cannot reasonably be argued that placement in restrictive housing for three days, out of the reach of the individual he allegedly fears, would deter a similarly situated inmate from exercising his constitutional rights.

Because the plaintiff's claims were de minimis, the trial court properly concluded that they did not rise to the level of constitutional violations and, thus, properly rendered summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID W. BURNELL, EXECUTOR (ESTATE OF DONALD B. BURNELL), ET AL. *v.* RONALD CHORCHES, TRUSTEE, ET AL.

(AC 38267)

Sheldon, Keller and Prescott, Js.

Syllabus

The plaintiffs, the executor of the decedent's estate and his attorney, appealed to the trial court from the orders issued by the Probate Court after the defendant bankruptcy trustee objected to the plaintiffs' financial report. The trial court granted the defendant's motion to dismiss the appeal for lack of subject matter jurisdiction on the ground that it was untimely pursuant to the statute (§ 45a-186 [a]) providing that an appeal from a Probate Court order must be filed in the Superior Court within thirty days of when the order was mailed to the parties. Although the plaintiffs delivered the appeal papers to a state marshal within the thirty day appeal period, they filed the appeal in the Superior Court after the appeal period expired. On appeal to this court, the plaintiffs claimed that the trial court improperly granted the defendant's motion to dismiss because they had not received sufficient notice of the probate hearing and, therefore, the probate appeal was timely filed within the twelve month period provided by the statute (§ 45a-187 [a]) pertaining to probate appeals when the appealing party had no notice of the probate hearing and was not present. The plaintiffs also claimed that, even if the thirty day period in § 45a-186 (a) did apply, their probate appeal was saved by the statute (§ 52-593a) providing that a cause of action shall not be lost if process is personally delivered to a state marshal within the time allowed to bring the action and then served within thirty days of delivery. *Held* that the trial court properly dismissed the plaintiffs' probate appeal, as they failed to comply with the plain language of § 45a-186 (a) that they file the appeal within thirty days of when the Probate Court order was mailed: the plaintiffs' probate appeal was not governed by the twelve month appeal period in § 45a-187 (a), as they were present at the probate hearing and, given that they had filed a response to the defendant's objection to the financial report, the plaintiffs had notice that the financial report was the subject of that hearing; furthermore, the plaintiffs' delivery of their appeal papers to a marshal did not save their appeal under § 52-593a, as that statute applies to civil actions, and a probate appeal is not a civil action.

Argued January 13—officially released June 13, 2017

Procedural History

Appeal from the orders of the Probate Court for the district of Northern Fairfield County regarding a financial report filed by the named plaintiff, brought to the Superior Court in the judicial district of Danbury, where the court, *Truglia*, *J.*, granted the named defendant's motion to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiffs' motion to reargue, and the plaintiffs appealed to this court. *Affirmed.*

Stephen L. Savarese, for the appellants (plaintiffs).

Michael S. Schenker, for the appellee (named defendant).

Opinion

SHELDON, J. The plaintiffs, David W. Burnell, individually and as executor of the estate of his father, Donald B. Burnell (decedent), and Stephen Lawrence Savarese, the attorney for David W. Burnell in his capacity as executor, appeal from the judgment of the trial court dismissing this action for lack of subject matter jurisdiction. The plaintiffs brought the action against the defendant bankruptcy trustee Ronald Chorches[1] as an appeal from orders of the Probate Court for the district of Northern Fairfield County stemming from a financial report filed by Burnell in his administration of the decedent's estate. The court granted the defendant's motion to dismiss for lack of subject matter jurisdiction on the ground that the appeal was untimely because it was not filed in the Superior Court within thirty days of the mailing of the Probate Court's decree, as required by General Statutes § 45a-186. We affirm the judgment of the trial court.

[1] Additional heirs or beneficiaries of the decedent's estate are also named as defendants in this action, but have not participated in this appeal. Thus, any reference herein to the defendant refers to Chorches only.

The following factual and procedural history, as set forth by the trial court, is relevant to the plaintiffs' claims on appeal. "On December 11, 2014, the Court of Probate for the Northern District of Fairfield County (Probate Court) issued a notice of hearing for the estate of [the decedent], which provided for a hearing to be held on January 6, 2015. This notice was sent to all persons who had an interest in the estate, including the plaintiffs, David Burnell, individually and as executor of the decedent's estate, and Stephen Savarese, attorney for Burnell as executor. The notice scheduled a hearing '[u]pon the petition for allowance of the final financial report of the fiduciary and an order of distribution of said estate as per petition on file more fully appears.' The hearing took place as scheduled on January 6, 2015. At the hearing, the plaintiffs appeared and were heard. The plaintiffs had advance notice of the defendant's objections to the final account, including his claims of breach of fiduciary duty and payment of excessive counsel fees. The plaintiffs also had advance notice of the Probate Court's intention to address the issue of the defendant's standing . . . . No objection was made by the plaintiffs as to the form of the notice of the hearing prior to, during, or after the hearing; nor did the plaintiffs file a motion for reconsideration, modification, or revocation of the decree with the Probate Court. The court also notes that the plaintiffs' complaint does not claim any defect in the December 11, 2014 notice.

"The Probate Court issued a memorandum of decision, *Egan, J.*, on February 12, 2015, which was then mailed to all interested parties on February 13, 2015. The affidavit filed by Attorney Savarese in opposition to the defendant's motion to dismiss indicates that the plaintiffs received an actual copy of the Probate Court's decision on February 23, 2015. On March 13, 2015, the plaintiffs delivered the original summons and complaint to a state marshal for service of process. The marshal's

return indicates that service was made on the interested parties on March 16, 2015. The summons and complaint commencing this appeal were thereafter filed with the Superior Court on April 2, 2015.

"The defendant's argument is straightforward. The complaint in this probate appeal was not filed with the Superior Court within thirty days of the Probate Court mailing its decision to the parties as required under § 45a-186. The timely filing of a complaint with the Superior Court is a subject matter jurisdictional prerequisite to commencement of a probate appeal. Therefore, according to the defendant, this court is without subject matter jurisdiction to hear this appeal, and the motion to dismiss must be granted.

"The plaintiffs oppose the motion to dismiss on the following grounds. First, the plaintiffs argue that they did not receive sufficient notice of the January 6 hearing. Therefore, instead of being bound by the thirty day limitation of § 45-186 (a), the plaintiffs maintain that they are entitled to rely on the twelve month limitation set forth in General Statutes § 45a-187 and, accordingly, the appeal has been timely commenced. Second, the plaintiffs argue that even if the thirty day limitation applies, they are entitled to the benefit of the savings provision of General Statutes § 52-593a. The plaintiffs maintain that because service of process in this action was delivered to a proper officer within the thirty day appeal period, who then served and returned it within thirty days thereafter, their appeal is timely." (Footnotes omitted.)

The trial court rejected the plaintiffs' arguments in opposition to the defendant's motion, concluded that the plaintiffs had failed to file their appeal of the Probate Court's decree within thirty days of the mailing of the decree, as required under § 45a-186, and thus dismissed

the plaintiffs' action for lack of subject matter jurisdiction on the ground that it was not timely filed. This appeal followed.

On appeal, the plaintiffs challenge the court's dismissal of their action on the same grounds as they raised in the trial court in opposition to the defendant's motion to dismiss. The plaintiffs first claim that, because they did not receive sufficient notice of the probate hearing, the thirty day time limit for filing an appeal under § 45a-186 (a) did not apply to their appeal, but, instead, that their appeal was governed by the twelve month time period set forth in § 45a-187 (a). The plaintiffs also argue that, even if the thirty day time limitation of §45a-186 (a) did apply to their appeal, they complied with that statutory requirement by delivering their appeal papers to the marshal within thirty days of the date on which the Probate Court decree was mailed to them, for service upon the defendants pursuant to § 52-593a.[2] We are not persuaded.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . Whether an issue implicates subject matter jurisdiction is a question of law over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *Heussner* v. *Hayes*, 289 Conn. 795, 802, 961 A.2d 365 (2008).

[2] The plaintiffs also claim that the thirty day time period within which they were required to file their appeal from the Probate Court was tolled by their filing with the Probate Court a motion to reargue and for reconsideration. The plaintiffs have not cited to any legal support for this claim, nor are we aware of any. We further note that the plaintiffs did not file an appeal from the Probate Court's purported denial of their motion to reargue and for reconsideration. It is axiomatic that the plaintiffs' failure to appeal from the Probate Court's denial of their motion to reargue precludes our consideration of it.

The plaintiffs' claims on appeal implicate the provisions of §§ 45a-186, 45a-187 and 52-593a, and thus present issues of statutory construction over which our review is also plenary. General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

"[W]e are . . . mindful of the familiar principle that a court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . The Superior Court, in turn, in passing on an appeal, acts as a court of probate with the same powers and subject to the same limitations. . . . It is also well established that [t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met. . . . Thus, only [w]hen the right to appeal . . . exists and the right has been duly exercised in the manner prescribed by law [does] the Superior Court [have] full jurisdiction over [it] . . . ." (Citations omitted; internal quotation marks omitted.) *Connery* v. *Gieske*, 323 Conn. 377, 390–91, 147 A.3d 94 (2016).

With the foregoing principles in mind, we turn to the language of the statutes under which the plaintiffs claim

that their probate appeal was timely filed. Section 45a-186 (a) provides in relevant part: "Except as provided in sections 45a-187 and 45a-188, any person aggrieved by any order, denial or decree of a Probate Court in any matter, unless otherwise specially provided by law, may . . . not later than thirty days after mailing of an order, denial or decree for any other matter in a Probate Court, appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court in the judicial district in which such Probate Court is located . . . ." Section 45a-187 (a) also provides in relevant part: "An appeal by persons of the age of majority who are present or who have legal notice to be present, or who have been given notice of their right to request a hearing or have filed a written waiver of their right to a hearing, shall be taken within the time provided in section 45a-186, except as otherwise provided in this section. If such persons have no notice to be present and are not present, or have not been given notice of their right to request a hearing, such appeal shall be taken within twelve months . . . ." Our Supreme Court has stated: "It is axiomatic that strict compliance with [the] terms [of § 45a-186] is a prerequisite to an aggrieved party's right to appeal and to the Superior Court's jurisdiction over the appeal." *Connery* v. *Gieske*, supra, 323 Conn. 389.

The plain and unambiguous language of § 45a-186 (a) requires that an appeal from a court of probate be filed within thirty days from the date that the decree was mailed to the parties. The timeline in this case is not disputed. The order of the Probate Court from which the plaintiffs have appealed was mailed to them on February 13, 2015, and received on February 23, 2015. The plaintiffs filed their appeal from the Probate Court with the Superior Court on April 2, 2015. The plaintiffs thus failed to comply with the plain language of § 45a-186 (a) requiring that they file their appeal within thirty days.

The plaintiffs nevertheless contend that they fall within the exception to that requirement pursuant to § 45a-187. The plaintiffs argue that they did not have sufficient notice of the January 6, 2015 hearing before the Probate Court, and thus that the twelve month time period set forth in § 45a-187 (a) applied to their appeal. Although the plaintiffs do not claim that they did not receive the December 11, 2014 notice of the January 6, 2015 hearing on the financial report previously filed by Burnell, they claim that the notice of the hearing was deficient in that it "d[id] not [provide] any mention of the various objections to [the financial] report . . . ." The plaintiffs argue that "no notice was provided that fairly apprised [them] of proceedings leading to orders, [that were] never discussed in any hearing, requiring [them] to disgorge payments made more than four years earlier . . . ."

The plaintiffs' reliance on § 45a-187 fails for two reasons. First, § 45a-187 provides that the thirty day time limitation in § 45a-186 for the filing of a probate appeal may be avoided "[i]f such persons have no notice to be present *and* are not present" at the hearing on the issue from which the appeal is being taken. (Emphasis added.) General Statutes § 45a-187 (a). The plain language of § 45a-187 (a) requires that appeals in actions in which parties who are present at the probate hearing adhere to the thirty day requirement set forth in § 45a-186. The plaintiffs attended and participated in the January 6, 2015 hearing before the Probate Court. Because they were present at the hearing, the plaintiffs' action was governed by § 45a-186 (a), not by § 45a-187.

Moreover, the plaintiffs had notice that the financial report was the subject of the January 6, 2015 hearing, and were aware that the defendant had filed objections to certain portions of the report. The plaintiffs, in fact, filed a written response to the defendant's objections to the report. It is absurd to think that properly filed

objections to a report, of which the plaintiffs had notice and to which they had filed a written response, would not be considered at a hearing to determine if the report should be accepted, particularly in light of the fact that the sums previously collected by the plaintiffs, which were the subject of the defendant's objections, were listed in the report that the court was reviewing for approval. The plaintiffs' claim that their action was governed by § 45a-187, rather than § 45a-186, thus must fail.

The plaintiffs also claim that they complied with § 45a-186 (a) by delivering their appeal papers to the marshal within thirty days of the date that the Probate Court decree was mailed to them. The plaintiffs claim relief under § 52-593a (a), which provides in relevant part: "[A] cause or right of action shall not be lost because of the passage of the time limited by law within which the action may be brought, *if the process to be served* is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery." (Emphasis added.) Section 52-593a, by its inclusion in the title of the General Statutes governing civil actions, and by its language referring to service of process, indisputably applies to civil actions. As noted herein, probate appeals are not civil actions. "They are not commenced by the service of process . . . ." (Internal quotation marks omitted.) *Heussner* v. *Hayes*, supra, 289 Conn. 805. Probate appeals are, rather, properly commenced by filing the complaint with the Superior Court. "[J]urisdiction over a probate appeal attaches when the appeal is properly taken and . . . the requirements of mesne process do not apply to probate appeals." Id., 802. The plaintiffs' delivery of their appeal papers to a marshal therefore did not save their appeal under § 52-593a. Accordingly, the trial court properly dismissed the plaintiffs' action.

The judgment is affirmed.

In this opinion the other judges concurred.

ELEONES BUENO *v.* COMMISSIONER OF CORRECTION (AC 38662)

Prescott, Mullins and Beach, Js.

Syllabus

The petitioner, a citizen of the Dominican Republic who had been admitted as a lawful permanent resident of the United States, and who had pleaded guilty to the crime of larceny in the second degree, sought a writ of habeas corpus, claiming that his guilty plea was not made knowingly, intelligently and voluntarily because he did not know or understand the immigration consequences of the plea in violation of his right to due process, and that his trial counsel rendered ineffective assistance of counsel by failing to properly research and advise him of those consequences. At the same time the petitioner entered his plea to larceny in the second degree, he also pleaded guilty under a separate docket to larceny in the fifth degree. Eleven months later, the petitioner pleaded guilty to one count of escape in the first degree for his failure to return to the supervised community release facility in which he was residing. While the petitioner was incarcerated, the United States Department of Homeland Security commenced removal proceedings against him, articulating that the two distinct grounds for removal were the petitioner's violation of federal immigration law for having been convicted of an aggravated felony relating to a theft offense and for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The United State Immigration Court found both grounds proven and ordered the petitioner to be removed to the Dominican Republic. The Board of Immigration Appeals dismissed the petitioner's appeal from the immigration court's decision, expressly indicating that the removal order was predicated solely on the petitioner's two larceny convictions in violation of Connecticut law, and the petitioner was removed to the Dominican Republic. Prior to the habeas trial, the respondent, the Commissioner of Correction, moved to dismiss the petition on the ground of mootness, alleging that in light of the petitioner's other unchallenged convictions that would prevent his reentry into the United States, the habeas court could not provide him any practical relief. The court deferred consideration of that motion, and, at the habeas trial, an immigration attorney testified regarding the petitioner's guilty plea to a crime involving the assault of a public safety officer in Florida more than ten years earlier and opined that such an offense likely would have adverse immigration consequences for a defendant, provided that the defendant received a sentence of one year or more. The petitioner, on cross-examination, testified via videoconference that he had entered a guilty plea in Florida in 2002 to an unspecified

offense and had been ordered to perform community service but that he had never been imprisoned as a result of that plea. In its memorandum of decision, the habeas court first granted the respondent's motion to dismiss, finding that the matter was moot in light of the petitioner's testimony regarding his Florida plea as the petitioner would be regarded as having been convicted of an aggravated felony, which would be an absolute bar to his reentry into the United States. The habeas court, in the alternative, addressed the merits of the petitioner's claims. The court expressly credited the testimony of K, the petitioner's trial attorney at the time of his plea, that he had advised the petitioner of the immigration consequences of his plea, specifically that he would be deported as a result of his plea, and discredited the petitioner's testimony to the contrary. The court noted, inter alia, that the petitioner accepted the plea offer because it significantly reduced his possible prison sentence, and that he was likely to have been convicted of other deportable offenses in any event in connection with the incident for which he was entering the plea. The habeas court concluded that the amended petition was dismissed, or in the alternative, denied, and subsequently denied the petitioner's petition for certification to appeal. On appeal to this court, *held*:

1. The habeas court improperly determined that the amended petition for a writ of habeas corpus was moot because there was no evidence in the record on which the court could have concluded that the petitioner's conviction resulting from his plea in the Florida case constituted an aggravated felony under federal law that would permanently bar his reentry into the United States; it was undisputed that the record here reflected that the petitioner's removal was based solely on his guilty plea to larceny in the second degree, as the immigration court found that larceny conviction to be both an aggravated felony under federal immigration law and one of two crimes involving moral turpitude, and, as the record did not disclose the specific crime to which the petitioner pleaded guilty under Florida law, whether it was a crime of violence for which the term of imprisonment was at least one year, and whether the petitioner in fact received such a term of imprisonment, the habeas court was not able to determine whether that offense constituted an aggravated felony under federal immigration law.
2. This court concluded that the petitioner could not prevail on his due process and ineffective assistance of counsel claims as he could not demonstrate that those claims were debatable among jurists of reason, could have been resolved in a different manner, or were adequate to deserve encouragement to proceed further; the habeas court found, in light of its assessment of the relative credibility of the testimony offered at the trial by the petitioner and by K, as well as the admonition on immigration consequences provided to the petitioner by the trial judge during the plea canvass, that the petitioner was prudently and adequately advised that deportation was certain to follow his conviction, those

findings were substantiated by the evidentiary record, and, accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

Argued March 21—officially released June 13, 2017

Procedural History

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

Vishal K. Garg, for the appellant (petitioner).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Randall Blowers*, former special deputy assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. The petitioner, Eleones Bueno, appeals following the denial of his petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. The dispositive issue is whether the habeas court abused its discretion in so doing. We conclude that it did not and, accordingly, dismiss the appeal.

The petitioner is a citizen of the Dominican Republic who was admitted as a lawful permanent resident of the United States in 1992. On April 11, 2012, the petitioner appeared before the trial court to enter into a plea agreement concerning two separate criminal matters. At that time, he was represented by Attorney Robert Koetsch. The petitioner first pleaded guilty, in docket number CR-11-0141887-S, to one count of larceny in the fifth degree in violation of General Statutes § 53a-125a. The petitioner then pleaded guilty, in docket number

CR-11-0141917-S, to one count of larceny in the second degree in violation of General Statutes § 53a–123 (a) (3). In its canvass of the petitioner, the court inquired as to whether the petitioner had "had enough time to talk with" Koetsch and whether he was "satisfied with his legal advice"; the petitioner responded affirmatively. The court further advised the petitioner as follows: "If you're not a citizen of the United States, do you understand the conviction for these offenses might have a consequence of deportation, exclusion from admission or denial of naturalization, pursuant to federal immigration law?" The petitioner answered, "Yes, sir." The court then found the pleas to be knowingly, intelligently and voluntarily made with the assistance of competent counsel. In accordance with the terms of the plea agreement, the court sentenced the petitioner to a total effective sentence of eighteen months incarceration and three years of probation.

Eleven months later, the petitioner again appeared before the trial court.[1] At that time, he pleaded guilty, in docket number CR-13-0415495-S, to one count of escape in the first degree in violation of General Statutes § 53a-169, stemming from his failure to return to a "transitional supervision community release" facility. In canvassing the petitioner, the court informed the petitioner that, as a result of his plea, he "could be deported, excluded from the [United States], or denied naturalization." In response, the petitioner stated, "I understand." The court sentenced the petitioner to a term of one year incarceration, execution suspended after six months, with one day of conditional discharge.

While the petitioner was incarcerated, the United States Department of Homeland Security commenced a removal proceeding against him. Its notice to appear

[1] The petitioner was represented by Attorney Matthew Ramia at that proceeding.

articulated two distinct grounds for removal. First, it charged the petitioner with violating "[§] 237 (a) (2) (A) (iii) of the Immigration and Nationality Act . . . as amended, in that, at any time after admission, you have been convicted of an aggravated felony . . . relating to a theft offense . . . or burglary offense for which the term of imprisonment [of] at least [one] year was imposed." Second, the notice charged the petitioner with violating "[§] 237 (a) (2) (A) (ii) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." Following a hearing, the United States Immigration Court on February 20, 2014, issued an oral decision in which it found both grounds proven and ordered the petitioner to be removed to the Dominican Republic. The petitioner filed an appeal from that decision, which the Board of Immigration Appeals dismissed on June 9, 2014. In its written decision, the Board of Immigration Appeals expressly indicated that the removal order was predicated solely on the petitioner's convictions for larceny in the second degree and larceny in the fifth degree in violation of Connecticut law.[2] The petitioner was removed to the Dominican Republic in August, 2014.

Approximately three months after the immigration court issued its removal order, the petitioner filed an application for a writ of habeas corpus in the Superior Court. The operative pleading, the petitioner's April 30, 2015 amended petition, contains two intertwined claims regarding the immigration consequences of his guilty

[2] Both the decision of the United States Immigration Court and the subsequent decision of the Board of Immigration Appeals reflect that the basis of the removal order was the immigration court's findings that (1) the petitioner's conviction for larceny in the second degree constituted an aggravated felony under federal immigration law, and (2) his convictions for larceny in the second degree and larceny in the fifth degree both constituted "crimes involving moral turpitude" thereunder.

plea in docket number CR–11–0141917-S, to one count of larceny in the second degree.[3] Specifically, the petitioner alleged that (1) his guilty plea "was not made knowingly, intelligently, and voluntarily because [he] did not know or understand [its] immigration consequences" in violation of his right to due process, and (2) Koetsch rendered ineffective assistance of counsel by failing to properly research and advise him of those consequences.[4]

[3] As the petitioner reiterated in his appellate brief, he "is only challenging" his conviction for larceny in the second degree in this habeas action.

[4] The petition also alleged that Koetsch rendered ineffective assistance by failing to "make [his] immigration status . . . part of the plea bargaining process . . . ." At trial, Koetsch testified that, in negotiating the petitioner's pleas, he asked the state to consider a "lesser larceny" charge that would minimize the immigration consequences of a guilty plea. His attempt was unsuccessful. Prosecutor Warren Murray, who handled the petitioner's larceny pleas on behalf of the state, corroborated that testimony by providing a detailed explanation as to why the state would not entertain such a request. Even if the petitioner had offered to serve a greater total effective sentence, Murray testified that he "would have wanted a robbery. It was a crime of violence . . . where a citizen was struck and I would probably want some type of conviction . . . I think society should know that he was engaged in some type of behavior which was rather serious."

In that respect, we note that the long form information in CR-11-0141917-S was admitted into evidence at the habeas trial. Count one alleged that the petitioner committed robbery in the third degree in violation of General Statutes § 53a-136 (a) and stated in relevant part that "at the City of Danbury . . . at approximately 8:15pm, on or about the 22nd day of July 2011, [the petitioner] did commit a robbery where in the course of committing a larceny, he used or threatened the immediate use of physical force upon another person for the purpose of overcoming resistance to the taking of the property, to wit: he and/or another demanded money from [the victim] and when refused he did strike [the victim] and took his wallet and cellular phone . . . ." Count two of the information alleged that the petitioner committed larceny in the second degree, while the third and final count alleged assault in the third degree in violation of General Statutes § 53a-61 (a) (1). That count alleged in relevant part that the petitioner "with the intent to cause physical injury to another person [caused] such injury to another person, to wit: he did strike [the victim] in the head causing pain and/or swelling . . . ." At the plea hearing, the trial court remarked to the petitioner: "Sir, I understand you're disappointed that you're not receiving a completely suspended sentence, but I want to tell you your attorney fought very hard for you and, in fact, the state is giving you consideration in the

The respondent, the Commissioner of Correction, thereafter moved to dismiss the petition on mootness grounds, alleging that, in light of the petitioner's other unchallenged convictions that would prevent the petitioner's reentry into the United States, the habeas court could provide him no practical relief. Prior to the commencement of trial on September 18, 2015, the court discussed that motion with the parties. At that time, the court deferred consideration of the matter due to the representation of the petitioner's habeas counsel that a witness who was "necessary for the motion to dismiss" had not yet arrived. A two day trial followed, at which the court heard testimony from four individuals—the petitioner, Koetsch, Warren Murray, a prosecutor for the state, and Justin Conlon, an immigration attorney.

The petitioner testified via videoconference with the aid of an interpreter. In his testimony, the petitioner stated that Koetsch "never spoke about immigration consequences" of his pleas with him. The petitioner testified that, at the time that he entered his pleas, he did not know that deportation would result from his guilty pleas. He further testified that, if he had been so advised, he "would have never [pleaded] guilty to the crimes."

Koetsch offered contrasting testimony. He stated unequivocally that he apprised the petitioner that "[h]e will be deported" as a result of his guilty pleas. In a colloquy with the petitioner's habeas counsel, Koetsch elaborated on his conversation with the petitioner regarding the immigration consequences of a guilty plea:

sense that the plea agreement, as I understand it, does not require a plea to the robbery charge, which would require you to serve 85 percent." In this appeal, the petitioner has not raised any claim regarding Koetsch's alleged failure to make his immigration status part of the plea bargaining process.

"[The Petitioner's Counsel]: . . . I see you told him he will be deported?

"[Koetsch]: Yes. Then we did have a conversation regarding that and . . . he told me that he had a conversation with his father, after I had met with him at the correctional facility, and [the petitioner] told me he didn't care if he got deported and that he would just come back in the country anyway.

"[The Petitioner's Counsel]: Did you give him any advice as to whether he would be able to come back in the country?

"[Koetsch]: I told him once he's deported he's not going to be able to come back in. I don't know how he intended to come back in. I don't get involved in how they come back in the country."

Conlon testified on the petitioner's behalf as to the immigration consequences of the petitioner's larceny pleas, as well as his March 14, 2013 plea of guilty to escape in the first degree. Conlon opined that the latter conviction did not constitute an aggravated felony or a crime involving moral turpitude under federal immigration law. Conlon also acknowledged that the immigration court had found that the petitioner's convictions of larceny in the second degree and larceny in the fifth degree constituted crimes involving moral turpitude.

In addition, Conlon provided testimony regarding the petitioner's guilty plea to a crime involving the assault of a public safety officer a decade earlier in Florida (Florida plea).[5] Conlon noted that the United States Court of Appeals for the Second Circuit has held that,

[5] In his testimony at the habeas trial, the petitioner acknowledged that, in 1999, he was arrested in Florida and charged with an unspecified offense pertaining to the assault of a public safety officer. The petitioner further testified that he "pled guilty" to that charge, for which he was ordered to perform community service and "was never imprisoned."

under Connecticut law, a conviction of assaulting a public safety officer for which a defendant was sentenced to at least one year imprisonment constituted an aggravated felony under federal immigration law. See *Canada* v. *Gonzales*, 448 F.3d 560, 564–73 (2d Cir. 2006). Although he was not familiar with such an offense under Florida law, Conlon opined that a felony conviction of assaulting a public safety officer likely would have adverse immigration consequences for a defendant, provided that it was accompanied by "a one year sentence or more . . . ."

Days after the habeas trial concluded, the court issued its memorandum of decision. In that decision, the court first granted the respondent's motion to dismiss, finding that the matter was moot in light of the Florida plea. In so doing, the court acknowledged that "[n]o transcript [or] court record of the Florida proceeding was introduced before this court. Neither party requested that the court take judicial notice of the laws of Florida concerning deferred adjudications nor supplied reference to specific statutes governing that procedure. However, the petitioner testified at the habeas hearing, and, on cross-examination, he recalled that he entered a guilty plea in the Florida case. Also, his criminal history in 2013 disclosed a 2002 Florida felony record for the offense in question."[6] Accordingly, the court found that, "[a]lthough the evidentiary record is scant, the petitioner's admission to pleading guilty in Florida, in conjunction with his recorded criminal history corroborating the same, persuade this court that,

[6] The transcript of the petitioner's March 14, 2013 plea hearing on the charge of escape in the first degree was admitted into evidence at the habeas trial. At the outset of that proceeding, a bail commissioner reviewed the petitioner's criminal history, stating in relevant part: "His most recent [conviction] was . . . April of 2012, for larceny second from a person. . . . Also April of 2012 . . . a larceny five . . . . He has a Florida record dated back to 2002, which was a felony." The record before us contains no further documentation of that unspecified offense.

for purposes of immigration law, the petitioner would be regarded as having been convicted of an aggravated felony. This conviction forms an absolute bar to his reentry into the United States."

The court continued: "Usually, this conclusion would terminate the court's adjudicative process. However, it is possible that an appellate tribunal would disagree with this court's determination of a lack of subject matter jurisdiction, either because of an insufficiency of evidence regarding the Florida disposition or because a legal conclusion that bar to reentry does not moot this habeas case. Therefore, the court will, as an alternative, also address the merits of the petitioner's claims." The court noted that "[b]oth the petitioner's due process violation and ineffective assistance claims hinge on proof that the petitioner was unaware that his guilty plea to larceny second degree would automatically compel his deportation by the federal authorities when he decided to plead guilty to that charge . . . ." The court then expressly credited Koetsch's testimony that he advised the petitioner that he definitely would be deported as a result of his guilty plea to the charge of larceny in the second degree. The court discredited the petitioner's testimony to the contrary, finding that "the petitioner was prudently and adequately advised that deportation was certain to follow his conviction." The court further found that "the [petitioner] decided to accept the plea offer because the agreement significantly reduced his possible prison sentence, he was likely to be convicted of deportable offenses in any event, and because of his misplaced reliance on his father's advice as to the ease with which he could return to the United States legally or otherwise." For those reasons, the court concluded, "the amended petition is dismissed, or, alternatively, denied." The petitioner subsequently filed a petition for certification to appeal

to this court, which the habeas court denied, and this appeal followed.

"When the habeas court denies certification to appeal, a petitioner faces a formidable challenge, as we will not consider the merits of a habeas appeal unless the petitioner establishes that the denial of certification to appeal amounts to an abuse of discretion." *Jefferson* v. *Commissioner of Correction*, 144 Conn. App. 767, 772, 73 A.3d 840, cert. denied, 310 Conn. 929, 78 A.3d 856 (2013). To prevail, the petitioner must demonstrate "that the *issues* are debatable among jurists of reason; that a court could resolve the *issues* [in a different manner]; or that the *questions* are adequate to deserve encouragement to proceed further." (Emphasis altered; internal quotation marks omitted.) *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994).

At the outset, we note that two distinct issues are presented in this appeal. The first concerns the question of mootness; the second involves the merits of the petitioner's due process and ineffective assistance of counsel claims. To demonstrate that the court abused its discretion in denying certification to appeal, the petitioner must establish that both issues satisfy the standard enunciated in *Simms* v. *Warden*, supra, 230 Conn. 616.

I

We first consider the mootness question, which implicates the subject matter jurisdiction of the court. See *Council* v. *Commissioner of Correction*, 286 Conn. 477, 486–87, 944 A.2d 340 (2008). "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 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. . . . When . . . events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 225–26, 756 A.2d 1264 (2000). Our review of the question of mootness is plenary. *Council* v. *Commissioner of Correction*, supra, 487.

The present case involves a petitioner who has been removed from this country by federal decree following proceedings before the immigration court. In recent years, our courts have considered the mootness question in this context. The seminal decision is *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006), in which a defendant, who had been residing illegally in the United States, appealed from the trial court's denial of his motion to withdraw a guilty plea. Id., 294. In that motion, the defendant claimed that his plea "was not knowingly and voluntarily" made because counsel never advised him of the "certainty of deportation as the result of the plea." Id. The trial court denied that motion and, while an appeal was pending, the defendant was deported. Id., 297. Our Supreme Court thereafter determined that the defendant's appeal was moot, stating: "The defendant did not produce any evidence at the hearing on his motion to withdraw his guilty plea—indeed, he did not even claim—that he would be deported solely as the result of his guilty plea. . . . There is no evidence in the record as to the reason for his deportation. If it was not the result of his guilty plea alone, then this court can grant no practical relief . . . ." Id., 298. Our appellate courts have adhered to that precedent on numerous occasions. See, e.g., *Quiroga* v. *Commissioner of Correction*, 149 Conn. App. 168, 174, 87 A.3d 1171 (observing that "*Aquino* requires proof that the larceny plea was the exclusive basis of the petitioner's

deportation, rather than a primary or likely one"), cert. denied, 311 Conn. 950, 91 A.3d 462 (2014); *State* v. *Chavarro*, 130 Conn. App. 12, 17–18, 21 A.3d 541 (2011) (appeal moot because defendant failed to establish that his deportation was result of guilty plea alone).

The record reflects, and the respondent does not dispute, that the petitioner's removal was based solely on his guilty plea to larceny in the second degree, as the immigration court found that conviction to be both an aggravated felony under federal immigration law and one of two crimes involving moral turpitude. See footnote 2 of this opinion. Accordingly, the "narrow inquiry before us is whether there is evidence to suggest that, in the absence of the [larcency in the second degree] conviction underlying the present habeas petition, the petitioner would be allowed to reenter this country or become a citizen." *St. Juste* v. *Commissioner of Correction*, 155 Conn. App. 164, 175, 109 A.3d 523, cert. granted, 316 Conn. 901, 111 A.3d 470 (2015); see also *State* v. *Aquino*, supra, 279 Conn. 298–99 n.3 (noting that "there is no evidence to suggest that, in the absence of the guilty plea, the defendant would be allowed to reenter this country or become a citizen").

In the present case, the court's mootness determination was predicated on its conclusion that the Florida plea constituted an aggravated felony under federal immigration law that was "an absolute bar to [the petitioner's] reentry into the United States." Both at trial and on appeal, the petitioner has challenged that determination.[7] For two reasons, we conclude that the court's determination is untenable. First, the record does not disclose the precise crime to which the petitioner pleaded guilty under Florida law. As the Second Circuit

[7] As the petitioner's counsel argued at the habeas trial, "there's no reason for this court to find that [the Florida plea] would be an aggravated felony that would prevent the petitioner's reentry or that [it] was an alternative basis for deportation."

has noted with respect to aggravated felonies under federal immigration law, "[t]o determine whether an offense is a crime of violence . . . we must look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the] petitioner's crime." (Internal quotation marks omitted.) *Canada* v. *Gonzales*, supra, 448 F.3d 565. The paucity of evidence regarding the Florida plea precluded such review in the present case, as the record before the habeas court did not disclose the specific offense to which the petitioner pleaded guilty under Florida law.

Second, although the petitioner acknowledges that a plea to a crime involving the assault of a public safety officer may give rise to adverse immigration consequences, he maintains that it does so only in instances in which a defendant receives a sentence of at least one year.[8] The Immigration and Nationality Act enumerates dozens of aggravated felonies. See 8 U.S.C. § 1101 (a) (43) (2012). Among those is "a crime of violence . . . for which the term of imprisonment [is] at least one year . . . ." 8 U.S.C. § 1101 (a) (43) (F) (2012). In *Canada* v. *Gonzales*, supra, 448 F.3d 573, the Second Circuit held that a "conviction for assaulting a peace officer, in violation of [General Statutes] § 53a-167c (a) (1), constitutes a 'crime of violence' . . . thus permitting removal of

[8] The respondent contends that this distinct claim was not presented to the habeas court and, thus, is unpreserved. In response, the petitioner, citing *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015), argues that his claim is "subsumed within or intertwined with arguments related to the legal claim raised at trial."

We note that the respondent made no reference whatsoever to the Florida plea in either his August 21, 2015 motion to dismiss or his accompanying memorandum of law in support thereof. Rather, those pleadings focused entirely on the petitioner's larceny and escape pleas in Connecticut. The respondent first mentioned the Florida plea during his cross-examination of Conlon, the final witness at the September 18, 2015 proceeding. At that time, the respondent informed the court that he had "a reasonable basis to believe that the petitioner has been convicted of battery against a police officer, a public safety officer in the state of Florida in 2002 or 2003."

[the] [p]etitioner as an aggravated felon . . . .'' In that case, the petitioner was ''sentenced to a total of four years' imprisonment . . . .'' Id., 563.

In his appellate brief, the respondent avers ''that the offense of battery of a public safety officer meets the definition of a crime of violence.''[9] It nonetheless remains that the habeas court was presented with no evidence that the petitioner received a ''term of imprisonment [of] at least one year'' in connection with the Florida plea, as federal law requires. See, e.g., *United States* v. *Martinez-Gonzalez*, 286 Fed. Appx. 672, 673 (11th Cir. 2008) (noting that although defendant's ''prior conviction for battery on a law enforcement officer constituted a 'crime of violence' under [federal law] . . . it did not meet the requirements of an 'aggravated felony' because he was sentenced to less than one year of imprisonment''). The only evidence regarding the terms of the Florida plea came during the petitioner's testimony, in which he acknowledged that he performed community service after pleading guilty to the unspecified criminal offense, but ''was never imprisoned.'' The record, therefore, lacks evidence on which the court could conclude that the petitioner's plea to the unspecified Florida offense constituted an aggravated felony under federal immigration law that permanently barred his reentry into the United States. See *Placide* v. *Commissioner of Correction*, 167 Conn. App. 497, 501 n.1, 143 A.3d 1174 (considering additional conviction that did not serve as basis of petitioner's deportation and concluding that ''we are not convinced that the petitioner's other conviction . . . would bar reentry as a crime of moral turpitude''), cert. denied, 323 Conn. 922, 150 A.3d 1150 (2016). Accordingly, the court

[9] Apart from being a crime of violence pursuant to 8 U.S.C. § 1101 (a) (43) (F), the respondent has not identified any other basis on which the Florida plea could constitute an aggravated felony under federal law.

improperly determined that the petition was moot as a result of the Florida plea.

II

That determination does not end our inquiry, as the petitioner also must demonstrate that the merits of his due process and ineffective assistance of counsel claims are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further. *Simms* v. *Warden*, supra, 230 Conn. 616. In resolving those claims, the court expressly credited the testimony of Koetsch and discredited the petitioner's testimony as to whether the petitioner was advised that deportation would result from his guilty plea. As our Supreme Court recently observed, an appellate court "does not . . . evaluate the credibility of the witnesses. . . . Rather, [it] must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 643–44, 153 A.3d 1264 (2017); see also *Eastwood* v. *Commissioner of Correction*, 114 Conn. App. 471, 484, 969 A.2d 860 (appellate court does not second-guess findings of habeas court related to credibility of witnesses), cert. denied, 292 Conn. 918, 973 A.2d 1275 (2009). This court, therefore, cannot disturb those determinations.

In light of its assessment of the relative credibility of the testimony offered at trial by the petitioner and Koetsch, as well as the admonition on immigration consequences provided to the petitioner by the trial judge during the plea canvass, the habeas court found that "the petitioner was prudently and adequately advised

that deportation was certain to follow his conviction" and that "the petitioner decided to accept the plea offer because the agreement significantly reduced his possible prison sentence, he was likely to be convicted of deportable offenses in any event, and because of his misplaced reliance on his father's advice as to the ease with which he could return to the United States legally or otherwise." Those findings are substantiated by the evidentiary record before us. We therefore conclude that the petitioner cannot demonstrate that his due process and ineffective assistance of counsel claims are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further. *Simms* v. *Warden*, supra, 230 Conn. 616. Accordingly, the court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.