JOHN PAJOR *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT, ET AL.
(AC 38604)

Alvord, Sheldon and Norcott, Js.

Syllabus

The plaintiff, whose native language is Polish, was discharged from his full-time position with the defendant W Co. and filed a claim for partial unemployment benefits. While he was employed at W Co., he was also employed full-time at E Co. Sometime after his claim for partial benefits was approved, the plaintiff left his job at E Co. and began working at C Co. After learning of the plaintiff's voluntary separation from E Co., the defendant Administrator of the Unemployment Compensation Act subsequently determined that the plaintiff was no longer eligible for benefits from his discharge from W Co., that he was not entitled to the benefits he had received while he was employed at E Co., and therefore that he had received an overpayment of benefits due to his failure to report his earnings from E Co. for an eight week period. The plaintiff appealed to an appeals referee, who dismissed the appeal as untimely. On the plaintiff's appeal from that decision, the Employment Security Appeals Division Board of Review reversed and remanded the matter to the referee for a hearing on the merits of the plaintiff's appeal. The plaintiff, however, failed to appear at the remand hearing, and the referee dismissed the appeal, concluding that the plaintiff's claim that he failed to appear was the result of a language barrier was unavailing. The board thereafter dismissed the plaintiff's appeal from the referee's decision, and the plaintiff appealed to the trial court. The board had denied, in part, the plaintiff's motion to correct the board's findings in which he sought, inter alia, to correct the findings regarding the Polish language proficiency of his attorney. The trial court dismissed the appeal, having determined that the decision of the board was not unreasonable, arbitrary, or illegal, and that there was evidence in the record to support the corrected findings. On appeal to this court, *held*:

1. This court found unavailing the plaintiff's claim that the trial court applied an incorrect standard of review regarding the board's decision on his motion to correct because, contrary to the plaintiff's claim that the board was required to admit as true certain facts that he claimed were undisputed and material to his subsequent appeal pursuant to the applicable rule of practice (§ 22-9 [b]), the facts at issue here were not undisputed; a court's review of the board's findings does not extend to conclusions of the board when they depend on the weight of the evidence and the credibility of witnesses, and here, the plaintiff's requested finding regarding his counsel's diminished proficiency in Polish was not supported by the record and the board did not credit the plaintiff's claim

that his failure to attend the hearing on remand before the referee was due to his mistaken belief that his counsel would take care of the meeting.

2. The trial court properly determined that the board's decision that the plaintiff lacked good cause for his failure to attend the remand hearing was logically based on its findings of fact and was not arbitrary, illegal, or unreasonable; there was evidence in the record to support the board's finding that the plaintiff had attended a prior hearing and thus it was not plausible that he would not understand that he needed to attend the remand hearing, notwithstanding his alleged miscommunication with his counsel.

Argued March 8—officially released June 27, 2017

Procedural History

Appeal from the decision of the Employment Security Board of Review denying the plaintiff's motion to open its decision affirming the decision by appeals referee dismissing the plaintiff's appeal for failure to prosecute, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Young*, *J.*; judgment dismissing the appeal; thereafter, the court denied the plaintiff's motion to reargue; subsequently, the court denied the plaintiff's motion for an articulation, and the plaintiff appealed to this court; thereafter, the court issued an articulation of its decision. *Affirmed.*

Mariusz Kurzyna, for the appellant (plaintiff).

Richard T. Sponzo, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (named defendant).

Opinion

NORCOTT, J. The plaintiff, John Pajor, appeals from the judgment of the trial court dismissing his appeal from the decision of the Employment Security Appeals Division Board of Review (board), which dismissed his appeal from the dismissal of his challenge to a finding that he had been overpaid certain unemployment compensation benefits. On appeal, the plaintiff claims that

the court improperly (1) applied the wrong standard of review to the board's decision on his motion to correct findings, and (2) concluded that the board's determination that the plaintiff did not show good cause for failing to attend a hearing on remand before an appeals referee was not arbitrary, unreasonable, or an abuse of discretion. We disagree and, accordingly, affirm the judgment of the trial court.

The record reflects the following facts and procedural history. The plaintiff worked full-time for Wal-Mart Associates, Inc. (Wal-Mart) from September 18, 1999, to April 28, 2012, earning $12.30 per hour. He subsequently was discharged on April 29, 2012, after which time he filed a claim for partial unemployment compensation benefits. While he was employed at Wal-Mart, the plaintiff also worked full-time at EBM Papst, Inc. (EBM). On August 31, 2012, an appeals referee (referee) approved the plaintiff's claim for partial benefits on the basis of on his discharge from Wal-Mart. The plaintiff, however, subsequently left his job at EBM on September 14, 2012,[1] having accepted an offer for a position at Corbin Russwin.

The plaintiff states, in his brief, that he discontinued his claim for benefits against Wal-Mart after accepting the offer for employment at Corbin Russwin. The record, however, fails to reflect such discontinuation. From our careful review of the record, it appears that the plaintiff failed to notify the defendant Administrator, Unemployment Compensation Act (administrator),[2] about his voluntary separation from EBM. Instead, the record reflects that, as part of a routine audit of the plaintiff's benefits account, the administrator, by way of a letter dated September 11, 2012, requested that

[1] The plaintiff did not file a specific claim for benefits against EBM.

[2] The plaintiff also named EBM and the board as defendants, but they are not participating in the appeal to this court.

EBM indicate, in a certificate of earnings, the gross earnings of the plaintiff for the weeks for which the plaintiff received partial benefits. EBM subsequently sent this information, as well as a letter from the plaintiff to EBM indicating his desire to terminate his employment with EBM. It appears that the administrator, upon learning of the plaintiff's voluntary separation from EBM, initiated the investigation into whether the plaintiff had fraudulently received partial benefit payments because of his failure to disclose his full-time employment at EBM during the period of time in which he was receiving partial unemployment compensation benefits.

The plaintiff states that he did, in fact, disclose that he was working full-time at EBM in his initial claim for partial unemployment compensation benefits, and that this prior disclosure is the reason why he responded "no" to the following weekly claims question: "Did you work full time or part-time for an employer or in self-employment or return to full-time work during the week ending last Saturday, which you have not already reported?" The record, however, does not contain the plaintiff's initial claim for benefits, or any disclosure to the administrator that he was concurrently working full-time at EBM during the period in which he was receiving benefits. Thus we cannot discern whether the plaintiff did, in fact, make such a disclosure. Additionally, the record contains a sheet entitled "Fact Finding Report Claimant Statement," which contains a statement from the plaintiff that he "did not report the earnings because [he] had been laid off from Wal-Mart and [that he had] reported that to the Department of Labor."

The plaintiff further states that the administrator informed him that he was "eligible for benefits by virtue of losing his full-time position with Wal-Mart even while he continued in his other full-time position at EBM." The record reflects, however, that the administrator, in an overpayment and administrative penalty decision

dated November 9, 2012, stated that the plaintiff received fraudulent benefit payments because he failed to disclose his earnings from EBM during the benefits period.

In its November 9, 2012 decision, the administrator determined that, effective September 9, 2012, the plaintiff was no longer eligible for benefits stemming from his discharge from Wal-Mart because of his voluntary separation from EBM. The administrator also determined that the plaintiff was not entitled to the benefits he had received while employed full-time at EBM and that, as a result, the plaintiff had fraudulently received an overpayment of $4599 due to unreported earnings from EBM from the weeks ending July 21, 2012 to September 15, 2012. The plaintiff appealed that decision to a referee pursuant to General Statutes § 31-237j.[3]

The referee heard that appeal on December 26, 2012, and issued his decision on December 31, 2012. In that decision, the referee dismissed the appeal due to the plaintiff's failure to file the appeal within the statutorily prescribed period.[4] Thereafter, the plaintiff filed a motion to open the referee's decision on January 21, 2013, which the referee denied on January 25, 2013. The plaintiff filed an appeal to the board, challenging both the December 31, 2012 decision and the referee's January 25, 2013 decision. The board reversed both decisions, concluding that the plaintiff had shown good cause for filing an untimely appeal because he did not

[3] General Statutes § 31-237j provides in relevant part: "The referees shall promptly hear and decide appeals from the decisions of the administrator of this chapter, or his designee, appeals from all other determinations made pursuant to any provision of this chapter and appeals from any proceeding conducted by authorized personnel of the Employment Security Division. . . ."

[4] The referee had determined that he did not have jurisdiction to consider the plaintiff's late appeal. But see Regs., Conn. State Agencies § 31-237g-15 (a) (any appeal filed after twenty-one day period has expired may be considered to be timely filed if filing party demonstrates good cause for late filing).

"receive . . . [the notice] advisements in his native language." Furthermore, it determined that the plaintiff was genuinely confused by the administrator's decision that he was disqualified from receiving benefits from Wal-Mart, based on his separation from EBM, and that such confusion served as an additional basis for good cause to excuse the late filing of the appeal. The board remanded the case to the referee to conduct further proceedings on the merits of his appeal.

A hearing on remand before the referee was scheduled for July 9, 2013. The plaintiff failed to appear. The appeals referee subsequently issued a decision on July 10, 2013, dismissing the appeal for failure to attend the hearing. On July 29, 2013, the plaintiff filed a motion to open the referee's decision on the basis that he had failed to attend the hearing because he thought that his attorney would "take care of it," therefore obviating his need to attend the hearing in person.[5] The referee denied the plaintiff's motion on August 8, 2013, on the ground that the plaintiff could not show good cause to open the decision. Specifically, the referee concluded that the plaintiff's claim that he failed to understand the necessity of attending the hearing in person as a result of a language barrier was unavailing, and that the plaintiff deliberately failed to attend the hearing as a delay tactic. The plaintiff appealed that decision to the board on August 28, 2013.

On September 30, 2013, the board affirmed the referee's decision and dismissed the appeal. It also denied the plaintiff's subsequent motion to open the board's decision. On January 13, 2014, the plaintiff appealed from the board's decision to the Superior Court. He also filed a motion to correct the board's findings on

[5] General Statutes § 31-248 (b) provides in relevant part: "Any decision of a referee may be reopened, set aside, vacated or modified on the timely filed motion of a party aggrieved by such decision . . . on grounds of new evidence or if the ends of justice so require upon good cause shown."

August 14, 2014.[6] Relevant to this appeal, the plaintiff specifically challenged the board's finding of fact that his counsel was proficient in Polish, and its finding regarding the plaintiff's misunderstanding as to his

[6] Specifically, the plaintiff requested that the board revise its findings of fact that: (1) his counsel translated to him the June 24, 2013 hearing notice; (2) his counsel's native language was Polish; (3) his counsel informed him that he needed to respond directly to the referee's and employer's questions at the July 9, 2013 hearing; (4) the plaintiff told his counsel that his case is "clear cut" and that he could not afford to have counsel present at the hearing; and (5) the plaintiff attended the referee's December 26, 2012 hearing and received a similar hearing notice to appear at that hearing. The plaintiff requested that the board replace the findings of fact with the following: (1) "[t]he [plaintiff] was not represented by counsel when he appealed the administrator's determination, when he received notice of the referee's December 26, 2012 hearing, or when he attended said hearing"; (2) "[a]fter the December 31, 2012 dismissal of the [plaintiff's] appeal by the referee, [the plaintiff's counsel] agreed to assist the [plaintiff] with appealing the referee's decision to the [b]oard"; (3) "[t]he [b]oard sustained the [plaintiff's] appeal and remanded the matter to the referee for further proceedings"; (4) "[u]pon receipt of the notice for the July 9, 2013 remand hearing, [the plaintiff's counsel] met with the [plaintiff] to explain the [b]oard's decision and the ongoing process of appealing the administrator's determination"; (5) [t]he [plaintiff] told [his counsel] that he could not pay an attorney to attend the remand hearing"; (6) "[the plaintiff's counsel] told the [plaintiff] that his case was clear cut and that the [plaintiff] should prevail without an attorney present at the hearing so long as he abides by the admonishment in the May 31, 2013 decision of the [board] to 'respond directly to the referee's or the employer's questions at the referee's remand hearing' "; (7) "[the plaintiff's counsel] also told the [plaintiff] that if he followed those instructions, it was highly unlikely that the referee would rule against him, but should such a contingency occur, [the plaintiff's counsel] would help the [plaintiff] with another appeal to the [b]oard"; (8) "[d]uring the same meeting, the [plaintiff] spoke to [his counsel] about the need to correct the [defendant's] alleged delay in acknowledging the [plaintiff's] initial claim and the consequent nonpayment of benefits for most of his eligible weeks, [and, in response, the plaintiff's counsel] told the [plaintiff] that he might be able to assist him after the [plaintiff] receives a decision on waiver of any overpayment penalties in the present case"; (9) "Polish was [his counsel's] first-acquired language, but has been rarely used during most of his life and [counsel's] ability to communicate in Polish has diminished in the twenty-six years since he immigrated to the United States as a child"; (10) "[counsels'] command of Polish is much better than the [plaintiff's] command of English and they communicate with each other in Polish"; and (11) "[t]he [plaintiff] failed to attend the July 9, 2013 remand hearing because he mistakenly believed that [his counsel] would 'take care of it' by appearing as his representative or providing him additional instructions."

counsel's involvement in the remand hearing. On October 21, 2014, the board denied in part and granted in part the plaintiff's requested corrections.[7] The plaintiff subsequently amended his appeal to the Superior Court and filed claims of error with regard to the board's decision on his motion to correct findings. The court dismissed the plaintiff's appeal, concluding that "[t]here is nothing in the record to indicate that the decision of the board was unreasonable, arbitrary or illegal. There is evidence to support the finding of facts as corrected. The board's decision is logically based upon the findings of fact." This appeal followed.

I

The plaintiff first claims that the court applied the incorrect standard of review regarding the board's decision on his motion to correct findings. Specifically, he argues that the court failed to apply the standard set forth in *McQuade* v. *Ashford*, 130 Conn. 478, 482–83, 35 A.2d 842 (1944), which the plaintiff claims to require the board, upon the plaintiff's filing of a motion to correct, to admit as true the denied underlying findings of fact that the plaintiff claims are undisputed and material to a subsequent appeal. Because the facts upon

[7] The board declined the plaintiff's request to delete the board's finding that his counsel's native language was Polish, and denied the plaintiff's first, seventh, eighth, ninth, and eleventh requests for corrections of fact. It granted the remainder of the plaintiff's requests. The board found that, while Polish may very well be counsel's first-acquired language, the record did not support a finding that he rarely spoke it during most of his life, or that his ability to communicate in Polish has diminished since he immigrated to the United States. With regard to the plaintiff's seventh, eighth and ninth requests, respectively, the board concluded that the requested findings were neither relevant nor material to the determination of whether the plaintiff had good cause for failing to attend the referee's July 9, 2013 hearing. Finally, it denied the plaintiff's eleventh request on the basis that the plaintiff was improperly "requesting that the board reweigh the evidence in the record and reverse its credibility determination that the [plaintiff] was aware [that] he needed to appear at the referee's July 9, 2013 hearing, but deliberately chose not to attend the hearing."

which the plaintiff relies are, in fact, disputed, we conclude that *McQuade* is distinguishable from the present case.

"[O]ur analysis of whether the court applied the correct legal standard is a question of law subject to plenary review." (Internal quotation marks omitted.) *Breen* v. *Judge*, 124 Conn. App. 147, 158, 4 A.3d 326 (2010).

At the outset, we must address the plaintiff's argument that, because he filed a motion to correct findings in accordance with Practice Book § 22-4, the trial court was neither bound by, nor precluded from reviewing, the board's credibility determinations. The plaintiff misconstrues our case law.

It is well established that the failure to file a motion to correct findings of the board precludes an appellant from challenging those facts as found by the board and further limits this court only to consider the board-certified evidence. *Reeder* v. *Administrator, Unemployment Compensation Act*, 88 Conn. App. 556, 558, 869 A.2d 1288, cert. denied, 275 Conn. 918, 883 A.2d 145 (2005); see also *Davis* v. *Administrator, Unemployment Compensation Act*, 155 Conn. App. 259, 262–63, 109 A.3d 540 (2015). The plaintiff is also incorrect in his assertion that the filing of such a motion permits the court to review the board's credibility determinations. Practice Book § 22-9 (b) provides: "Corrections by the court of the board's finding will only be made upon the refusal to find a material fact which was an admitted or undisputed fact, upon the finding of a fact in language of doubtful meaning so that its real significance may not clearly appear, or upon the finding of a material fact without evidence." Section 22-9 (a) provides that, despite the filing of a motion to correct, a court's review of the board's findings does not extend to "conclusions of the board when these depend on the weight of the evidence and the credibility of witnesses."

Turning to the gravamen of the plaintiff's claim, he argues that our Supreme Court, in *McQuade* v. *Ashford*, supra, 130 Conn. 482–83, sets forth the standard of review that governs this claim. In particular, the plaintiff argues that *McQuade* mandates that the trial court "accept as true undisputed facts essential to [the plaintiff's] claims," and cites to *McQuade* for the following principle: "The finding in a compensation case should contain all the subordinate facts which are pertinent to the inquiry, and the conclusions of the commissioner therefrom. . . . If a finding does not conform to these requirements . . . neither the Superior Court nor this court is in a position to decide whether the award was correct and just or not. . . . To refuse to find the facts which a party seeks to have stated because the commissioner deems them unnecessary or immaterial is not ordinarily fair to the parties, the court or the State and its officers. It is not fair to the parties because they are entitled to have found such proven facts as they deem it necessary to present to the court upon the appeal." (Citations omitted; internal quotation marks omitted.) *McQuade* v. *Ashford*, supra, 482. The court in *McQuade* ultimately held that the trial court "should have returned the case to the [board] with a direction to correct the finding by adding such of those facts contained in the plaintiff's motion to correct as [it] found to be either undisputed or established upon conflicting evidence." Id., 484.

On appeal to this court, the plaintiff argues that the foregoing language required the board to accept as true the facts that he claims to be undisputed, relevant, and material to his case in a potential appeal. In particular, the plaintiff argues that the board should have accepted as true the requested facts that (1) although Polish was his counsel's first-acquired language, counsel's proficiency in the language had diminished over the twenty-six years since he immigrated to the United States, and

(2) that the plaintiff failed to attend the July 9, 2013 hearing because he mistakenly believed that his counsel would "take care of it" by appearing as his representative or providing him with additional information.[8]

In its memorandum of decision, the trial court held that *McQuade* does not apply to the present case because that case "concerned a cause of action brought pursuant to the Worker's Compensation Act, General Statutes § 31-291, et seq.," and cites to *McQuade* for the principle that "[c]ases under the [Worker's] Compensation Act . . . are upon a different basis from actions between ordinary litigants." (Internal quotation marks omitted.) Id., 482. The court subsequently noted that our courts have not extended the *McQuade* analysis to unemployment compensation appeals, and thus it did not consider a *McQuade* analysis when it rendered its decision in this unemployment compensation appeal. Although we agree with the trial court that our courts have not yet extended *McQuade* to unemployment compensation appeals, we need not consider the extension of *McQuade* in the present case because its facts are distinguishable from the facts here. In this appeal, the plaintiff's first requested correction of fact is disputed, and therefore *McQuade* does not apply. The plaintiff requested a correction to the board's finding with regard to his counsel's diminished proficiency in Polish by arguing, essentially, that such a finding was significant to their conversation concerning his attendance at the July 9, 2013 hearing. The board denied that request and concluded that such a finding was not supported by the record because the plaintiff's counsel specifically wrote that he communicated with the plaintiff in Polish, "the native language of both," a phrase which the board found to be unambiguous. It further

[8] The plaintiff does not raise any claims on appeal to this court with respect to the other requested findings of fact that were denied.

determined that the record failed to support the plaintiff's request to adopt a finding that, although Polish was his counsel's first-acquired language, counsel's proficiency in it had diminished over the twenty-six years since he immigrated to the United States. In particular, the board explained that, on the basis of counsel's statement that "[a]lthough Polish is my first language, I immigrated to the United States as a child and have spent most of my *adult* life not speaking the language," it could "not infer from this statement that [the plaintiff's counsel] has rarely spoken Polish during most of his adult life, nor can we infer that his ability to communicate in Polish has diminished in the twenty-six years since he immigrated to the United States. We decline to add a separate finding of fact that Polish is [counsel's] first-acquired language because such a finding would be unduly repetitive of our finding of fact that [counsel] is a native Polish speaker." (Emphasis original.)

In *McQuade*, the plaintiff was not challenging existing findings of facts. Instead, the plaintiff in that case requested the finding of additional material facts that were pertinent to a subsequent appeal. *McQuade* v. *Ashford*, supra, 130 Conn. 484. By contrast, the plaintiff in the present case asked the trial court to make contrary findings as to a fact that the board has already determined. Moreover, he requests that this court direct the trial court to make contrary findings as to a disputed fact. Practice Book § 22-9 (b), however, prohibits such a request.

The plaintiff's second requested correction seeks to have the board adopt a finding that the plaintiff failed to attend the referee's July 9, 2013 remand hearing because he mistakenly believed that his counsel would "take care of it" by appearing as his representative or by providing him additional instructions. The board denied the plaintiff's requested correction on the basis that he was "requesting the board to reweigh evidence

in the record and reverse its credibility determination that the [plaintiff] was aware that he needed to appear at the referee's July 9, 2013 hearing, but deliberately chose not to attend the hearing."[9] As described in the preceding paragraphs, Practice Book § 22-9 (a) prohibits a court from reviewing the board's credibility determinations.

It is clear that *McQuade* does not apply in the present case and that Practice Book § 22-9 (a) and (b) precluded the trial court from directing the board to adopt the plaintiff's requested corrections of fact. We therefore reject the plaintiff's first claim.

II

The plaintiff next claims that the court improperly concluded that the board's determination that he lacked good cause for his failure to attend the remand hearing was not arbitrary, unreasonable, or an abuse of discretion. Specifically, he argues that he had been actively prosecuting the appeal for a year, and, thus, the referee's determination that he deliberately chose not to attend the remand hearing as a "delay tactic" was unavailing. The plaintiff further argues that he failed to attend the hearing because of a language barrier between himself and his counsel. He alleges that, during a meeting following the board's remand to the referee for a hearing on the merits, his attorney communicated with him in Polish, the language in which the plaintiff is proficient, in regard to the upcoming hearing, and that he had left that meeting with the mistaken impression that his counsel would "take care of" the hearing, either by attending it or providing him with further

[9] The record refutes the plaintiff's assertion in his brief that the board refused to adopt this finding on the basis that it was neither relevant nor material to its determination that the plaintiff lacked good cause for his failure to attend the hearing.

instructions. We are not persuaded by the plaintiff's arguments.

"It is well established that [r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." (Internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 622–23, 134 A.3d 581 (2016). Similar to the prohibition on a court's ability to review conclusions of the board based upon the weight of the evidence and the credibility of witnesses, "[j]udicial review of the conclusions of the law reached administratively is also limited." (Internal quotation marks omitted.) *Chicatell* v. *Administrator, Unemployment Compensation Act*, 145 Conn. App. 143, 149, 74 A.3d 519 (2013). "Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 623.

General Statutes § 31-242 authorizes an appeals referee to hold a hearing de novo on an appeal from the administrator's decision on a claimant's eligibility for unemployment compensation. Section 31-237g-26 (b) (1) of the Regulations of Connecticut State Agencies provides that, if the appealing party fails to timely appear at the referee's scheduled hearing, the referee may dismiss the appeal due to the appealing party's

failure to prosecute the appeal if there is no error apparent on the face of the record. General Statutes § 31-248 (b) provides that any decision of the referee may be reopened on "grounds of new evidence or if the ends of justice so require upon good cause shown."

The board's September 30, 2013 findings of fact state that the plaintiff received notice of the hearing on June 24, 2013, and that his counsel translated that notice to him in Polish, the plaintiff's native language. The board further found that the plaintiff's counsel informed him that he needed to respond directly to the referee's and the employer's questions at the hearing, which were to be based on the specific advisement in the board's May 31, 2013 decision. Upon the plaintiff's statement that he could not pay an attorney to attend the July 9, 2013 hearing, the plaintiff's counsel informed him that his case was "clear cut" and the plaintiff should prevail without an attorney present at the hearing as long as he responded to the referee's or employer's questions at the hearing. The board further found that the plaintiff had attended the referee's December 26, 2012 hearing and had received a similar hearing notice to appear at that hearing, and thus that it was not plausible that the plaintiff would not understand that he needed to appear at the referee's July 9, 2013 hearing. The board then found that, under the foregoing circumstances, the plaintiff had deliberately chosen not to attend the referee's hearing. Accordingly, it concluded that the plaintiff had not shown good cause for his failure to participate in the referee's hearing and that he had failed to prosecute his appeal because of his failure to attend the hearing. The board also concluded that the referee did not abuse his discretion in dismissing the appeal for lack of prosecution or in denying the plaintiff's motion to reopen.

The plaintiff, on appeal, does not dispute the board's findings that he met with his counsel and discussed the

scheduled hearing. He argues only that he misunderstood his counsel's advice because his counsel had an alleged limited ability to communicate in Polish. It is clear, in our review of the board's September 30, 2013 decision, that its findings depended on the weight of all of the evidence before it and that those findings did not discount the plaintiff's conversation with his counsel about the hearing. In fact, the board made a credibility determination that the plaintiff's alleged confusion lacked merit in light of his counsel's advice that he would prevail if he answered the referee's and employer's questions at the hearing. It further determined that he had received a similar notice to appear at a prior hearing and did so appear, and thus he should have been well aware of his required presence at the July 9, 2013 hearing.

On the basis of the record before us, we conclude that the board was presented with substantial evidence to justify its conclusions concerning the plaintiff's failure to prosecute the appeal. Accordingly, we agree with the court that the board's decision was logically based upon its findings of fact, and that there is nothing in the record to indicate that its decision was unreasonable, arbitrary, or illegal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* STACY SMITH
(AC 37632)

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

Syllabus

Convicted, after a jury trial, of the crimes of sexual assault in the second degree, sexual assault in the fourth degree and risk of injury to a child in connection with his inappropriate sexual behavior toward the minor

victim on a number of occasions over a two year period, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his unpreserved claim that his conviction violated his right to due process under the constitution of Connecticut because the police lost potentially exculpatory evidence in the form of a text message that he had sent to the victim's mother, the record having been inadequate to review the defendant's claim; it was undisputed that the defendant did not raise his due process claim before the trial court, and, therefore, the court did not make any factual findings pursuant to the balancing test set forth in *State* v. *Asherman* (193 Conn. 695) weighing the state's reasons for the unavailability of the subject evidence against the degree of prejudice to the defendant, and, without those necessary findings, this court was unable to consider the defendant's claim pursuant to *State* v. *Golding* (213 Conn. 233).
2. There was no merit to the defendant's unpreserved claim that his constitutional right against double jeopardy was violated by his conviction of both sexual assault in the second degree and risk of injury to a child, the defendant having failed to demonstrate that the crimes constituted the same offense for double jeopardy purposes under the test set forth in *Blockburger* v. *United States* (284 U.S. 299): the subject offenses each required proof of a fact that the other did not, namely, risk of injury to a child required proof that the defendant had contact with the intimate parts of the minor victim in a sexual and indecent manner likely to impair her health or morals, and sexual assault in the second degree required proof that the defendant had sexual intercourse with the minor victim, and, thus, the crimes did not constitute the same offense; accordingly, this court concluded that the defendant's claim failed under the third prong of *Golding* because the constitutional violation that the defendant had alleged did not exist.

Argued January 30—officially released June 27, 2017

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the fourth degree, two counts of the crime of sexual assault in the second degree, and four counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Kevin M. Smith, with whom, on the brief, were *Norman A. Pattis* and *Daniel M. Erwin*, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Christopher Pelosi*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Stacy Smith, appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1) (count one), risk of injury to a child in violation of General Statutes § 53-21 (a) (2) (count two), sexual assault in the second degree in violation of § 53a-71 (a) (1) (count three), risk of injury to a child in violation of § 53-21 (a) (2) (count four), sexual assault in the fourth degree in violation of General Statutes § 53-73a (a) (1) (count five), risk of injury to a child in violation of § 53-21 (a) (2) (count six), and risk of injury to a child in violation of § 53-21 (a) (1) (count seven). On appeal, the defendant claims that (1) his conviction violated his right to due process under the constitution of Connecticut because the police lost potentially exculpatory evidence, in the form of a text message, in violation of *State* v. *Morales*, 232 Conn. 707, 720, 657 A.2d 585 (1995), and (2) his conviction for both sexual assault in the second degree (counts one and three) and risk of injury to a child (counts two and four) constituted a violation of his constitutional right against double jeopardy. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The charged events occurred between October, 2007, and October, 2009, when the victim[1] was thirteen,

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

fourteen and fifteen years old. At that time, she lived with her mother, M, two older brothers, and a younger sister. Until the end of 2009, the victim's family socialized "almost every weekend" with D, who was the victim's godmother and M's best friend, and D's sons. In 2006, the victim met the defendant for the first time at a Dunkin' Donuts store and learned that he was the father of D's oldest son. The defendant was thirty-seven or thirty-eight years old at the time, recently had finished serving a prison sentence for federal narcotics violations, and was living in a halfway house and working at Dunkin' Donuts. Shortly thereafter, the defendant and D resumed their previous relationship, and, in the winter of 2007, the defendant moved into D's East Hartford home.

In the summers of 2007, 2008 and 2009, the victim and her family regularly attended get-togethers at D's home with D, her sons, and the defendant. During that time, the victim also frequently babysat for D's younger son at D's house. On those occasions, the defendant would often be present. The defendant's inappropriate behavior toward the victim started in 2007, when the victim was socializing with D's family and babysitting at D's house. Specifically, between 2007 and 2008, the defendant began talking to the victim about sex, he would caress her calf while they were watching a movie, and he would show her "in his phone . . . other girls he was messing with other than [D], telling [her] things that he would do with them and . . . what [she] should do with other guys if [she] was dating someone."

In 2008, the defendant began kissing and touching the victim while she was babysitting or attending social gatherings at D's house. The defendant put his fingers in her vagina and touched her breasts or buttocks multiple times between October, 2008 and October, 2009. On one occasion in the summer of 2008, the defendant

performed oral sex on the victim while she was babysitting for D. Although the victim asked him to stop and tried to push him off of her, he continued for about thirty seconds and stopped when he heard D's car pull into the driveway. On several occasions when the defendant was kissing or touching the victim, he would unzip his pants and pull out his penis. Although the defendant asked the victim to perform oral sex on him two or three times, she refused, and he "laughed it off."

In 2010, the victim's family stopped socializing with D's family because the defendant "was getting abusive" with D, and M did not want her daughters "to be around all that arguing." The last time the victim saw the defendant was at a Fourth of July party at D's house in 2010, at which the defendant tried to pull the victim into a room and to kiss her, but she was able to escape.

In January, 2011, the victim told M about the defendant's actions. The next day, M took the victim to the East Hartford Police Department, where they met with Officer Daniel Zaleski. Zaleski spoke with the victim separately for about twenty minutes, during which time the victim disclosed the pertinent details about the defendant's repeated sexual conduct toward her. Zaleski then referred the case to a juvenile investigator, Detective Samuel Kelsey, who investigated sexual assaults involving minors, and reported the matter to the Department of Children and Families (department).

On February 1, 2011, after receiving a phone call from Kelsey requesting to speak with him about the allegations against him, the defendant voluntarily went to the East Hartford Police Department and gave a statement. According to Kelsey, the defendant admitted to having had "close contact" with the victim "in an inappropriate nature, [such] as touching her breast and vagina." Specifically, during this interview with Kelsey, the defendant "said at no time did he have sex with

her; he said he was under the influence of alcohol and he can't remember all the events but he does admit having made contact with her; he said he was very sorry and that he would like to make amends in any way deemed necessary, this is not him . . . but that's no excuse." After Kelsey reduced the defendant's statement to writing, the defendant initialed and signed it. The entire interview lasted approximately forty minutes.

After the interview, in the lobby of the police station, the defendant was met by Betzalda Torres, an investigator employed by the department who was investigating the alleged physical neglect and sexual abuse of the victim by the defendant. After Torres reviewed the allegations against him involving the physical neglect and sexual abuse of the victim, for the purposes of the investigation by the department, the defendant "basically, confirmed that what [the victim] said was correct, did not deny it, and . . . [he] was feeling apologetic to the family for what he ha[d] done." The defendant told Torres that he had been sexually inappropriate with the victim and that he had had "many" discussions with her regarding sex and her virginity. During this interview, the defendant was not specific as to the details of the actual acts he preformed, but he explained that his alcohol and drug use played a role and he "took full responsibility" for being "sexually inappropriate toward [the victim]."

The defendant subsequently was arrested and, following a jury trial, was convicted of two counts of sexual assault in the second degree, four counts of risk of injury to a child, and one count of sexual assault in the fourth degree. The court, *Dewey*, *J.*, subsequently sentenced the defendant to a total effective sentence of thirty years incarceration, followed by five years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that his conviction violated his right to due process under the constitution of Connecticut because the police lost potentially exculpatory evidence, in the form of a text message, sent from the defendant to M, in violation of *State* v. *Morales*, supra, 232 Conn. 707. Specifically, the defendant argues that because M showed the text message to Kelsey and Torres, the East Hartford police and the department were on notice of the existence of this "apologetic" text message, creating a duty to preserve the evidence, and that their failure to do so violated his right to due process under the state constitution.[2] The state counters that there is an inadequate record to review the defendant's due process claim because he never raised this issue before the trial court, and, therefore, the court did not make the findings necessary for us to review this claim. We agree with the state.

The following facts are relevant to our conclusion. At the defendant's trial multiple witnesses testified regarding the existence of a text message that the defendant sent to MT in February, 2011.[3] Specifically, while being cross-examined by defense counsel, M testified that the defendant sent her a text message that was a purported apology for his actions involving the victim.[4]

[2] Within this due process claim, the defendant also contends that the text message had important impeachment value, and its loss deprived him of "a singular opportunity to counter the state's narrative of confession and consciousness of guilt." The defendant further contends that the court should have issued an adverse inference instruction about the lost text message. As we further discuss in this opinion, there is an inadequate record to review the defendant's due process claim.

[3] The specific content of the text message was not entered into evidence because it could not be retrieved.

[4] The following colloquy occurred between the defense counsel and M:

"[Defense Counsel]: "And after that, either to [Torres] or to the East Hartford Police Department, you told someone that you had received a text from [the defendant]. Is that correct?

"[M]: That's correct. . . .

During redirect examination by the prosecutor, M further testified that she showed this text message to Kelsey and Torres, but that she did not have a copy of the text message because her phone had been damaged, and she no longer had that phone.

Kelsey also testified regarding the text message sent from the defendant to M while being cross-examined by defense counsel. Specifically, Kelsey testified that he had seen the text message that was a purported apology, but that he did not memorialize it or record it because he believed that there was probable cause to arrest the defendant based on the statements he made regarding the victim.[5]

During direct examination by the prosecutor, Torres also testified regarding the existence and contents of the text message. Torres explained that M showed her

"[Defense Counsel]: Which—did you tell [Torres] or the police department first? Do you remember?

"[M]: I can't remember which one I told . . . first.

"[Defense Counsel]: You—but you wound up telling both, correct?

"[M]: Yes, I did.

"[Defense Counsel]: And both told you to hang on to that text because it might be important, right?

"[M]: That's correct. . . .

"[Defense Counsel]: Where is that text now? Did anybody retain a copy of it?

"[M]: No. . . .

"[Defense Counsel]: Did you delete it?

"[M]: No, I didn't delete it.

"[Defense Counsel]: Well, where is it?

"[M]: My phone [got] damaged, and I have another phone."

[5] The following colloquy occurred between defense counsel and Kelsey:

"[Defense Counsel]: Did you actually see the text message?

"[The Witness]: I did read the text message. . . .

"[Defense Counsel]: Okay. Did you make any effort to memorialize it or record it?

"[The Witness]: No. No, I didn't.

"[Defense Counsel]: Is there a reason why not?

"[The Witness]: I believe they had probable cause—enough probable cause with [the defendant's] statement to submit a warrant. I didn't really need that, and it only said he was sorry."

a text message she had received from the defendant that was apologetic in nature. Torres further testified that she did not save that text message or make a copy of it.[6]

In addition, Detective Frank Napolitano testified that he submitted an ex parte warrant to obtain M's cell phone records and that another detective obtained a search warrant to obtain the defendant's cell phone records. Napolitano further testified that the cell phone records indicated only that a text message had been sent from the defendant's cell phone to M's cell phone on the date in question, because too much time had lapsed for the cell phone company to be able to retrieve the contents of the text message.[7]

On appeal, the defendant claims that his conviction violated his right to due process, under article first, § 8, of the Connecticut constitution, because the police lost potentially exculpatory evidence in the form of a text message that he had sent to M. It is not disputed that the defendant did not raise his due process claim before the trial court, and, therefore, he seeks review pursuant

[6] The following colloquy occurred between the prosecutor and Torres:

"[The Prosecutor]: All right. And at that time, did [MT] show you anything relative to her phone?

"[Torres]: Yes.

"[The Prosecutor]: What was that?

"[Torres]: It was a text from [the defendant].

"[The Prosecutor]: Okay. And what did the text say?

"[Torres]: I don't know exactly what the text says, but I recall that it was an apology in regards to the situation that occurred between him and [the victim].

"[The Prosecutor]: From your recollection, do you know if he admitted any conduct in that text?

"[Torres]: Yes.

"[The Prosecutor]: Okay. As a [department] worker, although, you're not in charge of criminal investigation, did you save that text at all. . . .

"[Torres]: No, I didn't."

[7] Napolitano testified that there were numerous text messages from the defendant's number to M's number, but due to a lapse of time, he was unable to retrieve them.

to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). In *Golding*, our Supreme Court held: "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. . . . Id.; see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding* by eliminating word clearly before words exists and deprived)." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Mark*, 170 Conn. App. 254, 264–65, A.3d (2017).

We conclude that we do not have a sufficient record on appeal to consider this claim. See *State* v. *Walker*, 147 Conn. App. 1, 28, 82 A.3d 630 (2013) ("although *Golding* review requested, because defendant did not clearly raise state constitutional claim before trial court, state not put on notice that it was required to defend against such claim, and, therefore, neither state nor trial court—nor court on appeal—had benefit of complete factual inquiry"), aff'd, 319 Conn. 668, 126 A.3d 1087 (2015).

The defendant's claim is based on the proposition that his conviction violated his right to due process under the constitution of Connecticut because the police lost potentially exculpatory evidence in the form of a text message that he sent to M, which M showed to Kelsey and Torres. "Therefore, we begin by noting that it is well established that there are two areas of constitutionally guaranteed access to evidence such

that denying or foreclosing the defendant's access to that evidence may constitute a due process violation. The first situation concerns the withholding of exculpatory evidence by the police from the accused. . . . The second situation . . . concerns the failure of the police to preserve evidence that might be useful to the accused." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Johnson*, 288 Conn. 236, 275–76, 951 A.2d 1257 (2008). It is this second situation that the defendant claims is applicable in the present case.

"Despite these constitutional concerns, it is not sufficient under the federal or state constitution for a defendant simply to demonstrate that the police or the state has failed to preserve evidence. With respect to a due process violation for failure to preserve under the federal constitution, the United States Supreme Court has held that the due process clause of the fourteenth amendment requires that a criminal defendant . . . show bad faith on the part of the police [for] failure to preserve potentially useful evidence [to] constitute a denial of due process of law. . . . Notably, in [*Arizona* v. *Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)], the court observed that it had adopted a higher burden for defendants seeking to demonstrate a due process violation for failure to preserve evidence than that applicable to claims that the state has suppressed or withheld exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (not requiring defendant to show bad faith to demonstrate due process violation). The court in *Youngblood* explained that it was unwilling to read the fundamental fairness requirement of the [d]ue [p]rocess [c]lause . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.

"In [*State* v. *Morales*, supra, 232 Conn. 720], we rejected the federal bad faith requirement for claims alleging a failure to preserve in violation of our state constitution. Rather, we maintained that, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must employ the . . . balancing test [laid out in *State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984)], weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Johnson*, supra, 288 Conn. 276–77.

The defendant argues that the record is adequate for review of his due process claim because it reveals: "(1) cause to believe that the lost evidence existed and some reason to believe it would have helped the defendant; (2) that the evidence was in the state's custody at a relevant point in time; [and] (3) the circumstances of the loss or destruction of evidence."[8] The state first counters by arguing that the factors "the defendant has identified are merely some, but not all, of the considerations a trial court would balance in evaluating the four *Asherman* factors: materiality; likelihood of mistaken interpretation; reason for nonavailability to defense; and prejudice. . . . In particular, the defendant's factors do not include whether the missing evidence would likely be subject to misinterpretation, and whether its

[8] The defendant, however, has not cited any authority for his assertion that these factors suffice to establish an adequate record for review of his claim on appeal.

loss prejudiced the defendant." (Citation omitted.) The state continues by arguing that the first and the third factors the defendant identified are disputed and, therefore, "[t]o conclude that a verbatim copy of the text message would have helped the defendant, this court would have to resolve the conflicting testimony, which it cannot do on appeal."[9]

After our review of the record, we agree with the state. We iterate that because the defendant did not raise this claim before the trial court, the court did not make factual findings related to any of the *Asherman* factors. See *State* v. *Darden*, 239 Conn. 467, 469–71, 687 A.2d 132 (1996) (Supreme Court declined to apply *Asherman* factors for first time on appeal because determination of *Asherman* factors requires factual findings).[10] Without the necessary findings, we are

[9] The conflicting testimony consists of testimony from M, Kelsey, Torres, and the defendant. The testimony from M, Kelsey, and Torres explained that they had seen the text message sent from the defendant to M and that the content of the text message was the defendant apologizing for his behavior toward the victim. By contrast, in testifying that the text message was not inculpatory, the defendant stated that "I might have been drinking and that's how something could have happened, but as far as I know nothing has happened, and I didn't do anything."

[10] In *State* v. *Walker*, supra, 147 Conn. App. 29 n.4, this court further stated: "Although our Supreme Court in *Darden* remanded the case to the trial court to hold an evidentiary hearing and to apply the *Asherman* balancing test, such a remand was appropriate in that case because the defendant had raised a state due process claim before the trial court, and the court had not conducted the necessary balancing test in light of then newly decided *State* v. *Morales*, supra, 232 Conn. 707. . . . In the present case, the defendant never raised a state due process claim nor asked the court to apply the now well established *Asherman* factors. Accordingly, we conclude that it would be inappropriate to remand the case for an evidentiary hearing." (Citation omitted.) This is analogous to the present case where the defendant did not raise a state due process claim, ask the trial court to apply the *Asherman* factors or request the court to issue an adverse inference instruction during the trial. Following *Walker*, we, therefore, conclude that it would be inappropriate to grant the defendant's request to reverse his conviction and to remand the case for a new trial that includes an adverse inference instruction because the defendant did not raise such issues/requests before the trial court.

unable to consider the defendant's claim on appeal. Accordingly, the defendant's claim is not entitled to *Golding* review because the record is inadequate for review. See *State* v. *Walker*, supra, 147 Conn. App. 28–29.

II

The defendant next claims that his conviction for sexual assault in the second degree pursuant to § 53a-71 (a) (1)[11] (counts one and three) and risk of injury to a child pursuant to § 53-21 (a) (2)[12] (counts two and four) constituted a violation of his constitutional right against double jeopardy. Specifically, the defendant argues that rather than the state reciting the language of the statutes it charged the defendant with violating in the operative information, the state instead selected specific acts of sexual assault—digital penetration and cunnilingus—and charged those as both sexual assault in the second degree and risk of injury to a child. According to the defendant, the identification of these specific acts as the basis for the risk of injury to a child charges bars the state from arguing that the sexual assault in the second degree charges were based upon another contact with the victim. Given his assertions, the defendant thus maintains that the trial court violated

[11] General Statutes § 53a-71 (a) (1) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than other such person . . . ."

[12] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

his right against double jeopardy when it failed to reverse his conviction for risk of injury to a child in violation of § 53-21 (a) (2) (counts two and four). In response, the state argues that the defendant's double jeopardy claim fails because sexual assault in the second degree and risk of injury to a child are different offenses. We agree with the state.

The defendant did not raise this claim before the trial court. He seeks review, therefore, pursuant to *Golding*.[13] Although the record is adequate for our review and the claim is of constitutional magnitude, the defendant cannot demonstrate that a constitutional violation existed that deprived him of a fair trial, and so his claim must fail. See *State* v. *Mark*, supra, 170 Conn. App. 265.

As a preliminary matter, we set forth the applicable standard of review and relevant legal principles that govern claims involving the constitutional right against double jeopardy. "A defendant's claim that a conviction violated his constitutional right against double jeopardy raises an issue of law; our review of such a claim is plenary. . . . The United States constitution contains the guarantee that [n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . . The fifth amendment's prohibition of double jeopardy applies to state prosecutions through the due process clause of the fourteenth amendment. . . . The double jeopardy clause protects against a second

[13] As previously discussed in part I of this opinion, under *Golding*, "[a] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Mark*, supra, 170 Conn. App. 264.

prosecution for the same offense following acquittal, a second prosecution for the same offense after conviction and multiple punishments for the same offense." (Citations omitted; internal quotation marks omitted.) *State* v. *Antwon W.*, 118 Conn. App. 180, 186–87, 982 A.2d 1112 (2009), cert. denied, 295 Conn. 922, 991 A.2d 568 (2010). It is the final protection that is implicated in the present case.

"In determining whether two offenses are the same offense for double jeopardy purposes, we apply a two part test. First, we must determine whether the offenses arose out of the same act or transaction. . . . Second, we must determine whether the charged crimes constitute the same offense. . . . . Multiple punishments are a constitutional violation only where both conditions are met." (Citations omitted; internal quotation marks omitted.) Id., 187. Accordingly, "[t]he defendant on appeal bears the burden of proving that the prosecutions are for the same offense in law and fact." (Internal quotation marks omitted.) *State* v. *Alvaro F.*, 291 Conn. 1, 6, 966 A.2d 712, cert. denied, 558 U.S. 882, 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009).

The parties in the present case do not dispute that the conduct alleged in counts one and two of the information arose out of the same act or transaction. Likewise, they agree that the conduct alleged in counts three and four of the information arose out of the same act or transaction. Accordingly, our analysis focuses on the second prong of the test, namely, whether the defendant's conviction of sexual assault in the second degree under § 53a-71 (a) (1) (counts one and three) and risk of injury to a child under § 53-21 (a) (2) (counts two and four) violated the constitutional prohibition against double jeopardy because those crimes constitute the same offenses. See id.

"Traditionally we have applied the [test set out in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.

Ct. 180, 76 L. Ed. 306 (1932)] to determine whether two statutes criminalize the same offense . . . . Under that test, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial. . . . Thus, [t]he issue, though essentially constitutional, becomes one of statutory construction. . . .

"Our courts have addressed the relationship between risk of injury to a child and the various degrees of sexual assault in the context of double jeopardy claims on several occasions, each time concluding that the two crimes do not constitute the same offense. In *State* v. *Bletsch*, [281 Conn. 5, 28–29, 912 A.2d 992 (2007)], for example, we . . . concluded that, under the charging instruments in that case, the crimes of sexual assault in the second degree under . . . § 53a-71 (a), and risk of injury to a child under § 53-21 (a) (2), do not constitute the same offense for double jeopardy purposes because the language of the statutes makes it possible to have sexual intercourse under § 53a-71 (a) without touching the victim's intimate parts under § 53-21 (a) (2), and vice versa." (Citations omitted; internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 7.

The defendant contends, however, that *State* v. *Bletsch*, supra, 281 Conn. 28, is distinguishable from the present case because in that case the state copied, nearly verbatim, the language of the statute in which it charged the defendant with violating in the information. Contrary to *Bletsch*, the defendant here contends that the state alleged exactly the same facts in support of each of the charged offenses at issue, and, thus, the

specifics contained in the information made count one the same offense as count two, and count three the same offense as count four because "the state necessarily proved the risk of injury to a [child] counts when it prove[d] the sexual assault in the second degree counts." We disagree.

The defendant's argument is based on the precise language used in the information that set forth the charges against him. The information filed by the state alleged in relevant part: "Count one: The undersigned Senior Assistant State's Attorney charges the defendant . . . with the crime of sexual assault in the second degree in violation of . . . [§] 53a-71 (a) (1) and alleges that on or about October 2007–October 4, 2009 in East Hartford, Connecticut, the defendant engaged in sexual intercourse to wit: digital intercourse with another person who was thirteen years of age or older but under sixteen years of age and the defendant was more than three years older than such person.

"Count two: The undersigned Senior Assistant State's Attorney further charges the defendant . . . with the crime of risk of injury to a [child] in violation of . . . [§] 53-21 (a) (2) and alleges that on or about October 2007–October 4, 2009 in East Hartford, Connecticut, the defendant had contact with the intimate parts of a child under the age of sixteen years and subjected a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child to wit: digital intercourse.

"Count three: The undersigned Senior Assistant State's Attorney further charges the defendant . . . with the crime of sexual assault in the second degree in violation of . . . [§] 53a-71 (a) (1) and alleges that on or about 2008 in East Hartford, Connecticut, the

defendant engaged in sexual intercourse to wit: cunnilingus with another person who was thirteen years of age or older but under sixteen years of age and the defendant was more than three years older than such person.

"Count four: The undersigned Senior Assistant State's Attorney further charges the defendant . . . with the crime of risk of injury to a [child] in violation of [§] 53-21 (a) (2) and alleges that on or about 2008 in East Hartford, Connecticut, the defendant had contact with the intimate parts of a child under the age of sixteen years and subjected a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child to wit: cunnilingus."

Although the defendant contends that the state provided the same facts for counts one and two and counts three and four in the information, our Supreme Court has previously concluded that "[i]t is irrelevant that the state may have relied on the same evidence to prove that the elements of both statutes were satisfied." *State* v. *Kirsch*, 263 Conn. 390, 421, 820 A.2d 236 (2003). Rather, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (Internal quotation marks omitted.) Id., 420.

After examining the elements of the charged offenses in the information, it is clear that § 53a-71 (a) (1) and § 53-21 (a) (2) each requires proof of a fact that the other does not. For counts one and three, to prove that a defendant is guilty of sexual assault in the second degree in violation of § 53a-71 (a) (1), the state was required to establish the following elements: "(1) a person engages in sexual intercourse,[14] (2) with another

[14] General Statutes § 53a-65 (2) defines sexual intercourse as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. Penetration, however slight, is sufficient to complete vaginal intercourse,

person who is thirteen years of age or older but under sixteen years of age, and (3) the actor is more than two years older than such person." (Emphasis omitted.) *State* v. *Rivera*, 84 Conn. App. 245, 249, 853 A.2d 554, cert. denied, 271 Conn. 934, 861 A.2d 511 (2004). In contrast, for counts two and four, "[t]o convict the defendant of risk of injury to a child under § 53-21 [a] (2), the state must prove that (1) the defendant had contact with the intimate parts of, or subjected to contact with his intimate parts, (2) a child under the age of sixteen years, (3) in a sexually and indecent manner likely to impair the health or morals of such child." (Internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 10.

Although those two offenses both share similar characteristics, it is clear that each requires proof of facts that the other does not. Specifically, "[r]isk of injury to a child requires proof that the contact was made in a sexual and indecent manner likely to impair the health or morals of the child, while sexual assault in the second degree does not. Sexual assault in the second degree requires proof of sexual intercourse, while risk of injury to a child does not." *State* v. *Rivera*, supra, 84 Conn. App. 249–50. "Thus, although a defendant may not be convicted under § 53-21 (a) (2) unless the state proves that the contact was made in a sexual and indecent manner likely to impair the health or morals of such child, there is no such requirement under [§ 53a-71 (a) (1)]." (Internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 10. Moreover, this court and our Supreme Court previously have concluded that sexual assault in the second degree in violation of § 53a-71 (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2) are in fact separate offenses. See id. (risk of

anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body."

injury to child and various degrees of sexual assault do not constitute same offense for purposes of double jeopardy); *State* v. *Antwon W.*, supra, 118 Conn. App. 190–91 (unlike offense of risk of injury to a child in violation of § 53-21 (a) (2), "sexual assault in the second degree in violation of § 53a-71 (a) (1) does not require proof that the contact was made in a sexual and indecent manner likely to impair the health or morals of the child" [footnote omitted]); *State* v. *Ellison*, 79 Conn. App. 591, 602, 830 A.2d 812 (same), cert. denied, 267 Conn. 901, 838 A.2d 211(2003); see also *State* v. *Bletsch*, supra, 281 Conn. 28 (sexual assault in second degree and risk of injury to child do not violate double jeopardy, as each offense requires state to prove element that other does not); *State* v. *Rivera*, supra, 84 Conn. App. 249 (same).

In light of the foregoing, we conclude that the crimes of sexual assault in the second degree in violation of § 53a-71 (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2) do not constitute the same offense under *Blockburger*, as each crime requires proof of a fact not required by the other.[15] Thus, the conduct alleged in counts one and two do not constitute the same offense nor does the conduct alleged in counts three and four. We, therefore, conclude that the defendant's claim fails under the third prong of *Golding*

[15] In addition, we note that "[o]ur analysis of double jeopardy claims does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose, the rule should not be controlling where . . . there is a clear indication of contrary legislative intent." (Internal quotation marks omitted.) *State* v. *Mark*, supra, 170 Conn. App. 268. "However, [w]hen the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Internal quotation marks omitted.) *State* v. *Antwon W.*, supra, 118 Conn. App. 191. In the present case, the defendant has provided no analysis to demonstrate that the legislature did not intend the crimes described by § 53a-71 (a) (1) and § 53-21 (a) (2) to be separate offenses.

because the constitutional violation he alleges does not exist. See *State* v. *Golding*, supra, 213 Conn. 240.

The judgment is affirmed.

In this opinion the other judges concurred.

REDDING LIFE CARE, LLC *v.* TOWN OF REDDING (AC 37928)

DiPentima, C. J., and Prescott and Beach, Js.

Syllabus

The plaintiff in error, S, who previously had appraised certain real property that was the subject of a tax appeal, filed a writ of error claiming that the trial court in the tax appeal had improperly denied his motion for a protective order seeking to prohibit the defendant in error town from taking his deposition. S had conducted two appraisals on behalf of two banks who were considering lending money to the property owner in the tax appeal, which was challenging the town's assessment of the property. S's motion for a protective order claimed that he had not been retained in the tax appeal by either party, did not have any relevant knowledge, and that Connecticut law prohibited compelling unretained expert testimony. On appeal, S argued that under Connecticut common law an absolute unretained expert privilege exists or, in the alternative, a qualified privilege exists that can be overcome only by an affirmative showing of a compelling need for the testimony. *Held* that the trial court improperly denied S's motion for a protective order, as he can invoke a qualified unretained expert privilege based on whether, under the circumstances here, he reasonably should have expected in the normal course of events to be called upon to provide opinion testimony in the litigation, and whether there existed a compelling need for his opinion testimony: although this court declined to recognize an absolute unretained expert privilege, as a categorical rule permitting experts to refuse to testify would be contrary to our liberal discovery rules, and this court found no justification for a rule that wholly exempts experts from testifying about previously formulated opinions, this court found persuasive Superior Court decisions that had recognized a qualified unretained expert privilege based on a nonparty expert's expectation of whether he would be called as a witness in subsequent litigation and whether there was a compelling need for that testimony, as those considerations properly balance the right of expert witnesses to be free from testifying against their will and the needs of the court and the litigants for that testimony; accordingly, the writ of error was granted, and the case was remanded to the trial court with direction to vacate

the order denying S's motion for a protective order and for further proceedings.

Argued January 6—officially released June 27, 2017

Procedural History

Writ of error from an order of the Superior Court in the judicial district of New Britain, *Schuman, J.*, denying the motion for a protective order filed by the plaintiff in error, brought to the Supreme Court, which transferred the matter to this court; thereafter, the court, *Schuman, J.*, issued an articulation of its decision; subsequently, this court denied the motion to dismiss filed by the defendant in error. *Writ granted; order vacated; further proceedings.*

Proloy K. Das, with whom were *Robert E. Kaelin*, *Joseph B. Schwartz* and, on the brief, *Sarah Gruber*, for the plaintiff in error (David R. Salinas).

Elliott B. Pollack, with whom, on the brief, was *Tiffany K. Spinella*, for the defendant in error (town of Redding).

Opinion

BEACH, J. The plaintiff in error, David R. Salinas, an appraiser, provided two opinions to banks regarding the value of a certain property. In a subsequent, unrelated tax appeal regarding that property, a party sought to compel him to testify in a deposition regarding those opinions. The issue presented in this writ of error is whether an expert, who previously has rendered an opinion on an issue material to a later, unrelated case in which neither party has engaged his services, may be compelled by subpoena to provide an opinion in that case. We hold that Connecticut recognizes a qualified testimonial privilege for unretained expert witnesses and, accordingly, we grant the writ of error and remand the case for further proceedings.

The record reveals the following undisputed facts and procedural history. In April, 2013, Redding Life Care, LLC (Redding Life), initiated an action against the defendant in error town of Redding (town) to challenge the town's assessment of a property owned by Redding Life (tax appeal). Prior to the initiation of that action, Salinas had completed two appraisals of that property on behalf of banks that were considering lending to Redding Life. In July, 2014, after learning about these appraisals, the town filed a motion for commission[1] to depose Salinas. Redding Life and CapitalSource Bank, a nonparty to the tax appeal and one of the banks for which Salinas had conducted an appraisal, objected. The trial court, *Hon. Arnold W. Aronson*, judge trial referee, granted the town's motion.

Approximately four months later, the town served Salinas with a subpoena compelling him to appear at a deposition scheduled for January, 2015. Salinas filed a motion for a protective order seeking to prohibit the town from taking his deposition. He argued that he had not been retained in the tax appeal, did not have any relevant knowledge, and could not be compelled to testify as an expert. He specifically argued that Connecticut law "prohibit[s] the compulsion of unretained expert testimony," and referred the court to the decisions in *Drown* v. *Markowitz*, Superior Court, judicial district of Hartford, Docket No. CV-05-4010740 (August 18, 2006) (41 Conn. L. Rptr. 855, 856), which relied on the reasoning from other jurisdictions that " 'absent extraordinary circumstances . . . a nonparty expert cannot be compelled to give opinion testimony against his or her will,' " and *Hill* v. *Lawrence & Memorial Hospital*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. HHD-X04-CV-4034622-S (June 30, 2008) (45 Conn. L. Rptr. 789, 792),

[1] Salinas was residing in Florida.

which held that "[i]n the absence of compelling necessity, the fact that the [experts] are likely to have formed opinions is an insufficient basis on which to require them to be expert witnesses."[2] The town objected.

The court rejected Salinas' argument, denied his motion, and ordered the following: "The deposition shall proceed. The town shall pay the witness his fees and expenses as provided in Practice Book § 13-4 (c) (2). The town shall enter into any reasonable protective order proposed by the witness or the other parties designed to limit the use of the information obtained in the deposition to this case only." Salinas subsequently filed a motion seeking the following articulation: "Did the trial court conclude that . . . Salinas can be compelled under Connecticut law to provide expert witness testimony against his will? If so, what is the basis for that conclusion?" The court responded as follows: "The answer to the first question is no. It was unnecessary to reach that conclusion because [Salinas] had already authored appraisals that contained his opinions."

Salinas filed a writ of error with our Supreme Court on February 3, 2015, seeking appellate review of the trial court's denial of his motion for a protective order. The town filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the court's discovery order did not constitute an appealable final judgment. Our Supreme Court transferred the matter to this court, and this court denied the town's motion.

[2] The issue of qualified privilege, then, was presented to the court, and both sides addressed *Drown* and *Hill*. The court had the opportunity to rule on the issue. Both Salinas and the town expressly addressed the issue of qualified privilege in their briefs to this court and at oral argument. Accordingly, the issue of qualified privilege was adequately preserved, we have an adequate record for review, and no party has suggested that it was not preserved.

Salinas argues that the court erred in failing to recognize that an unretained expert privilege[3] exists under Connecticut common law and, consequently, erred in denying his motion for a protective order. He notes that, although Connecticut appellate courts have not addressed directly the question whether an unretained expert privilege exists under Connecticut common law, several Superior Court decisions have recognized such a privilege. Salinas also argues that, if this court holds that such a privilege does exist, the privilege is absolute. In the alternative, he argues that there should be a qualified privilege that "can only be overcome by an affirmative showing of 'compelling need.' "

The town responds that "[t]here is no need for this court to opine whether any unretained nonparty expert testimonial privilege exists in Connecticut with regard to potential trial testimony at this time," because, as the court noted in its articulation, Salinas' testimony, regardless of whether it is admissible at trial, is discoverable because it " 'appears reasonably calculated to lead to the discovery of admissible evidence'; Practice Book § 13-2; especially under the liberal standard that applies to discovery in civil cases."[4] The town then argues that, if we do address the issue of privilege, we are bound by the precedent of *Thomaston* v. *Ives*, 156 Conn. 166, 239 A.2d 515 (1968). In that case, the town posits, our Supreme Court held that the question of whether a privilege exists should be determined on a

[3] We use the phrase "unretained expert privilege" to mean a privilege that may be invoked by an expert to prevent the compelled disclosure of his or her opinion.

[4] We address this claim only briefly. Practice Book § 13-30 (b) explicitly states that a deponent may be instructed not to answer "when necessary to preserve a privilege . . . ." In the circumstances of this case, the court ruled that Salinas had no privilege to preserve. Had the deposition proceeded, Salinas may have been placed in the unenviable position of either violating a putative privilege or disobeying a court order. Both parties have responsibly addressed the merits of the claimed privilege; we shall as well.

case-by-case basis, and that if a privilege does exist, it is never absolute. We agree with Salinas that an unretained expert privilege does exist under Connecticut common law, but we hold that it is a qualified privilege rather than an absolute privilege.

We begin our analysis by setting forth the standard of review. The question of whether an unretained expert privilege exists, and, if it does, whether that privilege is absolute, are questions of law. See *Hutchinson* v. *Farm Family Casualty Ins. Co.*, 273 Conn. 33, 38, 867 A.2d 1 (2005) ("[w]hether the trial court properly concluded that there is an exception to the attorney-client privilege when an insured has made an allegation of bad faith against an insurer . . . and, if so, whether it properly delineated the scope and contours of such an exception, are questions of law"); see also *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 169, 757 A.2d 14 (2000) (whether court should recognize civil fraud exception to attorney-client privilege and limitations on exception are questions of law). Accordingly, our review is plenary.

We turn first to the issue of whether we should recognize an absolute privilege. Connecticut appellate courts have not yet addressed directly whether an unretained expert privilege exists under Connecticut law. See C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 7.13, p. 485. Salinas argues that we should recognize an absolute unretained expert privilege.[5] On the basis of *Milliun* v. *New Milford Hospital*, 129 Conn. App. 81, 108–109, 20 A.3d 36 (2011), aff'd on other grounds, 310

[5] Salinas presents the following definition of absolute privilege, which has been adopted by courts in other jurisdictions: "Under the absolute privilege the witness is only required to testify regarding his or her observations, just as any other witness. The witness is not compelled to give expert testimony even if the witness had formed opinions prior to the deposition and without additional study, experimentation, thought or reflection." (Internal quotation marks omitted.)

Conn. 711, 80 A.3d 887 (2013), however, we decline to recognize an absolute privilege.

In *Milliun*, this court held that nonparty physicians could be compelled to testify as expert witnesses for the plaintiff conservator in a professional negligence action regarding the bases for medical opinions they previously formed after treating the conserved person. Id., 108–109. In that case, the plaintiff alleged that, while in the defendant hospital's care, the conserved person suffered an "anoxic incident" which resulted in her cognitive impairment. Id., 85. Subsequent to this incident, but prior to initiating the underlying action against the defendant, the conserved person sought treatment from physicians at the Mayo Clinic for the purpose of determining whether the anoxic incident had caused her impairment.[6] Id., 85–86. The defendant hospital attempted to assert an expert privilege on behalf of the physicians, and argued that the physicians' testimony regarding causation was barred by the privilege. Id., 107.

This court determined that the physicians could be compelled to testify for three reasons: (1) the defendant

[6] In *Milliun*, "[the conserved person] had sought treatment at the Mayo Clinic . . . in connection with her cognitive health. At the Mayo Clinic, she first was seen by Kathleen M. McEvoy, a physician. McEvoy reported that [the conserved person] had brought extensive outside records with her, along with an investigative report from the department of health regarding the anoxic incident that occurred while she was in the care of the defendant. McEvoy's admittance notes indicated that the plaintiff also reported this event to her." *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 85. When the conserved person returned to the Mayo Clinic three years later, "[Stefan A.] Dupont, a resident at the Mayo Clinic, reported in his neurology consult that her 'cognitive dysfunction . . . seems to have occurred because of anoxic encephalopathy suffered during her respiratory arrest [while in the defendant's care].' [Another physician's] evaluation echoed Dupont's conclusion. He reported as follows: 'It is my opinion that [the] cognitive impairment . . . is secondary to whatever event occurred or whatever transpired [while she was in the defendant's care]. . . . Therefore, one must conclude that her cognitive impairment was secondary to [that] event . . . .' " Id., 86.

had asserted the privilege rather than the physicians; (2) a categorical rule permitting *treating* physicians to refuse to testify at a deposition would be contrary to "our liberal discovery rules"; and (3) because there was no justification for a rule that would "wholly" exempt experts from testifying about previously formulated opinions, the court did not wish "to create a testimonial privilege that would prevent such witnesses from being deposed in the present case." (Internal quotation marks omitted.) Id., 107–109. Consistent with our holding and the underlying reasoning in *Milliun*,[7] then, we decline to recognize an absolute privilege for unretained expert testimony in this case.

Salinas argues in the alternative, however, that we should recognize a qualified privilege. He asks this court to recognize a "broader qualified privilege" with a "compelling need exception," as defined by the Wisconsin Supreme Court in *Burnett* v. *Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (Wis. 1999). (Internal quotation marks omitted.) "Under [a] broader qualified privilege, an expert may be forced to provide expert testimony but only if the compelling party affirmatively demonstrate[s] some compelling necessity for an expert's testimony that overcomes the expert's and the public's need for protection. . . . Furthermore, an expert only can be compelled to give previously formed opinions and cannot be required to engage in any out-of-court preparation." (Citations omitted; internal quotation marks omitted.) Id., 87–88. With this assertion, we agree.

We first observe that the issue of a qualified privilege was not presented in *Milliun*. In introducing the issue

[7] Our decision in *Milliun* was appealed to our Supreme Court. On appeal, that court determined, on the basis of representations made by the plaintiff during oral argument, that the issue of privilege was not before them. *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 740, 80 A.3d 887 (2013). Because that court did not consider the issue of privilege, our decision stands. See id., 741.

in that case, this court stated, "[t]he defendant contends that the treating physicians enjoyed *an absolute privilege* not to be pressed into service as experts for the plaintiff." (Emphasis added.) *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 107. In its discussion, as noted previously, this court agreed that there was no justification for treating physicians to be "wholly exempt" from providing information. (Internal quotation marks omitted.) Id., 109. Our decision in that case, however, was not inconsistent with the existence of a qualified unretained expert privilege. This case provides us with an opportunity to clarify whether a qualified privilege exists.

Several Superior Court decisions have recognized a qualified unretained expert privilege. These decisions have held that an unretained expert called as a witness against his or her will may be questioned regarding his or her own conduct and observations, but, without more, cannot be questioned more generally on matters with which he or she is conversant as an expert. See *Hill* v. *Lawrence & Memorial Hospital*, supra, 45 Conn. L. Rptr. 792 (plaintiff prohibited from questioning treating physicians about damages or causation, but could question them about their own conduct and treatment of decedent); *Drown* v. *Markowitz*, supra, 41 Conn. L. Rptr. 856 (plaintiff could depose decedent's treating physician regarding her own conduct and to "facts that she knows," but not "her opinion as to those facts or standard of care of anyone except herself"); see also *Izquierdo* v. *KIA Motors America, Inc.*, Superior Court, judicial district of Tolland, Docket No. X07-CV-000075599-S (June 16, 2003) (plaintiff could not require witness to render expert opinion regarding whether brake system was defective and whether defect proximately caused car accident). In recognizing a qualified privilege, these decisions have drawn from the widely cited reasoning of the Wisconsin Supreme Court in *Alt*

as well as the reasoning of our Supreme Court in *Thomaston* v. *Ives*, supra, 156 Conn. 166.

In determining that an unretained expert privilege exists under Connecticut law, the court in *Drown* v. *Markowitz*, supra, 41 Conn. L. Rptr. 856, identified a similarity between a provision in the Connecticut Practice Book and the Wisconsin statute that served as the basis for the unretained expert privilege under Wisconsin law. In *Burnett* v. *Alt*, supra, 224 Wis. 2d 86, the Wisconsin Supreme Court recognized the existence of the unretained expert privilege on the basis of a statute that stated that "[a]n expert witness shall not be appointed by the judge unless the expert witness consents to act."[8] (Emphasis omitted.) The court in *Alt* noted that "[i]f a court cannot compel an expert witness to testify, it logically follows that a litigant should not be able to so compel an expert," and stated that "this express grant implies a privilege to refuse to testify if the expert is called by a litigant." Id. In *Drown*, a Connecticut court noted that Practice Book § 42-39, which provides in relevant part that "[a]n expert witness shall not be appointed by the judicial authority unless the expert consents to act," is nearly identical to that Wisconsin statute. *Drown* v. *Markowitz*, supra, 856. The court in *Drown* accordingly held that § 42-39 provides a basis for recognizing an unretained expert privilege under Connecticut law.[9] Id.

[8] The court was referring to Wis. Stat. § 907.06 (1).

[9] We note that the Superior Court decisions discussed here predate our decision in *Milliun*. We nonetheless find them informative, though of course not binding, especially because the issue of qualified privilege was not expressly decided in *Milliun*. In *Patterson* v. *Midstate Medical Center*, Superior Court, judicial district of Hartford, Docket No. MMX-CV-10-6002374-S (August 21, 2012) (54 Conn. L. Rptr. 575, 575), which addresses the issue of expert privilege following our decision in *Milliun*, the court acknowledged that "there is no Connecticut appellate authority directly on point" on the issue of expert privilege. Although the court in *Patterson* held that a physician's testimony was not protected by an expert privilege, it did not hold that an expert privilege does not exist, and it based its decision on considerations similar to those outlined later in this opinion. Id., 576.

In *Hill* v. *Lawrence & Memorial Hospital*, supra, 45 Conn. L. Rptr. 790, the Superior Court found a basis for the unretained expert privilege in our Supreme Court's holding in *Thomaston* v. *Ives*, supra, 156 Conn. 166. In *Thomaston*, an appraiser who had been hired by the defendant state highway commissioner to appraise the damages arising from a taking of certain property by the state was compelled by the plaintiff to testify as an expert concerning the value of the condemned property. *Thomaston* v. *Ives*, supra, 168. Our Supreme Court affirmed the judgment requiring that the appraiser testify, but carefully limited its holding, noting that "[t]his is not to be taken to mean that every expert witness is to be held to the same requirement. The wide diversity of subjects on which expert opinion may be required and the varying circumstances under which the opinion may be sought militate against any such sweeping generalization." Id., 174. The court specifically noted that the purpose of an eminent domain proceeding is "to ensure that the property owner shall receive, and that the state shall only be required to pay, the just compensation which the fundamental law promises the owner for the property," and that, therefore, "[a]ll material and relevant information which will assist the trier in determining the sum of money which will constitute that just compensation should, in justice to both parties, be made available . . . ." Id. The court reasoned that an appraiser hired by the state specifically to appraise the damages arising from a taking would expect, in the normal course of events, to be called to testify about the value of that property in a subsequent eminent domain proceeding in which the state, which had hired him, was a party. Id. As such, the court reasoned, the appraiser appropriately could be compelled to testify at that proceeding. Id.

In *Hill* v. *Lawrence & Memorial Hospital*, supra, 45 Conn. L. Rptr. 790, 792, the court applied the reasoning

set forth in *Thomaston* but reached a different result under the facts of that case. In *Hill*, two nonparty treating physicians were called as expert witnesses in a professional negligence action against the defendants, a hospital, a radiology practice and another physician. Id., 789. The court determined that a treating physician, as perhaps opposed to an expert hired by an adversary, would not, in the normal course of events, expect to be called as an expert witness in a professional negligence action against a hospital and another treating physician. Id., 790. The court held that the nonparty treating physicians could not be compelled to testify as experts in the underlying action. Id., 792.

In reaching this conclusion, the court in *Hill* also drew from the reasoning of the Wisconsin Supreme Court in *Burnett* v. *Alt*, supra, 224 Wis. 2d 72. In *Alt*, the court held that a qualified unretained expert privilege existed under Wisconsin law, such that an expert could not be compelled to serve as a witness, absent a compelling need for his or her testimony. Id., 89. That court noted that "[u]nlike factual testimony, expert testimony is not unique and a litigant will not be usually deprived of critical evidence if he cannot have the expert of his choice." (Internal quotation marks omitted.) Id. The court determined that the compelling need requirement would properly strike a balance "between the right of expert witnesses to be free from testifying against their will and the needs of the court and litigants for testimony." Id., 88.

Applying this reasoning, the court in *Hill* determined that the two nonparty treating physicians could not be compelled to testify as experts, because the plaintiff had failed to show that there was a compelling need for their testimony. *Hill* v. *Lawrence & Memorial Hospital*, supra, 45 Conn. L. Rptr. 792. The plaintiff had argued that there was a compelling need for the expert testimony of the decedent's treating physicians because,

in addition to being generally conversant as medical experts, the physicians had "unique insight concerning the decedent and would therefore be in the best position to testify as to treatment and survivability." Id., 791. The court rejected this argument, noting that "[t]his part of the plaintiffs' argument, taken to its logical extension, would necessitate that any physician who treats a patient after alleged malpractice has occurred is required to become an expert witness in an ensuing malpractice action. Such a blanket requirement would be contrary to the distinction, cited in *Thomaston*, 'between the duty of a witness to testify to factual matter[s] within his knowledge and the imposition of a requirement that he voice his opinion concerning a subject with which he is conversant as an expert.' "[10] Id.

As set forth previously, the decisions of our Superior Court have conducted reasoned analyses in recognizing a qualified unretained expert privilege under Connecticut law. Although not bound by them, we find persuasive their reasoning, as well as the Wisconsin Supreme Court's decision in *Burnett* v. *Alt*, supra, 224 Wis. 2d 72, and hold that a qualified unretained expert privilege exists. Accordingly, the trial court here improperly denied Salinas' motion for a protective order.

We must next determine the scope of that privilege. "The appropriate scope of expert privilege requires a balance between the right of expert witnesses to be free from testifying against their will and the needs of the court and litigants for testimony." *Burnett* v. *Alt*, supra, 224 Wis. 2d 88. We believe that, in order to strike this balance properly, the trial court here should, in determining whether to grant Salinas' motion for a protective order because his testimony is appropriately

[10] We note that the fact of whether a newly retained expert had the opportunity to examine the patient, or other subject of inquiry, may have some bearing on the issue of compelling need.

barred by the qualified unretained expert privilege, consider (1) whether, under the circumstances, he reasonably should have expected that, in the normal course of events, he would be called upon to provide opinion testimony in subsequent litigation; and (2) whether there exists a compelling need for his opinion testimony in this case. Additional considerations may be relevant to the analysis, including, for example, whether he was retained by a party with an eye to the present dispute.

The writ of error is granted and the case is remanded to the trial court with direction to vacate the order denying the plaintiff in error's motion for a protective order, and for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

VALLEY NATIONAL BANK *v.* STEVEN MARCANO (AC 38497)

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

Syllabus

The plaintiff bank sought to recover damages from the defendant for breach of contract for his obligation under a personal guarantee of a $250,000 line of credit. The defendant, as a cofounder of M Co., a baby products company, applied for a business line of credit with P Co., the plaintiff's predecessor in interest, and executed a personal guarantee. M Co., through requests by the defendant, then made drawdowns on the line of credit in the total amount of $248,723.06. Subsequently, P Co. was seized by the Federal Deposit Insurance Corporation and the plaintiff purchased P Co.'s assets from the FDIC through a purchase and assumption agreement, transferring the defendant's obligation on the line of credit from P Co. to the plaintiff. The defendant made no payments on the obligation of M Co. as a personal guarantor and the plaintiff brought this action to enforce the debt. The trial court rendered judgment for the plaintiff in the amount of the principal balance of the debt plus interest, from which the defendant appealed to this court. The defendant

claimed that the plaintiff did not establish a proper chain of title regarding its ownership of the promissory note originally executed and personally guaranteed by the defendant to P Co., depriving the plaintiff of standing to bring an action on the guarantee of that note, and that the plaintiff submitted insufficient evidence to accurately establish the loan balance it claimed was owed by the defendant. *Held*:

1. The trial court properly determined that the plaintiff had standing to pursue its claim against the defendant for his personal guarantee on the line of credit: the promissory note was not rendered unenforceable when it was not specially endorsed to the plaintiff or endorsed in blank because an unenforced note can still be transferred and enforced, although the plaintiff was not technically a holder of the note by virtue of its third-party status, it demonstrated that it acquired the right to enforce the note by way of the purchase and assumption agreement, which evidenced the intent of the FDIC to transfer P Co.'s assets to the plaintiff; the testimony of the plaintiff's witness, a loan workout officer for the plaintiff who was not an employee at the time the plaintiff acquired the assets of P Co., was not offered to authenticate the loan documents and purchase and assumption agreement as business records but, rather, to indicate what information he relied on to reach the total sum owed under the obligation, and, therefore, the defendant's claim that the witness lacked personal knowledge of the documents at issue could not succeed; furthermore, although the purchase and assumption agreement did not specifically identify the M Co. loan as an acquired asset, the plaintiff provided the necessary documentation to establish that it was the successor in interest to the FDIC as receiver for P Co. and had standing to prosecute this action.
2. The trial court did not err when it determined that the plaintiff had submitted sufficient evidence from which the outstanding loan balance at the time of trial could be accurately established: that court's award of damages was consistent with the figures provided in P Co.'s loan history and as testified to by the plaintiff's witness, a loan workout officer for the plaintiff, and the defendant admitted to his signatures being on each of the loan documents; furthermore, although the defendant testified that he did not authorize the amounts in the drawdown requests, he presented no evidence from which the court reasonably could have concluded that the amounts at issue had not been disbursed to M Co.

Argued February 16—officially released June 27, 2017

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court,

Swienton, *J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

David L. Gussak, for the appellant (defendant).

Miguel A. Almodóvar, for the appellee (plaintiff).

Opinion

HARPER, J. The defendant, Steven Marcano, appeals from the judgment rendered against him, after a court trial, for breach of his obligation under a personal guarantee of a $250,000 line of credit extended to My Little Star Baby Products, Inc. (My Little Star), by the plaintiff, Valley National Bank, as successor in interest to Park Avenue Bank (Valley National). The defendant challenges the trial court's findings that (1) Valley National established a proper chain of title regarding its ownership of the promissory note originally executed and personally guaranteed by the defendant to Park Avenue Bank (Park Avenue), thereby giving Valley National standing to bring an action on the guarantee of payment of that note and (2) Valley National submitted sufficient evidence to accurately establish the loan balance it claimed was owed by the defendant.[1] We affirm the judgment of the trial court.

In its September 17, 2015 memorandum of decision, the court found the following facts. "The defendant was one of the founders of the entity known as [My Little Star], and was the president of the company when it applied for a business line of credit with [Park Avenue] in New York. The loan application was approved, and [the defendant] executed the business loan agreement, commercial security agreement, corporate resolution

[1] Although the defendant raises in his brief a third claim that the trial court erred "in entering judgment against" him, this claim is, in substance, a reiteration of the first two claims. The resolution of the defendant's first two claims renders his third claim meritless, and thus, we need not address it here.

authorizing the borrowing, as well as the promissory note and [personal] guarantee. . . . The promissory note which secured the line of credit had a maturity date of May 27, 2009, when all sums drawn upon the line of credit along with interest were to be paid in full without demand.

"The personal guarantee signed by the defendant secured My Little Star's obligation to [Park Avenue]. After approval, My Little Star made drawdowns on the line of credit through drawdown requests made by the defendant. The total amount of the drawdowns was $248,723.06.

"At some point, [Park Avenue] was seized by the [Federal Deposit Insurance Corporation (FDIC)], and [Valley National] purchased the assets of [Park Avenue] from the FDIC as receiver. [The plaintiff's] Exhibit 9, which is a Purchase and Assumption Agreement, indicates that the FDIC transferred the defendant's obligation to [Park Avenue] to [Valley National]. . . .

"The defendant has made no payments on the obligation of My Little Star as a personal guarantor. The current amount due as of July 22, 2015, is $328,009.28, of which $248,723.06 is principal, and $79,286.22 is interest, with a per diem of $36.27." (Citation omitted; footnote omitted.) The plaintiff brought an action to enforce the debt owed by the defendant as the personal guarantor of the loan. The trial court found in favor of the plaintiff and rendered judgment against the defendant in the amount of $330,040.40, which represented a principal balance of $248,723.06, and interest in the amount of $81,317.34. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant's first claim is that the court improperly found that Valley National had established a proper

chain of title regarding its ownership of the promissory note, which was originally executed and personally guaranteed by the defendant to Park Avenue, thereby giving Valley National standing[2] to bring an action on the guarantee of payment of that note. Specifically, the defendant argues that the plaintiff lacks standing to bring an action to enforce the defendant's personal guarantee on the promissory note for the following reasons: (1) none of the loan documents is endorsed, either in blank or specially, from Park Avenue to Valley National; (2) the plaintiff cannot prove that it is a nonholder with the rights of a holder because the plaintiff's witness, Michael Robinson, was not an employee of the plaintiff at the time that it acquired the assets of Park Avenue, nor was he involved in the transaction between the FDIC and the plaintiff; and (3) the purchase and assumption agreement does not specifically identify the My Little Star loan as an asset acquired by the plaintiff from the FDIC. We disagree and conclude that the court properly determined that Valley National had standing to pursue its claim against the defendant for his personal guarantee on the line of credit.

We first set forth our standard of review. "The issue of standing implicates [the] court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title

[2] The defendant contends in his brief: "[The] plaintiff, based upon the evidence offered, lacked standing to maintain its claim." The plaintiff argues that, because the trial court made a factual finding as to Valley National's ownership of the loan documents, we must review the defendant's claim under the clearly erroneous standard. In substance, however, the defendant's first claim challenges Valley National's standing, and, therefore, the standard of review is plenary. See *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 142, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016).

or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Because standing implicates the court's subject matter jurisdiction, the plaintiff ultimately bears the burden of establishing standing. . . .

"Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, [the standard of] review is plenary. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved." (Citations omitted; internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 142, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016).

A

The defendant first argues that, because the note is not specially endorsed to the plaintiff or endorsed in blank, the plaintiff lacks standing to enforce its acquired rights under the note and other loan documents. We disagree.

In Connecticut, a party may enforce a note pursuant to the Uniform Commercial Code (UCC), codified at General Statutes § 42a-1-101 et seq. *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 146, 125 A.3d 262 (2015). General Statutes § 42a-3-301 provides in relevant part that a "[p]erson entitled to enforce an instrument means . . . the holder of the instrument[3] . . . [or] a nonholder in possession of the instrument who has

[3] " 'Holder' means: (A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; (B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or (C) The person in control of a negotiable electronic document of title." General Statutes § 42a-1-201 (b) (21).

the rights of a holder . . . .'' (Footnote added; internal quotation marks omitted.) ''The UCC's official comment underscores that a person entitled to enforce an instrument . . . is not limited to holders. . . . A nonholder in possession of an instrument includes a person that acquired rights of a holder . . . under [§ 42a-3-203 (a)]. . . . Under § 42a-3-203 (b), [t]ransfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument . . . . An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. General Statutes § 42a-3-203 (a). . . . Accordingly, a note that is unendorsed still can be transferred to a third party. Although that third party technically is not a holder of the note, the third party nevertheless acquires the right to enforce the note so long as that was the intent of the transferor.'' (Citation omitted; internal quotation marks omitted.) *Berkshire Bank* v. *Hartford Club*, 158 Conn. App. 705, 712, 120 A.3d 544, cert. denied, 319 Conn. 925, 125 A.3d 200 (2015).

In this case, the plaintiff presented the court with the loan documents and the purchase and assumption agreement. Section 3.1 of that agreement states in relevant part: ''[The plaintiff] hereby purchases from the [FDIC], and the [FDIC] hereby sells, assigns, transfers, conveys, and delivers to the [plaintiff], *all right, title and interest of the* [*FDIC*] *in and to all of the assets* (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, of [Park Avenue] *whether or not reflected on the books of* [*Park Avenue*] *as of Bank Closing*.'' (Emphasis added.) The court, in its findings of fact, found that the purchase and assumption agreement indicated that the ''FDIC transferred the

defendant's obligation to [Park Avenue] to [Valley National]." We agree with the court that, by virtue of the express language in Section 3.1 of the March 12, 2010 purchase and assumption agreement, the plaintiff received from the FDIC, on behalf of Park Avenue, "all right, title and interest . . . in and to all of the assets . . . whether or not reflected on the books of [Park Avenue] as of Bank Closing."[4] We also conclude that when the FDIC transferred to it "all" of Park Avenue's assets, the plaintiff became a nonholder with the rights of a holder.

Our decision in *Berkshire Bank* makes clear that an unendorsed note can still be transferred and enforced, and that although a third party technically is not a holder of the note, that third party nevertheless acquires the right to enforce the note so long as that was the intent of the transferor. *Berkshire Bank* v. *Hartford Club*, supra, 158 Conn. App. 712. Therefore, the defendant's first argument, that the note is unenforceable because it is not specially endorsed to the plaintiff or endorsed in blank, fails because the note was not rendered unenforceable by the lack of such endorsements.

B

Similarly, the defendant's second argument that the plaintiff could not prove that it was a nonholder that had acquired the rights of a holder fails because, although the plaintiff is not technically a holder of the note by virtue of its third-party status, it demonstrated that it acquired the right to enforce that note by way of the purchase and assumption agreement. That

[4] The defendant challenges the transfer of the loan from Park Avenue to the FDIC. The court found that "[a]t some point, [Park Avenue] was seized by the FDIC." The record supports this finding, and therefore we also conclude that Park Avenue's assets, including the defendant's loan, were transferred to the FDIC as receiver. Moreover, the defendant testified that Park Avenue went out of business and that it was seized by the FDIC. The defendant's challenge to that transfer fails.

agreement evidenced the intent of the FDIC to transfer to the plaintiff Park Avenue's assets. The defendant also argues that the plaintiff cannot prove that it is a nonholder with the rights of a holder because the plaintiff's witness, Robinson, was not an employee of the plaintiff at the time that the plaintiff acquired the assets of Park Avenue, nor was he involved in the transaction between the FDIC and the plaintiff. This argument fails because Robinson's testimony was not offered to authenticate the loan documents and the purchase and assumption agreement as business records. Those exhibits already had been admitted. Rather, Robinson testified as to what information he relied on to reach the total sum owed under the defendant's contractual obligation with Park Avenue. See part II of this opinion. Moreover, a custodian or supervisor of business records, such as Robinson, need not always have made the record or seen it made in order to testify to its authenticity. Therefore, the defendant's argument that Robinson lacked personal knowledge of the documents at issue cannot succeed. See *First Union National Bank* v. *Woermer*, 92 Conn. App. 696, 708, 887 A.2d 893 (2005), cert. denied, 277 Conn. 914, 895 A.2d 788 (2006).

C

The defendant's final argument is that the plaintiff could not prove chain of title because the purchase and assumption agreement does not specifically identify the My Little Star loan as an acquired asset. Specifically, he argues that Robinson mistakenly relied on Section 3.1 of the purchase and assumption agreement to support his contention that the My Little Star loan was transferred to the plaintiff because nowhere in the agreement is there a "listing, identification, enumeration, or description as to what the [Park Avenue] assets consist of, and whether or not they include the [My Little Star] loan." Schedule 3.1 of the purchase and

assumption agreement provides, inter alia, that the list of assets acquired "may not include all loans and assets" and that "[t]he list may be replaced with a more accurate list post closing." Paragraph (d) of Schedule 3.2, entitled "Purchase Price of Assets or assets," reads "Loans: Book Value." The agreement defines "loans," in relevant part, to mean "revolving commercial lines of credit," such as the loan at issue.

On the basis of this evidence, we agree with the court's conclusion that the plaintiff had "provided the necessary documentation to establish that [Valley National] is the successor in interest" to the FDIC as receiver for Park Avenue and, thus, had standing to prosecute the present action. Accordingly, we reject the defendant's first claim.

II

The defendant's second claim is that the trial court erred when it determined that Valley National had submitted sufficient evidence from which the outstanding loan balance could be accurately established. Specifically, the defendant argues that he did not create some of the exhibits entered by the plaintiff to establish the debt owed, and that the testimony of Robinson was not sufficient to establish an accurate calculation of the outstanding debt. We disagree and conclude that the trial court's findings as to damages are supported by sufficient evidence and, thus, are not clearly erroneous.

The following additional facts are relevant to our resolution of the defendant's claim. At trial, the defendant testified that his signature was on all of the loan documents, and admitted that his signature and a loan number matching the same loan number on the promissory note was on most of the drawdown requests, listed as plaintiff's exhibits ten through eighteen.[5] The plaintiff

[5] The defendant objected to the admission of the plaintiff's exhibit fourteen, a drawdown request dated July 23, 2008, because he could not confirm a signature. He did confirm, however, that the loan number contained on the

presented testimony from Robinson, a loan workout officer employed by Valley National, to establish the total debt owed. Robinson testified that, as the loan officer assigned to the loan at issue, he was familiar with the file and that Valley National was the current holder of the loan. He also testified that Valley National became holder of the loan when it purchased, by way of a purchase and assumption agreement, the assets of Park Avenue from the FDIC as receiver. In addition to the note and other loan documents, Robinson was asked to identify and testify about documents that had been admitted into evidence, over the defendant's objections, as plaintiff's exhibits ten through eighteen. Robinson testified that these exhibits were internal transfer memoranda that documented requested and transferred funds from Park Avenue to My Little Star. Robinson testified that when he calculated the balance of the loan, he relied on the Park Avenue loan history, admitted as the plaintiff's exhibit twenty-one, and not the internal transfer memoranda. According to Robinson, the loan history showed a principal balance in the amount of $248,723.06, and that, as of July 22, 2015, the total interest that had accrued on the principal balance was $79,286.22. He further testified that the per diem amount, under the terms of the note, was $36.27 under the note rate of 5.25 percent.

On the basis of such evidence, the trial court found that the defendant had made no payments on the loan obligation as the personal guarantor. It further found

drawdown request was the same loan number as contained in the promissory note. The defendant also testified that he believed the total amount drawn down on the loan at issue was $40,000 to $50,000, and that his accounting firm also had authority to request funds from the loan's line of credit. The court ultimately overruled the defendant's objection. In its memorandum of decision, the court determined that "[a]lthough [the defendant] testified that his accountants had [the] authority to make these drawdowns, and therefore he was unaware of the drawdowns, there was no credible evidence to support this claim."

that the plaintiff had met its burden of establishing the sum of its alleged debts, and entered judgment against the defendant in the amount of $330,040.40, which represented a principal balance of $248,723.06 and interest as of September 17, 2015, in the amount of $81,317.34.

"With regard to the trial court's factual findings, the clearly erroneous standard of review is appropriate. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses. . . ." (Internal quotation marks omitted.) *Miller* v. *Guimaraes*, 78 Conn. App. 760, 766–67, 829 A.2d 422 (2003).

"It is well established that damages are a necessary element for a breach of contract action. . . . The trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . Thus, [t]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount." (Citation omitted; internal quotation marks omitted.) *Milford Bank* v. *Phoenix Contracting Group, Inc.*, 143 Conn. App. 519, 524–25, 72 A.3d 55 (2013).

In the present case, the trial court's award of damages is consistent with the figures provided in exhibit twenty-one and as testified to by Robinson, with the exception of the accrued interest to date, which was updated to

reflect the current payoff amount. Although Robinson testified that he did not rely on the drawdown requests, marked as the plaintiff's exhibits ten through eighteen, in arriving at his conclusion as to the total amount owed, such testimony did not undermine Robinson's testimony that exhibit twenty-one, the Park Avenue loan history, accurately reflected the financial transactions between Park Avenue and My Little Star. Further, although the defendant testified that he did not authorize the amounts in the drawdown requests, he presented no evidence from which the court reasonably could have concluded that the amounts at issue had not been disbursed to My Little Star. The Park Avenue loan history reflected in exhibit twenty-one, the defendant's testimony admitting to his signatures on each of the loan documents, and the testimony of Robinson, provided sufficient evidence of the debt owed by My Little Star to the plaintiff at the time of trial, and therefore of the amount owed by the defendant as the personal guarantor of My Little Star's debt. The award of damages is fully supported by the record before us, and, thus, the court's finding that the plaintiff had submitted sufficient evidence from which the outstanding loan balance could be accurately established is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

THE ACCESS AGENCY, INC. *v.* SECOND CONSOLIDATED BLIMPIE CONNECTICUT REALTY, INC. ET AL.

(AC 38178)

Lavine, Keller and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendants S Co., K Co., G and T for breach of a lease agreement. In 2000, the plaintiff had leased

certain premises to S Co. for use as a sandwich shop. The lease created a tenancy for five years and granted S Co. three options to renew the lease for three additional five year periods. A rider to the lease provided for the subletting of the premises to a franchisee of the sandwich shop and required the subtenant to execute a personal guarantee. In the event that the store was transferred to another subtenant and the new subtenant signed a personal guarantee, the prior subtenant would be released from its guarantee. T had executed a guarantee at approximately the same time as the first lease and rider were executed, in which T guaranteed payment for liabilities incurred by S Co. under the lease. The first lease was renewed in 2005, for a five year period. In 2007, K Co. became the successor, by merger, to S Co. After the renewed lease lapsed in July, 2010, a prior franchisee sold its franchise, equipment and inventory to G, who began dealing with the plaintiff regarding the franchise. In December, 2010, the plaintiff and K Co. entered into a new lease, and G entered into a new guarantee agreement with the plaintiff, which guaranteed the obligations of K Co. When K Co. failed to make rental payments, the plaintiff commenced the present action. The trial court found that the 2010 agreement was a new lease agreement and that T's obligations under the 2000 lease ceased when the plaintiff and K Co. signed the 2010 lease agreement. The trial court rendered judgment in favor of the plaintiff as against K Co. and G and awarded damages for, inter alia, unpaid rent, but it found that T was not liable. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on its claim that the trial court improperly found that G was the sole guarantor of the 2010 lease, which was based on its claim that the provisions of the 2000 lease remained in effect, such that T remained a guarantor, along with G, of K Co.'s obligations under the 2010 agreement, as that court's findings that the 2000 lease agreement had expired and that G was the sole guarantor of the 2010 agreement were supported by the record and were not clearly erroneous; the court found that neither S Co. nor its successor, K Co., had renewed the 2000 lease, which had expired, that G signed a guarantee of K Co.'s obligations under the 2010 lease after the expiration of the 2000 lease, and that there was no language in T's guarantee that made him liable for the obligations of a new tenant after the expiration of the 2000 lease, and those findings were supported by the documents executed by the parties in 2000, which contemplated that the tenant, or franchisor, had the ability to freely sublease the premises to serial franchisees, and that a sublessee was to be released from his obligation as guarantor when a successor sublessee was substituted on the premises.
2. Although the trial court improperly used an exhibit for substantive purposes rather than only for the limited purpose for which it had been admitted, specifically, to impeach the credibility of the plaintiff's president, who testified at trial, the error was harmless, as the exhibit was cumulative of other evidence, including uncontested documents, that

was already before the court and was not likely to have affected the result.

Argued January 5—officially released June 27, 2017

Procedural History

Action to recover damages for breach of a lease agreement, and for other relief, brought to the Superior Court in the judicial district of Windham, where the named defendant et al. were defaulted for failure to appear; thereafter, the defendant Richard Tarascio, Jr., was defaulted for failure to plead; subsequently, the court, *Boland*, *J.*, granted the motion to open the default judgment filed by the defendant Richard Tarascio, Jr.; thereafter, the defendant Richard Tarascio, Jr., filed an answer, special defenses and cross complaint; subsequently, the defendant Marshall Gebhardt was defaulted as to the cross complaint for failure to appear; thereafter, the matter was tried to the court, *A. Santos*, *J.*; judgment in part for the plaintiff on the complaint and on the cross complaint, from which the plaintiff appealed to this court. *Affirmed.*

Lloyd L. Langhammer, for the appellant (plaintiff).

Richard S. Cody, with whom, on the brief, was *Jon B. Chase*, for the appellee (defendant Richard Tarascio, Jr.).

Opinion

BEACH, J. The plaintiff, The Access Agency, Inc., appeals from the judgment of the trial court rendered in favor of the defendant,[1] Richard Tarascio, Jr. The plaintiff claims the court erred in (1) finding that a guaranty signed in connection with an expired lease

[1] The complaint was also brought against Second Consolidated Blimpie Connecticut Realty, Inc., KRES-CT, LLC, and Marshall Gebhardt. The court clerk granted the plaintiff's Practice Book § 17-20 motion for default for failure to appear as to those parties. Tarascio only filed a brief in response to the plaintiff's appeal. We will refer to Tarascio only as the defendant.

did not obligate the guarantor under a new lease and (2) using an exhibit for purposes beyond the limited purpose for which it was introduced. We affirm the judgment of the trial court.

Pursuant to a lease agreement executed in August, 2000, the plaintiff leased premises at 1325 Main Street in Willimantic (premises) to Second Consolidated Blimpie Connecticut Realty, Inc., (Consolidated Blimpie) for use as a sandwich shop (2000 lease agreement). The parties introduced into evidence several documents which together define the business relationships among the several entities. The seminal document is the lease agreement between the plaintiff landlord and Consolidated Blimpie, as tenant. The lease created a tenancy of five years, from August 1, 2000 until July 31, 2005. The lease granted to Consolidated Blimpie three options to renew the lease for three additional five year periods. The lease expressly incorporated a second document, entitled "Rider to Lease" (rider). The lease was executed in August, 2000, by representatives of the plaintiff and of Consolidated Blimpie.

The rider specifically contemplated the use of the premises as a Blimpie's franchise, and provided for the subletting of the premises to a franchisee of Blimpie International, Inc. The subtenant was required, according to the rider, to execute a personal guaranty. In the event that the "store" was transferred to another subtenant and the new subtenant signed a personal guaranty, the "prior subtenant shall be released from its guaranty." The rider also provided that Consolidated Blimpie was entitled to assign the lease, and paragraph 7 (b) provided that an assignment or sublease would not serve to extinguish the liability of the assignor or sublessor.

The rider specifically contemplated that Consolidated Blimpie did not have assets other than the lease,

but was created for the purpose of negotiating and signing the lease. The rider provided that the plaintiff could not seek damages from any party other than the tenant "and/or, if appropriate, the sublessee." No stockholder or member of a limited liability company, expressly including Blimpie International, Inc., could be held liable for any obligation of the tenant. The rider further provided that Consolidated Blimpie would be subletting the premises to a Blimpie's franchisee, and, in the event of any default on the part of the sublessee, the plaintiff agreed to offer the tenant a new lease, so that Consolidated Blimpie could sublet the premises to another Blimpie franchisee.

The structure of the arrangement can be gleaned from the rider and the lease. The tenant, Consolidated Blimpie, was acting in the interest of Blimpie International, the franchisor. Consolidated Blimpie effectively insulated itself from liability by having no assets other than the lease and by requiring the plaintiff to agree that no stockholders or members, including Blimpie International, Inc., could be held liable in damages. Consolidated Blimpie could freely sublet the premises to Blimpie franchisees, who were to pay rent directly to the plaintiff and were liable to the plaintiff in the event of default. In essence, the tenant, acting in the interest of the franchisor, decided who, as a Blimpie franchisee, would be in possession of the premises and who would serve to guarantee Consolidated Blimpie's obligations to the plaintiff.

The first relevant guaranty was executed by the defendant at approximately the same time as the first lease and rider were executed. The guaranty referenced the lease between the plaintiff and Consolidated Blimpie. The defendant generally guaranteed payment for liabilities incurred by Consolidated Blimpie under "the lease." The guaranty provided that the defendant's potential liability would "remain . . . payable even

though the demised term or any renewal or extension thereof shall have expired," and an assignment of the lease or any subletting was not to release the defendant from liability as guarantor.

The first lease was renewed in 2005, for a five year period. In 2007, KRES-CT, LLC, (KRES-CT), became the successor, by merger, to Consolidated Blimpie. The renewed lease lapsed on July 31, 2010. A series of events took place at the end of 2010: the prior franchisee, Tri-Star Blimpie I, LLC, which was controlled by the defendant, sold its franchise, equipment and inventory to Marshall Gebhardt, who in turn entered into a new guaranty agreement with the plaintiff. The Gebhardt guaranty is identical in material respects to the guaranty previously executed by the defendant, except that it guarantees the obligations of "KRES-CT, LLC, successor by merger to [Consolidated Blimpie]." At approximately the same time, a "Renewal of Lease Agreement" was entered into by the plaintiff and KRES-CT. The renewal recited the prior merger of Consolidated Blimpie and KRES-CT, and generally incorporated the provisions of the prior leases. KRES-CT represented that it was the successor to all duties and obligations of the lessee.[2]

Finally, by letter dated January 6, 2011, the plaintiff was informed that Gebhardt had bought the franchise and that KRES-CT would remain liable as tenant.[3] As discussed previously, Gebhardt guaranteed KRES-CT's obligations.

On August 31, 2011, the plaintiff notified Gebhardt that it had not received rent payments for July and

[2] Exhibit 3 is an unsigned copy of the "Renewal of Lease Agreement"; it contains a signature line for a representative of KRES-CT. The parties appear to have deemed Exhibit 3 to be authentic.

[3] The plaintiff claims that this letter was improperly used for substantive purposes by the court. See part II of this opinion.

August, 2011. KRES-CT did not make rental payments after October 1, 2012. There was no claim that the defendant had not paid rent while he or his business entity was the franchisee, or that rents were in arrears when he sold his business to Gebhardt.

In 2014, the plaintiff commenced an action against the defendant and others for failure to pay rent under the terms of the lease agreement.[4] The court found that the 2010 agreement was a new lease agreement between the plaintiff and KRES-CT, in which KRES-CT agreed to be bound by the terms of the original lease agreement. The court found that the defendant's "obligations under the 2000 lease ceased when the plaintiff and KRES-CT signed the 'Renewal of the Lease.' Under the new lease, the plaintiff sought to protect itself in case of default by KRES-CT of its obligations, and thus required Gebhardt to guarantee the new lease obligations. . . . *Gebhardt was the sole guarantor of the new lease at the time that KRES-CT breached the lease and failed to pay rent.* The damages suffered by the plaintiff as a result of the breach are attributable to KRES-CT and Gebhardt as guarantor of the lease."[5] (Emphasis added.) The court rendered judgment in favor of the plaintiff as against KRES-CT and Gebhardt, and awarded the plaintiff damages in the amount of $57,368.18 against KRES-CT and Gebhardt, which included, inter alia, $43,940 in unpaid rent, as well as $8506 in attorney's fees, additional postjudgment attorney's fees in the amount of $1850, and $3072.18 in interest on the plaintiff's offer of compromise. The court found the defendant not liable and rendered judgment in his favor. This appeal followed.

[4] See footnote 1 of this opinion.

[5] The defendant filed a "cross complaint" on which the court found in favor of the plaintiff and Gebhardt. The judgment on the "cross complaint" is not an issue on appeal.

I

The plaintiff first claims that the court erred in finding that Gebhardt was the sole guarantor of the 2010 lease agreement. We disagree.

"A guaranty is merely a species of contract. . . . [A] guarantee is a promise to answer for the debt, default or miscarriage of another. . . . The contract of guarantee is no doubt an agreement separate and distinct from the contract between the [lessor] and the [lessee]." (Citations omitted; internal quotation marks omitted.) *JSA Finanical Corp.* v. *Quality Kitchen Corp. of Delaware*, 113 Conn. App. 52, 57, 964 A.2d 584 (2009). "The interpretation of continuing guaranties, as of other contracts, is principally a question of the intention of the contracting parties, a question of fact to be determined by the trier of facts. . . . Even a continuing guaranty that is, in terms, unlimited as to duration, imposes liability upon a guarantor only for such a period of time as is reasonable in light of all of the circumstances of the particular case. . . . The finding of the trial court with respect to the intent of the contracting parties regarding the scope of their contractual commitment is, like any other finding of fact, subject only to limited review on appeal. . . . Our role is limited to determining whether the decision of the trier of facts was clearly erroneous in light of the evidence and the pleadings in the whole record." (Citations omitted; internal quotation marks omitted.) *Monroe Ready Mix Concrete, Inc.* v. *Westcor Development Corp.*, 183 Conn. 348, 351–52, 439 A.2d 362 (1981). "In determining the parties' intentions, the trial court was entitled to rely on, inter alia, the language of the guaranty." *Connecticut National Bank* v. *Foley*, 18 Conn. App. 667, 670, 560 A.2d 475 (1989).

The plaintiff argues that the provisions of the 2000 lease agreement remained in effect, such that the defendant remained a guarantor, along with Gebhardt, of

KRES-CT's obligations under the 2010 agreement. It contends that the following language of the guaranty signed by the defendant is clear regarding the continuing nature of the guaranty: "This Guaranty shall be an absolute and unconditional guaranty and shall remain in full force and effect as to the [defendant] during the demised term of said Lease, and any renewal or extension thereof, and thereafter so long as any Liabilities remain and payable even though the demised term or any renewal or extension thereof shall have expired." The plaintiff further argues that the "renewal agreement" did not create a new lease but rather extended the original lease agreement. In support of its argument, the plaintiff refers to the heading "Renewal of Lease Agreement" placed on the renewal agreement and to the clauses in the renewal agreement that recite that "KRES-CT assumed all duties and obligations of the lessee" and that "KRES-CT wishes to exercise its option to renew the Lease on the terms and conditions as contained therein . . . ." We disagree and conclude that the court's findings were not clearly erroneous.

The 2000 lease agreement provided that the term of the lease commenced on August 1, 2000, and ended on July 31, 2005. The lease agreement provided for three options to renew for a period of five years per renewal. In 2005, Consolidated Blimpie exercised its first option to renew. It is undisputed that the defendant guaranteed the 2000 lease agreement and that his guaranty also applied to the 2005 renewal. Further, the 2007 merger of Consolidated Blimpie into KRES-CT is not claimed to have affected the guaranty, because of the language of the documents discussed previously.

The court found factually, however, that neither Consolidated Blimpie nor KRES-CT, the successor to Con-

solidated Blimpie, renewed the 2000 lease in 2010; rather, the 2000 lease expired.[6] The 2010 agreement, signed by the plaintiff, stated that the 2000 lease agreement "as previously renewed, expired as of July 31, 2010."[7] *After the lease expired, the defendant's limited liability company sold the Blimpie's franchise to Gebhardt.* Peter Debiasi, the president of the plaintiff, testified that in 2010 Gebhardt bought the franchise, and, as such, the plaintiff began dealing with Gebhardt regarding the franchise. KRES-CT entered into the 2010 lease agreement with the plaintiff on December 20, 2010. Gebhardt signed a guaranty for obligations arising under the 2010 agreement.

The guaranty signed by the defendant provided that, under the lease from the plaintiff to Consolidated Blimpie, the defendant would "absolutely and unconditionally guarantee to [the plaintiff], its successors and assigns the full and prompt payment when due of all rents, charges and additional sums coming due under the Lease, together with the performance of all covenants and agreements of [Consolidated Blimpie] therein contained and together with the full and prompt payment of all damages that may arise or be incurred by [the plaintiff] in consequence of [Consolidated Blimpie's] failure to perform such covenants and agreements . . . ." There is no language in the defendant's guaranty

[6] Although the title of the 2010 agreement is "Renewal of Lease Agreement," it does not necessarily follow that the 2010 agreement was in fact a renewal of the 2000 lease. There is ample evidence in the record to support the court's conclusion that the 2010 agreement was a new lease rather than a renewal.

[7] Additionally, the rider to the 2000 lease provides in relevant part that "[w]ithin sixty (60) days prior to the expiration of the time within which [Consolidated Blimpie] is required to give notice of the exercise of and option to extend the term of this Lease, [the plaintiff] shall give written notice to [Consolidated Blimpie] advising [Consolidated Blimpie] of the time within which its right to serve the notice expires." There was no evidence presented that the plaintiff sent such notice.

that makes him liable for the obligations of a new tenant after the expiration of the 2000 lease agreement.[8]

The court's finding that the defendant did not guarantee obligations under the 2010 lease is reinforced by the reality of the business transaction, as outlined in the documents discussed at some length in the factual history section of this opinion. The documents executed by the parties in 2000 contemplated that the tenant, in effect the franchisor, had the ability freely to sublease the premises to serial franchisees. The rider, signed by the plaintiff, plainly stated that a sublessee was to be released from his obligation as guarantor when a successor sublessee was substituted on the premises.[9] In sum, the court's findings that the 2000 lease agreement had expired and that Gebhardt was the sole guarantor of the 2010 agreement are supported by the record and, as such, are not clearly erroneous.

II

The plaintiff next claims that the court committed reversible error when it used an exhibit for substantive purposes rather than only for the limited purpose for which it had been admitted. We conclude that there was error, but that it was harmless.

At trial, the court permitted the defendant to introduce a letter dated January 6, 2011, for the limited

[8] Subsection 7 (d) of the rider to the 2000 lease provides that "[t]he subtenant shall execute a personal guaranty in the form attached hereto. Upon transfer of the store to another subtenant, provided the new subtenant executes a personal guaranty, in the same form attached hereto, the prior subtenant shall be released from its guaranty." The plaintiff argues that the defendant did not allege release as a special defense. In his special defenses, however, the defendant claimed that "Gebhardt is the sole guarantor of the Lease alleged to have been breached."

[9] We note that, under the scheme, the prior sublessee would nonetheless be responsible for obligations incurred while he was sublessee. It makes economic sense for a franchisee to be liable for his own debts, as the franchisee paid rent directly to the landlord, but not for those of a successor who might come to occupy the same premises.

purpose of impeaching Debiasi. The letter notified the plaintiff that there would be a new Blimpie's franchise on the premises. In reaching its conclusion that Gehardt was the sole guarantor of the 2010 agreement, the court noted that "[t]he January 6, 2011 letter to the plaintiff reminds the plaintiff that Gebhardt is the new franchisee and that KRES-CT is the new tenant."

"Evidence which is offered and admitted for a limited purpose only, and the facts found from such evidence, cannot be used for another and totally different purpose." *O'Hara* v. *Hartford Oil Heating Co.*, 106 Conn. 468, 473, 138 A. 438 (1927). It was improper for the court to use the letter for substantive purposes when it was admitted for the limited purpose of testing Debiasi's credibility. Such error, however, is subject to a harmless error analysis. See *Testone* v. *C. R. Gibson Co.*, 114 Conn. App. 210, 218–19, 969 A.2d 179, cert. denied, 292 Conn. 914, 973 A.2d 663 (2009). Other evidence that Gebhardt was operating a Blimpie's franchise on the premises was before the court. The 2010 agreement stated that the 2000 lease had expired, and the bill of sale indicated that the defendant sold the Blimpie's franchise to Gebhardt. The letter was cumulative of other evidence, including uncontested documents, and was most unlikely to have affected the result. See *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 384, 389, 739 A.2d 311 (whether improperly admitted evidence was cumulative is factor in harmless error analysis), cert. denied, 251 Conn. 928, 742 A.2d 362 (1999).

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT E. HEALEY *v.* THE HAYMOND LAW FIRM, P.C., ET AL.
(AC 38599)

Prescott, Mullins and Bear, Js.

Syllabus

The plaintiff lawyer, H, a former employee of the defendant law firm, H Co., sought to recover damages from H Co. for, inter alia, unpaid wages pursuant to statute (§ 31-72). Specifically, the plaintiff, pursuant to an agreement he had reached with H Co. when he reduced his workload from full time to part time, sought to recover, primarily on the basis of a breach of contract claim and a § 31-72 claim for unpaid wages, his remaining share of legal fees recovered by H Co. in two medical malpractice cases that the plaintiff had settled, and 15 percent of the referral fee that H Co. received from another law firm in a case referred by the plaintiff. The plaintiff also sought to recover double damages and attorney's fees pursuant to § 31-72. Subsequently, the jury returned a verdict for the plaintiff and awarded him damages, and the trial court later awarded attorney's fees and interest to the plaintiff, and rendered judgment in his favor. On appeal, H Co. claimed that the trial court erred in providing jury instructions that retroactively applied the amended version of § 31-72, because the amendment took effect after this action had commenced and, thus, the court was required to charge the jury on the repealed version of that statute that had been in effect at the time the alleged injuries occurred. In the alternative, H Co. argued that the trial court's instruction on the amended version of the statute was a clear, obvious, and indisputable error that warranted reversal under the plain error doctrine. *Held*:

1. This court declined to review H Co.'s claim that the trial court should have instructed the jury on the repealed version of § 31-72, pursuant to which the plaintiff could recover double damages if the plaintiff proved that the defendant withheld the wages in bad faith, instead of improperly instructing the jury that, pursuant to the amended version of § 31-72, it must award the plaintiff double damages for unlawfully withheld wages unless the defendant established that it withheld the wages in good faith, because H Co. induced the alleged error of which it complained by affirmatively requesting the language it challenged on appeal: H Co. filed a written request to charge that cited and quoted the amended version of § 31-72, including the provision of the amended version that imposes liability for double damages on an employer who fails to prove that it withheld wages in good faith and, in accordance with H Co.'s request, the court instructed the jury in relevant part, that "[i]f you find that [H Co.] failed to prove that it had . . . a good faith belief [in

withholding the plaintiff's wages], then you must award the plaintiff twice the amount of unpaid wages."

2. H Co. cannot prevail on its alternative claim that the trial court's alleged error in determining that the amended version of § 31-72 applied retroactively was plain error because, even to the extent that the plain error doctrine applies to claims of induced error, H Co. failed to demonstrate that the court's alleged instructional error resulted in manifest injustice: H Co.'s own actions contributed to the claimed error because it was induced by H Co.'s submission of a written request to charge that quoted the amended version of § 31-72, and the record revealed that on several occasions throughout trial the defendant acquiesced to the court instructing the jury on the amended version.

Argued January 31—officially released June 27, 2017

Procedural History

Action to recover damages for, inter alia, unpaid wages, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to a jury before *Elgo*, *J.*; verdict and judgment for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Leon M. Rosenblatt and *Richard J. Padykula*, for the appellant (named defendant).

Andrew L. Houlding, for the appellee (plaintiff).

Opinion

MULLINS, J. The defendant, The Haymond Law Firm, P.C.,[1] appeals from the judgment of the trial court, rendered after a jury trial, awarding its former employee, the plaintiff, Robert E. Healey, damages for unpaid wages pursuant to General Statutes § 31-72.[2] On appeal,

[1] John I. Haymond also was named as a defendant in this action but the plaintiff withdrew the claims against Haymond in his individual capacity prior to trial. Accordingly, we refer to The Haymond Law Firm, P.C., as the defendant throughout this opinion.

[2] The plaintiff also sought recovery on four other claims alleging breach of contract, invasion of privacy, money withheld and interest pursuant to General Statutes § 37-3a, and violations of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The jury found for the plaintiff on all of those claims, and the defendant has not challenged the judgment with respect to those claims in this appeal. The defendant's failure to challenge the judgment with respect to those claims does not implicate

the defendant claims that the court erred by charging the jury on the amended version of § 31-72 because the amendment took effect after this action had commenced. Therefore, the defendant argues, the court was required to charge the jury on the repealed version of that statute that had been in effect at the time the alleged injuries occurred. The defendant also claims that the court's instruction on the amended version of the statute was a clear, obvious, and indisputable error that warrants reversal under the plain error doctrine.[3]

We conclude that the defendant's claim is unreviewable because it induced the alleged instructional impropriety by affirmatively requesting that the court charge the jury on the amended version of § 31-72. We also conclude that plain error reversal is not warranted in this case. Accordingly, we affirm the judgment of the trial court.

The following facts, which are not in dispute for the purposes of this appeal, and procedural history are relevant to the defendant's claim. The plaintiff worked for the defendant as a medical malpractice attorney for more than seventeen years. In 2011, the plaintiff informed John I. Haymond, the defendant's principal, that he wished to retire from practicing law full time. Consequently, the defendant and the plaintiff agreed

mootness because those claims are not independent bases supporting the jury's award of double damages.

[3] We note that the defendant's invocation of the plain error doctrine occurs only in a footnote in its brief. We previously have indicated that this is not the preferred method by which a party should present claims to this court. See, e.g., *State* v. *Reddick*, 15 Conn. App. 342, 343, 545 A.2d 1109 ("we refuse to review any claim or any alternative claim to a properly briefed claim which has been presented and argued by way of footnotes"), cert. denied, 209 Conn. 819, 551 A.2d 758 (1988). Nevertheless, we choose to address the defendant's plain error argument in this case. See *State* v. *Salz*, 26 Conn. App. 448, 457 n.4, 602 A.2d 594 (1992) ("we [examine] this claim even though the defendant requested . . . plain error review in a footnote"), aff'd, 226 Conn. 20, 627 A.2d 862 (1993).

that the plaintiff would continue to work for the defendant through 2012 on a part-time basis.

In September, 2012, the defendant and the plaintiff reached another agreement that further reduced the plaintiff's workload and modified the plaintiff's compensation. In particular, the agreement provided that (1) the plaintiff would retain responsibility only for a small number of medical malpractice cases; (2) the defendant would pay the plaintiff 50 percent of the legal fees recovered in those cases; and (3) the defendant would pay the plaintiff 15 percent of any referral fees that the defendant received in cases that the plaintiff had referred to the law firm of Koskoff, Koskoff & Bieder, P.C. (Koskoff, Koskoff & Bieder).

In March, 2013, the plaintiff settled two medical malpractice cases for which he had retained responsibility pursuant to the September, 2012 agreement. Subsequently, the plaintiff requested that the defendant pay him 50 percent of the legal fees it received in those settlements. The defendant refused to pay the plaintiff 50 percent of the recovered legal fees and, instead, paid him only approximately 15 percent of the fees.

Around August, 2014, the plaintiff learned that one of the cases that he had referred to Koskoff, Koskoff & Bieder had been settled and that the defendant received a referral fee from Koskoff, Koskoff & Bieder for that case. The defendant never tendered any part of that referral fee to the plaintiff.

Thereafter, the plaintiff brought the present action, seeking recovery of (1) his full 50 percent share of the legal fees recovered in the two medical malpractice cases that he had settled, and (2) 15 percent of the referral fee that the defendant received from the case settled by Koskoff, Koskoff & Bieder. Specifically, the plaintiff's complaint sought recovery principally[4] on the

[4] See footnote 2 of this opinion.

basis of a statutory claim for unpaid wages made pursuant to § 31-72 and a breach of contract claim.

Regarding the statutory claim for unpaid wages, the governing statute, § 31-72, was amended while this action was pending. On June 19, 2013, when this action was initiated, the version of the statute that was in effect at that time provided in relevant part: "When any employer [unlawfully] fails to pay an employee wages . . . such employee . . . *may* recover, in a civil action, *twice the full amount* of such wages . . . ." (Emphasis added.) General Statutes (Rev. to 2013) § 31-72. Our Supreme Court also had provided the following interpretive gloss relating to double damages under that version of § 31-72: "The statute provides for a *discretionary* award of double damages . . . to employees who are successful in actions against their employers for wages due. . . . Although § 31-72 does not set forth a standard by which to determine whether double damages should be awarded in particular cases, it is well established . . . that it is appropriate for a plaintiff to recover . . . double damages . . . *only when the trial court has found that the defendant acted with bad faith, arbitrariness or unreasonableness*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 724, 941 A.2d 309 (2008). Also, in cases in which a discretionary award of double damages was sought under that version of § 31-72, the burden of proving an employer's bad faith, arbitrariness, or unreasonableness was on the plaintiff. See *Somers* v. *LeVasseur*, 230 Conn. 560, 568, 645 A.2d 993 (1994) ("the traditional principle [is] that in a civil case [t]he general burden of proof rests upon the plaintiff" [internal quotation marks omitted]).

In June, 2015, approximately two years after this action was commenced and four months before trial began, § 31-72 was amended by No. 15-86, § 2, of the

2015 Public Acts. The amended version took effect on October 1, 2015, several weeks before trial began. It provides in relevant part: "When any employer [unlawfully] fails to pay an employee wages . . . such employee . . . *shall* recover, in a civil action, (1) twice the full amount of such wages . . . *or* (2) if the *employer establishes* that the employer had a *good faith belief* that the underpayment of wages was in compliance with law, the full amount of such wages . . . with costs and such reasonable attorney's fees as may be allowed by the court. . . ." (Emphasis added.) General Statutes § 31-72.

On October 20, 2015, the plaintiff submitted a preliminary request to charge, proposing that the court instruct the jury using the language in the amended version of § 31-72. After quoting the relevant part of the amended version of § 31-72 in his proposed instructions, the plaintiff requested the following specific instructions: (1) "If you do find in favor of the plaintiff—that is, that the defendant unlawfully withheld his pay—you must then determine whether the [defendant] had a 'good faith belief that the underpayment of wages was in compliance with law.' It is the *defendant's burden* to prove to you that the defendant had such a good faith belief"; and (2) "If you find that *the defendant failed to prove that it had such a good faith belief*, then you *must* award the plaintiff twice the amount of unpaid wages . . . [and the plaintiff] is *entitled* to collect his attorney's fees." (Emphasis added.)

On October 26, 2015, the plaintiff filed a memorandum of law supplementing his preliminary request to charge. In that memorandum, the plaintiff argued that the court should conclude that the amended version of § 31-72 applied retroactively and, therefore, use that version in its instructions. The defendant did not file any response to the plaintiff's preliminary request to charge and accompanying memorandum of law.

On October 27, 2015, the defendant filed its own preliminary request to charge, which also quoted the *amended* version of § 31-72. In particular, the defendant asked the court to give the following instruction: "I will summarize the law for you. . . . [Section] 31-72 provides criteria for an employee to collect unpaid wages. Section 31-72 states, in pertinent part [that] . . . [w]hen any employer [unlawfully] fails to pay an employee wages . . . such employee . . . *shall* recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) *if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court.*" (Emphasis altered; internal quotation marks omitted.)

On October 28, 2015, the second day of evidence, the plaintiff filed two additional requests. The first was a request for jury interrogatories. That request proposed interrogatories tracking the language of the amended version of § 31-72, including an interrogatory asking the jury if it "[found] that *the defendant failed to prove* that it acted in good faith in failing to pay the plaintiff in full the compensation he had earned." (Emphasis added.) Although the defendant did not file a written objection to the proposed interrogatories, the defendant's counsel subsequently made the following oral objection to the aforementioned interrogatory: "[It is] unjustifiably prejudicial. I would suggest that it say, Do you find that the defendant had a good faith belief that it paid wages in compliance with the law, yes or no?" The second request, filed by the plaintiff on October 28, 2015, was a revised request to charge. That request, like the plaintiff's preliminary request to charge, proposed that the court instruct the jury according to the amended version

of § 31-72. The defendant did not file a written objection to the revised request to charge.

Also on October 28, 2015, the court heard argument from the parties regarding the proposed jury instructions. The plaintiff's counsel began argument by stating: "[T]he defendant has agreed that the latest version of the § 31-72 statute, as amended effective October 1, 2015, is the statute that is in effect now and we don't have to be concerned about the question of retroactivity." It appears that the plaintiff's counsel concluded that the defendant had "agreed" that the amended version controlled because the defendant had quoted verbatim that version of the statute in its own request to charge. Thus, relying on the amended statute, the plaintiff's counsel requested the court to instruct the jury "that it's the *employer's burden* to prove that it acted in good faith in failing to pay wages . . . ." (Emphasis added.)

The defendant's counsel did not object to that requested instruction. Rather, in responding to the argument by the plaintiff's counsel, the defendant's counsel stated that "[t]he plaintiff's attorney is correct that . . . the statute has been amended going forward. What [the plaintiff's counsel] has not done . . . though, is articulate that the court still maintains the discretion, under the new wording of the [amended] statute, whether or not to allow attorney's fees if there is a . . . good faith belief that wages were paid." That is, the defendant's counsel apparently was contending that the amended version is ambiguous as to whether an award of attorney's fees for an employer's withholding of wages is mandatory or discretionary. In so arguing, the defendant was challenging the plaintiff's assertion that the amended version *requires* an award of attorney's fees where an employer unlawfully fails to pay an employee wages, *not* his assertion that the amended version

applied retroactively and that the employer now was required to prove good faith.

Moreover, later in that hearing, the following exchange occurred between the defendant's counsel and the court regarding the interpretation of the amended version of § 31-72:

"The Court: The burden of [proving] good faith, right. That is the defendant's burden. Are we clear about that?"

"[The Defendant's Counsel]: *We are clear about that.*

"The Court: Okay.

"[The Defendant's Counsel]: The language, *I will concede . . . is very clear with respect . . . to that.*" (Emphasis added.)

After the conclusion of evidence on October 28, 2015, the court reviewed the substance of its anticipated charge with counsel. In particular, the court asked the defendant's counsel the following question: "[W]ith respect to the wages, I am going to charge what's in the statute. Is there any objection to that?" The defendant's counsel replied, "No."

On October 29, 2015, the court charged the jury. The charge contained the following relevant provisions. First, the court recited the amended version of § 31-72. Second, the court instructed that "[i]f you do find in favor of the plaintiff [with respect to the claim made under § 31-72], that is, that the defendant unlawfully withheld his pay, you must then determine whether the [defendant] had a good faith belief that the underpayment of wages was in compliance with law. Please be clear that with respect to this element and this element alone, *the burden shifts to the defendant to prove to you that the defendant had such a good faith belief.* . . . If you find that the defendant had such a good

faith belief, then the defendant is liable to the plaintiff only for the full amount of the unpaid wages. If you find that *the defendant failed to prove that it had such a good faith belief*, then you *must* award plaintiff twice the amount of unpaid wages. In addition, if the plaintiff prevails on this count, then he is entitled to collect his attorney's fees, although you will not make any determination with respect to attorney's fees. The amount of attorney's fees shall be determined by the court." (Emphasis added.)

When the court asked if counsel had any exceptions to the charge, the defendant's counsel replied: "With respect to the request to charge, we would reclaim our objection to the charge that the General Assembly intended that attorney's fees are automatically recoverable under § 31-72 if a jury finds that a claim for unpaid wages has been sustained. Also, we would object to the inclusion in the charge of General Statutes § 31-71f[5] to the specific claims in this case because the authority has applied that subsection of the law in cases that are significantly different than claimed here." (Footnote

[5] The plaintiff's request to charge asked that the court instruct the jury that "[i]n making [its] determination of whether all wages were paid to the plaintiff, [it] . . . take into account the provisions of [§] 31-71f."

General Statutes § 31-71f requires an employer to "(1) [a]dvise [its] employees in writing, at the time of hiring, of the rate of remuneration, hours of employment and wage payment schedules, and (2) make available to [its] employees, either in writing or through a posted notice maintained in a place accessible to [its] employees, any employment practices and policies or change therein with regard to wages, vacation pay, sick leave, health and welfare benefits and comparable matters." An employer's failure to comply with the requirements of § 31-71f is actionable under § 31-72. See General Statutes § 31-72 ("[w]hen any employer fails to pay an employee wages in accordance with the provisions of sections 31-71a to 31-71i, inclusive . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court").

added.) The defendant did not raise any other objections to the charge.

At no point during the trial court proceedings did the defendant ever argue that the court should instruct on the repealed version of § 31-72, which placed the burden of proving bad faith on the employee, rather than that statute's amended version. Furthermore, the defendant conceded that the amended version of § 31-72 places the burden of proving good faith on the employer.

The jury returned a verdict for the plaintiff on all five counts asserted in his complaint and awarded him $262,930 in damages. In addition, the court awarded the plaintiff $114,742 in attorney's fees and interest, resulting in a total judgment for the plaintiff in the amount of $377,672. This appeal followed.

On appeal, the defendant claims that the trial court's jury instructions were improper because they retroactively applied the amended version of § 31-72 that was enacted after this action was commenced. Specifically, the defendant argues that the court improperly instructed the jury that, pursuant to the amended version of § 31-72, it *must* award the plaintiff double damages for unlawfully withheld wages *unless the defendant* establishes that it withheld the wages in good faith. According to the defendant, the court should have instructed the jury on the repealed version of § 31-72, pursuant to which the plaintiff *may* recover double damages *if he* proves that the defendant withheld the wages in bad faith. The plaintiff responds that the defendant failed to preserve this claim for appeal and also that it "induced by [its] own actions the alleged instructional defect that it now challenges." (Internal quotation marks omitted.) We agree with the plaintiff that the defendant induced the alleged instructional impropriety and, thus, decline to review the defendant's claim.

We begin with the relevant legal principles. "This court routinely has held that it will not afford review of *claims*[6] of error when they have been induced. [T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional and induced constitutional error. . . . The invited error doctrine rests on principles of fairness, both to the trial court and to the opposing party." (Emphasis added; footnote omitted; internal quotation marks omitted.) *Gorelick* v. *Montanaro*, 119 Conn. App. 785, 796–97, 990 A.2d 371 (2010). "The rationale for declining to review jury instruction claims when the instructional error was induced . . . [is that] . . . allow[ing] [a] defendant to seek reversal [after] . . . his trial strategy has failed would amount to allowing him to . . . ambush the [opposing party and the trial court] with that claim on appeal." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 470, 10 A.3d 942 (2011).

[6] The term "induced error" apparently has become shorthand for the doctrine pursuant to which we decline to review a party's *claim* of error if the party "induced the action of the [trial] court from which she now complains." *Gladstein* v. *Goldfield*, 163 Conn. App. 579, 585, 137 A.3d 60, appeal dismissed, 325 Conn. 418, A.3d (2017). It may be misleading, however, to refer to this doctrine simply as "induced error." Failing to use the qualifiers *claimed* or *alleged* to describe the error might give the impression that this court is determining that the *claimed* error is *in fact* error. Given that the doctrine implicates only a *claim's reviewability*, our jurisprudence is clear that the doctrine does not require us to address the merits of the claim. See, e.g., id., 585 n.3 ("Because we conclude that the plaintiff's claim is not reviewable, we need not determine whether the court's interpretation of the term 'mistake' in [General Statutes] § 52-109 was proper. We leave consideration of that issue to the day when such claim properly may come before us."). Thus, in applying the doctrine in this case, we do not mean to suggest that the *claimed* or *alleged* error *actually* is error. Id.

"[Our appellate courts] ha[ve] found [claims of] induced error undeserving of appellate review in the context of a jury instruction claim when the [appealing party] has affirmatively requested the challenged jury instruction . . . ." (Internal quotation marks omitted.) *State* v. *Lindsay*, 143 Conn. App. 160, 183, 66 A.3d 944, cert. denied, 310 Conn. 910, 76 A.3d 626 (2013). See, e.g., *State* v. *Cruz*, 269 Conn. 97, 106–107, 848 A.2d 445 (2004) (declining to review claim of induced error where "challenged jury instruction repeated the exact language that the defendant had requested" [emphasis omitted]); *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 265–67, 698 A.2d 838 (1997) ("[because] the trial court instruct[ed] on both standards in accordance with the defendant's own request to charge submitted to the trial court . . . [t]he defendant cannot now complain when the trial court's jury instructions were based largely on [its] own proposed draft jury instructions").

Our review of the record reveals that the defendant induced the alleged instructional impropriety by affirmatively requesting the language it now challenges. The defendant filed a written request to charge that cited and quoted the *amended* version of § 31-72. In particular, the request quoted the provision of the amended version that imposes liability for double damages on an employer who fails to prove that it withheld wages in good faith. Specifically, the defendant requested the following instruction: "When any employer [unlawfully] fails to pay an employee wages . . . such employee . . . *shall* recover, in a civil action, (1) *twice the full amount of such wages . . . or* (2) *if the employer establishes that the employer had a good faith belief* that the underpayment of wages was [lawful], the full amount of such wages or compensation . . . ." (Emphasis altered; internal quotation marks omitted.)

In accordance with the defendant's written request, the court instructed the jury on the amended version

of § 31-72. It charged the jury, in relevant part: "If you find that the *defendant failed to prove* that it had . . . a good faith belief [in withholding the plaintiff's wages], then you *must* award the plaintiff twice the amount of unpaid wages." (Emphasis added.) Thus, the defendant received an instruction consistent with the language that it had requested. Accordingly, we decline to review the defendant's claim of instructional impropriety because the defendant induced the alleged error of which it now complains.

The defendant also seeks reversal pursuant to the plain error doctrine. Specifically, it argues that the trial court's alleged error in determining that the amended version of § 31-72 applied retroactively was plain error. The plaintiff responds that "[p]lain error review is not appropriate in this case" because the defendant induced the error of which it now complains. He further argues that if we reach the merits of the defendant's plain error claim, the trial court did not err in retroactively applying the amended version of § 31-72. In particular, the plaintiff argues that although there is no authority addressing whether the amended version of § 31-72 applies retroactively, retroactive application is consistent with the general legal principles governing the retroactive applicability of statutes. We conclude that, to the extent that the plain error doctrine applies to claims of induced error, the defendant's alleged instructional impropriety does not rise to the level of plain error because it has failed to demonstrate that such error resulted in manifest injustice.

We first review the relevant legal principles governing the plain error doctrine. Notwithstanding the apparent uncertainty[7] regarding whether this court can evaluate

[7] Our Supreme Court has "recognize[d] that there appears to be some tension in our appellate case law as to whether reversal on the basis of plain error could be available in cases where the alleged error is causally connected to the defendant's own behavior. In [some cases, the Supreme Court] held that where the defendant, personally and through counsel, had

claims of induced error under the plain error doctrine, this court recently considered whether a claim of induced instructional error constituted reversible plain error. See *State* v. *Schuler*, 157 Conn. App. 757, 774, 776, 118 A.3d 91 ("[o]ur review of the record leads us to the conclusion that the claimed error in the jury instruction, [which the defendant conceded was induced] although potentially ambiguous in its meaning, fails to rise to the level of plain error"), cert. denied, 318 Conn. 903, 122 A.3d 633 (2015); cf. *State* v. *McClain*, 324 Conn. 802, 808, 155 A.3d 209 (2017) ("[w]e . . . conclude that a *Kitchens* waiver [whereby a criminal defendant implicitly waives a claim of instructional error] does not preclude appellate relief under the plain error doctrine"). Accordingly, we address the defendant's claim of plain error.

The following principles guide our application of the plain error doctrine to the defendant's claim. "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires

expressly waived his right to trial, reversal for plain error was not appropriate because if there has been a valid waiver, there is no error for [the reviewing court] to correct. . . . In other cases, [it] has addressed a claim of plain error despite a finding of waiver or induced error, but nonetheless has relied in part on the defendant's action as a basis for concluding that the defendant had not demonstrated the manifest injustice or prejudice required to prevail under the plain error doctrine." (Citations omitted; internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 371–72 n.17, 33 A.3d 239 (2012); see also *State* v. *Coward*, 292 Conn. 296, 305–13, 972 A.2d 691 (2009) (applying plain error doctrine to instructional impropriety that defendant conceded was induced by his own conduct); *State* v. *Maskiell*, 100 Conn. App. 507, 520, 918 A.2d 293 ("[t]his court has evaluated under the plain error doctrine claims of error that pertained to induced error . . . and has explicitly rejected the . . . contention [that the plain error doctrine is inapplicable to claims of induced error]" [citations omitted]), cert. denied, 282 Conn. 922, 925 A.2d 1104 (2007).

reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . .

"[Our Supreme Court] recently clarified the [two-pronged] framework under which we review claims of plain error. [Under the] [f]irst [prong], we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Darryl W.*, 303 Conn. 353, 371–73, 33 A.3d 239 (2012).

"[U]nder the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if *both prongs* of the analysis are satisfied can the appealing party obtain relief." (Emphasis added; internal quotation marks omitted.) *In re Jah'za G.*, 141 Conn. App. 15, 22, 60 A.3d 392, cert. denied, 308 Conn. 926, 64 A.3d 329 (2013).

After reviewing the record, we reject the defendant's request to reverse the trial court's judgment pursuant to the plain error doctrine. Even if we assume, without deciding, that the court's retroactive application of the amended statute was an error satisfying the first prong of the plain error doctrine, we conclude that such error

fails to satisfy the second plain error prong because it did not result in manifest injustice. See, e.g., *State* v. *Sanchez*, 308 Conn. 64, 84, 60 A.3d 271 (2013) ("assuming that it is not debatable that [trial court improperly failed to give a *Ledbetter* instruction] . . . the omitted jury instruction did not result in manifest injustice"); *98 Lords Highway, LLC* v. *One Hundred Lords Highway, LLC*, 138 Conn. App. 776, 804, 54 A.3d 232 (2012) ("assum[ing] that the [court's] failure to require [the counterclaim plaintiffs to amend their pleadings] was an error in satisfaction of the first prong of the plain error test, we would be unable to conclude that the results of such a claimed error rose to the level of fundamental unfairness in satisfaction of the second prong of the test"); *State* v. *Edwin M.*, 124 Conn. App. 707, 716, 6 A.3d 124 (2010) ("[e]ven if we assume, without deciding, that it was improper for the trial court to allow . . . an expert opinion in the area of sexual abuse, we do not believe that [t]his testimony . . . work[ed] a serious and manifest injustice on the [defendant]" [citation omitted; internal quotation marks omitted]), cert. denied, 299 Conn. 922, 11 A.3d 151 (2011).

Turning then to the second prong, in "address[ing] . . . claim[s] of plain error despite a finding of waiver or induced error . . . [our Supreme Court] has relied in part on the defendant's action as a basis for concluding that the defendant had not demonstrated the manifest injustice or prejudice required to prevail under the plain error doctrine." *State* v. *Darryl W.*, supra, 303 Conn. 372 n.17; see also *State* v. *Alston*, 272 Conn. 432, 456, 862 A.2d 817 (2005) ("we conclude that the defendant is not entitled to a new trial because he induced the trial court to take the very actions he now criticizes as erroneous, and he has failed to demonstrate any prejudice resulting therefrom").

Indeed, in a case in which we applied the plain error doctrine to a claim of induced error, this court recently

opined: "Regardless of whether the [alleged impropriety satisfies the first plain error prong], no manifest injustice results from our refusal to entertain an argument fashioned anew for appellate purposes, particularly where the freshly minted argument contradicts the position that the plaintiff advanced in the trial court." *Gladstein* v. *Goldfield*, supra, 163 Conn. App. 586–87.

As previously set forth in considerable detail, the alleged instructional error was induced by the defendant's submission of a request to charge that quoted and relied on the amended version of § 31-72. Furthermore, the record reveals that on several occasions throughout the trial, the defendant acquiesced to the court instructing the jury on the amended version. In light of the extent to which the defendant's own actions contributed to the claimed error, we conclude that it has failed to demonstrate that the consequences of the claimed error were manifestly unjust.

Accordingly, we decline to afford the defendant relief under the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAMS GROUND SERVICES, INC. *v.* ROBERT F. JORDAN
(AC 38333)

Alvord, Prescott and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendant in connection with the defendant's failure to pay for landscaping and snow plowing services performed by the plaintiff at the defendant's property from 2001 through 2013. Following a trial to the court, the trial court found that the defendant had waived any statute of limitations defense by failing to raise it as a special defense, and, alternatively, that the defendant's several acknowledgments of the debt and the conduct of the

parties tolled the statute of limitations. From the judgment rendered in favor of the plaintiff, the defendant appealed to this court. *Held*:

1. The trial court's finding that the statute of limitations had been tolled by the defendant's several acknowledgments of the debt was not clearly erroneous; although the defendant claimed that the evidence presented was insufficient to infer an unequivocal acknowledgment of the debt, his arguments concerned the credibility of the witnesses and the weight of the evidence, which were matters for the court as the trier of fact, and the court's finding that the defendant unequivocally acknowledged the debt was supported by the testimony and other evidence submitted, which included a $500 payment made by the defendant with a note on the check indicating that it was for his account, various statements by the defendant that he was unable to pay his outstanding balance, his promise that he would give the plaintiff a "fat check" upon the closing of the sale of his house, and his additional statement that the plaintiff would be paid when his house was sold.

2. The defendant could not prevail on his claim that the trial court improperly admitted, for the truth of their contents, certain photocopies of invoices, which he described as yearly summaries of the monthly bills allegedly delivered to him by the plaintiff over the course of a decade: the defendant having objected at trial on the ground that the invoices were incomplete business records, he failed to preserve any evidentiary claims related to a ground other than to lack of completeness, and accordingly, this court did not review those claims; with respect to the defendant's claim that the photocopies were not complete and accurate copies of the originals sufficient to satisfy § 8-4 (c) of the Connecticut Code of Evidence, which provides that a reproduction, when satisfactorily identified, shall be as admissible in evidence as the original, the plaintiff did not testify that reproductions of business records were being submitted into evidence, but rather sought to admit his original business records, which consisted of photocopies of the original invoices sent to the defendant that the plaintiff kept for his records, and, therefore, the trial court did not abuse its discretion in admitting the invoices into evidence.

Argued February 8—officially released June 27, 2017

Procedural History

Action to recover damages for payment due for services rendered, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Robert D. Russo, III, with whom was *Colin B. Connor*, for the appellant (defendant).

Paul S. Nakian, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant, Williams Ground Services, Inc., appeals from the judgment rendered, following a bench trial, in favor of the plaintiff, Robert F. Jordan, on the plaintiff's claim of payment due for unpaid landscaping and snow plowing services. On appeal, the defendant claims that the trial court erred by (1) determining that the statute of limitations had been tolled because he unequivocally acknowledged the debt and (2) admitting certain documents that he argues are inadmissible under various provisions of the Connecticut Code of Evidence. We affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to the resolution of this appeal. Beginning in approximately 2001, the plaintiff "performed lawn, cleanup, lawn maintenance, and snow plowing services" for the defendant at his single family home in Darien. These services were provided annually from 2001 through 2013, and were billed to the defendant, who made payments on an irregular and infrequent basis.

At some point, the plaintiff became aware that the defendant's house was for sale, and the two parties discussed the matter. When the sale of the home was imminent, the defendant asked the plaintiff to plow the driveway so that a moving company could move him out safely. The defendant indicated that the plaintiff would receive a "fat check" at the closing. He also indicated that the outstanding bill would be paid in full.

The plaintiff acceded to the defendant's request and plowed the driveway.[1]

On January 6, 2015, the plaintiff commenced this action against the defendant to recover the outstanding balance due for his services. The defendant filed an answer and three special defenses asserting that (1) the plaintiff sought compensation for services he did not provide, (2) the plaintiff was not the entity the defendant knew to have performed work on his property, and (3) the plaintiff was not entitled to the punitive damages and attorney's fees he claimed. The parties subsequently submitted pretrial briefs in which the defendant for the first time raised a statute of limitations defense as a basis for dismissing the action, and the plaintiff argued that the continuing course of conduct doctrine tolled the statute of limitations.

On August 18, 2015, following a bench trial, the court issued its memorandum of decision. The court found that the defendant had waived any statute of limitations defense by failing to raise it as a special defense. Alternatively, the court found that the defendant's several acknowledgments of the debt and the conduct of the parties tolled the statute of limitations. The court also found that the defendant had not proved his first and second special defenses, but it found, pursuant to his third special defense, that he had proved that the plaintiff was not entitled to punitive damages or attorney's fees. Finally, the court found in favor of the plaintiff on his claim for unpaid landscaping and snow plowing services, awarded him $32,558.70 in damages with taxable costs, and rendered judgment thereon. This appeal

[1] The court also found that prior to the sale of the defendant's real property, some confusion occurred because the plaintiff improperly filed a mechanic's lien on the land records for the estimated amount of his services, but money was held out at the closing to satisfy any damages awarded to the plaintiff from any legal action.

followed. Further facts and procedural history will be set forth as necessary for the resolution of this appeal.

I

The defendant claims that the court erred in finding that the statute of limitations was tolled by, inter alia, his acknowledgments of the debt.[2] We disagree.

Before addressing the court's determination that the applicable statute of limitations was tolled by the defendant's acknowledgments of the debt, we assess the trial court's reliance in this case on *Zatakia* v. *Ecoair Corp.*, 128 Conn. App. 362, 18 A.3d 604, cert. denied, 301 Conn. 936, 23 A.3d 729 (2011). The defendant claims that the court's reliance on *Zatakia* is misplaced.[3] This court held in *Zatakia* that, inter alia, the trial court had not committed clear error when it found that correspondence from the defendant's president was a clear acknowledgment of indebtedness. Id., 370–71.

The defendant claims on appeal that the court's "factual analogy" to *Zatakia*, in support of its determination

[2] We need not reach the defendant's claim that the court improperly found that he waived his statute of limitations defense by failing to raise it as a special defense, or that the statute of limitations was tolled by the continuing course of conduct doctrine because we affirm the court's alternative finding that the defendant's acknowledgments of the debt tolled the statute of limitations.

[3] The defendant also claims that an ancient case, *Weed* v. *Bishop*, 7 Conn. 128 (1828), controls. The court in *Weed* held that a creditor, as party to the case, was incompetent to testify to an acknowledgment of a debt. Id., 131–32. The defendant failed to raise *Weed* before the trial court as the controlling law in this case regarding the acknowledgment of the debt. Accordingly, the defendant failed to preserve his claim that the plaintiff was incompetent to testify to the defendant's acknowledgment of the debt. See *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 143–44, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Nevertheless, the defendant's reliance on *Weed* is misplaced because the General Assembly abolished the general common-law rule upon which *Weed* was based nearly 170 years ago. See *State* v. *James*, 211 Conn. 555, 560, 560 A.2d 426 (1989) ("[i]n 1848 the common law disability of parties to testify as witnesses was removed by a statute now incorporated in General Statutes § 52-145 [a]").

that he acknowledged the debt, was misplaced because the cases are factually distinguishable and, thus, its determination that he unequivocally acknowledged the debt was clear error. We reject this argument because we disagree with the defendant's characterization of the manner in which the court relied on *Zatakia*. The court quoted *Zatakia* for the applicable legal standard to determine whether an unequivocal acknowledgment of a debt has tolled the statute of limitations. At no point did the court refer to or rely on the facts of *Zatakia* as set forth by the defendant.

The defendant also claims that, under the rule stated in *Zatakia*, the conduct of the parties in the present case was insufficient to infer an unequivocal acknowledgment of the debt and, thus, the court's determination was clearly erroneous.[4] We disagree.

"The [s]tatute of [l]imitations creates a defense to an action. It does not erase the debt. Hence, the defense can be lost by an unequivocal acknowledgment of the debt, such as a new promise, an unqualified recognition of the debt, or a payment on account. . . . Whether partial payment constitutes unequivocal acknowledgment of the whole debt from which an unconditional promise to pay can be implied thereby tolling the statute of limitations is a question for the trier of fact. . . .

"A general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute. The governing principle is this: The determination of whether a sufficient acknowledgment has been made depends upon proof that the defendant has by an express or implied recognition of the debt voluntarily renounced

[4] We note that the court appears to have raised sua sponte the tolling doctrine on the basis of the defendant's several acknowledgments of his debt to the plaintiff. At trial, the defendant did not object to the court's sua sponte insertion of such tolling doctrine into the case, and he has not raised the issue on appeal as it relates to any of his claims. We thus do not consider whether the court erred by inserting and relying on that doctrine.

the protection of the statute. . . . But an implication of a promise to pay cannot arise if it appears that although the debt was directly acknowledged, this acknowledgment was accompanied by expressions which showed that the defendant did not intend to pay it, and did not intend to deprive himself of the right to rely on the [s]tatute of [l]imitations. . . . [A] general acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of the debt has been asserted in the debtor's presence and he did not contradict the assertion. . . .

"We review the trial court's finding . . . under a clearly erroneous standard. . . . [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. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citations omitted; internal quotation marks omitted.) *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 461–63, 802 A.2d 887, cert. denied, 262 Conn. 918, 812 A.2d 861 (2002); see also *Zatakia* v. *Ecoair Corp.*, supra, 128 Conn. 369–70.

In the present case, the court found that the defendant's several acknowledgments of the debt tolled the statute of limitations. In support of this conclusion, the court relied on the testimony of the plaintiff, stating: "There was testimony by the plaintiff that the defendant said he was unable to pay the bill. There is testimony that the defendant said 'the property had been sold and the plaintiff would receive a fat check at the closing.' The defendant said 'the plaintiff would be paid when

the house was sold.' " The court also found: "Exhibit 2 shows payment by the defendant on October 28, 2011, being check [number] 6067 showing a $500 payment with a note on the front that it was 'on account-2011' indicating to this court that there was money due, and this was payment on it."[5]

The defendant argues that evidence presented was insufficient to infer an unequivocal acknowledgment of the debt. Specifically, he asserts that the plaintiff's testimony regarding his promises to pay was "undocumented, uncorroborated, and self-serving hearsay testimony from the party directly and materially benefitted by said testimony."[6] Additionally, he argues that his testimony contradicts that of the plaintiff. All of these arguments go to credibility and the weight to be given to the evidence presented. Credibility and weight of the evidence are matters for the finder of fact. *Baillergeau* v. *McMillan*, 143 Conn. App. 745, 754 n.2, 72 A.3d 70 (2013).

Having reviewed the record, we determine that the testimony and other evidence submitted to the court support the court's finding that the defendant unequivocally acknowledged the debt. The defendant acknowledges that the $500 payment could be considered as evidence of his unequivocal acknowledgment of the debt. He does not challenge any finding of the court made on the basis of this evidence. He merely claims that the amount of evidence supporting any such finding

[5] The defendant asserts that the court improperly considered a $2500 payment made by him in 2012 as part of its determination that he acknowledged the debt. As the defendant states, however, the court found that the payment was made as an advance payment and was made "in order to induce the plaintiff to continue working." The court, thus, did not consider this payment in determining that the defendant unequivocally acknowledged the debt.

[6] As statements of a party opponent, the plaintiff's testimony about the defendant's statements falls within an exception to the hearsay rule. Conn. Code Evid. § 8-3 (1).

is sparse. Although this evidence concerning the $500 payment, standing alone, could be enough to support the court's finding that the defendant acknowledged the debt,[7] the court also considered the defendant's various statements that he was unable to pay his outstanding balance, his promise of a "fat check" upon closing, and his additional statement that the plaintiff would be paid when his house was sold. Any testimony by the defendant to the contrary, the plaintiff's interest in the outcome, and the plaintiff's lack of documentation and corroboration of the defendant's acknowledgments, are matters of credibility and weight that we do not consider independently on appeal. Accordingly, the defendant has failed to carry his burden of proving that the court's finding was clearly erroneous. The court's conclusion that the statute of limitations had been tolled by the defendant's several acknowledgments of the debt thus was not error.

II

The defendant also claims that the court erred by admitting, for the truth of their contents, certain photocopies of invoices, which he describes as "yearly summaries," of the monthly bills allegedly delivered to the defendant over more than a decade. We disagree.

The following additional procedural facts are relevant to the resolution of this claim. When the plaintiff sought to admit the first invoice into evidence, which included landscaping charges for services performed over the course of 2001, the defendant objected as follows: "Your

[7] Having concluded that the defendant had waived any statute of limitations defense, the court did not determine whether the three year statute of limitations for oral contracts, General Statutes § 52-581, or the six year statute of limitations for written contracts, General Statutes § 52-576, would apply to this case. The $500 payment made in 2011 could have tolled the six year statute of limitations if it applied. Because there also was evidence that the defendant acknowledged the debt within three years of the commencement of the action, we need not decide which statute applies.

Honor, I'm going to object on the grounds that this is an incomplete business record. It has the top cut off of it. It has no date from when it was created and he doesn't really remember the specifics of when it was created." The court responded: "The objection is overruled. It goes to weight, not admissibility."[8]

On appeal, the defendant claims that the invoices are inadmissible because the yearly summaries were not business records under the legal definition and because the summaries, as photocopies, were incomplete business records and not complete and accurate copies of the originals sufficient to satisfy § 8-4 (c) of the Connecticut Code of Evidence. We reject this argument.

The defendant objected at trial that the invoices were "*incomplete* business record[s]," and the court, based on its ruling on the objection, understood his objection to go to completeness. The defendant did not seek to clarify or to add other grounds to his objection as each of the twenty-one other invoices was admitted into evidence.[9] The defendant, therefore, failed to preserve an objection related to a ground other than to lack of completeness.[10]

[8] The defendant made his objection to the first landscaping bill for 2001. He seems to have attempted to maintain his objection on the same grounds with respect to other billing documents, stating, "And if you're comfortable with it Your Honor, for expediency purposes, I don't need to voir dire every single invoice that looks like this," to which the court responded, "Okay." The plaintiff submitted twelve other similar annual landscaping invoices, eight snow plowing invoices covering 2003 through 2013, and a single invoice for extra work in 2005, 2008, 2011, and 2013. We assume that the defendant's objection was maintained for all of these documents even though these documents arguably differ.

[9] See footnote 8 of this opinion.

[10] The defendant also claims that the invoices were inadmissible because the plaintiff failed to establish that the documents were business records under § 8-4 (a) of the Connecticut Code of Evidence; that the plaintiff did not establish that the original documents qualified as summaries of voluminous writings or that the documents from which the summaries were prepared were admissible business records sufficient to satisfy § 10-5 of the Connecticut Code of Evidence; and that the plaintiff failed to establish that the summaries satisfied the best evidence rule under § 10-2 of the

"Our role in reviewing evidentiary rulings of the trial court is settled. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done." (Internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 133, 998 A.2d 730 (2010. "In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Internal quotation marks omitted.) *State* v. *Rivera*, 169 Conn. App. 343, 366, 150 A.3d 244 (2016), cert. denied, 324 Conn. 905, 15 A.3d 544 (2017). "Our review of evidentiary rulings made by the trial court is limited to the specific legal ground raised in the objection [to the trial court]. . . . This court reviews rulings solely on the ground on which the party's objection is based. . . . [W]e have explained that, to afford petitioners on appeal an opportunity to raise different theories of objection would amount to ambush of the trial court because, [h]ad specific objections been made at trial, the court would have had the opportunity to . . . respond." (Citation omitted; internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 133–34.

Because the defendant's objection was that the invoices were *incomplete* business records, he failed to preserve his evidentiary claims under §§ 8-4 (a), 10-2, and 10-5 of the Connecticut Code of Evidence. We, therefore, do not review these claims.

Connecticut Code of Evidence. These claims are not preserved, and, therefore, we do not discuss them.

The defendant also claims that the invoices, as photocopies, were not complete and accurate copies of the originals sufficient to satisfy § 8-4 (c).[11] We disagree.

At trial, the defendant examined the plaintiff regarding the invoices prior to the admission of the first yearly invoice.[12] The plaintiff testified that he would leave the

[11] Section 8-4 (c) of the Connecticut Code of Evidence provides in relevant part: "[I]f any person in the regular course of business has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of them to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other process *which accurately reproduces* or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is otherwise required by statute. The reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of the reproduction shall be likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile shall not preclude admission of the original." (Emphasis added.) Section 8-4 (c) of the Connecticut Code of Evidence was amended in 2015 to make technical changes that are not relevant to this appeal.

[12] The following exchange occurred between the defendant's counsel and the plaintiff:

"Q. Mr. Williams, is this a complete copy of the original?

"A. Yes, as far as I know.

"Q. It's not cut off at the top?

"A. No. Well, Williams Ground Service is in there. Sometimes when you put it in the copy machine it cuts it off.

"Q. But it is not a complete copy of the original invoice?

"A. It looks like one for me, except for the name at the top.

"Q. So it is cut off on the top?

"A. Yes.

"Q. Is [it] possible there's other writing up there that we can't see?

"A. It would just say Williams Ground Service.

"Q. Where are these original invoices?

"A. These are the only ones that I have. I—when I made these I gave the originals, left them at [the defendant's] and I keep the copy.

"Q. Didn't you say the other day you gave the originals to [your attorney]?

"A. In other words I copied and gave them to him off copies that I had. The originals—when I put the original bill, I would turn the originals in and I would keep a copy for myself. Okay. So—

"Q. Oh, turn them you mean give them to [the defendant]?

original invoices at the defendant's home and would keep a photocopy for his own records. He testified that the document sought to be admitted into evidence was one of these photocopies. The defendant asked whether the plaintiff had testified at his deposition that he gave "the originals" to his attorney. The plaintiff clarified that he had photocopied the copies that he had kept for his records, kept those photocopies, and gave his attorney the copies that he first kept for his records.

Section 8-4 (c) of the Connecticut Code of Evidence provides that a "reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding . . . ." Although the defendant argues that the plaintiff sought to admit reproductions into evidence, the plaintiff sought to admit his *original business records*. His original *business records*, for the purposes of § 8-4 (c), were the photocopies of the invoices sent to the defendant that the plaintiff kept for his records. These were the documents that the plaintiff testified were being admitted into evidence. He did not testify that *reproductions* of business records were being submitted into evidence. The court, therefore, did not abuse its discretion when it admitted the invoices into evidence. In the circumstances of this case, any issue concerning whether they were substantively complete went to the weight to be given them and not to their admissibility. See *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 699 n.11, 1 A.3d 157 (2010) ("[B]usiness records do not carry any presumption of accuracy merely because they are admissible. The credibility of such records remains a question for the trier of fact." [Internal quotation marks omitted.]).

"A. That's correct. So then I would copy the bills I have and those are the bills that I gave to [my attorney]."

In summary, the court's finding of several acknowledgments of the debt by plaintiff was not clearly erroneous. The court did not err in concluding that the applicable statute of limitations was tolled by the defendant's acknowledgments of the debt. The court did not abuse its discretion in admitting the plaintiff's business records into evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSE RONALD JOSEPH (AC 38473)

Sheldon, Beach and Harper, Js.

Syllabus

The defendant, who had been convicted of sexual assault in the first degree and risk of injury to a child, appealed to this court, claiming, inter alia, that the trial court violated his statutory (§ 54-82m) and constitutional rights to a speedy trial, and committed plain error when it instructed the jury about constancy of accusation testimony. The defendant had filed four pro se motions for a speedy trial and to dismiss the charges against him prior to the start of trial. The trial court did not address or make any factual findings as to his claims in the speedy trial motions. Several of those motions were not certified as having been served upon the state, two were withdrawn by the defendant's counsel, and several were denied by the clerk of the court because the defendant was represented by counsel at the time that he attempted to file the motions. *Held*:

1. The trial court did not violate the defendant's right to a speedy trial under § 54-82m: the proper application of § 54-82m and our related rules of practice require a factual finding as to whether the applicable time limit has passed and that inquiry in turn necessitates factual findings as to whether certain delays are excluded from that calculation, and here the trial court did not address or make factual findings as to the defendant's assertions in the speedy trial motions, and given the state of the record, this court could not properly engage in meaningful review of the defendant's claim without resort to speculation and conjecture, which have no place in appellate review; furthermore, the defendant was represented by counsel when he attempted to file his pro se motions for a speedy trial and, thus, having availed himself of legal counsel, he lacked the authority to file such motions, the clerk's office was informed that

the defendant's counsel did not want to pursue the motions, and the defendant at no time requested that he be allowed to represent himself.

2. This court declined to review the defendant's claim that the trial court violated his sixth amendment right to a speedy trial, as the record lacked the requisite findings under § 54-82m and the applicable rule of practice (§ 43-40) as to the length of and reasons for the delay; the defendant lacked the authority to file his pro se motions for a speedy trial and, therefore, did not properly assert his right to a speedy trial before the trial court, and his counsel during oral argument to this court acknowledged that there was no evidence of prejudice.

3. The defendant could not prevail on his unpreserved claim that the trial court denied his right to procedural due process by failing to hold hearings on his pro se motions for a speedy trial; the record was silent as to what transpired before the trial court with respect to those motions, and even if he could surmount that fact, the defendant lacked the authority to file the motions, and his counsel affirmatively indicated to the trial court that he did not want to pursue those motions.

4. This court found unavailing the defendant's claim that the trial court committed plain error when it instructed the jury on constancy of accusation testimony: the defendant implicitly waived that claim when the trial court provided counsel with a copy of the constancy of accusation instruction and thereafter conducted a charging conference at which counsel raised no objection to the instruction and expressly agreed that the instruction was fair; furthermore, the defendant did not demonstrate the manifest injustice required to establish plain error, as the instruction advised the jury of the limited purpose for which it could consider the constancy of accusation testimony, and the defendant's assertion that the jury likely was misled by the court's failure to define the term corroboration in the instruction had previously been rejected by our appellate courts.

Argued February 8—officially released June 27, 2017

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Comerford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the court, *Comerford*, *J.*, granted the defendant's motion for rectification of the record. *Affirmed.*

Allison M. Near, assigned counsel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Maureen Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Jose Ronald Joseph, appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and two counts of risk of injury to a child in violation of § 53-21 (a) (2). On appeal, the defendant claims that the trial court (1) violated his statutory right under General Statutes § 54-82m to a speedy trial, (2) violated his sixth amendment right to a speedy trial, (3) violated his right to procedural due process by not holding hearings on his motions for a speedy trial, and (4) committed plain error in providing a constancy of accusation instruction to the jury. We affirm the judgment of the trial court.

From the evidence adduced at trial, the jury reasonably could have found the following facts. The victim was eight years old when the defendant began dating her mother, E.[1] E soon became pregnant with the defendant's child and the defendant moved into her home. Although E worked two jobs and was "[a]lways working overtime," the defendant was unemployed. As a result, the defendant served as the victim's primary caregiver.

While the victim's mother was at work, the defendant began playing "games" with the victim, in which he

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

digitally penetrated her vagina. The victim testified that, while playing "these games, [the defendant] would suck on my ear. He would twirl his fingers in my belly button. He would have me . . . sit on the couch with him with the covers over [and] there would be excessive touching in my private areas." The defendant proceeded to touch the victim in her "private areas" on a weekly basis.

That conduct continued after the birth of the defendant's daughter, A, who was the victim's half-sister. On one occasion, the victim encountered the defendant "on the couch with my little sister underneath the covers." When she observed the defendant touching A "in her private areas," the victim asked if her sister could "come play with me." As the victim recounted at trial, the defendant "refused and got angry. He stood up and pushed me. And then he told me that he knew what I wanted. And then he held me down and he penetrated my vagina [with] his penis." In the years that followed, the defendant continued to touch the victim and penetrate her with his penis on multiple occasions. That conduct transpired until the victim was nearly thirteen years old.

When the victim was almost fourteen years old, she broke down during an argument with her mother and told her that the defendant had raped and molested her. E asked the defendant if that was true; when he said no, the discussion ended. Later that night, the victim heard her mother crying in the shower. Nevertheless, E did nothing in response to her daughter's allegations.

In the years that followed, the victim "couldn't even stay in [her] home because [the defendant] was consistently there." She therefore routinely "made arrangements so that [she] would not be home." The victim also would "cut" herself, and attempted to kill herself on multiple occasions.

When the victim was nineteen years old, she informed the police of her physical encounters with the defendant. During their investigation of those allegations, the police visited the victim's former bedroom and discovered two writings that were "scratched into the wall" behind a mirror. The writings stated, "I hate Ronald,"[2] and, "God will save me." The victim testified that she wrote those statements on her bedroom wall when she was in middle school. Detective Christie Girard, who investigated the victim's former bedroom, similarly testified that the writings appeared to have been there "[f]or a while." The defendant corroborated that assessment at trial when he testified that he discovered the "I hate Ronald" writing on the victim's bedroom wall in "February, 2002."[3] Photographs of those writings were introduced into evidence at trial.

The defendant was arrested on May 21, 2010, and subsequently was charged with two counts of sexual assault in the first degree and two counts of risk of injury to a child. On June 29, 2010, the defendant first appeared before the trial court. At that time, he was represented by a public defender, Attorney Howard A. Ehring, who requested that the matter be continued until July 20, 2010. On July 20, 2010, Ehring and the defendant again appeared before the court. At that time, Ehring requested a signed copy of the warrant and a continuance for one week.

On July 27, 2010, Ehring appeared briefly before the court to indicate that he had filed a motion for reduction of the defendant's bond. He requested a hearing on that motion on August 4, 2010. At the August 4, 2010 proceeding, Ehring requested a further continuance to ensure that "a family member [of the defendant could]

[2] At trial, the victim identified the defendant as "Ronald Joseph."

[3] In February, 2002, the victim was eleven years old.

speak on his behalf." Ehring also requested the assistance of a French interpreter.[4] The court granted those requests and continued the matter until August 10, 2010.

At the outset of the August 10, 2010 proceeding, Ehring informed the court of a potential conflict of interest in his representation of the defendant. He therefore filed a motion for the appointment of a special public defender and requested a continuance, which the court granted. On August 31, 2010, the defendant and Ehring appeared before the court, at which time the court appointed Attorney John W. Imhoff, Jr., as the defendant's special public defender. Because Imhoff was recovering from knee surgery, the court continued the matter for one month.

On October 1, 2010, Imhoff appeared before the court with the defendant. At that time, the prosecutor indicated that she had provided discovery to Imhoff earlier that day. Imhoff, in turn, requested a continuance for three weeks to review those materials with the defendant, which the court granted. Imhoff appeared briefly before the court on November 18, 2010, and requested a further continuance, which the court again granted.

On the morning of January 5, 2011, Imhoff and the defendant appeared before the court. The court began by noting that a "Haitian interpreter" would not be available until later in the afternoon and inquired as to whether the defendant spoke "any English at all . . . ." Imhoff replied, "Yes, Your Honor. He's written me several letters [and] his grammar is better than most of my clients." Imhoff nevertheless informed the court that the defendant "would prefer to have" the assistance of an interpreter. The court thus continued the matter until that afternoon. Later in the day, however, the prosecutor informed the court that, due to a miscommunication, the interpreter had left the courthouse. The

[4] The record reflects that the defendant is a citizen of Canada who speaks in a French dialect.

interpreter's office further indicated that it needed "a little over a week's continuance to get somebody here." Accordingly, the court continued the matter.

Imhoff and the defendant appeared before the court two weeks later. The prosecutor informed the court that "[t]here's been no indication that [the defendant] had a willingness to plead to any of the charges that the state would proceed on." Imhoff confirmed that account and opined that the matter should be placed on the firm jury list, which the court agreed to do at that time.

On December 23, 2011, the defendant filed a pro se motion for a speedy trial. That one page motion was completed on a preprinted form and was signed by the defendant. The certification portion of that form, which indicates the date of service on the Office of the State's Attorney, was left blank. That motion was denied on January 4, 2012. The clerk who signed the "order" portion of the motion by circling "denied" and writing, "Motion filed pro se, defendant is represented by an attorney. Copy mailed to [the defendant]."

On February 7, 2012, the defendant attempted to file a second pro se motion for a speedy trial. That motion once again utilized a preprinted form. The defendant did not sign that motion or complete the certification portion to indicate that it was served on the Office of the State's Attorney. The motion was accompanied by a one paragraph note that stated: "This missive, it's to inform that I called 'Maitre' Imhoff today . . . and left a message at his office asking him to go to the clerk's office . . . to signed [and] completed the 'Motion for Speedy Trial' encl. Therefore, I respectfully implore the clerk to inform him on reception of this missive." There is no indication in the record of any court action on that request, apart from the following handwritten notation: "3/1/12 per Attorney Imhoff: he has no intent to

file this motion [and] he withdraws what was filed by his client."

On April 5, 2012, the defendant filed a third pro se motion for a speedy trial, again utilizing the same preprinted form. Although he signed that form, which was accompanied by another one paragraph note, he did not complete the certification portion to indicate that he had served it on the Office of the State's Attorney. The clerk who signed the "order" portion of the motion circled "denied" and wrote, "(*White*, *J.*) Denied—filed pro se; defendant is represented, counsel does not want to file." While the defendant was attempting to file those pro se motions with the court, Imhoff filed several unrelated motions on his behalf, including a motion for a bill of particulars, a "motion for production of the Department of Children and Families' medical and psychiatric records of the state's witness," and a motion "for notice of subject matter of proposed expert testimony."

On October 17, 2012, Attorney Haldan E. Connor, Jr., filed an appearance in lieu of Imhoff as the defendant's counsel.[5] On November 1, 2012, Connor appeared before the court, at which time the prosecutor remarked that she believed that Connor "being new to the case . . . probably needs a little bit more time to talk to his client prior to setting this case down for a trial date." Connor concurred and requested a continuance until November 15, 2012, which the court granted. When Connor appeared before the court on that date, however, he informed the court that the matter "should go back on the jury list" because "[w]e weren't able to reach any kind of resolution" with the state.

On November 26, 2012, the defendant attempted to file a pro se motion to dismiss. That handwritten motion

[5] The record before us is bereft of any explanation for that substitution. The record further does not contain any indication that Connor was a court-appointed attorney.

set forth ten distinct grounds, including the denial of his right to a speedy trial.[6] The defendant further requested a hearing on his motion. There is no indication in the record that the defendant provided a copy of that motion to the state or that the court took any action on the defendant's request. Furthermore, on the day that the defendant's motion to dismiss was received, a criminal caseflow coordinator, Ryan Flanagan, sent a written response to the defendant. In that correspondence, Flanagan advised the defendant that "[w]e cannot accept or file motions from defendan[ts] who are currently represented by attorneys. Our records indicate [that] Attorney Connor has filed an appearance in your case. Therefore, we cannot accept your motion and it is being returned to you. If you have any questions you can contact your attorney . . . ." The letter then recited Connor's contact information.

On April 16, 2013, Attorney Matthew Couloute filed an appearance in lieu of Connor as the defendant's counsel.[7] On December 11, 2013, the parties appeared

[6] The defendant's November 26, 2012 motion to dismiss states in relevant part that he "requests the court to dismiss the information on the ground that:

"(1) The information failed to charge and offense; or

"(2) The institution of the prosecution was defective; or

"(3) The statute of limit has expired; or

"(4) The court has no jurisdiction over the subject matter; or

"(5) The court has no jurisdiction over the defendant; or

"(6) There is insufficient evidence or cause to justify the bringing or continuing of such information or the placing of the defendant on trial; or

"(7) The defendant has been denied a speedy trial;

"(8) The law defining the offense charges is unconstitutional or otherwise invalid; or

"(9) The affidavit relied on for the issuance of the arrest warrant is insufficient; or

"(10) Any other legally sufficient grounds the defendant can establish."

[7] The record lacks any explanation for that substitution. In the appendix to its appellate brief, the state has included a copy of a petition for a writ of habeas corpus filed by the defendant on December 31, 2014. In that petition, the defendant avers that Couloute was privately retained. We properly may take judicial notice of that pleading. See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning our power to take judicial notice of files of the

before the court, at which time the state indicated that the defendant faced a maximum possible exposure of eighty years incarceration on all of his pending charges. The state then formally offered the defendant the opportunity to enter a guilty plea to one count of sexual assault in the first degree in exchange for "a ten year sentence" with a two year mandatory minimum, ten years of special parole and registration as a sexual offender. The defendant rejected that offer. Couloute informed the court that the defendant proposed a counteroffer under which he would plead guilty in exchange for a sentence of time already served. The court summarily rejected that counteroffer.

At that proceeding, the defendant contended that he had not been provided with any notice of the charges against him, stating that "I want to know what's . . . the accusation. . . . I don't have no notion of the accusation. I don't have no due process. . . . [The state has not] accused me of anything." In response, the court apprised the defendant that the information contained four counts alleging sexual assault in the first degree and risk of injury to a child. Couloute then informed the court that, contrary to his client's representation, he had spoken with the defendant about those offenses and had explained to him their elements and the range of possible penalties.

Later that day, jury selection for the defendant's criminal trial commenced, and a trial was scheduled for the following month. That trial did not take place due to the death of Couloute's father. As Couloute explained to the court on February 24, 2014, in late December his "father had a stroke and was hospitalized [and] he subsequently passed away on January 7th." Couloute,

Superior Court, whether the file is from the case at bar or otherwise"); *Folsom* v. *Zoning Board of Appeals*, 160 Conn. App. 1, 3 n.3, 124 A.3d 928 (2015) (taking "judicial notice of the plaintiff's Superior Court filings in . . . related actions filed by the plaintiff").

therefore, was unavailable while tending to "those concerns and his estate." As a result of those "extraordinary family circumstances," the court declared a mistrial and dismissed the potential jurors by agreement of the parties. The parties agreed to begin selecting a new jury on April 8, 2014.

Couloute and the defendant appeared before the court on that date. At the outset, the court explained that, due to unforeseen circumstances, jury selection would be delayed by one day. The court then asked the parties if they wanted to put any other matters on the record. At that time, Couloute informed the court that communications with the defendant "ha[d] broken down." Couloute explained that it was the defendant's position that "no one has reviewed his file with him." Couloute indicated that he had met with the defendant one day earlier at the correctional facility and discussed his file with him, as he had done on prior occasions. Couloute also informed the court of a disagreement over trial strategy, as the defendant was "adamant" in his desire to call certain witnesses. Couloute had advised the defendant that he would not call those witnesses, stating that "[s]trategically, I don't think it's smart to call them. And at this point in time, when it comes to that matter, I don't think it's prudent to put those witnesses on the witness list." Couloute indicated that those witnesses were minors whom he believed "add nothing to the . . . case that would help defend [the defendant]. . . . I do believe the use of these witnesses and the context in which their testimony would be offered isn't relevant, nor is it probative . . . or useful for his . . . defense." Couloute notified the court that the defendant "wanted to make sure that the court was aware that [Couloute] refused to call those witnesses." Couloute concluded by stating, "I'm not sure that [the defendant] feels that I can effectively

represent him without using these witnesses. But that's the place we are in."

In response, the court noted that this development was on the eve of trial and years after the defendant's arrest. It then addressed counsel, in relevant part, as follows: "Either I can let you out of this thing and [the defendant] can represent himself if he wants to. He has that right, if he wants to do that. . . . You're a perfectly competent trial lawyer . . . and we're not going to play these games on the eve of trial here. This is purely dilatory. This is nonsense. I'm not going to let anybody manipulate the system to the detriment of the people here. . . . [N]obody on my watch will manipulate the system, Mr. Couloute. And that's exactly what we're doing here. This man has been through two or three lawyers. And every time we're about ready to go, something comes up; nonsense, absolute nonsense. If, after we pick this jury—we're going to commence the evidence on [April 22, 2014]—if you think that somebody has to be heard in terms of an offer of proof, I would be delighted to entertain that. I'll make whatever determinations I deem are appropriate. No one will see to it more than me that he'll get a fair trial."

Couloute then stated that, in light of the defendant "being adamant regarding witnesses being called, I suggest that . . . if he clearly or if he truly believes that these witnesses are imperative to his defense, that he either seek other counsel or represent himself. But for the record, I am telling the court and [the defendant], I will not be calling those witnesses." The court concluded by informing the parties that if the defendant "wishes to consider representing himself in this matter, based upon what you have told me, I will see to it that a *Faretta* canvass[8] is done here, and he can proceed

[8] See *Faretta* v. *California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

on his own, if he wishes to do so. If it's that much of a fissure that has taken place, he can do that. It isn't going to delay the trial. If he wants to pick them by himself, that's up to him. . . . [T]hat's his constitutional prerogative." (Footnote added.) The court then asked the defendant if he had "anything to say about [his] representation" by Couloute; the defendant did not respond in any manner. With that, the court stood in recess. At no time thereafter did the defendant indicate a desire to represent himself.

A trial was held over the course of four days in April, 2014. At its conclusion, the jury found the defendant guilty on all counts. The court rendered judgment accordingly and sentenced the defendant to a total effective term of twenty years incarceration, of which five years were a mandatory minimum. From that judgment, the defendant now appeals.

I

The defendant first claims that the court violated his statutory right to a speedy trial under § 54-82m. For two distinct reasons, we disagree.

Section 54-82m "requires the judges of the Superior Court to adopt rules that are necessary to assure a speedy trial for any person charged with a criminal offense . . . . With respect to a defendant who is incarcerated in a correction institution of this state pending trial, § 54-82m requires the rules to provide: (1) in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of a criminal offense shall commence . . . within eight months from the filing date of the information or indictment or from the date of arrest, whichever is later; and (2) if a defendant is not brought to trial within the time limit set forth in subdivision (1) and a trial is not commenced within thirty days of a motion for a speedy trial made by the

defendant at any time after such time limit has passed, the information or indictment shall be dismissed. Such rules shall include provisions to identify periods of delay caused by the action of the defendant, or the defendant's inability to stand trial, to be excluded in computing the time limits set forth in subdivision (1). . . . Practice Book § 43-40 then sets forth ten circumstances constituting those periods of time [that] shall be excluded in computing the [eight months] within which the trial of a defendant . . . must commence pursuant to [Practice Book §] 43-39." (Citations omitted; internal quotation marks omitted.) *State* v. *Cote*, 101 Conn. App. 527, 532–33, 922 A.2d 322, cert. denied, 284 Conn. 901, 931 A.2d 266 (2007).

"The determination of whether a defendant has been denied his right to a speedy trial is a finding of fact, which will be reversed on appeal only if it is clearly erroneous. . . . The trial court's conclusions must stand unless they are legally and logically inconsistent with the facts." (Internal quotation marks omitted.) *State* v. *Jeffreys*, 78 Conn. App. 659, 669–70, 828 A.2d 659, cert. denied, 266 Conn. 913, 833 A.2d 465 (2003), overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 248, 253, 61 A.3d 1084 (2013). The proper application of § 54-82m and our related rules of practice require a factual finding as to whether the applicable time limit has passed. That inquiry, in turn, necessitates factual findings as to whether certain periods of delay are excluded from that calculation. See Practice Book § 43-40.[9]

In *State* v. *Miller*, 121 Conn. App. 775, 786–87, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010),

[9] Practice Book § 43-40 outlines various circumstances in which periods of time are excluded from the calculation of the time limitations of § 54-82m. They include periods of time attributable to, inter alia, continuances granted by the judicial authority at the request of the defendant, the unavailability of counsel for the defendant, and "delay occasioned by exceptional circumstances." Practice Book § 43-40 (10).

this court considered a case in which the trial court summarily denied a motion for a speedy trial and the defendant thereafter took no steps to ascertain the basis of that ruling. As the court noted, "the [trial] court did not address the defendant's § 54-82m claim. The defendant never filed a motion for articulation pursuant to Practice Book § 66-5. Additionally, the record is devoid of any information that would apply to whether any of the relevant time period was subject to exclusion; see Practice Book § 43-40; from the speedy trial calculus." For that reason, this court concluded that "the record is inadequate to review the defendant's claim." In so doing, the court indicated that, without those necessary factual findings, its decision would be entirely speculative. *State* v. *Miller*, supra, 787.

In the present case, the trial court likewise did not address the claims set forth in the defendant's motions for a speedy trial, nor did it make any factual findings related thereto. Given the state of the record before us, this court cannot properly engage in meaningful review of the defendant's claim without resort to speculation and conjecture, which "have no place in appellate review." (Internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009).

The defendant's claim is plagued by a further infirmity. It is undisputed that the defendant was represented at all times by counsel when he attempted to file his pro se motions. As such, his claim is foreclosed by well established precedent.

In *State* v. *Gibbs*, 254 Conn. 578, 608, 758 A.2d 327 (2000), the defendant, despite being represented by counsel, made a pro se motion to dismiss predicated on "an alleged violation of his federal and state constitutional right to a speedy trial," which the trial court denied. On appeal, our Supreme Court emphasized that,

although "a defendant *either* may exercise his right to be represented by counsel . . . or his right to represent himself . . . *he has no constitutional right to do both at the same time*." (Citations omitted; emphasis in original.) Id., 610. The court continued: "It is equally well settled that, having made the knowing, intelligent and voluntary choice to avail himself of the services of counsel, a defendant necessarily surrenders to that counsel the authority to make a wide range of strategic and tactical decisions regarding his case. . . . Although a represented defendant does retain the absolute right to make a limited number of choices regarding his case . . . neither the United States Supreme Court, nor this court, has ever expanded that extremely narrow class to include the choice of whether to file a motion to dismiss for lack of a speedy trial. Indeed, such a choice clearly is one of the vast panoply of trial decisions for which one retains an experienced and competent attorney." (Citations omitted.) Id., 610–11. In light of certain representations made by the defendant's counsel to the trial court, the Supreme Court concluded that counsel's "decision not to file a motion to dismiss very likely was tactical in nature." Id., 612. For that reason, the court held that "the defendant had no authority to make the motion pro se." Id.; see also *State* v. *Cote*, supra, 101 Conn. App. 532 n.6 ("the defendant had no authority to make a pro se oral motion to dismiss on speedy trial grounds while he was represented by counsel").

That logic applies equally in the present case. Here, the defendant sought to file pro se motions for a speedy trial and to dismiss, despite the fact that he was represented by counsel at all times. Moreover, his trial counsel on multiple occasions informed the clerk's office that he did not want to pursue such motions with the

court.[10] As in *Gibbs*, we must presume that counsel's decision was tactical in nature. In addition, when the defendant attempted to file his pro se motion to dismiss, the caseflow coordinator responded in writing to indicate that, consistent with the foregoing precedent, the court "cannot accept or file motions from defendan[ts] who are currently represented by attorneys." Yet at no time did the defendant request to represent himself. Having availed himself of legal counsel, the defendant lacked the authority to file the pro se motions at issue in the present case.

II

The defendant next claims that the court violated his constitutional right to a speedy trial. The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[11] The sixth amendment right to a speedy trial is made applicable to the states through the due process clause of the fourteenth amendment. See *Klopfer* v. *North Carolina*, 386 U.S. 213, 222–23, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).

"Although the right to a speedy trial is fundamental, it is necessarily relative, since a requirement of unreasonable speed would have an adverse impact both on the accused and on society." *State* v. *Johnson*, 190 Conn. 541, 544, 461 A.2d 981 (1983). In *Barker* v. *Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the United States Supreme Court articulated a balancing test to determine whether the right to a speedy trial

[10] As the defendant notes in his principal appellate brief, "his attorney repeatedly informed the clerk that he did not want to file the motion for a speedy trial."

[11] Although the defendant also alleges a violation of his right under article first, § 8, of the Connecticut constitution, he has provided no independent analysis thereof. Accordingly, we consider his claim under the federal constitution alone. See *State* v. *Saturno*, 322 Conn. 80, 113 n.27, 139 A.3d 629 (2016).

has been violated, which entails consideration of the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." As our Supreme Court has explained, "[u]nder *Barker*, the determination of whether such rights have been violated requires a case-by-case approach in which the court examines the factual circumstances in light of [that] balancing test . . . ." *State* v. *Smith*, 289 Conn. 598, 613, 960 A.2d 993 (2008); accord *United States* v. *Marshall*, 669 F.3d 288, 296 (D.C. Cir. 2011) ("factual findings are required pursuant to *Barker* v. *Wingo* [supra, 514]"); *United States* v. *Fredrick*, 334 Fed. Appx. 727, 728 (5th Cir. 2009) ("[i]n reviewing a speedy trial claim, this court reviews factual findings for clear error"), cert. denied, 559 U.S. 986, 130 S. Ct. 1725, 176 L. Ed. 2d 204 (2010).

In this case, the record before us lacks the requisite findings under § 54-82m, which "codifies a defendant's constitutional right to a speedy trial"; *State* v. *Hampton*, 66 Conn. App. 357, 366–67, 784 A.2d 444, cert. denied, 259 Conn. 901, 789 A.2d 992 (2001); and Practice Book § 43-40 regarding the length of delay, including any periods of time that, under our rules of practice, are excluded from the calculation thereof. See footnote 9 of this opinion. The record also does not contain any findings as to the reasons for the delay.[12] The lack of such findings also impairs our ability to properly consider the question of prejudice. We note further that, at oral argument before this court, the defendant's counsel acknowledged that "there is no evidence in this record of prejudice." Moreover, as discussed in part I of this opinion, the defendant did not properly assert his right to a speedy trial before the trial court.[13]

[12] As the state emphasizes in its appellate brief, the record is silent as to why no proceedings transpired before the court from January 5, 2011 to October 17, 2012, and from November 15, 2012 to December 11, 2013.

[13] We reiterate that, pursuant to *State* v. *Gibbs*, supra, 254 Conn. 612, the defendant lacked authority to file his pro se motions for a speedy trial and to dismiss. Furthermore, it is undisputed that the defendant failed to serve

State v. *Smith*, supra, 289 Conn. 598, is instructive in this regard. In that case, "the defendant did not ask the trial court to apply *Barker* and, therefore, the court did not make the factual findings required under that test." Id., 613. Because "the record [did] not contain all of the relevant factual findings," our Supreme Court declined to review the defendant's sixth amendment claim. Id.; see also *State* v. *Friend*, 159 Conn. App. 285, 342, 122 A.3d 740 (concluding that record was inadequate to review speedy trial claim), cert. denied, 319 Conn. 954, 125 A.3d 533 (2015). Guided by that precedent, we decline to further consider the defendant's claim.

III

The defendant also contends that the court violated his right to procedural due process by failing to hold hearings on his pro se motions for a speedy trial. The defendant did not preserve this claim at trial and now seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[14]

copies of those motions on the state. In so doing, he undermined an essential purpose of § 54-82m. As the Supreme Court has observed, the legislature enacted that statute "with the intent that the defendant's motion would alert . . . the state that the clock was running and that, to avoid dismissal of the charges, the defendant would have to be afforded a trial within thirty days. . . . The legislature recognized that institutional negligence might occur . . . and that the defendant's speedy trial motion would remind the state that it must commence the trial within thirty days or face a dismissal. . . . In other words, *the motion for a speedy trial is supposed to be the state's wake up call*. It is intended to [give] the state another crack from preventing that individual from being set free." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *McCahill*, 265 Conn. 437, 451–52, 828 A.2d 1235 (2003). No such wake-up call was provided to the state in the present case.

[14] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the

Even if he could surmount the fact that the record before us is largely silent as to what transpired before the trial court with respect to his pro se motions for a speedy trial, he still could not prevail, as he lacked authority to file those motions under established law. See *State* v. *Gibbs*, supra, 254 Conn. 612; *State* v. *Cote*, supra, 101 Conn. App. 532 n.6. Moreover, the defendant's counsel in the present case affirmatively indicated to the trial court that he did not want to pursue those motions. See footnote 10 of this opinion. In light of the foregoing, the defendant's claim must fail.

IV

The defendant maintains, as a final matter, that the court committed plain error in providing a constancy of accusation charge to the jury. We disagree.

The following additional facts are relevant to the defendant's claim. At trial, the victim was asked if she had spoken to any peers about "what had happened" with the defendant. The victim testified that, when she was sixteen years old, she confided in her "best friend," D, about that experience. D later testified at trial as a constancy of accusation witness. In his testimony, D stated that, while they were in high school together, the victim told him that she was sexually assaulted by a person she described as her stepfather "when she was a little girl." D further indicated that the victim did not provide any specifics regarding the nature of those assaults.

The victim's mother, E, also testified as a constancy of accusation witness. The victim earlier had testified that she had told E that the defendant had raped and molested her. In her testimony, E described the time that, during an argument regarding the defendant, her

state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

daughter "lashed out that he had touched her." E testified that the victim informed her that the defendant had sexually assaulted her, and when and where those assaults transpired.

Following the close of evidence, the court held a charging conference with the parties. At the outset, the court noted that "counsel has had a copy of the charge in hand for a couple of days." The court then proceeded to review the substance of its jury charge with the parties. With respect to its instruction on constancy of accusation testimony,[15] the court stated: "On the constancy of accusation, there were two witnesses that were constancy witnesses, in part the mother of the

[15] The court's instruction on constancy of accusation testimony stated in relevant part: "If you find that a witness made statements at other times about the case, whether oral or written, you may consider whether those statements were consistent or inconsistent with what the witness has testified to here before you in court when weighing their credibility.

"In a case such as this, you may also consider any delay in the reporting of the alleged incident in evaluating the credibility of the [victim] and the weight to be given her testimony. In this regard, you'll recall that you heard some testimony in the case from Dr. Lawrence Rosenberg, who testified as to child grooming and of delayed reporting by children, amongst other things. Any opinions rendered by him are not binding upon you. Such expert testimony is subject to review at your hands just as any other testimony. You will size up and give the weight to that testimony as you deem appropriate.

"Now, let me talk to you about a couple of other things before we take a quick break. Let me talk to you about something called constancy witnesses. Ordinarily, when someone makes a statement out of court not under oath, it's inadmissible. We normally call that hearsay; it's not tested by an oath. But there are exceptions, and we have encountered one in this case. The state has offered evidence of statements made by the [victim] out of court to certain individuals concerning the alleged crimes, and you'll recall those statements were admitted into evidence.

"Please recall the statements made by the [victim] to her mother and to her friend, [D]. This evidence is admitted solely to corroborate her testimony here in court; it's to be considered by you for the limited purpose of determining the credibility and the weight to be given her testimony before you. In other words, it's not admitted for the truth of those statements but only for the purpose of corroborating what she testified to you—testified before you, here in court."

[victim] here, and [D]. Do you both agree that the constancy charge is a fair charge to set forth [to the jury]?" Both defense counsel and the prosecutor answered affirmatively.

On appeal, the defendant reverses course and contends that the court's constancy of accusation instruction was improper. In response, the state submits that the defendant has waived his claim of instructional error.

In *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), our Supreme Court held that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case."

Those criteria all are satisfied in the present case. The court provided counsel with a copy of its proposed jury charge days in advance. It thereafter conducted a charging conference, at which it solicited feedback from the parties. During that conference, defense counsel raised no objection to the constancy of accusation instruction. Indeed, counsel expressly indicated that he believed that the instruction was a "fair" one. Accordingly, we conclude that the defendant implicitly waived his jury instruction claim under the rule articulated in *Kitchens*.

That determination does not end our inquiry, as the defendant claims that the judgment should be reversed pursuant to the plain error doctrine. See Practice Book

§ 60-5. During the pendency of this appeal, our Supreme Court clarified that "a *Kitchens* waiver does not preclude plain error review." *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). We therefore consider the merits of the defendant's claim.

Review under the plain error doctrine is "reserved for only the most egregious errors"; id., 814; and "truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009). To prevail under the plain error doctrine, an appellant must demonstrate, as a threshold matter, the existence of an error "that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812. The defendant has not met that substantial burden.

Under Connecticut law, constancy of accusation evidence—which generally consists of testimony by "a person to whom a sexual assault victim has reported the assault"—is "admissible only to corroborate the victim's testimony and not for substantive purposes." *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996).[16] The instruction provided in the present case comports with that precedent, as it informed the jury that the constancy of accusation testimony provided

[16] In his principal appellate brief, the defendant argues that "[t]his case provides yet another instance of why this court should overrule *Troupe* and its progeny." We are not the proper audience for such claims. As an intermediate appellate body, it is axiomatic that this court is "bound by Supreme Court precedent and [is] unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court . . . . [I]t is not within our province to reevaluate or replace those decisions." (Citation omitted; internal quotation marks omitted.) *State* v. *Smith*, 107 Conn. App. 666, 684–85, 946 A.2d 319, cert. denied, 288 Conn. 902, 952 A.2d 811 (2008).

by D and E was "admitted solely to corroborate [the victim's] testimony here in court, it's to be considered by you for the limited purpose of determining the credibility and the weight to be given her testimony before you. In other words, it's not admitted for the truth of those statements but only for the purpose of corroborating what she testified to you—testified before you, here in court."

The defendant nonetheless argues that the jury likely was misled by the court's failure to define the term "corroboration." Our appellate courts have rejected such a claim twice in the past ten months. See *State* v. *Daniel W. E.*, 322 Conn. 593, 609, 142 A.3d 265 (2016) (concluding that court's constancy of accusation instruction "accurately portrayed the law and did not mislead the jury" despite "the trial court's failure to define the word 'corroborate' "); *State* v. *Roberto Q.*, 170 Conn. App. 733, 744–45, 155 A.3d 756 (same), cert. denied, 325 Conn. 910, A.3d (2017). In the present case, the court plainly advised the jurors of the limited purpose for which they could consider the constancy of accusation testimony provided by D and E. Accordingly, we cannot conclude that the court's constancy of accusation instruction constituted an error "obvious in the sense of not debatable." (Internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812.

Furthermore, the defendant has not demonstrated that manifest injustice resulted from the court's allegedly improper instruction, as the plain error doctrine requires. See *State* v. *Coward*, 292 Conn. 296, 307, 972 A.2d 691 (2009). Although the defendant on appeal argues that the court should have defined the term " 'corroboration' such that the jury would be able to determine the difference between an appropriate use of constancy [of] accusation evidence (to prove that a complaint was made), and an inappropriate use of

[such] evidence (to prove that the complaint was true),'' the record reveals that the defendant expressly encouraged the latter practice at trial. Specifically, his counsel elicited testimony from E indicating that she did not believe the victim's initial disclosure of sexual assault, and then argued to the jury that it should discredit the victim's testimony in light of that evidence.[17] When a party so utilizes allegedly improper evidence, it cannot prevail under the plain error doctrine. See, e.g., *State* v. *Ampero*, 144 Conn. App. 706, 715, 72 A.3d 435 (''[t]he defendant cannot show manifest injustice because his defense counsel waived this claim by failing to take action against the admission of such evidence and then strategically used the evidence to his advantage''), cert. denied, 310 Conn. 914, 76 A.3d 631 (2013); *State* v. *Hawkins*, 51 Conn. App. 248, 256, 722 A.2d 278 (1998) (''[h]aving used some of this [the constancy of accusation] evidence to his advantage in his closing argument, the defendant cannot now establish that any alleged improper evidentiary ruling . . . deprived him of a fair trial''), cert. denied, 281 Conn. 901, 916 A.2d 46 (2007). The defendant's invocation of the plain error doctrine, therefore, is unavailing.

The judgment is affirmed.

In this opinion the other judges concurred.

[17] In his closing argument to the jury, defense counsel stated in relevant part: ''[T]ake into consideration the lack of affect when [the victim] told the story that she used, the lack of details, the lack of corroboration of the story, the actions afterward—when I say afterward, after the disclosure. I wonder why after the disclosure to the mother, everybody went on about their business. The mother truly didn't believe her to the point where she just let the child just go back to the same places, the same routines and everything else. So, if the mother doesn't believe her, eight, nine years later, how are you supposed to believe her? How are you supposed to convict someone on a statement made that far from the time of the event where the mother didn't believe it, when it was going on?''

ANTHONY JOHNSON *v.* BRIAN PRELESKI, STATE'S ATTORNEY
(AC 38583)

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

Syllabus

The petitioner, who had been convicted of murder, served a petition for a new trial on the respondent state's attorney one day after the three year limitation period provided by the statute governing the timeliness for such petitions (§ 52-582) expired. The respondent filed a motion to dismiss on the ground that the action was untimely. The petitioner argued that the action was timely pursuant to the saving statute (§ 52-593a), which provided that a cause or right of action shall not be lost because of the passage of the relevant statute of limitations if "the process to be served is personally delivered to a state marshal" within the limitation period and such process is served within thirty days of the delivery. The trial court conducted an evidentiary hearing on the motion to dismiss during which the office manager for the petitioner's counsel testified that she had faxed the summons and petition to the marshal on August 5, which was before the limitation period expired. The marshal testified that the fax was successfully transmitted to his office and that he served the process on August 6, but that he could not recall whether he personally received the fax on August 5. The trial court determined that because the process was not "personally delivered" to the marshal with in the limitation period, § 52-593a did not operate to save the otherwise untimely action and, accordingly, rendered judgment dismissing the action. On the petitioner's appeal to this court, *held* that the trial court properly dismissed the petitioner's action: a party seeking to rely on a saving statute must demonstrate compliance with its provisions and, in order for § 52-593a to extend the time for service of process beyond the relevant statute of limitations, the process must be personally delivered to the marshal within the limitation period, and here, although there was evidence that the process was transmitted via fax to the marshal's office within the limitation period, there was no evidence that process in any form was personally delivered to the marshal as neither the marshal's return nor his testimony during the hearing before the trial court clarified when he actually came into physical possession of the process to be served.

Argued February 6—officially released June 27, 2017

Procedural History

Petition for a new trial, following the petitioner's conviction of the crime of murder, brought to the Superior Court in the judicial district of New Britain, where

the court, *Young*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the petitioner appealed to this court. *Affirmed.*

Daniel M. Erwin, with whom, on the brief, was *Norman A. Pattis*, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Christian M. Watson*, assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Anthony Johnson, appeals from the judgment of the trial court dismissing his petition for a new trial brought against the respondent, Brian Preleski, the state's attorney for the judicial district of New Britain. The petitioner claims that, in concluding that the petitioner's action was time barred under General Statutes § 52-282, the court improperly rejected his argument that General Statutes § 52-593a saved his cause of action. We affirm the judgment of the trial court.

The following facts and procedural history underlie this appeal. In 2011, following a jury trial, the petitioner was convicted of murder. On August 5, 2011, the defendant was sentenced to a term of incarceration of forty-five years. This court affirmed the judgment of conviction following the petitioner's direct appeal. *State* v. *Johnson*, 149 Conn. App. 816, 89 A.3d 983, cert. denied, 312 Conn. 915, 93 A.3d 597 (2014).

On August 6, 2014, the petitioner commenced the underlying action, a petition for a new trial based on newly discovered evidence under General Statutes § 52-270,[1] against the respondent when a state marshal,

[1] "A petition for a new trial is collateral to the action in which a new trial is sought. . . . In an action on a petition for [a] new trial, a petitioner is not a criminal defendant but, rather, is a *civil* petitioner. . . . A proceeding on a petition for [a] new trial, therefore, is not a criminal action. Rather, it is a distinct proceeding that is commenced by the service of civil process

Charles J. Lilley, served process on the respondent. On August 28, 2014, the respondent moved to dismiss the petition on the ground that it was time barred under § 52-582[2] because it was not commenced within the three year limitation period, which began to run when the petitioner was sentenced on August 5, 2011, and ended on August 5, 2014. The petitioner objected to the motion to dismiss. First, he argued that he delivered the writ, summons, and petition to the marshal on August 5, 2014, prior to the expiration of the three year limitation period codified in § 52-582. Second, he argued that § 52-593a[3] applied because it provided a thirty day remedial period in which service may be made after such time as process has been delivered, within the statutory time limit, to a marshal. Thus, the petitioner argued, his petition should not be dismissed. As a special defense to the petition, the respondent asserted that the petition

and is prosecuted as a civil action." (Citations omitted; emphasis in original.) *Small* v. *State*, 101 Conn. App. 213, 217, 920 A.2d 1024 (2007), appeal dismissed, 290 Conn. 128, 962 A.2d 80, cert. denied, 558 U.S. 842, 130 S. Ct. 102, 175 L. Ed. 2d 68 (2009).

We observe that "[c]hapter 896, General Statutes § 52-45 et seq., governs civil process. Chapter 896 requires that 'a proper officer' must serve on each defendant a 'true and attested copy' of process. See, e.g., General Statutes §§ 52-57, 52-59b, 52-59c, 52-63 and 52-64." (Footnote omitted.) *Francis* v. *Fonfara*, 303 Conn. 292, 299, 33 A.3d 185 (2012).

[2] General Statutes § 52-582 provides: "No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition based on DNA (deoxyribonucleic acid) evidence that was not discoverable or available at the time of the original trial may be brought at any time after the discovery or availability of such new evidence."

[3] General Statutes § 52-593a provides: "(a) Except in the case of an appeal from an administrative agency governed by section 4-183, 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.

"(b) In any such case, the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service in accordance with this section."

was barred by § 52-582 and that § 52-593a did not save the action "because the process was not 'personally delivered' to a state marshal pursuant to [§ 52-593a (a)] and the state marshal in this case failed to 'endorse under oath on his return the date of delivery of the process' pursuant to § 52-593a (b)." In his reply to the special defense, the petitioner alleged that the petition was "served in substantial conformity" with § 52-593a.

Over the course of two days, the court held a hearing on the motion to dismiss. The petitioner presented testimony from two witnesses concerning the circumstances under which process was delivered to Lilley. The first witness was Donna Peat, the office manager of the Pattis Law Firm, which represented the petitioner in connection with his petition for a new trial. The second witness was Lilley, the Connecticut state marshal who, in this matter, served process on the respondent on August 6, 2014.

During her brief examination, Peat testified that on August 5, 2014, she faxed "a summons and complaint" in the present action to Lilley's office. She testified that the fax cover sheet[4] admitted into evidence reflected that the transmission was competed at 5:01 p.m. that day, but that she did not have any personal knowledge with respect to whether, on that day, Lilley personally received the documents.[5] Peat testified that Lilley's office "confirmed that they served it the following morning."

[4] The court admitted both a fax cover sheet and a document entitled "TX Result Report." Both documents reflected the time "17:01" on August 5, 2014. We observe that, the message section of the fax cover sheet, which was signed by Peat and dated August 5, 2014, states in relevant part: "Please make service of the attached ASAP. Also, please confirm receipt. I will mail the originals." (Emphasis in original.)

[5] Attached as an exhibit to the petitioner's objection to the motion to dismiss is an affidavit of Peat in which she avers in relevant part that she had attempted to reach Lilley by telephone on August 5, 2014, "but was only able to leave a voice mail."

Lilley, referring to the fax cover sheet admitted into evidence, testified that, by means of his fax machine, he "received" the complaint in this matter on August 5, 2014, at 5:01 p.m. He went on to explain, however, that he did not have any independent knowledge or recollection as to whether, on that date, he received the documents at issue "personally," had "custody" of the documents at issue, or "physically held" the documents at issue in his hands. Lilley testified that he served the complaint in this matter on August 6, 2014.

During argument on the motion to dismiss, the parties agreed that § 52-582 was the statute of limitations governing the case and that it began to run on August 5, 2011. The parties agreed that the issue before the court concerned the application of the savings statute, § 52-593a, and, specifically, whether, under subsection (a) of the statute, process was personally delivered to a state marshal on or before August 5, 2014. The parties disagreed, however, with respect to what constituted personal delivery. The petitioner argued that he demonstrated by the evidence presented at the hearing on the motion to dismiss that personal delivery occurred on August 5, 2014; the respondent argued that such a showing had not been made. Additionally, as it relates to the applicability of § 52-593a, the respondent argued, and the petitioner agreed, that the marshal's return did not strictly satisfy subsection (b) of the statute because it did not specify the date on which process had been delivered to the marshal.[6] The petitioner urged the court

[6] The return, signed by Lilley and dated August 6, 2014, states in relevant part: "Then and by virtue hereof, on the 6th day of August, 2014, I made due and legal service on the within named defendant, BRIAN PRELESK[I], NEW BRITAIN STATE'S ATTORNEY'S OFFICE, by leaving a verified and true attested copy of the original Writ, Summons and Petition For New Trial Based Upon Newly Discovered Evidence, with and in the hands of Margaret Q. Chapple, Associate Attorney General who is duly authorized to accept service at the office of the Attorney General for the State of Connecticut, at 55 Elm Street, in the City of Hartford.

"The within is the original, Writ, Summons and Petition For New Trial Based Upon Newly Discovered Evidence, with my doings hereon endorsed."

to conclude that he could satisfy this requirement by means of Lilley's testimony, but acknowledged that he was unaware of any authority that supported that proposition.

Later, the parties submitted briefs to the court in support of their respective arguments in support of and in opposition to the respondent's motion to dismiss. The respondent made clear that he did not dispute that Peat sent process to Lilley's office via fax on August 5, 2014, and that the fax successfully arrived at Lilley's office. The respondent, however, argued that because Lilley testified that he was unable to verify that he personally received the process on August 5, 2014, the petitioner was unable to avail himself of the remedy provided by § 52-593a. The petitioner, arguing that § 52-593a applied, urged the court to conclude that the remedial nature of § 52-593a weighed in favor of a liberal interpretation of the statute. The petitioner argued that the requirement set forth in § 52-593a (b), that the officer serving process endorse the date that process was delivered to him on his return, is directory and not mandatory. Relying on the evidence presented at the hearing, the petitioner argued that the date of delivery was August 5, 2014. Additionally, the petitioner argued that the policies underlying the statute of limitations and the saving statute were satisfied because process had been delivered timely to Lilley and that he served the petition within thirty days thereafter.

In relevant part, the court summarized the following undisputed facts in its memorandum of decision: "The petitioner was convicted of murder and sentenced on August 5, 2011. Pursuant to § 52-282, the petitioner had until August 5, 2014, to file a petition for a new trial. On that date, the office manager of the petitioner's counsel sent the writ, summons, and petition (process) by facsimile (fax) to the state marshal's office at 4:59 p.m. The marshal does not recall receiving the process

that day or when he received the fax. The marshal's return . . . does not indicate when the marshal received the process for service. The marshal served the process on the respondent the following day, August 6, 2014." The court observed that, because an action is commenced on the date of service of the writ, service had not been made within the three years of the date of sentencing and, thus, service occurred outside of the applicable statute of limitations.

With respect to the dispositive issue, namely, the applicability of § 52-593a, the court observed that the petitioner did not provide the court with any support for the proposition that faxing process to Lilley's office was the equivalent of personally delivering process to him. The court determined that Lilley's failure to comply with § 52-593a (b) by endorsing on the return the date that process had been delivered to him was not a fatal defect, yet this omission harmed the petitioner because it deprived the court of evidence that delivery of process to Lilley had occurred prior to the expiration of the three year statutory period. Also, the court stated that, "[h]ere, the marshal testified that he did not know whether he personally received the process on August 5, 2014, and would be unable to comply with § 53-593a (b)."

The court concluded: "Had the petitioner served the process on the respondent on or before August 5, 2014, in compliance with § 52-582, the action would have been timely commenced. Had the petitioner arranged to have the process personally delivered to the marshal or had the marshal indicated the date he received service on the return as required by § 52-593a, the action would have been saved.

"In the absence of any authority which finds the faxing of process to be personal delivery and in the absence of any evidence that the marshal received the process

on the date it was faxed, the court finds in favor of the respondent on its special defense that § 52-582 bars the petition. The petition for a new trial is dismissed."

Reiterating the arguments that the petitioner raised before the trial court, he argues that the court erroneously interpreted the requirement in § 52-593a (a) that "the process to be served is personally delivered to a state marshal" to preclude the type of delivery that occurred in the present case. The petitioner argues "that the undisputed evidence demonstrating the petitioner's delivery to [Lilley's] office by facsimile on August 5 is a sufficient basis upon which to receive the benefit of § 52-593a." The petitioner argues that (1) because the statute is remedial in nature, it should be interpreted liberally to afford relief in the present circumstances; (2) Lilley's failure to endorse the return in accordance with § 52-593a (b) should not preclude the petitioner from availing himself of the benefit of § 52-593a because the requirement at issue is directory and not mandatory, and he presented evidence to demonstrate that personal delivery occurred on August 5, 2014; and (3) in the present circumstances, permitting the petition to be heard would not thwart the policies underlying the statute of limitations or undermine the reliability of the fact-finding process. The respondent argues that the court properly interpreted § 52-593a in dismissing the petition.[7]

[7] Following oral argument in this appeal, this court ordered the parties to file supplemental briefs addressing the following question: "Is personal delivery of the *original* writ, summons and petition, as opposed to a *copy*, *facsimile*, *or electronic copy*, required by General Statutes § 52-593a?" (Emphasis added.) In response, the petitioner argues that the issue set forth in the briefing order was unpreserved and not reviewable. Alternatively, the petitioner argues that "a facsimile or other electronic copy is legally sufficient and [for purposes of § 52-593a is] equivalent to an 'original' copy." Further, the petitioner argues that, if this court determines that § 52-593a requires the personal delivery of original copies of the process to be served and that the "facsimile copy" delivered to the marshal in the present case was not "an original copy," the statutory requirement should be liberally interpreted to be directory and not mandatory and, in light of the evidence

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . The issue [of whether an action is timely] . . . pursuant to the savings provision in § 52-593a, is one of statutory construction, and is therefore a question of law over which we employ plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider 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

presented, should not be interpreted as a barrier to obtaining relief under the statute. Additionally, the petitioner argues that to interpret § 52-593a such that the facsimile copy was insufficient would arbitrarily burden his ability to present new evidence in support of his petition and, thus, violate his right to present a defense. The respondent argues that § 52-593a required personal delivery of the original writ, summons, and petition, but that, regardless of whether the faxed process at issue in this case satisfies that requirement, we should conclude that the court correctly ruled in the respondent's favor because it correctly found that there was no evidence that process in any form had been personally delivered to a marshal on or before August 5, 2014. In light of our resolution of the present claim, we need not resolve the issue set forth in our supplemental briefing order.

statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citations omitted; internal quotation marks omitted.) *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 679, 986 A.2d 290 (2010).

Section 52-593a is remedial in nature as its "intended to prevent a party from losing the right to a cause of action because of untimely service on the part of the marshal by giving the marshal additional time in which to effect proper service on the party in question." (Emphasis omitted.) Id., 682. The statute evinces "[t]he legislature's policy of avoiding the unfairness that would result from holding a plaintiff responsible for a failure of service that is attributable to the marshal rather than the litigant . . . ." Id., 682 n.10.

A petition for a new trial brought pursuant to § 52-270 is subject to the statute of limitations codified in § 52-582, which provides in relevant part that "no petition for a new trial in any . . . criminal proceeding shall be brought but within three years next after the rendition of the judgment . . . complained of . . . ." In a criminal case, the date of rendition of judgment is the date of imposition of the sentence by the trial court. *Summerville* v. *Warden*, 229 Conn. 397, 426, 641 A.2d 1356 (1994); *State* v. *Coleman*, 202 Conn. 86, 89, 519 A.2d 1201 (1987).

The petitioner urges us to conclude that he demonstrated that, on August 5, 2014, within the three year limitation period, he personally delivered to Lilley the process to be served. Section 52-593a (a) provides in relevant part that "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* . . . within such time and the process is

served, as provided by law, within thirty days of the delivery." (Emphasis added.)

The resolution of the petitioner's claim hinges on the meaning of the phrase "personally delivered to a state marshal" in § 52-593a. This phrase has been the subject of interpretation by this court. In *Gianetti* v. *Connecticut Newspapers Publishing Co.*, 136 Conn. App. 67, 44 A.3d 191, cert. denied, 307 Conn. 923, 55 A.3d 567 (2012), this court considered whether certain counts of the plaintiff's cause of action were saved by § 52-593a. It was undisputed in *Gianetti* that service was untimely; the applicable limitation period expired on June 20, 2006, and the marshal's return indicated that process was served on July 7, 2006. Id., 73. The plaintiff argued that § 52-593a afforded him relief because he mailed the process to be served to the marshal within the limitation period, on June 9, 2006. Id.

In rejecting the plaintiff's claim in *Gianetti*, this court stated: "Section 52-593a only extends the period of time for the serving officer to make the delivery. Process must still be received by the serving officer on time. In other words, the plaintiff must get the process to the serving officer within the period allowed by the statute [of limitations]. . . . Although the plaintiff is permitted to mail the process to the marshal, the determinative standard is when the marshal receives the process, not when it is mailed. 'All that § 52-593a requires . . . is that the process be personally delivered. It does not require that the delivery be made by the plaintiff, his attorney, or any particular individual. The person making the delivery has no statutory role to perform respecting the delivery. He is neither required nor permitted to endorse his doings on the return. In addition, the statute does not detail the manner of making delivery. The word "deliver" includes a handing over for the purpose of taking even though both acts do not occur simultaneously. . . . Although delivery by mail is not

mentioned in the extension statute, such delivery is not precluded. The fact that the extension statute becomes operative only where the process has been delivered before the running of the statute of limitations, and the fact that the serving officer is required to attest to the date of delivery suggest that the purpose of the statute is to ensure that the process is received on time by the officer. The word "personally" means in a personal manner . . . in person . . . . For something to be delivered in person it must be so delivered as to come into the possession of the person to whom it is to be delivered. Thus, where a delivery of process is to be made by mail, it has not been personally delivered until it has been received in person by the serving officer, at which point he can so attest.' " (Citations omitted; footnote omitted.) Id., 73–74.[8]

Thus, this court has interpreted "personally delivered," as used in § 52-593a, to require receipt in person or, stated otherwise, a showing that the item to be delivered has come into the physical possession of the person to whom it is to be delivered. Applying the interpretation of the statute set forth in *Gianetti* to the facts of the present case, we conclude that the undisputed evidence, that the petitioner's counsel transmitted process to Lilley's office on August 5, 2014, by means of a fax machine, fell short of demonstrating that process was personally delivered to Lilley on August 5, 2014. The act of transmitting a facsimile, like the act of mailing in *Gianetti*, established that the process to be served was *sent* to Lilley on August 5, 2014, but did not shed any light on whether the process to be served came into Lilley's *possession* on August 5, 2014. Neither Lilley's return[9] nor the testimony presented during the hearing

[8] In its analysis, this court implicitly adopted the interpretation of § 52-593a set forth in *Zarillo* v. *Peck*, 33 Conn. Supp. 676, 678–79, 366 A.2d 1165, cert. denied, 171 Conn. 731, 357 A.2d 515 (1976).

[9] This court has held that the requirement set forth in § 52-593a (b), that "the officer making service shall endorse under oath on such officer's return the date of delivery of the process to such officer for service," is directory,

clarified the issue. Cf. *Doe* v. *West Hartford*, 168 Conn. App. 354, 367–68, 147 A.3d 1083 (genuine issue of material fact existed with respect to availability of § 52-593a), cert. granted, 323 Conn. 936, 151 A.3d 384 (2016).

Due to its remedial nature, § 52-593a should be interpreted liberally in favor of those whom the legislature intended to benefit. See *Dorry* v. *Garden*, 313 Conn. 516, 533, 98 A.3d 55 (2014). Yet, this approach does not require us to vitiate clear statutory requirements, thus rendering meaningless the thing to be accomplished by the statute. As this court has observed, "[a] plaintiff relying upon a 'saving statute' must demonstrate compliance with its provisions." *Gianetti* v. *Connecticut Newspapers Publishing Co.*, supra, 136 Conn. App. 74.

not mandatory, in nature. *Dickerson* v. *Pincus*, 154 Conn. App. 146, 154–55, 105 A.3d 338 (2014). In *Dickerson*, this court stated in relevant part: "The essence of the thing to be accomplished in § 52-593a is to allow an action to be brought even though process is served after the expiration of the limitations period, when process is delivered to the marshal within the limitations period and the marshal serves process within thirty days of delivery. . . .

"Subsection (b) of § 52-593a does not address the essence of the thing to be done, which, in this case, was delivery to the marshal within the period of limitations; rather, it provides the manner in which compliance with subsection (a) of § 52–593a is supposed to be shown. . . . The purpose of the remedial savings statute would not be served by prohibiting the plaintiff from bringing the action only because the marshal did not perfectly fill out the marshal's return, as provided in subsection (b), when it is nonetheless clear from the marshal's return in this case that the marshal received the summons and complaint within the limitations period and served it on the defendant within thirty days, as required by subsection (a)." (Internal quotation marks omitted.) Id.; see also *Doe* v. *West Hartford*, 168 Conn. App. 354, 377–79, 147 A.3d 1083 (§ 52-593a available to save cause of action despite failure of serving officer to endorse on officer's return date of delivery of process to him pursuant to subsection [b]), cert. granted, 323 Conn. 936, 151 A.3d 384 (2016).

Thus, we do not view Lilley's failure to endorse the return in compliance with subsection (b) of § 52-593a to be a defect that precludes application of the statute. Yet, like the trial court, we observe that the return did not otherwise demonstrate that the thing to be accomplished, namely, timely personal delivery of process as described in subsection (a), occurred in this case.

Because we conclude that the petitioner failed to demonstrate that process, *in any form*, was personally delivered to a state marshal within the limitation period, we conclude that the petitioner is unable to avail himself of the relief afforded by § 52-593a. The court properly dismissed the action.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HIRAL M. PATEL (AC 163346)

Sheldon, Keller and Prescott, Js.

Syllabus

The petitioner, a media organization, filed a petition for review of the trial court's clarification of orders that it previously had issued in which it restricted the petitioner's recording and photographing of proceedings during a certain criminal trial. The court had granted pretrial motions filed by the respondent state to place restrictions on the petitioner's recording and photographing of portions of the criminal trial. Nothing in the respondent's motions or the court's subsequent orders addressed trial exhibits and whether the petitioner was prevented from obtaining copies of the exhibits. Thereafter, the petitioner sought to obtain copies of certain trial exhibits from the clerk of the court. The clerk's office denied the request, and the petitioner filed a motion requesting that the court clarify its initial orders. The petitioner claimed in the motion to clarify that the court had directed the clerk's office to not allow copies of certain exhibits to be made and that such a prohibition on the disclosure of exhibits was not part of the relief granted to the respondent. The court issued an oral decision stating that because it had not issued any order regarding exhibits, there was no order to clarify. The court then acknowledged two categories of exhibits—one category that included exhibits that could be viewed, copied and disseminated by anyone, and a second category that included exhibits that could be viewed at the courthouse but not copied. The court ruled that the public and the petitioner, in the presence of its attorney, could examine all trial exhibits at the clerk's office, but that certain of those exhibits, which included crime scene and autopsy photographs, could not be copied. The court's decision also referenced a sealing order that certain exhibits were not to be video recorded or otherwise disseminated. The next day, the petitioner filed a second motion for clarification, which asked the court

to explain its references to the sealing order that instructed that certain exhibits not be videoed and disseminated. The petitioner stated in the motion that no party had sought to seal trial exhibits, and that the court's initial orders restricted only the videotaping and recording of certain trial proceedings. The petitioner further asked the court to produce a list identifying which exhibits were in which category. Thereafter, the petitioner obtained a list of exhibits that did not indicate which exhibits were subject to the sealing order referenced by the court in its oral clarification, however, the court took no further action on the petitioner's second motion for clarification. The petitioner claimed in its petition for review by this court that the trial court, in its oral clarification, improperly limited the petitioner's ability to obtain copies of certain exhibits without having adhered to the applicable rule of practice (§ 49-42A) that provides procedural safeguards to protect the interests of the public and the petitioner. The respondent opposed the petition for review, claiming, inter alia, that it should be dismissed on the grounds that it was not subject to review by this court pursuant to statute (§ 51-164x [c]) because the trial court's orders had been issued pursuant to the rule of practice (§ 1-11C) applicable to media coverage of criminal proceedings, and that such orders were final and could not be challenged in a petition for review. *Held*:

1. Contrary to the respondent's claim that this court should dismiss the petitioner's petition for review for lack of jurisdiction because the trial court's initial orders only placed restrictions on the dissemination of certain trial exhibits pursuant to Practice Book § 1-11C and, thus, were not subject to review by this court under § 51-164x (c), the petitioner met its burden to establish a colorable claim that the trial court's clarification order limited the disclosure of materials that were subject to the procedural safeguards in Practice Book § 42-49A and, thus, was subject to review under § 51-164x; nothing in § 1-11C addressed the trial court's authority to limit access to materials in the custody of the clerk's office, which, by default, are generally available to the public, nothing in the respondent's motions addressed trial exhibits or whether the petitioner was prevented from obtaining copies of them, the parties did not assert nor did the record indicate that the trial court entered any additional, related order directed at exhibits on file with the court, and the petition for review challenged only the court's oral clarification as to the sealing order and the prohibition against the copying of exhibits.
2. The trial court improperly failed to adhere to the procedures in Practice Book § 42-49A in its oral clarification of its initial orders when it prevented the petitioner from obtaining copies of the trial exhibits:

   a. Any order preventing the public or the media from obtaining copies of exhibits, with the exception of reasonable restrictions on time, place and procedures, constitutes a limitation on the common-law right to access and a limitation on disclosure, and the court here clearly denied

the petitioner the right to obtain copies of the trial exhibits and, therefore, improperly limited the disclosure of those exhibits, as § 42-49A was intended to protect the petitioner's common-law right to access to the exhibits, which are judicial documents that are subject to a strong presumption of public access.

b. The court's oral clarification improperly failed to afford the petitioner an opportunity to be heard and failed to give prior notice to the public in violation of § 42-49A (e), as the court did not articulate what overriding interest it sought to protect by limiting the petitioner's access to copies of exhibits, made no findings underlying its order, and did not list which exhibits were subject to the order; accordingly, this court vacated that portion of the trial court's order that prevented the petitioner from obtaining copies of the trial exhibits and ordered that any subsequent limitation on the disclosure of materials on file with the court must comply with § 42-49A.

(*One judge dissenting*)

Argued February 3—officially released June 27, 2017

Procedural History

Motions to restrict certain recording and photographing during trial proceedings, brought to the Superior Court in the judicial district of Litchfield, where the court, *Danaher*, *J.*, granted the respondent's motions and issued certain orders; thereafter, the court issued clarifications of its ruling, and the petitioner filed a petition for review with this court; subsequently, this court denied the petitioner's motion that this court take judicial notice of certain matters. *Petition granted; relief requested granted.*

Rachel M. Baird, for the petitioner (American News and Information Services, Inc.).

Robert J. Scheinblum, senior assistant state's attorney, for the respondent (state).

Opinion

PRESCOTT, J. In this criminal matter, the petitioner, American News and Information Services, Inc., seeks relief, pursuant to Practice Book § 77-1 and General

Statutes § 51-164x (c),[1] from an order of the trial court that, although allowing the petitioner to view certain documents that were marked as exhibits in the underlying murder trial prosecuted by the respondent, the state of Connecticut, against the defendant, Hiram M. Patel,[2] prevented the petitioner from obtaining copies of those exhibits. The petitioner claims that the exhibits at issue are judicial documents to which a presumption of public access attaches, and that the court, in violation of Practice Book § 42-49A,[3] improperly limited the petitioner's

[1] General Statutes § 51-164x provides in relevant part: "(c) Any person affected by a court order that seals or limits the disclosure of any files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding, except (1) any order issued pursuant to section 46b-11 or 54-33c or any other provision of the general statutes under which the court is authorized to seal or limit the disclosure of files, affidavits, documents or materials, whether at a pretrial or trial stage, and (2) any order issued pursuant to a court rule that seals or limits the disclosure of any affidavit in support of an arrest warrant, shall have the right to the review of such order by the filing of a petition for review with the Appellate Court within seventy-two hours from the issuance of such court order.

"(d) The Appellate Court shall provide an expedited hearing on such petitions filed pursuant to subsections (a) and (c) of this section in accordance with such rules as the judges of the Appellate Court may adopt, consistent with the rights of the petitioner and the parties to the case."

Practice Book § 77-1 contains rules and procedures necessary to effectuate the expedited review authorized under § 51-164x. See also Practice Book § 42-49A (g).

[2] As set forth in the respondent's opposition to the petition for review, the defendant allegedly participated in a scheme to steal proceeds of illicit drug sales, in which he and a coconspirator entered the home of the victim drug dealer, bound the victim's mother and shot the victim, killing him. In addition to murder, the defendant was charged with felony murder, home invasion, accessory to first degree burglary, accessory to first degree robbery, conspiracy to commit first degree robbery, conspiracy to commit first degree burglary, and evidence tampering. On February 1, 2017, the jury returned a verdict of guilty on all counts, after which the trial court rendered judgment and sentenced the defendant, whose subsequent appeal to our Supreme Court is pending. See *State* v. *Patel*, appeal docketed, SC 19920 (May 16, 2017).

[3] Practice Book § 42-49A, titled "Sealing or Limiting Disclosure of Documents in Criminal Cases," provides in relevant part: "(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.

access to them without first articulating on the record the overriding interest that the court's order was intended to protect or specifying its findings underlying its order.

The respondent contends that we should dismiss the petition for review because, in its view, there was no

"(b) Except as provided in this section and except as otherwise provided by law, including [Practice Book §§] 36-2, 40-29 and 40-40 through 40-43 and General Statutes § 54-33c, the judicial authority shall not order that any files, affidavits, documents, or other materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited.

"(c) Upon written motion of the prosecuting authority or of the defendant, or upon its own motion, the judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. An agreement of the parties to seal or limit the disclosure of documents on file with the court or filed in connection with a court proceeding shall not constitute a sufficient basis for the issuance of such an order.

"(d) In connection with any order issued pursuant to subsection (c) of this section, the judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. If any finding would reveal information entitled to remain confidential, those findings may be set forth in a sealed portion of the record. The time, date, scope and duration of any such order shall be set forth in a writing signed by the judicial authority which upon issuance the court clerk shall immediately enter in the court file and publish by posting on a bulletin board adjacent to the clerk's office and accessible to the public. The judicial authority shall order that a transcript of its decision be included in the file or prepare a memorandum setting forth the reasons for its order.

"(e) Except as otherwise ordered by the judicial authority, a motion to seal or limit the disclosure of affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding shall be calendared so that notice to the public is given of the time and place of the hearing on the motion and to afford the public an opportunity to be heard on the motion under consideration. The notice of the time, date and place of the hearing on the motion shall be posted on a bulletin board adjacent to the clerk's office and accessible to the public. The procedures set forth in Sections 7-4B and 7-4C shall be followed in connection with a

court order that limited disclosure of or denied the petitioner access to any exhibits or other materials, and the existence of such an order is a factual predicate necessary to invoke our jurisdiction under § 51-164x. See also Practice Book § 77-1. According to the respondent, the court's order merely placed reasonable restrictions on copying exhibits that, at most, limited the dissemination of those exhibits, which the respondent maintains was a permissible restriction authorized pursuant to Practice Book § 1-11C.[4] The respondent further

motion to file affidavits, documents or other materials under seal or to limit their disclosure. . . ."

[4] Practice Book § 1-11C, titled "Media Coverage of Criminal Proceedings," provides in relevant part: "(a) Except as authorized by Section 1-11A regarding media coverage of arraignments, the broadcasting, televising, recording or photographing by media of criminal proceedings and trials in the superior court shall be allowed except as hereinafter precluded or limited and subject to the limitations set forth in Section 1-10B. . . .

"(c) As used in this rule, the word 'trial' in jury cases shall mean proceedings taking place after the jury has been sworn and in nonjury proceedings commencing with the swearing in of the first witness. 'Criminal proceeding' shall mean any hearing or testimony, or any portion thereof, in open court and on the record except an arraignment subject to Section 1-11A. . . .

"(e) Any party, attorney, witness or other interested person may object in advance of electronic coverage of a criminal proceeding or trial if there exists a substantial reason to believe that such coverage will undermine the legal rights of a party or will significantly compromise the safety of a witness or other person or impact significant privacy concerns. In the event that the media request camera coverage and, to the extent practicable, notice that an objection to the electronic coverage has been filed, the date, time and location of the hearing on such objection shall be posted on the Judicial Branch website. Any person, including the media, whose rights are at issue in considering whether to allow electronic coverage of the proceeding or trial, may participate in the hearing to determine whether to limit or preclude such coverage. When such objection is filed by any party, attorney, witness or other interested person, the burden of proving that electronic coverage of the criminal proceeding or trial should be limited or precluded shall be on the person who filed the objection.

"(f) The judicial authority, in deciding whether to limit or preclude electronic coverage of a criminal proceeding or trial, shall consider all rights at issue and shall limit or preclude such coverage only if there exists a compelling reason to do so, there are no reasonable alternatives to such limitation or preclusion, and such limitation or preclusion is no broader than necessary to protect the compelling interest at issue.

asserts that such an order was final; see Practice Book § 1-11C (j); and, thus, cannot be challenged in a petition for review.

On the basis of our review of the record, we agree with the petitioner that the court improperly limited the disclosure of judicial documents without adhering to the procedural safeguards required under our rules of practice. Accordingly, we vacate that portion of the court's order preventing the petitioner from obtaining copies of trial exhibits and direct the court to follow the procedures set forth in Practice Book § 42-49A prior to rendering any new order limiting disclosure of exhibits.

"(g) If the judicial authority has a substantial reason to believe that the electronic coverage of a criminal proceeding or trial will undermine the legal rights of a party or will significantly compromise the safety or privacy concerns of a party, witness or other interested person, and no party, attorney, witness or other interested person has objected to such coverage, the judicial authority shall schedule a hearing to consider limiting or precluding such coverage. To the extent practicable, notice that the judicial authority is considering limiting or precluding electronic coverage of a criminal proceeding or trial, and the date, time and location of the hearing thereon shall be given to the parties and others whose interests may be directly affected by a decision so that they may participate in the hearing and shall be posted on the Judicial Branch website.

"(h) Objection raised during the course of a criminal proceeding or trial to the photographing, videotaping or audio recording of specific aspects of the proceeding or trial, or specific individuals or exhibits will be heard and decided by the judicial authority, based on the same standards as set out in subsection (f) of this section used to determine whether to limit or preclude coverage based on objections raised before the start of a criminal proceeding or trial.

"(i) The judge presiding over the proceeding or trial in his or her discretion, upon the judge's own motion or at the request of a participant, may prohibit the broadcasting, televising, recording or photographing of any participant at the trial. The judge shall give great weight to requests where the protection of the identity of a person is desirable in the interests of justice, such as for the victims of crime, police informants, undercover agents, relocated witnesses, juveniles and individuals in comparable situations. 'Participant' for the purpose of this section shall mean any party, lawyer or witness.

"(j) The judicial authority shall articulate the reasons for its decision on whether or not to limit or preclude electronic coverage of a criminal proceeding or trial, and such decision shall be final. . . ."

The following procedural history is relevant to our consideration of the petitioner's claims. On December 28, 2016, the petitioner submitted a request with the Chief Court Administrator to video record the underlying criminal proceedings. That request was forwarded to the trial court, *Danaher*, *J.*, which heard arguments on January 4, 2017. Both the defendant and the respondent objected to having the trial proceedings recorded. In response to the petitioner's request, the respondent also filed two motions that asked the court to place restrictions on any audiotaping, videotaping, or photographing of portions of the criminal trial.

In the first motion, the respondent, citing Practice Book § 1-11C (e), (g) and (i), asked the court to disallow the recording or photographing of the testimony of the victim's mother, the medical examiner, two additional fact witnesses, and of any testimony discussing the decedent's body or photographs thereof. The respondent argued that there were significant safety and privacy concerns warranting its request.

The second motion cited Practice Book § 1-11B (g),[5] and asked the court to disallow any photographing or video recording of an undercover police detective, whom the respondent intended to call as a witness at trial. The respondent argued that because the detective continued to engage in undercover activities, his safety would be seriously compromised by any disclosure of his appearance. The state did not object, however, to any audio recording of the detective's testimony.

After hearing from the parties and the petitioner, the court granted the petitioner's request to video record the trial, subject to written orders issued by the court

[5] The respondent appears inadvertently to have referred to the rule governing media coverage of civil proceedings rather than the corresponding, and nearly identical, provision applicable to criminal proceedings, which is found in Practice Book § 1-11C (i).

that required the petitioner to follow certain rules throughout the trial proceedings.[6] The court also granted the respondent's two motions and the additional restrictions requested therein.

On January 25, 2017, the petitioner requested copies of exhibits entered into the record as full exhibits, but the court clerk's office denied the request. In response, the petitioner filed a motion asking the court for clarification of its January 4, 2017 ruling, "related orders," "and such other directive/order/ruling applicable to [the petitioner]'s access to trial exhibits." The petitioner asserted in its motion that the court had directed the clerk's office to deny the petitioner "copies of full exhibits entered in public view while the jury was present and not subject to any sealing order." (Footnote omitted.) The petitioner further noted that such a prohibition on disclosure was not part of the relief granted to the respondent, nor was an order pertaining to exhibits included in the court's January 4, 2017 written orders. The petitioner indicated that it intended to seek review of the court's directive, and asked the court to clarify whether the prohibition on obtaining copies applied (1)

[6] Specifically, the court instructed that (1) no recording would take place until after the jury was sworn, (2) the parties, during the course of the trial, should inform the court if they believed any recording would compromise the safety of a witness or undermine a legal right, at which time the court would determine whether to suspend recording, (3) the parties should inform the court at the earliest opportunity if a witness was a victim of crime, a police informant, an undercover agent, a relocated witness, a juvenile, or in any comparable situation, at which point the court would determine whether to suspend recording, (4) recording would be limited to the courtroom, utilizing one camera and one microphone operated by an employee of the petitioner who had read and understood the court's order, (5) the recording equipment would be located in a designated spot, and would be unobtrusive, operated manually and could not remain in the courtroom in the absence of an operator, (6) no equipment producing distracting sound or light, including an artificial light source, would be permitted, (7) recording would be shut off during recesses, sidebar conferences and whenever the jury was excused, and (8) no broadcasting, televising, recording or photographing of jurors would be permitted.

to the public or just the petitioner, and (2) to all exhibits submitted during trial or only a subset of trial exhibits.

The court addressed the petitioner's motion during proceedings later in the day on January 25, 2017. The attorney for the petitioner was not present. The court first indicated that, contrary to the petitioner's assertions in the motion to clarify, it had never instructed the clerk's office to deny the petitioner copies of exhibits. The court explained that, because it never issued any order regarding exhibits, the motion to clarify was founded on a faulty premise, and it could not clarify an order it never issued. The court then stated that "[a]ny exhibit that is a full exhibit is available to any member of the public to view. Any member of the public can come here and look at any exhibit. *There are some exhibits that are subject to an order that they not be videoed and otherwise disseminated, and that includes, for example, I believe, possibly autopsy photographs, some crime scene photographs, photographs of victims, if there were such.*" (Emphasis added.)

The court proceeded to indicate that there was no prohibition on the petitioner seeing any exhibit, "[a]nd, in fact, they can have copies of the exhibits, and they can disseminate the full exhibits *with the exception of those subject to the order*. The problem in effectuating that is that there are some exhibits, like some CDs that might have twenty or thirty photographs in them, some of which are not subject to the *sealing* order but some of which are, and the parties have, to my understanding—I've conveyed this several days ago to the parties that there is this request. I have no problem with it. I acquiesce in it. The parties have been busy and have not had time to go through all of these exhibits and sort out those that are subject to the sealing order,

those that are not . . . .”[7] (Emphasis added.) As set forth more fully in part II A of this opinion, we construe the court’s decision as an order establishing that, although the public and the petitioner could examine all of the trial exhibits at the clerk’s office, a subset of those exhibits, including crime scene and autopsy photographs, could not be copied.

The following day, January 26, 2017, the petitioner filed a second motion for clarification asking the court to explain its January 25, 2017 oral response to the first motion for clarification. After quoting the court’s several references to a “sealing” order that instructed that certain exhibits not be “videoed and otherwise disseminated,” the petitioner noted that no party had sought to seal any trial exhibits pursuant to Practice Book § 11-20A (c) and (d) (2),[8] and that the court’s January 4, 2017 orders only effectuated restrictions on the videotaping of trial proceedings, including limiting the recording of certain witnesses. Because the court’s January 25, 2017 ruling nevertheless acknowledged two distinct categories of exhibits—one that included exhibits that could be viewed, copied and disseminated by anyone, and a second that included exhibits that could be viewed at the courthouse but not copied—the petitioner asked the court to produce a list identifying which exhibits were in which category. With respect to the exhibits in the second category, the petitioner indicated that it intended to seek review of the court’s ruling in accordance with Practice Book § 77-1. Later that same day, the petitioner asserts, it was provided

[7] It is entirely unclear from the record to what order the court was referring when it recalled a “sealing order.” Except for the order now on review, neither party has directed us to any order in which the court expressly limited the dissemination of or sealed any trial exhibits.

[8] The petitioner appears to have mistakenly referred to Practice Book § 11-20A, which governs the sealing of files and limiting the disclosure of documents in civil cases. The equivalent rules pertaining to criminal cases are found in Practice Book § 42-49A. See footnote 3 of this opinion.

with a copy of the list of trial exhibits, although nothing on that list indicated which exhibits, if any, were subject to the "sealing" order referenced by the court. To date, the court has not taken any further action on the petitioner's second motion for clarification.

On January 27, 2017, the petitioner filed this petition for review in which it challenges the court's January 25, 2017 ruling limiting its right to obtain copies of certain exhibits. The petitioner argues that the trial exhibits are all judicial documents and, thus, are presumptively subject to the public's right of access. It claims that the court improperly restricted that access without following procedures in place to protect the interests of the public and the petitioner.[9] See Practice Book § 42-49A.

The respondent filed a response to the petition on January 30, 2017. The respondent asks us to dismiss the petition, arguing that the petitioner has mischaracterized the court's January 25, 2017 response to the motion to clarify either as a sealing order or as an order denying it access to exhibits. The respondent contends that the court never issued an order pursuant to Practice Book § 42-49A that sealed or limited the disclosure of exhibits. Rather, the respondent maintains that the only orders rendered by the court were those issued pursuant to Practice Book § 1-11C, and that the court only limited further dissemination of certain exhibits. According to the respondent, such orders are final and not properly the subject of a petition for review. Alternatively, the respondent asks that, to the extent the record is ambiguous regarding the nature of the court's January 25, 2017 ruling, we should remand the matter to the trial court "for a hearing on [the petitioner]'s claim that it has been denied access to exhibits, so that a factual

[9] By way of relief, the petition requested expedited review "and such other relief as this court deems appropriate."

predicate for such a claim, and any trial court ruling regarding it, may be established." This court heard oral argument on the petition on February 3, 2017.[10]

I

Before turning to the merits of the petition for review, we must first address whether we have jurisdiction over the petition, an issue that was raised and argued by the parties at oral argument. The respondent takes the position that the petition should be dismissed because the court never issued an order denying the petitioner access to exhibits, but only placed restrictions on their dissemination in accordance with Practice Book § 1-11C. We disagree that the court's order was so limited and conclude that the petition properly invokes our jurisdiction under § 51-164x (c).

It is axiomatic that the subject matter jurisdiction of the Appellate Court is governed by statute, and that unless the legislature specifically provides otherwise, our jurisdiction is limited to final judgments of the trial court. *Ruggiero* v. *Fuessenich*, 237 Conn. 339, 344–45, 676 A.2d 1367 (1996); see also General Statutes § 52-263. An example of such a statutory grant of jurisdiction over an otherwise interlocutory ruling is found in § 51-164x (c), which permits "[a]ny person affected" to

[10] On February 14, 2017, the petitioner filed a motion asking this court to take judicial notice of media coverage by Connecticut Network (CT-N) of the December, 2008 murder trial in *State* v. *Cipriani*, Superior Court, judicial district of Hartford, CR-07-0144338. Specifically, the petitioner referenced the video recording of graphic testimony and exhibits, including photographs of the crime scene and autopsy, which allegedly remains available to the public on CT-N's website. The petitioner argued that the media coverage in *Cipriani* supports its position that crime scene and autopsy testimony and photographs are important elements in the coverage of a murder trial, and that coverage of murder trials is in the public interest. Because this evidence goes to the merits of the court's ruling, and we grant this petition for review on procedural grounds, it is unnecessary for us to take judicial notice of the requested materials. Accordingly, we deny the petitioner's motion to take judicial notice.

obtain expedited review of any court order that "seals or limits the disclosure of any files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding . . . ." General Statutes § 51-164x (c); see also Practice Book § 77-1.

Appellate courts, in applying certain exceptions to our final judgment rule, have stated that a party wishing to invoke our jurisdiction need not conclusively demonstrate the factual predicate necessary to establish jurisdiction, but must set forth only a colorable claim that such a factual basis exist. Even if an appellant ultimately fails to establish those facts on appeal, this court does not lose jurisdiction; the appeal simply fails on its merits.[11] For example, the denial of a motion to intervene is immediately appealable only if the moving party can make a colorable claim of entitlement to intervene as a matter of right. See *Common Condominium Assns., Inc.* v. *Common Associates*, 5 Conn. App. 288, 291, 497

[11] The notion that a party need only raise a colorable claim to successfully invoke our jurisdiction is logically consistent with our Supreme Court's opinion in *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012), in which that court attempted to resolve an inconsistency in the way courts handled a party's failure to plead or prove an essential fact necessary to obtain relief in a statutory cause of action; more particularly, whether that failure implicated the court's subject matter jurisdiction or merely went to the legal sufficiency of the pleadings. The court held that "the failure to allege an essential fact under a particular statute goes to the legal sufficiency of the complaint, not to the subject matter jurisdiction of the trial court. . . . This conclusion is consistent with the rule that every presumption is to be indulged in favor of jurisdiction . . . is consistent with the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . by allowing the litigant, if possible, to amend the complaint to correct the defect . . . and avoids the bizarre result that the failure to prove an essential fact at trial deprives the court of subject matter jurisdiction. . . . Moreover . . . the purported distinction between a tribunal's action [that] exceeds its statutory authority, which we have treated as implicating the tribunal's jurisdiction, and a tribunal's action [that] misconstrues its statutory authority, which we have treated as involving the proper construction of the statute . . . has proven illusory in practice." (Citations omitted; internal quotation marks omitted.) Id., 579–80.

A.2d 780 (1985). If the motion to intervene merely sets forth a colorable claim to intervention as of right, "on appeal the court has jurisdiction to adjudicate both his claim to intervention as a matter of right and to permissive intervention." Id.; see also *State* v. *Crawford*, 257 Conn. 769, 775, 778 A.2d 947 (2001) (denial of motion to dismiss criminal charges immediately appealable if motion raises "colorable claim" of double jeopardy), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002); *Shay* v. *Rossi*, 253 Conn. 134, 167, 749 A.2d 1147 (2000) (denial of motion to dismiss raising colorable claim of sovereign immunity immediately appealable), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

Thus, in order to invoke our jurisdiction under § 51-164x, the factual allegations of the petition need not conclusively establish the existence of a Practice Book § 42-49A order, they must only allege sufficient facts necessary to establish a colorable claim that the court has rendered an order that "seals or limits the disclosure" of some material filed with the court. General Statutes § 51-164x (c). The petitioner does not suggest that the court issued a sealing order, but rather relies on the "limits the disclosure" language of the statute. General Statutes § 51-164x (c). To establish a colorable claim, a party must demonstrate only that there is a possibility, rather than a certainty, that the court's order falls within the confines of the statutory provision. See *State* v. *Tate*, 256 Conn. 262, 276–77, 773 A.2d 308 (2001). If the petition satisfies this threshold inquiry, we have jurisdiction to consider both whether the court's order in fact limited the disclosure of materials as contemplated by § 51-164x and, if so, whether the court abused its discretion in so ordering.

Here, resolution of the jurisdictional dispute turns largely upon whether we construe the court's ruling of January 25, 2017, as a sua sponte order under Practice

Book § 42-49A that limited the disclosure of certain trial exhibits—an order from which a petition for review certainly would lie—or whether the court was merely exercising its authority under Practice Book § 1-11C, which, under the provisions of the rule, would constitute a final, and arguably unreviewable, order on the merits. See Practice Book § 1-11C (j) ("[t]he judicial authority shall articulate the reasons for its decision on whether or not to limit or preclude electronic coverage of a criminal proceeding or trial, *and such decision shall be final*" [emphasis added]); *State* v. *Rupar*, 293 Conn. 489, 496, 978 A.2d 502 (2009) (interpreting identical language in General Statutes § 51-196 [d] that decision of sentence review division "shall be final" as meaning no form of appellate review is available with respect to merits of decision).[12] We do not agree with the respondent that the court's ruling is best characterized as a component of or an addition to its existing order under Practice Book § 1-11C, and conclude that the petitioner has met its burden of establishing a colorable claim that the court's order limited the disclosure of materials presumptively available to the public and, thus, was subject to the procedural requirements of Practice Book § 42-49A.

Practice Book § 1-11C is located in the general provisions section of our rules of practice, among other rules pertaining to the possession of electronic devices in court facilities and media coverage of court proceedings in general. Provisions applicable to all media coverage in the Superior Court are found in Practice Book § 1-10B. Practice Book § 1-11C contains specific provisions governing media coverage of a criminal proceeding. A

[12] It is not surprising that a ruling regarding media coverage of a criminal trial is not subject to further judicial scrutiny given that, prior to the amendment of Practice Book § 1-11C in 2012, the video recording or broadcasting of such trials was presumptively prohibited unless otherwise permitted at the discretion of the trial court.

"criminal proceeding" is defined in the rule as "any hearing or testimony, or any portion thereof, *in open court and on the record*," except arraignments, which are governed by separate rules set forth in Practice Book § 1-11A.[13] Subsection (a) of § 1-11C provides in relevant part that "the broadcasting, televising, recording or photographing by media *of criminal proceedings and trials* in the [S]uperior [C]ourt shall be allowed *except as hereinafter precluded or limited* . . . ." (Emphasis added.) Thus, by their express terms, the remaining provisions in § 1-11C establish the parameters of the court's authority to permit or limit media coverage of proceedings that occur *in the courtroom*.

Nothing in the provisions of Practice Book § 1-11C addresses a court's authority, outside the confines of the broadcasting, televising, recording, or photographing of courtroom proceedings, to limit access to, or the disclosure of, materials filed or lodged with the court (or the procedures for doing so), including limiting access to materials in the custody of the clerk's office, which, by default, are generally available to the public. Practice Book § 42-49A (a). A contrary conclusion would allow a court to seal or limit the disclosure of judicial documents that otherwise would be prohibited by Practice Book § 42-49A merely by the happenstance that there was media coverage of the trial and the documents were marked as exhibits.[14]

[13] Rules governing media coverage of civil matters are found in Practice Book § 1-11B.

[14] We do not share the dissent's concern that by not construing Practice Book § 1-11C to implicitly permit a court to enter an unreviewable, no-copying order that, without prior notice, limits the public's right of access to judicial records, we risk sanctioning an unconstitutional prior restraint.

First, that constitutional doctrine has not been raised or briefed by the parties in conjunction with this petition. Under these circumstances, it seems particularly unwise and unnecessary to wander into that briar patch.

Second, even if we were to consider the issue on its merits, we do not share the dissent's concern. The dissent suggests that the court's no-copying order must be viewed as a necessary extension of the court's earlier Practice Book § 1-11C ruling because, in the absence of a no-copying order, its initial

The absence of any provision in Practice Book § 1-11C regarding access to trial exhibits is important to note because, as we have previously indicated, our rules provide that orders that merely limit media coverage of trial proceedings "shall be final" and, thus, arguably unreviewable. Practice Book § 1-11C (j). Accordingly, it is important to avoid mislabeling an order intended to limit disclosure of materials to the public as merely

order permitting—with reasonable limitations—the videotaping of the trial would become an impermissible prior restraint. In other words, the dissent argues that, in order to justify a court's reasonable and narrow limitations on the scope of media coverage during a criminal trial, a court must concomitantly order additional and broader governmental restrictions on the public's rights to access court documents. Such an assertion turns on its head the policy underpinning the prior restraint doctrine because it will result in less speech, not more.

Because the media has no common-law or constitutional right to broadcast, photograph, or videotape this trial, the petitioner's right to do so here is a privilege extended by the court in order to foster the public's greater knowledge of our court system. In extending this privilege, and imposing reasonable limitations on it, the court does not simultaneously place its order in constitutional jeopardy by declining or failing to issue an order that prevents public access to judicial records that members of the public otherwise would presumptively have the right to copy but for the fact that a media organization was granted the privilege to videotape the trial.

Finally, it is important to recognize that the prior restraint doctrine is implicated when the government seeks to prevent the publication of information or materials that are *already in the public domain*. See *In re Brianna B.*, 66 Conn. App. 695, 701, 785 A.2d 1189 (2001). In the present case, the media and public were not in possession of the trial exhibits at issue when the court granted the petitioner permission, pursuant to Practice Book § 1-11C, to videotape, with reasonable limitations, this criminal trial. Accordingly, limitations on disclosure could not amount to a prior restraint. The one case cited by the dissent in support of its position, *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 97 S. Ct. 1045, L. Ed. 2d 355 (1977), is readily distinguishable from the present case because the plaintiff newspaper in that case was already in possession of the juvenile's name and photograph when the District Court issued its order prohibiting their publication. Id., 309.

We do not mean to suggest that the court is necessarily prevented from simultaneously issuing a no-copying order, pursuant to Practice Book § 42-49A, after it complies with the procedures set forth in that provision, including notice to the public. A decision not to issue such an order, however, does not place its order pursuant to Practice Book § 1-11C in any constitutional jeopardy.

a limitation on media coverage because to do so would thwart review that the legislature expressly has sanctioned in § 51-164x.

The only reference in Practice Book § 1-11C to exhibits is found in subsection (h), which was not raised by the respondent in its written opposition to the petition, but was raised at oral argument by the court. Subsection (h) provides: "Objection raised during the course of a criminal proceeding or trial to the photographing, videotaping or audio recording of specific aspects of the proceeding or trial, or specific individuals *or exhibits* will be heard and decided by the judicial authority, based on the same standards as set out in subsection (f) of this section used to determine whether to limit or preclude *coverage* based on objections raised before the start of a criminal proceeding or trial." (Emphasis added.) Practice Book § 1-11C (h). Subsection (f) in turn provides: "The judicial authority, in deciding whether to limit or preclude electronic *coverage of a criminal proceeding or trial*, shall consider all rights at issue and shall limit or preclude such coverage only if there exists a compelling reason to do so, there are no reasonable alternatives to such limitation or preclusion, and such limitation or preclusion is no broader than necessary to protect the compelling interest at issue." (Emphasis added.) Practice Book § 1-11C (f).

Placed in context of the overall subject matter of the rule, the reference to exhibits in subsection (h) are clearly and unambiguously directed at instances in which an objection arises during a criminal proceeding regarding the media's photographing or videotaping, or the audio recording of exhibits utilized by the parties during the criminal proceeding. This rule has no bearing on and provides no authority for the court to limit access to exhibits except during criminal proceedings, as that term is narrowly defined in the provision. Rules

governing limitations on disclosure are explicitly contained in Practice Book § 42-49A, which imposes certain procedural safeguards and an opportunity for review in accordance with § 51-164x and the procedures contained in Practice Book § 77-1.

It is undisputed that the petitioner was granted the privilege to video record the criminal trial. It is also undisputed that the respondent, prior to trial, filed motions pursuant to Practice Book § 1-11C, and that the court granted those motions and issued additional restrictions on media coverage in its ruling of January 4, 2017. Nothing in the respondent's motions regarding media coverage or the court's subsequent orders, however, addressed trial exhibits, and, in particular, whether the petitioner was prevented from obtaining copies of the exhibits. The only materials referenced in the motion as likely to be exhibits were autopsy photographs of the victim, and the motion asked only that the court disallow any *broadcasting of testimony* discussing the autopsy, the victim's body or photographs thereof. The parties have not asserted nor does the record disclose that the court entered any additional, related order directed at any exhibits on file with the court, including autopsy or crime scene photographs.

The petition for review does not seek to challenge any of the court's orders related to media coverage in the courtroom. Rather, the petition expressly challenges only the court's January 25, 2017 response to the first motion to clarify, in which the court expressed that certain exhibits were the subject of a "sealing" order and, although they could be viewed at the clerk's office, copies could not be made. Given (1) that § 51-164x permits expedited review of any order that "seals or limits the disclosure of any . . . material on file with the court," (2) that § 51-164x does not define what it means to limit disclosure, and no court has construed

that term, (3) that the allegations in the petition, supported by copies of transcripts, indicate that, on January 25, 2017, the court limited the petitioner's ability to obtain copies of exhibits on file with the court, and (4) that the court made several references to a prior "sealing" order, we are convinced that the petitioner has raised a colorable claim sufficient to establish our jurisdiction over the petition. That the petition properly invokes our jurisdiction is further demonstrated in our substantive discussion of the petition, which follows.

II

The petitioner maintains that the court's January 25, 2017 ruling, which effectively disallowed the petitioner from obtaining copies of all trial exhibits, was improper because the court's order limited the disclosure of materials on file with the court without adherence to any of the procedures set forth in Practice Book § 42-49A. For the reasons that follow, we agree.

We note as a starting point of our review that the exact nature of the court's January 25, 2017 ruling is somewhat difficult to categorize. It was not rendered in response to a motion expressly invoking Practice Book § 42-49A, but rather as part of the court's oral ruling on a motion to clarify an order allegedly directing the clerk's office not to allow copies to be made of trial exhibits. The court, however, disavowed having rendered any such order. The court nevertheless sanctioned, and effectively adopted, the actions of the clerk's office by perpetuating a prohibition on copying certain exhibits, and maintaining that the prohibition was consistent with a prior "sealing" order for which there is no record. In any event, in construing a court's decision, we are concerned with the substance and effect of that decision, rather than with any label attached to the order by the parties or the court. *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010) ("As

a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making . . . . Effect must be given to that which is clearly implied as well as to that which is expressed." [Internal quotation marks omitted.]).

The gravamen of the court's January 25, 2017 ruling was that the petitioner was entitled to view, but not make copies of, certain unspecified trial exhibits in the custody of the court. We therefore must determine (1) whether the prohibition on making copies "limited the disclosure" of those exhibits and, if so, (2) whether the court followed all required procedural safeguards.

A

Section 51-164x (c) permits expedited review of a court order that either "seals or limits the disclosure" of materials filed with the court.[15] The statute's use of the conjunctive signifies that an order limiting disclosure of materials is something distinct from a sealing order. As we have already indicated, however, there is nothing in our statutes, rules of practice or case law that defines what it means to "limit the disclosure" of materials. We nevertheless conclude, for the reasons that follow, that an order that prevents the media or the public from obtaining copies of documentary or photographic trial exhibits, unless otherwise prohibited

[15] We note that § 51-164x (c) is not the source of a trial court's authority to seal or limit the disclosure of files, affidavits, documents or other materials, but only a statute authorizing appellate review of such orders. The trial court's authority to seal or limit disclosure is inherent although limited by constitutional principles, common law, statutes and our rules of practice. See Practice Book § 42-49A and commentary.

from disclosure by an existing order or otherwise applicable law, constitutes a limit on disclosure as contemplated by Practice Book § 42-49A and § 51-164x (c).

"Words in a statute must be given their plain and ordinary meaning . . . unless the context indicates that a different meaning was intended. . . . Where a statute does not define a term it is appropriate to look to the common understanding expressed in the law and in dictionaries." (Citation omitted; internal quotation marks omitted.) *State* v. *Vickers*, 260 Conn. 219, 224, 796 A.2d 502 (2002). To "limit" means "to curtail or reduce in quantity or extent." Merriam-Webster's Collegiate Dictionary (10th Ed. 2003). To disclose means to "expose to view" or to "make known or public." Id. Thus, to limit the disclosure of materials means to curtail making those materials known to the public or infringing on the public's access to the materials. This construction comports with our Supreme Court's understanding that the procedural safeguards set forth in Practice Book § 42-49A are intended to codify and protect the public's and the media's common-law right to access to the court, which includes access to documents filed with the court in criminal cases. See *State* v. *Komisarjevsky*, 302 Conn. 162, 174–75, 25 A.3d 613 (2011); see also Practice Book (2003) § 42-49A, commentary.[16] Thus, it follows that a limit on disclosure

[16] Our Supreme Court has explained that "[p]ublic access to court documents traces its roots back centuries through the common law, stemming from the practice of open trials. . . . In the days before the Norman Conquest, public participation at criminal trials was an inherent part of the court system, as the freemen of the community, who represented the patria, or the country, and were required to attend, were responsible for rendering judgment at trial. . . . Over the centuries, trials remained open, and those not in attendance could be assured that community standards of justice and procedural norms would be enforced by those present. . . . This tradition of open trials made its way to colonial America and evolved into a presumption of public access to court proceedings and records that remains a fundamental part of our judicial system today. . . . The rationale underlying the presumption is straightforward: Public monitoring of the judicial process through open court proceedings and records enhances confidence in the

must be construed as synonymous with, or at least strongly correlative to, a limit on the right to access.

"[N]ot all documents in the court's possession are presumptively open. The presumption of public access applies only to judicial documents and records. . . . Such documents provide a surrogate to assist the public in monitoring the judicial process when it cannot be present. . . . Therefore, when determining whether a document should be open to the public, the threshold question under the common law is whether the document constitutes a judicial document. . . . A judicial document is any document filed that a court reasonably may rely on in support of its adjudicatory function . . . ." (Citation omitted; internal quotation marks omitted.) Id., 176. Because trial exhibits submitted to the court in the course of a criminal action are offered in support of or in opposition to issues relating to substantive rights of the parties, including any determination as to the guilt of the defendant, trial exhibits are unquestionably part of the adjudicative process and, thus, are judicial documents subject to a strong presumption of public access.

Courts in other jurisdictions have acknowledged that the public's common-law right to access to judicial documents includes not only a right of physical inspection and viewing, but also a right to obtain copies. The United States Supreme Court, in discussing the scope of the common-law right of access to judicial documents,

judicial system by ensuring that justice is administered equitably and in accordance with established procedures. . . . [T]he bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." (Citations omitted; internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 34–35, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, 558 U.S. 991, 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009).

stated that "[i]t is clear that the courts of this country recognize a general right to inspect *and copy* public records and documents, including judicial records and documents." (Emphasis added; footnote omitted.) *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); accord *In re Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980) ("there is a presumption in favor of public inspection *and copying* of any item entered into evidence at a public session of a trial" and only "the most extraordinary circumstances [would] justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction" [emphasis added]); *United States* v. *Beckham*, 789 F.2d 401, 414 (6th Cir. 1986) (agreeing with United States Court of Appeals for Second Circuit that common-law right to access extends to obtaining copies of trial exhibits); see also 76 C.J.S. Records § 84 (2007), and cases cited therein; *State ex rel. KOIN-TV, Inc.* v. *Olsen*, 300 Or. 392, 405–406, 711 P.2d 966 (1985) (assuming common-law right in Oregon of nonparties to copy exhibits received in a civil trial and discussing history behind common law). The respondent has provided no legal argument or authority that would lead us to conclude that the right of access under Connecticut law is, or should be, more limited in scope.[17]

We are persuaded that any order preventing the public or the media from obtaining copies of exhibits, with the exception of reasonable restrictions as to time, place and procedures, constitutes a limitation on the common-law right to access and a limitation on disclosure. The petitioner had a presumptive right not only

[17] As aptly noted in part I of the dissenting opinion, the notion that the right of disclosure should be construed to include the right to obtain copies finds additional support in how the term "disclosure" is used in other provisions of our rules of practice. See Practice Book §§ 40-7, 40-11 and 40-26.

to inspect all trial exhibits in the custody of the clerk's office but to obtain copies of those exhibits. The court's January 25, 2017 ruling clearly denied the petitioner the right to obtain copies of trial exhibits and therefore limited the disclosure of those exhibits.[18]

Certainly, the public's right of access is not absolute. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon* v. *Warner Communications, Inc.*, supra, 435 U.S. 598. In Connecticut, a court has the authority to exercise its discretion, either pursuant to a party's motion or sua sponte, to limit access to judicial documents filed in a criminal matter, including the right to obtain copies of exhibits, provided that it follows the procedures set forth in Practice Book § 42-49A. We thus turn to whether the trial court did so in the present case.

B

Practice Book § 42-49A provides in relevant part that "(c) . . . the judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall

[18] To the extent that our conclusion is viewed as surprising to trial courts or raises concerns about its effect on efficiency and workload, such issues are best addressed either by changes to our rules of practice or by the legislature. This majority opinion should not be read as suggesting that courts lack the authority to restrict access to graphic crime scene or autopsy photographs on the basis of a compelling interest but, only that, in doing so, the court must follow procedural safeguards in place to protect the right of the public and the media to access such materials.

be no broader than necessary to protect such overriding interest. . . .

"(d) In connection with any order issued pursuant to subsection (c) of this section, the judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. . . . The time, date, scope and duration of any such order shall be set forth in a writing signed by the judicial authority which upon issuance the court clerk shall immediately enter in the court file and publish by posting on a bulletin board adjacent to the clerk's office and accessible to the public. The judicial authority shall order that a transcript of its decision be included in the file or prepare a memorandum setting forth the reasons for its order.

"(e) Except as otherwise ordered by the judicial authority, a motion to seal or limit the disclosure of affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding shall be calendared so that notice to the public is given of the time and place of the hearing on the motion and to afford the public an opportunity to be heard on the motion under consideration. The notice of the time, date and place of the hearing on the motion shall be posted on a bulletin board adjacent to the clerk's office and accessible to the public. . . ."

In the present case, the court issued its order preventing the petitioner, as well as members of the public, from obtaining copies of certain exhibits in the absence of the petitioner's attorney and without prior notice to the public. See Practice Book § 42-49A (e). Accordingly, neither the petitioner nor interested members of the public were afforded an opportunity to be heard. The court did not articulate what overriding interest it sought to protect by limiting the petitioner's access to copies of exhibits and made no specific findings

underlying its order, including listing which exhibits were subject to the order. Because the court clearly failed to follow the procedures set forth in Practice Book § 42-49A, the petitioner is entitled to relief.[19] See *Vargas* v. *Doe*, 96 Conn. App. 399, 412–14, 900 A.2d 525 (vacating order rendered pursuant to Practice Book § 11-20A, the civil counterpart of Practice Book § 42-49A, because court did not follow mandatory procedural requirements), cert. denied, 280 Conn. 923, 908 A.2d 546 (2006).

The petition for review is granted and that portion of the court's January 25, 2017 ruling on the petitioner's motion to clarify indicating that the petitioner is not entitled to obtain copies of trial exhibits is vacated. Any subsequent order limiting the disclosure of materials on file with the court must comply with the requirements of Practice Book § 42-49A.

In this opinion KELLER, J., concurred.

SHELDON, J., dissenting. I agree with my colleagues that the general rule in this state governing the sealing or limitation of disclosure of files, affidavits, documents or other materials on file with the court or filed in connection with a court proceeding in a criminal case is Practice Book § 42-49A. By its terms, that rule applies to all written requests by the parties for sealing or limiting the disclosure of any such filed materials "[e]xcept as otherwise provided by law."

Practice Book § 42-49A establishes, in subsections (a) and (c) thereof, a presumption in favor of the public's right of access to all such filed materials that can only be overcome if the judicial authority considering

[19] Because we grant the petition on procedural grounds, we express no opinion on whether the court's decision to limit the disclosure of autopsy and crime scene photographs as well as other exhibits was justifiable under the particular facts and circumstances of this case.

the possible issuance of an order sealing or limiting the disclosure of such materials concludes that such an order "is necessary to preserve an interest which is determined to override the public's interest in viewing such materials." Practice Book § 42-49A (c). Consistent with the latter requirement, subsection (c) of the rule further requires the court, before issuing a sealing or limitation of disclosure order, to "consider reasonable alternatives to any such order" and to ensure that "such order shall be no broader than necessary to protect [that] overriding interest." Id.

To enforce the public's presumptive right of access to filed materials as to which sealing or limitation of disclosure is sought, Practice Book § 42-49A further establishes, in subsections (d) and (e) thereof, a detailed set of procedural protections designed to ensure that the public is notified of the pendency of any motion seeking such relief thereunder and given an opportunity to present argument in opposition thereto. Subsection (d) of the rule further requires the court, in the event it grants such a motion, to articulate the overriding interest being protected by its resulting order and to specify the findings underlying that order.

Finally, to enforce the foregoing limitations upon the court's power to seal or limit the disclosure of materials on file with the court or filed in connection with a court proceeding, and thus to vindicate the public's presumptive right of access to such materials, General Statutes § 51-164x (c) provides, in relevant part, that "[a]ny person affected by . . . [any] order that seals or limits the disclosure of" such materials may seek "review of such order by the filing of a petition for review with the Appellate Court within seventy-two hours from the issuance of such court order." The statute further provides that the petition for review shall be filed, heard and decided "in accordance with such rules as the judges of the Appellate Court may adopt

[for that purpose], consistent with the rights of the petitioner and the parties to the case." General Statutes § 51-164x (d). The rules we have adopted to implement the right of review under § 51-164x are set forth in Practice Book § 77-1, which provides, in language mirroring the statute, that "(a) . . . any person affected by . . . any order that seals or limits the disclosure of files, affidavits, documents or other material on file with the court or filed in connection with a court proceeding, may seek review of such order by filing a petition for review with the appellate court within seventy-two hours after the issuance of the order."

The instant petition for review was timely filed on January 27, 2017, two days after the trial court issued its clarification order of January 25, 2017, which the petitioner now challenges. The trial court issued that order in response to the petitioner's written motion to clarify the court's three prior orders of January 4, 2017, which together established the procedures for and the permissible scope of electronic coverage of the trial in this criminal case, in which the defendant was charged with murder.

In its first prior order, the court overruled the objections of the defendant and the state to the petitioner's request to broadcast, televise and/or record the proceedings in this case. That order expressly established, "[p]ursuant to the requirements of Practice Book § 1-11C," several "guidelines" to which the petitioner was to "adhere . . . throughout the trial of this case." Such guidelines specified, inter alia: which aspects of the proceedings could be recorded; what types of equipment could be used to record such proceedings; where in the courthouse and the courtroom such recording equipment could be used; how, by whom and in what manner such equipment could be operated; and that no juror was to be recorded at any time. In anticipation, moreover, of the possibility that either party might

come to "[believe], in the course of the trial, that recording will undermine the legal rights of a party or will significantly compromise the safety of a witness or other person or impact significant privacy concerns," the party so believing was directed to "inform the court and the court will then determine whether recording will be suspended."

In its second prior order, which was issued upon the granting of the state's first "request for restrictions on audio/video televising of certain witnesses," the court disallowed, inter alia, "any broadcasting of the testimony of the medical examiner, the autopsy and any testimony regarding the decedent's body, *including photos thereof*." (Emphasis added.) That motion, which was filed under Practice Book § 1-11C (e), (g) and (i), was supported, inter alia, by allegations that "the family of Luke Vitalis [the homicide victim] would like to preserve the dignity of their son's life to the extent possible, and for that reason, the state requests that [the] court disallow any broadcasting of the testimony of the medical examiner, the autopsy, and any testimony regarding the decedent's body, including photos thereof."

In its third prior order, which was issued upon the granting of the state's second "request for restrictions on audio/video televising of certain witnesses," the court disallowed "any photographing or videorecording" of the state's witness, Detective Arthur Walkley. That motion, which was filed under Practice Book § 1-11B (g),[1] was supported, inter alia, by allegations that Detective Walkley, a police officer, was then "assigned to task force(s) which require[d] him to engage in undercover activity."

In its subsequent motion to clarify, the petitioner alleged, inter alia, that the court, after issuing the above-described orders, had "directed the clerk of the court

[1] This citation to authority was obviously mistaken, in that Practice Book § 1-11B concerns electronic coverage of civil, not criminal, proceedings.

to deny [the petitioner] copies of full exhibits entered in public view while the jury was present and not subject to any sealing order." (Footnote omitted.) It further alleged that the court's "prohibition on disclosure to the media and/or the public" was "not stated in the January 4, 2017, ruling or related orders." On the basis of those allegations, the petitioner sought clarification of: "1. Whether the denial of access to full exhibits entered in public view while the jury was present and not subject to any sealing order applies to the public and other media or just [the petitioner]" and "2. Whether the denial of access to full exhibits entered in public view while the jury was present and not subject to any sealing order applies to all exhibits entered during the trial or a subset of exhibits."

The trial court, upon reading the motion to clarify after the petitioner's principal, Edward Peruta, who was attending the hearing without his attorney, Rachel Baird, handed it up in open court, responded directly and immediately to its central allegation that the court had made an off-the-record ruling prohibiting the petitioner from making or receiving copies of unsealed trial exhibits. The court flatly denied that it had ever made such a ruling. It then rejected the petitioner's claim that it had ever denied anyone access to full exhibits that had been entered in public view and were not subject to a sealing order, stating that it had not issued *any* order concerning electronic coverage in this case since January 4, 2017, when its first three orders were issued. The court finally explained for the record, as follows, its "understanding of the situation" under the three orders which the petitioner sought, by its motion, to clarify: "Any exhibit that is a full exhibit is available to any member of the public to view. Any member of the public can come here and look at any exhibit. *There are some exhibits that are subject to an order that they not be videoed and otherwise disseminated, and that*

includes, for example, I believe, possibly autopsy photographs, some crime scene photographs, photographs of victims, if there were such. The undercover agents could not be videotaped. That doesn't mean any member of the public, including people who have a criminal history, could not have come into this courtroom and looked at the undercover agents when they testified. That was permissible.

"*So I have advised the parties of the request by the media, including [the petitioner], to see the exhibits. There's no prohibition on that. And, in fact, they can have copies of the exhibits, and they can disseminate the full exhibits with the exception of those subject to the order.* The problem in effectuating that is that there are some exhibits, like some CDs, that might have twenty or thirty photographs in them, some of which are not subject to the sealing order but some of which are, and the parties have, to my understanding—I've conveyed this several days ago to the parties that there is this request. I have no problem with it. I acquiesce in it. The parties have been busy and have not had time to go through all of these exhibits and sort out those that are subject to the sealing order, those that are not, but.

"So this motion for clarification is founded on a faulty premise. I did not issue the order set forth here." (Emphasis added.)

The upshot of the foregoing clarification was that, although all trial exhibits were parts of the public record which any member of the media or the public could view at any time, and copies of *most* such exhibits could be made for and disseminated by any member of the media or the public, a limited set of such exhibits—particularly, autopsy photographs, crime scene photographs and any other photographs that depicted the victim's dead body, as to which the court had granted

the state's first "request for restrictions on audio/video televising of certain witnesses"—could not be "videoed and otherwise disseminated." *For that reason, although the latter exhibits could be viewed by everyone, they could not be copied by or for—or thus be made available for possible dissemination by—anyone.*[2]

The petitioner claims in its petition for review, and my colleagues agree, that the trial court erred in issuing its January 25, 2017 order clarifying that certain trial exhibits could be viewed but not be copied because the court issued that order, and the prior orders it thereby sought to clarify, without complying with the requirements of Practice Book § 42-49A. They find fault, in particular, with the court's failure to post notice of and hold evidentiary hearings on the subject motions, as well as its failure to articulate the overriding interest being protected by its challenged orders or to specify the findings underlying such orders.

The state opposes the petition for review, contending for two reasons that this court lacks subject matter jurisdiction over the petition under General Statutes § 51-164x (c) and Practice Book § 77-1. First, it argues that the challenged orders were not orders to "[seal] or [limit] the disclosure" of the subject trial exhibits, to which this court's power of review under General Statutes § 51-164x (c) and Practice Book § 77-1 is strictly limited, but instead were orders preserving the right of the media and the public to have access to such exhibits, albeit only by viewing them rather than by obtaining copies of them for their later examination

[2] Referring to those two classes of exhibits, for purposes of the court's clarification order, as Category One and Category Two, the petitioner filed a second motion to clarify the day after its first motion to clarify was decided, in which it sought a listing of which specific exhibits were in those categories. Because, however, it petitioned for review of the court's initial clarification order on the following day from when it filed its second motion for clarification, the latter motion has not yet been heard and decided.

and use, including, possibly, disseminating them to others. The petitioner disagrees, contending, as do my colleagues, that any order that trial exhibits not be copied for or made available for copying by the media or the public limits the disclosure of such exhibits, within the meaning of General Statutes § 51-164x (c) and Practice Book § 77-1, and thus is reviewable by this court on a timely petition for review filed under those provisions. I agree with the petitioner that this first aspect of the state's jurisdictional challenge to its petition for review must be rejected.

Second, the state claims that the order here complained of, like the limited no broadcasting order concerning the same trial exhibits that it sought to clarify, is not reviewable under General Statutes § 51-164x (c) and Practice Book § 77-1, because it was issued pursuant to Practice Book § 1-11C, which expressly provides, in subsection (j) thereof, that any order entered thereunder is "final." The petitioner disagrees with this claim as well, as do my colleagues. Although my colleagues recognize that any order entered under § 1-11C is final and unreviewable despite the broad language of § 77-1, they contend that the order here at issue neither was nor could have been issued under § 1-11C, but could only have been issued under the authority of, and in compliance with the procedures set forth in, Practice Book § 42-49A. I agree with the state on this second aspect of its jurisdictional challenge to the petitioner's petition for review, and, accordingly, I dissent.

I

WHETHER CHALLENGED ORDER PROHIBITING COPYING OF CERTAIN TRIAL EXHIBITS LIMITED DISCLOSURE OF SUCH EXHIBITS

I cannot agree with the state that the challenged order, to the extent that it prohibited the copying of

certain trial exhibits depicting the decedent's body that had been made subject to the court's prior no broadcasting order, did not "[limit] the disclosure" of such exhibits, within the meaning of General Statutes § 51-164x (c) and Practice Book § 77-1. There are two reasons for this conclusion. First, although an order prohibiting the copying but permitting the viewing of an exhibit obviously does not bar all access to that exhibit, and in fact preserves such access in the manner specifically permitted, an order need not bar all access to or disclosure of an item in order to effect a limitation upon its disclosure. By restricting the manner in which the subject trial exhibits could be accessed to viewing them physically, either in open court during trial or in the clerk's office when trial was not in session, the court unquestionably restricted the public's and the media's opportunity to gain access to such exhibits to persons who could come to the courthouse in person during business hours.

Second, although the term "limitation of disclosure" is not defined in Practice Book § 77-1, the term "disclosure" is so used in other Practice Book rules governing Connecticut criminal procedure as to suggest that the disclosure of materials, as used in those rules, means not only making materials available for viewing, but also providing copies of them or making them available for copying whenever it is practicable to do so. Most directly on point in this regard are our Practice Book rules governing criminal discovery, particularly: § 40-11, entitled "Disclosure by the Prosecuting Authority"; § 40-26, entitled "Disclosure by the Defendant; Information and Materials Discoverable by the Prosecuting Authority as of Right"; and § 40-7, entitled "Procedures for Disclosure." Section 40-11 (a) provides that, "[u]pon written request by a defendant . . . the prosecuting authority . . . shall promptly . . . disclose in writing the existence of, . . . *and allow the defendant in*

accordance with Section 40-7, to inspect, copy, photograph and have reasonable tests made on" several specifically listed items. (Emphasis added.) Similarly, § 40-26 provides that, "[u]pon written request by the prosecuting authority . . . the defendant . . . shall promptly . . . disclose in writing to the prosecuting authority the existence of and *make available for examination and copying in accordance with the procedures of Section 40-7*" several specifically listed items. (Emphasis added.) Finally, § 40-7 (b) provides, in relevant part, that "any party may make disclosure by notifying the opposing party that all pertinent material and information *may be inspected and, if practicable, copied* at specific times and locations and the parties may schedule agreed dates and times to photograph and have reasonable tests made upon any disclosed material." (Emphasis added.) Each of these provisions expressly contemplates that the "disclosure" of information or material involves making such material available, not just for viewing, but for copying and/or photographing as well whenever it is practicable to do so.

In light of these provisions, it must be concluded that a party's right to the "disclosure" of information or materials under the Practice Book presumptively includes the right to make copies or photographs of such materials, if it is practicable to do so. I therefore conclude that the trial court's challenged orders in this case, permitting the viewing but not the copying of certain trial exhibits depicting the victim's dead body, clearly constitutes an "order that . . . limits the disclosure" of such exhibits, within the meaning of General Statutes § 51-164x (c) and Practice Book § 77-1. Such an order is presumptively reviewable by this court under those provisions on a timely petition for review.

II

WHETHER COURT WAS AUTHORIZED TO ISSUE CHALLENGED ORDER UNDER PRACTICE BOOK § 1-11C

In support of its second jurisdictional challenge to the petitioner's petition for review, that the challenged no copying order is final and unreviewable because it was issued under the authority of Practice Book § 1-11C, the state correctly notes that that order was issued in response to the petitioner's motion to clarify, which in turn was filed after the court had issued its three prior orders concerning electronic coverage of the defendant's murder trial, all under § 1-11C. The second of those prior orders, "disallow[ing] [the] broadcasting of the testimony of the medical examiner, the autopsy, and any testimony regarding the decedent's body, including photos thereof," was issued by the granting of the state's first request for restrictions on audio/video televising of certain witnesses, which the state based expressly upon § 1-11C (e), (g) and (i). The question thus presented by the state's second jurisdictional challenge is whether the trial court had the authority under § 1-11C to order that the trial exhibits here at issue not be copied for the media or the public, either as part of or in conjunction with its prior order under that rule that such exhibits, all of which were either autopsy or crime scene photographs depicting the victim's dead body, not be "videoed" or "disseminated." If the court had such authority, then not only was it authorized by law to consider the state's request to limit the disclosure of such exhibits without invoking or being bound to follow the specific rules and procedures set forth in Practice Book § 42-49A, but any order it issued in the exercise of such authority would be final and unreviewable under § 1-11C (j). I conclude that the trial court had such authority under § 1-11C,

and must be understood to have exercised that authority both when it first issued its no broadcasting order as to such exhibits by granting the state's first "request for restrictions on audio/video televising of certain witnesses," and when it later clarified that order and its two other prior orders in this case. Accordingly, I conclude that those orders were all final under § 1-11C (j), and thus that this court lacks subject matter jurisdiction to review them under General Statutes § 51-164x (c) and Practice Book § 77-1.

Practice Book § 1-11C, as amended most recently in 2011, establishes rules governing media coverage of criminal proceedings in Connecticut, including trials in the Superior Court. Adopted initially on June 29, 2007, to take effect on January 1, 2008, pursuant to the recommendations of the Judicial Branch's Public Access Task Force, in 2006, to establish a pilot program allowing electronic coverage of criminal proceedings in a single judicial district to be chosen by the Chief Court Administrator; see 2008 Connecticut Practice Book, commentary to § 1-11C; it became applicable throughout the state by a subsequent amendment adopted on June 20, 2011, which became effective on January 1, 2012. See 2012 Connecticut Practice Book, commentary to § 1-11C.

Now, substantially similar to when it was first adopted, Practice Book § 1-11C provides, in subsection (a) thereof, that, "[e]xcept as authorized by Section 1-11A regarding media coverage of arraignments, the broadcasting, televising, recording or photographing by media of criminal proceedings and trials in the superior court shall be allowed except as hereinafter precluded or limited and subject to the limitations set forth in Section 1-10B . . ." The rule further provides, in subsection (d) thereof, that "[u]nless good cause is shown, any media or pool representative seeking to broadcast, televise, record or photograph a criminal proceeding

or trial shall, at least three days prior to the commencement of the proceeding or trial, submit a written notice of media coverage to the administrative judge of the judicial district where the proceeding is to be heard or the case is to be tried. . . . The administrative judge shall inform the judicial authority who will hear the proceeding or who will preside over the trial of the notice, and the judicial authority shall allow such coverage except as otherwise provided."

Subsection (e) of Practice Book § 1-11C goes on to provide that "[a]ny party, attorney, witness or other interested person may object in advance of electronic coverage of a criminal proceeding or trial if there exists a substantial reason to believe that such coverage will undermine the legal rights of a party or will significantly compromise the safety of a witness or other person or impact significant privacy concerns." Importantly, the subsection does not condition the right of a party, attorney, witness or other interested person to object to possible electronic coverage of the criminal proceeding or trial in question upon the media's submission of a written notice of media coverage under subsection (d), quite probably because of the media's right under that subsection either to file a late written notice of coverage or to file no such notice at all upon a showing of good cause, even after the start of the trial or other proceeding. In the event, however, that the media request camera coverage, and to the extent practicable, notice that an objection to electronic coverage has been filed, and the date, time and location of the hearing on such objection, in which any person whose rights are at issue, including the media, can participate, shall be posted on the Judicial Branch website. Practice Book § 1-11C (e). The burden of proof on any objection to electronic coverage shall be on the person who filed the objection.

Practice Book § 1-11C further provides, in subsection (f) thereof, that "[t]he judicial authority, in deciding

whether to limit or preclude electronic coverage of a criminal proceeding or trial, shall consider all rights at issue and shall limit or preclude such coverage only if there exists a compelling reason to do so, there are no reasonable alternatives to such limitation or preclusion, and such limitation or preclusion is no broader than necessary to protect the compelling interest at issue." Subsection (g) of the rule then goes on to provide, in language paralleling subsection (e), that among the matters the court can consider in deciding whether to limit or preclude electronic coverage of a criminal proceeding or trial are if such coverage "will undermine the legal rights of a party or will significantly compromise the safety or privacy concerns of a party, witness or other interested person . . . ." Subsection (g) finally requires that notice of the hearing on whether to limit or preclude coverage for the foregoing reasons must, if practicable, be given to all persons whose interests may be directly affected by the court's decision.

Although the first several subsections of Practice Book § 1-11C expressly set forth, as aforesaid, the manner in which objections to electronic media coverage that are filed before the start of a criminal proceeding or trial are to be made, heard and decided, the rule also addresses itself to objections to electronic coverage which are made in the course of such criminal proceeding or trial. On that subject, subsection (h) of the rule provides as follows: "Objection raised during the course of a criminal proceeding or trial to the *photographing*, *videotaping* or audio recording *of* specific aspects of the proceeding or trial, or *specific* individuals or *exhibits* will be heard and decided by the judicial authority, based on the same standards as set out in subsection (f) of this section used to determine whether to limit or preclude coverage based on objections raised before the start of [the] criminal proceeding or trial." (Emphasis added.) This subsection expressly authorizes the

trial court to limit or preclude coverage of a criminal proceeding or trial by issuing orders not only prohibiting or restricting the photographing or videotaping of specific phases of the criminal proceeding or trial in which particular trial exhibits are being offered into evidence or published to the finder of fact, but also prohibiting or restricting the photographing or videotaping of the exhibits themselves, either inside or outside the courtroom. Stated differently, the subsection empowers the trial court, in aid of its power to order that particular trial exhibits not be made subject to electronic media coverage, to preclude all photographing or videotaping of such exhibits at any time or by any means, including photocopying, if, as required by subsection (f), there "exists a compelling reason to do so, there are no reasonable alternatives to such . . . preclusion, and such . . . preclusion is no broader than necessary to protect the compelling interest at issue." Not surprisingly, the drafters of the final report of the Judicial Branch Public Access Task Force,[3] in recognition of the compelling privacy interests of relatives of murder victims in not having autopsy photographs of their loved ones publicly disseminated, inserted the explanatory parenthetical reference, "(e.g., autopsy photographs)," after the word "exhibits" in the text of their thirty-second recommendation, from which the text of subsection (h) was developed. Id., p. 5-12.

In light of its above-described provisions, Practice Book § 1-11C plainly authorizes the trial court, in any case where the trial exhibits include autopsy photographs or other material whose public dissemination would compromise significant privacy concerns of any party or other interested person, to order that such exhibits not be photographed or videotaped if there

[3] Final Report of the Judicial Branch Public Access Task Force (September 15, 2006), available at http://jud.ct.gov/external/news/PublicAccess/PATF_finalreport_091506.pdf (last visited June 16, 2017).

"exists a compelling reason to do so, there are no reasonable alternatives to such . . . preclusion, and such . . . preclusion is no broader than necessary to protect the compelling interest at issue." Practice Book § 1-11C (f). Although any such order would obviously "limit the disclosure" of any such trial exhibits, its issuance under § 1-11C would make it enforceable as a final order, under subsection (j) of that rule, and therefore unreviewable by this court on a petition for review under General Statutes § 51-164x (c) and Practice Book § 77-1.

Against this background, the trial court's clarification order of January 25, 2017, must be read and understood to have been issued under Practice Book § 1-11C. Because that order, like any other order issued under § 1-11C, must be enforced as a final order, this court lacks subject matter jurisdiction to review it on the petitioner's pending petition for review under General Statutes § 51-164x (c) and Practice Book § 77-1. The result is no different because the state, in its first "request for restrictions on audio/video televising of certain witnesses," did not cite subsection (h) of the rule as a partial basis for its request for relief. As the majority rightly notes, we look to the substance of a judicial order when assessing its legality.

Apart from the foregoing analysis of the text of Practice Book § 1-11C, there is one particularly compelling reason why that rule must be construed to authorize trial courts to issue no copying orders as to trial exhibits as to which they have issued no broadcasting orders. That reason, simply stated, is that without an accompanying no copying order, a no broadcasting order as to a trial exhibit such as an autopsy photograph would be constitutionally unenforceable as a prior restraint, in violation of the first and fourteenth amendments to the United States Constitution, against any person who has

lawfully obtained a copy of the exhibit.[4] Once information or materials have entered the public domain, a court cannot punish their publication without a justification in the form of a state interest of the highest order. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 103, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979). Such an interest can only be found to exist in exceptional circumstances, such as where the information or materials to be published reveals crucial military information, contains obscenity or may directly incite acts of violence. *Near* v. *Minnesota*, 283 U.S. 697, 716, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). Under that exacting standard, the prior restraint principle has been held, inter alia, to prohibit the enforcement of a court order not to publish a photograph of a juvenile charged with murder, which was lawfully taken by a reporter from one of the plaintiff's newspapers, when the juvenile was being transported from the courthouse to a detention facility. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 310–12, 97 S. Ct. 1045, 51 L. Ed. 2d 355 (1977). The juvenile, when photographed, was in public view of the photographer and the photographer, when he took the photograph, had a right to be where he was and doing what he was doing. Id., 309. The prior restraint principle would surely apply no less to any court order forbidding the broadcasting of a trial exhibit, such as an autopsy

[4] In stating that my position "turns on its head the policy underpinning the prior restraint doctrine because it will result in less speech, not more," the majority misconstrues my concern regarding a potential unconstitutional prior restraint in the absence of a no copying order. I reference the concept of prior restraint to emphasize that there can be no effective limitation on the media's right to broadcast or photograph a trial exhibit, without a preliminary restriction on the copying of that exhibit. In other words, prior to broadcasting an exhibit, a media outlet first must obtain a copy of that exhibit, for how else would it have possession of said material for broadcast? If that exhibit is permitted to be copied, by anyone, its broadcast, publication or distribution of that copy cannot constitutionally be restricted. The only way to constitutionally restrict or limit the distribution of the exhibit would be to prohibit the copying of that exhibit. The court cannot legally prohibit the broadcasting of an exhibit that is already in the public domain.

or crime scene photograph, if the copy of the exhibit that was shown in the broadcast was placed in the public domain by the court itself, by providing it to the media or the general public.

Two conclusions follow from this constitutional dilemma. The first, as previously noted, is that a no copying order must, as a practical matter, be issued as to any trial exhibit that is made the subject of a no broadcasting order lest the proverbial horse leave the barn before it is too late to close the door. If, stated differently, a no broadcasting order as to particular material, such as a trial exhibit, cannot constitutionally be enforced against any person seeking to broadcast such material who has lawfully obtained a copy of it, a no copying order as to such material must be issued and enforced *before* copies of it are made publicly available. As the United States Supreme Court observed in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), "[w]e are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. *If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know*

and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." (Emphasis added; footnote omitted.) Id., 496.

The second is that any such no copying order must not only apply to all persons who may wish to broadcast or publish the subject material themselves, but to all persons from or through whom any such would-be broadcaster or publisher could obtain a copy of the material if it became publicly available. In short, then, the timely issuance and effective enforcement of a no copying order as to a trial exhibit that is subject to a no broadcasting order is an objecting party's only potentially effective means for ensuring that the no broadcasting order will be enforced.

I conclude that the trial court's clarification order of January 25, 2017, was properly entered under the authority of Practice Book § 1-11C (h), that that order was a final order under § 1-11C (j), and thus that the order is unreviewable by this court under General Statutes § 51-164x (c) and Practice Book § 77-1. I therefore respectfully dissent, because I agree with the state that the petitioner's petition for review should be dismissed for lack of subject matter jurisdiction.