JOHN B. CROUSE *v.* TAMARA S. COX
(AC 38462)

Sheldon, Beach and Harper, Js.

Submitted on briefs May 23—officially released July 4, 2017

Procedural History

Action to recover damages for fraud, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Taggart D. Adams*, judge trial referee, granted the

defendant's motion to dismiss and rendered judgment thereon; subsequently, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Vacated; further proceedings.*

John B. Crouse, self-represented, the appellant (plaintiff) filed a brief.

Opinion

PER CURIAM. The judgment of dismissal is vacated. The case is remanded for further proceedings, without prejudice to the filing of a motion for summary judgment.

EH INVESTMENT COMPANY, LLC *v.* CHAPPO LLC ET AL. (AC 38693)

Prescott, Beach and Bishop, Js.

Syllabus

The plaintiff real estate development company sought return of a deposit it had paid to the defendant company and its principal, claiming that the defendant company had breached an agreement to find a lender willing to make a commercial loan to the plaintiff for purposes of redeeming a foreclosed commercial office property that it owned. The plaintiff had been leasing the foreclosed property to H Co. and informed the defendants that H Co. was considering whether to renew or extend its lease. The plaintiff sent the defendants a memorandum containing the specifics of the proposed lease with H Co., which was subject to the approval of H Co.'s senior management. The defendants prepared an engagement letter detailing that they would procure a lender that would provide financing for the plaintiff in accordance with the loan terms that were detailed in the engagement letter. The plaintiff agreed to pay the defendants a placement fee of 1 percent of the principal loan amount from the proceeds of the closing and, upon execution of the engagement letter, the plaintiff would wire the defendants one half of the placement fee as an engagement deposit. With respect to that deposit, the letter stated that, in the event the defendants were unable to provide a lender commitment, the deposit would be returned to the plaintiff, but the defendants would retain the deposit if the plaintiff failed to

complete financing after they had provided a lender commitment. Furthermore, the letter concluded with a merger clause that provided that the terms of the letter superseded all of the parties' prior understandings. The plaintiff wired the deposit to the defendants and returned the executed engagement letter. The defendants found a lender that would supply a loan according to the terms in the engagement letter and sent the plaintiff a loan application that would become the lender commitment letter after being returned and signed by the lender. The plaintiff, however, failed to sign and return the loan application because it had not secured a lease extension with H Co. After the defendants refused to return the deposit, the plaintiff commenced its action for, inter alia, breach of contract premised on the defendants' alleged wrongful retention of the deposit. The trial court rendered judgment in part for the plaintiff, concluding that the lease renewal with H Co. was a condition precedent to the parties' contract, and that because the condition precedent was not met, the plaintiff had no duty to perform and, therefore, the defendants breached the parties' contract by failing to return the deposit. The court also found that the defendants had exercised ownership over the plaintiff's property to the plaintiff's detriment and, therefore, the retention of the deposit also constituted a conversion. On appeal, the defendants claimed, inter alia, that the trial court improperly found that they had breached the contract because the lease renewal with H Co. was not a condition precedent, the absence of which mandated a return of the deposit, and the only obligation they undertook pursuant to the contract's plain and unambiguous terms was to find a lender that was willing to fund a loan according to the terms of the engagement letter. *Held* that the trial court improperly construed the parties' contract as including the H Co. lease extension as a condition precedent to the parties' obligations that required the defendants to return the deposit: there was no indication that the trial court gave proper deference to the language of the parties' fully integrated contract, which clearly and unambiguously provided that the defendants were entitled to keep the deposit if they obtained a loan commitment in accordance with the plaintiff's proposed terms and the loan failed to close; moreover, it was undisputed that, at the time the parties entered into their agreement, the plaintiff had not yet secured a lease extension with H Co. and, therefore, this was not a situation where the parties failed to fully contemplate the occurrence or nonoccurrence of the lease extension, and, if the plaintiff had viewed its lease with H Co. as an indispensable part of its agreement with the defendants, the plaintiff could have insisted that obtaining the lease extension be made a clear and express condition on its duty to compensate the defendants, or that the defendants would return the deposit in the event that the lease extension never materialized; furthermore, because the plaintiff was the party that had assumed the risk of engaging a loan broker before it had obtained the necessary lease commitment from H Co. to secure the

loan, it was improper for the trial court to shift that risk from the plaintiff to the defendants by rewriting the parties' contract.

Argued March 7—officially released July 4, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment in part for the plaintiff on the complaint and judgment for the plaintiff on the counterclaim; subsequently, the court denied the defendants' motion to reargue, and the defendants appealed to this court; thereafter, this court denied the plaintiff's motion to dismiss the appeal. *Reversed in part; judgment directed.*

Scott D. Brenner, for the appellants (defendants).

Robert R. Lewis, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendants, Chappo LLC and its principal, Richard J. Chappo, appeal from the judgment of the trial court rendered in favor of the plaintiff, EH Investment Company, LLC, on those counts of the complaint alleging breach of contract by Chappo LLC and conversion by both defendants.[1] The court determined that the defendants, whom the plaintiff had engaged to find a lender willing to make a commercial loan that the plaintiff needed in order to redeem a foreclosed office building it had owned, improperly refused to

[1] The trial court rendered judgment in favor of the defendants on the remaining counts of the complaint. Those counts, directed at both defendants, alleged statutory theft pursuant to General Statutes § 52-564, breach of the covenant of good faith and fair dealing, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110 et seq. The plaintiff has not appealed or cross appealed from those aspects of the court's judgment.

return the plaintiff's deposit after the plaintiff informed them that it would be unable to proceed with a loan because it had not obtained a lease extension from the building's primary tenant, the proceeds from which were intended to service the debt on the loan. The trial court determined that the existence of an executed lease with the tenant was a condition precedent to the parties' loan procurement contract, the nonoccurrence of which excused the plaintiff's performance and required Chappo LLC to return the plaintiff's deposit. The court awarded the plaintiff total damages of $47,500, the amount of the deposit.

The defendants claim on appeal that the trial court improperly determined that the existence of a lease extension was a condition precedent to the parties' contract. According to the defendants, the terms of the parties' contract were memorialized in a written engagement letter drafted by Chappo, and Chappo LLC successfully performed its only duty under the parties' contract by successfully finding a lender willing to make a loan on the terms sought by the plaintiff as set forth in the engagement letter. Further, they contend that because the engagement letter unambiguously set forth express terms governing the disposition of the engagement deposit, which did not include any provision requiring Chappo LLC to return the deposit if the plaintiff was unable to obtain a lease after Chappo LLC procured a commitment from a lender, they were entitled to keep the plaintiff's deposit. For the reasons that follow, we agree with the defendants. Accordingly, we reverse in part the judgment of the trial court and remand the case to that court with direction to render judgment in favor of the defendants on the breach of contract and conversion counts. The remainder of the judgment is affirmed.

The relevant facts underlying this appeal are set forth by the court in its memorandum of decision and, generally, are not disputed.[2] The plaintiff is a real estate development company. Its principal, Fred Gordon, is a real estate investor and developer who holds a master's degree in business administration, in addition to being a practicing attorney. Gordon conducts his business from Bloomfield Hills, Michigan. Chappo also has an master's degree in business administration and has worked for more than thirty years in financing and real estate. His business, Chappo LLC, is located in Connecticut and specializes in arranging financing for corporate properties. Prior to entering into the business transaction now at issue, Gordon and Chappo were familiar with each other from Chappo's earlier experiences in investment banking, and the two men had communicated on several occasions over a twelve year period about financing opportunities for various properties.

In November, 2012, Gordon spoke with Chappo by phone regarding a 94,000 square foot commercial office building located on a twelve acre property in Auburn Hills, Michigan. The plaintiff previously owned that property, but recently had lost title to a bank in foreclosure proceedings after having defaulted on a loan obligation. The plaintiff had leased the building to Huntsman Corporation (Huntsman), which remained the building's primary tenant. Two years remained on the original lease. Gordon informed Chappo that Huntsman was considering whether to renew or extend the lease. Gordon wished to obtain financing in order to redeem the property from the bank,[3] but indicated to

[2] In their appellate brief, the defendants assert that, for purposes of this appeal, they do "not dispute or seek to reverse the trial court's findings . . . with regard to the facts, and focus this appeal instead on the conclusions of law and judgment entered . . . ."

[3] Under Michigan law, real property owners whose interest have been foreclosed have between six and twelve months in which to exercise their right of redemption. See Mich. Comp. Laws §§ 600.3140 (1) and 600.3240.

Chappo that, due to the distressed state of Michigan's economy, many lenders would not consider financing property there, especially foreclosed property.

Over the next few weeks, Gordon and Chappo continued to discuss by phone or by e-mail details of a potential financing deal for the property, which included details of the plaintiff's efforts to negotiate a lease extension with Huntsman as well as general information about the property market in Auburn Hills. In an e-mail dated November 15, 2012, Gordon sent Chappo a memorandum that contained specifics of the proposed Huntsman lease. The proposed lease was to run for a period of fifteen years and have an annual lease rental value of $1,220,000. Around the same time, Gordon also sent a memorandum to the executives at Huntsman who were handling lease negotiations with the plaintiff, in which he indicated that the plaintiff hoped to obtain a commitment to a lease extension, subject to Huntsman senior management approval, by early January, 2013, in order to permit the plaintiff to obtain a refinancing commitment from a lender. Gordon informed Chappo that any lease with Huntsman would need the approval of Huntsman senior management. As succinctly explained by the trial court, "Gordon's plan was to finance the [redemption] price of the property after [the plaintiff] had defaulted on the existing loan at enough savings that, if he could get [Huntsman] to agree to extend the lease under terms similar to those then in existence, the plaintiff would gain a windfall profit of approximately $5 million."

The defendants subsequently began working on obtaining the financing sought by the plaintiff. To that end, Chappo prepared an engagement letter dated November 20, 2012, that "included all the terms of the loan and indicated that [Chappo LLC] had an exclusive engagement to procure a lender which would then provide financing for a single tenant property occupied by

[Huntsman] in accordance with the terms outlined in the engagement letter." Those terms, as the trial court indicated, included "that the tenant would be [Huntsman] and that the lender would be an institutional lender, that the term of the loan would be ten years, that the principal amount would be $9,500,000 at an interest rate of 5.25 percent, and that debt service would be based on a twenty year amortization." Lease payments would be made by Huntsman directly to the lender to service the debt, with any excess returned to the plaintiff. The engagement letter also contained a detailed description of the property, set forth basic terms of the as yet unrealized Huntsman lease extension,[4] and indicated that the lender would receive a first mortgage security interest in the property. The closing and funding of the loan were to occur approximately thirty days from the date of the lender commitment.

Pursuant to the engagement letter, the plaintiff agreed to pay Chappo LLC a "[p]lacement [f]ee" equal to $95,000, 1 percent of the principal amount of the note, to be paid out of the proceeds when the loan closed. The plaintiff also agreed that, upon executing the engagement letter, it would wire Chappo LLC an "[e]ngagement [d]eposit" equal to one half of 1 percent of the principal amount of the proposed $9,500,000 note, or $47,500. The engagement letter contained the following language directly pertaining to the return or retention of the engagement deposit: "In the event Chappo LLC is unable to provide a [l]ender commitment as stipulated above and such time frame is not extended,

[4] As noted by the court, "[t]he lease originally was to commence in November, 2012, but Gordon changed that [term on the executed engagement letter] to [March, 2013], with a term ending October 31, 2024. The lease was a triple net lease in which there are no landlord responsibilities. The lease payments Gordon [also] had corrected to be $1,183,000 for the first sixty-two months and $1,130,000 for the remaining term."

the [e]ngagement [d]eposit will be returned to the [b]orrower. Chappo LLC will retain the deposit if the [b]orrower fails to provide requested information in a timely manner or fails to complete the financing after Chappo LLC had provided a [l]ender commitment." Importantly, the penultimate paragraph of the engagement letter provided as follows: "It is understood and agreed that the terms of this [e]ngagement shall supersede any and all prior [e]ngagements, arrangements or understandings among the parties with respect to the subject matter discussed above."

On January 4, 2013, the plaintiff executed the engagement letter and delivered it to the defendants. Attached to the executed engagement letter was a memorandum from Gordon that stated as follows: "Enclosed is an executed copy of the engagement letter for the Huntsman property. The deposit of $47,500 will be wire transferred. The deposit will be returned within five days of the time at which it appears a loan pursuant to the application is not probable of funding by February 28, 2013, or an agreed later funding date. Looking forward to the expedited loan closing."

Gordon later wire transferred $47,500 to Chappo LLC.[5] As previously noted, Gordon also made changes directly on the engagement letter because he was still in the process of negotiating the exact terms of the lease extension with Huntsman. See footnote 4 of this opinion. The defendants did not respond or object to the changes made by Gordon on the executed engagement letter or to the language in the accompanying memorandum.

On January 10, 2013, the defendants e-mailed the plaintiff portions of a loan application from a lender,

[5] There was no requirement in the agreement that the deposit be held in escrow or in a segregated account, and, accordingly, it was deposited into Chappo LLC's general operating account.

American National Insurance Company (American National). Gordon, finding the terms acceptable, completed the relevant pages and returned them to the defendants within hours. After receiving the returned pages of the application, an investment officer from American National "circulated the complete application/commitment letter to [the] investment committee and the senior vice president with authority to commit to the loan. The final version of the mortgage loan application was e-mailed to Gordon on January 22, 2015, with a hard copy [sent] direct from American National . . . the following morning. On the formal application was a signature block for Gordon and for the senior vice president of American National, Scott F. Brast. As soon as Gordon signed and returned the original, Brast would countersign, and the document would become the commitment letter. The application/commitment letter included all the terms specified by Gordon's engagement letter as well as an agreement by American National to fund by February 28, 2013, the date needed by Gordon."

Section 4.4 of the application/commitment letter provides: "At the time of closing, Applicant will have entered into a lease or leases and/or lease guarantees, the terms and conditions of which are to be approved by Lender, with a tenant or tenants and lease guarantors approved by Lender, to occupy 94,000 square feet with an annual rental from such lease or leases to produce no less than $1,183,000." The document also provided that American National approved Huntsman for occupancy and as lease guarantors.

The plaintiff, however, would not execute the application/commitment letter because it did not have an executed lease agreement with Huntsman, and it surmised that American National would never approve and fund the loan without the extended Huntsman lease as security. From late January, 2013, through mid-February,

2013, there was "a paucity of communication" between the parties. Although American National expressed some concern to the defendants that it might no longer be able to fund the transaction within the requisite time frame, Gordon continued to tell the defendants that he was waiting to hear from Huntsman about executing the lease extension, although he actually was still negotiating with Huntsman about the terms of the lease.

As set forth by the trial court, "Huntsman had retained . . . a real estate services organization to represent it in negotiations regarding the proposed lease renewal. Gordon informed Chappo that the lease advisor informed Huntsman that the terms which Gordon was seeking were too generous to the [plaintiff] and that Huntsman was not offering [the plaintiff] the terms which Gordon had outlined to Chappo. Gordon then informed Chappo that he was working with the original lender . . . to extend the redemption date deadline of the foreclosure by consent. On March 1, 2013, Gordon sent a memorandum to [the original lender] stating that a tentative lease agreement had been concluded with Huntsman satisfactory to the lender of the redemption funding and that all of the redemption loan documentation had been completely negotiated and prepared. Gordon had been negotiating a separate transaction with a separate lease extension involving a separate lender." The defendants continued to believe that they could broker successfully the deal between American National and the plaintiff. Chappo contacted the investment officer from American National, who presented the transaction to its investment committee. The committee subsequently voted to go forward with the loan.

Nevertheless, on March 3, 2013, the plaintiff advised the defendants that "based on current circumstances we are withdrawing the [a]pplication."[6] The plaintiff

[6] The record reflects that after title to the property fully vested in the foreclosing bank it reached a new lease agreement with Huntsman. The bank then later sold the property to a third party subject to the Huntsman lease.

requested that the defendants return the engagement deposit. The defendants refused, citing the engagement letter's exclusivity clause, which the defendants posited the plaintiff had breached by negotiating directly with another lender.

On December 29, 2013, the plaintiff commenced the underlying action. The complaint contained five counts, all premised upon the defendants' alleged wrongful retention of the engagement deposit. Count one alleged breach of contract by Chappo LLC, count two alleged statutory theft against both defendants,[7] count three alleged that the defendants were liable for conversion, count four alleged that the defendants breached the implied covenant of good faith and fair dealing, and count five alleged that the defendants' actions amounted to a violation of the Connecticut Unfair Trade Practices Act (CUTPA). See footnote 1 of this opinion.

The defendants filed an answer that denied the material allegations of the complaint, raised a special defense of fraud, and alleged two counterclaims against the plaintiff sounding in fraud and breach of contract. The plaintiff filed a response in which it denied the allegations in the special defense and counterclaims.

The matter was tried to the court, *Hon. Michael Hartmere*, judge trial referee, on May 13 and May 14, 2015. Gordon and Chappo were the only witnesses to testify. The parties each submitted posttrial memoranda.

The plaintiff argued in relevant part that the defendants had no legitimate basis for retaining the engagement deposit because Chappo knew from the outset that the entire transaction at issue was predicated on Huntsman executing a lease renewal with the plaintiff,

[7] The complaint contains a typographical error, referring to General Statutes § 52-54, rather than General Statutes § 52-564. Section 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

and Chappo acknowledged at trial that no lender would commit to funding a loan without the lease as security. The plaintiff further argued that obtaining the lease was not a promissory obligation undertaken by the plaintiff as suggested by the defendants. Rather, the existence of a lease was a condition precedent, the failure of which voided the contractual obligations of the parties and, thus, obligated the return of the deposit.

In their posttrial briefs, the defendants invoked the doctrine of prevention in defense of the breach of contract allegations, arguing that the plaintiff was not entitled to a return of the deposit because, despite Chappo LLC's having found a lender who was willing to provide a loan to the plaintiff in accordance with all the terms specified in the engagement letter, the plaintiff refused to sign and return the application/commitment, thus preventing the execution of a formal commitment letter. Further, the defendants argued that the lease extension with Huntsman was never a condition of the agreement to secure a lender's commitment, but only a condition of ultimately funding the loan. The loan could have proceeded if a lease with terms more favorable to Huntsman could have been negotiated.

On October 29, 2015, the court issued a memorandum of decision. The court found in favor of the plaintiff on the breach of contract and conversion counts, but in favor of the defendants on the remainder of the complaint. The court reasoned that the Huntsman lease renewal was a condition precedent to the parties' contract and that, because that condition was never met, the plaintiff had no duty to perform and was entitled to the return of its deposit. The court found that the defendants' failure to return the deposit constituted a breach of contract by Chappo LLC, and, because the defendants exercised "ownership over the plaintiff's property to the plaintiff's harm," the defendants' retention of the deposit also amounted to a conversion.

The court nevertheless found that the plaintiff had failed to establish the necessary larcenous intent on the part of the defendants to establish the elements of a statutory theft. Further, the court found that the plaintiff failed to demonstrate that the defendants' actions were done in bad faith or were immoral, unethical, and unscrupulous so as to support, respectively, the plaintiff's counts alleging breach of the implied covenant of good faith and fair dealing or a CUTPA violation. Because the defendants failed to brief their special defense and counterclaims, the court deemed them abandoned.[8]

The defendants filed a motion to reargue and for reconsideration on November 18, 2015. The court denied that motion on December 2, 2015. This appeal followed.[9]

The defendants claim on appeal that the trial court improperly determined that Chappo LLC breached its contract with the plaintiff by failing to return the engagement deposit.[10] The defendants argue that,

[8] The defendants have not challenged that portion of the court's judgment in the present appeal.

[9] The plaintiff filed a motion to dismiss the appeal as untimely on the basis of a handwritten notation on the court's memorandum of decision indicating that notice of the court's decision had issued on October 28, 2015. The plaintiff argued that if the initial appeal period began to run on October 28, 2015, the defendants' November 18, 2015 motion for reconsideration was filed one day after the appeal period had expired and, as a result, the present appeal was untimely. See Practice Book § 63-1. The date stamp on the memorandum of decision, however, as well as the electronic docket, indicate that the court's memorandum was not filed with the court until October 29, 2015. We denied the plaintiff's motion to dismiss.

[10] As noted, the court also ruled in favor of the plaintiff on its conversion count on the basis of its determination that the defendants wrongfully retained and exercised control over the deposit after the plaintiff asked the defendants to return those funds. The defendants also challenge that aspect of the court's judgment. Our resolution of the appeal in favor of Chappo LLC on the breach of contract count, however, logically also requires a reversal on the conversion count against the defendants. "Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights." *Discover*

although obtaining a lease extension from Huntsman might have been integral to the plaintiff's ability to close on the loan commitment secured by Chappo LLC, the existence of a lease was not, under the express terms of the parties' contract, a condition the absence of which mandated a return of the engagement deposit. The plaintiff agreed to compensate Chappo LLC from the proceeds realized at the closing of a loan, assuming Chappo LLC was able to secure a loan commitment. The deposit requirement reasonably can be viewed as a means to protect the defendants in the event that they secured a commitment but the loan failed to close through no fault of their own. In other words, the deposit signaled the parties' intent to allocate a large portion of the risk that a lease extension or alternative security for the loan would never materialize to the party that was in control of the lease negotiations: the plaintiff. The defendants assert that because Chappo LLC found a lender that was willing to commit to fund a loan on the terms agreed upon, which was the only obligation it undertook pursuant to the plain and unambiguous terms of the parties' contract, the defendants had a right to retain the deposit in accordance with the express terms of the engagement letter despite the fact that a loan never actually closed. We agree and conclude that the court improperly construed the parties' contract as requiring a return of the deposit.

Because the defendants' claim challenges the court's interpretation of the parties' contract, particularly its having construed the contract as containing a condition precedent, we begin our analysis by setting forth the applicable standard of review and general principles of law relevant to the construction of contracts. "The law

Leasing, Inc. v. *Murphy*, 33 Conn. App. 303, 309, 635 A.2d 843 (1993). If the defendants were entitled to retain the deposit, they did not exercise unauthorized control over the plaintiff's funds. Accordingly, we limit our discussion to the breach of contract count.

governing the construction of contracts is well settled. When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 13, 938 A.2d 576 (2008). "If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . [If] the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 183, 2 A.3d 873 (2010). "A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . Accordingly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . .

"[W]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . [If] the language is unambiguous, we must give the contract effect according to its terms. . . . [If] the language is ambiguous, however, we must construe those ambiguities against the drafter. . . . Moreover, in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citations omitted; internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, supra, 285 Conn. 13–14.

In ascertaining the intent of contracting parties, we are also mindful that a court's interpretation of a contract must also be informed by whether the terms of

the contract are contained in a fully integrated writing. This is important because "[t]he parol evidence rule prohibits the use of extrinsic evidence to vary or contradict the terms of an integrated written contract. . . . The parol evidence rule does not apply, however, if the written contract is not completely integrated." (Citation omitted; internal quotation marks omitted.) *Benvenuti Oil Co.* v. *Foss Consultants, Inc.*, 64 Conn. App. 723, 727, 781 A.2d 435 (2001).

An integrated contract is one that the parties have reduced to written form and which represents the full and final statement of the agreement between the parties. See id., 728–29. Accordingly, an integrated contract must be interpreted solely according to the terms contained therein. Whether a contract is deemed integrated oftentimes will turn on whether a merger clause exists in the contract. Id., 728. The presence of a merger clause in a written agreement establishes conclusive proof of the parties' intent to create a completely integrated contract and, unless there was unequal bargaining power between the parties, the use of extrinsic evidence in construing the contract is prohibited. See *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 502–504, 746 A.2d 1277 (2000).

"We long have held that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme.

. . . Although there are exceptions to this rule, we continue to adhere to the general principle that the unambiguous terms of a written contract containing a merger clause may not be varied or contradicted by extrinsic evidence." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 502–503; see also 2 Restatement (Second), Contracts § 204, comment (e), p. 98 (1981) ("[w]here there is complete integration and interpretation of the writing discloses a failure to agree on an essential term, evidence of prior negotiations or agreements is not admissible to supply the omitted term"). Courts must always be mindful that "parties are entitled to the benefit of their bargain, and the mere fact it turns out to have been a bad bargain for one of the parties does not justify, through artful interpretation, changing the clear meaning of the parties' words." 13 R. Lord, Williston on Contracts (4th Ed. 2000) § 38:13, p. 427.

Because the court interpreted the parties' contract as containing an unmet condition precedent, a brief discussion of the legal parameters of contractual conditions is necessary. "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. . . . Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." (Citations omitted.) *Lach* v. *Cahill*, 138 Conn. 418, 421, 85 A.2d 481 (1951); see also 2 Restatement (Second), supra, § 224, p. 160 ("[a] condition is an event, not certain to

occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due").

Conditions precedent can be either express or implied. 8 C. McCaulif, Corbin on Contracts (J. Perillo ed., Rev. Ed. 1999) § 30.10, p. 19. An express condition precedent is one that springs from language in the contract and qualifies one or both parties' rights or duties of performance. Id., § 30.7, p. 14, § 30.10, p. 19. Although not strictly required, parties often signal their agreement to create an express condition precedent by using words such as "on [the] condition that," "provided that," unless and until, or "if." (Internal quotation marks omitted.) 2 Restatement (Second), supra, § 226, comment (a), p. 170. In addition to express conditions precedent, a condition precedent may be implied or "supplied by the court," often in circumstances in which the court determines that the contracting parties have failed to foresee or recognize the significance of an event or its potential effect on the parties' rights. See id., § 204, comments (b) and (d), pp. 97–98.

Interpreting a contract as containing an implied condition precedent, however, is disfavored if the result will be a forfeiture of compensation or other benefit, especially if that forfeiture falls on a party who had no control over whether the condition or event would occur. This principle is aptly reflected in § 227 of the Restatement (Second), supra, p. 174, which provides in relevant part: "In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk." As explained in the commentary of the rule, "[if] the nature of [a] condition is such that the uncertainty as to [an] event will be resolved before either party has

relied on its anticipated occurrence, both parties can be entirely relieved of their duties, and the obligee risks only the loss of his expectations. [If], however, the nature of the condition is such that the uncertainty is not likely to be resolved until after the obligee has relied by preparing to perform or by performing at least in part, he risks forfeiture. If the event is within his control, he will often assume this risk. If it is not within his control, it is sufficiently unusual for him to assume the risk that, in case of doubt, an interpretation is preferred under which the event is not a condition." 2 Restatement (Second), supra, § 227, comment (b), pp. 175–76. Thus, whereas the policy favoring freedom of contract would require that an *express* condition precedent be honored even though a forfeiture would result, if "it is doubtful whether or not the agreement makes an event a condition of an obligor's duty, an interpretation is preferred that will reduce the risk of forfeiture." Id., p. 175. The Restatement (Second) further posits that even in those cases in which the court finds a condition precedent exists, "[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." 2 Restatement (Second), supra, § 229, p. 185.

Turning to the defendants' claim, we first conclude that the language of the engagement letter is unambiguous and, therefore, the intent of the parties is a question of law. We agree with the defendants that the court improperly construed the parties' contractual agreement as intending the occurrence of a Huntsman lease extension as a condition precedent of the parties' contractual obligations such that the nonoccurrence of the lease extension completely excused the plaintiff's performance and required the defendants to return the plaintiff's engagement deposit. In particular, as we will

discuss further, the court in this case did not determine whether the parties' contract was a fully integrated writing between commercial entities with equal bargaining power and, thus, entitled to stricter adherence to its express terms; did not state as part of its analysis whether the express contractual provisions regarding the retention or return of the deposit were ambiguous, inapplicable, or insufficient to resolve the parties' dispute; did not identify what contractual language, provision, or extrinsic evidence the court relied upon in determining that obtaining a lease extension was a condition precedent of the contract; and, perhaps most importantly, did not address whether its construction of the contract would result in a forfeiture of compensation by Chappo LLC, despite the fact that Chappo LLC had no involvement in or control over the lease negotiations. After considering these factors, we conclude that the court improperly construed the parties' contract and incorrectly determined that Chappo LLC had breached that contract and wrongfully retained the plaintiff's deposit.

We note at the outset that there is no indication that the court gave proper deference to the language of the parties' contract, which was a fully integrated writing. The court determined, and we agree, that a valid contract was formed between the parties as memorialized in the engagement letter. Likewise, there is no disagreement that the terms of that contract also included the modifications that Gordon made at the time he signed the engagement letter on behalf of the plaintiff, both the changes he made to the executed engagement letter as well as the additional language in his accompanying memorandum. Pursuant to the contract, Chappo LLC promised to obtain a commitment from a lender willing to fund a loan on the terms supplied by the plaintiff in the contract, and, in exchange for that promise, the plaintiff agreed to pay Chappo LLC a commission equal

to 1 percent of the loan from the proceeds at closing. The plaintiff also agreed to provide Chappo LLC with a deposit equal to roughly one half of the expected commission.

In its analysis of the breach of contract claim, the court makes no mention of the paragraph in the engagement letter that, in legal effect, amounted to a merger clause. That paragraph provided that "the terms of this [e]ngagement shall supersede any and all prior [e]ngagements, arrangements or *understandings among the parties with respect to the subject matter discussed above*." (Emphasis added.) The inclusion of this merger clause was prima facie evidence that the parties intended their written agreement to encompass "the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, supra, 252 Conn. 502. Although the court notes that Chappo drafted the engagement letter "with full knowledge that the lease extension had not been executed," the court did not find nor does the record disclose any imbalance in the parties' bargaining power. Both Gordon and Chappo are highly educated and familiar with these types of financial transactions, and, as evidenced by the changes that Gordon made to the engagement letter at the time he executed the contract, Gordon fully was capable of protecting the interests of the plaintiff. Rather than construe the language used by the parties, the court appears to have looked beyond the plain language of the agreement in deciding that the Huntsman lease was a condition precedent to any and all performance under the contract.

Certainly, at the time the parties entered into their agreement, it is undisputed that the plaintiff had not yet secured a lease extension from Huntsman and that all parties were aware of that fact. Negotiation of the

lease was ongoing at that time. Accordingly, this is not a situation where the parties failed to fully contemplate the occurrence or nonoccurrence of a particular event. Despite the uncertainty surrounding the lease, and likely because the window of time for redeeming the property was quickly closing, the plaintiff decided to enter into the agreement with Chappo LLC to find a lender that would be willing to commit to financing the plaintiff's redemption of the property under the assumption that a lease renewal would be executed prior to closing. The defendants had no part in negotiating that lease, which was entirely the responsibility of the plaintiff. The plaintiff had all the information necessary to gauge the likelihood of retaining Huntsman as a lessee or whether some alternative contingency for servicing the loan debt was possible, such as modifying the terms of the proposed lease or securing a different tenant altogether. Because Chappo LLC had no actual control over whether the plaintiff would be able to negotiate a new lease with Huntsman, the plaintiff was the party best situated to evaluate the risk that Chappo LLC would expend resources in obtaining a lender only to have the loan unable to close.

To that end, if the plaintiff viewed the Huntsman lease as an indispensable part of its agreement with Chappo LLC, the plaintiff could have insisted that obtaining the lease be made a clear and express condition on its duty to compensate Chappo LLC for its efforts in obtaining a loan commitment. Alternatively, the plaintiff could have insisted that the engagement letter provide that Chappo LLC would return the deposit in the event that a lease never materialized. Instead, there is nothing in the parties' agreement that shifts any potential risk of the failure to obtain a lease from the plaintiff to Chappo LLC.[11]

[11] The plaintiff argues that the Gordon memorandum is a part of the parties' contract, and that the following language was intended to further condition Chappo LLC's duty to return the deposit in the event that a loan could not

Rather, the contract is clear and unambiguous that if Chappo LLC obtained a loan commitment in accordance with the plaintiff's proposed terms, and the loan failed to close, Chappo LLC was entitled to keep the deposit. Although, by agreement, the loan had to close in order for Chappo LLC to earn its full commission, and the loan almost certainly would not close without the intended lease with Huntsman, a notion that the defendants readily admit, nothing in the language of the parties' agreement expressly made obtaining the lease a condition precedent to the retention of the deposit. Chappo LLC simply had to secure the required loan commitment, which it did.[12]

Certainly, if it is clear from the facts and circumstances surrounding the making of a contract that the

close: "The deposit will be returned within five days of the time at which it appears a loan pursuant to the application is not probable of funding by February 28, 2013, or an agreed later funding date." The defendants do not contest that the parties' contract includes the Gordon memorandum. They argue, however, that the provision in question should be construed as clarifying the last date on which a loan could fund in order to allow the plaintiff time to redeem the property and, accordingly, provides a specific time frame for the return of the engagement deposit should Chappo LLC be unable to obtain a commitment to fund by that date. In other words, the Gordon memorandum did not contain any new condition with respect to the return of the deposit but, as with the other changes Gordon made to the engagement letter, merely clarified an existing term in light of the state of events at the time he executed the engagement letter. In this case, it clarified the existing provision requiring Chappo LLC to return the deposit "[i]n the event Chappo LLC is unable to provide a [l]ender commitment as stipulated above and such time frame is not extended . . . ." To the extent that the language in the Gordon memorandum is susceptible of two meanings, it should be read in conjunction with the contract as a whole and consistent with other terms. See *C & H Electric, Inc.* v. *Bethel*, 312 Conn. 843, 853, 96 A.3d 477 (2014). We are simply unpersuaded that any language in the Gordon memorandum supports in any way the court's determination that a Huntsman lease extension was a condition precedent of the parties' agreement or that the failure of the lease negotiations mandated that the defendants return the engagement deposit, the only compensation the defendants received for their work.

[12] The record before us shows that Chappo LLC found a lender, American National, that was fully committed to providing a loan to the plaintiff on the terms specified in the engagement letter including the as yet unattained Huntsman lease. The plaintiff suggests that Chappo LLC nevertheless failed

parties had failed to set forth expressly some condition that needed to exist before the parties' duty to perform under the contract ripened, a court has the authority to recognize and give effect to such an implied condition. In construing a fully integrated written contract, however, drafted and executed by sophisticated commercial parties, the court should be particularly wary before construing the contract to include an implied condition precedent, especially when supplying such a term will result in one of the parties forfeiting the benefits of his performance.

It is true that, pursuant to the engagement letter, Chappo LLC agreed to be compensated from the proceeds generated by the loan's closing, and, thus, Chappo LLC accepted some risk that, should the loan fail to close, it would not be entitled to the full benefit of the bargain. Nevertheless, Chappo LLC also ensured that that risk was partially set off by requiring the plaintiff to provide a deposit. Pursuant to the engagement letter,

to fully perform because it never obtained a duly executed commitment letter. The defendants counter that the only hindrance in obtaining the formal commitment letter from American National was Gordon's refusal to sign the application, and the doctrine of prevention prohibits a party from taking advantage of any failure in performance that the party acted to hinder. We find it unnecessary to engage in such analysis, however, for two reasons. First, the language of the contract required only "a [l]ender commitment" not a formal commitment letter from a lender. Second, even if a formal letter was necessary, because Chappo LLC had found a willing lender and all that remained to secure a formal commitment was the signing of the application, there was substantial performance.

"The doctrine of substantial performance shields contracting parties from the harsh effects of being held to the letter of their agreements. Pursuant to the doctrine of substantial performance, a technical breach of the terms of a contract is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial." (Internal quotation marks omitted.) *Mastroianni* v. *Fairfield County Paving, LLC*, 106 Conn. App. 330, 340–41, 942 A.2d 418 (2008). Accordingly, Chappo LLC substantially performed all of the obligations it undertook to perform pursuant to the parties' contract.

Chappo LLC was required to return the deposit only if it failed to secure a loan commitment, which we have concluded did not occur here. Here, if we were to accept the court's construction of the parties' contract as containing an unmet condition precedent, this would result in a forfeiture of compensation to Chappo LLC, which had substantially performed its duties under the contract.

The fact that the loan was unlikely to close due to circumstances outside the control of the defendants did not change the nature of the business arrangement between the plaintiff and Chappo LLC. Chappo LLC kept its promise to find the plaintiff a lender willing to finance on the agreed upon terms. The plaintiff was the party that, hoping to net approximately $5 million, had assumed the risk of engaging a loan broker before it had obtained the necessary lease commitment from Huntsman to secure a loan. It was incorrect for the court to rewrite the parties' contract in such a way as to shift that risk from the plaintiff to Chappo LLC.

The judgment is reversed in part and the case remanded with direction to render judgment in favor of the defendants on the breach of contract and conversion counts. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JAMIE PRONOVOST *v.* MARISA TIERNEY
(AC 38572)

Alvord, Prescott and Bear, Js.

Syllabus

The plaintiff, P, a resident of Connecticut, sought to recover damages from the defendant, T, a nonresident of Connecticut, arising from a motor vehicle accident in Maryland caused by the defendant's alleged negligence. The trial court granted the defendant's motion to dismiss on the

ground that the relevant long arm statute (§ 52-59b [a] [3] [B]), which confers personal jurisdiction over a nonresident individual with respect to a cause of action arising from a tortious act outside Connecticut that causes injury to a person or property in Connecticut, did not provide personal jurisdiction over the defendant based on the facts alleged in the amended complaint and the facts evidenced in the record. The court concluded that there was no evidence that the defendant, who the plaintiff claimed maintained a calligraphy and graphic design business engaged in interstate commerce, derived any revenue from Connecticut residents and no evidence that the defendant had earned enough revenue in Connecticut to have a commercial impact in the forum. On the plaintiff's appeal to this court, *held* that the plaintiff could not prevail on his claim that the trial court erred in its application of § 52-59b (a) (3) (B) because the statute only required that the defendant derived substantial revenue from interstate commerce, and did not additionally require that the defendant derived substantial revenue from Connecticut: this court was bound by our Supreme Court's interpretation of the term "substantial revenue" in *Ryan* v. *Cerullo* (282 Conn. 109), as sufficient revenue to indicate a commercial impact in the forum state, and the plaintiff here did not allege, and did not produce any evidence in support of his opposition to the defendant's motion to dismiss, that the defendant derived substantial revenue from Connecticut residents, and, therefore, § 52-59b (a) (3) (B) did not authorize the assertion of jurisdiction over the defendant; moreover, the plaintiff's proposed interpretation of § 52-59b (a) (3) (B) would have placed the statute in constitutional jeopardy because the due process clause of the fourteenth amendment to the United States constitution protects an individual's liberty interest in not being subject to binding judgments of a forum with which he or she had established no meaningful contacts, ties, or relations, and, in the present case, there was no evidence that the defendant derived any revenue from Connecticut, and the motor vehicle accident was the only interaction between the parties upon which the plaintiff relied for the establishment of personal jurisdiction in Connecticut over the defendant.

Argued March 15—officially released July 4, 2017

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Shapiro*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew Julian Forrest, for the appellant (plaintiff).

Thomas S. Lambert, with whom, on the brief, was *Robert O. Hickey*, for the appellee (defendant).

Opinion

BEAR, J. The plaintiff, Jamie Pronovost, appeals from the judgment of the trial court dismissing his single count, amended complaint, in which he alleged negligence against the defendant, Marisa Tierney, arising from a motor vehicle collision in Maryland. The court dismissed the plaintiff's complaint against the defendant, a nonresident of Connecticut at the time that the action was commenced,[1] after determining that the relevant long arm statute, General Statutes § 52-59b (a) (3) (B), did not provide jurisdiction over the defendant based on the facts alleged in the complaint and in an affidavit filed by the defendant in her reply to the plaintiff's memorandum in opposition to the motion to dismiss. On appeal, the plaintiff claims that the court erred in its application of § 52-59b (a) (3) (B) to the facts as pleaded in this case. We affirm the judgment of the court.

The following facts, as alleged in the plaintiff's complaint,[2] and procedural history are relevant to the resolution of this appeal. The plaintiff, a Connecticut

[1] The plaintiff alleged in the complaint that the defendant was a resident of Virginia when this action commenced, but the defendant's affidavit filed in support of her reply to the memorandum in opposition to the motion to dismiss asserts that she was a resident of Maryland at the time the action was commenced. Regardless of whether she is in fact a Maryland or Virginia resident on the date that this action commenced, it is undisputed that she was not a resident of Connecticut on that date or on the date of the accident, and there is no claim that she owns or owned real property in Connecticut.

[2] In reviewing "the trial court's decision to grant a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 108, 967 A.2d 495 (2009). "We also recognize that a motion to dismiss invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Emphasis omitted; internal quotation marks omitted.) *Connors* v. *Rolls-Royce North America, Inc.*, 161 Conn. App. 407, 409, 127 A.3d 1133 (2015).

resident, commenced this action in Connecticut against the defendant on April 9, 2015. In the complaint, the plaintiff alleged that, on September 13, 2013, the defendant, while operating a motor vehicle, collided with the rear end of the plaintiff's vehicle in Maryland. The defendant's conduct or actions caused the damages to the plaintiff's vehicle in that she (1) was inattentive because she failed to a keep reasonable and prudent lookout for other vehicles on the road; (2) failed to operate the vehicle under reasonable and proper control to enable her to avoid causing damage to the plaintiff's vehicle; and (3) failed to operate her vehicle as a reasonably prudent person would have under the circumstances. The collision caused damages to the plaintiff's vehicle and a corresponding diminution in value to the automobile. The plaintiff sought $4737 plus interest from the time of the accident, as well as costs, fees, and other consequential damages.

On July 2, 2015, the defendant filed a motion to dismiss the plaintiff's complaint, arguing that the court lacked personal jurisdiction over her under § 52-59b and that the exercise of jurisdiction would violate the due process clause of the fourteenth amendment to the United States constitution. The plaintiff countered in his memorandum of law in opposition to the motion that the court had personal jurisdiction under § 52-59b (a) (3) (B), and he provided evidence purporting to establish that the defendant had maintained a calligraphy and graphic design business engaged in interstate commerce. In reply, the defendant argued, inter alia, that the plaintiff had failed to allege or provide evidence that she derived "substantial revenue from interstate . . . commerce" under § 52-59b (a) (3) (B), as that phrase was defined by our Supreme Court in *Ryan* v. *Cerullo*, 282 Conn. 109, 124–25, 918 A.2d 867 (2007), because there was no allegation or evidence that she had derived any revenue from Connecticut.

The court heard argument on October 26, 2015. On October 28, 2015, the court issued its memorandum of decision granting the defendant's motion to dismiss. After setting forth the substantial revenue requirement under *Ryan*, the court determined that there was no evidence that the defendant derived any revenue from Connecticut residents. Additionally, the court determined that there was no evidence showing that the defendant earned enough revenue from Connecticut to have a commercial impact in the forum. Accordingly, the court granted the defendant's motion to dismiss. This appeal followed.

Before addressing the plaintiff's claim on appeal, we set forth the applicable standard of review. "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. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010).

"When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state [long arm] statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the

exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 514–15, 923 A.2d 638 (2007). "Only if we find the [long arm] statute to be applicable do we reach the question whether it would offend due process to assert jurisdiction." (Internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 543, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014).

"The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, supra, 296 Conn. 201. The court may also consider undisputed facts evidenced in the record established by affidavits submitted in support or opposition, other types of undisputed evidence, and/or public records of which judicial notice may be taken. *Cuozzo* v. *Orange*, 315 Conn. 606, 615, 109 A.3d 903 (2015).

On appeal, the plaintiff claims that the court erred in its application of § 52-59b (a) (3) (B). Specifically, he argues that the statute does not require that substantial revenue be derived from Connecticut-based commerce; such revenue need only be derived from interstate commerce. We disagree.

Section 52-59b (a) provides in relevant part: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual . . . who in person or through an agent . . . (3) commits a tortious act outside the state causing injury to person or property within the state . . . if such person or agent . . . (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce

. . . .” A trial court, therefore, has personal jurisdiction over a defendant under § 52-59b (a) (3) (B) when (1) the defendant, himself or through an agent, commits a tortious act outside Connecticut, (2) that act causes injury to a person or property in Connecticut, (3) that act gives rise to the cause of action claimed by the plaintiff, (4) the defendant expected or reasonably should have expected that the act would have consequences in Connecticut, and (5) the defendant derives substantial revenue from interstate or international commerce. See *Ryan* v. *Cerullo*, supra, 282 Conn. 123–24. In the present case, the court, in addressing the fifth prong, determined that the plaintiff had failed to provide evidence that the defendant derived substantial revenue from interstate commerce under *Ryan*.

In *Ryan*, our Supreme Court for the first time determined the meaning of “derives substantial revenue from interstate or international commerce” under § 52-59b: “Although this court never has been required to determine the meaning of derives substantial revenue from interstate or international commerce for purposes of § 52-59b (a) (3) (B), New York courts have concluded, in interpreting their identically worded long arm statute, that the substantial revenue requirement is designed to narrow the [long arm] reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the [s]tate but whose business operations are of a local character . . . . Put differently, substantial revenue means enough revenue to indicate a commercial impact *in the forum*, such that a defendant fairly could have expected to be haled into court there. . . . Because of the indefinite nature of the substantial revenue requirement, the determination of whether that jurisdictional threshold has been met in any particular case necessarily will require a careful review of the relevant facts and frequently will entail an evaluation of both the total amount of revenue

involved and the percentage of annual income that that revenue represents. Compare *Founding Church of Scientology of Washington, D.C.* v. *Verlag*, 536 F.2d 429, 432–33 (D.C. Cir. 1976) (1 percent of magazine's gross revenue, or $26,000, [from sales in forum] constituted substantial revenue on basis of low unit price of magazines) with *Murdock* v. *Arenson International USA, Inc.*, 157 App. Div. 2d 110, 113–14, 554 N.Y.S.2d 887 (1990) ([sales in forum of] 0.05 percent of corporate defendant's total sales, totaling $9000, did not satisfy substantial revenue requirement)." (Citations omitted; emphasis added; internal quotation marks omitted.) *Ryan* v. *Cerullo*, supra, 282 Conn. 124–25.

In the present case, the plaintiff argues that he need not demonstrate that the defendant's business dealings had any impact in Connecticut, but must only demonstrate that the defendant was engaged in interstate commerce under § 52-59b (a) (3) (B). This is in direct contradiction to how our Supreme Court has defined "substantial revenue" as "enough revenue to indicate a commercial impact *in the forum*, such that a defendant fairly could have expected to be haled into court there." (Emphasis added; internal quotation marks omitted.) Id., 125. We are bound by this interpretation. The plaintiff did not allege, and did not produce any evidence in support of his opposition to the defendant's motion to dismiss, that the defendant derived substantial revenue from this state's residents. The applicable state long arm statute, § 52-59b (a) (3) (B), thus does not authorize the assertion of jurisdiction over the defendant.

Moreover, the plaintiff's proposed interpretation of the statute, if accepted by this court, could place the statute in constitutional jeopardy. See *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 523 ("[a]s articulated in the seminal case of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the constitutional due process standard

requires that, in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" [internal quotation marks omitted]).

In the present case, the defendant had no contact with Connecticut relating to or arising out of the automobile accident in Maryland, and there is no evidence that the defendant derived *any* revenue from Connecticut with respect to her interstate commerce activities. That automobile accident is the sum total of the interaction between the parties upon which the plaintiff relies for the establishment of personal jurisdiction in Connecticut over the defendant. For the plaintiff to assert that the court has personal jurisdiction over the nonresident defendant under these circumstances is problematic. See *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 523 (due process clause protects individual's liberty interest in not being subject to binding judgments of forum with which he has established no meaningful contacts, ties, or relations).

"[A] court has a duty to avoid interpreting statutes in a manner that places them in constitutional jeopardy." *Turn of River Fire Dept., Inc.* v. *Stamford*, 159 Conn. App. 708, 719, 123 A.3d 909 (2015). Accordingly, the court did not err in declining the plaintiff's invitation to expand the ambit of § 52-59b (a) (3) (B) in order to obtain personal jurisdiction over the defendant beyond what is permitted by the due process clause of the United States constitution. Because the court properly determined that the plaintiff had not proved all of the requirements of § 52-59b (a) (3) (B) for long arm jurisdiction over the defendant, and because the court's exercise of jurisdiction over the defendant in this case would violate the due process clause of the United

States constitution, the court properly rendered judgment dismissing the plaintiff's single count complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* JAMES W. TALBOT ET AL.
(AC 38489)

Lavine, Prescott and Bishop, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property of the defendant T. When T failed to file an appearance or any responsive pleadings, the plaintiff filed a motion for default for failure to appear and a motion for a judgment of strict foreclosure. After T was defaulted for failure to appear, counsel for T filed an appearance, which, by operation of law pursuant to the applicable rule of practice (§ 17-20 [d]), set aside the default for failure to appear. Subsequently, T was defaulted for failure to plead on January 29, 2014. Two days prior to the granting of that default, however, on January 27, 2014, the trial court rendered a judgment of foreclosure by sale. The trial court subsequently granted the plaintiff's motion to open and to vacate that judgment, which the plaintiff sought for the purpose of allowing it more time to review T for a possible short sale. After a mediation period had terminated, the plaintiff filed a second motion for a judgment of strict foreclosure that was based on the January 29, 2014 default for failure to plead, which had not been set aside. Before the court ruled on that motion, T filed an answer and special defenses, and a motion to set aside the default for failure to plead, which the trial court denied. Thereafter, the court rendered a judgment of foreclosure by sale, and T appealed to this court. On appeal, the parties did not dispute that the trial court erred in ordering the first foreclosure judgment on January 27, 2014, but they disagreed on the effect that the first foreclosure judgment had on the court clerk's subsequent granting of the default for failure to plead and the second foreclosure judgment rendered on that default. T claimed that the trial court abused its discretion in granting the plaintiff's second foreclosure motion because the default for failure to plead was void ab initio, as it was entered after the first foreclosure motion had been granted erroneously, and, thus, the second foreclosure motion was predicated on an invalid entry of default. *Held* that the trial court did not abuse its discretion in rendering the second judgment of foreclosure

by sale, as it was predicated on a valid entry of default against T for failure to plead; because the first foreclosure judgment was predicated on the default for failure to appear, which had been automatically set aside by operation of law when T's counsel filed an appearance, the first foreclosure judgment was void ab initio, as it was predicated on a default that had been cured, and it thus had no legal effect or bearing on the validity of the subsequent default for failure to plead, which was predicated on a valid motion for default filed by the plaintiff that was granted by the court clerk, and because T filed his answer and special defenses after the plaintiff filed its second motion for a judgment of strict foreclosure, pursuant to the applicable rule of practice (§ 17-32 [b]), the default for failure to plead was not automatically set aside and the court had discretion to deny the motion to set aside the default filed by T, who did not challenge that decision on appeal.

Argued February 16—officially released July 4, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. were defaulted for failure to appear; thereafter, counsel for the named defendant filed an appearance; subsequently, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered a judgment of foreclosure by sale; thereafter, the named defendant was defaulted for failure to plead; subsequently, the court granted the plaintiff's motion to open and to vacate the default judgment; thereafter, the court granted the plaintiff's motion for a judgment of strict foreclosure and rendered a judgment of foreclosure by sale; subsequently, the court denied the named defendant's motions to reargue and to open the judgment, and the named defendant appealed to this court. *Affirmed.*

Francis Lieto, with whom, on the brief, was *Nicole L. Barber*, for the appellant (named defendant).

Benjamin T. Staskiewicz, for the appellee (plaintiff).

Opinion

BISHOP, J. In this foreclosure action, the defendant James W. Talbot appeals from the judgment of foreclosure by sale, rendered in favor of the plaintiff, The Bank of New York Mellon, formerly known as The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH3, Mortgage Pass-Through Certificates, Series 2007-OH3.[1] The defendant claims on appeal that the court abused its discretion because the judgment of foreclosure by sale was predicated on a default that had been entered in error. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this claim. The defendant owned real property in New Canaan for which he executed and delivered to Countrywide Home Loans, Inc. (Countrywide), a note for a loan in the principal amount of $2,280,000. As security for the note, on May 25, 2007, the defendant executed and delivered a mortgage on the property to Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide. The mortgage was recorded on May 31, 2007, and later was assigned to the plaintiff on October 19, 2011. The assignment was recorded on November 1, 2011. The plaintiff, stating that the note was in default, elected to accelerate the balance due on the note, and provided written notice to the defendant of its intention to foreclose on the property unless the note was paid in full. The defendant did not cure the default, and on July 20, 2012, the plaintiff filed this foreclosure action against the defendant.

The defendant did not file an appearance or any responsive pleadings over the following eighteen

[1] The plaintiff also served as defendants: Sharon Talbot; Bank of America, N.A.; United States of America, Internal Revenue Service; Olympic Construction, LLC; and Optos Inc. The defendant James Talbot solely brought this appeal, and, therefore, any reference to the defendant is to James Talbot unless otherwise indicated.

months, and on December 13, 2013, the plaintiff filed a motion for default against the defendant for failure to appear, which the court clerk granted on December 24, 2013. The plaintiff also filed, on December 13, 2013, a motion for judgment of strict foreclosure (first foreclosure motion), on which the court did not immediately rule. Counsel for the defendant later filed an appearance on January 2, 2014, which, by operation of law, set aside the default for failure to appear. Practice Book § 17-20 (d). Following the filing of this appearance, the defendant failed to file any responsive pleadings, and on January 22, 2014, the plaintiff filed a motion for default against the defendant for failure to plead, which the court clerk granted on January 29, 2014. The defendant made no attempt to set aside this default. Two days *prior* to the granting of the default, however, on January 27, 2014, the court, *Mintz*, *J.*, rendered a judgment of foreclosure by sale (first foreclosure judgment), rather than a strict foreclosure, as the plaintiff had requested in its December 13, 2013 motion for judgment of strict foreclosure. The defendant made no attempt to vacate the judgment. The plaintiff, however, filed a motion asking the court to open and to vacate the judgment of foreclosure by sale on March 13, 2014. The plaintiff requested in its motion that the court open the judgment "for the purpose of allowing the plaintiff additional time to review the [defendant] for a possible short sale." The motion to open was not based on the fact that the judgment had been rendered in the absence of a valid entry of default. The court granted the motion to open on March 31, 2014.

The case was continued multiple times over the next year as the parties participated in foreclosure mediation, and on June 3, 2015, the foreclosure mediator submitted a final report to the court certifying that the mediation period had terminated. On June 23, 2015, new counsel for the defendant filed an appearance, but

the defendant still failed to file any responsive pleadings. Thereafter, on July 14, 2015, the plaintiff filed its second motion for judgment of strict foreclosure (second foreclosure motion), on the basis of the default for failure to plead, which had been granted on January 29, 2014, and had never been set aside.

Before the court ruled on the plaintiff's second foreclosure motion, the defendant filed, on July 16, 2015, his answer and special defenses. Additionally, he filed a motion to set aside the January 29, 2014 default for failure to plead. In his motion, he alleged that he had "diligently [pursued] a short sale throughout the term of the mediation," that "[t]he plaintiff will not be prejudiced, in any way, by the setting aside of the default, as mediation was just terminated a month ago," and that he had hired new counsel who "needs time to review the applicable complaint as well as interview the defendant to determine if he has any defenses . . . ." After a hearing, the court, on July 27, 2015, summarily denied the defendant's motion to set aside the default for failure to plead. The defendant does not challenge this decision on appeal.

On July 27, 2015, the court again rendered a judgment of foreclosure by sale (second foreclosure judgment), rather than the strict foreclosure that the plaintiff had requested in its second foreclosure motion. The defendant filed a motion to reargue/reconsider the court's denial of his motion to set aside the default for failure to plead, and a motion to reargue/reconsider the court's granting of the plaintiff's second foreclosure motion. After a hearing, the court denied both motions on September 28, 2015. This appeal followed.

On appeal, the parties do not dispute that the court erred in ordering the first foreclosure judgment on January 27, 2014. They disagree, however, on the effect that

the January 27, 2014 judgment had on the clerk's subsequent granting of a default for failure to plead and the second foreclosure judgment rendered on that default. The defendant argues that the court abused its discretion in granting the plaintiff's second foreclosure motion. Specifically, he argues that the default for failure to plead was void ab initio because it was entered after the first foreclosure motion had been granted erroneously, and, therefore, the second foreclosure motion was predicated on an invalid entry of default. In response, the plaintiff argues that the validity of the default for failure to plead was not affected by the erroneous granting of the first foreclosure motion, and, therefore, the second foreclosure judgment, the operative judgment, was predicated on a valid entry of default. We agree with the plaintiff.

We first set forth our standard of review. "The standard of review of a judgment of foreclosure by sale or by strict foreclosure is whether the trial court abused its discretion. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *People's United Bank* v. *Bok*, 143 Conn. App. 263, 267, 70 A.3d 1074 (2013).

We next review the relevant legal and procedural principles that govern our analysis. Practice Book § 17-20 (d) provides in relevant part that when a party is in default for failure to appear, "[i]f the defaulted party files an appearance in the action prior to the entry of judgment after default, the default shall automatically be set aside by operation of law. . . ." If a judgment is rendered "based on a default which had been set

aside automatically," the judgment is void ab initio and without legal effect. *Hartford Provision Co.* v. *Salvatore's Restaurant, Inc.*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-92-0509323-S (March 7, 1994) (11 Conn. L. Rptr. 252).

"General Statutes § 52-119 provides that [p]arties failing to plead according to the rules and orders of the court may be . . . defaulted . . . . Section 10-18 of our rules of practice essentially mirrors that language." (Internal quotation marks omitted.) *People's United Bank* v. *Bok*, supra, 143 Conn. App. 268. "[T]he effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . ." Practice Book § 17-33 (b). Practice Book § 17-33 (b) provides that when a party is in default for failure to plead, "the judicial authority, at or after the time it renders the default . . . may also render judgment in foreclosure cases . . . ." If the defaulted party has filed an answer before judgment is rendered, however, the default is automatically set aside by operation of law. Practice Book § 17-32 (b). If a motion for judgment already has been filed by the adverse party at the time the defaulted party files his answer, however, "the default may be set aside only by the judicial authority." Practice Book § 17-32 (b).

Applying these procedural rules to the present case, we conclude that the default for failure to plead was properly entered on January 29, 2014, and it was not affected by the court's rendering and then setting aside of the first judgment. As a consequence, the second motion for foreclosure was predicated on a valid entry of default against the defendant. In so determining, we look first at the plaintiff's motion for default for failure to appear, which it filed with its first foreclosure motion on December 13, 2013, over one month before the plaintiff filed the motion for default for failure to plead. Therefore, contrary to the defendant's assertion that

the first foreclosure judgment was predicated on the default for failure to *plead*, it would appear, instead, that the first foreclosure judgment was actually predicated on the default for failure to *appear*, which was granted by the clerk on December 24, 2013. Before the court rendered the judgment of foreclosure by sale, however, the defendant's counsel filed an appearance on January 6, 2014. Accordingly, the default for failure to appear was automatically set aside by operation of law, pursuant to Practice Book § 17-20 (d), rendering the first foreclosure judgment void ab initio, as it was predicated on that now cured default.

Therefore, the first foreclosure judgment, having no legal effect, had no legal bearing on the validity of the subsequent default for failure to plead, which was predicated on a valid motion filed by the plaintiff on January 22, 2014, and granted by the clerk on January 29, 2014. Because the defendant filed his answer after the plaintiff filed its second motion for a judgment of strict foreclosure, the default for failure to plead was not automatically set aside, pursuant to Practice Book § 17-32 (b). Therefore, the court had the discretion to deny the defendant's motion to set aside the default. Because the defendant does not challenge on appeal the court's denial of his motion to set aside the default, we need not determine whether the court correctly denied the motion.

The court, thereafter, rendered judgment of foreclosure by sale, on July 27, 2015, predicated on a valid entry of default for failure to plead, which was entered on January 29, 2014. Accordingly, the court did not abuse its discretion in rendering the judgment of foreclosure by sale against the defendant.

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

In this opinion the other judges concurred.

RAYMOND GODAIRE *v.* DEPARTMENT OF SOCIAL SERVICES ET AL.
(AC 39068)

Alvord, Sheldon and Norcott, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing his administrative appeal from the decision of the defendant Department of Social Services discontinuing the plaintiff's medical benefits under a medical assistance program for the aged, blind and disabled on the ground that he had not met the program's spenddown requirements. Prior to an administrative hearing on the matter, the Department of Social Services redetermined that the plaintiff, who was eighty-two years old at the time, was eligible for the program's benefits under a spenddown totaling $1929.72 for the period March, 2015, through August, 2015. The plaintiff previously was granted coverage under the program from August, 2014, to January, 2015, and certain dental work was to be included in that coverage. Because the dental work would not be completed until the second week of February, beyond the coverage date, a department employee extended the plaintiff's coverage under the program for one month to include February. At the hearing held on April 1, 2015, an eligibility specialist for the department told the hearing officer that the department's reinstatement of the plaintiff's benefits for one month had to be corrected, and following the hearing, a corrected eligibility document was submitted to the hearing officer indicating that the plaintiff's spenddown period would run from February, 2015, to July, 2015, rather than from March, 2015, to August, 2015. The hearing officer denied the plaintiff's appeal from the discontinuation of his medical benefits and concluded that the department correctly determined that the plaintiff had to meet a spenddown to receive the program's coverage beginning February, 2015. The plaintiff thereafter, pursuant to statute (§ 4-183), filed his administrative appeal from the hearing officer's decision in the Superior Court in the judicial district of New London. Subsequently, the trial court transferred the appeal to the Tax and Administrative Appeals Session in the judicial district of New Britain. The plaintiff, who resided in New London, filed an objection to the change of venue that was overruled by the trial court, which permitted the plaintiff to appear at the courthouse in New London and to participate in the hearing by way of closed-circuit television. The trial court thereafter dismissed the plaintiff's administrative appeal, and this appeal followed. The plaintiff claimed that the trial court had no authority to transfer his appeal from New London to New Britain, and that the court should have sustained his appeal, pursuant to § 4-183 (j), because the hearing officer's decision was made upon unlawful procedure in that it

was made on the basis of records that were changed by the department to reflect a redetermined spenddown period beginning in February, 2015, rather than March, 2015, which prevented the plaintiff from receiving benefits for the dental procedures that he needed in February, 2015. *Held*:

1. The plaintiff's claim that he was denied access to the court due to the change of venue was unavailing; the trial court properly determined that there was authority for the transfer pursuant to statute (§ 51-347b [a]), which permits transfers when required for the efficient operation of the courts and to ensure the prompt and proper administration of justice, and the plaintiff having been afforded his due process rights by being allowed to participate in the hearing via closed-circuit television, he was not denied access to the courts and he could not demonstrate any prejudice to his rights as a result of the transfer of his administrative appeal.
2. Under the circumstances of the present case, the hearing officer's decision to discontinue the plaintiff's medical benefits was made upon unlawful procedure, as the plaintiff did not have a meaningful opportunity to respond to the "corrected" evidence presented by the department at the end of the April 1, 2015 hearing, and, therefore, substantial rights of the plaintiff were prejudiced: the evidence in the administrative record showed that the department had advised the plaintiff that his new coverage period for the program's benefits would run from March, 2015, through August, 2015, that the plaintiff's dental work begun in the prior coverage period was covered through February, 2015, because he had satisfied the spenddown requirements for that period, that an employee of the department had extended the plaintiff's coverage through February so that he could have his dental work paid for and completed, and that, on the basis of the documents existing at the time that he appeared at the April 1, 2015 hearing, the plaintiff was operating under the reasonable belief that he had satisfied the program's prior spenddown requirements, was covered through February, and did not need to present any additional bills for his dental work; moreover, the department's retroactive change to the eligibility period resulted in the denial of coverage for the plaintiff's dental work, the plaintiff having been informed by the department that his eligibility period had been extended through February, 2015, he detrimentally relied on such information to not meet the corrected deadline of January 31 for obtaining and presenting a bill for the dental work that had already begun that would have entitled him to payment for the completion of such work, and therefore, his preexisting eligibility through February, 2015, was required under the doctrine of equitable tolling, as he should not have been penalized for failing to timely obtain and produce the dental bill when he could have done so if the department had properly advised him before January 31 that the prior eligibility period would not in fact be extended.

Argued April 18—officially released June 21, 2017*

* June 21, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the named defendant discontinuing certain of the plaintiff's medical benefits, brought to the Superior Court in the judicial district of New London, and transferred to the judicial district of New Britain; thereafter, the matter was tried to the court, *Schuman*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Reversed; judgment directed.*

Raymond Godaire, self-represented, the appellant (plaintiff).

Tanya Feliciano DeMattia, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellees (defendants).

Opinion

ALVORD, J. The self-represented plaintiff, Raymond Godaire, appeals from the trial court's dismissal of his appeal from the final decision of the defendant the Department of Social Services (department).[1] The decision appealed from discontinued the plaintiff's benefits under the department's Medical Assistance to the Aged, Blind, and Disabled program (program or Husky C) on the ground that he had not met the program's spend-down requirements. On appeal, the plaintiff claims that the court improperly (1) concluded that the transfer of his administrative appeal from the judicial district of New London to the judicial district of New Britain did not violate his due process rights by denying him reasonable access to the courts, and (2) failed to conclude that his appeal should be sustained because the hearing officer's decision was based on "faulty records" and

[1] Gary Sardo, an eligibility service specialist for the department, was also named as a defendant in this appeal, and we refer to him by name.

"records changed by the department . . . ." We reverse the judgment of the trial court for the reason that substantial rights of the plaintiff have been prejudiced because the hearing officer's decision was made upon unlawful procedure. See General Statutes § 4-183 (j).[2]

The following facts, as found by the hearing officer or as undisputed in the record, and procedural history are relevant to the resolution of the plaintiff's claims. By notice dated January 28, 2015, the department advised the plaintiff that his medical assistance under Husky C was to be discontinued on January 31, 2015, due to his failure to "complete the review process." The plaintiff, aged eighty-two at that time, requested an administrative hearing to contest the department's action. On February 2, 2015, prior to the scheduled hearing, the department completed the plaintiff's "redetermination" and concluded that he was eligible for the program's benefits "under a spenddown totaling $1929.72 for the period March, 2015 through August, 2015."[3] The plaintiff was sent notice of that redetermination.

The administrative hearing was held before a hearing officer on April 1, 2015. At the hearing, the plaintiff

[2] General Statutes § 4-183 (j) provides: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) *made upon unlawful procedure*; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings. For purposes of this section, a remand is a final judgment." (Emphasis added.)

[3] Eligibility for the program's benefits is redetermined by the department every six months.

represented that he had been in the process of completing some dental work when he received the department's notice that he was required to meet a spenddown requirement before the dental work could continue. According to the plaintiff, the department had previously advised his dentist that it would pay for the making of his false teeth. When the plaintiff reached the time for his last appointment, which had been scheduled for the first or second week of February, 2015, the dentist was notified by the department that the plaintiff's benefits had been discontinued. As a result of this notification, the plaintiff's appointment was canceled and all work on the false teeth ceased.

The department's Eligibility Services Specialist, Gary Sardo, read the Medicaid hearing summary into the record at the April 1, 2015 hearing. The summary sets forth the issue as follows: "[The plaintiff] receives $1182 monthly in [Social Security Administration] benefits. His income is in excess of the monthly gross limit for S99 Medicaid eligibility. [The plaintiff's] *period of eligibility runs from March 1, 2015, to August 31, 2015*. His current spenddown amount is $1929.72. [The plaintiff] does not agree with the fact that he is on a spenddown." (Emphasis added.) Also part of the administrative record was a notice for spenddown, dated March 30, 2015, which advised the plaintiff: "Your income is too high for you to receive medical assistance now. However, *you may still receive medical assistance from March, 2015, to August, 2015*. To be eligible, you must show us that you have medical bills that you owe or have recently paid. When your bills total $1929.72, your eligibility for medical assistance will begin." (Emphasis added.)

The plaintiff told the hearing officer that he had submitted the requisite medical bills for the period from August, 2014, through January 31, 2015. As acknowledged by Sardo at the hearing, the department employee

who assisted the plaintiff had "reinstated [the benefits] for one month, February [2015] . . . ." A letter from the department to the plaintiff dated February 18, 2015, titled "Appeal Resolution Notice," appears to confirm this statement. Referring to the discontinuance of the program's benefits, the letter advised: "Our records show that since the time you requested this hearing, the agency has taken the following action to address the above mentioned matter that you have appealed: Benefits reinstated." Despite these documents indicating that the plaintiff's benefits had been reinstated for the month of February, 2015, and that the new redetermination period would run from March, 2015, through August, 2015, Sardo told the hearing officer that the department's reinstatement of the plaintiff's benefits for one month "would need to be corrected." The hearing officer inquired: "Then let me ask, if the department should have begun the spenddown February 1, why wasn't any action taken to correct that prior to today's hearing?" Sardo responded: "I just noticed it."

Later during the hearing, the hearing officer asked Sardo if he would "be able to pull off the Connect system [the plaintiff's] actual redetermination and any supporting documents that he submitted with that." Sardo responded that he would. At the very end of the hearing, the hearing officer stated: "And then also make sure, Mr. Sardo, since you'll be submitting that redetermination and supporting documents along with the shelter screen and the . . . fee screen, that you make copies to send to Mr. Sardo [sic] as well, so that he knows what I'm looking at as well." Sardo responded that he would get the requested documents to the hearing officer by the end of the day. Following the hearing, a "corrected" financial eligibility screen print was submitted to the hearing officer that indicated that the plaintiff's redetermination period "begin date" was February, 2015, and "end date" was July, 2015. In the hearing officer's notice of decision dated April 28, 2015, she

made the following finding of fact: "On April 1, 2015, the department corrected the spenddown period from March, 2015, through August, 2015, to February, 2015, through July, 2015. No change made to spenddown amount." The hearing officer denied the plaintiff's appeal, concluding that "the department correctly determined [that the plaintiff] must meet a spenddown to receive [the program's] coverage beginning February, 2015."

On June 11, 2015, the plaintiff, who resides in New London, filed this administrative appeal from the hearing officer's decision in the Superior Court for the judicial district of New London, pursuant to General Statutes § 4-183. The court transferred the appeal to the Tax and Administrative Appeals Session in the judicial district of New Britain. The plaintiff filed an objection to the change of venue on June 25, 2015, which was overruled by the court on June 26, 2015. Oral argument on the merits of the appeal was scheduled for March 11, 2016. The court permitted the plaintiff to appear at the courthouse in New London and to participate in the hearing by way of closed-circuit television.

In his administrative appeal, the plaintiff alleged, inter alia, that (1) "on February 2, 2015, [the] Husky C spenddown extended through [the] last day of February, 2015," (2) "on April 1, 2015, [the] 'Hearing Summary' [provided that] . . . Husky C extended through [the] last day of February, 2015," (3) "the hearing officer and [Sardo] . . . opened the hearing after [the] plaintiff was gone on April 1, 2015, to change [the] plaintiff's Husky C eligibility date . . . to make the decision to discontinue [the] plaintiff's Husky C medical [benefits] within the right time frame, thus denying [the] plaintiff coverage for his false teeth," (4) "[General Statutes] § 4-183 . . . permits modification or reversal of an agency's decision if substantial rights of the appellant

have been prejudiced because the administrative findings . . . conclusions, or decisions are . . . made upon unlawful procedure," (5) the department "canceled payment for [the] plaintiff's false teeth on [January 31, 2015], and this date would not hold up if [the] plaintiff had coverage [until] the end of February, 2015," (6) "the office manager [at New London Dental Care] called [the department] and was told [that the department] would pay for the false teeth. Work was begun to make [the] plaintiff's false teeth. [The plaintiff's] last appointment before [he] received [his] false teeth fell on [February 9, 2015]. [The plaintiff] called [the department] and told [it that] the appointment fell on a date beyond [his] coverage date. [The department] said the date would be changed so [the plaintiff] could get [his] false teeth, from [August, 2014], to [January 31, 2015], changed to [August, 2014], to [February, 2015]," and (7) "the hearing officer's decision was made under unlawful procedures . . . ." (Citations omitted; internal quotation marks omitted.)

Prior to the March 11, 2016 hearing before the court, the plaintiff filed a prehearing brief in which he set forth his claims and arguments. In the section titled "Statement of the Case," the plaintiff made the following representations: "[The] plaintiff was granted Husky C . . . coverage from August, 2014, to January, 2015. [The] plaintiff was allowed to have his upper teeth pulled with the understanding that New London Dental [Care] would make up an upper plate to replace the teeth which were removed. [The department] notified New London Dental [Care] that [the department] would pay for the replacement plate. The making of the false teeth went beyond the January coverage [the] plaintiff had with his Husky C . . . August, 2014, to January, 2015. The teeth were to be completed the second week of February, 2015. [The department's] worker extended [the] plaintiff's Husky C . . . for one month so [the]

plaintiff would receive his teeth. Coverage included February, 2015. [The department] now states no extension was granted, and if one was, it was a mistake." In support of his argument that he was covered through February, 2015, the plaintiff referred to the department's letter to him dated February 2, 2015, which stated that new coverage would start in March, 2015, and run through August, 2015, if the plaintiff met certain spenddown requirements. Additionally, the plaintiff referred to the hearing summary, which had been sent to him by Sardo and had been cosigned by Sardo's supervisor, which stated that the plaintiff's new coverage period would be from March 1, 2015, to August 31, 2015. That hearing summary was read into the administrative record at the April 1, 2015 hearing. The plaintiff argued that both of those documents demonstrated that February, 2015, was covered in the prior spenddown period and that he had satisfied those requirements.

In his prehearing brief, the plaintiff also referred to the hearing officer's action in allowing the department to change the dates of the redetermination period. According to the plaintiff: "[The] plaintiff was previously covered by Husky C . . . from August, 2014, through February, 2015. . . . [The action] change[d] that coverage back to August, 2014, to January, 2015, denying [the] plaintiff coverage for the completion of his false teeth and conform[ing] to the decision of the hearing officer." The documents in the administrative record support these representations regarding the change in coverage periods.

The department, in its prehearing brief filed on January 29, 2016, acknowledged that "the administrative record . . . shows that on February 2, 2015, [the department] completed the plaintiff's recertification for [the program] and determined that he was eligible for [the program's benefits], subject to a spenddown totaling $1929.72, for the time period of *March, 2015*,

through August, 2015. . . . [The department] notified the plaintiff that he would need to submit medical bills totaling $1929.72 to meet the spenddown requirements in order to become eligible for [the program's] coverage for the *March, 2015, [to] August, 2015 period*." (Citations omitted; emphasis added.) The department further acknowledged that the period was changed at the April 1, 2015 hearing: "At the administrative hearing, [the department] determined that its determination of a spenddown period of March [to] August, 2015, as noted in the [notice from the department to the plaintiff dated January 28, 2015] was incorrect because the prior spenddown period had been from August, 2014, [to] January, 2015. . . . *The spenddown period was corrected to February, 2015, [to] July, 2015*, although there was no change to the $1929.72 spenddown amount." (Citations omitted; emphasis added.) In a footnote in its prehearing brief, the department stated: "It appears that the plaintiff considers [the] correction of this error (correcting the beginning of the spenddown period from March, 2015, to February, 2015) to be the revocation of an 'extension' of his prior six month eligibility period."

The teleconference hearing before the court was held on March 11, 2016. At that time, the plaintiff read excerpts from the transcript of the April 1, 2015 hearing before the hearing officer. He referred to the hearing officer's question: "Okay. So is [the plaintiff] under a spenddown for the month of February as well?" Sardo responded: "He's on a one month spenddown and that's incorrect."[4] The plaintiff argued to the court: "[The department] also stated that [it] didn't know the spenddown for February was incorrect until the hearing of April 1. So how could [the department] possibly deny

[4] Sardo went on to explain: "It should be a six month spenddown but the worker who worked on it did a reinstatement instead of a regranting [of] the case."

Husky [C] coverage in February when [the department] didn't know it was an error?" The plaintiff also told the court that the documents in the administrative record showed that his income was too high, but that he still might receive benefits from March, 2015 through August, 2015: "The [month of] February was covered by the previous spenddown. Other than that, [the plaintiff] would have had February, 2015, to July, 2015."

Additionally, the plaintiff argued to the court: "I'm not a mind reader. I was covered in February by [the department's] own documents and [it] told me I was covered. [The department] told me [and] the dentist [that it] would pay [the bill]. Now, [the department] declares a ruling [that it is] no longer going to pay for it." The attorney for the department responded to the plaintiff's claim pertaining to the change in the coverage period as follows: "[The court is] correct in noting that the—I believe it was a typo, was noticed at the hearing. . . . [T]he record was held open for additional documents while this correction was made, so [the plaintiff] was aware at the time. I don't believe he presented any evidence at the hearing about these specific dental bills."

The court issued its memorandum of decision on March 14, 2016. The court first addressed the plaintiff's claim that the court had no authority to transfer his administrative appeal from New London to New Britain and concluded that General Statutes § 51-347b (a)[5]

[5] General Statutes § 51-347b (a) provides in relevant part: "Any action or the trial of any issue or issues therein may be transferred, by order of the court on its own motion or on the granting of a motion of any of the parties, or by agreement of the parties, from the superior court for one judicial district to the superior court in another court location within the same district or to a superior court location for any other judicial district, upon notice by the clerk to the parties after the order of the court . . . . The Chief Court Administrator or any judge designated by the Chief Court Administrator to act on behalf of the Chief Court Administrator under this section may, on motion of the Chief Court Administrator or any such judge, when required for the efficient operation of the courts and to insure the prompt and proper administration of justice, order like transfers."

authorized such a transfer. The court referred to two standing orders that permit the transfer of Uniform Administrative Procedure Act appeals from the court where initially filed to the Tax and Administrative Appeals Session at the judicial district of New Britain. Furthermore, the court concluded that the plaintiff could not demonstrate that substantial rights of his had been prejudiced by the transfer because the plaintiff was permitted to appear in the courthouse in New London and to participate in the hearing by way of a closed-circuit television.

The court next addressed the plaintiff's claim that the department "changed the administrative record from one reflecting a spenddown period beginning in March, 2015, to one beginning in February, 2015," which "prevented him from receiving benefits for dental procedures that he needed in February, 2015." The court rejected the plaintiff's claim: "At the end of the hearing, the hearing officer reiterated that the department would submit 'that redetermination' and the department stated that it could do so 'by the end of today.' " The court noted that exhibit 7 in the administrative record was the corrected redetermination document and that the document had been submitted by the department "on April 1 [2015], after the hearing, just as it promised to do at the hearing itself." The court determined that "[t]he exhibit merely confirmed the department's representations at the hearing that it had corrected the plaintiff's records so that the spenddown period would begin in February rather than March, 2015. . . . The plaintiff was present at the hearing and never voiced any objection as the hearing officer and the department discussed submitting the supplemental exhibit." Accordingly, the court concluded that "there is no merit to the plaintiff's complaint." The court affirmed the department's decision and dismissed the plaintiff's administrative appeal. This appeal followed.

Even though we are reversing the judgment on another ground, we address the plaintiff's first claim that he was denied access to the courts, because his appeal was transferred from New London to New Britain, for the reason that it is likely to arise in any subsequent proceedings. See *State* v. *A. M.*, 156 Conn. App. 138, 156–57, 111 A.3d 974 (2015), aff'd, 324 Conn. 190, 152 A.3d 49 (2016). The plaintiff's argument merits little discussion. We agree with the trial court that there is statutory authority for the transfer; General Statutes § 51-347b (a); and that the plaintiff was afforded his due process rights by being allowed to participate in the hearing via closed-circuit television. The plaintiff was not denied access to the courts, and he cannot demonstrate any prejudice to his rights as a result of the transfer of his administrative appeal.

The plaintiff's next claim is that the trial court should have sustained his appeal because the hearing officer's decision was based on "faulty records" and "records changed by the department . . . ." The plaintiff argues that the decision violated his rights because, inter alia, it was "made upon unlawful procedure . . . ." He argues: "The department and its attorney altered documents to fit the hearing officer's decision. The hearing officer was a party to the altering of [the] plaintiff's Husky C . . . coverage, changing it from coverage for the month of February, 2015, to no coverage, by their change to January, 2015." We agree that substantial rights of the plaintiff have been prejudiced because the hearing officer's decision was made upon unlawful procedure. See General Statutes § 4-183 (j).

We begin with the applicable standard of review. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether

it comports with the [UAPA]." (Internal quotation marks omitted.) *Dickman* v. *Office of State Ethics, Citizen's Ethics Advisory Board*, 140 Conn. App. 754, 766, 60 A.3d 297, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013). "Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) Id., 767.

"General Statutes § 4-183 (a) provides an avenue for any person, aggrieved by a final administrative decision, to appeal to the Superior Court." *Searles* v. *Dept. of Social Services*, 96 Conn. App. 511, 513, 900 A.2d 598 (2006). Section 4-183 (j) provides, in relevant part, that "[t]he court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . made upon unlawful procedure . . . ."

We note that there is a paucity of case law that discusses the issue of whether the decision of an administrative agency is improper because it was made upon unlawful procedure. Nevertheless, we find the case of *Henderson* v. *Dept. of Motor Vehicles*, 202 Conn. 453, 521 A.2d 1040 (1987), to be instructive. In *Henderson*, the plaintiff appealed from a decision of the adjudication unit of the Department of Motor Vehicles that suspended his license because of his involvement in a fatal accident. Relying on General Statutes (Rev. to 1987) § 4-183 (g) of the UAPA, subsequently amended and renumbered as § 4-183 (j), the plaintiff argued that the agency's decision had been made upon unlawful procedure because it had received an ex parte communication. Id., 454–58. Although the issue certified for appeal

was whether the plaintiff had the burden of proving prejudice to substantial rights under those circumstances, our Supreme Court nevertheless recognized that "an ex parte communication by an adjudicator concerning a case before him would indicate that the decision had been 'made upon unlawful procedure,' a ground for reversal or modification specifically mentioned in § 4-183 (g) (3)." Id., 458. We conclude that the circumstances of this case are similar to those in *Henderson*, in that the plaintiff did not have a meaningful opportunity to respond to the "corrected" evidence presented by the department at the end of the April 1, 2015 hearing.

The evidence in the administrative record supports the plaintiff's claim that the department had advised him that his new coverage period for the program's benefits would run from March, 2015, through August, 2015, and that his dental work begun in the prior period was covered through February, 2015, because he had satisfied the spenddown requirements for that period. The evidence further supports the plaintiff's claim that he proceeded at the April 1, 2015 hearing under those reasonable assumptions as to his satisfaction of the program's prior spenddown requirements.

The plaintiff consistently and persistently has claimed that an employee of the department extended his coverage through February, 2015, so that he could have his dental work paid for and completed. There is evidence in the administrative record to support that claim and, in fact, the department acknowledged that it appears that an extension had been given, but that it was "incorrect" and needed to be "corrected." The plaintiff, however, on the basis of the documents existing at the time that he appeared at the April 1, 2015 hearing, was operating under the reasonable belief that he was covered through February and, therefore, did not need to present any additional bills for his dental

work. There was no reason for him to have presented the bill from New London Dental Care for the completion of his false teeth because (1) he had been advised when the extension had been granted that the work to be completed in February would be covered by the program, (2) his documents from the department provided that he was covered through February, 2015, and (3) his dental work was to be completed in the second week in February, and he had met the requirements for coverage for the previous period. He already had had his upper teeth removed in preparation for the upper dental plate, and was about to attend his last dental appointment when he was told that the work was no longer covered. At the April 1, 2015 hearing, he was told that the department's documents were incorrect and that the documents needed to be changed to reflect that he was not covered for work completed in February, 2015. The hearing officer allowed the submission of the "corrected document," which had the effect of excluding him from coverage, after the hearing.[6]

Under the circumstances of this case, we conclude that the decision was made upon unlawful procedure. Although the plaintiff has not used the term "equitable tolling" in his administrative appeal, in his briefs or in his arguments to the trial court or this court, the substance of his claim falls within the parameters of that doctrine. He has argued, with support from the record, that the department retroactively changed the

[6] We do not believe that the plaintiff's failure to object at the hearing warrants a different conclusion. After reading the transcript, it is not at all clear exactly what was going to be submitted later that day to the hearing officer by the department. The plaintiff had also challenged the department's determination with respect to his receipt of food stamps, which is not at issue in this appeal, and the plaintiff reasonably could have been confused. We accord the plaintiff "the leniency traditionally afforded to inexperienced pro se parties . . . ." (Internal quotation marks omitted.) *Bridgeport Dental, LLC* v. *Commissioner of Social Services*, 165 Conn. App. 642, 657, 140 A.3d 263, cert. denied, 322 Conn. 908, 140 A.3d 221 (2016).

eligibility period, thereby resulting in the denial of coverage for the remainder of his dental work. Having been informed by the department that his eligibility period had been extended through February, 2015, the plaintiff detrimentally relied on such information to not meet the corrected deadline of January 31, 2015, for obtaining and presenting a bill from New London Dental Care for work that had already begun that would have entitled him to payment for the completion of such work. "We treat 'equitable tolling' as a doctrine inclusive of waiver, consent, or estoppel, that is, as an equitable principle to excuse untimeliness." *Williams* v. *Commission on Human Rights & Opportunities*, 67 Conn. App. 316, 320 n.9, 786 A.2d 1283 (2001). The plaintiff should not be penalized for failing to timely obtain and produce the dental bill when he could have done so if the department had properly advised him before January 31, 2015, that the prior eligibility period would not in fact be extended. The plaintiff's preexisting eligibility through February, 2015, is required under the equitable tolling doctrine, and the department is ordered to proceed in accordance with this opinion.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT JOHN PURCELL
(AC 38206)

Alvord, Keller and Dennis, Js.

Syllabus

The defendant, who had been convicted of three counts risk of injury to a child in connection with four separate incidents, appealed to this court, claiming, inter alia, that the trial court abused its discretion when it

denied his motion for a mistrial after the mother of the minor victim testified that the victim had been diagnosed with post-traumatic stress disorder. The defendant also claimed that the court improperly denied his motion to suppress certain statements that he had made to two police officers during a custodial interrogation. After the officers advised the defendant of his constitutional rights, he told them that he had consulted with an attorney, who advised him not to talk to them about anything that could be misconstrued as inappropriate or about other matters pertaining to the victim's allegations. The defendant expressed to the officers misgivings about his attorney's advice, but continued talking with them and thereafter stated, inter alia, "See, if my lawyer was here, I'd . . . we could talk. That's, you know, that's it," and, "I'm supposed to have my lawyer here. You know that." On appeal, the defendant claimed that the officers violated his federal and state constitutional rights when they failed to cease questioning him because the statements at issue constituted clear and unequivocal invocations of his right to counsel. The defendant further claimed that even if the statements were ambiguous or equivocal, the officers were required under the article first, § 8, of the state constitution to cease questioning him and to clarify his statements. The defendant also asserted that the harmfulness of the mother's testimony about the victim's diagnosis could not be cured by the instruction that the court gave to the jury immediately after the testimony because the diagnosis related to the victim's credibility, which was crucial to the state's case in light of the lack of physical evidence that the defendant sexually assaulted the victim. *Held*:

1. This court found unavailing the defendant's claim that the trial court abused its discretion in denying his motion for a mistrial, which was based on his assertion that the jury's verdict was substantially swayed by testimony from the victim's mother that the victim had been diagnosed with post-traumatic stress disorder and that the testimony about the diagnosis constituted harmful error that could not be cured by the trial court's instruction to the jury immediately thereafter: the diagnosis of post-traumatic stress disorder was mentioned only during the mother's testimony, the court instructed the jury that the diagnosis had nothing to do with the evidence, and that the jury should ignore and not make any decision on the basis of that testimony, and the defendant offered no reason why that instruction was insufficient to break the link between the diagnosis and the charges against the defendant, and to prevent the jury from considering the isolated statement of the victim's mother during its deliberations; moreover, notwithstanding the defendant's assertion that the testimony constituted an improper endorsement of both his guilt and the victim's credibility, the jury's requests during deliberations to hear certain statements and to rehear portions of the victim's testimony suggested that although the question of the victim's credibility was a difficult one, the jury's finding that the defendant was not guilty of sexual assault with respect to any of the alleged incidents

and was not guilty of an additional count of risk of injury to a child as charged indicated that the jury did not find all of the victim's testimony to be credible.

2. The trial court properly denied the defendant's motion to suppress the statements that he made to the police officers during their custodial interrogation of him, as he did not clearly and unequivocally invoke his right to counsel and, thus, the officers were not required to cease questioning him:

a. Invocation of one's right to counsel requires, at a minimum, some statement that reasonably can be construed as an expression of a desire for the assistance of counsel, and this court concluded that a reasonable police officer under the circumstances here would not have understood as a clear and unequivocal request for counsel the defendant's statements, "See, if my lawyer was here, I'd . . . we could talk. That's, you know, that's it," and, "I'm supposed to have my lawyer here. You know that"; although the defendant expressed to the officers misgivings about his attorney's advice, he continued talking with them, and the defendant's references to counsel might have been an attempt to persuade the officers to limit the interview's scope, a reiteration of his attorney's advice not to speak about the incidents at issue without counsel present, a request for an attorney or an expression that it was prudent to have an attorney present, rather than a request by the defendant that he actually wanted to speak to an attorney before proceeding with the interview.

b. Contrary to the defendant's unpreserved claim that article first, § 8, of the state constitution provided greater protection than does the federal constitution by requiring that the police officers cease questioning him to clarify any ambiguous or equivocal references to counsel that he made during the custodial interrogation, a review of this state's constitutional language, precedents and history did not disclose any meaningful difference between the state and federal constitutional protections against compulsory self-incrimination, courts in the majority of other states have concluded that their state constitutions do not afford greater protections in this context than does the federal constitution, the reasoning of other states' courts that have found greater protections in their state constitutions was unpersuasive, and the defendant's policy arguments were insufficient to justify any divergence from this state's Supreme Court precedent that the self-incrimination and due process clauses of article first, § 8, are coextensive with their federal counterparts and, therefore, this court declined to adopt a new state constitutional standard with respect to ambiguous or equivocal references to counsel.

Argued April 5—officially released July 4, 2017

Procedural History

Substitute information charging the defendant with four counts of the crime of risk of injury to a child,

two counts of the crime of sexual assault in the second degree and with the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of New Haven, where the court, *O'Keefe*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; subsequently, the court denied the defendant's motion for a mistrial; verdict and judgment of guilty of three counts of risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Seth R. Garbarsky*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Robert John Purcell, appeals from the judgment of the trial court, rendered after a jury trial, of conviction of one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] The jury found the defendant not guilty of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), and one count of risk of injury to a child in violation of § 53-21 (a) (2). On appeal, the defendant raises various claims pertaining to testimony by the

[1] General Statutes § 53-21 provides in relevant part: "(a) Any person who (1) wilfully . . . causes or permits any child under the age of sixteen years to be placed in such a situation that . . . the morals of such child are likely to be impaired . . . or (2) has contact with the intimate parts . . . of a child under the age of sixteen years . . . in a sexual and indecent manner likely to impair the health or morals of such child . . . ."

"Intimate parts" means, in relevant part, "the genital area . . . ." General Statutes § 53a-65 (8).

victim's mother[2] that the victim had been diagnosed with post-traumatic stress disorder (PTSD testimony) and the trial court's denial of his motion to suppress statements that he made to the police during a custodial interrogation. With respect to the PTSD testimony, the defendant claims that allowing the victim's mother to testify about his medical conditions constituted a harmful evidentiary error, which was based on the PTSD testimony. With respect to his motion to suppress, the defendant claims that the interrogating detectives violated *Edwards* v. *Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), by continuing to question him after he clearly and unambiguously invoked his right to counsel. Alternatively, the defendant argues that, even if his invocations were ambiguous or equivocal, and therefore ineffective under *Edwards*, article first, § 8, of the Connecticut constitution required the interrogating detectives to clarify his statements before questioning him further. We reject the defendant's claims and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In 2002, the victim's parents adopted the victim, who had several medical conditions, including autism.[3] The defendant is the victim's uncle by marriage. The victim and his family had only a casual relationship with the defendant, whom they saw on average three to five times a year for holidays and family events. The victim initially viewed the defendant as "just an ordinary uncle," but, in 2010, when the victim was twelve and the defendant was seventy, the defendant began engaging in sexually inappropriate behavior with the victim.

[2] In accordance with our policy of protecting the privacy interests of the victims of 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.

[3] The victim's mother testified that he is in the middle of the autism scale and considered high functioning.

Three incidents in particular served as the basis for the defendant's conviction. In August, 2010, the victim, the defendant, and other family members went to lunch at a restaurant. After lunch, the defendant and the victim went to use the bathroom. While in the bathroom, the defendant began rubbing his penis and asked the victim to rub it. The victim refused, left the bathroom, and returned to the table where his family was sitting. In December, 2011, the victim and his father went to the defendant's house to visit his grandparents, who lived with the defendant and his wife. While the defendant and the victim's father spoke to the victim's grandfather in the basement apartment, the victim went upstairs to find the defendant's cats. The victim found one of the cats in the defendant's bedroom and began playing with it on the defendant's bed. Sometime thereafter, the defendant came into the bedroom and had contact with the victim's penis in a sexual and indecent manner. Finally, in August, 2013, the defendant and other members of the victim's family went to the victim's middle school to watch him perform in a school play. After the play, the defendant went to use the school bathroom, and the victim followed him inside so that he could remove his makeup. While in the bathroom, the defendant had contact with the victim's penis in a sexual and indecent manner.

In September, 2013, the victim's mother found pictures on the victim's Nintendo DS game console that concerned her, including pictures of the clothed stomachs of the defendant and the victim's father and two pictures of circumcised penises.[4] The victim's mother deleted the penis pictures. Later, she told the victim's father about the pictures she found and asked him to talk to the victim about them. Two weeks later, on Saturday, September 28, 2013, the victim's father

[4] The defendant is not circumcised.

engaged in a discussion with the victim about his sexuality.[5] The victim's father asked if the victim liked girls or boys, to which the victim replied that he liked girls. The victim's father explained that, in the eyes of the Catholic Church, it is bad and a sin to like boys and that sex should occur between a man and a woman. The victim then acknowledged that he had started to like and think about boys but maintained, "[i]t's not my fault." The victim told his father that the defendant "has been having sex with me."

The following Monday, September 30, 2013, after the victim left for school, the victim's parents went to the police station to report his allegation. While at the police station, the victim's parents received a phone call from the victim's school social worker informing them that the victim told him that his "Uncle Robert" was having sex with him.

The defendant was subsequently arrested on the basis of the victim's allegations. The operative long form information charged the defendant with seven offenses in connection with four separate incidents. Relative to the August, 2010 incident, the defendant was charged with risk of injury to a child in violation of § 53-21 (a) (1). Relative to the December, 2011 incident, the defendant was charged with sexual assault in the first degree in violation of § 53a-70 (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2). Relative to an incident that allegedly occurred in April, 2012, the defendant was charged with sexual assault in the second degree in violation of § 53a-71 (a) (1) and risk of

[5] At trial, the victim's father maintained that he spoke to the victim about his sexuality because his wife found pictures of penises on the victim's Nintendo DS. In his statement to the police on September 30, 2013, however, he stated that he spoke to the victim about his sexuality because his wife found pictures of his stomach on the victim's Nintendo DS and the victim was always rubbing and touching his stomach. The victim's father did not mention in his police statement that his wife had found pictures of penises on the victim's Nintendo DS.

injury to a child in violation of § 53-21 (a) (2). Finally, relative to the August, 2013 incident, the defendant was charged with 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).

After a trial, a jury found the defendant guilty of the risk of injury counts with respect to the August, 2011, the December, 2011, and the August, 2013 incidents. The jury found the defendant not guilty of all counts of sexual assault and not guilty of the risk of injury count relative to the alleged incident in April, 2012. The defendant was sentenced to a total effective term of sixteen years of imprisonment, execution suspended after nine years, and ten years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

We begin with the defendant's claims pertaining to the PTSD testimony. The defendant claims that the PTSD testimony was hearsay and constituted a harmful nonconstitutional evidentiary error, and, therefore, the court abused its discretion by denying his motion for a mistrial. In particular, the defendant argues that the PTSD testimony "constituted an [improper] endorsement or confirmation of [the victim's] credibility—and the defendant's guilt," and improperly embraced an ultimate issue in the case, i.e., whether some or all of the events the victim described actually happened, thereby causing his PTSD. The defendant argues that the prejudicial nature of this evidence was beyond the curative powers of the court because the PTSD diagnosis related to the victim's credibility, which was crucial to a successful prosecution because the state's case lacked physical evidence of sexual assault and portions of the victim's testimony "were highly implausible." The state responds that the court's "clear and forceful curative instructions . . . expressly broke any link between the

PTSD diagnosis and the charges for which the defendant was on trial . . . and expressly removed [the PTSD] testimony . . . from evidence entirely." As a result, the state argues, the PTSD testimony did not constitute a harmful evidentiary error and the court did not abuse its discretion by denying the defendant's motion for a mistrial. We agree with the state.

The following additional facts are relevant to these claims. The victim's mother was the first witness as the trial commenced. She began her testimony by providing background on the victim and his medical conditions, including his autism. During a colloquy with the prosecutor about other medical conditions that the victim had been diagnosed with, defense counsel objected on the ground of hearsay. The court overruled the objection but admonished the victim's mother to limit her testimony to her understanding of her son's medical conditions and not to testify about what someone else told her. After further discussion about the victim's medical conditions, the following colloquy occurred:

"[The Prosecutor]: I think we're missing one or two other conditions, if the—if the court pleases.

"The Court: Okay. That's the question then. What other conditions?

"[The Prosecutor]: Fair enough.

"The Court: Yeah. Go ahead.

"[The Victim's Mother]: Okay. *He also suffers from post-traumatic stress disorder, which was a later diagnosis after why we're here.* I'm trying to think what else was on there. I think that's—

"[The Prosecutor]: Well, let me ask you this.

"[The Victim's Mother]: Yeah. Okay.

"[The Prosecutor]: Does he take any meds currently?

"[The Victim's Mother]: Yes, he does.

"[The Prosecutor]: Okay. And what type of meds does he take?

"[The Victim's Mother]: I'm sorry. He takes Concerta for [attention deficit hyperactivity disorder]. He—

"[The Prosecutor]: Is that one of the—

"The Court: The jury can be excused for a minute." (Emphasis added.)

Thereafter, the jury exited the courtroom, and the court excused the victim's mother from the witness stand. The court then engaged in a lengthy discussion with counsel about how to address the PTSD testimony. The court observed: "PTSD is somebody else's opinion that—that a person has suffered a stressful event and is reacting to it. So, it's almost a comment on circumstantial evidence of the credibility of the [victim]." Defense counsel explained that he had never seen any evidence that the victim had been diagnosed with PTSD and opined: "I don't know how we cure that at this point." Although the prosecutor acknowledged that he was aware of the PTSD diagnosis prior to the PTSD testimony, he maintained that he did not know that the mother would testify about it.[6] The prosecutor further disputed the court's suggestion that the PTSD testimony constituted circumstantial evidence of the credibility of the victim because it was his understanding that the victim was prescribed medication for PTSD based on his symptoms, not based on a discussion with someone about a traumatic event. The court explained: "As soon as I heard that, I interpreted it—that, as someone

[6] We observe, without further comment, that the victim's mother worked for seven years as a police officer in New Haven and approximately twenty-two years in adult probation. She further acknowledged at trial that, in that capacity, she had testified "countless" times and was comfortable in a courtroom setting.

treated the [victim]. She said it was related to this event. They determined that it was a valid event and diagnosed him with a reaction to this event. That's my—my interpretation of when a person says, he's treated for PTSD as a result of this event."

After discussing the import of the statement by the victim's mother with the prosecutor further, the court asked defense counsel for his opinion. Defense counsel stated: "Your Honor, again, I was not prepared for that. I don't think it can be cured. I move for a mistrial at this point, Your Honor. I think it's an—she says that an expert has diagnosed him with this condition and it relates to the reason that we're here." The court and the parties continued to discuss how best to address the PTSD testimony. After a brief recess, the court issued the following ruling: "Well, I don't think that there's enough for a mistrial at this point. I'll give defense counsel the option. I'll give the strongest instruction possible on this issue of PTSD, and point out to [the jury], as the prosecutor has said, that there's really nothing in the record which would indicate that the—whatever that's about is related to this event. Now, PTSD may—may come up later in the trial, but everything is context. At this point, it's—you know, link it—I would think that the jury would link that to this event, and it's somebody else's opinion about— really, about the credibility of the complainant, or I'll ignore it, if that's what you want." Defense counsel stated, "I feel like I'm in a catch-22," because he did not want to highlight the testimony, but he decided that it would be "prudent that a curative instruction be administered."

When the jury returned to the courtroom, the court gave the following instruction: "The witness will be back in a minute, but before she comes back, let me talk about—she said that there was—the PTSD—there was a PTSD diagnosis. *That has nothing to do with the evidence in this—in this case. There's nothing in the*

record that links the PTSD to this case. Ignore it. Don't make any decision in this case, none, based on what she said about PTSD. Just completely and totally ignore it, like it isn't even part of the record, like it isn't even part of the evidence. Okay. All right. She can come back." (Emphasis added.)

We begin our analysis by setting forth the legal principles that govern the defendant's claims. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [O]ur determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as [1] the importance of the . . . testimony in the [state's] case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the [state's] case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014); see also *State* v. *Bouknight*, 323 Conn. 620, 626, 149 A.3d 975 (2016) ("[t]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error" [internal quotation marks omitted]).

"In our review of the denial of a motion for mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no

longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Berrios*, 320 Conn. 265, 274, 129 A.3d 696 (2016). On appeal, we are cognizant of the fact that "[t]he trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Citation omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 555, 122 A.3d 555 (2015).

"While the remedy of a mistrial is permitted under the rules of practice, it is not favored. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided." (Internal quotation marks omitted.) Id., 554–55. "[I]n the absence of evidence that the jury disregarded any of the court's instructions, we presume that the jury followed the instructions." *State* v. *A. M.*, 324 Conn. 190, 215, 152 A.3d 49 (2016). Mere conjecture by the defendant is insufficient to rebut this presumption. *State* v. *Gaffney*, 209 Conn. 416, 422, 551 A.2d 414 (1988); *State* v. *Reddick*, 33 Conn. App. 311, 336 n.13, 635 A.2d 848 (1993), cert. denied, 228 Conn. 924, 638 A.2d 38 (1994). "The burden is on the defendant to establish that, in the context of the proceedings as a whole, the challenged testimony was so prejudicial, notwithstanding the court's curative instructions, that the jury reasonably cannot be presumed to have disregarded it." *State* v. *Nash*, 278 Conn. 620, 659–60, 899 A.2d 1 (2006).

Having scrupulously reviewed the record in this case, we are not persuaded that the jury's verdict was substantially swayed by the PTSD testimony or that the court abused its discretion by denying the defendant's motion for a mistrial. The only time the victim's PTSD diagnosis was mentioned was during the testimony of the victim's mother. After that testimony, the court instructed the jury that the victim's PTSD diagnosis "has nothing to do with the evidence . . . in this case" and that "[t]here's nothing in the record that links the PTSD to this case." In addition, the court admonished the jury that it was not to "make any decision in this case, none, based on what [the victim's mother] said about PTSD" and that they were to "completely and totally ignore it, like it isn't even part of the record, like it isn't even part of the evidence." The defendant has offered no persuasive reason why this prompt, clear, and forceful instruction by the court was insufficient to break the link between the PTSD diagnosis and the charges for which the defendant was on trial and to prevent the jurors from considering this isolated statement by the victim's mother during their deliberations.

We recognize that the state's case was not particularly strong, given the lack of physical or eyewitness evidence, and that, as a result, the victim's testimony was crucial to a successful prosecution. See *State* v. *Maguire*, 310 Conn. 535, 561, 78 A.3d 828 (2013) (sexual assault case not strong where "there was no physical evidence of abuse, and there was no eyewitness testimony other than that of the victim, whose testimony at times was both equivocal and vague"); *State* v. *Ritrovato*, 280 Conn. 36, 57, 905 A.2d 1079 (2006) ("[a]lthough the absence of conclusive physical evidence of sexual abuse does not automatically render the state's case weak where the case involves a credibility contest between the victim and the defendant . . . a sexual

assault case lacking physical evidence is not particularly strong, especially when the victim is a minor" [citation omitted]). During its deliberations, the jury sent notes to the court requesting to hear the victim's police interview, which was not in evidence, and to rehear portions of the victim's testimony, which suggested that the question of the victim's credibility was a difficult one. See *State* v. *Devalda*, 306 Conn. 494, 510, 50 A.3d 882 (2012) ("[w]e have recognized that a request by a jury may be a significant indicator of their concern about evidence and issues important to their resolution of the case" [internal quotation marks omitted]). In addition, the jury's finding that the defendant was not guilty of sexual assault with respect to any of the alleged incidents and not guilty of one of the counts of risk of injury indicates that the jury did not in fact find all aspects of the victim's testimony to be credible. See *State* v. *Samuel M.*, 159 Conn. App. 242, 255, 123 A.3d 44 (2015) (jury's finding of guilty of three counts of sexual assault in the first degree and one count of risk of injury and finding of not guilty of nine other counts of sexual assault in the first degree "demonstrates that [the jury] did reject a vast portion of [the victim's] testimony"), aff'd, 323 Conn. 785, 151 A.3d 815 (2016).

Nevertheless, a jury may properly decide "what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Victor C.*, 145 Conn. App. 54, 61, 75 A.3d 48, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). The defendant has not persuaded us that the jury failed to heed the court's curative instruction and that its deliberations, therefore, were improperly influenced by the PTSD testimony.

II

We next address the defendant's claim that his rights under the fifth and fourteenth amendments to the

United States constitution and article first, § 8, of the Connecticut constitution were violated when the court denied his motion to suppress statements that he made to the police during a custodial interrogation. The defendant argues that his statements (1) "See, if my lawyer was here, I'd, then I'd, we could talk. That's, you know, that's it," and, (2) "I'm supposed to have my lawyer here. You know that," constituted clear and unequivocal invocations of his right to counsel, requiring the detectives to cease all questioning until counsel was present. Alternatively, the defendant argues that even if the disputed statements were ambiguous or equivocal, article first, § 8, required the detectives to cease questioning immediately and to clarify his statements.[7] We disagree with both contentions.

The following additional facts are relevant to this claim. On October 17, 2013, Detective Michael Zerella and Sergeant John Ventura interviewed the defendant

[7] The defendant further asks this court to exercise its supervisory authority over the administration of justice to implement a cease and clarify rule. "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764, 91 A.3d 862 (2014). "The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) Id., 765. The defendant's request implicates the scope of our supervisory authority, however, "because we normally exercise this power with regard to the conduct of judicial actors." *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010). Although imposing a cease and clarify rule on law enforcement would directly affect the admissibility of evidence, which is surely within the authority of this court, it would also directly implicate the activities of law enforcement agencies. Accordingly, we decline to invoke our supervisory authority in the present case. Accord *State* v. *Fernandez*, 52 Conn. App. 599, 615, 728 A.2d 1 (declining defendant's invitation to exercise our supervisory authority "[b]ecause acceptance of the defendant's invitation would require this court to exercise our supervisory powers outside the conduct of judicial actors"), cert. denied, 249 Conn. 913, 733 A.2d 229, cert. denied, 528 U.S. 939, 120 S. Ct. 348, 14 L. Ed. 2d 272 (1999).

concerning the victim's allegations (first interview). The defendant agreed to come to the police station to discuss a complaint made against him, but he was not made aware of the nature of the allegations prior to arriving. When it became apparent that he was being accused of engaging in sexually inappropriate conduct with the victim, the defendant explained two instances that he could think of that served as the basis for the victim's complaint, but he maintained that nothing inappropriate happened. Approximately twenty minutes into the interview, Zerella wondered aloud whether, based on what he knew happened, "(a) you're a sick, perverted person or, or stuff, stuff accidentally happened." The following exchange occurred:

"[The Defendant]: Let's, let's, let's stop this here.

"[Zerella]: Or stuff, stuff happened.

"[The Defendant]: It sounds, sounds, sounds, like I need a lawyer, right?

"[Ventura]: It's up to you.

"[The Defendant]: I know it.

"[Ventura]: Why would you say that, though? That you need a lawyer?

"[The Defendant]: Well, it sound, sounds like, well, you, uh . . .

"[Ventura]: You could get up and leave any time you want.

"[The Defendant]: That I could be, possibly be, a sick, perverted person.

"[Zerella]: You didn't, you didn't let me, you didn't let me finish what I was gonna say.

"[The Defendant]: But it sounds, sounds like you said it, I'm a, sounds like I might, might be a sick, perverted person.

"[Zerella]: Or something innocently happened that, that, that didn't, that didn't mean to happen. That's all. I, we need to know that. That's why I need to know from you the truth. That's, that's what I'm trying to get at here."

The interview continued. Approximately thirty minutes into the interview, however, when Zerella and Ventura began to press the defendant about why the victim would make up these allegations and give "specific incidents that Uncle Bobby and me had sex together," the defendant ended the interview because "[t]hings are getting strange now. . . . It's a little bit too strange." The defendant was permitted to leave the police station.

On November 26, 2013, the defendant was arrested and charged with sexual assault in the first degree and risk of injury to a child. That same day, Zerella and Detective Sean Fairbrother interviewed the defendant (second interview). Zerella began the interview by reading the defendant his *Miranda*[8] rights and asking him to complete a *Miranda* waiver form. The defendant asked: "I can still, after, after, after I initial that, I can still stop answering then?" Zerella replied: "Oh, anytime you want. No problem."

After the defendant completed the *Miranda* waiver form, Zerella asked the defendant whether he knew why he had been arrested. The defendant explained that he had received a letter from the Department of Children and Families (department) informing him that he was being investigated for allegations of child abuse with respect to the victim. When Zerella asked what he discussed with the department, the defendant stated that he had never talked to anyone from the department. Zerella asked why, and the defendant explained: "Well,

[8] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

I asked my lawyer, and he said, well, just not to, I, I think that's, I think that's all together wrong, but that's what he said." He went on to elaborate that "my lawyer knows what's going on, you know? But, he says don't talk, I don't talk." When Zerella asked him how he felt about that, the defendant stated: "Well, it's like I said, I probably wouldn't be here now if I talked to them." Zerella suggested that if he had elaborated more and been more forthcoming during the first interview, they might not be here. After some discussion about whether and why Zerella called him a pervert during the first interview, Zerella stated: "Okay, well, we could, we could go on about the last interview if you want to, but—" The defendant interjected: "—I know, I know . . . let's . . . let's go on right, what, what more do you want to know?"

After remarking that the defendant knew he was under arrest and that a judge and prosecutor had found probable cause to arrest him, the defendant observed that it was because "I didn't talk, that's why." Zerella remarked: "Well, you did, you did talk to me. You did tell me a few things." The defendant agreed but acknowledged, "not enough, I know." The defendant then expressed his belief that the victim's parents were acting wrongly by pressing charges against him and his concern that nobody would believe him over the victim's parents because they are both retired members of the police department. Zerella explained that it was the victim, not his parents, who was pressing charges and that he had already corroborated many of the victim's allegations. When Zerella asked the defendant to tell him some of the stories of his encounters with the victim, the defendant opined: "I don't know the stories that he made up."

Fairbrother asked the defendant whether he knew the crime with which he was charged, and the defendant replied child abuse. Fairbrother explained that he was

charged with sexual assault and risk of injury to a child. The defendant asked whether that means that the allegation is that he did something sexual with the victim, and Fairbrother said that it did. The defendant adamantly denied having sexual relations with the victim. When the detectives pressed him about whether there were any moments that could be misconstrued as inappropriate, the defendant responded: "Well, yes, there's what, well, I, I, my lawyer said not to talk about it but, no, it's." The detectives both stated that it was up to the defendant whether to talk with them.

The defendant observed that Zerella had told him that there was a picture of him naked on the victim's Nintendo DS during the first interview, and he asked repeatedly whether the picture actually existed.[9] When Zerella suggested that the defendant had personal knowledge that the picture existed, the defendant insisted that he did not and that he knew about the picture only because Zerella told him about it during the first interview. Zerella maintained that "there's other, other things, there's other instances beside that," and, after the defendant asked what, Zerella observed that "you just said, there [is] stuff but my lawyer told me not to talk about it." The defendant stated that he was referring to the picture. He further asked, "what else is there," and opined that he wanted to know "what they are pressing against me." Thereafter, the following exchange occurred:

"[Zerella]: Alls I got to say is, tomorrow, when you go into court, you're gonna look at a judge and a prosecutor. . . . And they're gonna look at all this stuff, all these allegations that were made against you. . . . That it's a, it's a very, very strong case against you.

[9] Zerella testified at trial that "I actually didn't have a picture of [the defendant] . . . without any clothes on. I never did." He explained that lying to a suspect is a tactic often used by members of law enforcement to obtain information or an admission from a suspect.

Very, very strong. They're gonna look at it and say, listen, this, this man, because they don't know you from Adam, but they're just gonna see you.

"[The Defendant]: Right. Well, they're gonna know my name.

"[Zerella]: As, as a, as a, as a mean, as a mean individual.

"[The Defendant]: Right.

"[Zerella]: In, in reality—

"[Fairbrother]: As a predator.

"[Zerella]: As a predator, who, who's technically not cooperating and not saying, yeah, this is, this is what happened, this is probably why he thinks, thinks the way he does or—

"[The Defendant]: —*See, if my lawyer was here, I'd, then I'd, we could talk. That's, you know, that's it.*

"[Zerella]: It's up to you. You could—

"[The Defendant]: —I know it. I know, I know, I know it.

"[Zerella]: You could (a), you could (a) talk to me or you could (b) not talk to me.

"[The Defendant]: I know it but, I'm trying, you know I, *I'm supposed to have my lawyer here. You know that.*

"[Zerella]: You don't, you don't have to, it's, it's—

"[Fairbrother]: It's up to you.

"[Zerella]: It's up to you, man. Some people talk to me without one, some people want one it . . . it's all up to you, man. . . I'm just affording you that opportunity, that's all.

"[Fairbrother]: The problem is that, at your age, you don't want to go to prison.

"[The Defendant]: [indiscernible]

"[Fairbrother]: Okay? You don't want to go to prison. If there was some inappropriate things with this child, something that can be explained, maybe you helped him go to the bathroom, maybe, you know, he makes some sort of crazy allegation or does some sort of craziness, he's not—

"[Zerella]: —Maybe he—

"[Fairbrother]: He doesn't have a hundred percent capacity. If you're in a, now, now is the time to talk about it, now is to get your half out there.

"[Zerella]: Yeah, maybe he came at you.

"[Fairbrother]: —You know if—

"[Zerella]: Maybe he came at you.

"[Fairbrother]: You know, that, that's all we're offering you, the opportunity to, because it's the last time we're gonna be able to talk.

"[Zerella]: That's all.

"[Fairbrother]: You know, that's all, and, and, you know, if—

"[The Defendant]: —Oh, geez, I don't know—

"[Fairbrother]: —If you want to have an attorney—

"[The Defendant]: —I, I don't think it's—

"[Fairbrother]: —That's fine. You can, but—

"[The Defendant]: —that's right, right or wrong, but, uh, real, really.

"[Zerella]: Just, just affording you the opportunity, sir, because after, after today, you're never gonna be able to, to give me or any other cop your story. You're gonna let, a judge is gonna look at ya and say, some

serious charges against you. You could go to jail for the rest of your life.

"[The Defendant]: All right, now what's, what, what, what, uh, all right, I'll, I'll, I'll talk. Uh, what do you, what do you, what do you want to know? Tell, tell me, what do you want to know." (Emphasis added.)

Thereafter, the interview continued without further mention of counsel.

On June 4, 2014, the defendant filed a generic motion to suppress any oral or written statements that he gave to the police pursuant to the fifth, sixth, and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. On April 28, 2015, the defendant filed a second motion to suppress the statements that he made during the second interview, pursuant to the fifth and fourteenth amendments and article first, § 8, on the grounds that his statement "was taken against his rights to counsel, to remain silent, and self-incrimination."[10] The court was provided with a video recording and transcript of the second interview. A suppression hearing was held during trial on April 29, 2015, during which the court heard the brief testimony of Zerella and argument from counsel. At the end of the hearing, the court issued an oral ruling denying the defendant's motion to suppress.[11]

A

We begin by setting forth the legal principles that guide our analysis of the defendant's claim that the detectives violated *Edwards* by continuing to question

[10] Although the defendant invoked his right to counsel under the Connecticut constitution, he did not argue before the trial court that the Connecticut constitution affords greater protection than the federal constitution with respect to ambiguous invocations of the right to counsel during custodial interrogations.

[11] Pursuant to Practice Book § 64-1 (a) (4), the defendant has provided this court with a signed transcript of the court's oral ruling.

him after he clearly and unequivocally invoked his right to counsel during the second interview.[12] In *Miranda* v. *Arizona*, 384 U.S. 436, 469–73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that "a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. . . . If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him." (Citations omitted.) *Davis* v. *United States*, 512 U.S. 452, 457–58, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

In *Edwards* v. *Arizona*, supra, 451 U.S. 484–85, however, the United States Supreme Court determined that the "traditional standard for waiver was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel . . . ." *Maryland* v. *Shatzer*, 559 U.S. 98, 104, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). The court therefore superimposed a " 'second layer of prophylaxis' " to prevent the police from badgering a defendant into waiving his previously asserted *Miranda* rights. Id.; *Davis* v. *United States*, supra, 512 U.S. 458. Under the *Edwards* rule, if a suspect requests counsel at any

[12] Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen [however] a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set [forth] in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 295–96, 25 A.3d 648 (2011).

time during the interview, he cannot be subjected to further questioning until an attorney has been made available, unless the suspect himself reinitiates conversation or a fourteen day break in custody has occurred. See *Maryland* v. *Shatzer*, supra, 110; *Edwards* v. *Arizona*, supra, 484–85.

"The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused *actually invoked* his right to counsel. . . . To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. . . . Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. . . . But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . .

"Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. . . . Although a suspect need not speak with the discrimination of an Oxford don . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Davis* v. *United States*, supra, 512 U.S. 458–59.

In the present case, we conclude that a reasonable police officer in this circumstance would not have

understood the disputed statements—"See, if my lawyer was here, I'd, then I'd, we could talk. That's, you know, that's it," and, "I'm supposed to have my lawyer here. You know that"—to be requests for an attorney. At the outset of the interview, the defendant was informed of his *Miranda* rights and waived them in writing. Shortly thereafter, the defendant told the detectives that he had consulted an attorney after he received a notice from the department concerning its investigation into the victim's allegations and that the attorney advised him "not to talk about it." The defendant repeatedly expressed his misgivings with that advice and his belief that he would not have been arrested had he spoken with the department concerning the victim's allegations. Moreover, after referencing his attorney's advice "not to talk about it," the defendant continued to talk to the detectives about the victim's allegations. Indeed, on one occasion, he opined that his attorney did not want him to talk about any moments that could be misconstrued as inappropriate, e.g., the picture purportedly on the victim's Nintendo DS, and then he proceeded to ask about the picture Zerella mentioned during the first interview. Finally, in the moments leading up to the disputed statements, it was evident that the defendant wanted both to avoid discussing his side of the story and to obtain more information about the victim's allegations and the evidence against him.

In light of these preceding circumstances, the defendant's first reference to counsel—"See, if my lawyer was here, I'd, then I'd, we could talk. That's, you know, that's it"—"lacked the clear implication of a present desire to consult with counsel . . . ." *Lord* v. *Duckworth*, 29 F.3d 1216, 1221 (7th Cir. 1994). This statement might well have been an attempt to persuade the detectives to limit the scope of the interview to the victim's allegations and the detectives' evidence, a reiteration of his attorney's advice that he should not discuss his

side of the story without counsel present, a request for an attorney, or something else entirely. Because of this ambiguity in the statement, it cannot be considered an effective invocation of the right to counsel under *Edwards*. The defendant argues that his next reference to counsel—"I'm supposed to have my lawyer here. You know that"—clarified any ambiguity. We disagree. This statement could also mean that the defendant simply believed that it was prudent for him to have an attorney present when speaking to authorities, not that he actually wanted to speak to an attorney before proceeding further with the interview.

Accordingly, we conclude that the court properly denied the defendant's motion to suppress because he did not clearly and unequivocally invoke his right to counsel and, therefore, the detectives were not required to cease questioning him.

B

Alternatively, the defendant argues that even if his invocation of the right to counsel was ambiguous or equivocal, the self-incrimination and due process clauses of article first, § 8, of our state constitution required the detectives to cease questioning immediately and to clarify his ambiguous references to counsel. The defendant seeks review of this unpreserved state constitutional claim 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).[13] Although we conclude that the defendant's

[13] "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." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015). "The first two

claim is reviewable pursuant to the first and second prongs of *Golding*, the defendant is not entitled to reversal under the third prong of *Golding* because our state constitution does not provide greater protection than the federal constitution in this context. As a matter of state constitutional law, interrogating officers are not required to clarify ambiguous or equivocal references to an attorney. This conclusion does not diminish, however, our admonition to law enforcement that it is the better practice to clarify such issues at the time of interrogation rather than in after-the-fact arguments before the courts.

"It is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights." (Internal quotation marks omitted.) *State* v. *Saturno*, 322 Conn. 80, 102, 139 A.3d 629 (2016). In determining the contours of the protections provided by our state constitution, we employ a multifactor approach that our Supreme Court first adopted in *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). The factors that we consider are (1) the text of the relevant constitutional provisions; (2) persuasive federal precedents; (3) related Connecticut precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of the constitutional framers; and (6) relevant public policies. *State* v. *Santiago*, 318 Conn. 1, 17–18, 122 A.3d 1 (2015). We address each factor in turn.

steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 615, 929 A.2d 312 (2007). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Dixon*, supra, 511.

1

The first factor, the text of the relevant constitutional provisions, favors the state. Although the wording of the state and federal self-incrimination clauses is different,[14] our Supreme Court has repeatedly "declined to construe this provision more broadly than the right provided in the fifth amendment to the United States constitution." *State* v. *Lockhart*, supra, 298 Conn. 552; *State* v. *Castonguay*, 218 Conn. 486, 495–96, 590 A.2d 901 (1991); *State* v. *Asherman*, 193 Conn. 695, 711–15, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). "The due process clauses of the state and federal constitutions are virtually identical."[15] *State* v. *Ledbetter*, 275 Conn. 534, 562, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). As a result, our Supreme Court has previously recognized that the similarity between the two provisions "support[s] a common source and, thus, a common interpretation of the provisions." (Footnote omitted.) Id.; see also *State* v. *Wade*, 297 Conn. 262, 288, 998 A.2d 1114 (2010).

2

The second *Geisler* factor, persuasive federal precedents, favors the state as well. In *Davis* v. *United States*,

[14] Article first, § 8, of the Connecticut constitution, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "No person shall be compelled to give evidence against himself . . . ."

The fifth amendment to the United States constitution provides in relevant part: "[No person] shall be compelled in any criminal case to be a witness against himself . . . ."

[15] Article first, § 8, of the Connecticut constitution, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

The fifth amendment to the United States constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The fourteenth amendment to the United States constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

supra, 512 U.S. 459, the United States Supreme Court "decline[d] [the] petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney." Instead, the *Davis* court adopted a bright-line approach: "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." Id., 461–62.

Moreover, the United States Supreme Court has "frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. . . . Because *Edwards* is our rule, not a constitutional command, it is our obligation to justify its expansion. . . . A judicially crafted rule is justified only by reference to its prophylactic purpose . . . and applies only where its benefits outweigh its costs . . . ." (Citations omitted; internal quotation marks omitted.) *Maryland* v. *Shatzer*, supra, 559 U.S. 105–106; id., 108–109 (declining to extend *Edwards* to prevent officers from approaching suspects who have invoked their right to counsel after there has been break in custody because of diminished benefits and increased costs, namely, "voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain").

3

The third *Geisler* factor, related Connecticut precedents, favors the state. The defendant is correct that this state has a long history of commitment to the principles of *Miranda*, as evidenced by the fact that our Supreme Court recognized the constitutional significance of *Miranda* long before the United States Supreme Court. Compare *State* v. *Ferrell*, 191 Conn. 37, 40–41, 463 A.2d 573 (1983) ("[a]lthough the *Miranda* warnings were originally effective in state prosecutions

only because they were a component of due process of law under the fourteenth amendment . . . they have also come to have independent significance under our state constitution" [citations omitted]), with *Dickerson* v. *United States*, 530 U.S. 428, 432, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (holding *Miranda* is a constitutional rule). Nevertheless, our Supreme Court has consistently held that our self-incrimination and due process clauses do not afford greater protection than the federal due process and self-incrimination clauses. See part III B 1 of this opinion. As a result, our courts have previously declined to utilize our state constitution to afford suspects greater protections during custodial interrogations than the federal constitution affords. E.g., *State* v. *Lockhart*, supra, 298 Conn. 543–44 (declining to require all custodial interrogations to be recorded); *State* v. *Lawrence*, 282 Conn. 141, 158–59, 920 A.2d 236 (2007) (declining to require higher standard of proof to establish voluntariness of confession); *State* v. *Piorkowski*, 243 Conn. 205, 221, 700 A.2d 1146 (1997) (declining to require presence of counsel for valid waiver of right to counsel when defendant initiates contact with police and has been properly advised of his *Miranda* rights); *State* v. *Doyle*, 104 Conn. App. 4, 15–16 n.4, 931 A.2d 393 (declining to extend warnings required by *Miranda* to noncustodial police interviews), cert. denied, 284 Conn. 935, 935 A.2d 152 (2007). Indeed, our Supreme Court has declined to deviate from federal precedent specifically in the context of a defendant's invocation of the right to counsel under *Miranda*. E.g., *State* v. *Barrett*, 205 Conn. 437, 447, 448, 534 A.2d 219 (1987) (state constitution, like federal constitution, permits a distinction between suspect's willingness to make uncounseled oral statements and his disinclination to make uncounseled written statements); *State* v. *Hafford*, 252 Conn. 274, 293–94, 746 A.2d 150 (declining to hold that, as a matter of state constitutional law,

when officers have honored an equivocal request for counsel by not asking suspect any further questions and suspect subsequently initiates contact with police, they cannot resume interrogation without first clarifying earlier equivocal request for counsel), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

Nonetheless, the defendant argues that the rule he proposes finds support in other aspects of our Supreme Court's jurisprudence. The precedent relied on by the defendant, however, is unpersuasive. First, the defendant relies on *State* v. *Ferrell*, supra, 191 Conn. 37, to support his contention that article first, § 8, affords greater protection than the federal constitution in the context of the right to counsel under *Miranda*. In *Ferrell*, our Supreme Court held that police officers may not testify regarding statements they overheard while the defendant, who was in custody, was speaking with his attorney; id., 41–42; reasoning that "the right to consult a lawyer before being interrogated is meaningless if the accused cannot privately and freely discuss the case with that attorney." Id., 45. The court's holding, however, was based on the due process clauses of both the state and federal constitutions, which it treated as being coextensive with one another. Id., 41, 45; see also *State* v. *Lockhart*, supra, 298 Conn. 554 (*Ferrell* does not "[indicate] that our state constitution imposes greater protections with regard to the advisement of *Miranda* rights or requires additional corroboration for admission of testimony describing such an advisement").

The defendant also relies on *State* v. *Stoddard*, 206 Conn. 157, 161, 537 A.2d 446 (1988). In that case, our Supreme Court concluded that our state constitution, unlike the federal constitution, imposes a duty on officers who are holding a suspect for custodial interrogation to act reasonably, diligently, and promptly to apprise the suspect of efforts by counsel to provide pertinent and timely legal assistance. Id., 163; cf. *Moran*

v. *Burbine*, 475 U.S. 412, 422–23, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (declining to impose such a duty). The court further held that a waiver of *Miranda* rights may, depending upon the totality of the circumstances, be vitiated by the failure of the police to fulfill this duty. *State* v. *Stoddard*, supra, 163. The court reasoned that the fact that "a suspect validly waives the presence of counsel only means for the moment the suspect is foregoing the exercise of that conceptual privilege. . . . Faced with a concrete offer of assistance, however, a suspect may well decide to reclaim his or her continuing right to legal assistance. To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. . . . We cannot therefore conclude that a decision to forego the abstract offer contained in *Miranda* embodies an implied rejection of a specific opportunity to confer with a known lawyer." (Citations omitted; internal quotation marks omitted.) Id., 168.

Importantly, the conclusion in *Stoddard* was influenced by Connecticut's "long history of recognizing the significance of the right to counsel . . . ." Id., 164; see also id., 164–66. The court acknowledged that "this history specifically illuminates the right to counsel that attaches after the initiation of adversary judicial proceedings," but it concluded that this history also informed the due process concerns raised by police interference with counsel's access to a custodial suspect. Id., 166. In particular, the court reasoned that because the police are responsible for the suspect's isolation during a custodial interrogation, they "may not preclude the suspect from exercising the choice to which he is constitutionally entitled by responding in

less than forthright fashion to the efforts by counsel to contact the suspect." Id., 167.

Our Supreme Court clarified the narrow confines of *Stoddard* in *State* v. *Whitaker*, 215 Conn. 739, 751–52, 578 A.2d 1031 (1990). In that case, the defendant, who was a minor at the time of the custodial interrogation in question, argued that *Stoddard* required officers to inform him that his mother had called the police station and told them that she wanted him to speak with an attorney. Id., 751. The court rejected the defendant's claim, stating that "*Stoddard* prohibited only police interference in the attorney-client relationship." (Internal quotation marks omitted.) Id., 752. The court considered the advice of the defendant's mother to be "more akin to an abstract offer to call some unknown lawyer than the concrete offer of [legal] assistance that *Stoddard* protects." (Internal quotation marks omitted.) Id.

Like *Whitaker*, the present case does not directly implicate the attorney-client relationship or to involve a concrete offer of legal assistance. Instead, the defendant is asking this court to adopt a rule that would require interrogating officers to clarify equivocal or ambiguous references to an attorney in order to determine whether the defendant wants to invoke his right to counsel. *Stoddard* does not support the proposition that interrogating officers have a duty to help suspects calibrate their self-interest in deciding whether to speak or to invoke their *Miranda* rights. See *State* v. *Stoddard*, supra, 206 Conn. 168 ("the police have no general duty to 'supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights' "); see also *State* v. *Lockhart*, supra, 298 Conn. 554 (*Stoddard* does not "[indicate] that our state constitution imposes greater protections with regard to the advisement of *Miranda* rights or requires additional corroboration for admission of testimony describing such an advisement").

Finally, the defendant relies on pre-*Davis* precedent, in which our Supreme Court held that the federal constitution requires police officers upon the defendant's making of an ambiguous or equivocal reference to an attorney to cease questioning immediately and to clarify the statement. *State* v. *Anderson*, 209 Conn. 622, 627, 553 A.2d 589 (1989); *State* v. *Acquin*, 187 Conn. 647, 673–75, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983), overruled in part by *Davis* v. *United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); see also *State* v. *Anonymous*, 240 Conn. 708, 723 n.16, 694 A.2d 766 (1997). The defendant argues that because of this precedent, he "is not asking this court to 'go out on a limb' to make 'new law,' but is rather asking the court to embrace the 'old law'—and to refuse to follow *Davis*' step *backward* with respect to the *Miranda* right to counsel." (Emphasis in original.) The problem with the defendant's argument is that neither *Anderson* nor *Acquin* illuminate the issue presently before this court—whether (and why) our state constitution affords greater protection than the federal constitution in this context—because neither case adopted the clarification approach because of *state specific* factors. Instead, our Supreme Court adopted the clarification approach because, at the time, the United States Supreme Court had not provided guidance on how to address ambiguous or equivocal references to counsel and the trend among federal courts was to require clarification. *State* v. *Anderson*, supra, 627–28; *State* v. *Acquin*, supra, 673–75.

4

The fourth *Geisler* factor, persuasive precedents of other state courts, favors the state. The majority of states to address the specific issue of whether their state constitutions require interrogating officers to clarify ambiguous invocations of the right to counsel have

followed *Davis* and declined to require clarification.[16] E.g., *People* v. *Crittenden*, 9 Cal. 4th 83, 129, 885 P.2d 887, 36 Cal. Rptr. 2d 474 (1994), cert. denied, 516 U.S. 849, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995); *State* v. *Owen*, 696 So. 2d 715, 719 (Fla.), cert. denied, 522 U.S. 1002, 118 S. Ct. 574, 139 L. Ed. 2d 413 (1997); *Taylor* v. *State*, 689 N.E.2d 699, 704 (Ind. 1997); *State* v. *Morgan*, 559 N.W.2d 603, 609 (Iowa 1997); *State* v. *Morris*, 255 Kan. 964, 981, 880 P.2d 1244 (1994); *Franklin* v. *State*, 170 So. 3d 481, 491 (Miss. 2015); *State* v. *Nixon*, 369 Mont. 359, 368–69, 298 P.3d 408 (2013); *State* v. *Perry*, 146 N.M. 208, 217, 207 P.3d 1185 (App. 2009); *State* v. *Saylor*, 117 S.W.3d 239, 245–46 (Tenn. 2003), cert. denied, 540 U.S. 1208, 124 S. Ct. 1483, 158 L. Ed. 2d 133 (2004); *State* v. *Panetti*, 891 S.W.2d 281, 283–84 (Tex. 1994); *State* v. *Horton*, 195 Wn. App. 202, 216–17, 380 P.3d 608 (2016), review denied, 187 Wn. 2d 1003, 386 P.3d 1083 (2017); *State* v. *Farley*, 192 W. Va. 247, 256, 452 S.E.2d 50 (1994); *State* v. *Jennings*, 252 Wis. 2d 228, 249, 647 N.W.2d 142 (2002); see *Commonwealth* v. *Sicari*, 434 Mass. 732, 746 n.10, 752 N.E.2d 684 (2001) (Supreme Judicial Court of Massachusetts "content to

[16] North Carolina has also adopted *Davis*' bright-line approach as a matter of state statutory law. See *State* v. *Saldierna*, 794 S.E.2d 474, 479 (N.C. 2016). Some states have also endorsed *Davis*' bright-line approach but not specifically evaluated whether their state constitution requires them to follow *Davis*. E.g., *Harte* v. *State*, 116 Nev. 1054, 1066–68, 13 P.3d 420 (2000) (holding the rule announced in *Davis* applies to custodial interrogations in Nevada and overruling conflicting precedent but not analyzing Nevada constitution); *Hadden* v. *State*, 42 P.3d 495, 504 (Wyo.) (finding *Davis* persuasive and adopting *Davis*' bright-line approach but not analyzing Wyoming constitution), cert. denied, 537 U.S. 868, 123 S. Ct. 272, 154 L. Ed. 2d 114 (2002). Other states have endorsed *Davis* but interpreted *Davis* to apply only to the post-*Miranda* waiver context. E.g., *State* v. *Blackburn*, 766 N.W.2d 177, 183 (S.D. 2009); *State* v. *Leyva*, 951 P.2d 738, 743 (Utah 1997) (abrogating state precedent to extent it contradicts *Davis* because *Miranda* warnings not required under state constitution). Accordingly, interrogating officers in those states must clarify an ambiguous or equivocal invocation of the right to counsel if the invocation is made before the suspect waives his *Miranda* rights.

interpret" applicable provision in state constitution as fifth amendment has been interpreted by United States Supreme Court), cert. denied, 534 U.S. 1142, 122 S. Ct. 1096, 151 L. Ed. 2d 993 (2002). In many of these cases, the court's decision was driven by the fact that the relevant state constitutional provisions were virtually identical to and had been previously treated as coextensive with the relevant federal constitutional provisions. E.g., *People* v. *Crittenden*, supra, 129; *State* v. *Morris*, supra, 979–80; *State* v. *Saylor*, supra, 245–46; *State* v. *Horton*, supra, 216–17; *State* v. *Jennings*, supra, 248–49; see also *State* v. *Perry*, supra, 216–17 (defendant failed to show federal analysis is flawed or there is structural difference between relevant state and federal provisions).

We have found only four states that have rejected *Davis* on the grounds that their state constitutions provide greater protection than the federal constitution in this context. See *Steckel* v. *State*, 711 A.2d 5, 10–11 (Del. 1998); *State* v. *Hoey*, 77 Haw. 17, 36, 881 P.2d 504 (1994); *State* v. *Risk*, 598 N.W.2d 642, 648–49 (Minn. 1999); *State* v. *Charboneau*, 323 Or. 38, 58–60, 913 P.2d 308 (1996).[17] These decisions are unpersuasive, however, because they appear to be driven by judicial preference for the clarification approach rather than by a meaningful distinction between the state and federal constitutions. Indeed, none of the decisions involved any meaningful state constitutional analysis, such as we are required to perform pursuant to the *Geisler* decision.

[17] New Jersey has also adopted the clarification approach, albeit not on state constitutional grounds. The right against self-incrimination under New Jersey law "is founded on a common-law and statutory—rather than a constitutional—basis." *State* v. *Chew*, 150 N.J. 39, 50, 695 A.2d 1301 (1997). Although "New Jersey law governing the privilege against self-incrimination generally parallels federal constitutional doctrine"; id.; the New Jersey Supreme Court rejected *Davis* because it seemed "prudent" to continue to apply the clarification approach it adopted prior to *Davis*. Id., 63.

5

The parties agree that the fifth *Geisler* factor, historical insights into the intent of the constitutional framers, is neutral because *Miranda* warnings did not exist in 1818 when our constitution was originally enacted.[18]

6

The sixth *Geisler* factor, relevant public policies, is neutral because there are policy arguments in favor of both the *Davis* bright-line approach and the clarification approach. The comparative merit of each approach was thoroughly explored in *Davis*. Compare *Davis* v. *United States*, supra, 512 U.S. 458–62 (adopting the bright-line approach) with id., 469–75 (Souter, J., concurring in the judgment) (advocating for the clarification approach). In addition, numerous academic works have addressed the impact of *Davis* as well as the merits of the bright-line and clarification approaches. E.g., M. Strauss, "*Understanding* Davis *v.* United States," 40 Loy. L.A. L. Rev. 1011, 1012–13 (2007) (analyzing comparative impact of *Davis* on women, minorities, and Caucasian men); T. Levenberg, "*Fifth Amendment—Responding to Ambiguous Requests for Counsel During Custodial Interrogations* Davis *v.* United States, 114 S. Ct. 2350 (1994)," 85 J. Crim. L. & Criminology 962, 963 (1995) (analyzing merits of bright-line, clarification, and per se approaches and proposing modified clarification approach); see also *State* v. *Effler*, 769 N.W.2d 880, 896 (Iowa) (Appel, J., specially concurring) (collecting academic and judicial writings criticizing *Davis*), cert. denied, 558 U.S. 1096, 130 S. Ct. 1024, 175 L. Ed. 2d 627 (2009). These policy perspectives need not be repeated here except to note that the policy debate among the legal and academic communities reflects the fact that

[18] Although our state constitution has been amended since 1818, the self-incrimination and due process clauses were present in the original constitution.

"*Miranda* represents a compromise between the need of the state for effective interrogation of a suspect to solve a crime and the right of the individual to say nothing that may incriminate him." *State* v. *Stoddard*, supra, 206 Conn. 181 (*Shea*, *J.*, dissenting); accord *Davis* v. *United States*, supra, 460–61; *Davis* v. *United States*, supra, 469 (Souter, J., concurring in the judgment). In essence, the bright-line approach adopted by *Davis* prioritizes society's interest in effective law enforcement whereas the clarification approach the defendant advocates prioritizes the individual's right not to say something that may incriminate him by securing the advice of counsel.

Having performed a complete *Geisler* analysis of the defendant's state constitutional claim in this appeal, we conclude that article first, § 8, does not provide greater protection than the federal constitution with respect to ambiguous or equivocal references to counsel during a custodial interrogation. Having reviewed our own constitutional language, precedents and history, we cannot discern any meaningful difference between the state and federal constitutional protections against compulsory self-incrimination that would justify or require a "third layer of prophylaxis" that the United States Supreme Court has found to be unnecessary. Moreover, the vast majority of our sister states have concluded that their state constitutions do not afford greater protections than the federal constitution in this context. Although some states have elected to adopt the clarification approach as a matter of state constitutional law, the reasoning in those decisions is not persuasive. Finally, although the defendant's position finds some support in the academic and legal communities, we do not believe that countervailing policy arguments are sufficient justification to diverge from our Supreme Court's well established precedent holding that our self-incrimination and due process clauses are coextensive

with the federal self-incrimination and due process clauses. We therefore decline to adopt a new state constitutional standard at this time.

Nonetheless, we believe that it is appropriate in this opinion to reiterate the advice offered by the United States Supreme Court in *Davis*: "[W]hen a suspect makes an ambiguous or equivocal statement *it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney*. . . . Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel." (Emphasis added.) *Davis* v. *United States*, supra, 512 U.S. 461.

The judgment is affirmed.

In this opinion the other judges concurred.

THOMAS MARRA *v.* COMMISSIONER OF CORRECTION (AC 38033)

Keller, Prescott and Harper, Js.

Syllabus

The petitioner, who had been convicted in two separate criminal cases of multiple offenses, including conspiracy to commit kidnapping in the first degree, attempted kidnapping in the first degree, and murder, sought writs of habeas corpus, claiming that his attorneys in both cases had rendered ineffective assistance. The cases were subsequently consolidated. The day before his habeas trial was set to begin, after multiple postponements, the petitioner filed a withdrawal of the habeas action. Despite the filing, the habeas court required the petitioner to appear the next day, with counsel, and canvassed the petitioner on the record regarding his decision to withdraw the case. The habeas court noted the withdrawal and deemed it to be with prejudice. Less than one month after he withdrew the habeas action, the petitioner filed another petition for habeas corpus, claiming ineffective assistance of his prior habeas

counsel for their failure to adequately challenge the effectiveness of the petitioner's trial and appellate counsel in the underlying criminal cases. The trial court rendered judgment dismissing the petition after hearing evidence on the respondent Commissioner of Correction's special defenses, including deliberate bypass, by which the court can deny relief to a petitioner who has intentionally given up rights or privileges by bypassing orderly court procedure and surrendering any remedies. The trial court concluded that the deliberate bypass doctrine applied, therefore depriving the court of subject matter jurisdiction. On the granting of certification, the petitioner appealed to this court, claiming that the trial court improperly gave preclusive effect to the ruling of the prior habeas court that the petitioner's withdrawal was with prejudice because no hearing on the merits had commenced pursuant to statute (§ 52-80), and that the trial court improperly concluded that the doctrine of deliberate bypass barred his action. *Held*:

1. The trial court did not impermissibly rely on the prior habeas court's ruling that the petitioner's withdrawal was with prejudice, but, rather, made its own independent ruling on the merits under the circumstances to determine that the petitioner could not maintain the present action: the petitioner's waiver of his right to go forward with the habeas trial was made expressly and on the record before the prior habeas court, the petitioner participated personally in the decision to withdraw the petition and signed the withdrawal form after consultation with his attorney, and the prior habeas court's canvass made abundantly clear that the decision to terminate the case was the petitioner's, made knowingly and without force or pressure; furthermore, the petitioner engaged in procedural chicanery by filing the petition in an attempt to undermine the order of the prior habeas court, and such gamesmanship is a limitation on the general rule that a party has a right to unilaterally withdraw litigation prior to a hearing on the merits.
2. This court did not address the issue of whether the trial court improperly applied the deliberate bypass doctrine, as it was not necessary to reach that claim because of the resolution of the petitioner's first claim; this court concluded, however, that the form of the trial court's judgment was improper because the trial court's determination that the prior habeas action should be deemed to be withdrawn with prejudice did not implicate the subject matter jurisdiction of the court, and as such, the trial court should have denied, rather than dismissed, the petition.

Argued January 17—officially released July 4, 2017

Procedural History

Two petitions for writs of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the cases were consolidated; thereafter, the court, *Oliver*, *J.*, granted the petitioner's motion for

permission to amend his pleading; subsequently, the court, *Sferrazza, J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Improper form of judgment*; *judgment directed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

Emily D. Trudeau, assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Thomas Marra, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court improperly dismissed his eighteen count petition, which alleged claims of ineffective assistance of counsel against his prior habeas attorneys, because the court improperly (1) relied on a decision of the prior habeas court deeming his withdrawal of that action as being "with prejudice" and (2) concluded that the deliberate bypass doctrine barred his action. We conclude that only the form of the habeas court's judgment is improper and, accordingly, reverse the judgment on that limited ground.

The record reveals the following relevant facts and procedural history of this habeas appeal, which derives from two separate criminal cases and their subsequent posttrial proceedings. With regard to the first case (Noel case), the petitioner was found guilty, following a jury trial, of one count of conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-48 and 53a-92 (a) (2) (A), two counts of attempted kidnapping in the first degree in violation of

[1] The habeas court subsequently granted certification to appeal from the judgment.

General Statutes §§ 53a-49 and 53a-92, one count of arson in the second degree in violation of General Statutes § 53a-112 (a) (1) (B), two counts of larceny in the second degree in violation of General Statutes § 53a-123 (a) (1), and one count of accessory to kidnapping in the first degree in violation of General Statutes §§ 53a-8 and 53a-92 (a) (2) (A). *State* v. *Marra*, 215 Conn. 716, 718–19, 579 A.2d 9 (1990). He was subsequently sentenced to sixty-five years of incarceration. Id., 719.

The relevant facts underlying the Noel case are discussed at length in our Supreme Court's opinion affirming that judgment. They may be summarized as follows.

Sometime during 1981, the petitioner began operating a criminal enterprise that involved selling stolen automobiles to J. W. Ownby, who lived in Kansas City, Missouri. Id., 720. In 1982, the petitioner hired Richard Noel, the victim, to drive the stolen automobiles to Ownby, and Ownby and Noel developed a friendly relationship. Id. In 1983, Ownby terminated almost all of his dealings with the petitioner and began dealing primarily with Noel. Id. The petitioner became "aggravated" with the situation, and his relationships with both men deteriorated. Id.

In November, 1983, during the course of a police investigation into auto theft in the Bridgeport area, Noel implicated the petitioner in statements to the police, and the petitioner later became aware of Noel's conversations with the police. Id., 721. On January 23, 1984, a neighbor of Noel "awoke at approximately 2 a.m. to the sound of a male voice, coming from outside, screaming: 'No, no!' "; observed two men quickly carrying the limp body of another man, presumably Noel, by his arms and legs down the sidewalk toward a parked van in which they tossed him; and, later that morning, "observed a large puddle of blood near the door of the

building, a clump of dark brown hair near the puddle, blood splattered from the puddle over to the place where the van had been parked, and a set of keys." Id., 722–23. The petitioner later burned the van, and he and his associates dumped a barrel, presumably containing Noel's body, into the harbor in Stratford. See id., 723–24.

Subsequently, the petitioner enlisted some of his associates to participate in a scheme to steal money from Noel's bank account, which continued until the bank closed the account in March, 1984. See id., 724–25. In addition, the petitioner filed a lawsuit to collect on a promissory note in the amount of $18,000 on which Noel appeared as the maker and the petitioner as the payee; that suit resulted in a judgment in favor of the petitioner. Id., 725.

As previously indicated, the petitioner appealed from his judgment of conviction, and our Supreme Court affirmed the judgment of the trial court. See id., 739. Thereafter, the petitioner filed a petition for a writ of habeas corpus, alleging ineffective assistance of trial and appellate counsel in the Noel case, and the habeas court, *Bishop*, *J.*, dismissed the petition and denied the petition for certification to appeal. *Marra* v. *Commissioner of Correction*, 51 Conn. App. 305, 305, 721 A.2d 1237 (1998), cert. denied, 247 Conn. 961, 723 A.2d 816 (1999). The petitioner subsequently appealed the habeas court's decision to this court, and this court dismissed the appeal. See id., 310.

With regard to the second case (Palmieri case), the petitioner was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a (a) and sentenced to sixty years of incarceration. *State* v. *Marra*, 222 Conn. 506, 508, 610 A.2d 1113 (1992). The relevant facts underlying the Palmieri case were set

forth in our Supreme Court's opinion affirming that judgment as well.

"On February 6, 1984, the [petitioner] asked [Nicholas] Byers to drive the fifteen year old victim, another associate of the [petitioner], to the [petitioner's] house later that day. At the same time, the [petitioner] asked [Frank] Spetrino [an associate of his] if he would help him put the victim in a barrel. That evening, Byers drove the victim [Alex Palmieri], Spetrino and Tamara Thiel, the victim's girlfriend, to the [petitioner's] house. The [petitioner], the victim, Byers and Spetrino entered the [petitioner's] garage, while Thiel remained in the car.

"In the garage, the [petitioner] and the victim argued about the [petitioner's] desire that the victim leave Connecticut and reside for a time in Italy, and the victim's refusal to do so. When the matter was not resolved to the [petitioner's] satisfaction, he handed Spetrino an aluminum baseball bat and told Spetrino not to let the victim leave the garage. Thereafter, as the group began to exit the garage, Spetrino struck the victim in the head with the bat. After Spetrino had hit the victim from one to three times, the [petitioner] said, 'Let's get him in the refrigerator.' Spetrino then began to drag the victim toward a refrigerator that was located inside the [petitioner]'s garage. As he was being dragged, the victim began to speak incoherently, and the [petitioner] said, 'Shut up Alex. You didn't go to Italy.' When the victim failed to quiet down, the [petitioner] struck him on the head with the bat numerous times. The additional blows made the victim bleed heavily and caused some of his brain tissue to protrude from his skull. The [petitioner], Byers and Spetrino then placed the victim into a large refrigerator, and the [petitioner] closed and padlocked the door. The men then loaded the refrigerator into the back of a rented van, and the [petitioner] and Spetrino drove the van to a parking area near the Pequonnock River, where the river empties into the

harbor in downtown Bridgeport. After making several holes in the refrigerator with an axe so that it would sink, the [petitioner] and Spetrino slid the refrigerator into the water and it floated away. Although a police dive team searched the harbor for the victim's body and the refrigerator for a period of five months, the divers could locate neither. The victim has not been seen or heard from by his family or friends since February 6, 1984." Id., 508–10.

The petitioner appealed from the judgment of conviction, and our Supreme Court affirmed the judgment of the trial court. See id., 539. Thereafter, on November 25, 1993, the petitioner filed a petition for a writ of habeas corpus, alleging ineffective assistance of trial and appellate counsel in the Palmieri case, and the habeas court, *Zarella*, *J.*, dismissed the petition. On appeal, this court affirmed the habeas court's dismissal.[2]

[2] We note that the petitioner also has filed several other habeas petitions. Specifically, he filed an application for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, raising the following claims with regard to his trial in the Palmieri case: "(1) during the initial closing argument and the rebuttal argument, the State improperly commented on his failure to testify; (2) the trial court violated his right to a fair trial by giving misleading examples of reasonable doubt during the jury instructions; (3) the trial court improperly charged the jury that it could convict him as an accessory to murder; (4) insufficient evidence was produced at his probable cause hearing to establish that the victim was dead; (5) the trial court improperly admitted testimony regarding lost evidence; (6) the trial court improperly admitted irrelevant physical evidence; (7) the trial court improperly bolstered the testimony of his accomplices during the jury instructions; (8) the trial court constructively amended the charges against him; (9) the trial court improperly marshalled the evidence in favor of the State during the jury instructions; (10) his trial counsel barred him from testifying in his defense; (11) his appellate counsel failed to raise a cognizable issue on appeal; and (12) the State failed to disclose *Brady* materials." *Marra* v. *Acosta*, United States District Court, Docket No. 3:01CV0368 (AWT) (D. Conn. November 7, 2008). The federal district court denied that petition. Id.

On October 18, 2007, the petitioner filed a pro se petition for a writ of habeas corpus in the Superior Court in Rockville under docket number CV-07-4002041-S, and the habeas court, *Schuman*, *J.*, declined to issue the writ pursuant to Practice Book § 23-24. Likewise, on May 14, 2015, the petitioner filed yet another petition for a writ of habeas corpus in Rockville under

Marra v. *Commissioner*, 56 Conn. App. 907, 743 A.2d 1165, cert. denied, 252 Conn. 949, 747 A.2d 525 (2000).

Subsequently, the petitioner filed two additional habeas actions alleging ineffective assistance of his prior habeas counsel in both the Noel and Palmieri cases. Those two actions eventually were consolidated under docket number CV-05-4000275 (CV-05). As discussed in the habeas court's memorandum of decision in the present case, the petitioner's habeas trial in the CV-05 action "was first scheduled to begin in February 2010. At the request of the petitioner, trial was postponed to . . . August, 2010. For unknown reasons, the trial was again rescheduled to . . . October 4, 2011. The petitioner again requested a postponement and the case was reassigned a 'hard' and firm trial start date of October 23, 2012, [with] Judge Pavia presiding.

"However, the day before trial was to begin, the petitioner executed a withdrawal of the habeas action on October 22, 2012. The petitioner signed the withdrawal form as [did] counsel. Despite the withdrawal filing, Judge Pavia required the petitioner and counsel to appear before her on October 23, 2012. Judge Pavia and [the] respondent's counsel both expressed their readiness to proceed with the habeas trial, but [the] petitioner's counsel reiterated the petitioner's desire to withdraw the case.

docket number CV-15-4007255-S, which alleged claims of ineffective assistance of habeas counsel in both the Noel and Palmieri cases. The habeas court, *Bright, J.*, dismissed that petition. That dismissal was recently affirmed on appeal by this court, and certification was denied by our Supreme Court. See *Marra* v. *Commissioner of Correction*, 170 Conn. App. 908, 154 A.3d 1123, cert. denied, 325 Conn. 906, 156 A.3d 536 (2017).

The petitioner additionally has two separate habeas actions that are currently pending before the trial court; however, the record in this case does not disclose the particular claims in those actions. See Rockville docket numbers CV-15-4007234-S, filed on May 27, 2015, and CV-15-4007353-S, filed on July 13, 2015.

"Judge Pavia canvassed the petitioner on the record regarding his decision to withdraw the case and relinquish his opportunity to prove his allegations against previous habeas counsel. The judge recounted the lengthy procedural history and the fact that the trial had been postponed multiple times. Judge Pavia warned the petitioner that attempts to refile would be met with opposition by the respondent [Commissioner of Correction] and that such refiling might be dismissed summarily because of the withdrawal.

"The judge ascertained that the petitioner's decision to terminate the litigation was made after consultation with counsel and without coercion of any sort and was a product of the petitioner's free will. The petitioner acknowledged the judge's admonitions but still wished to withdraw his case."

Judge Pavia deemed the withdrawal to be with prejudice,[3] stating: "For what it's worth, I am going to just put this on the record. I understand that there's an issue in terms of whether or not this is with prejudice or without prejudice. And while there may not be any case law that addresses the issue of prejudice in such a matter, I do want to place some things on the record for the next judge if in fact this issue ever is addressed again.

"As indicated, we are here today for the first day of trial. This trial date was set many months ago. We were accommodating a request, a special request, which came in from Rockville to accommodate the [petitioner] because he had some serious health concerns and we wanted to be able to accommodate his needs so that

[3] To the extent that Judge Pavia's order on the record may be ambiguous as to whether the withdrawal was made with or without prejudice, the written notice of the order, issued to all parties of record on October 26, 2012, makes clear that the matter was deemed to be withdrawn with prejudice. Moreover, neither party disputes that the withdrawal was deemed to be with prejudice.

he was able to attend the trial in the best manner that he possibly could. And so this court agreed to take the case.

"The case is not necessarily a short habeas petition and did need at least a week to two weeks of trial time, as I was told from counsel. And on several occasions, we cleared our matters here in this court where we only have a single trial judge to be able to accommodate the petitioner's matter. In addition, we had addressed the idea of depositions taking place before the trial began, specifically the deposition of Attorney [Frank] Riccio, who is one of the main [witnesses with respect to the] claims of ineffectiveness in terms of the petitioner's habeas petition. That deposition was scheduled and rescheduled on several occasions.

"I know that the state is—or the respondent is indicating that they're not going to ponder as to why the deposition did not go forward, but I think it's worth noting for the record that it was not the respondent who was not available. It was also not the deponent who was not available, but for one reason or another, the matter was called off. So it was not the respondent calling it off, it was not the deponent calling it off. And I think that matter will probably become more developed as time goes on.

"This court has not only set aside the time in terms of trial, but the clerk gave up her time by way of setting afternoons, and even met with the attorneys and marked all the exhibits for this matter so that we'd be ready to go in an effective way today. The . . . respondent is ready to begin, and has, according to . . . much discussion in chambers, been actively pursuing their readiness for this trial for some time and are prepared to go forward today. The court is ready to go forward today.

"I note the withdrawal of the action after a full canvass of the matter and the ramifications of that canvass. And to the extent that this matter can be deemed to be with prejudice, it would be this court's opinion that it should be."

On November 14, 2012, that is, less than one month after he withdrew the CV-05 action before Judge Pavia, the petitioner filed the present habeas action.[4] In his fifth amended petition dated March 26, 2015,[5] the petitioner alleged in eighteen counts that his prior habeas attorneys in both the Noel and Palmieri cases rendered ineffective assistance of counsel. More specifically, the petitioner alleges, inter alia, that the petitioner's prior habeas counsel in the Noel case, Attorney Raymond Rigat, did not adequately challenge the effectiveness of the petitioner's appellate counsel, Attorney Timothy Pothin, and his trial counsel, Attorney Riccio; and that the petitioner's prior habeas counsel in the Palmieri case, Attorney Thomas Conroy, failed to adequately challenge the effectiveness of the petitioner's trial counsel in that case, Attorney Riccio. In his return,[6] the

[4] This case, in which the petitioner was represented by Attorney Kenneth Fox, eventually was consolidated with another of the petitioner's habeas actions in Rockville, docket number CV-13-4005039-S, in which the petitioner was represented by Attorney Adam Wallace. Accordingly, the petitioner was represented by two attorneys in this habeas action.

[5] At the hearing before the habeas court on May 4, 2015, the respondent stated that "the . . . factual allegations [in the fifth amended petition] are identical to the CV-05 case that [the petitioner] withdrew intentionally in 2012 and then refiled [in] this action." The petitioner later stated that "the allegations are the same in the sense that the allegations are about whether Attorney Riccio had originally done adequately discovery himself, but [there] are new items [that differ from the withdrawn petition that] we feel he could have discovered if he had done it adequately himself."

[6] "Practice Book § 23-30 (b) provides, in relevant part, that the respondent's return shall allege any facts in support of any claim of procedural default, abuse of the writ, or any other claim that the petitioner is not entitled to relief. . . . [T]he doctrine of deliberate bypass historically has arisen in the context of habeas petitions involving claims procedurally defaulted at trial and on appeal." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 157 Conn. App. 701, 706, 117 A.3d 1003,

respondent pleaded the special defenses of procedural default, deliberate bypass, res judicata,[7] and laches.[8]

The habeas court, *Sferrazza*, *J.*, was scheduled to begin trial on the petitioner's claims on May 4, 2015. That day, however, prior to hearing evidence, Attorney Fox stated that the parties were in agreement that "it would be simpler for [the court] to . . . decide whether [it] would want to rule on [the special defense] issues . . . if [the respondent] prevails, the trial is not going forward, so it would make sense to deal with them now." Judge Sferrazza agreed, and the parties presented evidence, which included the testimony of the petitioner, on the limited issues posed by the respondent's special defenses. Later that day, Judge Sferrazza orally ruled that the petitioner's action was dismissed.

In his written memorandum of decision dated May 7, 2015, Judge Sferrazza made the following findings: "[T]he petitioner testified that his decision to withdraw the case and his responses to Judge Pavia were clouded by the effects of illness and/or medication. The court finds this testimony unworthy of belief. He signed the withdrawal form on October *22*, 2012, after discussions with counsel. His replies to Judge Pavia the next day were cogent and belie his assertion of diminished comprehension.

"His counsel, on October 23, 2012, revealed that the reason for the withdrawal was predicated on counsel's inability to arrange to depose Attorney Riccio, who was seriously ill around that date. Habeas counsel feared that Attorney Riccio might be unable to testify as to

cert. granted, 318 Conn. 903, 122 A.3d 632 (2015). Because the respondent pleaded procedural default and deliberate bypass as part of its special defenses, it satisfied the requirement of § 23-30 (b).

[7] More specifically, the respondent pleaded that count twelve is barred by the doctrine of res judicata.

[8] More specifically, the respondent pleaded that counts sixteen and seventeen are barred by the doctrine of laches.

his version of events at the habeas trial because of his deteriorating health. He died a few months later in 2013.

"Habeas counsel's explanation for withdrawal on the eve of trial was due to a lack of confidence in proving the habeas on a habeas case if the trial proceeded. Attorney Wallace remarked, 'The fact that [Attorney Riccio] is our main witness, that that—without his testimony, *this trial would go nowhere*' . . . .

"It must be noted that the petitioner chose to *terminate* the case rather than request additional time to secure whatever useful information Attorney Riccio might possess. Recall that Attorney Riccio had testified at the earlier habeas trials . . . . Presumably, he was available for discussion with new habeas counsel during the seven year period between January, 2005, when the previous habeas on a habeas case was filed, and October, 2012. . . . As mentioned above, the habeas trial was twice postponed at the petitioner's behest." (Citation omitted; emphasis in original.)

Ultimately, Judge Sferrazza concluded that "Judge Pavia's canvass made abundantly clear that [the petitioner's] decision to terminate his case was, indeed, *his* decision, made knowingly and without force or pressure. A petitioner ought not be permitted to withdraw a habeas case at the moment of trial simply based on fear of failure if the trial were to proceed, without incurring the consequence of finality." (Emphasis in original.) He then concluded that the deliberate bypass doctrine applied and dismissed the petition due to a lack of subject matter jurisdiction. This appeal followed.

We begin by setting forth the applicable standard of review. "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and

logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . .'' (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 157 Conn. App. 701, 704, 117 A.3d 1003, cert. granted in part, 318 Conn. 903, 122 A.3d 632 (2015).

I

The petitioner first claims on appeal that, in determining that the prior habeas action was withdrawn with prejudice, Judge Sferrazza improperly gave preclusive effect to the prior ruling of Judge Pavia in the CV-05 action, which the petitioner claims was improper because no hearing on the merits had commenced pursuant to General Statutes § 52-80 as interpreted by *Kendall* v. *Commissioner of Correction*, 162 Conn. App. 23, 130 A.3d 268 (2015). In response, the respondent contends that the previous ruling in the CV-05 action was permissible because *Kendall* is distinguishable from the present case, and ''any mechanical application of § 52-80 to permit the petitioner to deliberately forgo pursuit of his known claims, only to reassert them years later when all of the available evidence is more stale and some of the most critical evidence . . . is now forever unavailable, would completely ignore the concerns for finality reflected in our habeas jurisprudence, be irreconcilable with the policies behind our habeas rules of procedural default, and completely turn on their head the equitable principles that serve as the foundation for habeas corpus relief.'' We conclude that Judge Sferrazza did not impermissibly rely on Judge Pavia's prior ruling but, rather, made his own independent ruling, and, on the merits, we agree with the respondent.

As an initial matter, we address the faulty premise upon which the petitioner's first claim rests, i.e., that

Judge Sferrazza's dismissal was predicated solely on Judge Pavia's prior ruling. Having thoroughly reviewed Judge Sferrazza's memorandum of decision, we construe his ruling to be an independent determination that the petitioner's conduct in the previous CV-05 proceeding constituted a withdrawal with prejudice. More specifically, we conclude that although Judge Sferrazza relied upon the factual findings of Judge Pavia with respect to the CV-05 action, he did not treat Judge Pavia's legal conclusions as res judicata[9] on the issue of whether the petitioner's withdrawal should be deemed to be with prejudice.

We, therefore, turn to whether Judge Sferrazza correctly determined that *this* habeas action could not be maintained in light of the petitioner's conduct in the prior proceeding. We conclude that Judge Sferrazza properly determined that the petitioner could not maintain the present action because his withdrawal of the CV-05 action should, under the circumstances, be deemed to be with prejudice.

Section 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action . . . only by leave of court for cause shown." "The term 'with prejudice' means '[w]ith loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim . . . .' " *Mozell* v. *Commissioner of Correction*, 147 Conn. App. 748, 756, 83 A.3d

[9] "The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings." (Internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 161 Conn. App. 253, 265, 127 A.3d 1001, cert. denied, 320 Conn. 910, 128 A.3d 953 (2015).

1174, cert. denied, 311 Conn. 928, 86 A.3d 1057 (2014). "The disposition of withdrawal with prejudice exists within Connecticut jurisprudence. . . . Indeed, the disposition of withdrawal with prejudice is a logically compelling disposition in some circumstances. A plaintiff is generally empowered, though not without limitation, to withdraw a complaint before commencement of a hearing on the merits. . . . A plaintiff is not entitled to withdraw a complaint without consequence at such hearing." (Citations omitted.) Id., 757. "The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being 'with prejudice' is, when authorized, a decision left to that court's discretion." *Kendall* v. *Commissioner of Correction*, supra, 162 Conn. App. 28, citing *Mozell* v. *Commissioner of Correction*, supra, 759–60.

As previously mentioned, the petitioner cites to *Kendall* v. *Commissioner of Correction*, supra, 162 Conn. App. 23, as support for his argument that the withdrawal of the CV-05 action cannot properly be labelled "with prejudice" because a hearing on the merits had not yet commenced at the time he requested it. In *Kendall*, which was decided several months after Judge Sferrazza dismissed the petition in the present case, the petitioner wished to withdraw his habeas petition without prejudice *after* the court had taken the bench for his scheduled habeas trial but *before* any evidence or arguments concerning the merits of the case had been presented. Id., 26–27. The habeas court would not permit him to do so on the ground that his "habeas hearing [had] commenced for purposes of [General Statutes] § 52-80 when the court took the bench to hear evidence on the date and time assigned." (Internal quotation marks omitted.) Id., 28. On appeal, we reversed the judgment of the habeas court, concluding that "no hearing on the merits can be said to have commenced within the meaning of the statute at the time the petitioner

stated that he wished to withdraw his petition and the court ruled that it would allow a withdrawal only with prejudice."[10] Id., 48, 51.

Significantly, however, the court in *Kendall* recognized that in certain circumstances, a withdrawal of a petition *prior* to the commencement of a hearing on the merits could be deemed to be with prejudice: " '[A] plaintiff is *generally* empowered, *though not without limitation*, to withdraw a complaint before commencement of a hearing on the merits . . . .' " (Emphasis added.) Id., 29, quoting *Mozell* v. *Commissioner of Correction*, supra, 147 Conn. App. 757. Moreover, this court, in *Kendall*, was careful to make clear that the only question it was asked to resolve in that case was whether a hearing on the merits had commenced for purposes of applying § 52-80. *Kendall* v. *Commissioner of Correction*, supra, 162 Conn. App. 29 ("[n]either party disputes that § 52-80 applies to habeas actions or that, under the appropriate circumstances, a habeas court can order that a withdrawal of a habeas petition be with prejudice; rather, the primary point of contention concerns whether the habeas court properly determined that the petitioner could not withdraw his petition without prejudice because a hearing on the merits had commenced"). Accordingly, as neither party here

[10] More specifically, this court concluded that "[h]abeas counsel had alerted the habeas court prior to the court's taking the bench that the petitioner wished to address the court. After addressing both the petitioner and habeas counsel, the court denied the petitioner's oral motion to appoint new counsel and indicated that the case would proceed that day. Immediately following this denial and prior to the court calling for the testimony of the first witness or the petitioner's taking the witness stand, however, habeas counsel, after conferring with the petitioner, indicated that his client wished to withdraw his petition. No evidence had been taken, and neither party had presented any arguments concerning the merits of the case before the court ruled that the petitioner could not withdraw his petition without prejudice." (Footnotes omitted.) *Kendall* v. *Commissioner of Correction*, supra, 162 Conn. App. 48.

disputes that a hearing on the merits had not yet commenced at the time the petitioner requested a withdrawal of his CV-05 action, *Kendall* does not resolve the question before this court.

One year after *Kendall* was decided, this court decided *Palumbo* v. *Barbadimos*, 163 Conn. App. 100, 134 A.3d 696 (2016).[11] *Palumbo* stands for the principle that although the party initiating an action generally enjoys a right to withdraw litigation unilaterally prior to a hearing on the merits, a later filing of an identical case by that party can be deemed an abuse of that right if it constitutes "procedural chicanery," that is, it "offends the orderly and due administration of justice" and is intended "to avoid the consequences of [his or] her [previous] waiver." Id., 103–104. The defendant in *Palumbo* sought to have a civil action restored to the docket, because the plaintiff had previously withdrawn that original action and filed a second, identical action to avoid a bench trial that was the consequence of the plaintiff having missed the deadline for claiming the action to the jury trial list. Id., 102. We agreed with the defendant that his motion to restore the original action to the docket should have been granted, holding that "the broad authority granted to a [party] pursuant to § 52-80 to unilaterally withdraw an action prior to a hearing on the merits does not automatically extend to [that party] the additional right to commence an essentially identical action following that withdrawal if the primary purpose for doing so is to undermine an order of the court rendered in the prior litigation . . . ." Id., 115.

[11] In *Palumbo*, we cited to *Kendall*, inter alia, as support for the following assertion: "The broad language used by this court to describe a plaintiff's right to withdraw an action must be read in conjunction with other cases that make clear that the right of withdrawal may be trumped in certain circumstances by another party's right to restore the case to the docket." *Palumbo* v. *Barbadimos*, supra, 163 Conn. App. 112.

We recognize that, in the present case, the consequence of the petitioner's withdrawal of his previous CV-05 action is that he is now precluded from raising the CV-05 habeas claims entirely, a harsher result than that occasioned in *Palumbo*. In the present case, however, the petitioner's waiver of his right to go forward with the habeas trial in the CV-05 case was made expressly and on the record before Judge Pavia, as opposed to in *Palumbo*, where the plaintiff's waiver of his right to a jury trial was done by operation of statute once he missed the deadline for claiming the action to a jury trial list. See General Statutes § 51-239b. As Judge Sferrazza highlighted in his memorandum of decision, the petitioner here "participated personally in the decision to withdraw the previous habeas matter the day before trial was to begin. He signed the form on October 22, 2012, after consultation with his lawyer. Judge Pavia's canvass made abundantly clear that his decision to terminate his case was, indeed, *his* decision, made knowingly and without force or pressure." (Emphasis in original.) To the extent that the petitioner believed it was improper for Judge Pavia to canvass him and to enter the withdrawal with prejudice, he could have appealed her decision,[12] rather than file a second, identical habeas petition.

Additionally, in relying on Judge Pavia's prior findings and the record in that proceeding,[13] Judge Sferrazza

[12] We have previously held that an appeal of a withdrawal with prejudice is ripe for review because it "does not constitute a hypothetical injury contingent on a future event. The court's decision [constitutes] a final adjudication ending this matter and [concludes] the petitioner's rights with respect to [the] case." (Footnote omitted.) *Mozell* v. *Commissioner of Correction*, supra, 147 Conn. App. 756.

[13] At the previous CV-05 proceeding, Judge Pavia found that the trial date in that matter had been set many months in advance and that the issue of taking Attorney Riccio's deposition before the start of trial, due to his failing health, had been previously addressed by the parties and the court. Judge Pavia found that "[t]hat deposition was scheduled and rescheduled on several occasions. I know that the . . . respondent is indicating that they're not going to ponder as to why the deposition did not go forward, but I think

found that "[h]abeas counsel's explanation for withdrawal [of the CV-05 action] on the eve of trial was due to a lack of confidence in proving the habeas on a habeas case if the trial proceeded. Attorney Wallace remarked, 'The fact that [Attorney Riccio] is our main witness, that that—without his testimony, *this trial would go nowhere*.' " (Emphasis in original.) Judge Sferrazza also stated that Attorney Riccio presumably was "available for discussion with new habeas counsel during the seven year period between January, 2005, when the [CV-05] habeas on a habeas case was filed, and October, 2012 [when the withdrawal of that action occurred]," and that "[a]ny lack of preparedness was attributable to the petitioner rather than the respondent or the court." Judge Sferrazza did not find that the petitioner's previous withdrawal was due to the petitioner's own health problems, and he found that the petitioner lacked credibility when he testified before the court.[14]

Ultimately, Judge Sferrazza considered the procedural posture of this case to implicate the doctrine of deliberate bypass,[15] noting that the petitioner chose to

it's worth noting for the record that it was not the respondent who was not available. It was also not the deponent who was not available, but for one reason or another, the matter was called off." As previously mentioned, Judge Pavia's factual findings were never challenged by the petitioner. Accordingly, Judge Sferrazza was free to rely upon them in determining whether to dismiss the present petition.

[14] In his memorandum of decision, Judge Sferrazza stated: "Before this court, the petitioner testified that his decision to withdraw the case and his responses to Judge Pavia was clouded by the effects of illness and/or medication. The court finds this testimony unworthy of belief."

[15] Our appellate courts historically "employed the deliberate bypass rule, as articulated in *Fay* v. *Noia* [372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963)], in order to determine the reviewability of constitutional claims in habeas corpus proceedings that had not been properly raised at trial or pursued on direct appeal. . . . In *Fay* v. *Noia*, supra, [372 U.S. 438–39], the United States Supreme Court held that habeas corpus jurisdiction was not affected by the procedural default, specifically a failure to appeal, of a petitioner during state court proceedings resulting in his conviction. The court recognized, however, a limited discretion in the federal habeas judge

terminate the CV-05 case rather than request additional time to secure whatever useful information Attorney Riccio could have provided as evidence. The argument could also be made that the court's disposition falls more neatly under other doctrines such as waiver or abuse of the writ.[16] Regardless of the label, the effect is the same. Judge Sferrazza's independent determination that the petitioner's conduct in the previous CV-05 proceeding constituted a withdrawal with prejudice was legally correct, despite the fact that a hearing on the merits had not yet commenced, because the petitioner engaged in "procedural chicanery" by filing the present

to deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. . . . This deliberate bypass standard for waiver required an intentional relinquishment or abandonment of a known right or privilege by the petitioner personally and depended on his considered choice. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief." (Citation omitted; internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 130–31, 629 A.2d 413 (1993). "The deliberate bypass rule serves two important functions: (1) it encourages a litigant to have all constitutional claims resolved in a single proceeding economizing the time and resources of all concerned parties and bringing the case to a conclusion; and (2) it prevents a prisoner from deliberately deferring his claims of unlawful confinement until a time when a new trial, if required as a result of the collateral proceeding, would be, for all practical purposes, impossible." (Internal quotation marks omitted.) *State* v. *Rivera*, 196 Conn. 567, 571, 494 A.2d 570 (1985).

We acknowledge that our Supreme Court later concluded that the *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), cause and prejudice standard should be employed to determine the reviewability of habeas claims that were not properly pursued at trial or on direct appeal. See *Jackson* v. *Commissioner of Correction*, supra, 227 Conn. 132; *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991). The majority in *Jackson* made clear, however, that "[i]n those rare instances in which a deliberate bypass is found, of course, habeas review would be barred for that reason alone, apart from the cause and prejudice standard." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, supra, 132.

[16] "[T]he ability to bring a habeas corpus petition at any time is limited by the traditional doctrine of abuse of the writ based upon unnecessary successive petitions." *Summerville* v. *Warden*, 229 Conn. 397, 428 n.15, 641 A.2d 1356 (1994).

petition in an attempt to undermine the order of the court in the CV-05 action. As previously discussed, we have considered such gamesmanship to be a limitation on the general rule that a party has a right to withdraw litigation unilaterally prior to a hearing on the merits. See *Palumbo* v. *Barbadimos*, supra, 163 Conn. App. 103–104.

II

The petitioner next claims on appeal that Judge Sferrazza improperly applied the doctrine of deliberate bypass.[17] Although the basis of Judge Sferrazza's reliance upon the deliberate bypass doctrine is less than clear, we conclude that it is unnecessary to reach the respondent's second claim because of our prior conclusion that the petitioner's withdrawal of his CV-05 petition was with prejudice. Because we conclude that the withdrawal was with prejudice, the petitioner is barred from raising identical claims in the present petition. See *Mozell* v. *Commissioner of Correction*, supra, 147 Conn. App. 756. Accordingly, it would serve no practical purpose to analyze whether Judge Sferrazza's reliance on the deliberate bypass doctrine was appropriate under the circumstances of this case.

Finally, we note that Judge Sferrazza's determination that the prior action should be deemed to be withdrawn with prejudice does not implicate the subject matter jurisdiction of the court over this petition. Accordingly, he should have denied, rather than dismissed, the petition, and the form of the judgment is thus improper.

The form of the judgment is improper; the judgment dismissing the petition for habeas corpus is reversed,

[17] As previously discussed in part I of this opinion, we need not decide whether Judge Sferrazza's basis for dismissing the petition more properly implicates the doctrine of deliberate bypass, waiver, or abuse of the writ, as application of any of those doctrines results in the same outcome here.

and the case is remanded with direction to render judgment denying the petition for a writ of habeas corpus.

In this opinion the other judges concurred.

ERIC KURISOO *v.* HARRY ZIEGLER ET AL.
(AC 38659)

Sheldon, Beach and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, Z and M Co., for negligence in connection with personal injuries he had sustained in a motor vehicle accident when his vehicle was struck by a vehicle driven by Z. As to M Co., the plaintiff initially brought this action claiming that M Co.'s direct negligence had proximately caused his injuries. M Co. moved for summary judgment on the only count then pending against it, claiming that it did not owe a duty of care to the plaintiff because M Co.'s alleged negligence did not create a reasonably foreseeable risk that the alleged harm would occur, as required under the first prong of the legal duty analysis. The trial court rejected M Co.'s argument, but granted M Co.'s motion for summary judgment on the ground that, under the second prong of the legal duty analysis, M Co.'s responsibility for its alleged negligence should not extend to the plaintiff under these circumstances for reasons of public policy, and that there was no need for a determination of the factual issue of whether the plaintiff's injuries were reasonably foreseeable to M Co. Subsequent to M Co.'s filing of its first summary judgment motion, but prior to the trial court's ruling on that motion, the plaintiff amended his complaint to allege that M Co. was also vicariously liable for the negligence of Z, who had proximately caused his injuries. In response, after the court had ruled on M Co.'s first motion for summary judgment, M Co. filed a motion for summary judgment on the plaintiff's vicarious liability claim on the sole ground that vicarious liability could not be established because Z was not acting as the agent, servant or employee of M Co. at the time of the collision that caused the plaintiff's injuries. The court again rejected the argument raised by M Co., concluding, inter alia, that the plaintiff had failed to establish the absence of a genuine issue of material fact as to whether Z was acting as M Co.'s agent, but again rendered summary judgment in favor of M Co., finding that, as a matter of public policy, M Co. owed no legal duty to the plaintiff at the time of its alleged negligence that proximately caused the plaintiff's injuries. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly rendered summary judgment in favor of M Co. on both of its motions because the court based its rulings on a ground not raised in M Co.'s summary

judgment motions. *Held* that both of M Co.'s motions for summary judgment should have been denied, the trial court having lacked the authority to render summary judgment for M Co. because the court based its summary judgment rulings on a ground not raised by M Co. in its motions, namely, that M Co.'s responsibility for its alleged negligence should not extend to the plaintiff under the circumstances of this case for reasons of public policy; in ruling on both the first and second motion for summary judgment, the court rejected the only basis upon which M Co. claimed it was entitled to judgment as a matter of law, specifically, that it owed no duty of care to the plaintiff.

Argued February 8—officially released July 4, 2017

Procedural History

Action to recover damages for the defendants' alleged negligence, brought to the Superior Court in the judicial district of New London, where the court, *Zemetis*, *J.*, granted the motion for summary judgment filed by the defendant Mystic Seaport Museum as to one count of the complaint; thereafter, the court, *Vacchelli*, *J.*, granted the motion for summary judgment filed by the defendant Mystic Seaport Museum and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Mary M. Puhlick, for the appellant (plaintiff).

Alexandra J. Zeman, with whom, on the brief, were *Michael P. Kenney* and *Kate J. Boucher*, for the appellee (named defendant).

Joseph M. Musco, for the appellee (defendant Mystic Seaport Museum).

Opinion

SHELDON, J. The plaintiff, Eric Kurisoo, appeals from the summary judgment rendered by the trial court in favor of the defendant Mystic Seaport Museum d/b/a Mystic Seaport. On September 20, 2013, the plaintiff was injured when the motorcycle he was operating collided with a motor vehicle operated by Harry

Ziegler,[1] who, at the time of the collision, was participating in an antique car tour sponsored by the defendant. The plaintiff initially brought this action, claiming that its direct negligence had proximately caused his injuries. Subsequently, he amended his complaint to allege, as well, that the defendant was vicariously liable for the negligence of Ziegler, who had proximately caused such injuries. The court rendered summary judgment in favor of the defendant on both of the plaintiff's claims, finding, as a matter of public policy, that it owed no duty to the plaintiff at the time of its direct or vicarious negligence. On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendant on both of his claims because it based its rulings on a ground not raised in the defendant's summary judgment motions. We agree with the plaintiff, and thus reverse the judgment of the trial court.[2]

The trial court found that the following facts were undisputed. "[The defendant] is a nonprofit, educational institution that operates Mystic Seaport [(seaport)], located in Mystic. . . . It is a recreation of a nineteenth century coastal village with historic ships, and it offers related exhibits and attractions to the public. It has, since 1996, sponsored an antique car show featuring pre-1930 vintage automobiles on the grounds of the seaport called the 'By Land and By Sea Antique Vehicle Show.' The show permits vintage car owners to exhibit their vehicles for public viewing on a Sunday. Although there is an admission fee for entry to the seaport, there

[1] Ziegler is also a defendant in this action. Because this appeal deals only with the summary judgment rendered in favor of Mystic Seaport Museum, any reference to the defendant herein refers to Mystic Seaport Museum only. We note that Ziegler has filed a brief in this appeal supporting the position of the plaintiff in accordance with Practice Book § 67-3.

[2] The plaintiff also claims that the court's public policy analysis was flawed on its merits. Because we reverse the judgment of the trial court on the ground that the public policy issue was not properly before it, we need not address it now.

is no extra charge for viewing the Sunday antique auto show.

"At the time of the accident . . . Ziegler registered his antique car for inclusion in the show. He was required to and did pay a $40 registration fee to be able to enter his car in the show. As part of the weekend activities, [the] seaport staff and volunteers organized driving tours on the Friday and Saturday before the show for the entrants to give them the opportunity to see the local scenery and attractions and to allow them to exhibit their vehicles to the public.

"On Friday, September 20, 2013, Ziegler participated in a [thirty] mile scenic tour of the Mystic/Stonington area arranged by the event volunteers and staff. About [forty] or [fifty] cars were involved. The participants gathered at the Old Mystic Village north parking lot and were provided with printed driving directions, routes and a map to follow for the event's tour that particular day. In addition, the participants were provided with banners to place on their antique cars by event volunteers and staff, which stated, 'Follow Me on Sunday to Mystic Seaport to the Mystic Seaport Antique Vehicle Show.' . . . Ziegler affixed the banner to his car prior to the tour commencing, and then he joined the tour. It was not a parade of cars, with one following the other, and event organizers did not arrange for personnel to guard intersections or direct traffic along the route. Cars did not follow one after the other. Rather, each driver simply proceeded independently and followed the directions given at the start. Although participants were not required to follow the route, it was assumed that most participants would stay together and follow the instructions. They were instructed to follow the rules of the road, and be vigilant at intersections. They were encouraged to remain on the prescribed route because [the] seaport arranged for a 'trouble car' to

help with breakdowns along the route, although there was no trouble car available on the day of the accident.

"Ziegler did follow the directions he was given. While on Coogan Boulevard at the intersection with Jerry Browne Road in North Stonington, he stopped at a stop sign, then proceeded to turn left (northbound) onto Jerry Browne Road, when the collision [with the plaintiff] occurred."

On March 20, 2014, the plaintiff commenced this action by way of a two count complaint, one count against Ziegler and the other count against the defendant. As to the defendant, the plaintiff alleged that it had negligently caused his injuries by failing to provide an escort for the procession, failing to warn the public regarding the route of the procession, failing to properly secure the intersection where the collision occurred, failing to properly instruct or train the participants in the procession, and failing to obtain a permit for the procession. On January 21, 2015, the plaintiff amended his complaint to add a third count, claiming that the defendant was vicariously liable for the negligence of Ziegler, who had caused his injuries.

On December 18, 2014, prior to the filing of the plaintiff's amended complaint, the defendant moved for summary judgment on the sole count then pending against it, which sounded in direct negligence. The defendant argued in support of its motion that it did not owe a duty to the plaintiff because "the defendant's negligence, as alleged, [did not create] a reasonably foreseeable risk that . . . Ziegler would pull out from a stop sign into the path of the plaintiff's oncoming motorcycle when it was not safe to do so." In its memorandum of decision, filed on May 22, 2015, the court disagreed, explaining: "The question is whether a reasonable jury could find that [the defendant] should have anticipated that a motorist might be injured by a vehicle participating

in the antique vehicle show without [the defendant] employing additional safety precautions on public roadways. Because reasonable people could disagree as to whether [the defendant] should have anticipated a harm of the general nature of that suffered by the plaintiff, reasonable foreseeability in the present case would be a question for the jury." The court went on, however, to consider "whether public policy militates against imposing a duty under the circumstances of this case." On that issue, which the defendant had not raised in its motion and the parties had not briefed or argued, the court concluded: "If one who provides directions to a motorist may be liable for the consequences of that motorist's failure to follow the rules of the road while en route and not because of the route directions provided, significant costs would be imposed on society. Because public policy considerations preclude the imposition of a duty on [the defendant], there is no need for a jury to determine the factual issue of whether the injuries suffered by the plaintiff were reasonably foreseeable to [the defendant]." On that sole ground, the court rendered summary judgment in favor of the defendant.

On July 29, 2015, the defendant filed a second motion for summary judgment on the plaintiff's claim of vicarious liability for the negligence of Ziegler, on the sole ground that vicarious liability could not be established because Ziegler was not acting as the agent, servant or employee of the defendant at the time of the collision that caused the plaintiff's injuries. In its November 20, 2015 memorandum of decision, the court found that "there are multiple facts in the record tending to establish that [Ziegler] was an agent" and, thus, "[a] trier of fact could conclude that . . . Ziegler was an agent [of the defendant] during the procession." The court concluded, on that basis, that the defendant had failed to establish the absence of a genuine issue of material fact

as to whether Ziegler was its agent at the time of his alleged negligence, or thus that it was entitled to judgment on the plaintiff's vicarious liability claim as a matter of law. Even so, the court went on to grant summary judgment in favor of the defendant on the unpleaded, unargued basis of its earlier ruling on the defendant's first motion for summary judgment, to wit: that, on the basis of public policy considerations, the defendant owed the plaintiff no duty of care at the time of the alleged negligence that proximately caused his injuries. The court explained its reasoning as follows: "Absent a duty, [the defendant] cannot be held liable, vicariously or otherwise. To permit vicarious liability where there is no direct liability would be to accomplish indirectly that which could not be accomplished [directly]. The law does not permit that type of legal circumvention." This appeal followed.

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for

the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

The plaintiff challenges the court's summary judgment rulings on both of his claims against the defendant on the basis that each was improperly based on a ground that the defendant had not raised in its summary judgment motions, and which the parties had not briefed or argued. The plaintiff claims initially that the court improperly rendered summary judgment in favor of the defendant on his claim of direct negligence because it improperly determined that the defendant owed no duty to him based on public policy considerations, which had not been raised or argued in support of its first motion for summary judgment. We agree.

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable . . . . [T]he test for the existence of a legal duty entails

(1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 328–29, 107 A.3d 381 (2015).

Based on the foregoing principles, the determination of the existence of a legal duty entails a two-pronged analysis. In its first motion for summary judgment, the defendant challenged the existence of a duty to the plaintiff only under the first prong of that analysis—that the harm alleged by the plaintiff was not reasonably foreseeable. The defendant did not assert any argument whatsoever under the second prong—that its responsibility for its alleged negligence should not extend to the plaintiff under these circumstances for reasons of public policy.[3] Consequently, and understandably, the plaintiff did not brief that issue in opposition to the defendant's motion for summary judgment. This court has held that a trial court lacks authority to render summary judgment on a ground not raised or briefed by the parties that does not implicate the court's subject

[3] The defendant contends that its citation of cases that involve public policy, among other legal issues, is sufficient to have raised the issue for determination by the trial court, even though it did not actually assert a public policy argument in this case. We decline to countenance such an argument.

Other than that argument, which is contained in a single footnote of its brief, the defendant does not address the plaintiff's claims on appeal. Rather, the defendant reasserts the arguments that it made to the trial court in its motions for summary judgment, both of which were rejected by the trial court. The defendant has not challenged those determinations on appeal, nor has it stated an alternative ground to affirm the court's summary judgment. Those arguments are thus not properly before this court.

matter jurisdiction. *Greene* v. *Keating*, 156 Conn. App. 854, 860, 115 A.3d 512 (2015) ("[t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented" [emphasis in original; internal quotation marks omitted]); see also *Bombero* v. *Bombero*, 160 Conn. App. 118, 131–32, 125 A.3d 229 (2015). Thus, because the court improperly based its summary judgment ruling on a ground not raised by the defendant in its motion, and rejected the only basis upon which the defendant claimed it was entitled to judgment as a matter of law in its first motion for summary judgment, that motion should have been denied.

As to the defendant's second motion for summary judgment, the court similarly rejected the sole argument advanced by the defendant in support of its motion, but rendered summary judgment for the defendant on an unraised ground. The court based its ruling on that motion on the earlier improper determination that the defendant owed no duty to the plaintiff on public policy grounds, which was not raised by the defendant in either of its summary judgment motions. The summary judgment on the plaintiff's vicarious liability claim thus cannot stand.

The judgment is reversed and the case is remanded with direction to deny both of the defendant's motions for summary judgment, and for further proceedings according to law.

In this opinion the other judges concurred.

AMERICAN EXPRESS BANK, FSB *v.* KRZYSZTOF RUTKOWSKI ET AL.
(AC 38900)

Sheldon, Beach and Sheridan, Js.

Syllabus

The defendants appealed from the trial court's judgment rendered in favor of the plaintiff in connection with the plaintiff's action to recover for the defendants' breach of a contractual credit agreement. The defendants opened a credit card account with the plaintiff, were mailed a credit card and cardmember agreement, used the account to pay for various goods and services, and received monthly billing statements from the plaintiff. When the defendants failed to make payments on the account, the plaintiff closed the account, which had a balance of $182,367.29. In opposing the plaintiff's motion for summary judgment, the defendants asserted, inter alia, that the plaintiff's claim was barred by the statute of frauds (§ 52-550 [a] [6]), which bars civil actions upon any agreement for a loan in excess of $50,000 unless the agreement is written and signed by the party to be charged. The trial court granted the motion for summary judgment as to liability and, following a hearing in damages, rendered judgment for the plaintiff for the full amount of the balance, plus costs. On appeal to this court, the defendants claimed that the trial court improperly granted summary judgment on the issue of liability because the credit card agreement constituted a loan under the statute of frauds, and, therefore, enforcement of the agreement was barred in the absence of a writing signed by the defendants. *Held* that the trial court properly granted the plaintiff's motion for summary judgment because the present action was not barred by the statute of frauds: the plaintiff's claim for breach of a contractual credit agreement was not related to any agreement for a loan that exceeded $50,000 because the underlying agreement was not a loan within the meaning of § 52-550 (a) (6); furthermore, the defendants were never given a sum of more than $50,000 by the plaintiff but, rather, were able to make third party transactions in varying amounts through the use of the credit card account.

Argued April 24—officially released July 4, 2017

Procedural History

Action to recover damages for, inter alia, breach of a credit card agreement, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the defendants were defaulted for failure

to plead; thereafter, the court, *Abrams*, *J.*, granted the defendants' motion to open the judgment; subsequently, the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability; thereafter, following a hearing in damages, the court, *Wiese*, *J.*, rendered judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Scott M. Schwartz, for the appellants (defendants).

Erica Gesing, for the appellee (plaintiff).

Opinion

SHERIDAN, J. The defendants, Krzysztof Rutkowski and Tri-City Trading, LLC, appeal from the judgment rendered by the trial court in favor of the plaintiff, American Express Bank, FSB. On appeal, the defendants claim that the court improperly rendered summary judgment as to liability on the plaintiff's claim of breach of a contractual credit agreement because the statute of frauds, General Statutes § 52-550 (a) (6), bars enforcement of the agreement. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendants opened a credit card account with the plaintiff on February 26, 2004. Upon opening the account, the defendants were mailed a credit card along with a copy of the cardmember agreement. The defendants used the credit card account to pay for various goods and services and received monthly billing statements from the plaintiff. The defendants did not object to the balances shown as due and owing on the monthly statements provided by the plaintiff. Following the defendants' failure to make payments on the credit card account, the plaintiff closed the account with a remaining balance due and owing of $182,367.29.

On August 15, 2013, the plaintiff commenced the present action against the defendants. The amended complaint filed on December 20, 2013, alleged one count of breach of a contractual credit agreement (count one) and one count of unjust enrichment (count two).[1] The defendants filed an answer denying the allegations of the complaint and alleging special defenses claiming inter alia, that the plaintiff's claims were barred by the statute of frauds, § 52-550 (a) (6).

The plaintiff subsequently filed a motion for summary judgment on both counts on August 13, 2015. The court, *Hon. Joseph M. Shortall*, judge trial referee, found that the statute of frauds did not bar the plaintiff's claim, there was no genuine issue of material fact, and thus the plaintiff was entitled to judgment as a matter of law on count one as to liability only.[2] Following a hearing in damages, the court, *Wiese, J.*, rendered judgment for the plaintiff on count one in the amount of $182,367.29 plus costs. This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the relevant standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.)

[1] Count two is not at issue in this appeal.

[2] The court declined to render final judgment because "the amount in demand [was] differently stated in the complaint, the motion [for summary judgment] and the affidavit of debt, and no bill of costs [was] on file."

Bellemare v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 597, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007).

On appeal, the defendants claim that the court erred in granting summary judgment on the issue of liability on count one because the statute of frauds, § 52-550 (a) (6),[3] bars the enforcement of any loan exceeding $50,000 in the absence of a writing signed by the party to be charged. The plaintiff argues that the court did not err because the contractual credit agreement between the plaintiff and defendants was not a loan, and thus it was not governed by the statute of frauds.

We agree with the plaintiff that the present action is not barred by the statute of frauds. The plaintiff's claim for breach of the contractual credit agreement was not related to "any agreement for a loan in an amount which exceeds fifty thousand dollars"; General Statutes § 52-550 (a) (6); because the underlying credit agreement was not a loan within the meaning of the statute of frauds. Cf. *Stelco Industries, Inc.* v. *Zander*, 3 Conn. App. 306, 307-308, 487 A.2d 574 (1985) (credit sales agreement was not subject to usury statutes because indebtedness to plaintiff arose out of credit sales transactions, and not out of loan of money). The defendants have failed to point to any legal authority in support of the proposition that the defendants' credit card agreement constitutes a loan as contemplated by the statute of frauds.[4] Further, the defendants were never

[3] General Statutes § 52-550 (a) provides, in relevant part: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (6) upon any agreement for a loan in an amount which exceeds fifty thousand dollars."

[4] The defendants' brief cites to Black's Law Dictionary (9th Ed. 2009) as defining a "loan" as "[a] thing lent for the borrower's temporary use; esp., a sum of money lent at interest," as well as a 1962 case stating that "[a] loan is made when borrower receives money over which he exercises dominion and which he expressly or impliedly promises to return." *Rogers* v. *Hannon-Hatch Post No. 9929*, 23 Conn. Supp. 326, 327, 182 A.2d 923 (1962). Although these remote authorities may help to establish what constitutes

given a sum that exceeds $50,000 by the plaintiff, but rather were able to effectuate third party transactions in various amounts through the use of the defendants' credit card account with the plaintiff. Accordingly, the trial court properly granted the plaintiff's summary judgment motion, and we affirm the judgment of the trial court.[5]

The judgment is affirmed.

In this opinion the other judges concurred.

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a "loan," they fail to establish how the defendants' credit card agreement should be considered as such.

[5] At oral argument before this court, a question was raised regarding a provision in the cardmember agreement specifying that "Utah law and federal law govern this Agreement and the Account." Practice Book § 10-3 (b) provides that "[a] party to an action who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state shall give notice in his or her pleadings or other reasonable written notice." The defendants in the present case did not rely on Utah law or federal law in alleging their special defense or in opposing the plaintiff's motion, choosing instead to argue that the action was barred by General Statutes § 52-550 (a) (6). The parties are bound by their pleadings. *O'Halloran* v. *Charlotte Hungerford Hospital*, 63 Conn. App. 460, 463, 776 A.2d 514 (2001). Moreover, "[g]enerally, claims neither addressed nor decided by the trial court are not properly before an appellate tribunal." (Internal quotation marks omitted.) *Natarajan* v. *Natarajan*, 107 Conn. App. 381, 394 n.8, 945 A.2d 540, cert. denied, 287 Conn. 924, 951 A.2d 572 (2008). Accordingly, we decline to decide any questions under Utah law or federal law.