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CONNECTICUT REPORTS

Vol. 326

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* CRAIG KALLBERG
(SC 19536)

Rogers, C. J., and Palmer, McDonald, Espinosa and Robinson, Js.

Syllabus

The defendant, who had been convicted of the crimes of larceny in the third degree as an accessory and conspiracy to commit larceny in the third degree in connection with his role in the theft of certain items from an apartment building storage locker, appealed to the Appellate Court, claiming that the trial court had improperly denied his motion to dismiss those charges because they previously had been permanently disposed of as part of an agreement with the state. Approximately one year earlier, the state and the defendant had been prepared to enter into a plea agreement under which the defendant would plead guilty to possession of drug paraphernalia and pay a fine in one case, and the state would enter nolle prosequis in three other cases, including the case involving the larceny charges arising out of the storage locker thefts. The trial judge who had assisted the parties in negotiating that plea agreement was unavailable to accept the plea, so the state presented an agreement to a different judge pursuant to which the state would enter nolles with respect to the charges in all four cases and the defendant would make a donation to the Criminal Injuries Compensation Fund. Subsequently, the state withdrew the nolle in the case involving the larceny charges and initiated the prosecution on those charges. The trial court denied the defendant's motion to dismiss the charges, concluding that it was clear from the transcript of the hearing at which the agreement had been made that the donation to the compensation fund was to obtain a nolle only in the drug case, rather than to effectuate a global disposition of all four of the defendant's cases in exchange for the donation. The Appellate Court reversed the judgment of conviction, concluding, inter

alia, that the entry of the nolle in the case involving the larceny charges and the entry of the nolles in the three other cases were part of an agreement between the state and the defendant that contemplated a global disposition supported by consideration, which barred the defendant's prosecution on the larceny charges. The Appellate Court remanded the case to the trial court with direction to vacate the conviction and to dismiss the charges, and the state, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly reversed the judgment of conviction and remanded the case to the trial court with direction to order specific performance of the agreement, the state having breached the parties' agreement by filing criminal charges related to the same conduct at issue in the larceny case: this court determined, after a review of the transcript memorializing the agreement, which was the sole evidence before the trial court when it ruled on the motion to dismiss, that the agreement was ambiguous as to the parties' intent, and the state bore the burden for that ambiguity and lack of clarity, which required the agreement to be construed in the defendant's favor as a global disposition, the prosecutor's remarks at the outset of the hearing did not indicate that any one of the four cases was being treated differently, he did not explicitly state on the record that he intended to enter unilateral nolle prosequis in three cases and effectuate an agreement confined to only the drug case, he did not state for the record any material change in circumstances relevant to the charges that would explain a change from the original intent to effectuate a global disposition other than the unavailability of the original trial judge, the defendant had a reasonable expectation that all of the nolles were entered as part of a global disposition akin to the original plea agreement, and the trial judge before whom the nolles were entered did not draw any distinction between the nolles in the four cases, never addressed the defendant to ask him if he understood the terms of the agreement, and did not make any statement on the record sanctioning the parties' agreement; furthermore, although the prosecutor's discussion of the defendant's donation to the compensation fund was temporally connected to the drug case, that consideration bore no logical connection to the drug case, as the reasons for entering the nolle in that case were wholly unrelated to victim compensation, and, instead, the donation bore a logical connection to certain of the other cases, each of which involved identifiable victims; moreover, certain comments by the prosecutor concerning the larceny charges, including his request that the property related to the case be returned to its rightful owner, reasonably would have suggested to the defendant that the prosecutor would not recommence prosecution in the larceny case.

(*One justice dissenting*)

Argued January 23—officially released June 13, 2017

Procedural History

Substitute information charging the defendant with the crimes of larceny in the third degree as an accessory and conspiracy to commit larceny in the third degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the trial court, *Alander*, *J.*, denied the defendant's motion to dismiss; thereafter, the matter was tried to the jury before *Alander*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Gruendel*, *Alvord* and *Borden*, *Js.*, which reversed the trial court's judgment and remanded the case to the trial court with direction to vacate the conviction and to render judgment of dismissal, and the state, on the granting of certification, appealed to this court. *Affirmed.*

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Kevin Murphy*, former supervisory assistant state's attorney, for the appellant (state).

Alice Osedach, senior assistant public defender, for the appellee (defendant).

Opinion

McDONALD, J. The defendant, Craig Kallberg, was convicted of larceny in the third degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-124 (a) (2) and conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 and 53a-124 (a) (2) after he unsuccessfully moved to dismiss those charges on the basis of the state's prior entry of a nolle prosequi on the same charges. The issue in

this certified appeal[1] is whether the Appellate Court properly reversed the judgment of conviction on the ground that the entry of a nolle on those charges and nolles on charges in three other cases was part of an agreement between the state and the defendant, contemplating a global disposition supported by consideration, which barred his prosecution in the present proceeding. The state contends that the Appellate Court improperly concluded that the trial court's finding that the parties intended to enter into an agreement relating to only one of the cases was clearly erroneous, or to the extent that the agreement was ambiguous, it should have been construed in the defendant's favor. *State* v. *Kallberg*, 157 Conn. App. 720, 729–30, 118 A.3d 84 (2015). We conclude that the agreement was ambiguous as to the parties' intent, and therefore must be construed in the defendant's favor as a global disposition. Accordingly, we affirm the Appellate Court's judgment.

The record reveals the following undisputed facts. Michael Higgins, an acquaintance of the defendant, confessed to the police that he and the defendant had pawned several items, including a set of golf clubs. A resident of the same apartment building where Higgins lived had reported to the police that various items had been stolen from his basement storage locker; many of those items were the same items that Higgins admitted to having pawned. In August, 2010, the defendant was arrested and charged with burglary in the third degree, larceny in the third degree, and conspiracy to commit both of those offenses under docket number CR-10-0046439-T (burglary/larceny case).

By September, 2011, the defendant had three other cases pending against him from arrests prior to 2011,

[1] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the trial court improperly denied the defendant's pretrial motion to dismiss?" *State* v. *Kallberg*, 319 Conn. 903, 122 A.3d 637 (2015).

each under separate docket numbers, including one charging him with possession of narcotics (drug case).[2] In September, 2011, the state entered a nolle prosequi in each of the defendant's four pending cases at a hearing before Judge Kahn, who had been assigned to serve as the trial judge.[3] Approximately one year later, the state initiated the present prosecution, charging the defendant with larceny in the third degree as an accessory and conspiracy to commit larceny in the third degree for his role in the storage locker thefts.

The defendant filed a motion to dismiss the charges, claiming that they had been permanently disposed of as part of an agreement (nolle agreement) that was memorialized on the record in the hearing before Judge Kahn. The defendant asserted that Judge Strackbein had assisted the parties in negotiating a plea agreement that was a global disposition of the four pending cases, under which he would plead guilty to possession of drug paraphernalia in the drug case and pay a fine of $300, in exchange for which the state would enter nolles in the other three cases, including the burglary/larceny case. The defendant further asserted that due to Judge Strackbein's subsequent unavailability to accept the plea, the parties had effectuated a comparable global disposition whereby the defendant made a donation of $271 to the Connecticut Criminal Injuries Compensation Fund (victim's fund) in exchange for nolles on all of his cases. The state opposed the motion, contending that the donation was consideration for the nolle in the drug case only.

[2] At various points in the record, there are references to four docket numbers, but five files or five cases. At one point, the state suggested that two files were combined under one docket number. For convenience, we refer to four cases in this opinion, consistent with the four nolles entered on the record.

[3] Although the Appellate Court indicated that Judge Kahn had been assigned as the trial judge in the drug case; see *State* v. *Kallberg*, supra, 157 Conn. App. 723; Judge Kahn simply indicated that she "would have been the trial judge."

The sole evidence offered in connection with the motion to dismiss was the transcript of the hearing before Judge Kahn, which provided in relevant part as follows:

"[Judge Kahn]: Good afternoon . . . . They're four matters correct?

* * *

"[The Prosecutor]: MV-10-228488 . . . CR-10-46914 and then CR-10-47442 and lastly CR-10-46439. These matters are all on the trial list and over a course of time—some of these are a year old, going on a year and a half old, [defense counsel] and I we were able to have recent discussions.

"I'll start with the file ending in 488, no insurance, traveling unreasonably fast. What we do in those cases is make sure that the insurance is gotten, if in fact he's driving an automobile, and the license is still valid or is valid. [The defendant] says that . . . he was operating with a valid motor vehicle license. The state is entering a nolle on that.

"[Judge Kahn]: Nolle is noted.

"[The Prosecutor]: Breach of [the] peace [in the second degree], which is the file ending in 442, we reached out to the complainant in that matter. . . . [W]e spoke to his attorney . . . [who] indicated and represented to us that . . . he does not want to pursue. In a normal day what we do is probably sub this . . . but we're entering a nolle in that matter based on the victim's wishes.

"[Judge Kahn]: Nolle noted.

"[The Prosecutor]: I'll leave the file ending with 914 to the end. The other file it looks fairly complicated and serious ends in 439. It's a bunch of burglaries; it's a larceny, at least the allegations. We have a couple of

problems in that matter. One is the burglaries occurred to storage sheds. It doesn't mean they weren't burglaries, but the storage sheds had no tops on them. And it's arguable whether we could ever prove the breaking and entering or the illegal entry when in fact [the defendant] was alleged and admitted to peeking into the top. Many of those that he peeked into were empty. So what we really have in this case when it's all boiled down is a larceny in the [fourth] degree by possession. [The defendant] really gave up possession to the police of those possessions that he had possession of, isn't that true, [defense counsel]?

"[Defense Counsel]: That's true.

"[The Prosecutor]: So nobody here is out anything in this particular file. The state's entering a nolle in that file.

"[Judge Kahn]: Nolle noted.

"[The Prosecutor]: Now that leaves us with the drug case . . . . [W]e have various dosages of hydrocodone which is a narcotic or oxycodone a narcotic. But we have [the defendant] who over the course of time maybe not commensurate exactly with the day in question here, he has had prescriptions in the past and they have been provided to me—a copy of the bottles have been provided to me: I took some issue with [defense counsel] in that the prescription was say six or seven months old. But suffice it to say, this is still a simple possession of narcotics—a little shot glass of crushed up narcotics and another person in the car who's already copped to some of these. . . .

"*So what we had here was a proposed disposition to get rid of all of these files with a plea of drug paraphernalia and a fine of $300. That didn't work out today because we were unable to actually tap into Judge Strackbein. So I took the bull by the horns and*

asked [*the defendant*] *to make a donation of $271 to the victim's fund.*[4] Do we have a copy of that receipt in the file, madam clerk?

"The Clerk: Yes, we do. . . .

"[The Prosecutor]: . . . In light of that, what we do each and every day over in [another geographical area] is to nolle this case, as well. *So*, *now* [*the defendant's*] *matters are all resolved* . . . .

"[Judge Kahn]: All right, I'll note the nolle on that. I do have something I'd like to put on the record. First, I want to put on the record that I would have been the trial judge. I know that these matters had been, at least one of them if not more, on the trial list. And so [the prosecutor]—and by the way I do know his nature is not to enter nolles lightly and so it's not his practice to nolle cases unless there's good reason, so I'm going to take him at his word that he couldn't prove the case. He did mention to me there were some issues about some codefendants that may be deceased, as well, in chambers.

"[The Prosecutor]: Actually I should say that in the burglary/larceny case the codefendant in this matter is dead. The victim can't be found. That case as it stands today is unprovable.

"[Judge Kahn]: Okay, so I want to be able to note that [the prosecutor] was very careful not to mention what the offer was, but he came up to chambers. He told me that you were here [defense counsel], your client was here. *That you had worked out a deal.* That he had asked Judge Strackbein, I guess, to put this on." (Emphasis added; footnote added.)

Judge Kahn explained that Judge Strackbein was unavailable due to a scheduling conflict but that Judge

[4] The record is unclear why the state agreed to accept $271 instead of the original, agreed upon $300 of consideration.

Strackbein had "assured me that all the matters had been resolved. . . . I was hesitant to engage in the plea negotiations because I was going to be the trial judge, so I couldn't do that. But [the prosecutor] did tell me that he had some issues. He would nolle some matters because he had an inability to get certain witnesses, but he didn't share with me the substance of it. . . .

"So if Judge Strackbein were here, irrespective of which judge is present, we cannot if the state wishes to enter a nolle, there's nothing the court can do. The state can enter a nolle. It's within the prosecutorial discretion. All the . . . court can do is ask the state to put their reasons on the record. But they can nolle cases whenever they want, and all the court can do is ask the reasons. . . . You've put them on the record, and so I'm not quarreling with that at all."

Judge Kahn then addressed the defendant about his potential substance abuse issues, and warned him that the state would not hesitate to pursue charges against him even if he had a valid prescription, if he abused his medication. Judge Kahn concluded her admonishment by stating: "Hopefully we won't see you again, and I will note the nolles for the reasons stated on the record."[5] Finally, pursuant to the prosecutor's request at the end of the hearing, Judge Kahn ordered that the stolen property still remaining in police custody be returned to its rightful owner.

[5] In its brief, the state also cited a portion of the colloquy in which the prosecutor asserted: "[H]ad Judge Strackbein been here, I would have explained to her that her prior pretrial where she acknowledged Judge Brunetti's offer of one year suspended after [sixty] days on the larceny four. Perhaps the drug case changed significantly when [the] codefendant died and [the] victim was unavailable." The state asserts that these statements suggest that the prosecutor's "present inability to pursue prosecution of the larceny may have left him reluctant to concede too much in the stronger drug case." It is unclear to us what these statements mean, let alone their significance to the issue in the present case. Indeed, neither the trial court nor the Appellate Court relied on these statements in making their determinations.

At the hearing on the motion to dismiss, although the parties contested the meaning of the preceding exchange as to the parties' intent in making the nolle agreement, because neither the defendant nor the state was represented by the counsel from the nolle hearing, they offered no personal knowledge regarding the facts and circumstances surrounding the execution of the agreement. After hearing argument from the parties, the trial court denied the motion to dismiss in an oral decision. The trial court acknowledged that the original plea agreement worked out with Judge Strackbein was a "global deal," but ascribed no significance to that fact because that deal was never effectuated. As to the nolle agreement that was effectuated, the trial court concluded that the transcript did not support the defendant's claim that this agreement was a global disposition of all of the defendant's cases in exchange for the donation to the victim's fund. Rather, the trial court found it clear from the transcript that the donation had been made to obtain a nolle on the drug case alone. The court ascribed particular significance to the fact that the state had provided reasons for entering nolles on the other cases and to the absence of any statement by the prosecutor that all four cases were nolled in exchange for the donation to the victim's fund.

Following a jury trial, the defendant was convicted of both larceny charges. The court rendered judgment in accordance with the verdict and sentenced the defendant to a total effective sentence of four years of incarceration, suspended after two years, followed by three years of probation.

The defendant appealed to the Appellate Court, claiming, among other things, that the trial court improperly had denied his motion to dismiss. *State* v. *Kallberg*, supra, 157 Conn. App. 720, 722. The Appellate Court agreed. Id., 730. The court prefaced its analysis with this statement: "Whether we view the [nolle]

agreement as a purely factual matter of the parties' intent, or whether we view the agreement as ambiguous and therefore to be construed in the defendant's favor, we arrive at the same conclusion." Id., 727. As to the first view, the Appellate Court held that a factual finding that the parties intended to enter into an agreement for a nolle on the drug case only was clearly erroneous, as the court was left with a firm and definite conviction that a mistake had been made. See id., 727–29. The court explained: "The conduct of the parties reveals to us that the defendant was offered a plea agreement, which was to be accepted, but that the unavailability of the judge before whom the plea agreement was to be entered caused the prosecutor to adopt an alternative means of disposing of the cases in a substantially similar fashion in exchange for substantially similar consideration by the defendant. The statements of the prosecutor reflect the intended result: an equivalent substitute for the original plea agreement." Id., 729–30. As to the second possible view of the record, the Appellate Court concluded that to the extent that the nolle agreement was ambiguous as to whether it contemplated a global disposition, it must be construed in favor of the defendant. See id., 727, 730. Accordingly, the Appellate Court reversed the judgment of conviction and remanded the case to the trial court with direction to vacate the conviction and to dismiss the charges. Id., 730. The state's certified appeal to this court followed.

On appeal, the state concedes that the original plea agreement was a global disposition. It contends, however, that the trial court properly determined that the original plea agreement had no bearing on the construction of the nolle agreement effectuated. The state contends that the Appellate Court engaged in impermissible fact-finding by reading the transcript to reflect an intent to substitute the original global plea agreement with a substantially similar agreement whereby all four cases

were nolled in exchange for the donation. The state further contends that the Appellate Court improperly concluded that the trial court's factual finding as to the parties' intent was clearly erroneous, arguing that the transcript of the hearing before Judge Kahn reflects a clear intent by the state to (a) unilaterally nolle the three cases other than the drug case for the reasons stated on the record, and (b) effectuate an agreement in the drug case whereby the state would enter a nolle in exchange for the defendant's donation to the victim's fund. We agree with the Appellate Court that the nolle agreement was ambiguous and should be construed against the state.

"Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016). For the reasons that follow, we conclude that de novo review governs our resolution of the present case.

We begin by distinguishing a prosecutor's unilateral entry of a nolle from a bilateral agreement involving entry of a nolle. Practice Book § 39-29 provides that "[a] prosecuting authority shall have the power to enter a nolle prosequi in a case. It shall be entered upon the record after a brief statement by the prosecuting authority in open court of the reasons therefor." We have recognized that "a nolle is, except when limited by statute or rule of practice[6] . . . a unilateral act by

[6] General Statutes § 54-56b provides: "A nolle prosequi may not be entered as to any count in a complaint or information if the accused objects to the nolle prosequi and demands either a trial or dismissal, except with respect to prosecutions in which a nolle prosequi is entered upon a representation

a prosecutor, which ends the pending proceedings without an acquittal and without placing the defendant in jeopardy." (Citations omitted; footnote added; internal quotation marks omitted.) *Cislo* v. *Shelton*, 240 Conn. 590, 599 n.9, 692 A.2d 1255 (1997). "Although the entry of a nolle prosequi results in the defendant's release from custody, he can . . . be tried again upon a new information and a new arrest." (Citation omitted.) *State* v. *Lloyd*, 185 Conn. 199, 201, 440 A.2d 867 (1981); accord Practice Book § 39-31.

A nolle may, however, be bargained for as part of a plea agreement; see *State* v. *Daly*, 111 Conn. App. 397, 400 n.2, 960 A.2d 1040 (2008), cert. denied, 292 Conn. 909, 973 A.2d 108 (2009); Practice Book § 39-5 (2); see also *Mason* v. *State*, 302 Md. 434, 440, 488 A.2d 955 (1985) (nolle as part of plea agreement tantamount to dismissal of nolled charge); or as part of an agreement whereby the defendant provides something else of benefit to the state or the victim in exchange for entry of a nolle. See, e.g., *People* v. *Reagan*, 395 Mich. 306, 317–18, 235 N.W.2d 581 (1975) (enforcing agreement in which prosecution would enter nolle if defendant passed polygraph examination); see also *Holman* v. *Cascio*, 390 F. Supp. 2d 120, 123–24 (D. Conn. 2005) ("a nolle will preclude a subsequent case for malicious prosecution [due to lack of a favorable termination of the prior criminal case] when it was made as part of a plea bargain or under other circumstances that indicate that the defendant received the nolle in exchange for providing something of benefit to the state or victim").[7]

to the court by the prosecuting official that a material witness has died, disappeared or become disabled or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary." Practice Book § 39-30 provides equivalent terms. Thus, a defendant may preclude the entry of a nolle by objection if the prosecutor cannot establish one of the aforementioned reasons for entry of the nolle.

[7] In the context of malicious prosecution claims, which require, among other things, that the plaintiff prove that the prior criminal action was terminated in his or her favor, courts have recognized that a unilateral nolle

Bilateral agreements in which the defendant provides a benefit to the state or the victim other than a guilty plea to a charge are typically treated as the functional equivalent to a plea agreement, in that subsequent prosecution is barred as long as the defendant has performed his obligation. See *People* v. *Reagan*, supra, 309 (nolle agreement was "a pledge of public faith which became binding when the [n]olle prosequi order was approved by the trial judge"); see also *Bowers* v. *State*, 500 N.E.2d 203, 204 (Ind. 1986) (enforcing agreement not to prosecute in exchange for defendant's provision of information sufficient to obtain search warrant); *State* v. *Franklin*, 147 So. 3d 231, 238 (La. App. 2014) (enforcing agreement not to prosecute conditioned on defendant's successful completion of pretrial diversion program), cert. denied, 159 So. 3d 460 (La. 2015); *Jackson* v. *State*, 358 Md. 259, 262, 277–78, 747 A.2d 1199 (2000) (enforcing agreement in which defendant waived speedy trial rights in exchange for state's promise to dismiss charges if DNA analysis of certain evidence came back negative).

The question in the present case, therefore, is whether the defendant's donation was made in exchange for all four nolles (and thus constituted a global nolle agreement) or only for the nolle in the drug case. If the latter, there would be no bar to prosecution on the present charges.

In resolving this question, we apply principles that also govern the interpretation of plea agreements. It is well settled that "[p]rinciples of contract law and spe-

is "really just an abandonment of prosecution that is not conditioned on the defendant 'giving up' anything," which would be a favorable disposition. By contrast, a bargained for nolle, where the defendant provides consideration for something of benefit to the state or the victim, would not constitute a favorable disposition and thus precludes a malicious prosecution claim. *Lupinacci* v. *Pizighelli*, 588 F. Supp. 2d 242, 249 (D. Conn. 2008); see also *DeLaurentis* v. *New Haven*, 220 Conn. 225, 251, 597 A.2d 807 (1991).

cial due process concerns for fairness govern our interpretation of plea agreements." (Internal quotation marks omitted.) *State* v. *Rivers*, 283 Conn. 713, 724, 931 A.2d 185 (2007); see also *State* v. *Lopez*, 77 Conn. App. 67, 77, 822 A.2d 948 (2003) ("a plea agreement is akin to a contract and . . . well established principles of contract law can provide guidance in the interpretation of a plea agreement"), aff'd, 269 Conn. 799, 850 A.2d 143 (2004); *State* v. *Franklin*, supra, 147 So. 3d 241 (drawing analogy to principles of commercial contracts in interpreting agreement not to prosecute conditioned on defendant's successful completion of pretrial diversion program).

As has previously been explained in the context of plea agreements, "[t]he primary goal of contract interpretation is to effectuate the intent of the parties . . . ." (Internal quotation marks omitted.) *State* v. *Rosado*, 92 Conn. App. 823, 827, 887 A.2d 917 (2006). In ascertaining that intent, we employ an objective standard and look to what the parties reasonably understood to be the terms of the plea agreement on the basis of their words and conduct, and in light of the circumstances surrounding the making of the agreement and the purposes they sought to accomplish. See *United States* v. *Alexander*, 736 F. Supp. 1236, 1239 (N.D.N.Y. 1989), aff'd, 901 F.2d 272 (2d Cir. 1990); accord *Paradiso* v. *United States*, 689 F.2d 28, 31 (2d Cir. 1982), cert. denied, 459 U.S. 1116, 103 S. Ct. 752, 74 L. Ed. 2d 970 (1983); *State* v. *Nelson*, 23 Conn. App. 215, 219–20, 579 A.2d 1104, cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991). An unambiguous agreement is presumptively an accurate reflection of the parties' intent. Thus, "[when] the language is unambiguous, we must give the contract effect according to its terms." (Internal quotation marks omitted.) *State* v. *Rivers*, supra, 283 Conn. 725.

"[When] the language is ambiguous, however, we must construe those ambiguities against the drafter [namely, the state]."[8] (Internal quotation marks omitted.) Id.; accord *State* v. *Nelson*, supra, 23 Conn. App. 219. The reason for this rule of construction, applied by a majority of the federal Circuit Courts of Appeal; *State* v. *Rivers*, supra, 283 Conn. 726; is that the state "generally holds substantially superior bargaining power over the other party to the agreement, the criminal defendant." Id., 725; see, e.g., *United States* v. *Palladino*, 347 F.3d 29, 33 (2d Cir. 2003) ("[b]ecause the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant" [internal quotation marks omitted]). These same principles apply to oral plea agreements. See *State* v. *Obas*, 320 Conn. 426, 442–43, 130 A.3d 252 (2016); *State* v. *Rosado*, supra, 92 Conn. App. 827–28.

It is well settled that the threshold determination as to whether a plea agreement is ambiguous as to the parties' intent is a question of law subject to plenary review. See, e.g., *State* v. *Rivers*, supra, 283 Conn. 725. If the reviewing court deems the agreement ambiguous and extrinsic evidence has been offered to dispel that ambiguity, such as testimony regarding the facts surrounding the making of the agreement, then intent is a

[8] Some courts have made clear that this rule of construction applies only after resort to facts and extrinsic evidence fails to resolve the ambiguity as to the parties' intent. See, e.g., *United States* v. *Clark*, 218 F.3d 1092, 1095 (9th Cir.) (when plea agreement contains ambiguities, court will first look to facts and extrinsic evidence to determine what parties reasonably understood to be terms of agreement and, if ambiguity remains, "the government ordinarily must bear responsibility for any lack of clarity . . . [because] [c]onstruing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise" [citations omitted; internal quotation marks omitted]), cert. denied, 531 U.S. 1057, 121 S. Ct. 668, 148 L. Ed. 2d 569 (2000). We did not reach this question in *State* v. *Rivers*, supra, 283 Conn. 713, because, like the present case, no extrinsic evidence was presented to the court.

question of fact for the trial court, reversible only if clearly erroneous. See, e.g., *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741–43, 937 A.2d 656 (2007); *Martinez* v. *Commissioner of Correction*, 105 Conn. App. 65, 73, 936 A.2d 665 (2007), cert. denied, 285 Conn. 917, 943 A.2d 475 (2008). If, however, the agreement is ambiguous and no extrinsic evidence has been offered, resolution of the dispute as to the parties' intent necessarily hinges on what inferences can be drawn solely from the four corners of the agreement. Under such circumstances, the intention of the parties presents a question of law over which we exercise plenary review. See *State* v. *Rivers*, supra, 723–24, 725 n.11 (noting that court would apply de novo review and that no extrinsic evidence was offered regarding formation of contract); see also *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7–8, 931 A.2d 837 (2007) ("In the present case, even though there is a purported ambiguity in the lease agreement, no extrinsic evidence was offered at trial to establish the intent of the parties. Therefore, the trial court's determination of the parties' intent was based solely on the language of the lease agreement and did not involve the resolution of any evidentiary issues of credibility. Accordingly, our review of the trial court's interpretation of the lease agreement involves a question of law over which our review is plenary."); *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 230, 654 A.2d 342 (1995) ("because the trial court relied solely upon the written agreements in ascertaining the intent of the parties, the legal inferences properly to be drawn from the documents are questions of law, rather than fact"). In the absence of extrinsic evidence, determining the intent of the parties does not require resolution of disputed facts or credibility assessments.[9] See *State* v. *Lewis*, 273 Conn. 509, 516–17,

[9] We have continued, however, to draw a distinction between cases in which the sole evidence is documentary evidence in the nature of a contract and those in which transcripts reflect testimonial evidence that still is subject to a credibility assessment. See, e.g., *State* v. *Lawrence*, 282 Conn. 141, 157,

871 A.2d 986 (2005) ("[a]lthough we generally review a trial court's factual findings under the 'clearly erroneous' standard, when a trial court makes a decision based on pleadings and other documents, rather than on the live testimony of witnesses, we review its conclusions as questions of law"); *Morton Buildings, Inc.* v. *Bannon*, 222 Conn. 49, 53–54, 607 A.2d 424 (1992) ("In this case, the trial court's determinations were based on a record that consisted solely of a stipulation of facts, written briefs, and oral arguments by counsel. The trial court had no occasion to evaluate the credibility of witnesses or to assess the intent of the parties in light of additional evidence first presented at trial. The record before the trial court was, therefore, identical with the record before this court. In these circumstances, the legal inferences properly to be drawn from the parties' definitive stipulation of facts raises questions of law rather than of fact.").

In the present case, the sole evidence before the trial court in ruling on the motion to dismiss was the transcript memorializing the nolle agreement. Accordingly, we exercise plenary review in ascertaining the parties' intent.

Having articulated the proper standard of review and relevant guiding principles, we turn to the statements of counsel contained in the transcript to ascertain whether they reflect a clear intent consistent with the state's interpretation. We begin with the prosecutor's statements relating to the nolles. As we previously noted, the prosecutor addressed each of the four cases in turn,

920 A.2d 236 (2007) ("it would be improper for this court to supplant its credibility determinations for those of the fact finder, regardless of whether the fact finder relied on the cold printed record to make those determinations"); *Besade* v. *Interstate Security Services*, 212 Conn. 441, 447–49, 562 A.2d 1086 (1989) (rejecting claim that this court need not defer to factual findings because evidence largely was documentary and, therefore, findings were not based on personal appraisal of witness' demeanor).

articulating separate reasons for entering each nolle. The prosecutor then entered a nolle in each case, which Judge Kahn accepted. The prosecutor first discussed the motor vehicle case, followed by the breach of the peace case, the burglary/larceny case, and finally the drug case. After providing reasons for entering a nolle on the drug case, but before entering the nolle, the prosecutor made the following critical statement: "So what we had here was a proposed disposition to get rid of all of these files with a plea of drug paraphernalia and a fine of $300. That didn't work out today because we were unable to actually tap into Judge Strackbein. So I took the bull by the horns and asked [the defendant] to make a donation of $271 to the victim's fund. . . . In light of that, what we do each and every day over in [another geographical area] is to nolle this case, as well. So, now [the defendant's] matters are all resolved . . . ."

The meaning or scope of an agreement may be deemed ambiguous if it is susceptible to more than one reasonable interpretation. See *State* v. *Obas*, supra, 320 Conn. 444; *State* v. *Rosado*, supra, 92 Conn. App. 829. We conclude that the prosecutor's statements are susceptible to interpretations that support both parties' positions.

On the one hand, there is support for the state's interpretation. The prosecutor commenced his discussion of the drug case after entering nolles in the other three cases, each supported by independent reasons. The prosecutor discussed the defendant's donation to the victim's fund only in the course of addressing that case, indicating that, "[i]n light of that [donation]," he would "nolle this case, as well." The fact that the prosecutor's "took the bull by the horns" comment was made before he entered the nolle in the drug case lends support to the state's position, such that it could simply mean that, when Judge Strackbein became unavailable

to accept the original plea agreement, the prosecutor decided to exercise his discretion to enter unilateral nolles on three cases and effectuate an agreement only on the drug case.

On the other hand, there is ample evidence in the transcript supporting the defendant's view. The prosecutor made no remark at the outset of the hearing to indicate that one of the four cases was being treated differently, nor did he preface the discussion of the drug case with any such comment. There were several indications, however, of like treatment of the four cases. The prosecutor entered identical dispositions in every case—a nolle. The prosecutor articulated reasons in support of the nolles in every case, including the drug case. The reasons stated for the nolle in the drug case—problems in proof and lack of interest in pressing the matters given the circumstances attendant to the case—did not suggest a basis for differential treatment as they were not materially different from those offered in the other cases.

We also observe that, although the discussion of the defendant's donation to the victim's fund was temporally connected to the drug case, that consideration bore no logical connection to the drug case. The reasons for entering the nolle on the drug case were wholly unrelated to victim compensation. Indeed, a donation to the victim's fund bore a logical connection to the breach of the peace case and the burglary/larceny case, each of which involved identifiable victims, whereas there was no identifiable victim in the drug case other than arguably the defendant himself. The donation could have been reasonably understood as a logical alternative to restitution in those cases because the victim of the breach of the peace case was incarcerated and the victim of the burglary/larceny case could not be located.

In addition, certain comments by the prosecutor reasonably would have suggested to the defendant that the prosecutor would not recommence prosecution in the burglary/larceny case. The prosecutor's concluding statement before entering the nolle in the burglary/larceny case was "nobody here is out anything in this particular file." The prosecutor later noted for the record that the codefendant in the case was deceased. At the conclusion of the hearing, the prosecutor asked that any property relating to the case remaining in police custody be returned to its rightful owner. "The destruction of any evidence seized at a crime scene is consistent with a belief that no further charges will be brought and lends credence to the defendant's claim that [he] reasonably believed [his] plea ended [his] criminal liability."[10] *State* v. *Nelson*, supra, 23 Conn. App. 220.

Beyond this evidence suggesting like treatment of all of the cases, the prosecutor's expressed intention to take the "bull by the horns" due to Judge Strackbein's unavailability further suggests an intent to effectuate a global disposition substantially similar to the original plea agreement. The bull by the horns statement was made immediately after the prosecutor noted the terms of the parties' original agreement—to dispose of all of the defendant's cases in exchange for a guilty plea and

[10] The state correctly points to certain countervailing facts. It contends that photographs taken of the property would be admissible as secondary evidence in any subsequent prosecution. See General Statutes § 54-36a (b) (2). There was no indication on the record, however, that the state informed the defendant that photographs of the evidence had been taken or that they were being preserved for this purpose. The state points to the fact that the prosecutor stated that the burglary/larceny case was "unprovable" "as it stands today" because the codefendant was deceased and the victim could not be located. The state overlooks the facts that the death of the codefendant was not a fact that would change so as to make the case provable in the future and that the prosecutor added this reason after it entered the nolle in the case and only after Judge Kahn prompted the remark. At best, the state's arguments demonstrate why this aspect of the transcript is also ambiguous.

a fine. The mere fact that the prosecutor thought it was necessary to state these terms for the record suggests that this original plea agreement had relevance to the agreement executed before Judge Kahn. It is also notable that the prosecutor did not state for the record any material change in circumstances relevant to the charges that would explain a change from the original intent to effectuate a global disposition. Rather, the only changed circumstance identified was Judge Strackbein's unavailability. It is unreasonable to assume, without any explanation, that the mere happenstance of Judge Strackbein's unavailability would justify a substantive transformation of the parties' original global plea agreement to an agreement that conclusively disposed of only the drug case. Conversely, Judge Strackbein's unavailability provides a logical basis for going forward with a functionally similar agreement, minus the plea to the minor charge of possession of drug paraphernalia, because plea negotiations would have had to begin anew with Judge Kahn, who would thereafter have had to recuse herself from being the trial judge. Indeed, Judge Kahn repeatedly emphasized that she had assiduously avoided learning any substantive details of the plea agreement for that reason.

Finally, although the trial court gave dispositive weight to the fact that the prosecutor made no statement in the transcript that the donation was to be given in exchange for nolles in all four cases, in our view, it is far more significant that the prosecutor failed to make an unambiguous statement that the donation was consideration for a promise not to commence a future prosecution only on the drug case. If the prosecutor intended to enter unilateral nolles on three of the cases and effectuate a nolle agreement confined to only the drug case, then it was incumbent on the prosecutor to make that explicit on the record to avoid any ambiguity. See *State* v. *Nelson*, supra, 23 Conn. App. 219 ("[I]t was

incumbent upon the state to enunciate what was and was not covered by the agreement lest the defendant be allowed to go to plea under the impression that the criminal portion of this tragic episode was closed. If the state was reserving a right to reprosecute in the event of the victim's death, it could have, and should have, said so."). It bears emphasizing that "the state, as the drafting party wielding disproportionate power, must memorialize any and all obligations for which it holds the defendant responsible, as well as all promises that it has made for the purpose of inducing the defendant to cooperate. The terms of the agreement should be stated clearly and unambiguously, so that the defendant, in assenting to waive certain fundamental rights, knows what is expected of him and what he can expect in return. Likewise, such clarity ensures that the state knows what it may demand of the defendant and what it is obligated to provide in exchange for the defendant's cooperation." (Internal quotation marks omitted.) *State* v. *Obas*, supra, 320 Conn. 443. The defendant was entitled to a clear understanding that, contrary to the original global plea agreement contemplated by the state and the defendant, the nolle agreement as articulated by the state before Judge Kahn had been substantively changed, in the view of the state, and left him vulnerable to potential prosecution in the other three cases. The transcript of the hearing before Judge Kahn contains no language that would support any such notice to the defendant.

Nonetheless, the state points to Judge Kahn's statement during the plea hearing that she could not prevent the state from entering a nolle as evidence that she understood that the prosecutor was entering nolles in the cases independently and on his own initiative rather than as part of any agreement. The problem with this view is that it also undermines the state's argument that one of the nolles was part of an agreement, as

Judge Kahn drew no distinction between the nolles on the four cases. Judge Kahn never addressed the defendant to ask him if he understood the terms of the agreement and did not make any statement on the record sanctioning the parties' agreement. Indeed, Judge Kahn's statement underscores the inherent ambiguity in the record as to the parties' intention. See *State* v. *Obas*, 147 Conn. App. 465, 481, 83 A.3d 674 (2014) (plea agreement "is a contract between the defendant and the state—not between the defendant, the state and the court"), aff'd, 320 Conn. 426, 130 A.3d 252 (2016). Moreover, because Judge Kahn emphasized that the prosecutor was "very careful not to mention what the offer was" to her in chambers because she was assigned to serve as the trial judge, she would have no idea to what extent the nolle agreement conformed to the original global plea agreement.[11]

The state also asserts that defense counsel's silence evidenced the defendant's acquiescence to the state's purported intent to enter unilateral nolles on the three cases other than the drug case. One, however, cannot object to what one does not know. The silence of defense counsel during the hearing can also be indicative of his interpretation of the state's comments as effectuating the parties' original intent to enter a disposition to dispose of all of the files in exchange for the defendant's donation. Regardless, "derelictions on the part of defense counsel that contribute to ambiguities and imprecisions in plea agreements may not be allowed to relieve the [g]overnment of its primary responsibility for insuring precision in the agreement."

[11] To the extent the state relies on Judge Kahn's warning to the defendant about potential prosecution in the event of his continued substance abuse as evidence that the state was leaving open the possibility of prosecution even in the drug case, that argument is devoid of merit. Judge Kahn's comments plainly were directed at potential liability for the defendant's *future* conduct, not the possibility of prosecution for the past conduct alleged in the nolled drug case.

United States v. *Harvey*, 791 F.2d 294, 301 (4th Cir. 1986).

On the basis of the foregoing, we hold that the state must bear the burden for the ambiguity and lack of clarity in the nolle agreement as memorialized on the record by the prosecutor. We conclude that the defendant had a reasonable expectation that all the nolles were entered as a part of a global disposition akin to the original plea agreement. Our holding is consistent with the purposes underlying the application of this rule of construction—namely, to "encourage greater clarity and specificity in plea negotiations and plea agreements . . . to ensure fairness, stabilize and finalize the parties' expectations, and reduce the waste of judicial resources required to review challenges to guilty pleas that are encouraged when the record of the plea proceedings is ambiguous." *Innes* v. *Dalsheim*, 864 F.2d 974, 980 (2d Cir. 1988), cert. denied, 493 U.S. 809, 110 S. Ct. 50, 107 L. Ed. 2d 19 (1989).

Because the state breached the parties' nolle agreement by filing criminal charges related to the same conduct at issue in the burglary/larceny case, the Appellate Court properly reversed the judgment of conviction and remanded the case to the trial court with direction to order specific performance of the nolle agreement.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER and ROBINSON, Js., concurred.

ESPINOSA, J., dissenting. The majority concludes that the disposition agreement between the defendant, Craig Kallberg, and the state, as reflected in the transcript of the September 22, 2011 disposition hearing, was ambiguous as to whether the defendant's charitable contribution of $271 was intended to be in exchange

for the nolle prosequi of the charges that the state has reinstituted in the present case. Construing that ambiguity in favor of the defendant, the majority concludes that the state agreed to the nolle in exchange for consideration. Accordingly, it holds that the charges in the present case should have been dismissed. I would conclude that, to the contrary, the transcript of the disposition hearing clearly and unambiguously demonstrates that the defendant agreed to make the charitable contribution in exchange for the nolle of the charges in a separate case and that the nolle of the charges that were reinstituted in the present case was unilateral. I would conclude, therefore, that there was no bar to bringing the charges in the present case.[1] Accordingly, I dissent.

As the majority indicates, in September, 2011, the defendant had four separate cases pending against him with separate docket numbers. For purposes of this dissenting opinion, I refer to the cases as: (1) the driving case (docket number MV-10-0228488); (2) the drug case (docket number CR-10-0046914); (3) the breach of the peace case (docket number CR-10-0047442); and (4) the burglary case (docket number CR-10-0046439-T, the underlying facts of which form the basis of the charges in the present case). With the assistance of Judge Strackbein, the defendant and the state entered into a tentative plea agreement pursuant to which the defendant agreed to plead guilty to possession of drug paraphernalia in the drug case and to pay a fine of $300, in

[1] Because I conclude that the intent of the disposition agreement was clear and unambiguous, I need not determine whether the majority correctly concludes that the standard of review of Judge Alander's decision denying the defendant's motion to dismiss is plenary because the ruling was based solely on his interpretation of the written transcript of the disposition hearing, and not on the live testimony of witnesses, and that any ambiguities in the disposition agreement must be resolved against the state. Even if I were to assume that those standards are correct, I would affirm Judge Alander's ruling denying the motion to dismiss.

exchange for which the state would enter nolles in the other three cases.[2] When the parties appeared in court to enter the plea on September 22, 2011, however, Judge Strackbein was unavailable. Accordingly, Judge Kahn, who was under the understanding that she was going to be the trial judge in this case, heard the matter. The state has represented to this court, and the defendant does not dispute, that, because Judge Strackbein was unavailable to take the guilty plea, and because Judge Kahn was reluctant to become involved in plea negotiations because she would be trying the case,[3] the parties agreed that entering a guilty plea on the drug charge would not be an option if they were to resolve the matter at that time. Accordingly, they reached a new disposition agreement under which all of the cases would be nolled.

Pursuant to Practice Book § 39-29,[4] the prosecutor explained the new disposition agreement to Judge Kahn as follows. First, the prosecutor read into the record the docket numbers of the four cases that were to be addressed at the disposition hearing, in the order set forth previously. With respect to the first case, the driving case, which involved charges of driving without insurance and driving unreasonably fast, the prosecutor explained that "[w]hat we do in those cases is make sure that the insurance is gotten, if in fact he's driving an automobile, and the license is still valid or is valid.

[2] See Practice Book § 39-5 ("[t]he parties may agree that the defendant will plead guilty or nolo contendere on one or more of the following conditions . . . [2] [t]hat the prosecuting authority will nolle . . . certain other charges against the defendant").

[3] Judge Kahn stated at the September 22, 2011 hearing that she "was hesitant to engage in the plea negotiations because [she] was going to be the trial judge . . . ."

[4] Practice Book § 39-29 provides: "A prosecuting authority shall have the power to enter a nolle prosequi in a case. It shall be entered upon the record after a brief statement by the prosecuting authority in open court of the reasons therefor."

[The defendant] says that . . . he was operating with a valid motor vehicle license." Accordingly, the prosecutor explained, "[t]he state is entering a nolle on that." Judge Kahn immediately responded, "Nolle is noted."

With respect to the third case, the breach of the peace case, the prosecutor explained that the complainant in that case had been incarcerated and did not want to pursue the matter. Accordingly, he explained "we're entering a nolle in that matter based on the victim's wishes." Judge Kahn again responded immediately, "Nolle noted." The prosecutor then stated that he would address the second case that he had mentioned at the outset, the drug case, at the end of the hearing.

With respect to the burglary case, the prosecutor explained that the state had serious doubts as to "whether [it] could ever prove the breaking and entering or the illegal entry . . . ."[5] In addition, the defendant had given up possession of the items at issue to the police. Accordingly, the prosecutor explained, "[t]he state's entering a nolle in that file." Yet again, Judge Kahn immediately responded, "Nolle noted."

Finally, with respect to the drug case, the prosecutor explained that the matter involved "a simple possession of narcotics," and that another individual had admitted to possessing some of the narcotics at issue. The prosecutor further explained that, as the result of these circumstances, the defendant originally had agreed to plead guilty to possession of drug paraphernalia and to pay a fine of $300, in exchange for which the state would nolle the other three cases. The prosecutor then explained that, because of the concerns over the entry of a guilty plea raised by Judge Strackbein's absence, the defendant had agreed that he would instead contrib-

[5] In addition, the prosecutor stated later in the proceeding that "in the [burglary case] the codefendant . . . is dead. The victim can't be found. That case as it stands today is unprovable."

ute $271 to the "victim's fund,"[6] "in light of [which the state agreed] . . . to nolle this case, as well."[7] Judge Kahn responded that she would "note the nolle on that."

In my view, the foregoing makes it inescapably clear that each of the four cases against the defendant was nolled for an entirely distinct reason, and *only* the drug case was nolled in exchange for the $271 charitable contribution. As I have explained, Judge Kahn noted that nolles in the driving case, the breach of the peace case and the burglary case had been entered *before* the prosecutor even mentioned the disposition of the drug case. In addition, Judge Kahn expressly stated at the September 22, 2011 hearing: "I do know [that the prosecutor's] nature is not to enter nolles lightly and so it's not his practice to nolle cases unless there's a good reason, so I'm going to take him at his word that he couldn't prove the [burglary] case."[8] Moreover, while he was attempting to explain to Judge Kahn why a previous guilty plea offer in the burglary case, of which Judge Strackbein had been aware, was no longer in effect, the prosecutor stated: "Perhaps the drug case changed significantly when [the codefendant] died and [the victim] was unavailable.[9] So I don't have a larceny four . . . ." (Footnote added.) Judge Kahn responded,

[6] Presumably, the prosecutor was referring to the Criminal Injuries Compensation Fund, the statutorily authorized victim's compensation fund. See General Statutes § 54-215.

[7] See *State* v. *Pieger*, 240 Conn. 639, 653, 692 A.2d 1273 (1997) (order that defendant make charitable contribution was authorized by General Statutes [Rev. to 1995] § 53a-30 [a] [12], [now General Statutes § 53a-30 (17)], under which court has authority to impose as condition on discharge that defendant "satisfy any other conditions reasonably related to his rehabilitation"); *See* v. *Gosselin*, 133 Conn. 158, 161, 48 A.2d 560 (1946) ("a nolle does necessarily imply a discharge").

[8] Although Judge Kahn did not expressly refer to the burglary case, that was the only case in which the prosecutor explained that it was being nolled because of problems of proof.

[9] It is possible that the prosecutor intended to refer to the burglary case. See footnote 5 of this dissenting opinion.

"I appreciate that you've made a full record of it . . . ." It is clear, therefore, that Judge Kahn understood that lack of proof was the reason for the nolle of the burglary case. Judge Kahn further stated that she understood that the prosecutor "would nolle some matters because he had an inability to get certain witnesses . . . ." In addition, she stated that "if the state wishes to enter a nolle, there's nothing the court can do. The state can enter a nolle. It's within the prosecutorial discretion. All the . . . court can do is ask the state to put their reasons on the record. But they can nolle cases whenever they want, and all the court can do is ask the reasons. I have no issues with [the prosecutor's] reasons . . . . I understand them. You've put them on the record, and so I'm not quarreling with that at all." Finally, Judge Kahn stated that she would "note the nolles *for the reasons stated on the record*." (Emphasis added.) Thus, Judge Kahn clearly viewed the reasons for entering the four nolles as distinct and independent reasons.

Indeed, if the defendant had agreed to make the $271 charitable contribution in exchange for all four nolles, there would have been absolutely no reason for the prosecutor to state on the record the reasons for the nolles in the driving case, the breach of the peace case and the burglary case. The prosecutor could have simply explained that, in exchange for the contribution, all four cases were being nolled. To the contrary, however, the prosecutor expressly stated that, in light of the charitable contribution, the state had agreed to nolle "*this case*"—the drug case—not all of the cases. (Emphasis added.) Thus, the only reasonable interpretation of the transcript of the disposition hearing is that the parties intended that *only* the drug case would be nolled in exchange for the defendant's charitable contribution of $271, and the other three cases would be nolled for entirely distinct reasons, none of which

involved any concessions by or consideration from the defendant.

In addition, there is a plausible explanation for this restructuring of the disposition agreement. Instead of receiving a conviction in the drug case and effective dismissals of the other three cases,[10] the defendant would receive an effective dismissal in the drug case and unilateral nolles on the other three charges, under which the state would be entitled to reinstitute the charges.[11] The original plea agreement was in accordance with Practice Book § 39-5, which authorizes the state to nolle other charges against the defendant in exchange for a *guilty plea* on a particular charge. Presumably, the parties' agreement that the defendant would plead guilty to possession of drug paraphernalia and pay a criminal fine only in the drug case was premised on their view that that was the state's strongest case, considering both the extent of the defendant's culpability and the strength of the state's evidence. A guilty plea in the drug case, however, was no longer an option. Accordingly, it is reasonable to conclude that, with a view to preserving the original intent to tie the financial consequences to the defendant exclusively to the drug case, and knowing that the guilty plea no longer provided consideration for the nolles in the other three cases, the parties agreed that the defendant would make a charitable contribution in exchange for the nolle in the drug case and the other cases would be nolled for distinct reasons. This new arrangement involved trade-offs for both parties, in that the state gave up the conviction in the drug case but gained the ability to

[10] See *Mason* v. *State*, 302 Md. 434, 440, 488 A.2d 955 (1985) (nolle as part of plea agreement is tantamount to dismissal of nolled charge).

[11] See *State* v. *Lloyd*, 185 Conn. 199, 201, 440 A.2d 867 (1981); Practice Book § 39-31 ("The entry of a nolle prosequi terminates the prosecution and the defendant shall be released from custody. If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated.").

reinstitute charges in the other three cases if circumstances changed, while, conversely, the defendant avoided a certain criminal conviction in the drug case but took on the risk that the state might reinstitute the charges in the other cases. In contrast, if the parties had agreed to preserve the original intent to effectively dismiss the driving case, the breach of the peace case and the burglary case by entering nolles in all four cases in exchange for a charitable contribution, the benefits of the change in disposition would have flowed exclusively to the defendant. Specifically, the defendant would have avoided a criminal conviction in the drug case *and* the state would have been barred from reinstituting the charges in all four cases. Accordingly, because it is clear that it was the intent of the parties that the defendant would pay a charitable contribution in exchange only for the nolle in the drug case, and because there is a more than plausible explanation for the change in the disposition of the other cases, I would conclude that the state was barred only from reinstituting charges in the drug case, and it was free to reinstitute the charges in the present case arising from the conduct that was the basis of the nolled burglary case.

The majority makes numerous arguments in support of its conclusion to the contrary, none of which bears scrutiny. First, the majority points out that "[t]he prosecutor made no remark at the outset of the hearing to indicate that one of the four cases was being treated *differently*, nor did he preface the discussion of the drug case with any such comment." (Emphasis added.) As I have indicated, however, the prosecutor did treat the cases differently because he took the drug case out of order and addressed it last. Thus, he grouped the three cases that were unilaterally nolled together and treated the drug case separately. Moreover, the failure of the prosecutor to state expressly that only the drug case was being nolled in exchange for consideration

does not render the remarks that he *did* make ambiguous. As I have indicated, he unambiguously indicated that each of the four cases had a different reason for being nolled, and that the drug case was the only case that was being nolled in exchange for the defendant's charitable contribution.

The majority also contends that, because all of the cases were treated the *same*, i.e., they were nolled, it is reasonable to conclude that the parties intended that the driving case, the breach of the peace case and the burglary case would be effectively dismissed, like the drug case. Specifically, the majority contends that the reasons given by the prosecutor for the nolle in the drug case were "problems in proof and lack of interest in pressing the matters given the circumstances attendant to the case," reasons that were not markedly different from the reasons given in the other cases. The prosecutor mentioned these issues, however, in an attempt to explain the reasons for the previous plea agreement pursuant to which the defendant would plead guilty to possession of drug paraphernalia and pay a $300 fine. The prosecutor then explained that, in lieu of the fine, the defendant had made a $271 charitable contribution and, "[i]n light of that," the state was entering a nolle in that case. It is clear, therefore, that the *reason* for that nolle, *unlike* the nolles in the other cases, was the payment of the charitable contribution. The majority further contends that Judge Kahn's remarks referring to a prosecutor's broad discretion to enter nolles as long as the prosecutor states the reasons on the record merely "underscores the inherent ambiguity in the record as to the parties' intention" because she drew no distinction between the unilateral nolles and the nolle in the drug case. From the perspective of *Judge Kahn* however, there was no distinction between the unilateral nolles and the nolle in exchange for the charitable contribution, in the sense that she

could not reject any particular nolle and demand that the state continue with the prosecution. That does not mean that there was no distinction between a unilateral nolle and a nolle entered in exchange for consideration from the *defendant's* point of view.

To the extent that the majority suggests that the defendant might reasonably have had the mistaken belief that the nolle entered in exchange for consideration and the unilateral nolles would have the *same legal effect*, the defendant has raised no claim of legal mistake, unilateral or otherwise, before the trial court or on appeal. Rather, the defendant contended in his motion to dismiss only that "the state previously entered a nolle prosequi on these charges after the payment of a charitable contribution by the defendant. The payment of this charitable contribution was made by the defendant in consideration of the state entering a nolle prosequi on the pending charges [in the burglary case], constituting a valid and enforceable plea agreement." The defendant further contended in support of his motion to dismiss, as he does on appeal, that, to the extent that the disposition agreement, as reflected in the transcript of the disposition hearing, is ambiguous on this point, it should be construed in his favor. There is a difference between a contract that is ambiguous and a contract that is clear and unambiguous but, because of a mistake of fact or law, does not accurately reflect the intent of one of the parties, and the defendant has not raised a claim involving the latter issue. Accordingly, this court must presume that the defendant understood the legal distinction between unilateral nolles and nolles entered in exchange for consideration.

Second, the majority contends that the defendant's charitable contribution to the victim's fund "bore no logical connection to the drug case" because, according

to the majority, there was no victim in that case.[12] As I have explained, however, the logical connection to the drug case was the preexisting intent of the parties that the financial consequences to the defendant would be tied to that case. Because the defendant could not be required to pay a criminal fine if he did not plead guilty to the charge, a charitable contribution to the victim's fund, which is a common practice when disposing of criminal matters, was a logical substitute, regardless of whether any specific victim of this particular crime could be identified.

Third, the majority contends that the prosecutor made comments that "reasonably would have suggested to the defendant that the prosecutor would not recommence prosecution in the [burglary] case." Specifically, the majority relies on the prosecutor's comment that "nobody here is out anything in the particular file" and his request that any property relating to the case be returned to its rightful owner. The majority ignores the fact, however, that the primary reason that the prosecutor gave to Judge Kahn for entering a nolle in this case was that he had doubts that the state "could ever prove the breaking and entering or the illegal entry," thereby indicating that, if proof became available, all bets would be off. It was only after giving that reason for the nolle that the prosecutor made the offhand comment that "nobody here is out anything" as additional support for the nolle. The prosecutor was entitled to balance problems of proof with the extent of the harm to the victim, and when proof is difficult and the harm small, a nolle may be indicated. That does not mean that, if strong evidence becomes available, a decision not to prosecute would still be the appropriate course. In any

[12] I would note that the prosecutor stated at the September 22, 2011 hearing that "[p]erhaps the drug case changed significantly when [the codefendant] died and [the victim] was unavailable." But see footnote 9 of this dissenting opinion.

event, even if I were to agree that the prosecutor suggested that he did not anticipate any change in circumstances that would support reinstitution of the charges, that would not render the intent of the parties to enter a unilateral nolle ambiguous.

With respect to the prosecutor's request that the property be returned to its rightful owner, the return of stolen property does not constitute the "destruction of . . . evidence" and, therefore, the majority's reliance on *State* v. *Nelson*, 23 Conn. App. 215, 219–20, 579 A.2d 1104, cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991), for the proposition that the destruction of evidence evinces a belief that no further charges will be brought is misplaced. See General Statutes § 54-36a (b) (2).[13] The majority contends that, to the contrary, § 54-36a (b) (2) has no bearing on its argument because the prosecutor never indicated on the record "that photographs of the evidence had been taken or that they

[13] General Statutes § 54-36a (b) (2) provides in relevant part: "If the seized property is stolen property, within ten days of the seizure, the law enforcement agency seizing the property shall notify the owner of the property if known, or, if the owner of the property is unknown at the time of seizure, such agency shall within ten days of any subsequent ascertainment of the owner notify such owner, and, on a form prescribed by the Office of the Chief Court Administrator, advise the owner of such owner's rights concerning the property and the location of the property. Such written notice shall include a request form for the return of the property. The owner may request the return of the property by filing such request form with such law enforcement agency, and upon receipt of such request, the law enforcement agency shall forward it to the clerk of the court for the geographical area in which the criminal offense is alleged to have been committed. The clerk of the court shall notify the defendant or defendants of the request to return the property. The court shall order the return of the property within thirty days of the date of filing such return request by the owner, except that for good cause shown, the court may order retention of the property for a period to be determined by the court. Any secondary evidence of the identity, description or value of such property shall be admissible in evidence against such defendant in the trial of such case. The fact that the evidence is secondary in nature may be shown to affect the weight of such evidence, but not to affect its admissibility. . . ."

were being preserved" as secondary evidence. See footnote 10 of the majority opinion. There is no requirement, however, that a prosecutor who has entered a unilateral nolle and requested that stolen property be returned to the owner explain on the record whether or how secondary evidence is being preserved in order to maintain the right to reinstitute the charges. Moreover, even if I were to assume that the defendant reasonably could have believed that the state would no longer possess evidence to support the burglary charge, making it unlikely that it would reinstitute that charge, that would not render the *reason* for the nolle ambiguous, and if the defendant intended that the nolle would be unilateral, we must presume that he knew that the state was not barred from reinstituting the charges. The majority continually confuses the issue of whether the defendant could have misunderstood the *legal effect* of a unilateral nolle—an issue that has not been raised—with the issue of whether the parties intended that the nolle in the burglary case would be unilateral, which they clearly did.

Fourth, the majority makes an elaborate argument regarding the prosecutor's intent to take the "bull by the horns" in light of Judge Strackbein's unavailability and his failure to state on the record how this or any other change in circumstances "would explain a change from the original intent to effectuate a global disposition." As I have explained, however, Judge Strackbein's unavailability meant that the defendant could not plead guilty on the drug charge as consideration for the effective dismissal of the other cases. Because that was no longer an option, it is reasonable to conclude that the parties abandoned their plan to effectively dismiss the charges in those cases as part of a trade-off that involved gains and losses for both parties. In my view, the prosecutor had no obligation to explain on the record why the parties were not entering into a new agreement

that would benefit the defendant exclusively. Moreover, even under the state's view, the new disposition agreement, like the discarded plea agreement, would be "global" in the sense that each of the four cases would be disposed of in some manner. In any event, the prosecutor's failure to expressly discuss the theory underlying the new *overall* disposition on the record does not change the fact that the distinct reasons that he gave for entering a nolle in each of the four individual cases show clearly and unambiguously that *only* the drug case was nolled in exchange for the charitable contribution.

Finally, the majority argues—yet again—that "[i]f the prosecutor intended to enter unilateral nolles on three of the cases and effectuate a nolle agreement confined to only the drug case, then it was incumbent on the prosecutor to make that explicit on the record to avoid any ambiguity." It is clear to me, however, that the prosecutor did everything that was required by Practice Book § 38-29 when he gave a clear and unambiguous statement in open court of the specific reasons that each of the four cases was being nolled. He was not required to give those reasons and then to dispel all possible doubt about the reasons for the nolles by reiterating that the specific reason that he gave for the nolle in each case was, in fact, the reason for that nolle. Nor was the prosecutor required to explain to the defendant that the unilateral nolles did not bar the state from reinstituting the charges if the circumstances changed.[14]

[14] Because a guilty plea involves the waiver of important constitutional rights, the defendant must be canvassed by the court to ensure that the plea is knowing and voluntary. See *State* v. *Domian*, 235 Conn. 679, 687, 668 A.2d 1333 (1996) ("the federal constitution requires that the record of the plea canvass indicate the voluntariness of any waiver of the three core constitutional rights [implicated by the guilty plea]" [internal quotation marks omitted]). I am aware of no comparable requirement that a prosecutor advise the defendant of the legal effect and consequences of a unilateral nolle, which does not require the defendant to waive any constitutional rights. Although providing such an explanation is arguably the better practice if the prosecutor has any reason to believe that the defendant lacks knowl-

In any event, the defendant has made no claim that he did not understand the effect of a unilateral nolle.

It is clear to me, therefore, that the majority is allowing the defendant, in light of a subsequent change in circumstances, to substitute his hindsight view of what he should have done—request the state to nolle all four cases in exchange for a charitable contribution to the victim's fund—for what, as far as the transcript of the disposition hearing reveals, the parties actually agreed to do—nolle the drug case in exchange for a charitable contribution and nolle the other three cases for entirely distinct reasons, none of which barred the reinstitution of the underlying charges in those three cases if circumstances changed.[15] In doing so, the majority has entirely ignored the fact that the disposition agreement, as reflected in the transcript of the disposition hearing, involved trade-offs, and, instead, it has given effect to the terms of both the abandoned plea agreement and the substituted disposition agreement that favor the defendant, while nullifying the favorable terms for which the state bargained. In my view, it is not the role of this court to retroactively change the terms of a clear and unambiguous disposition agreement that is otherwise enforceable merely because subsequent developments have triggered a term that disfavors the defendant.

edge on that matter, that presumably would not be the case when the defendant is represented by counsel.

[15] As I have indicated, the defendant has made no claim that he agreed to the new disposition because he did not realize that a unilateral nolle would allow the state to reinstitute the charges. Even if the defendant had made such a claim, however, the remedy for a unilateral mistake ordinarily is not to reform the contract to conform to the mistaken party's intent, but, at most, to void the contract. See *Bender* v. *Bender*, 292 Conn. 696, 730–31, 975 A.2d 636 (2009) ("[t]he mistake of [only one] of the parties inducing him to sign a contract which, but for the mistake, he would not have entered into, may be a ground in some cases for cancelling the contract" [internal quotation marks omitted]).

Because I believe that the transcript of the disposition hearing shows clearly and unambiguously that the prosecutor unilaterally nolled the burglary case, I would conclude that there is no bar to the reinstitution of those charges in the present case. Accordingly, I would reverse the judgment of the Appellate Court reversing the trial court's judgment of conviction following its denial of the defendant's motion to dismiss, and I would direct that court to uphold the judgment of conviction. I therefore dissent.

ORDERS

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ORDERS

SUZETTE BROWN *v.* EDWIN NJOKU ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 170 Conn. App. 329 (AC 38022), is denied.

Edwin Njoku, self-represented, in support of the petition.

Decided May 24, 2017

FAIRFIELD MERRITTVIEW LIMITED PARTNERSHIP *v.* CITY OF NORWALK ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 160 (AC 34950), is denied.

Carolyn M. Colangelo, assistant corporation counsel, and *Daniel J. Krisch*, in support of the petition.

James R. Fogarty, in opposition.

Decided May 24, 2017

RAFAEL ABREU *v.* COMMISSIONER OF CORRECTION

The petitioner Rafael Abreu's petition for certification for appeal from the Appellate Court, 172 Conn. App. 567 (AC 38161), is denied.

Peter Tsimbidaros, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 24, 2017

STATE OF CONNECTICUT *v.* WILLIAM LINDER

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 231 (AC 38433), is denied.

Justine F. Miller, assigned counsel, in support of the petition.

James M. Ralls, senior assistant state's attorney, in opposition.

Decided May 24, 2017

FEDERAL NATIONAL MORTGAGE ASSOCIATION *v.* G. WARREN LAWSON ET AL.

The named defendant's petition for certification for appeal from the Appellate Court (AC 39672) is denied.

G. Warren Lawson, self-represented, in support of the petition.

Tara L. Trifon and *Adam Lewis*, in opposition.

Decided May 24, 2017

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CONCLUSION

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

So ordered.

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

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

Syllabus

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

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

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

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

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

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

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

Procedural History

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

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

III

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

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

Syllabus

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

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

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

Argued February 16—officially released June 13, 2017

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

(AC 38267)

Sheldon, Keller and Prescott, Js.

Syllabus

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

Argued January 13—officially released June 13, 2017

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

Prescott, Mullins and Beach, Js.

Syllabus

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

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

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

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

Argued March 21—officially released June 13, 2017

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I

We first consider the mootness question, which implicates the subject matter jurisdiction of the court. See *Council* v. *Commissioner of Correction*, 286 Conn. 477, 486–87, 944 A.2d 340 (2008). "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from

the determination of which no practical relief can follow. . . . When . . . events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 225–26, 756 A.2d 1264 (2000). Our review of the question of mootness is plenary. *Council* v. *Commissioner of Correction*, supra, 487.

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

The appeal is dismissed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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VOL. 173

NAUGATUCK VALLEY SAVINGS AND LOAN
v. HANDSOME, INC., ET AL.
(AC 38601)

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

Argued May 15—officially released June 6, 2017

Defendant Todd Cascella's appeal from the Superior Court in the judicial district of Fairfield, *Hon. Michael Hartmere*, judge trial referee; *Hon. Alfred J. Jennings, Jr.*, judge trial referee.

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

MICHAEL INZITARI *v.* COMMISSIONER
OF CORRECTION
(AC 38386)

Sheldon, Keller and Bishop, Js.

Argued May 15—officially released June 6, 2017

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver, J.*

Per Curiam. The judgment is affirmed.

JESSE PAULETTE *v.* RYAN PAULETTE
(AC 38577)

Keller, Prescott and Flynn, Js.

Submitted on briefs May 18—officially released June 13, 2017

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Morgan, J.*

Per Curiam. The judgment is affirmed.

CARL J. LIANO *v.* CITY OF BRIDGEPORT
(AC 39188)

Keller, Prescott and Beach, Js.

Submitted on briefs May 19—officially released June 13, 2017

Plaintiff's appeal from the Workers' Compensation Review Board.

Per Curiam. The decision of the Workers' Compensation Review Board is affirmed.

ANTHONY C. CARTER *v.* GERALD M. KLEIN
(AC 38132)

Keller, Prescott and Beach, Js.

Submitted on briefs May 19—officially released June 13, 2017

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Kwak*, *J.*

Per Curiam. The judgment is affirmed.

US BANK NATIONAL ASSOCIATION AS TRUSTEE
v. CLAUDE M. BROUILLARD ET AL.
(AC 38818)

DiPentima, C. J., and Alvord and Bishop, Js.

Argued May 18—officially released June 13, 2017

Appeal by the named defendant et al. from the Superior Court in the judicial district of Hartford, *Robaina*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

ADAM DEMEUSY *v.* TOWN OF CANTON ET AL.
(AC 39043)

Keller, Prescott and Beach, Js.

Submitted on briefs May 19—officially released June 13, 2017

Plaintiff's appeal from the Superior Court in the judicial district of Hartford, *Huddleston*, *J.*

Per Curiam. The judgment is affirmed.

MICHAEL SMITH *v.* COMMISSIONER OF CORRECTION
(AC 38546)

DiPentima, C. J., and Alvord and Bishop, Js.

Argued May 18—officially released June 13, 2017

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Oliver*, *J.*

Per Curiam. The judgment is affirmed.

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Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal denial of petition for writ of habeas corpus; claim that petitioner's guilty plea to larceny second degree was not made knowingly, intelligently and voluntarily because he did not know or understand immigration consequences of plea in violation of right to due process; claim that trial counsel rendered ineffective assistance of counsel by failing to properly research and advise petitioner of immigration consequences of plea; claim that petition should be dismissed on ground of mootness because habeas court could provide no practical relief; whether petitioner's claims are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further.
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Demeusy *v.* Canton (Memorandum Decision) 905

Doe *v.* Rackliffe 389

Sexual assault; whether trial court abused discretion in denying motion for continued use of pseudonyms; whether trial court properly determined that plaintiffs did not meet burden of demonstrating substantial privacy interests in maintaining anonymity that outweighed public's interest in knowing plaintiffs' names, as required under applicable rule of practice (§ 11-20A [h]); whether minor victims of sexual assault have strong privacy interests in having allegations and surrounding circumstances concealed from public scrutiny; whether procedures that rules of practice provide permit automatic approval of use of pseudonyms by party or parties involved.

Evans *v.* Tiger Claw, Inc. 409

Unpaid wages; whether trial court erred in failing to apply or misapplying wage and hour law; whether trial court applied incorrect burden of proof; claim that trial court erred in finding that plaintiff had not proven that defendant failed to pay wages to which plaintiff was otherwise entitled.

Fitzpatrick *v.* U.S. Bank National Assn. 686

Petition for discharge of mortgage; motion to strike; whether statutory (§ 49-13) language requiring undisturbed possession of property for six years after expiration of time limited in mortgage for full performance of conditions thereof referred to maturity date specified in mortgage or acceleration date after default.

Girolametti *v.* Michael Horton Associates, Inc. 630

Negligence; arbitration; summary judgment; res judicata; collateral estoppel; whether trial court properly granted motion for summary judgment filed by general contractor on ground that plaintiffs' claims against it were barred by res judicata because issues between them either were or could have been fully litigated in prior arbitration proceeding; whether trial court properly denied motions for summary judgment filed by seven other defendants that were subcontractors or sub-subcontractors to general contractor arising out of same construction project; whether privity is required for defensive use of collateral estoppel, discussed; whether plaintiffs' claims against defendant subcontractors and sub-subcontractors were barred by res judicata; whether record was sufficient to review claim that plaintiffs' claims against defendant testing company, with whom plaintiffs had contracted directly to perform certain testing, were barred by collateral estoppel.

Girolametti *v.* VP Buildings, Inc. (See Girolametti *v.* Michael Horton Associates, Inc.) . . 630

Haughey *v.* Commissioner of Correction 559

Habeas corpus; claim that habeas court abused discretion in denying petition for certification to appeal; claim that habeas court improperly concluded that petitioner was not entitled to individualized, proportionate sentencing hearing, as articulated in Miller *v.* Alabama *(567 U.S. 460); reviewability of petitioner's claim that mandatory sentence of life imprisonment without possibility of release violated Connecticut constitution's prohibition against cruel and unusual punishment.*

Heinonen *v.* Gupton 54
Fraud; subject matter jurisdiction; standing; motion to dismiss; whether trial court correctly determined that plaintiff lacked standing because he failed to prove legal ownership of subject premises; whether plaintiff relinquished any legal or equitable ownership interest in subject premises when he transferred interest to trust created for benefit of children; whether claim to protect allegedly fraudulent deprivation of interest of children's trust in subject premises must be brought by trustee.
Hulten *v.* Thurlow (see Thurlow *v.* Hulten) 694
Inzitari *v.* Commissioner of Correction (Memorandum Decision). 903
Johnson *v.* Raffy's Café I, LLC. 193
Assault; default for failure to plead; motion to set aside default for failure to plead; motion to dismiss for lack of subject matter jurisdiction; motion for new trial; claim that trial court erred in denying motion to dismiss in that plaintiff had invalid probate certificate; claim that trial court erred in denying motion to dismiss in that probate certificate did not authorize suit; claim that trial court erred in denying motion to dismiss in that defendant entitled to sovereign immunity; claim that trial court erred in denying motion to dismiss in that double jeopardy barred action; claim that trial court erred in denying motion to dismiss in that granting summary judgment to other defendants required court to dismiss counts against defendant; claim that trial court abused discretion in denying motion to set aside default for failure to plead in that defendant was exercising fifth amendment right against self-incrimination; claim that trial court abused discretion in denying motion to set aside default for failure to plead in that requiring defendant to plead while also facing criminal charges placed him under duress; claim that trial court abused discretion in denying motion to set aside default for failure to plead in that defendant mistakenly believed affidavit served as answer; claim that trial court erred in denying motion for new trial in that defendant was denied reasonable opportunity to appear and defend at hearing in damages; claim that trial court erred in denying motion for new trial in that defendant discovered new evidence and judgment was obtained through fraud.
Jonas *v.* Playhouse Square Condominium Assn., Inc.. 36
Contracts; whether trial court properly denied motion to open judgment of dismissal where motion was filed eight months after judgment was rendered and plaintiff failed to prove that exception to statutory four month time limitation for filing motion to open existed.
JP Morgan Chase Bank, National Assn. *v.* Healey (Memorandum Decision) 902
Kruger *v.* Grauer. 539
Defamation; negligent infliction of emotional distress; intentional infliction of emotional distress; immunity from suit; summary judgment; whether trial court properly denied defendant's motion for summary judgment; claim that defendant was entitled to common-law absolute immunity from suit, rather than qualified immunity, pursuant to statute (§ 17a-101e [b]), for statements made to Department of Children and Families and to sexual assault clinic personnel during department investigation of allegations that plaintiff sexually assaulted parties' minor child; claim that legislature in § 17a-101e (b) did not intend to abrogate common-law absolute immunity; doctrine of absolute immunity, discussed; litigation privilege protecting statements made in judicial or quasi-judicial proceedings, discussed.
Lamar *v.* Brevetti 284
Negligence; negligent infliction of emotional distress; recklessness; false arrest; malicious prosecution; false imprisonment; intentional infliction of emotional distress; civil rights violations; claim that trial court improperly rendered summary judgment; whether alleged actions of defendant police officers were discretionary or ministerial acts; whether probable cause barred plaintiff's common-law tort claims; whether claims against city were derivative of claims against individual defendants.
Lee *v.* Commissioner of Correction 379
Habeas corpus; whether habeas court abused discretion in denying petition for certification to appeal; claim that trial counsel rendered deficient performance by failing to seek bond increase in first case when petitioner was arraigned on subsequent charges that resulted in convictions and sentences, which he claimed resulted in loss of twenty-seven days of presentence confinement credit served in first case; whether question of prejudice was debatable among jurists of reason, could have been resolved differently, or deserved encouragement to proceed further

when petitioner's current sentences would not have been reduced by those twenty-seven days pursuant to presentence confinement statute (§ 18-98d) because no sentence was ever imposed on first charge.

Liano *v.* Bridgeport (Memorandum Decision) 904

Mandable *v.* Planning & Zoning Commission 256

Zoning appeal; statutory construction; appeal from decision of Planning and Zoning Commission declining to consider plaintiffs' petition to determine that defendant landowners filed resubdivision map in town of Westport land records and seeking declaratory judgment; claim that two lot line adjustment maps were improperly recorded in town's land records by defendant landowners because maps qualify as "resubdivisions," as defined by statute (§ 8-18), and thus required approval by defendant Planning and Zoning Commission to be valid; whether trial court correctly determined that maps filed by defendant landowners did not alter subdivision and were exempt from requirement of approval by commission.

Mangiafico *v.* Farmington 158

Injunction; motion to dismiss; exhaustion of administrative remedies; motion for summary judgment; impermissible collateral attack; whether plaintiff failed to exhaust administrative remedies because he failed to timely appeal to Superior Court, pursuant to applicable statute (§ 7-152c [g]) and Farmington Town Code provision (§ 91-2 [G]); claim that plaintiff not required to exhaust administrative remedies because federal civil rights actions brought in state courts do not require exhaustion of administrative remedies; whether statutory citation appeals process provided inadequate remedy at law for plaintiff's claims seeking declaratory and injunctive relief for unconstitutional taking of his property and violation of his due process rights; whether citation appeal process was inadequate, burdensome, and futile, as it would have required plaintiff to bring numerous separate citation appeals; whether trial court improperly rendered summary judgment on count of complaint seeking discharge of municipal blight liens on plaintiff's property, because trial court erroneously concluded that he could not collaterally attack the validity of those liens.

Mangiafico *v.* Farmington 178

Petition to open municipal blight citation; ripeness; mootness; judicial estoppel; claim that appeal by defendant town was moot because town did not pursue enforcement of citations within twelve months from expiration of final period for uncontested payment of fines as required by statute (§ 7-152c [d]); whether plaintiff's petition to open citation was ripe for adjudication; claim that town was judicially estopped from arguing that plaintiff's claims with respect to enforcement of citations at issue in present case were not ripe because town sought dismissal of plaintiff's claims in prior proceeding involving enforcement of previous citations and fines on ground that plaintiff failed to timely appeal prior citations as required by § 7-152c (g).

Mills *v.* Mills (Memorandum Decision) 902

Naugatuck Valley Savings & Loan *v.* Handsome, Inc. (Memorandum Decision) 903

Paulette *v.* Paulette (Memorandum Decision) 903

Pressley *v.* Johnson 402

Dissolution of marriage; postdissolution proceedings; motion for contempt; motion to reargue; claim that trial court erred finding defendant did not owe plaintiff arrearage for work related child care expenses; claim that trial court erred vacating prior order requiring weekly monetary contributions from defendant to plaintiff for child care expenses.

Rendahl *v.* Peluso 66

Breach of fiduciary duty; legal malpractice; whether trial court properly declined to accept jury's initial verdict and acted within discretion by not accepting that verdict and returning jury to continue deliberations to clarify initial verdict; whether jury's failure to award damages rendered initial verdict ambiguous as first presented; whether trial court could not have accepted initial verdict pursuant to applicable rule of practice (§ 16-31) until court resolved inconsistency and ambiguity in verdict; whether jury, after returning to continue deliberations, had power to change initial plaintiff's verdict to defendants' verdict on all counts; reviewability of claim that trial court's supplemental jury instructions were improper; whether plaintiff failed to adequately preserve issue for review on appeal by failing to take meaningful exception to court's proposed charges before or after court's supplemental instructions; whether trial court abused discretion in denying motions to set aside verdict or in declining to admit certain exhibit offered by plaintiff; reviewability of claim not asserted at trial; whether exhibit

was probative as to whether defendant breached fiduciary duty to estate under facts of case; failure to seek articulation of claim not addressed by trial court.

Riley *v.* Travelers Home & Marine Ins. Co. 422

Breach of contract; negligent infliction of emotional distress; whether evidence was sufficient to support jury's verdict and damages award on plaintiff's claim of negligent infliction of emotional distress; claim that trial trial court was limited to considering evidence adduced in plaintiff's case-in-chief when it ruled on defendant's motion for judgment notwithstanding verdict; claim that court improperly denied defendant's motion for remittitur; whether evidence adduced during entire trial was sufficient to establish that defendant proximately caused plaintiff emotional distress; whether emotional distress that defendant caused plaintiff was severe enough such that it might have resulted in illness or bodily harm; claim that court improperly denied defendant's motion for remittitur; whether court abused discretion in denying defendant's motion to preclude testimony by plaintiff's expert witnesses; claim that court improperly failed to conduct hearing on defendant's motion to preclude testimony by plaintiff's expert witnesses; whether court improperly awarded plaintiff prejudgment interest at rate lower than statutory (§ 37-3a) rate of 10 percent per annum.

Rinfret *v.* Porter 498

Application for custody of minor child; motion for attorney's fees; claim that trial court improperly awarded attorney's fees under bad faith exception to American rule by broadly concluding that underlying custody action was both entirely without color and taken in bad faith.

Sinchak *v.* Commissioner of Correction 352

Habeas corpus; reviewability of claim that petitioner's right to due process was violated because jury's guilty verdict was against weight of evidence; reviewability of claim that petitioner's trial counsel, appellate counsel and prior habeas counsel rendered ineffective assistance for having failed to raise weight of evidence claim; whether petitioner's trial counsel rendered ineffective assistance during closing argument to jury by failing to marshal facts in petitioner's favor; claim that petitioner's prior habeas counsel was ineffective for having failed to raise claim in prior habeas proceeding that trial counsel was ineffective during closing argument to jury for having failed to marshal facts in petitioner's favor.

Smith *v.* Commissioner of Correction (Memorandum Decision) 905

Sousa *v.* Sousa 755

Dissolution of marriage; motion to modify; fraud by nondisclosure; fraud on court claim; claim that trial court erroneously concluded that defendant failed to prove by clear and convincing evidence that plaintiff fraudulently misrepresented value of pension in financial affidavit; whether defendant presented clear and convincing evidence that plaintiff knew that disclosed value of subject pension was inaccurate; whether plaintiff's alleged fraud impacted defendant's decision to enter into subject stipulation; whether substantial probability that trial court would have rejected modification had court known that plaintiff had inaccurately valued plaintiff's pension in financial affidavit; claim that plaintiff committed fraud by nondisclosure by listing only value of pension contribution in financial affidavit and by failing to file corrected affidavit prior to modification of dissolution judgment.

State *v.* Chankar 227

Arson in first degree; criminal mischief in first degree; claim that police conducted custodial interrogation of defendant in violation of his constitutional rights against self-incrimination; whether trial court improperly determined that police were not required to give defendant warning pursuant to Miranda *v.* Arizona *(384 U.S. 436); whether evidence was sufficient to support conviction of arson first degree; claim that prosecutor committed improprieties during closing argument to jury in violation of defendant's right to fair trial.*

State *v.* Guaman 144

Assault first degree; claim that trial court abused discretion in denying defendant's motion to withdraw guilty plea on ground that trial counsel rendered ineffective assistance by failing to advise defendant of immigration consequences of plea; claim that trial counsel was laboring under actual conflict of interest arising out of his forthcoming suspension from practice of law for four month period following plea canvass.

State *v.* Heath 625

Motion to correct illegal sentence; sexual assault in first degree; assault in first degree; claim that sentence for sexual assault in first degree was illegal because

it included period or probation rather than period of special parole; claim that trial court, in granting in part motion to correct illegal sentence, improperly concluded that it was required, pursuant to statute ([Rev. to 2007] § 53a-70 [b] [3]), to resentence defendant to period of special parole for conviction of sexual assault in first degree as class B felony; claim that Supreme Court cases decided during pendency of appeal should not apply retroactively because Supreme Court's determination in those cases amounted to change in law and defendant had relied on law as it existed at time he filed motion.

State *v.* Henderson 119

Robbery in first degree; attempt to escape from custody; whether trial court properly denied motion to correct illegal sentence; claim that enhanced sentences as persistent dangerous felony offender, pursuant to statute ([Rev. to 1991] § 53a-40 [a]) and as persistent serious felony offender, pursuant to statute ([Rev. to 1991] § 53a-40 [b]), violated multiple punishments prohibition of double jeopardy clause and contravened intent of legislature; claim that legislature intended that § 53a-40 (a) and (b) permit application of one sentence enhancement rather than simultaneous punishment as both persistent dangerous felony offender and persistent serious felony offender; claim that certain language by Commission to Revise the Criminal Statutes (§ 53a-40, commission comment) precluded enhancement of robbery sentence under § 53a-40 (a); claim that preclusion under § 53a-40 (d) of use of certain convictions rendered simultaneously as basis for conviction as persistent felony offender was applicable to basis for conviction as persistent felony offender pursuant to § 53a-40 (a) and (b).

State *v.* Henry D. 265

Attempt to commit sexual assault first degree; risk of injury to child; whether trial court abused discretion in admitting into evidence alleged victim's recorded forensic interview as prior consistent statement in its entirety; claim that prosecutor committed impropriety when he used puzzle analogy to explain concept of beyond reasonable doubt.

State *v.* Jones 218

Violation of probation; mootness; whether probation violation appeal was moot because defendant failed to timely appeal from criminal conviction stemming from same conduct; claim that motion for permission to file late appeal from criminal conviction preserved live controversy; whether appeal not moot because trial court allegedly assured defendant that Alford *plea would not preclude probation violation appeal; whether defendant's criminal conviction conclusively established that he engaged in criminal conduct giving rise to violation of probation.*

State *v.* Joseph R. B. 518

Risk of injury to child; whether evidence was sufficient to support conviction of risk of injury to child; whether jury reasonably could have found that defendant was perpetrator and that he possessed requisite general intent; whether comments of prosecutor regarding defendant's knowledge that he had used too much force when freeing child's leg from crib infringed on defendant's constitutional right to remain silent; whether jury naturally and necessarily would have understood remarks as referring to defendant's failure to testify; whether comment that defendant was without reasonable explanation or had no reasonable explanation to show why he was innocent is comment that jury would naturally and necessarily interpret as related to defendant's constitutional and statutory right to decline to testify.

State *v.* McClean. 62

Motion to correct illegal sentence; reconsideration of prior decision in light of Supreme Court decision; whether trial court properly dismissed motion to correct illegal sentence on ground that it lacked jurisdiction to consider motion.

State *v.* Parker (Memorandum Decision). 901

State *v.* Perez. 40

Motion for return of seized property; plea agreement; claim that trial court improperly denied defendant's motion for return of seized property; claim that defendant was entitled to return of certain seized property because state failed to initiate in rem proceeding regarding property; whether state was required to initiate in rem civil proceeding; claim that defendant was entitled to return of certain seized property because it was never forfeited in accordance with applicable statute (§ 54-36a [e]); whether trial court's finding that seized items were contraband and subject to forfeiture remained law of case; claim that trial court should have granted defendant's motion because defendant never authorized defense counsel to forfeit certain seized property as part of plea negotiations.

State *v.* Ruiz 608
Motion to correct illegal sentence; sexual assault in first degree; risk of injury to child; sexual assault in fourth degree; claim that trial court, in granting in part motion to correct illegal sentence, improperly concluded that it was required, pursuant to statute ([Rev. to 2001] § 53a-70 [b] [3], as amended by Public Acts 2002, No. 02-138 § 5), to resentence defendant to period of special parole for conviction of sexual assault in first degree; claim that because requirement of special parole for persons convicted of violating § 53a-70 (b) (3) was "settled law" defendant should not be penalized for relying on established law, and that it would amount to impermissible retroactive application of law if this court were to apply Supreme Court cases decided during pendency of appeal; whether defendant's original sentence was illegal for lack of period of special parole; reviewability of claim concerning classification of charge of sexual assault in first degree as class A or class B felony.

State *v.* Sinclair 1
Possession of narcotics with intent to sell by person who is not drug-dependent; claim that certain police testimony was inadmissible testimonial hearsay; claim that trial court violated defendant's right to confrontation when it admitted into evidence certain police testimony about vehicle used in drug transaction; claim that court's admission into evidence of certain police testimony about vehicle used in drug transaction was not harmless beyond reasonable doubt; whether prosecutorial impropriety denied defendant right to fair trial; claim that certain police testimony constituted impermissible guilt by association evidence; whether court abused discretion when it allowed police officer to testify that certain individual involved in drug transaction was known heroin dealer.

State *v.* Torres (Memorandum Decision) 901

State *v.* Williams-Bey 64
Motion to correct illegal sentence; reconsideration of prior decision in light of Supreme Court decision; whether trial court properly dismissed motion to correct illegal sentence on ground that it lacked jurisdiction to consider motion.

Suntech of Connecticut, Inc. *v.* Lawrence Brunoli, Inc. 321
Contracts; breach of contract; motion to preclude; claim that trial court abused discretion with respect to certain evidentiary rulings; whether plaintiff demonstrated that it was harmed by subject rulings; whether trial court improperly precluded certain witness from offering expert testimony; claim that trial court improperly denied plaintiff's motion to disclose witness as expert witness because it did not hold hearing on motion; whether trial court abused discretion by reversing prior ruling granting plaintiff's motion to preclude certain testimony with respect to named defendant's special defense of setoff; claim that trial court erred by not adopting reasoning of Massachusetts trial court decision in adjudicating plaintiff's claim that it was damaged by named defendant's delay of completion of subject construction project.

Teixeira *v.* Home Depot, Inc. 594
Workers' compensation; retaliatory discharge pursuant to statute (§ 31-290a); claim that Workers' Compensation Commissioner abused discretion in denying plaintiff's request for continuance on day of trial; claim that Workers' Compensation Commissioner improperly dismissed claim because plaintiff had not met burden of proof that discharge was retaliatory for exercising rights under act.

Theodore *v.* Lifeline Systems Co. 291
Negligence; contracts; products liability; whether trial court properly granted motions for directed verdict and determined that plaintiff failed to present evidence sufficient to satisfy essential element of causation; whether plaintiff failed to establish unbroken sequence of events causally flowing from defendants' alleged negligent acts to decedent's death; whether evidence presented failed to establish cause of decedent's death; reviewability of claim that trial court improperly excluded certain evidence.

Thurlow *v.* Hulten 694
Quiet title; easement; injunction; trespass; declaratory relief; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

Townsend *v.* Hardy 779
Violation of prisoner's constitutional rights; sexual harassment; prisoner's first amendment retaliation claim under 42 U.S.C. § 1983; prisoner's eighth amendment claim for protection from cruel and unusual punishment under 42 U.S.C. § 1983; whether plaintiff's claim of sexual harassment and eighth amendment

claim for protection from cruel and unusual punishment failed as matter of law; whether trial court erred in rendering summary judgment in favor of defendant prison officials on plaintiff's claims relating to allegedly retaliatory conduct of defendants after plaintiff filed his complaint for sexual harassment and reported defendant correction officer's conduct to state police; elements of first amendment retaliation claim by prisoner under 42 U.S.C. 1983, set forth and discussed.

US Bank National Assn. *v.* Brouillard (Memorandum Decision) 904

U.S. Bank, National Assn., Trustee *v.* Nelson 34

Foreclosure; whether trial court properly denied motions to open judgment of strict foreclosure and to dismiss underlying foreclosure action; whether motion to open must be heard, and not merely filed, prior to vesting of title; whether, once law day passed, title to property vested in plaintiff.

NOTICES

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2017 - 2018 court year is as follows: September 11, 2017; October 10, 2017; November 6, 2017; December 11, 2017; January 16, 2018; February 20, 2018; March 26, 2018; and April 30, 2018.

Carolyn C. Ziogas
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2017 - 2018 court year is as follows: September 6, 2017; October 4, 2017; November 13, 2017; January 2, 2018; January 29, 2018; March 5, 2018; April 9, 2018; and May 14, 2018.

Carolyn C. Ziogas
Chief Clerk

Notice of Suspension of Attorney

MMX-CV-16-6016371-S. OFFICE OF CHIEF DISCIPLINARY COUNSEL V. MATTHEW L. DI SORBO. SUPERIOR COURT, JUDICIAL DISTRICT OF MIDDLESEX AT MIDDLETOWN, MAY 24, 2017.

ORDER: Judgment is entered in favor of the movant, Office of Chief Disciplinary Counsel, and the following discipline is ordered:

a. Respondent, Matthew L Disorbo is suspended from the practice of law for a term of six months retroactive back to the date of interim suspension of November 23, 2016 through May 24, 2017. He will be automatically reinstated on May 24, 2017.

b. Should the respondent engage in the practice of law within the next six months, under circumstances where he is required by the Connecticut Practice Book to maintain an IOLTA account, then he must notify the Statewide Grievance

Committee of this fact, and be subject to a monthly audit of his IOLTA account for a period of six months.

Approved and so ordered.

HON. JULIA L. AURIGEMMA, *JUDGE*

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on June 1, 2017, in Docket Number HHD-CV-17-6077584- Howard M. Adelsberg (juris# 303836 of Woodmere, NY), was ordered suspended for one year as reciprocal discipline for his Supreme Court of the State of New York Appellate Division, Second Judicial District order of discipline.

Antonio Robaina
Presiding Judge

Notice of Online Publication of Connecticut Law Journal

Effective July 1, 2017, the Connecticut Law Journal will be available free of charge on the Judicial Branch website, pursuant to General Statutes § 51-216a. The printed version of the Law Journal will no longer be produced once the publication is made available online. Please do not file new subscription requests or send payment for renewal subscriptions at this time. Hard bound volumes of the Connecticut Reports and the Connecticut Appellate Reports will continue to be printed and sold.

The link to the Law Journal page will be: http://www.jud.ct.gov/LawJournal.

In addition, the deadline for material to be published will change: Deadline will be Wednesday at noon for publication on the Tuesday six days later. The deadline will move back one day when a holiday falls within that six day period.

Hon. Patrick L. Carroll III
Chief Court Administrator

COMMISSION ON OFFICIAL LEGAL PUBLICATIONS

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*The deadline for submitting material is Friday at noon for publication in the Law Journal on the Tuesday eleven days later. **If one or more holidays fall within the 11 day time period, the deadline will change as noted in bold type in the following deadline listing:**

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September 19, 2017	Friday, September 8, 2017
September 26, 2017	Friday, September 15, 2017
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October 10, 2017	**Thursday, September 28, 2017**
October 17, 2017	**Thursday, October 5, 2017**
October 24, 2017	Friday, October 13, 2017
October 31, 2017	Friday, October 20, 2017
November 7, 2017	Friday, October 27, 2017
November 14, 2017	**Thursday, November 2, 2017**
November 21, 2017	**Thursday, November 9, 2017**
November 28, 2017	**Thursday November 16, 2017**
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