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got [the petitioner's] name, date of birth, and we were able to pull up a picture—his [Department of Correction] picture on the computer within the cruiser." The petitioner claims that this information "clearly inform[ed] the jury that [the petitioner] ha[d] been previously arrested, convicted, and sentenced" and that "the jury was then aware that the subject conviction involved the [victim]."

The petitioner argues that the use of such prior misconduct evidence was "inherently prejudicial" and necessitated a limiting instruction. He misapprehends our holding in *State* v. *Huckabee*, 41 Conn. App. 565, 574, 677 A.2d 452, cert. denied, 239 Conn. 903, 682 A.2d 1009 (1996), for the proposition that trial counsel must request a limiting instruction when prior misconduct evidence is presented, and, as a result, that failing to request one was per se prejudicial for the purposes of an ineffective assistance of counsel claim. In *Huckabee*, this court determined that the state's introduction of evidence of a defendant's prior escapes from a juvenile detention center was proper after the defendant "opened the door to such inquiry," but that the "introduction of the . . . escapes prior to this prosecution, however, should have been accompanied by a limiting instruction that the evidence was to be used solely for the purpose of evaluating the defendant's veracity" and that the "nature of this evidence . . . requires a limiting instruction." Id. The petitioner fails to recognize, however, that in *Huckabee*, which was a direct criminal appeal, not a habeas action, the defendant raised an evidentiary claim that required him to prove that it was "reasonably probable that the jury was misled by the failure to give a limiting instruction." Id. 575. Here, the petitioner is not making an evidentiary claim. Rather, he is claiming that Lorenzen provided ineffective assistance of counsel and that claim requires a standard different from the claim in *Huckabee*. Instead of

determining whether it was "reasonably probable that the jury was misled" by the lack of a limiting instruction, we are charged with the two prong *Strickland* standard and may decide the matter against the petitioner on either the performance or the prejudice prong. *Lewis* v. *Commissioner of Correction*, supra, 165 Conn. App. 451.

In the present case, we conclude that the petitioner's claim fails because the state's case against the petitioner was strong and thus the petitioner cannot demonstrate prejudice. We do not agree with the petitioner that the "introduction of prior acts of misconduct and prior incarceration effectively bolstered a case which found no other support beyond the mere accusation [of the victim]." There is no reasonable probability that, had evidence of the petitioner's prior misconduct not been introduced, or had its introduction been properly limited, the outcome of the trial would have been different.

Quaglini testified that he and Officer Robert Iovanna, the other responding officer, went to 104 Ward Street in search of the petitioner after interviewing the victim and observed the petitioner standing on the front steps. Upon approaching the petitioner, the petitioner "made eye contact and he immediately spun around [and] ripped the door open." Quaglini stated that he ordered the petitioner to stop, but the petitioner did not comply and instead "ran up the stairs." Quaglini "chased him up the stairs into the apartment, ran through the apartment down the back stairs out of the back of the house [and] ran back around to Ward Street." Quaglini further testified that the petitioner was "hopping fences" and running through backyards in an effort to evade him. Quaglini followed him to a parking lot located at 913 Broad Street and found the petitioner hiding under a motor vehicle.

on count one, of sexual assault in the first degree was a class A felony, then a period of probation would not have been allowed pursuant to § 53a-29[9] and the original sentence on count one, therefore, would be illegal. The state further contends that, because the defendant failed to meet his alleged burden of proof by providing evidence that his conviction on count one was, instead, a class A, rather than a class B, felony, we must assume and hold that the conviction was for a class B felony and that the sentence, therefore, was legal.[10]

The defendant contends that we should not decide this issue because it was neither presented to nor decided by the trial court. He argues that it was not his theory of illegality before the trial court and that he, therefore, did not attempt to provide any proof whatsoever that his conviction on count one should have been classified as a class A felony. We agree with the defendant.

"Only in [the] most exceptional circumstances can and will [a reviewing court] consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." (Internal quotation marks omitted.) *State* v. *Martin M.*, 143 Conn. App. 140, 151, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013). "For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Internal quo-

[9] General Statutes § 53a-29 (a) provides in relevant part: "The court may sentence a person to a period of probation upon conviction of any crime, other than a class A felony . . . ."

[10] Although requesting that we issue a ruling concluding that the defendant's conviction on count one was for a class B felony, in response to a question by the panel during oral argument before this court, the state expressed that it was not immediately aware of any doctrine that would prohibit the defendant from offering evidence in another proceeding to substantiate a claim that his conviction was for a class A, rather than class a B, felony.

tation marks omitted.) *State* v. *Koslik*, 116 Conn. App. 693, 702, 977 A.2d 275, cert. denied, 293 Conn. 930, 980 A.2d 916 (2009).

For purposes of this appeal, we assume, without deciding, that the defendant's conviction on count one was for a class B felony. We are mindful that our Supreme Court has stated that a criminal sentence may be challenged "on the ground that it is illegal by raising the issue on direct appeal or by filing a motion pursuant to [Practice Book] § 43-22 with the judicial authority, namely, the trial court." (Internal quotation marks omitted.) *State* v. *Tabone*, supra, 279 Conn. 534, quoting *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 38, 779 A.2d 80 (2001); see also *Victor O. I*, supra, 301 Conn. 193. Here, however, the state does not ask us to correct an *illegal sentence*; rather, it seeks to have us issue a ruling declaring that the defendant's sentence *is legal* because the defendant did not claim and prove that it was illegal on the ground that the conviction was for a class A felony and the sentence improperly included a period of probation.

Because the defendant does not claim that his sentence on count one is illegal on the ground that his conviction should have been classified as a class A felony, for which our Supreme Court has ruled a period of probation would not be permitted, we decline to issue the ruling that the state is seeking; there simply is no record on which we could base such a ruling. Indeed, we must assume that the defendant's conviction for both counts of sexual assault in the first degree was for a class B felony because we have no record that would permit us to go beyond that assumption, neither party having ever challenged the assumed classification.[11] Therefore, under the particular and unique facts

[11] The only document we have seen in the record that appears to set forth the classification for the charges of sexual assault in the first degree, as class B felonies, is the short form information, which the court also uses as its docket sheet during the criminal trial. The charges set forth in that information, however, were superseded by a long form information.

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

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

Opinion

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

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

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

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

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

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

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

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CHANNING REAL ESTATE, LLC *v.* BRIAN GATES (SC 19575)

Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.

Syllabus

The plaintiff limited liability company appealed to this court from the judgment of the Appellate Court, which reversed the judgment of the trial court and ordered a new trial. The defendant was a co-owner and member of F Co., a limited liability company that owned commercial real estate. On six different occasions, the defendant executed a promissory note in exchange for funds that the plaintiff provided to him. Each of the six notes included an identical clause that precluded oral modification of the note. After the defendant failed to make any payments on the notes, the plaintiff brought a breach of contract action. The defendant alleged four special defenses and filed a three count counterclaim. The plaintiff filed a motion in limine to preclude any extrinsic evidence that varied the terms of the notes, including the evidence the defendant sought to introduce to support his claim that the funds that the plaintiff had provided to him were interim payments made in exchange for an interest in commercial real estate owned by F Co. The trial court denied the plaintiff's motion, concluding that the parol evidence rule did not bar the introduction of extrinsic evidence to vary the terms of the notes because the notes were not integrated

as a result of the parties' failure to reduce to writing their full agreement, including the proposed real estate transaction. The trial court rendered judgment for the defendant on, inter alia, the complaint and on the third count of the counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.). On appeal to the Appellate Court, the plaintiff claimed, inter alia, that the trial court improperly had admitted parol evidence to vary the terms of the notes. The Appellate Court concluded that the notes were integrated and that their terms were unambiguous, and, therefore, that the parol evidence rule barred the introduction of extrinsic evidence. The court remanded the case for a new trial on the basis of its conclusion that the introduction of parol evidence was an error that permeated the trial court's findings and undermined its entire judgment, and stated that, on remand, the defendant was entitled to allege and prove any exceptions he may have to the parol evidence rule as a special defense or counterclaim, including a violation of CUTPA. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. This court concluded that, although the Appellate Court properly determined that the parol evidence rule barred the introduction of extrinsic evidence to vary the terms of the notes, that court improperly remanded the case for a new trial rather than directing judgment for the plaintiff on the issue of liability and ordering a hearing in damages: each note having contained language that barred the introduction of extrinsic evidence under the applicable parol evidence rule, and the defendant having failed to present any valid defenses or counterclaims that served as exceptions to the parol evidence rule, the trial court's findings pertaining to the extrinsic evidence were irrelevant, and the trial court's remaining findings regarding the terms of the notes and the defendant's failure to pay any of the amounts due thereunder were sufficient to establish the defendant's liability as a matter of law, rendering a new trial on remand unnecessary; furthermore, this court declined to address the defendant's unpreserved claim that, notwithstanding the application of the parol evidence rule, certain actions of the plaintiff effected a postcontractual modification of the notes, providing him with a valid and meritorious special defense in equitable estoppel that entitled him to a new trial on remand, the defendant having failed to raise this distinct claim in the trial court.

2. A new trial on the count of the defendant's counterclaim alleging a violation of CUTPA was unwarranted because it was F Co. rather than the defendant who would have had standing to assert a CUTPA claim against the plaintiff; F Co. was a limited liability company and thus a distinct legal entity from the defendant, the injuries the defendant alleged in the CUTPA count of his counterclaim were those allegedly suffered by F Co., specifically, and not the defendant, and, because a member of a limited liability company, such as the defendant, cannot recover

for an injury allegedly suffered by the company itself, the defendant lacked standing to pursue his CUTPA claim.

Argued November 16, 2016—officially released July 4, 2017

Procedural History

Action to recover on six promissory notes, and for other relief, brought to the Superior Court in the judicial district of Windham, where the defendant filed a counterclaim; thereafter, the court, *A. Santos*, *J.*, denied the plaintiff's motion to preclude certain evidence; subsequently, the case was tried to the court, *A. Santos*, *J.*; judgment for the defendant on the complaint and in part on the counterclaim, from which the plaintiff appealed to the Appellate Court, *Sheldon*, *Keller* and *Bear*, *Js.*, which reversed the trial court's judgment and remanded the case for a new trial, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed in part; reversed in part; judgment directed; further proceedings.*

Linda L. Morkan, with whom was *Stuart D. Rosen*, for the appellant (plaintiff).

Frank J. Liberty, for the appellee (defendant).

Opinion

ESPINOSA, J. The plaintiff, Channing Real Estate, LLC, appeals from the judgment of the Appellate Court, which reversed the judgment of the trial court in favor of the defendant, Brian Gates, on both the plaintiff's complaint seeking recovery on six promissory notes (notes) and on the defendant's counterclaim alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. *Channing Real Estate, LLC* v. *Gates*, 159 Conn. App. 59, 83, 122 A.3d 677 (2015). The plaintiff, which prevailed in the Appellate Court, challenges only the scope of the court's remand order, claiming that it improperly ordered a new trial rather than restricting the proceedings on

remand to a hearing in damages. The plaintiff contends that a new trial is unnecessary because the Appellate Court's proper application of the parol evidence rule resolved the issue of liability on the notes in favor of the plaintiff as a matter of law and because the defendant lacks standing to raise a CUTPA claim.[1] The defendant argues that the Appellate Court correctly concluded that a new trial is necessary to allow him to pursue valid special defenses and counterclaims. We conclude that a new trial is unnecessary, and, accordingly, reverse in part the judgment of the Appellate Court.

The trial court found the following relevant facts. The plaintiff is a limited liability company organized under New York law, with Douglas Chan as principal. The defendant was a co-owner and member of Front Street Commons, LLC (Front Street Commons), a limited liability company organized under Connecticut law that owned commercial real estate in Putnam.

On six different occasions between January, 2008, and February, 2009, the defendant executed a promissory note in exchange for funds that the plaintiff provided to him. The total principal amount of the six notes was $281,272.74. The defendant has made no payments on any of the notes.

[1] We granted the plaintiff's petition for certification to appeal limited to the following questions: (1) "Did the Appellate Court correctly remand this case for a new trial instead of a hearing in damages?"; (2) "Did the Appellate Court correctly order a retrial on the defendant's negligent misrepresentation claim when there was no appeal from the trial court's decision against him?"; (3) "Did the defendant have standing to raise a [CUTPA] claim?"; and (4) "Does CUTPA apply to disputes among either intracorporate entities and/or joint venturers?" *Channing Real Estate, LLC* v. *Gates*, 319 Conn. 952, 125 A.3d 530 (2015). This court's resolution of the first certified question is dispositive of the second certified question. See footnote 2 of this opinion. Further, because we conclude that the defendant lacks standing to pursue a CUTPA claim against the plaintiff, we need not reach the fourth certified question.

With the exception of the principal amounts and maturity dates, the terms of each of the six notes were identical. In each note, the defendant promised to pay the corresponding principal amount to the defendant with annual interest at the rate of 14 percent. If the notes were not paid by the maturity dates, their terms called for the payment of interest either at 16 percent annually or the highest rate permitted under New York law, whichever was higher. Each note set forth the address to which the defendant was to send his payments and in what form those payments were to be made. The terms of each note also stated that the defendant promised to pay all reasonable collection costs, including attorney's fees. Finally, each note included the following clause precluding oral modification of the contract: "This [n]ote may not be changed, modified or discharged, nor any provision waived, orally, but only in writing, signed by the party against whom enforcement of any such change, modification, discharge or waiver is sought."

On December 15, 2009, the plaintiff demanded payment of all six notes and, after the defendant failed to make any payments, brought this action for breach of contract, seeking to collect principal, interest, costs, and fees as provided in the notes. The defendant alleged four special defenses and filed a three count counterclaim, all of which related to the parties' failed negotiations pertaining to a proposed real estate transaction through which the plaintiff would have acquired an interest in the commercial real estate owned by Front Street Commons. The defendant asserted special defenses of fraud in the inducement, unjust enrichment, innocent or negligent misrepresentation, and promissory estoppel. The defendant's counterclaim alleged fraud, negligent misrepresentation, and a violation of CUTPA, and sought, inter alia, damages for lost rents in connection with the failed real estate transaction.

The plaintiff filed a pretrial motion in limine claiming that the parol evidence rule barred the trial court from considering any extrinsic evidence that varied the terms of the notes because the notes are written, integrated, and the terms stated therein are unambiguous. The extrinsic evidence the plaintiff sought to exclude related to the defendant's claim that the notes were not promises to repay loans but were issued in connection with the proposed real estate transaction between the parties. Specifically, the defendant claimed that, rather than loans, the funds that the plaintiff had paid to him were interim payments made in exchange for an interest in the commercial real estate owned by Front Street Commons. The sole purpose of the notes, according to the defendant, was to protect the plaintiff's investment in the event that the defendant backed out of the proposed transaction or the commercial property was destroyed.

The trial court denied the plaintiff's motion in limine, concluding that the parol evidence rule did not bar the introduction of extrinsic evidence to vary the terms of the notes. The trial court determined that the parol evidence rule did not apply because it found that the notes were not integrated as a result of the parties' failure to reduce to writing what the court deemed to constitute their full agreement—the proposed real estate transaction. Relying on the extrinsic evidence presented by the defendant, the trial court ruled in his favor on the plaintiff's complaint, and on the third and fourth special defenses alleging negligent misrepresentation and estoppel, as well as the third count of the counterclaim alleging a violation of CUTPA. Lastly, the trial court found for the plaintiff on the defendant's first and second special defenses alleging fraud in the inducement and unjust enrichment, and on the first count of the defendant's counterclaim alleging fraud in the inducement. Although in its memorandum of

decision the trial court ruled in favor of the defendant's counterclaim for negligent misrepresentation, it did not award any damages in connection with that claim.[2] The trial court awarded the defendant $25,575 in attorney's fees on the CUTPA claim.[3] See General Statutes § 42-110g (d).

The plaintiff appealed to the Appellate Court claiming, inter alia, that the trial court improperly admitted parol evidence to vary the unambiguous terms of the notes, each of which was a fully integrated agreement. The Appellate Court examined the notes and agreed that they were integrated and that their terms were unambiguous. The court therefore reversed the judgment of the trial court, concluding that the parol evidence rule barred the introduction of extrinsic evidence to vary the terms of the notes. *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 81–83. Unlike the trial court—which examined the notes and the parol evidence rule under Connecticut law—the Appellate Court applied New York law, but observed that "there are no material differences between New York and Connecticut law as applied to the facts of the present case." Id., 73.

The Appellate Court remanded the case for a new trial on the basis of its conclusion that the introduction

[2] The defendant did not appeal from the trial court's judgment awarding him no damages on his counterclaim for negligent misrepresentation and therefore did not preserve this claim for appeal. Even if the defendant had appealed from the trial court's judgment, the defendant's counterclaim sounding in negligent misrepresentation relied on the same extrinsic evidence that he cited in support of his defenses to the plaintiff's complaint. Accordingly, our conclusion that the Appellate Court properly concluded that the parol evidence rule precluded the consideration of that extrinsic evidence is dispositive of the second certified question. See footnote 1 of this opinion.

[3] Initially, the trial court had awarded the defendant $28,000 in attorney's fees. In response to the plaintiff's objection to that award, the court decreased the defendant's award to $25,575.

of parol evidence to vary the terms of the notes was "an error that permeate[d] the [trial] court's findings and undermine[d] its entire judgment." Id., 83. The court stated that, "[o]n remand, the plaintiff is . . . entitled to the opportunity to prove its damages with respect to each of the notes, the existence and written terms of which the defendant does not dispute. The defendant is entitled on remand to allege and prove any of the defenses [he] may have to each of the notes in accordance with the recognized exceptions under New York law to the parol evidence rule. . . . The only exceptions to the parol evidence rule that the defendant has pleaded as a special defense or counterclaim are mistake,[4] fraud, and a violation of CUTPA. On remand, the trier of fact should analyze separately each of the defendant's valid defenses under New York law with respect to each of the notes, and each count of the counterclaim alleged by the defendant, at least one of which, the CUTPA count, is subject to Connecticut law, in accordance with this opinion. . . . To the extent that the negligent misrepresentation and CUTPA counts of the counterclaim can still be pursued by the defendant, it is likely that those claims, on the basis of the alleged place of injury, will be subject to Connecticut law." (Citations omitted; footnote added.) Id., 82–83.

The plaintiff filed a motion for reconsideration or clarification, requesting that the court restrict its remand of the case to order only a hearing in damages. The plaintiff also requested that the court address the plaintiff's claims that the defendant lacked standing to pursue a CUTPA claim and that CUTPA did not apply to the parties. The Appellate Court denied the plaintiff's motion. This appeal followed. Additional facts will be set forth as necessary.

[4] Although the Appellate Court's opinion appears to suggest that the defendant pleaded mistake as a special defense, our review of the record does not reveal that the defendant did so.

I

The plaintiff first contends that although the Appellate Court properly concluded that the application of the parol evidence rule to the facts of the present case required reversal of the judgment of the trial court, it improperly ordered a new trial rather than ordering only a hearing in damages. We agree that the Appellate Court properly held that the parol evidence rule barred the introduction of extrinsic evidence to vary the terms of the notes. Because that conclusion resolved all questions regarding the defendant's liability under the notes, we conclude that the Appellate Court improperly remanded the case for a new trial rather than directing judgment for the plaintiff and ordering a hearing in damages.

The Appellate Court considered whether the substantive contract law of New York or Connecticut applied to its interpretation and construction of the notes. *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 72. The notes did not contain a choice of law provision but did require the defendant to make payment by mail to the plaintiff in New York. The court, citing § 195 of the Restatement (Second) of Conflict of Laws, determined that the local law of the state where the contracts required that payment be made was applicable and, therefore, applied the substantive contract law of New York. Id., 73–74; 1 Restatement (Second), Conflict of Laws § 195 (1971). New York's parol evidence rule is clear. "Briefly, absent fraud or mutual mistake, where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing." *Marine Midland Bank-Southern* v. *Thurlow*, 53 N.Y.2d 381, 387, 425 N.E.2d 805, 442 N.Y.S.2d 417 (1981). Furthermore, under New York's parol evidence rule, "extrinsic and

parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (Internal quotation marks omitted.) *W.W.W. Associates, Inc.* v. *Giancontieri*, 77 N.Y.2d 157, 163, 566 N.E.2d 639, 565 N.Y.S.2d 440 (1990).

The Appellate Court reviewed the terms of the notes and determined that "[e]ach of the six notes represented and reflected a specific transaction between the parties. Standing alone, each note constituted an integrated agreement, supported by new and different consideration, and was enforceable separately according to its unambiguous terms." *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 78. On the basis of that conclusion, the Appellate Court applied the parol evidence rule and held that the trial court improperly admitted extrinsic evidence to vary the terms of the notes. Our review of the notes leads us to the same conclusion. The clause in each note prohibiting oral modification is clear. Accordingly, the Appellate Court properly concluded that the parol evidence rule barred the consideration of extrinsic evidence. Id., 77–79; see *Marine Midland Bank-Southern* v. *Thurlow*, supra, 53 N.Y.2d 387.

The remaining question is whether, in light of the Appellate Court's correct conclusion that the parol evidence rule precluded consideration of the extrinsic evidence relied on by the defendant, the Appellate Court properly remanded the case for a new trial rather than directing judgment and ordering a hearing in damages. Whether the Appellate Court properly determined the scope of a remand order is a question of law over which this court's review is plenary. See, e.g., *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011).

When no question of liability remains, given the undisputed facts in the record, the appropriate scope of the remand is limited to a hearing in damages. See *Allstate*

Ins. Co. v. *Palumbo*, 296 Conn. 253, 268, 994 A.2d 174 (2010) ("[t]here are times . . . when the undisputed facts or uncontroverted evidence and testimony in the record make a factual conclusion inevitable so that a remand to the trial court for a determination would be unnecessary" [internal quotation marks omitted]); *Waterbury* v. *Washington*, 260 Conn. 506, 583, 800 A.2d 1102 (2002) (remand for decision on unreached elements of claim is unnecessary if remaining elements can be determined as matter of law on record); *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 171–72, 117 A.3d 876 (remand for new trial was unnecessary when all elements of cause of action for breach of contract had been proven), cert. denied, 318 Conn. 902, 122 A.3d 631 (2015); see also *State* v. *Carbone*, 172 Conn. 242, 254, 374 A.2d 215 ("The reversal of a judgment annuls it, but does not necessarily set aside the foundation on which it rests. This foundation may be sufficient to support a judgment of a different kind, and may be such as to require it. A reversal therefore is never, standing alone, and ex vi termini, the grant of a new trial. If the error was one in drawing a wrong legal conclusion from facts properly found and appearing on the record, it would be an unnecessary prolongation of litigation to enter again on the work of ascertaining them." [Internal quotation marks omitted.]), cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977).

In the present case, our review of the record reveals that a remand to the trial court for a new trial is unnecessary because there is no question as to the defendant's liability under the notes. The trial court, in its findings of fact, set forth certain terms of the notes and the undisputed fact of the defendant's failure to pay any of the amounts listed in them. Most significantly, there is no dispute that each of the six notes contains the language that both this court and the Appellate Court have

concluded bars the introduction of extrinsic evidence under the New York parol evidence rule. Namely, each note provides: "This [n]ote may not be changed, modified or discharged, nor any provision waived, orally, but only in writing, signed by the party against whom enforcement of any such change, modification, discharge or waiver is sought." The trial court made no findings of any executed collateral agreements, nor is there any evidence in the record of any such agreements. All of the defendant's defenses and claims relied on extrinsic evidence. The sole claim raised by the defendant that would have constituted an exception to the parol evidence rule—and for which he had standing—was his special defense of fraud.[5] But the trial court found that the defendant failed to prove fraud, and the defendant has not appealed from that ruling. Accordingly, the defendant has not presented any valid defenses or counterclaims that are exceptions to the parol evidence rule, and he is liable on the notes as a matter of law.

The Appellate Court grounded its decision to remand for a new trial on its conclusion that the trial court's misapplication of the law so permeated the trial court's findings that a new trial was necessary. *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 83. Our reading of the trial court's findings leads us to a different conclusion. The effect of the Appellate Court's proper application of the parol evidence rule undermined only those findings of the trial court that pertained to the extrinsic evidence offered by the defendant. The application of the parol evidence rule simply renders the court's findings regarding that extrinsic evidence irrele-

[5] We recognize that the defendant also brought a counterclaim asserting that the plaintiff violated CUTPA. As we explain in part II of this opinion, we conclude that the defendant lacks standing to pursue a CUTPA claim against the plaintiff. Accordingly, it is unnecessary for us to resolve whether the defendant's allegations supporting his CUTPA claim, if proven, would constitute an exception to New York's parol evidence rule.

vant. What remain unaffected, however, are the trial court's findings of fact that govern the disposition of the present case as a matter of law. The only matter that remains to be litigated between the parties, therefore, is the amount of the plaintiff's damages.

Notwithstanding the application of the parol evidence rule, the defendant claims that, because some of the plaintiff's actions effected a postcontractual modification of the notes, he has a valid and meritorious special defense in equitable estoppel and therefore is entitled to a new trial on remand. The defendant did not raise this distinct claim in the trial court, however. Therefore, we decline to address its merits. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

The following additional relevant facts as found by the trial court demonstrate that the claim is unpreserved. In arguing that the plaintiff was equitably estopped from collecting on the notes, the defendant relied in part on a letter that the plaintiff sent to the defendant after the last note was signed. This letter, which was drafted by the defendant, stated that the funds that the plaintiff had provided to the defendant were part of the parties' proposed real estate transaction, and that through those funds, the plaintiff had purchased an interest in the commercial real estate owned by Front Street Commons. Despite the absence of finalized terms for the proposed transaction and the lack of any executed operating or option agreements, Sharon Chan—a member of the plaintiff—signed the letter on its behalf.

The defendant contends that his defense of equitable estoppel is not barred by the parol evidence rule because it relies on an event that occurred after the execution of the last note—Sharon Chan's signing of

the letter—to establish a postcontractual modification of the notes. The defendant claims that because this event constitutes a postcontractual modification of the notes, it is not evidence of a prior or contemporaneous agreement, which would be barred by the parol evidence rule. See *Lax* v. *Design Quest N.Y. Ltd.*, 101 App. Div. 3d 431, 955 N.Y.S.2d 34 (2012). The record reveals, however, that the defendant did not raise this claim of *postcontractual* modification through equitable estoppel in the trial court. Instead, he argued to the trial court that the plaintiff was equitably estopped from enforcing the notes because the letter was evidence of the plaintiff's *precontractual* representations as to the purpose of the notes. Accordingly, this claim is unpreserved and we do not address it.

The defendant also contends that he has the right to present evidence at a new trial based on the Appellate Court's ruling that New York law, rather than Connecticut law, applies when interpreting the notes. As noted by the Appellate Court, however, "there are no material differences between New York and Connecticut law as applied to the facts of the present case." *Channing Real Estate, LLC* v. *Gates*, supra, 159 Conn. App. 73.

II

The plaintiff next claims that because the defendant lacks standing to allege a violation of CUTPA, a new trial on the third count of the defendant's counterclaim is unwarranted. Specifically, the plaintiff argues that Front Street Commons, not the defendant, would be the proper party to allege any such claim. We agree.

The following additional facts are relevant to our determination of this issue. During the parties' negotiations regarding Front Street Commons' commercial real estate, the parties exchanged various proposed option and operating agreements, none of which was executed. The proposed agreements listed Front Street Commons

as a party, not the defendant. At trial, the defendant sought damages for lost rental income suffered by Front Street Commons, and the trial court found that "[t]he injury to the defendant is that *Front Street Commons* no longer receives financial assistance, as necessary, from the plaintiff." (Emphasis added.) Front Street Commons is not a party to this action.

The issue of standing implicates a court's subject matter jurisdiction and is subject to plenary review. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 511, 518, 970 A.2d 583 (2009). "Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009).

Although this court has not addressed the question of whether a member of a limited liability company has standing to bring suit on the basis of a wrong allegedly suffered by the limited liability company, we find guidance in the decisions of the Appellate Court. "A limited liability company is a distinct legal entity whose existence is separate from its members. . . . A limited liability company has the power to sue or to be sued in its own name; see General Statutes §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. See General Statutes

§ 34-187.[6] A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company." (Citation omitted; footnote added; internal quotation marks omitted.) *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013).

In the present case, the facts demonstrate that it is Front Street Commons and not the defendant that would have standing to assert a CUTPA claim against the plaintiff. The defendant has not demonstrated a specific, personal, and legal interest separate from that of Front Street Commons. Front Street Commons owned the property that was at issue during the parties' negotiations. Front Street Commons would have been a party to the proposed option and operating agreements. Front Street Commons allegedly lost financial assistance from the plaintiff and suffered lost rental income. From these facts, it is clear that the injuries the defendant alleges in the CUTPA count of his counterclaim, if any, are those allegedly suffered by Front Street Commons specifically, and not the defendant. Front Street Commons is a limited liability company and is therefore a distinct legal entity from the defendant, who is simply a member of that entity. Because a member of a limited liability company cannot recover for an injury allegedly suffered by the limited liability company, we conclude that the defendant lacks standing to pursue a claim alleging a violation of CUTPA. But cf. *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 215–16, 982 A.2d 1053 (2009) (members of limited liability company have standing

[6] We note that §§ 34-124, 34-186 and 34-187 have been repealed, effective July 1, 2017. See Public Acts 2016, No. 16-97. We also note, however, that General Statutes § 34-243h (a), effective July 1, 2017, provides: "A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs."

to bring claims for breach of contract when they are personally parties to contract).

The judgment of the Appellate Court is reversed in part and the case is remanded to that court with direction to reverse the judgment of the trial court in favor of the defendant on the complaint and on the third count of the counterclaim and to remand the case to the trial court with direction to render judgment for the plaintiff as to the liability on the complaint and on the third count of the counterclaim, and for a hearing in damages on the complaint; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

ROBERT BARTON *v.* CITY OF NORWALK
(SC 19671)

Rogers, C. J., and Palmer, Eveleigh, Robinson and Beach, Js.

Syllabus

The plaintiff B brought this action, alleging, inter alia, that the defendant city had inversely condemned a parcel of real property containing a partially leased building by taking, through the power of eminent domain, an adjacent parcel containing a parking lot used by the tenants of the subject property. Shortly after purchasing the subject property, B purchased the adjacent parcel in order to construct a parking lot. B subsequently began leasing portions of the building on the subject property to various residential and commercial tenants including, among others, a church. In 2002, the defendant condemned the adjacent parcel in order to build a police station and paid B $127,000 in compensation for the taking. The lack of available parking due to the condemnation of the adjacent parcel subsequently rendered the subject property undesirable to current and prospective tenants. Both the percentage of space leased and B's rental income subsequently declined. Thereafter, B filed an action in the Superior Court seeking review of the compensation afforded to him by the defendant for the condemnation of the adjacent parcel. The court found in favor of the plaintiff, determining that the adjacent parcel was worth $310,000 rather than $127,000. Because B could not recover for losses to the subject property in the previous action concerning the adjacent parcel, he subsequently commenced the present action alleging inverse condemnation of the subject property.

The trial court concluded that the lack of parking resulting from the defendant's condemnation of the adjacent parcel precluded B from operating the building on the subject property as a leasable facility and, as a result, had substantially destroyed B's use and enjoyment of the subject property. In so concluding, the trial court rejected the defendant's claim that, in light of B's position in the previous action that the highest and best use of the adjacent parcel was as a mixed use development, the doctrine of judicial estoppel barred B from asserting, for the purpose of his inverse condemnation claim, that he would have continued using the adjacent parcel as a parking lot. The trial court rendered judgment in favor of B, from which the defendant appealed to the Appellate Court claiming, inter alia, that B had failed to make out prima facie case for inverse condemnation because the subject property retained significant value and that the trial court had incorrectly concluded that B's claim was not barred by the doctrine of judicial estoppel. The Appellate Court disagreed with these claims and, accordingly, affirmed the judgment of the trial court. The defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly determined that the defendant had inversely condemned the subject property by taking the adjacent parcel through the power of eminent domain: the trial court's conclusion that B's use and enjoyment of the subject property was substantially destroyed was amply supported by its factual findings that B faced extreme difficulty renting space due to the absence of parking and that the market value of the subject property had fallen by more than 80 percent; moreover, this court could not conclude, in light of declining lease rates and the lack of success in marketing, that the continued presence of the church, which had declined to renew its lease after the condemnation of the adjacent parcel, undermined the trial court's conclusions; furthermore, the fact that the subject property retained some economic value did not undermine the trial court's ultimate finding that B's use and enjoyment of the subject property was substantially destroyed.
2. The defendant could not prevail on its claim that the trial court abused its discretion by declining to bar B's inverse condemnation claim under the doctrine of judicial estoppel; the plaintiff's claim in the present action that he would continue to use the adjacent parcel as a parking lot was not clearly inconsistent with his position in the previous action that the highest and best use of the adjacent parcel was as a mixed use development, as a property owner need not actually use his or her property in accordance with its highest and best use.

Argued January 19—officially released July 4, 2017

Procedural History

Action to recover damages for, inter alia, the defendant's alleged taking of certain of the plaintiff's real

property by inverse condemnation, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion to cite in Sonoson, LLC, as a party plaintiff; subsequently, the matter was tried to the court, *Hon. Taggart D. Adams*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiffs, from which the defendant appealed to the Appellate Court, *Gruendel*, *Prescott* and *Pellegrino*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Carolyn M. Colangelo, assistant corporation counsel, with whom were *Mario F. Coppola*, corporation counsel, and *Daniel J. Krisch*, for the appellant (defendant).

Elliott B. Pollack, with whom, on the brief, was *Tiffany K. Spinella*, for the appellees (plaintiffs).

Opinion

EVELEIGH, J. In this certified appeal, the defendant, the city of Norwalk, appeals from the judgment of the Appellate Court affirming the judgment of the trial court awarding the plaintiff Robert Barton[1] $899,480 in damages plus prejudgment interest for his claim that the defendant inversely condemned a parcel of real property located at 70 South Main Street in Norwalk (70 South Main) by taking, through the power of eminent domain, the plaintiff's parking lot located across the street at 65 South Main Street (65 South Main). See *Barton* v. *Norwalk*, 163 Conn. App. 190, 193–94, 135

[1] We note that Sonoson, LLC, is also a plaintiff in the present action. Barton was the owner of the property at issue at the time of the alleged taking and commenced the present action. Thereafter, Barton executed a quitclaim deed to the property in favor of Sonoson, LLC. Thereafter, Barton filed a motion to cite in Sonoson, LLC, as a party plaintiff, which was granted by the trial court. For the sake of convenience, we hereinafter refer to Barton as the plaintiff.

A.3d 711 (2016). The defendant raises two claims in the present appeal. First, the defendant claims that the Appellate Court incorrectly affirmed the judgment of the trial court that the plaintiff had proven inverse condemnation because 70 South Main retains significant value and generates significant income. Second, the defendant claims that the Appellate Court incorrectly concluded that the plaintiff's inverse condemnation claim was not barred by judicial estoppel. We disagree with the defendant and, accordingly, affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to the disposition of the present appeal. "In 1981, the plaintiff purchased the four story walk-up commercial building at 70 South Main as an office for his sail-making business. There was a single parking space at 70 South Main. The defendant told the plaintiff that he needed more parking for 70 South Main to comply with zoning regulations. The defendant approved a site plan for 70 South Main that involved the [plaintiff's purchase of] the vacant lot across the street at 65 South Main and creating forty-four parking spaces there. The plaintiff did so, and the defendant issued a certificate of zoning compliance in 1984 for both properties.

"In 1985, the plaintiff sold his sail-making business but kept the building. The buyers remained at 70 South Main for one year before moving out. When they did, the plaintiff began leasing space at 70 South Main to a number of commercial tenants. Lessees included a barbershop and a housing services office on the first floor, Macedonia Church on the second floor as well as parts of the third and fourth floors, a photo-gift business on the third floor, and several crafts persons on the fourth floor. The court did not expressly find but it is undisputed that there was also a residential apartment on the fourth floor. For most of the next fifteen years, the building was 95 to 100 percent occupied.

"When the plaintiff bought 70 South Main, there was abundant on-street parking nearby. Beginning in 1990, however, the defendant enlarged no-parking zones and converted several side streets into through streets. As a result, on-street parking grew steadily more limited. In 1996, when the plaintiff learned of the defendant's interest in building a new police headquarters on land that included his parking lot at 65 South Main, he and his tenants grew concerned that they and their customers would have nowhere to park. They expressed this concern to city officials, who offered the plaintiff and his tenants forty parking permits at the South Norwalk train station, which would expire after ten years, as a compromise. The plaintiff and his tenants rejected this offer because they asserted that those spaces were far away, unpleasant, and possibly dangerous. The plaintiff stressed in his talks with two subsequent mayors of Norwalk that, if the defendant condemned his parking lot at 65 South Main, it would cripple operations at 70 South Main.

"In February, 2002, the defendant condemned the parking lot at 65 South Main and paid the plaintiff $127,000 as just compensation for it. . . . The plaintiff asked the Superior Court to review the defendant's statement of just compensation, arguing that 65 South Main was worth $350,000. . . . In addition, the plaintiff twice tried to amend his pleadings in that case to add a claim for losses to 70 South Main as a result of the taking of 65 South Main. The defendant successfully objected to both amendments.

"The parties' experts testified in that proceeding only to the fair market value of 65 South Main standing alone. . . . Specifically, both parties' real estate appraisers agreed that the highest and best use for 65 South Main, which is the standard measure of just compensation . . . would be a mixed use . . . .

"On January 27, 2009, the court rendered judgment in favor of the plaintiff in that case. The court found that 65 South Main was worth $310,000 as a mixed use development and awarded the plaintiff $310,000 in just compensation, minus the $127,000 that the defendant had already paid the plaintiff, plus interest, fees, and costs. . . .

"Because the plaintiff could not recover for losses to 70 South Main in the action concerning 65 South Main, he filed a second action—the subject of this appeal—in November, 2003, in which he alleged that the defendant had inversely condemned 70 South Main when it took 65 South Main. A four day trial to the court occurred in February, 2013. The plaintiff called four witnesses, namely, himself, his expert real estate appraiser, a former tenant of 70 South Main, and a current tenant of 70 South Main. The defendant chose to call no witnesses. Instead, when the plaintiff rested, the defendant moved for a judgment of dismissal on the ground that the plaintiff had failed to make out a prima facie case. After the court took that motion under advisement, the defendant rested without presenting a case-in-chief." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 194–97.

The trial court found that the lack of parking, caused by the taking of 65 South Main, had "substantially destroyed the [plaintiff's] ability to operate [70 South Main] as a leasable facility and enjoy even a modicum of financial success." More specifically, the trial court found that the lack of parking made the plaintiff's "chances of commercial success" at 70 South Main "negligible or nonexistent." The trial court concluded that this is a "close case," but nevertheless found that "the only evidence in this case is that 70 South Main has substantially depreciated in value, by [more than 80 percent], and this loss has been caused by the taking through eminent domain of the dedicated parking

spaces [at 65 South Main]." On the basis of these findings, the trial court concluded that the defendant had inversely condemned 70 South Main because the taking of 65 South Main amounted to "a substantial destruction of the [plaintiff's] ability to enjoy or use [70 South Main] . . . ."

The trial court also rejected the defendant's judicial estoppel claim.[2] "The defendant had argued that the plaintiff was judicially estopped from bringing an action for the inverse condemnation of 70 South Main because (1) the plaintiff's position in the previous litigation that 65 South Main's highest and best use was as a mixed use development was 'completely inconsistent' with his position in this litigation that he would have continued using 65 South Main as a parking lot, and (2) his inconsistent positions gave him the unfair advantage of being able to bring the inverse condemnation action for losses to 70 South Main. The [trial] court disagreed, finding that the positions were consistent and that the plaintiff derived no unfair advantage." *Barton* v. *Norwalk*, supra, 163 Conn. App. 200–201.

Accordingly, "the court rendered judgment in favor of the plaintiff on his claim for the inverse condemnation of 70 South Main. The court awarded him $899,480 in damages plus $543,384.49 in prejudgment interest." Id., 197. The defendant appealed to the Appellate Court, which affirmed the judgment of the trial court.[3] See id., 219. This certified appeal followed.[4]

[2] At the trial court, the defendant asserted other special defenses and counterclaims, all of which were rejected. None of those claims are raised on appeal.

[3] The Appellate Court rejected the plaintiff's claim on cross appeal that the trial court incorrectly denied the plaintiff offer of compromise interest under General Statutes § 52-192a. *Barton* v. *Norwalk*, supra, 163 Conn. App. 219. The plaintiff has not appealed from the judgment of the Appellate Court on that issue.

[4] This court granted the defendant's petition for certification for appeal limited to the following issues: (1) "Did the Appellate Court properly affirm the trial court's judgment awarding monetary damages based upon the theory

I

We begin with the defendant's claim that the Appellate Court incorrectly affirmed the trial court's judgment awarding monetary damages on a theory of inverse condemnation. The defendant claims that 70 South Main was not inversely condemned because it retained economic value, was approximately one half occupied, and continued to generate revenue. In response, the plaintiff claims that the Appellate Court properly affirmed the judgment of the trial court because the plaintiff's use and enjoyment of 70 South Main was substantially destroyed. We agree with the plaintiff.

"As a preliminary matter, we note that, for this constitutional claim [of inverse condemnation], we review the trial court's factual findings under a clearly erroneous standard and its conclusions of law de novo." *Rural Water Co.* v. *Zoning Board of Appeals*, 287 Conn. 282, 298, 947 A.2d 944 (2008).

"Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. . . . An inverse condemnation claim accrues when the purpose of government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding . . . ." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 83, 931

of inverse condemnation when [70 South Main] retained significant value, was used for the same purpose as before the condemnation, and continued to generate substantial rental income?"; and (2) "Did the Appellate Court properly hold that the plaintiff's inverse condemnation action was not barred by the doctrine of judicial estoppel, given the inconsistent positions that he had taken on the use of the taken property?" *Barton* v. *Norwalk*, 321 Conn. 901, 901–902, 136 A.3d 1272 (2016).

A.2d 237 (2007). The government action must result in such a substantial interference with the use of the property that it "amounts to practical confiscation." (Internal quotation marks omitted.) *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 298. "Accordingly, an inverse condemnation action has been aptly described as an eminent domain proceeding initiated by the property owner rather than the condemnor." (Internal quotation marks omitted.) *Bristol* v. *Tilcon Minerals, Inc.*, supra, 83.

"The word taken in article first, § 11 of our state constitution[5] means the exclusion of the owner from his private use and possession, and the assumption of the use and possession for the public purpose by the authority exercising the right of eminent domain. . . . Although property may be taken without any actual appropriation or physical intrusion . . . there is no taking in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose . . . as where the economic utilization of the land is, for all practical purposes, destroyed. . . . A constitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed." (Footnote in original; internal quotation marks omitted.) Id., 83–84. In other words, "Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property." Id., 85.

The issue of whether there has been a substantial destruction of an owner's ability to use or enjoy a prop-

[5] Article first, § 11, of the constitution of Connecticut provides: "The property of no person shall be taken for public use, without just compensation therefor."

erty—the basis for liability in the present case—is a fact intensive issue. See *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 298 ("[w]hether a claim that a particular governmental regulation or action taken thereon has deprived a claimant of his property without just compensation is an essentially ad hoc factual inquir[y]" [internal quotation marks omitted]). There is no bright line standard. We have previously observed that "it may be difficult to determine in certain close cases whether the alleged infringement on property rights is sufficient to constitute the type of complete taking that inverse condemnation requires . . . ." *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 85; see also *Washington Market Enterprises, Inc.* v. *Trenton*, 68 N.J. 107, 116, 343 A.2d 408 (1975) ("[t]he general question as to when governmental action amounts to a taking of property has always presented a vexing and thorny problem").

We recently observed, in a zoning variance case, that "[w]hen a reasonable use of the property exists, there can be no practical confiscation."[6] (Internal quotation

[6] We have noted that the "same analysis" is applied in zoning variance cases as in inverse condemnation cases because "when the [zoning] regulation practically destroys or greatly decreases [the property's] value for any permitted use to which it can reasonably be put . . . the loss of value alone may rise to the level of a hardship." (Citation omitted; internal quotation marks omitted.) *Caruso* v. *Zoning Board of Appeals*, 320 Conn. 315, 323, 130 A.3d 241 (2016). Generally speaking, a landowner must show, inter alia, "unusual hardship" to be granted a variance. Id., 321. In order to meet this element of the legal standard for a variance, the landowner may demonstrate that "the zoning regulation has deprived the property of all reasonable use and value, thereby practically confiscating the property." Id., 322. Accordingly, we have observed that this places our variance cases "at the intersection of two related, yet distinct, areas of law: land use regulation and constitutional takings jurisprudence." (Internal quotation marks omitted.) Id. The unusual hardship test in zoning variance cases and the substantial destruction test in inverse condemnation cases require a showing that the property cannot be utilized for any reasonable purpose. Compare id., 323 ("we have continually held in variance cases that [w]hen a reasonable use of the property exists, there can be no practical confiscation" [internal quotation marks omitted]), with *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284

marks omitted.) *Caruso* v. *Zoning Board of Appeals*, 320 Conn. 315, 323, 130 A.3d 241 (2016). Thus, when a putative condemnee fails to show that the property cannot be used for any reasonable and proper purpose, liability for inverse condemnation is precluded. See *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 298–300 (finding no inverse condemnation where landowner failed to show it could not continue to operate water utility on subject property); *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 55 (finding no inverse condemnation where contamination from nearby city landfill did not prevent landowner from continuing to use land for mining operations or marketing land for residential development); *Sinotte* v. *Waterbury*, 121 Conn. App. 420, 437, 995 A.2d 131 (finding no inverse condemnation where landowners could still use home as residence despite periodic sewage backups), cert. denied, 297 Conn. 921, 996 A.2d 1192 (2010).

"Conversely, when the property retains no reasonable use or value under the zoning regulation, a practical confiscation occurs." *Caruso* v. *Zoning Board of Appeals*, supra, 320 Conn. 324. In *Caruso*, this court noted prior cases holding that compelling the use of large homes as single-family homes when it would be prohibitively expensive to maintain the homes as such would result in a practical confiscation. Id., 324–25, citing *Culinary Institute of America, Inc.* v. *Board of Zoning Appeals*, 143 Conn. 257, 260–61, 121 A.2d 637 (1956), and *Libby* v. *Board of Zoning Appeals*, 143 Conn. 46, 52–53, 118 A.2d 894 (1955). In *Libby*, the conclusion that the regulation amounted to a practical confiscation was sustained on the basis of the inability

Conn. 84 ("there is no taking in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose" [internal quotation marks omitted]); see also *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 299 (noting that landowner's inverse condemnation claim failed for same reasons as its claim of unusual hardship).

to market the property as a single-family residence. *Libby* v. *Board of Zoning Appeals*, supra, 52 ("[The property's] usefulness as a [single-family] house is gone. The extent to which its value has dropped is borne out by the inability to find, over a [two year] period, a single individual who was willing to make any offer for it.").

Against this legal background, we conclude that the trial court properly found that the defendant inversely condemned 70 South Main in the present case. After the defendant took the parking lot at 65 South Main, the use of 70 South Main was substantially destroyed. This conclusion is amply supported by the trial court's findings of fact that the plaintiff faced extreme difficulty renting space at 70 South Main, which, in turn, resulted in a more than 80 percent diminution of its value.

At the outset of its analysis, the trial court highlighted the "serious, immediate, and enduring adverse effects" of the taking of 65 South Main on the marketability of 70 South Main. The court concluded that the lack of parking had rendered space at 70 South Main undesirable to prospective tenants. This was evidenced by the plaintiff's graph depicting a drop in leased space from 97 percent[7] in 2001, to 5 percent in 2006, with a slight increase to 10 percent in 2011. The Family and Children's Aid Society of Fairfield County, a prior tenant that had occupied three quarters of the ground floor, left at the end of its lease citing the lack of parking. Tenants on the third and fourth floor also departed at the end of their lease because of the lack of parking. The

[7] The memorandum of decision recites that 87 percent of the building was under lease in 2001. The graph admitted into evidence recites the figure of 97 percent for 2001. Elsewhere in the memorandum of decision, the trial court states that "[r]ental space under lease fell from over 90 percent in 2001 . . . ." Because the trial court cited the graph as its source for the 87 percent figure and we find no other basis in the record for the conclusion that 87 percent of the building was under lease in 2001, we conclude that the 87 percent figure in the memorandum of decision was a typographical error.

trial court noted the evidence presented about interest from prospective tenants who found the space attractive, but were dissuaded by the lack of parking. Lover Thomas, a barber who had run his business out of 70 South Main since 1989, attempted to endure the parking challenges. He suffered a loss of one quarter of his customers and ultimately closed shop, citing the lack of parking.[8]

As the tenants departed, the plaintiff was unable to replace them. After 65 South Main was taken, the plaintiff's real estate broker documented the interest of prospective tenants, interest that would not materialize into a lease principally due to the lack of parking.[9] In a letter, the broker informed the plaintiff that, without a solution to the lack of parking, "the future tenancy of 70 South Main . . . looks very bleak at present." In the intervening ten years from the taking of 65 South Main to the trial, the plaintiff managed to attract only two small tenants to lease space. One is a cell phone store and the other is a bail bondsman. The trial court found that the tenancy of the bail bondsman is the consequence of the unique situation that 70 South Main is located across the street from the police station. The cell phone store depends on walk-in clientele, and the owner himself walks to work. The trial court found that "the remainder of the building will attract tenants only

[8] Thomas stated the following in a June, 2006 letter: "It just doesn't pay to open every day anymore. The neighborhood is better, and that should be good, but the parking situation has just killed us. . . . Nobody wants to pay a $15 or $25 fine to get a $12 haircut. . . . With all this, it is a struggle each month to stay current with the rent and other expenses, and I don't see the situation improving."

[9] Over the course of approximately 120 days in 2002, the broker fielded twenty to twenty-five inquiries regarding the space available at 70 South Main. The broker noted that the "primary and paramount issue" with respect to the spaces for these inquiries was the lack of on-site or nearby parking. Four potential tenants were shown space. Three of the potential tenants declined to enter a lease citing parking issues, while the fourth did not give a reason.

by rock bottom rents, and these will be tenants for which parking is not an issue, likely a small and transient group."

As a result of the lack of marketability, the plaintiff struggled to maintain 70 South Main. When the plaintiff sought the necessary permits for certain maintenance services, he was rebuffed by the defendant's agencies on the basis of the lack of parking. The trial court noted that "the record is replete with responses from municipal authorities that nothing can be done because of the parking issue and pending litigation." The trial court noted that, in order to keep costs down, at one point, the plaintiff's son lived in the building and furnished maintenance services. Indeed, as the trial court found, "[t]he evidence shows the lack of parking . . . reduced [70 South Main's] chances of commercial success to negligible or nonexistent."

The defendant claims that the trial court's finding with respect to the viability of the property is improper because it ignores the fact that Macedonia Church, which had leased space from the plaintiff since 1987 continued to occupy space in the building and generate substantial revenue. It is true that Macedonia Church occupied a substantial portion of the building—39 percent. Macedonia Church continued to occupy all of the second floor and parts of the third and fourth floor of the building through the date of the trial on a month to month basis. As a result of the its continued tenancy, the decline in operating income[10] was not as steep as the decline in term lease tenancy. The trial court found that the income declined from $94,080 in 2001 to $20,661 in 2006.

[10] According to the plaintiff's exhibit, "[o]perating [i]ncome is defined as [g]ross [r]ents received less [o]perating [e]xpenses. Operating [e]xpenses exclude mortgage interest and principal, depreciation, and capital improvements. Services provided 'in-kind' to the property are not reflected in [o]perating [e]xpenses."

The defendant, however, glosses over significant facts regarding Macedonia Church's occupancy of 70 South Main. Although it enjoyed below market rents, once the parking lot was taken, Macedonia Church did not renew its lease with the plaintiff and informed the plaintiff that it intended to quit the premises when a suitable alternative was found. As an act of municipal grace, the defendant permitted Macedonia Church to use certain parking spaces on a nearby street at no cost. A leader from Macedonia Church testified that, if parking were not furnished, it would need to seek an alternative location on a temporary basis. As of the date of trial, the plaintiff had not found any new tenants for any of the spaces above the ground level. Thus, notwithstanding the length of Macedonia Church's continuing month to month occupancy, the plaintiff simply could not count on it as a revenue stream to continue to profitably operate the building long term. Therefore, we cannot conclude that, in light of the dismal lease rate and lack of success marketing vacant space, Macedonia Church's presence undermined the trial court's conclusion that the plaintiff's use and enjoyment of 70 South Main has been substantially destroyed.

The trial court's conclusion is also supported by its finding that the value of 70 South Main had fallen by more than 80 percent. In making its finding, the trial court "generally accept[ed]" the documentary and oral expert testimony of a commercial real estate appraiser, Michael McGuire. McGuire had thirty years of experience as a real estate appraiser, was a principal at a real estate appraisal firm in Norwalk, and was "knowledgeable about real estate values and trends in the Norwalk area . . . ." McGuire had recent experience in dealing with parking rules in Norwalk.[11] On the basis of McGuire's report, the trial court found that the value of 70

[11] McGuire testified that he had recently served on a committee that examined parking in the area.

South Main had diminished from $1.1 million to $200,520 or 81.77 percent.[12] McGuire attributed this decline in value to the absence of available parking. He testified that "parking is the lifeline of [a] building" in a suburban market. He added that when "[y]ou take the parking away, you've gutted . . . the value of a building." McGuire further testified that 70 South Main was "pretty close to teardown value." The appraisal report stated that, without available parking, the property may be worth less than if it were vacant and available for development.

We are not persuaded that the fact that 70 South Main retains some economic value undermines the trial court's conclusion that the plaintiff's use and enjoyment of the property was substantially destroyed. "Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property." *Bristol* v. *Tilcon Minerals, Inc.*, supra, 284 Conn. 85. Logic dictates that where inverse condemnation is found for substantial—but not complete—destruction of an owner's ability to use or enjoy property, the remaining quantum of use or enjoyment will be reflected in some economic value. Where, as here, the plaintiff has shown that his use and enjoyment of property has been substantially destroyed, the taking is of constitutional magnitude and the plaintiff is enti-

[12] The defendant notes in its brief that McGuire determined the before taking value of 70 South Main by applying valuation methodology that considered the use of 70 South Main and 65 South Main together and suggests that this method is inaccurate. At trial, however, the defendant declined to present any evidence with respect to the value of 70 South Main. Ultimately, the trial court credited McGuire's testimony and found that his analysis provided a determination of the damage done to only 70 South Main. The defendant did not challenge the trial court's findings of fact on appeal. Our holding in the present case, therefore, should not be construed as an endorsement of the method used by McGuire to determine the before taking value of 70 South Main.

tled to just compensation for the inverse condemnation of his property. "[T]he usual measure of damages is the difference between the market value of the [property] before the taking and the market value of [the property] thereafter." (Internal quotation marks omitted.) Id., 71.

In sum, we conclude that the trial court properly concluded that the plaintiff had proven his theory of inverse condemnation in the present case.

II

We next turn to the defendant's claim that the plaintiff's inverse condemnation action was barred by the doctrine of judicial estoppel. The defendant claims the trial court incorrectly failed to find the plaintiff estopped from asserting that 70 South Main should be valued with the use of 65 South Main as a parking lot. Specifically, the defendant claims the following: (1) the plaintiff's position with respect to the use of 65 South Main is clearly inconsistent with his position in the previous eminent domain action, wherein he argued the highest and best use of 65 South Main was as mixed use development; (2) the trial court in the previous case adopted the plaintiff's position and awarded compensation on that basis; and (3) the plaintiff would derive an unfair advantage against the defendant by taking such a position in the present case. We conclude that the defendant failed to prove that the plaintiff's claim was barred by judicial estoppel.

We begin by setting forth our standard of review of the defendant's claim. "Because the rule is intended to prevent improper use of judicial machinery . . . judicial estoppel is an equitable doctrine invoked by a court at its discretion . . . . Accordingly, our review of the trial court's decision not to invoke the doctrine is for abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 171, 2 A.3d 873 (2010).

"[J]udicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding. . . . [J]udicial estoppel serves interests different from those served by equitable estoppel, which is designed to ensure fairness in the relationship between parties. . . . The courts invoke judicial estoppel as a means to preserve the sanctity of the oath or to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, 301 Conn. 361, 372, 21 A.3d 791 (2011). The doctrine "protect[s] the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment . . . ." (Citations omitted; internal quotation marks omitted.) *New Hampshire* v. *Maine*, 532 U.S. 742, 749–50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

Judicial estoppel applies if (1) "a party's later position is clearly inconsistent with its earlier position," (2) "the party's former position has been adopted in some way by the court in the earlier proceeding," and (3) "the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." (Internal quotation marks omitted.) *Dept. of Transportation* v. *White Oak Corp.*, 319 Conn. 582, 612, 125 A.3d 988 (2015); see *Dougan* v. *Dougan*, supra, 301 Conn. 372–73; see also *DeRosa* v. *National Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010). The application of judicial estoppel is further limited to "situations where the risk of inconsistent results with its impact on judicial integrity is certain." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, supra, 373. In addition, generally speaking, the doctrine will not apply "if the first statement or omission was the result of a good faith mistake . . . or an unintentional error." (Internal quotation marks omitted.) Id.

With respect to the first element of judicial estoppel, the defendant claims that in the earlier eminent domain proceeding, the plaintiff took the position that the highest and best use of 65 South Main was as a mixed use development, whereas in the present case, 65 South Main was treated as a parking lot dedicated to use in conjunction with 70 South Main for purposes of valuation. The defendant claims that the plaintiff's positions with respect to 65 South Main are clearly inconsistent. The plaintiff claims that the positions are not inconsistent because a person need not actually use property in accordance with its asserted highest and best use. We agree with the plaintiff.

When land is taken by the government, the landowner is entitled to just compensation. Conn. Const., art. I, § 11. It is by now axiomatic that "the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken." (Internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272 Conn. 14, 25, 861 A.2d 473 (2004). To achieve this, the landowner is compensated the fair market value of the property taken. Id. "In determining market value, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land . . . . The fair market value is the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use." (Internal quotation marks omitted.) Id. The highest and best use of certain property is not necessarily the present use of the property. To the contrary, "[t]he highest and best use concept, chiefly employed as a starting point in estimating the value of real estate by appraisers, has to do with the use which will most likely produce the highest market value, greatest financial return, or the most profit from

the use of a particular piece of real estate." (Internal quotation marks omitted.) Id. The law requires the court to "consider whether there was a reasonable probability that the subject property would be put to that use in the reasonably near future, and what effect such a prospective use may have had on the property's market value at the time of the taking." (Internal quotation marks omitted.) Id.

The defendant's claim in this case is a conflation of " 'value in use' " and " 'value in exchange.' " *Wellmark, Inc.* v. *Polk County Board of Review*, 875 N.W.2d 667, 673 (Iowa 2016). " 'Value in exchange' refers to the value to persons generally and focuses on market value based upon a willing buyer and willing seller. . . . 'Value in use' refers to the value a specific property has for a specific use. . . . Value in use is based upon the value of the property as it is currently used, not on its market value considering alternative uses." (Citations omitted.) Id. In a free society, there is no requirement that every property owner employ his property in its highest and best use. But the fact that a property owner chooses to put his property to less productive use does not necessarily result in a diminution of the market value of the property.[13] If someone were to use the newest model cell phone as nothing more than a paper weight, no one would argue that in a competitive market the cell phone would be worth that of an idle paper weight. Because there would be a reasonable probability that a willing buyer would use the cell phone as intended—its highest and best use—rather than as a paper weight, its market value is the former rather than the latter, irrespective of its actual use. In valuing property, an asserted highest and best use is not a promise,

[13] The defendant's suggestion elsewhere in its brief that the before taking value of 70 South Main should be based upon the capitalization of the below market rent the plaintiff received from the Macedonia Church suffers from the same flaw.

but rather a means to ascertain fair market value. It is not inconsistent for a property owner to assert a particular use of property different from an asserted highest and best use of the property.

The fact that the plaintiff sought and proved a fair market value of 65 South Main as a mixed use development in the earlier eminent domain proceeding does not now preclude him from claiming, in the present case, that he would continue to use that property as a parking lot had it not been taken. This case is about the value of 70 South Main. In presenting his case, the plaintiff, through his expert, compared the value of 70 South Main with the use of 65 South Main as a parking lot with the value 70 South Main without the use of 65 South Main as a parking lot. The trial court found as fact, and the defendant did not challenge on appeal, that this analysis showed the damage 70 South Main incurred as a result of the defendant taking 65 South Main. The fact that the plaintiff asserts in the present case that he would have continued to use 65 South Main as a parking lot is not clearly inconsistent from his assertions in the earlier eminent domain action as to the fair market value of that property.[14] Accordingly, the trial court did not abuse its discretion in rejecting the defendant's judicial estoppel claim.

We conclude that the Appellate Court properly determined that the trial court correctly concluded that the defendant had inversely condemned 70 South Main when it took 65 South Main, and that the trial court did not abuse its discretion in rejecting the defendant's judicial estoppel claim.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[14] Because we conclude that the defendant failed to prove the first element of judicial estoppel, we need not discuss whether the defendant had satisfied the second and third elements.

ORDERS

CONNECTICUT REPORTS

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VINCENTE ROSA *v.* COMMISSIONER OF CORRECTION

The petitioner Vincente Rosa's petition for certification for appeal from the Appellate Court, 171 Conn. App. 428 (AC 37573), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided June 14, 2017

WILLIAM RAVEIS REAL ESTATE, INC. *v.* PETER ZAJACZKOWSKI ET AL.

The petition by the defendants Peter Zajaczkowski and Iwona Zajaczkowski for certification for appeal from the Appellate Court, 172 Conn. App. 405 (AC 37843), is denied.

PALMER and EVELEIGH, Js., did not participate in the consideration of or decision on this petition.

Andrew M. McPherson, in support of the petition.

Decided June 14, 2017

STATE OF CONNECTICUT *v.* DIVENSON PETION

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 668 (AC 37884), is granted, limited to the following issue:

"In rejecting the defendant's claim that there was insufficient evidence to support his conviction of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) with respect to Rosa Bran, did the Appellate Court properly conclude that a jury reasonably could have found that the one and one-half inch scar on her forearm constituted serious disfigurement, and therefore, a serious physical injury?"

Jennifer B. Smith, assigned counsel, in support of the petition.

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

Decided June 14, 2017

COURTNEY GREEN *v.* COMMISSIONER OF CORRECTION

The petitioner Courtney Green's petition for certification for appeal from the Appellate Court, 172 Conn. App. 585 (AC 38205), is denied.

McDONALD, J., did not participate in the consideration of or decision on this petition.

Brittany B. Paz, in support of the petition.

Decided June 14, 2017

STATE OF CONNECTICUT *v.* DARRYL BONDS

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 108 (AC 38309), is denied.

Stephan E. Seeger, in support of the petition.

Decided June 14, 2017

REGINALD REESE *v.* COMMISSIONER OF CORRECTION

The petitioner Reginald Reese's petition for certification for appeal from the Appellate Court, 172 Conn. App. 350 (AC 38586), is denied.

Sean P. Barrett, assigned counsel, in support of the petition.

Peter A. McShane, state's attorney, in opposition.

Decided June 14, 2017

SOMEN SHIPMAN *v.* COMMISSIONER OF CORRECTION

The petitioner Somen Shipman's petition for certification for appeal from the Appellate Court, 172 Conn. App. 600 (AC 38774), is denied.

Michael W. Brown, assigned counsel, in support of the petition.

C. Robert Satti, Jr., supervisory assistant state's attorney, in opposition.

Decided June 14, 2017

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* MOSES NELSON ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 173 Conn. App. 34 (AC 38638), is denied.

Moses Nelson, self-represented, in support of the petition.

David M. Bizar, in opposition.

Decided June 14, 2017

STATE OF CONNECTICUT *v.* EDDIE ALBERTO PEREZ

The defendant's petition for certification for appeal from the Appellate Court (AC 40110) is denied.

EVELEIGH and ESPINOSA, Js., did not participate in the consideration of or decision on this petition.

Hubert J. Santos and *Trent A. LaLima*, in support of the petition.

Michael A. Gailor, executive assistant state's attorney, in opposition.

Decided June 14, 2017

AMANDA R. HULL *v.* JONATHAN L. HULL

The defendant's petition for certification for appeal from the Appellate Court (AC 40180) is denied.

ESPINOSA and D'AURIA, Js., did not participate in the consideration of or decision on this petition.

Jonathan L. Hull, self-represented, in support of the petition.

Decided June 14, 2017

STATE OF CONNECTICUT *v.* ISSIAH KILLIEBREW

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 1 (AC 37613), is denied.

Daniel J. Foster, assigned counsel, in support of the petition.

Jennifer F. Miller, deputy assistant state's attorney, in opposition.

Decided June 21, 2017

ANTWON W. *v.* COMMISSIONER OF CORRECTION

The petitioner Antwon W.'s petition for certification for appeal from the Appellate Court, 172 Conn. App. 843 (AC 37661), is denied.

EVELEIGH, J., did not participate in the consideration of or decision on this petition.

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

Michele C. Lukban, senior assistant state's attorney, in opposition.

Decided June 21, 2017

STATE OF CONNECTICUT *v.* FRANCISCO NAVARRO

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 472 (AC 37724), is denied.

Deren Manasevit, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided June 21, 2017

STATE OF CONNECTICUT *v.* JOSE F. NAVARRO

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 496 (AC 37725), is denied.

Richard E. Condon, Jr., senior assistant public defender, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided June 21, 2017

PMG LAND ASSOCIATES, L.P. *v.* HARBOUR LANDING CONDOMINIUM ASSOCIATION, INC., ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 172 Conn. App. 688 (AC 37965), is denied.

ESPINOSA, J., did not participate in the consideration of or decision on this petition.

Scott M. Maser, in support of the petition.

Laura Pascale Zaino and *Joshua M. Auxier*, in opposition.

Decided June 21, 2017

STATE OF CONNECTICUT *v.* TOMAS MOREL

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 202 (AC 38326), is denied.

Cameron R. Dorman, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided June 21, 2017

STATE OF CONNECTICUT *v.* DARRYL CRENSHAW

The defendant's petition for certification for appeal from the Appellate Court, 172 Conn. App. 526 (AC 39377), is denied.

David J. Reich, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided June 21, 2017

STATE OF CONNECTICUT *v.* HENRY D.

The defendant's petition for certification for appeal from the Appellate Court, 173 Conn. App. 265 (AC 37118), is denied.

ROBINSON, J., did not participate in the consideration of or decision on this petition.

Raymond L. Durelli, assigned counsel, in support of the petition.

Adam E. Mattei, assistant state's attorney, in opposition.

Decided June 21, 2017

BETH KELLER *v.* RICHARD KELLER

The plaintiff's petition for certification for appeal from the Appellate Court (AC 39842) is denied.

ROGERS, C. J., did not participate in the consideration of or decision on this petition.

Nadine M. Pare, in support of the petition.

Richard A. Keller, self-represented, in opposition.

Decided June 21, 2017

NEW HAVEN PARKING AUTHORITY ET AL. *v.* LONG WHARF REALTY CORPORATION ET AL.

The petition by the defendants Rommerro Farrah, Albert Farrah and East Shore Management, LLC, for certification for appeal from the Appellate Court (AC 39948) is denied.

Scott M. Schwartz, in support of the petition.

Clifford A. Merin and *Joseph L. Rini*, in opposition.

Decided June 21, 2017

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CONNECTICUT APPELLATE REPORTS

Vol. 174

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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

Sheldon, Beach and Harper, Js.

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

Procedural History

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

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

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

Opinion

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

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

Prescott, Beach and Bishop, Js.

Syllabus

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

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

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

Argued March 7—officially released July 4, 2017

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In this opinion the other judges concurred.

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

Alvord, Prescott and Bear, Js.

Syllabus

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

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

Argued March 15—officially released July 4, 2017

Procedural History

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

Matthew Julian Forrest, for the appellant (plaintiff).

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

Opinion

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

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

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

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

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

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

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

Before addressing the plaintiff's claim on appeal, we set forth the applicable standard of review. "The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

Lavine, Prescott and Bishop, Js.

Syllabus

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

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

Argued February 16—officially released July 4, 2017

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In this opinion the other judges concurred.

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

Alvord, Sheldon and Norcott, Js.

Syllabus

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

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

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

Argued April 18—officially released June 21, 2017*

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

Procedural History

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In this opinion the other judges concurred.

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

Alvord, Keller and Dennis, Js.

Syllabus

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

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

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

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

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

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

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

Argued April 5—officially released July 4, 2017

Procedural History

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

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

Richard Emanuel, for the appellant (defendant).

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

Opinion

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

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

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

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

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

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

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

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

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

[4] The defendant is not circumcised.

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

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

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

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

injury to a child in violation of § 53-21 (a) (2). Finally, relative to the August, 2013 incident, the defendant was charged with sexual assault in the second degree in violation of § 53a-71 (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2).

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

I

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

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

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

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

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

"[The Prosecutor]: Fair enough.

"The Court: Yeah. Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

"[Zerella]: Or stuff, stuff happened.

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

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

"[The Defendant]: I know it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"[The Defendant]: Right.

"[Zerella]: In, in reality—

"[Fairbrother]: As a predator.

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

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

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

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

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

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

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

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

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

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

"[The Defendant]: [indiscernible]

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

"[Zerella]: —Maybe he—

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

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

"[Fairbrother]: —You know if—

"[Zerella]: Maybe he came at you.

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

"[Zerella]: That's all.

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

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

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

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

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

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

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

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

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

Thereafter, the interview continued without further mention of counsel.

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

Alternatively, the defendant argues that even if his invocation of the right to counsel was ambiguous or equivocal, the self-incrimination and due process clauses of article first, § 8, of our state constitution required the detectives to cease questioning immediately and to clarify his ambiguous references to counsel. The defendant seeks review of this unpreserved state constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[13] Although we conclude that the defendant's

[13] "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015). "The first two

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

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

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

1

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

2

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

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

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

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

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

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

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

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

3

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

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

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

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

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

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

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

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

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

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

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

4

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

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

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

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

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

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

5

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

6

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

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

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

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

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

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

Keller, Prescott and Harper, Js.

Syllabus

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

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

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

Argued January 17—officially released July 4, 2017

Procedural History

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

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

In this opinion the other judges concurred.

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

Sheldon, Beach and Harper, Js.

Syllabus

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

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

Argued February 8—officially released July 4, 2017

Procedural History

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

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

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

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

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In this opinion the other judges concurred.

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

Sheldon, Beach and Sheridan, Js.

Syllabus

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

Argued April 24—officially released July 4, 2017

Procedural History

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

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

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

Erica Gesing, for the appellee (plaintiff).

Opinion

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

In this opinion the other judges concurred.

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

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

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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MEMORANDUM DECISIONS

JENNIFER B. CROUSE *v.* ROBERT R. SLOAT ET AL.
(AC 39146)

Lavine, Elgo and Beach, Js.

Argued May 30—officially released July 4, 2017

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

Per Curiam. The judgment is affirmed.

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Petition for review; whether trial court improperly precluded petitioner from copying certain trial exhibits in custody of clerk's office; claim that court's orders that referenced sealing of documents and limited access to trial exhibits in custody of clerk's office were issued pursuant to rule of practice (§ 1-11C) applicable to media coverage of criminal proceedings; claim that orders that referenced sealing of documents and limited access to trial exhibits in custody of clerk's office were final and could not be challenged in petition for review; claim that court's orders that referenced sealing of documents and limited access to trial exhibits in custody of clerk's office were not subject to expedited review pursuant to statute (§ 51-164x [c]).
State *v.* Purcell. 401
Risk of injury to child; whether trial court abused discretion in denying defendant's motion for mistrial; claim that jury verdict was substantially swayed by testimony that victim had been diagnosed with post-traumatic stress disorder; claim that harmfulness of testimony that victim had been diagnosed with post-traumatic stress disorder could not be cured by court's instruction to jury; whether court improperly denied defendant's motion to suppress statements to police made during custodial interrogation; unpreserved claim that article first, § 8, of state constitution required police to cease questioning during custodial interrogation and to clarify defendant's ambiguous or equivocal references to counsel.
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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

MERIBEAR PRODUCTIONS, INC. *v.* JOAN E. FRANK et al., SC 19721
Judicial District of Fairfield

Whether California Court Lacked Personal Jurisdiction Over Defendant; Whether Contract to Facilitate Sale of Real Property Exempt From Home Solicitation Sales Act; Whether Trial Court Improperly Awarded Double Damages. The defendants, Joan Frank and George Frank, were selling their Westport home, and they contracted with the plaintiff, a California corporation, to provide decorating and staging services to make the home more attractive to potential buyers. The plaintiff subsequently brought a breach of contract action against the defendants in California pursuant to a forum selection clause in the contract, and the plaintiff obtained a default judgment against the defendants in that action. The plaintiff then brought this action seeking to enforce the California judgment or, alternatively, damages for breach of contract. The trial court found George Frank liable for the foreign judgment and Joan Frank liable for breach of contract. The defendants appealed, and the Appellate Court (165 Conn. App. 305) affirmed the judgment. The Appellate Court rejected the defendants' claim that the trial court improperly enforced the California judgment against George Frank because the California court lacked personal jurisdiction over him, finding that George Frank had consented to the California court's jurisdiction by virtue of the contract's forum selection clause. The court explained that, while George Frank did not sign the contract, he was nevertheless subject to the forum selection clause because he had signed an addendum that was incorporated into the contract. The Appellate Court also rejected the defendants' claim that the contract was not enforceable against Joan Frank because it did not comply with the notice provisions of the Home Solicitation Sales Act, General Statutes § 42-134a et seq., noting that § 42-134a (a) (5) of the act exempts transactions "pertaining to the sale or rental of real property" from the its provisions. The court noted that the parties' transaction clearly pertained to the sale of their real property because the sole purpose of the agreement was to facilitate the sale of the defendants' home. Finally, the Appellate Court rejected the defendants' claim that the trial court improperly rendered judgment against George Frank in the amount of $259,746.10 and rendered judgment against Joan Frank in the amount of $283,106.45, where the defendants argued that the court thereby effec-

tively permitted the plaintiff to recover twice for the same harm. The court noted that, while the plaintiff could recover the full amount awarded by the trial court against either George Frank or Joan Frank, there was nothing in the record to indicate that the trial court intended that the plaintiff was entitled to recover double damages. The defendants appeal, and the Supreme Court will decide whether the Appellate Court correctly ruled that: (1) the California judgment was enforceable against George Frank, (2) the parties' contract was not governed by the Home Solicitation Sales Act, and (3) the trial court properly awarded the plaintiff damages against both George Frank and Joan Frank.

BERNADINE BROOKS, ADMINISTRATRIX (ESTATE OF ELSIE WHITE) *v.* ROBERT POWERS et al., SC 19727

Judicial District of Middlesex

Negligence; Governmental Immunity; Whether Appellate Court Properly Determined that a Jury Reasonably Could Conclude that Identifiable Victim, Imminent Harm Exception to Discretionary Act Immunity Applied Under Facts Here. Elsie White's estate brought this action alleging that Elsie White died as a result of the negligence of two Westport police officers. On the stormy evening of the day before White was found dead, the officers were approached by a concerned citizen at a gas station who reported to one of the officers that there was a woman who appeared to need medical attention in a field just up the road. The citizen reported that the woman was not properly dressed for the severe weather and that she was standing with her hands raised to the sky. The officer said he would take care of the situation but joked about it when calling a dispatcher to relay the citizen's report. The officer asked the dispatcher to send another officer to the field, but the dispatcher failed to do so, and the police did not drive by the field until several hours after the report. The body of the woman, identified as White, was found the next morning floating in Long Island Sound, less than a mile from where White was last seen. The cause of her death was accidental drowning. The trial court rendered summary judgment in favor of the defendants, ruling that, as a matter of law, the police officers, as municipal employees, enjoyed discretionary act immunity from the plaintiff's claims and that the imminent harm, identifiable victim exception to discretionary act immunity did not apply. The Appellate Court (165 Conn. App. 44) reversed, holding that summary judgment was improper because there was evidence from which a reasonable jury could find that the immi-

nent harm, identifiable victim exception applied to defeat the defendants' immunity. The Appellate Court noted that the exception applies where it is apparent to a public official that his conduct is likely to subject an identifiable victim to imminent harm. The Appellate Court found that a reasonable jury could find from the evidence submitted that the citizen had sufficiently identified White as a potential victim of the storm and that it was apparent to the officers that White was at risk of imminent harm because they had all of the relevant facts of her situation before them. The Appellate Court then found that a reasonable jury could conclude that the officers had subjected White to a risk of imminent harm in that it was more likely than not that she would become a victim of the storm because the officers isolated her from any chance of help by falsely stating that they would take care of the situation, by reporting the incident to the dispatcher in such a way that suggested it was a joke rather than a true emergency, and by failing to respond to the situation themselves. The defendants appeal, and the Supreme Court will decide whether the Appellate Court used the correct standard for determining whether the harm was imminent and properly applied the identifiable victim, imminent harm exception to the facts of this case.

PATRICK CALLAGHAN *v.* CAR PARTS INTERNATIONAL, LLC, SC 19755

Compensation Review Board

Workers' Compensation; Whether, Where Injured Employee Recovered from Third Party, Employer Properly Allowed a Moratorium on Future Workers' Compensation Payments to Employee in the Amount of the One-Third Reduction in Reimbursement Authorized by General Statutes § 31-293 (a). The plaintiff was injured in a work related motor vehicle accident. He brought a personal injury action against the tortfeasor, and that action was settled for $100,000. At the time of the settlement, the plaintiff's employer had paid him $74,226.04 in workers' compensation benefits in connection with the motor vehicle accident. The plaintiff netted $66,062 from the settlement of the personal injury action, and he reimbursed his employer two thirds of that amount, or $44,041.33, and retained the remaining $22,020.67 of the settlement proceeds. The employer subsequently refused to pay the plaintiff further workers' compensation benefits, arguing that it was entitled to a $22,020.67 credit for future benefits and a moratorium on further payments until the plaintiff had spent the $22,020.67 he had retained on workers'

compensation expenses. The plaintiff argued that the employer was not entitled to a moratorium on future payments, pointing to General Statutes § 31-293 (a), which was amended in 2011 to provide that, when an injured employee brings a civil action against a tortfeasor and recovers damages, "the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer . . . which reduction shall inure solely to the benefit of the employee. . . ." The trial commissioner ruled that the employer was entitled to a $22,020.67 moratorium on future payments, and the Compensation Review Board (board) affirmed that ruling. The board noted that, in decisions such as *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391 (2010), the Supreme Court has held that an employer's lien for workers' compensation payments on an injured employee's recovery from a third party includes a credit for future workers' compensation payments in the amount of the net proceeds recovered by the employee from the third party. While acknowledging that the 2011 amendment of § 31-293 (a) concerning a one-third reduction of the benefits to be reimbursed to an employer was ambiguous, the board found nothing in the legislative history of the amendment evidencing any intent to change the law as interpreted by the Supreme Court in *Thomas*. The plaintiff appeals, and the Supreme Court will determine whether the board properly construed § 31-293 (a) to allow an employer a moratorium on future workers' compensation payments in an amount equal to the one-third reduction permitted by the 2011 amendment to the statute.

ALISON BARLOW *v.* COMMISSIONER OF CORRECTION, SC 19774
Judicial District of Tolland

Habeas; Ineffective Assistance of Counsel; Whether § 51-183c Required that Habeas Court Recuse Itself from Conducting Proceedings on Remand; Whether Habeas Court Improperly Barred Petitioner from Presenting New Evidence on Remand to Prove Prejudice. The petitioner brought this habeas action alleging, among other things, the ineffective assistance of his trial counsel. The habeas court dismissed the claim, and the petitioner appealed. The Appellate Court reversed the judgment dismissing the ineffective assistance claim, concluding that, as a matter of law, the petitioner's trial counsel had performed deficiently in failing to advise the petitioner adequately regarding a plea offer. The Appellate Court remanded the case to the habeas court for further proceedings on the issue of whether the petitioner was prejudiced as a result of his attorney's deficient

performance. On remand, the proceedings were presided over by the same judge who had presided over the initial habeas proceedings and who had issued the judgment that was reversed by the Appellate Court. The petitioner filed a motion for recusal under General Statutes § 51-183c, which provides that "[n]o judge of any court who tried a case without a jury . . . in which the judgment is reversed . . . may again try the case." The habeas court denied that motion and it also rejected the petitioner's claim that there should be a new evidentiary hearing on the prejudice issue, ruling that it would make the required finding on the basis of evidence that was already in the record. The habeas court then found that the petitioner was not prejudiced by his trial counsel's deficient performance and it denied the petition. The petitioner appealed, and the Appellate Court (166 Conn. App. 408) reversed and remanded the case for a hearing before a different judge for the purpose of determining whether the petitioner was prejudiced by deficient performance. The Appellate Court concluded that the habeas court improperly denied the petitioner's motion for recusal, ruling that § 51-183c necessitated that a different judge preside over the proceedings on remand. The Appellate Court also ruled that the habeas court had wrongly construed the Appellate Court's previous remand order as precluding a new evidentiary hearing on the prejudice issue. The respondent appeals, and the Supreme Court will decide whether the Appellate Court properly determined that § 51-183c required the habeas court to grant the motion for recusal. The Supreme Court will also consider whether the Appellate Court properly determined that the habeas court erred in barring the petitioner from presenting new evidence on remand for purposes of proving prejudice.

AMICA MUTUAL INSURANCE COMPANY *v.* ANDREW MULDOWNEY et al., SC 19794

Judicial District of Stamford-Norwalk

Insurance; Subrogation; Landlord/Tenant; Whether Appellate Court Properly Concluded that Insurer had Right of Equitable Subrogation against its Insured's Tenants. The plaintiff insurer indemnified its insured, the owner of a single family dwelling, for water damage caused by the failure of the owner's tenants (defendants) to maintain the heat properly during their two-week absence from the premises. The plaintiff brought this equitable subrogation action seeking to recover from the defendants the sums it had expended to repair the premises. The trial court rendered judgment in favor of the plaintiff. The defendants appealed, claiming that the trial court

improperly determined that the plaintiff's claim for equitable subrogation was not barred under *DiLullo* v. *Joseph*, 259 Conn. 847 (2002), in which the court established a "default rule" that, where a lease is silent as to the possibility of subrogation, a landlord's insurer has no right of equitable subrogation against a tenant. The Appellate Court (166 Conn. App. 831) affirmed the judgment on determining that the considerations underlying the *DiLullo* rule—the likely lack of expectation regarding a tenant's obligation to be subject to subrogation and the economic waste arising from having multiple insurance policies on the same piece of property—were not present in this case. The court explained that, because the lease agreement here clearly stated that the defendants were to pay all damages associated with breaking any promise contained in the agreement, including using the heating system in a prudent manner, the defendants had adequate notice that they could be liable for damages associated with their negligent maintenance of the heating system, and this notice created an expectation of liability that was sufficient to avoid application of the *DiLullo* rule. The court additionally explained that the public policy considerations in *DiLullo* concerning the economic waste of requiring a tenant of a single unit in a multiunit commercial building to subrogate the landlord's insurer for harm the tenant caused to the entire building were demonstrably lacking in the present case, which concerned a single family dwelling. The defendants appeal, and the Supreme Court will decide whether the plaintiff had a right of equitable subrogation against the defendants under *DiLullo*.

A BETTER WAY WHOLESALE AUTOS, INC. v. COMMISSIONER OF MOTOR VEHICLES, SC 19815

Judicial District of New Britain

Motor Vehicles; Whether Appellate Court Correctly Concluded that Finding that Car Dealer had Violated General Statutes § 14-54 by Selling Cars from an Unapproved Lot was Unsupported by the Evidence. General Statutes § 14-54 provides that "any person who desires to obtain a license for dealing in motor vehicles . . . shall first obtain and present to [the Commissioner of Motor Vehicles] a certificate of approval of the location for which such license is desired from [the town or city] wherein the business is located. . . ." The Commissioner of Motor Vehicles (commissioner) found that the plaintiff car dealer violated § 14-54 by selling cars from a lot on which the plaintiff stored hundreds of cars. The commissioner determined that, while the plaintiff had obtained approval from the

town of Naugatuck to store cars on the lot, it had not obtained approval from the town to sell cars from that location. The trial court sustained the commissioner's finding that the plaintiff had violated § 14-54. The plaintiff appealed, and the Appellate Court (167 Conn. App. 207) reversed the trial court's judgment, ruling that the record lacked substantial evidence to support the determination that the plaintiff had violated § 14-54. It reasoned that the record was devoid of any evidence that the plaintiff, consistent with a desire to obtain a license to deal in motor vehicles at the storage lot, failed either to obtain a certificate of approval from the town or to present such a certificate to the commissioner as required by § 14-54. The Appellate Court also rejected the commissioner's claim that § 14-54 requires car dealers to obtain licenses for each location on which they wish to operate a car dealership. The commissioner appeals, and the Supreme Court will determine whether the Appellate Court correctly concluded that a car dealer's license is not conditioned upon local approval for each proposed location pursuant to § 14-54. It will also decide whether the Appellate Court correctly concluded that the administrative record lacked substantial evidence to support the finding that the plaintiff violated § 14-54.

JOHN DOE *v.* TOWN OF WEST HARTFORD et al., SC 19828
Judicial District of Hartford

Statute of Limitations; Whether Genuine Issue of Material Fact Existed as to Availability of Savings Statute; Whether § 52-593a Could Save Cause of Action Despite Serving Officer's Failure to Endorse Date of Delivery of Process. The plaintiff brought this action alleging various incidents of wrongful conduct on the part of the defendants between May 22, 2007, and June 8, 2007. A state marshal served the defendants on June 9, 2010, one day after the expiration of the latest applicable statute of limitations. The defendants moved for summary judgment, claiming that the plaintiff's claims were time barred. The plaintiff objected, claiming that the action was timely under General Statutes § 52-593a, which provides that a cause of action shall not be lost if process is delivered to a marshal within the limitations period and the marshal serves it within thirty days of the delivery to the marshal. The plaintiff submitted an affidavit from his former attorney attesting that the marshal had picked up the process at the attorney's office on May 20, 2010, thereby saving the causes of action under § 52-593a. The defendants moved to strike the affidavit on the ground that it was not based on the attorney's personal knowledge,

and they attached a copy of the attorney's deposition testimony indicating that the attorney did not personally observe the marshal pick up the process. The trial court struck the affidavit and rendered summary judgment for the defendants, finding that the plaintiff failed to establish a genuine issue of material fact that process had been delivered prior to the running of the statutes of limitations. The plaintiff appealed, and the Appellate Court (168 Conn. App. 354) reversed the judgment in favor of the defendants. The court determined that, even without consideration of the attorney's affidavit, the attorney's deposition testimony raised a genuine issue of material fact as to whether the marshal received process on May 20, 2010, as he testified about following his office practice of leaving urgent process on a front counter for the marshal to retrieve and about not seeing it there later. The Appellate Court also concluded that the marshal's failure to comply with § 52-593a (b) by endorsing the date that process was delivered to the marshal on the return did not preclude application of the statute's saving provisions, concluding that § 52-593a (b) is directory rather than mandatory and that the failure of the marshal to include the date on the return is not a fatal defect. The defendants appeal, and the Supreme Court will decide whether the Appellate Court properly (1) reversed the judgment in favor of the defendants on determining that a genuine issue of material fact existed with respect to the availability of the savings statute, § 52-593a, and (2) concluded that § 52-593a is available to save a cause of action despite the failure of the serving officer to endorse on the return the date of delivery of the process to such officer pursuant to § 52-593a (b).

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

Practice Book Revisions

Superior Court Rules

Forms

July 4, 2017

NOTICE

SUPERIOR COURT

On June 23, 2017, the judges of the Superior Court adopted the revisions to the Practice Book that are contained herein.

These revisions become effective on January 1, 2018.

Attest:

Joseph J. Del Ciampo
Deputy Director, Legal Services

INTRODUCTION

Contained herein are revisions to the Superior Court rules and forms. These revisions are indicated by brackets for deletions and underlines for added language. The designation ''NEW'' is printed with the title of each new rule and form. This material should be used as a supplement to the Practice Book until the next edition becomes available.

The Commentaries to the Superior Court rules and forms are for informational purposes only.

Rules Committee of the
Superior Court

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AMENDMENTS TO THE GENERAL PROVISIONS OF THE SUPERIOR COURT RULES

(NEW) Sec. 2-13A. Military Spouse Temporary Licensing

(a) Qualifications. An applicant who meets all of the following requirements listed in (1) through (11) may be temporarily licensed and admitted to the practice of law in Connecticut, upon approval of the bar examining committee. The applicant:

(1) is the spouse of an active duty service member of the United States Army, Navy, Air Force, Marine Corps or Coast Guard and that service member is or will be stationed in Connecticut due to military orders;

(2) is licensed to practice law before the highest court in at least one state or territory of the United States or in the District of Columbia;

(3) is currently an active member in good standing in every jurisdiction to which the applicant has been admitted to practice, or has resigned or become inactive or had a license administratively suspended or revoked while in good standing from every jurisdiction without any pending disciplinary actions;

(4) is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;

(5) meets the educational qualifications required to take the examination in Connecticut;

(6) possesses the good moral character and fitness to practice law required of all applicants for admission in Connecticut;

(7) has passed an examination in professional responsibility administered under the auspices of the bar examining committee or has

completed a course in professional responsibility in accordance with the regulation of the bar examining committee;

(8) is or will be physically residing in Connecticut due to the service member's military orders;

(9) has not failed the Connecticut bar examination within the past five years;

(10) has not had an application for admission to the Connecticut bar or the bar of any state, the District of Columbia or United States territory denied on character and fitness grounds; and

(11) has not failed to achieve the Connecticut scaled score on the Uniform Bar Examination administered within any jurisdiction within the past five years.

(b) Application Requirements. Any applicant seeking a temporary license to practice law in Connecticut under this section shall file a written application and payment of such fee as the bar examining committee shall from time to time determine. Such application, duly verified, shall be filed with the administrative director of the bar examining committee and shall set forth his or her qualifications as hereinbefore provided. In addition, the applicant shall file with the bar examining committee the following:

(1) a copy of the applicant's Military Spouse Dependent Identification and documentation evidencing a spousal relationship with the service member;

(2) a copy of the service member's military orders to a military installation in Connecticut or a letter from the service member's com-

mand verifying that the requirement in subsection (a) (8) of this section is met;

(3) certificate(s) of good standing from the highest court of each state, the District of Columbia or United States territory to which the applicant has been admitted, or proof that the applicant has resigned, or become inactive or had a license administratively suspended or revoked while in good standing;

(4) an affidavit from the applicant, certifying whether such applicant has a grievance pending against him or her, has ever been reprimanded, suspended, placed on inactive status, disbarred, or has ever resigned from the practice of law, and, if so setting forth the circumstances concerning such action; and

(5) affidavits from two attorneys who personally know the applicant certifying to his or her good moral character and fitness to practice law.

(c) Duration and Renewal.

(1) A temporary license to practice law issued under this rule will be valid for three years provided that the temporary attorney remains a spouse of the service member and resides in Connecticut due to military orders or continues to reside in Connecticut due to the service member's immediately subsequent assignment specifying that dependents are not authorized to accompany the service member. The temporary license may be renewed for one additional two year period.

(2) A renewal application must be submitted with the appropriate fee as established by the bar examining committee and all other documentation required by the bar examining committee, including a copy of the service member's military orders. Such renewal application shall

be filed not less than thirty (30) days before the expiration of the original three year period.

(3) A temporarily licensed attorney who wishes to become a permanent member of the bar of Connecticut may apply for admission by examination or for admission without examination for the standard application fee minus the application fee paid to the committee for the application for temporary license, not including any fees for renewal.

(d) Termination.

(1) Termination of Temporary License. A temporary license shall terminate, and an attorney shall cease the practice of law in Connecticut pursuant to that admission, unless otherwise authorized by these rules, thirty days after any of the following events:

(A) the service member's separation or retirement from military service;

(B) the service member's permanent relocation to another jurisdiction, unless the service member's immediately subsequent assignment specifies that the dependents are not authorized to accompany the service member, in which case the temporary attorney may continue to practice law in Connecticut as provided in this rule until the service member departs Connecticut for a permanent change of station where the presence of dependents is authorized;

(C) the attorney's permanent relocation outside of the state of Connecticut for reasons other than the service member's relocation;

(D) upon the termination of the temporary attorney's spousal relationship to the service member;

(E) the attorney's failure to meet the annual licensing requirements for an active member of the bar of Connecticut;

(F) the attorney's request;

(G) the attorney's admission to practice law in Connecticut by examination or without examination;

(H) the attorney's denial of admission to the practice of law in Connecticut; or

(I) the death of the service member.

Notice of one of the events set forth in subsection (d) (1) must be filed with the bar examining committee by the temporarily admitted attorney within thirty (30) days of such event. Notice of the event set forth in subsection (d) (1) (I) must be filed with the bar examining committee by the temporarily admitted attorney within thirty (30) days of the event, and the attorney shall cease the practice of law within one year of the event. Failure to provide such notice by the temporarily admitted attorney shall be a basis for discipline pursuant to the Rules of Professional Conduct for attorneys.

(2) Notice of Termination of Temporary License. Upon receipt of the notice required by subsection (d) (1), the bar examining committee shall forward a request to the statewide bar counsel that the license under this chapter be revoked. Notice of the revocation shall be mailed by the statewide bar counsel to the temporarily admitted attorney.

(3) Notices Required. At least sixty (60) days before termination of the temporary admission, or as soon as possible under the circumstances, the attorney shall:

(A) file in each matter pending before any court, tribunal, agency or commission a notice that the attorney will no longer be involved in the case; and

(B) provide written notice to all clients receiving representation from the attorney that the attorney will no longer represent them.

(e) Responsibilities and Obligations. An attorney temporarily admitted under this section shall be subject to all responsibilities and obligations of active members of the Connecticut bar, and shall be subject to the jurisdiction of the courts and agencies of Connecticut, and shall be subject to the laws and rules of Connecticut governing the conduct and discipline of attorneys to the same extent as an active member of the Connecticut bar. The attorney shall maintain participation in a mentoring program provided by a state or local bar association in the state of Connecticut.

COMMENTARY: This rule permits an attorney licensed in another jurisdiction, who is the spouse of an active military member, to be temporarily licensed and admitted to practice law in Connecticut.

Sec. 2-68. Client Security Fund Established

(a) A client security fund is hereby established to promote public confidence in the judicial system and the integrity of the legal profession by reimbursing clients, to the extent provided for by these rules, for losses resulting from the dishonest conduct of attorneys practicing law in this state in the course of the attorney-client relationship **[**and**]**, by providing crisis intervention and referral assistance to attorneys admitted to the practice of law in this state who suffer from alcohol or other substance abuse problems or gambling problems, or who have

behavioral health problems and by making grants-in-aid to the organization administering the program for the use of interest earned on lawyers' clients' funds accounts pursuant to General Statute § 51-81c, for the purpose of funding the delivery of legal services to the poor.

(b) It is the obligation of all attorneys admitted to the practice of law in this state to participate in the collective effort to reimburse clients who have lost money or property as the result of the unethical and dishonest conduct of other attorneys [and], to provide crisis intervention and referral assistance to attorneys admitted to the practice of law in this state who suffer from alcohol or other substance abuse problems or gambling problems, or who have behavioral health problems and to fund the delivery of legal services to the poor.

(c) The client security fund is provided as a public service to persons using the legal services of attorneys practicing in this state and as a means of providing crisis intervention and referral assistance to impaired attorneys, and grants-in-aid for the purpose of funding the delivery of legal services to the poor. All moneys and assets of the fund shall constitute a trust.

(d) The establishment, administration and operation of the fund shall not impose or create any obligation, expectation of recovery from or liability of the fund to any claimant [or], attorney or organization, and all reimbursements therefrom shall be a matter of grace and not of right.

COMMENTARY: The changes to this section implement the provisions of Public Act 16-26 which authorized the Client Security Fund to be used to make grants-in-aid to the organization administering the program for the use of interest on lawyers' clients' funds accounts

pursuant to General Statutes § 51-81c, for the purpose of funding the delivery of legal services to the poor, in addition to its other purposes of reimbursing claims for losses caused by the dishonest conduct of attorneys and for crisis intervention and referral assistance to attorneys admitted in Connecticut who suffer from alcohol or other substance abuse or gambling problems or who have behavioral health problems.

Sec. 2-70. —Client Security Fund Fee

(a) The judges of the superior court shall assess an annual fee in an amount adequate for the proper payment of claims, **[**and**]** the provision of crisis intervention and referral assistance, and for making grants-in-aid for the purpose of funding the delivery of legal services to the poor under these rules and the costs of administering the client security fund. Such fee, which shall be $75, shall be paid by each attorney admitted to the practice of law in this state and each judge, judge trial referee, state referee, family support magistrate, family support referee and workers' compensation commissioner in this state. Notwithstanding the above, an attorney who is disbarred, retired, resigned, or serving on active duty with the armed forces of the United States for more than six months in such year shall be exempt from payment of the fee, and an attorney who does not engage in the practice of law as an occupation and receives less than **[**$450**]** $1000 in legal fees or other compensation for services involving the practice of law during the calendar year shall be obligated to pay one-half of such fee. No attorney who is disbarred, retired or resigned shall be reinstated pursuant to Sections 2-53 or 2-55 until such time as the

attorney has paid the fee due for the year in which the attorney retired, resigned or was disbarred.

(b) An attorney or family support referee who fails to pay the client security fund fee in accordance with this section shall be administratively suspended from the practice of law in this state pursuant to Section 2-79 of these rules until such payment, along with a reinstatement fee of $75, has been made. An attorney or family support referee who is under suspension for another reason at the time he or she fails to pay the fee, shall be the subject of an additional suspension which shall continue until the fee and reinstatement fee are paid.

(c) A judge, judge trial referee, state referee, family support magistrate or workers' compensation commissioner who fails to pay the client security fund fee in accordance with this section shall be referred to the judicial review council.

COMMENTARY: The changes to this section implement the provisions of Public Act 16-26 which authorized the Client Security Fund to be used to make grants-in-aid to the organization administering the program for the use of interest on lawyers' clients' funds accounts pursuant to General Statutes § 51-81c, for the purpose of funding the delivery of legal services to the poor, in addition to its other purposes of reimbursing claims for losses caused by the dishonest conduct of attorneys and for crisis intervention and referral assistance to attorneys admitted in Connecticut who suffer from alcohol or other substance abuse or gambling problems or who have behavioral health problems.

Sec. 2-73. —Powers and Duties of Client Security Fund Committee

In addition to any other powers and duties set forth in Sections 2-68 through 2-81, the client security fund committee shall:

(a) Publicize its activities to the public and bar, including filing with the chief justice and the executive committee of the superior court an annual report on the claims made and processed and the amounts disbursed.

(b) Receive, investigate and evaluate claims for reimbursement.

(c) Determine in its judgment whether reimbursement should be made and the amount of such reimbursement.

(d) Prosecute claims for restitution against attorneys whose conduct has resulted in disbursements.

(e) Employ such persons and contract with any public or private entity as may be reasonably necessary to provide for its efficient and effective operations, which shall include, but not be limited to, the investigation of claims and the prosecution of claims for restitution against attorneys.

(f) Pay to the chief court administrator for the provision of crisis intervention and referral assistance to attorneys admitted to the practice of law in this state who suffer from alcohol or other substance abuse problems or gambling problems, or who have behavioral health problems, any amounts required pursuant to Section 2-77.

(g) Pay to the chief court administrator for making grants-in-aid to the organization administering the program for the use of interest earned on lawyers' clients' funds accounts pursuant to General Stat-

utes § 51-81c, for the purpose of funding the delivery of legal services to the poor, any amounts required pursuant to Section 2-77.

[(g)**]**(h) Perform all other acts necessary or proper for the fulfillment of the purposes and effective administration of the fund.

COMMENTARY: The changes to this section implement the provisions of Public Act 16-26 which authorized the Client Security Fund to be used to make grants-in-aid to the organization administering the program for the use of interest on lawyers' clients' funds accounts pursuant to General Statutes § 51-81c, for the purpose of funding the delivery of legal services to the poor, in addition to its other purposes of reimbursing claims for losses caused by the dishonest conduct of attorneys and for crisis intervention and referral assistance to attorneys admitted in Connecticut who suffer from alcohol or other substance abuse or gambling problems or who have behavioral health problems.

Sec. 2-77. —Review of Status of Fund

The client security fund committee shall periodically analyze the status of the fund, the approved claims and the pending claims, **[**and**]** the cost to the fund of providing crisis intervention and referral assistance to attorneys, and the cost to the fund of funding the delivery of legal services to the poor, to ensure the integrity of the fund for its intended purposes. Based upon the analysis and recommendation of the client security fund committee, the judges of the superior court may increase or decrease the amount of the client security fund fee and the superior court executive committee may fix a maximum amount on reimbursements payable from the fund.

The amount paid from the fund in any calendar year to the chief court administrator for the provision of crisis intervention and referral assistance to attorneys shall not exceed 15.9 percent of the amount received by the fund from payments of the client security fund fee in the prior calendar year. If less than the 15.9 percent maximum amount is paid from the fund in any calendar year for the provision of crisis intervention and referral assistance to attorneys, the remaining amount may not be carried over and added to the amount that may be paid from the fund for that purpose in any other year.

By April 1 of each year, the client security fund committee shall recommend to the chief court administrator the amount of funds available to be paid for making grants-in-aid for the purpose of funding the delivery of legal services to the poor. The chief court administrator shall review the recommendation of the client security fund committee and any other relevant information and determine and advise the client security fund committee of the amount of funds to be used for making grants-in-aid for the purpose of funding the delivery of legal services to the poor.

COMMENTARY: The changes to this section implement the provisions of Public Act 16-26 which authorized the Client Security Fund to be used to make grants-in-aid to the organization administering the program for the use of interest on lawyers' clients' funds accounts pursuant to General Statutes § 51-81c, for the purpose of funding the delivery of legal services to the poor, in addition to its other purposes of reimbursing claims for losses caused by the dishonest conduct of attorneys and for crisis intervention and referral assistance to attorneys

admitted in Connecticut who suffer from alcohol or other substance abuse or gambling problems or who have behavioral health problems.

Sec. 7-11. –Judgments on the Merits—Stripping and Retention

(a) With the exception of actions which affect the title to land and actions which have been disposed of pursuant to Section 7-10, the files in civil, family and juvenile actions in which judgment has been rendered may be stripped and destroyed pursuant to the schedule set forth in subsection (d) below, except that requests relating to discovery, responses and objections thereto may be stripped after the expiration of the appeal period.

(b) When a file is to be stripped, all papers in the file shall be destroyed except:

(1) The complaint, including any amendment thereto, substituted complaint or amended complaint;

(2) All orders of notice, appearances and officers' returns;

(3) All military or other affidavits;

(4) Any cross complaint, third-party complaint, or amendment thereto;

(5) All responsive pleadings;

(6) Any memorandum of decision;

(7) The judgment file or notation of the entry of judgment, and all modifications of judgment;

(8) All executions issued and returned.

(c) Upon the expiration of the stripping date, or at any time if facilities are not available for local retention, the file in any action set forth in subsection (d) may be transferred to the records center or other proper

designated storage area, where it shall be retained for the balance of the retention period. Files in actions concerning dissolution of marriage or civil union, legal separation, or annulment may, upon agreement with officials of the state library, be transferred to the state library at the expiration of their retention period.

(d) The following is a schedule which sets forth when a file may be stripped and the length of time the file shall be retained. The time periods indicated below shall run from the date judgment is rendered, except receivership actions or actions for injunctive relief, which shall run from the date of the termination of the receivership or injunction.

	Type of Case	*Stripping Date*	*Retention Date*
(1)	Administrative appeals		3 years
(2)	Contracts (where money damages are not awarded)	1 year	20 years
(3)	Eminent domain (except as provided in Section 7-12)		10 years
(4)	Family		
	-Dissolution of marriage or civil union, legal separation, annulment and change of name	5 years	75 years
	-Delinquency		Until subject is 25 years of age
	-Family with service needs		Until subject is 25 years of age
	-Termination of parental rights		Permanent
	-Neglect and uncared for		75 years
	-Emancipation of minor		5 years
	-Orders in relief from physical abuse (General Statutes § 46b-15)		5 years
	-Other		75 years

(5)	Family support magistrate matters		75 years
	-Uniform reciprocal enforcement of support		[6 years after youngest child reaches majority age or after activity ceases, whichever is shorter, subject to federal law on filing an amended tax return] 75 years
	-Uniform interstate Family Support Act		[6 years after youngest child reaches majority age or after activity ceases, whichever is shorter, subject to federal law on filing an amended tax return] 75 years
(6)	Landlord/Tenant		
	-Summary process		3 years
	-Housing code enforcement (General Statutes § 47a-14h)		5 years
	-Contracts/Leases (where money damages are not awarded)	1 year	20 years
	-Money damages (except where a satisfaction of judgment has been filed)	1 year	26 years
(7)	Miscellaneous		
	-Bar discipline		50 years
	-Money damages (except where a satisfaction of judgment has been filed)	1 year	26 years
	-Mandamus, habeas corpus, arbitration, petition for new trial, action for an accounting, interpleader		10 years
	-Injunctive relief (where no other relief is requested)		5 years

(8)	Property (except as provided in Section 7-12)	5 years	26 years
(9)	Receivership		10 years
(10)	Small Claims		15 years
(11)	Torts (except as noted below) -Money damages if the judgment was rendered in an action to recover damages for personal injury caused by sexual assault where the party at fault was convicted under General Statutes § 53a-70 or § 53a-70a (except where a satisfaction of judgment has been filed)	1 year	26 years Permanent
(12)	Wills and estates		10 years
(13)	Asset forfeiture (General Statutes § 54-36h)		10 years
(14)	Alcohol and drug commitment (General Statutes § 17a-685)		10 years
(15)	All other civil actions (except as provided in Section 7-12)		75 years

COMMENTARY: The changes to this section make the retention period for UIFSA and URESA cases 75 years to conform the retention of those case types with the retention of other Family Support Magistrate matters.

Sec. 7-18. Hospital, Psychiatric and Medical Records

Hospital, psychiatric and medical records shall not be filed with the clerk unless such records are submitted in a sealed envelope clearly identified with the case caption, the subject's name and **[**the health care provider, institution or facility from which said records were issued**]** the name of the attorney or self-represented party pursuant to Section

7-19 subpoenaing the same. Such records shall be opened only pursuant to court order.

COMMENTARY: The changes to this section make it consistent with General Statutes § 4-104.

AMENDMENTS TO THE CIVIL RULES

Sec. 10-50. —Denials; Special Defenses

No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. Thus, accord and satisfaction, arbitration and award, [coverture,] duress, fraud, illegality not apparent on the face of the pleadings, infancy, that the defendant was non compos mentis, payment (even though nonpayment is alleged by the plaintiff), release, the statute of limitations and res judicata must be specially pleaded, while advantage may be taken, under a simple denial, of such matters as the statute of frauds, or title in a third person to what the plaintiff sues upon or alleges to be the plaintiff's own.

COMMENTARY: The change to this section removes ''coverture'' as a special defense as it is an obsolete vestige of the past.

Sec. 11-20A. Sealing Files or Limiting Disclosure of Documents in Civil Cases

(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.

(b) Except as provided in this section and except as otherwise provided by law, including Section 13-5, the judicial authority shall not order that any files, affidavits, documents, or other materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited.

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

(d) In connection with any order issued pursuant to subsection (c) of this section, the judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. If any findings would reveal information entitled to remain confidential, those findings may be set forth in a sealed portion of the record. The time, date, scope and duration of any such order shall be set forth in a writing signed by the judicial authority which upon issuance the court clerk shall immediately enter in the court file and publish by posting both on the Judicial Branch

website and on a bulletin board adjacent to the clerk's office and accessible to the public. The judicial authority shall order that a transcript of its decision be included in the file or prepare a memorandum setting forth the reasons for its order.

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

(f) (1) A motion to seal the contents of an entire court file shall be placed on the short calendar to be held not less than fifteen days following the filing of the motion, unless the judicial authority otherwise directs, so that notice to the public is given of the time and place of the hearing on the motion and to afford the public an opportunity to be heard on the motion under consideration. The procedures set forth in Sections 7-4B and 7-4C shall be followed in connection with such motion. (2) The judicial authority may issue an order sealing the contents of an entire court file only upon a finding that there is not available a more narrowly tailored method of protecting the overriding interest, such as redaction, sealing a portion of the file or authorizing the use of pseudonyms. The judicial authority shall state in its decision or

order each of the more narrowly tailored methods that was considered and the reason each such method was unavailable or inadequate.

(g) With the exception of any provision of the General Statutes under which the court is authorized to seal or limit the disclosure of files, affidavits, documents, or other materials, whether at a pretrial or trial stage, any person affected by a court order that seals or limits the disclosure of any files, documents or other materials on file with the court or filed in connection with a court proceeding, shall have the right to the review of such order by the filing of a petition for review with the appellate court within seventy-two hours from the issuance of such order. Nothing under this subsection shall operate as a stay of such sealing order. Any party requesting the use of a pseudonym pursuant to this section shall lodge the original documents with the true identity of the party or parties with the clerk of the court in accordance with Sections 7-4B and 7-4C.

(h) (1) Pseudonyms may be used in place of the name of a party or parties only with the prior approval of the judicial authority and only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in knowing the name of the party or parties. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. The judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. If any findings would reveal information entitled to remain confidential, those findings may be set

forth in a sealed portion of the record. The time, date, scope and duration of any such order shall forthwith be reduced to writing and be signed by the judicial authority and be entered by the court clerk in the court file. The judicial authority shall order that a transcript of its decision be included in the file or prepare a memorandum setting forth the reasons for its order. An agreement of the parties that pseudonyms be used shall not constitute a sufficient basis for the issuance of such an order. The authorization of pseudonyms pursuant to this section shall be in place of the names of the parties required by Section 7-4A.

(2) The judicial authority may grant prior to the commencement of the action a temporary ex parte application for permission to use pseudonyms pending a hearing on continuing the use of such pseudonyms to be held not less than fifteen days after the return date of the complaint.

(3) After commencement of the action, a motion for permission to use pseudonyms shall be placed on the short calendar to be held not less than fifteen days following the filing of the motion, unless the judicial authority otherwise directs, so that notice to the public is given of the time and place of the hearing on the motion and to afford the public an opportunity to be heard on the motion under consideration. Leave of the court may be sought to file the motion under seal pending a disposition of the motion by the judicial authority.

(4) Any order allowing the use of a pseudonym in place of the name of a party shall also require the parties to use such pseudonym in all documents filed with the court.

(i) The provisions of this section shall not apply to settlement conferences or negotiations or to documents submitted to the court in connection with such conferences or negotiations. The provisions of this section shall apply to settlement agreements which have been filed with the court or have been incorporated into a judgment of the court.

(j) When placed on a short calendar, motions filed under this rule shall be listed in a separate section titled ''Motions to Seal or Close'' and shall also be listed with the time, date and place of the hearing on the Judicial Branch website. A notice of such motion being placed on the short calendar shall, upon issuance of the short calendar, be posted on a bulletin board adjacent to the clerk's office and accessible to the public.

COMMENTARY: The change to this section clarifies that a party requesting the approval of the judicial authority to use a pseudonym must lodge the original documents identifying the party or parties by name with the clerk of the court.

Sec. 13-3. —Materials Prepared in Anticipation of Litigation; Statements of Parties; Privilege Log

(a) Subject to the provisions of Section 13-4, a party may obtain discovery of documents and tangible things otherwise discoverable under Section 13-2 and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials

when the required showing has been made, the judicial authority shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(b) A party may obtain, without the showing required under this section, discovery of the party's own statement and of any nonprivileged statement of any other party concerning the action or its subject matter.

(c) A party may obtain, without the showing required under this section, discovery of any recording, by film, photograph, video, audio or any other digital or electronic means, of the requesting party and of any recording of any other party concerning the action or the subject matter, thereof, including any transcript of such recording, prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. A party may obtain information identifying any such recording and transcript, if one was created, prior to the deposition of the party who is the subject of the recording; but the person from whom discovery is sought shall not be required to produce the recording or transcript until thirty days after the completion of the deposition of the party who is the subject of the recording or sixty days prior to the date the case is assigned to commence trial, whichever is earlier; except that if a deposition of the party who is the subject of the recording was not taken, the recording and transcript shall be produced sixty days prior to the date the case is assigned to commence trial. If a recording was created within such sixty day period, the recording and transcript must be produced immediately. No such

recording or transcript is required to be identified or produced if neither it nor any part thereof will be introduced into evidence at trial. However, if any such recording or part or transcript thereof is required to be identified or produced, all recordings and transcripts thereof of the subject of the recording party shall be identified and produced, rather than only those recordings, or transcripts or parts thereof that the producing party intends to use or introduce at trial.

(d) When a claim of privilege or work product protection has been asserted pursuant to Sections 13-5, 13-8 or 13-10 in response to a discovery request for documents or electronically stored information, the party asserting the privilege or protection shall provide, within forty-five days from the request of the party serving the discovery, the following information in the form of a privilege log:

(1) The type of document or electronically stored information;

(2) The general subject matter of the document or electronically stored information;

(3) The date of the document or electronically stored information;

(4) The author of the document or electronically stored information;

(5) Each recipient of the document or electronically stored information; and

(6) The nature of the privilege or protection asserted.

The privilege log shall initially be served upon all parties but not filed in court.

If the information called for by one or more of the foregoing categories is itself privileged, it need not be disclosed. However, the existence

of the document and any nonprivileged information called for by the other categories must be disclosed.

A privilege log must be prepared with respect to all documents and electronically stored information withheld on the basis of a claim of privilege or work product protection, except for the following: written or electronic communications after commencement of the action between a party and the firm or lawyer appearing for the party in the action or as otherwise ordered by the judicial authority.

COMMENTARY: The change to this section is consistent with the change to Section 13-8 regarding the withholding of information based upon an assertion of privilege or work product protection.

Sec. 13-6. Interrogatories; In General

(a) In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sections 10-12 through 10-17 written interrogatories, which may be in electronic format, upon any other party to be answered by the party served. Written interrogatories may be served upon any party without leave of the judicial authority at any time after the return day. Except as provided in subsection (d) or where the interrogatories are served electronically as provided in Section 10-13 and in a format that allows the recipient to electronically insert the answers in the transmitted document, the party serving interrogatories shall leave sufficient space following each interrogatory in which the party to whom the interrogatories are directed can insert the answer. In the event that an answer requires more space than that provided on interrogato-

ries that were not served electronically and in a format that allows the recipient to electronically insert the answers in the transmitted document, the answer shall be continued on a separate sheet of paper which shall be attached to the completed answers.

(b) Interrogatories may relate to any matters which can be inquired into under Sections 13-2 through 13-5 and the answers may be used at trial to the extent permitted by the rules of evidence. In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, or in actions claiming a loss of consortium or uninsured/underinsured motorist coverage benefits, the interrogatories shall be limited to those set forth in Forms 201, 202, 203, 208, 210, [and/or] 212, 213 and/or 214 of the rules of practice, unless upon motion, the judicial authority determines that such interrogatories are inappropriate or inadequate in the particular action. These forms are set forth in the Appendix of Forms in this volume. Unless the judicial authority orders otherwise, the frequency of use of interrogatories in all actions except those for which interrogatories have been set forth in Forms 201, 202, 203, 208, 210, [and/or] 212, 213 and/or 214 of the rules of practice is not limited.

(c) The standard interrogatories are intended to address discovery needs in most cases in which their use is mandated, but they do not preclude any party from moving for permission to serve such additional discovery as may be necessary in any particular case.

(d) In lieu of serving the interrogatories set forth in Forms 201, 202, 203, 208, 210, [and/or] 212, 213 and/or 214 of the rules of practice

on a party who is represented by counsel, the moving party may serve on such party a notice of interrogatories, which shall not include the actual interrogatories to be answered, but shall instead set forth the number of the Practice Book form containing such interrogatories and the name of the party to whom the interrogatories are directed. The party to whom such notice is directed shall in his or her response set forth each interrogatory immediately followed by that party's answer thereto.

(e) The party serving interrogatories or the notice of interrogatories shall not file them with the court.

(f) Unless leave of court is granted, the instructions to Forms 201 through 203 are to be used for all nonstandard interrogatories.

COMMENTARY: This section now includes references to standard interrogatories in cases claiming loss of consortium or uninsured/underinsured motorist coverage benefits. Standard interrogatories for loss of consortium were approved effective January 1, 2017.

Sec. 13-8. —Objections to Interrogatories

(a) The party objecting to any interrogatory shall: (1) set forth each interrogatory **[**immediately followed by reasons for the objection**]**; (2) specifically state the reasons for the objection; and (3) state whether any responsive information is being withheld on the basis of the stated objection. Objections shall be: (1) governed by the provisions of Sections 13-2 through 13-5; (2) signed by the attorney or self-represented party making them; and **[**(2)**]** (3) filed with the court pursuant to Section 13-7. No objection may be filed with respect to interrogatories which have been set forth in Forms 201, 202, 203, 208, 210, **[**and/or**]** 212,

213 and or 214 of the rules of practice for use in connection with Section 13-6.

(b) To the extent a party withholds responsive information based on an assertion of a claim of privilege or work product protection, the party must file an objection in compliance with the provisions of subsection (a) of this section and comply with the provisions set forth in subsection (d) of Section 13-3.

[(b)**]** (c) No objections to interrogatories shall be placed on the short calendar list until an affidavit by either counsel is filed certifying that bona fide attempts have been made to resolve the differences concerning the subject matter of the objection and that counsel have been unable to reach an agreement. The affidavit shall set forth the date of the objection, the name of the party who filed the objection and the name of the party to whom the objection was addressed. The affidavit shall also recite the date, time and place of any conference held to resolve the differences and the names of all persons participating therein or, if no conference has been held, the reasons for the failure to hold such a conference. If any objection to an interrogatory is overruled, the objecting party shall answer the interrogatory, and serve the answer within twenty days after the judicial authority ruling unless otherwise ordered by the judicial authority.

[(c)**]** (d) An interrogatory otherwise proper is not objectionable merely because it involves more than one fact or relates to the application of law to facts.

COMMENTARY: The revisions to this section on objections to interrogatories incorporate the language regarding a specific state-

ment of the reasons for an objection and a statement as to whether responsive information is being withheld on the basis of an objection that was added to Section 13-10 on objections to production. In addition, a statement that objections are governed by the provisions of Sections 13-2 through 13-5 has been added to this section. Finally, this section now includes references to standardized interrogatories in cases claiming a loss of consortium or uninsured/underinsured motorist coverage benefits and adds language to clarify that any party withholding information based on an assertion of privilege or work product protection must comply with subsection (a) of this section and Section 13-3 (d).

Sec. 13-9. Requests for Production, Inspection and Examination; In General

(a) In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sections 10-12 through 10-17 upon any other party a request to afford the party submitting the request the opportunity to inspect, copy, photograph or otherwise reproduce designated documents or to inspect and copy, test or sample any tangible things in the possession, custody or control of the party upon whom the request is served or to permit entry upon designated land or other property for the purpose of inspection, measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon. Such requests will be governed by the provisions of Sections 13-2 through 13-5. In all personal injury actions alleging liability based

on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, or in actions claiming a loss of consortium or uninsured/underinsured motorist coverage benefits, the requests for production shall be limited to those set forth in Forms 204, 205, 206, 209, [and/or] 211 , 215 and/or 216 of the rules of practice, unless, upon motion, the judicial authority determines that such requests for production are inappropriate or inadequate in the particular action. These forms are set forth in the Appendix of Forms in this volume.

(b) The standard requests for production are intended to address discovery needs in most cases in which their use is mandated, but they do not preclude any party from moving for permission to serve such additional discovery as may be necessary in any particular case.

(c) Requests for production may be served upon any party without leave of court at any time after the return day. In lieu of serving the requests for production set forth in Forms 204, 205, 206, 209, [and/or] 211, 215 and/or 216 of the rules of practice on a party who is represented by counsel, the moving party may serve on such party a notice of requests for production, which shall not include the actual requests, but shall instead set forth the number of the Practice Book form containing such requests and the name of the party to whom the requests are directed.

(d) The request shall clearly designate the items to be inspected either individually or by category. The request or, if applicable, the notice of requests for production shall specify a reasonable time, place and manner of making the inspection. Unless the judicial authority

orders otherwise, the frequency of use of requests for production in all actions except those for which requests for production have been set forth in Forms 204, 205, 206, 209, [and/or] 211, 215 and/or 216 of the rules of practice is not limited.

(e) If information has been electronically stored, and if a request for production does not specify a form for producing a type of electronically stored information, the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable. A party need not produce the same electronically stored information in more than one form.

(f) The party serving such request or notice of requests for production shall not file it with the court.

(g) Unless leave of court is granted, the instructions to Forms 204 through 206 of the rules of practice are to be used for all nonstandard requests for production.

(h) A party seeking the production of a written authorization in compliance with the Health Insurance Portability and Accountability Act to inspect and make copies of protected health information, or a written authorization in compliance with the Public Health Service Act to inspect and make copies of alcohol and drug records that are protected by that act, shall file a motion pursuant to Section 13-11A. A motion need not be filed to obtain such authorization in actions to which Forms 204, [and] 205 and 216 of the rules of practice apply.

COMMENTARY: This section now includes references to standardized requests for production in cases claiming a loss of consortium or uninsured/underinsured motorist coverage benefits.

Sec. 13-10. —Responses to Requests for Production; Objections

(a) The party to whom the request is directed or such party's attorney shall serve a written response, which may be in electronic format, within sixty days after the date of certification of service, in accordance with Sections 10-12 through 10-17, of the request or, if applicable, the notice of requests for production on the responding party or within such shorter or longer time as the judicial authority may allow, unless:

(1) Counsel and/or self-represented parties file with the court a written stipulation extending the time within which responses may be served; or

(2) Upon motion, the court allows a longer time; or

(3) Objections to the requests for production and the reasons therefor are filed and served within the sixty day period.

(b) All responses: (1) shall repeat immediately before the response the request for production being responded to; and (2) shall state with respect to each item or category that inspection and related activities will be permitted as requested, unless the request or any part thereof is objected to.

(c) Where a request calling for submission of copies of documents is not objected to, the party responding to the request shall produce those copies with the response served upon all parties.

(d) Objection by a party to certain parts of a request shall not relieve that party of the obligation to respond to those portions to which that party has not objected within the sixty day period.

(e) A party objecting to one or more of the requests for production shall file an objection in accordance with Section 13-10 (f).

(f) A party who objects to any request or portion of a request shall: (1) set forth the request objected to; (2) specifically state the reasons for the objection; and (3) state whether any responsive materials are being withheld on the basis of the stated objection**[**; and (4) sign the objections and file them with the court**]**. Objections shall be: (1) governed by the provisions of Sections 13-2 through 13-5; (2) signed by the attorney or self-represented party making them; and (3) filed with the court.

(g) To the extent a party withholds any responsive material based on an assertion of a claim of privilege or work product protection, the party must file an objection in compliance with the provisions of subsection (f) of this section and comply with the provisions set forth in subsection (d) of Section 13-3.

[(g)**]** (h) No objection may be filed with respect to requests for production set forth in Forms 204, 205, 206, 209, **[**and/or**]** 211, 215 and/or 216 of the rules of practice for use in connection with Section 13-9.

[(h)**]** (i) No objection to any request for production shall be placed on the short calendar list until an affidavit by counsel or self-represented parties is filed certifying that they have made good faith attempts to resolve the objection and that counsel and/or self-represented parties have been unable to reach an agreement. The affidavit shall set forth: (1) the date of the objection; (2) the name of the party who filed the objection and to whom the objection was addressed; (3) the date, time

and place of any conference held to resolve the differences; and (4) the names of all conference participants. If no conference has been held, the affidavit shall also set forth the reasons for the failure to hold such a conference.

[(i)**]** (j) If an objection to any part of a request for production is overruled, the objecting party shall comply with the request at a time set by the judicial authority.

[(j)**]** (k) The party serving the request or the notice of request for production may move for an order under Section 13-14 with respect to any failure to respond by the party to whom the request or notice is addressed.

COMMENTARY: A statement that objections to requests for production are governed by the provisions of Sections 13-2 through 13-5 has been added to subsection (f) of this section. Other minor changes have been made to the existing provisions in the subsection to accommodate the additional language. Finally, this section now includes references to standardized requests for production in cases claiming a loss of consortium or uninsured/underinsured coverage benefits and adds language to clarify that any party withholding responsive material based on an assertion of privilege or work product protection must comply with subsection (f) of this section and Section 13-3 (d).

Sec. 13-15. Continuing Duty to Disclose

If, subsequent to compliance with any request or order for discovery, including partial compliance subject to an objection or made notwithstanding an objection, and prior to or during trial, a party discovers additional or new material or information previously requested and

ordered subject to discovery or inspection or discovers that the prior compliance was totally or partially incorrect or, though correct when made, is no longer true and the circumstances are such that a failure to amend the compliance is in substance a knowing concealment, that party shall promptly notify the other party, or the other party's attorney, and file and serve in accordance with Sections 10-12 through 10-17 a supplemental or corrected compliance.

COMMENTARY: The change to this section clarifies that parties have a continuing duty to disclose even if there has been only partial compliance subject to an objection or compliance notwithstanding an objection.

Sec. 17-44. Summary Judgments; Scope of Remedy

In any action, including administrative appeals which are enumerated in Section 14-7(c), any party may move for a summary judgment as to any claim or defense as a matter of right at any time if no scheduling order exists and the case has not been assigned for trial. If a scheduling order has been entered by the court, either party may move for summary judgment as to any claim or defense as a matter of right by the time specified in the scheduling order. If no scheduling order exists but the case has been assigned for trial, a party must move for permission of the judicial authority to file a motion for summary judgment. These rules shall be applicable to counterclaims and cross complaints, so that any party may move for summary judgment upon any counterclaim or cross complaint as if it were an independent action. The pendency of a motion for summary judgment shall delay trial only at the discretion of the trial judge.

COMMENTARY: The change to this section clarifies that the type of administrative appeals in which motions for summary judgment are appropriate are those in which parties are entitled to a trial de novo.

AMENDMENTS TO THE FAMILY RULES

Sec. 25-12. Motion to Dismiss

(a) Any defendant, wishing to assert grounds to dismiss the action under Section 25-13 (2), (3)**[**,**]** or (4) **[**or (5)**]** must do so by filing a motion to dismiss within thirty days of the filing of an appearance.

(b) Any claim based on Section 25-13 (2), (3)**[**,**]** or (4) **[**or (5)**]** is waived if not raised by a motion to dismiss filed in the sequence provided in Section 25-11, within the time provided in this section.

COMMENTARY: General Statutes § 51-351, which became effective July 1, 1978, provides that ''[n]o cause shall fail on the ground that it has been made returnable to an improper location.'' Since that statute became effective, the courts have found that the appropriate remedy for improper venue is the transfer of the case to the proper venue by the court upon its own motion, or upon motion or agreement of the parties. The revision to this section, therefore, makes it clear that improper venue is not waivable because it is not a ground for filing a motion to dismiss.

Sec. 25-13. —Grounds on Motion to Dismiss

(a) The motion to dismiss shall be used to assert (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) **[**improper venue, (4)**]** insufficiency of process and **[**(5)**]** (4) insufficiency of service of process. This motion shall always be filed with a

supporting memorandum of law and, where appropriate, with supporting affidavits as to facts not apparent on the record.

(b) If an adverse party objects to this motion he or she shall, at least five days before the motion is to be considered on the short calendar, file and serve in accordance with Sections 10-12 through 10-17 a memorandum of law and, where appropriate, supporting affidavits as to facts not apparent on the record.

COMMENTARY: General Statutes § 51-351, which became effective July 1, 1978, provides that ''[n]o cause shall fail on the ground that it has been made returnable to an improper location.'' Since that statute became effective, the courts have found that the appropriate remedy for improper venue is the transfer of the case to the proper venue by the court upon its own motion, or upon motion or agreement of the parties. The revision to this section, therefore, removes improper venue as grounds for filing a motion to dismiss.

Sec. 25-60. Evaluations, Studies, Family Services Mediation Reports and Family Services Conflict Resolution Reports

(a) Whenever, in any family matter, an evaluation or study has been ordered pursuant to Section 25-60A or Section 25-61, or the Court Support Services Division Family Services Unit has been ordered to conduct mediation or to hold a conflict resolution conference pursuant to Section 25-61, the case shall not be disposed of until the report has been filed as hereinafter provided, and counsel and the parties have had a reasonable opportunity to examine it prior to the time the case is to be heard, unless the judicial authority orders that the case be heard before the report is filed.

(b) Any report of an evaluation or study pursuant to Section 25-60A or Section 25-61, or any mediation report or conflict resolution conference report filed by the Family Services Unit as a result of a referral of the matter to such unit, shall be filed with the clerk, who will seal such report, and shall be provided by the filer to counsel of record, guardians ad litem and self-represented parties unless otherwise ordered by the judicial authority. Any such report shall be available for inspection to counsel of record, guardians ad litem, and the parties to the action, unless otherwise ordered by the judicial authority.

(c) Any report of an evaluation or study prepared pursuant to Section 25-60A or Section 25-61 shall be admissible in evidence provided the author of the report is available for cross-examination.

(d) The file compiled by the Family Services Unit in the course of preparing any mediation report or conflict resolution conference report shall not be available for inspection or copying unless otherwise ordered by the judicial authority. The file compiled by the Family Services Unit in the course of preparing an evaluation or study conducted pursuant to Section 25-61 that has been completed and filed with the clerk in accordance with subsection (b) shall be available for inspection only to counsel of record, guardians ad litem, and the parties to the action to the extent permitted by any applicable authorization for release of information; and further provided that copies of documents, notes, information or other material in the file shall only be provided to such individuals if they make the request in writing and certify that it is requested for legitimate purposes of trial preparation and/or trial proceedings in the case in which the evaluation or study was filed.

For purposes of this section, the word ''file'' shall include any documents, notes, information or other material retained by the Family Services Unit in any format.

(e) Any information or copies of the file disclosed pursuant to this section shall not be further disclosed unless otherwise ordered by the judicial authority or as otherwise authorized in this section or as otherwise required by law.

COMMENTARY: The changes to this section clarify what information from Family Services files compiled in connection with the reports, evaluations and studies under this section are subject to inspection and copying and by whom, to whom those copies can be provided, and for what purpose can they be requested. The changes also provide that any information or copies disclosed may not be further disclosed except as otherwise ordered, authorized or required.

AMENDMENTS TO THE FAMILY SUPPORT MAGISTRATE RULES

Sec. 25a-1. Family Support Magistrate Matters; Procedure

(a) In addition to the specific procedures set out in this chapter, the following provisions shall govern the practice and procedure in all family support magistrate matters, whether heard by a family support magistrate or any other judicial authority. The term ''judicial authority'' and the word ''judge'' as used in the rules referenced in this section shall include family support magistrates where applicable, unless specifically otherwise designated. The word ''complaint'' as used in the rules referenced in this section shall include petitions and applications filed in family support magistrate matters.

(1) General Provisions:

(A) Chapters 1, 2, 5 and 6, in their entirety;

(B) Chapter 3, in its entirety except subsection (b) of Section 3-2 and Section 3-9;

(C) Chapter 4, in its entirety except subsections (a) and (b) of Section 4-2;

(D) Chapter 7, **[**Section 7-19**]** in its entirety.

(2) Procedures in Civil Matters:

(A) Chapter 8, Sections 8-1 and 8-2;

(B) Chapter 9, Sections 9-1 and 9-18 through 9-20;

(C) Chapter 10, Sections 10-1, 10-3 through 10-5, 10-7, 10-10, 10-12 through 10-14, 10-17, 10-26, 10-28, subsections (a) and (c) of Section 10-30, 10-31 through 10-34, subsection (b) of Section 10-39, 10-40, 10-43 through 10-45 and 10-59 through 10-68;

(D) Chapter 11, Sections 11-1 through 11-8, 11-10 through 11-12 and 11-19;

(E) Chapter 12, in its entirety;

(F) Chapter 13, Sections 13-1 through 13-3, 13-5, 13-8, 13-10 except subsection (c), 13-11A, 13-21 except subdivision (13) of subsection (a), subsections (a), (e), (f), (g) and (h) of Sections 13-27, 13-28 and 13-30 through 13-32;

(G) Chapter 14, Sections 14-1 through 14-3, 14-9, 14-15, 14-17, 14-18, 14-24 and 14-25;

(H) Chapter 15, Sections 15-3, 15-5, 15-7 and 15-8;

(I) Chapter 17, Sections 17-1, 17-4, 17-5, 17-19, 17-21, subsection (a) of Sections 17-33 and 17-41;

(J) Chapter 18, Section 18-19;

(K) Chapter 19, Section 19-19;

(L) Chapter 20, Sections 20-1 and 20-3;

(M) Chapter 23, Sections 23-20, 23-67 and 23-68.

(3) Procedure in Family Matters:

Chapter 25, Sections 25-1, 25-9, 25-12 through 25-22, 25-27, 25-33, 25-48, 25-54, 25-59, 25-59A, 25-61, 25-62 through 25-64 and 25-68.

(b) Any pleading or motion filed in a family support magistrate matter shall indicate, in the lower right hand corner of the first page of the document, that it is a family support magistrate matter.

(c) Family support magistrate matters shall be placed on the family support magistrate matters list for hearing and determination.

(d) Family support magistrate list matters shall be assigned automatically by the clerk without the necessity of a written claim. No such matters shall be so assigned unless filed at least five days before the opening of court on the day the list is to be called.

(e) Family support magistrate list matters shall not be continued except by order of a judicial authority.

COMMENTARY: The change to this section makes Chapter 7 of the Practice Book, in its entirety, applicable to Family Support Magistrate matters.

Sec. 25a-23. Answers to Interrogatories

(a) Any such interrogatories shall be answered under oath by the party to whom directed and such answers shall not be filed with the court but shall be served within **[**thirty**]** sixty days after the date of

certification of service, in accordance with Sections 10-12, 10-14 and 10-17, of the interrogatories or, if applicable, the notice of interrogatories on the answering party, unless:

(1) Counsel file with the court a written stipulation extending the time within which answers or objections may be served; or

(2) The party to whom the interrogatories are directed, after service in accordance with Sections 10-12,10-14 and 10-17, files a request for extension of time, for not more than thirty days, within the initial **[**thirty**]** sixty day period. Such request shall contain a certification by the requesting party that the case has not been assigned for trial. Such request shall be deemed to have been automatically granted by the judicial authority on the date of filing, unless within ten days of such filing the party who has served the interrogatories or the notice of interrogatories shall file objection thereto. A party shall be entitled to one such request for each set of interrogatories directed to that party; or

(3) Upon motion, the judicial authority allows a longer time.

(b) The party answering interrogatories shall attach a cover sheet to the answers. The cover sheet shall comply with Sections 4-1 and 4-2 and shall state that the party has answered all of the interrogatories or shall set forth those interrogatories to which the party objects and the reasons for objection. The cover sheet and the answers shall not be filed with the court unless the responding party objects to one or more interrogatories, in which case only the cover sheet shall be so filed.

(c) All answers to interrogatories shall repeat immediately before each answer the interrogatory being answered. Answers are to be signed by the person making them. The party serving the interrogatories or the notice of interrogatories may move for an order under Section 25a-25 with respect to any failure to answer.

COMMENTARY: The change to this section increases the time for responding to interrogatories from 30 to 60 days consistent with the rules applicable to civil and family matters and Practice Book Form 207.

AMENDMENTS TO THE JUVENILE RULES

Sec. 30-5. Detention Time Limitations

(a) No child shall be held in detention for more than twenty-four hours, excluding Saturdays, Sundays, and holidays, unless (1) a delinquency petition or information alleging a delinquent **[**conduct**]** act has been filed **[**or an affidavit is filed by a police officer, probation officer or prosecutor setting forth the facts upon which they believe that a child in detention is a delinquent or nondelinquent child whose return is sought by another jurisdiction in accordance with the Interstate Compact on Juveniles,**]** and (2) an order for such continued detention has been signed by the judicial authority following a hearing as provided by subsection (b) of this section or a waiver as provided by Section 30-8.

(b) A hearing to determine probable cause and the need for further detention shall be held no later than the next business day following the arrest. **[**However, a judicial finding of probable cause must be made within forty-eight hours of arrest, including Saturdays, Sundays

and holidays. If there is no such finding of said probable cause within forty-eight hours of the arrest, the child shall be released from detention subject to an information and subsequent arrest by warrant or take into custody order.**]**

(c) If a nondelinquent child is being held for another jurisdiction in accordance with the Interstate Compact on Juveniles, following the initial hearing as provided by subsection (b) of this section, that child shall be held not more than ninety days and shall be held in a secure facility, as defined by rules promulgated in accordance with the Compact, other than a locked, state operated detention facility.

COMMENTARY: The amendments to this section conform to General Statutes § 46b-133, as amended by Section 1 of Public Act 16-147.

Sec. 30-6. Basis for Detention

No child **[**shall**]** may be held in detention unless **[**it appears from**]** a judge of the superior court determines, based on the available facts that there is probable cause to believe that the child **[**is responsible for**]** has committed the delinquent acts alleged, that there is no less restrictive alternative available and that there is **[**(1) a strong probability that the child will run away prior to the court hearing or disposition, or (2) a strong probability that the child will commit or attempt to commit other offenses injurious to the child or the community prior to the court disposition, or (3) probable cause to believe that the child's continued residence in the child's home pending disposition poses a risk to the child or the community because of the serious and dangerous nature of the act or acts the child is alleged to have committed, (4) a need to hold the child for another jurisdiction, (5) a need to hold the child

to assure the child's appearance before the court, in view of the child's previous failure to respond to the court process, or (6) the child has violated one or more of the conditions of a suspended detention order.**]** (1) probable cause to believe that the child will pose a risk to public safety if released to the community prior to the court hearing or disposition, (2) a need to hold the child in order to ensure the child's appearance before the court, as demonstrated by the child's previous failure to respond to the court process, or (3) a need to hold the child for another jurisdiction. The court in exercising its discretion to detain under General Statutes § 46b-133 (e) may consider as an alternative to detention a suspended detention order with graduated sanctions **[**as an alternative to detention in accordance with graduated sanctions procedures established**]** based upon a detention risk assessment for such child developed by the judicial branch.

COMMENTARY: The amendments to this section conform to General Statutes § 46b-133, as amended by Section 1 of Public Act 16-147.

Sec. 30-7. Place of Detention Hearings

The initial detention hearing **[**may be conducted**]** shall be in the superior court for juvenile matters **[**at the detention facility where the child is held**]** where the child resides if the residence of the child can be determined, and, thereafter, detention hearings shall be held at the superior court for juvenile matters of appropriate venue.

COMMENTARY: The amendments to this section conform to General Statutes § 46b-133, as amended by Section 1 of Public Act 16-147.

Sec. 30-8. Initial Order for Detention; Waiver of Hearing

Such initial order of detention may be signed without a hearing only if there is a written waiver of the detention hearing by the child and the child's attorney and there is a finding by the judicial authority that the circumstances outlined in Section 30-6 pertain to the child in question. An order of detention entered without a hearing shall authorize the detention of the child for a period not to exceed **[**ten**]** seven days, including the date of admission, or until the dispositional hearing is held, whichever is shorter, and may further authorize the detention superintendent or a designated representative to release the child to the custody of a parent, guardian or some other suitable person, with or without conditions of release, if detention is no longer necessary, except that no child shall be released from detention who is alleged to have committed a serious juvenile offense except by order of a judicial authority of the superior court. Such an ex parte order of detention shall **[**not**]** be renewable **[**without**]** only at a detention hearing before the judicial authority for a period that does not exceed seven days or until the dispositional hearing is held, whichever is shorter.

COMMENTARY: The amendments to this section conform to General Statutes § 46b-133, as amended by Section 1 of Public Act 16-147.

Sec. 30-10. Orders of a Judicial Authority after Initial Detention Hearing

(a) At the conclusion of the initial detention hearing, the judicial authority shall issue an order for detention on finding probable cause to believe that the child has committed a delinquent act and that at least one of the factors outlined in Section 30-6 applies to the child.

(b) If the child is placed in detention, such order for detention shall be for a period not to exceed **[**fifteen**]** seven days, including the date of admission, or until the dispositional hearing is held, whichever is the shorter period, unless, following a further detention review hearing, the order is renewed for a period that does not exceed seven days or until the dispositional hearing is held, whichever is shorter. Such detention review hearing may not be waived.

(c) If the child is not placed in detention but released on a suspended order of detention on conditions, such suspended order of detention shall continue to the dispositional hearing or until further order of the judicial authority. Said suspended order of detention may be reviewed by the judicial authority every **[**fifteen**]** seven days. Upon a finding of probable cause that the child has violated any condition, a judicial authority may issue a take into custody order or order such child to appear in court for a hearing on revocation of the suspended order of detention. Such an order to appear shall be served upon the child in accordance with General Statutes § 46b-128 (b), or, if the child is represented, by serving the order to appear upon the child's counsel, who shall notify the child of the order and the hearing date. After a hearing and upon a finding that the child has violated reasonable conditions imposed on release, the judicial authority may impose different or additional conditions of release or may remand the child to detention.

(d) In conjunction with any order of release from detention the judicial authority may, in accordance with General Statutes § 46b-133 (g), order the child to participate in a program of periodic alcohol or drug

testing and treatment as a condition of such release. The results of any such alcohol or drug test shall be admissible only for the purposes of enforcing the conditions of release from detention.

COMMENTARY: The amendments to this section conform to General Statutes § 46b-133, as amended by Section 1 of Public Act 16-147.

Sec. 30-11. Detention after Dispositional Hearing

While awaiting implementation of the judicial authority's order in a delinquency case, a child may be held in detention subsequent to the dispositional hearing, provided a hearing to review the circumstances and conditions of such detention order shall be conducted every **[**fifteen**]** seven days and such hearing may not be waived.

COMMENTARY: The amendments to this section conform to General Statutes § 46b-133, as amended by Section 1 of Public Act 16-147.

Sec. 31a-13. Take into Custody Order

(a) Upon written application in a delinquency proceeding, a take into custody order may be issued by the judicial authority:

(1) Upon a finding of probable cause to believe that the child is responsible for: (i) a delinquent act, including violation of court orders of probation or the failure of the child charged with a delinquent act, duly notified, to attend a pretrial, probation or evaluation appointment, or (ii) for failure to comply with any duly warned condition of a suspended order of detention. The judicial authority also must find at the time it issues a take into custody order that a ground for detention pursuant to Section 30-6 exists before issuing the order.

(2) For failure to appear in court in response to a delinquency petition or summons served in hand or to a direct notice previously provided in court.

(b) Any application for a take into custody order must be supported by a sworn statement alleging facts to substantiate probable cause, and where applicable, a petition or information charging a delinquent act.

(c) Any child detained under a take into custody order is subject to Sections 30-1A through 30-11.

COMMENTARY: The amendment to this section standardizes the manner in which a request should be made to detain a child.

Sec. 32a-3. Standards of Proof

(a) The standard of proof applied in a neglect, uncared for or dependency proceeding is a fair preponderance of the evidence.

(b) The standard of proof applied in a decision to terminate parental rights, **[**or**]** a finding that efforts to reunify a parent with a child or youth are no longer appropriate, or permanent legal guardianship is clear and convincing evidence.

(c) Any Indian child or youth custody proceedings, except delinquency, involving removal of an Indian child or youth from a parent or Indian custodian for placement shall, in addition, comply with the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq.

COMMENTARY: The amendments to this section set forth the standard of proof as to permanent legal guardianship and conforms to General Statutes § 46b-129.

Sec. 34a-10. Grounds of Motion to Dismiss

(a) The motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) **[**improper venue; (4)**]** insufficiency of process; and **[**(5)**]** (4) insufficiency of service of process. A motion to dismiss shall always be filed with a supporting memorandum of law, and where appropriate, with supporting affidavits as to facts not apparent on the record.

(b) Any adverse party who objects to a motion to dismiss shall, at least five days before the motion is to be considered on the short calendar, file and serve in accordance with Sections 10-12 (a) and (c), 10-13, 10-14 and 10-17 a memorandum of law and, where appropriate, supporting affidavits as to facts not apparent on the record.

COMMENTARY: General Statutes § 51-351, which became effective July 1, 1978, provides that ''[n]o cause shall fail on the ground that it has been made returnable to an improper location.'' Since that statute became effective, the courts have found that the appropriate remedy for improper venue is the transfer of the case to the proper venue by the court upon its own motion, or upon motion or agreement of the parties. The revision to this section, therefore, removes improper venue as grounds for filing a motion to dismiss.

Sec. 34a-11. Waiver Based on Certain Grounds

Any claim of lack of jurisdiction over the person, **[**improper venue,**]** insufficiency of process, or insufficiency of service of process is waived if not raised by a motion to dismiss filed in the sequence provided in Sections 34a-6 and 34a-7 and within the time provided by Section 34a-9.

COMMENTARY: General Statutes § 51-351, which became effective July 1, 1978, provides that ''[n]o cause shall fail on the ground that it has been made returnable to an improper location.'' Since that statute became effective, the courts have found that the appropriate remedy for improper venue is the transfer of the case to the proper venue by the court upon its own motion, or upon motion or agreement of the parties. The revision to this section, therefore, makes it clear that improper venue is not waivable because it is not a ground for filing a motion to dismiss.

AMENDMENTS TO THE CRIMINAL RULES

Sec. 43-33. Appointment of Initial Counsel for Appeal by Indigent Defendant

(a) An indigent defendant who wishes to prosecute his or her appeal may apply to the court from which the appeal is taken for the appointment of counsel to prosecute the defendant's appeal and for a waiver of fees and costs, pursuant to Sections 63-7 and 44-1 through 44-5.

(b) The application for a waiver of costs and fees must be sent for investigation of the applicant's indigence to the public defender's office in the court from which the appeal is taken. The judicial authority shall assign the application for hearing within twenty days after filing unless otherwise ordered by the judicial authority for good cause shown. At least ten days before the hearing, the clerk's office shall notify in writing trial counsel, the state's attorney, the trial public defender's office to which the application had been sent for investigation and the chief of legal services of the public defender's office, of the date of such hearing. The lack of timely notification to any of the above parties

shall result in a continuance of the hearing until proper and timely notification has been completed.

(c) The application for the appointment of counsel to prosecute the defendant's appeal shall be assigned to the same date and hearing as the application for waiver of fees, costs and expenses, and the judicial authority shall decide both applications at the same time. If trial counsel is not to be the assigned appellate counsel, the judicial authority shall inform and order trial counsel to cooperate fully with appellate counsel. If the chief of legal services of the public defender's office is to be assigned as appellate counsel, unless otherwise ordered by the court, trial counsel shall be deemed to have ''cooperated fully'' if counsel has delivered to the chief of legal services: a complete appellate worksheet, which shall be provided by the chief of legal services; and an electronic copy of trial counsel's file **[**or a copy thereof**]**. Failure to fully cooperate with appellate counsel will result in a short continuance of the applications for appellate counsel and for the waiver of fees, costs and expenses until cooperation is completed, or, if full cooperation is not completed within a reasonable time, sanctions against trial counsel may be imposed.

(d) The judicial authority shall act promptly on the applications following the hearing. Upon determination by the judicial authority that a defendant in a criminal case is indigent, the court to which the fees required by statute or rule are to be paid may (1) waive payment by the defendant of fees specified by statute and of taxable costs, and waive the requirement of Sec. 61-6 concerning the furnishing of security for costs upon appeal, (2) order that the necessary expenses of

prosecuting the appeal be paid by the state, and (3) appoint appellate counsel and permit the withdrawal of the trial attorney's appearance provided the judicial authority is satisfied that that attorney has cooperated fully with appellate counsel in the preparation of the defendant's appeal.

COMMENTARY: The changes to this section require that unless otherwise ordered by the court, if Public Defender Services has been appointed as appellate counsel, trial counsel must provide to appellate counsel an electronic copy of trial counsel's file.

Sec. 43-34. Attorney's Finding That Appeal is Wholly Frivolous; Request by Initial Counsel to Withdraw

When the defendant is represented at trial by the public defender or has counsel appointed to prosecute the appeal under the provisions of Section 43-33 and such public defender or counsel, after a conscientious examination of the case, finds that such an appeal would be wholly frivolous, **[**he or she**]** counsel shall advise the presiding judge **[**and request permission**]** by filing a motion for leave to withdraw from the case.

COMMENTARY: Sections 43-34 through 43-36 prescribe the procedure to follow when a public defender or appointed counsel concludes that an appeal would be wholly frivolous and implement the holding in *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 2094 (1967) and *State* v. *Pascucci*, 161 Conn. 382, 288 A.2d 408 (1971). The changes to these sections standardize the language among the rules pertaining to motions to withdraw by appointed counsel and clarify the filing procedures to follow in criminal matters.

Sec. 43-35. –Submission of [Brief] Memorandum of Law

(a) At the time such **[**request is made**]** motion for leave to withdraw is filed, counsel shall submit to the presiding judge a **[**brief which refers to**]** memorandum of law outlining anything in the record that might arguably support the appeal and the factual and legal basis for the conclusion that an appeal would be wholly frivolous. **[**A copy of such brief shall be provided to the defendant, and the defendant shall be allowed a reasonable time to raise, in writing, additional points in support of the appeal.**]**

(b) Any motion for leave to withdraw and supporting memorandum of law shall be filed under seal and provided to the defendant. Counsel shall serve opposing counsel with notice that a motion for leave to withdraw has been filed but shall not serve opposing counsel with a copy of the motion or any supporting memorandum of law. The defendant shall have thirty days from the date the motion and supporting memorandum are filed to file a response with the court.

COMMENTARY: Sections 43-34 through 43-36 prescribe the procedure to follow when a public defender or appointed counsel concludes that an appeal would be wholly frivolous and implement the holding in *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 2094 (1967) and *State* v. *Pascucci*, 161 Conn. 382, 288 A.2d 408 (1971). The changes to these sections standardize the language among the rules pertaining to motions to withdraw by appointed counsel and clarify the filing procedures to follow in criminal matters.

Sec. 43-36. –Finding That Appeal is Frivolous

The presiding judge shall fully examine **[**briefs**]** memorandum of law of counsel and **[**of**]** the defendant, **[**and shall review the transcript of the trial**]** together with any relevant portions of the record and transcript of the trial. If, after such examination, the presiding judge concludes that the defendant's appeal is wholly frivolous, such judge may grant counsel's motion to withdraw and **[**refuse to appoint new counsel**]** permit the defendant to proceed as a self-represented party. **[**Before refusing to appoint new counsel, t**]**The presiding judge shall **[**make a finding**]** file a memorandum setting forth the basis for the finding that the appeal is wholly frivolous **[**and shall file a memorandum, setting forth the basis for this finding**]**.

COMMENTARY: Sections 43-34 through 43-36 prescribe the procedure to follow when a public defender or appointed counsel concludes that an appeal would be wholly frivolous and implement the holding in *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 2094 (1967) and *State* v. *Pascucci*, 161 Conn. 382, 288 A.2d 408 (1971). The changes to these sections standardize the language among the rules pertaining to motions to withdraw by appointed counsel and clarify the filing procedures to follow in criminal matters.

AMENDMENTS TO THE PRACTICE BOOK FORMS

Form 201

Plaintiff's Interrogatories

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Plaintiff, hereby propounds the following interrogatories to be answered by the Defendant, _____, under oath, within sixty (60) days of the filing hereof in compliance with Practice Book Section 13-2.

Definition: ''You'' shall mean the Defendant to whom these interrogatories are directed except that if that Defendant has been sued as the representative of the estate of a decedent, ward, or incapable person, ''you'' shall also refer to the Defendant's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

In answering these interrogatories, the Defendant(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State the following:

(a) your full name and any other name(s) by which you have been known;

(b) your date of birth;

(c) your motor vehicle operator's license number;

(d) your home address;

(e) your business address;

(f) if you were not the owner of the subject vehicle, the name and address of the owner or lessor of the subject vehicle on the date of the alleged occurrence.

(2) Have you made any statements, as defined in Practice Book Section 13-1, to any person regarding any of the incidents alleged in the Complaint?

COMMENT:

This interrogatory is intended to include party statements made to a representative of an insurance company prior to involvement of defense counsel.

(3) If the answer to Interrogatory #2 is affirmative, state:

(a) the name and address of the person or persons to whom such statements were made;

(b) the date on which such statements were made;

(c) the form of the statement (i.e., whether written, made by recording device or recorded by a stenographer, etc.);

(d) the name and address of each person having custody, or a copy or copies of each statement.

(4) State the names and addresses of all persons known to you who were present at the time of the incident alleged in the Complaint or who observed or witnessed all or part of the incident.

(5) As to each individual named in response to Interrogatory #4, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined

in Practice Book Section 13-1 concerning the subject matter of the Complaint in this lawsuit. If your answer to this interrogatory is affirmative, state also:

(a) the date on which the statement or statements were taken;

(b) the names and addresses of the person or persons who took such statement or statements;

(c) the names and addresses of any person or persons present when such statement or statements were taken;

(d) whether such statement or statements were written, made by recording device or taken by court reporter or stenographer;

(e) the names and addresses of any person or persons having custody or a copy or copies or such statement or statements.

(6) Are you aware of any photographs or any recordings by film, video, audio or any other digital or electronic means depicting the incident alleged in the Complaint, the scene of the incident, any vehicle involved in the incident alleged in the Complaint, or any condition or injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs or each recording taken, obtained or prepared of each such subject **[**by each photographer**]**, please state:

(a) the name and address of the **[**photographer**]**person who took, obtained or prepared such photograph or recording, other than an expert who will not testify at trial;

(b) the dates on which such photographs were taken or such recordings were obtained or prepared;

(c) the subject (e.g., ''Plaintiff's vehicle,'' ''scene,'' etc.);

(d) the number of photographs or recordings;

(e) the nature of the recording (e.g., film, video, audio, etc.).

(7) If, at the time of the incident alleged in the Complaint, you were covered by an insurance policy under which an insurer may be liable to satisfy part or all of a judgment or reimburse you for payments to satisfy part or all of a judgment, state the following:

(a) the name(s) and address(es) of the insured(s);

(b) the amount of coverage under each insurance policy;

(c) the name(s) and address(es) of said insurer(s).

(8) If at the time of the incident which is the subject of this lawsuit you were protected against the type of risk which is the subject of this lawsuit by excess umbrella insurance, or any other insurance, state:

(a) the name(s) and address(es) of the named insured;

(b) the amount of coverage effective at this time;

(c) the name(s) and address(es) of said insurer(s).

(9) State whether any insurer, as described in Interrogatories #7 and #8 above, has disclaimed/reserved its duty to indemnify any insured or any other person protected by said policy.

(10) If applicable, describe in detail the damage to your vehicle.

(11) If applicable, please state the name and address of an appraiser or firm which appraised or repaired the damage to the vehicle owned or operated by you.

(12) If any of the Defendants are deceased, please state the date and place of death, whether an estate has been created, and the name and address of the legal representative thereof.

(13) If any of the Defendants is a business entity that has changed its name or status as a business entity (whether by dissolution, merger, acquisition, name change, or in any other manner) since the date of the incident alleged in the Complaint, please identify such Defendant, state the date of the change, and describe the change.

(14) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether, at the time of the incident, you were operating that vehicle in the course of your employment with any person or legal entity not named as a party to this lawsuit, and, if so, state the full name and address of that person or entity.

(15) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs or medications within the eight (8) hours next preceding the time of the incident alleged in the Complaint and, if so, indicate what you consumed or used, how much you consumed, and when.

(16) Please state whether, within eight (8) hours after the incident alleged in the Complaint, any testing was performed to determine the presence of alcohol, drugs or other medications in your blood, and, if so, state:

(a) the name and address of the hospital, person or entity performing such test or screen;

(b) the date and time;

(c) the results.

(17) Please identify surveillance material discoverable under Practice Book Section 13-3 (c), by stating the name and address of any person who obtained or prepared any and all recordings by film, photograph, videotape, audiotape, or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recordings were obtained and the person or persons of whom each such recording was made.

(18) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you were using a cell phone for any activity including, but not limited to, calling, texting, e-mailing, posting, tweeting, or visiting sites on the Internet for any purpose, at or immediately prior to the time of the incident.

PLAINTIFF,

BY_____

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Defendant)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior
Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The changes to this form expand the language in Interrogatory # 6 to capture each type of recording identified in that interrogatory and make the certification consistent with Section 10-14.

Form 202

Defendant's Interrogatories

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Plaintiff, _____, under oath, within sixty (60) days of the filing hereof in compliance with Practice Book Section 13-2.

Definition: ''You'' shall mean the Plaintiff to whom these interrogatories are directed except that if suit has been instituted by the representative of the estate of a decedent, ward, or incapable person, ''you'' shall also refer to the Plaintiff's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

In answering these interrogatories, the Plaintiff(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State the following:

(a) your full name and any other name(s) by which you have been known;

(b) your date of birth;

(c) your motor vehicle operator's license number;

(d) your home address;

(e) your business address;

(f) if you were not the owner of the subject vehicle, the name and address of the owner or lessor of the subject vehicle on the date of the alleged occurrence.

(2) Identify and list each injury you claim to have sustained as a result of the incidents alleged in the Complaint.

(3) When, where and from whom did you first receive treatment for said injuries?

(4) If you were treated at a hospital for injuries sustained in the alleged incident, state the name and location of each hospital and the dates of such treatment and confinement therein.

(5) State the name and address of each physician, therapist or other source of treatment for the conditions or injuries you sustained as a result of the incident alleged in your Complaint.

(6) When and from whom did you last receive any medical attention for injuries alleged to have been sustained as a result of the incident alleged in your Complaint?

(7) On what date were you fully recovered from the injuries or conditions alleged in your Complaint?

(8) If you claim you are not fully recovered, state precisely from what injuries or conditions you are presently suffering?

(9) Are you presently under the care of any doctor or other health care provider for the treatment of injuries alleged to have been sustained as a result of the incident alleged in your Complaint?

(10) If the answer to Interrogatory #9 is in the affirmative, state the name and address of each physician or other health care provider who is treating you.

(11) Do you claim any present disability resulting from injuries or conditions allegedly sustained as a result of the incident alleged in your Complaint?

(12) If so, state the nature of the disability claimed.

(13) Do you claim any permanent disability resulting from said incident?

(14) If the answer to Interrogatory #13 is in the affirmative, please answer the following:

(a) list the parts of your body which are disabled;

(b) list the motions, activities or use of your body which you have lost or which you are unable to perform;

(c) state the percentage of loss of use claimed as to each part of your body;

(d) state the name and address of the person who made the prognosis for permanent disability and the percentage of loss of use;

(e) list the date for each such prognosis.

(15) If you were or are confined to your home or your bed as a result of injuries or conditions sustained as a result of the incident alleged in your Complaint, state the dates you were so confined.

(16) List each medical report received by you or your attorney relating to your alleged injuries or conditions by stating the name and address of the treating doctor or other health care provider, and of

any doctor or health care person you anticipate calling as a trial witness, who provided each such report and the date thereof.

(17) List each item of expense which you claim to have incurred as a result of the incident alleged in your Complaint, the amount thereof and state the name and address of the person or organization to whom each item has been paid or is payable.

(18) For each item of expense identified in response to Interrogatory #17, if any such expense, or portion thereof, has been paid or reimbursed or is reimbursable by an insurer, state, as to each such item of expense, the name of the insurer that made such payment or reimbursement or that is responsible for such reimbursement.

(19) If, during the ten year period prior to the date of the incident alleged in the Complaint, you were under a doctor's care for any conditions which were in any way similar or related to those identified and listed in your response to Interrogatory #2, state the nature of said conditions, the dates on which treatment was received, and the name of the doctor or health care provider.

(20) If, during the ten year period prior to the date of the incident alleged in your Complaint, you were involved in any incident in which you received personal injuries similar or related to those identified and listed in your response to Interrogatory #2, please answer the following with respect to each such earlier incident:

(a) on what date and in what manner did you sustain such injuries?

(b) did you make a claim against anyone as a result of said accident?

(c) if so, provide the name and address of the person or persons against whom a claim was made;

(d) if suit was brought, state the name and location of the Court, the return date of the suit, and the docket number;

(e) state the nature of the injuries received in said accident;

(f) state the name and address of each physician who treated you for said injuries;

(g) state the dates on which you were so treated;

(h) state the nature of the treatment received on each such date;

(i) if you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

(21) If you were involved in any incident in which you received personal injuries since the date of the incident alleged in the Complaint, please answer the following:

(a) on what date and in what manner did you sustain said injuries?

(b) did you make a claim against anyone as a result of said accident?

(c) if so, provide the name and address of the person or persons against whom a claim was made;

(d) if suit was brought, state the name and location of the Court, the return date of the suit, and the docket number;

(e) state the nature of the injuries received in said accident;

(f) state the name and address of each physician who treated you for said injuries;

(g) state the dates on which you were so treated;

(h) state the nature of the treatment received on each such date;

(i) if you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

(22) Please state the name and address of any medical service provider who has rendered an opinion in writing or through testimony that you have sustained a permanent disability to any body part other than those listed in response to Interrogatories #13, #14, #20 or #21, and:

(a) list each such part of your body that has been assessed a permanent disability;

(b) state the percentage of loss of use assessed as to each part of your body;

(c) state the date on which each such assessment was made.

(23) If you claim that as a result of the incident alleged in your Complaint you were prevented from following your usual occupation, or otherwise lost time from work, please provide the following information:

(a) the name and address of your employer on the date of the incident alleged in the Complaint;

(b) the nature of your occupation and a precise description of your job responsibilities with said employer on the date of the incident alleged in the Complaint;

(c) your average, weekly earnings, salary, or income received from said employment for the year preceding the date of the incident alleged in the Complaint;

(d) the date following the date of the incident alleged in the Complaint on which you resumed the duties of said employment;

(e) what loss of income do you claim as a result of the incident alleged in your Complaint and how is said loss computed?

(f) the dates on which you were unable to perform the duties of your occupation and lost time from work as a result of injuries or conditions claimed to have been sustained as a result of the incident alleged in your Complaint;

(g) the names and addresses of each employer for whom you worked for three years prior to the date of the incident alleged in your Complaint.

(24) Do you claim an impairment of earning capacity?

(25) List any other expenses or loss and the amount thereof not already set forth and which you claim to have incurred as a result of the incident alleged in your Complaint.

(26) If you have signed a covenant not to sue, a release or discharge of any claim you had, have or may have against any person, corporation or other entity as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.

(27) If you or anyone on your behalf agreed or made an agreement with any person, corporation or other entity to limit in any way the liability of such person, corporation or other entity as a result of any claim you have or may have as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.

(28) If since the date of the incident alleged in your Complaint, you have made any claims for workers' compensation benefits, state the nature of such claims and the dates on which they were made.

(29) Have you made any statements, as defined in Practice Book Section 13-1, to any person regarding any of the events or happenings alleged in your Complaint?

COMMENT:

This interrogatory is intended to include party statements made to a representative of an insurance company prior to involvement of defense counsel.

(30) State the names and addresses of all persons known to you who were present at the time of the incident alleged in your Complaint or who observed or witnessed all or part of the accident.

(31) As to each individual named in response to Interrogatory #30, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined in Practice Book Section 13-1 concerning the subject matter of your Complaint or alleged injuries. If your answer to this interrogatory is affirmative, state also:

(a) the date on which such statement or statements were taken;

(b) the names and addresses of the person or persons who took such statement or statements;

(c) the names and addresses of any person or persons present when such statement or statements were taken;

(d) whether such statement or statements were written, made by recording device or taken by court reporter or stenographer;

(e) the names and addresses of any person or persons having custody or a copy or copies of such statement or statements.

(32) Are you aware of any photographs or any recordings by film, video, audio or any other digital or electronic means depicting the incident alleged in the Complaint, the scene of the incident, any vehicle involved in the incident alleged in the Complaint, or any condition or injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs or each recording taken, obtained or prepared of each such subject **[**by each photographer**]**, please state:

(a) the name and address of the **[**photographer**]** person who took, obtained or prepared such photograph or recording, other than an expert who will not testify at trial;

(b) the dates on which such photographs were taken or such recordings were obtained or prepared;

(c) the subject (e.g., ''Plaintiff's vehicle,'' ''scene,'' etc.);

(d) the number of photographs or recordings;

(e) the nature of the recording (e.g., film, video, audio, etc.).

(33) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs or medications within the eight (8) hours next preceding the time of the incident alleged in the Complaint and, if so, indicate what you consumed or used, how much you consumed, and when.

(34) Please state whether, within eight (8) hours after the incident alleged in the Complaint, any testing was performed to determine the presence of alcohol, drugs or other medications in your blood, and, if so, state:

(a) the name and address of the hospital, person or entity performing such test or screen;

(b) the date and time;

(c) the results.

(35) Please identify surveillance material discoverable under Practice Book Section 13-3 (c), by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, videotape, audiotape or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recordings were obtained and the person or persons of whom each such recording was made.

COMMENT:

The following two interrogatories are intended to identify situations in which a Plaintiff has applied for and received workers' compensation benefits. If compensation benefits were paid, then the supplemental interrogatories and requests for production may be served on the Plaintiff without leave of the court if the compensation carrier does not intervene in the action.

(36) Did you make a claim for workers' compensation benefits as a result of the incident/occurrence alleged in the Complaint?

(37) Did you receive workers' compensation benefits as a result of the incident/occurrence alleged in the Complaint?

(38) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you were using a cell phone for any activity including, but not limited to, calling, texting, e-mailing, posting, tweeting, or visiting sites on the Internet for any purpose, at or immediately prior to the time of the incident.

DEFENDANT,

BY_____

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Plaintiff)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

Signed (Signature of filer) Print or type name of person signing

Date Signed

Mailing address (Number, street, town, state and zip code) or

E-mail address, if applicable

Telephone number

COMMENTARY: The changes to this form conform the language of Interrogatory #32 regarding recordings of an incident by film, photograph, videotape, audiotape or any other digital or electronic means to similar questions in other standard interrogatories in order to avoid any confusion, and make the certification consistent with Section 10-14.

Form 203

Plaintiff's Interrogatories

Premises Liability Cases

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Plaintiff, hereby propounds the following interrogatories to be answered by the Defendant, _____, under oath, within sixty (60) days of the filing hereof in compliance with Practice Book Section 13-2.

In answering these interrogatories, the Defendant(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) Identify the person(s) who, at the time of the Plaintiff's alleged injury, owned the premises where the Plaintiff claims to have been injured.

(a) If the owner is a natural person, please state:

(i) your name and any other name by which you have been known;

(ii) your date of birth;

(iii) your home address;

(iv) your business address.

(b) If the owner is not a natural person, please state:

(i) your name and any other name by which you have been known;

(ii) your business address;

(iii) the nature of your business entity (corporation, partnership, etc.);

(iv) whether you are registered to do business in Connecticut;

(v) the name of the manager of the property, if applicable.

(2) Identify the person(s) who, at the time of the Plaintiff's alleged injury, had a possessory interest (e.g., tenants) in the premises where the Plaintiff claims to have been injured.

(3) Identify the person(s) responsible for the maintenance and inspection of the premises at the time and place where the Plaintiff claims to have been injured.

(4) State whether you had in effect at the time of the Plaintiff's injuries any written policies or procedures that relate to the kind of conduct or condition the Plaintiff alleges caused the injury.

(5) State whether it is your business practice to prepare, or to obtain from your employees, a written report of the circumstances surrounding injuries sustained by persons on the subject premises.

(6) State whether any written report of the incident described in the Complaint was prepared by you or your employees in the regular course of business.

(7) State whether any warnings or caution signs or barriers were erected at or near the scene of the incident at the time the Plaintiff claims to have been injured.

(8) If the answer to the previous interrogatory is in the affirmative, please state:

(a) the name, address and employer of the person who erected the warning or caution signs or barriers;

(b) the name, address and employer who instructed the person to erect the warning or caution signs or barriers;

(c) the time and date a sign or barrier was erected;

(d) the size of the sign or barrier and wording that appeared thereon.

(9) State whether you received, at any time within twenty-four (24) months before the incident described by the Plaintiff, complaints from anyone about the defect or condition that the Plaintiff claims caused the Plaintiff's injury.

(10) If the answer to the previous interrogatory is in the affirmative, please state:

(a) the name and address of the person who made the complaint;

(b) the name, address and person to whom said complaint was made;

(c) whether the complaint was in writing;

(d) the nature of the complaint.

(11) Please identify surveillance material discoverable under Practice Book Section 13-3 (c), by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, videotape, audiotape or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recordings were obtained and the person or persons of whom each such recording was made.

(12) Are you aware of any photographs or any recordings by film, video, audio or any other digital or electronic means depicting the incident alleged in the Complaint, the scene of the incident, or any condition or injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs or each recording taken, obtained or prepared of each such subject, please state:

(a) the name and address of the person who took, obtained or prepared such photograph or recording, other than an expert who will not testify at trial;

(b) the dates on which such photographs were taken or such recordings were obtained or prepared;

(c) the subject (e.g., ''scene of incident,'' etc.);

(d) the number of photographs or recordings;

(e) the nature of the recording (e.g., film, video, audio, etc.).

(13)–(23) (Interrogatories #1 (a) through (e), #2 through #5, #7, #8, #9, #12, #13 and #16 of Form 201 may be used to complete this standard set of interrogatories.)

PLAINTIFF,

BY _____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys

and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 204

Plaintiff's Requests for Production

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Plaintiff(s) hereby request(s) that the Defendant provide counsel for the Plaintiff(s) with copies of the documents described in the following requests for production, or afford counsel for said Plaintiff(s) the opportunity or, if necessary, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorization shall take place at the offices of _____ on _____ (day), _____ (date) at _____ (time).

In answering these production requests, the Defendant(s) are required to provide all information within their possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

Definition: ''You'' shall mean the Defendant to whom these interrogatories are directed except that if that Defendant has been sued as the representative of the estate of a decedent, ward, or incapable person, ''you'' shall also refer to the Defendant's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

(1) A copy of the appraisal or bill for repairs as identified in response to Interrogatory #11.

(2) A copy of declaration page(s) of each insurance policy identified in response to Interrogatory #7 and/or #8.

(3) If the answer to Interrogatory #9 is in the affirmative, a copy of the complete policy contents of each insurance policy identified in response to Interrogatory #7 and/or #8.

(4) A copy of any photographs or recordings identified in response to Interrogatory #6.

(5) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

(6) A copy of all lease agreements pertaining to any motor vehicle involved in the incident which is the subject of this action, which was owned or operated by you or your employee, and all documents referenced or incorporated therein.

(7) A copy of all records of blood alcohol testing or drug screens referred to in answer to Interrogatory #16, or a signed authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act (HIPAA) or those of the Public Health Service Act, whichever is applicable, to obtain the same for each hospital, person or entity that performed such test or screen. Information obtained pursuant to the provisions of HIPAA or the Public Health Service Act shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(8) A copy of each and every recording of surveillance material discoverable under Practice Book Section 13-3 (c), by film, photograph, videotape, audiotape or any other digital or electronic means, of any party to this lawsuit concerning this lawsuit or the subject matter thereof, including any transcript of such recording.

PLAINTIFF,

BY _____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

E-mail address, if applicable

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 205

Defendant's Requests for Production

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Defendant(s) hereby request(s) that the Plaintiff provide counsel for the Defendant(s) with copies of the documents described in the following requests for production, or afford counsel for said Defendant(s) the opportunity or, where requested, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorizations shall take place at the offices of _____ not later than sixty (60) days after the service of the Requests for Production.

In answering these production requests, the Plaintiff(s) are required to provide all information within their possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

(1) All hospital records relating to treatment received as a result of the alleged incident, and to injuries, diseases or defects to which reference is made in the answers to Interrogatories #19, #20, #21 and #22, or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act (HIPAA), to inspect and make copies of said hospital records. Information obtained

pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(2) All reports and records of all doctors and all other care providers relating to treatment allegedly received by the Plaintiff(s) as a result of the alleged incident, and to the injuries, diseases or defects to which reference is made in the answers to Interrogatories #19, #20, #21 and #22 (exclusive of any records prepared or maintained by a licensed psychiatrist or psychologist) or written authorization, sufficient to comply with provisions of the Health Insurance Portability and Accountability Act, to inspect and make copies of said reports. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(3) If a claim for lost wages or lost earning capacity is being made, copies of, or sufficient written authorization to inspect and make copies of, the wage and employment records of all employers of the Plaintiff(s) for three (3) years prior to the date of the incident and for all years subsequent to the date of the incident to and including the date hereof.

(4) If a claim of impaired earning capacity or lost wages is being alleged, provide copies of, or sufficient written authorization to obtain copies of, that part of all income tax returns relating to lost income filed by the Plaintiff(s) for a period of three (3) years prior to the date of the incident and for all years subsequent to the date of the incident through the time of trial.

(5) All property damage bills that are claimed to have been incurred as a result of this incident.

(6) All medical bills that are claimed to have been incurred as a result of this incident or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act, to inspect and make copies of said medical bills. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(7) All bills for each item of expense that is claimed to have been incurred in the answer to Interroga- tory #18, and not already provided in response ¶5 and ¶6 above.

(8) Copies of all documentation of claims of right to reimbursement provided to the Plaintiff by third party payors, and copies of, or written authorization, sufficient to comply with provisions of the Health Insurance Portability and Accountability Act, to obtain any and all documentation of payments made by a third party for medical services received or premiums paid to obtain such payment. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(9) All documents identified or referred to in the answers to Interrogatory #26.

(10) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

(11) Any and all photographs or recordings identified in response to Interrogatory #32.

(12) A copy of all records of blood alcohol testing or drug screens referred to in answer to Interrogatory #34, or a signed authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act or those of the Public Health Service Act, whichever is applicable, to obtain the same. Information obtained pursuant to the provisions of HIPAA or the Public Health Service Act shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(13) A copy of each and every recording of surveillance material discoverable under Practice Book Section 13-3 (c), by film, photograph, videotape, audiotape or any other digital or electronic means, of any party to this lawsuit concerning this lawsuit or the subject matter thereof, including any transcript of such recording.

DEFENDANT,

BY _____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties <u>of record who received or will immediately be</u> receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 206

Plaintiff's Requests for Production—Premises Liability

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Plaintiff hereby requests that the Defendant provide counsel for the Plaintiff with copies of the documents described in the following requests for production, or afford counsel for said Plaintiff the opportunity or, if necessary, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorization shall take place at the offices of _____ on _____ (day), _____ (date) at _____ (time).

In answering these production requests, the Defendant(s) are required to provide all information within their possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

(1) A copy of the policies or procedures identified in response to Interrogatory #4.

(2) A copy of the report identified in response to Interrogatory #6.

(3) A copy of any written complaints identified in Interrogatory #10.

(4) A copy of declaration page(s) evidencing the insurance policy or policies identified in response to Interrogatories numbered _____ and _____.

(5) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this lawsuit concerning this action or its subject matter.

(6) A copy of each and every recording of surveillance material discoverable under Practice Book Section 13-3 (c), by film, photograph, videotape, audiotape or any other digital or electronic means, of any party to this lawsuit concerning this lawsuit or the subject matter thereof, including any transcript of such recording.

(7) A copy of any photographs or recordings, identified in response to Interrogatory #12.

(8) A copy of any written leases(s) and any amendments or extensions to such lease(s) for the premises where the plaintiff claims to have been injured in effect at the time of the plaintiff's injury between you and the person or entity identified in Interrogatory #2.

(9) A copy of any written contract or agreement regarding the maintenance and inspection of the premises where the plaintiff claims to have been injured in effect at the time of the plaintiff's injury between you and the person or entity identified in Interrogatory #3.

PLAINTIFF,

BY _____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys

and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to this form adds requests for production of any written lease or lease extension for the premises and for the production of any contract or agreement regarding the maintenance and inspection of the premises in effect at the time of the alleged incident. Currently, a plaintiff is required to file a motion for permission to file supplemental requests for production in order to obtain the documents. This change will eliminate the need for such a motion. The change to the certification makes it consistent with Section 10-14.

Form 207

Interrogatories—Actions to Establish, Enforce or Modify Child Support Orders

No. CV-	: SUPERIOR COURT
(Plaintiff)	: FAMILY SUPPORT
VS.	: MAGISTRATE DIVISION
(Defendant)	: JUDICIAL DISTRICT OF
	: AT
	: (Date)

The undersigned, on behalf of the Plaintiff/Defendant, propounds the following interrogatories to be answered by the Defendant/Plaintiff within sixty (60) days of the filing hereof.

(1) For your present residence:

(a) What is the address?

(b) What type of property is it (apartment, condominium, single-family home)?

(c) Who is the owner of the property?

(d) What is your relationship to the owner (landlord, parents, spouse)?

(e) When did you start living at this residence?

(2) List the names of all the adults that live with you.

(a) For each adult you live with, what is your relationship to them (spouse, sibling, roommate, parent, girlfriend or boyfriend)?

(b) For each adult you live with, what is their financial contribution to the household (who pays the rent, who pays the utilities, who buys the groceries)?

(3) Give the name and address of your employer.

(a) Are you employed full-time or part-time? Are you self-employed? If you are self-employed, do not answer (b) through (h) and go directly to Interrogatory #4.

(b) Are you paid a salary, on an hourly basis, or do you work on commission or tips?

(c) What is your income per week?

(d) How many hours per week do you usually work?

(e) Is overtime available, and if it is, how many hours per week do you work overtime and what are you paid?

(f) Do you, or have you, ever received bonus income from your employment and what is the basis for the bonus?

(g) Does your employer deduct federal and state taxes and Medicare from your wages or are you responsible for filing your own deductions? If you file, provide a copy of your most recent tax returns.

(h) Do you have a second source of employment? If so, please provide the same information as requested in (a) through (g).

(4) If you are self-employed:

(a) Are you part of a partnership, corporation or LLC, and if you are, give the name of the business and your role in it?

(b) Name the other people involved in your business and their roles.

(c) Does the business file taxes (if so, bring copies of the last two tax returns filed to your next court date)?

(d) Describe the work you do.

(e) How many hours per week do you work, on average?

(f) How much do you typically earn per hour?

(g) List your business expenses, and what they cost per week.

(h) State how you are typically paid (check or cash).

(i) Name the five people or companies you did most of your work for in the last year.

(j) If you have a business account, what bank is it at (bring copies of the last six months of bank statements to your next court date)?

(k) Do you work alone or do you employ anyone and pay them wages? If you employ anyone, please identify them, their relationship to you, if any, and the amount you pay them.

(*l*) How do you keep your payment and expense records? Do you employ an accountant, and if so, please give the name and address of the accountant responsible for your records?

(5) Except for your current job, list all the places you have worked for the last three years. For each place, list the address, the type of work you did, the dates you worked there and how much you were paid at each job.

(6) If you cannot work because of a disability, what is the nature of your disability?

(a) What is the date you became disabled?

(b) Is this disability permanent or temporary?

(c) If a doctor has told you that you cannot work, what is the name of the doctor and his or her office (bring a note from this doctor stating that you cannot work to your next court date)?

(d) If a doctor has told you that you cannot work, did he or she say you cannot work full-time or part-time?

(e) If you have a partial or permanent disability, please provide the percentage rating.

(f) Is your disability the result of an automobile accident, an accident at work, an accident at home or otherwise? Please give the date and details of the incident and whether you have filed a lawsuit or workers' compensation claim as a result.

(g) Have you had any children since the incident? If so, list their dates of birth.

(7) Have you applied for Social Security Disability (SSD) or Supplemental Security Income (SSI)?

(a) If you did, when did you apply and where are you in the application process?

(b) Have you been told if or when you will receive benefits? If so, who told you and what is the date they gave you?

(c) If your application for SSD and/or SSI has been denied, did you appeal? If you appealed, what is the status of the appeal and what lawyer, if any, represents you?

(d) Have you applied for or are you receiving state assistance?

(e) Are you a recipient of the state supplement program, medical assistance program, temporary family assistance program, state-administered general assistance program (SAGA medical or cash)? If so, state the source of the benefit, the effective date of the benefit

and the date when your eligibility for benefits will be redetermined by the department of social services.

(8) Do you have any lawsuits pending?

(a) If you do, what type of case is it?

(b) Give the name, address, e-mail address and phone number of the lawyer handling the case for you.

(c) What amount do you expect to recover and when do you expect to receive it?

(d) If you have already settled the case, please provide a copy of the settlement statement.

(9) Do you expect to inherit any money or property in the next six months?

(a) If you do, who do you expect to inherit from and where do they or where did they live?

(b) What do you expect to inherit, what is its value and when do you expect to inherit it?

(c) What is the name and address of the person or lawyer handling the estate and where is the probate court in which the action is filed?

(10) Is anyone holding any money for you? If so, name the person, their relationship to you, their address and the amount of money they are holding.

(11) Do you own any rental properties, by yourself, with someone else or in trust? If the answer is yes:

(a) Is the property residential or commercial?

(b) Please identify the location of the property or properties, include the address and identify your ownership interest.

(c) Do you derive any income from the property? Do you calculate your net income from the property on a weekly, monthly or yearly basis?

(d) What are your expenses relating to the property or properties? Please state the amount of your mortgage payment, if any, and the amount of your taxes, insurance and utility payments, if any, and your method of payment of these expenses.

(e) Did you have to apply for a loan to finance any part of the real property or to finance the purchase of any personal property? If so, identify the item, state the amount of the loan and give a copy of the loan application.

(12) Are you the beneficiary or settlor of a trust?

(a) If so, please identify the trust, the type of trust, the date of the creation of the trust, the name and address of the trustee and how the trust is funded.

(b) How often do you receive a distribution from the trust and from whom and in what amounts are the distributions?

BY_____

I, _____, certify that I have reviewed the interrogatories set out above and the responses to those interrogatories and they are true and accurate to the best of my knowledge and belief.

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 208

Defendant's Supplemental Interrogatories

Workers' Compensation Benefits—No Intervening Plaintiff

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Plaintiff, _____, under oath, within sixty (60) days of the filing hereof insofar as the disclosure sought will be of assistance in the defense of this action and can be provided by the Plaintiff with substantially greater facility than could otherwise be obtained.

Definition: ''You'' shall mean the Plaintiff to whom these interrogatories are directed except that if suit has been instituted by the representative of the estate of a decedent, ward, or incapable person, ''you'' shall also refer to the Plaintiff's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

In answering these interrogatories, the Plaintiff(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full, and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State your full name, home address, and business address.

(2) State the workers' compensation claim number and the date of injury of each workers' compensa- tion claim that you have filed as a result of the incident/occurrence alleged in the complaint.

(3) State the total amount paid on your behalf on each of the claims filed as a result of the incident/ occurrence alleged in the complaint and referred to in Interrogatory #2, and if known, specify the amount of medical benefits, loss of income benefits, and specific award benefits, and if unknown, provide an authorization for the same.

(4) Identify any First Report of Injury, Notice of Claim for Compensation, Notice of Intention to Reduce or Discontinue Benefits, Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits, and any reports of medical exams requested by the commissioner, respondent and/or employer arising out of the incident/occurrence alleged in the Complaint.

(5) Identify any voluntary agreements, approved stipulations to date, approved full and final stipula- tions and findings and awards, and findings and denials arising out of the incident/occurrence alleged in the Complaint and which formed the basis for your answer to Interrogatory #3.

(6) Which of your claims arising out of the incident/occurrence alleged in the Complaint and referenced in your answer to Interrogatory #2 are still open?

COMMENT:

These supplemental interrogatories are specifically directed at eliciting information about any workers' compensation claims, benefits and agreements. Unless the compensation carrier is a party to the action, it can be difficult to obtain this information. Often the Plaintiff's lawyers do not represent the client in the workers' compensation case, and although this information is

available in the workers' compensation file, providing these records to lawyers not involved in the compensation case could be time-consuming for the workers' compensation office staff. If compensation benefits were paid, these supplemental interrogatories may be served on the Plaintiff without leave of the court if there is no Intervening Plaintiff in the action.

DEFENDANT,

BY _____

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Plaintiff)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 209

Defendant's Supplemental Requests for Production

Workers' Compensation Benefits—No Intervening Plaintiff

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Defendant(s) hereby request(s) that the Plaintiff provide counsel for the Defendant(s) with copies of the documents described in the following requests for production, or afford counsel for said Defendant(s) the opportunity or, where requested, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorizations shall take place at the offices of _____ not later than sixty (60) days after the service of the Requests for Production.

In answering these production requests, the Plaintiff(s) are required to provide all information within their possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

(1) Produce a copy of the First Report of Injury (Form FRI), Notice of Claim for Compensation (Form 30C), Notice of Intention to Reduce or Discontinue Benefits (Form 36), and Notice to Compensation Com-

missioner and Employee of Intention to Contest Employee's Right to Compensation Benefits (Form 43).

(2) Produce a copy of all of the approved voluntary agreements, approved stipulations to date, approved full and final stipulations, findings and awards, and findings and denials that relate to one or more of the claims referenced in your answer to Interrogatory #2 on Form 208.

(3) Produce a copy of all reports of medical exams requested by the commissioner, respondent and/or employer that were prepared concerning any of the claims referenced in your answer to Interrogatory #2 on Form 208.

(4) If you are unable to specify the amount of medical benefits, loss of income benefits, and specific award benefits paid on your behalf, provide an authorization for the same.

COMMENT:

These supplemental requests for production are specifically directed at eliciting information about any workers' compensation claims, benefits and agreements. Unless the compensation carrier is a party to the action, it can be difficult to obtain this information. Often the Plaintiff's lawyers do not represent the client in the workers' compensation case, and although this information is available in the workers' compensation file, providing these records to lawyers not involved in the compensation case could be time-consuming for the workers' compensation office staff. If compensation benefits were paid, these supplemental requests for production may be served on the Plaintiff without leave of the court if there is no Intervening Plaintiff in the action.

DEFENDANT,

BY_____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record

[and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties <u>of record who received or will immediately be</u> receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address *(Number, street, town, state and zip code)* or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 210

Defendant's Interrogatories

Workers' Compensation Benefits—Intervening Plaintiff

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Intervening Plaintiff, _____, under oath, within sixty (60) days of the filing hereof insofar as the disclosure sought will be of assistance in the defense of this action and can be provided by the Intervening Plaintiff with substantially greater facility than could otherwise be obtained.

Definition: ''You'' shall mean the Intervening Plaintiff to whom these interrogatories are directed except that if suit has been instituted by the representative of the estate of a decedent, ward, or incapable person, ''you'' shall also refer to the Intervening Plaintiff's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

In answering these interrogatories, the Plaintiff(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full, and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State the name, business address, business telephone number, business e-mail address and relationship to the workers' compensation lien holder of the person answering these interrogatories.

(2) State the workers' compensation claim number and the date of injury of each workers' compensa- tion claim that gave rise to the lien asserted by the workers' compensation lien holder.

(3) State the total amount paid on each claim referenced in the answer to Interrogatory #2, specifying the amount of medical benefits, loss of income benefits, and specific award benefits paid.

(4) Identify any First Report of Injury, Notice of Claim for Compensation, Notice of Intention to Reduce or Discontinue Benefits, Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits, and any reports of medical exams requested by the commissioner, respondents and/or employer arising out of the incident/occurrence alleged in the Complaint.

(5) Identify any voluntary agreements, approved stipulations to date, approved full and final stipula- tions and findings and awards, and findings and denials.

(6) Identify the claims referenced in your answer to Interrogatory #2 that are still open.

COMMENT:

These standard interrogatories are intended to tailor the discovery from the intervening compensation carrier to the limited role and limited material information in the workers' compensation lien holder's file. The existing standard interrogatories directed to the Plaintiffs place an unnecessary burden on the parties, result in discovery disputes, and require the compensation carrier to produce information and documentation, in many instances, that is duplicative of the responses engendered by the same interrogatories served upon the Plaintiff in the case.

DEFENDANT,

BY_____

CERTIFICATION

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Plaintiff)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

Signed (Signature of filer) Print or type name of person signing

Date Signed

Mailing address (Number, street, town, state and zip code) or

E-mail address, if applicable

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 211

Defendant's Requests for Production

Workers' Compensation Benefits—Intervening Plaintiff

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Defendant(s) hereby request(s) that the Intervening Plaintiff provide counsel for the Defendant(s) with copies of the documents described in the following requests for production, or afford counsel for said Defendant(s) the opportunity or, where requested, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorizations shall take place at the offices of _____ not later than sixty (60) days after the service of the Requests for Production.

In answering these production requests, the Plaintiff(s) are required to provide all information within their possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

(1) Produce a copy of the First Report of Injury (Form FRI), Notice of Claim for Compensation (Form 30C), Notice of Intention to Reduce or Discontinue Benefits (Form 36), and Notice to Compensation Com-

missioner and Employee of Intention to Contest Employee's Right to Compensation Benefits (Form 43).

(2) Produce a copy of all of the approved voluntary agreements, approved stipulations to date, approved full and final stipulations, findings and awards, and findings and denials that relate to one or more of the claims referenced in your answer to Interrogatory #2 on Form 210.

(3) Produce a copy of all reports of medical exams requested by the commissioner, respondent and/or employer that were prepared concerning any of the claims referenced in your answer to Interrogatory #2 on Form 210.

(4) Produce a copy of your workers' compensation lien calculations.

COMMENT:

These standard requests for production are intended to tailor the discovery from the intervening compensation carrier to the limited role and limited material information in the workers' compensation lien holder's file. The existing standard requests for production directed to the Plaintiffs place an unnecessary burden on the parties, result in discovery disputes, and require the compensation carrier to produce information and documentation, in many instances, that is duplicative of the responses engen- dered by the same requests for production served upon the Plaintiff in the case.

DEFENDANT,

BY_____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties <u>of record who received or will immediately be</u> receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

Form 212

Defendant's Interrogatories — Loss of Consortium

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Plaintiff, _____, under oath, within sixty (60) days of the filing hereof in compliance with Practice Book Section 13-2.

Definition: ''You'' shall mean the Plaintiff to whom these interrogatories are directed except that if suit has been instituted by the representative of the estate of a decedent, ward, or incapable person, ''you'' shall also refer to the Plaintiff's decedent, ward or incapable person unless the context of an interrogatory clearly indicates otherwise.

In answering these interrogatories, the Plaintiff(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) Please state your name, address and occupation.

(2) Please state the date and place of your marriage.

(3) Do you have any children? If so, state their names and dates of birth.

(4) Describe the nature of your loss of consortium claim.

(5) During your marriage, please list your employers, the length of time employed by each, and the average number of hours worked per month.

(6) Prior to the incident which is the subject of this lawsuit (''the incident''), did your spouse regularly perform work, services and/or chores (''services'') in or around the home?

(7) If the answer to the previous interrogatory is in the affirmative, please describe the nature and frequency of such services.

(8) Subsequent to the incident, did such services change? If so, state how, and describe the impact of this change on you.

(9) Subsequent to the incident, did anyone other than your spouse perform the services usually performed by your spouse in and around the home?

(10) If the answer to the previous interrogatory is in the affirmative, please state the name(s) and address(es) of each person(s), the amount paid, the period of time they were hired and what services they performed.

(11) Have you or your spouse ever instituted legal proceedings seeking a divorce or separation? If so, state when.

(12) Did you, at any time during your marriage live apart from or separate yourself from your spouse? If so, state when and for how long such separation occurred, and state the reason for such separation.

(13) Describe any change(s) in the affection your spouse expressed or displayed toward you following the incident.

(14) If claimed, describe any change(s) in the frequency and satisfaction of your sexual relations with your spouse following the incident.

(15) Describe any change(s) in the activities which you and your spouse enjoyed together before the incident that you claim were caused by the incident.

(16) Within two years prior to the year of the incident up to the present, have you and/or your spouse had any marriage counseling? If so, state the name of each person consulted and the dates consulted or treated.

DEFENDANT,

BY _____

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Plaintiff)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record **[**and to all parties who have not appeared in this matter**]** and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

E-mail address, if applicable

_____

Telephone number

COMMENTARY: The change to the certification on this form is consistent with the provisions of Section 10-14.

(NEW) Form 213

Plaintiff's Interrogatories – Uninsured/Underinsured Motorist Cases

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Plaintiff, hereby propounds the following interrogatories to be answered by the Defendant, _____, under oath, within sixty (60) days of the filing hereof in compliance with Practice Book Section 13-2.

In answering these interrogatories, the Defendant(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State whether the plaintiff or plaintiffs were insured by you for purposes of uninsured/underinsured motorist coverage with regard to this incident under the policy.

(2) If the answer to the preceding interrogatory is other than ''yes'' please state each reason for which you contend that such plaintiff(s) were not so insured.

(3) Identify each policy of motor vehicle liability insurance, excess liability insurance, and/or umbrella liability insurance, of which you are aware, that provided coverage to the alleged tortfeasor(s) or the vehicle owned or operated by the alleged tortfeasor(s), his, her, its, or their agents, servants, and/or employees, with regard to this incident, stating:

(a) The name and address of each such insurer;

(b) The named insured(s);

(c) The policy number;

(d) The effective dates;

(e) The limits of uninsured/underinsured motorists coverage under such policy (including per person and per accident limits, if applicable); and

(f) The basis for contending that said alleged tortfeasor(s) are covered under said policy, including a brief description of any documents supporting that contention, and the names and addresses of any witnesses supporting that contention.

(4) State the limits of uninsured/underinsured motorist coverage available under the policy (including per person and per accident limits, if applicable), which you issued.

(5) State whether the policy affords uninsured/underinsured motorist conversion coverage, pursuant to General Statutes § 38a-336a.

(6) With regard to each credit, set-off, reduction, or deduction, which you contend lowers the maximum amount that you could be required to pay any plaintiff below the limits of the uninsured/underinsured

motorist coverage as stated on the declarations page of the policy, state:

(a) The policy provision providing for said credit, set-off, reduction, or deduction;

(b) The amount of the credit, set-off, reduction, or deduction; and

(c) A brief description of the factual basis for the credit, set-off, reduction, or deduction.

COMMENT: Interrogatory #6 is not intended to address any reduction in the verdict that may arise from the application of General Statutes § 52-572h (regarding comparative negligence and apportionment) or General Statutes § 52-225a (regarding collateral sources, as defined by General Statutes § 52-225b).

(7) Are you aware of any other insurance policy affording uninsured/underinsured motorist coverage, to any plaintiff herein, that is primary to the coverage afforded by your policy?

(8) If so, for each such policy, state:

(a) The name and address of the insurer;

(b) The name and address of each named insured;

(c) The policy number;

(d) The limits of uninsured/underinsured motorist coverage under such policy; and

(e) The basis for your contention that it is primary to your policy.

(9) State the names and addresses of all persons known to you who were present at the time of the incident alleged in the Complaint or who observed or witnessed all or part of the incident.

(10) As to each individual named in response to Interrogatory #9, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined in Practice Book Sections 13-1 and 13-3 (b) concerning the subject

matter of the Complaint in this action. If the answer to this interrogatory is affirmative, state also:

(a) The name and address of the person giving the statement;

(b) The date on which the statement or statements were taken;

(c) The names and addresses of the person or people who took such statement(s);

(d) The name and address of any person present when such statement(s) was taken;

(e) Whether such statement(s) was written, made by recording device, or taken by court reporter or stenographer; and

(f) The name and address of each person having custody or a copy or copies of such statement(s).

(11) Are you aware of any photographs or any recordings by film, video, audio or any other digital or electronic means depicting the incident alleged in the Complaint, the scene of the incident, any vehicle involved in the incident alleged in the Complaint, or any condition or injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs or each recording taken, obtained or prepared of each such subject, state:

(a) the name and address of the person who took, obtained or prepared such photograph or recording, other than an expert who will not testify at trial;

(b) the dates on which such photographs were taken or such recordings were obtained or prepared;

(c) the subject (e.g., ''Plaintiff's vehicle,'' ''scene,'' etc.);

(d) the number of photographs or recordings; and

(e) the nature of the recording (e.g., film, video, audio, etc.).

(12) Identify surveillance material discoverable under Practice Book Section 13-3 (c), by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, videotape, audiotape or any other digital or electronic means, of any party concerning this action or its subject matter, including any transcript thereof which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recording was obtained and the person or persons of whom each such recording was made.

PLAINTIFF,

BY_____

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Defendant)

Subscribed and sworn to before me this _____day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on

(date) _____ to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

Email address, if applicable

_____

Telephone number

COMMENTARY: Standard interrogatories have been developed for use in cases claiming uninsured/underinsured motorist coverage benefits. The standard interrogatories can be used without the need to file a motion for permission to file nonstandard interrogatories in any case for which the use of standard discovery is mandated when the underlying claim is for uninsured/underinsured motorist coverage benefits.

(NEW) Form 214

Defendant's Interrogatories – Uninsured/Underinsured Motorist Cases

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The undersigned, on behalf of the Defendant, hereby propounds the following interrogatories to be answered by the Plaintiff, _____, under oath, within sixty (60) days of the filing hereof in compliance with Practice Book Section 13-2.

In answering these interrogatories, the Plaintiff(s) is (are) required to provide all information within their knowledge, possession or power. If an interrogatory has subparts, answer each subpart separately and in full and do not limit the answer to the interrogatory as a whole. If any interrogatories cannot be answered in full, answer to the extent possible.

(1) State the following:

(a) Your full name and any other name(s) by which you have been known;

(b) Your date of birth;

(c) Your motor vehicle operator's license number;

(d) Your home address;

(e) Your business address; and

(f) If you were not the owner of the subject vehicle, the name and address of the owner or lessor of the subject vehicle on the date of the alleged occurrence.

(2) If, at the time of the incident alleged in the Complaint, you were covered by any uninsured/underinsured motorist policy, including any excess or umbrella policies, under which an insurer may be liable to satisfy part or all of a judgment after the underlying policy limits are exhausted or reimburse you for payments to satisfy part or all of a judgment after the underlying policy limits are exhausted, state the following:

(a) the name(s) and address(es) of the insured(s);

(b) the amount of coverage under each insurance policy;

(c) the name(s) and address(es) of said insurer(s); and

(d) whether a claim has been made for underinsured motorist benefits.

(3) State whether you resided with any relatives at the time of the incident, and, if so, identify any auto insurance policy they had that was in effect at the time of the accident.

(4) State whether any insurer, as described in Interrogatory #1 or #2 above, has disclaimed/reserved its duty to indemnify any insured or any other person protected by said policy.

(5) State the date on which your claim/lawsuit in the underlying matter settled, the sum(s) for which it settled and when you received the check.

(6) State all liability coverage that covered the person(s) against whom you brought suit in the underlying matter, including the policy limits.

(7) State whether the driver of the other vehicle in the underlying claim was working at the time of the incident and if so, state whether you made a claim against the other driver's employer.

(8) Identify and list each injury you claim to have sustained as a result of the incident alleged in the Complaint.

(9) When, where and from whom did you first receive treatment for said injuries?

(10) If you were treated at a hospital for injuries sustained in the alleged incident, state the name and location of each hospital and the dates of such treatment and confinement therein.

(11) State the name and address of each physician, therapist or other source of treatment for the conditions or injuries you sustained as a result of the incident alleged in your Complaint.

(12) When and from whom did you last receive any medical attention for injuries alleged to have been sustained as a result of the incident alleged in your Complaint?

(13) On what date were you fully recovered from the injuries or conditions alleged in your Complaint?

(14) If you claim you are not fully recovered, state precisely from what injuries or conditions you are presently suffering.

(15) Are you presently under the care of any doctor or other health care provider for the treatment of injures alleged to have been sustained as a result of the incident alleged in your Complaint?

(16) If the answer to Interrogatory #15 is in the affirmative, state the name and address of each physician or other health care provider who is treating you.

(17) Do you claim any present disability resulting from injuries or conditions allegedly sustained as a result of the incident alleged in your Complaint?

(18) If so, state the nature of the disability claimed.

(19) Do you claim any permanent disability resulting from said incident?

(20) If the answer to Interrogatory # 19 is in the affirmative, please answer the following:

(a) List the parts of your body which are disabled;

(b) List the motions, activities or use of your body which you have lost or which you are unable to perform;

(c) State the percentage of loss of use or the loss of function claimed as to each part of your body as provided by a medical service provider, if any;

(d) State the name and address of the person who made the prognosis for permanent disability and the percentage of loss of use; and

(e) List the date for each such prognosis.

(21) If you were or are confined to your home or your bed as a result of injuries or conditions sustained as a result of the incident alleged in your Complaint, state the dates you were so confined.

(22) List each medical report received by you or your attorney relating to your alleged injuries or conditions by stating the name and address of the treating doctor or other health care provider, and of

any doctor or health care person you anticipate calling as a trial witness, who provided each such report and the date thereof.

(23) List each item of expense which you claim to have incurred as a result of the incident alleged in your Complaint, the amount thereof, and state the name and address of the person or organization to whom each item has been paid or is payable.

(24) For each item of expense identified in response to Interrogatory #23, if any such expense, or portion thereof, has been paid or reimbursed or is reimbursable by an insurer, state, as to each such item of expense, the name of the insurer that made such payment or reimbursement or that is responsible for such reimbursement.

(25) If, during the ten year period prior to the date of the incident alleged in the Complaint, you were under a doctor's care for any conditions which were in any way similar or related to those identified and listed in your response to Interrogatory #8, state the nature of said conditions, the dates on which treatment was received, and the name of the doctor or health care provider.

(26) If, during the ten year period prior to the date of the incident alleged in your Complaint, you were involved in any incident in which you received personal injuries similar or related to those identified and listed in your response to Interrogatory #8, please answer the following with respect to each such earlier incident:

(a) On what date and in what manner did you sustain such injuries?

(b) Did you make a claim against anyone as a result of said incident?

(c) If so, provide the name and address of the person or persons against whom a claim was made;

(d) If suit was brought, state the name and location of the court, the return date of the suit, and the docket number;

(e) State the nature of the injuries received in said incident;

(f) State the name and address of each physician who treated you for said injuries;

(g) State the dates on which you were so treated;

(h) State the nature of the treatment received on each such date;

(i) If you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

(27) If you were involved in any incident in which you received personal injuries since the date of the incident alleged in the Complaint, please answer the following:

(a) On what date and in what manner did you sustain such injuries?

(b) Did you make a claim against anyone as a result of said incident?

(c) If so, provide the name and address of the person or persons against whom a claim was made;

(d) If suit was brought, state the name and location of the court, the return date of the suit, and the docket number;

(e) State the nature of the injuries received in said incident;

(f) State the name and address of each physician who treated you for said injuries;

(g) State the dates on which you were so treated;

(h) State the nature of the treatment received on each such date;

(i) If you are presently or permanently disabled as a result of said injuries, please state the nature of such disability, the name and address of each physician who diagnosed said disability and the date of each such diagnosis.

(28) Please state the name and address of any medical service provider who has rendered an opinion in writing or through testimony that you have sustained a permanent disability to any body part other than those listed in response to Interrogatories #19, #20, #26, or # 27, and:

(a) List each such part of your body that has been assessed a permanent disability;

(b) State the percentage of loss of use or function assessed as to each part of your body, if any; and

(c) State the date on which each such assessment was made.

(29) If you claim that as a result of the incident alleged in your Complaint you were prevented from following your usual occupation, or otherwise lost time from work, please provide the following information:

(a) The name and address of your employer on the date of the incident alleged in the Complaint;

(b) The nature of your occupation and a precise description of your job responsibilities with said employer on the date of the incident alleged in the Complaint;

(c) Your average weekly earnings, salary, or income received from said employment for the year preceding the date of the incident alleged in the Complaint;

(d) The date following the date of the incident alleged in the Complaint on which you resumed the duties of said employment;

(e) What loss of income do you claim as a result of the incident alleged in your Complaint and how is said loss computed?

(f) The dates on which you were unable to perform the duties of your occupation and lost time from work as a result of injuries or conditions claimed to have been sustained as a result of the incident alleged in your Complaint; and

(g) The names and addresses of each employer for whom you worked for three years prior to the date of the incident alleged in your Complaint.

(30) Do you claim an impairment of earning capacity?

(31) List any other expenses or loss and the amount thereof not already set forth and which you claim to have incurred as a result of the incident alleged in your Complaint.

(32) If you have signed a covenant not to sue, a release or discharge of any claim you had, have or may have against any person, corporation or other entity as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.

(33) If you or anyone on your behalf agreed or made an agreement with any person, corporation or other entity to limit in any way the liability of such person, corporation or other entity as a result of any claim you have or may have as a result of the incident alleged in your Complaint, please state in whose favor it was given, the date thereof, and the consideration paid to you for giving it.

(34) If, since the date of the incident alleged in your Complaint, you have made any claims for workers' compensation benefits as a result of the incident alleged in your complaint:

(a) State the nature of such claims and the dates on which they were made.

(b) State the workers' compensation claim number and the date of injury of each workers' compensation claim that you have filed as a result of the incident/occurrence alleged in the Complaint.

(c) State the total amount paid on your behalf on each of the claims filed as a result of the incident/occurrence alleged in the Complaint and referred to in Interrogatory #34, and if known, specify the amount of medical benefits, loss of income benefits, and specific award benefits, and if unknown, provide an authorization for the same.

(d) Identify any First Report of Injury, Notice of Claim for Compensation, Notice of Intention to Reduce or Discontinue Benefits, Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits, and any reports of medical exams requested by the commissioner, respondent and/or employer arising out of the incident/occurrence alleged in the Complaint.

(e) Identify any voluntary agreements, approved stipulations to date, approved full and final stipulations and findings and awards, and findings and denials arising out of the incident/occurrence alleged in the Complaint and which formed the basis for your answer to Interrogatory #34.

(f) Which of your claims arising out of the incident/occurrence alleged in the complaint and referenced in your answer to Interrogatory #34 are still open?

(35) Have you made any statements, as defined in Practice Book Section 13-1, to any person regarding any of the events or happenings alleged in your Complaint?

(36) State the names and addresses of all persons known to you who were present at the time of the incident alleged in your Complaint or who observed or witnessed all of part of the incident.

(37) As to each individual named in response to Interrogatory #36, state whether to your knowledge, or the knowledge of your attorney, such individual has given any statement or statements as defined in Practice Book Section 13-1 concerning the subject matter of the Complaint in this action. If the answer to this interrogatory is affirmative, state also:

(a) The date on which the statement or statements were taken;

(b) The names and addresses of the person or people who took such statement(s);

(c) The name and address of any person present when such statement(s) was taken;

(d) Whether such statement(s) was written, made by recording device, or taken by court reporter or stenographer; and

(e) The name and address of each person having custody or a copy or copies of such statement(s).

(38) Are you aware of any photographs or any recordings by film, video, audio or any other digital or electronic means depicting the

incident alleged in the Complaint, the scene of the incident, any vehicle involved in the incident alleged in the Complaint, or any condition or injury alleged to have been caused by the incident alleged in the Complaint? If so, for each set of photographs or each recording taken, obtained or prepared of each such subject state:

(a) The name and address of the person who took, obtained or prepared such photograph or recording, other than an expert who will not testify at trial;

(b) The dates on which such photographs were taken or such recordings were obtained or prepared;

(c) The subject (e.g., ''Plaintiff's vehicle,'' ''scene,'' etc.);

(d) The number of photographs or recordings; and

(e) The nature of the recording (e.g., film, videotape, audiotape, etc.).

(39) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you consumed or used any alcoholic beverages, drugs or medications within the eight (8) hours next preceding the time of the incident alleged in the Complaint, and, if so, indicate what you consumed or used, how much you consumed, and when.

(40) Please state whether, within eight (8) hours after the incident alleged in the Complaint, any testing was performed to determine the presence of alcohol, drugs or other medications in your blood, and, if so, state:

(a) The name and address of the hospital, person or entity performing such test or screen;

(b) The date and time; and

(c) The results.

(41) Please identify surveillance material discoverable under Practice Book Section 13-3 (c), by stating the name and address of any person who obtained or prepared any and all recordings, by film, photograph, videotape, audiotape or any other digital or electronic means, of any party concerning this lawsuit or its subject matter, including any transcript thereof, which are in your possession or control or in the possession or control of your attorney, and state the date on which each such recording was obtained and the person or persons of whom each such recording was made.

(42) If you were the operator of any motor vehicle involved in the incident that is the subject of this action, please state whether you were using a cellular telephone for any activity including, but not limited to, calling, texting, emailing, posting, tweeting, or visiting sites on the internet for any purpose, at or immediately prior to the time of the incident.

DEFENDANT,

BY_____

I, _____, hereby certify that I have reviewed the above interrogatories and responses thereto and that they are true and accurate to the best of my knowledge and belief.

_____

(Plaintiff)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____

Notary Public/
Commissioner of the Superior Court

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

Email address, if applicable

_____

Telephone number

COMMENTARY: Standard interrogatories have been developed for use in cases claiming uninsured/underinsured motorist coverage benefits. The standard interrogatories can be used without the need to file a motion for permission to file nonstandard interrogatories in any case for which the use of standard discovery is mandated when the underlying claim is for uninsured/underinsured motorist coverage benefits.

(NEW) Form 215

Plaintiff's Requests for Production – Uninsured/Underinsured Motorist Coverage

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Plaintiff(s) hereby request(s) that the Defendant provide counsel for the Plaintiff(s) with copies of the documents described in the following requests for production, or afford counsel for said Plaintiff(s) the opportunity or, if necessary, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorizations shall take place at the offices of _____ not later than sixty (60) days after the service of the Requests for Production.

In answering these production requests, the Defendant is required to provide all information within its possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

(1) A copy of the declarations page and complete policy for each insurance policy referred to in the allegations against you in the Complaint and for any other policy of insurance in effect on the date of the incident, by which you provided uninsured/underinsured motorist

coverage with regard to any person or vehicle involved in the incident that is the subject of this action.

(2) Copies of all documents and records regarding the existence of or the lack of insurance on the alleged tortfeasor(s) or the motor vehicle operated by the alleged tortfeasor(s), his, her, its or their agent, servant and/or employee, at the time of this incident, including but not limited to reservations of rights letters and letters about declination of coverage.

(3) A copy of any written request by any insured for a lesser limit of uninsured/underinsured motorist coverage than the amount equal to their limits for liability imposed by law, under the policy or any earlier policy of which the policy was a renewal, extension, change, replacement, or superseding policy.

(4) Any copy of any nonprivileged statement, as defined in Practice Book Sections 13-1 and 13-3 (b) of any party in this action concerning this action or its subject matter.

(5) A copy of each and every recording of surveillance material discoverable under Practice Book Section 13-3 (c), by film, photograph, videotape, audiotape or any other digital or electronic means, of any party to this lawsuit concerning this action or the subject matter thereof, including any transcript of such recording.

(6) A copy of any photographs or recordings identified in response to Interrogatory #11.

PLAINTIFF,

BY_____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

Email address, if applicable

_____

Telephone number

COMMENTARY: Standard requests for production have been developed for use in cases claiming uninsured/underinsured motorist coverage benefits. The standard request for production can be used without the need to file a motion for permission to file nonstandard request for production in any case for which the use of standard discovery is

mandated when the underlying claim is for uninsured/underinsured motorist coverage benefits.

(NEW) Form 216

Defendant's Requests for Production – Uninsured/Underinsured Motorist Cases

No. CV-	: SUPERIOR COURT
(Plaintiff)	: JUDICIAL DISTRICT OF
VS.	: AT
(Defendant)	: (Date)

The Defendant(s), hereby request(s) that the Plaintiff,_____, provide counsel for the Defendant(s) with copies of the documents described in the following requests for production, or afford counsel for said Defendant(s) the opportunity or, where requested, sufficient written authorization, to inspect, copy, photograph or otherwise reproduce said documents. The production of such documents, copies or written authorizations shall take place at the offices of _____ not later than sixty (60) days after the service of the Requests for Production.

In answering these production requests, the Plaintiff(s) are required to provide all information within their possession, custody or control. If any production request cannot be answered in full, answer to the extent possible.

(1) A copy of the declarations page and of the complete policy for each insurance policy in effect at the time of the incident alleged in your Complaint, including any excess or umbrella policies identified in response to Interrogatory #2.

(2) A copy of the declarations page and of the complete policy for each insurance policy in effect at the time of the incident alleged in your Complaint, including any excess or umbrella policies identified in response to Interrogatory #3.

(3) Copies of all documents and records regarding the existence or the lack of insurance on the alleged tortfeasor(s) or the motor vehicle operated by the alleged tortfeasor(s), his, her, its or their agent, servant and/or employee, at the time of this incident, including but not limited to reservations of rights letters and declination of coverage letters.

(4) A copy of any affidavit of ''no other insurance'' in the underlying matter.

(5) A copy of any notice to the defendant in writing of your claim in this action.

(6) All hospital records relating to treatment received as a result of the alleged incident, and to injuries, diseases or defects to which reference is made in the answers to Interrogatories #25, #26, #27 and #28, or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act (HIPAA), to inspect and make copies of said hospital records. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(7) All reports and records of all doctors and all other care providers relating to treatment allegedly received by the Plaintiff(s) as a result of the alleged incident, and to the injuries, diseases or defects to which reference is made in the answers to Interrogatories #25, #26, #27 and

#28, or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act (HIPAA), to inspect and make copies of said reports. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(8) If a claim for lost wages or lost earning capacity has been made as a result of the alleged incident, copies of, or sufficient written authorization to inspect and make copies of the wage and employment records of all employers of the Plaintiff(s) for three (3) years prior to the date of the incident and for all years subsequent to the date of the incident to and including the date hereof.

(9) If a claim of impaired earning capacity or lost wages has been made as a result of the alleged incident, copies of, or sufficient written authorization to obtain copies of, that part of all income tax returns relating to lost income filed by the Plaintiff(s) for a period of three (3) years prior to the date of the incident and for all years subsequent to the date of the incident through the time of trial.

(10) All property damage bills that are claimed to have been incurred as a result of the alleged incident.

(11) All medical bills that are claimed to have been incurred as a result of this incident or written authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act (HIPAA), to inspect and make copies of said medical bills. Information obtained pursuant to the provisions of HIPAA shall not be used

or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(12) All bills for each item of expense that is claimed to have been incurred in the answer to Interrogatory #23, and not already provided in response to Production requests #10 and #11.

(13) Copies of all documentation of claims of right to reimbursement provided to the Plaintiff by third party payors, and copies of, or written authorization, sufficient to comply with provisions of the Health Insurance Portability and Accountability Act (HIPAA), to obtain any and all documentation of payments made by a third party for medical services received or premiums paid to obtain such payment. Information obtained pursuant to the provisions of HIPAA shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(14) All documents identified or referenced in your answer to Interrogatory #32 and #33.

(15) A copy of any nonprivileged statement, as defined in Practice Book Section 13-1, of any party in this action concerning this action or its subject matter.

(16) Any and all photographs or recordings identified in response to Interrogatory #38.

(17) A copy of all records of blood alcohol testing or drug screens referred to in answer to Interrogatory #39, or a signed authorization, sufficient to comply with the provisions of the Health Insurance Portability and Accountability Act (HIPAA) or those of the Public Health Service Act, whichever is applicable, to obtain the same. Information obtained

pursuant to the provisions of HIPAA or the Public Health Service Act shall not be used or disclosed by the parties for any purpose other than the litigation or proceeding for which such information is requested.

(18) A copy of each and every recording of surveillance material discoverable under Practice Book Section 13-3 (c), by film, photograph, videotape, audiotape or any other digital or electronic means, of any party to this action concerning this action or the subject matter thereof, including any transcript of such recording.

(19) A copy of the First Report of Injury (Form FRI), Notice of Claim for Compensation (Form 30C), Notice of Intention to Reduce or Discontinue Benefits (Form 36), and Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits (Form 43) referenced in your answer to Interrogatory #34.

(20) A copy of all of the approved voluntary agreements, approved stipulations to date, approved full and final stipulations, findings and awards, and findings and denials that relate to one or more of the claims referenced in your answer to Interrogatory #34.

(21) A copy of all reports of medical exams requested by the commissioner, respondent and/or employer that were prepared concerning any of the claims referenced in your answer to Interrogatory #34.

(22) If you are unable to specify the amount of medical benefits, loss of income benefits, and specific award benefits paid on your behalf, provide an authorization for the same.

DEFENDANT,

BY_____

CERTIFICATION

I certify that a copy of this document was or will immediately be mailed or delivered electronically or non-electronically on (date) _____ to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

Name and address of each party and attorney that copy was or will immediately be mailed or delivered to*

*If necessary, attach additional sheet or sheets with the name and address which the copy was or will immediately be mailed or delivered to.

_____

Signed (Signature of filer) Print or type name of person signing

_____

Date Signed

_____

Mailing address (Number, street, town, state and zip code) or

_____

Email address, if applicable

_____

Telephone number

COMMENTARY: Standard requests for production have been developed for use in cases claiming uninsured/underinsured motorist coverage benefits. The standard request for production can be used without the need to file a motion for permission to file nonstandard request for production in any case for which the use of standard discovery is mandated when the underlying claim is for uninsured/underinsured motorist coverage benefits.

NOTICES

Notice of Certification as Authorized House Counsel

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

Certified as of June 9, 2017:

William Joseph Dorgan	Gartner, Inc.

Certified as of June 16, 2017:

Melissa Rebecca Cefalu	AQR Capital Management, LLC
Reginald Bryan Griffith	Louis Dreyfus Company, LLC
Anthony F. Parsio	Hedgeye Risk Management, LLC

Certified as of June 19, 2017:

Elise Minter Konover	UTC Aerospace Systems
Abiola F. Shobola	Pratt & Whitney

Hon. Patrick L. Carroll III
Chief Court Administrator

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