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Table of Contents

CONNECTICUT REPORTS

State *v.* Acosta, 326 C 405 3
Sexual assault first degree; risk of injury to child; certification from Appellate Court; whether Appellate Court correctly concluded that trial court had not abused its discretion in admitting twelve year old uncharged sexual misconduct evidence; whether uncharged sexual misconduct evidence was too remote and insufficiently similar to be admissible pursuant to State *v.* DeJesus *(288 Conn. 418); public policy concerns justifying admission of prior uncharged sexual misconduct, discussed.*
Volume 326 Cumulative Table of Cases 19

CONNECTICUT APPELLATE REPORTS

Bigelow *v.* Commissioner of Correction, 175 CA 206 . . . . . 104A
Habeas corpus; whether habeas court abused discretion in denying petitioner certification to appeal; whether court improperly denied petition for writ of habeas corpus; claim that habeas counsel failed to raise claims that trial counsel did not properly advise and adequately represent petitioner during plea negotiations and plea canvass; claim that habeas counsel failed to raise claim that trial counsel improperly failed to file motion seeking petitioner's entry into diversionary substance abuse program; claim that trial counsel provided ineffective assistance by failing to seek certain presentence confinement credit.
Colonial Investors, LLC *v.* Furbush, 175 CA 154 . . . . . 52A
Summary process; nonpayment of rent; claim that notice to quit was legally insufficient; claim that disclaimer in notice to quit that any partial payments would be accepted for use and occupancy only and not for rent was misleading; claim that trial court improperly determined that it did not need to decide second special defense; whether customer service charges for utilities were properly included as component of rent; claim that notice to quit included improper water charges and was legally insufficient; claim that plaintiff violated state regulation (§ 16-11-55) pertaining to submetering of water; whether Metropolitan District Commission was subject to regulation promulgated by state Public Utilities Commission; claim that plaintiff misapplied payment to defendant's arrearage rather than to current monthly rental obligation.
Commissioner of Public Health *v.* Colandrea, 175 CA 254 . . . . . 152A
Petition to enforce subpoena duces tecum seeking production of patient records from defendant dentist; subpoena issued pursuant to statute (§ 19a-14 [a] [10]) that explicitly gives Department of Public Health authority to issue subpoenas in connection with investigations; whether trial court properly granted petition to enforce subpoena duces tecum; claim that plaintiff, Commissioner of Public Health, failed to make sufficient factual showing that subpoenaed records were related to complaint under investigation; whether plaintiff established that subpoenaed records met requirements of provision in statute (§ 52-146o [b] [3]) allowing disclosure of patient communications or information without patient consent if disclosure is in connection with investigation or complaint, provided that such communications or information relates to complaint.
Dull *v.* Commissioner of Correction, 175 CA 250 . . . . . 148A
Habeas corpus; whether habeas court improperly dismissed habeas petition as untimely pursuant to statute (§ 52-470 [d] and [e]); claim that petitioner established good cause for untimely filing of habeas petition.

(continued on next page)

In re Luis N., 175 CA 271 . . . . . 169A
Termination of parental rights; claim that trial court violated respondent mother's right to due process by improperly considering evidence gleaned from ex parte meeting with children in terminating mother's parental rights; whether unpreserved claim was reviewable pursuant to State *v.* Golding *(213 Conn. 233); harmless error; claim that it was plain error for court to consider evidence gleaned from ex parte meeting with children; whether trial court violated mother's right to due process by failing to inform her that she was entitled to receive canvass pursuant to* In re Yasiel R. *(317 Conn. 773) prior to start of trial when that case was not decided until after commencement of mother's trial; whether trial court's finding that mother failed to achieve sufficient degree of personal rehabilitation as would encourage belief that, within reasonable time, considering age and needs of children, she could assume responsible position in their lives was supported by clear and convincing evidence; whether trial court improperly concluded that termination of mother's parental rights was in best interests of children.*

In re Luis N., 175 CA 307 . . . . . 205A
Termination of parental rights; claim that trial court deprived respondent father of fair trial by meeting with children ex parte, allowing visitation supervisor with Department of Children and Families to attend meeting and failing to make record of court's observations of children; whether unpreserved claim was reviewable pursuant to State *v.* Golding *(213 Conn. 233); whether, even if trial court's ex parte meeting violated father's right to fair trial, any error was harmless; whether father could prevail under plain error doctrine when he failed to challenge factual basis of judgments terminating parental rights; claim that trial court erred in failing to declare mistrial, sua sponte, after ex parte meeting with children; failure to raise claim before trial court.*

Medeiros *v.* Medeiros, 175 CA 174 . . . . . 72A
Dissolution of marriage; motion for contempt; sanctions; claim that trial court failed to allow defendant fair opportunity to present defense to motion for contempt; whether trial court improperly precluded, on hearsay grounds, defendant from testifying regarding statements made to him by parties' child; whether any error was harmless; claim that trial court failed to determine that evidence establishing finding of contempt met required clear and convincing standard of proof; claim that trial court erred in imposing sanctions for defendant's indirect civil contempt; whether challenge to trial court's stayed order of incarceration was moot; whether claim qualified for capable of repetition yet evading review exception to mootness doctrine; whether trial court's stayed incarceration order was punitive; whether trial court abused discretion by failing to consider defendant's ability to pay plaintiff attorney's fees and marshal fees; whether defendant waived right to raise claim as to fees on appeal; whether trial court erred in imposing compensatory fines on defendant without any evidence as to actual damages suffered by plaintiff.

Northrup *v.* Witkowski, 175 CA 223 . . . . . 121A
Negligence; recklessness; whether trial court properly granted motion for summary judgment on ground of governmental immunity; whether allegations that defen-

(continued on next page)

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dant town officials failed to maintain and repair storm drains involved discretionary acts for which defendants were entitled to governmental immunity pursuant to statute (§ 52-557n [a] [2] [B]); claim that genuine issue of material fact existed as to whether town ordinance created ministerial duty; claim that identifiable person-imminent harm exception to discretionary act immunity applied; whether plaintiffs demonstrated that harm alleged was imminent; whether counts alleging recklessness by individual town officials could be maintained as matter of law when record did not support finding that any of individual defendants acted or failed to act with type of wanton disregard that is hallmark of reckless behavior.

Questell *v.* Farogh, 175 CA 262 . . . . . 160A

Negligence; whether trial court abused discretion in denying motion to open and set aside default judgment; whether court reasonably could have concluded that plaintiff was not prevented from attending trial management conference as result of mistake, accident or other reasonable cause.

Sanchez *v.* Edson Mfg., 175 CA 105 . . . . . 3A

Workers' compensation; whether Workers' Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner denying plaintiff certain disability benefits; whether board properly determined that commissioner's findings concerning cause and extent of plaintiff's disability were supported by sufficient underlying facts; whether board properly found that opinion of medical expert was competent medical evidence on which commissioner properly relied in reaching decision; claim that this court should give less deference to commissioner's credibility determinations where medical examiners did not testify before commissioner; whether board abused discretion in not remanding matter for articulation as to why commissioner disregarded medical opinion of expert chosen by commissioner.

State *v.* Torres, 175 CA 138 . . . . . 36A

Murder; carrying pistol without permit; whether first time in-court identification of defendant as shooter made by eyewitness violated defendant's right to due process and should have been excluded pursuant to State *v.* Dickson *(322 Conn. 410), where eyewitness was unable to make reliable identification of defendant in nonsuggestive out-of-court procedure prior to trial; whether defendant waived claim that first time in-court identification of him as shooter by eyewitness violated right to due process and should have been excluded; whether record was adequate for this court to determine that in-court identification of defendant was unreliable; whether admission of identification was harmless beyond reasonable doubt.*

Volume 175 Cumulative Table of Cases 235A

SUPREME COURT PENDING CASES

Summary 1B

NOTICES OF CONNECTICUT STATE AGENCIES

Airport Authority, Connecticut. 1C

MISCELLANEOUS

Judge Trial Referee Designees—Arbitration Proceedings - Trial de Novo 3D
Notice of Certification as Authorized House Counsel 3D
Office of State Ethics Advisory Opinion 5D
Office of State Ethics—Order Regarding Advisory Opinion 19D
Opening of Litchfield Judicial District Courthouse at Torrington 1D
Revised Notice of Attorney Discipline 4D
Small Claims Decentralization 1D

CONNECTICUT REPORTS

Vol. 326

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ROBERTO ACOSTA (SC 19645)

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

Syllabus

The defendant, who was convicted of the crimes of sexual assault in the first degree and risk of injury to a child in connection with an incident in 2009 involving A, his twelve year old niece, appealed to the Appellate Court, claiming that the trial court had abused its discretion in admitting evidence of uncharged sexual misconduct, pursuant to *State* v. *DeJesus* (288 Conn. 418), that occurred in 1997 because that incident was too remote in time and was insufficiently similar to the charged conduct. The defendant came to visit A at her family home. The defendant asked A where her parents were, and she responded that they would not be home for several hours. After the defendant complimented A and touched her inappropriately, he sexually assaulted her. The state sought to offer evidence at the defendant's trial of, inter alia, the defendant's prior sexual misconduct involving other female family members, who were between nine and ten years old, for incidents that occurred in 1997 and 2006. With respect to the 1997 incident, the state proffered evidence, over defense counsel's objection, that when the defendant's nine year old niece, J, was visiting her grandmother's home, the defendant blindfolded J and placed her hand on his penis, after which J stated that she was going to tell her parents and ran away. The trial court concluded that the proffered evidence was relevant and that its probative value outweighed the prejudicial effect from its admission. The Appellate Court affirmed the judgment of conviction, and the defendant, on the

granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that the trial court had not abused its discretion in admitting the 1997 uncharged sexual misconduct evidence because that evidence satisfied the requirements of *DeJesus*, as the 1997 incident was not too remote in time and was sufficiently similar to the charged conduct: the 1997 uncharged misconduct was part of a sequence including the 2006 uncharged misconduct and the 2009 charged conduct, and was not an isolated incident, separated from the charged conduct by an unbroken gap of twelve years; moreover, the defendant's conduct with respect to A and J was sufficiently similar as the defendant placed each victim's hand on his penis, and, although the defendant's misconduct toward A escalated to vaginal penetration whereas his conduct toward J culminated in inappropriate contact, the jury reasonably could have inferred that the defendant stopped his actions toward J because she rebuffed him and threatened to report him, and A and J were sufficiently similar victims as both were prepubescent females and nieces of the defendant, and these familial relationships offered the defendant access to the victims and the opportunity for his actions; furthermore, the public policy underpinnings of *DeJesus*, which justify the admission of this type of evidence because of the unusually aberrant and compulsive nature of the crime of child molestation, were relevant because, with respect to both the 1997 misconduct and the charged conduct, the victims were alone in private places, allowing the defendant to act surreptitiously, in the absence of any neutral witnesses.

Argued January 23—officially released August 1, 2017

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the first degree and with two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Lavine*, *Alvord* and *Sullivan*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

James Ralls, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attor-

ney, *Deborah P. Mabbett*, senior assistant state's attorney, and *Brett R. Aiello*, former special deputy assistant state's attorney, for the appellee (state).

Opinion

ESPINOSA, J. The primary question presented in this appeal is whether evidence of uncharged sexual misconduct that occurred twelve years before a charged offense is too remote to be admissible pursuant to the factors set forth in *State* v. *DeJesus*, 288 Conn. 418, 476, 953 A.2d 45 (2008). The defendant, Roberto Acosta, appeals[1] from the judgment of the Appellate Court affirming his judgment of conviction, following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2). *State* v. *Acosta*, 162 Conn. App. 774, 775, 129 A.3d 808 (2016). The defendant, relying on *DeJesus*, argues that evidence of twelve year old uncharged sexual misconduct is too remote and insufficiently similar to the charged offenses, that the trial court therefore abused its discretion in admitting it, and that the Appellate Court improperly concluded otherwise.[2] The state counters that the uncharged conduct is not too remote under *DeJesus*, particularly in light of the similarities between the conduct and the victims. We agree with the state that the trial court acted within

[1] We granted the defendant's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "Did the Appellate Court properly conclude that the trial court, in a case alleging sexual assault, did not abuse its discretion in concluding that evidence of uncharged misconduct by the defendant twelve years previously was not 'too remote' for admissibility purposes under *State* v. *DeJesus*, [supra, 288 Conn. 418]?" *State* v. *Acosta*, 320 Conn. 922, 132 A.3d 1095 (2016).

[2] The relevant time interval for measuring remoteness is the time elapsed between the charged and uncharged misconduct. See, e.g., *State* v. *Romero*, 269 Conn. 481, 498, 849 A.2d 760 (2004) (discussing remoteness in context of nine year gap between charged and uncharged conduct).

its discretion in admitting the evidence and affirm the judgment of the Appellate Court.[3]

The Appellate Court set forth the following facts and procedural history. "One afternoon in the spring of 2009, A,[4] who was twelve years old and in sixth grade, had returned from school and was watching television at her home in Danbury. She lived with her parents and older brother, but she was alone at the time. Her parents were at work and were not expected until 6 or 7 p.m.

"When A's dog started barking, she looked outside and saw her uncle, the defendant, approaching the front door. He had not previously visited their home, and he did not live in the area. She opened the door and greeted him with a hug and a kiss because 'he was family.' After chatting for a bit, A took the defendant for a tour of the house. He asked where her parents were, and she told him that they would not be home until 6 p.m. The tour concluded in her bedroom, where she proceeded to show the defendant her snow globe collection. They continued to talk about the family, generally 'catching up,' when he told her that she looked beautiful. He then sat down on her bed and told her to do the same. The defendant began to rub her leg, shoulder and arms, again repeating that she looked beautiful.

"A was beginning to feel uncomfortable with the situation on her bed when the defendant instructed her to remove her shirt. She complied, and he unhooked her bra and started rubbing her breasts. At that point, he took her hand and placed it on his genital area on the

[3] Because we conclude that the trial court did not abuse its discretion, we need not address the defendant's argument that the admission of the uncharged sexual misconduct evidence by the trial court amounts to harmful error.

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

outside of his pants. He told her to get undressed while he removed his own clothing. A 'just followed what he said' because she did not know if he would hurt her. The defendant spread her legs and engaged in penile-vaginal intercourse with her. Approximately fifteen minutes later, after again asking what time her parents would be home, the defendant got dressed, told her 'to tell [her] parents that he said "hi," ' and then left the house. A was 'confused' and 'embarrass[ed],' and decided that she would not tell anyone about what had happened between her and the defendant.

"In January, 2012, while A was on a trip to New York City with two of her close friends, the girls decided to play a game of 'confessions.' A knew she could trust her girlfriends and told them that her uncle, the defendant, had sexually assaulted her. They all were upset, and A made her friends promise not to disclose the incident to anyone. Approximately one week later, however, one of the girls reported the incident to her guidance counselor at school, and A was asked to speak with her guidance counselor and a social worker. After she confirmed that she had been sexually assaulted by the defendant, an investigation commenced, and the defendant was arrested and charged with the three crimes [of] which he was convicted." (Footnote added.) Id., 775–76.

"Prior to trial, the state filed a notice of its intent to offer evidence of the defendant's prior misconduct involving three additional female family members. The alleged incidents took place in 1990, 1997, and 2006, when the prepubescent girl family members were between nine and ten years of age. On the first day of trial, outside the presence of the jury, the parties discussed the state's request. Defense counsel voiced his opposition to the proffered testimony with respect to the 1990 and the 1997 incidents. Id., 777. The defen-

dant "did not object to the state's proffer of evidence with respect to the 2006 incident."[5] Id., 777 n.2.

"With respect to the 1990 incident, the state indicated that the young girl at issue was the defendant's niece and that the defendant began having sexual conversations with her when she was nine or ten years old. Those inappropriate sexual conversations continued for a few years. Defense counsel argued that the conduct was too remote in time and that there had been no sexual contact, as had been alleged in the other incidents. The court, after stating the legal standard for the admission of prior uncharged sexual misconduct set forth in *State* v. *DeJesus*, [supra, 288 Conn. 476], ruled that 'the time frame is too remote' and 'the conduct itself is not sufficiently similar' to the charged conduct in the present case. For that reason, the court concluded: '[T]he court feels that it has not met the relevancy standard. And, in turn, that to admit it would simply be too prejudicial . . . .'

"With respect to the 1997 incident, the proffered evidence was that the defendant grabbed the hand of J, his nine year old niece, and placed it on his genital area. Defense counsel argued: '1997 is distant, so we do object, although you have an allegation of actual contact. And I will admit that's . . . as far as I'm concerned, a much closer call. I'm not going to concede that it should come in because I think on top of the other one, it is prejudicial.' The court ruled that the proffered evidence was relevant and that its probative

[5] As noted by the Appellate Court, the state's proffer of evidence with respect to the 2006 incident provided: " 'On or about July, 2006 . . . when [the witness C] was approximately ten years of age, the defendant pulled his penis out of his pants and told her [to] hold his penis because it was like candy and to suck his penis.' C's testimony at trial corroborated the facts as alleged in the state's proffer.' " *State* v. *Acosta*, supra, 162 Conn. App. 777 n.2. The Appellate Court also observed that, like the other victims, C was a prepubescent family member. Id., 783.

value outweighed the prejudicial effect from its admission.

"At trial . . . J was called as a state's witness to testify about the defendant's prior misconduct in 1997. J testified that her uncle, the defendant, sexually molested her when she was nine years old. She testified that she and her two brothers were at her grandmother's house, where they often visited and where the defendant would pay them to do chores. The defendant sent the brothers away 'to do something,' and J remained in the kitchen alone with the defendant. After her brothers left, the defendant placed a long white tube sock around her eyes and then grabbed her hand and placed it on his genital area. Once J realized what it was, she yanked her hand back and pulled the sock from her eyes. She told the defendant that she was going to tell her parents what had happened, and she ran from the kitchen." (Footnote omitted.) Id., 777–79.

"[T]he jury returned a verdict of guilty on all three counts of the substitute long form information. The court accepted the verdict and rendered judgment accordingly. The defendant was sentenced to thirty years incarceration, execution suspended after seventeen years, followed by twenty-five years of probation with various conditions." Id., 777. This certified appeal followed.

"It is well established that we review the trial court's decision to admit evidence . . . for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Smith*, 313 Conn. 325, 336, 96 A.3d 1238 (2014). Generally, "[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person . . . ." Conn. Code Evid. § 4-5 (a). Exceptions exist, however, and "[e]vidence of other sexual misconduct is admissible in a criminal case to establish that the

defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct" if certain conditions are satisfied. Conn. Code Evid. § 4-5 (b).

Strong public policy concerns justify this exception for prior sexual misconduct. See *State* v. *DeJesus*, supra, 288 Conn. 468 (recognizing that "strong public policy reasons continue to exist to admit evidence of uncharged misconduct more liberally in sexual assault cases than in other criminal cases"). First, "in sex crime cases generally, and in child molestation cases in particular, the offense often is committed surreptitiously, in the absence of any neutral witnesses. Consequently, courts allow prosecutorial authorities greater latitude in using prior misconduct evidence to bolster the credibility of the complaining witness and to aid in the obvious difficulty of proof." (Internal quotation marks omitted.) Id., 468–69. "Second, because of the unusually aberrant and pathological nature of the crime of child molestation, prior acts of similar misconduct, as opposed to other types of misconduct, are deemed to be highly probative because they tend to establish a necessary motive or explanation for an otherwise inexplicably horrible crime . . . and assist the jury in assessing the probability that a defendant has been falsely accused of such shocking behavior." (Citations omitted; internal quotation marks omitted.) Id., 469–70. Relatedly, "when human conduct involves sexual misconduct, people tend to act in generally consistent patterns of behavior, and . . . it is unlikely (although, of course, not impossible) that the same person will be falsely accused by a number of different victims." (Internal quotation marks omitted.) Id., 470.

Accordingly, this court has long held that "[e]vidence of prior sex offenses committed with persons other than the prosecuting witness is admissible to show a common design or plan where the prior offenses (1) are not too remote in time; (2) are similar to the offense

charged; and (3) are committed upon persons similar to the prosecuting witness."[6] *State* v. *Esposito*, 192 Conn. 166, 169–70, 471 A.2d 949 (1984). In *State* v. *Romero*, 269 Conn. 481, 498, 849 A.2d 760 (2004), this court restated these factors in the context of "prior sexual misconduct" evidence, noting that "such evidence is admissible when the prior misconduct is: (1) not too remote in time; (2) similar to the charged offense; and (3) committed upon a person similar to the victim in the charged misconduct." This court further observed that "the probative value of . . . [prior sexual misconduct] evidence must outweigh [its] prejudicial effect . . . ." (Internal quotation marks omitted.) Id., 497.

Drawing on the aforementioned public policy justifications, this court in *DeJesus* reaffirmed that "evidence of uncharged sexual misconduct properly may be admitted in sex crime cases to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive criminal sexual behavior if: (1) the trial court finds that such evidence is relevant to the charged crime in that it is not too remote in time, is similar to the offense charged and is committed upon persons similar to the prosecuting witness;[7] and (2) the trial court concludes that the probative value of such evidence outweighs its prejudicial effect." (Footnote added.) *State* v. *DeJesus*, supra, 288 Conn. 476. Ascertaining the relevancy of uncharged sexual misconduct

[6] Under this rule, this court routinely sustained the admission of uncharged sexual misconduct evidence where the three factors warranted it. See, e.g., *State* v. *Jacobson*, 283 Conn. 618, 635, 930 A.2d 628 (2007) (sustaining trial court's admission of testimony about uncharged incident by mother of child with whom defendant had slept in same bed).

[7] Although these relevancy factors may be traced to earlier cases, as discussed, we attribute them to *DeJesus* throughout this opinion, as it has become customary to do so. See, e.g., *State* v. *Devon D.*, 321 Conn. 656, 665–66, 138 A.3d 849 (2016) (citing to *DeJesus* in summarizing three relevancy factors).

evidence is a fact intensive inquiry, because the trial court must consider all three of the *DeJesus* relevancy factors together. See, e.g., *State* v. *Jacobson*, 283 Conn. 618, 632–35, 930 A.2d 628 (2007) (weighing remoteness of six to ten year interval between charged and uncharged misconduct, in relation to depth of similarities between respective victims and conduct in incidents in question). In the present case, the trial court was within its discretion to admit the 1997 evidence of uncharged sexual misconduct because the remoteness of the evidence is tempered by the similar conduct and victims in the two incidents.

Because we have repeatedly emphasized the connectedness of the three *DeJesus* relevancy factors, we decline to adopt a bright line rule for remoteness, or a rule that establishes a presumption that after ten years the uncharged conduct is too remote. In fact, in the present case, the uncharged sexual misconduct is not too remote in and of itself. In our cases predating *DeJesus*,[8] we recognized that although "increased remoteness in time does reduce the probative value of prior misconduct evidence"; *State* v. *Romero*, supra,

[8] Although this court has evaluated remoteness claims several times since *DeJesus*, none of those cases afforded an opportunity to consider a bright line limitation for remoteness, because the intervals between the charged and uncharged misconduct were too short. See *State* v. *Devon D.*, 321 Conn. 656, 667, 138 A.3d 849 (2016) (misconduct within span of less than four years); *State* v. *George A.*, 308 Conn. 274, 297, 63 A.3d 918 (2013) (four year interval); *State* v. *Gupta*, 297 Conn. 211, 215–220, 998 A.2d 1085 (2010) (misconduct within one year span); *State* v. *Johnson*, 289 Conn. 437, 455, 958 A.2d 713 (2008) (incidents within fifteen months of each other). One exception is *State* v. *Snelgrove*, 288 Conn. 742, 761–62, 954 A.2d 165 (2008), in which fourteen years had elapsed between the charged and uncharged incidents. This court observed that, although "ordinarily, a gap of fourteen years would raise serious questions as to whether the prior misconduct was too remote in time . . . [t]he defendant was incarcerated for eleven of those years . . . . [W]here prior misconduct evidence is otherwise admissible, an extended temporal gap between the prior misconduct and the charged conduct does not render the prior misconduct evidence irrelevant if the defendant was incarcerated during that time." Id.

269 Conn. 499–500; it alone is not "determinative." *State* v. *Jacobson*, supra, 283 Conn. 633. Furthermore, "[e]ven a relatively long hiatus between the charged and uncharged misconduct . . . is not, by itself, determinative of the admissibility of common plan or scheme evidence . . . especially when there are distinct parallels between the prior misconduct and the charged misconduct." (Citation omitted.) Id. Consequently, this court has upheld the admission of relatively remote uncharged sexual misconduct evidence if the other relevant similarities warranted it. For example, this court concluded that the trial court did not abuse its discretion in admitting evidence of uncharged sexual misconduct in both *State* v. *Romero*, supra, 499–500, and *State* v. *Jacobson*, supra, 632–633, 640, in which the evidence of such conduct occurred nine years and six to ten years, respectively, before the charged misconduct.

In the present case, twelve years elapsed between the uncharged and charged conduct. *State* v. *Acosta*, supra, 162 Conn. App. 783. We recognize that twelve years is "not an insignificant period of time . . . ." *State* v. *Jacobson*, supra, 283 Conn. 632; see id. (describing six to ten year interval as not "insignificant"). Nevertheless, because we do not review the individual prongs of the *DeJesus* relevancy test in isolation, we may observe that the 1997 uncharged sexual misconduct is not a lone incident. Indeed, as we have already explained in this opinion, the trial court admitted evidence of uncharged sexual misconduct from 2006, to which the defendant did not object. *State* v. *Acosta*, supra, 162 Conn. App. 777 n.2. The 2006 evidence diminishes the remoteness concerns of the 1997 uncharged sexual misconduct by bridging the gap between the 1997 incident and the charged misconduct. Rather than an isolated incident, separated from the charged offense by an unbroken gap of twelve years, the 1997 uncharged misconduct is part of a sequence including both the 2006

uncharged misconduct and the 2009 charged offense. Within that sequence, the longest gap was nine years between the 1997 and 2006 incidents. Our treatment of the 1997 incident as part of a series, rather than an isolated event, is particularly appropriate in light of our repeated recognition that one of the hallmarks of sexual misconduct is that it evinces itself in "generally consistent patterns of behavior . . . ." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 470.

The similarity of the conduct involved in the charged and uncharged incidents also supports the trial court's conclusion that the uncharged misconduct evidence was relevant under *DeJesus*. "It is well established that the victim and the conduct at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence." *State* v. *George A.*, 308 Conn. 274, 298 n.24, 63 A.3d 918 (2013). Additionally, differences in the severity of misconduct may "not illustrate a behavioral distinction of any significance" when a victim rebuffs or reports the misconduct. (Internal quotation marks omitted.) *State* v. *McKenzie-Adams*, 281 Conn. 486, 531, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007).

For example, in *State* v. *McKenzie-Adams*, supra, 281 Conn. 489–90, the defendant, a high school teacher, had been convicted of thirteen counts of sexual assault in the second degree against two of his students. The defendant had penile-vaginal intercourse with one of the students on several occasions, and had engaged in oral sex with the other student and had digitally penetrated her vagina. Id., 491–96. This court concluded that the trial court did not abuse its discretion in admitting uncharged sexual misconduct evidence from a third student, even though the defendant's conduct toward her culminated in inappropriate comments and touching, because "the jury reasonably could have inferred from [the third student's] testimony that [the defen-

dant's] misconduct ceased only after she rebuffed his sexual advances and reported his behavior to her mother and brother." Id., 531, 532.

In the present case, the charged and uncharged misconduct are sufficiently similar. In the initial stages of both incidents, the defendant placed the victim's hand on his penis. *State* v. *Acosta*, supra, 162 Conn. App. 776, 779. The defendant argues that the initial stages of the respective assaults are different, because the charged misconduct against A began with compliments and touching, whereas the uncharged misconduct against J began by tricking the victim into touching his penis. This argument is unconvincing, however, because the charged and uncharged misconduct need only be similar; *State* v. *George A.*, supra, 308 Conn. 298 n.24; and it is enough that the defendant placed both victims' hands on his penis. Furthermore, although the defendant's misconduct toward A escalated to vaginal penetration, and his misconduct toward J culminated in inappropriate contact; *State* v. *Acosta*, supra, 776, 779; the distinction is unpersuasive. Indeed, because J rebuffed the defendant and threatened to report his actions; id., 779; the jury reasonably could have inferred that he stopped only because she rebuffed his sexual advances.[9] See *State* v. *McKenzie-Adams*, supra, 281 Conn. 531. Therefore, the similar conduct in the charged and uncharged incidents supports the relevancy of the uncharged misconduct evidence.

The victims were sufficiently similar to render the 1997 misconduct relevant under *DeJesus*. As with conduct, "the victim[s] . . . at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence." *State* v. *George A.*, supra, 308

[9] For this reason, we also are not persuaded by the defendant's argument that the 1997 uncharged sexual misconduct is inadmissible because it is substantially less egregious than the charged misconduct.

Conn. 298 n.24. Age and familial status may suggest victim similarities. See *State* v. *DeJesus*, supra, 288 Conn. 475 (taking into account that "[t]he women were similar in age," when weighing similarity of victims); *State* v. *Kulmac*, 230 Conn. 43, 63, 644 A.2d 887 (1994) (observing that in context of victim similarity, familial type relationship between defendant and victim's family gave him access to victim). In the present case, both victims were prepubescent at the time of the misconduct. *State* v. *Acosta*, supra, 162 Conn. App. 783. Furthermore, both were nieces of the defendant. Id. The familial relationships offered the defendant access to the victims and the opportunity for his actions. With regard to the charged misconduct, A let the defendant into her house even though he had never been to visit, because "he was family." (Internal quotation marks omitted.) Id., 775. In the 1997 incident, the defendant had access to J because they were both in the home of another family member. Id., 779.

Finally, we observe that the public policy underpinnings of *DeJesus* are particularly relevant here. The defendant's misconduct occurred when the victims of the 1997 misconduct and the charged misconduct were alone in private places. See *State* v. *Acosta*, supra, 162 Conn. App. 775, 779 (describing respective victims as being alone in private homes with defendant at time of misconduct). He was able to act, therefore, "surreptitiously, in the absence of any neutral witnesses." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 468. As a result, the uncharged misconduct evidence serves the important roles of providing a "necessary motive or explanation for an otherwise inexplicably horrible crime," helping the jury to determine whether the "defendant has been falsely accused of such shocking behavior." Id., 469–70. These considerations further emphasize the relevance of the 1997 uncharged sexual misconduct evidence. Accordingly,

the Appellate Court properly concluded that the trial court did not abuse its discretion in admitting uncharged sexual misconduct evidence that occurred twelve years prior to the charged conduct because it satisfied the requirements of *DeJesus*.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

Cumulative Table of Cases
Connecticut Reports
Volume 326

(Replaces Prior Cumulative Table)

Abreu *v.* Commissioner of Correction (Order) . . . 901
Antwon W. *v.* Commissioner of Correction (Order) . . . 909
Barton *v.* Norwalk . . . 139
Inverse condemnation; certification from Appellate Court; whether defendant city's condemnation of parking lot used by tenants substantially destroyed plaintiff property owner's use and enjoyment of subject property; whether claim of highest and best use in previous direct condemnation proceeding barred claim of inverse condemnation predicated on different use under doctrine of judicial estoppel.
Brenmor Properties, LLC *v.* Planning & Zoning Commission . . . 55
Zoning; certification from Appellate Court; whether Appellate Court correctly concluded that trial court properly sustained plaintiff developer's administrative appeal from defendant planning and zoning commission's denial of application for affordable housing subdivision pursuant to statute (§ 8-30g); whether, in light of commission's concession regarding applicable standard of review, trial court abused its discretion by remanding matter with direction to approve plaintiff's application as presented; standard of review applicable to trial court's affordable housing remedy under § 8-30g, discussed.
Brian S. *v.* Commissioner of Correction (Order) . . . 904
Brown *v.* Njoku (Order) . . . 901
Channing Real Estate, LLC *v.* Gates . . . 123
Action to recover on promissory notes; motion to preclude certain evidence; claim that, although Appellate Court properly concluded that parol evidence rule barred introduction of extrinsic evidence to vary terms of notes, that court improperly remanded case for new trial rather than directing judgment for plaintiff and restricting proceedings on remand to hearing in damages; parol evidence rule, discussed; claim that defendant lacked standing to pursue claim alleging violation of Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); whether member of limited liability company has standing to bring action on basis of injury allegedly suffered by limited liability company.
DeEsso *v.* Litzie (Order) . . . 913
Fairfield Merrittview Ltd. Partnership *v.* Norwalk (Order) . . . 901
Federal National Mortgage Assn. *v.* Lawson (Order) . . . 902
Federal National Mortgage Assn. *v.* Morneau (Order) . . . 913
Giuca *v.* Commissioner of Correction (Order) . . . 903
Green *v.* Commissioner of Correction (Order) . . . 907
Hull *v.* Hull (Order) . . . 909
James E. *v.* Commissioner of Correction . . . 388
Habeas corpus; assault of elderly person first degree; reckless endangerment first degree; risk of injury to child; whether habeas court properly dismissed writ of habeas corpus for lack of subject matter jurisdiction; claim that amendment to statute (§ 54-125a [b] [2]) that repealed provision advancing certain inmates' parole eligibility dates by earned risk reduction credit violated ex post facto clause of federal constitution; claim that proper comparison for ex post facto analysis is between provision in effect at time of sentencing and subsequently enacted provision; facts of Lynce *v.* Mathis *(519 U.S. 433), distinguished; decision and reasoning in* Perez *v.* Commissioner of Correction *(326 Conn. 357), controlling.*
Keller *v.* Keller (Order) . . . 912
Machado *v.* Taylor . . . 396
Motor vehicle negligence action; statutory provision (§ 52-556) providing injured motorist right of action against state for injuries resulting from negligent operation of state owned and insured motor vehicle by state employee; motion for judgment of dismissal; claim that action should be dismissed for plaintiff's failure to offer evidence at trial to establish vehicle was insured by state, placing claim outside purview of waiver of sovereign immunity; rules of practice (§§ 10-

30 [a] [1] and 15-8), distinguished; motion to open evidence; claim that trial court improperly denied motion to dismiss alleging lack of subject matter jurisdiction on basis of delay and doctrine of laches.

Maturo *v.* State Employees Retirement Commission 160

Administrative appeal; whether defendant State Employees Retirement Commission properly interpreted statutory provision (§ 7-438 [b]) of Municipal Employees' Retirement Act (§ 7-425 et seq.) to bar retired member from collecting pension while he was reemployed by municipality in nonparticipating position; statutory framework of act establishing and governing municipal employees retirement system, discussed; claim that position of mayor of East Haven did not constitute employment and mayor was not employee for purposes of act; claim that § 7-438 (b) evidences legislative intent to preclude member from receiving pension only while reemployed in position designated by town as participating in retirement system; whether statute (§ 7-432 [g]) providing for application to medical examining board for reconsideration of eligibility for disability retirement was applicable to plaintiff's claim; claim that legislature acquiesced in defendant's prior interpretation of act; claim that trial court should have deferred to nonbinding opinion letter of attorney general recommending that defendant not deviate from prior interpretation of act, specifically its interpretation of § 7-438 (b), in absence of further legislative direction.

Micek-Holt *v.* Papageorge (Order). 915

Middlebury *v.* Connecticut Siting Council 40

Administrative appeal; whether trial court properly dismissed plaintiffs' appeal from decision of defendant siting council granting petition to open and modify certificate for operation of electric generating facility; whether trial court improperly determined that council adequately had considered neighborhood concerns as required by statute (§ 16-50p [c] [1]) in granting petition; statutory construction, discussed; claim that trial court improperly concluded that plaintiffs had abandoned their due process and substantial evidence claims due to inadequate briefing; whether plaintiffs' claim that trial court improperly concluded that plaintiffs had abandoned due process and substantial evidence claims due to inadequate briefing was moot because plaintiffs failed to challenge on appeal trial court's alternative conclusions rejecting those claims on merits.

MYM Realty, LLC *v.* Doe (Order) 905

New Haven Parking Authority *v.* Long Wharf Realty Corp. (Order) 912

O'Brien *v.* O'Brien 81

Marital dissolution; motion for contempt for plaintiff's purported violation of court's automatic orders effective during pendency of dissolution proceeding and appeal from judgment of dissolution on basis of certain stock transactions that plaintiff executed without defendant's consent or court order; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court improperly had considered, in making its financial orders, plaintiff's violations of automatic orders stemming from his decision to conduct certain stock transactions; whether court may remedy harm caused by another party's violation of court order, even without finding of contempt; claim that trial court's financial award was erroneous because it was excessive and based on improper method for valuing loss to marital estate; whether court had discretion to consider value that stocks and options would have had at time of remand trial; claim, as alternative ground for affirming Appellate Court's judgment, that plaintiff's stock transactions did not violate automatic orders because those transactions were made in usual course of business; whether trial court's conclusion that stock options plaintiff exercised were marital property subject to distribution between parties was clearly erroneous; claim, as alternative ground for affirming Appellate Court's judgment, that trial court's award of retroactive alimony was improper because it purportedly required plaintiff to pay arrearage out his share of marital assets, thereby effectively reducing his share of property distribution.

Perez *v.* Commissioner of Correction. 357

Habeas corpus; manslaughter first degree with firearm; carrying pistol without permit; whether 2013 amendments (P.A. 13-3 and P.A. 13-247) to statute ([Rev. to 2013] § 54-125a) eliminating earned risk reduction credit from calculation of violent offender's parole eligibility date, when such credit was not allowed at time that offense was committed, and eliminating requirement of parole hearing, violated petitioner's right to due process under federal and state constitutions and right to personal liberty pursuant to state constitution; whether retroactive application to petitioner of 2013 amendments, when he committed offense and

was sentenced prior to amendments' effective date, violated ex post facto clause of federal constitution; claim that, in conducting ex post facto inquiry, habeas court was not limited to comparing challenged statute with statute in effect at time that offense was committed but may consider statute in effect at time of plea and sentencing; claim that application of 2013 amendment to parole eligibility provision of § 54-125a (b) (2) by Board of Pardons and Paroles violated doctrine of separation of powers in that it converted legislatively determined parole eligible offense into offense which, by virtue of executive action, was rendered parole ineligible; claim that 2013 amendment, as applied to petitioner, violated equal protection clause of federal constitution; claim that statute (§ 18-98e), pursuant to which respondent Commissioner of Correction was vested with discretion to award risk reduction credit toward reduction of inmate's sentence, facially violated equal protection clause; claim that proper interpretation of 2013 amendments would limit application of those provisions to those inmates who began serving sentences after effective date of provisions.

PMG Land Associates, L.P. *v.* Harbour Landing Condominium Assn. (Order). 911
Reese *v.* Commissioner of Correction (Order). 907
Rosa *v.* Commissioner of Correction (Order) 905
Shipman *v.* Commissioner of Correction (Order) 908
Spiotti *v.* Wolcott 190

Employment discrimination; whether plaintiff's claims previously decided adversely to her by State Board of Mediation and Arbitration pursuant to collective bargaining agreement barred by doctrine of collateral estoppel; whether this court should overrule Genovese *v.* Gallo Wine Merchants, Inc. *(226 Conn. 475); claim that* Genovese *should be overruled because it relied on legislative history to interpret statute (§ 31-51bb) pertaining to right of employee covered by collective bargaining agreement to pursue cause of action, and legislature subsequently enacted statute (§ 1-2z) requiring courts to interpret statutes pursuant to plain meaning rule; claim that this court should depart from principles of stare decisis and overrule* Genovese.

State *v.* Acosta 405

Sexual assault first degree; risk of injury to child; certification from Appellate Court; whether Appellate Court correctly concluded that trial court had not abused its discretion in admitting twelve year old uncharged sexual misconduct evidence; whether uncharged sexual misconduct evidence was too remote and insufficiently similar to be admissible pursuant to State *v.* DeJesus *(288 Conn. 418); public policy concerns justifying admission of prior uncharged sexual misconduct, discussed.*

State *v.* Baccala 232

Breach of peace second degree; claim that, because evidence was insufficient to support conviction of breach of peace second degree on basis of words that did not fall within narrow category of unprotected fighting words, conviction constituted violation of first amendment to federal constitution; scope and application of fighting words exception to protections of first amendment, discussed; whether words spoken by defendant under circumstances in which they were uttered were likely to provoke violent response.

State *v.* Bonds (Order) 907
State *v.* Caballero (Order) 903
State *v.* Chankar (Order) 914
State *v.* Crenshaw (Order) 911
State *v.* Henderson (Order) 914
State *v.* Henry D. (Order). 912
State *v.* Houghtaling. 330

Possession of marijuana with intent to sell; possession of more than four ounces of marijuana; motion to suppress; conditional plea of nolo contendere; certification from Appellate Court; whether Appellate Court correctly concluded that defendant lacked standing to challenge warrantless search of property because he lacked subjective expectation of privacy; proper standard for determining whether defendant has subjective expectation of privacy in property subject to warrantless search, discussed; claim that defendant's confession to police was fruit of unlawful stop of defendant in his vehicle and his subsequent warrantless arrest; whether police had reasonable and articulable suspicion that defendant was involved in marijuana grow operation on property; whether police had probable cause to arrest defendant after stop of his vehicle; State *v.* Boyd *(57 Conn. App. 176), to*

extent that it requires defendant, in order to establish subjective expectation of privacy, to show certain facts pertaining to his relationship with property and that he maintained property in private manner, overruled.

State *v.* Jerzy G. 206

Application for pretrial program of accelerated rehabilitation pursuant to statute (§ 54-56e); sexual assault fourth degree; motion to dismiss; certification from Appellate Court; mootness; whether Appellate Court properly dismissed deported defendant's appeal as moot; State *v.* Aquino *(279 Conn. 293), distinguished; collateral consequences doctrine, discussed; whether there was reasonable possibility of prejudicial collateral consequences resulting from trial court's orders terminating accelerated rehabilitation and ordering rearrest; claim that defendant must evince intention to reenter country in order to raise existence of collateral consequences above mere speculation.*

State *v.* Kallberg 1

Larceny third degree as accessory; conspiracy to commit larceny third degree; motion to dismiss; certification to appeal; whether Appellate Court correctly concluded that trial court improperly denied defendant's motion to dismiss charges; whether Appellate Court improperly concluded that trial court's factual finding as to parties' intent was clearly erroneous; whether Appellate Court properly reversed judgment of conviction on ground that prosecution of defendant was barred because nolle prosequi that had been entered on larceny charges had been part of global disposition agreement supported by consideration; unilateral entry of nolle prosequi and bilateral agreement involving entry of nolle prosequi, distinguished; claim that ambiguity in agreement between state and defendant must be construed against state.

State *v.* Killiebrew (Order) 909
State *v.* Linder (Order) 902
State *v.* Morel (Order) 911
State *v.* Navarro (Orders). 910
State *v.* Perez (Order). 908
State *v.* Petion (Order) 906
State *v.* Schovanec 310

Identity theft third degree; illegal use of credit card; credit card theft; larceny sixth degree; whether trial court improperly denied defendant's request for jury instruction on third-party culpability and excluded references to third-party culpability from argument; unpreserved claim that certain of defendant's convictions violated constitutional prohibition against double jeopardy.

State *v.* Seeley 65

Forgery second degree; supervisory authority over administration of justice; claim that waiver rule should be abandoned in context of bench trials; whether state presented sufficient evidence that defendant forged signature during purchase of automobile; whether state presented sufficient evidence that defendant acted with intent to deceive.

State *v.* Sinclair (Order) 904
State *v.* Snowden (Order) 903
State *v.* Williams (Order) 913
State *v.* Williams-Bey (Order) 920
U.S. Bank National Assn. *v.* Nelson (Order) 908
U.S. Bank, National Assn. *v.* Walbert (Order) 902
Wells Fargo Bank *v.* Braca (Order) 914
Wells Fargo Bank, N.A. *v.* Monaco (Order) 905
William Raveis Real Estate, Inc. *v.* Zajaczkowski (Order) 906

CONNECTICUT APPELLATE REPORTS

Vol. 175

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

LOUIS SANCHEZ *v.* EDSON MANUFACTURING ET AL.
(AC 38480)

Alvord, Sheldon and Mullins, Js.

Syllabus

The plaintiff appealed to this court from the decision of the Workers' Compensation Review Board affirming the decision of the Workers' Compensation Commissioner that the plaintiff was not entitled to certain temporary partial or total disability benefits. The plaintiff, who had undergone two prior surgeries on his left shoulder, claimed that he injured that shoulder during his employment with the defendant manufacturer, E Co., when he moved a barrel and felt a pop in the shoulder. Thereafter, an independent surgeon, S, who had been selected by E Co., examined the plaintiff and concurred with the determination by the plaintiff's treating physician, O, that the plaintiff was suffering from a fracture and lesions in his left shoulder. S, who did not have the plaintiff's entire prior medical history when he examined the plaintiff, determined that the fracture and lesions were not caused in the incident in which the plaintiff moved the barrel, which he determined caused nothing more than a temporary strain of the plaintiff's left shoulder. After obtaining additional prior medical records of the plaintiff, S affirmed that finding in a subsequent addendum to his medical report. After O examined the plaintiff and recommended that a third surgery be performed on the plaintiff's shoulder, the commissioner ordered the plaintiff to undergo an examination by B, a surgeon chosen by the commissioner. B determined that the fracture and lesions in the plaintiff's left shoulder were attributed to the barrel incident. The commissioner found that S's opinion was more persuasive than those of O and B, and concluded, inter alia, that the plaintiff had injured his left shoulder in the course of his employment for which he was entitled to receive certain temporary

total disability benefits, but that the fracture and lesions were not caused by the barrel incident. The commissioner, thus, denied the plaintiff's claim for certain temporary partial disability benefits. *Held*:

1. The board properly determined that the commissioner's findings concerning the cause and extent of the plaintiff's disability were supported by sufficient underlying facts and that the inferences drawn from those facts were reasonable and legally permissible:

   a. The board did not err in finding that S provided a reasonable basis for his opinion, which was supported by sufficient subordinate facts as to constitute competent medical evidence on which the commissioner properly could rely in making his findings; S physically examined the plaintiff, performed a neurological assessment of him, reviewed medical records from O and twice reviewed additional medical records that he did not have at the time he examined the plaintiff, and S's written opinion was not so contradicted by his deposition testimony as to render it speculative or conjectural.

   b. The plaintiff's claim that, because the medical examiners did not testify before the commissioner, this court should depart from the degree of deference usually afforded to the commissioner's credibility determinations and determine the appropriate weight to afford the opinions of the medical experts was unavailing; there was no reason for this court to give less deference to the commissioner's credibility determinations where, as here, the commissioner was not presented with only written reports of nontestifying witnesses, and his credibility determinations and findings were clearly influenced by the plaintiff's live testimony that he never engaged in weightlifting or other forms of physical exercise, which was directly contradicted by O's medical notes and statements from the plaintiff's former coworkers.

2. The board did not abuse its discretion in not remanding the matter to the commissioner for an articulation as to why the commissioner, in rendering his decision, disregarded the opinion of B, the medical examiner chosen by the commissioner to examine the plaintiff; the board, guided by the state regulation (§ 31-301-3) that governs the requisite content of a commissioner's decision, determined that the commissioner's decision complied with the standard for decisions that do not rely on the opinion of a medical examiner chosen by the commissioner, and this court deferred to the board's interpretation and construction of its own regulation.

Argued February 6—officially released August 1, 2017

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Sixth District dismissing in part the plaintiff's claim for certain disability benefits, brought to the Workers' Compensation Review Board,

which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Frank V. Costello, with whom, on the brief, was *Austin Berescik-Johns*, for the appellant (plaintiff).

Marian Yun, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Louis Sanchez, appeals from the decision of the Workers' Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Sixth District (commissioner), who dismissed, in part, his claim for workers' compensation benefits pursuant to General Statutes §§ 31-307 and 31-308 (a). On appeal, the plaintiff claims that the board erred (1) in affirming the commissioner's decision that the plaintiff was not entitled to temporary partial or temporary total disability benefits from August, 2013 to July, 2014, because the commissioner's finding as to the nature and extent of the plaintiff's workplace injury was not supported by sufficient subordinate facts; and (2) in not remanding this case to the commissioner with instructions that he articulate why, in reaching his decision, he disregarded the opinion of his own medical examiner as to the nature and extent of the plaintiff's injury. We affirm the decision of the board.

The following facts and procedural history are relevant to this appeal. In 1992, the plaintiff was hired by Celus Fasteners, a Massachusetts manufacturer, where he worked for approximately sixteen years making rivets. When Celus Fasteners went bankrupt, the plaintiff took a job with Metz Personnel (Metz), also in Massachusetts, where he worked as a laminator. On July 23, 2008, while working for Metz, the plaintiff tripped and fell, landing on his left shoulder. Following his fall, the plaintiff began to experience sharp pains in his

shoulder. Although the plaintiff was given a cortisone injection for his shoulder injury and underwent a course of physical therapy, his shoulder pain persisted for several months. Thus, in March, 2009, the plaintiff consulted with an orthopedic surgeon, Dr. Ergin,[1] about the advisability of undergoing surgery on his left shoulder joint. After examining the plaintiff, however, Ergin concluded that surgery on the plaintiff's left shoulder joint was unnecessary. Instead, Ergin gave the plaintiff two additional cortisone injections and instructed him to seek a second opinion if he wanted to pursue surgery.

In accordance with Ergin's instructions, the plaintiff consulted with and was examined by James D. O'Holleran, an orthopedic surgeon. After reviewing a magnetic resonance imaging (MRI) scan of the plaintiff's shoulder, O'Holleran opined that the plaintiff was suffering from a torn rotator cuff, AC joint arthrosis, and a superior labral tear in his left shoulder, for which he recommended that the plaintiff undergo surgery. O'Holleran performed the recommended surgery on June 5, 2009. Almost six months later, after the plaintiff completed another course of physical therapy, O'Holleran gave him a medical release to return to full work duties on November 18, 2009.

Thereafter, the plaintiff took a new job with Charm Sciences, another Massachusetts manufacturer, for which he mixed commercial grade chemicals. While working at Charm Sciences on December 30, 2009, the plaintiff reinjured his left shoulder when lifting a forty pound box. As a result of this reinjury, the plaintiff experienced "difficulty reaching behind his shoulder as well as . . . overhead." The following week, the plaintiff was reexamined by O'Holleran, who gave him another cortisone injection, placed him on a light duty

[1] The record before this court does not contain any reference to Dr. Ergin's first name.

work restriction, and recommended that he undergo an additional six weeks of physical therapy. On March 22, 2010, when the plaintiff was reexamined by O'Holleran after he had completed the recommended course of physical therapy, he reported that his shoulder had experienced "a dramatic improvement . . . ." Accordingly, the plaintiff requested that O'Holleran give him a release to return to full work duty and a clearance "to do some weight training and lifting." O'Holleran gave the plaintiff a release to return to full work duty and instructed him to return "on an as-needed basis."

On June 2, 2011, the plaintiff returned to O'Holleran, complaining of persistent pain in his left shoulder. O'Holleran gave the plaintiff another cortisone injection and instructed him to undergo additional physical therapy. These conservative treatments proved to be unsuccessful, however, and the plaintiff remained unable to return to work throughout July, 2011. Thereafter, the plaintiff underwent another MRI scan on August 31, 2011. On September 15, 2011, when O'Holleran reviewed the new MRI scan with the plaintiff, he opined that, although the plaintiff had not suffered a new tear in his left shoulder, there was "a high degree of [inflammation] within the tissue inside the AC joint." After discussing several treatment options with O'Holleran, the plaintiff elected to undergo a second surgery for shoulder arthroscopy, lysis of adhesions, and debridement,[2] which O'Holleran performed on February 28, 2012. Although the second surgery was performed without complication, the plaintiff remained unable to work for several months thereafter.

In April, 2013, the plaintiff was employed by the defendant Edson Manufacturing,[3] a Connecticut manufacturer, as a mechanic and machine operator. As part

[2] O'Holleran later explained that this second surgery was performed to cut away portions of residual scar tissue in the plaintiff's shoulder, thereby reducing stiffness and increasing the range of motion in the left shoulder.

[3] Peerless Insurance Company, the workers' compensation insurer for Edson Manufacturing, is also a defendant in this case. For convenience, we

of his duties, the plaintiff used a dolly[4] to bring barrels of nails to the company's rivet-making machines and to transport finished rivets to other locations in the factory after they were made. While working on April 15, 2013, the plaintiff prepared to move a barrel of stainless steel nails weighing approximately 100 pounds. To do so, he first positioned himself behind the dolly and barrel, then, with his right hand on the back of the dolly, reached out with his left arm and placed his left hand on the rim of the barrel. Then, with his left hand gripping the rim of the barrel, the plaintiff pulled the barrel of nails toward his chest until he felt a sudden "pop" in his left shoulder. The plaintiff did not inform anyone of his injury at the time he sustained it, nor did he request time off from work after he finished his shift that day. Rather, he continued to work for the defendant, without complaint, for the next eleven days, until he was laid off on April 26, 2013.

Because the layoff was supposed to be temporary, the plaintiff intended to return to his job with the defendant when it was over. On May 20, 2013, the defendant notified the plaintiff, by text message, that he could return to work. The plaintiff responded by text message that he would return to work the following Monday. The defendant's offer later was retracted, however, due to an unexpected delay in receiving certain materials and supplies.

Two days later, on May 22, 2013, thirty-seven days after the plaintiff suffered his workplace injury, he went

refer in this opinion to Edson Manufacturing as the defendant. See *Sellers* v. *Sellers Garage, Inc.*, 155 Conn. App. 635, 636 n.1, 110 A.3d 521 (2015).

[4] During the formal hearing before the commissioner, the plaintiff agreed with his counsel's statements that the dolly he used was a "vertical piece of metal with a flat bottom" with two wheels in the back, and that, to operate the dolly, the operator would place an item on the flat bottom, pull the item back toward the vertical piece of metal, and rest the weight of the item on the dolly's wheels.

to the emergency room of Lawrence General Hospital in Lawrence, Massachusetts, complaining of pain in his left shoulder. Thereafter, the plaintiff was referred back to O'Holleran, who examined him on May 24, 2013. During that examination, the plaintiff stated that he had been experiencing "significant worsening pain" in his left shoulder since the date of his injury, which had caused him to be unable to sleep or to perform overhead activities without pain. Accordingly, O'Holleran ordered another MRI scan of the plaintiff's left shoulder and gave him documentation stating that he would be unable to return to work until he was reevaluated.

On July 9, 2013, the plaintiff filed a form 30C notice of his workers' compensation claim.[5] On July 7, 2013, more than seventy days after the date of his workplace injury, the plaintiff informed the defendant, for the first time, that he had suffered a shoulder injury while working on April 15, 2013. After receiving the plaintiff's form 30C, the defendant requested, pursuant to General Statutes § 31-294f (a),[6] that an independent medical examination of the plaintiff be conducted in order to assist

[5] General Statutes § 31-294c (a) provides in relevant part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident . . . which caused the personal injury . . . . Notice of claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident . . . . An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. . . ."

[6] General Statutes § 31-294f (a) provides in relevant part: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. . . . The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

it in determining whether to accept or contest the plaintiff's workers' compensation claim.

Prior to that examination, on June 8, 2013, the plaintiff underwent another MRI scan at the request of O'Holleran. On August 8, 2013, the plaintiff met with O'Holleran to discuss his findings. After reviewing the MRI scan, O'Holleran opined that the plaintiff had not aggravated a previous injury to his left shoulder on April 15, 2013, but, instead, had sustained a new injury—an anterior glenoid fracture with a bony Bankart lesion[7] and a Hill-Sachs lesion.[8] O'Holleran then noted, "I feel that his fracture fragment is in very good position and does not need surgery at this time. Given that his original injury was in April, I feel that [the] fragment has essentially healed. He still certainly has the labral tear and he certainly has pain. . . . I have recommended a course of physical therapy . . . . Regarding work, he will be cleared for light duty with no lifting greater than [ten] pounds." On September 11, 2013, however, O'Holleran changed that work restriction by ordering that the plaintiff not return to work until he was reevaluated. He later reaffirmed that total work restriction on October 23, 2013.

On September 25, 2013, the plaintiff was examined by Steven E. Selden, an orthopedic surgeon selected by the defendant as its independent medical examiner. During that examination, the plaintiff informed Selden that, on April 15, 2013, "he was moving a barrel [when he] felt a pop in his left shoulder . . . [but] he did not

[7] During his deposition, O'Holleran testified that a Bankart lesion "is a tear of the labrum [the cartilage that surrounds the socket in the shoulder] off of the glenoid in . . . [the] socket." He further testified that a bony Bankart lesion is caused "by the shoulder sliding out of [the] joint either partially, which is a subluxation, or fully, which is a dislocation," which results in "an avulsion of the labrum where it takes off a fleck of bone with it."

[8] Dr. Steven E. Selden testified that "[a] Hill-Sachs lesion is a depression in the humeral head that is a result of dislocations of your shoulder, where the ball and socket come apart."

feel any actual pain." After reviewing O'Holleran's May 24, 2013 notes and the June 8, 2013 MRI scan that O'Holleran had ordered, Selden noted that the plaintiff had sustained a prior shoulder injury in 2009, in connection with which he had undergone a "*posterior capsular shift* and distal clavicle excision." (Emphasis added.) Selden concurred with O'Holleran that the plaintiff was then suffering from a Hill-Sachs lesion and a bony Bankart lesion in his left shoulder. He did not agree, however, that this injury had occurred on April 15, 2013. Rather, he opined that "[the plaintiff] may have sustained a strain of his left shoulder as a result of moving a barrel . . . but he has a significant preexisting condition to his left shoulder for which he had two surgical procedures. It would be very helpful to have Dr. O'Holleran's notes regarding prior treatment for the left shoulder. Certainly, the [plaintiff's] Bankart lesion and Hill-Sachs lesion clearly preexisted April of 2013 based on the history reviewed. A course of physical therapy at this time would be appropriate." Selden further opined that the plaintiff was not totally disabled but, instead, was capable of light duty work "with avoidance of lifting more than [twenty-five] pounds and . . . overhead reaching and lifting."

On December 23, 2013, O'Holleran reexamined the plaintiff a final time. During that examination, the plaintiff maintained that he was still experiencing persistent pain in his left shoulder, and thus he requested that a third surgery be performed. In light of the plaintiff's repeated history of cortisone injections, use of anti-inflammatories, and physical therapy, none of which had yet proved to be successful, O'Holleran recommended that a third surgery be performed on the plaintiff's left shoulder.

Thereafter, the commissioner directed the plaintiff, pursuant to § 31-294f (a), to submit to another medical examination by an independent medical examiner of

the commissioner's own choosing, Dr. Peter R. Barnett. After performing that examination on April 14, 2014, Barnett noted: "Currently, the [plaintiff] feels that his left shoulder complaints have worsened. . . . The [plaintiff] . . . complains of numbness and tingling circumferentially throughout the entire left upper extremity, intermittently present both during the day and at night since the injury." After reviewing the plaintiff's medical records, Barnett opined: "It is my impression based on information currently available that [the plaintiff's] bony Bankart lesion and Hill-Sachs lesion [are] attributable to the alleged work-related incident . . . on April 15, 2013." Barnett further opined that, although the plaintiff had not yet reached maximum medical improvement, he was capable of limited work duty with restrictions against lifting or reaching overhead, repetitive use of the left arm, and lifting more than fifteen pounds.

On July 14, 2014, the commissioner held a formal hearing on the plaintiff's claims (1) for total incapacity benefits from June 24 to August 8, 2013; (2) for temporary partial benefits from August 9 to October 23, 2013; and (3) for total incapacity benefits from October 24, 2013 to July 14, 2014. At that hearing, the plaintiff testified and produced documentary evidence, including MRI scans, the medical records of O'Holleran, Selden and Barnett, and transcripts of O'Holleran's and Selden's depositions. In response, the defendant produced, inter alia, a July 14, 2014 addendum to Selden's medical report, wherein Selden stated that, although he had reviewed additional medical records pertaining to the plaintiff, he still believed that the plaintiff's April 15, 2013 injury did not cause his glenoid fracture and lesions. The defendant also submitted copies of certain text messages between the plaintiff and his manager, several documents regarding the plaintiff's two prior workers' compensation claims for injuries to his left

shoulder, and several statements from the plaintiff's former coworkers describing past conversations with the plaintiff, in which he had told them that he routinely did pushups in the morning before going to work.

On January 5, 2015, the commissioner issued a written decision, in which he found, inter alia, that (1) the plaintiff had not informed either his employer or his coworkers of his workplace injury, or reported that he had any difficulty performing his job duties after the injury; (2) there was "[c]onflicting testimony . . . as to the [plaintiff's] weightlifting activities" around the date of his injury; (3) Selden disagreed with the mechanism of injury, opining that the April 15, 2013 incident had "caused nothing more than a temporary, self-limited strain of [the plaintiff's] left shoulder"; and (4) as to the extent of the plaintiff's disability caused by his April 15, 2013 injury and resulting need for further medical treatment, Selden's opinions were more persuasive than those of O'Holleran and Barnett. On the basis of those findings, the commissioner concluded that the plaintiff had sustained a left shoulder injury in the course of his employment, for which he was entitled to receive "temporary total benefits for the period of June 24, 2013 through August 8, 2013." The commissioner disagreed, however, that the April 15, 2013 incident had caused either the plaintiff's anterior glenoid fracture or his accompanying lesions. Instead, the commissioner adopted Selden's opinion that on April 15, 2013, the plaintiff had suffered a shoulder sprain, and thus that "any [current] restrictions or limitations on his ability to work were unrelated to the April 15, 2013 injury." On those grounds, the commissioner denied the plaintiff's claims for temporary partial benefits for the period from August 9 to October 23, 2013, and for temporary total benefits for the period from October 24, 2013 to July 14, 2014.

On February 18, 2015, the plaintiff appealed from the commissioner's decision to the board, claiming that the commissioner had "erred in finding . . . Selden to be more persuasive than . . . O'Holleran and Barnett on the issues of extent of disability and medical treatment." In his accompanying brief, the plaintiff argued that Selden had formed his opinion as to causation and extent of disability without first reviewing the plaintiff's medical records concerning the treatment of his prior shoulder injury from 2009 through 2012. As a result, he argued, Selden was unaware that the plaintiff's prior injury was to the *posterior* labrum, whereas the April 15, 2013 injury here at issue was to his *anterior* labrum. The plaintiff thus argued that "[b]ecause . . . Selden did not have sufficient subordinate facts to render an opinion [to a reasonable degree of medical probability], the commissioner erred in relying on his testimony." Last, the plaintiff claimed that the commissioner did not adequately articulate why he had disregarded the opinion of Barnett, his own medical examiner, in making his findings and issuing his award in this case. On those grounds, the plaintiff requested that the board reverse the commissioner's decision and find that the plaintiff was entitled to benefits "from August 8, 2013, to the present and continuing until a form 36 is approved."

On June 26, 2015, the board held a hearing on the plaintiff's claims. On October 6, 2015, it issued a written decision affirming the commissioner's decision. In so doing, the board found, inter alia, that (1) Selden had offered a reasonable basis for his medical opinions as to causation; (2) the commissioner's findings were supported by adequate subordinate facts; (3) the commissioner correctly applied the law to the facts found; and (4) the commissioner's written decision "complie[d] with the standard we have delineated for a decision which does not rely on the opinion of the commissioner's examiner." Thereafter, the plaintiff filed the present appeal. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff first claims that the board erred in affirming the commissioner's decision because the commissioner's findings regarding the cause and extent of the plaintiff's disability were not supported by sufficient subordinate facts. In support of his argument, the plaintiff asserts that Selden had formed his opinion as to the cause and extent of the plaintiff's disability before he had reviewed the plaintiff's medical records regarding the prior injuries to and corresponding treatments for his left shoulder. The plaintiff argues that, without first acquainting himself with the plaintiff's entire medical history, Selden's opinion that the plaintiff's fracture and lesions preexisted the April 15, 2013 injury was the product of speculation and conjecture, and thus his opinion could not be stated to a reasonable degree of medical probability. Therefore, the plaintiff argues, the commissioner's decision, which relied heavily on Selden's opinion, was based on speculation and conjecture. In the alternative, the plaintiff argues that because none of the medical examiners in this case testified before the commissioner at the July 14, 2014 formal hearing, this court is not obligated to defer to the commissioner's credibility determinations and, instead, should conclude that the commissioner erred by not adopting the more persuasive opinions of O'Holleran and Barnett. See *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, 130 Conn. App. 672, 25 A.3d 687, cert. denied, 302 Conn. 942, 29 A.3d 467 (2011).

The defendant disagrees, asserting that the board deferred appropriately to the commissioner's factual findings and credibility determinations. In support of its argument, the defendant argues that causation is a question of fact and, if presented with conflicting medical testimony, the commissioner has the sole discretion to determine whose opinions to credit and what weight

to give to such opinions. Therefore, the defendant argues, the board correctly held that it could not reject the commissioner's finding that Selden's opinion was more persuasive than those of O'Holleran and Barnett. The defendant further argues that the board correctly held that Selden offered a reasonable basis for his opinions on causation and that, unlike the medical expert in *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, 294 Conn. 132, 982 A.2d 157 (2009)—a case upon which the plaintiff relies for his argument that Selden's opinion was the product of speculation and conjecture—Selden physically examined the plaintiff and, on two separate occasions, reviewed additional medical information prior to submitting the July 14, 2014 addendum to his report, wherein he affirmed his original opinion that the plaintiff suffered a shoulder sprain on April 15, 2013. The defendant thus argues that the board did not abuse its discretion in affirming the commissioner's decision. We agree with the defendant.

The following additional facts, as presented to the commissioner, are relevant to this claim. As discussed in the preceding paragraphs, the commissioner was presented with the plaintiff's live testimony and documentary evidence of the plaintiff's medical history and examinations. In his testimony, the plaintiff was asked, and he answered, several questions as to whether he exercised or lifted weights around the date of his injury. The plaintiff denied that he had ever engaged in weightlifting, exercising at a gym, or even exercising at home. Moreover, the plaintiff denied that he had ever asked O'Holleran to provide him with a medical release so that he could resume weightlifting. The defendant challenged this testimony by submitting statements from three of the plaintiff's former coworkers, describing separate conversations with the plaintiff, in which he had told them that he did pushups and sit-ups every day before going to work. In one such conversation, a

coworker recalled that the plaintiff had bragged about "how easy [his job] was because 'he was used to doing 200 pushups and 200-300 sit-ups among other exercises every morning before work' . . . ."

The documentary evidence presented at the formal hearing included, inter alia, O'Holleran's February 27, 2014 deposition. At the deposition, O'Holleran testified that he had reviewed his notes from the years 2009 to 2013, as well as MRI scans and X-rays he had ordered of the plaintiff's shoulder. On the basis of those records, O'Holleran opined, inter alia, that the incident on April 15, 2013, had caused the glenoid fracture, the bony Bankart lesion and the Hill-Sachs lesion in the plaintiff's left shoulder; this injury was unrelated to the plaintiff's prior shoulder surgeries in 2009 and 2012; the plaintiff had not yet reached maximum medical improvement following his April 15, 2013 injury; and, in light of the fact that the plaintiff had exhausted all conservative treatment options for his shoulder, surgery would be the next logical step, after which the plaintiff would need approximately nine months to fully recover.

In explaining the basis for his opinions, O'Holleran stated that the plaintiff's present fracture and lesions were in the anterior portion of the labrum, and thus could not have been an aggravation of the plaintiff's prior injury, which was to his posterior labrum; the plaintiff's report of feeling a "pop" at the time he was injured was consistent with experiencing a glenoid fracture and a labral tear; and, although a recent MRI scan showed that the fracture had healed, it was likely that the plaintiff's labrum was still torn, and that the tear was causing the plaintiff's pain. Last, O'Holleran noted the presence of bone marrow edema[9] in the plaintiff's

[9] O'Holleran described bone marrow edema as "fluid [in the bone] from an injury . . . that goes away a few months after the injury." He further testified that, because edema typically subsides after six months, the presence of edema in the plaintiff's shoulder indicated that the plaintiff's injury was new and unrelated either to the 2009 or 2012 surgery.

shoulder, which was consistent with a recent injury to his shoulder joint.

O'Holleran's testimony, however, was not unqualified. Thus, as to the mechanism of the plaintiff's injury, O'Holleran conceded: "I have zero opinion as to whether or not he truly injured his shoulder as he said he did at work. . . . I wasn't there . . . . I can only go by what the patient tells me in the office." Moreover, after he was asked to assume that the plaintiff had operated the dolly in a conventional manner, O'Holleran conceded that it would have been uncommon for such activity to cause this type of injury. O'Holleran further conceded that a glenoid fracture that causes a bony Bankart lesion and Hill-Sachs lesion is a painful injury, and that it was "unusual" for the plaintiff to have waited five weeks before seeking medical treatment. Regarding the current status of the plaintiff's injury, O'Holleran agreed that the recent scans showed that the fracture had healed, but stated both that he would be unable to determine the extent of the injury until he performed an incision on the shoulder joint, and that he lacked objective evidence to explain the plaintiff's current neurological complaints. As to the benefits of undergoing a third surgery, O'Holleran stated: "I think, given [that] he has not improved in [ten] months, and . . . assuming that his condition hasn't changed, I think [that] it's unlikely he's going to get much better." Last, when asked about the March 22, 2010 note regarding the plaintiff's desire to return to weightlifting and exercising, O'Holleran stated that, although he had no independent recollection of the plaintiff's exercise habits, he did not believe that the note was a mistake.

Selden's deposition occurred on December 2, 2013. At his deposition, Selden testified that, prior to forming his opinions, he had physically examined the plaintiff, performed a neurological assessment of him, and reviewed O'Holleran's May 24, 2013 notes as well as

the June 8, 2013 MRI scan that O'Holleran had ordered. Selden further testified that, after his September 25, 2013 examination of the plaintiff but before he gave his deposition, he had received and reviewed additional medical records for the plaintiff.[10] When questioned as to the results of the June 8, 2013 MRI scan, Selden acknowledged that it showed a glenoid fracture as well as a bony Bankart lesion and a Hill-Sachs lesion. He maintained, however, that this injury had not occurred on April 15, 2013. Selden explained that his opinion was based on two factors: (1) the mechanism of injury, as described by the plaintiff, was inconsistent with causing a glenoid fracture; and (2) the plaintiff's claim that he did not feel any pain when he sustained the injury was inconsistent with sustaining a glenoid fracture. As to the mechanism of injury, Selden testified that "lifting a barrel, whether it's manually . . . or using . . . some type of dolly, is inconsistent with fracturing your glenoid. . . . It's the wrong mechanism to cause a fracture." As to the amount of pain the plaintiff reportedly felt at the time of his injury, moreover, Selden testified, "I have not seen anybody with a glenoid fracture that didn't have significant pain in their shoulder, as with any fracture around the shoulder. That's a painful injury. I've personally not [seen] any patients with fractures such as that, and I've seen lots over the years, who have not had significant pain."

[10] At the outset of Selden's deposition, the following colloquy occurred:

"Q. You physically examined [the plaintiff], correct?

"A. That is correct as well.

"Q. You issued a report . . . and that's the full report, is it not?

"A. Correct.

"Q. Since that time, just recently, you have been given a couple of additional medical records from the past, which you did not have, correct?

"A. That is correct."

Neither the plaintiff nor the defendant inquired as to which additional medical records Selden had received and reviewed prior to his December 2, 2013 deposition.

On those grounds, Selden opined, inter alia, that the plaintiff likely suffered a shoulder strain on April 15, 2013; given the plaintiff's history of shoulder injuries, a sprain of this nature would have healed within approximately six to eight weeks; notwithstanding such a shoulder sprain, the plaintiff would have retained a light duty work capacity, and should have reached maximum medical improvement within six months of the date of the injury; there was no discernible reason for additional surgery on the shoulder; and he did not believe that the plaintiff's current complaints of persistent pain and numbness were connected to the April 15, 2013 work injury because the plaintiff did not complain of, nor did Selden observe any evidence that he was experiencing, any numbness or nerve damage when he performed his neurological examination of the plaintiff.

Selden's testimony, like O'Holleran's, was not unqualified. When asked his opinion as to what had occurred when the plaintiff felt the "pop" in his shoulder, Selden opined that the plaintiff had either subluxed[11] his shoulder or felt the breaking of adhesions or residual scar tissue from his prior surgery. Thereafter, Selden agreed that the subluxation of the shoulder joint can cause a glenoid fracture resulting in Bankart lesions or Hill-Sachs lesions. He maintained, however, that the mechanism of injury and the amount of pain experienced on April 15, 2013, were inconsistent with sustaining a glenoid fracture.

In addition to these deposition transcripts, the plaintiff submitted the April 14, 2014 written report of Barnett, the commissioner's medical examiner. In that report, Barnett noted that he had reviewed O'Holleran's notes for the period from 2009 to 2013, as well as several X-rays and MRI scans performed between 2011 and

[11] Subluxation is the medical term for a partial dislocation of the joint, "where the shoulder goes partly out of place."

2013. He then noted that the plaintiff had stated that "he was *pushing* with his left arm when he felt a popping sensation and mild pain." (Emphasis added.) Barnett subsequently diagnosed the plaintiff as suffering from an anterior-inferior bony Bankart lesion *and a posterior*-superior bony Hill-Sachs lesion, further noting the presence of bone marrow edema in the plaintiff's shoulder. On the basis of those findings, Barnett opined: "It is my impression based on information currently available that [the plaintiff's] bony Bankart lesion and Hill-Sachs lesion is attributable to the alleged work-related incident . . . on April 15, 2013. There is no indication that either of these problems was present at the time of his prior surgical procedures or prior care for the shoulder." He further noted that, "[a]t this juncture surgical intervention on the left shoulder would not be recommended. . . . [I]t is recommended that the [plaintiff] undergo a neurologic assessment . . . to determine the cause and origin of the [plaintiff's] non-specific neurologic complaints . . . ."

Last, on the day of the formal hearing, the defendant submitted an addendum to Selden's report, dated July 14, 2014, wherein Selden stated, "I have reviewed additional medical records provided regarding [the plaintiff].[12] It remains my opinion that [the plaintiff] sustained a strain of his left shoulder as a result of moving a barrel on [April 15, 2013]. . . . It is my opinion that the incident of [April 15, 2013] caused nothing more than a temporary, self-limited strain of his left shoulder . . . [and] that any limitations on his ability to work at this time are unrelated to the incident of [April 15, 2013]. (Footnote added.)

[12] Notably, Selden's written addendum, much like his deposition testimony, does not state with any degree of specificity what additional medical records he reviewed between his December 2, 2013 deposition and his July 14, 2014 addendum to his written report. See footnote 10 of this opinion.

In summarizing the commissioner's findings, the board recalled that the commissioner had "noted that the medical evidence in this claim was disputed, and there was inconsistency between the [plaintiff's] narrative as to his exercise regimen and the reports of his treating physician." Thereafter, the board held that, in light of Selden's examination and conclusions, as confirmed by his July 14, 2014 addendum, "the opinions that [Selden] provided in this case were . . . competent evidence that the trial commissioner could reasonably rely upon. To the extent the initial opinions rendered by [Selden] had deficiencies, we believe that they were sufficiently clarified by the addendum submitted . . . to constitute a reliable expert opinion." Thus, the board held that the commissioner's conclusion "[was] consistent with a medical opinion he found persuasive and reliable." With these additional facts in mind, we turn to the merits of the plaintiff's claims.

A

We first address the plaintiff's argument that Selden's opinion was not competent medical evidence supported by sufficient subordinate facts, and thus that the commissioner's decision, which relied heavily on that opinion, was based on speculation and conjecture. The gravamen of the plaintiff's argument is that Selden was unaware, when formulating his opinions, that the plaintiff's prior injuries were to the *posterior* labrum—whereas his current injury was to the *anterior* labrum—and that his written opinion was directly contradicted by his subsequent deposition testimony. We are unpersuaded.

"[W]e first set forth our standard of review for workers' compensation appeals. The commissioner is the sole trier of fact and [t]he conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to

the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . The review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is [obligated] to hear the appeal on the record and not retry the facts. . . . On appeal, the board must determine whether there is *any evidence*[13] in the record to support the commissioner's findings and award. . . . Our scope of review of [the] actions of the [board] is [similarly] . . . limited. . . . [However] [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts which are admitted or undisputed." (Emphasis added; footnote added; internal quotation marks omitted.) *Mahoney* v. *Bill Mann Tree Service, Inc.*, 67 Conn. App. 134, 136, 787 A.2d 61 (2001).

"A commissioner's conclusion regarding causation is conclusive, provided it is supported by competent evidence and is otherwise consistent with the law." (Citation omitted.) *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440, 451, 774 A.2d 992 (2001). Moreover, "[i]t matters not that the basic facts from which the [commissioner] draws this inference are . . . controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and [the commissioner's] choice, if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) *Gartrell* v. *Dept. of Correction*, 259 Conn. 29, 36, 787 A.2d 541 (2002).

[13] Pursuant to § 31-301-8 of the Regulations of Connecticut State Agencies, the board "considers no evidence other than that certified to it by the commissioner, and then for the limited purpose of determining . . . whether there was *any evidence* to support in law the conclusion reached. It cannot review the conclusions of the commissioner when these depend upon the weight of the evidence and the credibility of witnesses. . . ." (Emphasis added.)

"[T]here must [however] be subordinate facts from which the conclusion that there is a causal connection between the employment and the injury can be drawn. . . . [Thus, the] right of a claimant to compensation must be based [on] more than speculation and conjecture." (Internal quotation marks omitted.) *DiNuzzo* v. *Dan Perkins Chevrolet GEO, Inc.*, supra, 294 Conn. 143. Accordingly, "[a]lthough . . . the board is prohibited from retrying the case or substituting its inferences for those drawn by the commissioner, the board certainly [is] free to examine the record to determine whether competent evidence supported the commissioner's findings, inferences drawn from such findings and conclusions." *Dengler* v. *Special Attention Health Services, Inc.*, supra, 450.

In the present case, the plaintiff argues that the commissioner's findings were not supported by competent medical evidence because, at the time he formed his opinions, Selden was unaware that the plaintiff's prior injuries involved the plaintiff's anterior labrum, not the posterior labrum. The plaintiff thus argues, citing *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, supra, 294 Conn. 132, that, without knowing the entirety of the plaintiff's prior medical history, Selden's opinion on causation and extent of disability amounted to mere speculation and conjecture, and thus "there were insufficient subordinate facts in the record to support the commissioner's finding"; id., 143; which was predicated on Selden's expert testimony.

After carefully reviewing the record in this case, we conclude that the board did not err in determining that Selden offered a reasonable basis for his opinion, and thus that the commissioner's decision, which relied upon that opinion, was supported by sufficient subordinate facts to require that it be affirmed. First, in his September 25, 2013 report, Selden specifically noted that he had reviewed the plaintiff's past medical history,

which revealed that, in 2009, the plaintiff had injured his shoulder and "underwent a *posterior* capsular shift and distal clavicle excision. He did not do well and had a second surgery in June of 2012. He underwent lysis of adhesions." (Emphasis added.) Thereafter, during his December 2, 2013 deposition, Selden agreed with the statement by the defendant's counsel that he reviewed "a couple of additional medical records from the past which [he] did not have" at the time of his examination. Last, in his July 14, 2014 addendum, Selden again reported that he had reviewed additional medical records, but that his opinion remained unchanged: the April 15, 2013 incident had caused nothing more than a shoulder strain, and any current limitations on the plaintiff's ability to work were unrelated to that incident. Looking at "the entire substance of the expert's testimony"; *O'Reilly* v. *General Dynamics Corp.*, 52 Conn. App. 813, 817, 728 A.2d 527 (1999); it is apparent that Selden was aware that the plaintiff's 2009 injury was to the posterior labrum and that, after personally examining the plaintiff, reviewing his past medical history, and twice reviewing additional medical reports, his opinion remained constant.

For that reason, we conclude that the board correctly determined that Selden's opinions were unlike those of the claimant's medical examiner in *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, supra, 294 Conn. 132. In *DiNuzzo*, the decedent's spouse "submitted a claim for dependent widow's benefits pursuant to . . . [General Statutes] § 31-306." (Internal quotation marks omitted.) Id., 134. In support of her claim, the claimant submitted a medical report prepared by the decedent's physician, in which the doctor "stated that the cause of [the decedent's] death was heart disease, secondary to atherosclerotic heart disease . . . brought about by the curtailment of his physical activities . . . [and that the decedent's prior] compensable injury and its treatment

substantially contributed to his death . . . because they severely limited his ability to maintain his physical fitness and aerobic conditioning." (Internal quotation marks omitted.) Id., 135. Thereafter, the commissioner in *DiNuzzo* found "that there was a relationship between the compensable injury and the decedent's death . . . [and, on that basis,] concluded that the plaintiff was entitled to benefits pursuant to § 31-306." (Internal quotation marks omitted.) Id., 136.

On appeal in *DiNuzzo*, our Supreme Court affirmed the judgment of this court, which reversed the board's affirmance of the commissioner's decision. In so doing, the *DiNuzzo* court noted that the medical examiner, upon whose opinion the commissioner had relied, had made the following concessions of fact which undermined his opinion: (1) the decedent had not been diagnosed with atherosclerotic heart disease; (2) the medical examiner was unaware that "the decedent had been hospitalized approximately one month before his death for certain side effects of Interferon"; id., 145; (3) the symptoms exhibited by the decedent shortly before his death "could have been the result of his use of Interferon"; id.; and (4) because he did examine the decedent's body postmortem, "it would be impossible to know whether the heart attack could have been prevented if the decedent had been able to exercise more because some heart attacks are caused by congenital heart defects that are not amenable to improvement through exercise." Id., 146. The court then noted that, aside from this unsupported medical opinion, "the plaintiff produced no evidence linking the decedent's death to a heart attack." Id., 144. Accordingly, the court held that that medical opinion amounted to no more than speculation and conjecture, and thus "the causal link between his compensable injury and his alleged manner of death simply [became] too attenuated to

support a reasonable inference that the two events were connected." Id., 148.

Here, unlike the medical examiner in *DiNuzzo*, Selden physically examined and performed a neurological assessment of the plaintiff, reviewed O'Holleran's May, 2013 medical notes, the June 8, 2013 MRI scan, which O'Holleran had ordered, and twice reviewed additional medical records concerning the plaintiff's prior shoulder injuries. In light of these facts, the commissioner in this case had far more evidence on the record before him to substantiate Selden's opinion as to the nature and extent of the plaintiff's injury than the medical examiner whose opinion was rejected as speculative and conjectural in *DiNuzzo*. See id., 145–48. Because Selden provided a reasonable basis for his opinion, that opinion was competent medical evidence supported by sufficient underlying facts to justify the commissioner's reliance upon it in reaching his decision in this case.

Last, we are not persuaded by the plaintiff's argument that Selden's written report was so contradicted by his deposition testimony, or that any inconsistencies between the report and the deposition were so substantial, as to make it inappropriate for the commissioner to rely on the report in making his findings in this case. Although the plaintiff correctly notes that Selden testified that he believed that the plaintiff may have subluxed his shoulder on April 15, 2013, and that a shoulder subluxation can result in a glenoid fracture, there are two fundamental flaws in the plaintiff's argument. First, Selden testified that the "pop" in the plaintiff's shoulder *could* have been *either* a subluxation *or* a tearing of preexisting adhesions and scar tissue, either of which could have caused the plaintiff's shoulder strain without causing the glenoid fracture. Second, the plaintiff fails to acknowledge that, even if he did sublux his shoulder on April 15, 2013, and a subluxation can

cause a glenoid fracture, those possibilities do not compel a finding that the particular subluxation, if any, that occurred on April 15, 2013, is what caused the glenoid fracture. Instead, both Selden and the commissioner reasonably could have concluded that the plaintiff, who claimed to have routinely done 200 pushups per day, sustained a second subluxation that caused the glenoid fracture after the date of his workplace injury on April 15, 2013, but before he went to the hospital on May 22, 2013. We thus cannot find that Selden's written opinion was so squarely contradicted by his deposition testimony as to render his opinion speculative or conjectural.

"Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it. . . . Similarly, the conclusions drawn by the commissioner from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It [is] within the commissioner's discretion to credit all, part or none of the . . . [expert] testimony. That determination cannot be overruled by the board unless it could not find *any evidence* to support the conclusion." (Citations omitted; emphasis added; internal quotation marks omitted.) *O'Reilly* v. *General Dynamics Corp.*, supra, 52 Conn. App. 818–19. In light of the foregoing analysis, we agree with the board that Selden's opinion was supported by sufficient subordinate facts to constitute competent medical evidence upon which the commissioner properly could rely in making his findings in this case. We thus conclude that the board correctly determined that the commissioner's findings were supported by sufficient underlying facts to uphold them, and that any inferences drawn from such facts were reasonable and legally permissible. See, e.g., *Blakeslee* v. *Platt Bros. & Co.*, 279 Conn. 239, 243, 902 A.2d 620 (2006).

B

Notwithstanding our conclusion that the commissioner's findings were supported by sufficient underlying facts, the plaintiff argues, in the alternative, under *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, supra, 130 Conn. App. 672, that this court should depart from the degree of deference usually afforded to the commissioner's credibility determinations and conclude that the commissioner erred in not adopting the opinions of O'Holleran and Barnett. This is so, the plaintiff argues, because none of the medical examiners gave live testimony before the commissioner at the July, 2014 formal hearing; rather, each examiner submitted a written report concerning his own medical evaluation of the plaintiff. The plaintiff argues that, under these circumstances, the commissioner's credibility determinations were not influenced by the live testimony of those witnesses, and thus this court is equally capable of determining the appropriate weight to afford the opinions of Selden, O'Holleran and Barnett. We disagree and conclude that the defendant's reliance on *Bode* is misplaced.

In *Bode*, the claimant sought temporary total disability benefits for fractures to his spine and shoulder that he sustained in 2002, after falling thirty feet from scaffolding. Id., 674. Although the claimant submitted a number of medical records in support of his claim, "[n]one of the physicians opined that the [claimant] was totally disabled or unable to work on or after April 26, 2005." Id., 676. In addition to these reports, the claimant submitted four vocational evaluations. Although the first two evaluations, performed in October, 2003, and January, 2004, had concluded that the claimant was " 'presently employable,' " the last two evaluations, which were performed in August, 2004, and July, 2008, had concluded that "due to his worsening

condition the [claimant] was completely unemployable." Id., 677. In January, 2009, the commissioner dismissed the claimant's request for disability benefits. Id., 678. Thereafter, the board affirmed the commissioner's finding, concluding, inter alia, that "the [claimant] failed to meet his burden of proving eligibility for temporary total disability benefits because . . . he did not introduce one medical report in which a physician opined that [he] was totally disabled . . . . [Thus] because this board is not empowered to overturn a trier's evidentiary determinations unless they lack foundation in the record . . . the trial commissioner's decision . . . must stand." (Internal quotation marks omitted.) Id.

On appeal in *Bode*, the claimant argued that the board had improperly affirmed the commissioner's decision because, inter alia, the commissioner "arbitrarily disregarded . . . the uncontroverted vocational expert opinions . . . ." Id., 679. This court agreed and reversed the decision of the board. Id. In so doing, the court in *Bode* acknowledged that the claimant had not introduced a single medical report establishing his total disability. It held, however, that "[t]he commissioner's inquiry . . . as to whether the plaintiff was realistically employable should not have ended with his review . . . of the plaintiff's physical capabilities. Under the facts of this case, the commissioner's decision necessarily involved his consideration of the . . . four vocational reports" as part of his decision as to whether the claimant proved his entitlement to temporary total disability benefits. Id., 681–82.

After reviewing the evidence presented to the commissioner, the court in *Bode* noted that none of the vocational experts had testified before the commissioner and that, of the four vocational reports, only the February, 2004 report unequivocally stated that the plaintiff presently was employable. Id., 682. Further, the court in *Bode* noted that the November, 2003 and

the July, 2008 vocational reports had been authored by the same evaluator, who had changed his opinion in his 2008 report by finding that the claimant, at that time, was " 'totally unemployable.' " Id., 684. Last, the court noted that the commissioner's decision discussed only the vocational reports suggesting that the plaintiff was employable, but made no finding as to the reliability of the August, 2004 or July, 2008 reports that had stated that the plaintiff was unemployable. Id., 684.

In reversing the decision of the board, the court in *Bode* "declined to afford deference to the commissioner's credibility determinations when such determinations were based solely on documentary evidence, noting that 'no testimony regarding any of the underlying assertions was taken. All of the facts . . . were reflected in the medical reports from the physicians . . . . Thus, the deference [that] we normally would give to the commissioner on issues of credibility is not warranted in the present case, because we are as able as he was to gauge the reliability of those documents.' " Id., 685, quoting *Pietraroia* v. *Northeast Utilities*, 254 Conn. 60, 75, 756 A.2d 845 (2000).

In the present case, the plaintiff argues, pursuant to *Bode*, that this court should decline to give deference to the commissioner's credibility determinations because here, as in *Bode*, none of the medical examiners testified before the commissioner, and thus this court is assertedly no less capable than the commissioner of deciding what weight to give to those reports. We disagree. Our conclusion rests on the fact that the commissioner's credibility determinations and findings in the present case were clearly influenced by the plaintiff's live testimony that he never engaged in weightlifting or other forms of physical exercise. As discussed in the preceding paragraphs, the plaintiff was questioned as to whether he had ever lifted weights, requested a medical release from O'Holleran to resume weightlifting, or had

conversations at work about doing pushups and situps every day before going to work. The plaintiff flatly denied these allegations. His testimony was directly contradicted, however, both by O'Holleran's medical notes and by the statements of his former coworkers. In his decision, the commissioner expressly found that there was "[c]onflicting testimony . . . between the [plaintiff] and [O'Holleran] as to the [plaintiff's] weightlifting activities and performing pushups"; that Selden "disagreed with the [plaintiff's] mechanism of the injury"; and that "the opinions and conclusions of [Selden are] more persuasive in part than those of . . . O'Holleran and Barnett on the issues of extent of disability and need for further medical treatment."

Against this background, we conclude that here, unlike in *Bode*, the commissioner was presented with " '[live] testimony regarding . . . the [claimant's] underlying assertions' "; *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, supra, 130 Conn. App. 685; not just written reports from nontestifying experts, upon which to make his findings and conclusions. It is well settled that "[the] authority to find the facts entitles the commissioner to determine the weight of the evidence presented and the credibility of the testimony offered by lay and expert witnesses." (Internal quotation marks omitted.) *Ryker* v. *Bethany*, 97 Conn. App. 304, 314, 904 A.2d 1227, cert. denied, 280 Conn. 932, 909 A.2d 958 (2006). Moreover, "[e]ven if the medical evidence . . . is not refuted, the [commissioner] can still dismiss the claim if [he] does not find the injured worker to be credible." 3 A. Sevarino, Connecticut Workers' Compensation After Reforms (J. Passaretti, Jr., ed., 6th Ed. 2014) § 6.02.3, p. 760. Under the circumstances of this case, we see no compelling reason to give less deference to the commissioner's findings than we usually give to such findings in similar cases.[14]

[14] Since the *Bode* decision, the board has held: "We do not believe *Bode* . . . has limited such precedents as [*O'Reilly* v. *General Dynamics Corp.*,

II

The plaintiff's final claim is that the board erred in not remanding the case to the commissioner with instructions that the commissioner articulate why he disregarded the opinion of Barnett, the medical examiner he chose to examine the plaintiff. In support of this claim, the plaintiff argues that, although a commissioner may "[choose] not to adopt the diagnosis of the physician performing [the commissioner's] examination," the commissioner "should articulate the reasons behind his or her decision to disregard the examiner's report" because it "has long been the expectation within workers' compensation law . . . that the [commissioner's] examiner's opinion will provide strong guidance to the commissioner's ultimate decision." (Internal quotation marks omitted.) The plaintiff asserts that the commissioner's decision in this case "summarily states the opinions and conclusions of [Selden]" without including "any explanation whatsoever for this departure," and thus the board erred in not remanding this case to the commissioner for further articulation. We disagree.

The following facts are pertinent to this claim. In his decision, the commissioner found, inter alia, that (1) Selden "opined in pertinent part that the [plaintiff] may have sustained a strain to his left shoulder"; (2) "Dr. Barnett opined, in relevant part, causally relating the present injury to the April 15, 2013 work-related incident, did not recommend surgical intervention . . .

supra, 52 Conn. App. 813] as to the trial commissioner's prerogative to assess and weigh medical evidence. A trial commissioner is not obligated to accept the most recent medical opinion presented to the tribunal. . . . However, when a medical witness offers subsequent testimony which deviates from a prior opinion, a trial commissioner must acknowledge and reconcile the differing opinions and should the commissioner seek to rely on the prior opinion, grounds for the reliance must be provided." (Citation omitted.) *Sullins* v. *United Parcel Service, Inc.*, No. 5611, CRB 1-10-12, 2012 WL 979543, *3 n.2 (January 6, 2012), rev'd on other grounds, 146 Conn. App. 154, 77 A.3d 196 (2013), aff'd, 315 Conn. 543, 108 A.3d 1110 (2015).

and recommended the [plaintiff] undergo a neurologic assessment"; and that (3) "the opinions and conclusions of [Selden are] more persuasive in part than those of . . . O'Holleran and Barnett on the issues of extent of disability and need for further medical treatment." On those grounds, the commissioner agreed with Selden that the plaintiff's April 15, 2013 injury "was self-limiting in nature . . . any restrictions or limitations on his ability to work were unrelated to the April 15, 2013 injury . . . [and that] no further medical treatment is required as it relates to the April 15, 2013 injury."

In affirming that decision, the board held, in part, that it "reviewed the finding [and] award and [identified] no legal error." The board further held that "the text of the finding [and] award complies with the standard we have delineated for a decision which does not rely on the opinion of the commissioner's examiner." After reviewing the contents of the commissioner's decision, the board concluded that the reasoning for the commissioner's departure from Barnett's medical opinion "is clearly ascertainable in this opinion."

When reviewing the decision of the board, "[t]he role of this court is to determine whether the . . . [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Internal quotation marks omitted.) *Tartaglino* v. *Dept. of Correction*, 55 Conn. App. 190, 193, 737 A.2d 993, cert. denied, 251 Conn. 929, 742 A.2d 364 (1999). "[T]he discretion [to remand the case] is a legal discretion vested in the [board]," and thus we review that decision to determine "whether the [board's] failure to remand the case to the commissioner constituted an abuse of its discretion . . . ." (Internal quotation marks omitted.) *Matey* v. *Estate of Dember*, 256 Conn. 456, 489, 774 A.2d 113 (2001).

It is well settled that "when a commissioner orders a medical examination, there is usually an expectation among the parties that said examination will provide strong guidance to the commissioner. Where a commissioner chooses not to adopt the diagnosis of the physician performing that examination, he or she should articulate the reasons behind his or her decision to disregard the examiner's report. . . . [A]lthough a commissioner should articulate the reasons behind his decision to disregard a § 31-294f examiner's opinion, the ultimate decision is always with the commissioner . . . ." (Citations omitted; internal quotation marks omitted.) *Gillis* v. *White Oak Corp.*, 49 Conn. App. 630, 636–37, 716 A.2d 115, cert. denied, 247 Conn. 919, 722 A.2d 806 (1998).

In concluding that the commissioner's decision "complied with the standard . . . delineated for a decision which does not rely on the opinion of the commissioner's examiner," the board was necessarily guided by § 31-310-3 of the Regulations of Connecticut State Agencies,[15] which governs the requisite content of a commissioner's decision. After interpreting the mandates of that rule, the board concluded that the commissioner's decision in this case satisfied those requirements. It is well settled that "[an appellate] court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . [A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts." (Internal quotation marks

[15] Section 31-301-3 of the Regulations of Connecticut State Agencies provides: "The finding of the commissioner should contain only the ultimate relevant and material facts essential to the case in hand and found by him, together with a statement of his conclusions and the claims of law made by the parties. It should not contain excerpts from evidence or merely evidential facts, nor the reasons for his conclusions. The opinions, beliefs, reasons and argument of the commissioner should be expressed in the memorandum of decision, if any be filed, so far as they may be helpful in the decision of the case."

omitted.) *Bailey* v. *State*, 65 Conn. App. 592, 602–603, 783 A.2d 491 (2001); see also *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, supra, 130 Conn. App. 679 ("[i]t is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board" [internal quotation marks omitted]).

In light of the foregoing case law and principles, which afford considerable deference to the board's interpretation and construction of its own regulations; see, e.g., *Bailey* v. *State*, supra, 65 Conn. App. 602–603; we conclude that the board did not abuse its discretion in not remanding the commissioner's decision for further articulation.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* QUAVON TORRES
(AC 39796)

Lavine, Keller and Bishop, Js.

Syllabus

Convicted of the crimes of murder and carrying a pistol without a permit, the defendant appealed. The defendant's conviction stemmed from his alleged conduct in shooting the victim while near a drive-through at a fast food restaurant. On appeal, he claimed that the first time in-court identification of him as the shooter by an eyewitness, J, violated his right to due process and should have been excluded pursuant to *State* v. *Dickson* (322 Conn. 410), which was decided during the pendency of this appeal. In *Dickson*, our Supreme Court held that in cases in which identity is an issue, a first time in-court identification by a witness who would have been unable to make a reliable identification of the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation. Although J had provided a statement to police several hours after the shooting, when shown two photographic lineups, one of which included the defendant's photo, she was unable to identify

anyone as the shooter. Almost two years prior to trial, the defendant's original trial counsel had filed a motion to suppress any out-of-court identification of the defendant, but the motion was never ruled on by the trial court, the defendant's subsequently appointed counsel did not request that the court rule on the motion, and the defendant did not object at the time that J made her in-court identification of him. *Held*:

1. Contrary to the claim of the state, the defendant did not waive his claim that J's in-court identification of him was unreliable and should have been excluded; because there was no evidence that, prior to J's in-court identification, there had been any suggestive out-of-court identification procedure and, given the state of the law at the time of the pretrial hearing and the in-court identification, J's identification of the defendant was permissible, the defendant would have had no reason to believe that objecting to the identification would provide him any relief, and, therefore, he could not have waived his claim, especially given that he did not know at the time of his trial that he had a right to be free from first time in-court identifications.
2. J's first time in-court identification of the defendant violated the defendant's right to due process as set forth in *Dickson* and should not have been admitted: given that J's in-court identification of the defendant was preceded only by her unsuccessful attempt to identify the defendant in a photographic lineup and that the identity of the shooter was in dispute, the principles set forth in *Dickson* applied, and where, as here, J had the opportunity, shortly after the incident, to identify the defendant in a photographic lineup but was unable to do so, and her description of the shooter at the time of the incident was vague and included a description of the shooter's clothing, approximate age, height, build, and race, the record was adequate for this court to determine that J's in-court identification of the defendant, made two years later, was unreliable; moreover, the admission of the identification was not harmless beyond a reasonable doubt, as the state's case would have been considerably weakened without J's testimony identifying the defendant as the shooter in that the case was full of inconsistent statements and contradictory testimony, the jury had requested to hear a playback of J's testimony only, indicating that it considered the testimony to be important, and, in the absence of J's identification of the defendant, the state's case was not so overwhelming that it was clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible evidence.

Argued February 15—officially released August 1, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder and carrying a pistol without a permit, brought to the Superior Court in the judicial

district of New Haven, geographical area number twenty-three, where the defendant filed a motion to suppress identifications; thereafter, the case was tried to the jury before *Blue*, *J.*; verdict and judgment of guilty; subsequently, the court denied the defendant's motions for judgment of acquittal and for a new trial, and the defendant appealed. *Reversed*; *new trial.*

Jennifer B. Smith, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, *Gary Nicholson*, supervisory assistant state's attorney, and *Michael Dearington*, former state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Quavon Torres, appeals from the judgment of conviction, rendered after a jury trial, of murder pursuant to General Statutes § 53a-54a and carrying a pistol without a permit pursuant to General Statutes § 29-35 (a). He claims on appeal that an eyewitness' first time in-court identification of him as the shooter should have been excluded pursuant to our Supreme Court's decision in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S. (June 19, 2017) (No. 16-866).[1] We agree and reverse the judgment of the trial court.

The jury reasonably could have found the following facts. On July 23, 2012, the defendant and two other young men, Marcus Lloyd and Freddie Pickette, were at 541-543 Orchard Street in New Haven, where the defendant's cousin, Tasia Milton, lived. One of them

[1] The defendant also claims that the court abused its discretion in denying his motion for a new trial because the verdict was against the weight of the evidence, and seeks a reversal of his conviction and a remand for a new trial. Because we reverse the judgment on the basis of the erroneous inclusion of the first time in-court identification, we need not address this claim.

called the victim, Donald Bradley, on the phone to ask for a ride to Farnam Courts, also in New Haven. The victim parked his car, a four door Honda Accord, in the CVS Pharmacy parking lot, across the street from 541-543 Orchard Street, and went inside CVS Pharmacy. While the victim was in the store, the three men entered his car. Pickette sat in the front passenger seat, Lloyd sat in the rear passenger side seat behind Pickette, and the defendant sat in the rear driver side seat. The victim exited CVS and entered his car, sitting in the driver's seat, directly in front of the defendant. Pickette recommended that they go to the Burger King, which was very close to the CVS Pharmacy on Whalley Avenue, to get some food on their way to Farnam Courts.

While in the drive-through line, but before ordering, the victim, then realizing that the defendant was in the car, told him to leave. When the defendant did not leave, the victim got out of the car and walked over to the passenger side. He leaned into the car, either in the front passenger seat, where Pickette was seated, or the rear passenger seat, where Lloyd was seated.[2] The defendant exited the car and walked toward the victim on the passenger side of the car. The victim was then fatally shot. The defendant, Lloyd, and Pickette exited the car and ran.

The police arrived on the scene at approximately 7:20 p.m., and the victim was transported to the hospital, where he ultimately died from multiple gunshot wounds. The police were advised he was pronounced dead at 7:51 p.m., and received information that two

[2] The record is unclear as to why the victim went to the passenger side of the car, but a bat was later found on the floor of the back of the vehicle. Pickette told the police that he saw the victim retrieving the bat, but at trial he testified that he did not see the victim doing so. Lloyd told the police that the victim came to the passenger side of the car to retrieve the bat. Regardless of whether the victim sought to retrieve the bat, the defendant did not claim self-defense at trial.

suspects were inside the house at 541-543 Orchard Street. By 9 p.m., the police had the house surrounded. Eventually, the defendant and Lloyd emerged from the house, and they were arrested. The police obtained a search warrant for the third floor of the building and seized, among other items, a .38 caliber Colt revolver containing two live rounds. The weapon was later identified as the gun from which three of the four bullets found in the victim were fired.[3]

Several hours after the shooting, two eyewitnesses, Theresa Jones and Lachell Hall, provided statements to the police. Jones reported that she saw the shooting while standing across the street from the Burger King at a Stop & Shop grocery store. She told the police in her initial statement that three black men had been arguing around a car that was parked in the drive-through lane at Burger King, and after the shooting, they ran from the back of the car, past the front of Burger King toward Orchard Street. She was shown a photographic lineup, and identified Pickette, whom she knew, and told the police that the shooter looked like Pickette. She was then shown another photographic lineup, which included the defendant's photograph, and she was unable to identify anyone as the shooter. She described the shooter as thin, about five feet seven or eight inches tall, and wearing a blue shirt.

Hall had been standing outside of a deli near the Burger King at the time of the shooting. She recognized Pickette, her nephew, in the front passenger seat of the vehicle wearing a black T-shirt. She said that the victim got out of the car from the driver's seat and walked around the back of the car, and she recognized him as someone she knew. She told the police that the person in the rear driver's side seat got out of the car, went around the back of the car to the passenger side, and

[3] The defendant did not have a permit to carry a pistol.

then the shooting began. She was shown a photographic lineup and was unable to identify the shooter, although she identified Pickette's photograph from a separate photographic lineup and told the police that he was not the shooter. She described the shooter as a skinny black male, around five feet seven inches tall, wearing a black T-shirt.

Lloyd told the police that he did not see who shot the victim and that he and Pickette left the car and were walking toward the front of the Burger King when they heard gunshots. He later changed his story and said that he was still in the car when the defendant got out of the car on the driver's side and, without going around to the other side of the car, shot the victim, who was standing on the passenger side of the car. He then chose Pickette from a photographic lineup and wrote "Fred was just in the car." Lloyd chose the defendant from an additional photographic lineup and identified him as the shooter. Pickette gave a statement to the police the day after the shooting and also chose the defendant's picture from a photographic lineup and identified him as the shooter.

Milton, who lived on the third floor of the Orchard Street house, gave a videotaped statement to police at 3:30 a.m. on July 24, 2012. She told police that she was on the front porch of her house with the defendant, Lloyd, Pickette, and the defendant's sister, Amber Torres, when someone came to pick up the three men. She remained on the porch and shortly thereafter heard gunshots. She then ran up to the third floor, and as she was running up the stairs, the defendant and Lloyd came running up behind her. She stated that while running up the stairs with them behind her, she was still hearing gunshots. She told the police that she saw the defendant give Amber the gun, and later testified that Amber had the gun while they were in Milton's bedroom. She also

told the police and testified that the defendant told Amber to "do something with it."

The defendant was subsequently charged on July 23, 2012, with murder and carrying a pistol without a permit. Trial began on August 14, 2014. At trial, many witnesses testified, including Jones who, though unable to identify the shooter in a photographic lineup shortly after the incident, identified the defendant as the shooter in court during her testimony. During deliberation, the jury requested to hear a playback of Jones' testimony.

On August 25, 2014, the jury found the defendant guilty of murder pursuant to § 53a-54a and guilty of carrying a pistol without a permit pursuant to § 29-35 (a). At sentencing, on November 7, 2014, the defendant moved for a new trial. The court, *Blue*, *J.*, denied the motion and sentenced the defendant to forty-five years of incarceration and ten years of special parole on the murder conviction, and five years of incarceration, to run concurrently, on the conviction of carrying a pistol without a permit. The total effective sentence was forty-five years of incarceration and ten years of special parole. This appeal followed.[4] Additional facts and procedural history will be set forth as necessary.

[4] The defendant appealed to the Supreme Court. He submitted his brief to the court on April 29, 2016, in which he argued that Jones' first time in-court identification of him as the shooter was suggestive, and, therefore, should be analyzed for reliability on state constitutional grounds. He argued that the court should consider a number of different tests in doing so. While the defendant's appeal was pending, however, the Supreme Court released its decision in *State* v. *Dickson*, supra, 322 Conn. 410, in which it held that "in cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore must be prescreened by the trial court." (Footnotes omitted.) Id., 415. In doing so, it overruled its prior decision in *State* v. *Smith*, 200 Conn. 465, 469, 512 A.2d 189 (1986), in which it had determined that "an in-court testimonial identification need be excluded, as violative of due process, only when it is tainted by an out-of-court identification procedure which is unnecessarily suggestive and conducive to irreparable misidentification."

The defendant claims that Jones' first time in-court identification of him as the shooter should have been excluded pursuant to our Supreme Court's decision in *State* v. *Dickson*, supra, 322 Conn. 410. In response, the state argues that the defendant waived this claim. We disagree with the state that the claim was waived and agree with the defendant that the identification should have been excluded.

I

We discuss first the state's argument that the defendant waived his claim that Jones' in-court identification of him was unreliable, and, therefore, should have been excluded.

The following additional facts and procedural history are relevant to our analysis. Almost two years prior to trial, on October 24, 2012, the defendant's original counsel filed a motion to suppress "any out-of-court and in-court identification of the defendant . . . ." The court did not rule on this motion, and the defendant subsequently was appointed new counsel. The day before the start of evidence, on August 13, 2014, the court met with defense counsel and the state's attorney to discuss any outstanding motions. Defense counsel did not request that the court rule on the motion to suppress identifications, and the court did not rule on it. Thereafter, the trial began and at the time Jones made the in-court identification, the defendant did not object to the identification. On the basis of these two occurrences, the state argues that the defendant waived

Subsequently, the defendant moved that he be allowed to file a supplemental brief addressing the impact of *Dickson* on his case. The Supreme Court granted the motion on November 8, 2016, and ordered that the state also file a supplemental brief, responsive to the defendant's. The Supreme Court additionally transferred the defendant's appeal to this court. The defendant filed his consolidated reply and supplemental brief to this court on November 28, 2016. The state filed its supplemental brief thereafter.

his claim that his due process rights were violated by this in-court identification. We disagree.

Waiver is "an intentional relinquishment or abandonment of a known right or privilege. . . . It involves the idea of assent, and assent is an act of understanding. . . ." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 469, 10 A.3d 942 (2011). Implicit waiver "arises from an inference that the defendant knowingly and voluntarily relinquished the right in question." (Emphasis omitted.) Id., 483. The court "will indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . [will] not presume acquiescence in the loss of [such a right]." (Internal quotation marks omitted.) *State* v. *Woods*, 297 Conn. 569, 583–84, 4 A.3d 236 (2010).

At the time of Jones' in-court identification of the defendant, the state of the law regarding first time in-court identifications was quite different than it is now, post-*Dickson*. See footnote 4 of this opinion. Our Supreme Court held, in *State* v. *Smith*, 200 Conn. 465, 469, 512 A.2d 189 (1986), that "an in-court testimonial identification need be excluded, as violative of due process, only when it is tainted by an out-of-court identification procedure which is unnecessarily suggestive and conducive to irreparable misidentification."

There was no evidence that prior to Jones' in-court identification of the defendant, there had been any suggestive out-of-court identification procedure. Therefore, at the time of the pretrial hearing and the in-court identification, Jones' identification was permissible, and, accordingly, the defendant would have had no reason to believe that objecting to the identification would provide him with any relief. Therefore, the defendant could not have waived this argument, as being free from first time in-court identifications was not a known

right to him at the time of his trial. Accordingly, the defendant did not waive this claim.

II

We turn now to the merits of the defendant's claim that Jones' first time in-court identification of him should not have been admitted pursuant to our Supreme Court's ruling in *Dickson*.

The following additional facts and procedural history are relevant to our resolution of this claim. In support of her identification of the defendant as the shooter, Jones testified that she saw the shooter's face during the incident, but she found it difficult to pick someone out in a photograph. She further testified that she felt if she had seen him in person, she would have been able to identify him that night. Nonetheless, she did not identify the defendant as the shooter at any point prior to trial. When asked at trial if the shooter was in the courtroom, she answered "yes" and pointed out the defendant.

On appeal, the defendant claims that Jones' first time in-court identification of him as the shooter violated his right to due process under our Supreme Court's holding in *Dickson*, and, therefore should have been excluded. We agree.

We note first that "[w]hether [a party] was deprived of his due process rights is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. 423.

"In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable

based on examination of the totality of the circumstances." (Internal quotation marks omitted.) *State* v. *Marquez*, 291 Conn. 122, 141, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009).

"The first suggestiveness prong involves the circumstances of the identification procedure itself . . . and the critical question is whether the procedure was conducted in such a manner as to emphasize or highlight the individual whom the police believe is the suspect. . . . If the trial court determines that there was no unduly suggestive identification procedure, that is the end of the analysis, and the identification evidence is admissible. . . . If the court finds there was an unduly suggestive procedure, the court goes on to address the second reliability prong, under which the corruptive effect of the suggestive procedure is weighed against certain factors, such as the opportunity of the [eyewitness] to view the criminal at the time of the crime, the [eyewitness'] degree of attention, the accuracy of [the eyewitness'] prior description of the criminal, the level of certainty demonstrated at the [identification] and the time between the crime and the [identification]." (Citations omitted; internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. 421.

Turning to the suggestiveness prong, our Supreme Court recently has held that when the suspect's identity is at issue, a "first time in-court identification by a witness who would have been unable to reliably identify the defendant in a nonsuggestive out-of-court procedure constitutes a procedural due process violation."[5]

[5] The court stated: "We agree that one-on-one in-court identifications do not always implicate the defendant's due process rights, as when identity is not an issue or when there has been a nonsuggestive out-of-court identification procedure. . . . [T]he specific question that we are addressing here [is] whether the trial court is constitutionally required to prescreen *first time* in-court identifications . . . ." (Emphasis in original.) *State* v. *Dickson*, supra, 322 Conn. 433.

Id., 426 n.11. In doing so, the court stated: "[W]e are hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person [whom] the state has accused of committing [a] crime, and then asking the witness if he can identify the person who committed the crime. . . . If this procedure is not suggestive, then *no* procedure is suggestive." (Emphasis in original; footnote omitted.) Id., 423–24.

In order to avoid such suggestive procedures, the court announced a new procedural rule: "In cases in which there has been no pretrial identification, however, and the state intends to present a first time in-court identification, the state must first request permission to do so from the trial court. . . . The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue." (Citation omitted.) Id., 445–46. This procedural rule, the court stated, applied prospectively and to all cases pending on review. Id., 450–51.

In cases like the present one, where the suggestive in-court identification occurred before *Dickson* was decided, the court created an alternative procedure for reviewing courts to retroactively apply the *Dickson* principles and determine whether the suggestive in-court identification was nonetheless reliable and, therefore, admissible. "[I]n pending *appeals* involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification

under the totality of the circumstances." Id., 452. Alternatively, if the record is adequate to make a determination as to the reliability and admissibility of the identification, then the reviewing court could make such a determination. Id., 452 n.35. The court in *Dickson* specifically highlighted a situation in which "the eyewitness had a full and fair opportunity to identify the defendant before trial and was unable to do so" as an example of an instance in which a reviewing court *could* make such a determination on the basis of the record. Id. ("[O]f course, if the record is adequate for review of the reliability and admissibility of the in-court identification, the reviewing court may make this determination. For example, if the eyewitness had a full and fair opportunity to identify the defendant before trial and was unable to do so, the reviewing court reasonably could conclude that the subsequent in-court identification was unreliable.")

Turning now to the present case, we first acknowledge that the *Dickson* principles apply to Jones' identification of the defendant. Jones' in-court identification of the defendant was preceded only by her unsuccessful attempt to identify the defendant in a photographic lineup, and the identity of the shooter was in dispute. See id., 452–53. The record makes plain that Jones had the opportunity, shortly after the incident, to identify the defendant in a photographic lineup and she could not. Her description of the shooter at the time of the incident was vague and contained only a description of his clothing, approximate age, height, and build, and race. Therefore, the record is adequate for us to determine that her in-court identification of the defendant, two years later, was unreliable.

Accordingly, we must determine now whether the admission of the identification was harmless. We conclude that it was not. "A constitutional error is harmless when it is clear beyond a reasonable doubt that the

jury would have returned a guilty verdict without the impermissible [evidence]. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Citation omitted; internal quotation marks omitted.) Id., 453.

We note first that the jury undoubtedly considered Jones' testimony important because during deliberation it requested to hear a playback of her testimony, and did not request to rehear any other testimony. Additionally, without Jones' testimony identifying the defendant as the shooter, the state's case would have been considerably weakened. In addition to Jones, Hall testified about her eye-witness account of the incident. She testified that she saw the car park in the Burger King drive-through and recognized Pickette, her nephew, in the front seat of the car. She also recognized the victim when he got out of the front driver's side door and walked around the car to the passenger side of the car. She was about to go say hello but before she could, someone got out of the rear driver's side of the car, walked around the back of the car, and stood with his back facing her, and then the victim was shot. Hall testified that she was sure that the shooter was the person who got out of the car from the rear driver's side seat, but testified that she only told the police that "because when the person got out [of] the rear behind the driver, that's when the shooting started." She testified that she did not see the man who got out of the car raise his arm. She further testified that she did not see the gun, she did not see the shooter's face, and she could not identify the shooter. When asked whether she knew who shot the victim, she testified "I just know it was somebody in that car." Additionally, her description of the shooter wearing a black T-shirt contradicted Jones' testimony that the shooter wore a blue shirt.

Lloyd testified that he did not remember anything about the shooting because he was intoxicated and under the influence of drugs that night. He testified that he did not see who shot the victim, and that his father, who was present at the police station during his statement, and the police pressured him to choose the defendant's picture. A redacted version of his videotaped statement was admitted at trial pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).[6]

Pickette testified that he saw the defendant get out of the rear driver's side of the car and walk to the rear passenger side, where the victim was, but on cross-examination, testified that he did not see the defendant get out of the car because he was watching the victim who had come around the car to the passenger side. He testified multiple times that he did not see whether the defendant had a gun. He also testified on cross-examination that he did not see the victim get shot, but then later testified on recross-examination that he did see the defendant shoot the victim. He testified that after the shooting, he ran down the Burger King drive-through alley to Whalley Avenue and then down to McDonald's, not to Orchard Street with the defendant and Lloyd. Surveillance footage showed, however, that Pickette crossed Orchard Street and went through the CVS Pharmacy parking lot before retreating down Whalley Avenue.

Milton testified that she ran up to the third floor of her apartment building as soon as she heard gunshots,

[6] "[I]n *Whelan*, [our Supreme Court] held that a prior written inconsistent statement of a nonparty witness is admissible for substantive purposes if the statement is signed by the declarant, who has personal knowledge of the facts stated, and the declarant testifies at trial and is available for cross-examination. See *State* v. *Whelan*, supra, 200 Conn. 753. This rule later was expanded to apply to tape-recorded statements that otherwise satisfy the *Whelan* criteria. E.g., *State* v. *Simpson*, 286 Conn. 634, 642, 945 A.2d 449 (2008)." *State* v. *Carrion*, 313 Conn. 823, 825 n.3, 100 A.3d 361 (2014).

and as she was running up the stairs, the defendant and Lloyd were running behind her. She testified that she was still hearing gunshots as the defendant and Lloyd were behind her on the stairs. She also testified that she never actually saw the defendant with a gun, which conflicted with what she told the police, but just assumed that he was giving Amber a gun when she heard him tell her to "do something with it." She conceded on cross-examination that somebody, but she did not know who, gave Amber the gun. A redacted version of Milton's videotaped statement was admitted at trial pursuant to *State* v. *Whelan*, supra, 200 Conn. 743. See footnote 6 of this opinion.

Kristen Sasinouski, a forensic science examiner for the state of Connecticut, testified regarding the DNA and fingerprint evidence found on the gun. She testified that she tested three areas of the gun for DNA: the grip area, the cylinder area, and the trigger area. She also testified that two cartridges were swabbed for DNA as well, on which no DNA was found. She further testified that three DNA profiles were found on the gun, none of which was the defendant's.[7] When asked if that meant that the defendant necessarily did not touch the gun, she testified "[n]o, it does not." She did testify, though, that given the fact that the shooting occurred in hot weather in July, and that parts of the gun had an abrasive surface, she would have expected to find DNA on the gun of someone who handled it.

Ultimately, the case was full of inconsistent statements and contradictory testimony, which raise substantial concerns. There was contradictory testimony about what color shirt the shooter was wearing, where the shooter was standing, where the victim was standing, and where the defendant, Pickette, and Lloyd ran

[7] The defendant, the victim, and Lloyd were all eliminated as contributors of the DNA profiles found on the gun. A DNA sample was never taken from Pickette, however.

after the shooting. Accordingly, without Jones' in-court identification of the defendant, the state's case was not so overwhelming that we can conclude "it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible [evidence] . . . ." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. 453. Therefore, the erroneous admission of Jones' in-court identification was not harmless beyond a reasonable doubt.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

COLONIAL INVESTORS, LLC *v.* LOIS FURBUSH ET AL.
(AC 38303)

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

Syllabus

The plaintiff owner of a mobile home park sought, by way of summary process, to regain possession of certain premises leased to the defendant in connection with the defendant's alleged nonpayment of rent. The defendant alleged several special defenses, including that the notice to quit was legally insufficient, that certain charges assessed by the plaintiff were improperly treated as part of her rent and thereby improperly increased the amount of her arrearage, and that the plaintiff had misapplied a payment to the defendant's arrearage rather than to her current monthly rental obligation. The trial court rendered a judgment of possession in favor of the plaintiff, from which the defendant appealed to this court. She claimed, inter alia, that the trial court lacked subject matter jurisdiction due to the legal insufficiency of the notice to quit. *Held*:

1. The defendant could not prevail on her claim that the notice to quit was legally insufficient because it failed to inform her clearly of her statutory (§ 21-80) right to avoid eviction by paying the total arrearage due within thirty days of receipt; the notice to quit clearly specified the total arrearage due and adequately informed the defendant of her right to avoid eviction by paying the total arrearage due within thirty days of receipt, and the disclaimer in the notice to quit that any partial payments would be accepted for use and occupancy only and not for rent was substantially similar to the use and occupancy disclaimer set forth in the general summary process statute (§ 47a-23 [e]), which applied to mobile home

parks pursuant to § 21-80 (a), and, therefore, was not misleading or ambiguous.

2. The defendant could not prevail on her claim that the trial court improperly determined that it did not need to decide her second special defense, in which she alleged that the plaintiff improperly imposed customer service charges for utilities as rent and that the plaintiff's charges for utilities in excess of the defendant's usage were illegal and could not serve as a basis for an eviction for nonpayment of rent: that court, which concluded that it did not need to find that the surcharges for the utilities were excessive or against public policy because, even if they were not enforced, there would still be an arrearage at the time that the notice to quit was served, in effect rejected the defendant's second special defense as a basis for attacking the legal sufficiency of the notice to quit; moreover, on the basis of the plain and unambiguous language of the parties' renewal rental agreement and the accompanying documents related to the defendant's billing, the customer service charges were properly included as a component of the rent billed to the defendant, and, therefore, the past arrearage due in the notice to quit was correct.

3. The trial court properly rejected the defendant's claim in her second special defense that the notice to quit included improper water charges and, thus, was legally insufficient, which was based on her claim that the plaintiff had engaged in illegal submetering in violation of the state regulation (§ 16-11-55) that requires that submetering of water be approved by the state Public Utilities Commission; that court properly determined that the plaintiff submetered water from the Metropolitan District Commission, which, by the plain language of the relevant statute (§ 16-1 [a] [6]), was not subject to that regulation, and, therefore, the notice to quit was not legally insufficient on that basis.

4. The trial court properly determined that the defendant's April, 2014 payment was correctly applied to a past arrearage that was due rather than to her current monthly rental obligation; because each monthly statement given to the defendant included any balance remaining from the previous month, and because the defendant often tendered payments exceeding her monthly rental obligation, which lowered her past arrearage due, it was clear from the parties' course of performance that the defendant was aware that her payments were applied first to her total arrearage due and then to her current rental obligation.

Argued February 1—officially released August 1, 2017

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Hartford, Housing Session, where the court, *Woods*, *J.*, denied the named defendant's motion to dismiss; thereafter, the matter was tried to the court; judgment for the plaintiff, from

which the named defendant appealed to this court; subsequently, the court, *Woods*, *J.*, denied the named defendant's motion for an articulation. *Affirmed.*

David A. Pels, with whom, on the brief, was *Giovanna Shay*, for the appellant (named defendant).

Colin P. Mahon, with whom was *Thomas T. Lombardo*, for the appellee (plaintiff).

Opinion

SCHALLER, J. The defendant Lois Furbush[1] appeals from the judgment of the trial court in favor of the plaintiff, Colonial Investors, LLC, in this summary process action. On appeal, the defendant claims that the trial court (1) lacked subject matter jurisdiction over the summary process action due to the legal insufficiency of the notice to quit and (2) improperly held that the defendant's April, 2014 payment to the plaintiff correctly was applied to her past arrearages that were due rather than to her April, 2014 rent obligation. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal. The plaintiff owns a mobile home site in East Hartford known as Colonial Mobile Home Park (park). The plaintiff leases the 460 lots in the park to tenants who own mobile homes. In August 2012, the defendant, who owned and occupied a mobile home, signed a one year rental agreement for a lot, and, in August, 2013, the defendant signed a renewal of rental agreement (renewal) for an additional year. Pursuant to the rental agreement and renewal, the defendant was to pay a base rent of $420, as well

[1] Although the plaintiff's amended complaint originally named Lois Furbush and Piper Goehring as defendants, the plaintiff subsequently moved for default against Goehring for failure to appear, which the court granted on June 1, 2016, and she has not participated in this appeal. We therefore refer to Furbush as the defendant.

as additional rent, which included utility charges for kerosene, propane, and water.

By January, 2013, the defendant was in arrears on her monthly rent payments. As of April 1, 2014, the defendant had an outstanding arrearage of $1615.13. This included base rent and additional rent. On April 11, 2014, the defendant made a $600 payment to the plaintiff, which was applied to the outstanding arrearage. After said payment, the defendant had a remaining balance of $1015.13.

On April 30, 2014, the plaintiff served the defendant with a notice to quit possession of the premises on or before June 2, 2014. The ground stated in the notice was for nonpayment of rent totaling $1015.13. Pursuant to the notice to quit, the defendant could avoid eviction should she pay the total arrearage due within thirty days of receipt of the notice. The defendant, however, did not tender any payment to the plaintiff within the thirty days.

Thereafter, on June 13, 2014, the plaintiff commenced this summary process action. In its one count amended complaint, the plaintiff alleged that the defendant failed to pay rent for the month of April, 2014, failed to tender the total arrearage due to the plaintiff following the receipt of the notice to quit, and subsequently failed to quit possession of the premises by the time designated in the notice to quit. On June 30, 2014, the defendant filed a motion to dismiss for lack of subject matter jurisdiction on the ground that the notice to quit was legally insufficient. The trial court denied the motion on July 23, 2014.

On October 14, 2014, the defendant filed an answer and special defenses. The first special defense alleged that the defendant tendered, and the plaintiff accepted, rent for the month of April, 2014, prior to the delivery of the notice to quit. The second special defense alleged

that the plaintiff submetered water at the park without the necessary approval required by § 16-11-55 of the Regulations of Connecticut State Agencies. The third special defense alleged that the notice to quit was legally insufficient in that it did not state correctly the rent due for April, 2014. After a trial before the court, the trial court issued a written decision on August 21, 2015, in which it rendered judgment of possession of the premises for the plaintiff. The defendant then filed this appeal. Additional facts will be set forth as necessary.

Before addressing the specifics of the defendant's claims, it is helpful to identify the legal principles regarding summary process actions. "Summary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed." (Internal quotation marks omitted.) *Sullivan* v. *Lazzari*, 135 Conn. App. 831, 835, 43 A.3d 750, cert. denied, 305 Conn. 925, 47 A.3d 884 (2012).

I

The defendant first claims that the trial court lacked subject matter jurisdiction over the summary process action because the notice to quit was legally insufficient. Specifically, she argues that the notice to quit failed to inform her clearly of her right to avoid eviction by paying the total arrearage due within thirty days of receipt. Moreover, she argues that the trial court improperly failed to consider her special defenses that the customer service charges were imposed improperly as rent and that the water was submetered illegally,

which led to the significant inflation of the past arrearage due as stated in the notice to quit.

Our Supreme Court previously has articulated the standard for "reviewing challenges to the trial court's subject matter jurisdiction in a summary process action on the basis of a defect in the notice to quit. Before the [trial] court can entertain a summary process action and evict a tenant, the owner of the land must previously have served the tenant with a notice to quit. . . . As a condition precedent to a summary process action, proper notice to quit . . . is a jurisdictional necessity. . . . This court's review of the trial court's determination as to whether a notice to quit served by the plaintiff effectively conferred subject matter jurisdiction is plenary." (Citations omitted; internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 388, 973 A.2d 1229 (2009).

The requirements for a notice to quit in a summary process action involving a mobile home is governed by General Statutes § 21-80 (b) (3). "Notwithstanding the provisions of [General Statutes] § 47a-23,[2] the general summary process statute, when a tenant, as in this case, breaches her lease by failing to pay rent, and the landlord seeks to terminate the tenancy, the landlord must follow the procedures enunciated in § 21-80 (b) (3) (B).[3]

[2] General Statutes § 47a-23 is the general summary process statute that governs the form and delivery of notices to quit possession, whereas § 21-80 is the provision specific to mobile home summary process actions. See *Lampasona* v. *Jacobs*, 209 Conn. 724, 726, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989).

[3] General Statutes § 21-80 (b) (3) provides in relevant part: "Notwithstanding the provisions of section 47a-23, termination of any tenancy in a mobile manufactured home park shall be effective only if made . . . (B) By the owner giving the resident at least sixty days' written notice, which shall state the reason or reasons for such termination, except that, when the termination is based upon subparagraph (A) of subdivision (1) of this subsection, the owner need give the resident only thirty days' notice, which notice shall state the total arrearage due provided, the owner shall not maintain or proceed with a summary process against a resident who tenders the total arrearage due to the owner within such thirty days . . . ."

. . . [U]nder the plain language of § 21-80 (b) (3) (B), the prerequisites to the maintenance of a summary process action for nonpayment of rent are a written thirty day notification to the tenant and a statement of the total arrearage due." (Footnotes added.) *Ossen* v. *Kreutzer*, 19 Conn. App. 564, 568–69, 563 A.2d 741 (1989).

A

We begin with the defendant's claim that the use and occupancy disclaimer included in the notice to quit was not a clear notification of the defendant's right pursuant to § 21-80 to avoid eviction by making full payment of past arrearage due within thirty days of receipt. The defendant argues that, because the plaintiff did not comply with the requirements of § 21-80, the trial court lacked subject matter jurisdiction.

The following facts and procedural history are relevant to this claim. The notice to quit included the following disclaimer: "ANY PARTIAL PAYMENTS TENDERED WILL BE ACCEPTED FOR USE AND OCCUPANCY ONLY AND NOT FOR RENT, WITH FULL RESERVATION OF RIGHTS TO CONTINUE WITH THE EVICTION ACTION IF THE TOTAL OF ALL PARTIAL PAYMENTS MADE WITHIN 30 DAYS OF RECEIPT OF THIS NOTICE DOES NOT EQUAL THE TOTAL ARREARAGE STATED ABOVE. **ALL PAYMENTS SHOULD BE MADE TO THE ATTORNEY'S OFFICE AND NOT TO THE LANDLORD.**" (Emphasis in original.) In its motion to dismiss, the defendant argued that the notice to quit failed to meet the requirements of § 21-80 because it did not indicate that the defendant could avoid eviction by paying the past

General Statutes § 21-80 (b) (1) provides in relevant part: "[A]n owner may terminate a rental agreement or maintain a summary process action against a resident who owns a mobile manufactured home . . . for . . . (A) Nonpayment of rent, utility charges or reasonable incidental service charges . . . ."

arrearage due. The trial court denied the defendant's motion to dismiss, finding that the notice to quit satisfied the requirements of § 21-80.

"Under [§ 21-80 (b) (3) (B)], to effectuate the termination [of a tenancy for nonpayment of rent] the landlord must give the resident thirty days written notice and that notice must state the total arrearage due. If the tenant tenders the total arrearage due within the thirty day notice period provided in this section, the landlord 'shall not maintain or proceed with the summary process action.' General Statutes § 21-80 (b) (3) (B). The purpose for reciting the total arrearage due in the notice is to afford the tenant a final opportunity to save the tenancy by tendering the total arrearage within the thirty day grace period. If tender is made within the grace period, the statute bars further action by the landlord." *Ossen* v. *Kreutzer*, supra, 19 Conn. App. 568.

In the present action, the notice to quit clearly specified the total arrearage due; it stated that the defendant owed rent of $834.09 for April, 2014, the balance of $160.04 for March 2014 rent, and a late fee of $21, for a total of $1015.13. The use and occupancy disclaimer then provided the required notice period; it made clear that the defendant had a thirty day grace period in which she could make payments totaling the past arrearage due in order to avoid eviction. Specifically, the disclaimer stated that the plaintiff reserved the "rights to continue with the eviction action if the total of all partial payments made within 30 days of receipt of this notice does not equal the total arrearage stated above."

The defendant, however, claims that the use and occupancy disclaimer was not a clear statement of this grace period, but rather a misleading statement that discouraged her from tendering payment. With regard to the appropriate language for a use and occupancy

disclaimer, § 21-80 does not provide any guidance. Pursuant to § 21-80 (a), however, the provisions for summary process in mobile home parks are in addition to the provisions for summary process under chapter 832, unless otherwise specified.[4] Section 47a-23, which falls under chapter 832, provides an example of a use and occupancy disclaimer, and, therefore we may examine it in relation to the disclaimer in the present case. Accordingly, § 47a-23 (e) provides that: "[A use and occupancy] disclaimer shall be in substantially the following form: 'Any payments tendered after the date specified to quit possession or occupancy, or the date of the completion of the pretermination process if that is later, will be accepted for use and occupancy only and not for rent, with full reservation of rights to continue with the eviction action.' " The use and occupancy disclaimer in the present case is substantially similar to that in § 47a-23 (e), clearly indicating that future payments by the defendant will be accepted for use and occupancy, not as rent, but that such payments may help the defendant avoid eviction should the total of her payments equal her past arrearage due of $1015.13.

In addition, the defendant claims that the disclaimer lacks clarity because it is a sentence of over fifty words with a double negative. Specifically, the defendant suggests that the phrases "and not for rent" and "does not equal" create a double negative. With regard to the phrase "and not for rent," the inclusion of the word "not" is to indicate to the defendant that all payments tendered will be accepted *not* for rent, but rather for

[4] General Statutes § 21-80 (a) provides in relevant part: "An action for summary process may be maintained by the owner of a mobile manufactured home park against a mobile manufactured home resident who rents a mobile manufactured home from such owner for the following reasons, which shall be in addition to other reasons allowed under chapter 832, and, except as otherwise specified, proceedings under this subsection shall be as prescribed in chapter 832 . . . ."

use and occupancy only. The same language can be seen in the suggested disclaimer found in § 47a-23 (e). With regard to the phrase "does not equal," the inclusion of the word "not" is to indicate that, if the defendant makes payments within thirty days of receipt of the notice, but these payments do *not* equal the past arrearage due, the defendant cannot avoid eviction. In neither context does the inclusion of the word "not" create a double negative. We therefore determine that there is no ambiguity regarding the language used in the use and occupancy disclaimer. Accordingly, we conclude that the notice to quit was legally sufficient in this regard.

B

The defendant next claims that the trial court improperly determined that it need not decide the defendant's claims alleged in the second and third special defenses that the past arrearage due in the notice to quit was incorrect, thereby causing the notice to be legally insufficient pursuant to § 21-80 and consequently depriving the trial court of subject matter jurisdiction. Specifically, the defendant claims that the trial court improperly held that it need not decide whether the plaintiff imposed customer service charges for the utilities as rent in violation of the parties' rental agreement.[5] Furthermore, the defendant claims that the trial court improperly held that it need not decide whether the plaintiff engaged in submetering in violation § 16-11-55 of the Regulations of Connecticut State Agencies, which led to the inclusion of improper water charges in the past arrearage due.

[5] On appeal, the defendant initially argued that the customer service charges were imposed as rent in violation of the parties' lease agreement and General Statutes § 47a-4 (a) (9). The defendant, pursuant to Practice Book § 67-10, subsequently withdrew § 47a-4 (a) (9) from her argument on the premise that General Statutes § 47a-2 (b) excludes from § 47a-4 (a) (9) mobile home owners who own their mobile homes but rent the lots on which the homes are situated.

The following facts and procedural history are relevant to the defendant's claim. Pursuant to the renewal, kerosene, propane, and water "will be billed . . . based on the usage at the rate posted in the park office . . . . Except for the . . . delineated rental payments and the utility charges [provided in § 3 of the renewal], the [plaintiff] shall not collect any service charges . . . unless itemized in billing to Resident and authorized elsewhere in this [r]ental [a]greement. Any charges or expenses assessed under the provisions of this [r]ental [a]greement or the [r]ules and [r]egulations of the [p]ark shall be paid to the [plaintiff] as additional rent . . . ." As part of additional rent, the defendant was billed for all kerosene usage, plus an additional $.70 per gallon of kerosene used; all propane usage, plus an additional $.45 per gallon of propane used; and all water usage, plus a $40.40 quarterly customer service charge. The monthly statements sent to the defendant included individual charges for kerosene and propane, and two distinct water charges, one for usage and one for the customer service charge.

With respect to water usage, the Metropolitan District Commission (MDC) supplies the water to the park. Specifically, MDC delivers the water to the master meter at the park. From the master meter, the plaintiff distributes the water to individual meters located on each of the occupied lots. The trial court heard evidence that the individual meters measure the water usage at each individual lot. These readings are recorded and sent to the park's corporate offices where bills are generated. The tenants are billed quarterly for water, and the total owed is comprised of actual water usage as measured by the individual meter and a quarterly customer service charge of $40.40. The plaintiff collects payment from the tenants and pays the usage portion of the bill to the MDC. The plaintiff retains the quarterly customer service charge to cover the cost of maintaining the

water system that connects the MDC master meter to the individual meters.

Generally, in determining whether a court lacks subject matter jurisdiction, the inquiry does not extend to the merits of the case. See *Lampasona* v. *Jacobs*, 209 Conn. 724, 728, 553 A.2d 175, cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989). In *Lampasona*, however, our Supreme Court, in considering whether the trial court lacked subject matter jurisdiction over a summary process action, determined that an examination of the facts was necessary. Id. Specifically, the court determined that, because proper notice to quit is a jurisdictional necessity for a summary process action, and the defendant in that case claimed that the notice to quit complied with the inapplicable general summary process provision rather than the applicable mobile home summary process provision, the court was required to determine which provision applied. Id., 726, 730. To resolve which provision applied, the court had to examine the facts of the case to determine whether the defendant was a resident of the plaintiff's mobile home park. Id., 730. In the present case, the defendant claims that the trial court lacked subject matter jurisdiction because the notice to quit was defective for failure to state properly the total arrearage due. The dispositive question in determining if the arrearage was stated properly is whether the customer service charges and water charges constituted rent, and, therefore, an examination of the facts is necessary.

1

We first address the defendant's claim that the trial court improperly held that it did not need to decide whether, as alleged in the defendant's second special defense, the plaintiff improperly imposed customer service charges for utilities as rent, in violation of the parties' rental agreement. Specifically, the court held:

"The defendant's second special defense is that the plaintiff's charges for utilities in excess of the tenant's usage [are] illegal and therefore cannot serve as the basis for an eviction for nonpayment of rent. The court does not need to find that the surcharges for the utilities are excessive and against public policy . . . because even if the surcharges are not enforced, there would still be an arrearage at the time that the notice to quit was served." Therefore, although the defendant argues that the trial court did not decide her second special defense, the record shows that the court essentially rejected the second special defense as a basis for attacking the legal sufficiency of the notice to quit due to the existence of an arrearage apart from the challenged surcharges. Nevertheless, we conclude that the customer service charges were a proper component of the rent billed to the defendant.

"In construing a written lease . . . three elementary principles must be [considered]: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; [and] (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible." (Internal quotation marks omitted.) *Elliott Enterprises, LLC* v. *Goodale*, 166 Conn. App. 461, 469, 142 A.3d 335 (2016).

The defendant claims that the rental agreement and renewal[6] did not contain an agreement that the defendant would pay utility charges beyond actual usage. The facts and the evidence before the trial court, however, do not support the defendant's position. The plaintiff treated as rent the "base rent in equal monthly

[6] The renewal substituted § 3 of the rental agreement, but otherwise incorporated all of the terms of the rental agreement.

installments" pursuant to § 3 (B) and "additional rent" pursuant to § 3 (C) of the renewal. Under the clear language of § 3 (C) of the renewal, all utilities are billed based on usage, and the rates at which they are billed are posted in the park office. The renewal and rental agreement do not mention the customer service charges related to each utility. Section 3 (D)[7] of the renewal, however, states that service charges may be collected if they are itemized in billing to the tenant and authorized elsewhere in the rental agreement. Section 5 (A) (6) of the rental agreement states that the plaintiff is to maintain all utilities provided by it, and § 5 (A) (7) specifically states that the plaintiff is to maintain all water lines and connections.

Recognizing that, when construing the renewal and rental agreement as a whole rent consists of multiple components, we conclude that the customer service charges billed to the defendant were not in violation of the rental agreement. Although the customer service charges were not listed specifically as additional rent in § 3 (C) of the renewal, they were authorized as additional rent through § 3 (D) of the renewal and § 5 of the rental agreement, for they were customer service charges that were a necessary part of maintaining the utilities and the water system. The details of how the customer service charges were calculated into the billing of utilities were provided to the defendant in utility rate notices sent to all residents of the park. The utility rate notices confirmed that the billing rates also would be posted in the park office, as stipulated in the renewal.

Moreover, the defendant's monthly statements itemized these customer service charges. Each monthly

[7] In the renewal, the subsection of § 3 discussing service charges is labeled "A." The subsection is mislabeled, however, and should be labeled "D," as provided in § 3 of the rental agreement. Therefore, we refer to the subsection of the lease addressing customer service charges as § 3 (D).

statement given to the defendant provided individual utility details for kerosene, propane, and water. For kerosene and propane, the rate at which usage was billed included the customer service charges. The inclusion of the charge in the rate was stipulated in the utility rate notices sent to the tenants. The total billed each month for propane and kerosene match the monthly entries in the plaintiff's ledgers. With regard to the water charges, a quarterly customer service charge was listed consistently under the water detail in the defendant's monthly statements. The customer service charge, however, was only included in the monthly balance due every three statements. These charges coincide with the plaintiff's ledgers, which included water charges every three entries. On the basis of the plain and unambiguous language in the renewal, rental agreement, and the accompanying documents related to the defendant's billing, the customer service charges were a proper component of the rent billed to the defendant, and, therefore, the past arrearage due in the notice to quit was correct. Consequently, this challenge to the legal sufficiency of the notice to quit fails.

2

We next address the defendant's claim that the trial court improperly held that it need not decide whether the plaintiff engaged in illegal submetering as alleged in her second special defense. Specifically, the defendant argues that the plaintiff engaged in submetering in violation of § 16-11-55 of the Regulations of Connecticut State Agencies because that regulation requires that submetering be approved by the state Public Utilities Commission (commission), and the MDC does not have such approval.[8] As a result, the defendant claims that

[8] The defendant also argues that the water customer service charge was an unfair or deceptive trade practice within the meaning of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and, therefore, its inclusion in the rent was improper. "[A] violation of CUTPA may be established by showing either an actual deceptive practice

the notice to quit was legally insufficient, for the total arrearage stated was inflated significantly by the inclusion of improper water charges.

We first note that the trial court did make a determination with regard to this aspect of the defendant's special defense. Specifically, the trial court held that the MDC was a water company that was not regulated by the Public Utilities Regulatory Authority (PURA), the authority under which § 16-11-55 was promulgated, and, therefore, it rejected the special defense.[9] We further conclude that the trial court properly rejected the defendant's special defense.

This issue of whether § 16-11-55 of the Regulations of Connecticut State Agencies applies to the MDC presents a question of statutory interpretation. "Administrative rules and regulations are given the force and effect of law. . . . We therefore construe agency regulations in accordance with accepted rules of statutory construction." (Citations omitted; internal quotation marks omitted.) *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 751, 865 A.2d 428 (2005). "When construing a statute,

. . . or a practice amounting to a violation of public policy." (Internal quotation marks omitted.) *Gebbie* v. *Cadle Co.*, 49 Conn. App. 265, 279, 714 A.2d 678 (1998). In her brief, the defendant merely states that the discrepancy between what the plaintiff collects from its tenants and what it owes to the MDC is enormous, and that the plaintiff deceives its residents by billing a customer service charge on the claim that it is related to MDC charges. No further analysis is given. Accordingly, we only address the illegality of submetering as to the applicability of § 16-11-55 of the Regulations of Connecticut State Agencies, which the defendant adequately briefed and argued before this court. See *Strobel* v. *Strobel*, 73 Conn. App. 488, 490, 808 A.2d 1138 ("[w]e consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]), cert. denied, 262 Conn. 928, 814 A.2d 383 (2002).

[9] The trial court also held that "[a] per se violation of this regulation, without more, would not rise to the level of a special defense in this action because the court finds that the charges for water usage (not the quarterly customer service charge) were reasonable."

[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z[10] directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Footnote in original; internal quotation marks omitted.) *In re William D.*, 97 Conn. App. 600, 606, 905 A.2d 696 (2006), aff'd, 284 Conn. 305, 933 A.2d 1147 (2007).

We begin our analysis with the governing statute and its accompanying regulation. Pursuant to General Statutes § 16-1 et seq., public service companies, including water companies, are regulated by PURA. A water company includes ''every person owning, leasing, maintaining, operating, managing or controlling any pond, lake, reservoir, stream, well or distributing plant or system employed for the purpose of supplying water to fifty or more consumers,'' but it does *not* include ''a

[10] General Statutes § 1-2z provides: ''The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.''

municipal waterworks system established under chapter 102, a district, metropolitan district, municipal district or special services district established under chapter 105, chapter 105a or any other general statute of any public or special act which is authorized to supply water . . . .'' General Statutes § 16-1 (a) (6). Pursuant to this statutory authority, PURA promulgated § 16-11-55 of the Regulations of Connecticut State Agencies, subdivision (4) of which requires a public service company to receive the approval of the commission to submeter.

The MDC was created in 1929 by a special act of the Connecticut General Assembly, which declares that the MDC is a metropolitan district within the county of Hartford formed to provide water and sewage services. 20 Spec. Acts 1204, No. 511, § 1 (1929);[11] see *Rocky Hill Convalescent Hospital, Inc.* v. *Metropolitan District*, 160 Conn. 446, 450, 280 A.2d 344 (1971). As a metropolitan district established through a special act, the MDC falls within the exception set forth in § 16-1 (a) (6). Thus, the MDC was not required to receive approval from the commission to submeter at the park. Accordingly, the trial court properly rejected the defendant's special defense that the MDC's submetering of the water was in violation of § 16-11-55 of the Regulations of Connecticut State Agencies.

We conclude that the notice to quit was legally sufficient. Accordingly, the trial court properly assumed jurisdiction over the summary process action.

[11] The act provides in relevant part: ''There shall be within the county of Hartford a *metropolitan district* with territorial limits as hereinafter more particularly defined. All the inhabitants and electors of the towns composing said metropolitan district are constituted and declared, upon the taking effect of this act as hereinafter provided, body politic and corporate by the name of The Metropolitan District . . . .'' (Emphasis added.) 20 Spec. Act 1204, No. 511, § 1 (1929).

II

The defendant further claims that the trial court improperly determined that her April, 2014 payment was applied correctly to the past arrearage instead of her April, 2014 rent obligation. Specifically, the defendant argues that no evidence was presented that standard practice between the parties was to have payments applied to the past arrearage due before the current monthly obligation. Rather, the defendant argues that this was an uncommunicated, unilateral practice of the plaintiff.

The following facts and procedural history are relevant to the defendant's claim. The trial court heard evidence that, if a tenant is in arrears, the custom of the plaintiff is to apply any payment by the tenant to the arrearage first. The tenants are not specifically notified as to how their payments are being applied, but the practice is memorialized through the monthly statements that tenants are given. The plaintiff's ledgers also reflect this practice. As recorded in the plaintiff's ledgers, as of April, 2014, the defendant owed a balance of $1615.13. On April 11, 2014, the plaintiff recorded in its ledger a $600 payment made by the plaintiff, which left a balance of $1015.13. Said payment also was reflected in a statement provided to the defendant.

Whether the defendant's April, 2014 payment properly was applied to the past arrearage due is a mixed question of law and fact. "Questions of law mixed with questions of fact receive plenary review." *Duperry* v. *Solnit*, 261 Conn. 309, 318, 803 A.2d 287 (2002). "When a debtor has two or more obligations to the same creditor, the debtor possesses the power to direct the manner in which his payment is to be applied. . . . The obligor must manifest his direction to the obligee, but he need not manifest it in words. A direction may be inferred from other circumstances, including the performance

itself. It is often clear from the nature of the performance that it is to be applied to a particular duty." (Citation omitted; footnote omitted; internal quotation marks omitted.) *South Sea Co.* v. *Global Turbine Component Technologies, LLC*, 95 Conn. App. 742, 750–51, 899 A.2d 642 (2002).

Applying the reasoning of *South Sea Co.* to the present case, we may consider the defendant's conduct, the parties' course of performance, and the defendant's failure to give a contrary direction in determining the proper application of the April, 2014 payment. Each monthly statement given to the defendant included any balance remaining from her previous month, thus providing her with the past arrearage due. By the time that the defendant's April, 2014 payment was made, the defendant had received numerous monthly statements and tendered payments based on the amount identified in each statement as due. On many of these occasions, the payments tendered exceeded the monthly rent and thus further lowered her past arrearage due. Consequently, it may be inferred that the defendant was aware that her payments were applied first to her total arrearage due and then to her current monthly obligation. Despite the defendant's having knowledge of the manner in which the payments were applied, nothing in the record suggests that she gave the plaintiff direction to apply the April, 2014 payment first to the April rent obligation instead of the past arrearage due. Because nothing suggests that the defendant gave direction to the plaintiff, either actually or inferentially, we conclude that the trial court properly determined that the defendant's April, 2014 payment was correctly applied to the past arrearage due rather than to her April, 2014 rent obligation.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTINA MEDEIROS *v.* DAVID D. MEDEIROS (AC 38070)

Keller, Prescott and Harper, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court finding him in contempt for having violated a postjudgment order providing the plaintiff with access to the parties' minor child. The dissolution judgment incorporated the parties' parental responsibility plan, which provided that the parties were to share joint legal and physical custody of the child. Thereafter, the dissolution judgment was modified, awarding the defendant sole legal custody of the child and requiring that the plaintiff's visitation with the child be supervised, but a later modification order restored the parties' joint legal custody and afforded the plaintiff with unsupervised and overnight visits. During one of the child's visits with the plaintiff, there was an incident in which the plaintiff disciplined the child. When the child returned to the defendant's house, they discussed what had occurred during that visit. Subsequently, the plaintiff filed a motion for contempt alleging that the defendant had refused to allow her access to the child in violation of the court's order. At the hearing on the contempt motion, the court sustained, on the ground of hearsay, three separate objections by the plaintiff to the admission of testimony regarding statements that the child had made to the defendant regarding what had occurred during his visit with the plaintiff. Thereafter, the trial court granted the plaintiff's motion for contempt, finding that the plaintiff had acted appropriately in disciplining the child and that the defendant was in wilful contempt of its previous modification order because his denial of access to the plaintiff was without justification. The court then imposed sanctions, including fines, and that the defendant be incarcerated for ten days and that he pay the plaintiff attorney's fees and marshal fees, but it stayed the order of incarceration pending the defendant's compliance with the court-ordered visitation. The court later vacated the stayed incarceration order upon the defendant's compliance with it. On appeal, the defendant claimed, inter alia, that the trial court committed error in failing to allow him a fair opportunity to present a defense to the plaintiff's motion for contempt by preventing him from testifying as to statements made to him by the child concerning his visit with the plaintiff. *Held*:

1. Although the trial court improperly precluded the defendant, on the ground of hearsay, from testifying regarding statements made to him by the child concerning what had occurred during the subject visit with the plaintiff, the error was harmless, as it was unlikely to have affected the outcome of the trial; although the challenged testimony should have

been admitted under the state of mind exception to the hearsay rule, the exclusion of the statements did not rise to the level of substantial prejudice or injustice to the defendant, as the record revealed that the court, without objection, heard testimony from the defendant that effectively conveyed the substance of the subject statements, but that it found more credible the plaintiff's testimony that she had appropriately disciplined the child, and it found that the defendant was without justification in denying the plaintiff access to the child.

2. The defendant could not prevail on his claim that the trial court failed to determine that the evidence establishing its finding of contempt met the required clear and convincing standard of proof; neither the court's oral decision nor its written order indicated what standard of proof the court had applied, and because the defendant did not seek an articulation or reargument of the court's decision, it was not otherwise clear from the record that an improper standard had been applied and this court presumed that the trial court had applied the correct standard of clear and convincing evidence.

3. Although the defendant's claim challenging, as punitive, the trial court's imposition of the stayed incarceration order was moot given that the court had vacated that order, the claim was reviewable because it qualified for the capable of repetition yet evading review to the mootness doctrine, as the challenged action was by its very nature of a limited duration so that there was a strong likelihood that the substantial majority of cases raising a question about its validity would become moot before appellate litigation could be concluded, there was a reasonable likelihood that the question presented would arise again in the future, and the issue of whether a court appropriately may employ a stayed incarceration order to monitor ongoing future compliance with a visitation order that has been violated was a matter of sufficient public importance; nevertheless, the stayed incarceration order was not improper, as the order never reached a point where it became punitive in that the court gave the defendant the ability to purge himself of the threat of incarceration by complying with the visitation order for a limited duration, and the order accomplished its purpose of obtaining the defendant's compliance with the visitation order.

4. The defendant could not prevail on his claim that the trial court abused its discretion by failing to consider his ability to pay the plaintiff attorney's fees and marshal fees, he having waived his right to raise that claim on appeal, as he failed to bring that objection to the attention of the court at the time that it considered the plaintiff's request for attorney's fees and marshal fees, and he did not raise any objection to the plaintiff's request for fees; nevertheless, the court erred in imposing compensatory fines on the defendant without any evidence as to actual damages suffered by the plaintiff, as the court failed to provide a factual basis for the amount of its award of compensatory damages to the plaintiff, nor was there any evidence presented that the plaintiff, apart

from her claimed attorney's fees and costs of marshal service, incurred any other pecuniary loss as a result of the defendant's contumacious conduct.

Argued January 9—officially released August 1, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Windham at Putnam and tried to the court, *Graziani*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *A. dos Santos*, *J.*, denied the defendant's motion to modify visitation and granted the plaintiff's motion for contempt, and the defendant appealed to this court. *Reversed in part; judgment directed.*

David A. Golas, for the appellant (defendant).

Andrew S. Knott, with whom, on the brief, was *Robert J. Santoro*, for the appellee (plaintiff).

Opinion

KELLER, J. In this postdissolution proceeding, the defendant, David D. Medeiros, appeals from the judgment of the trial court finding him in contempt for violating an order providing the plaintiff, Christine Medeiros, with access to their minor child. The defendant claims that the court committed error in (1) failing to allow him a fair opportunity to present a defense to the plaintiff's motion for contempt; (2) failing to require that the evidence establishing its finding of contempt met the required clear and convincing standard of proof; (3) preventing the defendant from testifying as to statements made to him by the minor child about events occurring during a visit with the plaintiff; and (4) imposing certain sanctions, including monetary fines. We agree with the defendant that the monetary fines

imposed on him by the court were improper, accordingly, we reverse that part of the judgment of the trial court. The judgment is affirmed in all other respects.

The following facts, as determined by the trial court in its oral decision of June 3, 2015,[1] and procedural history are relevant to this appeal. The parties were divorced on February 28, 2013. There is one child issue of the marriage, who was born in 2007. A parental responsibility plan, agreed to by the parties, was incorporated into the judgment of dissolution. That plan awarded joint legal custody and shared physical custody of the child to the parties. Subsequent to the date of the judgment of dissolution and prior to the contempt hearing that is the subject of this appeal, there were five separate modifications of the judgment affecting the orders pertaining to custody and access to the child. The first two of these subsequent modifications awarded the defendant sole legal custody of the child and required that the plaintiff's visitation with the child be supervised, but the final modification, issued by the court, *Boland*, *J.*, on April 7, 2015, restored the parties' joint legal custody, and the plaintiff was afforded access consisting of unsupervised visits, with overnight visits resuming effective July 30, 2015.[2] The order also noted

[1] Both parties have relied on the court's oral ruling of June 3, 2015. The record does not contain a signed transcript of the court's decision, as is required by Practice Book § 64-1 (a), and the defendant did not file a motion pursuant to Practice Book § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the defendant take any additional steps to obtain a decision in compliance with Practice Book § 64-1 (a). In some cases in which the requirements of Practice Book § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised on appeal is not hampered because we are able to readily identify a sufficiently detailed and concise statement of the court's findings in the transcript of the proceeding. See *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006).

[2] The final modification, effective April 7, 2015, includes a number of conditions clearly related to ensuring the safety of the child. It requires that

that the child's court appointed guardian ad litem, Tracie Molinaro, would be discharged effective July 30, 2015.[3]

On May 13, 2015, the plaintiff filed a motion for contempt alleging that on May 12, 2015, in violation of the April 7, 2015 order, the defendant refused to allow her access to the child and had threatened to stop all visitation.[4] The motion was heard by the court, *dos Santos*, *J.*, on June 3, 2015. The court heard testimony from the plaintiff and the defendant. At the conclusion of the hearing, following a recess, the court issued its oral decision setting forth the factual basis for its finding

the plaintiff not have any third party present during her visits who is known to be a criminal or involved with the Department of Children and Families, or who is an alcoholic or substance abuser. The plaintiff also cannot permit any contact between the child and his maternal grandparents, and she cannot use alcohol twenty-four hours before or during visits or abuse illegal substances and must continue with her current treatment provider. In addition, the child is to be provided with a cell phone, and no corporal punishment is to be used by either parent or any third party on the child.

[3] Although apparently consulted by the defendant subsequent to the visit of May 10, 2015, Molinaro was not present for the contempt hearing on June 3, 2015, in order to make any recommendation to the court. On June 3, 2015, the court commenced the contempt hearing by replacing her as guardian ad litem with Attorney George Duhaime, whose fees, including a retainer of $1500 payable within thirty days, were to be paid 90 percent by the defendant and 10 percent by the plaintiff. Although General Statutes § 46b-54 (e) provides, in relevant part, that "[a] guardian ad litem for the minor child . . . shall be heard on all matters pertaining to the interests of any child, including the custody, care, support, education and visitation of the child, so long as the court deems such representation to be in the best interests of the child," the defendant has not raised any claim premised on Molinaro's absence as guardian ad litem on the date of the contempt hearing.

[4] Pursuant to Practice Book § 25-27, a motion for contempt must, inter alia, state "the specific acts alleged to constitute the contempt . . . ." During the hearing on the motion for contempt, the defendant failed to object when the plaintiff, without amending her motion, introduced evidence that she also was denied visits with the child on two additional days, May 15 and May 17. "[T]he proper way to attack a variance between pleadings and proof is by objection at the trial to the admissibility of that evidence which varies from the pleadings, and failure to do so at the trial constitutes a waiver of any objection to such variance." (Internal quotation marks omitted.) *Russo Roofing, Inc.* v. *Rottman*, 86 Conn. App. 767, 774 n.6, 863 A.2d 713 (2005).

that the defendant was in wilful contempt of the April 7, 2015 order. The court stated: "The court finds that the [plaintiff] did not access visitation, as ordered by Judge Boland, and the denial of access visitation occurred on May 12, on May 15, and May 17, and that the denial was without justification.[5]

"There was an incident, while the child was in [the plaintiff's] custody/visitation/access, where [the plaintiff] disciplined the child. The court finds, based upon the credible testimony, that [the plaintiff] acted appropriately in disciplining the child. And the court also further finds that the child was not physically disciplined by [the plaintiff]. The court finds that the child acted unruly, and the [plaintiff] appropriately disciplined the child. The court notes that, in this instance, the child does not have a say on whether or not he wants to visit with [the plaintiff].

"The court finds that [the defendant's] actions in utilizing the recommendations of the [guardian ad litem] and the child's counselor are being used to alienate the ability of [the plaintiff] to parent this child, and that [the defendant's] actions are in wilful disregard of the orders that were imposed by, only a short time ago . . . Judge Boland.

"The court notes in making its findings that the [defendant] did not notify the police until he decided that he was going to stop visitation, that he did not contact [the Department of Children and Families] if [the defendant] was so concerned about the child's welfare and well-being. And the court cannot find that [the plaintiff] exposed the child to unsafe conditions or situations." (Footnote added.)

[5] The plaintiff indicated that before the first missed visit on May 12, 2015, the defendant told her that the visitation was to stop and that she was not going to see the child until a safer environment was in place.

The court then imposed sanctions. It ordered that the defendant be incarcerated for a period of ten days; that he be fined for each day that he denied the plaintiff access to her child at the rate of $100 per day, for a total of $300; that he be fined for violating the court's order in the amount of $500; and that he pay the plaintiff attorney's fees of $2500 and marshal fees for service in the amount of $143 within sixty days. With respect to the ten day order of incarceration, the court stated: "Now, insofar as the ten days ordered incarceration, the court will not, at this point, incarcerate the defendant, but give him an opportunity to allow the court-ordered visitation, that was ordered by Judge Boland, to take place. So, the court will not impose the incarceration at this time, but it is there, and the court, then, will consider whether or not to vacate it entirely upon successful—upon the court being satisfied that [the defendant] has complied with the court-ordered visitation."[6] On June 3, 2015, the court also issued a written order reiterating, without reference to the factual findings it had made in its oral decision that same day, its finding of wilful contempt and the sanctions it had imposed, and adding that all of the fines imposed were to be paid within twenty days. This appeal followed. Additional facts will be set forth as necessary.

I

We address the defendant's first and third claims together because they both relate to claimed error on the part of the court in not permitting him to present a defense to the motion for contempt. The defendant's first claim is that the court erred in failing to allow him a fair opportunity to present his defense, and his third claim is that the court erred in failing to allow him to

[6] The record reveals that on June 24, 2015, nine days after this appeal was filed, the court vacated the ten day incarceration order, finding that the defendant was in compliance.

testify as to statements made to him by the child about events occurring during a visit on May 10, 2015, with the plaintiff.[7] Specifically, the defendant asserts that after allowing the plaintiff to testify as to what had occurred on May 10, 2015, during her visit with the child, including statements that she testified the child had made to her,[8] he was not permitted to testify as to what the child told him when the child returned to the defendant's home after the visit.

We begin by setting forth the applicable standard of review for evidentiary claims. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if

[7] In reviewing the record and the defendant's appellate brief, we conclude that the real basis for those claims are evidentiary in nature, which the defendant has attempted to masquerade as a constitutional deprivation of his right to present a defense. The defendant has failed to cite any authority for the proposition that disallowing testimony as to a declarant's state of mind in a situation analogous to that on appeal is of constitutional magnitude, state or federal. We, therefore, address both of these claims as a single claim of evidentiary error. See, e.g., *State* v. *Walker*, 215 Conn. 1, 5, 574 A.2d 188 (1990) ("the admissibility of evidence is a matter of state law and unless there is a resultant denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved" [internal quotation marks omitted]).

In addition, in the present case, after a thorough review of the record, we detect no denial of fundamental fairness or a specific constitutional right. The defendant was provided with all the due process safeguards that must be satisfied in a contempt hearing. He was advised of the allegations against him, had a reasonable opportunity to meet them by way of defense or explanation, was represented by counsel, and had a chance to testify and call other witnesses on his behalf, although he did not choose to call any other witnesses. See *Brody* v. *Brody*, 315 Conn. 300, 317–18, 105 A.3d 887 (2015).

[8] The defendant posed no objection to the plaintiff's testimony in this regard.

premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citation omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 571–72, 46 A.3d 126 (2012).

"In a civil case, the appellant has the burden of establishing the specific harmfulness of the error by demonstrating the likelihood that the evidentiary ruling had affected the result." (Internal quotation marks omitted.) *Johnson* v. *Johnson*, 111 Conn. App. 413, 420, 959 A.2d 637 (2008).

Relative to the issue of whether the court erred in sustaining the plaintiff's objections to the defendant's testimony as to what the child reported to him after the May 10, 2015 visit, the following testimony occurred during the direct examination of the defendant.

"[The Defendant's Counsel]: Mr. Medeiros, you were in court April 7 when Judge Boland entered orders for visitation, correct?

"[The Defendant's Counsel]: And keep your voice up.

"[The Witness]: Okay.

"[The Defendant's Counsel]: Either that or I'll stand at the back of the courtroom and you'll have to yell at me.

"[The Witness]: Okay. Yes.

"[The Defendant's Counsel]: And from that day forward did you immediately start providing the visitation that Judge Boland had ordered?

"[The Witness]: Yeah. I was happy.

"[The Defendant's Counsel]: And how—when [the child would] come home did he express concerns to you over what was happening—

"[The Plaintiff's Counsel]: Objection. That would be hearsay just as well.

"[The Defendant's Counsel]: No. I didn't ask—I'm not asking—his state of mind—

"The Court: Well, it calls for a yes or no. I'll allow the question.

"[The Witness]: Yes.

"[The Defendant's Counsel]: Okay. Did you discuss these concerns with [the plaintiff]?

"[The Witness]: Yes.

"[The Defendant's Counsel]: And all during the time between April 7 and May 10 was [the child] provided with a cell phone?

"[The Witness]: Yes, he was. A safety phone.[9]

"[The Defendant's Counsel]: And what was your understanding as to the use of the cell phone? Why was he given a cell phone?

"[The Witness]: [The child] was given a cell phone on the recommendation, actually, of Judge Boland, where [the child] could have a safety phone. If he felt uncomfortable he could—or if something wasn't—if he needed to—if he needed some reassurance or if he needed to

[9] On September 26, 2014, the court, *Boland*, *J.*, in modifying the terms of the plaintiff's access to the child, ordered unsupervised visits to resume and included an order that the child be provided with a cell phone so that if a problem with the plaintiff arose, the child could call the defendant to come pick him up. In the order issued by Judge Boland on April 7, 2015, the parties were ordered to continue to provide the child with a cell phone.

come home he could call. It was his safety phone. He discussed that with his counselor as well.

"[The Defendant's Counsel]: All right. And did you receive several phone calls between April 7 and May 10 from [the child]?

"[The Witness]: Yes, I did.

"[The Defendant's Counsel]: Okay. And did you terminate any of the visits because of the phone calls?

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

"[The Defendant's Counsel]: What would you normally tell [the child]?

"[The Witness]: Well, I would listen to what was going on, and I'd ask him to wait a little bit more time to see if things could turn around, and typically he would call back and say, well, things are—you know, I feel a little bit better now, things are going good.

"[The Defendant's Counsel]: Did you ever terminate a visit before May 10 because of a phone call?

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

"[The Defendant's Counsel]: Okay. On May 10 did you terminate a visit, that was Mother's Day?

"[The Witness]: On Mother's Day, no, I didn't. But the visits prior to that [the child] was—

"[The Plaintiff's Counsel]: I'm going to object. I mean, we already put the time period as of May 12. The fact that he complied with the court order for some limited period of time should not have earned him any gravy points, and it's completely relevant. The relevancy is his conduct on May 12. Okay.

"The Court: Sustained.

"[The Defendant's Counsel]: Your Honor, I'm going to claim it, because we're looking at a reasonable cause to deny a visit, and this is based on a course of conduct—increasing course of conduct. It wasn't a one day affair, it was an increasing course—

"The Court: I sustained the objection. Ask your next question.[10]

"[The Defendant's Counsel]: On May—again, on May 10 were there concerns raised—

"[The Plaintiff's Counsel]: Objection again, Your Honor.

"[The Defendant's Counsel]: This is where—

"[The Plaintiff's Counsel]: It's the same question.

"The Court: Well, let her ask the question.

"[The Defendant's Counsel]: The plaintiff started—

"The Court: Let counsel ask the question.

"[The Defendant's Counsel]: The plaintiff started testifying about May 10, and the events of May 10. I'm asking for the same date.

"The Court: Again, what's the relevance or the—

"[The Defendant's Counsel]: Because it was—

"The Court: What is your offer of proof on that issue?

[10] In his appellate brief, the defendant makes a brief reference to this particular ruling, but mischaracterizes it as another incident in which the court precluded his testimony as to what the child had stated to him about the visit occurring on May 10, 2015. The question posed, however, to which the plaintiff took objection, was broader in scope and attempted to explore the defendant's opinion as to how visitation had been going prior to May 10, 2015. The defendant has failed to provide any analysis as to why the court's sustaining of the plaintiff's objection, based on relevancy, was improper. We, therefore, deem any claim pertaining to this particular ruling as inadequately briefed and decline to address it. See *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 133, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014).

"[The Defendant's Counsel]: That the child indicated such an unsafe situation at [the plaintiff's] house, which was corroborated by [the plaintiff], that [the defendant] felt [it] was unsafe to allow the child to see the [plaintiff] on the next visitation day, which was a Tuesday. And, again—

"The Court: That's the reason?

"[The Defendant's Counsel]: Yes, Your Honor.

"The Court: Objection sustained. Ask your next question.

"[The Defendant's Counsel]: Why did you not let the—[the child] go to visit—to see [the plaintiff] on May—on Tuesday?

"[The Witness]: [The child] came home [shaken] to his core. He was very, very upset, very scared. He was discussing many things that had happened, and it was very alarming and concerning. He was saying—he had told me that he was being screamed at, that he was being pushed, that he was being sworn at, that he was grabbed by his forearms, picked up into the air and slammed into a chair. He was—

"[The Plaintiff's Counsel]: Your Honor, I'm going to object. First of all, it's all hearsay—

"[The Witness]: He was—he explained to me that—

"[The Plaintiff's Counsel]: Objection.

"[Unknown Speaker]: One moment, sir. One moment.

"The Court: Sustained.

"[The Defendant's Counsel]: Your Honor. Your Honor, if—we're looking at the causes that—the justification for the termination. Whether these events occurred the issue is whether [the defendant] was reasonable in his understanding of what was going on.

There's no other way—whether they occurred or not—and, again, the [plaintiff] has given some evidence these events did occur. The issue is whether he had reasonable cause to take the steps he did.

"[The Plaintiff's Counsel]: I'm going still—

"The Court: Sustained. Ask your next question.

"[The Plaintiff's Counsel]: The issue is a contempt motion and whether he had—

"[The Defendant's Counsel]: He brought it out.

"[The Plaintiff's Counsel]: Okay. No. I did not bring it out.

"[The Defendant's Counsel]: With [the plaintiff]. He asked [the plaintiff] what happened on May 10.

"[The Plaintiff's Counsel]: He's basing it solely on the hearsay evidence of an eight year old boy, who we have no corroboration whatsoever, except for the testimony of the [defendant] who allegedly or—okay—committed contempt of a court order, and he's facing to go into prison.

"[The Defendant's Counsel]: The—

"The Court: Ask your next question.

"[The Defendant's Counsel]: Your Honor, are you barring me from bringing up any evidence as to the reason [the defendant] made this decision?

"The Court: You can ask him that.

"[The Defendant's Counsel]: I just did, Your Honor. That was my question.

"The Court: No. He testified of what [the child] said to him.

"[The Defendant's Counsel]: I'm asking him why he decided to—

"The Court: Well, then ask him that question.

"[The Defendant's Counsel]: Why did you decide to terminate—or not allow a visit on Tuesday, May—May 12?

"[The Witness]: Okay. [The child] came—[the child] was very distraught, he was very upset. He explained many things to me. I contacted [the plaintiff], I contacted the guardian ad litem, and I contacted [the child's] counselor to discuss these concerns. I made an appointment for [the child] to see his counselor. [The plaintiff] confirmed that these things had happened and, you know, we had a discussion if, you know—if these—if this was healthy and is this safe and, you know—it was obvious that it's not safe or healthy—

"[The Plaintiff's Counsel]: Objection—

"[The Witness]: —and—

"[The Plaintiff's Counsel]: —to his conclusions.

"The Court: I'll strike his opinion on whether it was safe and unhealthy.

"[The Defendant's Counsel]: Did—was it your understanding that [the child] was not allowed contact—allowed his telephone to call you, his safety phone?

"[The Witness]: Yeah. Yes.

"[The Defendant's Counsel]: Was it your understanding that [the plaintiff] had picked him up and put him in a chair physically?

"[The Witness]: Yes.

"[The Defendant's Counsel]: And is there a provision in the court order of May 7 saying that there should be no physical discipline of the child?

"[The Witness]: Yes. Absolutely." (Footnote added.)

The defendant claims that the court prevented him from explaining why his reaction to the child's report to him of what had occurred during the visit with the plaintiff on Sunday, May 10, 2015, was reasonable and, thus, did not constitute a wilful violation of the court's order.[11] He maintains that the court improperly sustained the plaintiff's objections to the admission of evidence of what the child reported to him as hearsay although he had offered it not for the truth of the child's statements, but to show the child's state of mind after the visit on May 10, 2015, which resulted in his reasonably justified decision to prevent visits from taking place on May 12, May 15, and May 17, 2015.[12] The plaintiff argues that the testimony was hearsay. We agree

[11] "The inability of the defendant to obey an order of the court, without fault on his part, is a good defense to a charge of contempt." *Tobey* v. *Tobey*, 165 Conn. 742, 746, 345 A.2d 21 (1974). The defendant claimed that it was essential to disallow the plaintiff's visits due to concerns for the child's safety emanating from things that the child had expressed to the defendant and the recommendations of the guardian ad litem and the child's counselor.

[12] The record also reveals that, before the trial court, the defendant's counsel also may have been arguing that the testimony was not hearsay because it was not offered for its truth but only to show its effect on the hearer. See Conn. Code Evid. § 8-1 (3); *State* v. *Miguel C.*, supra, 305 Conn. 574 ("if used for the purported purpose of demonstrating the effect of the [declarant's] statement on the [hearer], the contested testimony [is] not hearsay"). Our thorough review of the defendant's arguments on appeal reflects that, in his principal brief, the defendant failed to rely on this argument. For the first time in his reply brief, the defendant argues that the child's statements were "related to the defendant's belief that it was unsafe for the . . . child to visit with the plaintiff at her home." (Emphasis omitted.)

To the extent that the defendant's reply brief invites this court to consider whether the evidence was admissible to demonstrate its effect on him, the hearer, we decline to address such argument for two reasons. First, we observe that the argument is not supported by any citation to or analysis of relevant law. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case

with the defendant that the court should have allowed the child's May 10, 2015 statements to him into evidence under the state of mind of the declarant exception to the hearsay rule, but, in light of the testimony the court eventually did hear from the defendant about the child's reported reaction to that visit, without objection from the plaintiff, we conclude that the error was harmless.

State of mind is an exception to the hearsay rule, referred to in our Code of Evidence as then-existing mental or emotional condition. See Conn. Code Evid. § 8-3 (4).[13] Several times during his testimony, the defendant indicated that the child had returned from the May 10, 2015 visit with the plaintiff "very upset, very scared," and "very distraught." The defendant's testimony was admissible to show the child's state of mind and emotional condition at the time rather than to prove the truth of what the child stated had occurred. The defendant was offering the statements of the child to explain the reasons the child provided for his emotional distress. Such evidence was relevant to whether the defendant's conduct in disallowing the next three visits was reasonable under the circumstances.[14]

and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). Second, "[i]t is well established . . . that [c]laims . . . are unreviewable when raised for the first time in a reply brief. . . . Our practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." (Internal quotation marks omitted.) *SS–II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 302, 977 A.2d 189 (2009).

[13] Section 8-3 (4) of the Connecticut Code of Evidence provides: "A statement of the declarant's then-existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed."

[14] "The rules of evidence are somewhat relaxed in trials having to do with a determination of custody of [or visitation with] an infant where it is

The record, however, reveals that subsequent to the three times the court sustained the plaintiff's objections to the offer of the child's statements as hearsay, the court, without objection, heard testimony from the defendant that effectively conveyed the gist of the information he previously had attempted, unsuccessfully, to introduce. He was able to relay to the court that the child returned from the May 10, 2015 visit distraught and upset and had explained many things to him, including not being allowed to telephone the defendant when he felt unsafe, and being picked up and put in a chair physically. The court also heard evidence that after police officers spoke with the child at his school on May 15, 2015, they determined that rather than have a visit occur with the plaintiff, it was best that he go home with the defendant. The defendant also testified that he had concerns for the child's safety. Ultimately, the defendant was able to convey these points to the court. The court, however, found the plaintiff's testimony that she had appropriately disciplined the child more credible[15] and determined that the defendant's conduct in depriving the plaintiff of three subsequent visits was not justified. We, therefore, conclude that although the challenged testimony should have been

necessary to learn of the child's psychology and preferences. Therefore it is sometimes pertinent to bring to the court's knowledge the temperament, disposition and reactions of the child by testimony that borders upon hearsay in that it embraces a recital of the child's remarks. Such testimony, however, is not strictly hearsay because the objective and the result are to look into the child's mind and not to establish the truth or falsity of other matters set up as facts." (Internal quotation marks omitted.) *Gennarini* v. *Gennarini*, 2 Conn. App. 132, 139–40, 477 A.2d 674 (1984); see also C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 8.9 (declarations of implied state of mind of speaker as exception to hearsay rule).

[15] The plaintiff testified that she had placed the child in his room for a time-out for being disrespectful and that after the child calmed down, she called the defendant to explain what had occurred and then gave the phone to the child, who then gave the defendant an explanation similar to hers. She denied any physical or verbal abuse of the child.

admitted under the state of mind exception to the hearsay rule, the exclusion does not rise to the level of substantial prejudice or injustice to the defendant. "Although the defendant frames the appellate issue as one of a constitutional violation, [the] ultimate conclusion turns on evidentiary grounds. . . . It is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him. . . . The relevant inquiry is whether the claimed error of the trial court is likely to have affected the outcome of the trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Samuels*, 75 Conn. App. 671, 715, 817 A.2d 719 (2003), rev'd on other grounds, 273 Conn. 541, 871 A.2d 1005 (2005). On the basis of our review of the record, we are not persuaded that the court's error likely affected the outcome of the trial. Accordingly, the defendant's first and third claims are without merit.

II

The defendant's second claim is that the trial court failed to determine that the evidence establishing its finding of contempt met the required clear and convincing standard of proof. We disagree.

We first note the applicable standard of review. "The question of whether a trial court has held a party to a less exacting standard of proof than the law requires is a legal one. . . . Accordingly, our review is plenary." (Citation omitted.) *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 126, 981 A.2d 1068 (2009).

The defendant relies upon *Brody* v. *Brody*, 315 Conn. 300, 318–19,105 A.3d 887 (2015), for the proposition that indirect civil contempt proceedings should be proven by clear and convincing evidence, and that because the court, in the face of the conflicting testimony of the

plaintiff and the defendant, failed to state it had based its finding of contempt on clear and convincing evidence, it is not clear that the court weighed the evidence under the proper standard.[16] The plaintiff counters that the evidence sufficiently established by clear and convincing evidence that the defendant was in contempt of the court's order.

First, contrary to the plaintiff's argument with respect to this claim, the defendant does not contest the findings relied on by the court to conclude that his actions were wilful and in violation of the court's order. Rather, the defendant asks that the matter be remanded for a new hearing to assure that the court applied the proper standard of proof because the court's decision is silent on that particular point.[17]

The decision of our Supreme Court in *Kaczynski* v. *Kaczynski*, supra, 294 Conn. 121, is dispositive. Like the defendant in the present case, the defendant in *Kaczynski* claimed on appeal that the trial court's decision on a fraud claim should be reversed because the trial court failed to indicate, either explicitly or implicitly, that it was applying the clear and convincing standard of proof when making its findings of fraud. Id., 125.

"[A] defendant has an obligation to supply this court with a record adequate to review his claim of error. . . . It is important to recognize that a claim of error cannot be predicated on an assumption that the trial court acted erroneously. . . . When a trial court in a civil matter requiring proof by clear and convincing

[16] In *Brody*, the problem was not that the court was silent about what burden of proof it had applied when hearing an indirect civil contempt proceeding; rather, the problem in that case was that the court applied an incorrect standard of proof, the fair preponderance of the evidence standard. *Brody* v. *Brody*, supra, 315 Conn. 315.

[17] In his brief, the defendant's second claim is stated as follows: "The trial court never established the standard of proof applicable to the evidence offered on plaintiff's motion for contempt."

evidence fails to state what standard of proof it has applied, a reviewing court will presume that the correct standard was used. If a party, following the rendering of the trial court's judgment, believes that the trial court potentially utilized the less stringent standard of preponderance of the evidence, that party has the burden of seeking an articulation if the decision is unclear . . . or reargument if impropriety is apparent; see Practice Book § 11-12; thus giving that court the opportunity to clarify the standard used or to correct the impropriety and thereby avoiding an unnecessary appeal. If, instead, the party forgoes articulation or reargument and instead chooses to raise the issue for the first time on appeal, the reviewing court will not presume error from silence as to the standard used." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Kaczynski* v. *Kaczynski*, supra, 294 Conn. 129–31.

Neither the court's oral decision nor its written order, both issued on June 3, 2015, indicate what standard of proof the court applied, and the defendant did not seek articulation or reargument of its decision.[18] Consequently, because it is not otherwise clear from the record that an improper standard was applied, we presume that the court applied the clear and convincing evidence standard. Accordingly, we are not persuaded by the defendant's second claim.

III

The defendant's final claim is that the court erred in the imposition of sanctions for his contempt. Specifically, the defendant challenges the propriety of both fines, the ten day order of incarceration, and the award to the plaintiff of attorney's fees and costs. The plaintiff counters that all of the court's imposed sanctions were

[18] See also footnote 1 of this opinion addressing the defendant's failure to comply with Practice Book § 64-1 (a) by seeking a signed transcript or a written memorandum of decision from the trial court.

appropriate. We agree with the defendant that the fines imposed were improper but conclude that there are no grounds to reverse any of the other sanctions the court ordered.

We begin with a discussion of the nature of the contempt proceeding in the present case and the type of sanctions that may be imposed. "[C]riminal contempt is conduct directed against the authority and dignity of the court, while civil contempt is conduct directed against the rights of the opposing party. . . . A contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public. . . . Sanctions for civil contempt may be either a fine or imprisonment; the fine may be remedial or it may be the means of coercing compliance with the court's order and compensating the complainant for losses sustained." (Internal quotation marks omitted.) *DPF Financial Holdings, LLC* v. *Lyons*, 129 Conn. App. 380, 385, 21 A.3d 834 (2011). Because the grounds for the motion for contempt and sanctions in the present case were to serve the purposes of and to compensate the plaintiff, we conclude that the contempt was properly classified as civil, rather than criminal, in nature. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . Contempts of court may also be classified as either direct or indirect, the test being whether the contempt is offered within or outside the presence of the court." (Citation omitted; internal quotation marks omitted.) *Edmond* v. *Foisey*, 111 Conn. App. 760, 769, 961 A.2d 441 (2008). The plaintiff in this case alleged in her motion for contempt that the defendant failed to comply with the court's order, thus depriving her of visitation with the child. Because this occurred outside of the court's presence, the contempt is properly classified as indirect civil contempt.

A

We first address the stayed order of incarceration. The record reveals that on June 24, 2015, the court vacated its order of incarceration, which had been stayed. Neither of the parties brought this fact to our attention in their respective briefs. On February 22, 2017, we ordered the parties to file simultaneous supplemental briefs to address the following issue: "If this court determined that the contempt finding was proper, in determining the propriety of the sanctions that were imposed, should this court dismiss that portion of the appeal challenging the imposition of the incarceration order as moot?" Having reviewed the supplemental briefs, we conclude that the issue of the propriety of the incarceration order satisfies an exception to the mootness doctrine because it is capable of repetition yet evading review.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *Rocque* v. *Design Land Developers of Milford, Inc.*, 82 Conn. App. 361, 369 n.3, 844 A.2d 282 (2004). "If there is no longer an actual controversy in which [this court] can afford practical relief to the parties, we must dismiss the appeal." (Internal quotation marks omitted.) *Fiddelman* v. *Redmon*, 59 Conn. App. 481, 483, 757 A.2d 671 (2000). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." *Hechtman* v. *Savitsky*, 62 Conn. App. 654, 659, 772 A.2d 673 (2001). We recognize that an appeal challenging the validity of a court's finding of contempt, even when purged by making payments, is not moot because a contempt finding has collateral consequences in that it may impact the contemnor's future status in the action. "For example, a future citation for contempt, given the first finding of

contempt which is the subject of [the same] case, would make the defendant appear more recalcitrant than he might be, in fact. Such an impression is likely to affect a trial court's determination of the penalty attendant on any future finding of contempt in this [same] case." *Sgarellino* v. *Hightower*, 13 Conn. App. 591, 594–95, 538 A.2d 1065 (1988). In the present case, however, having found no error in the court's finding that the defendant was in contempt, the collateral consequences of that finding remain attached regardless of the propriety of the sanctions imposed. Accordingly, there would be no reason to review the propriety of the sanctions on the basis of collateral consequences that will continue to flow from the contempt finding regardless of whether some of the sanctions ordered upon a valid finding of contempt were improper.

If a controversy is moot, however, it is still justiciable if it meets the requirements of the "capable of repetition, yet evading review" doctrine, an exception to the mootness doctrine. See *Sweeney* v. *Sweeney*, 271 Conn. 193, 201, 856 A.2d 997 (2004). Our Supreme Court has articulated the following three requirements for an otherwise moot controversy to be justiciable under this exception. "First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance." *Loisel* v. *Rowe*, 233 Conn. 370, 382, 660 A.2d 323 (1995).

With respect to the first requirement, we recognize that most incarceration sanctions imposed pursuant to a finding of contempt in a family case, even if incarceration is stayed, are of limited duration. An incarcerated person will either purge the contempt and be released from imprisonment or be released when the court concludes, upon further review, that the contemnor is unable to purge.[19] Where the order is stayed to monitor compliance, such monitoring in most cases will occur over the span of, at most, a few continuances unless the continued failure to comply results in further contempt findings and sanctions.

As to the second requirement, the defendant notes that there is a reasonable likelihood that the question presented in this case will arise again in the future between the same parties and may affect him. The custody and visitation issues in this case have generated considerable court business since the date of the judgment of dissolution in 2013. We take judicial notice of the trial court file in this case, which indicates that disputes concerning the plaintiff's access to the child are ongoing. The defendant filed a motion to suspend all of the plaintiff's visits on July 10, 2015, barely a month after the contempt ruling at issue in this appeal was issued. Subsequently, after the court ordered coparenting counseling on October 27, 2015, the plaintiff filed two motions for contempt concerning the defendant's refusal to participate. The defendant also can be said to be representative of all alleged contemnors in questioning the authority of a court to issue an incarceration

[19] Practice Book § 23-20 provides: "No person shall continue to be detained in a correctional facility pursuant to an order of civil contempt for longer than thirty days, unless at the expiration of such thirty days such person is presented to the judicial authority. On each such presentment, the contemnor shall be given an opportunity to purge himself or herself of the contempt by compliance with the order of the judicial authority. If the contemnor does not so act, the judicial authority may direct that the contemnor remain in custody under the terms of the order of the judicial authority then in effect, or may modify the order if the interests of justice so dictate."

order upon a finding of contempt, but stay that incarceration to monitor future compliance with the order that the contemnor was found to have violated. This is not an isolated incident not likely to be repeated in the foreseeable future in the present case or in other future cases involving contempt of parental access orders. See *Shays* v. *Local Grievance Committee*, 197 Conn. 566, 574, 499 A.2d 1158 (1985).

Finally, we consider the issue of whether a court appropriately may employ a stayed incarceration order to monitor ongoing future compliance with a visitation order that has been violated to be a matter of sufficient public importance. Ensuring compliance by a custodial parent with appropriate orders granting visitation to the other parent can be a particularly vexing dilemma that must be addressed to protect both the best interests of the child and the visiting parent's fundamental "right to family integrity, including the right to the care, custody, companionship and management of one's children . . . ." *Roth* v. *Weston*, 259 Conn. 202, 210, 789 A.2d 431 (2002). We further recognize that cases regularly arise where the custodial parent displays a blatant disregard of a court order providing the other parent with meaningful contact with the child. We think it is important to determine whether the particular weapon of a stay of incarceration to monitor future compliance for a limited duration should properly remain in the trial courts' arsenal for enforcing their orders. Therefore, we conclude that the exception to the mootness doctrine applies in the present case and determine that the issue as to the propriety of the incarceration order is capable of repetition, yet evading review.

Having determined to review the issue, we agree with the plaintiff that the stayed incarceration order was not improper. Although the defendant might have resumed his compliance with the plaintiff's parental access order in the few weeks immediately preceding the contempt

hearing, he had begun violating the order almost immediately after the court, *Boland*, *J.*, had concluded a contested hearing and modified the visitation orders to expand what previously had been the plaintiff's very limited access to the child. This resulted, almost immediately, in the plaintiff having to expend further sums of money and time to enforce rights that she only recently had obtained after a contested hearing. The defendant claims that the incarceration order was punitive because he had no ability to purge his contempt because if he was incarcerated for ten days, he would not be able to adhere to the visitation schedule. This misrepresents the nature of the order. The court gave him the ability to purge himself of the threat of incarceration by complying with the visitation orders for a limited duration. The defendant, therefore, had the ability to prevent his incarceration altogether if he continued to remain compliant, which he did, resulting in the vacating of the incarceration order only a few weeks after it was entered. Such an order also enabled the plaintiff to await the outcome of this conditional test of the defendant's continued willingness to comply without having to immediately resort to the expense of initiating another motion for contempt and serving another citation on the defendant. The defendant was provided with the keys to continuing freedom from incarceration by exhibiting a short period of full compliance. As a result of such compliance, the court would have no justification for vacating the stay and imposing a ten day term of incarceration.

Civil contempt sanctions are intended to operate in a prospective manner and are "designed to compel future compliance with a court order . . . and avoidable through obedience . . . ." *International Union, United Mine Workers* v. *Bagwell*, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994). We decline to deprive our trial courts of the useful sanction of a stayed

incarceration order and conclude that a court, confronted with a contemnor who has displayed unsatisfactory reasons for his refusal to follow the court's orders, should have the authority, as part of the contempt process, to require, as a condition of a stayed order of incarceration, the contemnor's continued appearance before the court for the purpose of monitoring his future compliance for a reasonable time period. We acknowledge that in the event the contemnor returns to court on a future date for the purpose of monitoring his compliance and is shown to have persisted in his noncompliance, there is a legitimate question as to whether the court could immediately impose the stayed incarceration without further process by providing the contemnor with an opportunity to be heard and the imposition of a newly crafted sanction that would provide him with the ability to purge his contempt. If the court imposed the ten days of incarceration previously stayed, there would have to be an additional order with which the defendant could comply to secure his release or to reduce the length of his imprisonment, or the incarceration "[will] not have been coercive, it [will] have been a purely punitive sanction for a previous . . . violation. There [will] have been no opportunity . . . to purge himself of the civil contempt." *Eric S.* v. *Tiffany S.*, 143 Conn. App. 1, 11, 68 A.3d 139 (2013). The present case, however, never reached a point where the incarceration order imposed became punitive, and the stayed incarceration order accomplished its purpose—the defendant, who controlled his own destiny, complied with the access order and avoided being jailed.

B

Before discussing the specifics of the defendant's claim as it relates to the fines imposed, we identify the applicable standard of review. "[In *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 738, 444 A.2d

196 (1982),] the [Supreme Court] reviewed the claim that the penalties imposed by the trial court were improper and an abuse of discretion. . . . These claims are reviewable in an appeal from the contempt judgment *because the contemnor must have some remedy for* unauthorized or *excessive penalties*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Edmond* v. *Foisey*, supra, 111 Conn. App. 774. Accordingly, we review the propriety of the fines imposed pursuant to an abuse of discretion standard.

The defendant first argues that the court exceeded its discretion in ordering, as a sanction for his contempt, a compensatory damages award to the plaintiff of $100 per day as a fine for each day that the defendant denied the plaintiff access with the child, for a total of $300. The defendant asserts that this fine has no basis in fact. The court also imposed "a fine of $500 for violating the court's order" without directing to whom the fine was payable. The defendant argues this $500 fine was improper as a civil contempt fine if the court intended that it be paid to the plaintiff because it also lacked any basis in fact. He further argues that if the court intended this $500 fine to be payable to the state, the court improperly imposed a criminal contempt fine. Because we presume the court correctly analyzed the law in rendering its judgment; *DiBella* v. *Widlitz*, 207 Conn. 194, 203–204, 541 A.2d 91 (1988); absent a clear indication to the contrary, we decline to infer that the court engaged in the procedural irregularity of conducting a nonsummary criminal contempt proceeding in the context of a motion for contempt filed by a party in a family relations matter.[20] On the basis of the record

[20] If the $500 fine was intended to be payable to the state to vindicate the authority of the court, it would have been improper because it would only be "consistent with . . . punitive fines levied in criminal [not civil] contempt . . . ." *Board of Education* v. *Shelton Education Assn.*, 173 Conn. 81, 85, 376 A.2d 1080 (1977). Furthermore, such a fine only could be imposed pursuant to a nonsummary criminal contempt proceeding initiated pursuant to Practice Book §§ 1-17 and 1-18. See generally *State* v. *Murray*, 225 Conn.

before us, we conclude that the court correctly understood it was conducting a civil contempt proceeding and, therefore, all of the fines it imposed were intended to compensate the plaintiff.

Civil contempt fines, however, must be based on actual loss. "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed . . . to compensate the complainant for losses sustained. . . . Where compensation is intended, a fine is imposed, payable to the complainant. *Such fine must of course be based upon evidence of* [*the*] *complainant's actual loss* . . . . Civil contempt proceedings are *not* punitive—*i.e.*, they are not imposed for the purpose of vindicating the court's authority—but are purely remedial. . . . [I]t is well settled . . . that the court may, in a proceeding for civil contempt, impose the remedial punishment of a fine *payable to an aggrieved litigant as compensation* for the special damages he may have sustained by reason of the contumacious conduct of the offender. . . . [S]uch a compensatory fine must necessarily be limited to the actual damages suffered by the injured party as a result of the violation . . . ." (Citations omitted; emphasis altered; internal quotation marks omitted.) *DeMartino* v. *Monroe Little League, Inc.*, 192 Conn. 271, 278–79, 471 A.2d 638 (1984). In the present case, the court failed to provide a factual basis for the amount of its award of compensatory damages to the plaintiff in the nature of the fines totaling $800, nor was there any evidence presented that the plaintiff,

355, 361–62, 623 A.2d 60, cert. denied, 510 U.S. 821, 114 S. S. Ct. 78, 126 L. Ed. 2d 46 (1993). Practice Book § 1-17 provides, in relevant part, that "[t]he judicial authority should defer criminal contempt proceedings when . . . (3) the misconduct did not occur in the presence of the court . . . ." A criminal contempt deferred under § 1-17 must be prosecuted by means of an information. The judicial authority may, either upon its own order or upon the request of the prosecuting authority, issue a summons or an arrest warrant for the accused. The case then proceeds as any other criminal prosecution. See Practice Book § 1-18.

apart from her claimed attorney's fees and costs of marshal service, incurred any other pecuniary loss as a result of the defendant's contumacious conduct. Accordingly, we conclude the court erred in imposing compensatory fines on the defendant without any evidence as to actual damages suffered by the plaintiff.[21]

C

Finally, we address the defendant's claim that the award of $2500 in attorney's fees, plus $143 in marshal fees to the plaintiff was improper.[22] "[A]bsent contractual or statutory authorization, there can be no recovery, either as costs or damages . . . for counsel fees by a party from his opponent." (Internal quotation marks omitted.) *Marquardt & Roche/Meditz & Hackett, Inc.* v. *Riverbend Executive Center, Inc.*, 74 Conn. App. 412, 428–29, 812 A.2d 175 (2003). "When any person is found in contempt of an order of the Superior Court entered under [the applicable marriage dissolution statutes] the court may award to the petitioner a reasonable attorney's fee . . . . On appeal, we review the court's order for abuse of discretion." (Internal quotation marks omitted.) *Dowd* v. *Dowd*, 96 Conn. App. 75, 86, 899 A.2d 76, cert. denied, 280 Conn. 907, 907 A.2d 89 (2006).

The defendant claims that the court abused its discretion in ordering that the defendant pay attorney's fees to the plaintiff because its sole consideration was a review of the oral representation of the plaintiff's counsel to the court detailing his fees and expenses, and

[21] An award of court costs plus reasonable attorney's fees also has been viewed in the context of an indirect civil contempt proceeding as a proper remedial form of compensation consisting of actual losses suffered by a plaintiff as the result of contumacious conduct on the part of the defendant. See *DeMartino* v. *Monroe Little League, Inc.*, supra, 192 Conn. 280.

[22] Although the defendant claims that the award of marshal fees to the plaintiff was improper, he has failed to adequately brief this claim. Instead, he focuses his analysis only on the propriety of the attorney's fees award. We, therefore, consider the claim as to the award of the marshal's fee abandoned.

whether the charges appeared reasonable. The court, the defendant argues, failed to consider the total financial resources of the parties in light of the statutory criteria contained in General Statutes § 46b-62.[23] The defendant relies on *Miller* v. *Miller*, 16 Conn. App. 412, 418, 547 A.2d 922, cert. denied, 209 Conn. 823 (1988), in which the court stated: "In determining whether to award counsel fees, the trial court must consider the total financial resources of the parties in light of the statutory criteria." (Internal quotation marks omitted.) The plaintiff claims that the court's consideration of the statutory criteria and the defendant's ability to pay the attorney's fees is implicit in its earlier determination, which occurred during the same hearing on June 3, 2015, that the defendant had the ability to pay 90 percent of the $1500 fee retainer for the newly appointed guardian ad litem.

The defendant does not contest the reasonableness of the amount of the attorney's fees requested by the plaintiff, which was supported by the bare representations of the plaintiff's counsel, not an affidavit, that he spent ten hours prosecuting the motion for contempt at a rate of $250 an hour. Rather, the defendant claims that the court abused its discretion by failing to consider his ability to pay the fees. Our careful review of the record reveals that the defendant not only failed to bring this objection to the attention of the court at the time that it considered the plaintiff's request for attorney's fees, but he also failed to raise any objection to that request. On this record, we conclude that the defendant waived his right to raise the present claim on appeal.

[23] General Statutes § 46b-62 (a) provides in relevant part: "In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

In *Smith* v. *Snyder*, 267 Conn. 456, 481, 839 A.2d 589 (2004), our Supreme Court reasoned: "[A]lthough a bare request for attorney's fees, without more, ordinarily would not suffice . . . we conclude that a reversal of the award in the present case is not justified in light of the defendants' failure, prior to this appeal, to interpose *any objection whatsoever* to the plaintiffs' request for attorney's fees. In other words, the defendants, in failing to object to the plaintiffs' request for attorney's fees, effectively acquiesced in that request, and, consequently, they now will not be heard to complain about that request." (Emphasis in original.) Subsequently, this court has followed the rationale in *Smith* in declining to review claims arising from an award of attorney's fees. See, e.g., *Florian* v. *Lenge*, 91 Conn. App. 268, 285, 880 A.2d 985 (2005); *Arcano* v. *Board of Education*, 81 Conn. App. 761, 770–71, 841 A.2d 742 (2004).

The judgment is reversed in part and the case is remanded with direction to vacate the $800 in fines imposed on the defendant; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DAMON BIGELOW *v.* COMMISSIONER OF CORRECTION (AC 37565)

Alvord, Keller and Dennis, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of several criminal and motor vehicle charges, filed a second petition for a writ of habeas corpus, claiming that his criminal trial counsel, Z, and his first habeas counsel, T, had rendered ineffective assistance. The petitioner alleged, inter alia, that T failed to raise claims that Z improperly advised and inadequately represented him during plea negotiations and during his plea canvass, and failed to file a motion for an examination for entry into a certain diversionary substance abuse program. The petitioner also

alleged that T failed to raise a claim that Z was ineffective for failing to request three days of presentence confinement credit. The habeas court rendered judgment denying the petition and, thereafter, denied his petition for certification to appeal from the habeas court's judgment. On appeal to this court, the petitioner claimed, inter alia, that the habeas court had abused its discretion in denying his petition for certification and improperly denied his habeas petition. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to demonstrate that the issues he raised were debatable among jurists of reason, that a court could resolve those issues differently, or that the questions he raised deserved encouragement to proceed further, and, accordingly, his appeal was dismissed: the record supported the habeas court's factual findings underlying its conclusion that Z provided appropriate advice pertaining to the petitioner's guilty plea, as Z testified about the petitioner's willingness to accept certain of the state's plea offers, and about matters that Z generally discusses with clients, such as the petitioner, in preparation of a plea canvass, including those pertaining to the charges against them and the possible sentences they could receive; moreover, notwithstanding the petitioner's claim that had Z failed to adequately investigate the death of a certain witness on whom the state relied, significant other evidence supported the petitioner's underlying convictions, and nothing in the record suggested that the petitioner would have opted for a trial, as he had several pending cases that exposed him to significant jail time; furthermore, the court's findings with respect to the petitioner's claim regarding Z's failure to file a motion for examination for entry into the substance abuse program were not clearly erroneous, as the court could credit Z's testimony that no information was presented to him that would support a good faith basis to request such an examination, and Z did not improperly fail to seek three days of presentence confinement credit for time that the petitioner spent in lockup, as his discharge date would have remained unchanged because his longest concurrent sentence was not the one to which the credit applied.

Argued April 5—officially released August 1, 2017

Procedural History

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

David B. Rozwaski, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DENNIS, J. The petitioner, Damon Bigelow, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second postconviction petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly denied his petition for a writ of habeas corpus in which he claimed that counsel in both his underlying criminal prosecution and his first habeas proceeding rendered ineffective assistance. Because the petitioner has failed to demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal, we dismiss the appeal.

The following facts underlying the petitioner's convictions were set forth previously by this court. "In early 2008, the petitioner was a defendant in a number of criminal and motor vehicle matters pending in the Superior Court.[1] On September 24, 2008, while the petitioner was representing himself, the state extended a plea bargain to him that would have resolved all pending charges in exchange for guilty pleas and a total effective sentence of forty years incarceration, execution suspended after fifteen years, to be followed by a five year

[1] "The petitioner was charged with multiple counts of possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b), assault of a police officer in violation of General Statutes § 53a-167c, and disorderly conduct in violation of General Statutes § 53a-183." *Bigelow* v. *Commissioner of Correction*, 146 Conn. App. 737, 739 n.1, 80 A.3d 84 (2013).

period of probation. The petitioner, who was free on bond, was given time to consider the offer.

"Two days later, on September 26, 2008, the police executed a search and seizure warrant stemming from suspected drug trafficking activities at the petitioner's condominium. During the execution of the search warrant, the petitioner was arrested after police found a large quantity of heroin in a bedroom.[2] As a result of the additional charges, the state modified its original plea offer to reflect the new drug charges. Considering only the drug cases, the petitioner at trial would have faced forty-six years of mandatory minimum incarceration with a maximum sentence of life. The state's modified plea offer proposed that the petitioner actually serve twenty years as opposed to the original offer of fifteen.

"On October 1, 2008, the petitioner retained the services of Attorney Eugene Zingaro. Although the petitioner initially appeared willing to accept the state's modified plea offer, Zingaro ultimately was successful in restoring the original plea offer." (Footnotes in original.) *Bigelow* v. *Commissioner of Correction*, 146 Conn. App. 737, 739, 80 A.3d 84 (2013). During the sentencing hearing, the court thoroughly canvassed the petitioner, determined that his pleas were knowing, intelligent and voluntary, and accepted them.[3] "On November 12, 2008,

[2] "The petitioner was charged with possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b)." *Bigelow* v. *Commissioner of Correction*, 146 Conn. App. 737, 739 n.2, 80 A.3d 84 (2013).

[3] The transcript of the plea canvass provides in relevant part:

"The Court: Do you understand everything that's going on here today?

"[The Petitioner]: Yes, ma'am.

"The Court: Have you had enough time to speak with your attorney?

"[The Petitioner]: Yes, ma'am.

"The Court: Did your attorney explain to you the elements of all these offenses, the evidence the state has, and the possible penalties to you, including maximum periods of incarceration?

"[The Petitioner]: Yes, ma'am.

"The Court: All right. Now, Attorney Zingaro, did you have time to do that?

"Attorney Zingaro: Yes I did, Your Honor.

the petitioner accepted the original offer, pleaded guilty, and was sentenced to forty years incarceration, execution suspended after fifteen years, followed by five years of probation." Id., 739–40.

Following his convictions, the petitioner brought two petitions for writs of habeas corpus.[4] The petitioner's second such petition was filed on July 5, 2012, and amended for the final time on September 14, 2014. In essence, the petitioner argued that his first habeas counsel, Melissa Toddy, rendered ineffective assistance by failing to raise a claim regarding the deficient performance of his trial counsel, Zingaro. Specifically, the petitioner alleged that Toddy should have pursued such a claim because Zingaro rendered ineffective assistance in failing (1) to properly advise him regarding his guilty plea, (2) to file an application to participate in a drug treatment program on his behalf, (3) to seek jail credit for three days that he spent in local lockup, and (4) to properly investigate the death of an informant on whom the state relied.

In the second habeas trial, which is the subject of this appeal, the court heard testimony from the petitioner, Zingaro, and Toddy. Following the trial, the court issued a memorandum of decision denying the petitioner's claims of ineffective assistance of counsel. The habeas court subsequently denied the petition for certification

"The Court: All right. Are you satisfied with the services of your attorney?

"[The Petitioner]: Yes, ma'am. . . .

"The Court: Okay. Do you understand, sir, by pleading guilty in all of these files, you have waived certain rights?

"[The Petitioner]: Yes, ma'am."

[4] In the petitioner's first petition for a writ of habeas corpus, he alleged that his trial counsel was burdened by a conflict of interest as a result of having represented him and his brother at the same time. *Bigelow* v. *Commissioner of Correction*, supra, 146 Conn. App. 740–41. The habeas court denied the petition for a writ of habeas corpus, but granted the petition for certification to appeal. Id., 740. The petitioner appealed from that denial, and this court affirmed the judgment of the habeas court. Id., 744.

to appeal. This appeal followed. Additional facts will be set forth as necessary.

As an initial matter, we set forth the standard of review and the legal principles that guide our resolution of the petitioner's appeal. "In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), we concluded that [General Statutes] § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), we incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis in original; internal quotation marks omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 214–15, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013).

"We examine the petitioner's underlying claim of ineffective assistance of counsel in order to determine

whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 367, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014).

With respect to the petitioner's substantive claims, "[i]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . .

The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . The court, however, may decide against a petitioner on either prong, whichever is easier." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 823, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly rejected his claims of ineffective assistance of counsel. Specifically, the petitioner claims that the court abused its discretion in denying the petition for certification to appeal because, in the first habeas proceeding, Toddy failed to raise claims that Zingaro rendered ineffective assistance in that he failed (1) to adequately advise and represent him during plea negotiations and in connection with his eventual guilty plea, (2) to file a motion for examination under a substance abuse diversionary program,[5] and (3) to request presentence confinement credit of three days.

We turn to the merits of the petitioner's claims, recognizing that the claimed deficient performance regarding his first habeas counsel must fail if the claims of ineffective assistance of his trial counsel are without merit. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992).

I

The petitioner first claims that Zingaro inadequately advised him throughout the plea negotiation and ineffectively represented him when he pleaded guilty. Specifically, he argues that Zingaro rendered ineffective

[5] See General Statutes § 17a-693 et seq.

assistance because he failed (1) to ensure that there was a proper factual and evidentiary basis for each of the charged offenses, (2) to adequately inform the petitioner of the minimum and maximum sentence for each charge,[6] and (3) to adequately investigate the death of Nicklaus Larson.[7] The habeas court concluded that Zingaro provided appropriate advice relating to the petitioner's guilty plea on the basis of the petitioner's failure to satisfy his burden of proof under *Strickland*. We agree with the habeas court.

"For ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), which modified *Strickland*'s prejudice prong." *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 721, 789 A.2d 1046 (2002). "To satisfy the performance prong, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . A petitioner who accepts counsel's advice to plead guilty has the burden of demonstrating on habeas appeal that the advice was not within the range of competence demanded of attorneys in criminal cases. . . . To satisfy the prejudice prong, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . Reasonable probability does not require the petitioner to show that

[6] The respondent, the Commissioner of Correction, argues that this court is precluded from reviewing the petitioner's claim that Zingaro rendered ineffective assistance when he failed to inform the petitioner of the maximum and minimum penalties because this claim was not raised before and decided by the habeas court. Having reviewed the entire record, we conclude that the petitioner's argument is inextricably intertwined with the legal arguments and claims litigated before and decided by the habeas court. Accordingly, we conclude that this claim is reviewable on appeal. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015).

[7] Larson was a confidential informant to whom the petitioner sold drugs on his last arrest before he pleaded guilty in the underlying case.

counsel's deficient conduct more likely than not altered the outcome in the case, but he must establish a probability sufficient to undermine confidence in the outcome. . . . The *Hill* court noted that [i]n many guilty plea cases, the prejudice inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate . . . the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." (Citations omitted; internal quotation marks omitted.) *McClellan* v. *Commissioner of Correction*, 103 Conn. App. 159, 162, 927 A.2d 992 (2007).

At the plea hearing, the petitioner responded in the affirmative to Judge Reynolds' canvass, which asked him, inter alia, whether he was entering the plea voluntarily, whether he had had discussions regarding the plea with Zingaro pertaining to the elements of the charged offenses, the evidence the state had, and whether Zingaro discussed the possible penalties, including maximum periods of incarceration the charges carried.[8] At the conclusion of the canvass, the court found that the petitioner's plea was made "freely, voluntarily, intelligently . . . with the effective assistance of counsel, and [that] a factual basis does exist to support [the plea]." The court then accepted the guilty plea as to each charge, and the petitioner did not object.

"A court may properly rely on . . . the responses of the [petitioner] at the time [he] responded to the trial

[8] See footnote 3 of this opinion.

court's plea canvass . . . ." (Internal quotation marks omitted.) *Carey* v. *Commissioner of Correction*, 86 Conn. App. 180, 185, 860 A.2d 776 (2004), cert. denied, 272 Conn. 915, 866 A.2d 1283 (2005).[9] "It is appropriate to presume that in most cases counsel routinely explains the consequences of a plea agreement." *Toles* v. *Commissioner of Correction*, 113 Conn. App. 717, 727, 967 A.2d 576, cert. denied, 293 Conn. 906, 978 A.2d 1114 (2009).

In support of his argument that his guilty plea was not knowingly made, the petitioner primarily points to his testimony that he gave at the second habeas trial regarding Zingaro's failure (1) to explain to him the minimum and maximum sentence for each offense, and (2) to ensure that there was adequate evidentiary support for the charged offenses. That testimony clearly conflicts with the statements that the petitioner made during the plea canvass. More importantly, however, the habeas court discredited the petitioner's testimony and concluded that "Zingaro provided appropriate advice." These findings are supported by the record.

Zingaro testified at the second habeas proceeding that his usual practice in 2008, the time he represented the petitioner, with respect to preparing his clients prior to a plea canvass, was that he would discuss with his

[9] "In a related area, our Supreme Court has stated that the court need not advise a defendant of every possible consequence of a plea. Although a defendant must be aware of the direct consequences of a plea, the scope of direct consequences is very narrow. . . . In Connecticut, the direct consequences of a defendant's plea include only the mandatory minimum and maximum possible sentences . . . the maximum possible consecutive sentence . . . the possibility of additional punishment imposed because of previous conviction(s) . . . and the fact that the particular offense does not permit a sentence to be suspended. . . . The failure to inform a defendant as to all possible indirect and collateral consequences does not render a plea unintelligent or involuntary in a constitutional sense." (Internal quotation marks omitted.) *Toles* v. *Commissioner of Correction*, 113 Conn. App. 717, 727 n.5, 967 A.2d 576, cert. denied, 293 Conn. 906, 978 A.2d 1114 (2009).

client the "charges he was pleading to, the sentences, the total combined, the total effective sentence, which charges were mandatory, [and] which carried mandatory time." Zingaro further testified that he did not believe that the state's recitation of the facts during the petitioner's plea hearing were inaccurate. He also testified that if there was an error in the state's recitation of the facts or if the evidence did not support the charges brought against the petitioner, he would have raised those issues to the court. Moreover, Zingaro testified that the petitioner would have accepted the state's second offer of forty years imprisonment, suspended after twenty years, and had no second thoughts about accepting the third offer of forty years imprisonment, suspended after fifteen years.

On the basis of the court's canvass and its finding of guilty at the plea hearing, without objection from the petitioner, in addition to Zingaro's testimony at the habeas proceeding, we conclude that the habeas court's factual findings were not clearly erroneous.

Next, we briefly discuss the petitioner's argument that Zingaro failed to adequately investigate Larson's death. At the habeas trial, Zingaro testified that the state was not exclusively relying on Larson's testimony to prove its case because it had other evidence, including a written statement from Larson, and the testimony of several police officers who witnessed drug transactions between the petitioner and Larson. In Zingaro's opinion, the death of Larson did not significantly impact the state's case against the petitioner as a result.

In its memorandum of decision, the habeas court stated: "The evidence alleged to have been withheld by the prosecuting authority is the death of a Mr. Nicklaus Larson, the person to whom the petitioner sold drugs on his last arrest. Unfortunately for the petitioner's argument, the state clearly disclosed that fact in the

recitation of facts preceding the plea canvass *before* his plea was accepted." (Emphasis in original.) The court further stated: "[T]he testimony by Mr. Larson was not critical to the state proving that charge, as there were several hand-to-hand transactions observed by the undercover police officers. It is clear that the trial defense counsel made due diligence in investigating and understanding the facts surrounding the state's obviously strong case against the petitioner. This cannot form the basis for any complaint of ineffective assistance of trial defense counsel."

We agree with the habeas court's conclusion relating to this claim and need only address the petitioner's failure to satisfy the prejudice prong under *Strickland*. See *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 821–23. Other than the petitioner's own testimony, nothing in the record suggests that the petitioner would have opted for trial. At the time of the petitioner's guilty plea, the petitioner had several pending criminal cases that exposed him to significant jail time. The petitioner's guilty plea ultimately consolidated and disposed of his numerous pending cases into a sentence of forty years of imprisonment, execution suspended after fifteen years. The habeas court stated that "[a]ccepting this pretrial offer was prudent," given the substantial jail time he would have otherwise faced. Moreover, although Larson's death certainly did not strengthen the state's case, there was significant evidence supporting the petitioner's convictions, including the testimony of several undercover officers who witnessed the petitioner engage in hand-to-hand drug transactions. Simply put, even if we were to assume that the petitioner and his counsel were unaware of Larson's death, the petitioner's claim that he would have pursued a jury trial is speculative at best. Accordingly, this argument is without merit.

II

The petitioner next argues that Zingaro rendered ineffective assistance by failing to file a motion for examination for alcohol or drug dependency pursuant to the Connecticut Alcohol and Drug Abuse Commission's diversionary program (CADAC).[10] Specifically, he contends that Zingaro rendered ineffective assistance because he should have investigated the petitioner's personal history pertaining to substance abuse and should have determined whether the petitioner would have benefited from the program. We disagree.

In its memorandum of decision, the court noted that "in order to even be eligible for . . . CADAC one must be addicted to substances at the time of the offense. This record before this court is devoid of any evidence, with the exception of the petitioner's own self-serving testimony, that the petitioner was even using drugs, much less being addicted to them. In addition, the testimony at this habeas trial from [Zingaro] and the testimony at the petitioner's first habeas trial clearly show that the instant proceeding is the first time that there has been any issue surrounding the petitioner's potential substance abuse addiction. This court, therefore, concludes that any allegation of drug addiction was never brought to the attention of the trial defense counsel, so there would not even have been any reason to consider a CADAC application. Furthermore, merely making an application for CADAC does not guarantee that such an application would have been accepted by the trial court. Given the large number of criminal files that the petitioner had amassed, his reputation as the major drug dealer in Danbury, the large bond placed upon him, and comments by the trial court, it would appear to be most likely, indeed almost a certainty, that a CADAC application would have been rejected by the

[10] See General Statutes § 17a-693 et seq.

trial court, even had the examination shown he was addicted to substances at the time he committed his offenses (an unlikely finding based upon the totality of the evidence). The interests of justice would not have been served by treatment. To summarize, it is clear that [Zingaro] did not have a good faith basis to make a request for a [diversionary program] examination and, further, had one been made it is unlikely that it would have been granted even if made." (Footnote omitted.)

With respect to Zingaro's testimony, the court noted that he "went to great lengths to describe his observations of the physical condition of the petitioner . . . and his opinion that there was no way this man was a drug abuser. Second, the testimony by [Zingaro] is that no information was ever presented to him to support a suspicion that a [diversionary program] examination would reveal a substance abuse issue." The court expressly credited Zingaro's testimony and found that "the statements by the petitioner are rejected as being unworthy of belief."

"As an appellate court, we do not reevaluate the credibility of testimony, nor will we do so in this case. The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Furthermore, we are entitled to presume that the trial court acted properly and *considered all the evidence*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Palmenta* v. *Commissioner of Correction*, 152 Conn. App. 702, 707–708, 99 A.3d 1254, cert. denied, 314 Conn. 941, 103 A.3d 164 (2014).

The court expressly credited Zingaro's testimony that his personal observations did not lead him to conclude that the petitioner was abusing drugs at the time Zingaro represented him. Further, the only evidence suggesting otherwise was the petitioner's testimony, which the

court declined to credit. Because the habeas court is the sole arbiter of credibility determinations, and nothing in the record suggests that the court did not consider all of the evidence, we thus conclude that the court's findings were not clearly erroneous. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to this claim.

III

Finally, the petitioner argues that he received ineffective assistance of counsel because Zingaro failed to seek jail credit for three days that he spent in local lockup. This argument fails for the following reasons.

In its memorandum of decision, the habeas court rejected the petitioner's claim regarding jail credit and stated: "It is true that the petitioner was arrested on [September 26, 2008] and held in the local lockup until his arraignment in court on [September 29, 2008]. It is also true that in order for the petitioner to receive any credit for those three days, his counsel should have requested it at the time of sentencing so the local lockup credit could have been noted on the mittimus. It is clear that [Zingaro] did not make such a request and that normally this court would have found that to be deficient performance. But since this local lockup credit applied *only* to Docket No. CR-08-0133512 and the sentence on that docket was five years concurrent to the other sentences, this three day credit would not have resulted in any reduction of the time that the petitioner was required to serve. Consequently, there is no prejudice accruing to the petitioner." (Internal quotation marks omitted.)

The following legal principles guide our analysis. "If more than one sentence is imposed on a prisoner, the

respondent calculates the incarceration period and discharge date by applying the provisions of General Statutes § 53a-38 (b), which provides in relevant part: Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run . . . . The merger concept embodied in this provision simply requires that the respondent compare the length of each sentence, after adjustment for its authorized credits, in order to ascertain which is the longest for the purpose of determining the prisoner's discharge date. . . . The merger process does not alter the fact that concurrent sentences remain separate terms of imprisonment which the legislature has permitted to be served at one time." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 819, 860 A.2d 715 (2004).

Even if the petitioner received the claimed presentence confinement credit, that credit applied only to his sentence relating to Docket No. CR-08-0133512. As noted in the preceding paragraph, when sentences run concurrently, "the terms merge in and are satisfied by discharge of the term which has *the longest term to run* . . . ." (Emphasis added.) General Statutes § 53a-38 (b). That merger process clearly precludes the petitioner from showing any prejudice resulting from any alleged deficient performance because his discharge date ultimately remains unchanged. See *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 823. In short, the lockup credit, if applied, would not affect the petitioner's discharge date because the longest term to run was not his sentence relating to Docket No. CR-08-0133512. Thus, the court did not abuse its discretion as it relates to this claim.

In sum, the petitioner has failed to establish that the issues he raised are debatable among jurists of reason,

that a court could resolve them in a different manner or that the questions he raised are adequate to deserve encouragement to proceed further. See *Patterson* v. *Commissioner of Correction*, 150 Conn. App. 30, 34, 89 A.3d 1018 (2014). In light of our foregoing conclusion that the petitioner's claims against his trial counsel are without merit, the claims pertaining to his first habeas counsel necessarily fail. Accordingly, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal from the judgment denying his amended petition for a writ of habeas corpus.

The appeal is dismissed.

In this opinion the other judges concurred.

GEORGE NORTHRUP ET AL. *v.* HENRY WITKOWSKI, JR., ET AL.
(AC 38878)

Alvord, Prescott and Mullins, Js.

Syllabus

The plaintiff homeowners commenced this action against the defendants, the borough of Naugatuck and several of its town officials, to recover damages sustained as the result of repeated flooding of their property. They alleged that on eight occasions between 2009 and 2012, their property was inundated with water following heavy rainfall when the single catch basin in the area was clogged or otherwise inadequate to redirect water away from their property, and that the defendants negligently and recklessly had failed to perform their municipal duties in an appropriate manner. The trial court granted the defendants' motion for summary judgment on the ground of governmental immunity pursuant to statute (§ 52-557n [a] [2] [B]) as to the counts of the complaint alleging negligence and recklessness. From the judgment rendered thereon, the plaintiffs appealed to this court, claiming, inter alia, that issues of material fact existed as to whether the acts or omissions of the defendants were discretionary or ministerial in nature. Specifically, they claimed that certain language in a town ordinance, which assigned responsibility for the care, management, and maintenance of the town's storm water drainage system to the town's street commission, imposed a

ministerial duty on the defendants to keep the storm drains and drainage pipes near the plaintiff's property in a safe and operable condition. *Held*:

1. The trial court correctly determined that there were no genuine issues of material fact with respect to whether the defendants' alleged negligent acts or omissions were discretionary in nature and, thus, subject to governmental immunity: although the town ordinance on which the plaintiffs' relied required the street commission to clean, to maintain and to repair the town's storm water sewer system, the ordinance contained no provisions that mandated the time or manner in which those responsibilities were to be executed, and the day-to-day decision making regarding when and how to direct town resources in furtherance of the duty to keep the storm water systems up-to-date and working properly necessarily was left to the judgment and discretion of street commission officials and employees; moreover, certain case law relied on by the plaintiffs in support of their claim that genuine issues of material fact existed as to whether the defendants' duty was discretionary in nature was factually distinguishable from the present case and contained dicta that was not binding on this court.
2. The trial court properly rejected the plaintiffs' claim that the identifiable person-imminent harm exception to discretionary act immunity applied to the facts of the present case, the plaintiffs having failed to demonstrate that the harm alleged was imminent; because the instances of flooding here occurred eight times over the course of four years during periods of greater than usual rainfall when the catch basins in the area either were filled with snow and ice or otherwise blocked by debris, and because there was not a high probability that damaging flooding would occur at any particular time, there was no clear and urgent need for action on the part of the defendants, and the court, therefore, properly determined that the plaintiffs could not demonstrate imminent harm.
3. The trial court properly rendered summary judgment in favor of the defendants on the counts of the complaint alleging recklessness; the plaintiffs' allegations of recklessness, which were identical to the allegations in support of the negligence counts, could not reasonably be characterized as rising above mere negligence and, even if true, were insufficient, as a matter of law, for their submission to the jury, as the record could not support a finding that any of the individual defendants acted or failed to act with the type of wanton disregard that is the hallmark of reckless behavior.

Argued April 19—officially released August 1, 2017

Procedural History

Action to recover damages for property damage sustained as a result of the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New Haven,

where the court, *Blue*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the court denied the plaintiffs' motion to reargue, and the plaintiffs appealed to this court. *Affirmed*.

Joshua F. Gilman, for the appellants (plaintiffs).

Thomas Gerarde, with whom, on the brief, was *Emily E. Holland*, for the appellees (defendants).

Opinion

PRESCOTT, J. The underlying action arose as a result of the repeated flooding of residential property due to inadequate street drainage of which the municipality and its officials allegedly were aware but failed to correct. The plaintiffs, George Northrup and Helen Northrup,[1] the owners of the property at issue, appeal from the summary judgment rendered by the trial court in favor of the defendants—the borough of Naugatuck (town); Henry J. Witkowski, Jr., the town's former superintendent of streets; James Stewart, the former town engineer and, later, the town's director of public works;[2] and Robert A. Mezzo, the town's mayor[3]—upon its determination that all counts of the plaintiffs' complaint were barred by governmental immunity.

The plaintiffs claim on appeal that the court improperly determined that (1) the defendants were entitled to governmental immunity on all counts as a matter of law because the acts or omissions of which they complained were discretionary rather than ministerial in nature, (2) the identifiable person-imminent harm

[1] Helen Northrup also brought the action as next friend on behalf of her minor son, Timothy Northrup.

[2] Through 2009, the superintendent of streets was the official responsible for the care and management of the town's streets. After 2009, it became the responsibility of the town's department of public works.

[3] We refer to Witkowski, Jr., Stewart, and Mezzo collectively as the individual defendants.

exception to governmental immunity did not apply to the flooding at issue because the plaintiffs were not subject to imminent harm, and (3) the allegations of recklessness directed against the individual defendants could not be sustained as a matter of law. We disagree with the plaintiffs and, for the reasons that follow, affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiffs as the nonmoving party, reveals the following facts and procedural history. The plaintiffs reside on property located in the town at 61 Nettleton Avenue. On eight different occasions between 2009 and 2012, the plaintiff's property was damaged when surface rainwater and/or "black water"[4] inundated the property because the single catch basins in the area routinely became clogged or inadequately redirected water away from the property.

After the first occurrence in July, 2009, Helen Northrup contacted Stewart, who, at that time, was the town's supervisory engineer. He told her that the flooding was the result of a rare storm and that it would not happen again. Despite his assurance, however, flooding occurred again in October and December of that year. The plaintiffs continued to contact Stewart, to no avail. The plaintiffs made several requests to the town for sandbags; one such request was granted, but others were denied or simply ignored.

The town received a report in October, 2009, from an engineering firm about the Nettleton Avenue neighborhood. The report indicated that, over the past forty years, many residences in the neighborhood had experienced periodic flooding of their properties following periods of heavy rainfall. It further indicated that the

[4] In their complaint, the plaintiffs define "black water" as surface rainwater that overwhelms and causes a back-up in the sanitary sewer system, resulting in flood waters that contain sewage and other contaminants.

drainage system in the area was likely to experience flooding after rainfalls of two inches or more, which could occur several times a year. The report attributed the flooding to the fact that runoff was required to flow through relatively narrow drainpipes that were in poor to fair condition and that the majority of catch basins in the area were old and had small openings that often became overgrown with vegetation or obstructed by trash. The report recommended that the town construct new, larger storm drains to handle the storm runoff in the area, but the town failed to adopt that proposal. The plaintiffs' property flooded again in July of 2010, March and August of 2011, and June and September of 2012.

The plaintiffs commenced the underlying action in February, 2010. They filed an amended complaint on March 11, 2013. The amended complaint contained nine counts. Counts one, two, and six sounded in negligence against Witkowski, Jr., Stewart, and the town. Counts three through five alleged common-law recklessness against the individual defendants. Counts seven through nine alleged negligent infliction of emotional distress against Witkowski, Jr., Stewart, and the town.

On April 5, 2013, the defendants filed a motion to strike all but the negligence counts. Specifically, the defendants argued that the counts alleging common-law recklessness against the individual defendants should be stricken because they failed to set forth allegations of conduct that would give rise to a finding of recklessness. Further, the defendants argued that the counts sounding in negligent infliction of emotional distress should be stricken because such a cause of action cannot arise from allegations of damage to property only. The plaintiffs filed an opposition to the motion to strike alleging that all causes of action were sufficiently pleaded given those allegations that were expressly pleaded as well as those necessarily implied.

The court, *Frechette, J.*, issued an order denying the motion to strike as to the recklessness counts, but granting the motion as to those counts alleging negligent infliction of emotional distress. The court stated in its order that "[t]aken as admitted, the plaintiff's allegations of recklessness are sufficient." The court nevertheless agreed "with the vast majority of Superior Court decisions which hold that Connecticut does not recognize a cause of action for negligent infliction of emotional distress arising solely out of a property damage claim."

On June 4, 2013, the plaintiffs filed the operative second amended complaint, in which, among other things, they repleaded their counts alleging negligent infliction of emotional distress. The defendants filed a revised answer on February 27, 2014, in which they raised special defenses of contributory negligence, governmental immunity, and failure to mitigate damages. A certificate of closed pleadings and a claim for the trial list was filed on May 4, 2015.

On October 30, 2015, the defendants filed the motion for summary judgment underlying the present appeal. The defendants submitted a supporting memorandum of law, attached to which were partial transcripts from the depositions of Helen Northrup and the individual defendants, as well as an affidavit by Stewart. The defendants argued that the negligence counts, including those alleging negligent infliction of emotional distress, were barred by governmental immunity because they involved acts or omissions that required the exercise of judgment or discretion, and no other recognized exception to governmental immunity applied. The defendants further argued that the recklessness counts brought against the individual defendants also failed as a matter of law because, on the basis of the allegations and evidence presented, no reasonable fact finder could

determine that the individual defendants had engaged in demonstrably reckless conduct.

The plaintiffs filed an objection to the motion for summary judgment on November 18, 2015, arguing with respect to the negligence counts that there remained genuine issues of material fact as to whether the defendants were exercising ministerial or discretionary duties and, if discretionary, whether the identifiable person-imminent harm exception to governmental immunity applied. With regard to the recklessness counts, the plaintiffs argued that a genuine issue of material fact exists as to whether the conduct of the individual defendants rose to the level of recklessness. The plaintiffs attached a number of exhibits to their objection, including portions of the deposition testimony of Helen Northrup, Stewart, and Witkowski, Jr.; an affidavit from Helen Northrup; a copy of the "October, 2009 Stormwater Management Report for the Nettleton Avenue Neighborhood"; a copy of chapter 16, article II, § 16-32 of the town's code of ordinances; Witkowski, Jr.'s and Stewart's answers to the plaintiffs' interrogatories; and copies of sewer back-up reports and citizen complaints regarding problems at nearby properties. The defendants filed a reply memorandum.

Oral argument on the motion was heard by the court, *Blue*, *J.*, on January 4, 2016. During argument regarding whether there were sufficient facts in evidence to submit the recklessness counts to a jury, the court asked the plaintiffs' counsel whether he knew of "any case in Connecticut or elsewhere where a town or town official has been held liable in recklessness" in a situation similar to the present case. Counsel answered in the negative, but asked for an opportunity to submit a supplemental brief addressing the court's question. The court agreed, with the consent of the defendants' counsel, and continued the matter to January 19, 2016, for supplemental argument on the recklessness counts. The

plaintiffs submitted their supplemental brief on January 8, 2016, and the defendants filed a brief in response on January 15, 2016. Argument on the motion for summary judgment resumed on January 19, 2016.

On January 20, 2016, the court issued a memorandum of decision granting summary judgment in favor of the defendants on all counts. With respect to the negligence counts, including those counts alleging negligent infliction of emotional distress, the court concluded that the plaintiffs' specifications of negligence amounted to a "litany of discretionary omissions" and that their "allegations boiled down to a claim that the defendants failed to perform their municipal duties in an appropriate manner." The court determined that the city ordinance on which the plaintiffs relied in opposing summary judgment only set forth the general duties of the street department without any specific directions or mandates as to how those duties should be discharged. Accordingly, the court concluded that the defendants' acts or omissions in maintaining the town's drainage system were discretionary in nature. Furthermore, the court concluded that the identifiable person-imminent harm exception to discretionary act immunity was inapplicable as a matter of law because the risk of the property flooding at any given time was indefinite and, thus, did not constitute an imminent harm. The court also granted summary judgment with respect to the recklessness counts, concluding that they also were barred by governmental immunity.

The plaintiffs filed a motion to reargue and for reconsideration, which the defendants opposed. The court denied the plaintiffs' motion, and this appeal followed.

We begin with the standard of review we employ in appeals challenging a court's decision to grant summary judgment. "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. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016).

We turn next to the law governing municipal liability and the liability of municipal agents, which is well settled. At common law, a municipality generally was immune from liability for its tortious acts. *Spears* v. *Garcia*, 263 Conn. 22, 28, 818 A.2d 37 (2003). As our Supreme Court has recognized, however, "governmental immunity may be abrogated by statute." (Internal quotation marks omitted.) Id. General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof

acting within the scope of his employment or official duties . . . .'' This language ''clearly and expressly abrogates the traditional common-law doctrine in this state that municipalities are immune from suit for torts committed by their employees and agents.'' (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 223.

Subdivision (2) of § 52-557n (a), however, sets forth two express and significant limitations on the statute's general abrogation of governmental immunity. Relevant to the present appeal is the following: ''Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . .'' General Statutes § 52-557n (a) (2) (B). ''The statute, thus, distinguishes between discretionary acts and those that are ministerial in nature, with liability generally attaching to a municipality only for negligently performed ministerial acts, not for negligently performed discretionary acts.'' *DiMiceli* v. *Cheshire*, supra,162 Conn. App. 224.

''Municipal officials are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury. . . . In contrast, municipal officers are not immune

from liability for negligence arising out of their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion. . . . This is because society has no analogous interest in permitting municipal officers to exercise judgment in the performance of ministerial acts." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, 279 Conn. 607, 614–15, 903 A.2d 191 (2006).

"The hallmark of a discretionary act is that it requires the exercise of judgment. . . . In contrast, [m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion. . . . In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling a municipal employee] to [act] in any prescribed manner. . . .

"In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity. . . . A municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs. . . . Although the determination of whether official acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder . . . there are cases where [such a determination] is apparent from the complaint. . . . [W]hether an act or omission is discretionary in nature and, thus, whether governmental immunity may be successfully invoked pursuant to § 52-557n (a) (2) (B), turns on the character of the act or omission complained of in the complaint. . . . Accordingly, where it is apparent from the complaint that the defendants' allegedly negligent acts or omissions necessarily involved the exercise of judgment, and thus, necessarily were discretionary in

nature, summary judgment is proper." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 224–25.

Even if a municipal defendant's conduct is discretionary in nature, our courts have identified three exceptions to discretionary act immunity. "Each of these exceptions represents a situation in which the public official's duty to act is [so] clear and unequivocal that the policy rationale underlying discretionary act immunity—to encourage municipal officers to exercise judgment—has no force. . . . First, liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure. . . . Second, liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws. . . . Third, liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Petersen*, supra, 279 Conn. 615–16. With these general principles in mind, we turn to the plaintiffs' claims on appeal.

I

The plaintiffs first claim on appeal that the court improperly determined as a matter of law that the defendants were entitled to governmental immunity on all counts because the acts or omissions of which the plaintiffs complained were discretionary in nature rather than ministerial. We disagree.

In arguing that the alleged negligent acts or omissions of the defendants in the present case were ministerial in nature rather than discretionary, the plaintiffs rely upon § 16-32 of the town's code of ordinances and our

Supreme Court's decision in *Spitzer* v. *Waterbury*, 113 Conn. 84, 154 A. 157 (1931). We are not persuaded, however, that any language found in § 16-32 imposes a ministerial duty on the defendants with respect to maintaining and repairing the town's storm water drainage systems or that the language the plaintiffs have culled from the discussion in *Spitzer* necessarily supports a contrary conclusion. We address each argument in turn.

A

As previously set forth, our courts consistently have adhered to the principle that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion. See *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006); *Evon* v. *Andrews*, 211 Conn. 501, 506–507, 559 A.2d 1131 (1989); *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 224–25; *Grignano* v. *Milford*, 106 Conn. App. 648, 659–60, 943 A.2d 507 (2008). In the present case, the plaintiffs argue that § 16-32 of the town's code of ordinances, which assigns responsibility for the care, management, and maintenance of the town's storm water drainage system to the town's street commission, contains such language. Specifically, the plaintiffs insist that § 16-32 imposed a ministerial duty on the defendants to keep the storm drains and drainage pipes near their property in a safe and operable condition, and their failure to exercise that duty in a reasonable manner led to the flooding of the plaintiffs' property.

Section 16-32 of the town's code of ordinances provides as follows: "Except as otherwise provided in this article, the streets commission shall be responsible for

the care and management of all streets, avenues, highways, alleys and bridges, and the opening, grading improving, repairing and cleaning of the same; of the construction, protection, repair, furnishing, cleaning, heating, lighting and general care of all public streets and appurtenances, except such as are by the express terms of the Charter under the control of some other officer or department; of the construction, repair, cleaning and general care of all drains, culverts, sluiceways and catch basins, and the collection and disposing of ashes, garbage and refuse. The streets commission shall make all suitable rules and regulations in regard to the department and the conduct of its business."[5] Naugatuck Code of Ordinances, c. 16, art. II, § 16-32.

[5] The plaintiffs have not directed us to any rules or regulations that were promulgated in accordance with the ordinance or to any other written internal policies or standards in place regarding the defendants' duty to inspect or maintain the storm water sewers. In their brief, however, the plaintiffs quote a portion of Witkowski's deposition testimony in which he states that there was a schedule in place to "make sure" that all single catch basins were "maintained at least once in the course of a year." After oral argument of the appeal, the plaintiffs filed a supplemental authority letter pursuant to Practice Book § 67-10 raising, for the first time, our decision in *Wisniewski* v. *Darien*, 135 Conn. App. 364, 42 A.3d 436 (2012). The *Wisniewski* decision was not discussed or cited by the plaintiffs in their opposition to summary judgment, in their motion to reargue or in their briefs to this court. Accordingly, the defendants were never provided an opportunity to discuss this case or its applicability to the facts here. In any event, the *Wisniewski* holding is inapplicable to the facts of the present case.

Wisniewski involved a negligence action against the town of Darien and its tree warden by plaintiffs who were injured when a tree located in the town's right of way fell onto their vehicle. Id., 366. In affirming a judgment for the plaintiffs following a jury trial, this court concluded that the trial court properly had declined to set aside the verdict, concluding in part that the jury reasonably could have found that the town had a ministerial duty of inspection on the basis of the defendant tree warden's own testimony, including "that upon receipt of a complaint regarding a potentially hazardous tree, he has a nondiscretionary duty to perform an inspection." Id, 374–75. In contrast, unlike the tree warden in *Wisniewski*, Witkowski's statement is far more vague and does not come close to an admission that the town had a nondiscretionary duty in this case. The statement, on its face, simply is not one from which a ministerial duty reasonably could be inferred and, thus, does not raise a genuine issue of material fact for a jury.

It is indisputable that the ordinance places the responsibility of cleaning, maintaining and repairing the town's catch basins and other elements of the storm water sewer squarely in the hands of the streets commission. The plaintiffs, however, have not alerted us to, nor have we identified on the basis of our own review, any language in § 16-32 of the town's code of ordinances that mandates the manner in which the streets commission, the town, or any of its municipal employees should endeavor to meet this responsibility. The day-to-day decision-making regarding when and how to direct town resources in furtherance of the duty to keep the storm water systems up-to-date and working properly necessarily is left to the judgment and discretion of street commission officials and employees. See *Grignano* v. *Milford*, supra, 106 Conn. App. 656 ("[a] municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs").

"There is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions." *Bonington* v. *Westport*, 297 Conn. 297, 308, 999 A.2d 700 (2010). This court's decision in *Grignano* v. *Milford*, supra, 106 Conn. App. 648, in which this court affirmed the granting of summary judgment in favor of the defendant town, is illustrative of this point. The plaintiff in *Grignano* asserted that language in a town ordinance created a ministerial duty requiring the defendant town to perform reasonable and proper inspections and maintenance activities on the premises where the plaintiff had fallen and been injured. Id., 656. This court concluded to the contrary that the defendant's exercise of that duty was discretionary because the ordinance did not prescribe the frequency of or the manner in which the defendant was to perform inspection and maintenance. Id., 656–57.

Similarly, in *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 219, the plaintiffs appealed from a summary judgment rendered on their complaint alleging that the defendant town had negligently exercised its ministerial duty to maintain a town park and seesaw, on which the plaintiff child was injured. In support of their argument that the town's duty was ministerial rather than discretionary, the plaintiffs cited to, inter alia, a provision in the town's code of ordinances. Id., 225. The town ordinance at issue provided that "[t]he town's parks and recreational facilities shall be maintained for the residents of Cheshire and guests in their company." (Internal quotation marks omitted.) Id., 226. This court agreed with the trial court that the ordinance did not impose a ministerial duty on the town because it did not mandate the manner in which the town was supposed to conduct maintenance. Because those decisions were left to the judgment and discretion of municipal employees, the town was entitled to discretionary act immunity. Id., 226, 229.

Turning back to the present case, although there is language in § 16-32 of the town's code of ordinances that requires the streets commission to maintain and repair the town's storm water sewer system, the ordinance contains no provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees.

B

Despite the absence of any language limiting the discretion of the defendants, the plaintiffs nevertheless argue on the basis of language from our Supreme Court's decision in *Spitzer* v. *Waterbury*, supra, 113 Conn. 85, that there remains a genuine issue of material fact as to whether the defendants' duty was discretionary in nature. We are unconvinced that *Spitzer* undermines our analysis in part I A of this opinion, because

the language on which the plaintiffs rely is dicta and subsequent Supreme Court cases since *Spitzer* have refined and clarified the appropriate analysis to apply when determining whether acts or omissions of a municipality are discretionary or ministerial for purposes of determining governmental immunity. Accordingly, we conclude that *Spitzer* does not support the weight placed upon it by the plaintiffs.

In *Spitzer*, as in the present case, the plaintiff property owners sued the defendant city after the city's storm water sewer overflowed from a nearby catch basin and flooded their cellar, causing damage. *Spitzer* v. *Waterbury*, supra, 113 Conn. 85. The trial court ruled against the property owners and in favor of the defendant city on the two counts of negligence, and the Supreme Court affirmed that judgment on appeal. According to the Supreme Court, the appeal was limited to "the correctness of the court's conclusion that the city was not liable for the damage resulting from its failure to provide an outlet of sufficient size to carry off the water, which was discharged into [a] covered stream after the rainfall . . . ." Id., 85–86. In other words, the issue was not about whether catch basins were properly maintained and cleaned regularly so as to handle above ordinary rainfall, but whether the catch basin system as it was planned could handle even ordinary amounts of rain.

In resolving that issue, the Supreme Court reasoned that "if the plan adopted by the city failed to provide an outlet of sufficient size to carry off the surface water which might reasonably be expected to accumulate under ordinary conditions, with the result that the water thus collected was discharged in a body upon the plaintiffs' property, the city could not escape liability for the resulting invasion of the plaintiffs' rights upon the plea that it was acting in the discharge of a governmental duty. . . . If, however, the drains and sewers of a

municipality are amply sufficient to meet all demands upon them under ordinary conditions, the municipality is not liable because they may prove inadequate to carry off the surplus water from an extraordinary storm or flood. . . . An extraordinary storm is not necessarily an unprecedented one, but one that happens so rarely that it is unusual and not ordinarily to be expected." (Citations omitted.) Id., 90.

The Supreme Court cited to the trial court's unchallenged findings that the rainfall that caused the flooding of the Spitzers' property was unusual and unprecedented and that the storm water system in the area was of a sufficient size and construction to handle an ordinary rainfall. Id. According to the Supreme Court, those findings were "decisive, adverse to the plaintiffs' contention, as to the liability of the city, either on the ground of negligent construction or of a direct invasion of the plaintiffs' rights by reason of a defective plan of construction." Id., 90–91.

The claims of negligence at issue in *Spitzer* did not involve claims that municipal employees had failed to maintain the city's storm water system properly, or failed to correct or ignored problems brought to their attention by property owners, and, therefore, the case is factually distinguishable. Despite the fact that the defendant municipality prevailed in *Spitzer*, the plaintiffs here nevertheless direct our attention to the following passage, which they contend supports their assertion that discretionary act immunity should not apply in the present case. In discussing a municipality's general duty to construct a storm water system, which was not at issue in *Spitzer*, the Supreme Court observed that a city is "bound to exercise due care in the construction of its storm water sewers, and would be liable for its failure to do so, though the work was done in the performance of a public and governmental duty. . . . The work of constructing drains and sewers, *as well*

as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance." (Citations omitted; emphasis added.) Id., 88.

There is no further discussion or analysis in *Spitzer* regarding the nature of a municipality's duty to keep a drainage system in good repair. The court does not discuss, for example, whether the exercise of discretion or judgment was needed to meet the municipality's obligation, a touchstone now in determining whether a duty is ministerial in nature. *Violano* v. *Fernandez*, supra, 280 Conn. 318. Moreover, the language was superfluous to the issue before the court and unnecessary to the court's holding. This language from *Spitzer* has not been relied upon or cited favorably in any recent appellate cases in which the court was tasked with deciding whether a municipality had a discretionary or ministerial duty. We view the highlighted language as nothing more than dicta, which is not binding on this court.[6] See *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008).

Furthermore, in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, 135 Conn. App. 262, 41 A.3d 1147 (2012), this court, in addition to distinguishing *Spitzer* on its facts, suggested that *Spitzer* was no longer broadly applicable in distinguishing between ministerial and discretionary acts. The plaintiffs in *Silberstein* were homeowners who lived in a neighborhood association and

[6] At least one decision from a trial court that has considered this language also has reached the conclusion that the language in question is dicta. See *Blade Millworks, LLC* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5013039 (March 26, 2015) (*Hon. Taggert Adams*, judge trial referee); see also *Pyskaty* v. *Meriden*, Superior Court, judicial district of New Haven, Docket No. CV-12-6005514S (August 3, 2015) (*Fisher, J.*) (distinguishing and limiting *Spitzer*); but see *DeMarco* v. *Middletown*, Superior Court, judicial district of Middlesex, Docket No. CV-11-6006185S (April 3, 2014) (*Domnarski, J.*) (58 Conn. L. Rptr. 4) (following *Spitzer*).

private tax district, and they filed a negligence action against the association and tax district alleging that they had failed to maintain the roads and drainage systems in the neighborhood, resulting in periodic flooding of the homeowners' properties. Id., 265. The trial court determined that the duty to maintain the roads, storm drains, and sewers was discretionary in nature and granted summary judgment for the defendants on the basis of governmental immunity. Id., 266. In affirming the judgment of the trial court, this court discussed the *Spitzer* language, and noted, "[s]ince *Spitzer*, our Supreme Court has refined its analysis of the relationship and differences between ministerial and discretionary acts to determine [questions of municipal liability]." Id., 272. We agree with that analysis.

As we have already indicated, there is now a well-established legal distinction "between laws that impose general duties on officials and those that mandate a particular response to specific conditions." Id., 273. Under our existing jurisprudence, a ministerial duty on the part of a municipality or its agents ordinarily will be found only if some municipal ordinance, rule, policy, or other official directive clearly compels a prescribed manner of action that does not involve the exercise of judgment or discretion. See *Coley* v. *Hartford*, 312 Conn. 150, 161–62, 95 A.3d 480 (2014); *Bonington* v. *Westport*, supra, 297 Conn. 310–11; *Violano* v. *Fernandez*, supra, 280 Conn. 323.

Considered in light of our modern case law analyzing qualified governmental immunity, we are convinced that the court correctly determined that there was no genuine issue of material fact to be resolved with respect to whether the alleged negligent acts or omissions of the defendants were discretionary in nature and, thus, subject to immunity. Accordingly, we reject the plaintiffs' claim.

II

The plaintiffs next claim that, even if the defendants' actions were discretionary in nature, the court improperly concluded that the identifiable person-imminent harm exception to governmental immunity did not apply to the flooding of their property because the plaintiffs were not subject to imminent harm. We disagree.

"The imminent harm exception to discretionary act immunity [for municipalities and their employees] applies when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable [person]; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that [person] to that harm. . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 573–74, 148 A.3d 1011 (2016).

In *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), our Supreme Court reexamined and clarified our jurisprudence with respect to the principle of imminent harm. The court emphasized that in determining whether a harm is "imminent," it should focus on "the *magnitude of the risk* that the condition created" not "the *duration* of the alleged dangerous condition." (Emphasis in original.) Id., 322. This court later explained that "when the court in *Haynes* spoke of the magnitude of the risk . . . it specifically associated it with the *probability* that harm would occur, not the foreseeability of the harm." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Williams*

v. *Housing Authority*, 159 Conn. App. 679, 704–705, 124 A.3d 537, cert. granted on other grounds, 319 Conn. 947, 125 A.3d 528 (2015). "[T]he likelihood of the harm must be sufficient to place upon the municipal defendant a 'clear and unequivocal duty' . . . to alleviate the dangerous condition." (Citation omitted.) Id., 706. In other words, "the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm." (Emphasis omitted.) Id., 706.

The instances of flooding in the present case occurred eight times over the course of four years, from 2009 to 2012. There is no indication in the record about the number of rainfalls that occurred each year, but it would strain credulity to imagine the plaintiffs' property flooded each time it rained, a fact that was never asserted by the plaintiffs. In fact, the evidence suggests that the flooding at issue occurred during periods of greater than usual rainfall, when the catch basins in the area either were filled with snow and ice or otherwise blocked by debris. Although the possibility of damaging flooding to the plaintiffs' property arguably should have been apparent to the defendants given the property's history, the overall probability that conditions necessary to cause flooding would occur at any particular time was relatively low. Accordingly, the court properly determined that the plaintiffs could not demonstrate imminent harm.

Our conclusion finds support in our case law. In discussing imminent harm in *Haynes*, the Supreme Court discussed our decision in *Silberstein* v. *54 Hillcrest Park Associates, LLC*, supra, 135 Conn. App. 262, which also involved a claim of repeated flooding during periods of heavy rainfall over the course of several years. The Supreme Court observed in *Haynes* that the risk of harm in *Silberstein* was not imminent "because it was not apparent to the municipal defendant that the risk of harm was so great that the defendant's duty to

act immediately to prevent the harm was clear and unequivocal." *Haynes* v. *Middletown*, supra, 314 Conn. 322 n.14. In other words, because there was not a high probability that damaging flooding would occur at any particular time, there was no clear and urgent need for action on the part of the defendants.

Furthermore, our Supreme Court's decision in *Bonington* v. *Westport*, supra, 297 Conn. 297, also supports our conclusion that the harm at issue in the present case was not imminent harm for purposes of the identifiable person-imminent harm exception. The court in *Bonington* rejected the plaintiff landowners' argument that the risk of flooding caused by excess surface water runoff during periods of significant rainfall was an imminent harm. The court indicated that such a risk fell "short of the limited circumstances under which imminent harm may be established." Id., 314. As the court explained: "Although the plaintiffs' property undoubtedly constitutes a discrete place, and rainfall inevitably would occur at that site at some point in the future, a significant rainfall causing excessive surface runoff necessarily would occur at an indefinite point in time. Such harm is not imminent." Id., 315.

Consistent with *Bonington*, we conclude that the risk at issue here did not rise to imminent harm under the test established in *Haynes*. Accordingly, the court properly rejected the plaintiffs' claim that the identifiable person-imminent harm exception was applicable under the facts of this case.

III

Finally, the plaintiffs claim that the court improperly raised sua sponte whether the plaintiff's allegations of recklessness directed against the individual defendants could be maintained against them as a matter of law, and ultimately decided adversely to the plaintiffs that the counts alleging recklessness against the individual

defendants were barred by governmental immunity. For the reasons that follow, we affirm the court's decision to grant summary judgment on these counts, albeit on the basis of an alternative ground briefed by the parties. See *Diamond 67, LLC* v. *Oatis*, 167 Conn. App. 659, 679–80, 144 A.3d 1055 (appellate court may affirm judgment on dispositive alternative ground for which there is support in trial court record and provided parties not prejudiced or unfairly surprised by consideration of issue), cert. denied, 323 Conn. 927, 159 A.3d 229 (2016).

In their motion for summary judgment, the only basis for summary judgment asserted by the defendants with respect to the counts alleging recklessness was that there was no evidence that the individual defendants engaged in reckless behavior and that no genuine issue of material fact existed with respect to that issue. The court, however, later raised sua sponte and asked for briefing on whether claims of recklessness against a municipality or its agents could be maintained as a matter of law. In reaching its conclusion, it appears that the court made a subsidiary determination that the plaintiffs had sued the individual defendants only in their official capacities as town employees and that claims of reckless conduct against a municipality directly or against town officials in their official capacity are not legally cognizable because of governmental immunity. See General Statutes § 52-557n (a) (2) (A) (municipality not liable for personal injury or property damages for "[a]cts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct); *Pane* v. *Danbury*, 267 Conn. 669, 685, 841 A.2d 684 (2004) (holding that concepts of wilful, wanton or reckless conduct indistinguishable for purposes of § 52-557n [a] [2] [A]); *Himmelstein* v. *Bernard*, 139 Conn. App. 446, 456, 57 A.3d 384 (2012) ("well settled law that an action against a government official in his or her official capacity is not

an action against the official, but, instead is one against the official's office and, thus, is treated as an action against the entity itself" [internal quotation marks omitted]).

The plaintiffs argue on appeal that the court should have limited itself to the issues raised in the motion for summary judgment, but that even if the court properly considered the issue it raised sua sponte, it incorrectly decided that the plaintiffs had sued the individual defendants only in their official capacities, and that governmental immunity therefore barred these claims.

The defendants respond that the trial court properly raised and considered whether the plaintiffs' counts alleging recklessness against the individual defendants were legally cognizable, but also argue as an alternative ground for affirmance that, even if they were, the counts also fail as a matter of law because there is no evidence from which to conclude that the individual defendants engaged in reckless or wanton misconduct.

We believe that it is unwise for us to decide whether the individual defendants were sued only in their official capacity under the circumstances of this case, given the lack of findings by the trial court on that question. We conclude on the basis of our plenary review of the pleadings and evidentiary submissions in support and in opposition to summary judgment that there was no factual basis for the recklessness counts and, therefore, summary judgment on these counts was proper, albeit for a different reason. Accordingly, we need not reach whether the individual defendants were sued in their personal or official capacities.

"Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct

involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Internal quotation marks omitted.) *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 330, 147 A.3d 104 (2016). Reckless conduct "must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention . . . or even of an intentional omission to perform a statutory duty . . . ." W. Prosser & W. Keeton, Torts (5th Ed.) § 34, p. 214. "[In sum, reckless] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Lawrence* v. *Weiner*, 154 Conn. App. 592, 598, 106 A.3d 963, cert. denied, 315 Conn. 925, 109 A.3d 921 (2015).

We first note that the allegations of recklessness in the complaint are identical to those alleged in support of the negligence counts. In *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 927 A.2d 312, cert. denied, 284 Conn. 927, 934 A.2d 243 (2007), this court affirmed the granting of summary judgment on counts alleging common-law recklessness because the plaintiffs had "simply incorporated their allegations of negligence and

labeled the conduct recklessness." Id., 705. This court held that "[m]erely using the term 'recklessness' to describe conduct previously alleged as negligence is insufficient as a matter of law." Id.; see also *Dumond* v. *Denehy*, 145 Conn. 88, 91, 139 A.2d 58 (1958) ("[t]here is a wide difference between negligence and a reckless disregard of the rights or safety of others, and a complaint should employ language explicit enough to clearly inform the court and opposing counsel that reckless misconduct is relied on" [internal quotation marks omitted]). Although we must acknowledge that it is possible for an allegation of negligence to sometimes also describe reckless conduct, the plaintiffs' allegations in the present case cannot reasonably be characterized as rising above mere negligence. Even accepting all allegations as true, they do not, as a matter of law, support submitting the recklessness counts to a jury, and, therefore, summary judgment in favor of the individual defendants is appropriate.

Generally, the plaintiffs allege that the individual defendants failed to maintain and keep the storm drainage system in a reasonably operative condition, and that they had notice of the flooding that was occurring in the Nettleton Avenue area but failed to warn the plaintiffs and adopted a laissez faire attitude in addressing the situation. There is no evidence in the summary judgment record, however, that the defendants were aware of any existing drainage problem specifically involving the plaintiff's particular property prior to the first reported incident of flooding. Furthermore, there is no evidence that the flooding in the neighborhood involved a situation of such a high degree of danger that the failure to take immediate action to prevent its recurrence demonstrated a conscious disregard for the safety of the plaintiffs' or the neighborhood generally. Although the plaintiffs' frustration with what they viewed as ineptness and a lack of urgency by

the town and the individual defendants to alleviate the flooding situation in their neighborhood is understandable, there is nevertheless undisputed evidence that some action was taken to improve the drainage in the Nettleton Avenue area, albeit perhaps insufficient and not before additional flooding occurred. The record simply cannot support a finding that any of the individual defendants acted or failed to act with the type of wanton disregard that is the hallmark of reckless behavior. Moreover, in opposing summary judgment on the recklessness counts, the plaintiffs failed to submit any evidence that would alter that conclusion. Once the defendants established that no genuine issue of material fact existed that the recklessness allegations were unsupported by evidence, the burden shifted to the plaintiffs to produce that evidence. They failed to do so. Accordingly, the defendants were entitled to summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

NATHAN DULL *v.* COMMISSIONER OF CORRECTION (AC 39090)

Sheldon, Prescott and Bishop, Js.

Syllabus

Pursuant to statute (§ 52-470 [d]), there is a rebuttable presumption that a subsequent habeas petition has been delayed without good cause if, inter alia, such petition is filed two years or more after the date on which a final judgment has been rendered after the conclusion of appellate review on a prior habeas petition challenging the same conviction.

Pursuant further to statute (§ 52-470 [e]), in cases in which the rebuttable presumption of delay without good cause under § 52-470 (d) applies, the habeas court shall issue, upon request by the respondent, an order to show cause why the petition should be permitted to proceed and not be dismissed.

The petitioner, who had been convicted of murder, appealed to this court from the judgment of the habeas court, which dismissed his petition

for a writ of habeas corpus. In dismissing the petition, which followed the petitioner's prior habeas petition challenging the same conviction, the habeas court determined, pursuant to § 52-470 (d) and (e), that the petition was untimely because it was filed more than two years after final judgment was rendered on appellate review of the habeas court's denial of his prior petition and because the petitioner failed to demonstrate, in response to the court's order to show cause, that his alleged mental health problems constituted good cause for the late filing. On appeal to this court, the petitioner claimed that he established good cause for the delay in the filing of his subsequent habeas petition. *Held* that the habeas court did not err in dismissing as untimely the petitioner's subsequent habeas petition, there having been no fault in that court's conclusion that the petitioner failed to demonstrate good cause for the late filing.

Argued April 27—officially released August 1, 2017

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court; thereafter, the court, *Oliver*, *J.*, issued an articulation of its decision. *Affirmed*.

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, was *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Nathan Dull, appeals from the habeas court's dismissal of his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d).[1] Specifically, he argues that he

[1] Subsection (d) of No. 12-115 of the 2012 Public Acts, codified at § 52-470 (d), provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the

established good cause for the delay in the filing of his third habeas corpus petition. We are not persuaded and, accordingly, affirm the judgment of the habeas court.

This appeal requires us to review the underpinnings of § 52-470, which concerns the summary disposal of habeas corpus petitions. In 2012, the General Assembly enacted No. 12-115 of the 2012 Public Acts (P.A. 12-115), which amended § 52-470, by adding new subsections (c) through (e), establishing procedures for the court to respond to untimely habeas filings. Included in those amendments is a provision that there shall be a rebuttable presumption that a habeas petition challenging a conviction has been delayed without good cause if the petition was filed two years or more after the date on which a final judgment has been entered on a prior petition, or after October 1, 2014, whichever date is later. The statutory amendments also provide that when a petition is filed in which the rebuttable presumption of untimeliness applies, the court, upon request of the respondent, may issue an order to show cause why the petition should be permitted to proceed and not be dismissed. General Statutes § 52-470 (e).[2]

In the matter at hand, the record reflects that the petitioner was convicted of murder in violation of General Statutes § 53a-54a in 1998 after a trial before a three

prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014 . . . . For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. . . .”

[2] Subsection (e) of P.A. 12-115, codified at § 52-470 (e), provides in relevant part: “In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The . . . petitioner’s counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . .”

judge panel. In rendering judgment of conviction, the panel rejected the petitioner's insanity defense, and the conviction was affirmed on appeal. *State* v. *Dull*, 59 Conn. App. 579, 757 A.2d 1194 (2000). Thereafter, on December 19, 2002, the petitioner filed his first habeas corpus petition attacking his conviction. That petition was denied in 2005, and the habeas court's judgment was affirmed by this court on appeal. *Dull* v. *Commissioner of Correction*, 96 Conn. App. 787, 901 A.2d 1239 (2006). Later, on March 30, 2010, the petitioner filed a second habeas corpus petition, through which he again challenged his conviction. The second petition was withdrawn by the petitioner on October 13, 2011. This third petition was then brought on June 11, 2015, after the October 1, 2012 effective date of P.A. 12-115 and several months after October 1, 2014.[3]

On the basis of the lapse of time between the judgment on the first petition and the filing of the third petition, and the fact that the third petition was filed after October 1, 2014, the respondent, the Commissioner of Correction, filed a motion, pursuant to § 52-470 (e), seeking an order that the petitioner be required to show cause why his petition should not be dismissed as untimely. Thereafter, pursuant to the court's show cause order, a hearing was conducted at which the petitioner testified to his belief that his mental health condition prevented him from timely filing this petition, and, thus, good cause existed for the delay in its filing. After considering the evidence, the court issued its order in which it determined that the petition was untimely and that the petitioner had failed to demonstrate good cause for its late filing. Accordingly, the court dismissed the petition. This appeal followed.

[3] Because the petition was filed after October 1, 2014, the habeas court found that it was untimely. In accordance with the language of § 52-470 (d); see footnote 1 of this opinion; the filing and withdrawal of the second petition was not legally relevant to the court's determination.

While the appeal was pending and after oral argument, this court ordered the habeas court to file an articulation setting forth whether proof of the defendant's claim of mental health impairment constituted good cause for the untimely filing of this petition. In response, the court stated: "The petitioner's mental health problems were *not* so significant as to interfere with his ability to file a timely petition." (Emphasis in original.) The court explained that its reasoning was based on its assessment of the habeas evidence as well as a review of the record regarding the defendant's conviction and prior habeas petitions.

We note that the habeas court's decision to dismiss a habeas petition is a matter of law, subject to plenary review. *Anderson* v. *Commissioner of Correction*, 148 Conn. App. 641, 644, 85 A.3d 1240, cert. denied, 311 Conn. 945, 90 A.3d 976, cert. denied sub nom. *Anderson* v. *Dzurenda*, U.S. , 135 S. Ct. 201, 190 L. Ed. 2d 155 (2014). On the basis of our review of the court's thorough articulation and our review of the record, we find no fault in the court's conclusion that the petitioner has not shown good cause for his untimely filing of this habeas corpus petition. Accordingly, the court did not err in dismissing the petitioner's third petition for a writ of habeas corpus.

The judgment is affirmed.

COMMISSIONER OF PUBLIC HEALTH *v.* ANTHONY P. COLANDREA (AC 38906)

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

Syllabus

The defendant, a dentist licensed by the Department of Public Health, appealed to this court from the judgment of the trial court granting the petition filed by the plaintiff, the Commissioner of Public Health, to

enforce a subpoena duces tecum seeking the production of certain patient records from the defendant. V Co., which had contracted with a health insurer to audit various health care providers, made numerous attempts to obtain patient records from the defendant, who refused to comply. Thereafter, V Co. filed a complaint that was referred to the department, which opened an investigation into allegations of fraudulent billing practices by the defendant. As part of its investigation, the department, pursuant to its statutory (§ 19a-14 [a] [10]) authority, issued a subpoena duces tecum directing the defendant to produce complete copies of all records for thirty-one patients, and, after the defendant failed to comply, the plaintiff sought to enforce the subpoena. At a hearing before the trial court, the defendant argued that the statute (§ 52-146o) prohibiting licensed health care providers from disclosing patient communications and information without the patient's consent precluded him from disclosing the subpoenaed records in the absence of such consent. The defendant also argued that the plaintiff failed to meet the requirements of § 52-146o (b) (3), which allows disclosure to the department of patient communications or information in connection with an investigation or a complaint, if such communications or information relate to the complaint or investigation. On appeal from the trial court's judgment, the defendant claimed that the plaintiff failed to make a sufficient factual showing that the subpoenaed records were related to the complaint or investigation. *Held* that the trial court properly granted the petition to enforce the subpoena duces tecum, the plaintiff having proven that the subpoenaed records met the requirements of § 52-146o (b) (3); the facts of the present case established a clear connection between the complaint under investigation and the subpoenaed records, as there was testimony that the defendant was under investigation by the department for fraudulent billing practices, which was prompted by the complaint filed by V Co., the subpoena was issued in connection with that complaint and investigation pursuant to § 19a-14 (a) (10), the department subpoenaed only the defendant's patient records that related to that investigation, and the defendant's counsel declined the opportunity to challenge that evidence through cross-examination of a witness who testified at the hearing on behalf of the department.

Argued May 24—officially released August 1, 2017

Procedural History

Petition for an order to enforce a subpoena duces tecum, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Robaina*, *J.*; judgment granting the petition, from which the defendant appealed to this court. *Affirmed.*

Matthew D. Paradisi, with whom, on the brief, was *Michael J. Reilly*, for the appellant (defendant).

Susan Castonguay, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, Anthony P. Colandrea, appeals from the judgment of the trial court granting the petition to enforce a subpoena duces tecum filed by the plaintiff, the Commissioner of Public Health,[1] requesting the production of certain patient records from the defendant. The defendant claims that the plaintiff failed to make a sufficient factual showing that the subpoenaed records were related to a complaint under investigation, as required by General Statutes § 52-146o.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's claim. The defendant is a dentist licensed by the Department of Public Health (department). On August 27, 2014, the department opened an investigation into allegations of fraudulent billing practices by the defendant. The investigation was prompted by a referral from Verisk Health Management (Verisk), a company that contracted with United Healthcare, a health insurer, to audit various health care providers. After a review of the defendant's billing to United Healthcare, Verisk made numerous attempts to obtain

[1] The Commissioner of Public Health acts on behalf of the Department of Public Health, and references in this opinion to the department include the commissioner.

[2] The defendant also claims that "the trial court ignored the statutory language, legislative history, and controlling precedent that require the [the plaintiff] to establish that records it is seeking pursuant to . . . General Statutes § 52-146o (b) are reasonably related to a complaint under investigation." We have reviewed this claim and conclude that both issues, as presented by the defendant, conflate into a single issue relevant to this appeal: whether there was a sufficient factual showing that the records sought were related to a complaint under investigation, as required by the statute.

patient records from the defendant. The defendant refused to comply with Verisk's requests for records, and Verisk filed a complaint with the Office of the Attorney General. The Office of the Attorney General referred the complaint to the department, which commenced the investigation at issue.

As part of its investigation, on November 16, 2015, the department, pursuant to its authority under General Statutes § 19a-14 (a) (10),[3] issued a subpoena duces tecum to the defendant, instructing him to produce "[c]omplete copies of all records (including but not limited to all progress notes, x-rays, images, and billing records)" for thirty-one patients. The defendant failed to comply with the department's subpoena. On December 10, 2015, the plaintiff, pursuant to § 19a-14 (a) (10),[4] filed a petition for enforcement of the subpoena and an application for an order to show cause. The defendant filed an objection to the petition for enforcement.

The court held a hearing on January 25, 2016. At the hearing, the defendant argued that § 52-146o,[5] the

[3] General Statutes § 19a-14 (a) provides in relevant part: "The department shall . . . (10) Conduct any necessary review, inspection or investigation regarding qualifications of applicants for licenses or certificates, possible violations of statutes or regulations, and disciplinary matters. In connection with any investigation, the Commissioner of Public Health or the commissioner's authorized agent may administer oaths, issue subpoenas, compel testimony and order the production of books, records and documents. . . ."

[4] General Statutes § 19a-14 (a) (10) provides in relevant part: "If any person refuses to appear, to testify or to produce any book, record or document when so ordered, a judge of the Superior Court may make such order as may be appropriate to aid in the enforcement of this section . . . ."

[5] General Statutes § 52-146o (a) provides in relevant part: "Except as provided . . . in any civil action or any proceeding preliminary thereto or in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure."

physician-patient privilege statute, prohibited him from disclosing the subpoenaed records absent patient consent. The defendant acknowledged that, pursuant to § 52-146o (b) (3),[6] the department may subpoena records without patient consent, but maintained that the plaintiff failed to meet the requirements for this statutory exception because the subpoena contained "no indication as to how [the subpoenaed records] relate to the complaint or investigation." The defendant claimed that, at that time, he did not "even know what the investigation is against him."

In response to the defendant's objection, the plaintiff presented the testimony of Kathleen W. Boulware, a public health services manager in the department's practitioner investigation unit. Boulware testified, in relevant part, that (1) Verisk was hired by United Healthcare to audit its records to determine if there was any fraudulent activity occurring; (2) Verisk had attempted to obtain records directly from the defendant as part of its investigation; (3) after multiple failed attempts to obtain records directly from the defendant, Verisk sent a complaint to the Office of the Attorney General; (4) Verisk provided a list of selected defendant's patients with the complaint; (5) the department began investigating the defendant when it received the complaint from the Office of the Attorney General; (6) the department first attempted to request the records from the defendant by letter, which was standard practice; (7) after failing to obtain the records by letter, the department issued a subpoena for approximately 50 percent of the records identified by Verisk; and (8) it

[6] General Statutes § 52-146o (b) provides in relevant part: "Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information . . . (3) to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider in connection with an investigation of a complaint, if such records are related to the complaint . . . ."

is standard practice for the department to issue subpoenas to dental professionals to review patient records for possible fraudulent activity. The defendant's counsel was given the opportunity to cross-examine Boulware but declined to do so.

The trial court, relying on *Edelstein* v. *Dept. of Public Health & Addiction Services*, 240 Conn. 658, 692 A.2d 803 (1997), overruled the defendant's objection and granted the plaintiff's petition for enforcement. In its order overruling the defendant's objection, the court concluded that "[t]he evidence submitted by the department supports the request for the records which are the subject of the subpoena." The defendant filed a motion to reargue and for reconsideration, which the court denied. This appeal followed.

The defendant claims that the plaintiff failed to make a sufficient factual showing that the subpoenaed records were related to a complaint under investigation, as required by § 52-146o. Specifically, he argues that "[t]he [plaintiff] did not demonstrate and the trial court did not find that the records sought by [the department] in this case are reasonably related to a complaint as required by . . . § 52-146o (b) (3)." He contends that the plaintiff was required to make a showing as to the nature of his investigation by presenting evidence as to what "the suspected 'fraudulent activity' actually was" and "how the records [he] was seeking would shed any light on the unspecified 'fraudulent activity.' " We disagree.

We begin by setting forth the standard of review and legal principles that guide our analysis. Where a party asserts that the facts found were insufficient to support the trial court's legal conclusion, the issue presents a mixed question of law and fact to which we apply plenary review. *Centrix Management Co., LLC* v. *Valencia*, 132 Conn. App. 582, 586, 33 A.3d 802 (2011). Under

the plenary standard of review, we must decide whether the court's conclusions are legally and logically correct and supported by the facts in the record. Id., 586–87; *Winchester* v. *McCue*, 91 Conn. App. 721, 726, 882 A.2d 143, cert. denied, 276 Conn. 922, 888 A.2d 91 (2005).

Section 52-146o (a) prohibits physicians from disclosing patient records without patient consent. Subsection (b) provides four exceptions to that rule. As relevant here, the statute does not require consent for the release of medical records "to the Commissioner of Public Health for records of a patient of a physician, surgeon or health care provider in connection with an investigation of a complaint, if such records are related to the complaint . . . ." General Statutes § 52-146o (b) (3).

Our Supreme Court's decision in *Edelstein* v. *Dept. of Public Health & Addiction Services*, supra, 240 Conn. 658, informs our analysis of the issues raised on appeal.[7] In *Edelstein*, the Department of Public Health and Addiction Services received a complaint from a health insurer regarding a physician who allegedly had submitted several false claims for reimbursement to the health insurer and wrongfully caused the insurer to reimburse the physician for services that the insurance policy did not cover. Id., 660. The department began an investigation into the physician's billing practices and, in connection with that investigation, issued a subpoena duces tecum for patient medical records. Id. The physician filed an application to quash the department's subpoena on the ground that the records were privileged under § 52-146o. Id., 661. The trial court ultimately denied the application to quash on the ground that the records

[7] The defendant also relies on *Lieb* v. *Dept. of Health Services*, 14 Conn. App. 552, 553, 542 A.2d 741 (1988), a case decided eight years *prior* to the enactment of § 52-146o (b) (3), that addressed the issue of whether the department's statutory subpoena power overrides the statutory psychiatrist-patient privilege found in General Statutes § 52-146e (a). The defendant's reliance on this case is misplaced.

were not privileged under that section. Id. Our Supreme Court agreed with the physician that § 52-146o covered the patient records, but affirmed the trial court's denial of the application to quash. It reasoned that "the exception contained in § 52-146o (b) (3) applies to the medical records sought in the present case and requires that the [physician] disclose these records to the department." Id., 670.

As in *Edelstein*, the plaintiff in the present case has proven that the subpoenaed records fell within the exception of § 52-146o (b) (3).[8] The facts of this case establish a clear connection between the complaint under investigation and the subpoenaed records. The subpoena was written on department letterhead, specifically, that of the practitioner licensing and investigations section of the healthcare quality and safety branch of the department. The subpoena stated that it was being issued pursuant to § 19a-14 (a) (10), a statute that explicitly gives the department the authority to issue subpoenas in connection with investigations. See footnote 3 of this opinion. Boulware testified that the defendant was under investigation for fraudulent billing practices, an investigation prompted by a referral from the Office of the Attorney General of a complaint by

[8] The defendant argues that "the trial court did not find that the records sought by [the department] in this case are reasonably related to a complaint as required by . . . § 52-146o (b) (3)." We disagree. Although the court did not employ the exception's precise phrase, "related to the complaint," it concluded that "[t]he evidence submitted by the department supports the request for the records which are the subject of the subpoena." Implicit in that ruling is a finding that the plaintiff had satisfied the requirements of § 52-146o (b) (3). See *Rene Dry Wall Co., Inc.* v. *Strawberry Hill Associates*, 182 Conn. 568, 575, 438 A.2d 774 (1980) ("[a]lthough there was no explicit finding that the defendant's expenditures were reasonable [as required by the statute at issue], such a conclusion is implicit in the trier's findings, and is supported by testimony"); *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, 167 Conn. App. 36, 45–46, 145 A.3d 266 (2016) (concluding that finding of mutual assent was implicit within court's express finding that contract existed).

Verisk, and that the department subpoenaed only the defendant's patient records that related to that investigation. At the hearing, the trial court offered the defendant's counsel an opportunity to challenge this evidence through cross-examination of Boulware, and the defendant declined to do so. Accordingly, from the evidence presented, we are not persuaded by the defendant's claim that the plaintiff "failed completely to enunciate any relationship" between the subpoenaed records and the complaint. On the basis of this evidence, we conclude that the plaintiff satisfied the requirements of § 52-146o (b) (3).[9]

The judgment is affirmed.

JENNIFER QUESTELL *v.* SHEEBA FAROGH
(AC 38716)

Alvord, Prescott and Kahn, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court, which denied her motion to open and set aside that judgment after she was defaulted for her failure to appear at a scheduled trial management conference. The plaintiff had sought to recover damages for negligence in connection with injuries she suffered when she fell on the defendant's real property. At a conference that both parties attended, the trial court

[9] The defendant argues that *Edelstein* requires that the plaintiff "make a showing [of] the nature of [his] investigation," which includes an articulation of the specific allegations against the defendant that are being investigated. We disagree. *Edelstein* did not enunciate such a specificity requirement. Our Supreme Court concluded, in relevant part, that § 52-146o (b) (3) "must be accepted as a declaration of the legislature's original intent that the department may obtain access to medical records containing otherwise privileged communications when such access is sought in connection with the investigation of a complaint against a physician, and when the records are related to that complaint." *Edelstein* v. *Dept. of Public Health & Addiction Services*, supra, 240 Conn. 670. Although the court did note that the records must be related to the complaint under investigation, it did not go as far as to require the specificity suggested by the defendant.

issued a scheduling order that set a date and time for the trial management conference. The court thereafter issued notices that reminded the parties of the trial management conference. After the defendant, who was self-represented, failed to appear for the trial management conference, the court rendered judgment of default against her and, after a hearing, awarded the plaintiff damages. The court subsequently denied the defendant's motion to open and set aside the judgment. On appeal, the defendant claimed that, although she had attended the conference in which the court scheduled the trial management conference and had received notice reminding her of the date and time of the trial management conference, she was prevented by mistake from appearing at that conference because, as a nonattorney, she was unfamiliar with the court system, and because several motions and notices that had been filed and issued, respectively, in the month before that conference led her to believe that it was no longer scheduled. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to open and set aside the default judgment; the defendant having admitted that she was present when the trial management conference was scheduled and that she thereafter had been issued notice that confirmed the date and time of the conference, and there having been no evidence to suggest that she received notice from the court canceling the conference, or that she attempted to contact the court to verify whether the conference was canceled, the court reasonably could have found that she was not prevented from attending the trial management conference as a result of mistake, accident or other reasonable cause, but that her failure to attend the conference was due to her negligence.

Argued June 1—officially released August 1, 2017

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of New Britain, where the defendant was defaulted for failure to appear; thereafter, the court, *Young*, *J.*, rendered judgment for the plaintiff; subsequently, the court, *Swienton*, *J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Affirmed.*

Joseph A. O'Brien, for the appellant (defendant).

Isaias T. Diaz, with whom were *Alexa L. Parr* and *Sarah Mather*, for the appellee (plaintiff).

Opinion

KAHN, J. The defendant, Sheeba Farogh, appeals from the judgment of the trial court denying her motion to open the default judgment, which was rendered after she failed to appear at a scheduled trial management conference. On appeal, the defendant claims that she was prevented from appearing at the conference by mistake and that a valid defense existed at the time the judgment was rendered. We affirm the judgment of the trial court.

The following facts are relevant to this appeal. On August 11, 2014, the plaintiff, Jennifer Questell, initiated an action against the defendant, her landlord. The plaintiff alleged that on December 18, 2013, as a result of the defendant's negligence, she sustained injuries falling down the exterior stairs of her apartment. Specifically, the plaintiff alleged that her injuries resulted from the defendant's failure to remove ice and snow from the apartment's exterior stairs. The defendant filed an answer and special defenses in response to the plaintiff's complaint on October 15, 2014. On November 24, 2014, the plaintiff filed a motion for an extension of time to respond to the defendant's answer and special defenses, which the court granted on December 8, 2014.

On December 17, 2014, the parties attended a scheduling conference before the court, *Young*, *J*. A scheduling order was issued in open court on that day. The order read in relevant part: "Pretrial conference is scheduled for 9:15 a.m. on [August 13, 2015]. Trial management conference is scheduled for 9:15 a.m. on [September 9, 2015]. A joint report is required. Jury selection is scheduled for 9:30 a.m. on [September 15, 2015]. Evidence will commence at 10 a.m. on [September 22, 2015]." On December 19, 2014, the court issued notices reminding the parties of each of these scheduled events. The notice that set forth the date and time for the

September 9, 2015 trial management conference noted that both parties "MUST attend" and that "[f]ailure to comply with these requirements will result in the possible imposition of sanctions, including the entry of orders of default and/or nonsuit."

On August 6, 2015, one week before the parties' scheduled pretrial conference, the defendant's husband contacted the plaintiff's attorney and asked if the conference could be rescheduled. The plaintiff agreed and filed a motion for a continuance requesting that the conference be continued to August 17, 2015. The court granted the motion, noting that a new date was "to be assigned by the case flow coordinator." The record does not reflect that a new date was ever assigned. On August 7, 2015, the plaintiff served the defendant with several requests for admission via certified mail. The defendant signed the certification card, indicating that she had received the requests for admission, but did not respond. On August 20, 2015, the plaintiff responded to the defendant's special defenses, stating that "the plaintiff denies each and every allegation as set forth in the defendant's special defenses." The plaintiff also filed a certificate of closed pleadings on that day.

On August 20, 2015, the court sent notices to both parties informing them that "the following changes have been made to the schedule for the above-referenced case: jury selection scheduled for [September 15, 2015] is marked off, as the certificate of closed pleadings (#108) claimed the case to the court trial list; evidence scheduled for [September 22, 2015] is changed to reflect a court trial commencing on [September 22, 2015] at 9:30 a.m." That same day, the court sent a second notice to the parties informing them that the matter was scheduled for a court trial on September 22, 2015, at 9:30 a.m., and that "attorneys and self-represented litigants must comply with the statewide civil court trial management order, which may be obtained via the Internet

under the standing orders at www.jud.ct.gov or at the civil case flow office. Failure to comply as ordered may result in sanctions." Neither of these notices mentioned the previously scheduled September 9, 2015 trial management conference. The plaintiff subsequently filed a motion to continue the trial to March 22, 2016, noting that additional time was needed for discovery, "as [the] defendant is pro se." The court denied the motion on September 2, 2015.

The defendant subsequently failed to appear at the September 9 trial management conference. The court, *Young*, *J.*, issued an order entering a judgment of default against the defendant for failure to attend the conference. Notice of the judgment was issued to the defendant that day. The court noted in its order that "[t]he trial on [September 22, 2015] will be a hearing in damages to the court."

Approximately two weeks after the judgment of default was entered against the defendant, both parties appeared in court for the September 22, 2015 hearing in damages. At that hearing, the defendant attempted to object to the plaintiff's exhibits, arguing that the plaintiff's claims were false. The court, *Swienton*, *J.*, noted that "the problem is, you've already been defaulted because of a failure to show—failure to show up at a trial management conference on September 9th, and Judge Young defaulted you." In response, the defendant argued: "I received all the papers, but—but I did not receive any date of [September] 9th. I received the date for [September] 22nd, so that's why I'm showed up today." The court then noted: "[O]n December 17th, 2014, the date of September 9th was chosen, and you were present on that date." The defendant responded: "Yeah, I was there that day." After some further discussion, the court had a clerk print a copy of the scheduling order, presented it to the defendant, and said: "That's the order that was entered on December 17th. And I

circled the sentence that says you were to appear on September 9." The court proceeded with the hearing and awarded the plaintiff $29,992.90 in damages.

Approximately three weeks after that hearing, on October 15, 2015, the defendant filed a motion to open the judgment of default entered against her on September 9, 2015. In her motion, the defendant argued that the judgment should be set aside because "[t]he several motions and notices . . . which came out in the month preceding the September 9, 2015 case management conference caused the defendant, a nonattorney unfamiliar with the court system, to mistakenly believe the September 9, 2015 conference was no longer on the schedule." She also argued that she had a "valid defense as to liability" in the underlying action. The court, *Swienton*, *J.*, denied the defendant's motion without a hearing on December 7, 2015. This appeal followed.

We begin by setting forth the relevant standard of review and applicable legal principles. "A motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *Gillis* v. *Gillis*, 214 Conn. 336, 340–41, 572 A.2d 323 (1990).

"The power of a court to open a default judgment is controlled by § 52-212 of the General Statutes." *Eastern Elevator Co.* v. *Scalzi*, 193 Conn. 128, 131, 474 A.2d 456 (1984). General Statutes § 52-212 (a) provides: "Any judgment rendered or decree passed upon a default or

nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

In order to set aside a judgment passed upon default, then, "there must be a showing that: (1) a good defense existed at the time judgment was rendered; and (2) the party seeking to set aside the judgment was prevented from appearing because of mistake, accident, or other reasonable cause." *Pantlin & Chananie Development Corp.* v. *Hartford Cement & Building Supply Co.*, 196 Conn. 233, 240, 492 A.2d 159 (1985). "[B]ecause the movant must satisfy both prongs of this analysis, failure to meet either prong is fatal to [his or her] motion." (Internal quotation marks omitted.) *Dawson* v. *Britagna*, 162 Conn. App. 801, 806, 133 A.3d 880 (2016).

In support of the second prong of the two part test, the defendant claims that the court abused its discretion in denying her motion to open because she was prevented by mistake from attending the September 9, 2015 trial management conference. The record, however, does not support the defendant's assertion.

The transcript of the September 22, 2015 hearing in damages reveals that the defendant admitted to Judge Swienton that she was present in open court on December 17, 2014, when the trial management conference was scheduled for September 9, 2015. She admitted in her motion to open that she was issued a scheduling

order that confirmed that the "[p]retrial conference was scheduled for August 13, 2015; trial management for September 9, 2015, jury selection on September 15, 2015, and trial September 22, 2015." She also admitted that "[o]n August 20, 2015, the court issued a notice that jury selection for September 15, 2015, was marked off and [that a] court trial would commence on September 22, 2015. A separate notice was also issued that [the] court trial would commence on September 22, 2015, at 9:30 a.m. *Neither of these notices mentioned the September 9, 2015 trial management date*, which the defendant now mistakenly believed was off." (Emphasis added.) The defendant does not allege that she ever received a notice canceling the September 9, 2015 trial management conference.

As mentioned, the December 19, 2014 notice setting forth the date and time for the September 9, 2015 conference warned both parties that they "MUST attend" the scheduled conference and that the "[f]ailure to comply with these requirements will result in the possible imposition of sanctions, *including the entry of orders of default and/or nonsuit.*" (Emphasis added.) There is no evidence to suggest that the defendant, despite this warning, made any attempt to contact the clerk's office and clarify whether her assumption regarding the cancellation of the trial management conference was correct.

We have previously stated that "[a] court should not open a default judgment in cases where the defendants admit they received actual notice and simply chose to ignore the court's authority." (Internal quotation marks omitted.) *Woodruff* v. *Riley*, 78 Conn. App. 466, 471, 827 A.2d 743, cert. denied, 266 Conn. 922, 835 A.2d 474 (2003).[1] This court and our Supreme Court have also

[1] The defendant argues in her reply brief that her failure to appear at the conference was "not the result of negligence or ignoring the proceedings against her." The plaintiff's attorney, by contrast, presented the following argument at the September 22, 2015 hearing in damages: "[T]here are several

repeatedly held that "[n]egligence is no ground for vacating a judgment, and it has been consistently held that the denial of a motion to open a default judgment should not be held an abuse of discretion where the failure to assert a defense was the result of negligence." *Pantlin & Chananie Development Corp.* v. *Hartford Cement & Building Supply Co.*, supra, 196 Conn. 240–41; see also *Kaplan & Jellinghaus, P.C.* v. *Newfield Yacht Sales, Inc.*, 179 Conn. 290, 292, 426 A.2d 278 (1979) (defendants' failure to appear negligent where "defendants had notice of both the civil action for payment for legal services and of the motion for judgment," and "received and ignored the legal documents"); *Oliphant* v. *Heath*, 170 Conn. App. 360, 362, 364, 154 A.3d 582 (2017) (plaintiff's failure to attend pretrial conference not "anything beyond mere negligence" where she "admitted that she had notice of the pretrial conference many months in advance" but "failed to appear because [trial] court failed to provide her with reminder notices of the pretrial conference date").

From the record, the trial court reasonably could have found that the defendant was not prevented from attending the September 9, 2015 conference as a result of mistake, accident or other reasonable cause but, on the contrary, that her failure to attend the conference was due to her own negligence.[2] We note that

things that I'm taking issue with. One is that they've had more than sufficient time to deal with this ahead of time. I have no method of contacting them or communicating with them. They're saying on the record that the number they filed with the court is still adequate . . . I have photographs of their boarded up business on my phone. . . . [W]e did everything that we were obligated to do. And I tried to work with them. There's been no communication, there's been no settlement discussions, and there's been no response to any of my discovery requests. So, I just don't see how giving them a continuance would change anything. Especially considering we already have a liability admission because they chose to ignore their request for admissions that they signed for and received, certified mail."

[2] Because the defendant failed to meet her burden as to the second prong of the two-pronged test outlined previously, we need not address her argument as to the first prong.

"[a]lthough it is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party . . . we are also aware that [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Multilingual Consultant Associates, LLC* v. *Ngoh*, 163 Conn. App. 725, 734, 137 A.3d 97 (2016). We also note that the question presented in this appeal is not whether this court would refuse to set aside or open the judgment of default. Instead, "[a] motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Dziedzic* v. *Pine Island Marina, LLC*, 143 Conn. App. 644, 651, 72 A.3d 406 (2013). We conclude that the trial court did not abuse its discretion in denying the defendant's motion to open and set aside the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE LUIS N. ET AL.*
(AC 39953)

Lavine, Prescott and Harper, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her two minor

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

children. In response to a motion filed by the mother seeking to have the children, who were six and seven years old at the time, testify at the termination trial, the court ruled that, in lieu of testimony, it would invite the children to the courthouse so that they would have an opportunity to get to know the court and observe the courtroom, and to understand that the court would be deciding the case, and all counsel agreed to the procedure outlined by the court for the meeting. The court made no inquiry of the children during the visit, during which one of the children spontaneously stated that she would be willing to stay with her foster mother or go back to the respondent, and during which the children's guardian ad litem and a visitation supervisor for the Department of Children and Families were present. Following the meeting, the court stated on the record what had transpired, and it had the guardian ad litem make a statement regarding comments of the children during the meeting. *Held*:

1. The respondent mother could not prevail on her unpreserved claim that the trial court violated her right to due process by improperly considering evidence that it had gleaned from its ex parte meeting with the children in terminating her parental rights: although the record was adequate for review, and the claim was of constitutional magnitude and reviewable under *State* v. *Golding* (213 Conn. 233), any claimed error was harmless, as the mother failed to identify any evidence in the court's memorandum of decision that was not presented during the termination trial and to identify any facts found by the court, in either the adjudicatory or dispositional phase of the trial, that were clearly erroneous; moreover, the mother failed to demonstrate that it was plain error for the court to consider evidence gleaned from the ex parte meeting with the children, as she did not challenge the court's findings regarding the reasonable efforts to reunify her with her children and her failure to achieve a sufficient degree of personal rehabilitation, and did not demonstrate any harm and that the failure to reverse the judgments terminating her parental rights would result in manifest injustice.
2. There was no merit to the respondent mother's claim that the trial court violated her right to due process by failing to timely canvass her pursuant to *In re Yasiel R.* (317 Conn. 773), which requires a trial court to canvass a parent who does not consent to the termination of parental rights prior to the start of the termination trial in order to ensure the overall fairness of the termination process: although the mother claimed that the trial court's canvass was not timely because it did not occur at the start of trial and was done after the termination trial had begun, because *In re Yasiel R.* was not decided until after the commencement of the mother's termination trial, the court could not possibly have canvassed her in accordance with that case prior to trial, and there was no dispute that the court did canvass the mother in accord with *In re Yasiel R.* during the course of the termination trial; moreover, the mother's claim that the canvass was defective because the court did not inform her

that it had to be administered before trial started was unavailing, as the required canvass did not exist before the commencement of the mother's termination trial.

3. The trial court's finding that the respondent mother had failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the children, she could assume a responsible position in their lives was supported by clear and convincing evidence; the court's memorandum of decision contained a detailed history of the mother's pattern of substance abuse, including her use of illegal drugs during the termination proceedings despite the specific step to refrain from that activity, the court found that the mother did not appreciate the negative effect that her use of marijuana had on her capacity to meet the needs of the children or to keep them safe, and it acknowledged the mother's love for her children and her desire for reunification but found that, although the mother had achieved a period of sobriety for approximately six months prior to the end of the termination trial, her sobriety was too fragile and untested to lead to the conclusion that she would be able to tend to the special needs of the children within a reasonable time, and that the mother's desires, however sincere, were insufficient to sustain the children and to provide them with a safe, secure, and permanent environment.

4. The respondent mother could not prevail on her claim that the trial court improperly had concluded that the termination of her parental rights was in the best interests of the children, the mother having failed to identify any factual findings of the court that were clearly erroneous; that court was constrained to conclude, given the ages and stages of development of the children and their particular educational and emotional needs, that allowing more time for the mother to become able and willing to provide safe, reliable, and attentive care for the children would unreasonably relegate the children's best interests to a level of uncertainty, without a valid basis for determining that reunification could be achieved within a reasonable time, and the court properly concluded that to delay termination of the mother's parental rights would unduly interfere with the children's access to permanency that would enhance their opportunities and potential for healthy development.

Argued May 31—officially released July 27, 2017**

Procedural History

Amended petitions by the Commissioner of Children and Families to terminate the respondents' parental

** July 27, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

rights as to their minor children, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, where the court, *Rubinow*, *J.*, denied the respondents' motion to present child testimony; thereafter, the matter was tried to the court; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David J. Reich, for the appellant (respondent mother).

Frank H. LaMonaca, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent mother, B.F., appeals from the judgments of the trial court terminating her parental rights in her son, L.N., and daughter, M.N.[1] On appeal, the respondent claims that the court (1) violated her right to due process by meeting with the children ex parte, (2) failed timely to canvass her pursuant to *In re Yasiel R.*,[2] (3) erred by concluding that she had failed to rehabilitate to the degree that she could not be restored as a responsible parent within a reasonable time, and (4) erred by finding that it was in the best interests of the children to terminate her parental rights in them. We affirm the judgments of the trial court.

In a detailed, 120 page memorandum of decision, the trial court, *Rubinow*, *J.*, made the following findings of fact that are relevant to the issues in the present

[1] The parental rights of the respondent father, S.N., in the children also were terminated. He filed a separate appeal to challenge the termination of his parental rights in the children. See *In re Luis N.*, 175 Conn. App. 307, A.3d (2017).

[2] See *In re Yasiel R.*, 317 Conn. 773, 795, 120 A.3d 1188 (2015).

appeal. L.N., who was born in July, 2008, and M.N., who was born in June, 2009, came to the attention of the Department of Children and Families (department) in February, 2011. The children resided with the respondent, but not their father, S.N., who never married the respondent. The respondent was overwhelmed caring for the children, but they remained in her custody until October 11, 2011, when the department removed them pursuant to General Statutes § 17a-101g. On October 21, 2011, the court, *Hon. William L. Wollenberg*, judge trial referee, sustained the orders of temporary custody and ordered specific steps for the respondent to assist her reunification with the children.

On May 31, 2012, the court, *Frazzini, J.*, adjudicated the children neglected as to the respondent[3] on the ground that they were exposed to conditions injurious to their well-being.[4] The court ordered the children committed to the custody of the petitioner, the Commissioner of Children and Families, and ordered new specific steps for the respondent to facilitate reunification. See General Statutes § 46b-129. On December 12, 2012, the petitioner filed petitions to terminate the respondent's parental rights in the children and amended the petitions on September 6, 2013. The petitioner alleged that the department had made reasonable efforts to locate the respondent and reunify her with the children but that she was unable or unwilling to benefit from reasonable reunification efforts. The petitions also alleged that the respondent had failed to

[3] On August 9, 2012, Judge Frazzini adjudicated the children neglected as to S.N. on the ground that they were exposed to conditions injurious to their well-being. The petitioner filed petitions to terminate the parental rights of S.N. in the children on December 12, 2012. The termination of parental rights petitions as to both the respondent and S.N. were consolidated for trial.

[4] The department alleged that the children were exposed to the immediate risk of physical harm if they remained in the respondent's care due to her inadequate supervision of the children and the substandard conditions of her home. The respondent also was affected by substance abuse, and deteriorating mental health and cognitive functioning.

achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the ages and needs of the children, she could assume a responsible position in their lives, and that termination of her parental rights was in the best interests of the children.

Trial on the termination petitions commenced on November 24, 2014, and continued on approximately sixteen days until August 3, 2016. The court heard from approximately nineteen witnesses. On January 15, 2016, the court appointed Sam Christodlous, an attorney, to serve as guardian ad litem for the children. On January 29, 2016, Judge Rubinow canvassed the respondent in accordance with *In re Yasiel R.*, 317 Conn. 773, 795, 120 A.3d 1188 (2015).

The court found the following facts with respect to the respondent. She was born in 1989 and was herself removed from her mother's care due to neglect. Her grandmother adopted her when the respondent was ten years old. Her family history is significant for mental health issues and alcohol and drug abuse. As a child, the respondent was beaten, raped, and subjected to domestic violence; as an adult, she is troubled by memories of those incidents. In her youth, the respondent suffered from seizures and received mental health counseling. The respondent left high school in the tenth grade and has held occasional and temporary employment at a video game store, an election center, and a barber shop. She found full-time employment at a laundry service in October, 2013.

After the department became involved with the family, it referred the respondent for in-home services to address L.N.'s delayed speech and M.N.'s unspecified developmental issues. The respondent also was referred to parenting classes with case management

services. Over the next several months, the respondent's participation in those services was inconsistent. Moreover, her mental health deteriorated, she was isolated in her apartment, she and the children were unkempt, and she failed to respond to the children's cues for attention. The respondent had difficulty paying her rent, and a third party with a child was living in her home. The in-home service providers recommended that the respondent receive individual therapy and medication management services.

The respondent was referred to Valarie Williams, a licensed psychologist, for a clinical assessment. The respondent's mental health history included bipolar disorder, depression, and post-traumatic stress disorder. She had a history of insomnia, crying spells, poor concentration, mood swings, irritability, aggressive behavior, and poor impulse control. She was taking the medication Klonopin. The respondent had a limited circle of friends and was on probation for robbery in the second degree. Williams diagnosed the respondent with major depressive disorder and post-traumatic stress disorder, and referred her to a psychiatrist.

The court found that the respondent had a history of illegal drug use that began when she was thirteen years old. She had a pattern of using illegal drugs, participating in treatment, remaining drug free for a time, and relapsing, a pattern that persisted during the termination proceedings and when the respondent was caring for her youngest child, E.T. The department referred the respondent to Catholic Charities' Institute for the Hispanic Family for drug screening and evaluation. When the respondent was evicted from her home in the fall of 2011, the department removed the children from her care. Although the respondent was homeless for months, she continued to receive department sponsored services and had supervised visits with the children twice a week.

Throughout the first six months of 2012, the respondent tested positive for marijuana and cocaine. Williams discharged the respondent from individual counseling in June, 2012, because she failed to attend scheduled therapy sessions and to consult a psychiatrist, as recommended. In June, 2012, Bruce Freedman, a licensed psychologist, conducted a court-ordered psychological evaluation of the respondent, which included an assessment of her interaction with the children. Freedman determined that the respondent's intelligence is at the low end of the average range. In September, 2012, the respondent was referred to Community Renewal Team to address her mood instability, post-traumatic stress disorder, and marijuana use.

By December, 2012, the respondent was living with V.G., a man with a criminal history involving crimes of violence, including risk of injury to a child. V.G. physically abused the respondent. The department recommended that the respondent engage in domestic violence prevention services, but she refused. In January, 2013, the respondent was evicted from the apartment she shared with V.G. and continued to test positive for marijuana use. Community Renewal Team discharged her from its services and referred her to the Institute of Living. The court found no evidence that the respondent availed herself of the referral to the Institute of Living.

During the summer of 2013, the respondent was enrolled in anger management, domestic violence, and parent education programs at the Family Intervention Center. By September, 2013, she had attended a three day per week, three hour per day program where her substance abuse issues were to have been addressed. The respondent, however, did not complete the domestic violence and anger management programs, nor did she engage in the follow-up after substance-abuse

relapse prevention program or individual counseling that were recommended to her.[5]

The respondent had been employed by a salon to cut hair, but in October, 2013, with help from her cousin, she obtained employment at a laundry service in another community, where a man, L.T., was employed. The respondent worked from 7 a.m. until 3 p.m., Monday through Thursday, and therefore she claimed that she was unable to participate in services offered by the department. In late December, 2013, Freedman conducted a second court-ordered psychological evaluation of the respondent, which also included an assessment of her interaction with the children. As of January, 2014, the respondent was still using illegal drugs and admitted to smoking seven to eight blunts per day.

In March, 2014, the respondent moved to the community where the laundry service was located to live with L.T.[6] in a two bedroom apartment she had obtained with the assistance of a cousin and her grandmother. Although she was no longer receiving counseling, the department provided her with supervised visits with the children.

In August, 2014, the respondent became pregnant with her third child. In response to advice she received from her prenatal care provider, the respondent went

[5] Given the respondent's continued drug use, the court declined to credit any evidence she proffered to establish that she had acquired the coping skills to deal with environmental changes without relapsing. The court specifically found that the respondent did not acquire those skills because she did not successfully take part in the Family Intervention Center's intensive outpatient services.

[6] The court found that L.T. had a criminal history of convictions sufficiently grave to support the inference that the respondent knew the nature and extent of his unlawful conduct. From 2004 and continuing into 2009, L.T. had been arrested numerous times for drug possession, drug possession with intent to sell, criminal possession of a firearm, and violation of probation. He was sentenced to prison on numerous occasions.

to Perspectives Counseling Center and stated that she needed counseling. She reported a history of sexual abuse, physical abuse, domestic violence, counseling, psychotropic medication, and criminal activity. She also reported that she was in a domestic relationship with L.T., whom she described as being good and supportive. Perspectives Counseling Center diagnosed her with a major depressive disorder and recommended that she engage in individual and group therapy. Despite telling her service provider and the department that she had stopped using illegal drugs as of January, 2014, the court found that drug tests indicated that in November, 2014, while she was pregnant, the respondent tested positive for marijuana use. She tested positive for cocaine use in December, 2014, and marijuana use in January, 2015.

In February, 2015, the respondent returned to her hometown with L.T., after she had obtained a subsidized two bedroom apartment. The department referred the respondent to the Wheeler Clinic for substance abuse and mental health evaluations. Due to her pregnancy, the respondent was put on bed rest in March, 2015, and did not engage the recommended services at Wheeler Clinic.

In April, 2015, the respondent gave birth to a son, E.T. Because the respondent used illegal drugs during her pregnancy, the department became involved with the "new" family and filed a neglect petition on behalf of E.T., who remained in the custody of the respondent and L.T. The respondent's family and L.T.'s family helped care for E.T.

During the last phase of her pregnancy and after E.T. was born, the department transported L.N. and M.N. to visit the respondent in her home once a week. The court found that, under supervision, the respondent gave appropriate attention to all three of her children. In May, 2015, the department referred the respondent

to relapse prevention with Catholic Charities, but she did not utilize those services until November, 2015. On her own initiative, however, the respondent returned to Williams for individual counseling. She admitted that she used cocaine and marijuana in October, 2015, when she was E.T.'s legal guardian. Hair segment analysis on December 21, 2015, demonstrated that the respondent recently had used both cocaine and marijuana. The respondent continued to test positive for cocaine and marijuana in 2016, but her segmented hair analyses conducted on July 28, 2016, demonstrated that she had been drug free for approximately six months.

By January 13, 2016, L.T. was no longer living with the respondent in her subsidized housing.[7] She claimed, however, that he continued to coparent E.T. On January 14, 2016, pursuant to a motion filed by the petitioner, the court, *Woods*, *J.*, ordered that E.T. be moved from protective supervision to committed status.

The respondent had regular supervised visits with the children since they were removed from her home in October, 2011. The court found that the visits were cordial, involving physical activities, watching movies, or using a computer to access child appropriate websites. The respondent always brought food, toys, or an activity to the visits, and neither L.N. nor M.N. wanted her to leave when the visits ended. The respondent knew the location of the school the children attended, but she did not understand the nature or extent of their special education or behavioral health needs. She believed that she could provide adequate parental care for L.N. and M.N., even though she was also responsible for E.T., because the baby slept most of the time.

[7] The respondent admitted that in January, 2016, she knew that L.T. had been arrested, but she was willing to let L.T. provide care for E.T. She, however, was unwilling to ask L.T. about "certain things." The court considered the implications of the respondent's "poor parental judgment" in the context of her overall parenting history.

In its memorandum of decision, the court set forth the elements of General Statutes § 17a-112 (j),[8] which the petitioner was required to prove by clear and convincing evidence to prevail on the petitions to terminate the respondent's parental rights in L.N. and M.N. The court found by clear and convincing evidence that the department had made reasonable reunification efforts for the respondent during the adjudicatory period[9] and that she was unable or unwilling to benefit from reunification efforts offered by the department.[10]

[8] General Statutes § 17a-112 (j) provides in relevant part: "(1) the Department . . . has made reasonable efforts to locate the parent and to reunify the child with the parent . . . unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[9] The court found that the department's reunification efforts were reasonable in view of the respondent's history of trauma, transience, poor personal judgment, parenting deficits, and recurrent illegal drug use. Although the department never engaged the respondent in child abuse treatment services, the respondent was fully aware of the sexual trauma M.N. sustained when she was with her father. M.N.'s half-brother, S., a child approximately her age, sexually assaulted her in 2014. The department was engaged with the respondent thereafter, but she was never able or willing to focus on M.N.'s needs to inquire about access to family therapy for the sexual trauma.

[10] The court found that the respondent was unable or unwilling to benefit from the many services provided by the department. She failed to take advantage of individual counseling provided by Williams and was discharged for noncompliance. Although the respondent knew that she was not to use illegal drugs and that she was subject to random drug tests, she consistently tested positive for marijuana and frequently for cocaine until 2016. The respondent had a poor attendance record at peer support group sessions for drug treatment, and she failed to attend scheduled medication management appointments. Her drug use was refractory to treatment, which resulted in time limited periods of sobriety that are inconsistent with the functional benefits of valid, appropriate reunification services. The respondent began, but did not complete, parenting classes with the Hispanic Health Council. On occasion the respondent cooperated with mental health medication

The court also found that the petitioner had demonstrated by clear and convincing evidence that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and specialized needs of the children, she could assume a responsible position in their lives.[11] The respondent's

management, but her depression and behavioral issues remained unresolved and intact. The court found that the respondent's inability or unwillingness to benefit from all of the services and treatment provided only to relapse into drug use, constitutes behavior that is inimical to that of a parent who is able or willing to learn from what she has been taught.

[11] The court made the following findings with respect to L.N. and M.N. Both of the children suffer from eczema and asthma.

During his first days in foster care, L.N. had tantrums and engaged in sexualized behaviors with M.N. Because he was not toilet trained, L.N.'s entry into day care was delayed until he was three and one-half years old. In addition to his sexualized behavior, L.N. exhibited signs of having been traumatized, e.g., smearing feces and urinating on himself. He had difficulty in school and in his foster home, had tantrums, and cried in ways that were inappropriate for a five and one-half year old. He was defiant and oppositional. In June, 2014, L.N. was assessed at the Klingberg Family Centers because his oppositional and defiant behaviors had continued. He was diagnosed with generalized anxiety disorder, symptoms of hyperactivity, sleep problems, fears, and an inability to concentrate. He received therapy and gradually was able to sit still for longer periods of time in school. He failed to make academic progress, however. Given his specialized behavior needs, the department arranged for his school to conduct a pupil planning and placement team meeting for him, which led to his receiving special education services.

M.N. has special emotional needs due to her history of sexual trauma. She received therapy at Klingberg Family Centers, where she exhibited fear; physical and verbal aggression toward others; difficulty with fine motor skills, sitting still, paying attention, and concentrating; and learning challenges. M.N. also intentionally urinated on herself at school, which is consistent with trauma. She was diagnosed as a child victim of sexual abuse. She received therapy and was taught relaxation skills appropriate to her age. Despite improvement over the years, M.N. had a very difficult time in school. She struggled to stay on task and was removed from class due to her behavioral issues. She consistently stated that she did not trust S., who had sexually assaulted her, and that she did not want to be near him. Her specialized emotional needs require that her caregivers identify and adhere to a designated and appropriate safety plan to prevent M.N. from being victimized again.

failure to achieve statutory rehabilitation, the court found, was clearly and consistently evident from her pattern of recurrent substance abuse. Although the respondent participated to varying degrees in numerous services and counseling offered, she consistently returned to using cocaine and marijuana after treatment. The court found that the use of such drugs, whether in response to stress or for recreational purposes, was highly inconsistent with a parent's ability to provide safe, reliable, and consistent parenting in order to assume a responsible position in the lives of L.N. and M.N. The respondent's pattern of treatment, abstinence, and relapse was particularly evident from 2011 to 2015, and throughout the termination of parental rights proceedings.

The court acknowledged that in late 2015, after returning to individual counseling with Williams, the respondent reentered substance abuse treatment at Catholic Charities and at the conclusion of evidence in the termination of parental rights trial, the respondent was no longer using illegal drugs. The evidence was insufficient, however, for the court to conclude that the respondent had acquired the necessary skills to maintain abstinence. Her sobriety at the time was too fragile, too untested, and too unreliable for the court to infer that the respondent had developed the internal resources to ensure that she would put the needs of L.N. and M.N. above her own.

The court also found that even if, in 2016, the respondent was better able to manage her own life, her progress was modest and had to be viewed in the context of a parent whose children were removed from her care due to her recurrent drug use. The court noted the respondent's return to individual counseling, but also noted her failure to disclose information about her personal and parental instability, which was likely to lead to relapse. The court stated that the respondent had

not achieved a degree of insight into her proclivity to relapse when faced with stress, as would encourage the belief that she was even capable of learning to fulfil a responsible role in the lives of L.N. and M.N. The court concluded that even if, by the first half of 2016, the respondent had made some progress in recovering from drug abuse and improving her parenting skills, "those efforts were too little and too late" to meet the general or particular needs of the children.

With respect to the children, the court found that L.N. and M.N., were eight and seven years old, respectively, in 2016. Both of them have extraordinary specialized needs that require consistent, reliable attention from an alert and available parent figure to ensure that their emotional, educational, medical, and physical needs are addressed properly. Although the respondent has expressed love and affection for the children, the evidence clearly and convincingly established that since they entered foster care, the respondent rarely expressed concern over their health, education, and general well-being as would be expected of a parent. She provided the children with food and clothing on occasion, but she had not provided them with medical care or an adequate domicile since 2011.

In making its findings and coming to its conclusions, the court considered the respondent's complex circumstances, including her involvement with men who were not stable or responsible enough to remain a part of her household. In view of the respondent's repeated relapses into illegal drug use, which is incompatible with the need for safe custody of school-age children, and given the need for the department to intervene to keep E.T. safe when the respondent had no responsibilities to care for L.N. and M.N., the court found that even if the respondent is capable of caring for E.T., her progress has been *too little too late for L.N. and M.N.*

After finding that the respondent had failed to rehabilitate, the court turned to the dispositional phase of the proceedings to consider the best interests of the children. The court considered the children's present needs for sustained growth, healthy development, well-being, stability, and continuity of their environment, along with their need for consistent, structured care by a responsible parent figure ready, willing, and able to address their needs.

The children have lived together in the same foster home since their earliest years. They enjoy their visits with the respondent and E.T. Given the children's ages and stages of development, and their particular educational and emotional needs, the court concluded that to allow more time for the respondent to become able and willing to provide predictably safe, reliable, and attentive custodial care for the children would unreasonably relegate their best interests to a level of uncertainty, without a valid basis for determining that reunification with the respondent can practically be achieved within a reasonable time. Further delay in the termination of parental rights proceeding would unduly interfere with the children's access to a permanent placement that will enhance their opportunities for healthy human growth. The court stated that it had balanced the respondent's constitutionally protected relationship to L.N. and M.N. against the children's respective needs for permanency, security, safety, the opportunity for healthy growth, and consistency in environment.

The court made the following findings as required by § 17a-112 (k). The reunification services the department provided to the respondent and the children were timely and appropriate. The respondent, however, was not able to improve her ability to serve as a safe, effective parent to the children pursuant to the steps ordered for her. L.N. was three years old at the time the department

removed him from the respondent's care and eight years old at the conclusion of the termination proceedings. M.N. was two years old when she was removed from the respondent's care and seven years old when the termination proceedings ended.

The court also found that the children were bonded to one another. They know that the respondent is their biological mother even though they have lived in foster care since October, 2011. The children's emotional ties to the respondent are based on the regular visits they have had with her since 2011. L.N. loves the respondent and is attached to her and E.T. M.N. loves the respondent, but she sometimes indicates that she wishes to spend time alone with the respondent without L.N. Generally, both of the children do not want to leave the respondent at the conclusion of a visit and have expressed a desire to return to her custody. Neither child, however, looks to the respondent for "environmental" support.

The children have lived with their foster mother since October, 2011, and have close emotional ties to her and are bonded to her biological children. The children also have emotional ties to the foster mother's domestic partner, whose schedule permits him to take the children to services from time to time, while the foster mother works as a certified medical technician.

Although the respondent has limited financial resources, her economic circumstances have not prevented her from maintaining a meaningful relationship with either child. The court found that the respondent had lawful employment at a laundry service and benefitted from subsidized housing. The respondent's decisions about her personal life and her inability or unwillingness to benefit from reunification efforts, not economic factors, impeded her ability to develop a meaningful, parent-like relationship with the children.

The respondent argued that the children's foster mother impeded her relationship with the children due to the foster mother's inability or unwillingness to give the children appropriate attention or to attend parent counseling at Klingberg Family Centers. The respondent also claims that the foster mother did not ensure that L.N. consistently attended counseling and that M.N. consistently attended therapy. The court did not condone the foster mother's inconsistency in transporting the children to counseling, but it found that her conduct did not prevent the respondent from maintaining a meaningful relationship with the children. The court credited the testimony of the guardian ad litem, Christodlous, that the foster mother attempted to involve the respondent in the children's activities, such as birthday parties.

In coming to its conclusion as to the best interests of the children, the court considered their specialized needs in the context of the respondent's response to reunification efforts and her failure to rehabilitate. The court fully credited Christodlous' opinion that termination was in the best interests of the children, which was founded on what the court described as his thorough investigation of the children's and the respondent's circumstances. The court found by clear and convincing evidence that the respondent had not reached the point where she could, on a daily basis, meet the best interests of either L.N. or M.N.

On November 15, 2016, the court issued a memorandum of decision in which it terminated the parental rights of the respondent in the children. The court, *Vitale*, *J.*, granted the respondent's application for the waiver of fees to appeal. The respondent thereafter appealed.

Before addressing the respondent's claims on appeal, we review the legal framework for deciding termination

of parental rights petitions. "[A] hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Elijah G.-R.*, 167 Conn. App. 1, 18–19, 142 A.3d 482 (2016).

I

The respondent first claims that the court improperly considered evidence it gleaned from its ex parte meeting with the children without utilizing the due process protections that are required by Practice Book § 32a-4 and our case law. We disagree.

The respondent's claim arises from the following facts and procedural history. In January, 2016, the respondent and S.N. expressed an interest in having L.N. and M.N. testify at the termination of parental rights trial, but they wanted to protect the children from cross-examination. Pursuant to Practice Book § 32a-4 (b),[12] they filed a joint motion requesting permission for the

[12] Practice Book § 32a-4 provides in relevant part: "(b) Any party who intends to call a child or youth as a witness shall first file a motion seeking permission of the judicial authority. . . .

"(d) The judicial authority with the consent of all parties may privately interview the child or youth. Counsel may submit questions and areas of concern for examination. The knowledge gained in such a conference shall be shared on the record with counsel and, if there is no legal representation, with the parent."

At the court's request, the respondent and S.N. submitted questions to be asked of the children.

children to testify, arguing that the children, ages six and seven years old at the time, were parties to the termination proceedings and should be permitted to testify on their own behalf. The respondent and S.N. represented that during their respective visits with the children, the children expressed a desire to live with the parent with whom they were visiting at the time. The respondent and S.N. argued that the children's testimony was crucial in determining the best interests of the children and, therefore, relevant. On January 15, 2016, before the court ruled on the motion, Alina Bricklin-Goldstein, attorney for the children, filed a motion for the appointment of a guardian ad litem. Counsel for the petitioner, respondent, and S.N. did not object to the motion, which the court granted. Christodlous was appointed guardian ad litem for the children.

The joint motion for the children to testify came before the court on March 18, 2016. Before ruling on the motion, the court described the children as "very young" and, in lieu of testimony, offered to invite the children to come to the courthouse to see the courtroom's physical structure; to meet the court reporter, the marshal, the clerk, and the judge; and to spend time on the bench. The court, however, would not hear the children testify, concluding that it was not in the best interests of the children to put them in the position where they were either subject to cross-examination or where they could infer that something that they said could determine the outcome. The court stated that it would not ask the children whether they want to live with their father or their mother, as it would find no value from any answer either of the children might give.

The court asked Christodlous whether he knew the children well enough to have an opinion as to whether they would benefit from an opportunity to visit the court. Christodlous stated that he thought that he knew

the children well enough and: "I think because the children so much want to see what happens in this court, I don't think they should necessarily be here during the hearing, but I do think [it would] be very beneficial for them to come in, see the courtroom, meet Your Honor, too. . . . [T]hey understand through their lawyer that Your Honor makes the decision, no one else does. They've got a good relationship with [Bricklin-Goldstein], but I do think it would be very beneficial for them to be able to come into the courthouse to see the courtroom, to see what Your Honor does, to see who you are, those kinds of things." He also opined that it would be beneficial for the children if he and Bricklin-Goldstein were present, but he did not think that the respondent and S.N. should be present. The following colloquy between the court and Christodlous transpired:

"The Court: If the court inquired of the children only as to whether they had any questions for the court, do you think that would suffice in franchising them with regard to this process without infringing upon what should be, at their ages and stages of development, as innocent as is practicable, a perception of reality?

"Attorney Christodlous: I think so. I can't give [a] 100 percent answer on that, but I think so yes, Your Honor.

"The Court: Do you know of any therapeutic basis why the—either child should not be allowed to come into the courtroom and see what's going on here?

"Attorney Christodlous: I do not, and I personally believe it would be beneficial for them to be here."

Bricklin-Goldstein stated that coming to the courtroom would be a great experience for the children. Counsel for the respondent and S.N. stated that their clients were satisfied with the procedure the court outlined. The court inquired of the assistant attorney general, Frank H. LaMonaca, whether the department could

bring the children to court at 9 a.m. on April 27, 2016. LaMonaca suggested that the foster mother could bring the children to court. The court declined to permit the foster mother to bring the children to court.

The court ordered the department to produce the children at the courthouse on April 27, 2016, and to take them to the juvenile clerk's office where they could be brought to the courtroom by the clerk with the assistance of Bricklin-Goldstein and Christodlous. The judge would be present at 9 a.m. on that date. The court further stated that it was "the court's expectation that the children . . . will not be subject to a recording process; this is not an opportunity for them to give testimony. If they do have a question for the court, Mr. Christodlous will be here, and I hope you will accept his explication of and response [to] what it is they asked, or what it is they had to say. In the event that they should create any drawings, as sometimes happens when kids are in court and are faced with a great big desk like this and see pens and paper on it, the court will, of course, save them and make them available to counsel. But, I do not expect to obtain any testimony. They won't be subject to cross-examination. So, even if they should say something, they won't be under oath, and it will not be evidence. Is that satisfactory?" No counsel objected.[13]

The court met with the children in the courthouse on April 27, 2016. When court reconvened later that morning, the court stated on the record: "Counsel, before court commenced today in resolution of the motions for child testimony that had been filed, the court had made arrangements to meet with the children so they would have the opportunity, as you all had agreed, to get to know the court, to understand that the court and the court alone would be making the

[13] The court then denied the motion for the children to testify.

decision in this case and to observe the facilities, particularly the courtroom in which the case has been ongoing for so many years.

"This court had the opportunity to observe the children interacting with court staff at the child protection clerk's office. This court had the opportunity to observe the children interacting with court staff and with the [department] visitation supervisor who was present at the request, I understand, of the children's counsel and their guardian ad litem during this process. Several spontaneous comments were made by the children, by [L.N.] in particular. I will repeat them only if you request, but before I do so, there was in the presence of the court, but not on the record, and the marshal was also present and the marshal trainee was also present as was the clerk. I believe the monitor was still in the room as well.

"There was an inquiry of the children related to the children's desired outcome in these proceedings presented by an individual notwithstanding any orders that had been issued by the court previously to enhance the court's opportunity to see the children in as neutral a setting as possible, and the goal, again, was to enhance the children's understanding that the court and the court alone would be making decisions in this case. I believe . . . Christodlous could summarize that which occurred. . . . I don't attribute any intent on any party.

* * *

"Attorney Christodlous: The children made some statements which the [department] visitation supervisor did not believe Your Honor heard and repeated them, the statement directly to Your Honor. He felt—he was thinking he was assisting, did not [intend] any harm, but he did repeat the statements, which the children had made, and I do not know whether Your Honor had heard the statements initially made by the children,

but he repeated [them], and I'm quite clear Your Honor heard what he said . . . because Your Honor indicated to him that you did not want to hear from him.

"The Court: The court did hear all of the comments that were made by the children in the courtroom. Their visit in this courtroom was directed at achieving the one goal I identified, so that they would see the courtroom, have the opportunity to observe the facilities, and understand the environment in which the case is being tried. This court made no inquiry of the children as to what they desire. To the extent the court now has had the opportunity to observe the children, if that is not a part—their behavior and their demeanor is not a part of the report by the guardian ad litem at the appropriate time during the case, and I rather expect it will be, I will bring to your attention then that which I observed. I can do that now if you'd like, but my goal was not to acquire evidence for the use in the case. That's what . . . Christodlous' presence . . . at the visit to the courtroom was for, so he can [be] cross-examined.

"It is not that the court attributes no value to what the children said, the court does not know enough about these children to place their comments in any context one way or another. [There have] been sufficient concerns raised throughout the course of the evidence concerning the status of the children and supported by the court's observation of their behavior and demeanor today both in the child protection clerk's office and in the courtroom."

The court then directed Christodlous to consider and investigate the children's best interests and to inform the court of his opinion regarding the nature, type, and scope of a placement environment to address the best interests of each child in sustained growth, development, well-being, continuity, stability, and conduct as

they grow into their preteen and teenage years that will most likely lead to their success in the community. Christodlous agreed to do so. The court then asked whether anyone needed to hear further from the court regarding its observations of the children. All counsel responded in the negative.

On August 3, 2016, Christodlous testified, in relevant part, as follows: "I . . . met with the children on six separate occasions. I met with them at both parents' homes, at the foster parent's home, the school, and of course, here in the court. I have had an opportunity to sit down and talk to the children as well as [department personnel] and the [children's] attorney. I've also discussed this matter with all the attorneys involved in this matter. I have reviewed all the records that were—the exhibits which were in the court file. And again, I did read all the transcripts and prepare that way. I listened to testimony while here on the case since I was appointed, and I had questions which were asked on my behalf by other parties in this matter when they came up. . . .

"[T]he only time the children were in the courtroom, one of the children actually changed what she had said earlier to her attorney in my presence. And what she had said the last time we were here was that she would be willing to stay with her foster mom or go back to her parents. I did take that as a sign that she has become quite comfortable at her foster [parent's], which supports what I saw when I was there." On cross-examination by the respondent's counsel, Christodlous testified that M.N. once had expressed that she wished to live with the respondent, but she also stated that she would be happy to stay with her foster mother. M.N.'s statement about staying with her foster mother was made when she was in the courthouse.

On January 25, 2017, after Judge Rubinow had issued her memorandum of decision, the respondent filed a

motion for articulation in which she asked the court "to articulate the legal and factual details of [the court's] April 27, 2016 meeting with the two children who are the subject of this termination proceeding."[14] The petitioner objected to the motion for articulation. On February 23, 2017, the court, *Olear*, *J.*, responded to the motion for articulation, noting that Judge Rubinow had retired as a judge of the Superior Court on November 16, 2016. Judge Olear declined to hold a hearing on the respondent's motion as a hearing would not provide any information that would be sufficient to permit the court to respond to the motion for articulation. Judge Olear denied the motion for articulation.[15]

A

The respondent claims that the court considered evidence it gleaned from its ex parte meeting with the children in terminating her parental rights in them, thereby violating her constitutional right to due process. The respondent did not preserve this claim at trial and seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[16] We will review the claim

[14] The respondent asked the court to articulate: (1) the legal basis of its March 18, 2016 order directing the petitioner to have the children present in the courthouse to meet with the judicial authority, particularly in light of the court's having denied the joint motion for the children to testify; (2) the purpose of the court's meeting with the children as it relates to the termination trial; (3) why the attorneys for the parents were excluded from the meeting when a representative of the department and the children's attorney and guardian ad litem were present; (4) what the children, court, and others in the room said or did during the meeting; and (5) what the court learned about the children as a result of the meeting that was new information or information that supported the evidence or contradicted the evidence admitted at trial.

[15] On March 6, 2017, the respondent filed a motion for review of the trial court's denial of her motion for articulation. This court granted the motion for review but denied the relief requested.

[16] "[A respondent] 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 [respondent] of

because the record is adequate for review and the claim is of constitutional magnitude. See *In re Tayler F.*, 296 Conn. 524, 553, 995 A.2d 611 (2010) (right to confrontation and cross-examination in civil action grounded in due process clauses of fifth and fourteenth amendments). The respondent cannot prevail, however, because she has (1) not identified what, if any, evidence in the court's memorandum of decision was not presented during the termination trial and (2) failed to identify any facts found by the court, in either the adjudicatory or dispositional phase of the trial, that are clearly erroneous.[17] See *Manaker* v. *Manaker*, 11 Conn. App. 653, 656–57, 528 A.2d 1170 (1987) (judge able to disregard evidence not properly admitted). In other words, the petitioner has demonstrated that the claimed error, if any, was harmless.

B

The respondent also claims that it was plain error for the court to consider evidence it gleaned from its ex parte meeting with the children.[18] The respondent

a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

[17] For this reason, we will not engage in an analysis under *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), as urged by the respondent.

[18] "[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit

cannot prevail under the plain error doctrine for the same reasons that she cannot prevail pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. See part I A of this opinion. The respondent has not challenged the trial court's findings that the department made reasonable efforts to reunite her with the children or that she failed to make sufficient progress toward the fundamental treatment goal of being a safe and nurturing parent for the children, and, therefore, failed to achieve a sufficient degree of personal rehabilitation. She also has failed to identify any clearly erroneous factual finding relevant to the court's determination that termination is in the best interests of the children. In other words, the respondent has failed to demonstrate harm and that failure to reverse the judgments terminating her rights in L.N. and M.N. would result in manifest injustice. See *In re Sydnei V.*, 168 Conn. App. 538, 563–64, 147 A.3d 147, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016) (party claiming plain error must demonstrate error clear, obvious, and indisputable).

Although the respondent did not have the opportunity to cross-examine the children and the department visitation supervisor immediately after meeting with the

in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"[Our Supreme Court has] clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernible on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the [respondent] simply to demonstrate that his position is correct. Rather, [to prevail] the party [claiming] plain error [reversal] must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . ." (Internal quotation marks omitted.) *In re Sydnei V.*, 168 Conn. App. 538, 562–64, 147 A.3d 147, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016).

children, the court stated on the record what had transpired during the meeting and inquired of the respondent and others whether they wished further explanation.[19] All counsel declined further explanation by the court. Moreover, the court instructed Christodlous to report what transpired at the meeting, including the spontaneous comment made by one of the children that was repeated by the department visitation supervisor. The respondent was given an opportunity and did cross-examine Christodlous.[20] The respondent failed to identify any evidence the court relied upon that was not presented at trial. The respondent, therefore, cannot prevail under the plain error doctrine.

II

The respondent's second claim is that the court violated her right to due process because, although it canvassed her pursuant to *In re Yasiel R.*, supra, 317 Conn. 773 (*Yasiel* canvass), it did so after the termination of parental rights trial had begun, and it failed to inform her that the canvass is to be given at the start of trial. The claim lacks merit.

The fallacy in the respondent's claim is illustrated by the following timeline. Trial on the petitions to terminate the respondent's parental rights in L.N. and M.N. commenced on *November 24, 2014*. Our Supreme Court issued its decision in *In re Yasiel R.*, supra, on *August 18, 2015*; id., 774; more than eight months after trial

[19] See Practice Book § 32a-4 (d) (judicial authority with consent of all parties may privately interview child and knowledge gained in such conference shall be shared on record with counsel).

[20] We further note that the court's prompt report to the parties and their counsel is consistent with Rule 2.9 (b) of the Code of Judicial Conduct, which provides, "[i]f a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." The court gave the respondent an opportunity to respond but neither she nor her counsel chose to do so.

commenced. The court could not possibly have canvassed her prior to trial because the requirement did not then exist. There is no dispute, however, that the court canvassed the respondent in accord with *In re Yasiel R.*, on January 29, 2016. The respondent claims that the canvass was defective because the court did not inform her that the canvass is to be administered before trial started. The respondent's claim does not rise to the level of a due process violation.

We briefly review the history of our Supreme Court's supervisory order regarding the *Yasiel* canvass. Our Supreme Court exercised its supervisory authority; see Practice Book § 60-2; "to require that a trial court canvass a parent who does not consent to the termination prior to the start of a termination of parental rights trial, in order to ensure the overall fairness of the termination of parental rights process." *In re Yasiel R.*, supra, 317 Conn. 776.

The "procedural safeguard requiring that a trial court canvass a parent prior to a termination of parental rights trial does not substantially decrease any risk of erroneous deprivation of her right to family integrity. When the respondent is represented by counsel, the current procedures in place adequately protect the respondent from any claimed constitutional deficiencies." Id., 785. Our Supreme Court held that a respondent who was represented by counsel was not constitutionally entitled to a canvass regarding her trial counsel's strategy. Id., 793. Nonetheless, the court recognized "that the lack of a canvass of all parents in a parental rights termination trial may give the appearance of unfairness insofar as it may indicate a lack of concern over a parent's rights and understanding of the consequences of the proceeding. Therefore, [it] conclude[d] that public confidence in the integrity of the judicial system would be enhanced by a rule requiring a brief canvass of all parents immediately before a parental rights termination

trial so as to ensure that the parents understand the trial process, their rights during the trial and the potential consequences." Id., 793–94. In issuing that order, our Supreme Court stated that it was "not convinced that the trial court's failure to canvass the respondent constituted a denial of her right to due process under the fourteenth amendment to the United States constitution." Id., 776.

The respondent argues that the court should have told her that the canvass was to be given before trial. We disagree and note that several decisions of this court have held that failure to give the *Yasiel* canvass prior to trial does not require reversal of the judgment terminating parental rights. See *In re Sydnei V.*, supra, 168 Conn. App. 557 (court failed to canvass respondent); *In re Elijah G.-R.*, supra, 167 Conn. App. 7 (respondent canvassed after evidence but before judgment rendered); *In re Raymond B.*, 166 Conn. App. 856, 863, 142 A.3d 475 (2016) (respondent canvassed on second day of trial); *In re Leilah W.*, 166 Conn. App. 48, 58, 141 A.3d 1000 (2016) (respondent canvassed after evidence concluded but before judgment rendered). Unlike the present case, trials in those cases, except *In re Elijah G.-R.*, commenced after our Supreme Court issued *In re Yasiel R.*

"Although there were some differences in the way in which the canvasses were conducted in those cases, this court concluded that the stated purpose underlying the *Yasiel* canvass was met even though the respondents were not canvassed prior to the termination trial. In coming to that conclusion in each case, this court considered the factors the *Yasiel* canvass was intended to address and the actual trials of the subject cases. This court found . . . that on appeal, the respondents failed to explain how they were harmed by the timing of the *Yasiel* canvass, whether they would have moved for a new trial or asked that the evidence be opened

and what additional evidence they might offer that would have made a difference in the trial. The respondents in each case argued only that the timing of the canvass itself was harmful. . . . Although the trial court in the present case did not canvass the respondent, she has failed to explain what she did not know or understand about the termination of her parental rights without the court's canvass. She has not explained what she would have done differently if the court had canvassed her and how the outcome of the case would be different. In other words, the respondent has failed to explain how the court's failure to canvass her was harmful per se." (Citation omitted; footnote omitted.) *In re Sydnei V.*, supra, 168 Conn. App. 567–68.

The respondent argues that the court failed to inform her that she could have requested a mistrial or reopened the evidence because the court did not inform her that the canvass was to be given before trial began. The argument defies logic; the *Yasiel* canvass did not exist before the respondent's trial began. Just like the respondent in *In re Sydnei V.*, supra, 168 Conn. App. 567–68, the respondent has failed to demonstrate how she was harmed per se by the timing of the *Yasiel* canvass and what she would have done differently if the court had canvassed her before trial began. The respondent has not pointed to any aspect of the court's canvass that was not otherwise in keeping with *In re Yasiel R.* Moreover, the respondent exercised all of the rights articulated by the *Yasiel* canvass, i.e., she was represented by counsel, she testified on her own behalf, and she cross-examined witnesses. The respondent's claim, therefore, fails.

III

The respondent's third claim is that the court could not reasonably have concluded that there was clear and convincing evidence that she had failed to rehabilitate

to the degree that she could not be restored as a responsible parent within a reasonable time. We do not agree.

"The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585, 122 A.3d 1247 (2015). "The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Citation omitted; internal quotation marks omitted.) Id., 585–86.

A court's conclusion that a parent has failed to rehabilitate "is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B)." (Emphasis in original.) Id., 587-88. Our review of the court's ultimate conclusion "is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate

conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." Id., 588.

The respondent claims that there is insufficient evidence by which the court could have concluded that she had "failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." General Statutes § 17a-112 (j) (3) (B). She does not, however, claim that *any* of the court's underlying factual findings are clearly erroneous, which is significant because the court's factual findings form the basis of its conclusion that the respondent has failed to rehabilitate. In her appellate brief, the respondent emphasizes the relationship that she has with the children, but she does not mention the reasons the children were removed from her care. She did not discuss her mental health issues, her history of substance abuse, and her lack of good judgment with respect to male partners. She offered no explanation for her failure to engage fully in many of the services offered by the department.

The court's memorandum of decision contains a detailed history of the respondent's pattern of substance abuse, including her use of illegal drugs during the termination proceedings despite the specific step to refrain from that activity. The court found that the respondent never came to appreciate the negative effect the use of marijuana had on her capacity to meet the needs of the children, to keep them safe, or, in fact, to keep herself safe. Although the respondent achieved a period of sobriety for approximately six months prior to the end of the trial, the court concluded that the respondent's sobriety was too fragile and untested to lead to the conclusion that she would be able to care

for the special needs of L.N. and M.N. within a reasonable time.

On the basis of our review of the record, we conclude that there is clear and convincing evidence to support the court's conclusion that the respondent failed to rehabilitate. The court acknowledged the respondent's love for L.N. and M.N., her desire for reunification, and her wish to have the children live with her and E.T. We agree with the court that the respondent's desires, however sincere, are insufficient to sustain the children and to provide them with a safe, secure, and permanent environment. See *In re Sydnei V.*, supra, 168 Conn. App. 548–49. The court aptly stated that, even if the respondent is able to care for E.T. and has improved her parenting skills, that progress is *too little and too late for the children* who are the subject of the present termination of parental rights petitions. We, therefore, disagree that there is insufficient evidence to support the court's conclusion that the respondent failed to achieve sufficient personal rehabilitation so as to encourage the belief that she can assume a responsible position in the lives of the children within a reasonable time.

IV

The respondent's last claim is that the court improperly concluded that it was in the best interests of L.N. and M.N. to terminate her parental rights in them. We do not agree.

"The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of its environment." (Internal quotation marks omitted.) *In re Shyina B.*, 58 Conn. App. 159, 167, 752 A.2d 1139 (2000). This court will overturn the trial court's decision that it is in the best interests of the children to terminate the respondent's

parental rights in them only if the court's factual findings are clearly erroneous. *In re Daniel C.*, 63 Conn. App. 339, 367, 776 A.2d 487 (2001). The respondent has not identified any findings of the court that she claims are clearly erroneous.

The substance of the respondent's claim is that it is not in the best interests of the children to terminate her parental rights because she loves them and they love her. Her claim is not a new one and, standing alone, it is insufficient to reverse the judgments terminating her parental rights. "[O]ur courts consistently have held that even when there is a finding of a bond between parent and child, it still may be in the child's best interest to terminate parental rights." (Internal quotation marks omitted.) *In re Luciano B.*, 129 Conn. App. 449, 480, 21 A.3d 858 (2011); see also *In re Rachel J.*, 97 Conn. App. 748, 761, 905 A.2d 1271, cert. denied, 280 Conn. 941, 912 A.2d 476 (2006); *In re Tyqwane V.*, 85 Conn. App. 528, 536, 857 A.2d 963 (2004); *In re Ashley S.*, 61 Conn. App. 658, 667, 769 A.2d 718, cert. denied, 255 Conn. 950, 769 A.2d 61 (2001); *In re Quanitra M.*, 60 Conn. App. 96, 106–107, 758 A.2d 863, cert. denied, 255 Conn. 903, 762 A.2d 909 (2000).

The court found that, although the children enjoy visiting with the respondent, given their "ages and stages of development, and their particular educational and emotional needs, [it was] constrained to conclude that allowing more time for [the] respondent to become able and willing to provide predictably safe, reliable and attentive custodial care for [the children] would unreasonably relegate these children's best interests to a level of uncertainty, without any valid basis . . . for determining that reunification with [her] can practicably be achieved within [a] reasonable period of time . . . ." The court found that to delay termination of the respondent's parental rights would unduly interfere with the children's access to permanency that will

enhance their opportunities and potential for healthy human development. We have reviewed the record, considered the briefs and arguments of the parties, and agree with the court.

The judgments are affirmed.

In this opinion the other judges concurred.

IN RE LUIS N. ET AL.*
(AC 39934)

Lavine, Prescott and Harper, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to his two minor children. In response to a motion filed by the father seeking to have the children, who were six and seven years old at the time, testify at the termination trial, the court ruled that, in lieu of testimony, it would invite the children to the courthouse so that they would have an opportunity to get to know the court and observe the courtroom, and to understand that the court would be deciding the case, and all counsel agreed to the procedure outlined by the court for the meeting. The court made no inquiry of the children during the visit, during which one of the children spontaneously stated that she would be willing to stay with her foster mother or go back to her parents, and during which the children's guardian ad litem and a visitation supervisor for the Department of Children and Families were present. Following the meeting, the court stated on the record what had transpired, and it had the guardian ad litem make a statement regarding comments of the children during the meeting. *Held*:

1. The respondent father could not prevail on his unpreserved claim that the trial court deprived him of a fair trial by meeting with the children ex parte, allowing a department visitation supervisor to attend the meeting, and failing to make a record of its observations of the children: although the record was adequate for review, and the claim was of constitutional magnitude and reviewable under *State* v. *Golding* (213

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* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

Conn. 233), even if the trial court's ex parte meeting violated the father's right to a fair trial, any error was harmless, as the father did not challenge the court's statutory findings, in support of the termination judgments, concerning the reasonable efforts to reunify the father with his children, the fact that he was unable and unwilling to benefit from reunification efforts, his failure to achieve a sufficient degree of personal rehabilitation as required by statute, and the best interests of the children; moreover, although the father did not have the opportunity to cross-examine the children and the department visitation supervisor, the court stated on the record immediately after meeting with the children what had transpired during the meeting and inquired of the father and others whether they wanted further explanation, which was declined by counsel, and the court instructed the guardian ad litem to report what had transpired at the meeting, including the spontaneous comment made by one of the children that was repeated by the department visitation supervisor; furthermore, the father could not prevail under the plain error doctrine given his failure to challenge the factual basis of the judgments terminating his parental rights, and to reverse the judgments under these circumstances could undermine public confidence in the integrity of the judicial system.

2. The respondent father could not prevail on his claim that the trial court erred in failing to declare a mistrial, sua sponte, after it held an ex parte meeting with the children in the presence of the department visitation supervisor and allegedly drew evidentiary conclusions from its observation of the children; the father was aware of and agreed to the court's ex parte meeting with the children, there was nothing in the record to support the appearance of impartiality or bias on the part of the trial court due to the presence of the department visitation supervisor, and, because the father's counsel did not object or ask the court to recuse itself or to declare a mistrial when the court informed the parties about the supervisor's presence, the father could not now raise a claim that was not raised before the trial court.

Argued May 31—officially released July 27, 2017**

Procedural History

Amended petitions by the Commissioner of Children and Families to terminate the respondents' parental rights as to their minor children, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, where the court, *Rubinow*,

** July 27, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

J., denied the respondents' motion to present child testimony; thereafter, the matter was tried to the court; judgments terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed*.

Albert J. Oneto IV, assigned counsel, for the appellant (respondent father).

Frank H. LaMonaca, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent father, S.N., appeals from the judgments of the trial court terminating his parental rights in his son, L.N., and his daughter, M.N.[1] On appeal, the respondent claims that the judgments should be reversed because the court met with the children ex parte in the presence of a Department of Children and Families visitation supervisor, failed to make a record of its observations regarding the children, and failed to declare a mistrial. We affirm the judgments of the trial court.

I

A

The Termination Facts

In a 120 page memorandum of decision, the trial court, *Rubinow*, *J.*, made the following findings of fact that are relevant to the termination of parental rights petitions at issue in the present appeal. L.N. was born in July, 2008, and M.N. was born in June, 2009. They

[1] The court also terminated the parental rights of the children's mother, B.F. She filed a separate appeal to challenge the termination of her parental rights in the children. See *In re Luis N.*, 175 Conn. App. 271, A.3d (2017).

came to the attention of the Department of Children and Families (department), in February, 2011, when they were in the custody of their mother, B.F.,[2] who was overwhelmed by caring for them. The children remained in her custody until October 11, 2011, when the department removed them pursuant to General Statutes § 17a-101g. On October 21, 2011, the court, *Hon. William L. Wollenberg*, judge trial referee, sustained the orders of temporary custody in the petitioner, the Commissioner of Children and Families, and ordered specific steps for the respondent to aid in his reunification with the children.

On August 9, 2012, the court, *Frazzini*, *J.*, adjudicated the children neglected as to the respondent on the ground that they were exposed to conditions injurious to their well-being.[3] Judge Frazzini ordered the children committed to the custody of the petitioner and issued new specific steps for the respondent to facilitate reunification. See General Statutes § 46b-129. On December 12, 2012, the petitioner filed petitions to terminate the respondent's parental rights in the children. In her amended petitions, the petitioner alleged that the department had made reasonable efforts to locate the respondent and to reunify him with the children, that the respondent was unable or unwilling to benefit from reasonable reunification efforts, that he had failed to achieve personal rehabilitation, and that termination of his parental rights in the children was in their best interests. The trial on the termination petitions was held on approximately sixteen days between November 24, 2014, and August 3, 2016. Judge Rubinow issued a memorandum of decision in which the respondent's

[2] The respondent and B.F. did not live together.

[3] On May 31, 2012, Judge Frazzini adjudicated the children neglected as to B.F. The petitioner filed petitions to terminate the parental rights of B.F. in the children on December 12, 2012. The termination petitions as to both the respondent and B.F. were consolidated for trial.

parental rights in the children were terminated on November 15, 2016. The court, *Olear*, *J.*, granted the respondent's application for the appointment of appellate counsel and the waiver of fees. The respondent appealed.

Judge Rubinow made extensive findings of fact with regard to the respondent, which we summarize for the purposes of the present appeal. The respondent was born in 1981 and was graduated from high school. In 2011, he was employed at a car wash. The respondent had relatively simultaneous relationships with several women that resulted in the births of eight children, some of whom are only a few months apart in age.[4] He is married to T.F., the mother of two of his children: S.N., Jr. (S Jr.) and Y.[5]

The court found that department personnel met with the respondent on numerous occasions, beginning in February, 2011,[6] when the children were in B.F.'s custody. He agreed to work with the department and take care of the children on some weekends as a way of helping B.F. The department made in-home family preservation services available to the respondent from February through October, 2011, but he never availed himself of the services. In October, 2011, when the children were removed from B.F.'s custody, the respondent proposed that the children move into his parents' home. The department deemed the respondent's plan inappropriate; it involved too many people sharing too few bedrooms.[7]

[4] Only L.N. and M.N. are the subject of the present appeal.

[5] T.F. also has other children.

[6] At the time, the respondent had custody of his oldest child, C, who lived with him, a female companion, his sister and his parents. The other adults in the household took care of C before and after her school day while the respondent was at work.

[7] The department also was concerned about the ability of the respondent's mother, who suffers from Parkinson's disease and requires in-home health assistance, to care for L.N., M.N., and the other children who lived there.

Starting in October, 2011, the department provided the respondent with once a week, two hour supervised visits with the children. The department also provided him with behavioral health services to help him comply with his specific steps, in addition to a one-on-one fatherhood education program adjusted to meet his cognitive and reading limitations.[8] In June, 2012, Bruce Freedman, a licensed psychologist, conducted a court-ordered psychological evaluation of the respondent, which included an observation of the respondent's interaction with the children.

The petitioner filed petitions to terminate the respondent's rights in both of the children on December 12, 2012. In November, 2013, the department decided not to pursue the termination petitions due to the positive feedback it had received from the agencies and individuals who were providing services to the respondent. Instead, the department planned to reunify the respondent with the children by February 10, 2014.[9] The department, therefore, increased the amount of supervised visitation the respondent had with the children with a goal of ending supervision. At the time, L.N. was five years old and M.N. was four.

Prior to the planned reunification, the respondent was living in a two bedroom apartment with C, his oldest daughter. He planned to sleep in the living room while C and M.N. slept in one of the bedrooms, and L.N. slept in the other bedroom. Although the respondent and T.F. are married, they live apart during the week and spend weekends together along with C, S Jr., Y, and other children for whom T.F. was responsible.

[8] Gregory Davis, the mentor assigned to help the respondent, modified all aspects of the advanced parenting curriculum to meet the respondent's needs.

[9] Although the children were to be reunified with the respondent, the department planned for the children to remain in the custody of the petitioner.

Although the respondent wanted his children to live full time in the same household with T.F.'s children, he never obtained an apartment large enough to accommodate them all. Freedman conducted another court-ordered psychological evaluation, which again included an observation of the respondent's interaction with L.N. and M.N.

The department's reunification plan for the respondent was disrupted, however. In 2011, the respondent had secured employment as a school van driver. On December 10, 2013, the department received a complaint regarding the respondent's conduct while he was working as a school van driver. The department investigated and found that a seventh grader and a tenth grader had reported observing the respondent as he watched inappropriate images on his phone while the van was stopped. When the respondent noticed that the students were watching him, he "pulled his phone away." The respondent denied that he was "looking at porn," but admitted that he frequently looked at pictures of women in lingerie.[10] Despite this incident, the department continued its reunification plan for the respondent.

The court found that the reunification plan was interrupted again on February 7, 2014, when M.N. disclosed that her half brother S Jr., who was six years old at the time, had sexually molested her. B.F. and M.N.'s foster mother both reported the alleged abuse to the department. The alleged abuse occurred in the respondent's apartment when he left M.N. and S Jr. unattended while he was in the bathroom, possibly showering. The court found that M.N. credibly had reported the details of the sexual abuse during therapy. S Jr. had sexually touched M.N.'s genitals, exposed his own genitals, and stated

[10] The court found that the respondent was transferred to a different route following the incident in which students observed him viewing inappropriate material on his phone. In 2016, the respondent lost his employment as a school van driver. He returned to work at the car wash.

to M.N. that he wanted to "plug her" and have sex with her. The respondent was aware of M.N.'s accusations and discussed the matter with S Jr. Following the conversation, the respondent did not believe that S Jr. had committed the alleged sexual abuse or that he had made sexually suggestive comments to M.N.[11] The department personnel debated whether the respondent should be reunited with the children or the termination petitions should be pursued. In the fall of 2014, notwithstanding the parenting education and individual coaching that the respondent had received, the respondent lacked a concrete, viable plan to keep M.N. safe when she was visiting with any of his other children, including S Jr. In view of the circumstances, the department elected to forgo reunification and to proceed with the termination of parental rights petitions that had been filed in 2012.

In its memorandum of decision, the court set forth the elements of General Statutes § 17a-112 (j),[12] which the petitioner was required to prove by clear and convincing evidence in order to prevail on her petitions. The court found that the department had made reasonable efforts to maintain consistent contact with the respondent and had made reasonable reunification efforts for

[11] The department referred M.N. for therapy at a child abuse treatment center. S Jr. also was placed in therapy.

[12] General Statutes § 17a-112 (j) provides in relevant part: "(1) the Department . . . has made reasonable efforts to locate the parent and to reunify the child with the parent . . . unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

the respondent during the adjudicatory period[13] and that the respondent was unable or unwilling to benefit from reunification efforts as contemplated by § 17a-112 (j) (1).[14]

The court further found by clear and convincing evidence that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and specialized needs of the children, he could assume a responsible position in their lives. The court made specific findings of fact related to the statutory requirements.

In 2012, Freedman found that the respondent had significant difficulty interacting with L.N. and M.N., but by late 2013, the respondent's parenting techniques had improved considerably. The respondent, however, still showed some social avoidance, shyness, and insecurity in his reading skills. Freedman was more concerned,

[13] The court found that the department's reunification efforts for the respondent were reasonable in view of his status as the father of many young children, including S Jr., who allegedly sexually abused M.N., and the respondent's cognitive challenges.

[14] The court found that the respondent was unable or unwilling (1) to participate in in-home family preservation services by asserting that his work schedule prevented him from doing so, (2) to comply with instructions that the children could not eat certain foods given their allergies, (3) to benefit from all of the one-on-one mentoring services regarding individual father related, impulse control, and parent behavior monitoring services provided that was clearly and convincingly apparent by his using a phone to view inappropriate images on a school van, (4) to follow the department's reasonable instructions that there could be no "accumulated family" overnight visitation at his residence, (5) to perform without full support the basic management tasks required of a parent, (6) to manage fundamental parental obligations of household management or managing a blended family, (7) to acquire the reading skills needed to complete school forms for L.N., and (8) to develop a safety plan for M.N. The court also found that when the respondent testified in April, 2016, he was unwilling or unable to recall any particular content of the therapeutic services offered by Klingberg Family Centers two years earlier, and he did not believe that S Jr., had behaved inappropriately with M.N.

however, that the respondent had fathered many children, some of whom were exactly the same age, and the respondent did not know their birth dates. He also did not know the name of the school C attended. Freedman had serious concerns about the respondent's ability to supervise and emotionally support his progeny, especially if the respondent's dream of blending his families came to fruition.

Despite all of the parent education services that the respondent had received, the court found that he did not appreciate the problems he faced supporting eight children and finding time to spend with each of them. He had failed to achieve any meaningful degree of insight into L.N.'s and M.N.'s specialized needs. Without such insight, the respondent did not have the ability to prevent M.N. from again being exposed to S Jr.'s sexual behavior, to manage the sibling rivalry attendant to the long-term reunification of L.N. and M.N. with the respondent's other children and to manage the additional stress presented by T.F.'s need to care for her young twins.

To further support its conclusion that the respondent had failed to achieve the requisite degree of rehabilitation required by § 17a-112 (j) (3) (B) (i), the court examined the nature and extent of the respondent's compliance with the specific steps ordered for him under § 46b-129. In general, the court found that the respondent had only facially complied with a number of the steps. His mere attendance at educational programs and his cooperation with service providers did not support the conclusion that he had achieved any degree of personal rehabilitation that encouraged the belief that, within a reasonable time, considering the ages of the children and their special needs, he could assume a responsible position in their lives.[15] Although the

[15] The court made the following findings with respect to the children. Both of the children suffer from eczema, which is exacerbated by eating certain foods. They both also have chronic asthma.

respondent cooperated with the department, he had failed to make measurable progress toward the fundamental treatment goal of being able to provide a safe and nurturing environment for the children. The court concluded that the petitioner had met her burden of proving by clear and convincing evidence that the respondent had failed to achieve rehabilitation within the meaning of a § 17a-112 (j) (3) (B) (i).

The trial court also made the following findings, as required by § 17a-112 (k). The reunification services the department provided to the respondent and the children

During his first days in foster care, L.N. had tantrums and engaged in sexualized behaviors with M.N. Because he was not toilet trained, L.N.'s entry into day care was delayed until he was three and one-half years old. In addition to his sexualized behavior, L.N. exhibited other signs of having been traumatized, e.g., smearing feces and urinating on himself. He had difficulty in school and in his foster home, had tantrums and cried in ways that were inappropriate for a five and one-half year old. He was defiant and oppositional. In June, 2014, L.N. was evaluated at the Klingberg Family Centers because his oppositional and defiant behaviors had continued, among other inappropriate behavior, in his after-school program and foster home. He was diagnosed with generalized anxiety disorder, symptoms of hyperactivity, sleep problems, fears, and inability to concentrate. He received therapy and gradually was able to sit still for longer periods in school. He failed to make academic progress, however, and given his specialized behavior needs, the department arranged for his school to conduct a planning and placement team meeting, which led to the implementation of special education services for him.

M.N. has special emotional needs due to her history of sexual trauma. She received therapy at Klingberg Family Centers, where she exhibited fear; physical and verbal aggression toward others; difficulty with fine motor skills, sitting still, paying attention and concentrating; and learning challenges. M.N. also intentionally urinated on herself at school, which is consistent with sexual trauma, to obtain the attention of the school nurse. She was diagnosed as a child victim of sexual abuse. She received therapy and was taught relaxation skills appropriate to her age. Despite improvement over the years, M.N. had a very difficult time in school. She struggled to stay on task, and was removed from class due to her behavioral issues. She consistently stated that she did not trust S Jr., and that she did not want to be near him. Her specialized emotional needs require that her caregivers be able to adhere to a designated appropriate safety plan to prevent M.N. from future sexual victimization.

were timely and appropriate.[16] The respondent, however, was not able to improve his ability to serve as a safe, effective parent to the children pursuant to the specific steps ordered for him. L.N. was three years old and M.N. was two at the time the order of temporary custody entered; L.N. was eight years old and M.N. was seven at the time the respondent's parental rights in them were terminated.

The court found that the children are bonded to one another and know that the respondent is their biological father, even though they have lived in foster care since October, 2011. The children have no memory of their time with the respondent prior to the time they were removed from B.F.'s care; their memories of the respondent derive from their supervised visits with him. The children are bonded to the respondent and have a positive relationship with T.F. Although the children enjoy the time they spend with the respondent, they do not look to him for emotional support.

The children were placed with their foster mother, M.F., in October, 2011, and they have close emotional ties to her. They also are bonded to M.F.'s two biological children and her domestic partner, H.B., on whom they rely. H.B. works as a public safety officer and his schedule permits him to transport the children to services when M.F. is working as a certified medical technician.

The court found that although the respondent has limited financial resources, his economic circumstances have not prevented him from maintaining a meaningful relationship with the children. He also was not "prevented from maintaining a meaningful relationship with the [children] by the unreasonable act or conduct of the other parent of the [children], or the

[16] The trial court identified at least ten social service agencies and charitable organizations that had provided support, counseling, or services to the children, the respondent, and B.F.

unreasonable act of any other person . . . .” General Statutes § 17a-112 (k) (7). The respondent has benefitted from subsidized housing services. Despite his criminal history, the respondent has held lawful employment, but he lost his position as a school van driver because he was looking at inappropriate material on his phone in the presence of schoolchildren. The court found that that misconduct was inconsistent with the role of an adult responsible for the safe transportation of other people’s children. The respondent’s decisions about his personal life and his inability or unwillingness to benefit from reunification efforts, not economic factors, impeded his ability to develop a meaningful relationship with the children.

The court responded to the respondent’s argument that M.F. had impeded his relationship with the children due to her unwillingness or inability to attend various counseling sessions or to provide the children with consistent attendance at counseling. The court did not condone M.F.’s inconsistency in transporting the children to counseling, but it found that her conduct did not prevent the respondent from maintaining a meaningful relationship with them. According to Sam Christodlous, the children’s guardian ad litem, M.F. made efforts to involve the respondent in activities for the children, such as birthday parties, but he did not regularly accept her invitations.

In addressing the best interests of the children, the court considered the children’s particular specialized needs in the context of the respondent’s response to reunification efforts and his failure to achieve a degree of personal rehabilitation sufficient to encourage the belief that he could assume a responsible position in the life of the children within a reasonable time. The court fully credited Christodlous’ opinion that was founded on what the court described as his thorough,

detailed, careful, compassionate, yet objective, investigation of the children's and their parents' circumstances. The clear and convincing evidence, the court found, established that the respondent has not reached the point where, on a daily basis, he could meet the best interests of either of the children. The court, therefore, concluded that it was in the best interests of the children that the respondent's parental rights in them be terminated. The respondent's application for the appointment of counsel and the waiver of fees to appeal was granted.

B

The Facts Regarding the Appeal

The respondent appealed and raises two interrelated claims concerning an ex parte meeting the court had with the children. The following facts are related to the respondent's claims. In January, 2016, the respondent and B.F. expressed an interest in having the children testify at the termination of parental rights trial, but they wished to protect the children from cross-examination. On January 14, 2016, the respondent and B.F. filed a joint motion requesting permission for the children to testify pursuant to Practice Book § 32a-4 (b).[17] The motion argued that the children, ages six and seven at that time, were parties to the termination proceedings and should be permitted to testify on their own behalf. The motion represented that the children had expressed to the respondent and to B.F., during their respective visits, a desire to live with them. The respondent and

[17] Practice Book § 32a-4 provides in relevant part: "(b) Any party who intends to call a child or youth as a witness shall first file a motion seeking permission of the judicial authority. . . .

"(d) The judicial authority with the consent of all parties may privately interview the child or youth. Counsel may submit questions and areas of concern for examination. The knowledge gained in such a conference shall be shared on the record with counsel and, if there is no legal representation, with the parent."

B.F. argued that the children's testimony was crucial in determining the best interests of the children and therefore was relevant. Before the court ruled on the motion for the children to testify, on January 15, 2016, Alina Bricklin-Goldstein, the children's attorney, filed a motion for the appointment of a guardian ad litem for the children. Counsel for the petitioner, the respondent, and B.F. did not object. The court granted the motion and appointed Christodlous.

The joint motion for the children to testify came before the court on March 18, 2016. The court described the children as "very young," and, in lieu of testimony, the court offered to invite the children to come to court to see what goes on; to observe the physical structure of the courtroom; to meet the court reporter, the marshal, the clerk and the judge; and to sit on the bench. The court represented that it would take no testimony from the children, as the court had concluded that it was not in the best interests of the children to put them in a position where they were either subject to cross-examination or where they could draw the conclusion that something that they had stated would lead to an outcome. Although the children may have opinions and a desired outcome, the court stated that the children's opinions and desires could be represented by Bricklin-Goldstein. The court had not yet reached a conclusion regarding the outcome of the proceedings, but it understood that, from time to time, the children wished to live with the respondent when they are with him and with B.F. when they are with her.

The court asked Christodlous whether he knew the children well enough to have an opinion as to whether they would benefit from an opportunity to visit the court. Christodlous stated that he thought that he knew the children well enough to offer an opinion, to wit: "I think because the children so much want to see what

happens in this court, I don't think they should necessarily be here during the hearing, but I do think [it would] be very beneficial for them to come in, see the courtroom, meet Your Honor, too. . . . [T]hey understand through their lawyer that Your Honor makes the decision, no one else does." He also opined that it would be beneficial for the children if both he and Bricklin-Goldstein were present, but that the respondent and B.F. should not be present. The following colloquy then transpired.

"The Court: If the court inquired of the children only as to whether they had any questions for the court, do you think that would suffice in franchising them with regard to this process without infringing upon what should be, at their ages and stages of development, as innocent as is practicable, a perception of reality?

"Attorney Christodlous: I think so. I can't give a 100 percent answer on that, but I think so. Yes, Your Honor.

"The Court: Do you know of any therapeutic basis [for] why either child should not be allowed to come into the courtroom and see what's going on here?

"Attorney Christodlous: I do not, and I personally believe it would be beneficial for them to be here."

Bricklin-Goldstein stated that coming to the courtroom would be a great experience for the children. Counsel for the respondent and F.B. stated that their clients were satisfied with the procedure that the court outlined. The court inquired of the assistant attorney general, Frank H. LaMonaca, whether the department could bring the children to court at 9 a.m., on April 27, 2016. LaMonaca suggested that the foster mother could bring the children to court. The court declined to permit the foster mother to bring the children to court.

The court ordered the department to produce the children at the courthouse on April 27, 2016, and to

take them to the juvenile clerk's office, where they could be brought to the courtroom by the clerk with the assistance of Bricklin-Goldstein and Christodlous. The court would be present at 9 a.m. on that date. The court further stated that it is "the court's expectation that the children will . . . not be subject to a record process; this is not an opportunity for them to give testimony. If they do have a question for the court, Mr. Christodlous will be here, and I hope you will accept his explication [of] and response [to] what it is they asked, or what it is they had to say. In the event that they should create any drawings, as sometimes happens when kids are in court and are faced with a great big desk like this and see pens and paper on it, the court will of course save them and make them available to counsel. But, I do not expect to obtain any testimony. They won't be subject to cross-examination. So, even if they should say something, they won't be under oath, and it will not be evidence. Is that satisfactory?"[18] All counsel agreed to the procedure outlined by the court.[19]

After the court met with the children on April 27, 2016, it placed the following statement on the record. "Counsel, before court commenced today in resolution of the motions for child testimony that had been filed, the court had made arrangements to meet with the children so they would have the opportunity, as you all had agreed, to get to know the court, to understand that the court and the court alone would be making the decision in this case, and to observe the facilities, particularly the courtroom in which the case has been ongoing for so many years.

"This court had the opportunity to observe the children interacting with court staff at the child protection

[18] See *Manaker* v. *Manaker*, 11 Conn. App. 653, 655–57, 528 A.2d 1170 (1987) (judge able to disregard evidence not properly admitted).

[19] The court then explicitly denied the joint motion for the children to testify.

clerk's office. This court had the opportunity to observe the children interacting with court staff and with [the department] visitation supervisor, who was present at the request, I understand, of the children's counsel and their guardian ad litem during this process. Several spontaneous comments were made by the children, by [L.N.], in particular. I will repeat them only if you request, but before I do so, there was in the presence of the court, but not on the record, and the marshal was also present, and the marshal trainee was also present, as was the clerk. I believe the monitor was still in the room as well.

"There was an inquiry of the children related to the children's desired outcome in these proceedings presented by an individual, notwithstanding any orders that had been issued by the court previously to enhance the court's opportunity to see the children in as neutral a setting as possible, and the goal, again, was to enhance the children's understanding that the court and the court alone would be making decisions in the case. I believe that . . . Christodlous could summarize that which occurred. I don't attribute any intent on any party.

* * *

"Attorney Christodlous: The children made some statements which the [department] visitation supervisor did not believe Your Honor heard and repeated . . . the statements directly to Your Honor. He felt—he was thinking he was assisting, did not intend any harm, but he did repeat the statements, which the children had made, and I do not know whether Your Honor had heard the statements initially made by the children, but he repeated [them], and I'm quite clear Your Honor heard what he said . . . because Your Honor indicated to him that you did not want to hear from him.

"The Court: The court did hear all of the comments that were made by the children in the courtroom. Their

visit in this courtroom was directed at achieving the one goal I identified, so that they would see the courtroom, have the opportunity to observe the facilities, and understand the environment in which the case is being tried. This court made no inquiry of the children as to what they desire. To the extent the Court now has had the opportunity to observe the children, if that is not a part—their behavior and their demeanor is not a part of the report by the guardian ad litem at the appropriate time during the case, and I rather expect it will be, I will bring to your attention then that which I observed. I can do that now if you'd like, but my goal was not to acquire evidence for use in the case. That's what . . . Christodlous' presence at the visit to the courtroom was for, so he can be cross-examined.

"It is not that the court attributes no value to what the children said, the court does not know enough about these children to place their comments in any context one way or another. There have been sufficient concerns raised throughout the course of the evidence concerning the status of the children, and supported by the court's observations of their behavior and demeanor today, both in the child protection clerk's office and in the courtroom."

The court directed Christodlous to consider and investigate the children's best interests and to inform the court of his opinion regarding the nature, type, and scope of a placement environment to address the best interests of each child in sustained growth, development, well-being, continuity, stability, and conduct as they grow into their preteen and teenage years, that will most likely lead to their success in the community. Christodlous agreed to do so. The court asked whether anyone needed to hear further from the court regarding its observations of the children. All counsel responded in the negative.

On August 3, 2016, Christodlous testified, in relevant part, as follows. "I . . . met with the children on six separate occasions. I met with them at both parents' homes, at the foster parent's home, the school, and of course, here in the court. I have had an opportunity to sit down and talk to the children as well as [department personnel] and the child's attorney. I've also discussed this matter with all the attorneys involved in this matter. I have reviewed all the records that were the exhibits . . . in the court file. And again, I did read all the transcripts and prepare that way. I listened to testimony while here on the case since I was appointed, and I had questions which were asked on my behalf by other parties in this matter when they came up. . . .

"The only time the children were in the courtroom, one of the children actually changed what she had said earlier to her attorney in my presence. And what she had said the last time we were here was that she would be willing to stay with her foster mom or go back to her parents. I did take that as a sign that she has become quite comfortable at her foster parent's [home], which supports what I saw when I was there." On cross-examination by B.F.'s counsel, Christodlous testified that M.N. once had expressed that she wished to live with B.F., but she also stated that she would be happy to stay with her foster mother. M.N.'s statement about staying with her foster mother was made when she was in the courthouse.

On January 10, 2017, the respondent filed a motion for articulation and rectification in which he asked Judge Rubinow to articulate the legal basis of her March 18, 2016 order directing the department to produce the children at the courthouse to meet the judicial authority, but not for them to give testimony, be cross-examined or for any evidentiary purpose, so that they may be exposed to the architectural ambience of the courthouse and the courtroom, among other things. The

respondent also moved that the court rectify the record to set forth the details of its April 27, 2016 encounter with the children during which the court had the "opportunity to observe the children interacting with court staff . . . and with the [department] visitation supervisor" and hear several spontaneous comments the children made about their desired outcome of the proceedings. The petitioner objected to the motion for articulation and rectification.

In responding to the respondent's motion for articulation and rectification, on February 23, 2017, Judge Olear noted that Judge Rubinow had retired from the bench on November 16, 2016, and that "[n]o party to the proceeding has asked that the *trial court* conduct a hearing on the pending motions, and the court declines to do so sua sponte, as the court has determined that holding a hearing would not provide any information that would suffice to permit the court to respond to the motions for articulation and rectification." (Emphasis in original.) Judge Olear denied the motion for articulation and rectification.[20] The respondent appealed.

First, we set forth "the well established legal framework for deciding termination of parental rights petitions. [A] hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it

[20] The respondent filed a motion for review with this court, asking that his motion for review be granted and that this court order the trial court to hold a hearing at which Judge Rubinow and others appear to create an appellate record for review. The petitioner objected to the motion for review. This court granted the motion for review, but denied the relief requested.

proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Elijah G.-R.*, 167 Conn. App. 1, 18–19, 142 A.3d 482 (2016).

II

The respondent's first claim on appeal is that the court deprived him of a fair trial when it violated the parties' agreement permitting the court to meet with the children ex parte by allowing a department visitation supervisor to attend the meeting and by failing to make a record of its observations of the children. The respondent did not preserve this claim at trial and on appeal seeks (1) review and reversal pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified in *In re Yasiel R.*, 317 Conn. 733, 781, 120 A.3d 1188 (2015), or, in the alternative, (2) reversal pursuant to the plain error doctrine. Even if we assume without deciding that the court violated the respondent's rights, we are persuaded that any error was harmless. The respondent, therefore, cannot prevail under *Golding* or the plain error doctrine.

A

Golding Review

The respondent claims that the court violated his constitutional right to a fair trial by meeting with the children ex parte in the company of a department visitation supervisor and by failing to make a record of its observations of the children. He seeks to reverse the judgments terminating his parental rights in the children pursuant to *Golding*. Even if we assume, without deciding, that the respondent's rights were violated, the petitioner has persuaded us that any error was harmless.

"[A respondent] 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 clam is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

We will review the respondent's claim because the record is adequate for review and the claim is of constitutional magnitude.[21] See *In re Tayler F.*, 296 Conn. 524, 553, 995 A.2d 611 (2010) (right to confrontation and cross-examination in civil action is grounded in due process clauses of fifth and fourteenth amendments). Although the respondent did not have the opportunity to cross-examine the children and the department visitation supervisor, immediately after meeting with the children, the court stated on the record what had transpired during the meeting and inquired of the respondent and others whether they wished further explanation.[22] All counsel declined further explanation

[21] In her brief, the petitioner argued that the respondent waived his claim that he was deprived of a fair trial because he consented to the court's meeting ex parte with the children in the courthouse and also responded in the negative to the court's asking the parties whether anyone needed to hear anything further from the court in report of its observations with the children. Because we conclude that the respondent was not deprived of a fair trial, we need not decide whether he waived the right to raise the claim on appeal.

[22] See Practice Book § 32a-4 (d) (judicial authority with consent of all parties may privately interview the child; knowledge gained in such conference shall be shared on the record with counsel).

We further note that the court's prompt report to the parties and their counsel is consistent with rule 2.9 (b) of the Code of Judicial Conduct, which provides, "[i]f a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." The court gave the respondent an opportunity to respond, but he or his counsel chose not to do so.

by the court. Moreover, the court instructed Christodlous to report what transpired at the meeting, including the spontaneous comment made by one of the children that was repeated by the department visitation supervisor.

The respondent cannot prevail on appeal because he has not challenged any facts found by the court that support its judgments terminating the respondent's parental rights in the children. More specifically, the respondent does not challenge the court's findings, required by the statute, that the department made reasonable efforts to reunify him with the children; that he was unable and unwilling to benefit from reunification efforts; that he failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the children, he could assume a responsible position in their lives; or that it was in the best interests of the children to terminate his parental rights in them.

"In many cases of an alleged constitutional violation . . . the [petitioner] is able to demonstrate the harmlessness of such alleged violations beyond a reasonable doubt. . . . Under such circumstances, it would be a waste of judicial resources, and a pedantic exercise, to delve deeply into the constitutional merits of a claim that can appropriately be resolved in accordance with the relevant harmless error analysis." (Citations omitted.) *State* v. *Golding*, supra, 213 Conn. 241–42.

In this case, it was the children's concerns that the court sought to allay by inviting them to come into the courtroom. This case illustrates, however, the danger inherent in any case in the court's meeting with children outside the presence of counsel for the parties. No matter how good the intentions of the court may be and how controlled such a meeting may be, there is always a possibility that something may go wrong. In the

present case, the petitioner has demonstrated beyond a reasonable doubt that the constitutional error, if any, was harmless. Thus, the respondent's claim fails to satisfy the fourth prong of *Golding*. We conclude, therefore, that reversal of the termination judgments is not warranted.

B

Plain Error

The respondent also seeks reversal of the judgments terminating his parent rights in the children pursuant to the plain error doctrine. For the same reason that he cannot prevail under *Golding*, i.e., he failed to challenge the court's factual findings, the respondent cannot prevail under the plain error doctrine.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the

judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"[Our Supreme Court has] clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernible on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the [respondent] simply to demonstrate that his position is correct. Rather, [to prevail] the party [claiming] plain error [reversal] must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *In re Sydnei V.*, 168 Conn. App. 538, 562–64, 147 A.3d 147, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016). The respondent failed to identify the harm that would undermine the public's confidence in the outcome.

For the same reasons articulated in part II A of this opinion, we decline to reverse the judgments of the trial court on the ground of plain error. If there is no *Golding* violation, ipso facto, there can be no plain error. Given the unchallenged factual basis of the termination of the respondent's parental rights in the children, to reverse the judgments, we believe, might in and of itself undermine the public's confidence in the integrity of our judicial system. For the foregoing reasons, we will not reverse the termination of parental rights judgments pursuant to the plain error doctrine.

III

The respondent's second claim on appeal is that it was error for the trial court not to declare a mistrial, sua sponte, after it revealed that it had met the children in the company of a department visitation supervisor and that it allegedly had drawn evidentiary conclusions from its observations of the children. We disagree.

In making this claim, the respondent argues that the presence of the department visitation supervisor at the meeting with the children created the appearance of impropriety that required the court to recuse itself pursuant to rule 2.11 (a) of the Code of Judicial Conduct.[23] In essence, the respondent relies on his plain error argument, which we addressed in part II B of this opinion. In other words, the court's meeting with the children in the presence of the department visitation supervisor constituted plain error and, therefore, an appearance of impropriety.[24]

[23] Rule 2.11 (a) of the Code of Judicial Conduct provides in part: "A judge shall disqualify . . . herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."

[24] The respondent does not assert that the court was actually biased or motivated by anything other than a good faith desire to make the children feel enfranchised in the legal proceedings, about which they had questions and concerns.

To support his claim the respondent relies on two cases that are factually distinct. Our Supreme Court reversed the judgment of dissolution in *Cameron* v. *Cameron*, 187 Conn. 163, 444 A.2d 915 (1982). In that case, the trial court stated on the record several times, before the defendant husband took the witness stand, that the defendant or his counsel had deliberately falsified a financial affidavit. See id., 170. Our Supreme Court found that those "expressions of a preconceived view of the credibility of a witness who had not yet testified before the trier . . . must have been devastating to the defendant and astounding to any observer schooled in the simple faith that the court is an instrument of justice." Id. In remanding the case for a new trial, the court stated that proof of actual bias is not necessary where the appearance of impartiality is lacking. Id. There is nothing in the record to support even the appearance of impartiality or bias on the part of the court in the present case. Throughout the trial, especially when negotiating how to address the children's desire to understand the termination proceeding, the court repeatedly stated that it had not come to any conclusions. Moreover, the court went out of its way early in the proceedings to make known to the parties that the court suffers from asthma, as do the children, and that the court's daughter was a patient of a physician who also treated one of the children. At no time did the respondent ask the court to recuse itself.

The respondent also compares the trial court to the trial judge in *Abington Ltd. Partnership* v. *Heublein*, 246 Conn. 815, 717 A.2d 1232 (1998). That case concerned easement rights. Id., 817. The judge in that case viewed the subject property in the presence of the parties and their counsel. Id., 821. Unbeknownst to the parties and counsel, the court secretly returned to the site and engaged an adjoining property owner in a discussion of the property that was the subject of the litigation. Id. That fact came to light when the adjoining

property owner was called as a witness and disclosed his conversation with the judge. Id. The plaintiff filed a motion for the judge to disqualify himself and for a mistrial, thereby preserving its claim for appeal. Id. The judge denied the motion, claiming that his ex parte visit did not cause him to be prejudiced about the merits of the litigation, and later rendered judgment on behalf of the defendants. Id., 822, 824. On appeal, our Supreme Court reversed the judgment on the ground that the judge's ex parte visit to the property created the appearance of impropriety that required the judge to recuse himself pursuant to canon 3 (c) (1) (now rule 2.11 [a]) of the Code of Judicial Conduct. Id., 825–26. Conversely, the record in the present case contains nothing to indicate that the court's actions approached the surreptitious behavior of the judge in the *Abington Ltd. Partnership* case.

In the present case, the respondent knew that the court was to meet ex parte with the children, and agreed to it. When trial resumed, the court immediately informed the parties that the department visitation supervisor was present during its meeting with the children and that the supervisor repeated a comment made by one of the children. The respondent was represented by counsel, who did not object, and did not ask the court to recuse itself or declare a mistrial. A litigant cannot pursue one course of action at trial and seek to have the judgment reversed when the outcome is adverse. See *Ingels* v. *Saldana*, 103 Conn. App. 724, 730, 930 A.2d 774 (2007). To permit a party to raise a claim on appeal that was not raised at trial is unfair to the opposing parties and the trial court. Appellate courts do not sanction ambuscade of the trial court. See *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 618, 64 A.3d 1251 (2013). For the foregoing reasons, the court did not err in failing to declare, sua sponte, a mistrial.

The judgments are affirmed.

In this opinion the other judges concurred.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 175

(Replaces Prior Cumulative Table)

Bigelow *v.* Commissioner of Correction 206
Habeas corpus; whether habeas court abused discretion in denying petitioner certification to appeal; whether court improperly denied petition for writ of habeas corpus; claim that habeas counsel failed to raise claims that trial counsel did not properly advise and adequately represent petitioner during plea negotiations and plea canvass; claim that habeas counsel failed to raise claim that trial counsel improperly failed to file motion seeking petitioner's entry into diversionary substance abuse program; claim that trial counsel provided ineffective assistance by failing to seek certain presentence confinement credit.

Cadle Co. *v.* Ogalin 1
Summary judgment; action to enforce judgment; whether trial court improperly granted motion to strike second special defense alleging that action was duplicative, unfair, inequitable, vexatious and oppressive; whether allegation of nonpayment is sufficient reason for initiating action; whether defendant established claim that action was unfair and duplicative due to fact that active collection proceedings remained pending before trial court; whether trial court properly granted motion for summary judgment; whether trial court properly determined that special defense of laches was equitable defense and not applicable to action for monetary damages that was filed within relevant statute of limitations (§ 52-598); whether defendant alleged facts to create genuine issue of material fact as to whether he was prejudiced by any delay in enforcement; claim that trial court improperly awarded postjudgment interest; failure to specifically plead issue of res judicata as special defense; reviewability of claim raised for first time on appeal.

Colonial Investors, LLC *v.* Furbush 154
Summary process; nonpayment of rent; claim that notice to quit was legally insufficient; claim that disclaimer in notice to quit that any partial payments would be accepted for use and occupancy only and not for rent was misleading; claim that trial court improperly determined that it did not need to decide second special defense; whether customer service charges for utilities were properly included as component of rent; claim that notice to quit included improper water charges and was legally insufficient; claim that plaintiff violated state regulation (§ 16-11-55) pertaining to submetering of water; whether Metropolitan District Commission was subject to regulation promulgated by state Public Utilities Commission; claim that plaintiff misapplied payment to defendant's arrearage rather than to current monthly rental obligation.

Commissioner of Public Health *v.* Colandrea 254
Petition to enforce subpoena duces tecum seeking production of patient records from defendant dentist; subpoena issued pursuant to statute (§ 19a-14 [a] [10]) that explicitly gives Department of Public Health authority to issue subpoenas in connection with investigations; whether trial court properly granted petition to enforce subpoena duces tecum; claim that plaintiff, Commissioner of Public Health, failed to make sufficient factual showing that subpoenaed records were related to complaint under investigation; whether plaintiff established that subpoenaed records met requirements of provision in statute (§ 52-146o [b] [3]) allowing disclosure of patient communications or information without patient consent if disclosure is in connection with investigation or complaint, provided that such communications or information relates to complaint.

Dull *v.* Commissioner of Correction 250
Habeas corpus; whether habeas court improperly dismissed habeas petition as untimely pursuant to statute (§ 52-470 [d] and [e]); claim that petitioner established good cause for untimely filing of habeas petition.

Hosein *v.* Edman 13
Negligence; personal injury; claim that trial court erred in discrediting and effectively precluding testimony of accident reconstructionist witness without

affording plaintiff evidentiary hearing; whether it was within province of trial court, as trier of fact, to decide what weight, if any, to afford testimony of expert witness.

Hynes *v.* Jones 80
Probate; whether Superior Court properly dismissed appeal from Probate Court's denial of motion to dismiss guardianship proceedings; claim that Probate Court lacked subject matter jurisdiction pursuant to statute (§ 45a-629 [a]); claim that the Superior Court improperly determined that minor child was resident of probate district when she became entitled to share of award from victim compensation fund.

In re Luis N. 271
Termination of parental rights; claim that trial court violated respondent mother's right to due process by improperly considering evidence gleaned from ex parte meeting with children in terminating mother's parental rights; whether unpreserved claim was reviewable pursuant to State *v.* Golding *(213 Conn. 233); harmless error; claim that it was plain error for court to consider evidence gleaned from ex parte meeting with children; whether trial court violated mother's right to due process by failing to inform her that she was entitled to receive canvass pursuant to* In re Yasiel R. *(317 Conn. 773) prior to start of trial when that case was not decided until after commencement of mother's trial; whether trial court's finding that mother failed to achieve sufficient degree of personal rehabilitation as would encourage belief that, within reasonable time, considering age and needs of children, she could assume responsible position in their lives was supported by clear and convincing evidence; whether trial court improperly concluded that termination of mother's parental rights was in best interests of children.*

In re Luis N. 307
Termination of parental rights; claim that trial court deprived respondent father of fair trial by meeting with children ex parte, allowing visitation supervisor with Department of Children and Families to attend meeting and failing to make record of court's observations of children; whether unpreserved claim was reviewable pursuant to State *v.* Golding *(213 Conn. 233); whether, even if trial court's ex parte meeting violated father's right to fair trial, any error was harmless; whether father could prevail under plain error doctrine when he failed to challenge factual basis of judgments terminating parental rights; claim that trial court erred in failing to declare mistrial, sua sponte, after ex parte meeting with children; failure to raise claim before trial court.*

Medeiros *v.* Medeiros 174
Dissolution of marriage; motion for contempt; sanctions; claim that trial court failed to allow defendant fair opportunity to present defense to motion for contempt; whether trial court improperly precluded, on hearsay grounds, defendant from testifying regarding statements made to him by parties' child; whether any error was harmless; claim that trial court failed to determine that evidence establishing finding of contempt met required clear and convincing standard of proof; claim that trial court erred in imposing sanctions for defendant's indirect civil contempt; whether challenge to trial court's stayed order of incarceration was moot; whether claim qualified for capable of repetition yet evading review exception to mootness doctrine; whether trial court's stayed incarceration order was punitive; whether trial court abused discretion by failing to consider defendant's ability to pay plaintiff attorney's fees and marshal fees; whether defendant waived right to raise claim as to fees on appeal; whether trial court erred in imposing compensatory fines on defendant without any evidence as to actual damages suffered by plaintiff.

Northrup *v.* Witkowski 223
Negligence; recklessness; whether trial court properly granted motion for summary judgment on ground of governmental immunity; whether allegations that defendant town officials failed to maintain and repair storm drains involved discretionary acts for which defendants were entitled to governmental immunity pursuant to statute (§ 52-557n [a] [2] [B]); claim that genuine issue of material fact existed as to whether town ordinance created ministerial duty; claim that identifiable person-imminent harm exception to discretionary act immunity applied; whether plaintiffs demonstrated that harm alleged was imminent; whether counts alleging recklessness by individual town officials could be maintained as matter of law when record did not support finding that any of individual defendants acted or failed to act with type of wanton disregard that is hallmark of reckless behavior.

Questell *v.* Farogh 262
Negligence; whether trial court abused discretion in denying motion to open and set aside default judgment; whether court reasonably could have concluded that plaintiff was not prevented from attending trial management conference as result of mistake, accident or other reasonable cause.
Sanchez *v.* Edson Mfg. 105
Workers' compensation; whether Workers' Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner denying plaintiff certain disability benefits; whether board properly determined that commissioner's findings concerning cause and extent of plaintiff's disability were supported by sufficient underlying facts; whether board properly found that opinion of medical expert was competent medical evidence on which commissioner properly relied in reaching decision; claim that this court should give less deference to commissioner's credibility determinations where medical examiners did not testify before commissioner; whether board abused discretion in not remanding matter for articulation as to why commissioner disregarded medical opinion of expert chosen by commissioner.
State *v.* Franklin 22
Murder; attempt to commit robbery in first degree; conspiracy to commit robbery in first degree; criminal possession of firearm; whether evidence was sufficient to support conviction of murder; whether evidence was sufficient to support conviction of criminal possession of firearm; claim that trial court abused discretion when it admitted certain uncharged misconduct evidence; claim that prosecutor's allegedly improper comments during closing argument to jury violated defendant's right to fair trial.
State *v.* Torres 138
Murder; carrying pistol without permit; whether first time in-court identification of defendant as shooter made by eyewitness violated defendant's right to due process and should have been excluded pursuant to State *v.* Dickson *(322 Conn. 410), where eyewitness was unable to make reliable identification of defendant in nonsuggestive out-of-court procedure prior to trial; whether defendant waived claim that first time in-court identification of him as shooter by eyewitness violated right to due process and should have been excluded; whether record was adequate for this court to determine that in-court identification of defendant was unreliable; whether admission of identification was harmless beyond reasonable doubt.*
Village Mortgage Co. *v.* Veneziano 59
Injunction; alleged misappropriation of corporate funds through conversion, statutory theft, and embezzlement; statute of limitations; claim that trial court's factual findings were clearly erroneous; reviewability of claims challenging discovery rulings of trial court; credibility determinations; whether trial court improperly denied motion for discovery of information; claim that trial court improperly failed to conclude that plaintiff intentionally spoliated evidence or engaged in discovery misconduct; claim that trial court improperly concluded that three year statute of limitations (§ 52-577) was not tolled by doctrine of fraudulent concealment; claim that knowledge of corporation can only be imputed through board of directors.

SUPREME COURT PENDING CASE

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

IN RE HENRRY P. B.-P., SC 19907
Juvenile Matters at Hartford

Juveniles; Immigration; Whether Appellate Court Properly Affirmed Judgments Dismissing Appeals from Probate on Ground that Probate Court Lacked Statutory Authority to Provide Relief Once the Child Turned Eighteen. Henrry was seventeen years old when he fled persecution in Honduras and was reunited with his mother in Connecticut. Henrry and his mother filed petitions in the Probate Court asking that it make findings necessary for Henrry to petition the federal government to remain in this country. The Probate Court denied relief on those petitions, and Henrry and his mother challenged those decisions with two appeals to the Superior Court. The Superior Court dismissed the appeals, finding that it lacked jurisdiction because Henrry had turned eighteen years old before the appeals were filed. Henrry and his mother appealed to the Appellate Court, claiming that, under the circumstances here, the Probate Court should have waived certain requirements and should have provided emergency relief before Henrry turned eighteen in the form of special immigrant juvenile status findings. The Appellate Court (171 Conn. App. 393) disagreed and affirmed the judgments of dismissal, finding that the plain language of the statutes governing guardianship of minor children and authorizing special immigrant juvenile status findings did not permit the Probate Court to provide Henrry and his mother the relief they sought once Henrry turned eighteen. The Appellate Court concluded that, as a result, the trial court properly found that Henrry and his mother's claims had been rendered moot because the Probate Court could not provide them the relief they requested once Henrry had attained the age of majority. Henrry and his mother appeal, and the Supreme Court will decide whether the Appellate Court properly affirmed the Superior Court judgments dismissing their appeals from the Probate Court.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

The summary appearing here is not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues

raised on appeal. This summary is prepared by the Staff Attorneys' Office for the convenience of the bar. It in no way indicates the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

CONNECTICUT AIRPORT AUTHORITY

Notice of Intent to Adopt Taking Standards

In accordance with the provisions of Conn. Gen. Stat. § 13b-45, the Connecticut Airport Authority hereby establishes and adopts the following standards for making a determination that public convenience, necessity or safety require the taking of any parcel of land or interest in land under Conn. Gen. Stat. §§ 13b-43 and 13b-44:

When compliance with (1) Federal Aviation Regulation Part 77, as the same may be from time to time amended, and/or (2) Federal Aviation Advisory Circular No 150/5300-13, as the same may be from time to time amended, and/or FAA Order 8260.3B, as the same may from time to time be amended or changed, would require, without the taking of additional land or interests in land, a relocation of runway thresholds, or when an obstacle or obstacles otherwise present a safety impact or impacts and are determined to be a hazard to air navigation by the Federal Aviation Administration.

Dated at Windsor Locks, Connecticut, this 20th day of July, 2017.

Kevin A. Dillon, A.A.E.
Executive Director

NOTICES

Opening of Litchfield Judicial District Courthouse at Torrington, 50 Field Street, Torrington

This August, the Judicial Branch will commence operations in the new Litchfield Judicial District Courthouse at Torrington (hereinafter, new Torrington Superior Courthouse), located at 50 Field Street, Torrington. The new facility will combine the Litchfield Judicial District, Geographical Area 18 and Torrington Juvenile Matters courthouses. As a result, the following changes will occur:

Effective at the end of business on August 25, 2017, the Litchfield Judicial District Courthouse, 15 West Street, Litchfield will permanently close. At that time, all matters pending in that facility will be transferred to the new Torrington Superior Courthouse and all new matters filed in the Litchfield Judicial District must be filed in the new Torrington Superior Courthouse.

Effective at the end of business on September 8, 2017, the Superior Court for Juvenile Matters at 410 Winsted Road, Torrington, will permanently close. At that time, all matters pending in that facility will be transferred to the new Torrington Superior Courthouse and all new matters filed in the Torrington Juvenile Venue District must be filed in the new Torrington Superior Courthouse.

Effective at the end of business on September 15, 2017, the Geographical Area 18 Courthouse, 80 Doyle Road, Bantam, will permanently close. At that time, all matters pending in that facility will be transferred to the new Torrington Superior Courthouse and all new matters filed in Geographical Area 18 must be filed in the new Torrington Superior Courthouse.

Please direct all inquiries regarding this matter to Brandon Pelegano, Esq., Judicial District Chief Clerk, at 860-567-0885.

Hon. Patrick L. Carroll III
Chief Court Administrator

Small Claims Decentralization

Effective Monday, October 16, 2017, the Centralized Small Claims Office located at 80 Washington Street, Hartford, CT 06106 will be closed. No new small claims writs or any other documents on small claims cases can be filed at the Centralized Small Claims Office in person, by fax or by mail as of that date. The decentralization process will begin in August, 2017, and be completed effective October 16, 2017. The following is a brief summary of the changes. For more information on small claims decentralization, go to the Judicial Branch website at www.jud.ct.gov or a clerk's office, court service center, public information desk or law library.

Effective Friday, September 1, 2017 and after:

1. All small claims cases filed *with the Centralized Small Claims Office* or electronically through Small Claims E-Filing will have an answer date on or

after October 16, 2017, and will be transferred to the small claims docket at the appropriate judicial district or housing session.

2. Any existing (pending or post-judgment) small claims case that (1) requires a hearing date after September 1, 2017; or (2) has a final date for compliance ordered by a magistrate after September 1, 2017, will be transferred to the small claims docket in the appropriate judicial district or housing session.

3. When a case is transferred, the court will send to counsel and self-represented parties notice of the court location and a new docket number that must be used on any documents filed with the court for these cases. Paper documents must include the new docket number and be filed with the clerk of the appropriate location. Electronically-filed documents must be filed through *Superior Court E-filing*, using the new docket number.

4. Any new cases, or documents filed on existing cases that have not been transferred, shall be filed electronically through Centralized Small Claims E-Filing or on paper with the Centralized Small Claims Office or at the appropriate court location, until 5:00 p.m. on October 13, 2017.

Effective October 16, 2017, and after:

1. When you are filing a new small claims case after the defendants have been served, you must file the small claims writ with the appropriate judicial district or housing session location clerk's office as set forth in Section 51-345 and 51-346 of the Connecticut General Statutes.

2. If you are filing any document *on paper* (including an application for an execution filed by a self-represented party) on an existing case that has not been transferred to a judicial district or housing session location, you must file the paper document with the appropriate judicial district or housing session clerk's office. The clerk will then have the case transferred from Centralized Small Claims to the appropriate judicial district or housing session location.

3. If you are filing an application for an execution *electronically* on a small claims case that has *not* been transferred and assigned a new docket number, you must use the existing small claims docket number and file it through Centralized Small Claims E-Filing, not Superior Court E-Filing. Once the execution is filed, the case will be transferred to the small claims docket in the appropriate judicial district or housing session location and assigned a new docket number.

4. If you want to view a file that has not been transferred and assigned a new docket number, you must contact the appropriate judicial district or housing session location for assistance.

For more information on where to file small claims cases, go to the Judicial Branch website:
http://www.jud.ct.gov/directory/directory/directions/smallclaims.htm.

JUDGE TRIAL REFEREE DESIGNEES ARBITRATION PROCEEDINGS - TRIAL DE NOVO

The following judge trial referees have been duly designated by Chief Justice Chase T. Rogers in accordance with subsection (b) of Connecticut General Statutes § 52-434 to hear proceedings resulting from a demand for a trial de novo pursuant to subsection (e) of Connecticut General Statutes § 52-549z, for the period July 1, 2017 through June 30, 2018 (unless otherwise noted):

Hon. Taggart D. Adams
Hon. Gerard I. Adelman
Hon. Arnold W. Aronson
Hon. Sidney Axelrod
Hon. Robert E. Beach, Jr. (from 7/18/17)
Hon. Richard E. Burke
Hon. Henry S. Cohn
Hon. Richard F. Comerford, Jr.
Hon. Thomas J. Corradino
Hon. John F. Cronan
Hon. Lloyd Cutsumpas
Hon. Joseph W. Doherty
Hon. Edward J. Dolan
Hon. Constance L. Epstein
Hon. Francis J. Foley, III
Hon. Stephen F. Frazzini
Hon. Bernard D. Gaffney
Hon. Elizabeth A. Gallagher
Hon. Charles D. Gill
Hon. Robert G. Gilligan
Hon. Michael Hartmere
Hon. Arthur A. Hiller
Hon. Alfred J. Jennings, Jr.
Hon. Edward R. Karazin, Jr.
Hon. James G. Kenefick, Jr.
Hon. Joseph Q. Koletsky
Hon. William J. Lavery
Hon. Joseph A. Licari, Jr.
Hon. Michael A. Mack
Hon. Robert J. Malone
Hon. Robert A. Martin
Hon. John W. Moran
Hon. Maurice B. Mosley
Hon. A. William Mottolese
Hon. John F. Mulcahy, Jr.
Hon. Edward J. Mullarkey
Hon. Raymond R. Norko
Hon. Thomas V. O'Keefe, Jr. (from 7/18/17)
Hon. A. Susan Peck
Hon. Joseph H. Pellegrino
Hon. John W. Pickard
Hon. Barbara M. Quinn
Hon. John J. Ronan
Hon. William B. Rush
Hon. Thelma A. Santos
Hon. Karen Sequino (from 8/23/17)
Hon. William M. Shaughnessy, Jr.
Hon. Michael E. Shay
Hon. Joseph M. Shortall
Hon. Edward F. Stodolink
Hon. William J. Sullivan
Hon. Lois Tanzer
Hon. Samuel H. Teller
Hon. George N. Thim
Hon. Bruce W. Thompson
Hon. Kevin Tierney
Hon. David R. Tobin
Hon. Thomas G. West

Hon. Patrick L. Carroll III, Judge
Chief Court Administrator

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 July 17, 2017:

Georgia A. Foerstner	Travelers
Anna-Emily Chamblin Gaupp	Hubbell Incorporated

Certified as of July 21, 2017:

Emily Tabak Epstein	Nielsen
Debra Lee Stone	Renaissance Capital LLC

Hon. Patrick L. Carroll III
Chief Court Administrator

Revised Notice of Interim Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on July 19, 2017, in Docket Number HHD-CV 17-6079492, Patrick Lyle (juris# 408202) of Bloomfield, CT was placed on interim suspension from the practice of law, effective immediately, until further order of the court.

The court further orders Attorney Edward Gasser (juris #309481) of Avon, Connecticut to be appointed as Trustee, pursuant to the provisions of Practice Book § 2-64, to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondent's files, and to take control of Respondent's clients' funds, IOLTA and fiduciary accounts.

Antonio Robaina
Presiding Judge

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2017-2, dated July 20, 2017, by order of the Board, Charles F. Chiusano, Chairperson:

Questions Presented: **The petitioner asks (1) whether Randy Edsall's ''negotiation of a job at UConn for his son is permissible under the Code of Ethics''; and (2) whether his son's ''position with UConn may be as [an] Assistant Football Coach[.]''**

Brief Answers: **Based on the facts presented, we conclude (1) that, because Randy Edsall was a ''state employee'' as of December 28, 2016, the date he and UConn executed a binding and enforceable employment contract, his subsequent negotiations with UConn concerning his son's salary (among other things) were impermissible under General Statutes § 1-84 (c); and (2) that § 1-84 (c) prohibits Randy Edsall's son from being employed by UConn as one of his father's assistant football coaches.**

At its March 16, 2017 regular meeting, the Citizen's Ethics Advisory Board (Board) granted the petition for an advisory opinion submitted by its Chairperson, Charles F. Chiusano. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (Code).[1]

Background

On December 22, 2016, Kimberly Fearney, the Director of Compliance and Ethics Liaison for the Storrs and Regional Campuses of the University of Connecticut (UConn), sent an e-mail to the Legal Division of the Office of State Ethics (OSE). In it, Ms. Fearney asked for an informal staff opinion concerning a ''hypothetical'':

> The University is recruiting a candidate for a position. As part of the negotiations, one of the conditions sought is a position for their immediate family member. This would be part of the contract agreed to by the candidate and the University and signed before they begin employment. Can you confirm for me that this is permissible?
>
> In addition, I know from prior guidance that it would be permissible for the family member to work within the same department, if they are not reporting, either directly or indirectly, to their family member. This would all be reviewed and signed off by the appropriate individuals with the proper controls in place. It would follow the same guidance, etc. as shared in AO 94-5 and AO 88-8.
>
> Can you confirm for me that my understanding is correct and the above is permissible under the Code?

[1] General Statutes § 1-79 *et. seq*.

Though Ms. Fearney didn't name the candidate, the candidate's family member, the positions to be filled, or the department in which those positions are housed, she did refer to Advisory Opinion Nos. 88-8 and 94-5. Issued by the State Ethics Commission, the opinions conclude that immediate family members may—with certain caveats—serve in the same academic department. Assuming that Ms. Fearney's hypothetical involved a similar situation—namely, family members serving in the same academic department (say, the History Department)—the OSE Legal Division responded with this:

> Because the candidate is not yet a ''public official'' or ''state employee,'' the Code . . . does not apply to him or her, meaning that what would otherwise be a clear use-of-office violation under General Statutes § 1-84 (c)—namely, using one's state positon to help one's spouse obtain a state job—is nonetheless technically permissible.
>
> As for family members serving in the same department, it is likewise permissible, provided (as you note . . .) that the safeguards discussed in Advisory Opinion Nos. 88-8 and 94-5 are followed.[2]

Fast forward to January 9, 2017, the date the Hartford Courant published an article titled, ''Edsall Names 4 to UConn Staff, Including Son Corey, Who Won't Report to Coach.''[3] After reading it, the OSE Legal Division phoned Ms. Fearney, asking if the candidate mentioned in her hypothetical was Randy Edsall, and she answered yes. She was informed that the December 2016 informal staff opinion—which was based on generic facts and relied on advisory opinions involving family members serving in the same academic department—should not be read to suggest that ''Randy Edsall's son [may] be employed as an assistant UConn football coach.''[4] She was also encouraged to petition the Board for an advisory opinion because the issue of family members serving on the same coaching staff has never been addressed.

The next few weeks saw some back and forth on the matter between the OSE Legal Division and Ms. Fearney, who submitted a management plan concerning Corey Edsall on January 26, some highlights of which are as follows:

- ''Initial decisions regarding Corey's salary, will be dictated by the Director of Athletics or his designee (not subordinate to the Head Coach).''
- ''Performance evaluations will be conducted by the Director of Athletics or his designee (not subordinate to the Head Coach).''
- ''The decision to renew his employment on an annual basis will be made solely at the discretion of the Director of Athletics or his designee (not subordinate to the Head Coach).''
- ''Corey's status/employment as an assistant coach/position coach on the football staff will only be able to be modified at the direction of the Director of Athletics or his designee (not subordinate to the Head Coach). This would include any significant change in responsibility for position group, special teams, recruiting or coordination of the offense.''
- ''Corey Edsall will work with the Offensive Coordinator day to day. The Offensive Coordinator has a three year contract that was approved by the

[2] OSE Request for Advisory Opinion No. 15052 (2016).

[3] Mike Anthony, *Edsall Names 4 To UConn Staff, Including Son Corey, Who Won't Report To Coach*, Hartford Courant, January 9, 2017.

[4] OSE Request for Advisory Opinion No. 15159T (January 9, 2017).

Athletic Director. Amendment or renewals of his contract will be approved by the Athletic Director and not the Head Coach.''

- ''[T]he Director or his designee (not subordinate to the Head Coach) will'' do as follows:
  - ''Frequently attend football practice . . . with dedicated time being spent observing Corey Edsall.''
  - ''Attend all scheduled competitions, to observe and provide feedback, both directly and indirectly about performance.''
  - ''[R]andomly attend individual position meetings that are being led by Corey Edsall.''
  - ''[S]chedule monthly meetings to discuss job performance and any corrective measures necessary.''
  - ''Review the following performance metrics: annual academic performance, annual statistics of tight ends and their performance in game, number of recruits signed annually that Corey was the lead recruiter and social accountability measures.''
  - [P]erform an annual performance review . . . based on the Director of Athletics and this designee's observations, performance metrics, student-athlete exit interviews and comprehensive discussions with other football and non-football staff that interact with Corey.''

Three weeks after UConn submitted the management plan, a member of this Board independently raised the issue of Corey Edsall's hiring at the Board's February 2017 meeting. The Board discussed the matter, including the December 2016 informal staff opinion issued to Ms. Fearney. It then directed the OSE General Counsel to ''reach out to UConn and ask them to seek an Advisory Opinion on this matter which would allow the Board to gather and fully understand all pertinent facts and address this issue formally.''[5] The plan was to ''follow up on this issue at'' the Board's March 2017 meeting.[6]

As directed, the OSE General Counsel contacted Ms. Fearney, asking that UConn request an advisory opinion on the Edsall matter. UConn, through its Associate General Counsel, Nicole Fournier Gelston, responded with a four-page letter to the OSE General Counsel, dated March 1, 2017. In it, Attorney Gelston details the steps UConn has taken to comply with the Code; argues that the Code and the opinions interpreting it support UConn's position; notes that family members serving in the same department ''is relatively commonplace in institutions of higher education''; and suggests that the OSE Legal Division's reason for disallowing UConn to rely on the December 2016 informal staff letter was fear of public clamor: ''[I]n January 2017 following some criticism of Corey Edsall's hiring, your office reached out to Ms. Fearney . . . .''[7] (For the record, the OSE Legal Division contacted Ms. Fearney after reading the Courant article because it was the first time it had learned of the hiring. Further, the article is hardly critical; if anything, it is supportive,

[5] Citizen's Ethics Advisory Board, Minutes of February 16, 2017 meeting.

[6] Id.

[7] Attorney Gelston levels a similar charge at the letter's end, stating that the OSE Legal Division's position here ''undermines a central foundation of the Code . . . as it is intended to apply to all state employees, regardless of rank or position, and its application is to be 'unswayed by' among other things 'public clamor or fear of criticism.'''

noting that ''[f]athers and sons being part of the same coaching staff is not uncommon in college football,'' and following that with no less than six examples.[8])

A week later—with UConn still not having submitted an advisory-opinion petition—Charles F. Chiusano, Chairperson of this Board, submitted his own. In his petition, he asks the Board to address two issues under the Code: first, whether Randy Edsall's ''negotiation of a job at UConn for his son is permissible under the Code of Ethics,'' and second, whether his son's ''position with UConn may be as [an] Assistant Football Coach[.]'' The petition was sent to UConn, which was notified that the Board would vote on whether to grant it at the Board's March 16 meeting, and that UConn would have an opportunity to address the Board.

At the Board's March 16 meeting, Attorney Gelston—accompanied by Ms. Fearney, the UConn Athletics Director, and the Chief Operating Officer of UConn Athletics—argued to the Board that it would be ''unnecessary and inappropriate'' to issue an advisory opinion. Specifically, she argued that, because the issues Chairman Chiusano raised in his petition have already been addressed by the OSE and its predecessor (the State Ethics Commission), the Board should deny the petition. The Board rejected Attorney Gelston's argument, voting unanimously (6-0) to grant the petition, and asking UConn to cooperate with the OSE Legal Division in its attempt to obtain the relevant facts.

Five days later, the OSE Legal Division sent UConn a ''Document and Information Request.'' It contained twenty document requests and ten multi-part questions. UConn responded to that request on April 12 with numerous documents (e-mails, contracts, etc.); answers to the ten questions; and a letter arguing that the information requests are overly broad and (for the most part) irrelevant, and reiterating its prior argument that the employment of the Edsalls ''is fully consistent with the principles of the Code . . . and in accordance with longstanding precedent found in formal Advisory Opinions.''

We will set forth additional facts below as necessary.

Analysis

Before us, there are two questions, the first being whether, based on the facts presented, it was permissible for Randy Edsall to negotiate a job at UConn for his son. The follow-up question is whether the Code permits that position to be as one of Randy Edsall's assistant football coaches. To both questions, we answer no.

1. Randy Edsall's negotiation of a job at UConn for his son

In Advisory Opinion No. 94-18—which involved immediate family members serving in the same department of a state agency—the State Ethics Commission explained: ''the individual who is in a position of superior authority may not take any action which furthers the financial interest of his or her [family member].''[9] That is, ''[f]rom the hiring process to the evaluation process, the [family member] of greater rank must refrain from taking any such action.''[10] The Commission based its conclusion on General Statutes § 1-84 (c), under which ''no . . . *state employee* shall use his public . . . position . . . to obtain financial gain for . . . his spouse, child, child's spouse, parent, brother or sister . . . .''[11]

[8] See, supra, footnote 3.
[9] Advisory Opinion No. 94-18, Connecticut Law Journal, Vol. 56, No. 11, p. 5B (September 13, 1994).
[10] Id.
[11] (Emphasis added.)

The key term there is ''state employee,'' for UConn's entire argument on this first question rests on its assumption that Randy Edsall wasn't a ''state employee'' when he sought and negotiated a position for his son. Specifically, in an April 11, 2017 letter to the OSE General Counsel, Attorney Gelston argues that this question

> is resolved on showing that Randy Edsall was not a state employee when he sought, as a condition of his own employment, a position for his son. [UConn] has already represented to the Board that Randy Edsall was not employed by UConn when he sought a position for his son. Further, at no time since commencing employment with UConn has Randy Edsall taken any steps to influence Corey's salary or other terms and conditions of his employment, or any other steps that would have a financial impact on Corey Edsall.

But the question's answer isn't nearly as clear cut as UConn would have us believe. In its submission to the OSE, UConn attached a January 1, 2017 e-mail from Beth Goetz, Chief Operating Officer of UConn Athletics, to Randy Edsall, in which Ms. Goetz stated:

> I need the following information to draft an offer letter to Corey.
>
> Start date
> Salary
> Position
> Moving Expenses & temporary housing?

That same day, Randy Edsall sent an e-mail response to Ms. Goetz, who (minutes after receiving it) forwarded it to David Benedict, the UConn Athletic Director. In the e-mail, Randy Edsall states:

> Corey will start on Monday, January 9th and I would like to pay him $100,000.00. He will coach one of the skilled positions on offense. If it has to be specific right now, it would be Tight Ends. Could change, but don't think so.
>
> Moving Expenses = yes (shouldn't be too much)
>
> Temporary Housing = I would have him stay with me in the House until he gets an apartment on his own.

The next day, January 2, Ms. Goetz responded to that e-mail, stating: ''We don't have any concerns with the range we discussed with Corey. AAC salary date (prior to several coaching changes) shows the lowest coach at 85k, so no concerns going with the higher end.''

Two days later, UConn issued an offer letter to Corey Edsall, offering him ''the full time position of Assistant Football Coach (Specialist IIA) at [UConn] with a start date of Monday, January 9, 2017,'' and giving him what his father asked for: ''an annual salary of $100,000.'' Two days after that, UConn issued a ''Revised Offer Letter,'' this time offering him the reduced salary of $95,000. (When asked for any communications between UConn employees, including the Edsalls, concerning the initial and revised offer letters, UConn responded that it has none.)

Although it is unclear on what date they settled on that salary, it is clear that—as of January 1 and 2, 2017—Randy Edsall was still negotiating with UConn concerning his son's salary (among other things). The question, therefore, is whether

he was a ''state employee'' as of those dates, for if so, § 1-84 (c) would have barred him from engaging in the negotiations.

In answering that question, we start with Randy Edsall's December 28, 2016 employment contract with UConn. In the contract, Mr. Benedict opens with this:

> It is with great pleasure that *I offer you the position of Head Football Coach for the University of Connecticut (''UConn''), effective January 3, 2017*. This letter represents the material terms of UConn's employment offer and will be incorporated into a formal employment contract with UConn for execution at the earliest possible date.
>
> *Your acceptance of this offer will constitute a binding agreement between you and UConn* and, in advance of the execution of a formal employment contract, this letter and the terms set forth herein will exist as the *enforceable agreement* between you and UConn . . . .[12]

The contract goes on to set out Randy Edsall's terms of compensation and ''Other Terms,'' including that ''UConn agrees to make an employment offer to your son to serve in the Division of Athletics.'' (The contract doesn't specify what his son's position within the Division of Athletics would be, nor does it discuss his son's salary or other benefits.) Finally, the contract reiterates that ''this letter and the terms set forth herein will continue to exist as the *binding agreement* between the parties until the execution of a formal employment contract.''[13]

Randy Edsall signed the employment contract that very day, December 28, 2016.

As of December 28, 2016, then, there was a binding and enforceable employment contract between UConn and Randy Edsall under which he would take over as Head Football Coach for UConn ''effective January 3, 2017.'' Obviously, UConn takes the position that he didn't become a ''state employee'' until the January 3 effective date, meaning that his January 1 negotiations with UConn concerning his son were permissible, as he wasn't yet a ''state employee'' and thus wasn't yet subject to § 1-84 (c). The question, however, is whether Randy Edsall became a ''state employee''—for purposes of the Code's definition of that term—before that date, specifically, on December 28, 2016, the date he and UConn executed the employment contract.

The answer to that question is a matter of statutory construction, the objective of which ''is to ascertain and give effect to the apparent intent of the legislature.''[14] ''In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.''[15] General Statutes § 1–2z requires that we first consider the statute's text and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning of the statutory text is plain and unambiguous and does not yield absurd or unworkable results, we may not consider ''extratextual evidence of the meaning of the statute.[16] Only if we determine that the text of the statute is not plain and unambiguous may we look to extratextual evidence of its meaning,'' such as ''the legislative policy it was designed to implement . . . .''[17]

[12] (Emphasis added.)

[13] (Emphasis added.)

[14] (Internal quotation marks omitted.) *Perodeau* v. *Hartford*, 259 Conn. 729, 735 (2002).

[15] (Internal quotation marks omitted.) *Picco* v. *Voluntown*, 295 Conn. 141, 147 (2010).

[16] E.g., *Saunders* v. *Firtel*, 293 Conn. 515, 525 (2009).

[17] (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 399 (2010).

Starting with the relevant statutory text, General Statutes § 1-79 (13) defines ''state employee,'' in part, as ''any *employee* in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . . .''[18] That definition, alone, offers no help in determining when Randy Edsall became a ''state employee.'' The key lies in the word ''employee,'' and because the Code does not define it, we look to General Statutes § 1-1 (a), which directs that, ''[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . .'' ''[T]o ascertain [a word's] commonly approved meaning,'' ''[w]e look to [its] dictionary definition.''[19]

The Court of Appeals of Michigan did just that in *McCloughan* v. *Public School Employees Retirement System*.[20] There, the petitioner and a local board of education had ''executed an employment contract dated May 13, 1968,'' under which he would teach and coach at a local public school.[21] The contract was for the next school year (1968-1969), and its effective date was September 3, 1968, at which point the petitioner would start receiving a paycheck. Before the contract's effective date, the petitioner was drafted into the armed forces, where he served for two years. After returning home, he executed another employment contract to teach and coach at the local public school, where he worked for the next 40 years.

An issue in *McCloughan* was whether, under the Public School Retirement System, the petitioner was an ''employee'' of the local public school when he was drafted into the armed forces.[22] The retirement board thought not, stating:

> Obviously had [the petitioner] taught or coached on or after the contract's effective date, September 3, 1968, he would have been a public school employee. However, that never occurred because of his induction into the Army on August 28, 1968. Since he did not perform under the employment contract, he never became an employee of the public local school district.[23]

Michigan's Court of Appeals rejected that conclusion, noting that the Random House Webster's College Dictionary (1992) defines ''employee'' as ''a person who has been hired to work for another.''[24] Thus, said the court, ''the proper test was whether the petitioner was 'a person who has been hired to work for another' at the time he was inducted into the army.''[25] And the answer ''was clearly yes'': the petitioner ''was hired when he and representatives of the [local board of education]

[18] (Emphasis added.)

[19] *14 R. C. Equity Group, LLC* v. *Zoning Commission*, 285 Conn. 240, 254 n. 17 (2008).

[20] *McCloughan* v. *Public School Employees Retirement System*, No. 300750, 2011 WL 6378825 (Court of Appeals of Michigan Dec. 20, 2011).

[21] Id., *1.

[22] Id., *3.

[23] Id. Even under the retirement board's reasoning, Randy Edsall would be an ''employee'' of UConn before the January 3 effective date, because he was apparently performing under the employment contract before that date. In fact, in a separate letter of December 28, 2016, from the UConn Athletic Director to Randy Edsall (which was not submitted to us by UConn, but was located on the internet), the Athletic Director states: ''The University asked you to begin work immediately.'' And in an e-mail of January 1, 2017, from Beth Goetz to Randy Edsall discussing the interview process for assistant coaches, she states: ''We do need those you are interested in to officially apply . . . and then we need to officially request permission to interview. This shouldn't slow any conversations *you are having*.'' (Emphasis added.) Randy Edsall responded later that day with an e-mail of his own, listing seven individuals and the positions they would hold.

[24] Id.

[25] Id., *4.

signed the employment contract.''[26] According to the court, then, the petitioner was an ''employee'' of the public school once the employment contract was executed—rather than when the contract's effective date was reached.

Clearly, therefore, the word ''employee'' can be read to capture an individual who has entered into an employment contract, but who has not yet reached the effective date for assuming the position.[27] And it is this interpretation that makes the most sense when read in the context of the entire Code.[28] Indeed, in other instances, the Code expressly subjects individuals to some or all of its provisions even though they've not yet assumed a state position. For example, not only are members of the General Assembly subject to the Code in its entirety, but so too are ''*member[s]-elect* of the General Assembly.[29] In other words, an individual who is elected to the General Assembly in November is subject to the Code *on Election Day*, despite that he or she doesn't assume the office until January of the next year.[30] Still more, the Code subjects ''candidate[s] for public office''[31] to its gift and anti-bribery provisions, despite that they (unlike ''member[s]-elect'') haven't yet even been elected or appointed to the office.[32]

That said, the plain language of § 1-79 (13), when read in connection with other Code provisions, demonstrates that the legislature intended the word ''employee,'' as used in that statute, to mean a person who has been hired to work for the state. And if we apply that definition here, Randy Edsall became an ''employee'' of UConn—not on the January 3, 2017 effective date for assuming the position of Head Football Coach—but on December 28, 2016, the date he and UConn executed the binding and enforceable employment contract. As such, he was, as of December 28, 2016, a ''state employee'' for purposes of the Code, meaning that he was subject to its use-of-office ban and, as a result, barred from negotiating with UConn concerning his son's employment after that date. Accordingly, his January 1, 2017 negotiations with UConn concerning his son's salary (among other things) were impermissible under § 1-84 (c).

To conclude otherwise—that is, to hold that Randy Edsall was not a ''state employee'' at the point he and UConn executed the employment contract—would defy common sense and lead to an absurd result.[33] It would mean that an individual who has executed a binding and enforceable employment contract with a state or quasi-public agency, but whose effective date for assuming the position is a few days off, could—without any repercussions under the Code—

[26] Id.

[27] An example of a *statutory* (rather than dictionary) definition of ''employee'' that would capture such an individual is found in General Statutes § 31-275 (9) (A) (i) of the Connecticut Workers' Compensation Act, which defines the term, in part, as someone who ''[h]as entered into or works under any contract of service or apprenticeship with an employer.'' See *Bugryn* v. *State*, 97 Conn. App. 324, 330 (concluding that decedent, who died of a heart attack shortly after completing a physical fitness test as part of the job application process to become a correction officer, was not an ''employee'' of the state at the time because he had not yet ''entered into a contract of service with the state''), cert. defined, 280 Conn. 929 (2006).

[28] See *State* v. *LaFleur*, 307 Conn. 115, 129 (2012) (''[i]n accordance with '' 1–2z, we continue our analysis by looking to the relationship of the statute to other statutes'').

[29] General Statutes § 1-79 (11) (defining ''public official'').

[30] See Conn. Const., art. III, § 10.

[31] '''Candidate for public office' means any individual who has filed a declaration of candidacy or a petition to appear on the ballot for election as a public official, or who has raised or expended money in furtherance of such candidacy, or who has been nominated for appointment to serve as a public official . . . .'' General Statutes § 1-79 (3).

[32] General Statutes § 1-84 (f), (g), and (j).

[33] See *Shortell* v. *Cavanagh*, 300 Conn. 383, 388 (2011) (''[w]e must interpret [the statute] so that it does not lead to absurd results'').

- accept bribes;
- accept gifts from state lobbyists and contractors;
- solicit gifts from state lobbyists and contractors for himself and his immediate family members;
- demand that his immediate family members get state contracts without going through an open-and-public process;
- require his soon-to-be subordinates to clean his house, walk his dog, pick up his groceries, etc.

Surely the General Assembly couldn't have intended such a bizarre result.

Finally, even if, for argument's sake, we were to conclude that the language of § 1-79 (13), as read in connection with other Code provisions, was ambiguous, it would simply mean that we would be allowed to ''look to extratextual evidence of its meaning,'' such as ''the legislative policy it was designed to implement . . . [34] Indeed, according to our Supreme Court, if—as is the case here—''the word to be interpreted [i.e., ''state employee''] is found in a legislative prescription, the overall purpose of the legislation is of particular relevance in arriving at the appropriate meaning.''[35]

The Commission articulated the Code's purpose in Advisory Opinion No. 86-8. The question there was whether a person remains a ''State employee'' under ''the Code . . . while on [a six-month, unpaid] leave of absence.''[36] To answer it, the Commission looked to the Code's purpose—namely, ''to prevent a person from *using a State position . . . for private financial benefit*''[37]—and concluded as follows: ''To fulfill the purposes of the Code . . . and as its language allows, a State employee on leave of absence remains a 'State employee.'''[38] Its rationale for doing so was this:

> A person leaving active service in a State position for a period from six working days to a calendar year and then returning to the same or, perhaps, a similar position often would be almost as capable of using the *prospective position* for private gain as one who continues in a position. *The payoff might be delayed until the end of the leave of absence, but not necessarily . . .* .If limitations must be placed on the activity of former State employees in order to maintain public confidence in the integrity of the operations of State government *. . . it is even more important to circumscribe the activity of persons leaving active State service with the expectation or possibility of returning to a State position*.[39]

The Commission's rationale for concluding as it did applies with equal (if not more) force here. There, the person was leaving state service for six months—with the mere ''possibility'' of returning to her state position—yet the Commission still felt compelled to ''circumscribe [her] activity,'' so as to prevent her from using a ''prospective position for private gain,'' be it delayed or not. Here, Randy Edsall and UConn executed a binding and enforceable employment contract—at which

[34] (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, supra, 297 Conn. 399.
[35] *Planning & Zoning Commission* v. *Synanon Foundation, Inc.*, 153 Conn. 305, 309 (1966).
[36] Advisory Opinion No. 86-8, Connecticut Law Journal, Vol. 48, No. 6, p. 1D (August 5, 1986).
[37] (Emphasis added.) Id.
[38] Id., 2D.
[39] (Emphasis added.) Id.

point he possessed a position that he could use for private gain—and his official start date[40] was not six months off, but a mere six days. Hence, under the Commission's rationale in Advisory Opinion No. 86-8, it would defy logic for us *not* to circumscribe his activity.

Accordingly, we conclude that, because Randy Edsall was a ''state employee'' as of December 28, 2016, the date he and UConn executed an employment contract, his subsequent negotiations with UConn concerning his son's salary (among other things) were impermissible under § 1-84 (c).

2. Randy Edsall's son serving as an assistant on his father's coaching staff

Turning to the second issue, we must address whether Corey Edsall may serve as one of his father's assistant coaches. UConn argues that he may do so, and it relies on three advisory opinions issued by the State Ethics Commission for support. But in our view those opinions don't countenance the arrangement in question (and even if they did, we're not bound by them[41]).

Of the three advisory opinions UConn relies on, two of them address the issue of immediate family members serving in the same university department (Advisory Opinion Nos. 88-8 and 94-5), and one addresses spouses working in the same department of a state agency (Advisory Opinion No. 94-18). We will address each one.

In Advisory Opinion No. 88-8, the Commission was asked this question: ''Because of the *quasi*-supervisory role of the department chairperson in a department's activities, can either of two immediate relatives in the same *department* serve as chairperson without creating a situation in substantial conflict . . . .''[42] Yes, concluded the Commission, ''as long as the restrictions of subsections 1-84 (c) and 1-86 (a) are adhered to.''[43] That is, ''when required to take an action which would significantly affect the financial interest of [an immediate relative], the Chairperson must proceed as mandated by 1-86 (a)''—namely, abstain and file a conflict statement with his immediate superior, who must assign the matter to one of the Chairperson's peers or superiors.[44] Actions that could have a significant financial impact would include those involving ''promotion, tenure, reappointment, and appointment,'' as well as those involving ''teaching assignments and scheduling conflict.''[45] Further, ''[w]hen the requisite financial impact is present, the Chairperson must not only avoid acting with regard to the immediate relative, but also with regard to *any competitor* of that relative.[46] And if ''a chairperson must abstain and file statements pursuant to 1-86 (a) on frequent occasions, *e.g., when the immediate relative of the Chairperson is an untenured junior member of the departmen*t, the Chairperson should consider whether the potential conflicts are so substantial as to significantly interfere with official responsibilities. If so, the Chairperson should resign.''[47]

[40] As noted earlier, although the December 28, 2016 employment contract lists January 3, 2017, as Randy Edsall's effective date as UConn Head Football Coach, he was apparently expected to, and apparently did in fact, begin work before that date.

[41] See Advisory Opinion No. 2009-1 (''[a]lthough we will not lightly overturn precedent, if, after reconsidering a prior opinion and discussing it with our counsel, we are left with the 'firm conviction' that it was wrongly decided, we will not compound the error by following suit'').

[42] (Emphasis added.) Advisory Opinion No. 88-8, Connecticut Law Journal, Vol. 49, No. 48, p. 3D (May 31, 1988).

[43] Id., 4D.

[44] Id.

[45] Id.

[46] (Emphasis added.) Id.

[47] (Emphasis added.) Id.

After the Commission issued the opinion, its Executive Director/General Counsel sent a copy of it to the individual who requested it, along with a letter, saying this:

> As you will note, the Opinion states that immediate family relatives can be employed in the same department, as long as applicable provisions of the Code . . . are followed. However . . . the Commission felt that such employment would *almost inevitably lead to problems, and would best be avoided*. In fact, the Commission suggested that the University and the Union explore the possibility of establishing policies that would *bar immediate relatives from serving in the same department*.
>
> On more than one occasion, the Ethics Commission has been called upon to investigate complaints alleging nepotism at State institutions of higher education. These matters have been exceptionally acrimonious, and have had significant negative consequences for the institutions and individuals involved. It is with these experiences in mind that the Commission submits the above advice for your consideration.[48]

In light of that post hoc letter, we can't imagine that the Commission would have approved the arrangement before us. Indeed, the Commission clearly had reservations about the situation before it, which involved an academic department that was headed by a Chairperson with a ''*quasi*-supervisory role.'' Here, by way of sharp contrast, there is nothing ''quasi''—meaning: ''seemingly, apparently but not really''[49]—about the Head Football Coach's supervisory role over his assistant coaches.

Further, in Advisory Opinion No. 88-8, the Commission gave a single example of a situation that it deemed particularly problematic (even in a situation with an individual with a ''*quasi*-supervisory role''): ''when the immediate relative of the Chairperson is an untenured junior member of the department[.]''[50] Well, Corey Edsall is certainly ''untenured'' (he has a one-year contract), and it appears that he is *the* junior member of the UConn football coaching staff, having the lowest salary and the least amount of experience, and serving in a position (tight ends coach) that is ''typically the lowest rung for an assistant.''[51]

Moving on to Advisory Opinion No. 94-18, the Commission there dealt with the issue of spouses working in the same department of a state agency. After looking to the Code's use-of-office provision, § 1-84 (c), it stated that, ''[f]rom the hiring process to the evaluation process the spouse of greater rank must refrain from taking any . . . action'' that would affect the financial interests of his spouse and of anyone in competition with his spouse.[52] It also distinguished between performance evaluation, on the one hand, and supervision, on the other. That is, the spouse of greater rank was barred not only from evaluating his spouse and those in competition with her, but also from supervising them. Finally, the Commission explained that, ''[i]f the number and quality of potential conflicts are so great that they interfere significantly with the performance of the [individual's] duties, then it might become necessary for [one of the family members] to transfer to a different assignment.''[53]

[48] (Emphasis added.)

[49] New Oxford American Dictionary (Oxford Univ. Press, 2010).

[50] Connecticut Law Journal, Vol. 49, No. 48, supra, p. 4D.

[51] Ted Miller, *In College Football Coaching Fraternity, It's All Relative*, Seattle Post-Intelligencer, August 31, 2005.

[52] Advisory Opinion No. 94-18, Connecticut Law Journal, Vol. 56, No. 11, p. 6B (September 13, 1994).

[53] Id.

Advisory Opinion No. 94-5 is to the same effect. Titled ''Spouses Serving In Same University Department,'' it involved whether the petitioner, a faculty member at a state community-technical college, could serve as the head of an academic department in which her husband was a part-time faculty member.[54] Said the Commission, the Code ''does not bar spouses from working in the same department,'' but ''any exercise of the petitioner's authority to enhance her husband's position, or to harm the position of other part-time faculty members against whom he competes, would be an illegal use of office within the meaning of . . . '' 1-84 (c).[55] The Commission concluded, therefore, that the petitioner could serve as head of the academic department provided that she relegates all responsibility for supervising her spouse and other part-time faculty members to another department chairperson.

Those opinions were nicely summed up in a 1997 informal staff opinion:

> [A state employee] must have nothing to do with the hiring, promotion, evaluation or supervision of his [family member] or of those in competition with his [family member] for benefits. Of course, if [the state employee] supervises those who supervise his [family member], this too is a problem under the Code.[56]

If we apply that summation of prior advisory opinions here, Randy Edsall may have nothing to do with, not just the promotion and evaluation, *but also the supervision*, of (1) his son, (2) anyone who supervises his son, and (3) anyone in competition with his son for benefits. Let's take those in turn.

As for Corey Edsall, his father—''[t]heoretically''[57]—has been insulated from taking action concerning his son's promotion and evaluation. That is, under the management plan, the UConn Athletic Director ''or his designee (not subordinate to Randy Edsall)'' will conduct Corey Edsall's evaluations, decide annually whether to renew his contract, and determine whether to modify his ''status/employment as an assistant coach/position coach on the football staff'' (i.e., ''any significant change in responsibility for position group, special teams, recruiting or coordination of the offense''). On paper, then, Randy Edsall will have nothing to do with his son's evaluation or promotion.

That leaves whether he will have anything to do with his son's supervision. When the OSE asked UConn whether Randy Edsall would ''direct or supervise'' his son, and whether he would, for example, communicate with his son if the tight ends were performing below par, UConn responded:

> Coach Edsall is responsible for the overall direction and programmatic goals of the football program. It is expected that he will have contact with Corey Edsall in that capacity. However, Coach Edsall will not supervise Corey Edsall as Tight Ends Coach.

We disagree that Randy Edsall will not ''supervise'' his son. The word ''supervise'' means ''to watch over and direct (a process, work, workers, etc.); oversee; superintend.''[58] Similarly, a ''supervisor'' is ''one having authority over others, to superin-

[54] Advisory Opinion No. 94-5, Connecticut Law Journal, Vol. 55, No. 41, p. 3D (April 12, 1994).

[55] Id.

[56] State Ethics Commission, Request for Advisory Opinion No. 1933 (1997).

[57] In the 1990s, Florida State University set up a scheme similar to the one here in order for the son of then head football coach Bobby Bowden to be hired as one of his father's assistants. Under the arrangement, the son would report to the defensive coordinator, ''who's in charge of [the son's] annual written evaluation, and not the head coach, his father. '*Theoretically*,' explained the elder Bowden.'' See, supra, footnote 51.

[58] Random House Webster's College Dictionary.

tend and direct.''[59] It beggars belief to suppose that Randy Edsall—the head coach of a Division I football program—will not oversee and have authority over each and every one of his assistant coaches, including the tight ends coach, his son. And UConn's argument to the contrary amounts to what has aptly been described as ''a counterintuitive bureaucratic technicality that claims assistant coaches aren't supervised by their head coaches.''[60]

But even if we were to buy into UConn's argument that Randy Edsall won't supervise his son, he's also barred from supervising and evaluating anyone who supervises his son. And UConn concedes (albeit unintentionally) that Randy Edsall supervises at least one individual who supervises his son, namely, Rhett Lashlee, the offensive coordinator.

With respect to Rhett Lashlee, UConn had a handful of communications in the context of drafting the management plan concerning Corey Edsall. For instance, on January 13, 2017, Rachel Rubin, Chief of Staff to the UConn President, e-mailed those involved in drafting it, stating:

> One more point now that you have the [offensive coordinator] in place. He has a three year contract. They might argue that since the [offensive coordinator] reports to Randy that he may be under pressure to treat Corey a certain way. So, I would add to the document something that describes that the [offensive coordinator] has a three year contract (approved and negotiated by the [athletic director] through the [offensive coordinator's] agent) and that Randy has no ability to financially benefit the [offensive coordinator] separate from the terms of his contract.

A few weeks later, Ms. Rubin sent another e-mail on the subject, noting that she had ''added a section to [the management plan] about the [offensive coordinator],'' and explaining:

> I think it is important to let them know that the [offensive coordinator] who reports to the Head Coach is a buffer between Corey and his father and that we also understand that the father should not be in a position to put pressure on the [offensive coordinator] to give favorable reviews of the son in order to keep his contract or get future salary increases.

As with Corey Edsall, it appears that Randy Edsall—again, ''[t]heoretically''[61]—will have nothing to do with Rhett Lashlee's evaluation. But that still leaves supervision. When asked by the OSE whether Randy Edsall will supervise Rhett Lashlee, UConn gave a telling response:

> Coach Edsall is responsible for the overall direction and programmatic goals of the football program. In connection with that responsibility, it is expected he will *provide direction* to Rhett Lashlee on the field during practices and games. Notwithstanding that direction, Coach Edsall is not Rhett Lashlee's supervisor.[62]

The definition of the word ''supervise,'' recall, is to ''watch over and *direct* . . .'' Thus, despite UConn's claim to the contrary, Randy Edsall does, in fact, supervise Rhett Lashlee, meaning that the latter's supervision of the former's son is, as noted earlier, impermissible under the Code.

[59] Black's Law Dictionary (Abridged 6th Ed. 1991).
[60] See, supra, footnote 51.
[61] See, supra, footnote 51.
[62] (Emphasis added.)

Finally, Randy Edsall is also prohibited from supervising (and evaluating) anyone who competes with his son for benefits, which raises this question: With whom does Corey Edsall compete for benefits? We find guidance in Advisory Opinion No. 81-18. The issue was whether an individual could accept a teaching position in a department ''at a State college of which the individual's spouse is president.''[63] After noting that the president could not take ''official action affecting significantly his spouse's financial interests,'' the Commission explained that the same holds true with respect to his spouse's competitors.[64] The reason: ''By taking official action affecting a competitor of a[n] . . . individual, a public official or State employee can favor the financial interests of the . . . individual.''[65] As to who would be a competitor of the president's spouse, the Commission concluded: ''faculty members in her department.''[66]

Applying that logic here, Corey Edsall's competitors would be all UConn assistant football coaches. This makes perfect sense in the hyper-competitive world of college football coaching, ''the annual shuffling'' of which has been ''referred to as the 'coaching carousel,''' a ''game of musical chairs,'' and a ''swap meet.''[67] As a matter of fact, to illustrate, we need look no further than UConn's last football season, when Bob Diaco, then UConn Head Football Coach, swapped two of his assistant coaches in the middle of the season, ''demot[ing] offensive coordinator Frank Verducci and promot[ing] running backs coach David Corley.''[68] Further, when it comes to sons who've been hired as assistant coaches on their fathers' football teams, they rarely (if ever) stay put in their initial positions. For instance:

- In 1990, Skip Holtz was hired as the wide receivers coach for Notre Dame University, coached by his father Lou Holtz, and in 1992 was promoted to offensive coordinator.

- In 1994, Jeff Bowden was hired as the wide receivers coach for Florida State University, coached by his father Bobby Bowden, and in 2001 was promoted to offensive coordinator.

- In 1995, Jay Paterno was hired as the tight ends coach and recruiting coordinator for Penn State University, coached by his father Joe Paterno, and in 1999 was promoted to quarter backs coach.

- In 2005, Steve Spurrier, Jr., was hired as the wide receivers coach for the University of South Carolina, coached by his father Steve Spurrier; in 2009 was promoted to wide receivers coach and passing game coordinator; in 2011 was promoted to wide receivers coach, passing game coordinator and recruiting coordinator; and in 2012 was promoted to co-offensive coordinator.

- In 2008, Kendal Briles was hired as the inside receivers coach and offensive recruiting coordinator for Baylor University, coached by his father Art Briles; in 2012 was promoted to passing game coordinator,

[63] Advisory Opinion No. 81-18, Connecticut Law Journal, Vol. 43, No. 23, p. 43A (December 8, 1981).
[64] Id., 44A.
[65] Id.
[66] Id.; see also Connecticut Law Journal, Vol. 55, No. 41, supra, p. 3D (concluding that competitors of department head's spouse, who was a part-time faculty member, would be all part-time faculty members).
[67] Jesse Dougherty, *A Look At First-Year College Football Coaches*, Los Angeles Times, August 22, 2016.
[68] Mike Anthony, *Diaco Makes Move: Verducci Demoted, Corley New UConn Offensive Coordinator*, Hartford Courant, November 1, 2016.

receivers coach and offensive recruiting coordinator; and in 2015 was promoted to offensive coordinator.

- In 2012, Brian Ferentz was hired as the offensive line coach for the University of Iowa, coached by his father Kirk Ferentz, and in 2017 was promoted to offensive coordinator.

More than just showing that sons who serve as assistant coaches for their fathers have a habit of scaling the coaching ladder, that list also shows that the father-son coaching scheme at issue here isn't uncommon in the world of college football. As to how it is justified, Mike Price, the former head coach of the University of Alabama, whose sons served as his assistants, stated: '''That's a good question; how can I answer around this?' . . . . 'Most of the time, the head football coach gets to make his staff selections without consulting anyone. It's like the captain gets to pick his crew.''[69] Or as put by Bobby Bowden, former head coach of Florida State University, whose son served as his assistant: '''A lot of guys go into the family business' . . . . But I'm in a profession where you can't—unless you get special permission. So I got special permission. I imagine all of these guys did, if they were at a state university.''[70]

We don't have the statutory authority to grant such ''special permission'' in this instance, nor do we have the inclination to participate in what amounts to a ''wink-and-a-smile'' at the Code's conflict rules. In fact, UConn's assertion that its Head Football Coach will refrain from supervising (and evaluating) not just his tight ends coach, but also his offensive coordinator is, to quote a former Supreme Court Justice, ''so absurd as to be self-refuting.''[71] Not only that, it doesn't even go far enough, for to satisfy § 1-84 (c) (as interpreted in prior opinions), Randy Edsall would also have to refrain from supervising and evaluating his son's competitors, which, as shown earlier, would mean each and every one of his assistant football coaches.

Accordingly, we conclude that § 1-84 (c) prohibits Randy Edsall's son from being employed as one of his father's assistant football coaches.

Conclusion

Based on the facts presented, it is the opinion of the Board (1) that, because Randy Edsall was a ''state employee'' as of December 28, 2016, the date he and UConn executed an employment contract, his subsequent negotiations with UConn concerning his son's salary (among other things) were impermissible under § 1-84 (c); and (2) that § 1-84 (c) prohibits Randy Edsall's son from being employed as one of his father's assistant football coaches.

OFFICE OF STATE ETHICS

ORDER TO OFFICE OF STATE ETHICS ENFORCEMENT DIVISION REGARDING ADVISORY OPINION 2017-2

In Advisory Opinion No. 2017-2 (''AO 2017-2''), the Citizen's Ethics Advisory Board (''Board'') concluded that: (I) because Randy Edsall was for purposes of the Code of Ethics a ''state employee'', as of December 28, 2016, the date he and

[69] See, supra, footnote 51.
[70] Id.
[71] *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2597 (2014) (Scalia, J., concurring).

UConn executed a binding and enforceable employment contract, his subsequent negotiations with UConn concerning his son's salary (among other things) were impermissible under General Statutes § 1-84 (c); and (2) General Statutes § 1-84 (c) prohibits Randy Edsall's son from being employed by UConn as one of his father's assistant football coaches.

Notwithstanding the facts and conclusions reached in AO 2017-2, the Board, recognizing the potential disruption for the UConn Athletic Department and the Football Program in particular, exercises its discretion in imposing a remedy in this matter and orders the following:

The Board, instructs the Enforcement Division of the Office of State Ethics as follows:

1. To refrain from: a) filing, or prosecuting, any ethics complaint against Randy Edsall with respect to his negotiation of Corey Edsall's employment contract with UConn and b) filing, or prosecuting, any ethics complaint against Randy Edsall with respect to Corey Edsall's existing one year contract with UConn, so long as Corey Edsall's contract to be employed as one of his father's assistant football coaches is not renewed.

Dated: July 20, 2017 By order of the Board, Charles Chiusano, Chairperson