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Table of Contents

CONNECTICUT REPORTS

Bennett *v.* Commissioner of Correction (Order), 330 C 910 42
Dish Network, LLC *v.* Commissioner of Revenue Services, 330 C 280 2
Tax appeal; claim that plaintiff satellite video company's failure to request administrative review of audit pursuant to statute (§ 12-268i) barred subsequent request for refund pertaining to same tax period; whether trial court correctly concluded that gross earnings from sale, lease, installation, and maintenance of equipment were taxable pursuant to statute (§ 12-256 [b] [2]); whether trial court correctly concluded that gross earnings from digital video recording services and payment related fees were not taxable pursuant to § 12-256 (b) (2); whether trial court correctly concluded that plaintiff was not entitled to interest on refund pursuant to statute (§ 12-268c [b] [1]).
Hall *v.* Hall (Order), 330 C 911. 43
Kaplan *v.* Scheer (Order), 330 C 913 45
Murallo *v.* United Builders Supply Co. (Order), 330 C 913. 45
Nichols *v.* Oxford (Order), 330 C 912. 44
Randazzo *v.* Sakon (Order), 330 C 909 41
Saunders *v.* KDFBS, LLC (Order), 330 C 915 47
State *v.* Bischoff (Order), 330 C 912 44
State *v.* Crosby (Order), 330 C 911 43
State *v.* Dubuisson (Order), 330 C 914 46
State *v.* Gerald A. (Order), 330 C 914. 46
State *v.* Holmes (Order), 330 C 913 45
State *v.* Raynor (Order), 330 C 910 42
State *v.* Reservation Services International, Inc. (Order), 330 C 915 47
State *v.* Smith (Orders), 330 C 908, 914. . . . . 40, 46
State *v.* Stephenson (Order), 330 C 908 40
State *v.* Turner (Order), 330 C 909 41
State *v.* Wynne (Order), 330 C 911 43
Zilkha *v.* Zilkha (Order), 330 C 913 45
Volume 330 Cumulative Table of Cases 49

CONNECTICUT APPELLATE REPORTS

Adkins *v.* Commissioner of Correction, 185 CA 139 . . . . . 23A
Habeas corpus; ineffective assistance of counsel; motion to withdraw guilty plea; whether habeas court improperly rejected claim that prior habeas counsel rendered ineffective assistance by failing to raise claim that trial counsel rendered ineffective assistance by failing to advise petitioner with respect to his right to appeal from denial of motion to withdraw guilty plea; whether petitioner demonstrated that nonfrivolous ground for appeal of motion to withdraw guilty plea existed; whether petitioner demonstrated that trial counsel had constitutional obligation to advise him about his right to appeal; reviewability of claim that habeas court improperly rejected claim that prior habeas counsel rendered ineffective assistance by failing to present evidence in support of claim that petitioner's guilty plea was result of trial counsel's ineffective assistance; whether habeas court improperly rejected claim that prior habeas counsel rendered ineffective assistance by failing to claim in prior habeas action that trial counsel's conflict of interest resulted in petitioner's guilty plea; whether habeas court improperly determined that peti-

(continued on next page)

tioner had waived conflict of interest claim; whether habeas court's factual finding concerning voluntariness of petitioner's guilty plea was supported by evidence in record.

Bongiorno *v.* Capone, 185 CA 176 . . . . . 60A

Contracts; statutory theft; claim that breach of contract count should have been dismissed by trial court for lack of subject matter jurisdiction; claim that plaintiff had no standing to bring breach of contract claim because it was limited liability company, and not plaintiff, that suffered any damages as result of defendant's withdrawal from checking account owned by limited liability company; whether trial court lacked subject matter jurisdiction over statutory theft claim; whether statutory theft claim should have been dismissed rather than decided on substantive merits; whether plaintiff lacked standing to bring statutory theft claim in his individual capacity; reviewability of unpreserved claim that trial court erred in rendering judgment in favor of plaintiff on breach of contract claim without making conclusions of law regarding applicability of waiver provisions in settlement agreement.

Brochard *v.* Brochard, 185 CA 204 . . . . . 88A

Dissolution of marriage; claim that trial court abused its discretion in denying motion for contempt that was based on plaintiff's alleged failure to pay his share of minor children's unreimbursed medical and extracurricular activity expenses; claim that trial court improperly denied motion for contempt in which defendant alleged that plaintiff had violated certain court orders related to mortgage on parties' former marital home; preclusion of claim under doctrine of res judicata; claim that trial court improperly determined that dissolution court had not ordered plaintiff to pay four months of past due mortgage payments and interest; claim that trial court improperly declined to hold plaintiff in contempt for having failed to pay defendant one half of tax refunds he received from individual federal and state tax returns for 2010; claim that trial court abused its discretion in denying motion to modify order that allocated parties' obligation to pay guardian ad litem's fees; whether defendant failed to prove substantial change in circumstances since court's allocation of parties' obligation to pay guardian ad litem's fees that necessitated reduction in defendant's 20 percent share of payment of fees; claim that trial court abused its discretion in reducing plaintiff's child support obligation; claim that trial court improperly failed to hear defendant's cross motion for modification of child support; claim that trial court improperly failed to order plaintiff to pay to defendant full amount of past due alimony for 2012.

Errichetti *v.* Botoff, 185 CA 119 . . . . . 3A

Malicious erection of fence; injunction; claim that trial court erred by ordering defendants to restore area to previous condition; whether trial court properly determined that plaintiff was entitled to injunction pursuant to statute (§ 52-480); challenge to trial court's subordinate findings in support of its determination that defendants erected fence maliciously and with intent to injure plaintiff's enjoyment of land; whether trial court's finding of absence of any real usefulness of fence was clearly erroneous; credibility of witnesses; whether trial court erred

(continued on next page)

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with respect to finding that fence did not fit with character of neighborhood; whether plaintiff clearly requested restoration relief in complaint; whether there was anything in record demonstrating that plaintiff ever abandoned restoration relief; whether relief ordered by trial court fell within statutory authority conferred by § 52-480; whether trial court's order was vague.

Fredo *v.* Fredo, 185 CA 252 . . . . . 136A

Dissolution of marriage; motion to dismiss; motion for modification of child support; motion for accounting; motion to quash subpoena duces tecum; motion for attorney's fees; subject matter jurisdiction; whether trial court improperly granted motion to dismiss motion for modification of child support for lack of subject matter jurisdiction; whether trial court had subject matter jurisdiction to entertain motion for modification of child support pursuant to applicable statutes (§§ 46b-1 [4] and 46b-86 [a]); reviewability of claim that trial court improperly denied motion for modification of child support; whether claim was moot because there was no practical relief that this court could afford defendant; whether portions of appeal from trial court's judgment disposing of motion for accounting and granting motion to quash subpoena duces tecum were moot; whether trial court abused its discretion by awarding plaintiff $1500 in attorney's fees pursuant to bad faith exception to general rule that prevailing party is ordinarily not entitled to collect attorney's fees from losing party; failure of trial court to make requisite findings in support of its award of attorney's fees.

Knott *v.* Commissioner of Correction (Memorandum Decision), 185 CA 902 . . . . . 170A

Peixoto *v.* Peixoto, 185 CA 272 . . . . . 156A

Dissolution of marriage; postjudgment modification of alimony; whether trial court abused discretion in granting motion for modification of alimony; claim that trial court, in modifying alimony, improperly construed legal standards set forth in Dan *v.* Dan *(315 Conn. 1); whether it was clear that trial court found that exceptional circumstances existed that warranted modification of alimony award; claim that trial court improperly held that proscription on upward modifications of alimony applied only when parties entered into alimony stipulation at time of initial dissolution; whether, at time of dissolution, trial court gave indication as to purpose of alimony award to plaintiff; whether evidence submitted at modification hearing demonstrated substantial change in circumstances.*

Volume 185 Cumulative Table of Cases 171A

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut State Dental Commission 1B

MISCELLANEOUS

Notice of Attorney Reprimand 7C

Office of State Ethics Advisory Opinion 1C

CONNECTICUT REPORTS

Vol. 330

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DISH NETWORK, LLC *v.* COMMISSIONER OF REVENUE SERVICES
(SC 19800)
(SC 19801)
(SC 19802)

Palmer, McDonald, Robinson, Mullins and Kahn, Js.*

Syllabus

Pursuant to statute (§ 12-256 [b]), "each person operating a business that provides one-way transmission to subscribers of video programming by satellite, shall pay a quarterly tax upon the gross earnings from . . . (2) the transmission to subscribers in this state of video programming by satellite . . . ."

The plaintiff, D Co., a company that provides satellite delivered digital television to subscribers in Connecticut, appealed to the trial court from the decisions of the defendant, the Commissioner of Revenue Services, denying its claims for a refund of certain previously paid taxes. D Co. had sought tax refunds from the commissioner on the ground that taxes should not have been imposed on gross earnings relating to certain goods and services including, inter alia, the sale, lease, installation, and maintenance of equipment, payment related fees, and digital video recording services. Some of D Co.'s refund requests pertained to tax periods for which D Co. had previously been audited by the commissioner. On appeal to the trial court, D Co. filed motions for summary judgment, claiming that the enumerated goods and services did not constitute the transmission of video programming by satellite and, therefore, were not subject to taxation under § 12-256 (b) (2) as a matter of law. In response, the commissioner filed motions seeking partial summary judgment, claiming that D Co.'s appeals with respect to the audited tax periods were barred because D Co. had failed to exhaust its administrative remedies by challenging the results of the audits pursuant to statute (§ 12-268i). The commissioner further claimed that the enumerated goods and services were subject to taxation under § 12-256 (b) (2).

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

After rejecting the commissioner's exhaustion claim, the trial court concluded that the receipts relating to the sale, lease, installation, and maintenance of equipment were not gross earnings from the transmission of video programming by satellite and, therefore, that D Co. was entitled to a corresponding refund. The trial court also concluded that payment related fees and digital video recording services were related to the transmission of video programming by satellite and, therefore, subject to taxation under § 12-256 (b) (2). Thereafter, the trial court denied D Co.'s motion for interest on its refund and rendered judgment in accordance with a stipulation between the parties pertaining to the amount of the refund owed, from which the commissioner appealed and D Co. cross appealed. *Held*:

1. The trial court correctly determined that § 12-268i, which authorizes a taxpayer aggrieved by the commissioner's action in fixing the amount of any tax to seek, within sixty days of notice of such action, a hearing and a correction of the amount, does not provide the exclusive procedure for challenging a tax assessment after an audit by the commissioner, and, accordingly, D Co. was not barred from seeking a refund for the audited tax periods pursuant to another statute (§ 12-268c) permitting a refund claim for the alleged overpayment of taxes within three years of the due date for which the overpayment was made: the fact that the commissioner has conducted an audit does not mean that the taxpayer either must make a claim within sixty days for any overpayments made during the audited period, regardless of whether the overpayments are related to the audit result or are discoverable at the time, or be forever barred from seeking a refund of those overpayments, and, although attempting to relitigate the specific findings of an audit pursuant to § 12-268c would likely be barred by principles of res judicata and collateral estoppel, the commissioner made no claim that the refund D Co. requested pursuant to § 12-268c was related to errors previously discovered during the audit; moreover, construing § 12-268i as the exclusive method for challenging assessments for tax periods previously subject to an audit would yield unworkable results because taxpayers would be left without effective recourse when, for reasons entirely beyond their control, a refund claim arises long after the results of an audit have become final.

2. The trial court correctly determined that D Co.'s gross earnings from the sale, lease, installation, and maintenance of equipment were not subject to taxation under § 12-256 (b) (2): nothing in the text of § 12-256 or related statutes clearly indicated that the legislature intended to tax such earnings, and the well established rule requiring strict construction of statutes imposing a tax favored resolving the ambiguity in favor of D Co.; moreover, the commissioner could not prevail on his claim that the legislature's use of the word "from" in the phrase "gross earnings from . . . the transmission to subscribers in this state of video programming by satellite" in § 12-256 (b) was indicative of a legislative intent

to delegate discretion to the commissioner to tax gross earnings from business operations in addition to the transmission of video programming by satellite, or that that phrase should be construed broadly to include any potentially related operations, as the case law on which the commissioner based its claim had interpreted a statute that used the phrase "includes but shall not be limited to," which indicated reference to items other than expressly enumerated items, and there was no indication that the word "from," when coupled with a specified item, had a similarly expansive meeting.

3. The trial court incorrectly determined that gross earnings from digital video recording services were subject to taxation under § 12-256 (b) (2); because the capability to record video programming is distinct from the capability to receive the transmission of it, and because an additional fee is paid for the capability to record such programming, there was at least a plausible argument that digital video recording services represent an operation separate and distinct from the transmission of video programming by satellite under § 12-256 (b) (2), and this ambiguity was resolved in favor of D Co.

4. The trial court correctly determined that payment related fees, such as late fees and fees for reconnecting a subscriber after being disconnected for nonpayment, are subject to taxation under § 12-256 (b) (2); just as charges to subscribers seeking to recover the tax imposed by § 12-256 (b) (2) for the transmission of programming are subject to taxation, payment related fees are clearly part and parcel of D Co.'s taxed business operation of transmitting video programming by satellite.

5. The trial court correctly determined that the plaintiff was not entitled to interest pursuant to § 12-268c (b) (1) on the tax refund to which it was entitled; the statute (§ 12-268*l*) governing cases in which a taxpayer has appealed from the commissioner's denial of a refund claim rather than § 12-268c (b) (1), which requires the commissioner to add interest to refunds that he has granted, was applicable to the present case, and D Co. was not entitled to interest under § 12-268*l* because it failed to request an interest award pursuant to that statute.

Argued March 29—officially released October 2, 2018

Procedural History

Appeals from the decisions of the defendant denying the plaintiff's claims for a tax refund, brought to the Superior Court in the judicial district of New Britain, where the court, *Cohn*, *J.*, granted the plaintiff's motions for summary judgment in part and the defendant's motions for summary judgment in part; thereafter, the court rendered judgments in accordance with a stipulation filed by the parties, from which the defen-

dant appealed and the plaintiff cross appealed. *Reversed in part*; *judgments directed.*

John Langmaid, assistant attorney general, with whom were *Louis P. Bucari* and, on the brief, *George Jepsen*, attorney general, for the appellant-cross appellee (defendant).

Nicholas G. Green, with whom were *Jeffrey P. Mueller* and, on the brief, *Charles H. Lenore* and *Andrew N. Wogman*, for the appellee-cross appellant (plaintiff).

Opinion

ROBINSON, J. The principal issue in this case is the extent to which General Statutes § 12-256 (b) (2)[1] imposes a tax on gross earnings from a satellite television operator's business operations in this state, which include the transmission of video programming, the sale and lease of equipment required to view that programming, the installation and maintenance of such equipment, digital video recording (DVR) service, and payment related fees. The defendant, the Commissioner of Revenue Services (commissioner), appeals, and the plaintiff, Dish Network, LLC, cross appeals, from the judgment of the trial court sustaining in part the plaintiff's tax appeals and ordering a refund of taxes previously paid on earnings from the sale of certain goods

[1] General Statutes § 12-256 (b) provides in relevant part: "Each person operating a community antenna television system under chapter 289 or a certified competitive video service pursuant to sections 16-331e to 16-331o, inclusive, and each person operating a business that provides one-way transmission to subscribers of video programming by satellite, shall pay a quarterly tax upon the gross earnings from (1) the lines, facilities, apparatus and auxiliary equipment in this state used for operating a community antenna television system, or (2) the transmission to subscribers in this state of video programming by satellite or by a certified competitive video service provider, as the case may be. . . ."

and services.[2] Addressing the parties' various contentions, we reach the following conclusions: (1) the trial court properly determined that General Statutes § 12-268i[3] does not provide the exclusive procedure for challenging a tax assessment for a tax period that has been the subject of an audit, and, therefore, the plaintiff was not barred from seeking a refund for certain audited tax periods pursuant to General Statutes § 12-268c (a) (1);[4] (2) § 12-256 (b) (2) imposes a tax on gross earnings from the transmission of video programming by satellite and certain payment related fees, but not the sale, lease, installation, or maintenance of equipment or DVR service; and (3) the trial court properly determined that

[2] The plaintiff filed two separate tax appeals with the trial court pursuant to General Statutes § 12-268*l*, one relating to the commissioner's denial of a refund with respect to the plaintiff's tax payments for the first, second, third, and fourth quarters of 2006, and the first quarter of 2007, and the other relating to the denial of a refund with respect to tax payments for the third and fourth quarters of 2010 and the first quarter of 2011. The trial court consolidated the appeals for purposes of briefing and argument. After the trial court rendered judgment in favor of the plaintiff in each case, the commissioner appealed to the Appellate Court, and the plaintiff filed separate appeals in each case. The Appellate Court consolidated the plaintiff's appeals and treated that consolidated appeal as a cross appeal. We then transferred the commissioner's appeal, and the plaintiff's cross appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] General Statutes § 12-268i provides in relevant part: "Any taxpayer aggrieved by the action of the commissioner or his authorized agent in fixing the amount of any tax, penalty or interest provided for by chapter 210, 211 or 212 or this chapter may apply to the commissioner, in writing, within sixty days after the notice of such action is delivered or mailed to it, for a hearing and a correction of the amount of such tax, penalty or interest so fixed, setting forth the reasons why such hearing should be granted and the amount in which such tax, penalty or interest should be reduced. . . ."

[4] General Statutes § 12-268c (a) (1) provides in relevant part: "Any company included in section 12-249, 12-256 or 12-264 . . . believing that it has overpaid any taxes due under the provisions of chapter 210, 211 or 212 may file a claim for refund in writing with the commissioner within three years from the due date for which such overpayment was made, stating the specific grounds upon which the claim is founded. . . ."

We note that § 12-268c was amended in 2013. See Public Acts 2013, No. 13-232, § 1; see also footnote 23 of this opinion. For the purpose of clarity, unless otherwise noted, we refer to the current revision of the statute.

the plaintiff was not entitled to interest on the refund pursuant to § 12-268c (b) (1).[5] Accordingly, we reverse in part the judgments of the trial court.

The record reveals the following procedural history and facts that were found by the trial court or that are not disputed. The plaintiff, a limited liability company with its principal place of business in Colorado, is in the business of providing satellite delivered digital television to subscribers across the country, including in Connecticut. In order to provide this service, the plaintiff transmits video programming from its facilities to one or more satellites orbiting the Earth. The satellites then transmit the programming to an antenna, known as a satellite dish, which is connected to a receiver at the subscriber's location.[6]

In order to receive a particular package of video programming, individual subscribers must enter into a contract with the plaintiff. In addition to charging a fee for the transmission of video programming, these contracts allow the plaintiff to charge subscribers for the purchase or lease of satellite dishes and related equipment, equipment installation and maintenance, DVR service, and subscriptions to Dish Magazine, which is delivered by the United States Postal Service. The contracts also allow the plaintiff to impose fees for the failure of a subscriber to pay bills on time, for reconnecting the subscriber after being disconnected

[5] General Statutes § 12-268c (b) (1) provides: "To any refunds granted as a result of overpayments of any taxes under chapter 210, 211 or 212, except refunds due because of any intentional overpayment, there shall be added interest at the rate of two-thirds of one per cent for each month or fraction of a month, as provided in subdivisions (2) and (3) of this subsection."

[6] For purposes of this opinion, we refer to the plaintiff's transmission of video signals to satellites and the subsequent transmission of the programming to subscriber's antennae as "programming services." Cf. footnote 7 of this opinion.

for nonpayment, and for certain types of payment plans (payment related fees).[7]

Under § 12-256 (b), the plaintiff is required to "pay a quarterly tax upon the gross earnings from . . . . (2) the transmission to subscribers in this state of video programming by satellite . . . ." Pursuant to this provision, the plaintiff filed timely tax returns for the first, second, third, and fourth quarters of 2006, the first quarter of 2007, the third and fourth quarters of 2010, and the first quarter of 2011 (disputed tax periods).[8] In July 2008, the commissioner conducted a field audit of the plaintiff's returns for the first, second, and third quarters of 2006 (audited tax periods) pursuant to General Statutes § 12-268g[9] and sent a notice of the result to the plaintiff. The commissioner also sent the plaintiff a billing notice for the audited tax periods. The plaintiff never challenged the audit results.

The plaintiff ultimately filed amended tax returns and sought refunds pursuant to § 12-268c (a) (1) for all of the disputed tax periods, including the audited tax periods. The plaintiff claimed that it had paid taxes on gross earnings from the sale of both programming services and nonprogramming goods and services during the relevant periods when, according to the plaintiff, the only earnings subject to taxation under § 12-256 (b) (2) were its gross earnings from the sale of programming

[7] For purposes of this opinion, we refer to goods and services other than programming services as "nonprogramming goods and services." Cf. footnote 6 of this opinion.

[8] Although the plaintiff presumably filed tax returns for every quarter during the relevant period, these are the only tax periods that are presently at issue on appeal.

[9] General Statutes § 12-268g provides in relevant part: "The commissioner shall, within three years after the due date for the filing of a return, or, in the case of a completed return filed after such due date, within three years after the date on which such return was received by him, examine it and, in case any error is disclosed by such examination, shall, within thirty days after such disclosure, notify the taxpayer thereof. . . ."

services. The commissioner concluded that, to the contrary, the plaintiff's gross earnings from the sale of both programming services and nonprogramming goods and services were subject to taxation under § 12-256 (b) (2). Accordingly, the commissioner denied the plaintiff's requests for refunds.

The plaintiff appealed to the trial court from the commissioner's decisions pursuant to General Statutes § 12-268*l*.[10] Thereafter, the plaintiff filed a motion for summary judgment, contending that it was entitled, as a matter of law, to a refund of the taxes that it paid pursuant to § 12-256 (b) (2) on gross earnings from the sale of nonprogramming goods and services. The commissioner then filed a motion seeking partial summary judgment, contending that, to the contrary, the plaintiff's gross earnings from the sale of nonprogramming goods and services were, as a matter of law, subject to taxation under § 12-256 (b) (2).[11] The commissioner further claimed that the plaintiff's appeal with respect to the audited tax periods was barred because the amounts owed for those periods had been finally determined pursuant to the audit, the plaintiff had failed to exhaust its administrative remedies by challenging

[10] General Statutes § 12-268*l* provides in relevant part: "Any taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner of Revenue Services . . . may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of New Britain . . . ."

As we have indicated, the plaintiff filed two separate tax appeals pursuant to § 12-268*l*, which the trial court subsequently consolidated. See footnote 2 of this opinion. The plaintiff nonetheless continued to file separate motions in each appeal, and the trial court ultimately rendered a separate decision in each case. Because these documents were substantially identical in each case, in the interest of simplicity, we refer to them in the singular.

[11] The commissioner conceded in his memorandum in support of his motion for partial summary judgment that fees received by the plaintiff for subscriptions to Dish Magazine are not taxable under § 12-256 (b) (2). Accordingly, the phrase "nonprogramming services," as used hereinafter in this opinion, does not include such subscriptions.

the audit result pursuant to § 12-268i, and the statute authorizing refund claims, § 12-268c, did not provide an alternative route for the plaintiff to contest the final assessment for the audited tax periods.

With respect to the commissioner's claim that the plaintiff was barred from seeking a refund for the audited tax periods because it failed to challenge the audit result pursuant to § 12-268i, the trial court concluded that that statute does not provide the exclusive administrative remedy for the overpayment of taxes for a tax period that has been subject to an audit. Rather, the court concluded that "§§ 12-268c and 12-268i stand independently," and that § 12-268c provides an alternative procedure for correcting an overpayment of taxes under these circumstances. Accordingly, the court concluded that the plaintiff's claim with respect to the audited tax periods was not barred.

The court then turned to the plaintiff's claim that it was entitled to a refund of taxes paid on gross earnings from the sale of nonprogramming goods and services. The court noted that § 12-256 (b) required the plaintiff to pay taxes "upon the gross earnings from . . . the transmission to subscribers in this state of video programming by satellite . . . ." The court then observed that dictionaries have defined " 'from' as indicating 'the source or original or moving force of something.' " The court further noted that the language of § 12-256 (b) (2) stands in contrast to the language of § 12-256 (b) (1), which expressly imposes a tax on the gross earnings from "the lines, facilities, apparatus and auxiliary equipment in this state used for operating a community antenna television system . . . ."[12] Applying the princi-

[12] Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) pp. 171, 251, defines "community antenna television" as "cable television," which, in turn, is defined as "a system of television reception in which signals from distant stations are picked up by a master antenna and sent by cable to the individual receivers of paying subscribers . . . ."

ples that related parts of a statute provide guidance in determining the meaning of a statutory provision; see *State* v. *Ehlers*, 252 Conn. 579, 590, 750 A.2d 1079 (2000) ("[r]elated statutory provisions, or statutes in pari materia, often provide guidance in determining the meaning [of statutory language]" [internal quotation marks omitted]); and that tax statutes must be strictly construed; see *Zachs* v. *Groppo*, 207 Conn. 683, 689, 542 A.2d 1145 (1988); the trial court concluded that the plaintiff's gross earnings from the sale of equipment, installation and maintenance of equipment, and subscriptions to Dish Magazine are not gross earnings "from . . . the transmission . . . of video programming by satellite" and that, therefore, the plaintiff was entitled to a refund of the taxes that it had paid on those gross earnings. The court also concluded, however, that payment related fees and DVR service are sufficiently related to "the source," i.e., "transmission to subscribers in this state of video programming by satellite"; General Statutes § 12-256 (b) (2); that they constituted programming services subject to taxation.

The trial court then noted that the parties had not yet addressed the amount of the refund that was due to the plaintiff. Accordingly, the court ordered the parties to confer on that issue and to report back to the court. Thereafter, the parties submitted a joint stipulation to the court setting forth the amounts due to the plaintiff. On the basis of the stipulation, the trial court rendered judgment in favor of the plaintiff in the amount of $886,845.

The plaintiff then filed a motion requesting that the trial court award interest on the $886,845 refund pursuant to § 12-268c (b) (1). The trial court concluded that § 12-268c (b) (1) applies "only to the situation where the commissioner . . . allows for a refund due to overpayment. The correct statute referring to interest after a successful tax appeal from a gross earning tax pay-

ment is § 12-268*l*." The court denied the plaintiff's motion because an interest award pursuant to § 12-268*l* is "primarily an equitable determination and a matter lying within the discretion of the trial court"; (internal quotation marks omitted) *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 371, 133 A.3d 402 (2016); and the plaintiff had presented no evidence that the equities weighed in favor of granting an interest award. In addition, the court concluded that the plaintiff was not entitled to interest because it had voluntarily agreed to the stipulation of damages, which did not include interest on the refund.

The commissioner then filed an appeal, claiming that the trial court improperly determined that (1) the plaintiff's claim for a refund with respect to the audited tax periods was not barred, and (2) the plaintiff's gross earnings on the sale of nonprogramming goods and services were not subject to taxation under § 12-256 (b) (2). The plaintiff then cross appealed, claiming that (1) the trial court improperly determined that payment related fees and gross earnings from the provision of DVR service are subject to taxation pursuant to § 12-256 (b) (2), and (2) the plaintiff was not entitled to interest on the refund pursuant to § 12-268c (b) (1). See footnote 2 of this opinion. We agree with the plaintiff that the trial court improperly determined that gross earnings from the provision of DVR service are subject to taxation under § 12-256 (b) (2), and we reject the parties' other claims.

I

We first address the commissioner's claim that the trial court improperly determined that § 12-268i does not provide the exclusive procedure for challenging the assessment after an audit and, therefore, that the

plaintiff was not barred from seeking a refund for the audited tax periods pursuant to § 12-268c.[13] We disagree.

Whether § 12-268i provides the exclusive procedure for seeking a refund of an overpayment when the commissioner has previously conducted an audit for the tax period in question presents a question of statutory interpretation subject to plenary review. See, e.g., *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 507, 43 A.3d 69 (2012). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 507–508.

We begin with a review of the statutory language. Section 12-268g provides in relevant part that "[t]he commissioner shall, within three years after the due date for the filing of a return . . . examine it and, in case any error is disclosed by such examination, shall,

[13] Although the commissioner claimed in the trial court that the court lacked subject matter jurisdiction over the plaintiff's claim for a refund for the audited tax periods under the doctrine of exhaustion of administrative remedies, the commissioner does not dispute that the trial court had jurisdiction over the plaintiff's refund claim if § 12-268c provides an alternative route for seeking a refund of overpayments made during the audited tax periods. Accordingly, the determination as to whether § 12-268i provides the exclusive procedure for seeking a refund under these circumstances must be made *before* addressing the commissioner's claim that the plaintiff failed to exhaust its administrative remedies pursuant to § 12-268i.

within thirty days after such disclosure, notify the taxpayer thereof. . . .'' Section § 12-268i provides in relevant part that ''[a]ny taxpayer aggrieved by the action of the commissioner or his authorized agent in fixing the amount of any tax . . . may apply to the commissioner, in writing, within sixty days after the notice of such action is delivered or mailed to it, for a hearing and a correction of the amount of such tax . . . .'' Section 12-268c (a) (1) provides in relevant part that ''[a]ny company . . . believing that it has overpaid any taxes due under the provisions of chapter 210, 211 or 212 may file a claim for refund in writing with the commissioner within three years from the due date for which such overpayment was made . . . .''

The commissioner claims that, when the commissioner has audited a tax return for a specific tax period pursuant to § 12-268g and notified the taxpayer of errors that were discovered, and the taxpayer has failed to challenge the audit result within sixty days pursuant to § 12-268i, the taxpayer is then barred from requesting a refund for any overpayment of taxes during the audited period pursuant to § 12-268c (a) (1). The commissioner contends that allowing a taxpayer to file a refund claim pursuant to § 12-268c (a) (1) in these circumstances—under which a refund claim may be filed ''within three years from the due date for which such overpayment was made''—would ''[eliminate] the finality of audit determinations'' and render meaningless the sixty day time limitation contained in § 12-268i. Thus, under the commissioner's interpretation of the statutory scheme, if the commissioner discovers an error in a tax return during an audit conducted pursuant to § 12-268g, and the taxpayer does not dispute that specific error, the taxpayer must then either (1) conduct its own comprehensive audit to ensure that there was no overpayment of taxes during the audited period for any reason and, if it discovers an overpayment, challenge the audit

result and assessment within sixty days, or (2) be forever foreclosed from seeking a refund of the overpayment.

Nothing in the language of § 12-268g, however, suggests that there is any such burden on the taxpayer. To the contrary, the statute provides that the *commissioner* shall examine the taxpayer's tax return. See General Statutes § 12-268g ("[t]he commissioner shall, within three years after the due date for the filing of a return . . . examine it"). In turn, this suggests that, if the commissioner finds an error, the taxpayer has sixty days under § 12-268i to challenge *that specific finding of error* by filing what is the effective equivalent of an appeal from the audit result, and that the taxpayer is not required to identify at that time any and all overpayments made during the audited period, regardless of whether they are related in any manner to the error found by the commissioner. Indeed, an appeal from an administrative ruling ordinarily does not provide the appellant with the opportunity—much less impose the obligation—to raise claims that are entirely unrelated to the ruling being appealed from. Accordingly, it is reasonable to conclude that overpayments made during the audited period that are discovered by the *taxpayer* are governed by § 12-268c, which authorizes taxpayers to seek a refund by filing a claim with the commissioner within three years of the due date for the overpayment. See General Statutes § 12-268c (a) (1) ("[a]ny company . . . believing that it has overpaid any taxes . . . may file a claim for refund in writing with the commissioner within three years from the due date for which such overpayment was made").

The commissioner's interpretation of the relevant statutes is also unworkable because, as the plaintiff in the present case points out, there are circumstances under which a taxpayer may not even have a claim for a refund until long after the audit result has become

final. For example, a taxpayer that provided a refund to a customer for a payment received during the audit period after the sixty day period for challenging an audit result had expired, but before the three year period for seeking a refund pursuant to § 12-268c had expired, would be left without effective recourse. The commissioner asserted at oral argument before this court that a taxpayer may seek relief pursuant to General Statutes § 12-39s[14] under these circumstances, but that statute provides far less protection to taxpayers who have overpaid their taxes than § 12-268c does because refund claims pursuant § 12-39s, unlike claims pursuant to § 12-268c, "are committed to the [commissioner's] sole discretion, and [the courts are], therefore, without jurisdiction to evaluate [their] merits . . . ." *Chatterjee* v. *Commissioner of Revenue Services*, 277 Conn. 681, 693, 894 A.2d 919 (2006). Accordingly, we cannot conclude that the legislature intended that § 12-39s would apply to refund claims that, for reasons entirely beyond the control of the taxpayer, could not be discovered within sixty days of an audit result, but that are discovered within three years of the overpayment.

We conclude, therefore, that the trial court properly determined that the fact that an audit result has become final because the taxpayer has failed to challenge it within sixty days pursuant to § 12-268i does not necessarily mean that the taxpayer is barred from seeking a refund of overpayments made during the audited period pursuant to § 12-268c. We emphasize that we are *not* holding that a taxpayer may relitigate a specific audit result that has become final by requesting a refund of

[14] General Statutes § 12-39s (b) provides in relevant part: "The Commissioner of Revenue Services, of his own motion, is authorized, if the commissioner determines that any tax, penalty or interest has been paid more than once or has been erroneously or illegally collected or computed, to credit such amount against any amounts then due and payable from such person to said commissioner and to refund, upon order of the Comptroller, the balance, if any, to such person. . . ."

payments that were made on the basis of the specific error that the commissioner found. Principles of res judicata or collateral estoppel, as well as the policy disfavoring collateral attacks on final decisions, would likely bar any such claim. See *Weiss* v. *Weiss*, 297 Conn. 446, 459, 998 A.2d 766 (2010) ("[r]es judicata prevents a litigant from reasserting a claim that has already been decided on the merits" [internal quotation marks omitted]); *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 200–201, 544 A.2d 604 (1988) ("[u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings to correct perceived wrongs in the tribunal's conclusive decision"); *Doyle* v. *Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 14, 178 A.3d 445 (2017) ("[c]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties" [internal quotation marks omitted]); see also *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 773, 770 A.2d 1 (2001) ("[a]s a general proposition, the governing principle is that administrative adjudications have a preclusive effect when the parties have had an adequate opportunity to litigate" [internal quotation marks omitted]). We do conclude, however, that the fact that the commissioner has conducted an audit does not mean that a taxpayer must either make a claim within sixty days for any and all overpayments made during the audited period, regardless of whether the overpayments are related to the audit result or are discoverable at the time, or be forever barred from seeking a refund of those overpayments. In the present case, the commissioner does not argue that the claims that the plaintiff raised in its requests for a refund pursuant to § 12-268c were related in any way to errors that the commissioner discovered

during the audits. Accordingly, we conclude that the trial court properly determined that the plaintiff's claim for a refund for the audited periods is not barred.

II

We next address the parties' claims with respect to the scope of the plaintiff's earnings that are subject to taxation under § 12-256 (b) (2). The commissioner claims on appeal that the trial court improperly determined § 12-256 (b) (2) does not subject the plaintiff's gross earnings from the sale and lease of equipment or from equipment installation and maintenance to taxation. The plaintiff claims in its cross appeal that the trial court improperly determined that earnings from the sale of DVR service and payment related fees are subject to taxation under § 12-256 (b) (2).[15] We reject the commissioner's claim on appeal. We also reject the plaintiff's claim that the trial court improperly determined that payment related fees are subject to taxation. We agree with the plaintiff, however, that gross earnings from the sale of DVR service are not subject to taxation.

Whether gross earnings from the plaintiff's various business operations are subject to taxation under § 12-256 (b) (2) presents a question of statutory interpretation over which our review is plenary.[16] See, e.g., *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 507. "[W]hen the issue is the imposition of a tax, rather than a claimed right to an exemption or a deduction, the governing

[15] We acknowledge but reject the commissioner's arguments that the plaintiff has failed to present a proper cross appeal and failed to adequately brief its claims.

[16] The commissioner makes no claim that we must defer to his interpretation of § 12-256 because that interpretation has previously been subjected to judicial review or is time-tested. See *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010) ("we will defer to an agency's interpretation of a statutory term only when that interpretation of the statute previously has been subjected to judicial scrutiny or to a governmental agency's time-tested interpretation and is reasonable").

authorities must be strictly construed against the commissioner and in favor of the taxpayer." (Internal quotation marks omitted.) *Andersen Consulting, LLP* v. *Gavin*, 255 Conn. 498, 511, 767 A.2d 692 (2001); see also *Zachs* v. *Groppo*, supra, 207 Conn. 689 ("taxing statutes are to be strictly construed . . . and statutory ambiguities in the imposition of such taxes must be resolved in favor of the taxpayer and against the taxing authority" [citations omitted]).

We begin our analysis with the language of § 12-256 (b). That statute provides in relevant part that "each person operating a business that provides one-way transmission to subscribers of video programming by satellite, shall pay a quarterly tax upon the gross earnings from . . . (2) the transmission to subscribers in this state of video programming by satellite . . . . No deduction shall be allowed from such gross earnings for operations related to commissions, rebates or other payments, except such refunds as arise from errors or overcharges. On or before the last day of the month next succeeding each quarterly period, each such person shall render to the commissioner a return on forms prescribed or furnished by the commissioner, signed by the person performing the duties of treasurer or an authorized agent or officer of the system or service operated by such person, which return shall include information regarding the name and location within this state of such system or service and the total amount of gross earnings derived from such operations and such other facts as the commissioner may require for the purpose of making any computation required by this chapter." General Statutes § 12-256 (b).

A

We first address the commissioner's contention that the phrase "business that provides one-way transmission to subscribers of video programming by satellite"

was intended to distinguish the satellite television business from other types of businesses, and that the tax upon gross earnings was intended to be on gross earnings *from that business*, including gross earnings from the sale or lease of equipment required to view video programming and equipment installation and maintenance. The plaintiff contends, to the contrary, that § 12-256 (b) plainly and unambiguously imposes a tax *only* on the gross earnings from "the transmission to subscribers in this state of video programming by satellite"—i.e., programming services. The plaintiff further contends that, to the extent that there is any ambiguity in the statute, that ambiguity must be resolved in its favor because a statute imposing a tax must be strictly construed.

Although we are not entirely sure that the phrase "the transmission to subscribers in this state of video programming by satellite" plainly and unambiguously is limited to programming services, we also cannot conclude that, on its face, the phrase plainly and unambiguously includes such operations as the sale or lease of satellite dishes and related equipment or equipment installation and maintenance. Cf. *Texaco Refining & Marketing Co.* v. *Commissioner of Revenue Services*, 202 Conn. 583, 592–93, 522 A.2d 771 (1987) ("[w]hat the legislature intended by defining 'gross earnings' as 'earnings from the sale of petroleum products' can hardly be deemed to be plain and unambiguous on its face"). We therefore examine the other provisions of § 12-256 and related statutes to determine whether they clarify the meaning of the phrase. See, e.g., *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 508 ("§ 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes" to determine whether statutory language is ambiguous when considered in context [internal quotation marks omitted]).

We first consider the commissioner's claim that the language of § 12-256 (b) (2) imposing a tax on "gross earnings" establishes that earnings from the sale, lease, installation, and maintenance of equipment are subject to taxation because this court has consistently held that a business' "gross earnings include a taxpayer's entire earnings and receipts." (Internal quotation marks omitted.) *Texaco Refining & Marketing Co.* v. *Commissioner of Revenue Services*, supra, 202 Conn. 597. We conclude that the commissioner's reliance on *Texaco Refining & Marketing Co.* is misplaced. The plaintiff in that case contended that moneys that it collected from customers to pay for the tax imposed by General Statutes (Rev. to 1985) § 12-587 on "gross earnings . . . derived . . . from the sale of petroleum products in this state" were not taxable "gross earnings." Id., 584 n.3. This court summarily rejected the plaintiff's claim, made "in passing," that these moneys plainly were not "earnings from the sale of petroleum products" for purposes of § 12-587. Id., 592. The court then concluded that the only issue that it was required to address was the meaning of the phrase "gross earnings," as used in § 12-587. See id., 593 ("[t]he heart of the disagreement between the parties is how to define the relevant 'earnings' "); id., 594 ("the statutory definition of 'gross earnings' in § 12-587 instructs us to look to the usual meaning of 'gross receipts' "). Thus, *Texaco Refining & Marketing Co.* stands only for the proposition that "gross earnings" include the business' "entire earnings and receipts" *from an operation of the business that is subject to the tax.* (Internal quotation marks omitted.) Id., 597. Contrary to the commissioner's contention, this court did not hold that a gross earnings tax necessarily applies to *all operations* in which the taxed business is engaged.

The commissioner also makes a number of textual arguments in support of the contention that § 12-256 (b) (2) imposes a tax on all nonprogramming services.

First, he contends that the second sentence of § 12-256 (b) providing that "[n]o deduction shall be allowed from such gross earnings for operations related to commissions, rebates or other payments, except such refunds as arise from errors or overcharges," clearly means that the tax is imposed on "gross earnings for operations." We disagree. Although the sentence is not a model of clarity, it is more reasonably read as providing that "[n]o deduction shall be allowed . . . for operations related to commissions . . . ." General Statutes § 12-256 (b). In other words, contrary to the commissioner's contention, the phrase "for operations" does not modify "gross earnings"; rather, the phrase "related to commissions" modifies "operations." Indeed, the phrase "gross earnings *for* operations" makes little sense. (Emphasis added.) General Statutes § 12-256 (b). In ordinary usage, earnings derive *from* a business' operations, not *for* them. In contrast, the phrase "[n]o deduction shall be allowed . . . for operations" is grammatically sound. In any event, even if the legislature intended the phrase "gross earnings for operations" to refer to "gross earnings from operations," we cannot perceive why, as applied to satellite television providers, the word "operations" should be interpreted to mean anything other than "the transmission to subscribers in this state of video programming by satellite . . . ." General Statutes § 12-256 (b) (2).

Second, the commissioner relies on the third sentence of § 12-256 (b) providing that "[o]n or before the last day of the month next succeeding each quarterly period, each [taxpayer] shall render to the commissioner a return on forms prescribed or furnished by the commissioner, signed by the person performing the duties of treasurer or an authorized agent or officer of the system or service operated by such person, which return shall include information regarding the name and location within this state of such system or service

and the total amount of gross earnings derived from such operations and such other facts as the commissioner may require for the purpose of making any computation required by this chapter." (Emphasis added.) The commissioner contends that this language shows that the tax is imposed on gross earnings derived from *all* of the plaintiff's operations. The obvious flaw in this argument, however, is that the statute expressly refers to "*such* operations," and the antecedent to this phrase is "the transmission to subscribers in this state of video programming by satellite . . . ."[17] (Emphasis added.) General Statutes § 12-256 (b) (2). Accordingly, if the phrase "the transmission to subscribers in this state of video programming by satellite" does not include *all* of the plaintiff's operations—which is the very issue that we must decide—the phrase "such operations" does not include all of those operations.

The commissioner further contends that "construction of 'transmission of video programming by satellite' as referring to a separately itemized product, rather than a description of the [plaintiff's] business itself, leads to absurd or unworkable results," because the transmission of video programming itself is useless to subscribers if they do not have the equipment to receive and view the programming. Again, we are not persuaded. The mere fact that subscribers must purchase or lease equipment in order to view the video program-

[17] The phrase "such operations," as used in the third sentence of § 12-256 (b), cannot refer to the word "operations," as used in the second sentence, because, as we have explained, the most reasonable interpretation of that word is that it is modified by the phrase "related to commissions, rebates, or other payments," and it refers to the operations for which *deductions* are not allowed. The statute cannot mean that the taxpayer must submit to the commissioner a form listing "the total amount of gross earnings derived from [operations for which deductions are not allowed]." Even if the word "operations," as used in the second sentence of § 12-256 (b), refers to the "transmission to subscribers in this state of video programming by satellite," however, nothing in the third sentence expands that meaning.

ming transmitted by the plaintiff does not, ipso facto, establish that the legislature must have intended to impose a tax on earnings from the sale or lease of that equipment.

We also disagree with the commissioner's contention that the plaintiff sells no product that merely consists of the "transmission of video programming" because "[a] one-way video programming by satellite business . . . is always *transmitting* all of its offered programming to its entire service area, whether or not any given person on any given plot of real estate has subscribed to its services." (Emphasis in original.) Because subscribers would discontinue payments to the plaintiff if it stopped transmitting video programming, it necessarily follows that they are paying for such transmissions. Indeed, we see no reason why a satellite television provider could not engage *exclusively* in the operation of transmitting video programming and leave to others the sale and installation of equipment necessary to view the programing. In that case, the company's earnings could be from nothing *except* the sale of transmissions. We fail to see the significance of the fact that satellite television providers continue their transmissions regardless of the number of subscribers in a particular geographic area.

The commissioner further contends that, if § 12-256 (b) (2) applies only to programming services, satellite television providers hypothetically could avoid paying any tax at all by allocating all charges for transmission of video programming to charges for the sale or lease of equipment necessary to receive the transmissions. Nothing in the record, however, suggests that this hypothetical problem has actually materialized. To the contrary, the commissioner stipulated before the trial court that the plaintiff had accurately allocated earnings from programming services and nonprogramming goods and services when it calculated the amount of the refund

that it was owed for taxes paid on gross earnings from the sale of nonprogramming services, which allocation was based upon the plaintiff's internal accounting policies.[18]

Finally, the commissioner contends that, by using the word "from" in the phrase "gross earnings from . . . (2) the transmission to subscribers in this state of video programming by satellite"; General Statutes § 12-256 (b); the legislature "delegated the task of determining the sufficiency of the relationship of the receipts to the business' operations to the commissioner." To support this contention, the commissioner relies on this court's decision in *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 215, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012), in which we interpreted a statute, General Statutes § 12-407 (a) (15) (A), containing the phrase "includes but shall not be limited to." (Internal quotation marks omitted.) Id. We concluded that that phrase, "coupled with the enumeration of specific or illustrative acts of . . . conduct, is indicative of a legislative intent . . . to delegate to the [commissioner] the duty of ascertaining what other or additional acts fall within the articulated standard." (Internal quotation marks omitted.) Id. The basis for this conclusion, however, was that the phrase "includes but shall not be limited to" is *expansive*, that is, it indicates that the

[18] In the stipulation, the parties set forth two alternative methods for allocating earnings from the sale of "bundle[s]" that include both programming services and nonprogramming services, and asked the trial court to decide which was correct. The commissioner contended that all of the earnings from the sale of bundled services should be allocated to programming services. The trial court rejected that argument, agreeing instead with the plaintiff's contention that earnings should be allocated to programming services and nonprogramming goods and services according to the plaintiff's internal accounting policies. The commissioner did not contend in the trial court, and does not seriously contend on appeal, that these accounting policies do not accurately reflect the nature of the products that are being charged.

statute refers to items in addition to the expressly enumerated items. Id. The commissioner has cited no authority for the proposition that the word "from," when coupled with a specified item, has a similarly expansive meaning. Accordingly, we cannot conclude the legislature's use of the word "from" in § 12-256 (b) is indicative of an intent that the commissioner would have the discretion to tax gross earnings from business operations *in addition* to the specifically enumerated operation, namely, "the transmission to subscribers in this state of video programming by satellite," or that that phrase should be construed broadly to include any potentially *related* operations.

We further note that businesses are not always taxed on the gross earnings from *all* of their business operations. See *Hartford Electric Light Co.* v. *Sullivan*, 161 Conn. 145, 155–56, 285 A.2d 352 (1971) (statute imposing tax on gross earnings of public electric utility did not include earnings from contributions in aid of construction, transmission receipts and transmission credits); see also General Statutes § 12-587 (b) (2) (exempting earnings from sale of enumerated petroleum products from tax on gross earnings of company engaged in refining or distribution of petroleum products). In addition, when the legislature wants to tax a business' earnings from all sources, it knows how to do so. For example, General Statutes § 12-249 provides that "[e]ach corporation operating a railroad, and carrying on business for profit in this state, shall . . . pay a tax computed upon its gross earnings *from all sources from operations in this state* . . . ."[19] (Emphasis added.) We can perceive

[19] As we have explained, in the present case, the trial court concluded that the fact that § 12-256 (b) (2) does not contain language similar to the language of § 12-256 (b) (1), which imposes a tax on the gross earnings from "the lines, facilities, apparatus and auxiliary equipment in this state used for operating a community antenna television system," shows that the legislature did not intend to impose a tax on the sale and lease of equipment or equipment installation and maintenance by a business that provides one-way transmission of video programming by satellite. The record does not reveal, however, whether the sale and lease of equipment and equipment

no reason why the legislature would not have used similar language in § 12-256 (b) (2) if its intent had been to impose a tax on all operations of a business engaged in the transmission of video programming by satellite.

We acknowledge that the legislative history of Public Acts 2003, Spec. Sess., June, 2003, No. 03-1, § 92, which is codified at § 12-256 (b) (2), does not reveal the reasons why the legislature would have wanted to exempt from the imposition of the tax gross earnings from the sale and lease of equipment by satellite television providers, and from the installation and maintenance of such equipment. We cannot simply assume, however, that no such reasons could possibly have existed.[20] It is possible, for example, that the legislature might have believed that not imposing a tax on the sale or lease of equipment would incentivize the purchase of such equipment and thereby expand the gross earnings from transmissions that are subject to the tax.[21] It is also

installation and maintenance are subject to taxation under § 12-256 (b) (1), or whether that tax is limited to gross earnings derived from a business' use of its own lines, facilities, apparatus and auxiliary equipment. Accordingly, we conclude that § 12-256 (b) (1) sheds little light on the meaning of § 12-256 (b) (2).

[20] The commissioner makes no claim that, when a tax statute is ambiguous on its face, but its meaning can be clarified by considering the legislative history, there is no requirement that the statute be strictly construed in favor of the taxpayer. See, e.g., *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 389–90, 978 A.2d 49 (2009) (because statutes in derogation of sovereign immunity must be strictly construed, courts may not consult extratextual sources in construing ambiguous statute, but must construe statute as preserving sovereign immunity); but see *State* v. *Panek*, 328 Conn. 219, 242, 177 A.3d 1113 (2018) ("[i]t is well established that courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute" [internal quotation marks omitted]). Even if we were to assume that we may consult the legislative history of § 12-256 (b) (2), however, it sheds no light on the question presently before us.

[21] Indeed, this argument was made by the opponents of a legislative attempt in 2017 to amend § 12-256 to impose a tax on earnings from all operations of satellite television providers. The proposed legislation would have amended § 12-256 (b) by adding the following provision: "For purposes of this subdivision, receipts from subscribers include, but are not limited to, all revenues

received by a system, service or business described in this subdivision from sales or rentals of equipment related to the operation or use of such system, service or business, including, but not limited to, all charges related to the installation, maintenance and repair of such equipment." Raised Bill No. 7312, 2017 Sess., § 2. Nicholas Green, acting on behalf of the plaintiff in the present case, submitted written testimony to the Finance, Revenue and Bonding Committee opposing the enactment of the quoted portion of Raised Bill No. 7312. Conn. Joint Standing Committee Hearings, Finance, Revenue and Bonding, Pt. 5, 2017 Sess., p. 2487. Green stated that the proposed legislation would levy "a new tax on 175,000 Connecticut families that subscribe to satellite [television]" and would increase the average subscriber's tax burden to $10 per month, or by approximately 20 percent. Id. Green also pointed out that an appeal in the present case was pending, and he urged the committee to postpone approving any new legislation until this case was resolved. Id., p. 2488. Megan Kueck, manager of state and local government affairs for the Satellite Broadcasting and Communications Association, stated in written testimony that the proposed legislation would "increase the cost of service for every [Connecticut] satellite [television] customer" and would "unfairly [make] the new tax on [non]programming products and services retroactive . . . ." Id., p. 2524. In addition, Kueck's written testimony stated that this bill would "detrimentally affect the state's economy in multiple ways," including reducing the demand for satellite television service, to which nearly 175,000 families in the state subscribe. Id. The commissioner submitted written testimony in favor of the proposed legislation stating that "[s]atellite [television] sellers should not have a competitive tax advantage over cable and video providers of what is really the same service." Id., p. 2458. The commissioner did not contend that the proposed legislation merely clarified the original intent of § 12-256 (b) (2). The portion of the proposed legislation that would have amended § 12-256 (b) (2) was *not* included in the substitute house bill that was favorably reported out of committee. See Substitute Bill No. 7312, 2017 Sess.

We recognize that, "[o]rdinarily, we are reluctant to draw inferences regarding legislative intent from the failure of a legislative committee to report a bill to the floor, because in most cases the reasons for that lack of action remain unexpressed and thus obscured in the mist of committee inactivity." (Internal quotation marks omitted.) *State* v. *Miranda*, 245 Conn. 209, 231 n.24, 715 A.2d 680 (1998), overruled on other grounds by *State* v. *Miranda*, 274 Conn. 727, 878 A.2d 1118 (2005); but see *In re Valerie D.*, 223 Conn. 492, 521–23, 613 A.2d 748 (1992) (when one version of proposed legislation was favorably reported out of committee and another version of proposed legislation died in committee, court concluded that legislators were "persuaded by the policy arguments of [the successful legislation] and the opponents [of the unsuccessful legislation]"). It is difficult to understand, however, why the commissioner would have urged the adoption of new legislation subjecting all earnings of satellite television providers to a gross earnings tax if § 12-256 (b) already imposed such a tax, or why the Finance, Revenue and Bonding Committee would have rejected the proposed legislation if it believed that the legislature's original intent was to impose such a tax.

possible that the legislature was unaware that satellite television providers derive significant earnings from the sale and lease of equipment necessary to view the video programming that they transmit.

We conclude, therefore, that nothing in the text of § 12-256 or related statutes makes it clear that the phrase "the transmission to subscribers in this state of video programming by satellite," as it is used in § 12-256 (b) (2), was intended to include the sale or lease of satellite dishes and related equipment required to view video programming transmitted by satellite or fees for equipment installation and maintenance. Accordingly, we conclude that the phrase is ambiguous in that respect. It is well settled that tax statutes must be strictly construed, and any ambiguity must be resolved in favor of the taxpayer. See, e.g., *Andersen Consulting, LLP* v. *Gavin*, supra, 255 Conn. 511; *Zachs* v. *Groppo*, supra, 207 Conn. 689. We conclude, therefore, that the trial court properly determined that earnings from the sale and lease of equipment and equipment installation and maintenance are not subject to taxation under § 12-256 (b) (2).

B

We next address the plaintiff's claim, made in its cross appeal, that the trial court improperly determined that its gross earnings from the sale of DVR service and the imposition of payment related fees are subject to the tax imposed by § 12-256 (b) (2). We agree with the plaintiff that the gross earnings from the sale of DVR services are not subject to the tax, but reject its claim with respect to payment related fees.

We first consider whether payments from subscribers for DVR service clearly constitute "gross earnings from . . . the transmission to subscribers in this state of video programming by satellite" under § 12-256 (b) (2).

The plaintiff submitted an affidavit to the trial court averring that "DVR service is provided through a device leased to the subscriber that combines a receiver with a computer-type hard drive. This device . . . record[s] video programming transmitted to the subscriber's receiver, which allow[s] the subscriber to view the video programming on the subscriber's own schedule. The DVR service function[s] only after the video programming [has] been delivered to the subscriber by satellite." In addition, the affidavit averred that, "[w]hile the bulk of [the plaintiff's] gross earnings from subscribers were from its sale of [television] programming and pay-per-view movies and/or events, [the plaintiff] also received gross earnings from subscribers for other goods and services that did not constitute video programming transmitted by satellite," including DVR service. The commissioner concedes these factual assertions.

Although DVR service requires the prior transmission of video programming, we conclude that there is at least a plausible argument that DVR service is a separate and distinct operation from "the transmission to subscribers in this state of video programming by satellite . . . ." General Statutes § 12-256 (b) (2). The capability of recording video programming is not the same thing as the capability of receiving transmissions of video programming in the first instance. Indeed, according to the undisputed averments in the plaintiff's affidavit, subscribers pay for DVR service *in addition* to the transmission of the programming that is recorded with the DVR device. It would be anomalous to conclude that subscribers pay for the same service twice. Because § 12-256 (b) (2) is ambiguous as to whether it was intended to impose a tax on gross earnings from the provision of DVR service, we must construe the statute in the plaintiff's favor. See *Andersen Consulting, LLP* v. *Gavin*, supra, 255 Conn. 511; *Zachs* v. *Groppo*, supra, 207 Conn. 689. Accordingly, we conclude that

the trial court improperly determined that such earnings are subject to taxation.

We next consider whether payment related fees for the failure of a subscriber to pay bills on time, for reconnecting the subscriber after being disconnected for nonpayment, and for certain types of payment plans are subject to the gross earnings tax imposed by § 12-256 (b) (2). We conclude that, just as charges to subscribers to recover the tax imposed by § 12-256 (b) (2) are subject to taxation under that statute because such charges are clearly part and parcel of the taxed business operation, i.e., "the transmission to subscribers in this state of video programming by satellite"—which the plaintiff concedes—the imposition of payment related fees is clearly part and parcel of that operation.[22] Cf. *Texaco Refining & Marketing Co.* v. *Commissioner of Revenue Services*, supra, 202 Conn. 592–93 (rejecting claim that moneys collected from consumers to recover payment of gross earnings taxes on sale of petroleum products are not "earnings from the sale of petroleum products"). In other words, unlike the sale and lease of equipment and equipment maintenance and installation, the imposition of payment related fees is not a stand-alone business operation that is separate and distinct from the transmission of video programing. Accordingly, we conclude that the trial court properly determined that payment related fees are subject to taxation under § 12-256 (b) (2).

III

Finally, we address the plaintiff's claim, also made in its cross appeal, that the trial court improperly deter-

[22] We note that the plaintiff makes no claim that payment related fees are not subject to taxation under § 12-256 (b) (2) because they are related to the lease of equipment or the installation and maintenance of equipment. Rather, the plaintiff claims that a fee for a late payment for programming services, for example, is not a fee for programming services.

mined that the plaintiff was not entitled to interest on the refund pursuant to § 12-268c (b) (1) because § 12-268*l* governs interest awards in cases in which a taxpayer has appealed from the commissioner's denial of a claim for a refund, and the plaintiff made no claim that it was entitled to interest pursuant to that statute.[23] The commissioner disputes this claim and further contends that, even if § 12-268c (b) (1) applies, the trial court properly determined that the plaintiff is not entitled to interest on the refund award because the plaintiff waived any claim for interest by failing to request it in the joint stipulation of damages. We conclude that the trial court properly determined that § 12-268*l* applies when a taxpayer has appealed from the denial of a refund claim. We further conclude that the court properly determined that the plaintiff was not entitled to an interest award pursuant to § 12-268*l* because it never made a claim pursuant to that statute.[24]

Whether § 12-268c (b) (1) or § 12-268*l* applies in cases in which a taxpayer has appealed from the commissioner's denial of a refund claim is a question of statutory interpretation subject to plenary review. See, e.g., *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 507. We begin our analysis with the language of the relevant statutes. Section 12-268c (a) (1) authorizes certain taxpayers that believe that they have overpaid their taxes to

[23] We note that the commissioner appears to believe that General Statutes (Rev. to 2007) § 12-268c (b) (1) would apply if we were to agree with the plaintiff's claim. The current revision of § 12-268c (b) (1), however, is "applicable to refunds issued on or after [July 1, 2013]"; Public Acts 2013, No. 13-232, § 1; and the plaintiff relied on the current revision in the trial court. Because the commissioner has not explained why the current revision would not apply if we were to agree with the plaintiff's claim on appeal, we continue to apply the current revision of that statute. See footnote 5 of this opinion.

[24] Accordingly, we need not address the question of whether the trial court properly determined that the plaintiff was barred from seeking an interest award because it voluntarily agreed to the stipulation of damages, which did not include a request for interest.

"file a claim for refund in writing with the commissioner within three years from the due date for which such overpayment was made . . . ." Section 12-268c (b) (1) provides that, "[t]o any refunds granted as a result of overpayments of any taxes under chapter 210, 211 or 212, except refunds due because of any intentional overpayment, there shall be added interest at the rate of two-thirds of one per cent for each month or fraction of a month, as provided in subdivisions (2) and (3) of this subsection."

Section 12-268*l* authorizes a taxpayer that is aggrieved by an order of the commissioner to "take an appeal therefrom to the superior court for the judicial district of New Britain . . . ." Section 12-268*l* further provides that the trial court "may grant such relief as may be equitable and, if such tax has been paid prior to the granting of such relief, may order the Treasurer to pay the amount of such relief, with interest at the rate of two-thirds of one per cent per month or fraction thereof to the aggrieved taxpayer."

Thus, § 12-268*l* authorizes the trial court to award interest when the tax assessment that is disputed on appeal "has been paid prior to the granting of . . . relief . . . ." By its very nature, therefore, the interest provision of § 12-268*l* applies when, and only when, the trial court concludes that the taxpayer is entitled to a *refund*. Accordingly, if this interest provision does not apply to an appeal from the commissioner's denial of a refund claim filed pursuant to § 12-268c (a) (1), we would be hard-pressed to imagine when it would apply.[25] Put another way, if the interest provision of § 12-

[25] We note that § 12-268c (a) (1) permits "[a]ny company . . . believing that it has overpaid any taxes due under the provisions of chapter 210, 211 or 212 [to] file a claim for refund . . . ." Section 12-268*l* authorizes "[a]ny taxpayer aggrieved [by an] order . . . of the [c]ommissioner . . . made under the provisions of chapter 210, 211 or 212" to appeal from the order. Thus, § 12-268*l* does not authorize appeals from any rulings on refund claims except rulings made pursuant to § 12-268c. Moreover, a taxpayer must file a request for a refund pursuant to § 12-268c before seeking a refund pursuant

268c (b) (1) applies when the trial court has ordered a refund pursuant to § 12-268*l*, the provision of § 12-268*l* authorizing the trial court to award interest when, and only when, a taxpayer is entitled to a refund would be superfluous. It is well settled that "statutory interpretations that render language superfluous are disfavored . . . ." (Citation omitted; internal quotation marks omitted.) *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 70, 52 A.3d 636 (2012).

We conclude, therefore, that § 12-268c (b) (1) requires the commissioner to add interest to refunds that he has *granted*, and it does not apply when the commissioner has *denied* a refund and the taxpayer has appealed from the ruling pursuant to § 12-268*l*. Indeed, § 12-268c (a) (4) expressly recognizes that § 12-268*l* governs appeals from rulings on refund claims filed pursuant to § 12-268c (a) (1).[26] See General Statutes § 12-268c (a) (4) ("[t]he action of the commissioner on the company . . . protest shall

to § 12-268*l*. See *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 300, 152 A.3d 488 (2016) ("[c]ompliance with the refund statute is a condition precedent to availing oneself of the limited statutory waiver of sovereign immunity provided by the appeal statute"), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

[26] We recognize that this interpretation creates a conundrum. Namely, in a case in which the commissioner granted a claim for a refund, but refused to add interest as required by § 12-268c (b) (1), the taxpayer could seek relief from that ruling by appealing to the trial court pursuant to § 12-268*l*, in which case, the commissioner could contend that § 12-268c (b) no longer applied. In that situation, however, we have little doubt that, even assuming that an interest award pursuant to § 12-268*l* is discretionary—an issue that, as we discuss subsequently in this opinion, we need not decide here—it would be an abuse of discretion for the trial court to refuse to award interest pursuant to that statute. Indeed, the commissioner makes no claim in the present case that he has any authority to refuse to pay interest on a refund that he has granted pursuant to § 12-268c. As we also discuss subsequently in this opinion, we recognize that the method of calculating interest under § 12-268*l* is different from the method under § 12-268c (b). Because § 12-268*l* allows for a larger interest award, however, the taxpayer would not be harmed in this situation.

be final upon the expiration of one month from the date on which he mails notice of his action to the company . . . unless within such period the company . . . seeks judicial review of the commissioner's determination pursuant to section 12-268*l*").

The plaintiff contends, however, that even if § 12-268*l* governs interest awards in cases in which a taxpayer has appealed from the denial of a claim for a refund, that statute does not merely authorize the trial court to award interest in its equitable discretion. Rather, the plaintiff contends, the word "may," as used in the phrase "may order the Treasurer to pay the amount of such relief, with interest at the rate of two-thirds of one per cent per month or fraction thereof," is mandatory. See *State ex rel. Markley* v. *Bartlett*, 130 Conn. 88, 93, 32 A.2d 58 (1943) ("in a statute conferring power and authority for the benefit of the public, or of a third person, or of individuals generally, the word may is used, it shall be construed as equivalent to shall, and that the statute is mandatory and not permissive or discretionary" [internal quotation marks omitted]). We decline to review this claim, however, because the plaintiff never sought interest pursuant to § 12-268*l* in the trial court or claimed that the interest provision of that statute was mandatory.[27] See *State* v. *Devalda*, 306

[27] The plaintiff stated in a footnote in its reply to the commissioner's objection to its motion for interest that, "[s]ince . . . § 12-268c (b) clearly and specifically addresses the issue of interest on refunds of the satellite gross earnings tax, it is the controlling statute." The plaintiff then noted that "equity calls for the award of interest in any event. While [the commissioner] attempts to lay responsibility for the length of this litigation on [the plaintiff], the record is clear that: (i) [the plaintiff] repeatedly requested schedules and hearings in an effort to speedily resolve this litigation, only to be met with [the commissioner's] persistent objections; and (ii) [the plaintiff] supplied tremendous amounts of data to [the commissioner] in a good faith effort to come to an agreement on the amount of the refund due, both voluntarily and in response to formal discovery, ultimately fostering the parties' agreement on the amount of the refund." The plaintiff did not claim in the alternative, however, that § 12-268*l* applied. Nor did the plaintiff claim, as it does on appeal, that the interest provision of § 12-268*l* is mandatory. Rather, the plaintiff appears to have been suggesting that, *even if*, as the

Conn. 494, 504, 50 A.3d 882 (2012) ("this claim is unpreserved for appellate review and, therefore, unreviewable" [internal quotation marks omitted]). We note in this regard that, even if the plaintiff were correct that § 12-268*l* mandates that the trial court award interest on refunds, the statute cannot be construed as requiring the trial court to grant the *same* interest award that the commissioner would have been required to grant pursuant to § 12-268c (b) (1) if he had granted the refund in the first instance, because the methods of calculating interest set forth in §§ 12-268*l* and 12-268c (b) are different. Compare General Statutes § 12-268*l* (authorizing trial court to order payment of interest at rate of two-thirds of one percent per month or fraction of month), with General Statutes § 12-268c (b) (requiring commissioner to pay interest at rate of two-thirds of one percent per month or fraction of month, but excluding ninety days from interest period).[28] Accordingly, the plaintiff's failure to request an interest award pursuant to § 12-268*l* cannot be deemed a mere technicality in light of its request for interest pursuant to § 12-268c (b) (1).

commissioner had contended in his opposition to the plaintiff's motion for interest, § 12-268*l* applies to claims for interest in appeals from the commissioner's denial of a refund claim, the equities weighed in favor of an interest award. This is a factual question, however, that would have required the presentation of evidence, and the plaintiff never requested an evidentiary hearing on the issue in the trial court.

[28] General Statutes § 12-268c (b) provides in relevant part: "(1) To any refunds . . . there shall be added interest at the rate of two-thirds of one per cent for each month or fraction of a month, as provided in subdivisions (2) and (3) of this subsection.

"(2) In case of such overpayment pursuant to a tax return, no interest shall be allowed or paid under this subsection on such overpayment for any month or fraction thereof prior to (A) the ninety-first day after the last day prescribed for filing the tax return associated with such overpayment, or (B) the ninety-first day after the date such return was filed, whichever is later.

"(3) In case of such overpayment pursuant to an amended tax return, no interest shall be allowed or paid under this subsection on such overpayment for any month or fraction thereof prior to the ninety-first day after the date such amended tax return was filed."

The plaintiff also contends that, if the interest provision of § 12-268*l* is discretionary, that statute cannot apply when the trial court has ordered a refund following the denial of a claim filed pursuant to § 12-268c (a) (1) because the legislature could not have intended to encourage the commissioner to deny meritorious refund claims and "force taxpayers into court where a discretionary award of interest is far less likely." Even if we were to assume that interest awards pursuant to § 12-268*l* are discretionary, however, we would not find the plaintiff's argument persuasive. This court has held that, even when interest awards are discretionary, there is no requirement that the party seeking interest prove wrongfulness above and beyond the unlawful detention of the payment in order for the trial court to have the discretion to award interest. Cf. *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 53 n.13, 74 A.3d 1212 (2013) ("interest may be awarded in the discretion of the trial court [pursuant to General Statutes § 37-3a] even when the liable party's failure to pay the judgment was not blameworthy, unreasonable or in bad faith"). Although "a trial court properly may consider the relative merit of an appeal when weighing the equities"; id., 56 n.15; the primary equitable factor that the court must consider when exercising its discretion to award interest is the policy of "compensat[ing] parties that have been deprived of the use of their money." Id., 53 n.13. We believe that the legislature reasonably could have concluded that an interest award should not be *automatic* in cases in which the commissioner denies a refund claim filed pursuant to § 12-268c and the taxpayer ultimately prevails on appeal, but, rather, should be based on equitable factors, with significant weight being given to the taxpayer's interest in being compensated for the loss of the use of its money.

The judgments are reversed only with respect to the taxability of the plaintiff's gross earnings from DVR

service and the case is remanded with direction to render judgments sustaining the plaintiff's appeals as to that issue; the judgments are affirmed in all other respects.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 330

STATE OF CONNECTICUT *v.* JEFFREY SMITH

The defendant's petition for certification to appeal from the Appellate Court, 180 Conn. App. 371 (AC 40398), is granted, limited to the following issue:

"Does this court's holding in *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), readopting vacatur as a remedy for a cumulative conviction that violates double jeopardy protections, apply retroactively?"

*Adele V. Patterso*n, senior assistant public defender, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* LARRY LAMAR STEPHENSON

The defendant's petition for certification to appeal from the Appellate Court, 181 Conn. App. 614 (AC 38674), is denied.

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

James P. Sexton, assigned counsel, and *Megan L. Wade*, assigned counsel, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided September 20, 2018

MARY RANDAZZO *v.* JOHN ALAN SAKON

The defendant's petition for certification to appeal from the Appellate Court, 181 Conn. App. 80 (AC 39197), is denied.

John Alan Sakon, self-represented, in support of the petition.

Thomas P. Moriarty, in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* TYQUAN TURNER

The defendant's petition for certification to appeal from the Appellate Court, 181 Conn. App. 535 (AC 40248), is granted, limited to the following issues:

"1. Did the Appellate Court properly determine that the petitioner was not entitled to review, under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), of his unpreserved claim that the trial court improperly admitted cell tower coverage maps?

"2. Did the Appellate Court properly determine that the petitioner was not entitled to plain error review of his unpreserved claim that the trial court improperly admitted cell tower coverage maps?"

Ann M. Parrent, assistant public defender, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* DONALD RAYNOR

The defendant's petition for certification to appeal from the Appellate Court, 181 Conn. App. 760 (AC 41018), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the trial court had properly denied the defendant's motion for a *Porter* hearing to determine the reliability of firearm and toolmark identification?

"2. Did the Appellate Court correctly conclude that the trial court had properly denied the defendant's motion in limine to limit the scope of the testimony of the state's expert on firearm and toolmark analysis?

"3. Did the Appellate Court correctly conclude that the trial court had properly admitted the uncharged misconduct evidence?"

Andrew P. O'Shea in support of the petition.

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

Decided September 20, 2018

CALVIN BENNETT *v.* COMMISSIONER OF CORRECTION

The petitioner Calvin Bennett's petition for certification to appeal from the Appellate Court, 182 Conn. App. 541 (AC 37131), is denied.

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

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

Decided September 20, 2018

STATE OF CONNECTICUT *v.* DARREN MATTHEW CROSBY

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 373 (AC 37523), is denied.

James B. Streeto, senior assistant public defender, and *Alec Gulash*, in support of the petition.

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

Decided September 20, 2018

HUGH F. HALL *v.* DEBORAH HALL

The plaintiff's petition for certification to appeal from the Appellate Court, 182 Conn. App. 736 (AC 38834), is granted, limited to the following issue:

"1. Did the Appellate Court properly conclude that the trial court did not abuse its discretion in finding the plaintiff in contempt of court based on the wilful violation of a court order?

"2. If the answer to the first question is 'yes,' did the Appellate Court properly conclude that the trial court did not abuse its discretion in denying the parties' joint motion to open and vacate the judgment of contempt?"

Barbara M. Schellenberg, in support of the petition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* PAUL WYNNE

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 706 (AC 39169), is denied.

James B. Streeto, senior assistant public defender, in support of the petition.

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

Decided September 20, 2018

STATE OF CONNECTICUT *v.* HAJI JHMALAH BISCHOFF

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 563 (AC 39336), is denied.

James B. Streeto, senior assistant public defender, and *Emily H. Wagner*, assistant public defender, in support of the petition.

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

Decided September 20, 2018

CHRISTOPHER HOUK NICHOLS ET AL. *v.* TOWN OF OXFORD

The plaintiffs' petition for certification to appeal from the Appellate Court, 182 Conn. App. 674 (AC 39366), is denied.

Robert J. Nichols, in support of the petition.

Michael S. Hillis and *Kevin Condon*, in opposition.

Decided September 20, 2018

PATRICIA R. KAPLAN *v.* DAVID SCHEER ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 182 Conn. App. 488 (AC 39515), is denied.

Matthew G. Berger, in support of the petition.

Richard T. Meehan, Jr., in opposition.

Decided September 20, 2018

KAREN ZILKHA *v.* DAVID ZILKHA

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 459 (AC 39832), is denied.

Edward N. Lerner, in support of the petition.

Decided September 20, 2018

RANDY MURALLO *v.* UNITED BUILDERS SUPPLY COMPANY, INC.

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 594 (AC 40442), is denied.

Garon Camassar, in support of the petition.

Eugene C. Cushman, in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* EVAN J. HOLMES

The defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 124 (AC 40677), is denied.

Evan J. Holmes, self-represented, in support of the petition.

Paul J. Narducci, senior assistant state's attorney, in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* GERALD A.

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 82 (AC 39126), is denied.

Alice Osedach, assistant public defender, in support of the petition.

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

Decided September 20, 2018

STATE OF CONNECTICUT *v.* WALKER WILNER DUBUISSON

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 62 (AC 39685), is denied.

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

Linda F. Currie-Zeffiro, assistant state's attorney, in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* JACQUI SMITH

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 54 (AC 39744), is denied.

Mary Boehlert, assigned counsel, in support of the petition.

Rita M. Shair, senior assistant state's attorney, in opposition.

Decided September 20, 2018

ROGER SAUNDERS, TRUSTEE OF ROGER SAUNDERS MONEY PURCHASE PLAN *v.* KDFBS, LLC, ET AL.

The petition by the defendants Daniel Davis and Karen Davis for certification to appeal from the Appellate Court (AC 40918) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the defendants' appeal from the determination of priority of mortgages for lack of a final judgment in accordance with *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)?"

Neil R. Marcus, *Barbara M. Schellenber*, and *Alexander Copp*, in support of the petition.

Michael J. Jones and *Jessica M. Signor* in opposition.

Decided September 20, 2018

STATE OF CONNECTICUT *v.* RESERVATION SERVICES INTERNATIONAL, INC., ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 41585) is denied.

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

Proloy K. Das and *Eric B. Miller*, in support of the petition.

Robert L. Marconi and *Jonathan J. Blake*, assistant attorneys general, in opposition.

Decided September 20, 2018

Cumulative Table of Cases
Connecticut Reports
Volume 330

(Replaces Prior Cumulative Table)

Akers *v.* University of Connecticut Law School (Order) . . . 902
Amelio *v.* Monthie (Orders) . . . 907
Angersola *v.* Radiologic Associates of Middletown, P.C. . . . 251
Wrongful death action pursuant to statute (§ 52-555); motions to dismiss plaintiffs' action on ground that plaintiffs failed to commence action within five year repose period set forth in § 52-555; motion for limited discovery of disputed facts related to trial court's jurisdiction; claim that repose period of § 52-555 had been tolled as to all defendants in accordance with continuing course of conduct and continuing course of treatment doctrines; whether trial court correctly determined that failure to comply with repose provision of § 52-555 deprives trial court of subject matter jurisdiction over action brought pursuant to that statute; claim that plaintiffs could not invoke continuing course of conduct and continuing course of treatment doctrines as basis for extending repose period set forth in § 52-555; whether plaintiffs properly preserved their claim for evidentiary hearing to address disputed issues of fact in support of their tolling claims; whether trial court correctly concluded that record did not support application of continuing course of treatment doctrine; whether trial court properly denied plaintiffs' request for limited discovery or for evidentiary hearing before it ruled on motions to dismiss, in order to resolve disputed jurisdictional facts related to claim that repose period of § 52-555 was tolled by continuing course of conduct doctrine.
Battistotti *v.* Suzanne A. (Order) . . . 904
Bayview Loan Servicing, LLC *v.* Park City Sports, LLC (Order) . . . 901
Bennett *v.* Commissioner of Correction (Order) . . . 910
Clements *v.* Aramark Corp. (Order) . . . 904
Desmond *v.* Yale-New Haven Hospital, Inc. (Order) . . . 902
Dish Network, LLC *v.* Commissioner of Revenue Services . . . 280
Tax appeal; claim that plaintiff satellite video company's failure to request administrative review of audit pursuant to statute (§ 12-268i) barred subsequent request for refund pertaining to same tax period; whether trial court correctly concluded that gross earnings from sale, lease, installation, and maintenance of equipment were taxable pursuant to statute (§ 12-256 [b] [2]); whether trial court correctly concluded that gross earnings from digital video recording services and payment related fees were not taxable pursuant to § 12-256 (b) (2); whether trial court correctly concluded that plaintiff was not entitled to interest on refund pursuant to statute (§ 12-268c [b] [1]).
Filosi *v.* Electric Boat Corp. . . . 231
Workers' compensation; collateral estoppel; claim for benefits under state Workers' Compensation Act (§ 31-275 et seq.) by plaintiff, who had been awarded benefits under federal Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.) following husband's death from lung cancer that allegedly was caused by workplace asbestos exposure; whether finding by administrative law judge in prior federal proceeding that decedent's workplace exposure to asbestos was substantial contributing cause of development of his lung cancer precluded defendant employer and defendant insurers from contesting issue of causation under state act; claim by defendants that they were not collaterally estopped from litigating causal connection between decedent's death and his workplace exposure to asbestos because federal act requires lower standard of causation than substantial factor standard required under state act.
Francis *v.* Commissioner of Correction (Order) . . . 903
Georges *v.* OB-GYN Services, P.C. (Order) . . . 905
Greene *v.* Commissioner of Correction . . . 1
Habeas corpus; claim that prosecutor's failure to correct allegedly false testimony pertaining to plea agreement for cooperating witness deprived petitioner of right to due process of law; recommendation for conducting examinations of cooperating witnesses with respect to plea agreements, discussed; claim that state violated

petitioner's right to due process on ground that prosecutor knew before petitioner's criminal trial, but failed to disclose, intention to recommend favorable sentence for cooperating witness; whether trial court abused its discretion in denying petitioner's request to issue capias.

Hall *v.* Hall (Order) . . . 911

Hartford *v.* CBV Parking Hartford, LLC. . . . 200

Eminent domain; challenge to statement of compensation filed by plaintiff city; claim that city's appeal was moot because it challenged only one of two independent grounds that supported trial court's fair market value determination; whether trial court improperly valued property on basis of unreasonable assumption that defendants would assemble their parcels with adjoining properties owned by city for development; whether trial court improperly awarded interest pursuant to statute (§ 37-3c) at rate of 7.22 percent and offer of compromise interest.

In re James H. (Order) (See In re Katherine H.) . . . 906

In re Katherine H. (Order) . . . 906

In re Zoey H. (Order) . . . 906

Kaplan *v.* Scheer (Order) . . . 913

Ledyard *v.* WMS Gaming, Inc. . . . 75

Personal property taxes; attorney's fees; final judgment; appellate jurisdiction; certification from Appellate Court; whether Appellate Court lacked subject matter jurisdiction over defendant's appeal from trial court's decision to grant plaintiff town's motion for summary judgment as to liability only; claim that Appellate Court improperly dismissed appeal by relying on footnote in Paranteau *v.* DeVita *(208 Conn. 515); whether Appellate Court improperly failed to apply bright line rule from* Paranteau *that judgment on merits is final for purposes of appeal even though amount of attorney's fees had not yet been determined.*

Lewis *v.* Commissioner of Correction (Order). . . . 906

Murallo *v.* United Builders Supply Co. (Order) . . . 913

Murray *v.* Suffield Police Dept. (Order) . . . 902

Nichols *v.* Oxford (Order) . . . 912

Randazzo *v.* Sakon (Order). . . . 909

Saunders *v.* KDFBS, LLC (Order) . . . 915

Smith *v.* Rudolph . . . 138

Action pursuant to statute (§ 52-556) waiving sovereign immunity when person is injured due to negligence of state employee while that employee is operating motor vehicle owned and insured by state; right to jury trial; motion to strike case from jury trial list; claim that trial court incorrectly determined that § 52-556 did not afford plaintiff right to jury trial; whether trial court properly struck plaintiff's case from jury trial list; whether § 52-556 expressly provides for right to jury trial.

Standard Petroleum Co. *v.* Faugno Acquisition, LLC . . . 40

Class action; claim that defendant petroleum company, which supplied gasoline products to plaintiff service station operators and franchisees, overcharged them by failing to apply certain federal tax credit and by charging state gross receipts tax; claim under Connecticut Unfair Trade Practices Act (§ 42-110a et seq.); motions for class certification; standards that govern trial court's class certification decision, discussed; whether trial court abused its discretion in concluding that four prerequisites to class action set forth in applicable rule of practice (§ 9-7) were satisfied; whether trial court abused its discretion in concluding that common issues of law and fact predominated and that class action was superior to other methods of adjudication.

State *v.* Bagnaschi (Order) . . . 907

State *v.* Bischoff (Order) . . . 912

State *v.* Crosby (Order). . . . 911

State *v.* Dubuisson (Order). . . . 914

State *v.* Gerald A. (Order) . . . 914

State *v.* Harris . . . 91

Felony murder; robbery first degree; conspiracy to commit robbery first degree; eyewitness identifications; motion to suppress; out-of-court identification of defendant by eyewitness to crimes at arraignment on unrelated charges; claim that trial court violated defendant's due process rights under federal constitution by denying his motion to suppress eyewitness' out-of-court and in-court identifications of him because out-of-court identification was product of unnecessarily suggestive procedure and neither identification was reliable; claim that, even if

defendant's federal constitutional rights were not violated, admission of those identifications violated defendant's due process rights under state constitution; whether defendant was entitled to suppression of out-of-court and in-court identifications under federal constitution; whether identification procedure was unnecessarily suggestive; whether identification of defendant at arraignment proceeding was nevertheless reliable under totality of circumstances; modification of framework for determining reliability of identifications set forth in Neil *v.* Biggers *(409 U.S. 188) to conform to recent developments in social science and law, as matter of state constitutional law; endorsement of factors that this court identified as matter of state evidentiary law in* State *v.* Guilbert *(306 Conn. 218) for determining reliability of identifications; adoption of burden shifting framework that New Jersey Supreme Court articulated in* State *v.* Henderson *(208 N.J. 208) for purposes of allocating burden of proof with respect to admissibility of identification that is product of unnecessarily suggestive identification procedure; claim that, if trial court had applied standard that this court adopted for purposes of state constitution in present case, it would have concluded that identification should be excluded as insufficiently unreliable.*

State *v.* Hearl (Order) . . . 903
State *v.* Holmes (Order) . . . 913
State *v.* Liebenguth (Order) . . . 901
State *v.* Raynor (Order) . . . 910
State *v.* Reservation Services International, Inc. (Order) . . . 915
State *v.* Smith (Orders) . . . 908, 914
State *v.* Stephenson (Order) . . . 908
State *v.* Taupier . . . 149

Threatening first degree; breach of peace second degree; disorderly conduct; motion to dismiss; claim that threatening statements directed toward Superior Court judge in e-mail sent to others constituted protected speech under federal and state constitutions; claim that first degree threatening statute (§ 53a-61aa [a] [3]) was unconstitutional under free speech provisions of federal and state constitutions because statute did not require state to prove that defendant, in threatening to commit crime of violence, had specific intent to terrorize target of threatening statements; claim that first amendment requires higher mens rea for threatening speech directed at public official; whether trial court's consideration of evidence regarding certain events following defendant's threatening statement constituted reversible error; whether evidence was sufficient to support defendant's convictions of threatening in first degree and disorderly conduct; indirect communication of threats through third parties, discussed.

State *v.* Turner (Order) . . . 909
State *v.* Wynne (Order) . . . 911
Tedesco *v.* Agoli (Order) . . . 905
Traylor *v.* Gambrell (Order) . . . 901
White *v.* Commissioner of Correction (Order) . . . 904
Zilkha *v.* Zilkha (Order) . . . 913

CONNECTICUT APPELLATE REPORTS

Vol. 185

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MICHAEL ERRICHETTI *v.* DANIEL BOTOFF ET AL.
(AC 40143)

Lavine, Moll and Bishop, Js.

Syllabus

The plaintiff brought this action seeking injunctive relief pursuant to statute (§ 52-480) in connection with the alleged conduct of the defendants, D and L, in maliciously erecting a fence on certain of their real property that bordered the plaintiff's property. Following a trial to the court, the trial court rendered judgment in favor of plaintiff and ordered the defendants to remove the fence and to restore the surrounding area to its previous condition. On the defendants' appeal to this court, *held*:

1. The trial court properly determined that the plaintiff was entitled to an injunction pursuant to § 52-480 and that the defendants erected the fence maliciously and with the intent to injure the plaintiff's enjoyment of his land: the defendants' claim that the court based its determinations of malice and intent to injure on clearly erroneous findings that the fence was useless and that the fence impairs the plaintiff's enjoyment of his property was unavailing, as uselessness under § 52-480 focuses on whether the structure served an actual use, not whether the defendants can merely assert a purpose for erecting the structure, the court, in making its findings, was free to reject parts of L's testimony that she and D had erected the fence for privacy and safety, and to credit certain parts of the plaintiff's testimony that anyone can walk around the ends of the fence to enter his property and concerning the aesthetics of the wooded area and wetlands surrounding his home prior to the defendants' erection of the fence and how the fence impaired his enjoyment of his property, and the court's findings of the absence of any real usefulness of the fence and that the fence impairs the plaintiff's enjoyment of his property were not clearly erroneous; moreover, the trial court did not err with respect to its finding that the fence was out of character with the neighborhood, as the court explicitly credited the testimony of the plaintiff's expert that the fence caused the plaintiff's property to lose a beneficial wooded view, which reduced the value of his property, and it was not for this court to second-guess the trial court's assessment of the credibility of the witnesses.
2. The defendants could not prevail on their claim that the trial court erred in ordering them to restore the area in which the fence was erected to its previous condition: the plaintiff clearly requested that relief in his complaint and there was nothing in the record demonstrating that he ever abandoned that request, and the relief ordered by the court fell within the statutory authority conferred by § 52-480, as it was remedial in nature and consistent with the principle that the effect of the statute should not be extended beyond the evil it was intended to remedy;

moreover, the court's order was not vague, as the plaintiff testified extensively as to the area's appearance prior to the fence and entered several photographs of the area into evidence, and the defendants did not file any motion seeking clarification of the court's order, which was not so vague that persons of common intelligence would necessarily have to guess at its meaning or differ as to its application.

Argued May 16—officially released October 2, 2018

Procedural History

Action for an injunction precluding the defendants from erecting a fence, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Heller*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court; thereafter, the court, *Jacobs*, *J.*, granted the defendants' motion for a stay of the judgment pending appeal. *Affirmed*.

Patrick M. Fahey, with whom, on the brief, was *Matthew Ranelli*, for the appellants (defendants).

John R. Harness, for the appellee (plaintiff).

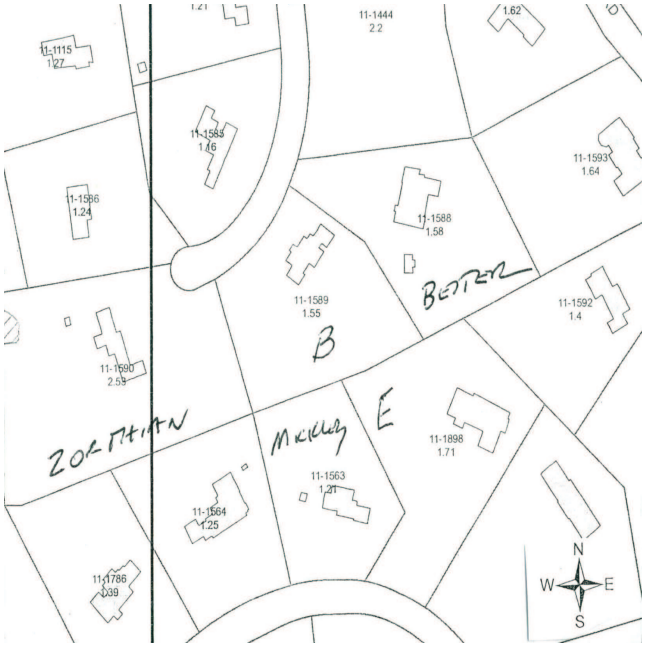
Opinion

MOLL, J. This case is about a so-called "spite fence" erected along the border between two residential properties in Greenwich. The defendants, Daniel Botoff and Laura Botoff, appeal from the trial court's judgment rendered in favor of the plaintiff, Michael Errichetti, entering an injunction pursuant to General Statutes § 52-480,[1] which required the defendants to remove the fence that they had constructed on their property and to restore the surrounding area. On appeal, the defendants claim that the court erred by (1) finding the second and third elements of § 52-480 satisfied, namely, a malicious erection of the structure and the intention to injure the

[1] General Statutes § 52-480 provides: "An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

enjoyment of the adjacent landowner's property, and (2) ordering the defendants to restore the area in which the fence was erected to its previous condition. We disagree, and, accordingly, we affirm the judgment of the trial court.

The trial court found the following facts that are relevant to this appeal. To aid the reader, we include from a trial exhibit (plaintiff's exhibit 5) a diagram of the properties at issue. "B" identifies the defendants' property; "E" identifies the plaintiff's property.



Since 1993, the plaintiff and his wife have owned and resided at a property located at 86 Rockwood Lane in Greenwich. In 2011, the defendants purchased, and have since resided at, a property located at 5 Dogwood Lane in Greenwich. Both properties are located in a two acre zoning district. Part of the defendants' backyard abuts part of the plaintiff's yard that lies to the north of his house. The defendants' property is bounded

to the northeast by property belonging to the Betters, to the west by property belonging to the Zorthians, and to the south by both the plaintiff's property and property belonging to the plaintiff's neighbor to the west, the Mickleys. The parties share a common boundary of 160 feet. In 2014, the defendants built a wooden stockade style fence along a 103 foot portion of this 160 foot boundary.[2]

At trial, the plaintiff described the area surrounding his home. The trial court found that to the northwest of the plaintiff's house is a "natural wooded area, most of which is wetlands," that covers part of the plaintiff's, the defendants', the Zorthians', and the Mickleys' properties. The wooded area creates a forty to sixty foot buffer between the parties' properties. A stream flows through this area on its way to Long Island Sound, and an old farmer's wall runs along the parties' shared boundary. The parties' properties each slope up from the stream to their respective homes. In 2004, the plaintiff and his wife renovated their house so that several main rooms offered views of the wooded area. According to the plaintiff, prior to the erection of the fence, he had "felt that his yard was very tranquil and beautiful" and "that he would not have purchased [his] property if the fence had been there already."

After purchasing the property in 2011, the defendants immediately began renovating the house. According to Laura Botoff's testimony, when she and her husband bought the property, they discussed erecting a fence and potentially installing a pool but decided to complete the work in phases for financial reasons. In 2012, after completing the renovations to the house, they began a landscaping project "to make sure that [the backyard] was safe for their young sons." When the defendants

[2] Although the defendants had applied for, and the Greenwich Inland Wetlands and Watercourses Agency had issued, a permit for a 110 foot fence, the agency later decided that the fence could be only 103 feet long.

began the landscaping project, they had the property staked for a fence. Laura Botoff testified that she and her husband believed that a fence would provide them with privacy and security, but they did not erect the fence for another two years after having it staked. During this period, the relationship between the parties deteriorated.

At trial, the parties testified about a few interactions they had concerning their shared boundary. According to the plaintiff, in the spring of 2012, he saw the defendants' landscaping project expanding into the wooded area between his and the defendants' homes. Assuming that the defendants had not received the proper approvals from the Greenwich Inland Wetlands and Watercourses Agency (agency), the plaintiff walked over to the defendants' house, introduced himself to Laura Botoff, and explained that she should contact the agency before proceeding with the project. Laura Botoff's recounting of the interaction differs. She testified that he approached her, without first identifying himself, to question her about the nonexistence of wetlands flags.

The next notable incident occurred in 2014, when the plaintiff noticed Laura Botoff walking along their shared boundary with a man who appeared to be measuring for a fence. The plaintiff testified that he went outside to ask Laura Botoff whether they were measuring for a fence and that, when she responded that they were, he reminded her that she needed approval from the agency before building anything in the wetlands. According to the plaintiff, Laura Botoff became agitated, at which point the plaintiff left and called the agency to report the defendants' plans for a fence. Again, Laura Botoff's recollection differs. According to her testimony, she calmly explained that she understood that she could build the fence as long as she received the proper permits, and, after the plaintiff returned to his house, she called the Greenwich Police

Department to file a complaint. Shortly after this incident, the defendants applied to the agency for a permit to build the fence. The agency issued the permit over the plaintiff's opposition.[3]

In June, 2014, the plaintiff commenced the underlying action, seeking injunctive relief pursuant to § 52-480. In August, 2014, the defendants installed the fence. In February, 2017, following a two day bench trial, at which all parties and their respective expert appraisers testified, the court rendered judgment in favor of the plaintiff and against the defendants. In its memorandum of decision, the court found that the plaintiff had met his burden of proof with respect to his claim under § 52-480 and, as injunctive relief, ordered the defendants to remove the fence and to restore the surrounding area to its previous condition. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the defendants first claim that the court erroneously determined that the plaintiff was entitled to an injunction pursuant to § 52-480. Specifically, they argue that the court, in determining that the defendants had erected the fence maliciously and with the intent to injure the plaintiff's enjoyment of his land, relied on clearly erroneous subordinate findings, namely, that the fence is useless, impairs the plaintiff's enjoyment of his property, and is out of character with the neighborhood. The plaintiff argues, to the contrary, that the evidence adequately supports the court's findings. We agree with the plaintiff.

[3] In June, 2014, the plaintiff appealed from the agency's decision to the Superior Court, which action the court dismissed in July, 2015. See *Errichetti* v. *Inland Wetlands & Watercourses Agency*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-14-6022517-S (July 28, 2015) (60 Conn. L. Rptr. 892). The plaintiff did not appeal from that dismissal to this court.

A

We begin by setting forth the standard of review and relevant law. "When the factual basis of a trial court's decision . . . is challenged, our function is to determine whether, in light of the pleadings and evidence in the whole record, these findings of fact are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, 138 Conn. App. 289, 296, 50 A.3d 968 (2012).

"The Connecticut progenitor of what have commonly been called the spite fence cases appears to be *Whitlock* v. *Uhle*, 75 Conn. 423, 53 A. 891 (1903). . . . In [*Whitlock*], our Supreme Court construed and applied the predecessors to General Statutes §§ 52-480 and 52-570[4] and set forth the elements necessary to state a cause of action under §§ 52-480 and 52-570. The court held that the essential elements are: (1) a structure erected on the [defendant's] land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure is useless to the defendant; and (6) the enjoyment of the adjacent landowner's land is in fact impaired." (Footnote added; footnotes omitted; internal quotation marks omitted.) Id., 302. The plaintiff bears the burden of demonstrating

[4] Whereas § 52-480 provides for injunctive relief for the malicious erection of a structure, § 52-570 provides a legal remedy therefor. See, e.g., *Geiger* v. *Carey*, Superior Court, judicial district of Litchfield, Docket No. CV-11-5007327-S (February 25, 2015) (reprinted at 170 Conn. App. 462, 466, 154 A.3d 1093 [2017]). This case concerns solely § 52-480.

each of these elements by a fair preponderance of the evidence. See *Rutka* v. *Rzegocki*, 132 Conn. 319, 322, 43 A.2d 658 (1945); see generally *Deane* v. *Kahn*, 179 Conn. App. 58, 73–74, 178 A.3d 403 (2018) (plaintiff bears burden of proof).

In its memorandum of decision, the court set forth the six *Whitlock* elements, found facts relating to each, and concluded that the plaintiff had satisfied his burden with respect to all six elements. The court began its analysis by stating that, with respect to the first element, "it is undisputed that the fence is a 'structure' that was erected on the [defendants'] property." The court then noted that the remaining *Whitlock* elements were "interrelated to a large extent, with the court's findings on the last three [elements] serving to inform the court's analysis on the issues of malice and intent" and, accordingly, analyzed those three elements first. After concluding that "the fence has impaired the value of the [plaintiff's] property; the fence is useless to the [defendants]; and the fence has impaired the enjoyment of the [plaintiff's] property," the court turned to the remaining two elements. In determining that the plaintiff demonstrated that the defendants had maliciously erected the fence, the court relied on the following facts: "[T]he [defendants] have erected a stockade style fence along 103 feet of the boundary between their property and the [plaintiff's] property. They did not install a fence anywhere else on their property. The fence was installed across a previously unspoiled wooded area and wetlands. It blocks [the plaintiff's] view of the natural surroundings and intrudes upon his enjoyment of his own property. The fence is out of character for the neighborhood. It does not provide privacy, safety or security to the [defendants]. Accordingly, the court finds that the fence was maliciously erected." Similarly, the court based its finding that "the [defendants] intended to injure the enjoyment of the [plaintiff's] property when they erected the fence" on the following: "As

the court has found, the fence impairs the value of the [plaintiff's] property and [the plaintiff's] enjoyment of the property. The fence is unsightly and out of character in the parties' residential neighborhood. The fence is useless to the [defendants]."

On appeal, the defendants do not directly challenge the court's conclusion that the plaintiff satisfied the last three *Whitlock* elements. Instead, the defendants challenge the court's "subordinate findings" of uselessness, impairment of the plaintiff's enjoyment of his property, and the fence being out of character with the neighborhood, to the extent that those findings support the court's conclusions that the fence was erected maliciously and with the intent to injure the plaintiff's enjoyment of his land. We address these "subordinate findings" in turn.[5]

Initially, we note that when determining whether the plaintiff has met his burden with respect to the second and third elements of the *Whitlock* test, the court does not "journey deep into the defendant's heart." *Geiger* v. *Carey*, Superior Court, judicial district of Litchfield, Docket No. CV-11-500-7327-S (February 25, 2015) (reprinted at 170 Conn. App. 462, 487, 154 A.3d 1093 [2017]). "Whether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it." *DeCecco* v. *Beach*, 174 Conn. 29, 32, 381 A.2d 543 (1977); see also *Gallagher* v. *Dodge*, 48 Conn. 387, 393, 40 Am. Rep. 182 (1880) ("The inquiry into and adjudication upon a man's motives has always been regarded as beyond the

[5] In their brief to this court, the defendants argue that "[b]ecause the subordinate facts necessary for [the court's] finding [of intent to injure] are essentially the same as those required for a finding of malice, and because the subordinate findings analyzed [with respect to malice] . . . are clearly erroneous, the trial court's finding that the [defendants] intended to injure [the plaintiff's] land was also in error." The defendants do not provide additional analysis specific to their claim regarding the intent to injure element. We likewise analyze these two claims together.

domain of civil jurisprudence, which resorts to presumptions of malice from a party's acts instead of enquiring into the real inner workings of his mind. When, therefore, we enquire how far a man was actuated by malice in erecting a structure upon his own land, we are enquiring after something that it will always be very difficult to ascertain, unless we adopt, as in other cases where the courts enquire after malice, a presumption of malice from the act done."). Similarly, assessing whether the defendants possessed the requisite intent to injure "relates to the thing done, its purpose and effect, and does not depend on the existence or nonexistence of personal spite or ill-will." *Whitlock* v. *Uhle*, supra, 75 Conn. 427.

"It is quite possible for a structure to bear on its face . . . convincing evidence that it was intended for a legitimate purpose, or that it was intended to injure the adjacent land and its owner. . . . The intention is not the motive from which it may have sprung, but the established purpose, from whatever motive, to use the land in a manner not justified by its ownership, and forbidden by law. . . . The intent to injure is determined mainly from the fact that the structure does impair the value of the adjacent land and injure the owner in its use, from the absence of any real usefulness of the structure . . . to the defendant, and from the character, location and surroundings of the structure itself . . . ." (Citation omitted; internal quotation marks omitted.) *DeCecco* v. *Beach*, supra, 174 Conn. 32. "When a structure, useless to the owner, injuring adjacent land and its owner, intended to work such injury, is wilfully erected, it is maliciously erected; that is, it is erected in knowing disregard of the law and the rights of others." *Whitlock* v. *Uhle*, supra, 75 Conn. 427. "[O]nce it is established that malice was the primary motive in [the fence's] erection, the fact that it also served to protect the [defendants'] premises from observation must be regarded as only incidental, since to hold

otherwise would be to nullify the statutes." *DeCecco* v. *Beach*, supra, 32–33.

B

We first address the defendants' argument that the court based its determinations of malice and intent to injure on a clearly erroneous finding that the fence is useless. In determining that the fence "does not provide privacy, safety or security" to the defendants and is, instead, useless, the court relied on the findings of fact that it had recited when concluding that the plaintiff had satisfied the fifth *Whitlock* element, i.e., uselessness of the structure.[6] The defendants rely primarily on Laura Botoff's testimony as support for their argument that the court's finding of uselessness was clearly erroneous.[7]

[6] With respect to the fence's uselessness, the court found that "the fence does not completely enclose the [defendants'] property. The [defendants] did not erect a fence on the eastern boundary of their property with the Better[s'] property, or on the western boundary with the Zorthian[s'] property, or on the southern boundary with the Mickley[s'] property. The fence extends for only 103 feet on the southern border of the [defendants'] property, which is less than two thirds of the 160 foot boundary between the [defendants'] and [the plaintiff's] properties.

"The fence does not prevent the [defendants'] children from exploring the [plaintiff's] property or the rest of the neighborhood. Similarly, the fence does not block anyone from entering the [defendants'] property through the [plaintiff's] property. The [defendants'] children—and anyone else—can venture from the [defendants'] property to the [plaintiff's] property and back through the fifty-seven feet of the border that remains unfenced. . . . The [defendants'] house, patio, and backyard are as visible from the [plaintiff's] property as they were before the fence was erected."

[7] The defendants also argue that the court misapprehended the law by concluding that "a 'spite fence' may serve some purpose yet still be objectionable." The defendants seemingly argue that where a structure serves a use, the plaintiff must show malice in fact. The defendants, however, fail to recognize that the court found, as a matter of fact, that the fence in question does not serve a use. Additionally, as previously noted, our Supreme Court has stated that "[w]hether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it." *DeCecco* v. *Beach*, supra, 174 Conn. 32. Accordingly, the defendants' argument fails.

As an initial matter, the defendants seem to suggest that uselessness of a structure cannot be found if the owner of the structure merely articulates an ostensibly useful purpose. We reject this argument. Uselessness under § 52-480 focuses on whether the structure serves an actual use, not whether the defendants can merely assert a purpose for erecting the structure. See, e.g., *DeCecco* v. *Beach*, supra, 174 Conn. 32 ("intent to injure is determined . . . [inter alia] from the absence of any *real* usefulness of the structure" [emphasis added]); *Harbison* v. *White*, 46 Conn. 106, 109 (1878) (rejecting defense to malice element—that structure screened defendants' premises from persons occupying plaintiff's house—because "[t]o concede this would be to nullify the statute; for it is not possible for malice to conceive any kind or form of structure which would not in some measure protect premises from observation"); see also *Panagos* v. *Cooke*, Superior Court, judicial district of Fairfield, Docket No. CV-03-0405596-S (February 9, 2006) (notwithstanding fact that fence was erected to prevent intruders from entering defendant's property, fence was deemed spite fence because its construction allowed intruders to enter property at various other locations); *Brabant* v. *McCarthy*, Superior Court, judicial district of Litchfield, Docket No. CV-96-0070352 (August 9, 1996) (although fence was erected to prevent neighbors from trespassing on property, portion of fence was deemed spite fence because defendants could not "plausibly argue [it was] of benefit to them"); *Horan* v. *Farmer*, Superior Court, judicial district of New Haven, Docket No. 30-29-95 (October 31, 1990) (notwithstanding fact that fence was erected for privacy and to prevent vandalism, fence was deemed spite fence because other factors indicated primary motive was malice).

At trial, Laura Botoff testified that she and her husband had erected the fence to provide privacy and safety for them and their children; she testified that the fence does, in fact, serve its intended purposes. For instance,

she stated that the fence "deters other people from coming into the yard and it allows for the children to feel more secure because we do have privacy . . . ." Further, she testified that the fence in question, combined with the deer fence erected on the Betters' property and the wetlands separating their property from that of the plaintiff and the Zorthians, prevents the defendants' children from leaving their property. On cross-examination, however, Laura Botoff admitted that, because the fence only ties into the Betters' deer fence on one end and does not connect to any other fencing at the other end, the children could leave their property by crossing the wetlands and going around the end of the fence onto the plaintiff's property. Likewise, she conceded that the way the fence exists now someone on the plaintiff's side of the property could walk around it and get to the defendants' side of the property, and the fence does not prevent someone standing in the defendants' yard from viewing the plaintiff's property. This portion of her testimony was consistent with the plaintiff's testimony that anyone could walk around the ends of the fence to enter his property from the defendants' property and that, because the parties' properties slope downward toward the fence, "when you stand on the sloping topography that is [his] yard and [his] lawn at that point, you can clearly see right over the fence into the [defendants'] backyard." Likewise, the court's description of the fence is consistent with these portions of Laura Botoff's and the plaintiff's testimony.

In its memorandum of decision, the court noted that, although the defendants erected the fence for privacy and safety, "[t]he fence as installed does not extend along the entire boundary between the [plaintiff's] property and the [defendants'] property. There is a narrow space between the end of the fence and the Betters' mesh deer fence on the eastern side of the [defendants']

property. The opening at the other end, near the Zorthian[s'] property, is approximately fifty-seven feet wide. . . . The fence does not block the view from the [plaintiff's] property of the [defendants'] house, patio, and backyard. Apart from any obstruction due to the natural vegetation, there is a clear sight line from one yard to the other because the properties slope down toward their common boundary. The fence would have to be substantially higher to block or screen the view entirely."

The court was free to reject parts of Laura Botoff's testimony and to credit the plaintiff's. See, e.g., *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, 230 Conn. 486, 507, 646 A.2d 1289 (1994) ("[It] was for the trial court to weigh the evidence and determine the credibility of the witnesses. . . . A trier of fact is free to reject testimony even if it is uncontradicted . . . and is equally free to reject part of the testimony of a witness even if other parts have been found credible." [Citations omitted; internal quotation marks omitted.]). Upon review of the evidence, we are not "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, supra, 138 Conn. App. 296. Accordingly, we conclude that the court's finding of "the absence of any *real* usefulness" of the fence; (emphasis added) *DeCecco* v. *Beach*, supra, 174 Conn. 32; was not clearly erroneous.

C

We next turn to the defendants' argument that the court based its findings of malice and intent to injure on a clearly erroneous finding that the fence impairs the plaintiff's enjoyment of his property. Similar to the court's finding of uselessness in the context of its determination of malice and intent to injure, the court did

not recite independent facts when it found that the fence "intrudes upon [the plaintiff's] enjoyment of his property" and, therefore, was erected maliciously with an intent to injure the plaintiff. Instead, the court relied on the findings that it had recited when concluding that the plaintiff had satisfied the sixth *Whitlock* element, i.e., impairment of the plaintiff's enjoyment of his land.[8] In challenging this finding, the defendants primarily argue that the plaintiff has not suffered any objective harm, such as an interference with the flow of light or air across, or the increased risk of damage from rain or snow to, his property. According to the defendants, the only harm suffered by the plaintiff was an impaired view of the defendants' backyard.[9]

[8] With respect to this element, the court found that "[t]he fence blocks the view from the [plaintiff's] property of the natural surroundings that [the plaintiff] previously enjoyed. The fence is out of character for the surrounding area—described by [the plaintiff's expert] as having a park-like aesthetic—and it starkly intrudes upon what would otherwise be an unspoiled vista. [The plaintiff] testified that it is impossible to look into his yard without seeing the fence. While the fence itself may not be ugly as far as stockade fences are concerned—it is new and apparently well-constructed—it is unsightly as installed across 103 feet of woodland and wetlands on the boundary between two residential properties in the Greenwich RA 2 zoning district."

[9] In addition to arguing that the evidentiary basis for the court's finding was insufficient, the defendants argue that this finding was clearly erroneous because the statute and relevant case law do not provide a landowner with the right to a view of a neighbor's property. Similarly, the defendants argue that the court erroneously construed the statute broadly by ordering the defendants to remove the fence based on its interference with the plaintiff's interest in a view onto their property. See, e.g., *Willoughby* v. *New Haven*, 123 Conn. 446, 454, 197 A. 85 (1937) ("operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope"). The defendants premise this argument on the fact that their "[r]esearch has not revealed a case where . . . § 52-480 was successfully invoked on the grounds that a structure obstructed an adjoining property owner's view onto her neighbor's property itself."

These arguments misconstrue the court's memorandum of decision. The court considered the fence's effect on the plaintiff's view of the surrounding woods and wetlands, some of which is situated on the defendants' property, when finding that the fence impairs the plaintiff's enjoyment and value of his property. Contrary to the defendants' arguments, the court did not find

As the court noted, "[t]he use and enjoyment of property may . . . be impaired by the intrusion of an unsightly structure into a vista that was formerly unspoiled." See, e.g., *DeCecco* v. *Beach*, supra, 174 Conn. 30–31. Although the court stated that this "fence itself may not be ugly as far as stockade fences are concerned," it nevertheless credited the plaintiff's testimony and found that the fence impairs his enjoyment of his property. The plaintiff testified extensively about the aesthetics of the wooded area and wetlands surrounding his home prior to the defendants' erection of the fence. He submitted several photographs of the area into evidence, including photographs depicting the dense woods separating the parties' properties and of the fence running along the border between their yards and cutting across the wetlands and stream. As the plaintiff and his expert testified, the plaintiff had designed several rooms of his house to afford views of these wetlands. The fence, therefore, is clearly visible from these rooms, as well as from his yard and when pulling up to the front of the house. The plaintiff testified that he had purchased this property because of the "natural wooded surroundings" and that if he "had seen . . . a stockade fence . . . [he] would not have purchased the property."

We again note that it is within the province of the trial court to assess the credibility of the witnesses; see, e.g., *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, supra, 230 Conn. 507; and that the court credited the plaintiff's testimony. Upon review of the

that the plaintiff has a right to a view of their land. Additionally, as our Supreme Court has noted, "[i]t is only incidental that the plaintiff, having established the elements necessary for relief under the [statute], might acquire in the process a . . . view" of the defendants' land. *DeCecco* v. *Beach*, supra, 174 Conn. 34 (rejecting defendant's argument that judgment in favor of plaintiff created unlawful visual easement across defendant's land where portion of fence that obstructed plaintiff's view of river was spite fence). Accordingly, these arguments fail.

evidence and in giving "every reasonable presumption . . . in favor of the trial court's ruling," we are not convinced "that a mistake has been committed." (Internal quotation marks omitted.) *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, supra, 138 Conn. App. 296. Accordingly, we conclude that the court's finding that the fence impairs the plaintiff's enjoyment of his property was not clearly erroneous.

D

Finally, we address the defendants' argument that the court clearly erred in finding that "[t]he fence is . . . out of character in the parties' residential neighborhood." In its memorandum of decision, the court described the fence and surrounding area, noting that "[b]oth properties are located in the Greenwich RA 2 zoning district, which is a two acre zoning district." The court proceeded to describe the natural wooded area and the "old fieldstone farmer's wall between the two properties." The fence, which runs along this fieldstone wall, "is a stockade style fence with a natural wood finish and capped posts between the fence sections." Nevertheless, the court noted that the plaintiff "described the fence as a commercial grade, stockade fence, of the type that he was accustomed to seeing beside a supermarket, not in a residential area" and that "he had not seen similar fences in the Rockwood Lane neighborhood, although the house across the street from the [plaintiff's] property has an old four foot tall stockade type pool fence, which he understood was required by the town of Greenwich."

The court heard conflicting testimony from the parties and their experts concerning the character of the neighborhood. According to the plaintiff, "on average, the homes [in this neighborhood] are worth anywhere between . . . four and seven million dollars," and his property "would achieve at least five million dollars in

the market." Although the defendants' expert testified that fences are "not uncommon in Connecticut, in Greenwich" and that the property across the street from the plaintiff has a stockade fence, the plaintiff's expert testified that stockade fences "are rare in property values such as this neighborhood." In discussing the testimony of the parties' respective experts regarding the impact of the fence on property values, the court explicitly credited the testimony of the plaintiff's expert. The court stated "that the fence caused the [plaintiff's] property to lose a beneficial wooded view, which reduced the value of the [plaintiff's] property by 1 to 5 percent." Laura Botoff testified that the Betters and Mickleys had installed fences on their properties, which conflicted with the plaintiff's testimony that he had not seen fences like this elsewhere in his neighborhood of Rockwood Lane. When questioned about the fence across the street from his house, the plaintiff described it as an old, approximately four foot tall pool fence that, for the most part, is not visible from the street and would be removed as soon as the owners remove the pool that it encloses.

Although the court received evidence of other fences in the neighborhood, "[w]e cannot second-guess the trial court's assessment of the credibility of the witnesses . . . . It is the trial court which had an opportunity to observe the demeanor of the witnesses and parties; thus, it is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Normand Josef Enterprises, Inc.* v. *Connecticut National Bank*, supra, 230 Conn. 507. Upon review of the evidence in the record, we are not firmly convinced "that a mistake has been committed"; (internal quotation marks omitted) *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, supra, 138 Conn. App. 296; and, therefore, the court's finding in this regard is not clearly erroneous.

In sum, the court did not clearly err with respect to any of the subordinate findings challenged by the defendants in connection with the second and third *Whitlock* elements, i.e., malice and intent to injure. We therefore affirm the court's conclusion that the plaintiff was entitled to an injunction pursuant to § 52-480.

II

The defendants also claim that the court erred by ordering them to "restore the area in which the fence was erected to its previous condition." They argue that the plaintiff abandoned this request for relief, the court exceeded its statutory authority by ordering "the landowner to do anything other than take down the offending structure," and the order is impermissibly vague.[10] These arguments are unavailing.

The defendants first contend that the plaintiff had abandoned seeking the relief ordered by the court because he did not explicitly mention this particular relief in his trial management report, at trial, or in his posttrial brief. "[T]he scope and quantum of injunctive relief rests in the sound discretion of the trier . . . ." *DeCecco* v. *Beach*, supra, 174 Conn. 35. The plaintiff's complaint specifically sought, in relevant part, "[p]ermanent injunctive relief ordering the [defendants] . . . to remove any construction work to date and to restore the wetlands and watercourse area to its previous condition . . . ." See, e.g., *Levesque Builders, Inc.* v. *Hoerle*, 49 Conn. App. 751, 758, 717 A.2d 252 (1998) ("general rule is that a prayer for relief must articulate

[10] The plaintiff argues that this claim is unreviewable because the defendants failed to seek an articulation of the court's basis for this portion of the order. Although Practice Book § 61-10 places the burden on "the appellant to provide an adequate record for review," that section provides in relevant part that "[t]he failure of any party on appeal to seek articulation pursuant to Section 66-5 shall not be the sole ground upon which the court declines to review any issue or claim on appeal." We therefore reject this argument.

with specificity the form of relief that is sought" [internal quotation marks omitted]). The plaintiff clearly requested the relief granted, and "there is nothing in the record which discloses that the plaintiff ever abandoned" that request. *Varley* v. *Varley*, 170 Conn. 455, 459, 365 A.2d 1212 (1976). Accordingly, this argument fails.

The defendants' second argument is that the court lacked the authority to grant such relief. "Any determination regarding the scope of a court's . . . authority to act presents a question of law over which our review is plenary." *Tarro* v. *Mastriani Realty, LLC*, 142 Conn. App. 419, 431, 69 A.3d 956, cert. denied, 309 Conn. 912, 69 A.3d 308, 309 (2013). Section 52-480 provides in relevant part that the court has the authority to order "[a]n injunction . . . against the malicious erection . . . of any structure . . . intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same." The defendants rely on *DeCecco* v. *Beach*, supra, 174 Conn. 35, for the proposition that § 52-480 does not permit an injunction beyond the removal of the offending structure. In that case, however, our Supreme Court found error in an order "enjoining the building of any other structures on that portion of the land from which it ordered removal of the fence since that part of the judgment went beyond the relief to which the plaintiff was entitled under the statutes." Id. The injunctive relief at issue in this case is materially different in that the court ordered the defendants to return the land to its prior condition, which is remedial in nature and consistent with the well settled principle that the effect of § 52-480 "should not be extended beyond the evil it was intended to remedy." *Whitlock* v. *Uhle*, supra, 75 Conn. 426. Simply stated, we conclude that the relief ordered by the court falls within the statutory authority conferred by § 52-480.

The defendants' final argument is that the order is impermissibly vague because "the record does not address how the [defendants'] property appeared in a manner by which compliance—or lack of compliance—with the trial court's permanent injunction could be reasonably assessed." Following the issuance of the court's memorandum of decision, the defendants did not file any motion seeking clarification of this order. Additionally, as previously noted, the plaintiff testified extensively as to the area's appearance prior to the installation of the fence and entered several photographs of the area into evidence. Accordingly, we conclude that this injunction is not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 339, 152 A.3d 1230 (2016).

The judgment is affirmed.

In this opinion the other judges concurred.

DENNIS ADKINS *v.* COMMISSIONER OF CORRECTION (AC 40037)

Sheldon, Keller and Prescott, Js.

Syllabus

The petitioner, who had been convicted on a guilty plea pursuant to the *Alford* doctrine of the crime of felony murder, sought a writ of habeas corpus. At his sentencing hearing, the petitioner's trial counsel notified the trial court that, although counsel was unaware of any legal grounds to do so, the petitioner had indicated to him that he wanted to withdraw his plea. The trial court noted that there was a reference to the petitioner's request in the presentence investigation report and that it had received a correspondence from the petitioner in which he requested to withdraw his plea. After the petitioner addressed the court personally on the matter, the court denied the request, concluding that the petitioner had not presented the court with a basis on which to permit him to withdraw his guilty plea. Thereafter, the petitioner brought a habeas

action, claiming, inter alia, that his trial counsel had rendered ineffective assistance and that he should be permitted to withdraw his guilty plea. The habeas court rendered judgment denying the habeas petition, and this court affirmed the judgment. Subsequently, the petitioner filed a third petition for a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to advise him with respect to his right to appeal from the trial court's denial of his oral motion to withdraw his guilty plea and had deprived him of his right to conflict free representation at trial because, prior to the date of this guilty plea, he had filed a grievance complaint against trial counsel. The petitioner also claimed that his prior habeas counsel had provided ineffective assistance in the prior habeas action by failing to raise his claims against trial counsel. Following a hearing at which trial counsel, prior habeas counsel and the petitioner testified, the habeas court dismissed the claims against trial counsel because they presented the same ground for relief that had been considered and denied by the court in the prior habeas action. The habeas court thereafter concluded that neither claim against prior habeas counsel had merit and rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly rejected his claim that his prior habeas counsel rendered ineffective assistance in the prior habeas action by failing to raise his claim that trial counsel rendered ineffective assistance by not advising the petitioner with respect to his right to appeal from the denial of his motion to withdraw his guilty plea: the petitioner was unable to demonstrate that a nonfrivolous ground for appeal of his motion to withdraw his guilty plea existed, as the habeas court expressly found that his motion was not related to ineffective representation by trial counsel or any misunderstanding by the petitioner but, instead, was based on the fact that he had changed his mind about the plea, which finding was fatal to the petitioner's claim that there were viable grounds to appeal and, thus, that a rational defendant would have wanted to bring an appeal to pursue those grounds, and there was no credible evidence to support the petitioner's claim that trial counsel should have been aware of a valid ground on which the petitioner may have based his motion, as the habeas court made findings of fact that undermined the petitioner's claim that nonfrivolous grounds existed and the petitioner did not demonstrate that those findings lacked support in the evidence; moreover, the petitioner did not demonstrate that, despite the fact that there were not any nonfrivolous grounds for an appeal, trial counsel had a constitutional obligation to advise him about his right to appeal, as the evidence, viewed in its entirety, did not support a finding that the petitioner reasonably demonstrated to trial counsel that he was interested in bringing an appeal or inquired to any extent about his appellate rights.

2. This court declined to review the petitioner's unpreserved claim that the habeas court improperly rejected his claim that his prior habeas counsel rendered ineffective assistance by failing to present evidence in support of his claim that his guilty plea was the result of trial counsel's ineffective assistance, as the petitioner did not distinctly raise that claim in his habeas petition, and, as a result, the habeas court did not expressly rule on it in its thorough memorandum of decision.

3. The petitioner could not prevail on his claim that the habeas court improperly rejected his claim that his prior habeas counsel rendered ineffective assistance by failing to claim in the prior habeas action that trial counsel's conflict of interest resulted in the petitioner's guilty plea: although the petitioner claimed that the habeas court improperly raised sua sponte the issue of waiver and dismissed his claim on that ground, the court did not conclude that the petitioner had waived his claim but, rather, appropriately considered and rejected the petitioner's claim on its merits, concluding that the waiver doctrine provided additional support for its determination that the underlying claim against trial counsel was dubious at best when viewed in light of state and federal authority concerning what types of claims may be raised following a valid guilty plea; moreover, the court unambiguously found that the petitioner's guilty plea was made knowingly and voluntarily, it explicitly rejected the petitioner's argument that his dissatisfaction with trial counsel and the issues surrounding the filing of his grievance complaint influenced his decision to plead guilty, and the court, having observed the petitioner testify about the plea and having assessed the truthfulness of his testimony, was not obligated to accept as true his version of the facts; accordingly, the court's factual finding concerning the voluntariness of the plea was supported by evidence in the record, and this court was not persuaded that a mistake had been made.

Argued April 10—officially released October 2, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Michael W. Brown, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. Following the granting of his petition for certification to appeal, the petitioner, Dennis Adkins, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the court improperly rejected his claim that his prior habeas counsel rendered ineffective assistance on the basis that he failed (1) to claim that trial counsel rendered ineffective assistance by failing to advise the petitioner with respect to his right to appeal from the denial of his motion to withdraw his guilty plea, (2) to present evidence in support of the petitioner's claim that his guilty plea was the result of trial counsel's ineffective assistance, and (3) to claim that trial counsel's conflict of interest resulted in the petitioner's guilty plea. We affirm the judgment of the habeas court.

The following undisputed procedural history is relevant to this appeal. The petitioner was arrested and charged with murder in violation of General Statutes § 53a-54 (a), felony murder in violation of General Statutes § 53a-54c, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On April 4, 2000, pursuant to a plea agreement with the state, the petitioner pleaded guilty under the *Alford* doctrine[1] to felony murder in violation of § 53a-54c. The petitioner was represented by Attorney Francis Mandanici.

The prosecutor set forth the factual basis of the plea, as follows: "On August 24, 1999, at or about 10:27 p.m., in front of 119 Dewitt Street in New Haven, the victim [in] this case, Rodney Williams, was on the front porch

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

and a person wearing a mask came down the driveway and confronted two people standing in the driveway, one of them a young lady. The person in the mask grabbed the lady's chain from around her neck. She grabbed it back. She and her boyfriend, who were in the driveway, indicated that the person was wearing a mask and had a handgun in his hand. According to witnesses out front, the individual came down the driveway with the mask and confronted the victim in this case, who was standing on the front steps or on the ground near the front steps, confronted the victim with a handgun, and the victim came down off the steps and went toward the assailant and there was a short tussle during which the assailant fired a series of shots, one of which hit the victim, Rodney Williams, in the chest and caused his death.

"During the subsequent investigation, a Calvin Hinton . . . was interviewed and indicated that he had been with [the petitioner] earlier that evening. They had talked about robbing the victim in this case and that he saw the [petitioner] with a weapon. The [petitioner], in a subsequent statement, indicated [that] he received the weapon . . . from Hinton. In any event, Hinton indicated that he saw the [petitioner] go to the area where the victim was standing and later saw the [petitioner] run away from the area.

"Subsequently, [the petitioner] was interviewed and admitted that he and Hinton had talked about [committing] the robbery, that Hinton had provided him the gun, that he had gone to the area for the purpose of committing a robbery of Williams, who they knew to be a drug dealer, [and] that a struggle ensued and shots were fired from his gun which struck Williams. [The petitioner] indicated that he did not intend to kill him, but that this did occur during the attempted commission of a robbery. Subsequently, after [the petitioner] was

arrested and [incarcerated,] he admitted to an individual in the correctional facility that he was responsible for the shooting and actually detailed the fact that it occurred during the commission of an attempted robbery."

The prosecutor set forth the details of the plea agreement. The petitioner was to serve a thirty-five year term of incarceration and the state agreed to enter a nolle prosequi with respect to additional charges. Additionally, the state agreed not to bring charges against the petitioner for what it considered to be efforts made by him to seek retribution against a witness. The trial court, *Fasano*, *J.*, thoroughly canvassed the petitioner. After finding that the plea was made knowingly and voluntarily, the court accepted the plea and entered a finding of guilt.

The petitioner returned before the court, *Fasano*, *J.*, on May 26, 2000, for sentencing. At the hearing, Mandanici indicated that, although he was unaware of any legal grounds for the request, the petitioner indicated to him that he wanted to withdraw his plea. The court observed that there was a reference to the petitioner's request in the presentence investigation report and that it had received a correspondence from the petitioner in which he requested to withdraw his plea. The petitioner addressed the court personally with respect to his request, indicating that he was not satisfied with Mandanici's representation, Mandanici was aware that he did not commit the crime, the evidence that he had confessed to the crime was "bull shit," and he believed that he was entitled to "a lesser charge." The petitioner stated that he was "not pleading out to no murder." The court replied that the petitioner already had pleaded guilty under the *Alford* doctrine, that the petitioner had been canvassed thoroughly, and that the petitioner had not presented the court with a basis on which to permit him to withdraw his guilty

plea.[2] Thereafter, the court sentenced the petitioner in accordance with the plea agreement that he had reached with the state.

In 2003, in a prior habeas corpus action, the petitioner filed an amended petition for a writ of habeas corpus in which he alleged that Mandanici had rendered ineffective assistance and, because of this violation of his constitutional rights, he should be permitted to withdraw his guilty plea. Also, relying on what he characterized as newly discovered evidence, the petitioner alleged that he was actually innocent. With respect to his ineffective assistance of counsel claim, the petitioner alleged that Mandanici had failed to conduct a proper pretrial investigation, failed to devote sufficient time to his defense, and failed to withdraw from his representation of the petitioner.

During the prior habeas action, the petitioner was represented by Attorney Brian Russell. Following a hearing, the court, *Fuger*, *J.*, concluded that the petitioner had failed to demonstrate that Mandanici had performed deficiently and that even if such a showing

[2] The petitioner was put to plea for "felony murder in violation of . . . § 53a-54c." As part of its canvass, the court asked the petitioner if had an opportunity to discuss with his attorney the elements of the offense and the evidence on which the state relied. Also, the court asked the petitioner if he understood the elements of the offense and the evidence on which the state relied. To both inquiries, the petitioner replied, "Yes." Further, the court asked Mandanici if he was satisfied that the petitioner understood the elements of the offense and the evidence on which the state relied. Mandanici replied affirmatively. The court did not further discuss the offense or the elements thereof.

None of the petitioner's claims in his amended petition for a writ of habeas corpus is based on an inadequacy in the court's canvass and, thus, such a claim is not before us. Nonetheless, we observe that, to dispel any possible confusion concerning the nature of the offense in cases such as the present case, it would be helpful for trial courts to clarify, during their plea canvasses, that when an accused pleads guilty to "felony murder" under the felony murder statute, § 53a-54c, he is, in fact, pleading guilty to a type of murder, other than intentional murder, and is, accordingly, subject to the same penalties that may be imposed for the crime of murder.

had been made, the petitioner had failed to demonstrate that he suffered any prejudice as a result of Mandanici's acts or omissions. In its memorandum of decision, the court observed that there were two witnesses to the murder committed by the petitioner and that the petitioner had provided a confession to the police in which he revealed his role as the shooter. The court then stated: "[T]he petitioner now asserts that he was under the influence of illegal drugs at the time he made the statement [to the police], that the statement is false and that he only did it because he did not want to be labeled a 'snitch.' However, these assertions are not worthy of belief. Insofar as being under the influence of drugs at the time the statement was made, there are two factors that undermine the credibility of this assertion. First, the petitioner was arrested at about 10 a.m. on September 23, 1999. The statement was taken between 7:46 p.m. and 8:17 p.m. on that day. According to the petitioner, he ran from the police and swallowed some unspecified amount of crack cocaine that he had on him. There has been no evidence presented to this habeas court that would allow the court to conclude that a person who had ingested cocaine would still be under the influence of that drug nearly ten hours later. Significantly, there has been no evidence adduced to allow this court to conclude what, if anything, the ingestion of cocaine might do to a person's cognitive abilities. However, it is more or less colloquially known that the effects of cocaine are relatively short lived. Second, the testimony of Detective Sergeant [Joanne] Schaller, who coincidentally has training as an EMT paramedic, is clear that the petitioner was not exhibiting any outward signs of drug intoxication, nor did he complain of any illness or impairment. Moreover, there is some evidence that the idea to argue intoxication as a means to invalidate the confession originated with another inmate, Jason Reese. All of this leads this court to conclude that the

petitioner's statement attacking his confession is self-serving and unworthy of belief." (Footnote omitted.)

Moreover, the court rejected the petitioner's claim of actual innocence, noting that the petitioner had failed to submit to the court "anything even remotely resembling newly discovered evidence." Consequently, the court denied the amended petition for a writ of habeas corpus. This court affirmed the judgment of the habeas court. *Adkins* v. *Commissioner of Correction*, 88 Conn. App. 901, 869 A.2d 279 (2005), cert. denied, 281 Conn. 906, 916 A.2d 48 (2007).

In May, 2016, the petitioner, represented by counsel, filed a third amended petition for a writ of habeas corpus in the habeas corpus action that underlies the present appeal. The amended petition set forth three counts. In count one, the petitioner alleged that Mandanici deprived him of his right to effective representation by failing to advise him with respect to his right to appeal from the trial court's denial of his oral motion to withdraw his guilty plea. He argued that he did not have a full and fair opportunity to raise this claim in his prior habeas action.

In count two, the petitioner alleged that Mandanici deprived him of his right to conflict free representation at trial because on February 19, 2000, prior to the date of his plea, he filed a grievance complaint against Mandanici.[3] The petitioner alleged that the filing of the complaint "completed a total and complete breakdown in the attorney-client relationship" between him and Mandanici. He argued that his defense "was adversely affected by [Mandanici's] actual conflict of interest"

[3] In the grievance complaint, the petitioner alleged in general terms that Mandanici failed to investigate his case and failed to communicate with him concerning his defense. The statewide grievance committee concluded that Mandanici had not breached ethical standards in his representation of the petitioner and, therefore, dismissed the complaint.

because Mandanici failed to communicate with him, failed to investigate the allegations against him, failed to zealously advocate for him during plea negotiations, and failed to advise him with respect to his right to appeal from the trial court's denial of his oral motion to withdraw his guilty plea. The petitioner alleged that he was prejudiced in that he received a harsher sentence than he would have received following a trial or an adequate plea bargaining process. The petitioner alleged that he did not have a full and fair opportunity to present this claim in his prior habeas action.

In count three, the petitioner alleged that Russell had deprived him of his right to the effective assistance of counsel during the prior habeas action by failing "to plead and present evidence and argument" in support of the claims set forth in counts one and two. The petitioner argued that there was a reasonable probability that, but for Russell's deficient performance, the result of the petitioner's prior habeas action would have been favorable to him.

With respect to the substantive allegations in the amended petition, the respondent, the Commissioner of Correction, generally left the petitioner to his proof. With respect to claims one and two, the respondent alleged as a special defense that, to the extent that the petitioner intended to raise these claims as freestanding claims against trial counsel, they were successive and should be dismissed. Additionally, with respect to claim one, the respondent alleged that, absent a showing that the Appellate Court denied a motion seeking permission to file a late appeal from the trial court's denial of the petitioner's motion to withdraw his guilty plea, the petitioner's claim related to his right to appeal was not ripe. Also, with respect to claim two, the respondent alleged as a special defense that the allegations set forth in claim two were barred by res judicata and collateral estoppel because they were raised, litigated, and

resolved against the petitioner in the prior habeas action. Moreover, the respondent alleged that claim two should be dismissed because it constituted a legally noncognizable claim of "cumulative" error by trial counsel. Also, the respondent argued that the petitioner was defaulted from litigating the allegations in claim two because his conflict with Mandanici was the basis for his motion to withdraw his guilty plea and, although he had the opportunity to do so, he failed to appeal from the trial court's denial of the motion to withdraw the guilty plea. The respondent alleged that the petitioner failed to satisfy the cause and prejudice standard to excuse the default.

In his reply to the return, the petitioner alleged that claims one and two were not barred by the successive petition doctrine because, due to Russell's ineffective representation during the prior habeas action, he was deprived of a full and fair opportunity to litigate these claims in that action. With respect to claim one, the petitioner alleged that his claim related to his right to appeal was ripe for adjudication.[4] With respect to claim two, the petitioner alleged that the doctrines of collateral estoppel and res judicata did not apply because the issues involved had not been litigated in a prior proceeding. Also, the petitioner alleged that claim two was not pleaded in a legally deficient manner. Finally, the petitioner alleged that any procedural default with respect to claim two was the result of the ineffective assistance of counsel.

The court, *Sferrazza*, *J.*, held a trial over the course of two days, September 1 and October 25, 2016. Among

[4] At trial, the petitioner presented evidence that by motion dated July 28, 2016, he sought permission from this court to file a late appeal from Judge Fasano's May 26, 2000 denial of his oral motion to withdraw his guilty plea, as well as an order from our Supreme Court, dated September 27, 2016, denying the motion.

the evidence presented, the court heard testimony from Mandanici, Russell, and the petitioner.

On December 7, 2016, the court rendered judgment denying the amended petition for a writ of habeas corpus. In its thorough memorandum of decision, the court dismissed the first and second counts of the petition under Practice Book § 23-29 (3) because they presented the same ground for relief, namely, ineffective representation by Mandanici, that Judge Fuger had considered and denied in the prior habeas action. The court, however, observed that, in the present action, the petitioner had the right to assert that Russell had rendered ineffective representation in the prior habeas action by failing to claim that Mandanici rendered ineffective representation because Russell failed to raise the newly raised claims on which the petitioner presently relies. These claims are that Mandanici failed to advise him with respect to his right to appeal from the trial court's denial of his motion to withdraw his guilty plea and that, because the petitioner filed a grievance complaint against Mandanici prior to the date of the plea, Mandanici had a conflict of interest during his representation of the petitioner. The court proceeded to analyze the merits of both of the petitioner's claims of ineffective assistance by Russell. After concluding that neither claim had merit, it denied the habeas petition.[5] Thereafter, the court granted the petitioner's petition for certification to appeal. This appeal followed. Additional facts will be discussed as necessary.

Before turning to the petitioner's claims, we set forth basic principles governing the present appeal. "The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme

[5] We will set forth the basis for the court's decision in the context of the claims raised on appeal.

Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . In *Lozada*, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. *Lozada* v. *Warden*, supra, 223 Conn. 842. As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . *Lozada* v. *Warden*, supra, 223 Conn. 842–43. In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

. . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . .

"It is well settled that in reviewing the denial of a habeas petition alleging the ineffective assistance of counsel, [t]his 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." (Citations omitted; internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, 169 Conn. App. 456, 463–65, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017); see also *Toccaline* v. *Commissioner of Correction*, 177 Conn. App. 480, 499, 172 A.3d 821 (describing petitioner's burden as "herculean task"), cert. denied, 327 Conn. 986, 175 A.3d 45 (2017).

I

First, the petitioner claims that the court improperly rejected his claim that Russell rendered ineffective assistance in the prior habeas action in that he failed to claim that Mandanici rendered ineffective assistance by failing to advise the petitioner with respect to his right to appeal from the denial of his motion to withdraw his guilty plea. We disagree.

The court analyzed this claim, in relevant part, as follows: "Between plea and sentencing, on May 26, 2000, the petitioner expressed his desire to withdraw his guilty plea to both Attorney Mandanici and the trial judge in the presentence investigation report . . . and other material sent directly to the court by the petitioner.

"Before imposing sentence, the trial judge heard the parties' positions on this request. Attorney Mandanici candidly acknowledged that he knew of no legal basis to grant the petitioner's request. Attorney Mandanici related that the petitioner never articulated to him any reason to withdraw the guilty plea except that the petitioner experienced a change of heart.

"The trial judge inquired of the petitioner as to why he should permit the petitioner to withdraw his guilty plea. The petitioner responded by disavowing any knowledge that he pleaded guilty to murder rather than a lesser offense and by repudiating his confessions to the police and admissions to others. The trial court found that no legitimate basis for the withdrawal of the guilty plea existed and denied the petitioner's request.

"Attorney Mandanici never advised the petitioner about the opportunity to appeal from that denial, and no appeal was timely initiated. The [Supreme] Court denied permission to file a late appeal on September 27, 2016, more than sixteen years after the criminal case concluded."

The habeas court stated that the petitioner bore the burden of proving not only that Mandanici performed deficiently by failing to advise him with respect to his right to appeal, but that he suffered prejudice in that he would have succeeded on appeal and that he would have been acquitted following a retrial.[6]

[6] In its analysis of the petitioner's claim of whether Russell deprived him of his right to effective representation by failing to claim in the prior habeas action that Mandanici deprived him of his right to effective representation

The court stated: "After consideration of all the evidence adduced, the court finds that the petitioner has failed to meet his burden of proving, by a preponderance of the evidence, that Attorney Russell was deficient for failing in the first habeas corpus [action] to raise [a claim related to] Attorney Mandanici's failure to advise the petitioner about the possibility of appealing from the denial of his request to withdraw his plea. Judge Fasano's denial of the request was unassailable. Attorney Mandanici provided no good faith basis to support that request. The petitioner voiced his complaint that he misunderstood that he [had] pleaded

by failing to advise him of his right to appeal from Judge Fasano's denial of his motion to withdraw his guilty plea, the court relied on what it believed to be authorities that governed an analysis of the claim in 2003, when Russell represented the petitioner, namely, *Bunkley* v. *Commissioner of Correction*, 222 Conn. 444, 454, 610 A.2d 598 (1992), and *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 151, 662 A.2d 718 (1995). The court correctly recognized that these cases later were overruled by *Small* v. *Commissioner of Correction*, 286 Conn. 707, 723, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008), and *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 600 n.6, 119 A.3d 1153 (2015), respectively.

The parties submit, and we agree, that the proper framework for evaluating an ineffective assistance of counsel claim based on counsel's failure to advise a defendant about his appellate rights following a guilty plea is based on an evaluation of whether counsel's deficient performance *deprived a defendant of an appeal that he would have taken*. This framework, which we will discuss in detail, was set forth in *Roe* v. *Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), and it has been followed by our appellate courts. See, e.g., *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 7, 761 A.2d 740 (2000); *Shelton* v. *Commissioner of Correction*, 116 Conn. App. 867, 878–79, 977 A.2d 714, cert. denied, 293 Conn. 936, 981 A.2d 1080 (2009). This is the standard under which we will evaluate the petitioner's claim. The fact that the habeas court utilized a different standard in its evaluation of the present claim does not affect our plenary evaluation of the claim. As we explain in our subsequent analysis, the habeas court's detailed factual findings, which are supported by the evidence, amply support a conclusion that the petitioner is unable to prevail under the currently recognized standard.

Moreover, to the extent that the petitioner argues that the court erroneously relied on *Copas* in its analysis of the petitioner's claim that Russell rendered ineffective representation by failing to pursue a claim related to

guilty to felony murder, but the transcript of the plea canvass refutes that statement.

"The court finds that the petitioner's request to withdraw his guilty plea was simply a change of mind. Reconsideration or regret, standing alone, cannot validly support a motion to withdraw a guilty plea that was otherwise lawfully entered. [In ruling on the petitioner's prior habeas petition] Judge Fuger found 'the petitioner's statement attacking his confession is self-serving and unworthy of belief' . . . . This court received no credible evidence that Attorney Russell could have presented a stronger case before Judge Fuger to alter that conclusion.

"No legal expert testified at the habeas trial that Attorney Russell ineffectively represented the petitioner on that issue or any other issue. The court rules that the petitioner has failed to demonstrate either prong of the *Strickland* standard with respect to Attorney Russell's assistance at the first habeas trial. . . . No genuine infirmity surrounding the guilty plea existed." (Citation omitted.)

In its evaluation of the merits of an appeal from Judge Fasano's ruling, the court observed that the petitioner failed to demonstrate that any of the grounds as set forth in Practice Book § 39-27[7] that would support a

an alleged conflict of interest on the part of Mandanici, the habeas court's memorandum of decision does not support the claim.

[7] Practice Book § 39-27 provides: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows:

"(1) The plea was accepted without substantial compliance with Section 39-19;

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed;

"(3) The sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement on which the judicial authority had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered;

"(4) The plea resulted from the denial of effective assistance of counsel;

"(5) There was no factual basis for the plea; or

motion to withdraw a guilty plea could be proven. As the court observed, in light of the petitioner's representations, he conceivably could have attempted to demonstrate under Practice Book § 39-27 (4) that Mandanici had rendered ineffective assistance that resulted in his decision to plead guilty. The court observed, however, that such a claim of ineffective assistance had been raised before and rejected on its merits by Judge Fuger in the prior habeas action and that Judge Fuger's decision had been affirmed on appeal.

The court stated: "At the time of his request, the petitioner bore the burden to present facts sufficient to persuade the trial court that his guilty plea should be withdrawn at [that] point in the proceedings . . . . There was no credible evidence presented at the habeas trial before this court to support a claim that such proof was available to Attorney Mandanici at the time the petitioner sought to withdraw his plea. Consequently, Attorney Russell had no professional obligation to raise a claim of ineffective assistance for failing to advise the petitioner of the possibility of appealing from that denial of his request because that appeal was very likely to fail." (Citation omitted; internal quotation marks omitted.)

In the present appeal, the petitioner argues that although counsel is not always required to advise a defendant of his or her right to appeal following a guilty plea, Mandanici had a duty to advise him that he could appeal from the denial of his motion to withdraw his guilty plea. The petitioner argues that his conduct during the sentencing hearing demonstrated his interest in pursuing an appeal. Moreover, the petitioner argues, the record reflected that he was prejudiced by Mandanici's

"(6) The plea either was not entered by a person authorized to act for a corporate defendant or was not subsequently ratified by a corporate defendant."

failure because he had several nonfrivolous claims to raise in an appeal, which included claims with respect to whether (1) his plea was the result of ineffective assistance of counsel, (2) the sentencing court should have appointed him new counsel for purpose of his motion to withdraw his plea and should have held a full hearing in connection with his motion to withdraw his plea, and (3) he did not fully understand the charges contemplated by the plea agreement. The petitioner acknowledges that, in addressing Judge Fasano, he did not articulate a basis for his motion, but he argues that it was unnecessary for him to do so because he provided a basis in his correspondence to the court and that, in denying the motion to withdraw the guilty plea, the sentencing court failed to address the concerns set forth therein, namely, that he had not understood the nature of the plea agreement and that he was dissatisfied with Mandanici's representation.

In *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 7–10, 761 A.2d 740 (2000), our Supreme Court, relying on *Roe* v. *Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), set forth the applicable standard of review under the federal constitution in the determination of whether counsel is ineffective in failing to apprise a defendant of the right to appeal from a guilty plea. The court stated: "*Roe* has clarified the applicable standard of review under the federal constitution in the determination of whether counsel is ineffective in failing to apprise a defendant of the right to appeal from a guilty plea. The Supreme Court held that, in such a case, counsel has a constitutional obligation to advise a defendant of appeal rights when either (1) the defendant has reasonably demonstrated to counsel his or her interest in filing an appeal, or (2) a rational defendant would want to appeal under the circumstances. . . .

"The Supreme Court began its decision in *Roe* with a review of *Strickland* v. *Washington*, supra, 466 U.S.

687, in which the court had held that criminal defendants have a sixth amendment right to 'reasonably effective' legal assistance. Under *Strickland*, a defendant claiming ineffective assistance of counsel must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness . . . and (2) counsel's deficient performance prejudiced the defendant in that there was a reasonable probability that the result of the proceeding would have been different. . . .

"The Supreme Court in *Roe* then further articulated that 'this [*Strickland*] test applies to claims, like [the petitioner's in *Roe*] that counsel was constitutionally ineffective for failing to file a notice of appeal.' *Roe* v. *Flores-Ortega*, supra, 528 U.S. 477. '[N]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel. . . . Rather, courts must judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct . . . and [j]udicial scrutiny of counsel's performance must be highly deferential . . . .' " (Citations omitted.) *Ghant* v. *Commissioner of Correction*, supra, 255 Conn. 7–8.

"The court in *Roe* began its analysis with the first part of the *Strickland* test and enunciated the rule to be applied to ineffective assistance claims concerning the failure to take an appeal. 'In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking . . . whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to [mean] . . . advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant

. . . [c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. . . . If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. . . . And, while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented . . . the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.' . . . *Roe* v. *Flores-Ortega*, supra, 528 U.S. 478–79 . . . .

"Rejecting a bright line test that would require counsel *always* to consult with a defendant regarding an appeal, the court in *Roe* stated: 'We . . . hold that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. . . . Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have

desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.' . . . [Id.] 480.

"The second part of the *Strickland* test, as enunciated in *Roe*, requires the defendant to show prejudice from counsel's deficient performance. . . . '[T]o show prejudice [when counsel fails to apprise a defendant of his or her appellate rights], a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.' Id., 484. The court further articulated that 'whether a given defendant has made the requisite showing will turn on the facts of a particular case. . . . [E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination.' . . . Id., 485." (Citations omitted; emphasis in original; footnote omitted.) *Ghant* v. *Commissioner of Correction*, supra, 255 Conn. 8–10.[8]

Having set forth the court's findings of fact and the legal standard governing the present claim, we turn to an examination of the merits of the petitioner's claim that Mandanici rendered ineffective assistance by failing to advise him concerning his right to appeal and that Russell rendered ineffective assistance by failing to raise such a claim in the prior habeas action. In the present case, there is no factual dispute that Mandanici

[8] We observe that, in *Roe*, the United States Supreme Court rejected a resort to a bright line rule that counsel must always consult with a defendant regarding an appeal. *Roe* v. *Flores-Ortega*, supra, 528 U.S. 480. Rather than adhering to what it considered to be per se rules governing the conduct of defense counsel, the court crafted an approach that focused on whether the failure to consult with a defendant regarding an appeal was reasonable in light of the particular circumstances of each case. Id., 481. We acknowledge, however, that the court in *Roe* stated that it was "the better practice for counsel routinely to consult with the defendant regarding the possibility of an appeal." Id., 479.

did not consult with the petitioner concerning his appellate rights following the denial of the motion to withdraw the guilty plea. In determining, under *Strickland*'s first prong, whether Mandanici had a constitutional obligation to advise the petitioner concerning his right to appeal, we first consider in our plenary review whether the issues arising from the denial of the motion to withdraw the guilty plea had such a degree of merit that a rational defendant would have wanted to appeal.

In arguing that Russell rendered ineffective assistance during the prior habeas trial, the petitioner argues that the record supports a finding that a rational defendant would have appealed from Judge Fasano's denial of his motion to withdraw his guilty plea. He asserts that, setting aside what he expressly stated to Judge Fasano when he was asked why he wanted to withdraw his plea,[9] he had alerted the court in a correspondence that his plea was the result of ineffective assistance by Mandanici and that he did not understand the charges contemplated by the plea agreement.[10] At the time that Judge Fasano addressed the petitioner and Mandanici, Judge Fasano stated that he was aware of the petitioner's correspondence. Assuming that, in addition to what

[9] The record reflects that at the sentencing hearing on May 26, 2000, Judge Fasano invited the petitioner to indicate a basis on which his motion to withdraw the plea should be granted. The petitioner stated that Mandanici was aware that he did not commit murder, that the confession on which the state relied was "bull shit," and that he believed that he would "get a lesser charge." When the petitioner stated that he was not pleading to murder, Judge Fasano reminded the petitioner that such a plea already had been made and accepted by the court.

[10] The correspondence on which the petitioner relies is addressed to Judge Fasano and is dated May 8, 2000. In this handwritten correspondence, the petitioner stated, in relevant part, that he was "unaware of what was really going on" with respect to the plea, Mandanici did not explain things adequately to him with respect to the plea, Mandanici did not communicate effectively with him, he believed that he was forced into making a plea, he no longer wanted to enter into a plea agreement, he wanted to proceed to trial, and he wanted an attorney appointed to represent him at trial.

the petitioner stated at the sentencing hearing when Judge Fasano afforded him an opportunity to explain his motion, Judge Fasano should have considered the content of any correspondence he had received from the petitioner concerning the motion, the petitioner is unable to demonstrate that the grounds for the motion to withdraw his plea were nonfrivolous in nature.

Previously in this opinion, we set forth in detail the habeas court's findings of fact. The habeas court expressly found that the petitioner's motion to withdraw his guilty plea was not related to ineffective representation by Mandanici or any misunderstanding by the petitioner. It is significant that, in its role as fact finder, the habeas court found that the petitioner's motion to withdraw his guilty plea reflected that *he simply had changed his mind about the plea*. The court found that there was "no credible evidence" to support the petitioner's claim that Mandanici should have been aware of a valid ground on which the petitioner may have based his motion. Consequently, the habeas court found that Russell was not deficient for failing to raise a claim related to Mandanici's assistance. The habeas court made findings of fact that undermine the petitioner's claim that nonfrivolous grounds existed to support an appeal from Judge Fasano's ruling. The petitioner has not demonstrated that the court's findings of fact lack support in the evidence.

The petitioner also argues that a nonfrivolous basis to appeal existed because Judge Fasano did not appoint new counsel to litigate the motion to withdraw the guilty plea or conduct an adequate hearing into the motion.[11] Regardless of whether the petitioner in the

[11] The defendant relies on this court's reasoning in *State* v. *Simpson*, 169 Conn. App. 168, 184–204, 150 A.3d 699 (2016). In *Simpson*, a direct appeal, this court determined that the trial court improperly had failed to conduct an evidentiary hearing on the defendant's motion to withdraw his guilty plea based on his representation that he did not understand the nature of the charge to which he pleaded guilty and that the trial court improperly had failed to inquire into his request for new counsel. Id. Following this

present case was afforded a full evidentiary hearing or new counsel to assist him in presenting his motion, he was afforded a full opportunity to demonstrate the merits of his motion during the present habeas trial. Specifically, the habeas trial afforded him a full opportunity to demonstrate that a reasonable defendant in his position would have appealed because nonfrivolous grounds for an appeal existed. After examining the evidence presented by the petitioner, however, the habeas court found that he was unable to demonstrate that a nonfrivolous ground for appeal existed because the motion was based not on a defect in Mandanici's representation or confusion about the nature of the charge, but on the fact that the petitioner had changed his mind. The petitioner cannot dispute that such a change of heart concerning the plea is an invalid basis upon which to base a motion to withdraw a plea. This finding is fatal to the petitioner's claim that there were viable grounds to appeal and, thus, that a rational defendant would have wanted to bring an appeal to pursue these grounds.

Next, in determining whether Mandanici had a constitutional obligation to advise the petitioner concerning his right to appeal, we consider under our plenary standard of review whether the evidence as a whole reflects that the petitioner had reasonably demonstrated to

court's decision, our Supreme Court granted certification to appeal. *State* v. *Simpson*, 324 Conn. 904, 151 A.3d 1289 (2016). Following oral argument in the present appeal, our Supreme Court officially released its decision reversing this court's judgment. *State* v. *Simpson*, 329 Conn. 820, A.3d (2018). Our Supreme Court concluded that the trial court had conducted an adequate hearing on the motion to withdraw the guilty plea and that an evidentiary hearing was unnecessary. Id., 842. Also, our Supreme Court concluded that the trial court was not required to conduct a hearing on the defendant's request for new counsel. Id.

The defendant's reliance on this court's decision in *Simpson* is unavailing, and a careful review of our Supreme Court's decision in *Simpson* does not lend any support to the defendant's claim that he had advanced a nonfrivolous ground in connection with his motion to withdraw his guilty plea.

Mandanici that he was interested in appealing from Judge Fasano's denial of his motion to withdraw the guilty plea. As we stated previously in this opinion, the habeas court did not analyze the petitioner's claim in light of the currently recognized standard as set forth in *Roe* and did not set forth any findings of fact with respect to this distinct issue. See footnote 6 of this opinion. As a reviewing court, we must rely on the factual findings of the habeas court unless they are not supported by the record. Despite the absence of specific factual findings with respect to this issue, we may examine the evidence to determine whether the petitioner presented evidence on which the habeas court reasonably could have found that such a showing had been made. If such evidence is lacking, the court's failure to make any relevant findings, under the *Roe* standard, with respect to the issue of whether the petitioner demonstrated an interest in appealing is harmless.

At the present habeas trial, the petitioner presented the transcripts from his prior habeas proceeding in 2003. The petitioner's testimony at that prior proceeding does not reflect that he had asked Mandanici about his right to appeal from the denial of his motion to withdraw his guilty plea or had otherwise indicated to Mandanici that he was interested in bringing an appeal. Likewise, during Mandanici's testimony at the prior habeas trial, Mandanici did not testify that the petitioner had asked him about his right to appeal or had otherwise stated that he was interested in bringing an appeal. Rather, Mandanici testified that he did not believe that there were grounds for bringing the motion to withdraw the guilty plea and that the petitioner wanted to withdraw his plea "because he had changed his mind."

During his testimony at the present habeas trial, the petitioner explained the reasons why he wanted to withdraw his plea and his view that he did not want to proceed to trial under Mandanici's representation. He

stated that, by the time of the sentencing hearing, he had filed a grievance complaint against Mandanici and that his relationship with Mandanici had deteriorated. He testified that prior to his appearance at the sentencing hearing, he had not even discussed his desire to withdraw his plea with Mandanici. The petitioner testified that, after the sentencing hearing and the court's denial of his motion, he did not speak with Mandanici. He testified that Mandanici did not advise him that he could appeal from Judge Fasano's ruling, and, in fact, he and Mandanici did not have *any* discussions about the topic of an appeal. He testified that he was unaware that he could appeal from that ruling but that he "most likely" would have appealed if he knew that he could do so. At the present habeas trial, Mandanici testified that he could not recall whether he spoke with the petitioner following the sentencing hearing.

The petitioner broadly asserts in his appellate brief that his "actions" at the sentencing hearing "reasonably demonstrated that he would be interested in pursuing an appeal." (Internal quotation marks omitted.) Our careful review of the transcript of the sentencing hearing, however, does not reflect that the petitioner made any reference to an appeal or, in lay terms, bringing any type of challenge to Judge Fasano's ruling. Although, at the hearing, the petitioner communicated with the court with respect to the reasons why he believed that he should be permitted to withdraw his guilty plea and expressed his dissatisfaction with Mandanici, none of his statements reasonably may be interpreted to reflect a desire to further pursue the issue.

The evidence, therefore, reflects that despite the fact that, during the present habeas trial, he expressed his desire to bring an appeal from Judge Fasano's ruling, there was no evidence that he demonstrated such an interest to Mandanici or inquired to any extent about

his appellate rights.[12] Because the evidence, viewed in its entirety, does not support a finding that the petitioner reasonably demonstrated to Mandanici that he was interested in bringing an appeal from Judge Fasano's denial of his motion to withdraw the guilty plea, the petitioner has not demonstrated that, despite the fact that there were not any nonfrivolous grounds for an appeal, Mandanici had a constitutional obligation to advise him about his right to appeal.

In light of the foregoing, we conclude that the petitioner is unable to demonstrate that, in the prior habeas action, Russell rendered ineffective assistance by failing to pursue a claim concerning Mandanici's failure to advise him concerning his right to appeal.

II

Next, the petitioner claims that the court improperly rejected his claim that Russell rendered ineffective assistance in that he failed to present evidence in support of the petitioner's claim that his guilty plea was the result of Mandanici's ineffective assistance. We decline to reach the merits of this unpreserved claim.

In support of this claim, the petitioner argues that, at the prior habeas trial, he testified, inter alia, about the ways in which, in his view, Mandanici rendered ineffective assistance. The petitioner argues, however, that, at the prior habeas trial, Russell failed to present testimony from him that would have demonstrated how the deficiencies in Mandanici's representation

[12] At the present habeas trial, the petitioner testified that several days following the sentencing hearing, he "tried to reach" Mandanici. It is unclear from the petitioner's testimony, however, whether he actually spoke with Mandanici following the sentencing hearing or why he wanted to speak to Mandanici. The petitioner testified, however, that approximately one year following the sentencing hearing, he contacted the public defender's office in an attempt to obtain information about how to "withdraw the plea," but he was advised that the time period in which to appeal from Judge Fasano's ruling had expired.

"impacted his decision to plead guilty, or what would have needed to change in order for the petitioner to have rejected the plea and proceeded to trial." He argues that the judgment of the habeas court should be reversed because Russell's failure to present such testimony deprived him of the effective assistance of habeas counsel.

The state argues, and we agree, that the petitioner did not plead this ground in his habeas petition. "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Internal quotation marks omitted.) *Abdullah* v. *Commissioner of Correction*, 123 Conn. App. 197, 202, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010); see also *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 262, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012).

Thus, we turn to the petitioner's amended petition. In count three of his amended petition, the only count based on Russell's representation, he alleged in relevant part that "[Russell's] performance was deficient because he failed to plead and present evidence and argument in support of the claims" previously set forth in his petition. These claims were, in count one, that Mandanici was ineffective for failing to advise the petitioner that he had the right to appeal from Judge Fasano's denial of his oral motion to withdraw his guilty

plea and, in count two, that "[t]he petitioner's defense was adversely affected by [Mandanici's] *actual conflict of interest* . . . ." (Emphasis added.) In count two, the petitioner alleged that he was prejudiced by a conflict of interest because Mandanici failed to reasonably communicate with him, to adequately investigate the allegations against him, to zealously advocate for him during plea negotiations, and to advise him about his right to appeal from Judge Fasano's denial of his motion to withdraw his guilty plea. Nowhere in the amended petition[13] did the petitioner allege that Russell was deficient for failing to present evidence in support of a claim that his decision to plead guilty was the product of any type of deficiencies in Mandanici's representation generally.[14]

In light of the fact that the petitioner did not distinctly raise the current claim in his amended petition, it is unsurprising that the court did not expressly rule on it in its thorough memorandum of decision.[15] "This court

[13] We observe, however, that the petitioner briefly mentioned the present claim in his posttrial brief, in which he argued that, in his prior habeas action, he bore the burden of demonstrating that he was prejudiced by Mandanici's ineffective assistance by proving that, if Mandanici had not performed deficiently, he would have rejected the state's plea offer and proceeded to trial. He argued in relevant part that Russell was ineffective for his failure "to present testimony that he would not have [pleaded] guilty if [he had been] properly represented [by Mandanici]." Although the petitioner made this argument in his posttrial brief, he did not distinctly raise it before the habeas court. "Claims raised for the first time in posttrial briefs are not reviewable by the habeas court or by this court on appeal." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 877, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

[14] Our conclusion that the petitioner's second claim is not based on ineffective representation, but on a conflict of interest, is bolstered by the fact that, in count two of the amended petition, the petitioner alleged that his claim, based on the existence of a conflict of interest, was not previously raised. As we stated previously in this opinion, one of the grounds of the petitioner's prior habeas petition, in 2003, was that Mandanici rendered ineffective assistance and, because of this constitutional violation, he should be permitted to withdraw his guilty plea.

[15] Presumably, if the petitioner believed that the habeas court had overlooked this claim, he could have asked the court to address the claim by filing a postjudgment motion.

is not bound to consider claimed errors unless it appears on the record that the question was distinctly raised . . . and was ruled upon and decided by the court adversely to the [petitioner's] claim. . . . This court is not compelled to consider issues neither alleged in the habeas petition nor considered at the habeas proceeding . . . ." (Internal quotation marks omitted.) *Satchwell* v. *Commissioner of Correction*, 119 Conn. App. 614, 619, 988 A.2d 907, cert. denied, 296 Conn. 901, 991 A.2d 1103 (2010); see also *Greene* v. *Commissioner of Correction*, 131 Conn. App. 820, 822, 29 A.3d 171 (2011), cert. denied, 303 Conn. 936, 36 A.3d 695 (2012). Accordingly, we decline to reach the merits of this claim.[16]

III

Finally, the petitioner claims that the court improperly rejected his claim that Russell rendered ineffective

[16] We observe that, to the extent that the petitioner believes that in the present habeas action he presented credible evidence, including his own testimony, that demonstrated that, apart from any conflict of interest on Mandanici's part, defective representation by Mandanici resulted in his guilty plea, we observe that the court clearly indicated in its decision that it was not persuaded by the petitioner's evidence in this regard. In addressing the issue of whether Mandanici had a colorable basis upon which to bring a motion to withdraw the petitioner's guilty plea, the court considered whether, under Practice Book § 39-27 (4), the petitioner could have demonstrated that "[t]he plea resulted from the denial of effective assistance of counsel . . . ." The court expressly found that the petitioner had not presented any "credible evidence" in the present proceeding that there was a sound basis for Mandanici to bring a motion to withdraw the petitioner's guilty plea. This finding is significant in terms of the present claim because, even if the claim at issue concerning Russell's failure to present certain testimony from the petitioner at the prior habeas trial had been properly raised and considered by the trial court, the habeas court's finding, after hearing that testimony from the petitioner at the present trial, that his plea was not the result of any deficiencies on Mandanici's part necessarily undermines the petitioner's claim that he had been prejudiced by Russell's failure to present the petitioner's testimony in this regard at the prior habeas trial. Thus, even if the court should have addressed a claim of this nature, we are convinced that its failure to do so was harmless in light of its other findings.

assistance in his prior habeas action by failing to claim that Mandanici's conflict of interest resulted in the petitioner's guilty plea. We disagree.

In rejecting the petitioner's claim, the habeas court stated in relevant part: "The petitioner alleges that . . . Russell represented him deficiently because he failed to raise the claim that . . . Mandanici had a conflict of interest in continued representation of the petitioner during his criminal case. The purported basis for that conflict of interest claim was that the petitioner had, on February 19, 2000, filed a complaint against . . . Mandanici with the Statewide Grievance Committee *while* the criminal case was pending. That grievance was ultimately dismissed because the committee determined that no misconduct occurred. This allegation of ineffective assistance by habeas counsel fails for multiple reasons.

"First, the gist of the petitioner's grievance was that he was dissatisfied with the amount of investigation performed and the lack of communication with the petitioner by . . . Mandanici. This form of discontent fails to create a conflict of interest requiring the removal of counsel . . . .

"Unhappiness with the perceived performance of counsel by a criminal defendant creates no ground for conflict of interest requiring removal of counsel . . . . Insignificant and unsubstantiated criticisms of trial counsel are insufficient to warrant withdrawal by that lawyer . . . . The filing of a grievance based on that perception is likewise insufficient to implicate violation of the defendant's sixth amendment rights and does not disqualify the attorney who is the subject of that grievance from continuing to represent the recalcitrant client . . . . Consequently, the supposed conflict of interest engendered by the lodging of the grievance against . . . Mandanici afforded a very shaky legal

ground on which . . . Russell could assert such a claim at the earlier habeas proceeding.

"Second, the petitioner's *later* guilty plea waived any conflict of interest claim even if . . . the ersatz disqualifying circumstance existed. The petitioner pleaded guilty on April 14, 2000, around two months *after* he grieved . . . Mandanici. The general rule is that a guilty plea waives all nonjurisdictional defects antecedent to the entering of the plea, including defects asserting constitutional deprivations . . . . Only defects which implicate the subject matter jurisdiction of the court survive a later valid guilty plea, and effects asserting lack of personal jurisdiction over an accused are waived by a subsequent guilty plea. . . . This waiver rule applies equally to matters raised by way of direct appeal or by collateral attack, such as through a petition for habeas corpus relief . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.)

Then, the court discussed Connecticut Supreme Court and federal court case law in support of the well settled proposition that a later guilty plea waives claims of ineffectiveness of counsel at earlier proceedings unrelated to the taking of a plea. The court correctly observed that, unless an alleged conflict of interest was shown to have rendered a plea itself to be involuntarily or unknowingly made, a claim of a conflict of interest by an accused's attorney is waived for all purposes by virtue of a guilty plea.

The court stated: "This court's review of the petitioner's plea hearing transcript discloses that the petitioner entered that plea, under the *Alford* doctrine, knowingly and voluntarily. Whatever psychological role the petitioner's dissatisfaction with . . . Mandanici's previous representation may have played in his decision to plead guilty is immaterial. What counts is that the petitioner understood the rights he gave up by pleading guilty,

the nature of the charge against him, the strengths and weaknesses of the state's case and his own, the punishments available for that offense, and the terms of the agreed disposition. This court's examination of the record leads it to concur with Judge Fuger's finding on the same point that the petitioner 'freely made the choice to give up his constitutional right to a trial in order to obtain favorable consideration upon sentencing' . . . .

"This waiver provides additional support for the conclusion that . . . Russell acted properly and professionally when he omitted such a dubious claim in the first habeas case."

On appeal, the petitioner argues that the court improperly raised the issue of waiver sua sponte and in reliance on that doctrine determined that he was unable to demonstrate that Russell rendered ineffective representation by failing to pursue a claim in the prior habeas action related to Mandanici's conflict of interest. The petitioner accurately observes that the respondent did not allege waiver as a special defense in his return. The petitioner argues that it was improper for the court to have disposed of his claim based on that defense because he was without notice that the court would rely on waiver. He argues that, "[a]lthough the issue of whether waiver must be pleaded by the respondent in a habeas case before a habeas court can dismiss a petition on grounds of waiver has not been directly been addressed by Connecticut courts," appellate case law and Practice Book § 23-30 (b), which requires the respondent to allege in the return "facts in support of any claim . . . that the petitioner is not entitled to relief," support a determination that a habeas court may not sua sponte raise a special defense and dispose of a claim in reliance thereupon. The petitioner relies heavily on this court's holdings in *Diaz* v. *Commissioner of Correction*, 157 Conn. App. 701, 706–707, 117 A.3d

1003 (2015), appeal dismissed, 326 Conn. 419, 165 A.3d 147 (2017), and *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 786–87, 93 A.3d 165 (2014). In both *Diaz* and *Barlow*, this court concluded that it was reversible error for a habeas court to have sua sponte raised the affirmative defense of procedural default and thereafter to have dismissed a habeas petition on that ground that had not been pleaded by the respondent. *Diaz* v. *Commissioner of Correction*, supra, 706–707; *Barlow* v. *Commissioner of Correction*, supra, 786–87.

We are not persuaded by the petitioner's argument concerning waiver because, contrary to the petitioner's characterization of the court's analysis, the court's decision does not reflect that it sua sponte either raised an affirmative defense (or a claim that the petitioner was not entitled to relief) or dismissed the petition, in whole or in part, on the basis of such defense or claim. The court did not conclude that the petitioner had waived his claim that Russell had deprived him of ineffective representation during the prior habeas action. Under *Strickland*, it was appropriate for the court to evaluate what prejudice, if any, resulted to the petitioner as a result of Russell's alleged deficient performance. The court, in evaluating whether the petitioner met his burden of demonstrating that Russell had prejudiced him by failing to raise a claim related to Mandanici's alleged conflict of interest relied, in part, on its conclusion that the claim that Russell did not raise would have been waived by virtue of the petitioner's guilty plea. Thus, the court considered and rejected the petitioner's claim against Russell on its merits, concluding that the waiver doctrine provided "additional support" for its determination that the underlying claim against Mandanici that Russell did not raise at the prior proceeding was "dubious," at best, when viewed in light of state and federal authority concerning what types of claims may be raised following a valid guilty plea. The habeas court did not

determine that the petitioner's claim arising from Russell's representation was waived nor did it dismiss that portion of the petition on that ground.

Additionally, the petitioner argues that, even if the court properly considered the issue of waiver, it improperly relied on that doctrine because his testimony at the habeas trial reflected that the breakdown in his relationship with Mandanici and his concern that Mandanici would not represent him zealously at trial was "the catalyst for his decision to accept the guilty plea." The petitioner argues that the evidence presented, including his testimony, demonstrated "a direct nexus" between the conflict of interest involving Mandanici and his guilty plea. The petitioner urges us to conclude that because he was able to prove this factual link between the conflict of interest and his plea, such a showing necessarily provided him with a valid ground to withdraw his plea under Practice Book § 39-27. Accordingly, the petitioner argues, the court should not have concluded that the conflict of interest claim was not strong and, thus, that Russell did not deprive him of his right to effective representation by not raising it in the prior habeas action.

In this aspect of his argument, the petitioner urges us to conclude that, to the extent that the court did not view his testimony and other evidence concerning his dissatisfaction with Mandanici as proof that Mandanici's conflict of interest was inherently related to his guilty plea, the court's findings are clearly erroneous.

As we have discussed previously in this opinion, the court recognized that it was significant to determine whether the claimed conflict of interest somehow rendered the petitioner's plea invalid. The court explained in its memorandum of decision, however, that "[t]he petitioner's request to withdraw his guilty plea was simply a change of mind. Reconsideration or regret,

standing alone, cannot validly support a motion to withdraw a guilty plea that was otherwise lawfully entered." The court unambiguously found that the petitioner's plea was knowingly and voluntarily made, explicitly rejecting the petitioner's argument that his dissatisfaction with Mandanici and the issues surrounding the filing of his grievance complaint influenced his decision to plead guilty. In making this finding, which is fatal to the petitioner's claim, the court stated that it had examined the record and, in particular, the transcript of the plea hearing of April 4, 2000.

We reiterate that we "cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Gerald W.* v. *Commissioner of Correction*, supra, 169 Conn. App. 465. "[A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776, 786, 166 A.3d 815, cert. denied, 327 Conn. 957, 172 A.3d 204 (2017). "[T]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Bennett* v. *Commissioner of Correction*, 182 Conn. App. 541, 555–56, A.3d (2018).

The petitioner relies on the weight of his testimony, in which he attempted to demonstrate that his plea was not knowingly and voluntarily made, as well as other evidence presented at the habeas trial to demonstrate that at the time of the plea he was dissatisfied with Mandanici's representation. The court, having had a firsthand vantage point from which to observe the petitioner testify about the plea and assess the truthfulness of his testimony, was not obligated to accept as true

the petitioner's version of the facts, specifically, that he was compelled to plead guilty by virtue of Mandanici's ineffectiveness and the filing of the grievance complaint. The court relied on the transcript of the plea hearing, which reflects that the petitioner had been thoroughly canvassed by Judge Fasano and, despite his expressions of dissatisfaction with Mandanici, nonetheless indicated, among other things, that he was agreeable to the plea agreement, that he was satisfied with Mandanici's advice concerning the plea, that he believed that he was doing the right thing by pleading guilty, that he understood the rights he was giving up by pleading guilty, that he was pleading guilty voluntarily, that he understood the state's case against him, that he understood the punishment he was facing if he proceeded to trial, and that he was motivated to plead guilty rather than risk receiving a heavier penalty following a trial. Thus, the court's factual finding concerning the voluntariness of the plea is supported by evidence in the record. We are not persuaded that a mistake has been made.

The judgment is affirmed.

In this opinion the other judges concurred.

FRANK BONGIORNO *v.* JOSEPH CAPONE
(AC 40205)

Sheldon, Elgo and Flynn, Js.

Syllabus

The plaintiff, who was a member of A Co., a limited liability company, sought to recover damages from the defendant for, inter alia, breach of contract in connection with a dispute involving the sale of the defendant's membership interest in A Co. to the plaintiff. The plaintiff and the defendant, who previously each owned a 50 percent membership interest in A Co., had signed a binding term sheet, which provided that the plaintiff would purchase the defendant's interest in A Co. for a certain sum, and that their agreement to make purchase and sale would

become enforceable on the date that the term sheet was signed. Pursuant to the term sheet, the parties subsequently executed a settlement agreement, at which time the plaintiff payed the defendant the purchase price, and the defendant conveyed his interest in A Co. to the plaintiff. On the day after the term sheet was signed but before the execution of the settlement agreement, the defendant withdrew $17,000 from a checking account owned by A Co. Thereafter, the plaintiff commenced this action, alleging claims for, inter alia, breach of contract and statutory theft against the defendant based on the defendant's withdrawal of that money. Specifically, the plaintiff's breach of contract claim alleged that all assets of A Co., except for certain items of the defendant's personal property that were referenced in the term sheet, were to have remained the assets and property of A Co. when the defendant conveyed his 50 percent interest in A Co. to the plaintiff and, therefore, that the defendant had breached the provisions of the term sheet by withdrawing $17,000 from A Co.'s checking account. The matter was referred to an attorney trial referee, who filed a report recommending judgment for the plaintiff. The trial court subsequently denied the defendant's motion to dismiss the operative complaint for lack of subject matter jurisdiction, accepted the attorney trial referee's second revised report, and rendered judgment in favor of the plaintiff on his claims of breach of contract and statutory theft in accordance with that report. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the breach of contract count should have been dismissed by the trial court for lack of subject matter jurisdiction, which was based on his assertion that the plaintiff had no standing to bring his breach of contract claim because it was A Co., and not the plaintiff, that suffered any damages as a result of the defendant's $17,000 withdrawal: the breach of contract claim did not seek damages from the defendant for losses he allegedly caused to A Co. by making an unauthorized withdrawal of money from A Co.'s checking account but, rather, sought damages for the resulting failure of the defendant to give the plaintiff full consideration for the purchase price that he had paid for the defendant's 50 percent interest in A Co., and, thus, to the extent that the defendant, by taking unilateral action to diminish the value of his membership interest before transferring it to the plaintiff in exchange for consideration, denied the plaintiff the benefit of his bargain under the contract, the plaintiff had standing, in his individual capacity, to bring an action against the defendant for breach of contract to recover compensatory damages for that lost benefit; moreover, because the plaintiff's contract with the defendant was to purchase a 50 percent interest in A Co., the loss of consideration suffered by the plaintiff due to A Co.'s loss of $17,000 in aggregate value was only one half of that amount, and, therefore, the trial court should have awarded the plaintiff damages of only $8500 instead of the full amount of the $17,000 withdrawal.

2. The trial court having lacked subject matter jurisdiction over the plaintiff's statutory theft claim, it improperly rendered judgment in favor of the plaintiff on the merits of that claim, which should have been dismissed, as the only injuries resulting from the alleged theft were suffered by A Co., and not by the plaintiff personally, and, thus, the plaintiff lacked standing to bring that claim in his individual capacity; the statutory theft count was based entirely on the defendant's withdrawal of $17,000 from the checking account that was owned by A Co., the term sheet and the settlement agreement did not pass title to A Co.'s assets from the defendant to the plaintiff, as only the defendant's membership interest in A Co. was thereby transferred and, under the allegations as pleaded, the only injuries resulting from the defendant's conduct were suffered by A Co., and the plaintiff could not recover individually for an injury to A Co. even after he became the sole member of A Co., which, as a limited liability company, remained a distinct legal entity.

3. This court declined to review the defendant's unpreserved claim that the trial court erred in rendering judgment in favor of the plaintiff on his breach of contract claim without making conclusions of law regarding the applicability of certain waiver provisions in the settlement agreement, as that claim was never raised before the trial court, and the defendant provided no legal basis for his claim that the trial court had a duty, sua sponte, to reject the allegedly incomplete findings of the attorney trial referee regarding the subject provisions.

Argued May 22—officially released October 2, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the plaintiff withdrew certain counts of his revised complaint; thereafter, the matter was referred to an attorney trial referee, who filed a report recommending judgment for the plaintiff; subsequently, the court, *Hon. Kevin Tierney*, judge trial referee, denied the defendant's motion to dismiss, sustained in part the defendant's objection to the acceptance of the report, and remanded the matter to the attorney trial referee; thereafter, the attorney trial referee filed a revised report recommending judgment for the plaintiff; subsequently, the court remanded the matter to the attorney trial referee, who filed a second revised report recommending judgment for the plaintiff; thereafter, the court

rendered judgment in accordance with the second revised report, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Richard J. Rapice, with whom, on the brief, were *Peter V. Lathouris* and *Michael P. Longo, Jr.*, for the appellant (defendant).

Mark F. Katz, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, Joseph Capone, appeals from the judgment of the trial court, rendered in accordance with the second revised finding of facts and report of an attorney trial referee (referee) to whom this case was referred for trial, awarding the plaintiff, Frank Bongiorno: compensatory damages of $17,000 on the plaintiff's claim of breach of contract, plus statutory prejudgment interest on that sum, under General Statutes § 37-3a, at the rate of 10 percent per annum; and treble damages of $51,000 on the plaintiff's claim of statutory theft under General Statutes § 52-564, less $17,000 to avoid duplication of the damages awarded for breach of contract.[1] The defendant claims that the court improperly: (1) concluded that the plaintiff had standing in his individual capacity to pursue claims of breach of contract and statutory theft against the defendant based upon his withdrawal of $17,000 from the checking account of AAA Advantage Carting &

[1] The plaintiff's complaint also pleaded claims of violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and breach of contract involving a separate company, Diaz Boncap, LLC. The plaintiff withdrew those claims prior to trial. Additionally, the plaintiff's complaint pleaded a claim of conversion. The trial court found that this claim was moot because damages for conversion and statutory theft cannot be separately awarded based upon the taking of the same sum of money; it therefore found for the defendant on that count. The plaintiff also claimed in his first count that the defendant had failed to transfer two cell phone numbers to him. The referee found in favor of the defendant on that claim, and the court upheld the decision. It is not an issue on appeal.

Demolition Service, LLC (company), a limited liability company in which the defendant had a 50 percent membership interest that he had agreed to sell to the plaintiff for $200,000 on the basis of a binding term sheet that did not authorize the challenged withdrawal; (2) rendered judgment in favor of the plaintiff on the merits of his breach of contract claim without making legal conclusions as to the applicability of the waiver-of-suit provisions in the contractual documents to that claim; and (3) rendered judgment in favor of the plaintiff on the merits of his statutory theft claim.[2]

We agree with the defendant that the plaintiff lacked standing, in his individual capacity, to bring an action against him in this case to recover damages for losses he allegedly caused to the company. On that basis, we conclude that both the plaintiff's statutory theft claim and that portion of his breach of contract claim, in which he sought compensatory damages for diminishing the value of his own preexisting 50 percent interest in the company, rather than the other 50 percent interest in the company that he agreed to purchase under the contract, must be dismissed for lack of subject matter jurisdiction. To the extent, however, that the plaintiff sought damages from the defendant for losses he personally suffered due to the defendant's withdrawal of $17,000 from the company's account based on the resulting diminution in value of the 50 percent interest in the company that the defendant had agreed to sell him in exchange for his payment of $200,000, we find that the plaintiff had standing to prosecute that claim. Even so, although the defendant admittedly failed to

[2] In his brief, the defendant also claimed that the court erred in rendering judgment in favor of the plaintiff on the plaintiff's claim of conversion. This claim is unfounded, as the defendant makes no mention of conversion in his argument, and the court determined that the plaintiff's conversion claim was moot. See footnote 1 of this opinion.

We do not address the defendant's third claim in this opinion because that claim is rendered unnecessary by our resolution of his first claim.

raise before the trial court, and thus to preserve for appellate review, his only present challenge to the merits of that judgment, we further conclude that the amount of that judgment on the plaintiff's breach of contract claim must be reduced, in light of our jurisdictional ruling, to reflect the true extent of the proven diminution in value of the company resulting from the defendant's $17,000 withdrawal from it that he had standing, in his individual capacity, to recover as damages in this case. Because the proven diminution of the company's aggregate value that resulted from the defendant's withdrawal was $17,000, the resulting diminution in value of the 50 percent interest in the company that he received from the defendant in consideration for his payment was only one half of that amount, or $8500. We, thus, reverse the court's judgment for the plaintiff on his breach of contract claim, as to damages only, and remand this case with direction to render judgment for the plaintiff on that claim in the modified amount of $8500, plus prejudgment statutory interest on that sum, of 10 percent per annum, from the date on which the defendant's transfer of interest to the plaintiff became final until the date of judgment.

The following facts and procedural history are relevant to our review. The plaintiff and the defendant are brothers-in-law. For many years, both owned 50 percent interests in the company. In 2012, however, they decided to end their business relationship. To that end, the plaintiff and the defendant signed two documents by which they agreed that the defendant would convey his 50 percent interest in the company to the plaintiff for the sum of $200,000. The parties first signed a "binding term sheet" on August 28, 2012, which provided that the plaintiff would purchase the defendant's interest in the company for $200,000, and that their agreement to make purchase and sale became enforceable on that date. Pursuant to the term sheet, the parties agreed to

execute a "settlement agreement" no later than September 7, 2012, at which time the plaintiff would pay the defendant the agreed upon purchase price, and the defendant would convey his 50 percent interest in the company to the plaintiff. Although the term sheet did not specifically define what was to be included in the company's assets as of that date, August 28, 2012, it did specify that the defendant's attorneys were to send to the plaintiff's attorneys a list of all of the defendant's personal property then located in the company offices, that the defendant must remove such property by September 1, 2012, and that the defendant must remove all confidential or trade secret information of the company from his personal files.[3] The term sheet did not include a reference to any checking account belonging to the company.

On September 7, 2012, the parties executed a settlement agreement, which expressly incorporated the term sheet and its provisions. The settlement agreement provided that, upon its execution, the plaintiff would

[3] The full provision provides as follows: "No later than 3:00 p.m. on Friday, August 31, 2012, [the defendant's] attorneys shall transmit to [the plaintiff's] attorneys a list of all personal property belonging to [the defendant] that [the defendant] intends to remove from [the company's] offices. [The defendant] shall have the right to remove all books and records of Boncap Realty, LLC, Boncap Recycling, LLC, and Plymouth Boncap, LLC, necessary for managing and operating such entities pursuant to Section 9 below. [The plaintiff] shall be entitled to copies of all such documents at the expense of the respective entity whose documents are copied. [The defendant] shall remove all such items from [the company's] offices no later than 5:00 p.m. on Saturday, September 1, 2012. [The plaintiff] may observe the removal. Thereafter, [the defendant] shall have no rights to occupy [the company's] offices. If there is a dispute as to what items [the defendant] may remove from [the company's] offices, such dispute shall be submitted to the Mediator for a final, binding and non-appealable decision to be rendered no later than [September 7, 2012]. [The defendant] shall remove any confidential or trade secret information of [the company] from his personal files. However, [the defendant] shall have access in the future to any [company] information necessary for tax, financial or legal purposes pertaining to the period of his ownership of [the company]."

purchase from the defendant, and the defendant would sell to the plaintiff, the defendant's 50 percent interest in the company for the purchase price of $200,000,[4] and that upon the delivery of the purchase price to the defendant, he would execute and deliver to the plaintiff an assignment of his membership interest, irrevocably transferring his 50 percent interest in the company to the plaintiff. The settlement agreement further provided that the defendant would deliver certain specific property to the plaintiff at the time of transfer, or as soon as possible thereafter.[5] The settlement agreement provided that, immediately following the transfer of his

[4] The settlement agreement included a handwritten addition here, initialed by both the plaintiff and the defendant, stating that $25,000 of the $200,000 "shall be held in escrow by the mediator, to be distributed to [the defendant] upon completion of the transfer of phone number 203-329-3878 to [the plaintiff]." This addition is not at issue in this appeal.

[5] The provision, in relevant part, provides as follows: "In addition, [the defendant] shall deliver, to the extent he has possession . . . custody or control, all customer lists, contracts, vehicle titles, passwords, computer codes, computer discs and sticks and backups, accounts, telephone equipment, files, books of account, bank records, correspondence, invoices, purchase orders, receipts and any and all other records, accounts, documents, or tangibles, without limitation, which are proprietary to [the company]; and [the defendant] shall not retain originals or copies of said items, whether such said copies are in electronic or any other form. The [company] telephone numbers and services, 203-329-3878, presently located at 31 Laurel Ledge Rd., Stamford, CT 06903, as well as telephone number 203-324-9961, shall be immediately (within one (1) business day) transferred to 79 Hardesty Rd., Stamford, CT 06903, and [the defendant] shall not use these numbers or services for any purpose whatsoever; password to the time clock; passcode to reprogram security system at Diaz garage; IP Address and password to the West Ave. camera system; IP Address and password to camera system at Diaz Garage; any other needed passwords; the key schedule for Diaz building that [the defendant] took with him when he left; the two memory [backup] sticks that were used to back up [the company's] system nightly with the information still in them; company navigation in [the defendant's] possession; company digital camera in [the defendant's] possession; newly purchased company I-phone in [the defendant's] wife's possession; company mobile phone in [the defendant's] possession; letter from [the defendant] to credit card company, Sprint and any other company needed, as primary name on account, that he is no longer with the company . . . and that [the plaintiff] is the primary contact on the account; and any other documents needed to facilitate the transition."

membership interest, the defendant would have no ownership or any other interest in the company and no authority to act on the company's behalf, and that he would be deemed to have resigned from any and all positions within the company. The settlement agreement also included provisions as to mutual special releases and remedies. The parties released each other from any and all actions against each other relating to the company, except with respect to any breach of the settlement agreement or the term sheet.[6] The parties agreed that, should a party breach the settlement agreement or the term sheet, the nonbreaching party would not be prohibited from pursuing or being entitled to available redress, including the recovery of damages.[7]

On August 29, 2012, the day after the binding term sheet was signed, the defendant withdrew $17,000 from a checking account owned by the company. On September 7, 2012, the parties executed the settlement agreement, and the defendant signed an assignment of

[6] The provision includes the following, in relevant part: "Each Party . . . hereby forever releases, remises, acquits, waives and discharges each other Party . . . from any and all actions, causes of action, suits . . . trespasses, damages . . . claims and demands whatsoever, in law or equity, which against a Party or . . . another Party . . . ever had, now have or hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this Agreement arising solely from or related to [the company], except with respect to any breach of this Agreement or the Term Sheet. . . .

"It is understood by each Party that there is a risk that subsequent to the execution of this Agreement, a Party may discover facts different from or in addition to the facts which he now knows or believes to be true with respect to the subject matter of this Agreement . . . . Each Party intends this Agreement to apply to all unknown or unanticipated results, as well as those known and anticipated, except such facts as may have been [wilfully] and intentionally withheld . . . ."

[7] The relevant provision includes the following language: "Each of the Parties . . . agrees that, should a Party breach any of the provisions of this Agreement or the Term Sheet, the non-breaching Party will be irreparably harmed . . . . Nothing shall be construed as prohibiting any non-breaching Party from pursuing or being entitled to any other available redress for such breach or threatened breach including the recovery of damages. . . ."

membership interest, conveying all of his rights, title and interest in his 50 percent membership interest in the company to the plaintiff in exchange for the purchase price of $200,000.

The plaintiff commenced this action against the defendant by causing him to be served with a writ, summons and complaint on September 28, 2012. On December 10, 2012, in response to the defendant's request to revise, the plaintiff filed a revised complaint, which thereby became the operative complaint in this action. The operative complaint initially included the following claims: (1) breach of contract; (2) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; (3) conversion; (4) statutory theft in violation of § 52-564; and (5) breach of contract as to Diaz Boncap, LLC.[8] The plaintiff later withdrew his claim under CUTPA and his breach of contract claim as to Diaz Boncap, LLC.

In his first count, pleading breach of contract, the plaintiff alleged that all assets of the company, except for items of the defendant's personal property that were referenced in the term sheet, were to have remained the assets and property of the company when the defendant conveyed his 50 percent interest in the company to the plaintiff pursuant to the settlement agreement. He therefore claimed that the defendant had breached the provisions of the term sheet by withdrawing $17,000 from the company checking account on August 29, 2012. The defendant subsequently filed an answer in which he denied all material allegations of the operative complaint and asserted seven special defenses, including that the plaintiff had suffered no actual damages as a

[8] Diaz Boncap, LLC, was another company jointly owned by the plaintiff and the defendant. Provisions detailing the sale of the defendant's 50 percent interest in that company to the plaintiff were included in both the binding term sheet and the settlement agreement. The plaintiff later withdrew all claims regarding that company, and it is not at issue in this appeal.

result of the defendant's challenged $17,000 withdrawal. The plaintiff denied all of the defendant's special defenses.

The matter was ultimately referred for trial to a referee, who conducted the trial on June 24, 2015. The documentary evidence presented at trial included: the binding term sheet, the settlement agreement, a copy of the withdrawal slip for the $17,000, a list of personal items to be removed from the company by the defendant, a Sprint phone bill, a Sprint account history, and a spreadsheet of financial distributions from the company to the plaintiff and the defendant. The plaintiff and the defendant both testified at the trial.

The plaintiff testified that he and the defendant had entered into an agreement on August 28, 2012, under which the defendant agreed to convey his 50 percent interest in the company to the plaintiff. He further testified that the document dated August 28, 2012, was a binding term sheet that memorialized generally his agreement with the defendant, and that another document, dated September 7, 2012, was a more formalized agreement in which he and the defendant agreed on the details of the transfer of the defendant's 50 percent interest. The plaintiff and the defendant arrived at the purchase price of $200,000 by considering "[t]he amount in the [company's] checkbook . . . the amount of receivables owed to the company, the amount of payables paid out, and [the value] of the equipment" prior to the sale of the company. The plaintiff testified that the term sheet provided that the defendant would be permitted to remove all of his personal property from the company's offices after he furnished a list of such property, and that the defendant had in fact come to the offices on August 28, 29 and 30, 2012, to clear out his computer and personal items.

The defendant withdrew $17,000 from the company's account on August 29, 2012. The plaintiff never authorized the withdrawal, and the defendant never told the plaintiff that he intended to make the withdrawal. The plaintiff confirmed that the checking account from which the defendant made the withdrawal belonged to the company and was not the plaintiff's personal checking account. The plaintiff further testified that, pursuant to the term sheet, he believed that the defendant's ownership in the company had ended on August 28, 2012. He contended, on that basis, that the defendant's August 29, 2012 withdrawal constituted theft.

According to the plaintiff, he and the defendant had adopted a standard business practice for making withdrawals from the company checking account. In accordance with that practice, he and the defendant would compensate themselves from the income of the company, as deposited in the account, by taking weekly disbursements of $1000, "if the checkbook . . . allow[ed] it," but they would not take such disbursements on the weeks when the company did not have sufficient funds in the account with which to make them. They did not pay themselves retroactively for any missed weeks. The plaintiff and the defendant also made withdrawals from the company account to support other property they jointly owned; the plaintiff characterized such withdrawals as capital contributions. Payments from the company account always were made equally to the plaintiff and the defendant, with the exception of reimbursements for minor business purchases that they made. At the end of the year, based upon their accountant's determination, the plaintiff and the defendant would issue a check from the company account to the defendant in an amount representing the taxes he was required to pay on his income from the company that year, and a check to the plaintiff

in an identical amount.[9] The plaintiff testified that these tax reimbursement withdrawals were not made in years when their tax burdens were very low. The plaintiff testified that the company's business financial records contained no entry documenting the defendant's $17,000 withdrawal from the company checking account.[10]

The plaintiff claimed that the effective date of the transfer of the defendant's interest in the company to him was August 28, 2012, pursuant to the binding term sheet. He confirmed, however, that the actual closing date for the sale of the defendant's 50 percent interest in the company to him was September 7, 2012. Although before the binding term sheet was signed, the defendant had taken care of the bills and finances of the company, after it was signed, the plaintiff's secretary took care of all deposits and the plaintiff's son wrote all the checks. The plaintiff reiterated that the defendant did not engage in the company business activity after August 28, 2012.

In his testimony, the defendant admitted that, although he had signed the binding term sheet on August 28, 2012, he withdrew $17,000 from the company's checking account on August 29, 2012. The defendant confirmed that there was no mention of the $17,000, or of his right to receive that sum from the company, in either the binding term sheet or the settlement agreement. He testified that $9000 of the $17,000

[9] The plaintiff testified that "[the defendant] didn't have the readily available funds . . . or he didn't wanna to come out-of-pocket, so he wanted to know what part of his tax burden was attributed to [the company], so if [$]15,000 was attributed . . . to [the company], he would get a check for [$]15,000; because we were fifty-fifty partners, I would take a check for $15,000."

[10] We note that the record of distributions in 2012 from the company to both the defendant and the plaintiff, which was an exhibit at the trial, uphold the plaintiff's testimony as to the disbursements. This record makes no reference to either $8000 or $9000 paid to either the defendant or the plaintiff on August 29, 2012, and it shows that each payment that was made was in equal amounts to each party.

he withdrew from the company account represented nine weeks of $1000 disbursements that he had taken retroactively to make up for weeks when no disbursements could be made because there were insufficient funds in the account with which to make them. He testified that the other $8000 of the $17,000 withdrawal had been taken to cover his estimated tax burden on income he had received from the company from January 1 through August 30, 2012. He claimed that it was a standard business practice for him to withdraw money from the account in this way for tax reimbursement purposes. According to the defendant, the account contained approximately $60,000 when he made the $17,000 withdrawal from it, but he did not tell the plaintiff about the withdrawal because he and the plaintiff were not communicating at the time. He claimed that he was still working for the company until sometime between August 29 and September 7, 2012. He also claimed that he was conducting normal business operations for the company, including making out checks, until September 7, 2012, and thus, that his duties at the company did not cease, and he was not out of the company, until that date.

On November 5, 2015, the referee filed his first report and a motion for acceptance of the report and the entry of judgment in accordance therewith. In the report, the referee first found that, although the settlement agreement was executed approximately one week after the parties signed the term sheet, the provisions of the term sheet had become binding and enforceable as of August 28, 2012. The term sheet provided that the actual transfer of the defendant's interest in the company to the plaintiff was to occur no later than September 7, 2012. The referee further found that, at the time the term sheet was signed, on August 28, 2012, the price the parties had agreed to for the plaintiff's purchase of the defendant's 50 percent interest in the company had

been based in material part upon a valuation of the company's assets on the date the term sheet became enforceable, which included all the cash in the company account from which the defendant made the $17,000 withdrawal on August 29, 2012. The referee found, on that basis, that the defendant had breached his contract with the plaintiff by taking money from the company account that he had agreed would remain the property of the company at the time his 50 percent interest in the company was transferred to the plaintiff. Reasoning further that, upon the completion of the sale pursuant to the parties' contract, the plaintiff would become the sole owner of the company and, thus, of all of its assets, the referee awarded the plaintiff the full value of the defendant's $17,000 withdrawal to compensate him for diminution in the value of the consideration he received from the defendant for his payment of $200,000, plus prejudgment statutory interest on that amount pursuant to § 37-3a, from the date of the withdrawal until the date of judgment at the rate of 10 percent per annum. Although acknowledging implicitly that the actual transfer of the defendant's interest in the company did not take place until September 7, 2012, when the settlement agreement was signed and the plaintiff paid the defendant the sum of $200,000, the referee found that the defendant's ownership rights in the company ceased to exist on August 28, 2012. Therefore, further finding that the defendant's actions in withdrawing the $17,000 had been taken with the intent to deprive the plaintiff, as the sole member of the company upon completion of the parties' contract, of the money so withdrawn, he found that the plaintiff met his burden of proof as to his claims of conversion and statutory theft, and he awarded the plaintiff treble damages of $51,000 for statutory theft, pursuant to § 52-564.[11]

[11] The referee was not asked to make findings regarding the waiver-of-suit provisions to which the defendant refers on appeal, and, thus, he made no such findings.

The defendant filed an objection to the referee's report and a memorandum in opposition to the motion to accept that report on November 23, 2015, in which he argued, inter alia, that the referee had failed to file the report in compliance with Practice Book § 19-8 because the report was formatted as a memorandum of decision and did not set forth in separately and consecutively numbered paragraphs the ultimate facts found and the conclusions drawn therefrom; the conclusions of facts in the first report were not properly reached on the basis of the subordinate facts found; and the referee reached incorrect legal conclusions, including that the plaintiff had a sufficient personal property interest in the $17,000 withdrawn by the defendant to support his individual claims for damages. The defendant also filed a motion to dismiss the operative complaint for lack of subject matter jurisdiction, claiming that the $17,000 the defendant had withdrawn from the company account belonged to the company rather than to the plaintiff individually and, thus, that the plaintiff, who had brought suit in his individual capacity only, lacked standing to maintain any claim for damages based upon that withdrawal.

By order and memorandum of decision dated February 22, 2016, the court declined to accept the referee's report. The basis for its ruling was that the report did not comply with the requirements of Practice Book § 19-8 for referee reports. The court therefore ordered the referee to redraft his report within 120 days of its order. By a separate memorandum of decision issued on that same day, the court denied the defendant's motion to dismiss, ruling that, by claiming that the plaintiff was not the proper party to commence or prosecute this action, "the defendant [had sought] a remedy more appropriate for a motion to strike, the failure to join the proper party." The court found that the only two parties to the contracts at issue were the plaintiff and

the defendant, that each party had previously owned a 50 percent interest in the assets of the company, which included the checking account from which the defendant had withdrawn the $17,000, and thus, when the transaction by which the plaintiff purchased the defendant's interest in the company was completed, the plaintiff would own all the assets of the company, including the checking account in question. The court held for that reason that the plaintiff had pleaded a "colorable claim of direct injury" on the basis of the defendant's withdrawal, and so it denied the defendant's motion to dismiss. (Internal quotation marks omitted.)

On May 26, 2016, the referee filed his revised findings of fact and report. On June 14, 2016, the defendant filed an objection to the revised report and a memorandum in support of his objection, claiming, inter alia, that the revised report failed to comply with Practice Book § 19-8 by failing to set forth facts sufficient for the court to make a determination on the plaintiff's first, third and fourth causes of action, and reiterating his claim that the plaintiff had failed to prove that he had a sufficient property interest in the $17,000 the defendant had withdrawn from the company account to support his individual claims for money damages against the defendant. By order and memorandum of decision dated August 3, 2016, the trial court declined to accept the revised report because it did not state the standard of proof the referee had used in rendering his factual findings on the plaintiff's claim of statutory theft and did not cite the legal authority upon which the referee was relying in recommending an award of statutory interest, or recommend a rate at which such interest should be awarded.[12] The court therefore ordered the referee to submit a new report within 120 days after conducting

[12] The referee's first report and second revised report both included the amount of statutory interest awarded to the plaintiff as well as its legal basis.

whatever further proceedings he deemed necessary for that purpose.

On October 20, 2016, the referee held a conference in which the parties' counsel both participated, during which the referee offered the defendant an opportunity to schedule a further hearing on the issue of prejudgment statutory interest. After counsel conferred with one another on the issue, they reported that the defendant would not request a further hearing on the issue of interest and, thus, asked the referee to prepare his second revised report based solely upon the evidence presented at trial.

On December 2, 2016, the defendant filed a preemptive objection to the referee's second revised report, arguing that it would not be filed, as the court had ordered, within 120 days of August 3, 2016. The referee filed his second revised report[13] on December 6, 2016, along with a motion for acceptance of the report and the entry of judgment in accordance therewith. On December 23, 2016, the defendant filed a second objection to the second revised report, claiming not only that the report had been filed beyond the court ordered deadline, but that it was objectionable in substance for the reasons stated in his objections to the referee's prior reports.

On February 27, 2017, the court accepted the referee's second revised report and rendered judgment in favor of the plaintiff in accordance with that report. As for the defendant's objection based on timeliness, the court ruled that, although 120 days from August 3, 2016, was indeed December 1, 2016, the report had been timely filed because the 120 day period for filing it did not begin to run until October 20, 2016, the date of his final

[13] The referee's second revised report contained factual findings identical to his first report as to the counts of breach of contract and statutory theft and the underlying facts.

conference with counsel. As for the defendant's other objections, the court refused to revisit the issues decided in its earlier memorandum of decision denying the defendant's motion to dismiss, dated November 25, 2015. The court then adopted the referee's findings on the merits without independent analysis. The court therefore found that the facts found by the referee established the plaintiff's right to judgment in his favor on his claim of breach of contract, in the amount of $17,000 in compensatory damages, plus prejudgment statutory interest on that sum at the rate of 10 percent per annum, and on his claim of statutory theft, treble damages in the amount of $51,000, less $17,000 as duplicative of the damages awarded for breach of contract. Accordingly, it rendered judgment in the plaintiff's favor on those counts. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court erred in determining that the plaintiff had standing to maintain this action. We conclude that the plaintiff had standing to maintain his breach of contract claim. We agree with the defendant, however, that the plaintiff lacked standing to bring a statutory theft claim on the facts of this case.

"Standing is the legal right to set judicial machinery in motion." (Internal quotation marks omitted.) *Ma'Ayergi & Associates, LLC* v. *Pro Search, Inc.*, 115 Conn. App. 662, 667, 974 A.2d 724 (2009). "The issue of standing implicates a court's subject matter jurisdiction and is subject to plenary review. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully

demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Citation omitted; internal quotation marks omitted.) *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 137, 161 A.3d 1227 (2017). "Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests." (Internal quotation marks omitted.) *Ma'Ayergi & Associates, LLC* v. *Pro Search, Inc.*, supra, 667.

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 212–13, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013).

"[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . . One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [A]s a general rule, a plaintiff

lacks standing unless the harm alleged is direct rather than derivative or indirect. . . .

"The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . . Thus, to state these basic propositions another way, if the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. [When], for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Internal quotation marks omitted.) *Padawer* v. *Yur*, 142 Conn. App. 812, 816–17, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013); see also *O'Reilly* v. *Valletta*, supra, 139 Conn. App. 213–14.

A

"The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." (Internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 133, 172 A.3d 1228 (2017). For a plaintiff to have standing to bring an action seeking damages for breach of contract, he must allege and prove that he was a party to the contract and, thus, was entitled to enforce the contract for his own benefit, and that the other party's breach of the contract caused him to suffer damages in his individual capacity.

On appeal, the defendant argues that the plaintiff had no standing to bring this claim because it was the company, and not the plaintiff, that suffered any damages as a result of his $17,000 withdrawal. In his breach

of contract claim, however, the plaintiff did not seek damages from the defendant for losses he allegedly caused to the company by making an unauthorized withdrawal of money from it, but rather sought damages for the resulting failure of the defendant to give him full consideration for the $200,000 he had paid for the defendant's 50 percent interest in the company, with the understanding that the company's aggregate assets at the time of transfer would be those owned by the company on August 28, 2012. The parties' contract for the defendant to sell that membership interest to the plaintiff was a personal undertaking between them to which the company was not itself a party. The membership interest thereby purchased was personal property that the defendant had the right to sell to the plaintiff, and the plaintiff had the right to receive, own, enjoy, and dispose of as he wished. See General Statutes (Rev. to 2011) § 34-169.[14] Therefore, if and to the extent that the defendant, by taking unilateral action to diminish the value of that membership interest before transferring it to the plaintiff in exchange for his agreed upon payment for it, denied the plaintiff the benefit of his bargain under the contract, the plaintiff had standing, in his individual capacity, to sue the defendant for breach of contract to recover compensatory damages for that lost benefit.

The referee found that the $17,000 withdrawn by the defendant from the company checking account was among the assets the parties had agreed, under the binding term sheet, would remain the property of the company at the time the defendant's 50 percent interest in the company was transferred to the plaintiff. To make the plaintiff whole for this failure of consideration, the

[14] We note that chapter 613 of the General Statutes, §§ 34-100 through 34-242, was repealed, effective July 1, 2017. See Public Acts 2016, No. 16-97, § 110. We refer in this opinion to the statutory provisions in effect at the time of the alleged breach of contract and statutory theft.

court awarded the plaintiff the full amount of that withdrawal as compensatory damages for the company's lost value, plus prejudgment statutory interest on that sum, from the date of the withdrawal to the date of judgment.

Because, however, the plaintiff's contract with the defendant was to purchase only a 50 percent interest in the company, the loss of consideration suffered by the plaintiff due to the company's loss of $17,000 in aggregate value was only one half of that amount, or $8500. The plaintiff's damages for breach of contract must, therefore, be reduced to $8500. Accordingly, we thus reverse the court's judgment for the plaintiff on his breach of contract claim as to damages only, and remand this case with direction to render judgment for the plaintiff on that claim in the amount of $8500, plus prejudgment interest of 10 percent per annum on that sum from the date the undervalued interest was transferred until the date of judgment.[15]

B

"Section 52-564 provides: Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay *the owner* treble his damages. We consistently have held that [s]tatutory theft under § 52-564 is synonymous with larceny under

[15] We note that, pursuant to *Paulus* v. *LaSala*, 56 Conn. App. 139, 150, 742 A.2d 379 (1999), cert. denied, 252 Conn. 928, 746 A.2d 789 (2000), § 37-3a provides interest to the date final judgment is rendered.

We also note that there is a discrepancy in the trial court's judgment awarding prejudgment statutory interest. The court adopted the referee's finding that the transfer of the defendant's 50 percent interest in the company was not executed until September 7, 2012. However, it awarded prejudgment statutory interest starting from August 29, 2012, the date of the withdrawal, until the date of judgment. On remand, prejudgment interest must be calculated from September 7, 2012, the date on which the defendant breached the contract by failing to provide full consideration to the plaintiff, as agreed to, in the form of a 50 percent membership interest in the company with all of the assets it had on the date the term sheet was signed and agreed to.

General Statutes § 53a-119. . . . A person commits larceny within the meaning of . . . § 53a-119 when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from *an owner*. *An owner* is defined, for purposes of § 53a-119, as any person who has a right to possession superior to that of a taker, obtainer or withholder. General Statutes § 53a-118 (a) (5)." (Citations omitted; emphasis added; internal quotation marks omitted.) *Rana* v. *Terdjanian*, 136 Conn. App. 99, 113–14, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012).

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . A limited liability company has the power to sue or to be sued in its own name; see General Statutes [Rev. to 2011] §§ 34-124 (b) and 34-186; or may be a party to an action brought in its name by a member or manager. See General Statutes [Rev. to 2011] § 34-187."[16] (Citation omitted.) *O'Reilly* v. *Valletta*, supra, 139 Conn. App. 214; see also *Padawer* v. *Yur*, supra, 142 Conn. App. 817; *Wasko* v. *Farley*, 108 Conn. App. 156, 170, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008). "General Statutes [Rev. to 2011] § 34-167 (a) clearly establishes that [p]roperty transferred to or otherwise acquired by a limited liability company is property of the limited liability company and not of the members individually and that [a] member has no interest in specific limited liability company property."[17] (Internal quotation marks omitted.) *Mukon* v. *Gollnick*, 151 Conn. App. 126, 132, 92 A.3d 1052 (2014).

"A member or manager . . . may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company. . . . [A] member or manager of a limited liability company is not a

[16] See footnote 14 of this opinion.

[17] See footnote 14 of this opinion.

proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement . . . ." (Internal quotation marks omitted.) *Padawer* v. *Yur*, supra, 142 Conn. App. 817–18; see also *O'Reilly* v. *Valletta*, supra, 139 Conn. App. 214–15; *Wasko* v. *Farley*, supra, 108 Conn. App. 170.

This court has repeatedly held that damages suffered by a limited liability company cannot be recovered by a member of the limited liability company bringing the case in an individual capacity. In *Wasko* v. *Farley*, supra, 108 Conn. App. 170–71, because the plaintiff brought the action in her individual capacity and the limited liability company was not a party, damages incurred by the limited liability company were not at issue in the case, and we held that the court properly declined to instruct the jury on damages resulting from additional costs incurred by the limited liability company. In *Ma'Ayergi & Associates, LLC* v. *Pro Search, Inc.*, supra, 115 Conn. App. 666, we disagreed with the plaintiff's argument that he had standing as an individual to assert all causes of action on behalf of his companies because he was the sole member of those companies. "[A] corporation is a separate legal entity, separate and apart from its stockholders. . . . It is an elementary principle of corporate law that . . . corporate property is vested in the corporation and not in the owner of the corporate stock. . . . That principle also is applicable to limited liability companies and their members." (Internal quotation marks omitted.) Id. In *Padawer* v. *Yur*, supra, 142 Conn. App. 818, we held that "[a]lthough the plaintiff [was] the sole member of [the limited liability company], that [did] not impute ownership of the limited

liability company's assets to the plaintiff," and that the plaintiff's position as the sole member "[did] not provide him with standing to recover individually for harm to the limited liability company." In *O'Reilly* v. *Valletta*, supra, 139 Conn. App. 216, we held that the plaintiff "lacked the requisite direct personal interest in the lease, the leased premises or the restaurant business conducted by his [limited liability] company on those premises to confer standing on him to complain of any breach of the lease or of any harm to the business resulting therefrom" and, therefore, that "[t]he claim should have been dismissed for lack of subject matter jurisdiction . . . ."

In the present case, the statutory theft count is based entirely on the defendant's withdrawal of $17,000 from the company's checking account. The facts demonstrate that it is the company, and not the plaintiff, that would have standing to assert a statutory theft claim on the basis of the defendant's conduct. The plaintiff has not demonstrated a specific, personal and legal interest in the money separate from that of the company. The company owned the checking account from which the money was taken. The trial court's finding that the term sheet and the settlement agreement passed title to the company business assets from the defendant to the plaintiff is incorrect; only the defendant's membership interest in the company was thereby transferred. Under these allegations, the only injuries resulting from the defendant's conduct, as stated in the plaintiff's statutory theft count, were suffered by the company, not by the plaintiff personally. The company is a limited liability company and is, therefore, a distinct legal entity from the plaintiff, who is simply a member of that entity. Even after the plaintiff became the sole member of the company, the company remained a distinct legal entity. Because a member of a limited liability company cannot recover for an injury allegedly suffered

by the limited liability company, we conclude that the plaintiff lacked standing to pursue a claim of statutory theft in this case. Accordingly, we conclude that the trial court lacked subject matter jurisdiction over the plaintiff's statutory theft claim. The court improperly rendered judgment for the plaintiff on the merits of his statutory theft claim. The claim should have been dismissed for lack of subject matter jurisdiction rather than decided on its substantive merits.

The judgment for the plaintiff on his statutory theft claim is reversed because the plaintiff lacked standing to bring it in his individual capacity. This case is remanded with direction to dismiss that claim for lack of subject matter jurisdiction.

II

The defendant next claims that the trial court erred in rendering judgment in favor of the plaintiff on his breach of contract claim without making conclusions of law as to the applicability of the waiver-of-suit provisions in the contractual documents. The defendant contends that, pursuant to the settlement agreement, the parties agreed to "forever release, remise, acquit, waive and discharge . . . [the] other party . . . from any and all actions, causes of action, suits, debt, dues, sums of money . . . trespasses, damages . . . claims and demands whatsoever, in law or in equity, which against a party . . . [or another party] ever had, now have or hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of [the settlement] agreement . . . [except with respect to any breach of this agreement or the term sheet]." (Internal quotation marks omitted.); see footnote 6 of this opinion. He argues that the execution of the settlement agreement resulted in a waiver of any claims that relate to his conduct on or before September 7, 2012, and, thus, that

the plaintiff would only have a cause of action against him if the plaintiff sought to enforce any claim made in a previous litigation or sought to enforce the provisions of the term sheet and the settlement agreement. The plaintiff argues that the defendant has failed to preserve this issue for appellate review by not filing a transcript of the hearing before the referee in accordance with Practice Book § 19-14. The defendant did file the transcript of the hearing before the referee on November 23, 2015. We conclude, however, that the defendant failed to preserve this issue for our review by not raising it before the trial court.

After a thorough review of the record, we find that the defendant did not raise this defense at any time before the trial court. In his appellate brief, in fact, the defendant concedes that he did not raise this defense at the time of trial. He argues, however, that the trial court had a duty, sua sponte, to reject the allegedly incomplete factual finding of the referee regarding the alleged waiver-of-suit provisions of the contract documents. The defendant provides no legal basis for this assertion.

Pursuant to Practice Book § 60-5, we are not bound to consider a claim that was not distinctly raised at trial. Thus, we decline to address this claim.

The judgment is reversed in part and the case is remanded with direction to render judgment for the plaintiff on his claim of breach of contract in the modified amount of $8500, plus prejudgment statutory interest on that sum from the time the settlement agreement was executed until the time of judgment, at the rate of 10 percent per annum, and to render judgment dismissing the plaintiff's statutory theft claim for lack of subject matter jurisdiction; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

THOMAS BROCHARD *v.* BRITT BROCHARD
(AC 38957)

Keller, Prescott and Bright, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from certain postjudgment orders of the trial court. The defendant previously had appealed to this court from the judgment of the trial court denying her postjudgment motion for contempt, in which she claimed that the plaintiff had failed to provide her with a certain authorization form that would allow her to speak directly with the bank that held the mortgage on the parties' former marital home in an effort to avoid foreclosure. This court reversed the judgment of the trial court and remanded the matter for an evidentiary hearing on the authorization issue. During the pendency of the defendant's first appeal, the trial court permitted her to pursue the same contempt motion that was the subject of her appeal. The trial court adjudicated that motion and various other postjudgment motions that the parties previously had filed pertaining to financial issues, but which were not part of the defendant's first appeal. The trial court denied the defendant's postjudgment motions for contempt, in which she claimed that the plaintiff had failed to pay his share of medical and extracurricular activity expenses for the parties' minor children, had violated certain court orders as to the mortgage on the former marital home and had failed to pay her one half of certain tax refunds that he had received. The trial court also denied the defendant's motion to modify the court's allocation of the parties' payment of certain legal fees for the guardian ad litem who had been appointed for the minor children. The present appeal challenged those postjudgment rulings. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion for contempt, in which she claimed that the plaintiff had failed to pay his share of the minor children's unreimbursed medical and extracurricular activity expenses; that court correctly determined that the parties' parenting agreement, which had been incorporated into the judgment of dissolution, required the defendant to consult with the plaintiff before she made decisions regarding extracurricular activities and nonemergency medical treatment, there was no evidence that the defendant indicated to the plaintiff that she had made final decisions on medical treatment prior to his acceptance of the services, which would have alerted him to trigger a requirement in the parenting agreement to address medical bill disputes, and the trial court properly denied without prejudice the defendant's contempt motion as it related to extracurricular activities, as the testimony was unclear as to whether the defendant had complied with the parenting agreement regarding

notice and prior agreement for the extracurricular activity expenses and as to which of those expenses remained unpaid, and it was not improper for the court to permit the parties to return to court on the issue at a later date.

2. The defendant could not prevail on her claim that the trial court improperly denied her motion for contempt in which she alleged that the plaintiff had violated certain orders related to the mortgage on the parties' former marital home:

   a. The defendant's claim that the plaintiff's failure to execute an authorization to allow her to speak to and represent him with the mortgage loan holder was barred by the doctrine of res judicata, this court having considered that claim on its merits and issued a final decision on the matter in the defendant's prior appeal to this court.

   b. The defendant's claim that the trial court erred in failing to find the plaintiff in contempt of the trial court's orders for his failure to reimburse the defendant for four months of mortgage payments was unavailing; that court properly determined that the dissolution court had not ordered the plaintiff to pay four months of past due mortgage payments and interest, and, thus, the plaintiff could not be held in contempt of an order that did not exist.

3. The trial court properly declined to hold the plaintiff in contempt for his failure to pay the defendant one half of the tax refunds that he had received from his individual federal and state tax returns for 2010; that court's decision conformed to the clear and unambiguous language of the order in the judgment of dissolution that required the parties to share a refund that would result only from a jointly filed return for tax year 2010.

4. The trial court did not abuse its discretion in denying the defendant's motion to modify the court's order that allocated the parties' obligation to pay the guardian ad litem's fees; the defendant failed to prove that there was a substantial change in circumstances since the court's allocation order that necessitated a reduction in her 20 percent share of the fees, as there was no evidence concerning the amount that might still be owed other than the amounts that the parties claimed were due on their financial affidavits, the defendant provided no evidence of her inability to earn income, and her assets were significantly higher in value than the plaintiff's assets and more than sufficient to pay the debt that she averred she owed to the guardian ad litem.

5. The trial court did not abuse its discretion in granting the plaintiff's motion for a modification of child support and in reducing the plaintiff's child support obligation to $220 per week: that court properly found that $220 per week was the presumptive amount under the child support guidelines and that there had been a substantial change of circumstances as a result of the parties' eldest son having reached the age of majority and graduated from high school, the court's failure to hear the defendant's cross motion for modification of child support as part of its hearing on

combined financial issues was not improper, as the defendant never mentioned her pending motion, the plaintiff indicated that he was not prepared to defend against it, and the defendant acquiesced when the court indicated that it had heard everything it was going to hear and that additional arguments could be made in the parties' posttrial briefs; moreover, if the defendant were to reclaim her stale motion for modification, it would likely be moot, as the parties agreed on retroactivity only as to the plaintiff's motion for modification, the defendant would be unable to seek a prospective modification because both minor children had attained the age of eighteen, and the court's entry, upon reconsideration, of a child support order in the amount of $296 per week was not an abuse of discretion, as it was part of the changes that the defendant had requested in her motion to reargue.

6. The defendant's claim that the trial court improperly failed to order the plaintiff to pay her the full amount of past due alimony for 2012 was unavailing; that court corrected an oversight in its initial decision after both parties stipulated that the plaintiff owed the defendant $796.85 for 2012 past due alimony, and that ruling reflected that the defendant was awarded the full amount that she claimed was owed to her.

Argued April 12—officially released October 2, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the Regional Family Trial Docket at Middletown, where the matter was tried to the court, *Gordon*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court issued certain orders; subsequently, the defendant filed a motion for contempt; thereafter, the court, *Gould*, *J.*, declined to rule on a certain issue related to the defendant's motion for contempt; subsequently, the court, *Gould*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court; thereafter, the court, *Gould*, *J.*, denied the defendant's motions for contempt and for modification of the allocation of the parties' payments of certain guardian ad litem fees, and granted the plaintiff's motion for modification of child support and the defendant's motion for contempt as to certain alimony payments; subsequently, the defendant filed an amended appeal;

thereafter, the court, *Gould*, *J.*, granted the defendant's motion to reargue and issued certain orders; subsequently, the defendant filed a second appeal with this court; thereafter, the court, *Gould*, *J.*, modified its order of child support; subsequently, this court reversed the judgment with respect to the first appeal and remanded the case for further proceedings. *Affirmed.*

Britt Brochard, self-represented, the appellant (defendant).

Thomas Brochard, self-represented, the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Britt Brochard, appeals from the postdissolution judgment of the trial court rendered after a hearing on financial issues raised by the parties in multiple motions for contempt and modification.[1] The self-represented defendant's brief is not a

[1] On February 6, 2014, at the time the court, *Munro*, *J.*, referred this matter to the regional family trial docket in the judicial district of Middlesex at Middletown for a hearing on the plaintiff's motion to modify custody and child support, she inquired if any financial motions were also to be referred. The defendant mentioned four motions: a motion for contempt as to the children's expenses, a motion for contempt as to medical expenses, a motion for contempt as to alimony, and a motion for contempt as to the alleged failure by the plaintiff, Thomas Brochard, to sign an authorization for the defendant to be able to modify the mortgage on the parties' marital home. Prior to proceeding on pending financial issues, the court, *Gould*, *J.*, had conducted a hearing on the custody portion of the defendant's motion for modification of custody and child support in Middletown. At the commencement of the hearing on financial issues on April 21, 2015, which took place before Judge Gould in the judicial district of New Haven and gave rise to this appeal, the defendant provided the court with a list of pending motions that she intended to pursue. The court responded, "I have from you a list of twenty-seven motions, all right. We're not going to hear twenty-seven motions." The plaintiff was pursuing four motions. The court encouraged the defendant to reduce the number of motions she was pursuing and then proceeded in an orderly fashion to address each claimed motion chronologically. Eventually, the court considered and decided ten motions. The defendant continued to file numerous motions after the hearing concluded on July 10, 2015, and demanded that the court also rule on them, filing a document titled, "Defendant's List of Motions to Be Decided," which included a list of "motions filed after hearing."

model of clarity,[2] but after a thorough review of the record and the parties' briefs, we have divined that the defendant claims that the court erred in (1) denying her motion for contempt alleging that the plaintiff, Thomas Brochard, had failed to pay his share of the minor children's medical and extracurricular activity expenses; (2) denying her motion for contempt alleging that the plaintiff had violated orders related to the mortgage on the former marital home; (3) denying her motion for contempt alleging that the plaintiff had failed to pay her one half of the amounts of 2010 tax refunds he received; (4) denying her motion for modification of the court's order allocating the parties' obligation pertaining to payment of the guardian ad litem's fees; (5) granting the plaintiff's motion for modification of child support, thereby decreasing his obligation, and failing to consider her cross motion for modification, which sought an increase in the amount of child support; and (6) granting her motion for contempt regarding certain alimony payments, but failing to order the plaintiff to pay her the full amount she was owed. We affirm the judgment of the trial court.

The following facts, as determined by multiple judges who have presided over pertinent proceedings in this case, and procedural history are relevant to this appeal. On July 6, 2011, the court, *Gordon*, *J.*, dissolved the parties' marriage. In its memorandum of decision, the court found that the parties were married on August 27, 1995, in Ridgefield. They have two children, born in 1997 and 1999.[3] The plaintiff initiated the divorce action in 2008, following the parties' separation. The court found that the marriage had irretrievably broken down and issued the following orders relevant to this appeal. It ordered the plaintiff to pay to the defendant

[2] The plaintiff also is representing himself on appeal.

[3] Both children have since reached the age of majority.

child support in the amount of $342 per week, in accordance with the child support guidelines, on the basis of his yearly income of $85,441.72. It also ordered that he maintain medical and dental insurance for the benefit of the minor children if such insurance coverage was available through his employment. Additionally, the court ordered each of the parties to pay 50 percent of all unreimbursed, uninsured health related expenses for the minor children. The defendant was to submit the bill or statement for such expenses to the plaintiff within one week of receipt, and he was to pay it within one week. Each of the parties was responsible for one half of all reasonably incurred extracurricular expenses for the children. The court further ordered that the plaintiff pay to the defendant alimony of $350 per week until the earliest to occur of the following events: the death of either party, the remarriage of the defendant, June 30, 2021, or as otherwise provided for by law. The court stated that its order was subject to immediate wage withholding. As additional alimony, and subject to the same termination contingencies as the weekly order of alimony, the plaintiff was to pay, quarterly, 30 percent of all gross income earned from wages, self-employment, commissions, incentives, bonuses or other payment plan in excess of $90,000 per year ($22,500 per quarter), but less than $150,000 per year, and 20 percent of any such amounts between $150,000 and $200,000 per year. Every quarter, the plaintiff was to forward to the defendant proof of his earnings for the previous quarter together with any payment due. The court ordered the parties to file a joint tax return for 2010. The plaintiff was responsible for any taxes due and owing for that year, and any refund would be divided equally. The court awarded all right, title and interest in the marital home to the defendant, who would be responsible for all costs associated with the home.

The court also approved and incorporated into the judgment the terms of a parenting agreement between the parties dated March 25, 2011, which established joint legal custody of the children with primary residence with the defendant.

Protracted postdissolution proceedings commenced almost immediately after the court rendered the judgment of dissolution. In setting forth some of the postdissolution procedural history, we rely, in part, on our earlier opinion in *Brochard* v. *Brochard*, 165 Conn. App. 626, 140 A.3d 254 (2016) (*Brochard I*).

"On July 20, 2011, the defendant filed a postjudgment motion for order, alleging that the plaintiff had not made payments on the mortgage on the family home since March, 2011. The mortgage was solely in his name. The defendant requested that 'the plaintiff be required to bring the mortgage current, including all attorneys' fees and other charges.' In the alternative, the defendant move[d] that the plaintiff be required to immediately provide the bank with authorization to speak directly to the defendant, timely file all necessary paperwork in the foreclosure action to allow the parties to participate in the foreclosure mediation . . . attend the foreclosure mediation sessions along with the defendant, and . . . agree to any resolution the defendant comes to with the bank." Id., 629. The plaintiff objected to this motion.

Judge Gordon heard the motion for order, granting it in part and denying it in part, on August 12, 2011. The nature of these orders is discussed more thoroughly in part II A of this opinion.

On February 5, 2013, the plaintiff filed a motion to modify custody and child support, to which the defendant objected. The plaintiff claimed a substantial change in circumstances making it in the children's best interests for him to have primary physical custody and

also sought a modification of his child support obligation. On April 26, 2013, the defendant filed a motion for modification seeking an increase in the child support order. On May 2, 2013, the parties agreed in writing that the plaintiff's motion would not go forward, but further agreed that he could seek retroactivity of any subsequent order(s) regarding child support. That written agreement was approved and made an order of the court. It indicates: "The [plaintiff's] motion to modify child support shall go off with orders retroactive to today. However, the [plaintiff] retains the right to seek retroactivity to the [date of] filing of the motion."[4]

Also on May 2, 2013, as part of the same written agreement the parties agreed that a guardian ad litem would be appointed for the parties' then two minor children. They agreed that the percentage of payment for the guardian ad litem's legal fees would be argued upon completion of some outstanding discovery. Attorney Susan E. Nugent was appointed as guardian ad litem. On May 24, 2013, the defendant moved that the plaintiff be ordered to pay the entirety of Nugent's fees. On February 6, 2014, the court, *Munro*, *J.*, ordered that the plaintiff pay 80 percent and the defendant pay 20 percent of Nugent's fees. Judge Munro found that Nugent's fees totaled $5400, and that the plaintiff already had paid $2500 toward that amount as a retainer. The defendant had paid nothing despite Nugent's request of a similar retainer from her. The court ordered that the plaintiff would be responsible for $4320 and that the defendant would be responsible for $1080. Both parties were ordered to make payments to Nugent within fourteen days.

On June 16, 2014, the defendant moved for an order reallocating the percentage payment obligations

[4] We do not find persuasive the defendant's claim that this agreement also provided her with the right to seek a retroactive modification pursuant to her motion for a modification of the child support order.

ordered by Judge Munro, alleging that she did not have sufficient income or assets to continue to pay her 20 percent share. The plaintiff objected to the defendant's motion for order and requested that either the defendant pay all of Nugent's fees, or, in the alternative, that the parties continue to pay pursuant to Judge Munro's allocated order.

On April 26, 2013, the defendant filed a motion for contempt with respect to the payment of medical and activity expenses, claiming that the plaintiff had failed to pay his 50 percent share of some of the children's extracurricular expenses and unreimbursed medical and dental expenses, which he was required to pay pursuant to the parenting agreement.

On April 16, 2014, the defendant filed a motion to compel, which supplemented an earlier motion to compel she had filed on March 24, 2014 claiming, inter alia, that the plaintiff should be ordered to pay her one half of the federal and state tax refunds he had received for the year 2010 and to reimburse her for an estimated tax payment she made that year, which she claimed was ordered by Judge Gordon in the dissolution judgment.

"On November 13, 2013, the defendant filed a motion for contempt, claiming that the plaintiff had violated Judge Gordon's August 12, 2011 order [with respect to the mortgage on the marital home] by, inter alia, failing to execute an authorization allowing the defendant to speak with and represent the plaintiff with the mortgage loan holder, Wells Fargo, as the mortgage has been in the name of the plaintiff solely; said authorization to make [the] defendant the plaintiff's authorized agent for conversing, negotiating, entering into an agreement, all that kind of stuff with Wells Fargo to modify the mortgage loan to avoid foreclosure. Said authorization was to be specific that she has the authority." (Internal

quotation marks omitted.) *Brochard I*, supra, 165 Conn. App. 631.

In this contempt motion, the defendant further claimed that she had successfully renegotiated the mortgage loan, cancelled all the late fees and reduced the monthly payments, but that the plaintiff deliberately had interfered and caused the renegotiated plan to be cancelled, thereby forcing imminent foreclosure of the home. She further alleged that the plaintiff had violated other orders of Judge Gordon that he would be responsible for any attorney's fees, interest and/or penalties relating to any foreclosure action on the marital home, that he provide the defendant with any documentation he received from the lender bank, and that he bring the outstanding mortgage on the family home current for the months of March through July, 2011.

"The defendant's motion for contempt [regarding the mortgage] was heard by the court, *Munro*, *J.*, on November 14, 2013. Judge Munro examined an authorization agreement drafted by the defendant's attorney and asked if the plaintiff consented to it. The plaintiff's attorney replied that he did not, due to language that stated that the defendant would 'have full and complete authority to negotiate, agree and execute proposed settlements with said mortgage[e].' The plaintiff was concerned that this language would permit the defendant to extend the term of the mortgage, thereby further tying up his ability to obtain a new mortgage for a house of his own. The court subsequently told the defendant that 'if he signs something that allows you to negotiate, it should not be something that puts him on the hook for any more liability than he has now. Do you understand that?' The defendant replied that she believed that the intent of Judge Gordon's order was to allow modification of the loan, and that Judge Munro should consult the full transcript containing Judge Gordon's order. Thereupon, Judge Munro stated: 'I'm going to

stop. I hear you. This is a complicated problem. It's not going to be dealt with on short calendar with an audience full of people waiting. I'm going to give you a three day hearing, and this will be rolled into the three day hearing.' Following the short calendar hearing, on November 26, 2013, the plaintiff filed an objection to the defendant's motion for contempt, attaching an authorization form and asserting that 'Judge Munro has already told the defendant that Judge Gordon did not intend that the defendant could expand the plaintiff's exposure under the new mortgage.'

"The case subsequently was transferred to the regional family trial docket. At a hearing on February 6, 2014, regarding the transfer, Judge Munro asked, '[a]ll right, and the motions I sent to regional are motions regarding modification of custody. Any financial motions at all?' The defendant replied: 'A number of financial motions, there's a motion outstanding for contempt on not paying half the children's expenses; contempt on medical expenses; contempt on alimony; [and] contempt on not signing the authorization for me to be able to modify the home.' Judge Munro stated, 'I remember that.' The parties then began discussing the plaintiff's financial disclosure and did not mention the contempt motions further.

"The court, *Gould*, *J.*, held a hearing on various matters on June 10, 2014. After concluding the custody and visitation portion of the hearing, Judge Gould indicated that he intended to turn to financial issues. The defendant stated that she wished to proceed to the authorization issue. The plaintiff objected stating that he needed a few days to prepare. Judge Gould queried whether the authorization issue was before him or in the foreclosure court. The defendant replied that it was before him, after which Judge Gould stated that they would proceed with outstanding motions on financial issues at a later date.

"The defendant filed a motion for an emergency hearing on August 1, 2014, in which she asserted that the court never returned to the authorization issue. This motion was heard by Judge Gould on September 11, 2014. Judge Gould stated that it was his understanding that there was a ruling that the authorization did not have to be provided. The defendant protested that Judge Munro's ruling indicated otherwise. Judge Gould then stated, 'I'm not indicating [Judge Munro] ruled on [the authorization]. I'm indicating it was ruled on previously; it did not have to be provided.'

"The defendant filed a motion to reargue on October 3, 2014, asserting that Judge Gould's ruling of September 11, 2014, was based on a misapprehension of fact. She contended that Judge Gould incorrectly believed that the motion for contempt regarding the authorization had previously been ruled on. . . .

"Judge Gould considered the defendant's motion to reargue on November 6, 2014. He stated that '[t]his court said there was a prior ruling the authorization for modification of the mortgage would not have to be provided, and I have a specific recollection for issuing that order.' The plaintiff asserted that the issue had been decided by three judges . . . . The defendant asserted that the transcripts demonstrated that the issue had not been ruled on. The plaintiff quoted the statement by Judge Munro that the plaintiff should not be on the hook for more liability. Judge Gould then denied the defendant's motion to reargue with prejudice, noting that she could take an appeal if she chose.' " (Footnotes omitted.) Id., 631–35. The defendant filed an appeal on November 24, 2014.

Despite the pendency of the appeal in *Brochard I*, the defendant, rather than await a ruling by this court, persisted in seeking to have the trial court decide whether the plaintiff was in contempt for violating of

Judge Gordon's August 12, 2011 order regarding authorization of a mortgage modification.

The court, *Gould*, *J.*, held a consolidated hearing and addressed all of the foregoing motions. The hearing took place on April 21, April 22, and July 10, 2015. On April 22, 2015, the defendant advised the court that she wanted to pursue the exact same contempt motion that the court had addressed on November 6, 2014, even though it was still the subject of an appeal. Although the plaintiff objected on the ground that this particular issue was still on appeal, the court permitted the defendant to present her claim that although she since had been able to assume the mortgage, the plaintiff was in contempt for not cooperating with her efforts to modify or assume the mortgage, and pursuant to Judge Gordon's August 12, 2011 orders, he was liable to her for costs, including interest, penalties, and fees she had incurred to prevent a foreclosure and eventually reinstate and assume the loan.

On May 28, 2015, the defendant filed an addendum to her motion to modify child support. The court gave the parties three weeks to file additional information regarding the defendant's claim on the tax refund. The parties also were permitted to file posttrial briefs and attach additional "exhibits" to them. At the July 10, 2015 hearing, the court denied the defendant's request to submit additional evidence, but it indicated that it was giving both parties the opportunity to reinforce their positions and arguments in their briefs.

On September 28, 2015, Judge Gould issued a memorandum of decision that included a decision on the defendant's motion for contempt regarding the mortgage. Rather than marking the motion "off," as having previously been decided, he ruled on it. His decision does not reference the statement of Judge Gordon related to the authorization, but it did note that the

plaintiff alleged that " 'the court, *Munro*, *J.*, has previously ordered that the plaintiff did not have the duty to agree to a mortgage modification that would substantially increase the length of indebtedness to the bank.' [The court's decision also stated] that '[in] his objection, the plaintiff further alleges and provides evidence of a September 1, 2011 letter from his attorney to the defendant [that] enclosed the requested authorization referred to above, and further alleging that the defendant had been directly and actively dealing with the lender since September, 2011.' The decision concludes that 'the recitation of the court's orders and findings made by the plaintiff to be accurate.' The undersigned also finds that the plaintiff provided the subject authorization to the defendant." *Brochard I*, supra, 165 Conn. App. 636.

In addition to denying the defendant's motion for contempt concerning the mortgage on the marital home, in its September 28, 2015 decision, relevant to this appeal, the court granted the plaintiff's motion for modification of child support, granted the defendant's motion for contempt with respect to the payment of certain alimony payments, denied the defendant's motion to compel and to hold the plaintiff in contempt for failing to pay her half of the tax refunds he received for the year 2010, denied her motion to modify the allocation of the payment obligations for the guardian ad litem's fees, and denied her motion for contempt regarding the children's activities and unreimbursed medical expenses.[5]

On October 19, 2015, the defendant amended her prior pending appeal in *Brochard I*, claiming error only in the court's consideration of the mortgage authorization issue. Prior to the filing of this appeal, this court

[5] The defendant does not appeal from the court's ruling on the plaintiff's motion for modification of custody or its denial of her motion for contempt regarding religious education expenses.

heard oral argument on *Brochard I*. This court issued its decision on May 24, 2016, and reversed the judgment with respect to Judge Gould's conclusion that, due to prior court rulings, the plaintiff could not be held in contempt for failing to provide an adequate authorization. Id., 642. This court ruled that neither Judge Munro nor Judge Gould had ever afforded the defendant an opportunity to be heard on whether the plaintiff's proffered authorization met the requirements ordered by Judge Gordon and that the issue had never been decided. Id., 640. The case was remanded for an evidentiary hearing only on that issue, consistent with our opinion. Id., 642.

Upon returning to the trial court, on November 2, 2016, the defendant, through counsel, filed a motion to reargue/reconsider twelve aspects of the court's decision. After a hearing on the motion to reargue/reconsider on February 11, 2016, the court ruled from the bench on several issues and later, on March 16, 2016, issued a memorandum of decision in which it altered its modified order of weekly child support payable by the plaintiff from $220 to $296, effective June 19, 2015, after hearing argument from the defendant that the court had made an error in the calculation of the plaintiff's net income. The court also corrected the amount it found that the plaintiff owed to the defendant for past due 2012 alimony, but denied all of the defendant's other requests to reconsider its decision.

This appeal was filed on March 2, 2016. After filing this appeal, the defendant amended her then pending appeal in *Brochard I* to claim that the court erred in denying her motion for contempt relative to the mortgage authorization on September 28, 2015, because it failed to provide her with a full evidentiary hearing; the defendant has raised the identical claim in this appeal. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the court erred in denying her motion for contempt alleging that the plaintiff had failed to pay his share of the minor children's medical and extracurricular activity expenses. Specifically, the defendant claims that the plaintiff owes her $242.50 for his share of nonemergency unreimbursed medical expenses and $2129.13 for his share of activity expenses that he is required to pay pursuant to the parties' parenting agreement of March 25, 2011.

The defendant asserts that the court erred in not finding the plaintiff in contempt because it misinterpreted the parties' parenting agreement, which, thus, requires us to examine that document to ascertain the meaning of the terms contained therein. At the outset, we note that the applicable standard of review requires a two part inquiry. "First, we must determine whether the agreement entered into between the parties in conjunction with the dissolution of their marriage was clear and unambiguous. . . . Second, if we find that the court accurately assessed the intent of the parties regarding the [payment of medical and activity expenses for the minor children], we must then decide whether the court correctly determined that the [plaintiff] had [not] wilfully violated its terms." (Internal quotation marks omitted.) *Dowd* v. *Dowd*, 96 Conn. App. 75, 79, 899 A.2d 76, cert. denied, 280 Conn. 907, 907 A.2d 89 (2006).

Regarding the first inquiry, any agreement, including an agreement that is incorporated into a dissolution judgment is regarded as a contract. Accordingly, our resolution of the defendant's claim is guided by the general principles governing the construction of contracts. "A contract must be construed to effectuate the

intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Lisko* v. *Lisko*, 158 Conn. App. 734, 738–39, 121 A.3d 722 (2015). "Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 498, 746 A.2d 1277 (2000). "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007).

The "determination as to whether language of a contract is plain and unambiguous is a question of law subject to plenary review." (Internal quotation marks omitted.) *Perez* v. *Carlevaro*, 158 Conn. App. 716, 722, 120 A.3d 1265 (2015). "A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008).

As to the second inquiry, "[a] finding of indirect civil contempt must be established by sufficient proof that is premised upon competent evidence presented to the trial court . . . . A finding of contempt is a factual finding. . . . We will reverse that finding only if we conclude the trial court abused its discretion." (Internal quotation marks omitted.) *Legnos* v. *Legnos*, 70 Conn. App. 349, 352–53, 797 A.2d 1184, cert. denied, 261 Conn. 911, 806 A.2d 48 (2002). To the extent that the defendant challenges the factual findings the court relied on in making its determination that the plaintiff was not in contempt, "we apply our clearly erroneous standard, which is the well settled standard for reviewing a trial court's factual findings." Id., 353 n.2. The defendant, as the party seeking a finding of indirect civil contempt, has the burden of establishing by clear and convincing evidence that the plaintiff violated an order of the court. See *Brody* v. *Brody*, 315 Conn. 300, 318–19, 105 A.3d 887 (2015).

We first examine the language of the parenting agreement. The provisions of the parties' parenting agreement concerning the children's unreimbursed medical expenses and activities include paragraph 1, which states, in pertinent part: "It shall be the intent of the joint [legal] custody arrangement to allow each parent to have a full and active role in providing a sound social, economic, educational, religious and moral environment for the minor children.[6] To this end, the [defendant] shall consult with the [plaintiff] on all nonemergency matters affecting the health, safety, welfare

[6] In *Emerick* v. *Emerick*, 5 Conn. App. 649, 656–57, 502 A.2d 933 (1985), cert. dismissed, 200 Conn. 804, 510 A.2d 192 (1986), this court discussed the difference between a sole custodian and a joint legal custodian. A sole custodian has the ultimate authority to make all decisions regarding a child's welfare, such as education, religious instruction and medical care, whereas a joint legal custodian shares the responsibility for all of those decisions. Id., 657 n.9.

and education of the minor children, before such decisions involving the minor children are taken. These matters shall include, but not be limited to, such substantial issues as educational programs, camp, extracurricular activities and medical treatment, etc. If the [plaintiff] disagrees on the resolution of the issue, the parties shall seek the assistance of a co-parenting therapist (chosen by the guardian ad litem) in an effort to resolve the disputed issue. . . . The parties shall adhere to the following procedures when dealing with a disputed issue:

"a. After discussion, the [defendant] shall indicate to the [plaintiff] her final decision. The [plaintiff] shall within twenty-four hours, inform the [defendant] that he wishes to trigger the co-parenting therapy requirement.

"b. The [plaintiff] shall make an initial joint appointment with the therapist, said appointment to take place within seven days of the time of his trigger to this provision.

"c. At the conclusion of the initial appointment, and at the recommendation of the therapist, the parties may meet for a second appointment, within seven days.

"If the parties are unable to reach a joint decision after the meeting with the therapist, the [defendant] shall be allowed to make the final decision. The plaintiff . . . may elect to have a court hearing on the issue; however, this shall not delay the [defendant] from making the decision prior to any hearing." (Footnote added.)

Also relevant to the children's activities is paragraph 5 of the parenting agreement, which states, in pertinent part: "The parties shall enroll the children in agreed upon activities for the children and shall share the cost of the same. Consent for the children to participate in an activity shall not be unreasonably withheld."

We first address the defendant's claim that the plaintiff violated his obligation to share equally the cost of the children's unreimbursed medical expenses. The defendant is seeking an order requiring the plaintiff to reimburse her for $42.50 for eye examinations and/or corrective lenses by Shoreline Eye Associates, P.C., and $200 for a psychiatric consultation with a Dr. Paul El-Fishawy. She claims that the court misinterpreted the parenting agreement and thus made an "unwarranted modification" of the terms of the dissolution judgment. The defendant contends that the plaintiff agreed to these treatments, and even if he did not, the parenting agreement does not require her to notify and obtain the consent of the plaintiff before incurring expenses for nonemergency medical treatment or activities for the children. We disagree.

A plain reading of the applicable provisions in the parenting agreement, according the language its common, natural and ordinary meaning and usage, is that it obligates the defendant to notify the plaintiff of her intent to seek nonemergency medical treatment for the children. Only after the plaintiff has been given prior notice and, after some discussion, indicates that he disagrees, can the defendant make a decision. Once that occurs, the plaintiff has twenty-four hours to inform the defendant that he wants to continue to dispute that decision and trigger the coparenting therapy requirement. If he does so, and the appointment takes place within seven days and the parties are still unable to reach a joint decision, the defendant is then allowed to make the final decision and incur the contested expense, subject to the plaintiff's right to return to court for a final resolution if he so chooses.

The court correctly determined that paragraph 1 of the parenting agreement required the defendant to consult with the plaintiff regarding all nonemergency matters affecting the health, safety, welfare and education

of the minor children, *before* any decisions involving the minor children were made by the defendant. These matters included educational programming, extracurricular activities and nonemergency medical treatment. The court found that the record was "replete with [the defendant's] inability, or unwillingness, to communicate with the plaintiff before undertaking any major decisions regarding the [childrens'] care."[7] It further found that crucial e-mail evidence submitted during the hearing showed that the plaintiff did not agree with undertaking the defendant's claimed medical expenses and wanted to research and/or discuss the matter further with the provider and the defendant.

The defendant asserts that the plaintiff should have triggered the coparenting therapy requirement in the parenting agreement to address medical bill disputes, but that provision states: "After discussion, the [defendant] shall indicate to the [plaintiff] her final decision. The [plaintiff] shall within twenty-four hours, inform the [defendant] that he wishes to trigger the co-parenting therapy requirement." There is no evidence that the defendant gave any indication to the plaintiff that she had made her final decisions on medical treatment prior to the defendant's acceptance of the services at issue that would have alerted him that he needed to trigger this requirement.

Essentially, the defendant was putting the cart before the horse, incurring expenses for the children without consulting with the plaintiff and then demanding payment from him. Although the defendant is correct that the plaintiff must not unreasonably withhold his

[7] In modifying the custody orders, an issue that is not the subject of this appeal, the court stated that "the defendant has repeatedly failed to adhere to her prior agreement to significantly consult with the plaintiff regarding the minor child's matters pursuant to the [parenting] agreement" and removed the sole decision-making authority of the defendant.

approval of such expenses, it is not possible to unreasonably withhold approval of an action if one has no notice of it whatsoever or has not had sufficient time to consider it.

We agree with the court's determination that the parenting agreement unambiguously requires the defendant either to obtain the plaintiff's agreement or to have the type of discussion contemplated by the trigger provision before the defendant could incur nonemergency medical expenses for which she would seek reimbursement from the plaintiff. The court did not err in denying the portion of the defendant's motion for contempt regarding her claimed medical expenses.

As to the children's extracurricular activities, the defendant acknowledges that she was required to obtain the plaintiff's agreement prior to enrolling the children in those activities. The court noted that the defendant provided the court with an exhibit that contained a list of activities with a total cost of $2129.13. The court, however, found that the testimony was unclear as to whether the defendant complied with the parenting agreement provisions regarding notice and prior agreement for those expenses and which, if any, of the claimed expenses remain unpaid.[8] In denying

[8] The defendant's exhibit containing a list of the children's activities for which she claimed she had not been reimbursed includes confusing notations that some of the expenses had been paid by the plaintiff. She provided little evidence of her having sought the plaintiff's prior approval before she incurred these numerous expenditures. Although the defendant claims that some of her exhibits were "missing" or "falsely marked" as plaintiff's exhibits, she provides no further detail, has made no attempt to rectify the record, and we are unable to ascertain the truth of her assertion from the existing record. A number of exhibits were marked for identification only, but on this issue, the defendant does not inform us which of the exhibits for identification only should have been marked as full exhibits with respect to the medical and activities expenses. From our review of the record, the court admitted almost every exhibit the defendant proffered during the exchange on medical and activity expenses. There also was testimony that despite the children being covered by health insurance through the plaintiff's employer, the defendant had applied for and was receiving payments for

without prejudice the portion of the defendant's motion related to the children's extracurricular activities, the court essentially determined that the defendant had not proven contempt of court on the part of the plaintiff by clear and convincing evidence. It also indicated that the parties could return to court on this issue at a later date and provide additional evidence regarding any alleged agreement(s) and/or failures to pay. We agree with the court that the defendant failed to meet her burden to prove contempt, and we conclude that the court was more than fair in leaving the door open for her to make a later attempt at proving her claims as to the activity expenses.

We find no abuse of discretion on the part of the court in denying the defendant's motion for contempt regarding the children's unreimbursed nonemergency medical and activity expenses.

II

We next address the defendant's claim that the court erred in denying her motion for contempt alleging that the plaintiff had violated orders related to the mortgage on the former marital home. The defendant appeals from the denial of several of her claims in this motion, in which she alleged that the plaintiff had violated Judge Gordon's August 12, 2011 orders with respect to the mortgage on the marital home. In this contempt motion, the defendant claimed that she had successfully renegotiated the mortgage loan, cancelled all the late fees and reduced the monthly payments, but that the plaintiff

some of their medical expenses from the HUSKY state medical insurance program. Further undermining the defendant's credibility on amounts owed was evidence from the plaintiff that suggested that the defendant had doctored an e-mail exchange between the parties by deleting portions of it to make it appear that the plaintiff had agreed to pay half of Dr. El-Fishawy's bill. The plaintiff also testified that some of the activities the defendant listed to receive half payment were gifts from the child's grandparents, including a drum set and a tuxedo one child needed for an event.

deliberately had interfered and caused the renegotiated plan to be cancelled, thereby forcing imminent foreclosure of the home. She further alleged that the plaintiff had violated other orders of Judge Gordon that the plaintiff would be responsible for any attorneys' fees, interest and/or penalties relating to any foreclosure action on the marital home, and requiring that he bring the outstanding mortgage on the family home current for the months of March through July, 2011.

A

We begin with the defendant's claim that the plaintiff failed to execute an authorization allowing the defendant to speak with and represent the plaintiff with the mortgage loan holder, Wells Fargo, as the mortgage has been in the name of the plaintiff solely. For the following reasons, we decline to reach the merits of this claim.

The following additional facts apply to this claim. Shortly after the judgment of dissolution was rendered, on August 12, 2011, Judge Gordon held a hearing on the defendant's motion for an order. The motion for an order requested that the plaintiff be required to bring the mortgage current, including all attorney's fees and other charges. The defendant alleged that the mortgage had gone unpaid since April, 2011. In the alternative, the defendant moved for an order requiring the plaintiff to immediately provide the bank with authorization to speak directly to the defendant, timely file all necessary paperwork in the foreclosure action to allow the parties to participate in foreclosure mediation, attend mediation sessions with the defendant, and agree to any resolution that the defendant came to with the bank.

At the August 12, 2011 hearing before Judge Gordon, the plaintiff's attorney presented an authorization he claimed satisfied the defendant's request. The court rejected this proffered authorization and ruled that in order to effectuate a modification of the mortgage, the

authorization "has to say more than converse and negotiate. It has to say that she's his authorized agent for conversing, negotiating, entering into an agreement, all that kind of stuff. I mean, they're not going to let her—they—I mean, it's got to be specific that she has the authority."

As we noted previously in this opinion in setting forth the procedural history of this case, the particular ruling in the court's September 28, 2015 decision on whether the plaintiff ever provided a proper authorization to the defendant in conformity with Judge Gordon's order was recently the subject of a prior appeal, *Brochard I*, in which we reversed the judgment with respect to the decision by Judge Gould for having failed to provide the defendant a full evidentiary hearing on the authorization issue. See *Brochard I*, supra, 165 Conn. App. 641–42.

The defendant successfully argued to this court that Judge Gould had not afforded her an opportunity to be heard on whether the plaintiff's proffered authorization met the requirements ordered by Judge Gordon. This court held that it was improper for Judge Gould to have issued his September 28, 2015 ruling finding that the plaintiff was not in contempt because he had failed to conduct an evidentiary hearing on the defendant's motion despite her request.[9] Id., 641.

[9] We note that at oral argument before this court in *Brochard I* on February 9, 2016, the defendant acknowledged that she had not filed transcripts of subsequent hearings that occurred in 2015 on the mortgage authorization issue, but she claimed they only would further demonstrate that she had not been provided with a chance to argue her case before Judge Gould issued his September 28, 2015 decision. The plaintiff asserted that Judge Gould's September 28, 2015 decision solely was based on a prior decision of Judge Munro that the plaintiff claimed declared that he did not have to provide the authorization ordered by Judge Gordon. The plaintiff did not claim, despite this court's questioning of the defendant, that any hearing had been held between November 6, 2014, and September 28, 2015, at which both parties were given sufficient opportunity to be heard regarding the authorization issue. See *Brochard I*, supra, 165 Conn. App. 636. Despite the lack of the additional transcripts of all the hearings, we determined in

This court issued its decision in *Brochard I* on May 24, 2016, and reversed the judgment with respect to Judge Gould's conclusion that the plaintiff could not be held in contempt for failing to provide an adequate authorization. The case was remanded for an evidentiary hearing on the defendant's motion consistent with our decision. Id., 642. There is nothing in the record that shows or even suggests that this hearing has ever taken place. In the context of the present appeal, applying the doctrine of res judicata, we decline to address an appellate claim that this court previously has decided.[10]

We are cognizant of our sua sponte invocation of the doctrine of res judicata and that, generally, res judicata must be specifically pleaded. "This general rule, however, yields when, as here, the circumstances reveal that a remand 'would simply set judicial wheels unnecessarily spinning, only to remain at the same end of the road.' " *Tucker* v. *Pace Investments Associates*, 32 Conn. App. 384, 391–92, 629 A.2d 470, cert. denied, 228 Conn. 906, 634 A.2d 299 (1993), cert. denied, 510 U.S.

Brochard I that the record was adequate for review because the parties represented at oral argument before this court that there was no dispute about whether the trial court addressed the issue on any day for which we did not have the transcript; neither party claimed that any argument or evidence related to the authorization issue, the subject of the first appeal, was heard on those additional hearing days in 2015, and the court's memorandum of decision did not indicate that argument or evidence related to the authorization occurred on those hearing days. Id., 641 n.8. Having now had the opportunity to review these subsequent transcripts for this appeal, however, we determine that both parties, appearing as self-represented litigants, were less than candid with this court during oral argument in *Brochard I* as to whether Judge Gould subsequently had addressed the authorization issue.

[10] Our determination not to address this claim includes the defendant's claim that the plaintiff reimburse her for interest, penalties and fees incurred as a result of the plaintiff's failure to provide her with a proper authorization to negotiate with the mortgage lender because the amounts owed, if any, pursuant to the claim on the mortgage authorization order, may be dependent on whether a proper authorization was provided, and if so, when.

1196, 114 S. Ct. 1305, 127 L. Ed. 2d 657 (1994). The circumstances in the present case require us to apply res judicata sua sponte, despite the rule that, generally, it must be pleaded.

"[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to any other admissible matter which might have been offered for that purpose. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . . Furthermore, [t]he judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. . . . The conservation of judicial resources is of paramount importance as our trial dockets are deluged with new cases daily. We further emphasize that where a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding. But the scope of matters precluded necessarily depends on what has occurred in the former adjudication. . . .

"The transactional test measures the preclusive effect of a prior judgment, which includes any claims relating to the cause of action that were actually made or might have been made. . . . A cause of action for the purpose of the transactional test is the group of facts which is claimed to have brought about an unlawful injury to the plaintiff . . . . The fact that a prior judicial determination may be flawed . . . is ordinarily insufficient,

in and of itself, to overcome a claim that otherwise applicable principles of res judicata preclude it from being collaterally attacked. . . . If the judgment [in the prior action] is erroneous, the unsuccessful party's remedy is to have it set aside or reversed in the original proceedings. . . . It is well settled that [a] judgment may be final in a res judicata sense as to a part of an action although litigation continues as to the rest. . . . Thus, res judicata may operate to preclude a claim decided in a previous proceeding within the same case. . . . [F]or purposes of res judicata, a judgment will ordinarily be considered final if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication." (Citations omitted; internal quotation marks omitted.) *Honan* v. *Dimyan*, 63 Conn. App. 702, 706–708, 778 A.2d 989, cert. denied, 258 Conn. 942, 786 A.2d 430 (2001).

The defendant's claim pertaining to the plaintiff's failure to authorize her to speak with Wells Fargo was fully briefed by the parties in *Brochard I*. This court considered the claim on its merits in *Brochard I* and issued a final decision on the matter. The claim is therefore barred by that decision and we will not allow the parties to relitigate the matter in this appeal. See, e.g., *In re Zen T.*, 151 Conn. App. 724, 730, 95 A.3d 1258 (due to application of res judicata doctrine, appellant barred from relitigating claim raised in prior appeal), cert. denied, 314 Conn. 911, 100 A.3d 403 (2014), cert. denied sub nom. *Heather S.* v. *Commissioner of Children & Families*, U.S. , 135 S. Ct. 2326, 191 L. Ed. 2d 991 (2015); *Oliphant* v. *Commissioner of Correction*, 146 Conn. App. 499, 527, 79 A.3d 77 (same), cert. denied, 310 Conn. 963, 83 A.3d 346 (2013); *State* v. *Thomas*, 137 Conn. App. 782, 788–91, 49 A.3d 1038

(same), cert. denied, 307 Conn. 923, 55 A.3d 566 (2012); *Honan* v. *Dimyan*, supra, 63 Conn. App. 705–10 (same).

B

We will address the remaining portion of this claim, which is that the court erred in failing to find the plaintiff in contempt of Judge Gordon's August 12, 2011 orders pertaining to the mortgage on the marital home by failing to reimburse her for the four months of mortgage payments missed between April 1, 2011 and July 1, 2011. Resolution of this particular claim is not precluded by the doctrine of res judicata because it was not raised in the defendant's prior appeal in *Brochard I*.

In order to resolve whether the plaintiff was in contempt of Judge Gordon's orders of August 12, 2011, a review of those orders is necessary. In reviewing an appeal involving a civil contempt proceeding, "we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review." (Citations omitted.) *In re Leah S.*, 284 Conn. 685, 693, 935 A.2d 1021 (2007).

The defendant claims that Judge Gordon ordered the plaintiff to bring the mortgage payments current for the months of April 1 through July 1, 2011, and that the court erred in not finding the plaintiff in contempt for failure to do so.

The following additional facts and procedural history are necessary to the consideration of this claim. During the hearing before Judge Gordon on August 12, 2011, the court addressed the defendant's motion for clarification, which contained a request that the court answer five questions. In question three, the defendant asked: "[T]he court ordered the marital home transferred to the defendant, who shall be responsible for all costs

associated with the home. The mortgage on the marital home is only in the plaintiff's name, and the last payment made by the plaintiff was the March, 2011 payment . . . . Is the plaintiff responsible to bring the debt current before he quitclaims the property to the defendant?"

In question four, the defendant asked: "In paragraph 18, the court ordered the defendant to be responsible for her COBRA benefits.[11] The [d]efendant's health insurance is an individual policy paid monthly. The defendant therefore is not eligible for COBRA. Is the plaintiff responsible for the payments due through July 6, 2011, including the payment due July 1, 2011?" The following pertinent colloquy occurred:

"[The Defendant's Counsel]: And is he responsible to bring the mortgage current?—

"The Court: Right.[12]

"[The Defendant's Counsel]: —Before he quitclaims, which he hasn't done yet.

"The Court: Okay. Is the—the question is, does—is the responsible—yes. The answer to number four is yes. There was a payment due on the first. It was due on the first.

"[The Defendant's Counsel]: Yes, yes. So, he's responsible to—

"The Court: Yes.

"[The Defendant's Counsel]: —make the insurance payment due—

"[The Plaintiff's Counsel]: Well, but that covers the whole month, Your Honor.

[11] See the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §§ 1161 through 1168 (2012).

[12] The defendant claims that this particular response is where Judge Gordon ordered the plaintiff to bring the missed mortgage payments current. We disagree because a reading of the subsequent colloquy between counsel and the court reveals that the court reached the opposite conclusion on the defendant's request.

"The Court: Was it due on the first?

"[The Plaintiff's Counsel]: It was due on the first.

"The Court: It was due on the first. My decision didn't come out until the sixth.

"[The Plaintiff's Counsel]: Right.

"The Court: That's something . . . I'm not making that determination.

"[The Plaintiff's Counsel]: I didn't hear your answer to number three, Your Honor.

"The Court: *I don't have an answer to number three*—

"[The Plaintiff's Counsel]: Okay.

"The Court: —because it's the same as the problem on the mortgage and whether—

"[The Plaintiff's Counsel]: Okay.

"The Court: —he needs to bring it current." (Emphasis added; footnote added.)

Contrary to the defendant's arguments, it is clear from the previously quoted exchange that, at this point in the hearing, the court had not decided whether the plaintiff should be ordered to bring the mortgage payments missed since April, 2011, current.

A few minutes later, the court indicated: "I've got two issues left, one of which . . . is the mortgage arrearage and who's paying for that . . . ." The court then began a lengthy discussion about the other of the two issues, namely, who was obligated to pay certain other household expenses. At the end of the discussion on household expenses, the court ordered the plaintiff to pay an unpaid household expense arrearage in the amount of $32,438.35 by transferring one half of that amount out of his individual retirement account and paying the other half at the rate of $50 per week. The

court then stated: "Oh, I'm sorry. I'm sorry. Hang on for just a second. Let me finish the other order. The request regarding the repayment of the mortgage is denied, for the months to bring it current is denied."

After the court issued this order, it considered the defendant's motion for contempt. The following colloquy occurred:

"[The Defendant's Counsel]: Your Honor, I just, for one moment, just want to address the mortgage issue.

"The Court: Yes.

"[The Defendant's Counsel]: There are unpaid mortgage payments.

"The Court: Yes, I know.

"[The Defendant's Counsel]: That's one thing, but there are attorney's fees that have been incurred because the payments weren't made. All again, in [the plaintiff's] name, and interest because the payments weren't made. All, again, in [the plaintiff's] name. I have e-mails [where the plaintiff] just says it's in foreclosure. That's too bad.

"I mean, I really don't think that those things should be seen the same as the mortgage payments, which I also believe he should pay, but if there are attorney's fees that have been incurred, I can't see how that would appropriately be more penalties or any of that would appropriately be my client's responsibility.

"Again, she's seeking the mortgage payments as well, but I am asking the court to reconsider the idea that the whole kit and caboodle, which might include a couple thousand dollars in attorney's fees, would be my clients' responsibility.

"[The Plaintiff's Counsel]: She had the money to pay, Your Honor. She's liquid. [The plaintiff] was not. When

he got a reduction in his income, he was paying 72 percent of his gross income to the defendant. So, he didn't have the money, but she had $400,000 in the account, not including the money she paid back to her father."

The court then proceeded to hear evidence, asking the plaintiff's counsel: "All right, so do you want to put on evidence about when your client first gave her notice that the mortgage was not being paid? . . . Because that goes to the equities of the other fees. I mean, it's one thing to not pay it and say I can't pay it. It's another thing to be silent and let stuff, you know."

After hearing evidence, the court commented: "Once again, the enmity between the two of you has continued. . . . I mean, you're both so adamant about who's right about everything that you just keep, you know, wasting time and money and taking ridiculous positions. [Plaintiff], you owe—you're the only person on the note. If she sat back and did nothing and the house was foreclosed and there was a deficiency judgment, it would all be yours. . . . [I]f you really wanted to protect your credit as much as you say that you do, that people would go about this in an orderly process. On the other hand, [defendant], you said that you're terribly concerned about the roof over your children's heads. Well, yes and no. I mean, you did. You went through, you got all the stuff and everything is going, but you're still arguing about who's going to advance the money or who's going to do what, and it's absurd. Okay? You're living there. You had the liquidity to make the payments. I mean, I'm not—he hasn't been stellar, and he hasn't made a lot of the payments, and some of it was contemptuous, but he did not have the money to make them all up. Judge Abery-Wetstone's [pendente lite] order was very high, and I think that there—I don't know what everybody was contemplating in terms of the mortgage getting paid, but I already made my order that she's

going to take that over, but you're going to be responsible for any attorney's fees, any interest, any penalties, anything else because you could have sat down and instead of threatening . . . a custody fight . . . you could have sat down and said, let's get the papers done for the modification. . . . So, it may be true that you might not have been able to afford to make payments, but your judgment is lacking when it comes to how to solve a problem. Instead of being bellicose, all you had to do is go, great. Let's get the papers done. So, you're going to be responsible for what comes for that delay or that lack of judgment, and that is the attorney's fees, late penalties, reinstatement penalties, *anything but the actual mortgage and interest.* Okay?" (Emphasis added.)

During the hearing before Judge Gould on April 21, 2015, the defendant began the presentation of her motion for contempt on the mortgage issues by advising the court that the plaintiff owed her four months of mortgage payments from April through July, 2011, totaling $7578.88. She argued that Judge Gordon had ordered the plaintiff to pay the past due four months of mortgage payments and that when Judge Gordon stated: "The request regarding the repayment of the mortgage is denied, for the months to bring it current is denied," she only had denied the defendant's request to have the plaintiff pay the August 1, 2011 mortgage payment, but had intended to grant her request for the previous four months, April through July, consistent with her earlier response of "[r]ight," when the defendant's attorney asked: "And is he responsible to bring the mortgage current . . . ." The plaintiff argued that Judge Gordon denied the defendant's request that the plaintiff bring the mortgage current and pay the four months of missed payments.

In its memorandum of decision denying this particular motion for contempt, the court repeated the allegations of each party, and then determined that the

recitation of the court's order and findings set forth by the plaintiff were accurate. We interpret this ruling of the court to include a finding that the plaintiff's interpretation of Judge Gordon's order on whether the plaintiff had to bring the mortgage current was correct, and that Judge Gordon did not order the plaintiff to pay the four months past due mortgage payments and interest. Therefore, the court did not find the plaintiff in contempt for failing to bring the April through July, 2011 mortgage payments current.

A review of the entire transcript of the August 12, 2011 hearing leads us to conclude that the court's ruling was proper. Judge Gordon clearly denied the defendant's request that the plaintiff make up the payments missed on the mortgage between April, 2011, and July 6, 2011.

After indicating that "[t]he request regarding the repayment of the mortgage is denied,[13] *for the months to bring it current is denied*," counsel for the defendant began to argue that the court should reconsider its ruling on the defendant's request to bring the payments current while she pressed on to argue that, at the very least, she should recover any additional charges resulting from the default. (Emphasis added; footnote added.)

Shortly thereafter, Judge Gordon spoke to the parties about their unabating mutual animosity and how it was not helping anyone's situation. Her comments further reveal that she did not believe the plaintiff had the ability to pay the mortgage, and therefore determined only to hold him responsible for attorney's fees, costs, and reinstatement penalties emanating from his default, but not for the five months of missed mortgage and interest payments. The court specifically stated: "So,

[13] The first part of this statement was denying the plaintiff's request that he be reimbursed for paying the mortgage, pendente lite, from September, 2010.

you're going to be responsible for what comes for that delay or that lack of judgment, and that is the attorney's fees, late penalties, reinstatement penalties, *anything but the actual mortgage and interest*. Okay?" (Emphasis added.)

We reject the defendant's interpretation of Judge Gordon's order because her interpretation depends on the artificial isolation of words and phrases that support her position, but fails to take into account the totality of Judge Gordon's remarks. We conclude that the court did not err in declining to hold the plaintiff in contempt on this issue because he cannot be held in violation of an order that does not exist.

III

The defendant's next claim is that the court erred in denying her motion that the plaintiff be held in contempt for failing to pay her one half of the 2010 tax refunds that he received after filing individual federal and state tax returns for 2010.

The following additional facts pertain to this claim. On March 30, 2011, Judge Gordon asked both parties: "Did you all—you're not going to file—you're not filing jointly for 2010, right?" Counsel for both parties responded in the negative.[14] Subsequently, the plaintiff filed his state and federal tax returns as married, filing separately and received refunds, the amount of which are not ascertainable from the record.[15] It is not clear

[14] This does not support the defendant's assertion that Judge Gordon had no idea the plaintiff had intended to file a separate return prior to the entry of the judgment of dissolution.

[15] At the end of the hearing on financial issues on April 22, 2015, the court ordered the parties to provide information regarding what it referred to as the "2010 tax issue and refund issue" within three weeks and that it would keep the hearing open for that three week period of time. No hearing was held three weeks later, and at the next hearing on July 10, 2015, neither party offered any tax documents into evidence. On July 10, 2015, responding to the defendant's ongoing complaint that she was unable to present all of her motions and evidence, the court indicated it was holding the hearing open until July 31, 2015, without stating a purpose for doing so. It further

from the record whether the defendant also filed separate returns in 2010. When Judge Gordon rendered the judgment of dissolution on July 6, 2011, subsequent to the April 15 tax filing deadline, she ordered the parties to file a joint tax return. The plaintiff was ordered to pay any taxes owed, and the parties were to share equally in any refund. This order, which the plaintiff had no reason to contemplate on the basis of the discussion that had taken place in court on March 30, 2011, created another issue necessitating discussion during the August 12, 2011 hearing before Judge Gordon, who advised the parties to consult with an accountant to determine what would happen if a joint return were to be filed in lieu of separate returns. Although the court may have been reconsidering its order pending an accountant's opinion, it did not modify any portion of its dissolution order that obligated the parties to file a joint tax return for the tax year 2010. Despite the fact that this would require an amended return that would not be filed timely, Judge Gordon did not address who

invited the parties to file posttrial briefs and attach additional documents they believed pertinent to their arguments.

This court previously has rejected the use of such a procedure. Although seemingly efficient, it deprives both parties of their right to contest the pertinence of such last-minute, off-the-record submissions. See *IN Energy Solutions, Inc.* v. *Realgy, LLC*, 114 Conn. App. 262, 268–69, 969 A.2d 807 (2009) (court erred in relying on supplemental documentation contained in supplemental briefs that was not introduced into evidence and no evidence in record supported court's award). The proper procedure would have been for the court to leave open evidence in the hearing, *schedule another hearing date*, and permit the parties to offer additional documents into evidence at that time.

To the extent that the defendant relies on documents she attached to her posttrial briefs to prove she was owed a portion of tax refunds that the plaintiff received from filing individual federal and state tax refunds for 2010, we observe that those attachments are not in evidence, and there is no reference to them or indication in the court's memorandum of decision or in its decision on the motion to reargue/reconsider that it relied on them. We therefore decline to consider any of the defendant's attachments to her posttrial briefs because we cannot presume, as we can with evidence properly admitted during a trial, that the court relied on them.

would be responsible for any penalties. Ultimately, despite the parties' lack of cooperation for months afterward, Judge Munro finally intervened with an order to end the impasse, and an amended federal joint return was filed, which necessitated further payment to the Internal Revenue Service and resulted in no refund. The defendant, however, contends that because the plaintiff received a generous federal tax refund when he filed separately and had to pay the Internal Revenue Service less than that refund as a result of the jointly filed amended return, he was left with a "net positive," half of which is owed to her.

In its memorandum of decision, the court found that, rather than being entitled to a refund, the parties owed the Internal Revenue Service $2990.74 as a result of filing jointly for the calendar year 2010.

We conclude that the court's decision conforms to the clear and unambiguous language of the order in the judgment of dissolution as to the joint tax refund, which required the parties to share a refund that would result only from a jointly filed return for tax year 2010. The court properly declined to hold the plaintiff in contempt for failing to derive from this simple order an unstated, additional obligation inferred by the defendant but nowhere clearly imposed by Judge Gordon. The defendant's unverified, proposed mathematical calculation may be a fair proposal but, to effectuate it, she first should have sought a revised dissolution order. "[A] court . . . after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment." (Internal quotation marks omitted.) *O'Halpin* v. *O'Halpin*, 144 Conn. App. 671, 677–78, 74 A.3d 465, cert. denied, 310 Conn. 952, 81 A.3d 1180 (2013).

IV

We next address the defendant's claim that the court erred in denying her motion for modification of Judge Munro's order of February 6, 2014, which allocated the parties' obligation pertaining to payment of the guardian ad litem's fees. The defendant was ordered to pay 20 percent and the plaintiff was ordered to pay 80 percent of the fees owed to Attorney Nugent. The defendant alleged that there had been a substantial change in circumstances since the entry of Judge Munro's order because she was no longer employed and had insufficient assets to pay her share. The court found that there had been no substantial change in circumstances in the finances of either party since the order of February 6, 2014.[16]

"The court may order either party to pay the fees for [a] guardian ad litem pursuant to General Statutes § 46b-62, and how such expenses will be paid is within the court's discretion. . . . An abuse of discretion in granting [guardian ad litem] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citation omitted; internal quotation marks omitted.) *Lamacchia* v. *Chilinsky*, 79 Conn. App. 372, 374–75, 830 A.2d 329 (2003).

Both parties filed financial affidavits on July 10, 2015, at the conclusion of the hearing before Judge Gould. The financial affidavits they had filed prior to the hearing before Judge Munro where the 80/20 percent allocation of responsibility was ordered are in the court file. Although the court did not explicitly refer to these affidavits, we presume that it reviewed them in order to ascertain whether there had been a substantial change

[16] Despite the defendant's assertions to the contrary, the court did not address whether Attorney Nugent was owed any fees for services she may have rendered between February 6, 2014, and the date of the hearing on April 21, 2015.

in the financial circumstances of the parties. At the hearing before Judge Munro, Nugent was owed $2900 and reported that she had asked both parties to pay her a retainer of $2500 each in December, 2013, and that the plaintiff had done so, but the defendant had not. Judge Munro found that as of the date of the hearing, Nugent's fees totaled $5400, and that the plaintiff was responsible for $4320 and the defendant was responsible for $1080. Both were ordered to make their payments within fourteen days.

The defendant's financial affidavit filed on February 6, 2014, reflected a net weekly income of $968.91, weekly expenses of $1905.39, liabilities of $140,175.36 and assets of more than $418,758.68. The plaintiff's affidavit at that time reflected a net weekly income of $1372.02, weekly expenses of $1609.95, liabilities of $36,677.97 and assets of $11,446.33. The defendant filed another financial affidavit on July 10, 2015, indicating a debt owed to Attorney Nugent in the amount of $1333.15, which was based on her 20 percent share. The defendant's net weekly income was $692, her weekly expenses were $2760.70, her liabilities were $153,192.41 and her assets were $474,789. The plaintiff's affidavit, also filed July 10, 2015, reflects his outstanding debt to Nugent as $5332.60. His weekly income was $1596.53,[17] his weekly expenses were $2284.97, his liabilities were $103,077.46 and his assets were worth $12,771.68.

The court concluded that there had been no substantial change in the financial circumstances of either party since the entry of Judge Munro's order of February 6, 2014, regarding payment of Nugent's fees.[18] "The party

[17] We have added back in a deduction the defendant claimed that the plaintiff improperly took on this affidavit for his current child support and alimony obligation in the amount of $692, a sum the court agreed should not have been deducted from his gross income.

[18] The defendant also claims the plaintiff should pay all of the fees for the guardian ad litem and reimburse her for what she has paid because she never wanted a guardian ad litem appointed in the first place. She agreed, however, in writing and in court, on May 2, 2013, that a guardian ad litem

seeking the modification has the burden of proving a substantial change in circumstances. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential." (Citation omitted; internal quotation marks omitted.) *O'Donnell* v. *Bozzuti*, 148 Conn. App. 80, 87, 84 A.3d 479 (2014).

There was no evidence presented to the court as to what amount might still be owed to Nugent as of July 10, 2015, other than the amounts each of the parties claimed was due to her on their respective financial affidavits.[19] Although the defendant's weekly net income was slightly reduced, she provided no evidence to the court of any inability to seek employment and earn income.[20] There was only a slight increase in the plaintiff's weekly net income, and both parties had significant increases in their liabilities. The defendant,

should be appointed. We note that, on the basis of the file and after considering the previously noted comments of both Judge Gordon and Judge Gould as to the defendant's tenacity, it would not be fair to say that the need for a guardian ad litem to help resolve parenting issues was caused only by the actions of the plaintiff.

[19] There is a statement from Nugent that was filed in court on July 1, 2014, indicating a total balance due of $12,998.75. This statement reflected that as of June 12, 2014, the plaintiff had paid Nugent $3920 and the defendant had paid her $1080. If the amounts owed to Nugent that are reflected on the parties' financial affidavits of July 10, 2015, are accurate, each of them should have paid Nugent additional sums between February 6, 2014, and July 10, 2015, although neither of them indicated as such during the hearing.

[20] We decline to consider the defendant's self-serving, unsupported assertions as to her lack of an earning capacity contained in one of her three posttrial briefs, which are based on facts not in evidence. See footnote 15 of this opinion.

however, in July, 2015, still possessed assets of significantly higher value than the plaintiff's assets, far in excess of her liabilities and more than sufficient to pay the debt she averred she owed to Nugent. We find no abuse of discretion in the court's denial of her motion to reduce her 20 percent allocated share of the fees for the guardian ad litem, an appointment to which she agreed. See footnote 18 of this opinion. There was a reasonable basis in fact for denying the defendant's motion because the defendant had failed to prove a substantial change in circumstances necessitating a reduction in her allocated 20 percent share of the fees.

V

The defendant's next claim is that the court erred in granting the plaintiff's motion for modification of child support, thereby decreasing his obligation, and in failing to consider her cross motion for modification, which sought an increase in the amount of child support. We disagree.

Before addressing the merits of this claim, we note legal principles relevant to motions for modification. First, we set forth our well established standard of review in domestic relations matters. "A trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases, and its orders in such cases will not be reversed unless its findings have no reasonable basis in fact or it had abused its discretion, or unless, in the exercise of such discretion, it applies the wrong standard of law." (Internal quotation marks omitted.) *Hane* v. *Hane*, 158 Conn. App. 167, 172, 118 A.3d 685 (2015).

When presented with a motion for modification, a court must "first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court

finds a substantial change in circumstances it may properly consider the motion and, on the basis of the . . . [General Statutes] § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Internal quotation marks omitted.) *Barbour* v. *Barbour*, 156 Conn. App. 383, 390, 113 A.3d 77 (2015).

The following additional facts are relevant to this claim. At the commencement of the hearing on April 21, 2015, the defendant advised the court that her motion for modification of child support, seeking an increase retroactive to May 2, 2013, was pending and she wanted it to be heard. She advised the court that she had filed three child support guideline worksheets, one for each of the years 2013 through 2015, along with verification of income. She requested that the court, in ordering child support retroactively, consider the three different time periods. Counsel for the plaintiff responded that although the parties had reached an agreement on May 2, 2014, that agreement concerned only the plaintiff's motion for modification and that no such agreement was made with respect to the defendant's motion for modification seeking an increase in child support.[21]

The plaintiff filed a child support guidelines worksheet that had been prepared in 2013. The plaintiff sought a modification of the $342 per week child support obligation to $277, retroactive to May 2, 2013, and a credit for having overpaid his child support since that date. When the defendant asked the court for an opportunity to respond, the court said: "You don't need

[21] The May 2, 2013 agreement is in writing, signed by both parties and states in relevant part: "The [plaintiff's] motion to modify child support shall go off with orders retroactive to today. However, [the plaintiff] retains the right to seek retroactivity to the filing of the motion." The agreement was approved and made an order of the court on May 2, 2013.

to respond to it, ma'am. I understood your argument, and I will review your documentation." Later on, at the end of the hearing on April 22, 2015, the defendant inquired of the court whether it would be hearing *her* pending motion to modify child support. Counsel for the plaintiff responded that he had not seen the defendant's motion, which had been filed on April 26, 2013, so the court told the parties to speak to the presiding judge, *Emons*, *J.*, as to how to proceed on this motion because the plaintiff was not prepared to go forward on it, or the defendant could come back on some later date when the court would hear the motion. The defendant indicated that she wanted to speak to Judge Emons.

When the parties appeared before Judge Emons on April 22, 2015, Judge Emons indicated that it was Judge Gould's responsibility to hear all the parties' motions and advised the defendant that Judge Gould was going to hear all motions in this case. Judge Emons did not, however, specify a date on which the defendant's motion for modification of child support would be heard, although she had that authority as the presiding judge.

On May 28, 2015, the defendant filed a document captioned "Defendant's List of Pending Motions for Hearing July 10, 2015. At the very top of this list she noted, "1. Defendant's Motion to Modify—General 4/26/13 MOTION FOR MODIFICATION OF CS 321 JD-FM-174." On that same date, she also filed an "Addendum to Child Support Motion Filed [April 26, 2013]."

At the next hearing before Judge Gould on July 10, 2015, which was more of a "wrapup" session than an actual hearing, the court began by noting that it had "received notification from the parties of potential motions to be heard . . . . I have from the plaintiff that there are no motions pending; counsel, if you have anything else, let me know. I have reviewed from the

defendant number 430, which is a further motion to compel . . . 433, which is an addendum to the child support motion, 434, which is a request to provide an update, 435, which is a request to provide an update. . . . In reviewing those documents and in reviewing the motions that have been filed and reviewing the transcripts, my notes and the evidence that has been filed prior to today, I don't think any additional testimony is necessary on those motions."

The defendant then advised the court: "[W]hile [the plaintiff's counsel] gave his child support motion, I was not able to give you evidence, and I have a lot of evidence in conjunction with *that* child support motion." (Emphasis added.) The court advised the defendant that it was not hearing anything further, but that she could make additional arguments and attach any documents to her posttrial brief. There was no clear discussion during this exchange between the defendant and the court that the defendant wanted to be heard immediately on her motion for modification of child support.

The court continued: "Ma'am, the hearing on that issue has already been concluded. I have enough in terms of the amount of information that has been filed. I understand both parties' positions, and you can make any additional arguments and you can attach any documents as exhibits you think are appropriate on the briefs." The defendant responded: "Okay."

In its memorandum of decision, the court did not address the defendant's motion for modification of child support. It granted the plaintiff's motion for modification and reduced his child support obligation to $220 per week, finding that amount to be the presumptive amount pursuant to the child support guidelines, after finding that the defendant's net income, based on his most recent financial affidavit, was $904.53, and that

the defendant was unemployed. The court found a substantial change of circumstances, which was based on the parties' oldest son having reached the age of majority and graduated from high school. The decision makes no mention of any retroactivity of the order to May 2, 2013, and does not award the plaintiff any credit for overpayment since that date.[22] The court made no mention of, and did not rule on, the defendant' motion for an upward modification of child support.

In the defendant's motion to reargue/reconsider, the defendant alleged that the court made an error in determining the plaintiff's net income because the plaintiff should not have deducted his current alimony and support obligation from his gross income, which is not deductible for purposes of calculating the amount of child support due pursuant to the guidelines. The defendant requested that the court adjust the weekly amount up to $296 per week for the one remaining minor child, and the court did so, effective June 19, 2015, in its memorandum of decision on the motion to reargue/reconsider.

As to the court's failure to hear the defendant's motion for modification of child support, we cannot fault the court for not having heard that particular motion as part of its hearing on combined financial issues that began on April 21, 2015, and ended on July 10, 2015. We first note that on February 6, 2014, when Judge Munro inquired of the defendant which motions involving financial issues were to be referred to the

[22] We conclude that the court did not issue a retroactive order because it would have had to consider any changes in the plaintiff's income between 2013 and 2015 in order to do so, and it refers only to the plaintiff's financial affidavit of July 10, 2015. See *Zahringer* v. *Zahringe*r, 124 Conn. App. 672, 688–89, 6 A.3d 141 (2010) (retroactive award may take into account long time period between date of retroactivity and date motion is heard; court may examine changes in parties' incomes and needs during time motion pending to fashion equitable award).

regional family trial docket, the defendant never mentioned this pending motion for modification. On April 22, 2015, the plaintiff indicated to the court that he had not seen this motion and was not prepared to defend against it. Finally, in fairness to the court, we observe that the defendant never made any clear reference to her motion for modification on July 10, 2015, and that she subsequently acquiesced when the court indicated it had heard everything it was going to hear and any additional arguments could be made in the posttrial briefs. Because we are unable to conclude that the court actually was put on notice by either Judge Emons or the defendant that the defendant's motion for modification of child support should be heard before the court concluded the financial issues hearing it had commenced on April 21, 2015, we find no error.[23]

As the defendant still may intend to pursue her motion for modification retroactive to May 2, 3013, we will address the retroactivity issue. A review of the written agreement the parties submitted to the court reflects an unambiguous agreement as to retroactivity only on the plaintiff's motion; there is no mention of a pending defendant's motion or any reference to motions in the plural. Thus, we conclude that if the defendant were to reclaim this exceedingly stale motion for modification, it will likely be moot, as both of the minor children have attained the age of eighteen and she will be unable to seek a prospective modification.[24]

We further conclude that upon the court's reconsideration, it committed no error in granting the plaintiff a modification of child support based on his properly calculated net income and the change in circumstances from the eldest child attaining majority. We find no

[23] Rather than appealing, the defendant should have reclaimed her motion for modification to the family short calendar in 2015, which would have been a much more efficient way of ensuring it was promptly heard.

[24] The parties' youngest child became eighteen years old in 2016.

abuse of discretion in the entry of the $296 per week child support order, effective June 19, 2015. That was part of the numerous changes in the court's orders the defendant requested in her motion to reargue/reconsider.

VI

The defendant's final claim is that the court erred in granting her motion for contempt regarding past due alimony for the year 2012 in that it failed to order the plaintiff to pay her the full amount she was owed. We disagree.

The following additional facts are relevant to this claim, which concerns the defendant's entitlement to provisional alimony, which is additional alimony payable to her on a quarterly basis. Pursuant to the judgment of dissolution, it includes 30 percent of all of the plaintiff's gross income from wages, self-employment, commissions, incentives, bonuses or other payment plans in excess of $90,000 per year, but less than $150,000 per year.

In her testimony of April 22, 2015, the defendant indicated that the plaintiff had sent her a check for $794.45, which represented only a portion of the unpaid provisional alimony payments owed to her for 2012, and that she did not cash the check because she believed that doing so would be an acknowledgment on her part that the plaintiff had fulfilled his entire obligation for that particular time period. In response, the plaintiff's counsel admitted that the plaintiff's check had not been cashed. The evidence reflected that the plaintiff owed the defendant $1802.40 in provisional alimony for 2012.

The defendant argues that the court erroneously awarded her $1005.55 in unpaid provisional alimony despite the fact that the evidence clearly reflected that

because she did not cash the check for partial payment, she was actually owed $1802.40.

In its initial decision of September 28, 2015, the court found that the plaintiff had paid the defendant the $794.45. During the hearing on the defendant's motion to reargue/reconsider, however, the court, at the defendant's request, corrected this oversight after both parties stipulated that $796.85[25] was owed by the plaintiff to the defendant for 2012 past due provisional alimony. Therefore, we interpret the court's ruling to reflect that the defendant was awarded the full amount she now claims was owed to her.

Accordingly, we find no error in the court's granting of the motion for contempt regarding past due alimony.

The judgment is affirmed.

In this opinion the other judges concurred.

THOMAS FREDO *v.* KRISTIN FREDO
(AC 39719)

DiPentima, C. J., and Moll 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 with respect to certain of the parties' postdissolution motions. The parties' settlement agreement, which had been incorporated into the dissolution judgment, provided, inter alia, that the parties had joint legal custody and shared physical custody of their minor children and that the plaintiff would pay the defendant $250 per week in child support. The agreement also provided that the plaintiff was entitled to several family businesses free from any claims of the defendant. In consideration for the defendant's relinquishing any claims that she had to the family businesses, the agreement set forth terms concerning the transfer of a lot from the subdivision of certain real property located in North Granby from the

[25] There is no explanation given on the record for the $794.45 amount the defendant claimed during the hearing on April 22, 2015, and the stipulated amount of $796.85, a $2.40 differential that favors the defendant.

plaintiff to the defendant. The trial court subsequently approved certain modifications to the child support orders in accordance with various agreements of the parties. Thereafter, the defendant filed a motion for accounting, requesting that the plaintiff provide her with an accounting of all conveyances with respect to the North Granby property during a certain time period, and a motion for modification of child support in which she asserted that the parties' youngest child had vacated the plaintiff's home, which was then her primary residence, and had been residing continuously with and supported by her maternal aunt and uncle, K and T. The specific relief sought in the prayer for relief in the motion for modification was an order requiring the parties to pay recalculated child support to K, who was not a party in the action. In response, the plaintiff filed a motion to dismiss the motion for modification, as well as a motion to quash a subpoena duces tecum that had been served on him by the defendant, a motion for attorney's fees and an objection to the defendant's motion for an accounting. During the hearing on the parties' motions, the trial court stated that the prayer for relief in the defendant's motion for modification was flawed because the court lacked jurisdiction to order the payment of child support directly to K as a nonparty. In response, the defendant's counsel orally requested permission to modify the original prayer for relief. The court, however, did not specifically respond to that request but suggested that the defendant's counsel file a revised motion. No revised motion was filed, and, instead, the defendant filed a substitute prayer for relief without receiving permission from or notifying the court. The trial court thereafter rendered judgment granting the motion to dismiss, denying the motion for modification of child support and granting the motion to quash the subpoena duces tecum, and awarded the plaintiff $1500 in attorney's fees payable within thirty days. The court did not adjudicate the defendant's motion for an accounting or the plaintiff's objection thereto, finding that the parties had agreed during argument that the motion was premature because certain conditions precedent concerning the transfer of the North Granby lot to the defendant had not yet occurred. On the defendant's appeal to this court, *held*:

1. The trial court improperly granted the plaintiff's motion to dismiss the defendant's motion for modification of child support for lack of subject matter jurisdiction; that court had subject matter jurisdiction to entertain the motion pursuant to the applicable statutes (§§ 46b-1 [4] and 46b-86 [a]), which vested the court with plenary and general jurisdiction over child support and continuing jurisdiction to modify the child support orders, respectively.
2. The defendant's claim that the trial court improperly denied her motion for modification of child support was not reviewable, this court having concluded, sua sponte, that her appeal from the denial of the motion for modification was moot; the defendant's counsel represented at oral argument before this court that, by the time that the parties had argued

the motion for modification before the trial court, the defendant had abandoned the only relief that she had requested that was considered by the trial court, namely, the payment of recalculated child support to K, and, therefore, there was no practical relief that could be afforded to the defendant because she abandoned pursuing the only relief requested that was properly before the trial court with respect to her motion for modification.

3. The defendant's appeal from the trial court's judgment disposing of her motion for an accounting was moot; during oral argument before this court, the defendant's counsel represented that the defendant had received an informal accounting from the plaintiff and, consequently, that the defendant was no longer seeking a formal accounting, and, therefore, given that the defendant was no longer seeking the relief requested in her motion for an accounting, there was no practical relief that this court could afford her with respect to her motion for an accounting.

4. The defendant's appeal from the trial court's judgment granting the plaintiff's motion to quash the subpoena duces tecum was moot; in light of this court's conclusions that the portions of the defendant's appeal challenging the trial court's denial of the motion for modification of child support and its ruling on the motion for an accounting were moot, there was no practical relief that this court could afford the defendant with respect to the motion to quash.

5. The trial court abused its discretion by awarding the plaintiff $1500 in attorney's fees pursuant to the bad faith exception to the general rule that a prevailing party is ordinarily not entitled to collect attorney's fees from the losing party; that court failed to make the requisite findings in support of its award of attorney's fees pursuant to the bad faith exception, its memorandum of decision having contained no express findings, made with a high degree of specificity, that the defendant's claims with respect to her motions and the subpoena duces tecum served on the plaintiff were entirely without color and that the defendant had acted in bad faith, and, therefore, the award had to be vacated.

Argued May 29—officially released October 2, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Gruendel*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Ficeto*, *J.*, granted the plaintiff's motion to dismiss the defendant's motion for modification of child support, denied the

defendant's motion for modification of child support, declined to ruled on the defendant's motion for an accounting, granted the plaintiff's motion to quash a certain subpoena duces tecum and awarded the plaintiff attorney's fees; subsequently, the court, *Ficeto*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court. *Appeal dismissed in part*; *judgment reversed in part*; *judgment directed.*

John C. Lewis III, with whom, on the brief, was *Joseph R. Serrantino*, for the appellant (defendant).

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

Opinion

MOLL, J. The defendant, Kristin Fredo, appeals from the judgment of the trial court on several postdissolution motions rendered in favor of the plaintiff, Thomas Fredo. On appeal, the defendant claims that the court improperly (1) granted the plaintiff's motion to dismiss the defendant's motion for modification of child support for lack of subject matter jurisdiction, while also denying the motion for modification, (2) disposed of the defendant's motion for an accounting, (3) granted the plaintiff's motion to quash a subpoena duces tecum, and (4) awarded attorney's fees to the plaintiff. We reverse the judgment of the court granting the plaintiff's motion to dismiss the defendant's motion for modification and awarding attorney's fees to the plaintiff, and we dismiss, as moot, the remainder of the appeal.

The record reveals the following undisputed facts and procedural history. The parties married on July 17, 1993. They have three children of the marriage: a son born in January, 1994; a daughter born in October, 1995; and a daughter born in February, 1998. In July, 2004, the plaintiff filed the underlying complaint for dissolution of marriage. On November 24, 2004, the court rendered

judgment dissolving the parties' marriage. The judgment incorporated by reference the terms of a separation agreement that the parties had entered into on the same date. The agreement provided, inter alia, that the parties had joint legal custody and shared physical custody of the children, and that the plaintiff would pay the defendant a total sum of $250 per week in child support.

The separation agreement also provided that the plaintiff was entitled to several family businesses free from any claims of the defendant. In consideration of the defendant relinquishing any claims that she had to the family businesses, the agreement set forth terms concerning the transfer of certain real property located in North Granby from the plaintiff to the defendant. More specifically, TFHB, LLC, one of the family businesses of which the plaintiff was a member, owned real property in North Granby that it planned to subdivide. The agreement provided that, upon obtaining approval for the subdivision of the North Granby property, as well as zoning approval, the plaintiff was required to transfer one lot from the subdivision to the defendant and another lot from the subdivision to a trust for the benefit of the parties' children.

The court subsequently approved certain modifications to the child support orders. In 2005, the court approved an agreement providing, inter alia, that the primary residence of the minor children would be with the plaintiff and that the plaintiff would no longer pay any moneys to the defendant, subject to future orders of the court. Pursuant to a subsequent agreement approved by the court in 2008, the defendant was required to pay the plaintiff $50 per week in child support, as well as a portion of expenses related to the children's extracurricular activities and health care. In 2010, the court approved another agreement whereby

the defendant's obligation to pay the plaintiff child support and expenses related to the children's extracurricular activities and health care, past or present, would be deferred until certain conditions were met in relation to the transfer of the North Granby lot to the defendant.

On May 18, 2016, the defendant filed a motion for an accounting, requesting that the plaintiff provide her with an accounting of all conveyances with respect to the North Granby property from October 7, 2010 to the present date. That same day, the defendant also filed a motion for modification of child support. The defendant asserted therein that the parties' youngest child, who at that time remained subject to child support orders as a full-time high school student despite having reached the age of majority, had vacated the plaintiff's home and had been residing with the child's maternal aunt and uncle, Kimberly Brignole and Timothy Brignole, continuously since September, 2015. She further asserted that Kimberly and Timothy Brignole had been supporting the child. The original prayer for relief in the motion for modification read as follows: "Wherefore, for all of the foregoing reasons, the defendant mother hereby moves for modification of the orders of this court regarding child support for [the] youngest child and the payment of unreimbursed medical/dental expenses and the like for said minor child and the payment of extracurricular activity expenses for said child. The defendant respectfully requests that this court recalculate child support and order the parties to pay their respective share to the *maternal aunt* and that this court establish an allocation for each parent requiring that they reimburse the *maternal aunt* for the child's unreimbursed medical/dental expenses, prescription medications and the like and reimburse the *maternal aunt* for the child's extracurricular activity expenses." (Emphasis added.)

On June 7, 2016, the plaintiff filed a motion to dismiss the defendant's motion for modification,[1] asserting that the defendant lacked standing to request, and the court lacked jurisdiction to grant, an order directing payment of child support to Kimberly Brignole because she was not a party to the action and did not have legal custody of the parties' youngest child. That same day, the plaintiff separately filed a motion to quash a subpoena duces tecum that had been served on him by the defendant, a motion for attorney's fees, and an objection to the defendant's motion for an accounting. On June 13, 2016, Kimberly Brignole filed a motion seeking to intervene in the action but withdrew that motion on July 22, 2016, and did not attempt to intervene in the action thereafter.

On August 10, 2016, the court held a hearing on the parties' respective pending motions. Other than the submission by the plaintiff's counsel of an affidavit regarding attorney's fees, the hearing was limited to argument on the pending motions. During the hearing, the court stated that the original prayer for relief in the defendant's motion for modification was "flawed," as the court lacked jurisdiction to order the payment of child support directly to Kimberly Brignole as a nonparty. In response, the defendant's counsel orally requested permission to modify the original prayer for relief. Although the court did not specifically respond to that request, the court suggested that the defendant's counsel could file a revised motion. No revised motion was filed.

Instead, on August 18, 2016, the defendant filed a document titled "Substituted Prayer for Relief re: Defendant's Motion for Modification, Post Judgment No. 208.00." It was filed without the court's permission

[1] The filing was titled "Objection and/or Motion to Dismiss re: Defendant's Motion for Modification, Post Judgment." The court treated the submission as a motion to dismiss the motion for modification.

and nothing in the record before this court suggests that the defendant made the trial court aware of its filing. The substituted prayer for relief read as follows: "Wherefore, for all of the foregoing reasons, the defendant mother hereby moves to modify the orders of this court regarding child support for their youngest child. Due to the fact that the youngest child is no longer living with the plaintiff father, the defendant respectfully requests that this court terminate her obligations for the payment of child support directly to the plaintiff. The defendant further moves for an order, retroactive to the date of service of [the motion for modification], that the prior child support order of $50 per week shall no longer accrue against her pursuant to the deferred order dated October 7, 2010. The defendant further moves pursuant to [General Statutes] § 46b-84 (b) for the recalculation of child support, a finding that the parties' youngest child is in need of maintenance and an order that the parties shall maintain said child according to their respective abilities and pay their respective share of child support directly to their [youngest child] until such time as she ages out for child support purposes under state statute."

By a memorandum of decision dated August 31, 2016, the court rendered judgment granting the plaintiff's motion to dismiss the defendant's motion for modification, denying the motion for modification, granting the plaintiff's motion to quash the subpoena duces tecum, and awarding the plaintiff $1500 in attorney's fees payable within thirty days. The court did not adjudicate the defendant's motion for an accounting or the plaintiff's objection thereto, instead finding that the parties had "agreed during argument that the motion for accounting was premature," as certain conditions precedent concerning the transfer of the North Granby lot to the defendant had not yet occurred. A written notation on the motion for accounting contained in the trial court

file reads as follows: "Off/Noted: See 8/31/2016 memo of decision." The defendant subsequently filed a motion for reconsideration and to reargue, which the court denied. This appeal followed.[2] Additional facts will be set forth as necessary.

I

We first consider the defendant's claim that the court improperly granted the plaintiff's motion to dismiss the defendant's motion for modification for lack of subject matter jurisdiction, while also denying that motion. Specifically, the defendant claims that several state statutes vested the court with subject matter jurisdiction to entertain her motion for modification. We conclude that the court had subject matter jurisdiction to adjudicate the defendant's motion for modification, and, thus, the court erred by granting the plaintiff's motion to dismiss the motion for modification. To the extent that the defendant claims that the court improperly denied her motion for modification, however, we do not reach the merits of that claim because we determine that the portion of the appeal challenging the denial of the motion for modification is moot.

A

We begin by addressing the court's judgment granting the plaintiff's motion to dismiss the defendant's motion for modification for lack of subject matter jurisdiction. On several occasions during the August 10, 2016 hearing on the parties' postdissolution motions, the court stated its view that it lacked jurisdiction to consider the motion for modification because the original prayer for relief

[2] After filing this appeal, the defendant filed a motion for articulation directed to several of the orders set forth in the court's August 31, 2016 memorandum of decision, including the award of attorney's fees to the plaintiff. The court summarily denied the motion for articulation. The defendant did not file a motion for review of the court's denial of the motion for articulation pursuant to Practice Book § 66-7.

improperly requested payment of child support to Kimberly Brignole, a nonparty. In its August 31, 2016 memorandum of decision, the court stated in relevant part: "There are several issues relevant to the defendant's [original prayer for relief], the most critical being that: (i) [the youngest child] is now [eighteen]; and (ii) [Kimberly Brignole] is not a party to this litigation. There exists a statutory provision to allow the payment of child support to a third party upon the 'change or transfer' of custody.[3] A change of custody, as contemplated by said statute, has not, and cannot occur in this matter as [the youngest child] is no longer a 'minor child' as set forth in General Statutes § 1-1d. This fact was apparently recognized by the defendant who filed a motion to intervene on behalf of [Kimberly Brignole] and then withdrew the motion prior to argument." (Footnote in original.) The court proceeded to grant the plaintiff's motion to dismiss the motion for modification, while simultaneously denying the motion for modification.

The defendant asserts that, irrespective of the specific relief requested in her motion for modification, the court had subject matter jurisdiction to entertain her motion pursuant to General Statutes §§ 46b-1[4] and 46b-86 (a).[5] During oral argument before this court,

[3] "[General Statutes § 46b-224 provides:] Whenever the Probate Court, in a guardianship matter under chapter 802h, or the Superior Court, in a family relations matter, as defined in section 46b-1, orders a change or transfer of the guardianship or custody of a child who is the subject of a preexisting support order, and the court makes no finding with respect to such support order, such guardianship or custody order shall operate to: (1) Suspend the support order if guardianship or custody is transferred to the obligor under the support order; or (2) modify the payee of the support order to be the person or entity awarded guardianship or custody of the child by the court, if such person or entity is other than the obligor under the support order."

[4] General Statutes § 46b-1 provides in relevant part: "Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving . . . (4) alimony, support, custody and change of name incident to dissolution of marriage . . . ."

[5] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony

the plaintiff's counsel expressly conceded that the trial court had subject matter jurisdiction over the motion for modification.[6]

"The applicable standard of review is well established. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Jungnelius* v. *Jungnelius*, 133 Conn. App. 250, 253–54, 35 A.3d 359 (2012).

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. 1 Restatement (Second), Judgments § 11. A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727–28, 724 A.2d 1084 (1999).

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or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ."

[6] In his appellate brief, the plaintiff argues that the court lacked subject matter jurisdiction and/or statutory authority to modify child support by directing child support payments to Kimberly Brignole. At oral argument, however, when asked whether the trial court had jurisdiction in this case, the plaintiff's counsel responded: "I think the court did have jurisdiction."

In *Amodio* v. *Amodio*, supra, 247 Conn. 727, 732, our Supreme Court reversed this court's judgment that concluded that the Superior Court lacked subject matter jurisdiction to entertain a motion to modify a child support order where, as this court had concluded, "the parties' dissolution decree unambiguously foreclosed modification of the support order unless the [husband] earned more than $900 per week, and the [husband's] financial affidavit indicated that his income had remained at that level." Our Supreme Court determined that § 46b-1 (4) vests the Superior Court with "plenary and general subject matter jurisdiction over legal disputes in 'family relations matters,' including alimony and support," and § 46b-86 (a) vests the Superior Court "with continuing jurisdiction to modify support orders." Id., 729. Our Supreme Court continued: "[T]ogether . . . [those] two statutes provided the court with subject matter jurisdiction over the modification claim in [that] case." Id., 729–30.

Applying the rationale set forth in *Amodio* to the present case, we conclude that the court had subject matter jurisdiction to entertain the defendant's motion for modification of child support, notwithstanding any defects in the original prayer for relief contained in the motion for modification.[7] Section 46b-1 (4) vested the court with plenary and general jurisdiction over child support in the underlying matter, and § 46b-86 (a) vested the court with continuing jurisdiction to modify the child support orders.[8] Thus, the court erred by granting the plaintiff's motion to dismiss the motion for modification for lack of subject matter jurisdiction.

[7] Separate and distinct from the question of whether the court had subject matter jurisdiction to entertain the defendant's motion for modification is the question of whether the court had the statutory authority to grant the defendant's requested relief. See *Amodio* v. *Amodio*, supra, 247 Conn. 730. We need not address that question because we conclude in part I B of this opinion that the portion of the defendant's appeal taken from the denial of the motion for modification is moot.

[8] In her principal appellate brief, the defendant also cites General Statutes § 46b-84 (b) for the proposition that the parties' youngest child was entitled

B

Having concluded that the court had subject matter jurisdiction to entertain the defendant's motion for modification, we next turn to the court's judgment denying the motion for modification. We do not reach the merits of whether the court improperly denied the motion for modification because we conclude, sua sponte, that the defendant's appeal from the denial of the motion for modification is moot.

"Even though the issue of mootness was not raised in the briefs . . . this court has a duty to consider it sua sponte because mootness implicates the court's subject matter jurisdiction. It is, therefore, a threshold matter to resolve. . . . It is axiomatic that if the issues on appeal become moot, the reviewing court loses subject matter jurisdiction to hear the appeal. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Sorrentino* v. *Sorrentino*, 160 Conn. App. 25, 30–31, 123 A.3d 1287, cert. denied, 319 Conn. 958, 125 A.3d 535 (2015).

According to the original prayer for relief in the defendant's motion for modification, the specific relief that

to receive child support directly from the parties. To the extent that the defendant argues that § 46b-84 (b) also vested the court with subject matter jurisdiction over her motion for modification, she cites to no authority in support of that proposition. Further, we need not address whether § 46b-84 (b) vested the court with subject matter jurisdiction to entertain the motion for modification in light of our conclusion that the court had subject matter jurisdiction pursuant to §§ 46b-1 (4) and 46b-86 (a).

the defendant sought was an order requiring the parties to pay recalculated child support to Kimberly Brignole, a nonparty. During the August 10, 2016 hearing on the parties' respective postdissolution motions, the defendant's counsel acknowledged that the original prayer for relief requested payment of child support to Kimberly Brignole. The defendant's counsel also commented that the purpose of filing the motion for modification was to terminate the defendant's child support obligation to the plaintiff. The court stated that the original prayer for relief was "flawed" because the court lacked jurisdiction to order the payment of child support to Kimberly Brignole as a nonparty. The court remarked that the defendant could file a revised motion for modification with an amended prayer for relief. Instead, the defendant's counsel orally requested permission to modify the original prayer for relief. The court did not respond to that request expressly. The defendant did not file a revised motion thereafter.

The defendant subsequently filed a so-called "Substituted Prayer for Relief re: Defendant's Motion for Modification, Post Judgment No. 208.00" eight days after the hearing on the parties' postdissolution motions. There is no suggestion in the record that the substituted prayer for relief was filed with the permission of the court. Further, the record does not reflect that the court was even made aware of the substituted prayer for relief prior to issuing its memorandum of decision. Indeed, in its memorandum of decision, the court construed the relief requested in the defendant's motion for modification to be "an order for the recalculation of child support payable directly to [Kimberly Brignole]." Accordingly, the only relief requested by the defendant that was considered by the court with respect to the motion for modification was the payment of recalculated child support to Kimberly Brignole.[9]

[9] We emphasize that the court was under no obligation to consider the substituted prayer for relief under these circumstances. The defendant could

During oral argument before this court, the defendant's counsel conceded that the trial court lacked the authority to order the payment of child support to a nonparty even if the court had subject matter jurisdiction to entertain the defendant's motion for modification. Counsel further represented that, by the time that the parties had argued the motion for modification before the trial court, the defendant had abandoned seeking payment of child support to Kimberly Brignole.

In light of the foregoing, we conclude that the portion of the defendant's appeal from the court's denial of her motion for modification is moot. That is, with respect to this claim on appeal, we can afford no practical relief to the defendant because she has abandoned pursuing the only relief requested that was properly before the trial court with respect to her motion for modification. See *Platt* v. *Newman*, 13 Conn. App. 205, 208, 534 A.2d 1259 (1988) (dismissing, as moot, appeal challenging denial of application for permanent injunction where, during oral argument before this court, plaintiff represented that she no longer sought injunctive relief but, rather, sought monetary relief, which trial court had not considered during proceedings before it).

II

We next consider the defendant's claim that the court improperly disposed of her motion for an accounting, wherein she had requested that the plaintiff submit an accounting of all conveyances with respect to the North Granby property from October 7, 2010 to the filing date of the motion. The court marked "Off/noted"[10] the motion for an accounting following its finding that the

have filed, but for whatever reason did not file, a revised motion containing a substituted prayer for relief that could have been noticed and heard.

[10] In their respective appellate briefs, the parties dispute the nature of the court's disposition of the motion for an accounting. The defendant contends that the court implicitly dismissed the motion, whereas the plaintiff argues that the court denied the motion.

parties had "agreed during argument that the motion for accounting was premature," as certain conditions precedent concerning the transfer of the North Granby lot to the defendant had not yet occurred. On appeal, the defendant primarily asserts that the parties never agreed that the motion for an accounting was premature and that, based on the terms of the parties' separation agreement, the motion for an accounting was ripe for adjudication. In response, the plaintiff argues, inter alia, that the defendant's claim as to the motion for an accounting is moot because he has provided the defendant with an informal accounting.

During oral argument before this court, the defendant's counsel represented that the defendant had received an informal accounting from the plaintiff and, consequently, that the defendant is no longer seeking a formal accounting. Given that the defendant is no longer seeking the relief requested in her motion for an accounting, there is no practical relief that we may afford her with respect to her motion for an accounting, and, therefore, we conclude that the defendant's appeal from the judgment disposing of the motion for an accounting is moot. See *Platt* v. *Newman*, supra, 13 Conn. App. 208.

III

We next consider the defendant's claim that the court improperly granted the plaintiff's motion to quash the subpoena duces tecum served on him by the defendant. Specifically, the defendant asserts that the subpoena sought documents that were subject to mandatory disclosure pursuant to Practice Book § 25-32 and that the plaintiff's refusal to provide the defendant with a financial affidavit was the only reason that the subpoena was served on the plaintiff.[11] In response, the plaintiff

[11] The subpoena duces tecum directed the plaintiff to produce various financial documents, including income tax returns and pay stubs.

argues, inter alia, that the defendant's claim as to the motion to quash is moot if we affirm the court's decision as to the defendant's motion for modification.

In their respective appellate briefs, the parties appear to dispute whether the subpoena duces tecum was served on the plaintiff in relation both to the defendant's motion for modification and her motion for an accounting, or in relation to the motion for modification only. In light of our conclusions previously in this opinion that the portions of the appeal challenging the denial of the motion for modification and the ruling on the motion for an accounting are moot, there is no practical relief that we may afford the defendant with respect to the motion to quash, and, therefore, we conclude that the defendant's appeal from the judgment granting the motion to quash is also moot.

IV

Finally, we consider the defendant's claim that the court improperly awarded the plaintiff $1500 in attorney's fees. Specifically, the defendant claims that the court failed to make the requisite findings in support of the attorney's fees award pursuant to the bad faith exception to the "American rule."[12] We agree.[13]

We first set forth the applicable standard of review and legal principles that guide our analysis of the defendant's claim. "It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount

[12] "The so-called American rule for the award of attorney's fees to the prevailing party bars such an award except as provided by statute or in certain defined exceptional circumstances . . . ." (Internal quotation marks omitted.) *Maris* v. *McGrath*, 269 Conn. 834, 835, 850 A.2d 133 (2004).

[13] The defendant also claims that the trial court improperly awarded the plaintiff attorney's fees under General Statutes § 46b-62. Section 46b-62 is not implicated here, as the plaintiff sought attorney's fees pursuant to the bad faith exception to the American rule only and the August 31, 2016 memorandum of decision makes no mention of § 46b-62.

of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . .

"As a substantive matter, [t]his state follows the general rule that, except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . .

"[A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle. . . . To ensure . . . that fear of an award of attorney's fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . . Thus, *Maris* [v. *McGrath*, 269 Conn. 834, 850 A.2d 133 (2004)] makes clear that in order to impose sanctions pursuant to its inherent authority, the trial court must find *both* [1] that the litigant's claims were entirely without color *and* [2] that the litigant acted in bad faith. . . .

"Significantly, our appellate courts have declined to uphold awards under the bad-faith exception absent

. . . a high degree of specificity in the factual findings of [the] lower courts." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Rinfret* v. *Porter*, 173 Conn. App. 498, 507–509, 164 A.3d 812 (2017).

In his motion for attorney's fees, the plaintiff requested that the court, pursuant to its inherent authority, award him attorney's fees for his defense against the defendant's motion for modification, the defendant's motion for an accounting, and the subpoena duces tecum that the defendant had served on him. He asserted in relevant part that the purpose of the defendant's motions and subpoena was to harass and to vex him, as well as to obtain information concerning his current financial circumstances improperly. During the August 10, 2016 hearing on the parties' respective postdissolution motions, the court heard argument on the motion for attorney's fees. The plaintiff submitted an affidavit regarding attorney's fees during the hearing. The court made no findings on the record with respect to the merits of the motion for attorney's fees.

In its August 31, 2016 memorandum of decision, the court sets forth no reasoning in support of the attorney's fees award entered in favor of the plaintiff, other than stating that the plaintiff was seeking attorney's fees "for the defense of the postjudgment motions that he deems without merit" and that an affidavit regarding attorney's fees had been submitted during the August 10, 2016 hearing. The decision contains no express findings, made with a high degree of specificity, that the defendant's claims with respect to her motions and the subpoena duces tecum served on the plaintiff were entirely without color and that the defendant had acted in bad faith.[14] See *Maris* v. *McGrath*, supra, 269 Conn. 845.

[14] In his appellate brief, the plaintiff argues that we should presume that the trial court correctly analyzed the law and facts in awarding him attorney's fees because the defendant has failed to provide us with an adequate record to review her claim that the attorney's fees award was improper, noting

Thus, the court's award of attorney's fees to the plaintiff pursuant to the bad faith exception to the American rule constitutes an abuse of discretion and must be vacated. See *Sabrina C.* v. *Fortin*, 176 Conn. App. 730, 751–57, 170 A.3d 100 (2017) (vacating award of attorney's fees in favor of plaintiff pursuant to bad faith exception to American rule where trial count found, inter alia, that defendant's filings were without any merit and were made for purpose of "victimiz[ing]" plaintiff but did not find with adequate specificity that defendant's claims were entirely without color and that defendant had acted in bad faith); *Light* v. *Grimes*, 156 Conn. App. 53, 59, 66–68, 111 A.3d 551 (2015) (vacating award of attorney's fees in favor of plaintiff pursuant to bad faith exception to American rule where trial court found that motion for modification filed by defendant was "wasteful" and "on the border of being frivolous" but did not find that defendant's claims were entirely without color and that defendant had acted in bad faith).

The judgment is reversed as to the granting of the plaintiff's motion to dismiss the defendant's motion for modification of child support and the award of attorney's fees to the plaintiff, and the case is remanded with direction to deny the motion to dismiss and to

that she failed to file a motion for review of the court's denial of her motion for articulation. See footnote 2 of this opinion. Alternatively, the plaintiff appears to argue that we must utilize our authority pursuant to Practice Book §§ 60-5 and 60-10 (b) to order the trial court to articulate the basis of the attorney's fees award if we determine that the trial court failed to make the requisite findings. We are not persuaded. As the relevant case law instructs, in awarding attorney's fees pursuant to the bad faith exception to the American rule, a trial court must find, with a high degree of specificity, that the litigant's claims were entirely without color and that the litigant had acted in bad faith. In the present case, there is no ambiguity in the record that the trial court failed to make the requisite findings in support of the attorney's fees award that the defendant's claims were entirely without color and that the defendant had acted in bad faith.

vacate the attorney's fees award; the remainder of the appeal is dismissed as moot.

In this opinion the other judges concurred.

KATHERINE B. PEIXOTO *v.* MARK M. PEIXOTO (AC 40599)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for a modification of alimony. The defendant claimed that the trial court, in modifying alimony, improperly construed the legal standards set forth by our Supreme Court in *Dan* v. *Dan* (315 Conn. 1), in which the court held that an increase in the supporting spouse's income, standing alone, ordinarily will not justify the granting of a motion to modify an alimony award unless the initial alimony award was insufficient to fulfill the underlying purpose of the award or if other exceptional circumstances exist. *Held* that the trial court did not abuse its discretion in granting the plaintiff's motion to modify alimony: although the purpose of the alimony award ordered by the court was unclear from the record, it was clear that the trial court found that exceptional circumstances existed that warranted a modification of the alimony award, as the dissolution court rendered its judgment with minimum knowledge as to the earnings or debts of the defendant because he did not appear or participate in the dissolution proceedings, or file a financial affidavit, an agreement of the parties was not presented to the dissolution court, which had been presented with inaccurate information regarding the defendant's income, and evidence submitted at the modification hearing demonstrated that the defendant's actual base salary at the time of the dissolution was approximately 20 percent more than previously thought; moreover, although the trial court recognized that the lack of a stipulated agreement in this case was different from the facts presented in *Dan*, where the parties had a stipulated agreement, the court did not hold that the proscription on upward modifications of alimony in *Dan* applied only when the parties entered into a stipulation on alimony at the time of the initial dissolution, as the court found other distinguishing factors that set this case apart from *Dan*, including the defendant's nonappearance in the dissolution case and the lack of any financial information for the defendant, the trial court properly determined that the evidence demonstrated a substantial change in circumstances warranting a modification of alimony, and the

defendant's claim that the trial court acted in contravention of the standards set forth in *Dan* was unavailing.

Argued May 24—officially released October 2, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Colin, J.*, granted the plaintiff's motion for modification of alimony and child support, and the defendant appealed to this court. *Affirmed.*

Barbara M. Schellenberg, with whom, on the brief, was *Rachel A. Pencu*, for the appellant (defendant).

Katherine B. Peixoto, the appellee (plaintiff), filed a brief.

Opinion

PELLEGRINO, J. The defendant, Mark M. Peixoto, appeals from the judgment of the trial court granting the postjudgment motion for modification of alimony filed by the plaintiff, Katherine B. Peixoto.[1] On appeal, the defendant claims that the court erred in granting the modification of alimony after it "improperly construed the legal standards set forth by the Connecticut Supreme Court in *Dan* v. *Dan*, [315 Conn. 1, 105 A.3d 118 (2014)]." We affirm the judgment of the trial court.

The following procedural history, along with the facts as found by the trial court, *Colin, J.*, inform our review. "The marriage of the parties was dissolved on December 2, 2014. At that time, the parties had been married for nearly nine years. They have two minor children

[1] The court also modified the defendant's child support obligation. The defendant, however, does not claim any error with respect to that portion of the judgment.

(now ages eleven and nine), who reside primarily with the plaintiff-mother in a two-family home in Westport . . . . Although the defendant resided in New Jersey at the time of the dissolution of marriage action, he did not file an appearance in the proceedings; thus, the matter proceeded as an unopposed hearing before the court . . . on December 2, 2014. A financial affidavit for the defendant was not filed at that time. The court entered certain financial orders.

"The defendant was ordered to pay (1) child support in accordance with the child support guidelines in the amount of $320 per week; (2) $240 per week for childcare expenses . . . which represented one half of the childcare expenses at that time; and (3) periodic alimony in the amount of $500 per month until the death of either party, the remarriage of the plaintiff, or December 31, 2019, whichever first occurs.

"The plaintiff now seeks an increase in these financial orders and alleges in her motion that '[a] substantial change of circumstances has arisen since the entry of the orders of the court on December 2, 2014, in that the defendant's income has significantly increased.' She now seeks (1) child support of $471 per week in accordance with the current child support guidelines; (2) 55 [percent] of the cost of childcare expense . . . and (3) $1500 per month in alimony. The plaintiff also seeks to have these increased orders become effective retroactively to the date of filing of her motion."[2]

[2] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate. . . . No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an

The court also found: "The current child support guidelines provide for a presumptive child support award of $471 per week from [the defendant to the plaintiff] and a division of unreimbursed medical expenses and childcare contributions as follows: 55 [percent] to be paid by [the defendant] and 45 [percent] to be paid by [the plaintiff]. This is based on the following net weekly incomes: $1350 for [the plaintiff] and $2683 by [the defendant].

"The [defendant's] net weekly income at the time of the divorce in December, 2014, was reported to be $1669. However, that understated the defendant's actual income. The child support guidelines worksheet submitted to the dissolution court was based on the defendant having a gross annual income of $125,000 per year. The defendant's actual base salary at that time was $150,000 per year. This is the same base annual salary that the defendant now earns from his current employment.

"The defendant's gross annual income in 2016 was $201,465. The dissolution court in 2014 assumed a gross annual income of $125,000. Thus, the plaintiff has demonstrated by a preponderance of the evidence that the defendant's income has substantially increased since the date of the dissolution of marriage in 2014. As a result, a modification of the current orders is appropriate.

"The parties' two minor children reside with [the plaintiff] in Westport . . . . The defendant is entitled to parenting time with them on alternating weekends as per the parenting plan . . . . The plaintiff's employment earnings have increased since the date of the

alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50. If a court, after hearing, finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82."

divorce from a gross annual income of $60,000 to a gross annual income of $66,000. Since the date of dissolution, she has purchased a two-family home and now receives rental income from two separate tenants. Her gross yearly income in 2016 as shown on her financial affidavit was $75,000."

Additionally, the court found: "The defendant has a greater income and earning capacity than the plaintiff . . . . Moreover, the dissolution court was not provided with a true and accurate picture of the defendant's actual income at that time. The defendant's failure to appear and participate in the dissolution action deprived the dissolution court of the type of information customarily utilized by the court at the time of a final hearing. . . . Finally, the court has also considered the assets and debts of the parties. The plaintiff has assets with a total value of $149,577 and debts of $64,489, and the defendant has total assets of $328,742 and debts of $41,030."

The court also considered whether the present case presented exceptional circumstances that warranted a modification. The court found that such exceptional circumstances existed, namely: "(1) the defendant failed to appear or participate in the dissolution proceeding; (2) the defendant failed to appear at the final hearing; (3) the defendant failed to file a financial affidavit at or before the time of the final dissolution hearing; (4) an agreement of the parties was not presented to the dissolution court; [and] (5) the dissolution court was presented with inaccurate information regarding the defendant's income . . . ."

On the basis of these explicit findings, the court granted the plaintiff's motion to modify alimony and child support. As to alimony, the court ordered: "Starting June 15, 2017, the defendant shall pay additional

alimony to the plaintiff in an amount equal to [15 percent] of the gross amount of his bonus income from employment within [thirty] days of his receipt of a bonus. The payment shall be accompanied by reasonable documentation necessary for the plaintiff to verify that she has received the correct amount. The defendant is eligible for $60,000 in bonus compensation from his current employer each year, which is paid in two installments (July and December). Assuming the defendant remains employed with his present employer at the same level of compensation for the next three years, and earns his maximum annual bonus of $60,000 per year, then the plaintiff will receive [15 percent] of $180,000 or $27,000, and the defendant will receive $153,000. These payments shall be taxable to the plaintiff and deductible by the defendant. This division of the defendant's bonus income, if, as and when he earns it, is fair and equitable under the circumstances of this case after consideration of all of the factors set forth in [General Statutes § 46b-82]."[3] This appeal followed.

On appeal, the defendant claims that the court "improperly construed the legal standards set forth by our Connecticut Supreme Court in *Dan* v. *Dan*, [supra, 315 Conn. 1]" and that this misconstruction caused the court to err by granting the plaintiff's motion for modification of alimony. The defendant argues in the first paragraph of his appellate brief: "The trial court's decision to modify alimony is in conflict with *Dan* . . . [a

[3] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

case] which . . . [holds] that courts rarely have discretion to grant an upward modification of alimony when the only change in circumstance, postjudgment, is the payor's increase in income. The absence of a written agreement between the parties was not a factor that materially distinguished the instant case from *Dan*. Neither was there any exceptional circumstance that allowed the trial court to exercise its discretion by modifying the original alimony award. Accordingly, the trial court's judgment should be reversed." We are not persuaded by these arguments.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . [T]he foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Internal quotation marks omitted.) *McKeon* v. *Lennon*, 321 Conn. 323, 341–42, 138 A.3d 323 (2016).

In support of his claim, the defendant relies on our Supreme Court's holding in *Dan*, which provides that "an increase in the supporting spouse's income, standing alone, ordinarily will not justify the granting of a motion to modify an alimony award." *Dan* v. *Dan*, supra, 315 Conn. 10. The defendant states that he does recognize, however, that also pursuant to *Dan*, the trial court retains discretion to modify an alimony award upon a

showing of a change in the payor's income if exceptional circumstances exist. See id., 17.

The defendant contends, nevertheless, that in this instance the trial court: (1) "erroneously determined that *Dan*'s proscription on upward modification of alimony applies *only* when the parties entered into a stipulation on alimony at the time of the initial dissolution"; (emphasis added); (2) "failed to appreciate that the circumstances of the case at bar present just the type of situation that is fully consistent with the policy expressed by the [court in *Dan*] . . . [and] the fact that [the] defendant did not participate in the dissolution proceedings, appear at the dissolution hearing, or that the parties did not present a written agreement to the court in December, 2014, should have had no bearing on Judge Colin's decision"; (citations omitted); and (3) "because it is clear that [the] plaintiff's financial needs were met at the time of the dissolution and continue to be met . . . the inaccurate information regarding [the] defendant's income [at the time of the dissolution judgment] should not have qualified as an 'exceptional circumstance' so as to negate the application of *Dan*'s general rule." We are not persuaded.

First, we disagree with the defendant's contention that the court "erroneously determined that *Dan*'s proscription on upward modification of alimony applies *only* when the parties entered into a stipulation on alimony at the time of the initial dissolution." (Emphasis added.) We do not read the court's decision so narrowly. Rather, it is quite clear that although the court recognized that the lack of a stipulated agreement in this case was different from the facts presented in the *Dan* case, where the parties had a stipulated agreement, that single factor was not the only distinguishing factor found by the court. Indeed, the court also found that the defendant's nonappearance in his dissolution case, and the lack of any financial information or a financial

affidavit from the defendant were further distinguishing factors. The defendant's failure to appear and to submit *any* financial information to the dissolution court left that court and the plaintiff ill-informed as to the defendant's actual income and expenses. The dissolution court itself specifically stated that it was entering its award "with minimum knowledge on the part of the court as far as what the defendant earns and owes . . . ." Accordingly, we agree with the trial court that these factors distinguish this case from the facts presented in *Dan*.

Second, we disagree with the defendant's contention that the court "failed to appreciate that the circumstances of the case at bar present just the type of situation that is fully consistent with the policy expressed by the [court in *Dan*] . . . [and] the fact that [the] defendant did not participate in the dissolution proceedings, appear at the dissolution hearing, or that the parties did not present a written agreement to the court in December, 2014, should have had no bearing on Judge Colin's decision." (Citations omitted.) As explained in the previous paragraph, Judge Colin found it relevant that the dissolution court rendered its judgment, including alimony orders, with "minimum knowledge" as to the earnings or debts of the defendant because the defendant did not appear or participate in the dissolution proceedings. We agree with Judge Colin that this fact and the fact that evidence was presented at the modification hearing that demonstrated that the defendant had substantially more earnings, nearly 20 percent more, at the time of the dissolution than was known were important considerations in addressing the merits of the motion to modify alimony. These were also distinguishing factors from the facts present in *Dan*.

Third, we disagree with the defendant's contention that the court did not consider the policy expressed in *Dan* "because it is clear that [the] plaintiff's financial

needs were met at the time of the dissolution and continue to be met . . . .'' At the time the dissolution court rendered judgment and entered its alimony orders, however, it did not state whether the alimony award was to allow the plaintiff to continue to share in the defendant's standard of living after the divorce or whether it was to provide the plaintiff with the same standard of living that she had enjoyed during the marriage. We agree with the defendant that in *Dan*, our Supreme Court held that an increase in income, standing alone, does not justify a modification of an alimony award unless the initial alimony award was insufficient to fulfill the underlying purpose of the award; *Dan* v. *Dan*, supra, 315 Conn. 15–16; or if other exceptional circumstances exist. Id., 17.

More recently, however, in *Cohen* v. *Cohen*, 327 Conn. 485, 500–501, 176 A.3d 92 (2018), our Supreme Court also explained: ''[T]his court held in *Dan* that the trial court should consider the purpose of the original alimony award when determining whether an increase in the supporting spouse's income, standing alone, justifies a modification. See *Dan* v. *Dan*, supra, 315 Conn. 11–15. In the present case, the original alimony award in the separation agreement unambiguously provided that the defendant would pay the plaintiff a percentage of his income, up to a maximum of $250,000 annually. The agreement did not indicate, however, whether the purpose of the award was to allow the plaintiff to continue to share in the defendant's standard of living after the divorce or, instead, to provide her with the same standard of living that she had enjoyed during the marriage. If the defendant's income prior to the divorce had been steady over a long period of time and the parties anticipated that he would have a similar income for the foreseeable future, it would be reasonable to conclude that the purpose of the original alimony award was simply to maintain the plaintiff's standard of living.

On the other hand, if the defendant's income had fluctuated widely from year to year before the divorce, it would be reasonable to conclude that the purpose of the award was to allow the plaintiff to continue to share in the defendant's income after the divorce, in both bad times and good times. Because the separation agreement itself was silent on this point, we conclude that the trial court properly considered extrinsic evidence . . . . " *Cohen* v. *Cohen*, supra, 500–501.

In the present case, the dissolution court gave no indication as to the purpose of the alimony award to the plaintiff. We know that the award was based on the assumed gross income of the defendant, who had been nonappearing, of $125,000, with no information as to the defendant's net income. The plaintiff's financial affidavit demonstrated that, at the time of the dissolution, her gross wages were $60,008, and her mandatory deductions were $11,440. She listed her expenses as $73,424. In accordance with her request, the dissolution court awarded alimony in the amount of $6000 per year.

Evidence submitted at the modification hearing demonstrates that the defendant's actual base salary at the time of the dissolution was $150,000, approximately 20 percent more than previously thought. His gross income in 2016 was $201,465, which consisted of a base salary of $150,000 plus bonus income, and he listed mandatory deductions in the amount of $70,876. The defendant also listed his expenses as $109,876, which included alimony and child support expenses. The court found that the plaintiff's gross income in 2016 was $66,000 from salary and $9,000 from rental income. Her financial affidavit also reveals approximately $10,000 in bonus income. She lists her mandatory deductions as $14,560, and her expenses as $105,872. The court found that all of these facts demonstrated a substantial change in circumstances. We agree with that conclusion.

In *Dan*, our Supreme Court held that it was permissible for a court to order an upward modification of alimony on the basis of an increase in the payor's income if either: (1) the initial alimony award was insufficient to fulfill the underlying purpose of alimony; or (2) the court finds that other exceptional circumstances exist. *Dan* v. *Dan*, supra, 315 Conn. 15–17. Although the purpose of the alimony award ordered by the dissolution court may be unclear from the record, what is clear is that Judge Colin, after an evidentiary hearing, a review of the dissolution transcript and decision, and in full consideration of *Dan*, found that exceptional circumstances exist in this case that warrant a modification of the alimony award. We find no abuse of discretion in that conclusion. On the basis of the foregoing, we conclude that the defendant's claim that the trial court acted in contravention of the standard and the holding established by our Supreme Court in *Dan*, thus, is unavailing.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 185

OMAR KNOTT *v.* COMMISSIONER OF CORRECTION
(AC 40797)

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

Argued September 18—officially released October 2, 2018

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

Per Curiam. The appeal is dismissed.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 185

(Replaces Prior Cumulative Table)

Adkins *v.* Commissioner of Correction 139
Habeas corpus; ineffective assistance of counsel; motion to withdraw guilty plea; whether habeas court improperly rejected claim that prior habeas counsel rendered ineffective assistance by failing to raise claim that trial counsel rendered ineffective assistance by failing to advise petitioner with respect to his right to appeal from denial of motion to withdraw guilty plea; whether petitioner demonstrated that nonfrivolous ground for appeal of motion to withdraw guilty plea existed; whether petitioner demonstrated that trial counsel had constitutional obligation to advise him about his right to appeal; reviewability of claim that habeas court improperly rejected claim that prior habeas counsel rendered ineffective assistance by failing to present evidence in support of claim that petitioner's guilty plea was result of trial counsel's ineffective assistance; whether habeas court improperly rejected claim that prior habeas counsel rendered ineffective assistance by failing to claim in prior habeas action that trial counsel's conflict of interest resulted in petitioner's guilty plea; whether habeas court improperly determined that petitioner had waived conflict of interest claim; whether habeas court's factual finding concerning voluntariness of petitioner's guilty plea was supported by evidence in record.

Bongiorno *v.* Capone 176
Contracts; statutory theft; claim that breach of contract count should have been dismissed by trial court for lack of subject matter jurisdiction; claim that plaintiff had no standing to bring breach of contract claim because it was limited liability company, and not plaintiff, that suffered any damages as result of defendant's withdrawal from checking account owned by limited liability company; whether trial court lacked subject matter jurisdiction over statutory theft claim; whether statutory theft claim should have been dismissed rather than decided on substantive merits; whether plaintiff lacked standing to bring statutory theft claim in his individual capacity; reviewability of unpreserved claim that trial court erred in rendering judgment in favor of plaintiff on breach of contract claim without making conclusions of law regarding applicability of waiver provisions in settlement agreement.

Boria *v.* Commissioner of Correction (Memorandum Decision). 901

Brochard *v.* Brochard 204
Dissolution of marriage; claim that trial court abused its discretion in denying motion for contempt that was based on plaintiff's alleged failure to pay his share of minor children's unreimbursed medical and extracurricular activity expenses; claim that trial court improperly denied motion for contempt in which defendant alleged that plaintiff had violated certain court orders related to mortgage on parties' former marital home; preclusion of claim under doctrine of res judicata; claim that trial court improperly determined that dissolution court had not ordered plaintiff to pay four months of past due mortgage payments and interest; claim that trial court improperly declined to hold plaintiff in contempt for having failed to pay defendant one half of tax refunds he received from individual federal and state tax returns for 2010; claim that trial court abused its discretion in denying motion to modify order that allocated parties' obligation to pay guardian ad litem's fees; whether defendant failed to prove substantial change in circumstances since court's allocation of parties' obligation to pay guardian ad litem's fees that necessitated reduction in defendant's 20 percent share of payment of fees; claim that trial court abused its discretion in reducing plaintiff's child support obligation; claim that trial court improperly failed to hear defendant's cross motion for modification of child support; claim that trial court improperly failed to order plaintiff to pay to defendant full amount of past due alimony for 2012.

Carolina *v.* Commissioner of Correction (Memorandum Decision) 902

Dahle *v.* Stop & Shop Supermarket Co., LLC 71

Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner dismissing plaintiff's claim that she was entitled to temporary total disability benefits without social security offset pursuant to statute ([Rev. to 2003] § 31-307 [e]); claim that plaintiff should have been awarded benefits without social security offset because errors and delays by commissioner and board resulted in delay in obtaining compensation, which made her subject to offset; whether board erred by refusing to address plaintiff's attempt to correct past incorrect evidence and to introduce new evidence to prove that delays beyond her control made her subject to social security offset; whether board erred by failing to address commissioner's alleged statement that plaintiff's medical treatment was delayed; whether board erred in affirming commissioner's denial of plaintiff's request for financial compensation without social security offset.

Dubinsky *v.* Black 53

Legal malpractice; malicious prosecution; risk of injury to child; whether trial court erred in granting motion for summary judgment on ground that there was probable cause to charge plaintiff with crimes of assault and risk of injury to child; claim that arresting officers lacked probable cause in light of parental justification defense under statute (§ 53a-18 [1]); claim that trial court erred in granting motion for summary judgment because arresting officers fabricated claim that defendant left red welts on son's backside; whether plaintiff could demonstrate that he would have been entitled to judgment in malicious prosecution action against arresting officers but for defendant's professional negligence.

Errichetti *v.* Botoff 119

Malicious erection of fence; injunction; claim that trial court erred by ordering defendants to restore area to previous condition; whether trial court properly determined that plaintiff was entitled to injunction pursuant to statute (§ 52-480); challenge to trial court's subordinate findings in support of its determination that defendants erected fence maliciously and with intent to injure plaintiff's enjoyment of land; whether trial court's finding of absence of any real usefulness of fence was clearly erroneous; credibility of witnesses; whether trial court erred with respect to finding that fence did not fit with character of neighborhood; whether plaintiff clearly requested restoration relief in complaint; whether there was anything in record demonstrating that plaintiff ever abandoned restoration relief; whether relief ordered by trial court fell within statutory authority conferred by § 52-480; whether trial court's order was vague.

Fredo *v.* Fredo 252

Dissolution of marriage; motion to dismiss; motion for modification of child support; motion for accounting; motion to quash subpoena duces tecum; motion for attorney's fees; subject matter jurisdiction; whether trial court improperly granted motion to dismiss motion for modification of child support for lack of subject matter jurisdiction; whether trial court had subject matter jurisdiction to entertain motion for modification of child support pursuant to applicable statutes (§§ 46b-1 [4] and 46b-86 [a]); reviewability of claim that trial court improperly denied motion for modification of child support; whether claim was moot because there was no practical relief that this court could afford defendant; whether portions of appeal from trial court's judgment disposing of motion for accounting and granting motion to quash subpoena duces tecum were moot; whether trial court abused its discretion by awarding plaintiff $1500 in attorney's fees pursuant to bad faith exception to general rule that prevailing party is ordinarily not entitled to collect attorney's fees from losing party; failure of trial court to make requisite findings in support of its award of attorney's fees.

Knott *v.* Commissioner of Correction (Memorandum Decision) 902

Peixoto *v.* Peixoto 272

Dissolution of marriage; postjudgment modification of alimony; whether trial court abused discretion in granting motion for modification of alimony; claim that trial court, in modifying alimony, improperly construed legal standards set forth in Dan *v.* Dan *(315 Conn. 1); whether it was clear that trial court found that exceptional circumstances existed that warranted modification of alimony award; claim that trial court improperly held that proscription on upward modifications of alimony applied only when parties entered into alimony stipulation at time of initial dissolution; whether, at time of dissolution, trial court gave*

indication as to purpose of alimony award to plaintiff; whether evidence submitted at modification hearing demonstrated substantial change in circumstances.
State *v.* Carter (Memorandum Decision) 902
State *v.* Milledge (Memorandum Decision) 901
State *v.* Papantoniou 93
Felony murder; burglary in first degree; criminal possession of firearm; unpreserved claim that prosecutor's alleged generic tailoring argument in closing remarks to jury violated defendant's rights under state constitution to be present at trial and to confront witnesses against him; claim that certain comments of prosecutor violated defendant's rights to due process and fair trial; claim that prosecutor's alleged generic tailoring remarks deprived defendant of general due process right to fair trial.
State *v.* Ruiz-Pacheco 1
Assault in first degree; attempt to commit murder; conspiracy to commit assault in first degree; unpreserved claim that conviction of two counts each of assault in first degree as principal and as accessory violated defendant's right against double jeopardy; claim that conviction of accessory counts should be vacated; whether acts of stabbing victims were susceptible of separation into distinct criminal acts for which defendant could be punished without violating principles of double jeopardy; whether jury reasonably could have determined that defendant was guilty as principal actor for stab or stabs he inflicted on one victim and as accessorial actor for intentionally aiding in nearly simultaneous stab or stabs defendant's brother inflicted on same victim; unpreserved claim that trial court's jury instructions on attempted murder deprived defendant of fair trial, where court utilized phrase, "engaged in anything," in three instances, read full statutory definition of general and specific intent, and allegedly failed to adequately define substantial step element for attempt; whether separate claims of error taken together deprived defendant of fair trial; unpreserved claim that trial court improperly instructed jury on defenses of self-defense and defense of others, and on lesser included offenses of assault in second degree and assault in third degree because court's instructions on self-defense permitted jury to consider lesser included offenses if state failed to disprove self-defense beyond reasonable doubt; waiver of right to challenge jury instructions; whether jury instructions constituted obvious and undebatable error so as to establish manifest injustice or fundamental unfairness pursuant to plain error doctrine; claim that multiple instances of prosecutorial impropriety during closing arguments deprived defendant of fair trial; whether prosecutor argued facts that were not in evidence or improperly appealed to emotions of jurors.
Varoglu *v.* Sciarrino 84
Dissolution of marriage; claim that trial court improperly found that plaintiff had purchased condominium by using funds from loan that was secured by marital home; claim that trial court improperly failed to award plaintiff more than 40 percent of net proceeds from sale of marital home; claim that trial court, in fashioning orders pertaining to distribution of equity in marital home, failed to adequately take into account plaintiff's role in preserving marital property.
Wiggins *v.* Commissioner of Correction (Memorandum Decision) 901

NOTICES OF CONNECTICUT STATE AGENCIES

State of Connecticut
Connecticut State Dental Commission

Notice of Hearing

The Connecticut State Dental Commission will hold a hearing on November 28, 2018, at the Legislative Office Building, 300 Capitol Avenue, Hartford, Connecticut commencing at 9:30 a.m., in Hearing Room 1-B, for the purpose of issuing a declaratory ruling. The subject of the declaratory ruling is as follows:

Is it within the scope of practice of dentistry in the State of Connecticut for dentists licensed in Connecticut to perform point of care HbA1c testing?

The Connecticut State Dental Commission (''the Commission'') has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Connecticut General Statute § 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing, and may also be utilized by the Connecticut State Dental Commission, on a case by case basis, in future proceedings before it.

September 24, 2018

Jeanne P. Strathearn, DDS
Chairperson
Connecticut State Dental Commission
410 Capitol Avenue, MS# 13PHO
PO Box 340308
Hartford, CT 06134-0308

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. 2018-4, September 20, 2018

Question Presented: **Petitioner asks whether a professor at the University of Connecticut Health Center may—at the request of a law firm for which he has previously performed work in his state capacity (including work involving the matter at issue)—serve as an expert evaluator and witness in a lawsuit ''brought against several individuals in their individual capacity [and not against the State itself] based on their actions while they were State employees employed by the State Department of Correction . . . .''**

Brief Answer: **Based on the facts presented, we conclude that the professor may serve as an expert evaluator and witness in the lawsuit—in either his personal or state capacity—provided that he receives no compensation or other financial gain for doing so.**

At its August 2018 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Attorney Donald R. Seifel, Jr. The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials[1] (Code), is binding on the Board concerning the person who requested it and who acted in good-faith reliance thereon, and is based on the facts provided by the petitioner.

Facts

The following facts, as set forth by the petitioner, are relevant to this opinion:

> I represent Dr. Julian Ford who is a full-time professor in the Department of Psychiatry at the University of Connecticut Health Center. Dr. Ford has specialized expertise as a licensed clinical psychologist in an area within the field of psychiatry and is a nationally and internationally recognized expert in the diagnosis and treatment of traumatic stress (currently the President-elect of the International Society for Traumatic Stress Studies). Dr. Ford has been asked to serve as both an expert evaluator and expert witness by a plaintiff's law firm on several cases that are directly related to his area of expertise.
>
> As part of Dr. Ford's employment with the State of Connecticut (''State''), he has conducted interviews with four of that law firm's clients and for each client has provided the law firm a report documenting his findings, as well as testifying as an expert witness in court and in depositions for two of the firm's cases. Dr. Ford has performed these interviews as well as serving as an expert witness in court and depositions

[1] Chapter 10, part I, of the General Statutes.

with the prior knowledge and consent of Dr. David Steffen, his supervisor and Chair of the Department of Psychiatry at the University of Connecticut Health Center. In each instance, the University of Connecticut Health Center invoiced the law firm with respect to the interview fees as well as the expert testimony fees and all such fees were subsequently paid directly to the University of Connecticut Health Center in support of Dr. Ford's faculty appointment, and at no time did Dr. Ford receive any direct economic or other remuneration.

Dr. Ford has now been asked by the same law firm to conduct a second evaluation with one of its clients and to serve as an expert witness for the plaintiff in that personal injury case regarding the psychological trauma which the plaintiff suffered as a result of being assaulted at the York Correction facility. Again, Dr. Ford is employed by the University of Connecticut Health Center. The plaintiff's suit is being brought against several individuals in their individual capacity based on their actions while they were State employees employed by the State Department of Corrections and ostensibly supervising various other State Department of Correction employees that assaulted the plaintiff while she was incarcerated at the York Correction facility. The underlying State Department of Correction employees have all admitted that the assault against the plaintiff occurred. The State is not a named defendant in this case; however, the State through the Attorney General's Office may intend to represent the individual defendants and may indemnify these individuals per Connecticut General Statutes Section 5-141 d. should a jury find against them in the plaintiffs personal injury suit.

Analysis

As to whether Dr. Ford is subject to the Code, the term ''State employee'' is defined therein to include, among others, ''any employee in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . . .'' General Statutes § 1-79 (13). Dr. Ford is (in the petitioner's words) a ''full-time professor in the Department of Psychiatry at the University of Connecticut Health Center'' (UCHC), which—according to the Connecticut State Register and Manual (2017)—is an executive-branch state agency. Clearly, then, he is a ''State employee,'' meaning that he is subject to the Code, including its provisions pertaining to outside employment.

Among those provisions is General Statutes § 1-84 (d), to which the petitioner directs our attention, suggesting that Dr. Ford fits within one of its exceptions. The lengthiest of the Code's conflict provisions, § 1-84 (d) contains two general restrictions:

1. A state employee may not ''agree to accept . . . any employment, fee or other thing of value, or portion thereof, for appearing, agreeing to appear, or taking any other action on behalf of another person'' before the 11 enumerated state regulatory agencies.[2]

[2] The 11 state regulatory agencies listed in § 1-84 (d) include:

> the Department of Banking, the Office of the Claims Commissioner, the Office of Health Care Access division within the Department of Public Health, the Insurance Department, the Department of Consumer Protection, the Department of Motor Vehicles, the State Insurance and Risk Management Board, the Department of Energy and Environmental Protection, the Public Utilities Regulatory Authority, the Connecticut Siting Council or the Connecticut Real Estate Commission . . . .

2. A state employee may not ''be a member or employee of a partnership, association, professional corporation or sole proprietorship which [entity] . . . agrees to accept any employment, fee or other thing of value, or portion thereof, for appearing, agreeing to appear, or taking any other action on behalf of another person'' before the 11 enumerated state regulatory agencies.

As for second restriction, there are no facts before us suggesting that, in performing the proposed work for the law firm, Dr. Ford would become one of its ''member[s] or employee[s].'' That said, even if the law firm is in the business of representing clients before any of the 11 enumerated state regulatory agencies, the second restriction is not triggered here. Nor is the first restriction triggered, as it applies only to compensated appearances and actions *before the 11 enumerated state regulatory agencies*—none of which are involved here. That is, the proposed work would involve Dr. Ford appearing—not before any of those agencies—but before the Superior Court in a personal-injury case. Given, then, that neither of § 1-84 (d)'s restrictions is triggered here, there is no need for us to determine whether Dr. Ford satisfies any of its exceptions.

Even so, Dr. Ford's proposed work for the law firm must still be analyzed in the light of the Code's principal outside-employment provisions, subsections (b) and (c) of § 1-84. Under § 1-84 (b), a state employee may not ''accept other employment which will either impair his independence of judgment as to his official duties or employment . . . .'' And under § 1-84 (c), a state employee may not ''use his public office or position . . . to obtain financial gain for himself . . . .'' Subsections (b) and (c) of § 1-84 ''do not prohibit a state employee from using his . . . expertise, including expertise gained in state service, for personal financial gain as long as no provision of the Code . . . is violated. . . .'' Regs., Conn. State Agencies § 1-81-17.

Those provisions were applied to somewhat similar situations in a few informal staff opinions issued by the former State Ethics Commission (SEC):

- *SEC Request for Advisory Opinion No. 0891 (1992)*: A supervising chemist at the Department of Health Services Laboratory asked if he could ''accept outside employment as a consultant and expert witness in the area of forensic science,'' and the answer was this: ''[Y]ou might be able to provide expert testimony in a civil action between two private parties involving a car accident, in which the cause of action is in dispute. *As long as the state clearly has no substantial interest in the matter*, your expert testimony would not violate the . . . Code.'' (Emphasis added.)

- *SEC Request for Advisory Opinion No. 1286 (1994)*: An employee of the Department of Mental Retardation (DMR) asked whether she could ''accept outside employment as a consultant in a lawsuit, brought by the parents of a DMR client who died a few years ago, against the treating doctor and hospital,'' and the answer (in relevant part) was this: If ''the attorney has asked you to participate *because your presence might appear to lend the imprimatur of the DMR to his suit*, your acceptance of the employment would be an improper use of office for financial gain.'' (Emphasis added.)

- *SEC Request for Advisory Opinion No. 3068 (2002)*: An assistant attorney general asked if a training officer with the Connecticut Police Academy could accept outside employment as an expert witness in a case against the State of Connecticut brought by ''the estate . . . of a man who died while undergo-

> ing pre-employment physical assessment testing for the Department of Corrections,'' and the answer (in relevant part) was this: ''[I]it is apparent from his resume that [the training officer] has significant experience testifying as an expert witness. However, it is equally apparent that *[his] position with the State will add credibility to his work for the Estate, especially where, as in this case, the Estate is making a claim against [his] ultimate employer, the State of Connecticut*. Consistent with that notion, there is little doubt in my mind that *at least one of the reasons that the Estate hired [the training officer] is because of his State position*, i.e., his State position adds credibility to his testimony in support of a claim against the state.'' (Emphasis added.)

Here, although the State of Connecticut is not a named defendant in the lawsuit, the case involves *state* employees and their supervision of other *state* employees at a *state* facility. Indeed, the petitioner notes that the ''State through the Attorney General's Office may intend to represent the individual defendants and may indemnify these individuals . . . should a jury find against them in the plaintiff's personal injury suit.'' That said, we certainly cannot say (in the words of the first informal staff opinion discussed above) that ''the state clearly has no substantial interest in the matter.'' Not only that, it can be argued (to paraphrase the third informal staff opinion) that Dr. Ford's position with the State ''will add credibility to his work for'' the law firm and its client, especially given that the lawsuit involves state employees and a state facility. It also can be argued (in the words of the second informal staff opinion) that Dr. Ford's ''presence might appear to lend the imprimatur of'' the UCHC to the lawsuit.

We need not decide, though, whether those factors alone would constitute a use-of-office violation under § 1-84 (c), for there is another factor that tips the scales decisively in that direction: that Dr. Ford has already performed work for this law firm—indeed, work involving the very client at issue—and has done so (says the petitioner) ''[a]s part of [his] employment with the State . . . .'' That is, *in his capacity as a UCHC employee*, Dr. Ford ''has conducted interviews with four of that law firm's clients and for each client has provided the law firm a report documenting his findings, as well as testifying as an expert witness in court and in depositions for two of the firm's cases.'' And now, the law firm has asked him ''to conduct *a second evaluation* with one of its clients and to serve as an expert witness for the plaintiff in that personal injury case . . . .'' (Emphasis added.) For him to switch hats now and perform such work as outside ''employment'' would, we believe, constitute a use of office in violation of § 1-84 (c), particularly when combined with the other factors discussed above.

But our inquiry does not end there, for the term ''employment,'' as used in our outside-employment provisions, is defined by way of regulation as follows:

> the term employment shall be construed to include any work or endeavor, whatever its form, undertaken *in order to obtain financial gain* (e.g., employee of a business, sole practitioner, independent contractor, investor, etc.). The term shall not, however, include any endeavor undertaken only as a hobby or solely for charitable, educational, or public service purposes, when no compensation or other financial gain for the individual . . . is involved.

(Emphasis added.) Regs., Conn. State Agencies § 1-81-14. Here, then, there would be no violation of § 1-84 (c) if Dr. Ford were to undertake the proposed work for the law firm—in either his private or state capacity—''for no compensation or other financial gain . . . .'' After all, ''[t]he conflict of interest provisions of the Code

. . . are all grounded on one rationale: public service is a public trust and must not be used for personal financial gain. *Absent this requisite gain, the tenets of the Code do not apply and the jurisdiction of [this office] is lacking*.'' (Emphasis added.) Advisory Opinion No. 91-4.

Conclusion

Based on the facts presented, we conclude that Dr. Ford may, without violating the Code, serve as a consultant and expert witness in the lawsuit—in either his personal or state capacity—provided that he receives no compensation or other financial gain for doing so.

By order of the Board,

Dated 9/20/2018

/s/ Dena M. Castricone
Chairperson

Notice of Reprimand of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by reviewing committees of the Statewide Grievance Committee:

Reviewing Committee Reprimand

August 10, 2018: Thomas Patrick Willcutts, Hartford, Connecticut – 302886

Copies of the full text of the decision of the Statewide Grievance Committee is available through the Committee's offices at Second Floor, Suite Two, 287 Main Street, East Hartford, Connecticut 06118-1885. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Michael P. Bowler
Statewide Bar Counsel