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CONNECTICUT REPORTS

Vol. 330

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

COMMISSIONER OF EMERGENCY SERVICES AND PUBLIC PROTECTION ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
(SC 19852)
(SC 19853)

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

Syllabus

Pursuant to statute (§ 1-210 [a]), "[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to . . . receive a copy of such records . . . ."

The plaintiffs, the Commissioner of Emergency Services and Public Protection and the Department of Emergency Services and Public Protection, appealed from the decision of the named defendant, the Freedom of Information Commission, ordering the disclosure, pursuant to the Freedom of Information Act (§ 1-200 et seq.), of certain documents to the defendant newspaper and the defendant reporter. The documents related to a high profile school shooting in this state and were lawfully seized as part of a criminal investigation. In ordering disclosure, the commission concluded that, in light of heightened public interest in the shooting, the documents related to the conduct of the public's business, and, therefore, constituted public records under the act. The commission also concluded that the plaintiffs had failed to prove that the documents were otherwise exempt from disclosure. On appeal from the commission's decision, the trial court concluded that the documents constituted public records under the act because they related to the conduct of the public's business. The trial court further concluded, however, that the statutes (§§ 54-33a through 54-36p) governing searches and seizures by the police shielded from disclosure all seized property not used in a

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

criminal prosecution, and, therefore, the state law exception set forth in § 1-210 (a) was satisfied. The trial court thus determined that the documents were exempt from disclosure and rendered judgment sustaining the plaintiffs' administrative appeal, from which the defendants appealed. *Held*:

1. The trial court incorrectly concluded that the requirements of the state law exception set forth in § 1-210 (a) were satisfied and that the documents, therefore, were exempt from disclosure under that exception: the search and seizure statutes are entirely silent on the issues of confidentiality, copying, and disclosure to the public and, accordingly, could not form the basis for an exception under § 1-210 (a), as this court's review of relevant case law established that, in order for the "otherwise provided . . . by state statute" language in § 1-210 (a) to apply, the underlying statute, by its express terms, must address confidentiality or otherwise limit the disclosure, copying, or distribution of the documents at issue; moreover, although limiting the disclosure of seized documents to protect the privacy of their owner may be preferable, particularly if a criminal proceeding does not ensue, this court could not impose a duty of confidentiality or a restriction on disclosure that was not expressly required by the search and seizure statutes, and this court's conclusion was also supported by the statute (§ 1-215 [b]) regulating the disclosure of personal possessions seized during an arrest and by the statute (§ 1-210 [b] [3]) providing other detailed exemptions for records of law enforcement agencies.
2. The plaintiffs could not prevail on their claim that the judgment of the trial court could be affirmed on the alternative ground that the documents were not subject to disclosure because they did not constitute public records under the act; documents that are not created by an agency but come into its possession because there was probable cause to believe that they constitute evidence of a criminal offense relate to the conduct of the public's business and, therefore, constitute public records within the meaning of the act.

Argued March 1—officially released October 30, 2018

Procedural History

Appeal from the decision of the named defendant determining that the named plaintiff et al. had violated the requirements of the Freedom of Information Act and ordering, inter alia, that they comply with those requirements by disclosing certain records to the defendant The Hartford Courant Company et al., brought to the Superior Court in the judicial district of New Britain, where the court, *Schuman*, *J.*, granted the motion to intervene as a plaintiff filed by the Division of Criminal

Justice; thereafter, the case was tried to the court, *Schuman, J.*; judgment sustaining the appeal, from which the named defendant and the defendant The Hartford Courant Company et al. filed separate appeals, which were subsequently consolidated. *Reversed*; *judgment directed.*

Victor R. Perpetua, principal attorney, for the appellant (named defendant).

William S. Fish, Jr., with whom, on the brief, was *Alexa T. Millinger*, for the appellants (defendant The Hartford Courant Company et al.).

Steven M. Barry, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, and *Jane R. Rosenberg*, solicitor general, for the appellees (named plaintiff et al.).

Opinion

MULLINS, J. The central issue in this appeal is whether the search and seizure statutes, General Statutes §§ 54-33a through 54-36p, provide a basis for an exemption from the disclosure requirements of the Freedom of Information Act (act), General Statutes § 1-200 et seq. Specifically, we must decide whether the trial court improperly concluded that the search and seizure statutes satisfy the requirements set forth in General Statutes § 1-210 (a),[1] which exempts docu-

[1] General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ."

Although § 1-210 has been amended several times since the events underlying the present appeal; see, e.g., Public Acts 2017, No. 17-211, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

ments from disclosure under the act that are "*otherwise provided by any federal law or state statute . . . .*" (Emphasis added.) We conclude that the search and seizure statutes do not meet the requirements set forth in § 1-210 (a) and, accordingly, reverse the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to the present appeal. In January, 2014, the plaintiffs, the Commissioner of Emergency Services and Public Protection and the Department of Emergency Services and Public Protection,[2] received a request under the act from the defendant The Hartford Courant Company (Courant), and its reporter, the defendant David Altimari. In this request, the Courant and Altimari sought copies of certain documents referred to in the report prepared by the Connecticut State Police on the shooting that took place at Sandy Hook Elementary School on December 14, 2012. More specifically, the trial court's memorandum of decision notes that this request sought, inter alia, the following documents from the department: a spiral bound book written by the shooter, Adam Lanza, entitled "The Big Book of Granny," "a photo of the class of 2002–2003 at Sandy Hook Elementary School," and a "spreadsheet ranking mass murders by name, number killed, number injured, types of weapons used, and disposition." (Internal quotation marks omitted.)

The department did not file a timely response to this request. As a result, the Courant and Altimari filed a complaint with the named defendant, the Freedom of Information Commission (commission). After they filed

[2] Because the Commissioner of Emergency Services and Public Protection acts through the Department of Emergency Services and Public Protection, for the sake of simplicity, we refer to them collectively as the department hereinafter. We further note that, as discussed subsequently in this opinion, the Division of Criminal Justice filed a motion to intervene as a party plaintiff in the present case, which was granted by the trial court.

that complaint, the department responded to the initial request by letter. In that letter, the supervisor of the department's legal affairs unit, Christine Plourde, stated that "there are no documents responsive to your . . . request" because the request sought "access to or copies of . . . items of evidence that were seized or otherwise collected as part of the criminal investigation of the incident. Evidence collected as part of a criminal investigation does not constitute a public record under the [act]." (Internal quotation marks omitted.) Notwithstanding this response, the commission held a hearing on the complaint.

The parties in that administrative proceeding presented testimony, exhibits, and argument.[3] Specifically, the department asserted that the documents were not subject to disclosure because they were not public records[4] under the act insofar as they (1) do not relate "to the conduct of the public's business," (2) "are evidence under the control of the [J]udicial [B]ranch pursuant to the statutory scheme governing search warrants

[3] Prior to the hearing, the department filed a request to bifurcate. Specifically, the department sought to have the hearing first address whether the documents were indeed public records under the act, and then whether the documents were subject to an exemption from disclosure under the act. The commission denied the request to bifurcate the hearing, explaining that the department "should be prepared to present any additional claims of exemption at the . . . hearing . . . ."

Nevertheless, the testimony presented by the department at the hearing primarily focused on whether the documents were public records under the act. As discussed subsequently in this opinion, the only evidence directly addressing whether the documents were exempt from disclosure was in the form of an affidavit from Plourde. Neither she nor any of the other witnesses at the hearing actually had seen the documents.

[4] General Statutes § 1-200 (5) provides: " 'Public records or files' means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method."

and seized property," (3) are the private property of Adam Lanza or his mother, Nancy Lanza, and "disclosure would constitute an invasion of [their] personal privacy," and (4) are not included in the department's public records retention schedule because they are documents seized pursuant to a search warrant.

The commission rejected the department's claims and concluded that the documents were public records under the act. Specifically, the commission rejected the department's claim that the documents did not relate "to the conduct of the public's business" for purposes of § 1-200 (5). Instead, the commission determined that "in the aftermath of the shootings, there was heightened public interest in the shootings, in determining how and why such shootings occurred, and in preventing such a horrific crime from happening again."

The commission also found that, "[a]lthough the [department was] provided the opportunity to offer evidence that the requested documents are exempt from disclosure, [it] declined to do so. Instead, [the department] offered an affidavit from Plourde [averring] that, although she had not looked at the requested documents, she believed that some of the documents might be exempt from disclosure under [§] 1-210 (b) [(2), (10), (11) and (17)]." Consequently, the commission found that the department "failed to prove that any of the requested documents are exempt from disclosure pursuant to any exemption." Accordingly, the commission ordered the department to provide a copy of the documents to the Courant and Altimari.

Thereafter, the department filed an appeal from the commission's decision to the trial court pursuant to General Statutes § 4-183 of the Uniform Administrative Procedure Act (UAPA). The department also filed an application to stay enforcement of the final decision of the commission pending appeal, which was granted.

The Division of Criminal Justice then filed a motion to intervene in the present case as a party plaintiff, which was granted by the trial court. See footnote 2 of this opinion.

The trial court ultimately agreed with the commission that the documents were public records, concluding that "documents seized pursuant to a search warrant '[relate] to the conduct of the public's business' and, therefore, constitute public records under the act." Unlike the commission, however, the trial court then concluded that the documents were exempt from disclosure pursuant to § 1-210 (a).[5] Specifically, the trial court concluded the search and seizure statutes "act as a shield from public disclosure of all seized property not used in a criminal prosecution." These appeals followed.[6]

On appeal to this court, the defendants assert that the trial court improperly concluded that the documents were exempt from disclosure pursuant to § 1-210 (a). Specifically, the defendants assert that the trial court improperly failed to follow this court's existing precedent interpreting § 1-210 (a), which requires that the express terms of federal law or state statute must address confidentiality or otherwise limit the copying or disclosing of the documents at issue. The defendants further assert that the trial court improperly failed to construe the exemption in § 1-210 (a) narrowly, as required by the act.

In response, the department asserts that the trial court properly concluded that property seized pursuant to a search warrant is exempt from disclosure under

[5] See footnote 1 of this opinion.

[6] The commission appealed from the judgment of the trial court to the Appellate Court. The Courant and Altimari filed a separate appeal from the judgment of the trial court to the Appellate Court. Both of these appeals were transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Thereafter, the appeals were consolidated.

the act. More particularly, the department claims that this court's existing precedent establishes that state statutes that conflict or create conflicting obligations with public disclosure fall within the exemption from disclosure under § 1-210 (a). The department further asserts, as an alternative ground for affirmance, that the documents are not public records under the act. We agree with the defendants.

We begin with the relevant legal principles and standard of review. "This court reviews the trial court's judgment pursuant to the . . . UAPA . . . . Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judi-

cial scrutiny [or to] a governmental agency's time-tested interpretation . . . . *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281–82, 77 A.3d 121 (2013). Even if time-tested, we will defer to an agency's interpretation of a statute only if it is reasonable; that reasonableness is determined by [application of] our established rules of statutory construction. . . . *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 599, 996 A.2d 729 (2010).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, supra, 310 Conn. 283. The issue of statutory interpretation presented in this case is a question of law subject to plenary review. See id., 282–83." (Internal quotation marks omitted.) *Freedom of Information Officer, Dept. of Mental Health & Addiction Services* v. *Freedom of Information Commission*, 318 Conn. 769, 780–82, 122 A.3d 1217 (2015).

I

We first consider the defendants' claim that the trial court improperly concluded that the documents were exempt from disclosure because the search and seizure statutes, §§ 54-33a through 54-36p, create a shield from public disclosure for all seized property not used in a criminal prosecution. For the reasons that follow, we agree with the defendants.

In the present case, the trial court examined the obligations created by the search and seizure statutes. The trial court explained that "[t]hese provisions establish that, after property is seized pursuant to a warrant, the [agency] seizing it maintains custody of it until ordered to dispose of it by a court. The disposition provisions . . . make it mandatory that the court return seized property, other than contraband and the like, to an aggrieved criminal defendant in the event of an unlawful seizure or to any owner by the time of the final disposition of the criminal case." The trial court concluded, therefore, that "[t]he act conflicts with these provisions by providing for public disclosure of documents that were private property before seizure by the police and that a court would ordinarily order returned to the rightful owner by the end of a criminal case."

Although the trial court acknowledged that the state will often disclose seized items during the criminal process and that those items will likely become part of the public domain, that disclosure comes from the state's obligations to prosecute all crimes under General Statutes § 51-277 (b) and to disclose certain evidence to criminal defendants pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The trial court explained that the conflict between the act and the search and seizure statutes occurs in situations in which seized items have not been disclosed in the course of a prosecution.

The trial court explained that courts "ultimately [have] a mandatory, statutory duty to return the seized property, unless it is contraband or otherwise unlawful to possess, to the owner before anyone from the public will have an opportunity to see it. In these situations, the seizure statutes act as a shield from public disclosure." The trial court further explained that "[d]isclosure to the public under the act in such cases is in direct conflict with the ownership rights protected by the seizure statutes."

The trial court further explained that release of seized items under the act would render meaningless the court's obligation under the search and seizure statutes to return the items to their owner. The trial court cited to the basic tenet of statutory construction that a statute "must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 474, 28 A.3d 958 (2011). Accordingly, the trial court concluded that the act could not be interpreted in a manner that would allow for public disclosure of the documents. Instead, the trial court concluded that the search and seizure statutes "act as a shield from public disclosure of all seized property not used in a criminal prosecution."

Even assuming that the trial court's interpretation of the court's obligations under the search and seizure statutes is correct—namely, to return seized items to the lawful owner—we must determine whether those obligations render the documents exempt from the act because they are "otherwise provided by . . . state statute . . . ." General Statutes § 1-210 (a). As we explained previously herein, this question of statutory construction is subject to plenary review. See, e.g., *Freedom of Information Officer, Dept. of Mental Health &*

Addiction Services v. *Freedom of Information Commission*, supra, 318 Conn. 780–82.

"This question of statutory interpretation also must be resolved in light of certain general principles governing the act. First, we have often recognized the longstanding legislative policy of the [act] favoring the open conduct of government and free public access to government records. [See *Glastonbury Education Assn.* v. *Freedom of Information Commission*, 234 Conn. 704, 712, 663 A.2d 349 (1995); see also] *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 166, 635 A.2d 783 (1993); *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 450, 545 A.2d 1064 (1988); *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980). We consistently have held that this policy requires us to construe the provisions of the [act] to favor disclosure and to read narrowly that act's exceptions to disclosure. See, e.g., *Gifford* v. *Freedom of Information Commission*, [227 Conn. 641, 651, 631 A.2d 252 (1993)]; *Superintendent of Police* v. *Freedom of Information Commission*, 222 Conn. 621, 626, 609 A.2d 998 (1992). . . . *Waterbury Teachers Assn.* v. *Freedom of Information Commission*, 240 Conn. 835, 840, 694 A.2d 1241 (1997). Second, whether records are disclosable under the act does not depend in any way on the status or motive of the applicant for disclosure, because the act vindicates the public's right to know, rather than the rights of any individual. See *Rose* v. *Freedom of Information Commission*, 221 Conn. 217, 233, 602 A.2d 1019 (1992)." (Internal quotation marks omitted.) *Chief of Police* v. *Freedom of Information Commission*, 252 Conn. 377, 387, 746 A.2d 1264 (2000).

This court also has explained that "[t]he exemptions contained in [various state statutes] reflect a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private

needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 726, 6 A.3d 763 (2010), quoting *Maher* v. *Freedom of Information Commission*, 192 Conn. 310, 315, 472 A.2d 321 (1984); see also *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 328 ("the act does not confer upon the public an absolute right to all government information"). "Our construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed. . . . [T]he burden of proving the applicability of an exemption rests upon the agency claiming it." (Citation omitted; internal quotation marks omitted.) *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 672, 59 A.3d 172 (2013).

With these principles in mind, we begin with the language in question. Section 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records . . . or (3) receive a copy of such records . . . ."

"[I]n interpreting [statutory language] we do not write on a clean slate, but are bound by our previous judicial interpretations of this language and the purpose of the statute." *New England Road, Inc.* v. *Planning & Zoning Commission*, 308 Conn. 180, 186, 61 A.3d 505 (2013). Thus, determining the meaning and purpose of the exemption provided in § 1-210 (a) requires a review of our previous interpretations of this statutory language.

The defendants assert that the trial court's determination that the search and seizure statutes satisfy the "otherwise provided by any federal law or state statute" exemption of § 1-210 (a) is inconsistent with this court's case law. Specifically, the defendants contend that this court consistently has held that, in order for a statute to form the basis for an exemption pursuant to § 1-210 (a), the statute being cited as the basis for the exemption must, by its express terms, address confidentiality or otherwise limit the copying or disclosing of the documents at issue. We agree.

For instance, this court interpreted the exemption provided in § 1-210 (a) in *Chief of Police* v. *Freedom of Information Commission*, supra, 252 Conn. 377. In that case, the plaintiff claimed that documents that were the subject of federal civil litigation were exempt from disclosure under the act. Specifically, the plaintiff asserted that, because the disclosure of the documents was subject to the Federal Rules of Civil Procedure, the documents were exempt from disclosure under the act because they were "otherwise provided by . . . federal law . . . ." (Internal quotation marks omitted.) Id., 398–99.

Relying on the terms of the statute, this court reasoned that the reference to federal and state law in § 1-210 (a) "suggests . . . a reference to federal and state laws that, *by their terms*, provide for confidentiality of records or some other similar shield from public disclosure." (Emphasis added.) Id., 399. This court further relied on the legislative history of the act, explaining that "the only references in the entire legislative history of the act to the language in question are consistent with the suggestion that it was intended to refer to other federal and state laws that *by their terms* shield specific information from disclosure." (Emphasis added.) Id. This court further explained that there was nothing in the legislative history of the act that sug-

gested that the exemption in § 1-210 (a) was intended to encompass the types of determinations made under the Federal Rules of Civil Procedure for disclosing documents during the discovery process. Id., 399–400. Accordingly, this court rejected the plaintiff's claim that the documents were exempt from disclosure under § 1-210 (a) because the Federal Rules of Civil Procedure did not expressly provide for the confidentiality of the records or otherwise limit their disclosure. Id., 400.

In *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn. 703, this court once again required that the statute in question expressly limit disclosure in order to satisfy the exemption set forth in § 1-210 (a). In that case, the Department of Public Safety claimed that registration information under Megan's Law; see General Statutes § 54-250 et seq.; was not subject to disclosure under the act. *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 726–27. Specifically, it claimed that General Statutes § 54-258 (a) (4) expressly required confidentiality of registration information and, therefore, that the registration information was exempt from disclosure under § 1-210 (a). Section 54-258 (a) (4) provided that "registration information the dissemination of which has been restricted by court order pursuant to section 54-255 and which is not otherwise subject to disclosure, shall *not* be a public record and shall be released only for law enforcement purposes until such restriction is removed by the court pursuant to said section." (Emphasis added.)

This court agreed with the Department of Public Safety and concluded that "it is clear that the legislature intended that registration information restricted pursuant to § 54-255, which includes the requested information in this case, should not be disclosed except for law enforcement purposes until the court orders that the restriction be removed." *Dept. of Public Safety* v.

Freedom of Information Commission, supra, 298 Conn. 727. Accordingly, this court concluded that the express language of Megan's Law that restricted the release of the registration information satisfied the requirements § 1-210 (a). Id.

Then, in *Pictometry International Corp.* v. *Freedom of Information Commission*, supra, 307 Conn. 648, this court again addressed the § 1-210 (a) exemption. Although the statute at issue in that case did not expressly create any confidentiality for the documents, this court found that the statute at issue satisfied § 1-210 (a) because it expressly limited the disclosure or copying of the records. Id., 673–74. In that case, the Department of Environmental Protection received a request for copies of certain computerized aerial photographic images of sites within the state. Id., 652. In response to that request, it asserted that the images were exempt from disclosure under the act. Id. Specifically, it claimed that the images were subject to federal copyright law, which limited the use, distribution, and copying of work. Id. The commission determined that the federal copyright law did not satisfy the exemption provided in § 1-210 (a). Id., 658.

On appeal to this court, the commission relied on this court's decision in *Chief of Police* for the proposition that "the federal law exemption applies only to federal statutes that, by their terms, *bar the disclosure* of certain public records . . . ." (Emphasis altered.) Id., 676. The commission asserted that the exemption in § 1-210 (a) should not apply because federal copyright law permits disclosure, but only limits the use, distribution and copying of the images. Id., 676–77. This court rejected the commission's claim and explained that *Chief of Police* does not require a federal or state law to prohibit disclosure in order to satisfy the "otherwise provided" language in § 1-210 (a); rather, it requires that the federal or state law expressly conflict

with the requirements of the act. *Pictometry International Corp.* v. *Freedom of Information Commission*, supra, 307 Conn. 677.

Thus, this court concluded that the federal copyright law satisfied the federal law exemption in § 1-210 (a), explaining that this exemption "embodies the legislature's willingness to defer to federal laws barring disclosure of otherwise disclosable information . . . ." (Internal quotation marks omitted.) Id., 672. This court concluded that, "to the extent that the act and the Copyright Act impose conflicting legal obligations, the Copyright Act is a 'federal law' for purposes of the federal law exemption. Accordingly, although the federal law exemption does not entirely exempt copyrighted public records from the act, it exempts them from copying provisions of the act that are inconsistent with federal copyright law." Id., 674.[7]

The other cases in which this court has found that § 1-210 (a) provides an exemption under the act have

[7] The department asserts that this court's holding in *Pictometry International Corp.* supports the trial court's conclusion in the present case. Specifically, the department asserts that, in concluding that federal copyright law formed the basis for an exemption under § 1-210 (a), this court relied on the fact that the federal copyright law imposed "conflicting legal obligations . . . ." *Pictometry International Corp.* v. *Freedom of Information Commission*, supra, 307 Conn. 674. The department asserts that the legal obligations imposed by the search and seizure statutes similarly impose conflicting legal obligations—namely, the return of seized property to its owner. We disagree for two reasons.

First, although this court did explain that the federal copyright law and the act imposed "conflicting legal obligations," federal copyright law created specific obligations related to the copying of the documents that had been requested under the act. Id., 673–74. Second, the conflicting legal obligations that this court found were based on the express terms of federal copyright law. Id. As we explain in this opinion, in the present case, neither the department nor the trial court point to express terms of the search and seizure statutes that create confidentiality or otherwise conflict with the copying or disclosure requirements under the act. Accordingly, we conclude that *Pictometry International Corp.* does not support the trial court's conclusion in the present case.

all required that the state or federal law contain express language that creates confidentiality in the documents or otherwise limits the disclosure, copying, or distribution of the documents. See *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 74, 52 A.3d 636 (2012) (federal regulation expressly forbidding disclosure of information about person held by state for federal immigration purposes satisfied "otherwise provided" requirement of § 1-210 [a]); *Commissioner of Public Safety* v. *Freedom of Information Commission*, 204 Conn. 609, 621, 529 A.2d 692 (1987) (statute providing that "the [statewide] organized crime investigative task force may disseminate such information by such means and to such extent as it deems appropriate" satisfied " 'otherwise provided' " requirement of act's state law exemption); *Galvin* v. *Freedom of Information Commission*, 201 Conn. 448, 462, 518 A.2d 64 (1986) (state statute authorizing promulgation of regulations limiting disclosure of autopsy reports satisfied " 'otherwise provided' " requirements of act's state law exemption).

Similarly, the Appellate Court also has required that, in order for a statute to form the basis for an exemption pursuant to § 1-210 (a), the statute must by its express terms address confidentiality or otherwise limit the disclosure, copying, or distribution of the documents at issue. See, e.g., *Groton Police Dept.* v. *Freedom of Information Commission*, 104 Conn. App. 150, 160, 931 A.2d 989 (2007) (concluding that records from registry of abuse or neglect findings maintained by the Department of Children and Families are exempt from the act under § 1-210 [a] because General Statutes § 17a-101k [a] expressly provided that "[t]he information contained in the registry and any other information relative to child abuse, wherever located, shall be confidential" [internal quotation marks omitted]).

As the foregoing review of case law demonstrates, both this court and the Appellate Court consistently have required that any exemption from disclosure under the "otherwise provided" language of § 1-210 (a) be based on express terms in the state or federal law that either provide for the confidentiality of the documents or otherwise limit disclosure, copying, or distribution of the documents at issue. Such a requirement is consistent with the well established principle that "[o]ur construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed." (Internal quotation marks omitted.) *Pictometry International Corp.* v. *Freedom of Information Commission*, supra, 307 Conn. 672.

"In those limited circumstances where the legislature has determined that some other public interest overrides the public's right to know, it has provided explicit statutory exceptions. . . . We have held that these exceptions must be narrowly construed." *Lieberman* v. *State Board of Labor Relations*, 216 Conn. 253, 266, 579 A.2d 505 (1990); see, e.g., General Statutes § 35-42 (c) (2) (expressly providing that "[a]ll documentary material or other information furnished voluntarily to the Attorney General . . . for suspected violations of [the Connecticut Antitrust Act], and the identity of the person furnishing such documentary material or other information, shall be held in the custody of the Attorney General . . . and shall not be available to the public"); General Statutes § 46a-13e (a) (expressly providing that, with certain enumerated exceptions, "[t]he name, address and other personally identifiable information of a person who makes a complaint to the Victim Advocate . . . all information obtained or generated by the office [of the Victim Advocate] in the course of an investigation, the identity and location of any person receiving or considered for the receipt of protective services . . . all information obtained or generated by

the office [of the Victim Advocate] in the course of monitoring the provision of protective services . . . and all confidential records obtained by the Victim Advocate or his designee shall be confidential and shall not be subject to disclosure under the [act] or otherwise").

The department relies on a footnote in *Commissioner of Correction* v. *Freedom of Information Commission*, supra, 307 Conn. 65 n.17, for the proposition that only exceptions contained within the act are to be construed narrowly, and not those contained in § 1-210 (a) that depend on federal law or other state statutes. We disagree. Although we acknowledge that this court did state that the principle that exceptions to the general rule of disclosure under the act must be narrowly construed "applies to exemptions set forth within the act, not to other laws, especially not to laws enacted by a different sovereign," this statement must be read in the context of the issue being considered. Id. In that case, this court was considering whether a federal regulation prohibiting disclosure of information regarding people held by the state for federal immigration purposes served as the basis for an exemption from the act under § 1-210 (a). Id., 56–57. In considering whether the federal regulation applied to information about former detainees or only to current detainees, this court explained that it must follow the agency's interpretation, which supported a broad reading of the regulation—namely, to prohibit disclosure of information about current and former detainees. Id., 66. This court concluded that the question was whether the promulgating agency intended it to apply to former detainees. Id., 66–67.

In refusing to depart from the broad federal interpretation of the regulation, this court explained that "[o]ur legislature has no power to impose a particular interpretive gloss on federal law." Id., 65 n.17. To the extent

that this footnote implies that exceptions pursuant to § 1-210 (a) do not require narrow construction, we clarify that today. We reiterate that all exceptions from the act must be construed narrowly to effectuate the purpose of the act, which favors disclosure. Accordingly, we conclude that we must narrowly construe the "otherwise provided" language of § 1-210 (a), otherwise any statute governing an agency's general treatment of records becomes a possible restriction on disclosure—e.g., statutes that govern how state records are archived, or the retention of records by governmental agencies.

In the present case, the trial court pointed to nothing in the express terms of the search and seizure statutes that creates confidentiality in the documents or otherwise limits the disclosure, copying, or distribution of the documents. Indeed, the search and seizure statutes are silent on the issues of confidentiality, copying, or disclosure to the public. Therefore, the trial court's conclusion that the search and seizure statutes form the basis for an exemption under § 1-210 (a) is inconsistent with our case law interpreting this exemption.

Moreover, the basis for the trial court's holding was that "[d]isclosure to the public under the act in such cases is in direct conflict with the ownership rights protected by the seizure statutes." Even if we agree with the trial court that the search and seizure statutes protect the ownership rights of the people whose property has been seized, we cannot conclude that a statutory scheme requiring that property be returned to its owners creates a duty of confidentiality for those items or otherwise limits public disclosure.

Indeed, we are not blind to the fact that limiting the disclosure of seized documents in order to protect the privacy of those whose property is seized, particularly if a criminal proceeding does not result, may be a good or even preferable way in which to deal with documents

seized in this manner. The department, however, does not, and cannot, point to express language in the search and seizure statutes providing for such confidentiality, and our task is to "construe [the] statute as written." (Internal quotation marks omitted.) *Marciano* v. *Jiminez*, 324 Conn. 70, 77, 151 A.3d 1280 (2016). It is axiomatic that we "may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) Id. Accordingly, we cannot impose a duty of confidentiality or restriction on disclosure that is not provided by the express terms of the search and seizure statutes.

Furthermore, our conclusion that the documents at issue in the present case are not exempt from disclosure under the act is supported by the presence of General Statutes § 1-215 (b).[8] Section 1-215 (b) provides in relevant part: "Any personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects

[8] General Statutes § 1-215 (b) provides: "Notwithstanding any provision of the general statutes, and except as otherwise provided in this section, any record of the arrest of any person shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210. No law enforcement agency shall redact any record of the arrest of any person, except for (1) the identity of witnesses, (2) specific information about the commission of a crime, the disclosure of which the law enforcement agency reasonably believes may prejudice a pending prosecution or a prospective law enforcement action, or (3) any information that a judicial authority has ordered to be sealed from public inspection or disclosure. Any personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested."

are relevant to the crime for which such person was arrested." The treatment of items seized pursuant to an arrest also is governed by the requirements of the search and seizure statutes. See, e.g., General Statutes § 54-36a (b) (1) ("[w]henever property is seized in connection with a criminal arrest or seized pursuant to a search warrant without an arrest, the law enforcement agency seizing such property shall file, on forms provided for this purpose by the Office of the Chief Court Administrator, an inventory of the property seized") Therefore, if we were to conclude that the search and seizure statutes serve as the basis for an exemption for all items governed by the search and seizure statutes, § 1-215 (b) (3) would be superfluous because any items seized during a person's arrest would be exempt from disclosure under the act. It is axiomatic "that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Internal quotation marks omitted.) *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, supra, 302 Conn. 474. Accordingly, we conclude the presence of § 1-215 (b) lends further support to our conclusion that the search and seizure statutes do not form the basis of an exemption from the act under § 1-210 (a).

Additionally, § 1-210 (b) (3)[9] provides detailed exemptions for law enforcement records where the agency

[9] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (3) [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action,

can establish certain criteria. The legislature did not choose to include an exemption for items that are lawfully seized by a law enforcement agency. "Under the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded." *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016). Therefore, the failure of the legislature to include lawfully seized items in the exemptions for records of law enforcement agencies contained within § 1-210 (b) (3) supports our conclusion that records governed by the search and seizure statutes are not exempt from disclosure under the act.

We take this opportunity to point out that we reach the conclusion that the documents in the present case are subject to disclosure on the basis of the unique procedural posture of this case. The department had the opportunity to present evidence at the hearing before the commission establishing that these documents fell within another exception to the act, but it declined to do so. As we have explained previously herein, "the burden of proving the applicability of an exemption rests upon the agency claiming it." *Wilson* v. *Freedom of Information Commission*, supra, 181 Conn. 329.

Nevertheless, the department only made legal argument and presented testimony of, and an affidavit from,

(E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, voyeurism under section 53a-189a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216 . . . ."

witnesses who had never seen the documents at issue. Therefore, the commission concluded that the department had failed to produce any evidence that the documents were exempt from disclosure under any statute. Although we do not decide today whether the documents at issue in the present appeal would be exempt from disclosure under another section of the act or another state or federal law, the department's failure to produce sufficient evidence at the hearing before the commission would necessarily be fatal to such a claim.

As this court has explained, "[t]he agency representative may testify concerning the content and use of the documents, or supply affidavits to the commission relating to their content and use. Any such testimony or affidavits must not be couched in conclusory language or generalized allegations, however, but should be sufficiently detailed, without compromising the asserted right to confidentiality, to present the commission with an informed factual basis for its decision in review under the act. . . . No matter what method is utilized before the commission, however, one thing is clear: It is the agency that bears the burden of proving the applicability of an exemption, and therefore, the nature of the documents in question." (Citations omitted.) Id., 341.

For the foregoing reasons, we conclude that the trial court improperly concluded that the search and seizure statutes satisfied the requirements for an exemption from the act under § 1-210 (a).

II

The department asserts that, even if we conclude that the search and seizure statutes do not form the basis for an exemption under § 1-210 (a), this court should affirm the judgment of the trial court on an alternative ground—namely, that the documents at issue in the

present appeal were not subject to disclosure because they are not "public records" under the act. We disagree.

Section 1-200 (5) defines " '[p]ublic records or files' " for purposes of the act as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method."

The department asserts that the documents do not relate "to the conduct of the public's business" as that term is used in § 1-200 (5) because they were created by a private individual and not the department. The commission found that the documents related to the public's business for the following reasons: (1) "there was heightened public interest generally in the shootings and, specifically, in knowing how and why the shootings occurred"; (2) "the requested documents informed the investigation"; (3) "significant public resources were expended in conducting a massive, [yearlong] investigation, and in examining gun control measures and mental health issues arising out of the shootings"; and (4) "there will be no criminal prosecution through which the public otherwise would have any access to the requested documents . . . ." (Emphasis omitted.)

The trial court disagreed with this analysis, rejecting the notion that the question of whether a document was a public record for purposes of the act would depend on the public's interest in a particular criminal investigation. Instead, the trial court concluded that, "although documents may be privately created and perhaps do not '[relate] to [the conduct of] the public's business' at the time of their creation, the fact that they were

lawfully seized by the police means that there was probable cause to believe that, at a minimum, they constitute 'evidence of an offense, or . . . evidence that a particular person participated in the commission of an offense . . . .' [General Statutes § 54-33a (b) (3)]. At that point, they do relate to the public's business. For these reasons, the court concludes that documents seized pursuant to a search warrant '[relate] to the conduct of the public's business' and therefore constitute public records under the act." (Footnote omitted.)

In determining whether document seized during the investigation of a crime are public records under the act, we are mindful that the purpose of the act is "to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, supra, 298 Conn. 726. With this in mind, we agree with the trial court that documents that are not created by an agency, but come into its possession because there was probable cause to believe that they constitute "evidence of an offense, or . . . evidence that a particular person participated in the commission of an offense," relate to the conduct of the public's business. General Statutes § 54a-33a (b) (3).

Moreover, our interpretation that documents seized by the police are public records under the act is consistent with other provisions of the act. For instance, as discussed previously in this opinion, § 1-215 (b) provides in relevant part that "[a]ny personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested." See footnote 8 of this opinion.

If we were to accept the department's claim that items, more specifically documents, seized by the police in the investigation of a crime do not constitute a public record, this provision exempting some seized items from the act would be meaningless. As we have explained, we must interpret statutes so as not to render any term meaningless. See, e.g., *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, supra, 302 Conn. 474. Accordingly, we reject the department's claim that documents seized by law enforcement in the present case are not public records.

In support of its claim, the department relies on testimony that the documents are not public records because they are not the department's property and they are owned by someone else. Specifically, the department relies on testimony from the Chief State's Attorney, Kevin Kane, who testified before the commission that the seized property did not belong to the department. Kane conceded, however, that the written report describing the items was a public record. In any event, whether the documents constitute a public record for purposes of the act presents a question of law over which we exercise plenary review. See, e.g., *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, supra, 310 Conn. 281–82. Therefore, the testimony of the department's witnesses is not necessarily outcome determinative.

The only other support that the department relies on is *Boyles* v. *Preston*, 68 Conn. App. 596, 610, 792 A.2d 878, cert. denied, 261 Conn. 901, 802 A.2d 853 (2002), in which the Appellate Court held that evidence from a dismissed criminal case was not a record for purposes of the erasure statute, General Statutes § 54-142a. In *Boyles*, the Appellate Court considered whether testimony regarding certain videotape evidence from a prior dismissed criminal case could be admitted into evi-

dence in a subsequent civil proceeding. Id. The defendant in that case asserted that the videotape was an erased record within the meaning of the erasure statute because the underlying criminal matter had been dismissed. Id., 609. The Appellate Court concluded that the videotape was not subject to erasure because it was not a record for purposes of the erasure statute. Id., 610. We conclude that *Boyles* is inapplicable to the present case because it was based on an entirely different statute with different definitions and a different purpose.

Accordingly, we reject the department's invitation to affirm the judgment of the trial court on the alternative ground that the documents at issue in the present case do not constitute a public record under the act.

The judgment is reversed and the case is remanded to the trial court with direction to deny the department's appeal.

In this opinion the other justices concurred.

ORDERS

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STATE OF CONNECTICUT *v.* MICHAEL LATOUR

The defendant's petition for certification to appeal from the Appellate Court, 179 Conn. App. 907 (AC 39648), is denied.

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

Jennifer W. Cooper, special deputy assistant state's attorney, in opposition.

Decided October 17, 2018

STATE OF CONNECTICUT *v.* MIGUEL A. VEGA

The defendant's petition for certification to appeal from the Appellate Court, 181 Conn. App. 456 (AC 40082), is denied.

Lisa J. Steele, assigned counsel, in support of the petition.

Michael L. Regan, state's attorney, in opposition.

Decided October 17, 2018

MARIA UGALDE, ADMINISTRATRIX (ESTATE OF RICHARD UGALDE) *v.* SAINT MARY'S HOSPITAL, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 182 Conn. App. 1 (AC 39343), is denied.

Jeffrey M. Cooper, in support of the petition.

Decided October 17, 2018

THE BANK OF NEW YORK MELLON, SUCCESSOR TRUSTEE *v.* WADE H. HORSEY II ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 182 Conn. App. 417 (AC 39665), is denied.

Wade H. Horsey II, self-represented, in support of the petition.

Marissa I. Delinks, in opposition.

Decided October 17, 2018

STATE OF CONNECTICUT *v.* MORICE W.

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 32 (AC 38776), is denied.

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

Matthew C. Eagan, assigned counsel, and *Emily Graner Sexton*, assigned counsel, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided October 17, 2018

STATE OF CONNECTICUT *v.* CHAD PETITPAS

The defendant's petition for certification to appeal from the Appellate Court, 183 Conn. App. 442 (AC 40254), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided October 17, 2018

JOHN DRABIK *v.* ELAINE THOMAS ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 184 Conn. App. 238 (AC 38997), is denied.

Michael W. Sheehan, in support of the petition.

Andrew L. Houlding, in opposition.

Decided October 17, 2018

ROBERT E. THOMPSON *v.* COMMISSIONER OF CORRECTION

The petitioner Robert E. Thompson's petition for certification to appeal from the Appellate Court, 184 Conn. App. 215 (AC 39945), is denied.

Mary A. Beattie, assigned counsel, in support of the petition.

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

Decided October 17, 2018

ANNA IZABELA PALOSZ, COADMINISTRATOR (ESTATE OF BARTLOMIEJ F. PALOSZ), ET AL. *v.* TOWN OF GREENWICH ET AL.

The petition by the defendant Board of Education of the Town of Greenwich for certification to appeal from the Appellate Court, 184 Conn. App. 201 (AC 40315), is denied.

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

Daniel J. Krisch, *Fernando F. de Arango*, *Harold J. Friedman*, pro hac vice, and *Brett R. Leland*, pro hac vice, in support of the petition.

David S. Golub and *Jennifer B. Goldstein*, in opposition.

Decided October 17, 2018

STATE OF CONNECTICUT *v.* DEQUAN MCKETHAN

The defendant's petition for certification to appeal from the Appellate Court, 184 Conn. App. 187 (AC 40655), is denied.

S. Max Simmons, assigned counsel, in support of the petition.

Lawrence J. Tytla, supervisory assistant state's attorney, in opposition.

Decided October 17, 2018

JOSEPH STEPHENSON *v.* COMMISSIONER OF CORRECTION

The petitioner Joseph Stephenson's petition for certification to appeal from the Appellate Court (AC 38885) is denied.

Joseph Stephenson, self-represented, in support of the petition.

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

Decided October 17, 2018

JOHN DOE ET AL. *v.* BRUCE BEMER ET AL.

The named defendant's petition for certification to appeal from the Appellate Court's motion (AC 182040) is dismissed.

Wesley W. Horton, *Brendon P. Levesque*, *Anthony Spinella* and *John Sullivan*, in support of the petition.

Kevin C. Ferry and *Monique S. Foley*, in opposition.

Decided October 17, 2018

DANIEL WALSH, CONSERVATOR OF THE PERSON AND ESTATE OF JOHN DOE *v.* BRUCE BEMER ET AL.

The named defendant's petition for certification to appeal from the Appellate Court's motion (AC 182041) is dismissed.

Wesley W. Horton, *Brendon P. Levesque*, *Anthony Spinella* and *John Sullivan*, in support of the petition.

Jonathan A. Cantor, in opposition.

Decided October 17, 2018

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CONNECTICUT APPELLATE REPORTS

Vol. 185

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

BRANDON SMITH *v.* BL COMPANIES, INC., ET AL.

(AC 40368)

Lavine, Sheldon and Bright, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, B Co. and F, for alleged professional negligence in connection with an incident in which the plaintiff fell from a retaining wall onto a driveway approximately six feet below and sustained injuries. The plaintiff previously had brought an action against B Co., which had supervised the construction of the wall, and alleged that the wall constituted an absolute and public nuisance. The trial court in that action rendered summary judgment for B Co., concluding that the pleadings and exhibits did not support the claim that B Co. had control of the property on which the retaining wall was constructed. Thereafter, the plaintiff brought this action, alleging that the defendants were negligent. The trial court granted the defendants' motion for summary judgment, determining that the negligence claim was barred by res judicata in light of the judgment

on the merits in the nuisance action. From the judgment rendered thereon, the plaintiff appealed to this court, claiming that the trial court improperly concluded that the prior judgment on the nuisance claim precluded him from bringing a subsequent negligence claim against the defendants, which had not been pleaded in the previous action but was predicated on the same nucleus of fact. *Held* that the trial court properly rendered summary judgment in favor of the defendants; the claims raised by the plaintiff in this court essentially having been the same as those he raised in the trial court, which thoroughly addressed the arguments raised in this appeal in its memorandum of decision, this court adopted the trial court's well reasoned memorandum of decision as a proper statement of the facts and applicable law on the issues.

Argued September 12—officially released October 30, 2018

Procedural History

Action to recover damages for the defendants' alleged professional negligence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

A. Reynolds Gordon, with whom was *Frank A. DeNicola, Jr.*, for the appellant (plaintiff).

Jared Cohane, with whom were *Luke R. Conrad* and *Julia O'Brien*, general counsel, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Brandon Smith, appeals from the summary judgment rendered by the trial court in favor of the defendants, BL Companies, Inc. (company), and James Fielding, on the ground of res judicata. Specifically, the plaintiff claims that the trial court erred as a matter of law by concluding that a prior judgment on a nuisance claim precluded the plaintiff from bringing a subsequent negligence claim that was predicated on the same nucleus of fact but not pleaded in the previous action. We affirm the judgment of the trial court.

The following facts and procedural history underlie the appeal to this court. The town of Redding (town) hired the company to survey, design, engineer, inspect, and supervise the "Streetscape Project," which included the construction of a block retaining wall. On September 17, 2011, at approximately 2 a.m., the plaintiff fell off the retaining wall onto a driveway approximately six feet below, sustaining multiple injuries.

The plaintiff first brought an action against the town, its contractor, M. Rondano, Inc., and the company, alleging that the retaining wall constituted an absolute and public nuisance because it was not fenced off and no warning was provided. On December 5, 2014, the court, *Radcliffe*, *J.*, rendered summary judgment in favor of the company on the ground that the pleadings and exhibits did not support the claim that the company had control of the property on which the retaining wall was constructed. The plaintiff appealed from the judgment of the trial court, but then withdrew his appeal.

Thereafter, the plaintiff brought this second action against the defendants, alleging negligence. On April 3, 2017, the trial court, *Kamp*, *J.*, granted the defendants' motion for summary judgment on the ground that the negligence claim was barred by res judicata in light of the previous judgment on the merits of the nuisance cause of action.[1] The plaintiff appeals from the rendering of summary judgment in the negligence action.

The claims raised by the plaintiff in this court are essentially the same claims he raised in the trial court when he opposed the motion for summary judgment. We have examined the record on appeal, the briefs

[1] Although James Fielding was not a party in the first action, the trial court concluded that the judgment in the first action precluded any claim against him in this action because he is in privity with the company. The plaintiff has not challenged this conclusion.

and arguments of the parties, and conclude that the judgment of the trial court should be affirmed. Because Judge Kamp's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt that court's well reasoned decision as a proper statement of the facts and applicable law on the issues. *Smith* v. *BL Cos.*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6055532 (April 3, 2017) (reprinted at 185 Conn. App. 659, A.3d). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

APPENDIX

BRANDON SMITH *v.* BL COMPANIES, INC., ET AL.*

Superior Court, Judicial District of Fairfield
File No. CV-16-6055532

Memorandum filed April 3, 2017

Proceedings

Memorandum of decision on defendants' motion for summary judgment. *Motion granted.*

A. Reynolds Gordon and *Frank A. DeNicola, Jr.*, for the plaintiff.

Jared Cohane and *Luke R. Conrad*, for the defendants.

* Affirmed. *Smith* v. *BL Cos.*, 185 Conn. App. 656, A.3d (2018).

Opinion

KAMP, J. The issue before the court is the defendants' motion for summary judgment on the ground that the plaintiff's claims are barred by res judicata. For the reasons set forth below the motion is granted.

FACTS

The plaintiff, Brandon Smith, filed the two count second amended complaint on June 13, 2016. The plaintiff asserts one claim of professional negligence against each defendant; count one is against BL Companies, Inc. (BL Co.), and count two is against James Fielding.[1]

The plaintiff alleges the following facts. On September 17, 2011, the plaintiff fell off a retaining wall and sustained injuries. The drop from the retaining wall was between five and six feet, and there was no protective fence in place. BL Co., a firm of design engineers, negligently surveyed the area around the retaining wall. Furthermore, the landscape architect and project manager for this retaining wall, Fielding, submitted an unsafe design that was not in accordance with requirements established by the Department of Transportation and the Town of Redding Zoning Regulation. The construction and design of the retaining wall was unsafe and constituted a fall hazard.

On October 17, 2016, the defendants filed a motion for summary judgment on the ground that due to a judgment on the merits rendered in a prior action, *Smith* v. *Redding*, Superior Court, judicial district of Fairfield, Docket No. 12-6024402-S (December 5, 2014) (*Radcliffe*, *J.*) (59 Conn. L. Rptr. 408) (*Smith I*), the plaintiff's claims are barred by res judicata. The motion is accompanied by a memorandum of law and several exhibits: the trial court's decision from *Smith I*, granting

[1] Hereafter, BL Co. and Fielding will be referred to collectively as the defendants, and individually by name, where appropriate.

BL Co.'s motion for summary judgment; the affidavit of Derek A. Kohl, principal with BL Co.; a copy of the judgment file from *Smith I*; the plaintiff's motion for leave to amend his complaint and the amended complaint filed in *Smith I*, dated July 24, 2014; the withdrawal of the plaintiff's appeal from the trial court, on July 21, 2015; the verdict form from *Smith I*, finding in favor of the Town of Redding; and the plaintiff's motion for leave to amend his complaint, filed on June 13, 2016, as well as the complaint filed in the present action. The plaintiff filed a memorandum of law in opposition on November 15, 2016. The defendants responded with a memorandum of law on November 23, 2016. The plaintiff then filed a rebuttal on December 1, 2016. The parties were heard at short calendar on December 5, 2016.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "Moreover, summary judgment is an appropriate vehicle for raising a claim of res judicata . . . ." (Citations omitted.) *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 867 n.8, 675 A.2d 441 (1996).

The defendants argue that the plaintiff's claims are barred by res judicata because there was a judgment on the merits in *Smith I*, and the operative facts of *Smith I* and the present action are virtually identical. The defendants assert in their memoranda and through the exhibits provided that in *Smith I*, the plaintiff sued BL Co. on a theory of public nuisance for injuries arising from his fall from the retaining wall on September 17, 2011. The trial court, *Radcliffe*, *J.*, granted summary judgment to BL Co. in *Smith I*. The defendants argue that the plaintiff's claims for professional negligence in the present case are barred, notwithstanding the plaintiff's new legal theory, as the finality of the judgment rendered in *Smith I* applies to any other admissible matter that might have been raised, and the plaintiff had the opportunity to raise a professional negligence claim in the prior action. Finally, the defendants contend that the preclusive effect of *Smith I* applies to not only BL Co., a named defendant in *Smith I*, but also to Fielding, who the defendants argue is in privity with BL Co.

The plaintiff argues that the application of res judicata would push the doctrine beyond its intended purposes and, furthermore, that preclusion would unfairly prejudice him. First, the plaintiff argues that the question of wrongdoing was not determined in *Smith I*. The plaintiff also argues that the claim of professional negligence in the present case is a separate and distinct claim from the public nuisance claim in *Smith I*, and that the two do not form a convenient trial unit. Specifically, the plaintiff contends that the two claims require different liability experts and that, if presented together, the claims would confuse a jury. The plaintiff also argues that the policies and underlying purposes of res judicata counsel against barring the plaintiff's unliti-

gated claims because the present action is not duplicative and inconsistent judgments are impossible. Furthermore, the plaintiff asserts that the defendants are not harassed by the present action because it is brought pursuant to the trial court's reservation. To support this argument, the plaintiff looks to the trial court's summary judgment decision in *Smith I*.[2]

"The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum. . . . [C]ollateral estoppel, or issue preclusion . . . prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim." (Citations omitted; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600, 922 A.2d 1073 (2007).

"Unlike collateral estoppel, under which preclusion occurs only if a claim actually has been litigated, [u]nder the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim . . . [or any claim based on the same operative facts that] *might have been made*. . . . [T]he appropriate inquiry with respect to [claim] preclusion is

[2] For his reservation argument, the plaintiff relies on the following language: "Although free to assert claims of professional negligence against the architect, the Plaintiffs have failed to do so. No claim of professional negligence is pled in this case, although the time within which any such claim may be asserted, has not expired." *Smith* v. *Redding*, supra, 59 Conn. L. Rptr. 411.

whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding . . . .*" (Emphasis in original; internal quotation marks omitted.) *Connecticut National Bank* v. *Rytman*, 241 Conn. 24, 43–44, 694 A.2d 1246 (1997). "[R]es judicata prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 157–58, 129 A.3d 677 (2016).

In the present case, the plaintiff's argument that the issue of wrongdoing was not determined in *Smith I*—and, indeed, that the issue was not before the court in *Smith I*—does not impact the applicability of res judicata. Whether the issue was actually litigated is a relevant inquiry for the application of collateral estoppel, but not res judicata. Accordingly, in determining whether the present action is barred, the court must look to whether the plaintiff had the opportunity to raise a claim for professional negligence in the prior action; that the present action presents a new legal theory—and consequently, new issues to be considered—is not determinative.

"Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." Id., 156–57.

In the present case, the first two elements do not appear to be in dispute. First, summary judgment is a final judgment on the merits; because the trial court, *Radcliffe, J.*, determined that BL Co. was entitled to judgment as a matter of law in *Smith I*, the first element

is met. Second, both the plaintiff and BL Co. were parties to *Smith I*. As the plaintiff alleges that Fielding was at all times acting as the agent, servant and employee of BL Co., and within the scope of his duties, Fielding is in privity with BL Co. See *Summitwood Development, LLC* v. *Roberts*, 130 Conn. App. 792, 802–803, 25 A.3d 721 (defendant-agents in privity with employer named in prior suit), cert. denied, 302 Conn. 942, 29 A.3d 467 (2011), cert. denied, 565 U.S. 1260, 132 S. Ct. 1745, 182 L. Ed. 2d 530 (2012). Accordingly, the second element is also met.

With regard to the third element, adequate opportunity, "[r]es judicata bars the relitigation of claims actually made in the prior action as well as any claims that might have been made there. . . . Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 157. "[A]lthough parties are not *required* to resolve all disputes during a . . . proceeding, when a party had the opportunity to raise the claim and the . . . proceeding provided the proper forum for the resolution of that claim, res judicata may bar litigation of a subsequent action." (Emphasis in original.) *Weiss* v. *Weiss*, 297 Conn. 446, 464, 998 A.2d 766 (2010); cf. *In re Probate Appeal of Cadle Co.*, 152 Conn. App. 427, 100 A.3d 30 (2014) (where Superior Court lacked jurisdiction over claim not raised in Probate Court, plaintiff had no opportunity to raise claim).

Bifurcation and amendment afford a plaintiff the opportunity to avoid piecemeal litigation. "[A]ny potential prejudice resulting from facts that are not related could be resolved by bifurcating the trial. With bifurcation, the evidence common to both claims, which was considerable, could have been presented at once and not in separate lawsuits commenced at a distance of

months or years." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 610 n.5. The court in *Powell* also noted that the trial court, in applying res judicata, correctly considered that plaintiffs failed to amend their complaint to incorporate the allegations that were eventually raised in the second action. Id., 608.

The third element is met in the present case. As an initial matter, the Superior Court could have exercised jurisdiction over the professional negligence claim, had the plaintiff raised it. To the extent that the plaintiff argues that the differences between public nuisance and professional negligence deprived him of the opportunity to bring both—because to do so would be impossible—the plaintiff fails to consider the possibility of bifurcation. Moreover, the plaintiff not only had the opportunity to bring a claim for professional negligence at the commencement of the prior action, but he also had the opportunity to amend the pleadings in *Smith I* to add such a claim. When granting the motion for summary judgment in *Smith I*, the trial court, *Radcliffe, J.*, expressly noted that although the plaintiff had not pleaded professional negligence, the time to do so had not yet expired; even though the plaintiff amended his complaint in *Smith I* in July, 2014, he did not assert a claim for professional negligence. Therefore, the plaintiff had the opportunity to litigate the matter fully in the prior action.

The fourth element for res judicata is that "the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 157. "Although res judicata bars claims that were not actually litigated in a prior action, the previous and subsequent claims must be considered the same for res judicata to apply." Id., 159. "To determine whether claims are the same for res judicata purposes, this court has adopted the transactional test. . . . Under the transactional test, res

judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . . What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, *whether they form a convenient trial unit*, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . [E]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 159–60.

In *Wheeler*, the court declined to apply res judicata. This determination rested, in part, on the fact that the plaintiffs were not a party to the earlier action; id., 163–64; but also because the court in *Wheeler* determined that there was not a significant overlap in the evidence required for each cause of action. Id. The court noted that the differences "render the claims factually and legally dissimilar enough to preclude their presentation to a jury in a logically succinct way." Id., 163 n.18. Although the court in *Wheeler* considered the degree of overlap between the distinct causes of action when deciding not to apply res judicata, whether claims form a convenient trial unit is just one factor to be weighed. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If

there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series." 1 Restatement (Second), Judgments § 24, comment (b), p. 199 (1982); see also *Savvidis* v. *Norwalk*, 129 Conn. App. 406, 411–12, 21 A.3d 842, cert. denied, 302 Conn. 913, 27 A.3d 372 (2011).

Thus, when the facts underlying the claims are the same, res judicata may apply. See *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 609 ("because the factual underpinnings of the claims asserted in action II and those actually litigated in action I are the same, they formed a convenient trial unit that would have favored consolidation" [internal quotation marks omitted]); *Buck* v. *Berlin*, 163 Conn. App. 282, 293, 135 A.3d 1237 (applying res judicata where "virtually indistinguishable" factual circumstances gave rise to distinct legal theories), cert. denied, 321 Conn. 922, 138 A.3d 283 (2016); *Summitwood Development, LLC* v. *Roberts*, supra, 130 Conn. App. 804–805 (applying res judicata where claims arose from same facts and sought redress for the same injury).

In the present case, the fourth and final element is met because under the transaction test, the same underlying claim is at issue. The factual allegations giving rise to *Smith I* and the present action are nearly identical. In both instances, the plaintiff seeks redress from injuries sustained after falling off a retaining wall on September 17, 2011. The complaint in the present action does not allege that the defendants engaged in any relevant conduct after the commencement of *Smith I*. Moreover, the present action is distinguishable from *Wheeler*, as in that instance the plaintiffs facing preclusion had not been a party to the prior action, which was an important factor that the court weighed alongside the determinations concerning the claims' dissimilarities. As *Smith*

I and the present case arise from a common set of facts and merely offer different legal theories, the same underlying claim is at issue.

Having determined that res judicata may bar the plaintiff's claims, the court will consider whether the policies underlying res judicata favor preclusion. "[A]pplication of the doctrine can yield harsh results, especially in the context of claims that were not actually litigated . . . . The decision of whether res judicata should bar such claims should be based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 158. The purposes of res judicata are "promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties." *Weiss* v. *Weiss*, supra, 297 Conn. 465.

Related to repose, there are certain exceptions to the general rule concerning claim-splitting, such as when the court has reserved a plaintiff's right to bring a second action. See 1 Restatement (Second), supra, § 26. "A determination by the court that its judgment is 'without prejudice' (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action." Id., comment (b), p. 236; see *A.J. Masi Electric Co.* v. *Marron & Sipe Building & Contracting Corp.*, 21 Conn. App. 565, 574 A.2d 1323 (1990) (res judicata not applied where trial court in original case, with the consent of the parties, ordered claims to be severed and tried separately).

In the present case, the policies underlying res judicata favor preclusion. Litigation between the plaintiff and BL Co. commenced in January of 2012. With due respect to the plaintiff's alleged injuries, the countervailing interest in bringing litigation to a close is strong. The promotion of judicial economy weighs in favor of the defendants because the professional negligence claim could have been adjudicated at the same time as the public nuisance claim.

Furthermore, the plaintiff's argument that the present case is not repetitive ignores the numerous, fundamental similarities between *Smith I* and the present case in favor of emphasizing the minor differences. Both actions allege a common set of facts, both allege claims sounding in tort, and both seek redress of the same injury. That professional negligence is a different legal theory than public nuisance does not sufficiently distinguish the two actions. Accordingly, the goal of minimizing repetitive litigation also favors the defendants.

Although the plaintiff may be correct that the present case does not implicate the policy concerning inconsistent judgments, the plaintiff's argument concerning reservation is not persuasive. In *Smith I*, the trial court, *Radcliffe*, *J.*, merely noted that the plaintiff had the opportunity to assert a claim for professional negligence; there is no express language indicating that the court intended to reserve the plaintiff's right to bring a second action following a final judgment on the merits. The trial court's decision merely indicates that the plaintiff had the opportunity to assert a claim for professional negligence, but failed to do so, even though such a claim was not yet barred. The court's language does not reserve the plaintiff's right to bring the present action.

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is granted.

GREGG FISK *v.* BL COMPANIES, INC., ET AL.
(AC 40369)

Lavine, Sheldon and Bright, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, B Co. and F, for alleged professional negligence in connection with an incident in which the plaintiff fell from a retaining wall onto a driveway approximately six feet below and sustained injuries. The plaintiff previously had brought an action against B Co., which had supervised the construction of the wall, and alleged that the wall constituted an absolute and public nuisance. The trial court in that action rendered summary judgment for B Co., concluding that the pleadings and exhibits did not support the claim that B Co. had control of the property on which the retaining wall was constructed. Thereafter, the plaintiff brought this action, alleging that the defendants were negligent. The trial court granted the defendants' motion for summary judgment, determining that the negligence claim was barred by res judicata in light of the judgment on the merits in the nuisance action. From the judgment rendered thereon, the plaintiff appealed to this court, claiming that the trial court improperly concluded that the prior judgment on the nuisance claim precluded him from bringing a subsequent negligence claim against the defendants, which had not been pleaded in the previous action but was predicated on the same nucleus of fact. *Held* that the trial court properly rendered summary judgment in favor of the defendants; the claims raised by the plaintiff in this court essentially having been the same as those he raised in the trial court, which thoroughly addressed the arguments raised in this appeal in its memorandum of decision, this court adopted the trial court's well reasoned memorandum of decision as a proper statement of the facts and applicable law on the issues.

Argued September 12—officially released October 30, 2018

Procedural History

Action to recover damages for the defendants' alleged negligence, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

A. Reynolds Gordon, with whom was *Frank A. DeNicola, Jr.*, for the appellant (plaintiff).

Jared Cohane, with whom were *Luke R. Conrad* and *Julia O'Brien*, general counsel, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Gregg Fisk, appeals from the summary judgment rendered by the trial court in favor of the defendants, BL Companies, Inc. (company), and James Fielding, on the ground of res judicata. Specifically, the plaintiff claims that the trial court erred as a matter of law by concluding that a prior judgment on a nuisance claim precluded the plaintiff from bringing a subsequent negligence claim that was predicated on the same nucleus of fact but not pleaded in the previous action. We affirm the judgment of the trial court.

The following facts and procedural history underlie the appeal to this court. The town of Redding (town) hired the company to survey, design, engineer, inspect, and supervise the "Streetscape Project," which included the construction of a block retaining wall. On August 27, 2011, at approximately 2 a.m., the plaintiff fell off the retaining wall onto a driveway approximately six feet below, sustaining multiple injuries.

The plaintiff first brought an action against the town, its contractor, M. Rondano, Inc., and the company, alleging that the retaining wall constituted an absolute and public nuisance because it was not fenced off and no warning was provided. On December 5, 2014, the court, *Radcliffe, J.*, rendered summary judgment in favor of the company on the ground that the pleadings and exhibits did not support the claim that the company had control of the property on which the retaining wall was constructed. This court affirmed the judgment of

the trial court. *Fisk* v. *Redding*, 164 Conn. App. 647, 138 A.3d 410 (2016).

Thereafter, the plaintiff brought this second action against the defendants, alleging negligence. On April 3, 2017, the trial court, *Kamp*, *J.*, granted the defendants' motion for summary judgment on the ground that the negligence claim was barred by res judicata in light of the previous judgment on the merits of the nuisance cause of action.[1] The plaintiff appeals from the rendering of summary judgment in the negligence action.

The claims raised by the plaintiff in this court are essentially the same claims he raised in the trial court when he opposed the motion for summary judgment. We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgment of the trial court should be affirmed. Because Judge Kamp's memorandum of decision thoroughly addresses the arguments raised in this appeal, we adopt that court's well reasoned decision as a proper statement of the facts and applicable law on the issues. *Fisk* v. *BL Cos.*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6055533 (April 3, 2017) (reprinted at 185 Conn. App. 674, A.3d). It would serve no useful purpose for this court to engage in any further discussion. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

The judgment is affirmed.

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[1] Although Fielding was not a party in the first action, the trial court concluded that the judgment in the first action precluded any claim against him in this action because he is in privity with the company. The plaintiff has not challenged this conclusion.

APPENDIX

GREGG FISK *v.* BL COMPANIES, INC., ET AL.*

Superior Court, Judicial District of Fairfield
File No. CV-16-6055533

Memorandum filed April 3, 2017

Proceedings

Memorandum of decision on defendants' motion for summary judgment. *Motion granted.*

A. Reynolds Gordon and *Frank A. DeNicola, Jr.*, for the plaintiff.

Jared Cohane and *Luke R. Conrad*, for the defendants.

Opinion

KAMP, J. The issue before the court is the defendants' motion for summary judgment on the ground that the plaintiff's claims are barred by res judicata. For the reasons set forth below, the motion is granted.

FACTS

The plaintiff, Gregg Fisk, filed the two count second amended complaint on June 13, 2016. The plaintiff asserts one claim of professional negligence against each defendant; count one is against BL Companies, Inc. (BL Co.), and count two is against James Fielding.[1]

The plaintiff alleges the following facts. On August 27, 2011, the plaintiff fell off a retaining wall and sustained injuries. The drop from the retaining wall was between five and six feet, and there was no protective fence in place. BL Co., a firm of design engineers, negligently

* Affirmed. *Fisk* v. *BL Cos.*, 185 Conn. App. 671, A.3d (2018).

[1] Hereafter, BL Co. and Fielding will be referred to collectively as the defendants, and individually by name, where appropriate.

surveyed the area around the retaining wall. Furthermore, the landscape architect and project manager for this retaining wall, Fielding, submitted an unsafe design that was not in accordance with requirements established by the Department of Transportation and the town of Redding Zoning Regulation. The construction and design of the retaining wall was unsafe and constituted a fall hazard.

On October 17, 2016, the defendants filed a motion for summary judgment on the ground that due to a judgment on the merits rendered in a prior action, *Fisk* v. *Redding*, Superior Court, judicial district of Fairfield, Docket No. 12-6027299-S (December 5, 2014) (*Radcliffe*, *J.*) (*Fisk I*), the plaintiff's claims are barred by res judicata. The motion is accompanied by a memorandum of law and several exhibits: the trial court's decision from *Fisk I*, granting BL Co.'s motion for summary judgment; the affidavit of Derek A. Kohl, principal with BL Co.; a copy of the judgment file from *Fisk I*; the plaintiff's motion for leave to amend his complaint and the amended complaint filed in *Fisk I*, dated July 24, 2014; *Fisk* v. *Redding*, 164 Conn. App. 647, 138 A.3d 410 (2016) (affirming *Fisk I*); the verdict form from *Fisk I*, finding in favor of the town of Redding; and the plaintiff's motion for leave to amend his complaint, filed on June 13, 2016, as well as the complaint filed in the present action. The plaintiff filed a memorandum of law in opposition on November 15, 2016. The defendants responded with a memorandum of law on November 23, 2016. The plaintiff then filed a rebuttal on December 1, 2016, which is accompanied by the transcript from the oral argument before the Appellate Court in *Fisk I*. The parties were heard at short calendar on December 5, 2016.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof

submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "Moreover, summary judgment is an appropriate vehicle for raising a claim of res judicata . . . ." (Citations omitted.) *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 867 n.8, 675 A.2d 441 (1996).

The defendants argue that the plaintiff's claims are barred by res judicata because there was a judgment on the merits in *Fisk I*, and the operative facts of *Fisk I* and the present action are virtually identical. The defendants assert in their memoranda and through the exhibits provided that in *Fisk I*, the plaintiff sued BL Co. on a theory of public nuisance for injuries arising from his fall from the retaining wall on August 27, 2011. The trial court, *Radcliffe, J.*, granted summary judgment to BL Co. in *Fisk I*, which the Appellate Court affirmed. The defendants argue that the plaintiff's claims for professional negligence in the present case are barred, notwithstanding the plaintiff's new legal theory, as the finality of the judgment rendered in *Fisk I* applies to any other admissible matter that might have been raised, and the plaintiff had the opportunity to raise a professional negligence claim in the prior action. Finally, the defendants contend that the preclusive effect of *Fisk I* applies to not only BL Co., a named

defendant in *Fisk I*, but also to Fielding, who the defendants argue is in privity with BL Co.

The plaintiff argues that the application of res judicata would push the doctrine beyond its intended purposes and, furthermore, that preclusion would unfairly prejudice him. First, the plaintiff argues that the question of wrongdoing was not determined in *Fisk I*. The plaintiff also argues that the claim of professional negligence in the present case is a separate and distinct claim from the public nuisance claim in *Fisk I*, and that the two do not form a convenient trial unit. Specifically, the plaintiff contends that the two claims require different liability experts and that, if presented together, the claims would confuse a jury. The plaintiff also argues that the policies and underlying purposes of res judicata counsel against barring the plaintiff's unlitigated claims because the present action is not duplicative and inconsistent judgments are impossible. Furthermore, the plaintiff asserts that the defendants are not harassed by the present action because it is brought pursuant to the trial court's reservation and the defendants' invitation. To support this argument, the plaintiff looks to the trial court's summary judgment decision in *Fisk I*,[2] as well as statements made by the defendants' counsel at oral argument before the Appellate Court.[3]

[2] For his reservation argument, the plaintiff relies on the following language: "Although free to assert claims of professional negligence against the architect, the plaintiffs have failed to do so. No claim of professional negligence is [pleaded] in this case, although the time within which any such claim may be asserted, has not expired." *Fisk* v. *Redding*, supra, Superior Court, Docket No. 12-6027299-S.

[3] At oral argument, the defendants' counsel argued: "[T]he cause of action against those professionals is professional negligence, not absolute nuisance. It's a very different thing; it's a very important distinction to understand here. And the trial court pointed it out in its decision. They still, if they want to allege a professional negligence claim against BL Companies, I believe it's still within [the] statute of limitations to do so. That's their avenue for recourse here. Not stretching absolute nuisance to the nth degree . . . ." The defendants' counsel later indicated that professional negligence would have been "the appropriate cause of action" and noted that the seven year statute of limitations had not yet run. In closing, counsel said: "[W]e

"The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum. . . . [C]ollateral estoppel, or issue preclusion . . . prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim." (Citations omitted; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 600, 922 A.2d 1073 (2007).

"Unlike collateral estoppel, under which preclusion occurs only if a claim actually has been litigated, [u]nder the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim . . . [or any claim based on the same operative facts that] *might have been made*. . . . [T]he appropriate inquiry with respect to [claim] preclusion is whether the party had an *adequate opportunity to litigate the matter in the earlier proceeding* . . . ." (Emphasis in original; internal quotation marks omitted.) *Connecticut National Bank* v. *Rytman*, 241 Conn. 24, 43–44, 694 A.2d 1246 (1997). "[R]es judicata prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Internal quotation marks

ask that you not expand absolute nuisance to encapsulate work of design professionals. In this case, [it] was clearly undisputed that BL Companies has no control, was not a user of the property. We controlled our design. But there's a cause of action, and there's a right of action for [the plaintiff] if they can prove that we deviated from the standard of care in—in that design."

omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 157–58, 129 A.3d 677 (2016).

In the present case, the plaintiff's argument that the issue of wrongdoing was not determined in *Fisk I*—and, indeed, that the issue was not before the court in *Fisk I*—does not impact the applicability of res judicata. Whether the issue was actually litigated is a relevant inquiry for the application of collateral estoppel, but not res judicata. Accordingly, in determining whether the present action is barred, the court must look to whether the plaintiff had the opportunity to raise a claim for professional negligence in the prior action; that the present action presents a new legal theory—and consequently, new issues to be considered—is not determinative.

"Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." Id., 156–57.

In the present case, the first two elements do not appear to be in dispute. First, summary judgment is a final judgment on the merits; because the Appellate Court affirmed that BL Co. was entitled to judgment as a matter of law in *Fisk I*, the first element is met. Second, both the plaintiff and BL Co. were parties to *Fisk I*. As the plaintiff alleges that Fielding was at all times acting as the agent, servant and employee of BL Co., and within the scope of his duties, Fielding is in privity with BL Co. See *Summitwood Development, LLC* v. *Roberts*, 130 Conn. App. 792, 802–803, 25 A.3d 721 (defendant-agents in privity with employer named in prior suit), cert. denied, 302 Conn. 942, 29 A.3d 467 (2011), cert. denied, 565 U.S. 1260, 132 S. Ct. 1745, 182

L. Ed. 2d 530 (2012). Accordingly, the second element is also met.

With regard to the third element, adequate opportunity, "[r]es judicata bars the relitigation of claims actually made in the prior action as well as any claims that might have been made there. . . . Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 157. "[A]lthough parties are not *required* to resolve all disputes during a . . . proceeding, when a party had the opportunity to raise the claim and the . . . proceeding provided the proper forum for the resolution of that claim, res judicata may bar litigation of a subsequent action." (Emphasis in original.) *Weiss* v. *Weiss*, 297 Conn. 446, 464, 998 A.2d 766 (2010); cf. *In re Probate Appeal of Cadle Co.*, 152 Conn. App. 427, 100 A.3d 30 (2014) (where Superior Court lacked jurisdiction over claim not raised in Probate Court, plaintiff had no opportunity to raise claim).

Bifurcation and amendment afford a plaintiff the opportunity to avoid piecemeal litigation. "[A]ny potential prejudice resulting from facts that are not related could be resolved by bifurcating the trial. With bifurcation, the evidence common to both claims, which was considerable, could have been presented at once and not in separate lawsuits commenced at a distance of months or years." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 610 n.5. The court in *Powell* also noted that the trial court, in applying res judicata, correctly considered that the plaintiffs failed to amend their complaint to incorporate the allegations that were eventually raised in the second action. Id., 608.

The third element is met in the present case. As an initial matter, the Superior Court could have exercised

jurisdiction over the professional negligence claim, had the plaintiff raised it. To the extent that the plaintiff argues that the differences between public nuisance and professional negligence deprived him of the opportunity to bring both—because to do so would be impossible—the plaintiff fails to consider the possibility of bifurcation. Moreover, the plaintiff not only had the opportunity to bring a claim for professional negligence at the commencement of the prior action, but he also had the opportunity to amend the pleadings in *Fisk I* to add such a claim. When granting the motion for summary judgment in *Fisk I*, the trial court, *Radcliffe, J.*, expressly noted that although the plaintiff had not pleaded professional negligence, the time to do so had not yet expired; even though the plaintiff amended his complaint in *Fisk I* in July, 2014, he did not assert a claim for professional negligence. Therefore, the plaintiff had the opportunity to litigate the matter fully in the prior action.

The fourth element for res judicata is that "the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 157. "Although res judicata bars claims that were not actually litigated in a prior action, the previous and subsequent claims must be considered the same for res judicata to apply." Id., 159. "To determine whether claims are the same for res judicata purposes, this court has adopted the transactional test. . . . Under the transactional test, res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . . What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, *whether they form a convenient trial unit*, and whether

their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . [E]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 159–60.

In *Wheeler*, the court declined to apply res judicata. This determination rested, in part, on the fact that the plaintiffs were not a party to the earlier action; id., 163–64; but also because the court in *Wheeler* determined that there was not a significant overlap in the evidence required for each cause of action. Id. The court noted that the differences "render the claims factually and legally dissimilar enough to preclude their presentation to a jury in a logically succinct way." Id., 163 n.18. Although the court in *Wheeler* considered the degree of overlap between the distinct causes of action when deciding not to apply res judicata, whether claims form a convenient trial unit is just one factor to be weighed. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series." 1 Restatement (Second), Judgments § 24, comment (b), p. 199 (1982); see also *Savvidis* v. *Norwalk*, 129 Conn. App. 406, 411–12, 21 A.3d 842, cert. denied, 302 Conn. 913, 27 A.3d 372 (2011).

Thus, when the facts underlying the claims are the same, res judicata may apply. See *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 609 ("because the factual underpinnings of the claims asserted in action II and those actually litigated in action I are the same, they formed a convenient trial unit that would have favored consolidation" [internal quotation marks omitted]); *Buck* v. *Berlin*, 163 Conn. App. 282, 293, 135 A.3d 1237 (applying res judicata where "virtually indistinguishable" factual circumstances gave rise to distinct legal theories), cert. denied, 321 Conn. 922, 138 A.3d 283 (2016); *Summitwood Development, LLC* v. *Roberts*, supra, 130 Conn. App. 804–805 (applying res judicata where claims arose from same facts and sought redress for the same injury).

In the present case, the fourth and final element is met because under the transaction test, the same underlying claim is at issue. The factual allegations giving rise to *Fisk I* and the present action are nearly identical. In both instances, the plaintiff seeks redress from injuries sustained after falling off a retaining wall on August 27, 2011. The complaint in the present action does not allege that the defendants engaged in any relevant conduct after the commencement of *Fisk I*. Moreover, the present action is distinguishable from *Wheeler*, as in that instance the plaintiffs facing preclusion had not been a party to the prior action, which was an important factor that the court weighed alongside the determinations concerning the claims' dissimilarities. As *Fisk I* and the present case arise from a common set of facts and merely offer different legal theories, the same underlying claim is at issue.

Having determined that res judicata may bar the plaintiff's claims, the court will consider whether the policies underlying res judicata favor preclusion. "[A]pplication of the doctrine can yield harsh results, especially in the context of claims that were not actually

litigated . . . . The decision of whether res judicata should bar such claims should be based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 158. The purposes of res judicata are "promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties." *Weiss* v. *Weiss*, supra, 297 Conn. 465.

Related to repose, there are certain exceptions to the general rule concerning claim-splitting, such as when the court has reserved a plaintiff's right to bring a second action or when the defendant acquiesces to claim-splitting. See 1 Restatement (Second), supra, § 26. "A determination by the court that its judgment is 'without prejudice' (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action." Id., comment (b), p. 236; see *A.J. Masi Electric Co.* v. *Marron & Sipe Building & Contracting Corp.*, 21 Conn. App. 565, 574 A.2d 1323 (1990) (res judicata not applied where trial court in original case, with the consent of the parties, ordered claims to be severed and tried separately). In terms of acquiescence, although it appears that a defendant can consent to a second action implicitly, this determination requires a fact specific approach. See *Connecticut National Bank* v. *Rytman*, supra, 241 Conn. 43 n.23 (affirming trial court's fact specific determination that failing to object immediately was not acquiescence to claim-splitting); *Orselet* v. *DeMatteo*, 206 Conn. 542, 548–49, 539 A.2d 95 (1988) (no implicit consent because "there is no evidence to

indicate that the defendants' conduct contributed to the filing of two separate lawsuits based on a single cause of action").

In the present case, the policies underlying res judicata favor preclusion. Litigation between the plaintiff and BL Co. commenced in May of 2012, with decisions issuing from both the Superior and Appellate Courts. With due respect to the plaintiff's alleged injuries, the countervailing interest in bringing litigation to a close is strong. The promotion of judicial economy weighs in favor of the defendants because the professional negligence claim could have been adjudicated at the same time as the public nuisance claim.

Furthermore, the plaintiff's argument that the present case is not repetitive ignores the numerous, fundamental similarities between *Fisk I* and the present case in favor of emphasizing the minor differences. Both actions allege a common set of facts, both allege claims sounding in tort, and both seek redress of the same injury. That professional negligence is a different legal theory than public nuisance does not sufficiently distinguish the two actions. Accordingly, the goal of minimizing repetitive litigation also favors the defendants.

Although the plaintiff may be correct that the present case does not implicate the policy concerning inconsistent judgments, the plaintiff's arguments concerning reservation and invitation are not persuasive. In *Fisk I*, the trial court, *Radcliffe*, *J.*, merely noted that the plaintiff had the opportunity to assert a claim for professional negligence; there is no express language indicating that the court intended to reserve the plaintiff's right to bring a second action following a final judgment on the merits. Nor can the statements made by the defendants' counsel before the Appellate Court be construed as an invitation. The focus of counsel's argument concerns the appropriate cause of action to be brought

based upon the factual circumstances underlying the plaintiff's injuries. In context, the statements indicate that the defendants' counsel acknowledged that the statute of limitations had not run for a claim of professional negligence in order to highlight that the plaintiff ought to have—and had the opportunity to—bring such a claim, rather than "stretching absolute nuisance to the nth degree . . . ." Read together, the trial court's decision and the defendants' counsel's statements merely indicate that the plaintiff had the opportunity to assert a claim for professional negligence, but failed to do so, even though such a claim was not yet barred. Neither the trial court nor the defendants' counsel invited the present action.

CONCLUSION

For the foregoing reasons the defendants' motion for summary judgment is granted.

RAUL DIAZ *v.* COMMISSIONER OF CORRECTION (AC 39651)

DiPentima, C. J., and Elgo and Bear, Js.

Syllabus

The petitioner, who had been convicted, on a guilty plea, of the crime of home invasion, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel provided ineffective assistance. The habeas court, after a trial, rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. On appeal, he claimed that his trial counsel rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge, to which he had pleaded guilty pursuant to *North Carolina* v. *Alford* (400 U.S. 25), on the ground that the charge was duplicative of a charge of burglary in the first degree in the substitute information. *Held* that the habeas court properly denied the habeas petition; as a matter of law, the petitioner waived his claim that his trial counsel was ineffective in failing to file a motion to dismiss the home invasion charge when he pleaded guilty to the home invasion charge pursuant to the *Alford* doctrine and his plea was accepted by the trial court, and he made no claim that his plea was not made knowingly, intelligently, or voluntarily, nor did he allege a jurisdictional defect.

Argued September 13—officially released October 30, 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, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Deren Manasevit, for the appellant (petitioner).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Matthew Gedansky*, state's attorney, and *David Carlucci*, assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Raul Diaz, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erroneously denied his ineffective assistance of counsel claim. Specifically, the petitioner claims that his trial counsel rendered ineffective assistance by failing to file a motion to dismiss a home invasion charge, to which he pleaded guilty pursuant to the *Alford* doctrine.[1] We affirm the judgment of the habeas court.

The following factual and procedural background is relevant to our resolution of the petitioner's appeal.[2] On October 27, 2011, the petitioner entered the Ellington home of the seventy-seven year old victim when he was not there. While the petitioner was still in the home, the victim returned. The petitioner asked the victim to

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *State* v. *Webb*, 62 Conn. App. 805, 807 n.1, 772 A.2d 690 (2001).

[2] The facts are as recited by the prosecution during the petitioner's canvass.

step aside so that he could flee the home, but the victim refused. The petitioner struck the victim with a jewelry box, resulting in a laceration on his head and a broken nose and cheekbone. After taking the victim's wallet and car keys, the petitioner fled in the victim's car, but was later apprehended.

The petitioner was charged in a substitute information with two counts of home invasion in violation of General Statutes § 53a-100aa,[3] two counts of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) and (2), one count of larceny in the third degree in violation of General Statutes § 53a-124, one count of larceny in the fourth degree in violation of General Statutes § 53a-125, one count of assault in the second degree in violation of General Statutes § 53a-60b, and one count of robbery in the first degree involving a dangerous instrument in violation of General Statutes § 53a-134 (a) (3). On April 26, 2013, after the petitioner entered into a plea agreement with the state, he pleaded guilty under the *Alford* doctrine to one count of home invasion in violation of General Statutes § 53a-100aa (a) (2). After a thorough canvass, the court accepted the plea, rendered a judgment of conviction and sentenced the petitioner in accordance with the plea agreement to twenty-five years imprisonment. The petitioner did not appeal from the judgment of conviction.

Thereafter, the petitioner commenced this habeas action. On February 25, 2016, the petitioner filed an amended petition for a writ of habeas corpus, alleging, among other claims, that his trial counsel had rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge on the ground that it was duplicative of the first degree burglary charge. After

[3] The second of the home invasion charges was added by the state immediately prior to the trial. All references herein to the home invasion charge are to the first home invasion charge.

a trial, the habeas court issued a memorandum of decision denying the petition for a writ of habeas corpus, concluding that the petitioner had failed to establish that his trial counsel deficiently performed by not filing a motion to dismiss the home invasion charge. The habeas court found that although the petitioner's trial counsel agreed with the state's assessment that the petitioner violated the home invasion statute, he nonetheless argued, although unsuccessfully, to the court and the prosecutor that the home invasion charge should be dropped, and in any event that the petitioner should be allowed to plead to the first degree burglary charge instead of the home invasion charge. Moreover, the habeas court agreed with his trial counsel's testimony stating that there was no good faith basis on which to bring a motion to dismiss the home invasion charge in the trial court. The habeas court further concluded that, even if the petitioner's trial counsel had deficiently performed, which he had not, the petitioner was not prejudiced. The habeas court granted certification to appeal its denial, and this appeal followed. Additional facts will be set forth as necessary.

The petitioner's sole claim on appeal is that the habeas court erroneously denied his petition for a writ of habeas corpus because it concluded that trial counsel's failure to file a motion to dismiss the home invasion charge did not constitute ineffective assistance of counsel. We conclude that, as a matter of law, the petitioner waived his right to raise this claim when he pleaded guilty under the *Alford* doctrine.

We first set forth the applicable legal principles that guide our analysis. "A plea of guilty, voluntarily and knowingly made, waives all nonjurisdictional defects and defenses in the proceedings preliminary thereto." *Szarwak* v. *Warden*, 167 Conn. 10, 22, 355 A.2d 49 (1974). "In general, the only allowable challenges after a plea are those relating either to the voluntary and intelligent nature of the plea or the exercise of the trial

court's jurisdiction." *State* v. *Johnson*, 253 Conn. 1, 80, 751 A.2d 298 (2000). "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett* v. *Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). Moreover, "[i]t is . . . not necessary for the trial court to canvass the defendant to determine that [he] understands that [his] plea of guilty or nolo contendere operates as a waiver of any challenge to pretrial proceedings." (Internal quotation marks omitted.) *State* v. *Johnson*, supra, 42.

In *Savage* v. *Commissioner of Correction*, 122 Conn. App. 800, 802, 998 A.2d 1247 (2010), this court dismissed an appeal in which the petitioner, after pleading guilty pursuant to the *Alford* doctrine, claimed that his trial counsel had rendered ineffective assistance by failing to file a motion for a speedy trial and a motion to dismiss. Id. The court concluded that the petitioner waived his right to raise the claim when he pleaded guilty under *Alford*. Id.; see also *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 796–99, 189 A.3d 135 (petitioner waived claims unrelated to guilty plea, including ineffective assistance of counsel), cert. denied, 329 Conn. 911, 186 A.3d 707 (2018); *State* v. *Hanson*, 117 Conn. App. 436, 456–57, 979 A.2d 576 (2009) (declining to review nonjurisdictional claims made after voluntary and intelligent plea), cert. denied, 295 Conn. 907, 989 A.2d 604, cert. denied, 562 U.S. 986, 131 S. Ct. 425, 178 L. Ed. 2d 331 (2010); *McKnight* v. *Commissioner of Correction*, 35 Conn. App. 762, 765 n.6, 646 A.2d 305 (guilty plea would have waived ineffective assistance claim stemming from probable cause hearing), cert. denied, 231 Conn. 936, 650 A.2d 173

(1994). Additionally, in *State* v. *Christensen*, 157 Conn. App. 290, 291, 115 A.3d 1138 (2015), a direct appeal from the defendant's conviction, this court determined that the defendant waived his claims that the trial court improperly denied his motion to suppress and his conditional plea of nolo contendere when he subsequently entered into a voluntary and intelligent guilty plea.

We view *Savage* as factually and legally analogous to the present case. The petitioner in this case pleaded guilty to home invasion under *Alford* and makes no claim that his plea was not made knowingly, intelligently, or voluntarily, nor has he alleged a jurisdictional defect. As our case law makes clear, an *Alford* plea effectively waives a petitioner's right to claim a constitutional defect unrelated to the plea. *Savage* v. *Commissioner of Correction*, supra, 122 Conn. App. 800. As a result, the petitioner's claim of ineffective assistance of counsel due to his trial counsel's failure to file a motion to dismiss the home invasion charge was waived when he entered his *Alford* plea that was accepted by the trial court.

The judgment is affirmed.

In this opinion the other judges concurred.

WINSTON Y. LI ET AL. *v.* HENRY K. YAGGI III ET AL.
(AC 40683)

Alvord, Sheldon and Norcott, Js.

Syllabus

The plaintiffs, who had entered into an agreement to purchase a parcel of residential property from the defendants, brought the present action seeking, inter alia, the return of certain contractual deposits pursuant to a mortgage contingency clause. Shortly before expiration of the relevant contingency date, the plaintiffs sent the defendants an e-mail stating that they had been unable to secure a mortgage and requesting an

extension. Although the defendants responded that they would be willing to agree to an extension if the plaintiffs provided certain additional information, that information was never provided. After the contingency date passed, the plaintiffs received notices from two banks enumerating certain problems with their mortgage applications. On the basis of these notices, the plaintiffs requested termination of the agreement and a return of their deposits. Following a trial to the court, the court issued a memorandum of decision concluding that the plaintiffs' failure to diligently pursue financing and their failure to provide a timely written notice of termination constituted a breach of the agreement, and that, therefore, the defendants were entitled to retain the deposits as liquidated damages. Specifically, the court concluded the plaintiffs' e-mail did not constitute a written notice of termination but, rather, merely served as a request for an extension. The defendants subsequently filed a motion seeking attorney's fees pursuant to the agreement, which the court granted. Thereafter, the court rendered judgment in favor of the defendants in accordance with its decision, and the plaintiffs appealed to this court. *Held*:

1. The trial court's finding that the plaintiffs failed to diligently pursue financing was clearly erroneous; in light of the terms of the agreement, the question for the court was whether the plaintiffs used reasonable diligence in their efforts to pursue a written mortgage commitment on or before the commitment date, and the court, in reaching the conclusion that the plaintiffs had failed to fulfill their obligation under the agreement, improperly relied solely on the notices from the plaintiffs' banks, which were ambiguous as to whether they reflected efforts of the plaintiffs within the relevant time period and provided no suggestion as to whether the plaintiffs had previously been notified, prior to the commitment date, of any deficiencies in their applications, as the court failed to properly focus on the diligence of the efforts made by the plaintiffs up to the commitment date and made no finding that there had been a lack of reasonable diligence in that earlier time period.
2. The trial court erred in interpreting the mortgage contingency clause in a manner requiring the plaintiffs to provide a written notice of termination; given that, under the clear language of the mortgage contingency, if the plaintiffs provided the defendants with notice by the commitment date of their inability to obtain a written commitment by the commitment date, the agreement would have been null and void and the plaintiffs would have been entitled to the return of their deposits, the only question for the court was whether the plaintiffs' e-mail, taken as a whole, contained sufficient language to notify the defendants of the plaintiffs' inability to obtain financing by the contingency date, and the court's error in interpreting the plaintiffs' obligation under the contract as requiring notice of termination of the agreement left that question unanswered.
3. This court declined to address the plaintiffs' claim regarding the reasonableness of the trial court's award of attorney's fees, as this court's

reversal of the trial court's judgment in favor of the defendants also required vacatur of the award of attorney's fees.

4. The defendants could not prevail on their claim, raised as an alternative ground for affirming the judgment, that the plaintiffs should be equitably estopped from claiming that they intended their e-mail to terminate the agreement because they continued to act as if the agreement remained in effect; although the defendants were not precluded from raising an equitable estoppel claim on remand, the record was inadequate to review that claim in the present appeal, as the doctrine of equitable estoppel was neither raised before, nor addressed by, the trial court.

Argued May 24—officially released October 30, 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 New Haven and tried to the court *Wilson*, *J.*; judgment for the defendants, from which the plaintiffs appealed to this court; thereafter, the court, *Wilson*, *J.*, denied the plaintiffs' motion for articulation and granted the plaintiffs' motion for rectification. *Reversed*; *new trial.*

Winston Y. Li, self-represented, and *Liping Wang*, self-represented, the appellants (plaintiffs).

Philip G. Kent, with whom, on the brief, was *Adam D. Miller*, for the appellees (defendants).

Opinion

ALVORD, J. The self-represented plaintiffs, Winston Y. Li and Liping Wang, appeal from the judgment of the trial court, rendered after a trial to the court, in favor of the defendant, Valerie M. Yaggi, individually and as administratrix of the estate of Henry Yaggi, on the plaintiffs' two count complaint alleging breach of the parties' purchase and sale agreement and breach of contract.[1]

[1] Henry K. Yaggi III, who was originally named as a defendant in this action, died during the pendency of the action, and Valerie Yaggi was substituted as the administratrix of Henry Yaggi's estate. Accordingly, we refer to Valerie Yaggi in both of her capacities as the defendant.

On appeal, the plaintiffs claim that the court (1) erroneously found that the plaintiffs failed to diligently pursue a written mortgage commitment, (2) erroneously found that the plaintiffs failed to give notice of their inability to obtain financing for the real estate purchase by the agreed upon commitment date,[2] and (3) erred in awarding the defendant attorney's fees. The defendant raises the doctrine of equitable estoppel as an alternative ground for affirmance of the court's decision. We reverse the judgment of the trial court.

The record reveals the following facts and procedural history. On October 26, 2012, the defendant entered into a purchase and sale agreement (agreement) with the plaintiffs with respect to a parcel of real property located at 45 Wickford Place in the town of Madison (property). The purchase price of the property was $810,000, and the plaintiffs submitted deposits totaling $25,000.

The agreement contained a mortgage contingency clause in paragraph 6, which stated: "Buyer's obligation is contingent upon Buyer obtaining financing as specified in this paragraph. Buyer agrees to apply for such financing immediately and diligently pursue a written mortgage commitment on or before the Commitment Date. . . . If Buyer is unable to obtain a written commitment and notifies Seller in writing by 5:00 p.m. on said Commitment Date, this Agreement shall be null and void and any Deposits shall be immediately returned to Buyer. Otherwise, the Financing Contingency shall be deemed satisfied and this Agreement shall continue in full force and effect." The agreement specified that the commitment date was thirty days from the date of the October 26 agreement, which was November 25.

[2] For ease of discussion, we address the plaintiffs' claims in a different order than that in which they appear in their brief. Because the plaintiffs' first two claims are intertwined, we will address them together.

Because November 25 was a Sunday, the commitment date was November 26. The closing date was set for December 3.

Paragraph 14 of the agreement provided: "If Buyer fails to comply with any Terms of this Agreement by the time set forth for compliance and Seller is not in default, Seller shall be entitled to all initial and additional deposit funds provided for in section 4, whether or not Buyer has paid the same, as liquidated damages and both parties shall be relieved of further liability under this Agreement. If legal action is brought to enforce any provision of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees." On November 24, 2012, the plaintiffs sent an e-mail to the defendant, stating: "Attached is a request of mortgage extension. Due to the Hurricane Sandy and Thanksgiving holiday. We won't be able to obtain a mortgage commitment by 5 [p.m.] today. We request your approval of extension. We expect a commitment from a bank next week. Please sign and return to us ASAP." (November 24 e-mail) The plaintiffs attached to their e-mail a change form, which proposed an amended commitment date of December 3, 2012, and an amended closing date of December 14, 2012. The change form was signed by the plaintiffs.

The defendant forwarded the e-mail to her realtor, Lorey Walz, on November 24. The same day, Walz e-mailed Blake Ruchti, the plaintiffs' realtor, stating: "We have received the request to extend the mortgage commitment date and closing date. The sellers, Hank and Val Yaggi, are willing to do so after receiving verification from the bank that you have a mortgage approval contingent upon a bank appraisal. . . . Hank and Valerie Yaggi would like to see you purchase the home but have to be confident that a bank commitment will be given." The defendant did not sign the change form.

The plaintiffs submitted a second change form, signed by the plaintiffs and dated November 30, 2012, to the defendant. The second change form proposed an amended commitment date of December 14, 2012, and an amended closing date of December 21, 2012. The defendant handwrote, next to the amended commitment and closing dates, "[t]ime is of the essence," and initialed next to those handwritten additions. The defendant signed the second change form on December 4, 2012. The plaintiffs did not initial next to those handwritten additions, but they subsequently executed a third and a fourth change form, requesting further extensions of the commitment and closing dates. Neither form was signed by the defendant. The fourth change form proposed an amended commitment date of January 18, 2013, and an amended closing date of January 25, 2013.

On February 17, 2013, the plaintiffs e-mailed the defendant's counsel, James Segaloff, following up on a conversation from February 6, 2013, in which they told Segaloff that the first bank to which they applied for a mortgage had denied their loan application, the second such bank had requested an affidavit of repair for the roof before issuing a commitment, and the third such bank had not yet responded. In their e-mail, the plaintiffs stated: "We have requested for contract termination but no response from your clients. . . . Please advise the status and their consideration of the termination of the contract." The plaintiffs requested return of their deposits and attached a notice of loan denial from the first bank, United Wholesale Mortgage, dated December 13, 2012, and a suspense notice from the second bank, Mortgages Services III, LLC, dated December 6, 2012.[3]

[3] As detailed in the court's memorandum of decision, the suspense notice included eleven "suspense reasons (conditions needed prior to approval)." See footnote 10 of this opinion.

The plaintiffs' e-mail also stated: "As we indicated in the termination letter, we did not think we would be able to get a loan for the purchase of

On February 27, 2014, the plaintiffs commenced this action, alleging in relevant part that the defendant had breached the purchase and sale agreement by "not timely releas[ing] the deposit[s] . . . ." Both parties moved for summary judgment, those motions were denied, and the matter was tried to the court on March 9, 2017. The parties submitted proposed findings of fact and conclusions of law. On July 25, 2017, the court issued a memorandum of decision, finding that the plaintiffs had breached the purchase and sale agreement by failing (1) to timely terminate the contract, and (2) to diligently pursue financing as required under the agreement. Specifically, the court concluded that the November 24 e-mail sent by the plaintiffs did not constitute written notice of termination of the agreement, but rather served as a request for an extension of the commitment and closing dates. The court further found that none of the change forms submitted by the plaintiffs had been agreed upon by the parties and, thus, that the original commitment date remained operative. Because the plaintiffs did not provide written notice of termination by 5 p.m. on the commitment date, the court concluded that the defendant was entitled to retain the deposits.

Regarding the requirement to diligently pursue financing, the court relied on the two December, 2012

the property. Per the mortgage contingency we wanted to terminate the contract and requested return of the deposits. For your convenience attached are the bank denial and suspension letters along with the termination letter and signed form. Please encourage your clients to sign the termination form and return to us. . . . We noticed your clients have reactivated the listing in the market. Please note they are not entitled to sell the property to another buyer(s) without terminate the contract with us."

The plaintiffs previously had executed a termination of purchase and sale agreement dated January 11, 2013. The plaintiffs included as the reason for termination "[t]he sellers did not sign or reject for extension of mortgage contingency." The defendant contends, and the trial court found, that there was no evidence establishing that the January 11 termination form was ever sent to the defendant.

"mortgage denial notifications," provided by the plaintiffs to the defendant on February 17, 2013. The court found that the notifications "indicated that the plaintiffs did not fully complete their loan applications, and were thus denied financing." The court noted that the plaintiffs had submitted the third and fourth change forms requesting extensions of the commitment date after the issuance of the December denial notifications, at which time they were "fully aware that they had been denied a mortgage by two banks." Thus, the court concluded that the plaintiffs had breached the agreement by failing to pursue financing in a diligent manner.

Finally, the court concluded that the plaintiffs had defaulted on the agreement, triggering the liquidated damages clause set forth in paragraph 14 of the agreement. The court found that the amount of the deposits, $25,000, was a reasonable amount for the defendant to retain as liquidated damages because that sum represented only three percent of the $810,000 purchase price of the property and the defendant had testified that the delay occasioned by the plaintiffs had ultimately caused the defendant to sell the property for $135,000 less than the contract price to which the parties had agreed. With respect to the defendant's request for attorney's fees, the court ordered the defendant to file a motion, together with a supporting affidavit, and indicated that it would "determine whether reasonable attorney's fees shall be awarded" after a hearing on the motion.

The plaintiffs filed this appeal on July 28, 2017. On January 29, 2018, the court awarded the defendant attorney's fees in the amount of $38,000 and costs, after which the plaintiffs filed an amended appeal. Additional facts shall be set forth as necessary. We now turn to the plaintiffs' claims on appeal.

I

In the present case, the trial court determined that the plaintiffs were not entitled to the return of their deposits because they had not complied with the terms of the mortgage contingency clause. Specifically, the court found that the plaintiffs failed both to diligently pursue a written mortgage commitment and to give the notice to the defendant as described in the mortgage contingency clause. We conclude that the court's finding as to diligence was clearly erroneous because it was not specific to the relevant timeframe. We further conclude that the court's finding as to notice rested on a misinterpretation of the language contained in the mortgage contingency clause, in that the court construed the clause as requiring notice of termination of the agreement, rather than notice of an inability to obtain a written commitment by the commitment date. Consequently, the court's findings did not properly resolve the plaintiffs' breach of contract claim seeking to invoke the mortgage contingency clause's provision for the return of their deposits. The central questions that should have been decided by the court were (1) whether the plaintiffs diligently pursued a written mortgage commitment on or before the commitment date,[4] and (2) whether, if they were unable to obtain a written commitment by the commitment date, they so informed the defendant in writing by 5 p.m. on that date.

We begin by setting forth the general law applicable to mortgage contingency clauses. A mortgage contingency clause contained in a contract for the sale of real property generally allows a purchaser to recover his or her deposit if the purchaser is unable to secure a mortgage and has complied with the provisions of the contingency

[4] We note that the mortgage contingency clause also required the plaintiffs to "apply for . . . financing immediately . . . ." The court did not make any express findings regarding immediate application for financing, and neither party addresses this requirement in their briefs.

clause. See generally 77 Am. Jur. 2d, Vendor and Purchaser § 531 (2016) ("The purchaser may be expressly given the privilege or option to rescind the contract and to recover any payments made by him or her where the contract of sale provides for the cancellation of the contract[5] in the event that the purchaser is unable to obtain a mortgage or loan within a specified time. Accordingly, when a contract for the sale of real property contains a mortgage contingency clause . . . they are entitled to recover their down payment if the mortgage is not in fact approved through no fault of their own. . . . On the other hand, where the purchaser disregards the terms of a financing contingency contained in a contract for sale . . . the purchaser would not be entitled to invoke the contractual contingency and recover his or her down payment." [Footnotes added and omitted.]). The condition is "meant to protect the buyer. It is a condition of the buyer's duty, not a condition of the seller's duty under the contract. Upon the nonoccurrence of the condition, i.e., the buyer's obtaining financing, the buyer is ipso facto excused from performance." (Footnotes omitted.) 92 C.J.S., Vendor and Purchaser § 197 (2018); see also 2 Restatement (Second), Contracts § 225, illustration (8) (1981); id., § 226, illustration (4).

In the present case, the plain language of the provision in question, stating that the "Buyer's obligation is

[5] Note that mortgage contingency clauses must be considered according to the language used therein. For example, some clauses contemplate cancellation of the contract whereas others contemplate rendering the agreement null and void. Compare *McCoy* v. *Brown*, 130 Conn. App. 702, 705, 24 A.3d 597 (clause provided in part that "[i]n the event Buyer shall fail to secure said mortgage commitment . . . he shall have the option of terminating this Contract" [internal quotation marks omitted]), cert. denied, 302 Conn. 941, 29 A.3d 467 (2011), with *Aubin* v. *Miller*, 64 Conn. App. 781, 784, 781 A.2d 396 (2001) (clause provided in part that "[i]f Purchaser is unable to obtain a commitment for such loan . . . then this contract shall be null and void").

contingent upon Buyer obtaining financing," evidences the intent of the parties that the provision be a condition precedent to the plaintiffs' obligation to perform their agreement to purchase. Our appellate courts have previously interpreted similar mortgage contingency clauses and determined them to be conditions precedent to the contract. See, e.g., *Luttinger* v. *Rosen*, 164 Conn. 45, 48, 316 A.2d 757 (1972);[6] see also *Barber* v. *Jacobs*, 58 Conn. App. 330, 335, 753 A.2d 430 ("[t]he primary issue in this appeal is whether the plaintiff made a reasonable effort to obtain a mortgage which was a condition precedent of the contract"), cert. denied, 254 Conn. 920, 759 A.2d 1023 (2000).[7] The parties do not dispute that the plaintiffs were "unable to obtain a written commitment" by the commitment date. They disagree, however, as to whether the plaintiffs diligently pursued such a written commitment before that date and whether they gave written notice of their inability to obtain a commitment in such a way as to entitle them to the return of their deposits.

A

The plaintiffs claim that the court erred in concluding that the plaintiffs breached the purchase and sale

[6] The contract in *Luttinger* v. *Rosen*, supra, 164 Conn. 46, "was 'subject to and conditional upon the buyers obtaining first mortgage financing on said premises from a bank or other lending institution in an amount of $45,000 for a term of not less than twenty . . . years and at an interest rate which does not exceed [8.5 percent] per annum.' The plaintiffs agreed to use due diligence in attempting to obtain such financing. The parties further agreed that if the plaintiffs were unsuccessful in obtaining financing as provided in the contract, and notified the seller within a specific time, all sums paid on the contract would be refunded and the contract terminated without further obligation of either party."

[7] The contract in *Barber* v. *Jacobs*, supra, 58 Conn. App. 332–33, contained a mortgage contingency clause, which provided that the " '[a]greement [was] contingent upon Purchaser obtaining a commitment for a loan, to be secured by a first mortgage on the premises, in an amount not in excess of $1,300,000. . . .' The mortgage contingency required the plaintiff to 'make prompt application for such a loan' and 'to pursue said application with diligence.' "

agreement by failing to diligently pursue financing.[8] Specifically, the plaintiffs argue that they provided all documents to two banks to which they applied for financing, and that the December, 2012, denial and suspense notices presented to the court evidenced their diligent pursuit of such financing. They contend that the court "failed to understand the mortgage process and didn't analyze the denial/suspense reasons, terms, and conditions."[9] The plaintiffs further argue that the agreement did not require applications to multiple banks and, thus, that their application to one bank was sufficient to comply with the agreement. The defendant argues that the trial court's finding that the plaintiffs "did not fully complete their loan applications" was supported by the December, 2012 denial and suspense notices. We agree with the plaintiffs that the court's finding that they failed to diligently pursue financing was clearly erroneous, although we do so on the basis that the court erroneously relied upon the December, 2012 denial and suspense notices. Those notices were ambiguous as to whether they reflected the plaintiffs' efforts up to the commitment date and, therefore, shed light on the plaintiffs' diligence in pursuing financing during the relevant timeframe, or whether they reflected plaintiffs' efforts

[8] We note that the plaintiffs, in their principal brief to this court, reference certain documents that they identify as "new evidence" and include in their appendix. Their motion for articulation seeking to present the same documents was denied on the basis that the new evidence the plaintiffs sought to admit "consist[ed] of documents which the plaintiffs either had at the time of trial, or were available to the plaintiffs at the time of trial. The plaintiffs had every opportunity to introduce these documents into the record at the time of trial, however they failed to so . . . ." In their reply brief, the plaintiffs recognize that the documents were not presented before the trial court. Accordingly, we do not rely on those documents in reviewing the court's decision. See *Bank of America, N.A.* v. *Thomas*, 151 Conn. App. 790, 798 n.4, 96 A.3d 624 (2014).

[9] The plaintiffs also point to a typographical error in the court's memorandum of decision, which incorrectly referred to the Yaggis as the plaintiffs. As the defendant notes, the plaintiffs' motion for rectification was granted, effectively correcting the scrivener's error.

after the commitment date, i.e., after the deadline for the plaintiffs' use of diligence had passed.[10]

The mortgage contingency clause in the parties' agreement required the plaintiffs to diligently pursue a written mortgage commitment on or before the commitment date. Similar provisions have been interpreted by our appellate courts as "imply[ing] a promise by the borrower that he or she will make reasonable efforts to secure a suitable mortgage." (Internal quotation marks omitted.) *Barber* v. *Jacobs*, supra, 58 Conn. App. 335; see also *Phillipe* v. *Thomas*, 3 Conn. App. 471, 473, 489 A.2d 1056 (1985).

In *McCoy* v. *Brown*, 130 Conn. App. 702, 705, 708, 24 A.3d 597, cert. denied, 302 Conn. 941, 29 A.3d 467 (2011),

[10] The December 6, 2012 suspense notice, issued by Mortgage Services III, LLC, stated that the "LOAN IS SUSPENDED FOR INCOMPLETE FILE FOR SUBMISSION." The notice included the following eleven "SUSPENSE REASONS (CONDITIONS NEEDED PRIOR TO APPROVAL)": (1) "RESPA SUSPENSE DOCS MUST BE RECEIVED AND CLEARED PRIOR TO U/W"; (2) "PROVIDE TYPED 1003 & 1008 PER TERMS BEING SUBMITTED"; (3) "BORROWER SIGNED 'UNDISCLOSED DEBT DISCLOSURE' IS REQUIRED"; (4) "4506T RESULTS MUST BE RECEIVED VERIFYING 2 YR HISTORY"; (5) "DOCUMENT REASON FOR OMISSION OF CHASE AUTO LOAN DEBT AND PROVIDE PAPER TRAIL"; (6) "DOCUMENT AND SOURCE ANY FUNDS USED TO PAYOFF AUTO LOAN DEBT AND CREDIT REPORT SUPPLEMENT VERIFYING PAID"; (7) "2010 W2'S FOR BORROWER AND CO-BORROWER"; (8) "2010 COMPLETE TAX RETURNS W/ ALL PAGES . . . SCH-C INCOME MUST BE AVERAGED & VERIFIED FOR 2 YRS"; (9) "DOCUMENT EARNEST MONEY CHECKS PER CONTRACT FOR $25,000 PER CONTRACT AND EVIDENCE CLEARED BORROWERS ACCT"; (10) "SALES CONTRACT IS MISSING PAGE 4 OF 4 OF WILLIAM RAVEIS SALES CONTRACT"; (11) "FYI . . . PER CONTRACT, IF PROPERTY REQUIRES ROOF REPAIRS, MUST BE DONE PRIOR TO CLOSING . . . MUST EVIDENCE INSPECTION OF ROOF AND MIN. LIFE OF 3 YRS." The notice further stated that "ALL OF THE ABOVE REQUIRED ITEMS ARE REQUIRED FOR END INVESTOR UNDERWRITING REVIEW FOR CONSIDERATION."

The December 13, 2012 "Notice of Loan Denial," issued by United Wholesale Mortgage, provided the following reasons for denial of a mortgage loan: (1) "Credit History"; (2) "Insufficient Credit File for Cb . . . Borrower does not have installment tradeline reporting for 24 months opened and active in the last 6 months"; and (3) "We do not grant credit to any applicant on the terms and conditions you have requested."

this court explained that a mortgage contingency clause expressly requiring the buyers to "make application [for a loan] forthwith and pursue the same diligently," obligated the buyers to "use reasonable diligence in their efforts to obtain a mortgage commitment." (Internal quotation marks omitted.) "Reasonableness . . . is an objective standard, involving an analysis of what a person with ordinary prudence would do given the circumstances, without accounting for any particular knowledge or skill. . . . Whether the plaintiff's actions constituted reasonable efforts to satisfy the contractual condition is a factual determination for the trial court." (Internal quotation marks omitted.) Id., 708.

The question for the court was whether the plaintiffs had used reasonable diligence in their efforts to pursue a written mortgage commitment on or before the commitment date. By the express terms of the agreement, that obligation terminated on the commitment date. In reaching the conclusion that the plaintiffs failed to diligently pursue a written mortgage commitment on or before the commitment date, however, the court relied solely on the December, 2012 denial and suspense notices, which were ambiguous as to whether they reflected efforts of the plaintiffs within the relevant time period. Although the trial court found that the two notices "indicated that the plaintiffs did not fully complete their loan applications," the notices themselves provide no suggestion as to whether the plaintiffs were previously notified, prior to the commitment date, of any deficiencies in their applications. The court, in relying exclusively upon the denial and suspense notices, failed to properly focus on the diligence of the efforts made by the plaintiffs up to the commitment date. The court made no specific finding that there had been a lack of reasonable diligence in that earlier time period. Accordingly, the court's finding that the plaintiffs failed to diligently pursue financing is clearly erroneous.

B

The plaintiffs next contend that the court erroneously found that they failed to give written notice of their inability to obtain financing for the real estate purchase by the commitment date. They argue that they provided such notice by way of their November 24 e-mail, wherein they stated: "Attached is a request of mortgage extension. Due to the Hurricane Sandy and Thanksgiving holiday. We won't be able to obtain a mortgage commitment by 5 [p.m.] today. We request your approval of extension. We expect a commitment from a bank next week. Please sign and return to us ASAP." The plaintiffs argue that the November 24 e-mail satisfied their obligation under the agreement to provide notice of their inability to obtain financing by the commitment date, and that, contrary to the court's finding, the agreement did not require the plaintiffs to declare the contract terminated. As support for their argument, the plaintiffs identify a separate provision of the agreement that expressly requires the buyer to notify the seller of the "Buyer's election to terminate this Agreement." The defendant responds that "the text of the . . . e-mail alone is strong evidence in the record that plaintiffs did not seek a termination at all, but merely requested an extension." The defendant further emphasizes the plaintiffs' attachment of a change form to their e-mail as evidence that the plaintiffs sought an extension, not a termination of the agreement. We conclude that the court erred in interpreting the mortgage contingency clause to require *notice of termination* and consequently failed to make a factual determination as to whether the November 24 e-mail constituted *notice of an inability to obtain a written commitment.*

We first set forth our standard of review. "[T]he question of contract interpretation is a question of the parties' intent. . . . Ordinarily, that is a question of fact.

. . . If, however, the language of the contract is clear and unambiguous, the court's determination of what the parties intended in using such language is a conclusion of law. . . . In such a situation our scope of review is plenary, and is not limited by the clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *CAS Construction Co.* v. *East Hartford*, 82 Conn. App. 543, 552, 845 A.2d 466 (2004); see also *Southport Congregational Church—United Church of Christ* v. *Hadley*, 320 Conn. 103, 115, 128 A.3d 478 (2016) ("The proper interpretation of the [mortgage contingency] clause requires us to determine the intent of the parties. . . . The meaning properly to be ascribed to [a] mortgage commitment clause [is] to be determined, as a matter of fact, from the language of the contract, the circumstances attending its negotiation, and the conduct of the parties in relation thereto. . . . Like other contracts, though, the meaning of unambiguous language in a mortgage contingency clause is determined as a matter of law." [Citations omitted; internal quotation marks omitted.]).

In general, "[a] mortgage contingency clause may require that a purchaser give the vendor written notice of inability to obtain financing and if the purchaser does not adequately comply with such provision, he or she is not entitled to a refund." 92A C.J.S., Vendor and Purchaser § 709 (2018). In determining whether the buyer's notice is sufficient under the terms of the contract, the court should consider the entire communication. See *Zullo* v. *Smith*, 179 Conn. 596, 605, 427 A.2d 409 (1980) (concluding that "taken as a whole, the defendant's letter contains sufficient language to notify the plaintiff of the defendant's inability to obtain a building permit" in accordance with building permit contingency clause).

The provision at issue in the present case stated in relevant part: "If Buyer is unable to obtain a written

commitment and notifies Seller in writing by 5:00 p.m. on said Commitment Date, this Agreement shall be null and void and any Deposits shall be immediately returned to Buyer." The clear meaning of this provision is that if the plaintiffs were to give the defendant notice by the commitment date of their inability to obtain a written commitment by the commitment date, the agreement would be null and void and the plaintiffs would be entitled to the return of their deposits. The trial court instead considered "whether the plaintiffs complied with the terms of the agreement by providing the [defendant] with *notice of termination of the agreement* . . . ." (Emphasis added.) Because the provision at issue does not require the buyer to include in the writing a notice of termination of the agreement, the court addressed the wrong question.

Indeed, as the plaintiffs argue, an examination of the agreement as a whole reveals that where the parties intended to require a notice of termination, the agreement expressly included language to that effect. "[W]hen interpreting a contract, we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 322, 12 A.3d 995 (2011). Specifically, the agreement's inspection contingency clause permits the "Buyer [to] notify Seller . . . of Buyer's election to terminate this Agreement." In contrast, the provision at issue did not contemplate that the buyers would give notice of an election to terminate, but rather that they would give notice of their inability to obtain financing by the commitment date, which, in turn, would render the agreement null and void. Any construction of the agreement that disregards this distinction must be rejected. See *Recall Total Information Management*,

Inc. v. *Federal Ins. Co.*, 147 Conn. App. 450, 460, 83 A.3d 664 (2014) (rejecting broad construction of term "suit" where such construction would obliterate distinction between "suit" and "claim," and would create internal inconsistency in insurance contract), aff'd, 317 Conn. 46, 115 A.3d 458 (2015). Accordingly, the court should have determined whether the plaintiffs' November 24 e-mail, taken as a whole, contained sufficient language to notify the defendant of the plaintiffs' inability to obtain financing by the commitment date.

The court did find, and the parties agree, that the commitment date was never extended. Although the plaintiffs requested an extension of the commitment and closing dates in their November 24 e-mail, Walz replied that the Yaggis were only willing to agree to an extension "after receiving verification from the bank that you have a mortgage approval contingent upon a bank appraisal." Because the plaintiffs did not provide such verification, and therefore the condition was not fulfilled, the extension never became operative. See *Ziotas* v. *Reardon Law Firm, P.C.*, 111 Conn. App. 287, 304, 959 A.2d 1013 (2008) ("[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counteroffer" [internal quotation marks omitted]), aff'd in part and rev'd in part on other grounds, 296 Conn. 579, 997 A.2d 453 (2010). Likewise, none of the change forms submitted by the plaintiffs to the defendant effectively changed the commitment and closing dates. The first change form, attached to the plaintiffs' November 24 e-mail, was never signed by the defendant. The defendant, after signing the second change form, indicated that "[t]ime is of the essence" next to each of the amended commitment and closing dates, which the plaintiffs never initialed. The third and fourth change forms were never

signed by the defendant. Accordingly, the original commitment and closing dates were never extended.

The defendant argues that if the plaintiffs "really believed that they were terminating the agreement on November 24, 2012, when they sent the e-mail, there would be no reason for plaintiffs to ask for multiple extensions of the financing/commitment and closing dates. The underlying contract would have ceased to exist at that point and thus the financing/commitment and closing dates would have been null and void and would not need to be extended and plaintiffs would have had no reason to further pursue financing for the purchase." The defendant's argument relies heavily on the plaintiffs' intentions expressed within the November 24 e-mail and throughout their communications thereafter. The defendant argues that "[r]ather than expressing an inability to obtain financing as the plaintiffs' contend the e-mail actually represents that plaintiff *can* and *will* receive financing 'next week.' " (Emphasis in original.) Although the plaintiffs did seek an extension of the commitment and closing dates through their November 24 e-mail and subsequent change forms, it is undisputed that no agreement to an extension was ever reached. Thus, the only question for the court was whether the November 24 e-mail, taken as a whole, also contained sufficient language to notify the defendant of the plaintiffs' inability to obtain financing by the commitment date, as contemplated by the language contained in the mortgage contingency clause. The trial court's error in interpreting the plaintiffs' obligation under the contract left that question unanswered.

Having concluded that the court incorrectly interpreted the agreement's notice requirement and erroneously found that the plaintiffs had failed to diligently pursue financing, we conclude that the judgment must be reversed and that a remand to the trial court for a new trial is necessary. See *Phillipe* v. *Thomas*, supra, 3 Conn.

App. 476–77 (remanding for new trial when there was no factual determination of reasonableness of plaintiff's efforts to secure financing because trial court had improperly applied a good faith standard).

II

The plaintiffs' next claim is that the court erred in awarding the defendant attorney's fees. The plaintiffs claim that the award is "patently unreasonable . . . ." The defendant responds that the plaintiffs' claim fails because: (1) the defendant met her burden to set forth evidence that her attorney's fees were reasonable; (2) "the trial court properly performed a lodestar calculation, and evaluated the reasonableness of the fees based on the factors set forth in Rule 1.5 (a) of the Rules of Professional Conduct"; and (3) "the trial court did in fact reduce the lodestar value based on factors in Rule 1.5 (a) to arrive at a reasonable value of attorney's fees, which was well within its discretion." We need not address the reasonableness of the award because we conclude that our reversal of the court's judgment also requires that the award of attorney's fees be vacated. See *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 63, 578 A.2d 1054 (1990) ("In view of our reversal of the judgment in this case, it can no longer be said that the plaintiff prevailed in this action; she, therefore, has no claim for attorney's fees based on the judgment that we have reversed." [Internal quotation marks omitted.]).

III

On appeal, the defendant raises the doctrine of equitable estoppel as an alternative ground for affirmance of the court's decision, claiming that the plaintiffs represented that they expected to receive a mortgage commitment and acted as if the agreement was still in effect after the commitment date. The defendant argues that the plaintiffs "are estopped from claiming that they

intended to terminate the agreement on November 24, 2012, because they continued to act under the terms of the agreement until at least January 11, 2013, even though the mortgage commitment date had passed and they had forfeited their right to any deposit monies when they failed previously to notify the [defendant] of any intent to terminate the agreement." The defendant claims that she relied on the plaintiffs' representations to her detriment, in that she kept the property off the market for almost six months and ultimately sold the property for $135,000 less than the contract price with the plaintiffs. We conclude that the record is inadequate to review this claim, which was not raised before the trial court.

Our Supreme Court has held that "[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternate grounds for affirmance." (Internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 498–99, 43 A.3d 69 (2012); see also *Samnard Associates, LLC* v. *New Britain*, 140 Conn. App. 290, 294 n.5, 58 A.3d 377 (2013) ("[a]bsent exceptional grounds, an appellate court should not review an alternate ground for affirmance that was not raised before, and decided by, the trial court"). Moreover, "[t]he appellee's right to file a [Practice Book] § 63-4 (a) (1) statement has not eliminated the duty to have raised the issue in the trial court." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 390 n.11, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000); see also *Perez-Dickson* v. *Bridgeport*, supra, 499.

"The party claiming estoppel . . . has the burden of proof. . . . Whether that burden has been met is a question of fact that will not be overturned unless it is

clearly erroneous." (Internal quotation marks omitted.) *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 614, 830 A.2d 164 (2003); see also *St. Germain* v. *St. Germain*, 135 Conn. App. 329, 334, 41 A.3d 1126 (2012) ("[w]hether a party has met his burden of proving equitable estoppel is a question of fact"). "Equitable estoppel is a doctrine that operates in many contexts to bar a party from asserting a right that it otherwise would have but for its own conduct. . . . In its general application, we have recognized that [t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done." (Internal quotation marks omitted.) *St. Germain* v. *St. Germain*, supra, 334–35.

In the present case, the doctrine of equitable estoppel was not raised before the trial court. The defendant filed both a trial management report and a proposed statement of facts and conclusions of law, neither of which raised equitable estoppel as a defense.[11] During trial, the defendant's counsel did not reference estoppel in his opening or closing statements. Finally, in its memorandum of decision, the court never addressed any estoppel argument.

The defendant argues in her brief that the plaintiffs "intentionally concealed" the fact that they could not obtain financing "for the purpose of inducing the Yaggis to keep the property off the market." There were no

[11] In the defendant's pretrial management report, the defendant identified as the sole issue in dispute "[w]hether plaintiffs breached a certain real estate purchase and sale agreement resulting in the forfeiture of their deposit monies pursuant to that agreement under the liquidated damages clause." After trial, the defendant submitted proposed findings of fact and conclusions of law, in which the defendant requested that the court conclude that the plaintiffs breached the agreement.

findings made by the court as to intentional concealment or inducement to keep the property off the market.[12] Accordingly, we decline to review the defendant's equitable estoppel claim. See *Kline* v. *Kline*, 101 Conn. App. 402, 404 n.3, 922 A.2d 261 (declining to review defendant appellee's alternate ground for affirmance because court did not find requisite facts for her claim of equitable estoppel), cert. denied, 284 Conn. 901, 931 A.2d 263 (2007); see also *Conservation Commission* v. *Red 11, LLC*, 119 Conn. App. 377, 388, 987 A.2d 398 (record inadequate to review defendant's claim of municipal estoppel), cert. denied, 295 Conn. 924, 991 A.2d 566 (2010). We note, however, that the defendant is not precluded from raising equitable estoppel on remand.

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

In this opinion the other judges concurred.

CHELSEA CHAPMAN KIRWAN
v. LAURENCE KIRWAN
(AC 40008)
(AC 40047)

Sheldon, Prescott and Bear, Js.

Syllabus

The defendant appealed to this court from the judgments of the trial court dissolving his marriage to the plaintiff and ordering him to make a lump sum payment to her of $91,000 to satisfy a child support arrearage. The court had approved an agreement by the parties to enter into binding

[12] The trial court did note: "Interestingly, both notices of denial are dated December 6, 2012, and December 13, 2012, and the plaintiffs submitted the third and fourth change forms in December, 2012, both of which are dated December 14, 2012, and December 21, 2012, respectively, requesting an extension of the financing deadlines, when they were fully aware that they had been denied a mortgage by two banks." This notation, made in the context of whether the plaintiffs had diligently pursued financing, is insufficient to permit review of a newly asserted claim of equitable estoppel.

mediation/arbitration as to, inter alia, alimony and the division of marital property. The issue of child support was reserved to the court in accordance with the parties' agreement and as required by statute (§ 52-408). The arbitrator made several factual findings in her award, including a determination that the defendant's annual gross income was approximately $400,000 per year. The trial court rendered judgment dissolving the marriage and incorporated the arbitrator's award into the dissolution judgment. Thereafter, the court conducted an evidentiary hearing as to child support and found, inter alia, that the defendant's gross annual income was $560,637 for the purpose of calculating his child support obligation. The court ordered him to make weekly child support payments and credited him for having made certain postjudgment child support payments. Subsequently, the court denied a motion for contempt filed by the plaintiff as to the child support arrearage, but ordered the defendant to make the $91,000 lump sum payment. *Held*:

1. The defendant could not prevail on his claim that the trial court, in making its child support award, was bound by the arbitrator's finding that his gross annual income was $400,000 and, thus, that the court's finding of $560,637 was clearly erroneous: the arbitrator's finding of gross income, which was made in the context of determining alimony, was not entitled to preclusive effect in the court's adjudication of child support, as the provision in § 52-408 that excludes from arbitration issues related to child support is broad, the absence of qualifying language conveyed the legislature's intent to render inarbitrable all issues, legal and factual, that pertain to child support, and the defendant offered no analysis of § 52-408 in asserting that the arbitrator's finding should have been binding on the court in determining his child support obligation; moreover, even if the exclusionary provision of § 52-408 were not clear and unambiguous, this court's interpretation was consistent with extrinsic evidence of the legislature's intent, and it would be inconsistent with concerns for the best interests of children to permit issues related to child support to be resolved conclusively in arbitration, which is a nonjudicial forum outside the control of our courts, as that would constitute an impermissible delegation of judicial authority.
2. The trial court's finding that the defendant earned $400,000 in gross income from employment was not clearly erroneous; that court reasonably could have determined that the defendant's gross income from employment was at least $400,000, as the plaintiff, who had worked as the business administrator for the defendant's medical practice, testified that the defendant had income from the medical practice, from consulting for medical companies and from teaching, and the defendant disclosed on a credit application in connection with an automobile lease that his gross annual income from employment was $400,000.
3. The defendant's claim that the trial court improperly determined the amount of gross rental income that he received from property that was awarded to him was unavailing, as a sufficient evidentiary basis existed

for the court's finding; although the court utilized a rental income chart that had not been admitted into evidence, the chart contained numbers that reflected those in the defendant's 2015 tax return, which had been admitted into evidence, the figures on the chart were easily verified by comparing them with those on the tax return, and the court properly omitted from its calculation two of the defendant's properties that had generated substantial losses, as those properties were sold prior to the child support hearing and the defendant failed to explain why it would be improper for the court to consider only properties that would generate income in the future in calculating income on which to base his prospective child support obligations.

4. The defendant could not prevail on his claim that the trial court abused its discretion in calculating his gross income when it failed to take into account his payment of life insurance premiums; that court had no evidentiary basis from which to calculate a credit against the defendant's income for a life insurance policy to benefit the children, as he never provided the court with a breakdown of the premium payments for life insurance that he disclosed on his financial affidavits, and although he indicated on his financial affidavit a monthly personal expense for life insurance, he listed no details of the policies' beneficiaries or the premium payments per policy.

5. The trial court did not abuse its discretion in rendering its child support order, as the order was consistent with the criteria established by statute (§ 46b-84 [d]) and within the range between the minimum and maximum support amounts established by the child support guidelines, and because no deviation from the guidelines occurred, the court was not required to provide any additional explanation for its decision.

6. The defendant's claim that the trial court failed to credit the voluntary child support payments that he made during the child support proceedings was dismissed as moot: there was no practical relief that could be afforded to the defendant with respect to his claim that the court was obligated to subtract the amount of the voluntary payments from the amount of his arrearage, rather than providing him with credit for the voluntary payments by temporarily reducing his child support obligations, as the defendant had reduced his weekly child support obligation in accordance with the court's order and, thus, received full credit for his voluntary child support payments; moreover, even if the trial court abused its discretion in the manner in which it credited the voluntary payments, any decision by this court would be academic, as it would not alter the status quo, which was that the defendant received full credit for his voluntary payments.

7. The defendant could not prevail on his claim that the trial court improperly ordered him to pay a lump sum to satisfy the child support arrearage, rather than permitting him to satisfy that arrearage on a weekly basis, as contemplated by the child support arrearage guidelines; the defendant failed to demonstrate that the arrearage guidelines were applicable to

the lump sum order or that the court abused its discretion in ordering a lump sum payment, as the arrearage guidelines and the applicable state regulation (§ 46b-215a-3a [a]) reflect that the determination of lump sum payments is subject to the discretion of the court, and the court articulated that it ordered the lump sum payment because the defendant had the ability to pay, given his income and other finances, including the court's release to him of $100,000, which had been held in escrow, to aid him in meeting his child support obligations.

8. The defendant's claim that the trial court should have dismissed, rather than denied, the plaintiff's motion for contempt was not reviewable, the defendant having failed to raise that claim before the trial court; although the defendant had asked the trial court to deny the motion because he had not violated any clear and unambiguous order pertaining to the child support arrearage, he never asked the court to strike or dismiss the motion on the basis of legal or factual insufficiencies, or on the ground that it did not comply with our rules of practice.

Argued May 30—officially released October 23, 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, where the court, *Tindill*, *J.*, approved the agreement of the parties to enter into binding mediation/arbitration as to certain disputed matters; thereafter, the arbitrator issued an award and entered certain orders; subsequently, the arbitrator issued a clarification of the award; thereafter, the court granted the defendant's motion to confirm the arbitrator's award, and rendered judgment incorporating the arbitrator's award and clarification, and dissolving the marriage and granting certain other relief; subsequently, the court issued certain orders; thereafter, the court denied the defendant's motion to reargue and denied in part the defendant's motion for clarification, and the defendant appealed to this court; subsequently, the court, *Tindill*, *J.*, denied the plaintiff's motion for contempt, and entered certain orders as to child support and attorney's fees, and the defendant filed a second

* October 23, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

appeal; thereafter, the court, *Tindill*, *J.*, issued an articulation of its decision; subsequently, this court consolidated the appeals. *Affirmed*.

Alan Scott Pickel, for the appellant (defendant).

Joseph T. O'Connor, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In these consolidated appeals arising out of a marital dissolution action, we must determine, inter alia, whether an arbitrator's factual finding regarding the gross income of a party, which was made in the course of determining alimony and the equitable distribution of marital assets, is binding on the court with respect to its subsequent adjudication of child support, an issue that was statutorily and contractually excluded from the arbitration. We conclude that it was proper for the trial court to make its own independent findings regarding gross income, unfettered by the previous findings of the arbitrator.

The present appeals arose following the court's October 23, 2015 judgment dissolving the marriage of the plaintiff, Chelsea Chapman Kirwan, and the defendant, Laurence Kirwan. The judgment incorporated by reference a pendente lite arbitration award that had resolved most of the issues raised in the dissolution action, including alimony, the distribution of marital assets, and the enforceability of a premarital agreement. Both the parties' arbitration agreement and the arbitrator's award, however, expressly reserved for the Superior Court resolution of issues related to custody and child support.[1] Following an evidentiary hearing, the court, on December 7, 2016, issued child support orders,

[1] Specifically, the arbitrator's award stated in relevant part: "The issues of custody, access, child support, maintenance and cost of medical insurance for the minor children and unreimbursed medical expenses are reserved to the Connecticut Superior Court."

which, by agreement of the parties, were made retroactive to the date of the dissolution judgment. The defendant appeals from those child support orders (AC 40008). The defendant also appeals from a subsequent remedial order that the court issued in response to a motion for contempt and that required the defendant to make a $91,000 lump sum payment to the plaintiff to satisfy a child support arrearage resulting from the court's December 7, 2016 order making his child support obligation retroactive to October 23, 2015 (AC 40047).[2]

The defendant claims on appeal that the court improperly (1) failed to adhere to the arbitrator's factual findings regarding his gross income, as set forth in the arbitrator's award, despite the fact that the court incorporated the arbitrator's award by reference into the dissolution judgment; (2) found that his gross income from employment was $400,000; (3) calculated his gross rental income from property awarded to him as part of the division of marital assets; (4) failed to take into consideration his payments of premiums for life insurance policies for the benefit of his children;[3] (5) failed to explain why the plaintiff was entitled to support payments that exceeded the child support guidelines' minimum presumptive amount; (6) gave prospective credit for voluntary child support payments made during the pendency of the child support hearings rather than crediting them against the lump sum arrearage; (7) ordered a lump sum repayment of the child support arrearage rather than permitting repayment on a periodic basis as contemplated by the child support arrearage guidelines; and (8) failed to dismiss the plaintiff's

[2] On June 19, 2017, this court granted the defendant's motion to consolidate his two appeals in accordance with Practice Book § 61-7 (b) (3).

[3] The defendant also asserted that the court had failed to deduct health insurance premiums but, in his reply brief, concedes to the contrary, withdrawing that aspect of his claim.

motion for contempt rather than considering the merits of the motion. We conclude that the defendant's claim regarding the manner in which he was credited for voluntary child support payments is moot because there is no practical relief that we could order in light of the fact that he has received full credit for such payments, and that the arguments advanced in support of the remainder of the defendant's claims are unpersuasive. Accordingly, we affirm the judgments of the court.

The following facts and procedural history are relevant to our resolution of these appeals.[4] The parties were married in 2001. The defendant is a plastic surgeon with offices in New York, Norwalk, and London, as well as a consultant and a professor of plastic surgery. The plaintiff is college educated and worked in pharmaceutical sales until shortly after she married the defendant, at which time she worked for the defendant in his medical practice. The parties have three minor children together, one of whom has special needs.[5] Prior to their marriage, the parties entered into a premarital agreement that, in relevant part, limited the plaintiff's alimony in the event of divorce to $50,000 a year for five years and allocated 45 percent of the value of the marital home to the plaintiff as her share of marital property. In September, 2012, the plaintiff initiated an action to dissolve the parties' marriage.

On May 26, 2015, the court, *Tindill*, *J.*, approved an agreement by the parties to enter into binding mediation/arbitration of the dissolution action.[6] Pursuant to

[4] We rely on those facts set forth by the court in its memoranda of decision and those that are undisputed in the record.

[5] The parties have twin daughters who were born in May, 2003, and a younger daughter who was born in February, 2006.

[6] At that time, the parties also submitted a final custody and parenting plan that was made an order of the court. Pursuant to the parenting plan, the parties would have joint legal custody of their minor children, and the plaintiff would have primary physical custody subject to periodic visitations with the defendant.

the parties' arbitration agreement, which was made an order of the court, "[t]he parties agree[d] that the following issues in their action for dissolution of marriage shall be the subject of mediation and, if the parties are unable to resolve these issues via mediation, to binding arbitration . . . ." The list of issues to be resolved in arbitration included the validity and enforceability of the premarital agreement; the validity of an alleged rescission of that premarital agreement; a determination of alimony in accordance with General Statutes § 46b-82; an equitable division of marital property, assets, and liabilities pursuant to General Statutes § 46b-81; division of attorney's fees and guardian ad litem fees; and any other relief deemed appropriate by the arbitrator "except as it pertains to child custody and issues of child support."

On August 4, 2015, the arbitrator, former Superior Court Judge Elaine Gordon, issued her arbitration award. As a preliminary matter, the arbitrator determined that the parties' premarital agreement was unconscionable, and thus unenforceable, due to "the present, uncontemplated circumstances" of the parties.[7] The arbitrator issued a number of orders regarding alimony and the distribution of marital assets, including an order directing the sale of the marital home. In support of her orders, the arbitrator made several factual findings, including that "[t]he defendant's annual [gross] income is found to be approximately $400,000 per year based on his income tax returns, business financial statements and the information he has provided to lending institutions on his applications." As previously noted, the arbitration award indicated that

[7] The arbitrator stated in relevant part: "To leave the plaintiff, who has no experience in a competitive workplace after thirteen years, with no assets, an alimony award of five years, which is unrelated to either the plaintiff's needs or the defendant's income, and responsibility for three children, one of whom has special needs, is more than unfair or onerous, it is unconscionable."

"[t]he issues of custody, access, child support, maintenance and cost of medical insurance for minor children and unreimbursed medical expenses are reserved to the Connecticut Superior Court."[8]

On September 1, 2015, the defendant filed a motion asking the court to confirm the arbitration award and to render judgment dissolving the parties' marriage in accordance with the arbitration award. On that same date, the plaintiff filed a motion asking the court to issue orders on the unresolved matters of child support and postsecondary educational expenses. Neither party filed an objection to the other party's motion, and the matters were set down for a hearing on October 23, 2015. At that time, the court rendered a judgment of dissolution of marriage that incorporated by reference the arbitration award and subsequent clarification.[9] The parties agreed that the court would determine the defendant's child support obligations, including the issue of unreimbursed medical expenses and child care, after an evidentiary hearing, and that child support obligations would be made retroactive to the date of dissolution.

The court conducted an evidentiary hearing on the issue of child support and on certain other postjudgment motions of the parties beginning on December 23, 2015, and continuing to January 22, May 25, June 20 and June 29, 2016. Both parties were present at all hearings and represented by counsel. Both parties testified and submitted a number of exhibits into evidence.

On December 7, 2016, the court issued a memorandum of decision regarding child support. The court indicated that it carefully had reviewed the parties' various

[8] In response to requests by the parties, the arbitrator later issued a clarification of her award, the substance of which is not relevant to the issues on appeal.

[9] In its dissolution judgment, the court also reserved jurisdiction over the issue of postmajority educational support.

claims for relief, memoranda in support thereof, trial briefs, replies, evidence, testimony, relevant rules, statutory authority, case law, and the arguments of counsel. The court made a number of credibility determinations and factual findings, including that neither party "was credible regarding their expenses for the children" and that "[t]he defendant's testimony and evidence regarding his sources of income was not credible." The court found that, "[b]ased on the credible evidence before the court, the defendant has a gross annual income of $560,637—$400,000 gross income from employment as Dr. K Services, P.C., plus $160,637 of rental income from various real estate investments." The court also found that "[t]he parties' combined net weekly income is $7990" and, thus, that "[t]he parties' net weekly income exceeds the $4000 limit contained within the child support guidelines." The court calculated that "[f]or three children, the presumptive amount of child support is between $824 and $1564 per week . . . ."[10]

The court ordered that the defendant "shall pay $1500.00 per week in child support for the parties' three children, *retroactive to October 23, 2015* . . . ." (Emphasis added.) The court also ordered that the plaintiff is responsible for 25 percent of any unreimbursed medical expenses and child care, and the defendant is responsible for the remaining 75 percent. Moreover, "[t]he [d]efendant shall be given credit for the $18,432.41 in voluntary, postjudgment child support payments made from the date of the dissolution through June 30, 2016." The court instructed the defendant that if he claimed any additional support payments after

[10] In his posthearing brief, the defendant argued that the court should conclude that his share of the presumptive child support amount, as calculated pursuant to the guidelines, was $727 per week. The plaintiff, in her posthearing brief, argued that the defendant's share of presumptive child support under the guidelines was $1560 per week, but she sought an upward deviation to $2028 per week due, in part, to her claim that all three children had special needs.

June 30, 2016, he should provide the plaintiff's counsel with proof of those payments within one week of the court's order. The court stated that credit for the voluntary support payments "shall be in the form of a deduction from *current* support in equal payments over the course of one year." (Emphasis added.) In other words, given that there are fifty-two weeks in a year, the defendant would be entitled to reduce his $1500 child support obligation each week for the first year by an amount equal to one fifty-second of his total voluntary postjudgment child support payments. Finally, the court ordered that the defendant "shall continue to provide and maintain health, dental, and vision insurance for the minor children," and "shall maintain insurance on his life in the amount of $2,000,000, naming the three minor children as equal beneficiaries, for as long as he has a child support obligation to the twins."

On December 23, 2016, the defendant filed a motion to reargue the court's December 7, 2016 decision in which he claimed that the court had miscalculated his income for purposes of the support orders. Specifically, he argued that the arbitrator had found his gross annual income to be $400,000, the court had adopted that finding in its judgment of dissolution when it incorporated the arbitration award therein and, therefore, "the court should not have added on top of that figure rental income that was already included in the total annual income finding of $400,000."[11] Furthermore, he argued that the court had failed to reduce his net income by the

[11] We note that throughout the evidentiary hearing on the issue of child support, both parties presented evidence pertaining to the defendant's gross income. Such evidence would have been unnecessary if the court legally was bound to credit the factual findings of gross income contained in the arbitrator's award. The defendant, however, never asserted such a position during the hearing on child support. Although the defendant's counsel raised tentative objections during the hearing indicating that the defendant's earning capacity had been determined by the arbitrator, at no point did the defendant directly state to the trial court that he believed that the court legally was bound by the arbitrator's factual findings of income in resolving the issue of child support.

amount he had paid in premiums for the life insurance policy benefiting the children. The court denied the motion to reargue on December 29, 2016, without comment. The defendant also filed a motion for clarification requesting, inter alia, that the court set forth "the manner and method" it used to calculate the defendant's gross income. The court denied that motion in part.

On December 12, 2016, the plaintiff filed a motion for contempt claiming that a child support arrearage of $91,000 existed because the court had made the

To the contrary, in his posthearing brief, instead of arguing that the arbitrator's finding regarding the defendant's gross income was binding on the court, he argued that the arbitrator had overstated his gross income and asked the trial court to make its own finding for the purpose of calculating child support. Presumably, if the finding of the arbitrator was binding on the court, as the defendant now argues on appeal, the trial court would have had no more authority to find a lower amount of income than it had to find a higher amount. As we have expressed on a number of occasions, we generally disfavor permitting an appellant to take one legal position at trial and then take a contradictory position on appeal. "[O]rdinarily appellate review is not available to a party who follows one strategic path at trial and another on appeal, when the original strategy does not produce the desired result. . . . To allow the [party] to seek reversal now that his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the [opposing party and the court] with that claim on appeal." (Internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013).

Furthermore, we note that the doctrine of collateral estoppel, i.e., issue preclusion, "is neither statutorily nor constitutionally mandated. The doctrine, rather, is a judicially created rule of reason that is enforced on public policy grounds." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 58–59, 808 A.2d 1107 (2002). In order to take advantage defensively of the doctrine, it ordinarily should be pleaded or otherwise brought to the attention of the court. See, e.g., Practice Book § 10-50. The defendant made no assertion regarding the binding nature of the arbitrator's finding in the present case until the postjudgment motion to reargue, which was filed after the court had made an independent finding regarding gross income that did not favor the defendant. Nevertheless, because the plaintiff has not argued that the defendant either forfeited or waived his right to challenge the preclusive nature of the arbitrator's factual finding regarding gross income, and the issue was raised by the defendant to the trial court in his motion to reargue the child support order and implicitly rejected by the trial court, we will review the claim.

defendant's child support obligation retroactive to the date of dissolution. The plaintiff argued that the defendant should have paid the arrearage from money that the court had ordered released from an escrow account to the defendant.[12] In response, the defendant filed an objection to the plaintiff's motion for contempt, arguing that there was never a clear and unambiguous court order requiring him to immediately pay any child support arrearage arising from the December 7, 2016 orders. Accordingly, he argued that the motion for contempt should be denied and that he was entitled to attorney's fees for having to defend against a frivolous motion.

The court held a hearing on the motion for contempt on January 3, 2017. The following day, the court issued an order denying the motion for contempt, explaining that the plaintiff had failed to meet her burden of proving by clear and convincing evidence that the defendant wilfully had violated a court order. The court nevertheless took the opportunity to enter a remedial order requiring the defendant to pay the $91,000 child support arrearage to the plaintiff, in full, by no later than April 12, 2017.[13] The court also denied the defendant's request for attorney's fees. These appeals followed.

[12] As part of its December 7, 2016 orders, the court ordered $100,000 from the sale of the marital home that was being held in escrow at the time by the defendant's attorney as security released to the defendant within two business days.

[13] The trial court later issued an articulation setting forth the factual and legal bases for its January 3, 2017 order. In its articulation, the court stated that "[t]he [defendant's] testimony and evidence regarding his sources and amount of income, debts, assets, and liabilities was not credible," and "[t]he information on the [defendant's] sworn financial affidavits . . . regarding his earnings and expenses was not truthful." (Citations omitted.) The court also stated that it had released the $100,000 in escrowed funds to the defendant in order to give him "additional funds" from which to pay the child support arrearage that arose as a result of the court's December 7, 2016 support orders and to meet his child support obligations moving forward. (Emphasis omitted.) The court noted that "despite having the financial means *and* access to liquid pecuniary resources, [the defendant had] paid $0.00 toward the $91,000 arrearage he does not dispute existed." (Emphasis

We begin by stating the overarching and well settled standard that governs our review of claims in divorce actions. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the [evidence] presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . 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.* . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . 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." (Emphasis added; internal quotation marks omitted.) *Milazzo-Panico* v. *Panico*, 103 Conn. App. 464, 467–68, 929 A.2d 351 (2007). "As has often been explained, the 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 . . . ." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 200, 61 A.3d 449 (2013).

in original.) Regarding the legal bases for its decision, the court indicated that it considered whether the defendant had the ability to pay by the date specified in the court's order and determined that he did, on the basis of his actual employment income, his earning capacity, liquid assets, equity in several real estate interests and investments, and retirement funds. The court further stated that it had relied on General Statutes § 46b-84 and § 46b-215a-3a of the child support and arrearage guidelines effective July 1, 2015.

I

The defendant first claims that, in determining his annual income for the purpose of child support, the court was bound by the factual findings of the arbitrator as set forth in the arbitration award and incorporated by reference into the court's judgment of dissolution. He argues that the court's finding that he had a total gross annual income of $560,637 was inconsistent with the prior finding of the arbitrator that his gross annual income was $400,000, and, therefore, the court's finding was clearly erroneous. According to the defendant, because the court's child support orders were based on an erroneous factual finding, this court should order them set aside. The plaintiff responds that a trial court is not bound to accept the factual findings in an arbitrator's award when determining an issue that was specifically excluded by the parties from arbitration and expressly reserved to the Superior Court by the award and by statute. We agree with the plaintiff and, accordingly, reject the defendant's claim.

Stated succinctly, the issue before us is whether the arbitrator's factual finding regarding gross income, which was made in the context of determining alimony and other issues submitted to arbitration, is entitled to preclusive effect in the court's subsequent adjudication of child support, an issue that was expressly excluded from arbitration by General Statutes § 52-408, which excludes from the scope of arbitration in dissolution actions "issues related to child support," and the parties' arbitration agreement. In arguing that the trial court was required to adopt the arbitrator's findings of fact regarding the parties' gross income, the defendant relies on the deference that courts generally have afforded to arbitration decisions and also, by implication, invokes the doctrine of collateral estoppel or issue preclusion.

The defendant's arguments require us to engage in statutory interpretation of § 52-408, which presents a question of law over which our review is plenary. See *Smith* v. *Smith*, 249 Conn. 265, 272, 752 A.2d 1023 (1999). "[W]hen 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 the 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 227–28, 14 A.3d 307 (2011).

We begin by examining the text of § 52-408, which legislatively sanctions the use of arbitration in civil actions, including actions for the dissolution of marriage. The statute provides in relevant part: "[A]n agreement in writing between the parties to a marriage to submit to arbitration any controversy between them with respect to the dissolution of their marriage, *except issues related to child support, visitation and custody*, shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the

avoidance of written contracts generally." (Emphasis added.) General Statutes § 52-408.

The statute's use of the term "issues related to child support" is both broad and unqualified. For example, the statute does not distinguish between legal and factual issues. The absence of such qualifying language conveys the legislature's intent to render inarbitrable not only a final determination of a party's child support obligations but any and all *related issues*, both legal and factual, that pertain to such a determination.

Our child support guidelines are based on an income share model; see Child Support and Arrearage Guidelines (2015), preamble, § (d); meaning an accurate and complete determination of the parties' respective incomes is essential to ensure that adequate resources are directed toward affected children. Because a finding of the parties' income is a mandatory prerequisite to the determination of a child support order, it is indisputably an "issue related to child support," and such a finding cannot be conclusively determined by an arbitrator for purposes of calculating child support under the clear and unambiguous language of § 52-408. The defendant offers no analysis of § 52-408 in asserting that the arbitrator's factual finding regarding the defendant's income should be binding on a court determining child support obligations.[14]

Even if we were not convinced that the exclusionary provision of § 52-408 is clear and unambiguous as to

[14] We note that other states have adopted statutes permitting the arbitration of marital dissolution actions, including issues of custody and child support. As part of those statutes, however, such states have provided for more robust judicial oversight of arbitration awards than ordinarily is available under existing law. See, e.g., *Harvey* v. *Harvey*, 470 Mich. 186, 193–94, 680 N.W.2d 835 (2004) (court had authority under statute to modify arbitrator's award to ensure best interests of children). The absence of such explicit oversight in § 52-408 is additional evidence that our legislature intended that all issues pertaining to child support and custody be reserved to the Superior Court.

its scope, our interpretation is consistent with extrinsic evidence of the legislature's intent, including circumstances surrounding the enactment of the provision at issue, the policy it was intended to implement, and its relationship to common-law principles. The language in § 52-408 excluding from arbitration issues related to child support was added to the statute by the legislature in 2005.[15] See Public Acts 2005, No. 05-258, § 2 (P.A. 05-258). The exclusionary language is consistent with the importance that this state attaches to accurate and equitable determinations of child support as reflected in our child support guidelines.[16] Although it is true that the promulgation of our child support guidelines, which are applicable to all determinations of child support, "substantially circumscribe[d] the traditionally broad judicial discretion of the court in matters of child support"; (internal quotation marks omitted) *Maturo* v.

[15] Similar language also was added to General Statutes § 46b-66, which now provides in relevant part: "The provisions of [General Statutes § 52-408 et seq.] shall be applicable to any agreement to arbitrate in an action for dissolution of marriage under this chapter, provided (1) an arbitration pursuant to such agreement may proceed only after the court has made a thorough inquiry and is satisfied that (A) each party entered into such agreement voluntarily and without coercion, and (B) such agreement is fair and equitable under the circumstances, and (2) *such agreement and an arbitration pursuant to such agreement shall not include issues related to child support, visitation and custody* . . . ." (Emphasis added.) General Statutes § 46b-66 (c).

[16] Having reviewed the legislative history of P.A. 05-258, we note that the vast majority of public comments, mostly from members of the bar, supported adoption of the bill, many citing favorably to the bill's exclusion of issues related to child support, custody, and visitation because of the need for "careful supervision of those issues" by the court and the "state's special interest" in child support.

In support of the act, then Senator Andrew J. McDonald stated: "Mr. President, this bill is intended to make available to individuals who are becoming involved in a dissolution action an opportunity to voluntarily enter into an arbitration proceeding for the purposes of resolution of that dissolution.

"Mr. President, the bill excludes from the scope of permissible arbitration *any* consideration of custody or child support payments within the scope of the arbitration referral." (Emphasis added.) 48 S. Proc., Pt. 8, 2005 Sess., p. 2272.

Maturo, 296 Conn. 80, 116, 995 A.2d 1 (2010); the court nevertheless retains discretion to deviate from those guidelines if it determines that doing so "would be in the best interests of the child and financially equitable to the parties." Id.

Custody and support issues not only impact the divorcing parents but also significantly impact the future health and welfare of children for whom child support is intended to benefit. In *Guille* v. *Guille*, 196 Conn. 260, 262–64, 492 A.2d 175 (1985), our Supreme Court discussed the independent nature of a child's right to support and held that this right cannot be vitiated or circumscribed by way of an agreement between the parents. In *Guille*, the court first recognized that General Statutes § 46b-84 (a) imposes a duty on divorcing parents to "maintain the child according to their respective abilities, if the child is in need of maintenance." Id., 263. In the court's view, this statutory duty "creates a corresponding right in the children to such support." (Internal quotation marks omitted.) Id. The court in *Guille* also emphasized that although child support orders are "made and enforced as incidents to divorce decrees . . . the minor children's right to parental support has an independent character, separate and apart from the terms of the support obligations as set out in the judgment of dissolution." (Citation omitted; internal quotation marks omitted.) Id.

"The independent nature of a child's right to parental support [had been] recognized by [our Supreme Court] long before that right was codified in our statutes." Id. As an example, the court in *Guille* cited to its decision in *Burke* v. *Burke*, 137 Conn. 74, 80, 75 A.2d 42 (1950), in which it stated: "A husband and wife cannot make a contract with each other regarding the maintenance or custody of their child which the court is compelled to enforce, nor can the husband relieve himself of his primary liability to maintain his child by entering into

a contract with someone else to do so. The welfare of the child is the primary consideration. The court may recognize the contract, but such contract will not be enforced longer than it appears to be for the best interests of the child, and parents entering into such a contract are presumed to do so in contemplation of their obligations under the law and the rights of the child." (Internal quotation marks omitted.) *Guille* v. *Guille*, supra, 196 Conn. 264.

In the arbitration agreement in the present case, the list of issues to be resolved included the validity and enforceability of the premarital agreement; the validity of an alleged rescission of that premarital agreement; a determination of alimony; an equitable division of marital property; and attorney's fees and guardian ad litem fees. The resolution of those issues could not "affect the minor children's right . . . for parental maintenance"; id., 267; and extending the impact of the parent's resolution of nonsupport issues would violate the statutory prohibition against arbitrating child support. Furthermore, it would be inconsistent with our concerns for the best interest of children, an ideal that permeates our statutes and decisional law, to permit issues related to child support to be resolved conclusively in arbitration, a nonjudicial forum outside the control of our courts. See, e.g., *Masters* v. *Masters*, 201 Conn. 50, 64–65, 513 A.2d 104 (1986) ("the ultimate responsibility for determining and protecting the best interests of children in family disputes rests with the trial court and not with the parties to a dissolution action").[17]

There is no doubt that "[t]he courts of this state encourage arbitration as a means of alternative dispute

[17] To the extent that our Supreme Court in *Masters* v. *Masters*, supra, 201 Conn. 64–65, stated that some issues related to child support might be arbitrable, we note that *Masters* was decided prior to the enactment of § 52-408. Accordingly, that statement in *Masters* has been superseded by statute.

resolution . . . .” *Scinto* v. *Sosin*, 51 Conn. App. 222, 227, 721 A.2d 552 (1998), cert. denied, 247 Conn. 963, 724 A.2d 1125 (1999). They have “for many years wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . When arbitration is created by contract, we recognize that its autonomy can only be preserved by minimal judicial intervention. (Internal quotation marks omitted.) *Stutz* v. *Shepard*, 279 Conn. 115, 124, 901 A.2d 33 (2006). “The parties themselves, by the agreement of the submission, define the powers of the arbitrator. . . . The submission constitutes the charter of the entire arbitration proceedings and defines and limits the issues to be decided.” (Internal quotation marks omitted.) *Naek Construction Co.* v. *Wilcox Excavating Construction Co.*, 52 Conn. App. 367, 370, 726 A.2d 653 (1999). “[If] the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. . . . [Generally], courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact.” (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005).

Nevertheless, although binding arbitration may be utilized to resolve many types of issues arising in the course of civil litigation, including in a marital dissolution action, the legislature concluded, as a matter of public policy, that issues involving custody, visitation, and child support must be resolved only by a court. This court previously has indicated that if a court has a statutorily mandated duty to decide an issue, it would be an improper delegation of judicial authority to permit that issue to be resolved through binding arbitration,

particularly because of the limited opportunity for judicial review of arbitration awards. See *Nashid* v. *Andrawis*, 83 Conn. App. 115, 121–22, 847 A.2d 1098 (plain error to permit future disputes regarding custody and visitation to be decided in arbitration), cert. denied, 270 Conn. 912, 853 A.2d 528 (2004).

We simply are not persuaded that in an adjudication of child support following binding arbitration, a court must give preclusive effect to extrajudicial factual findings, particularly if the correctness of those findings is so integral to a resolution of an issue expressly excluded from arbitration in accordance with both § 52-408 and the parties' arbitration agreement. In other words, any findings the arbitrator made in disposing of the claims submitted had no effect on the court's duty to make an independent determination of the parties' child support obligation, unfettered by the findings of the arbitrator. Because a determination as to the proper amount of child support hinges almost entirely on a correct calculation of the parties' income, and it is the stated policy of this state that issues of child support be decided only by the court, it would run contrary to that policy to require the court to defer to findings of income made by an arbitrator, who was not tasked with considering the parties' incomes for that purpose.[18] Said another

[18] Our analytical approach finds support in the Restatement (Second) of Judgments, which provides useful guidance regarding whether findings made by arbitrators should be binding on courts in subsequent proceedings. Section 84 of the Restatement (Second) provides that courts generally should afford a valid and final arbitration award "the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court." 2 Restatement (Second), Judgments § 84 (1), p. 286 (1982). Nevertheless, there are several notable exceptions to that rule. In particular, § 84 (3) provides in relevant part: "A determination of an issue in arbitration does not preclude relitigation of that issue if: (a) [a]ccording preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question . . . ." As provided in the commentary to § 84, "[i]t is coherent to treat an arbitration proceeding as wholly self-contained, conclusive as to the claims represented in the award *but inoperative beyond them*."

way, the court's reliance on income findings of the arbitrator in determining child support obligations would constitute an impermissible delegation of judicial authority, something we previously have concluded amounts to plain error. See id.

We conclude that, although the court incorporated the arbitration award by reference into the dissolution judgment, it does not follow that the court was bound by every factual finding contained in the award in determining the defendant's child support obligation. In exercising its important and independent statutory obligation to determine child support—an issue important not only to the parties but to the children meant to benefit from such orders—the court was not legally bound by the arbitrator's factual findings regarding gross income. To hold otherwise could undermine the court's function to ensure that children receive an adequate level of support, and that concern outweighs any policy cautioning against judicial interference with arbitration. Accordingly, we reject the defendant's claim that the court was bound by the factual finding of the arbitrator regarding the defendant's gross income.

II

The defendant next claims that even if the court was not legally bound by the arbitrator's finding with respect

(Emphasis added.) Id., § 84, comment (c), p. 289. Further, "[a] dispute may be governed by an arbitration agreement but also be subject to statutory provisions for alternative or supplementary procedures. The conclusive effect of an arbitration award is subordinate to such provisions." Id., § 84, comment (g), p. 291. The approach of the Restatement (Second) is consistent with our Supreme Court's instruction that "[t]he doctrines of preclusion . . . should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 591, 674 A.2d 1290 (1996); id., 592 (holding application of res judicata to bar party from bringing postdissolution action claiming damages for misconduct occurring during marriage would be inappropriate given competing policy considerations).

to his gross income, the court's finding that the defendant earned $400,000 in gross income from employment was clearly erroneous. The plaintiff counters that the court's finding was correct and fully supported by the record. Because there is evidence in the record that supports the court's finding, we conclude that the finding was not 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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [*w*]*e do not examine the record to determine whether the* [*court*] *could have reached a conclusion other than the one reached.* . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Emphasis added; internal quotation marks omitted.) *Hammel* v. *Hammel*, 158 Conn. App. 827, 832–33, 120 A.3d 1259 (2015).

The defendant argues that the record contains no evidence that would support the court's finding that he earned $400,000 in gross income from his employment, and, therefore, the finding is clearly erroneous. He indicates that his financial affidavit submitted into evidence listed his gross income earned from employment as $360,000. He further notes that his 2015 income tax return, which was submitted into evidence, states that he earned $170,541 in gross income from employment. As our standard of review makes clear, however, the existence of evidence that is contrary to the court's finding is not dispositive of whether the court's finding is clearly erroneous.

The trial court, in its role as the trier of fact, was not bound by the financial numbers contained in either

party's financial affidavits and was free to assess the credibility of the parties with respect to the reliability of evidence proffered to establish income. See *Olson* v. *Olson*, 71 Conn. App. 826, 834, 804 A.2d 851 (2002). The court was free to make findings that differed from the parties' positions, provided that evidence existed to support such findings. Here, the court expressly indicated in its memorandum of decision that it found the evidence presented by the defendant regarding his income not credible and untruthful. See *Billington* v. *Billington*, 27 Conn. App. 466, 469, 606 A.2d 737 (contours of determination of credibility uniquely shaped by trial court and not reviewable on appeal), cert. denied, 224 Conn. 906, 615 A.2d 1047 (1992). Moreover, contrary to the defendant's assertion on appeal, our review of the record reveals evidence from which the court reasonably could have determined that the defendant's gross income from employment was at least $400,000.[19]

First, the plaintiff testified during the hearing that she was aware of the defendant's earnings during the course of their marriage. She testified that he had three sources of income from employment: his medical practice, consulting for medical companies, and teaching. In part, her knowledge of his earnings came from her having worked as the business administrator for the defendant's medical practice, in which capacity she had

[19] The trial court's finding of $560,637 in gross income included as a base component $400,000 in gross income from employment, which is the same amount the arbitrator set forth as the defendant's gross income. The arbitrator's award does not break down the components of that figure or indicate whether her finding also incorporated rental income. Thus, the trial court's finding of $560,637 in total gross income, rather than being a wholly inconsistent factual finding from that made by the arbitrator, might simply reflect a more complete representation of the defendant's total gross income. It is not necessary, however, for us to resolve the apparent conflict between the arbitrator's finding and the trial court's finding in order to conclude that the trial court's finding was supported by evidence in the record and, thus, was not clearly erroneous.

access to payroll documents. She testified that the defendant's salary was $16,000 every two weeks, which amounts to a yearly income from employment of $416,000.

Second, the plaintiff offered into evidence a consumer credit application that the defendant completed in connection with a lease he obtained in March, 2016, for a new BMW automobile. On the application, the defendant disclosed in the employment section of the application that his employer's name was Dr. K Services, P.C., and that his gross annual income from employment was $400,000.

Given that the true measure of the defendant's income was highly contested, and that the trial court found that the defendant's presentation of his finances, including income, was misleading, the court relied on other evidence in the record. There was certainly evidence, including the defendant's admission on the automobile application, that his income from employment was $400,000. Because the finding is supported by evidence and we are not left with any firm conviction that a mistake was made, we conclude that the trial court's finding was not clearly erroneous.

III

The defendant's third claim is that, in calculating his gross income, the court improperly determined the amount of gross rental income he received from property awarded to him as part of the division of marital assets. We are not persuaded.

"The [child support] guidelines worksheet is based on net income; weekly gross income is listed on the first line on the worksheet, and the subsequent lines list various deductions, including federal income tax withheld and social security tax. . . . The guidelines are used by the court to determine a presumptive child

support payment, which is to be deviated from only under extraordinary circumstances. . . . Our regulations define 'gross income' as 'the average weekly earned and unearned income *from all sources* before deductions, including but not limited to the items listed in subparagraph (A) of this subdivision, but excluding the items listed in subparagraph (B) of this subdivision.'' (Citation omitted; emphasis added.) *Giordano* v. *Giordano*, 153 Conn. App. 343, 356–57, 101 A.3d 327 (2014), citing Regs., Conn. State Agencies § 46b-215a-1 (11). One item expressly included in subparagraph (A) is ''rental income after deduction of reasonable and necessary expenses . . . .'' Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (xiv). Any challenge to the court's factual findings regarding rental income is subject to our clearly erroneous standard of review.

Although the defendant acknowledges that the child support guidelines permit the inclusion of rental income in the calculation of gross income, he argues that the court failed to ''delineate how the court arrived at the figure of $160,637.'' He also argues that ''[n]owhere in the record can there be found any indication of how the court arrived at the figure of $160,637 or whether the court deducted reasonable and necessary expenses from any such rental income.'' (Emphasis omitted.) Further, the defendant notes that the court's rental income figure matches the total found in a chart that the plaintiff prepared and attached to her posttrial brief, which, as the defendant correctly maintains, was never submitted into evidence during the hearing.

The court did not provide a detailed explanation of how it arrived at its calculation of rental income. After it set forth its findings regarding the defendant's total gross income, however, it did indicate the evidentiary basis for its finding, citing to the plaintiff's exhibits 7 and 13, and the defendant's testimony of May 25 and June 29, 2016. Exhibit 13 is a copy of the defendant's

2015 individual tax return. Schedule E of that return contains details of the income and expenses associated with the rental properties awarded to the defendant in the judgment of dissolution. Although the defendant maintains that the court improperly utilized the rental income chart that the plaintiff prepared and attached to her posttrial brief, which was never made an exhibit at the hearing, the chart references the defendant's 2015 tax return, which was an exhibit, and the numbers contained in the chart merely reflect figures contained in that tax return. The figures from the 2015 tax return, as used on the plaintiff's chart, were easily verified by the court by comparing the chart's figures with those on the tax return. Accordingly, we conclude that a sufficient evidentiary basis for the court's rental income finding exists.

Finally, the defendant argues that both the plaintiff's chart and the court's conclusion regarding rental income do not comport with the evidence presented because they disregard and omit from their calculation two properties that generated substantial losses. According to the defendant, if those properties were considered, his net rental income would have been substantially lower.

The plaintiff argues, however, that those properties were sold prior to the child support hearing, and thus any effect that the losses from those properties had on total rental income in 2015 were properly disregarded in calculating future income for the purposes of determining child support. The defendant does not dispute that assertion in his reply brief and fails to explain why it would be improper for the court to consider only properties that would generate income in the future in calculating income on which to base his prospective child support obligations. On the basis of our review, we conclude that the court's calculation and inclusion

of rental income in its determination of the defendant's total gross income was not clearly erroneous.

IV

In the defendant's fourth claim, he asserts that the court improperly failed to take into account his payment of life insurance premiums in calculating his gross income. The plaintiff responds that the defendant failed to provide the court with information regarding life insurance premiums and that the court properly accounted for all insurance premium payments brought to the attention of the court and reflected in the record. We agree with the plaintiff.

The following additional facts are relevant to this claim. The defendant testified that he maintained two life insurance policies that provided a total of $4,000,000 in coverage.[20] According to the defendant, the premiums for those policies were paid by his medical practice, and those payments were attributable to him as additional income. The life insurance policies are listed on the defendant's financial affidavit, which also includes as a personal expense his monthly life insurance premiums of $1053. The premium payment amounts are not broken out per policy. The child support guidelines worksheet submitted by the defendant to the court did not include any deduction for life insurance premiums, presumably because the defendant objected to the plaintiff's claim for relief requesting that the court order him to maintain $2,000,000 in life insurance for the benefit of the children. He argued that he would not be able to maintain his existing policies once they expired and that it would be financially unfeasible or overly burdensome for him to obtain new policies as a sixty-four year old man.

[20] The defendant also maintained a separate $500,000 life insurance policy benefiting a former wife from an earlier marriage.

The court made the following order with respect to life insurance: "The defendant shall maintain insurance on his life in the amount of $2,000,000, naming the three minor children as equal beneficiaries, for as long as he has a child support obligation to the twins." The court's calculation of net income for the purposes of child support, which is set forth on the court's child support guidelines worksheet attached as the court's exhibit 1 to the court's memorandum of decision, deducts $406 from the defendant's gross weekly income for premiums paid for the children's medical and dental insurance. Although the worksheet also contains a line for deducting the premium paid for "court-ordered life insurance for benefit of child," the court indicated $0 on that line.

The defendant stood to benefit from any reduction in his gross income attributable to life insurance premium payments. As such, he bore the burden to produce whatever evidence was necessary for the court to calculate this deduction. Our review of the record, however, including the exhibits and testimony offered during the hearing, show that the defendant never provided the court with a breakdown of his existing premium payments for the $4,000,000 in life insurance coverage he disclosed on his financial affidavits, including how the amount of premiums paid for those policies was applicable to the court's calculation of life insurance necessary to secure the defendant's child support obligation, an amount of insurance that was significantly less. Although he indicated on his financial affidavit a monthly personal expense for life insurance of $1053, he lists several insurance policies with no details of the policies' beneficiaries or premium payments per policy. Because the court had no evidentiary basis from which to calculate a credit against his income for a $2,000,000 life insurance policy benefiting the children, we cannot

conclude that the court's failure to include a credit in calculating net income was a clear abuse of discretion.

V

The defendant next claims that the court improperly failed to explain the basis for exercising its discretion to order child support in an amount that exceeded the child support guidelines' presumptive minimum. The question presented by this claim is whether the court is required to articulate why it chose the specific amount of child support that it did if that amount falls within the range of the minimum and maximum presumptive support amounts. We conclude that there is no such requirement and, accordingly, reject the defendant's claim.

"The question of whether, and to what extent, the child support guidelines apply . . . is a question of law over which this court should exercise plenary review." *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367, 999 A.2d 721 (2010). Further, whether the court is legally obligated to articulate the basis for a child support award also poses a legal question that invokes our de novo review. "It has long been established that the guidelines, as promulgated by a commission empowered pursuant to legislation enacted in 1989; see Public Acts 1989, No. 89-203; were intended to substantially [circumscribe] the traditionally broad judicial discretion of the court in matters of child support." (Internal quotation marks omitted.) *Ray* v. *Ray*, 177 Conn. App. 544, 563, 173 A.3d 464 (2017).

"[T]he . . . guidelines shall be considered in all determinations of child support amounts within the state and . . . the guidelines consist of the Schedule of Basic Child Support Obligations as well as the principles and procedures set forth [therein]." (Emphasis omitted; internal quotation marks omitted.) Id., 563–64. Additionally, "[t]he 2015 guidelines codified developments in

recent cases decided by the Supreme Court and this court regarding the consideration of child support order amounts whenever the parties' combined net weekly income exceeds $4000." Id., 564; see also Child Support and Arrearage Guidelines, supra, preamble, § (e) (5), p. ix.

"[I]n awarding child support, a court must consider and apply statutory child support and arrearage guidelines unless application of the guidelines is inequitable or inappropriate under the circumstances." *Lusa* v. *Grunberg*, 101 Conn. App. 739, 741, 923 A.2d 795 (2007). "To enter child support orders that deviate from the presumptive support amount, the court must make specific findings on the record to explain its reasons for doing so." Id. "[A]ny deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child." *Maturo* v. *Maturo*, supra, 296 Conn. 95–96.

"In *Maturo*, [our Supreme Court] . . . concluded that when a family's combined net weekly income exceeds $4000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84 (d)." (Internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 369–70. Our Supreme Court later clarified that "as long as the child support award is derived from a total support obligation within this range—between the presumptive minimum dollar amount and the presumptive maximum percentage of net income—*a finding in support of a deviation is not necessary*." (Emphasis added.) *Dowling* v. *Szymczak*, 309 Conn. 390, 402, 72 A.3d 1 (2013).

The child support guidelines provide that when the combined weekly net income of the parents is $4000, the presumptive minimum of child support for three children is $824 a week. As indicated previously, the maximum is calculated by multiplying the combined weekly income by the applicable percentage, which in this case is 20.61 percent. Regs., Conn. State Agencies § 46b-215a-2c. Here, there is no dispute that the amount of support ordered by the court fell within the range between the presumptive minimum and maximum amounts permitted under the child support guidelines. Because the court did not deviate from the guidelines, the court was not required to articulate statutory deviation criteria.

In his appellate brief, the defendant relies on language in § 46b-215a-2c that provides as follows: "When the parents' combined net weekly income exceeds $4000, child support awards shall be determined on a case-by-case basis, consistent with statutory criteria, including that which is described in subsection (d) of section 46b-84 of the Connecticut General Statutes." Regs., Conn. State Agencies § 46b-215a-2c (a) (2). General Statutes § 46b-84 (d) provides that "[i]n determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." The defendant reads the regulatory language as mandating that a court articulate why it is ordering any amount falling within the presumptive minimum and maximum support provided in the guidelines and notes that "[n]owhere in the memorandum of

decision does the court indicate that it considered the statutory criteria of [§ 46b-84 (d)] in deciding where within $824 per week . . . and $1580 per week . . . child support should fall."

Although the statutory language requires that child support awards shall be consistent with statutory criteria, it does not "mandate that a court articulate why" it is ordering an amount consistent with the criteria. "In accordance with the statutory directives set forth in General Statutes § 46b-215b (a), the guidelines emphasize that the support amounts calculated thereunder are the correct amounts to be ordered by the court unless rebutted by a specific finding on the record that such an amount would be inequitable or inappropriate." *Maturo* v. *Maturo*, supra, 296 Conn. 92. In this case, the child support award was within the range established by the guidelines, and the defendant made no argument that the amount ordered was inequitable or inappropriate. Further, there is nothing in the record from which we can conclude that the court's decision was not made with consideration of the criteria set forth in § 46b-84 (d).

In making its orders and findings of fact, the court conducted an extensive evidentiary hearing and reviewed the parties' various claims for relief, memoranda in support thereof, trial briefs, replies, evidence, testimony, relevant rules, statutory authority, case law, and the arguments of counsel. Notably, these findings pertained to the health and educational needs of the children, as well as the parties' ages, health, educational status, employability, earning capacities, and sources of income. The court calculated that, in this case, the maximum amount of child support per week was $1564. The actual amount of child support ordered by the court was $1500 per week. Because the child support order was consistent with statutory criteria and within the range between minimum and maximum support

amounts established by the guidelines, we find no abuse of discretion in the court's ruling. Further, because no deviation from the guidelines occurred, the court was not required to provide any additional explanation for its decision. In sum, the trial court did not abuse its discretion in rendering its December 7, 2016 child support orders.

VI

We turn next to those claims challenging the court's order requiring the defendant to make a lump sum payment of $91,000 to the plaintiff to satisfy a child support arrearage that resulted from the court's December 7, 2016 order making his child support obligation retroactive to the date of dissolution. The defendant first claims that in calculating the $91,000 child support arrearage, the court failed to credit properly the voluntary child support payments that he made to the plaintiff during the pendency of the child support proceedings. Specifically, the defendant maintains that the court was obligated to subtract the amount of the voluntary payments directly from the amount of the arrearage, rather than providing him with credit for the voluntary payments by temporarily reducing his child support obligations for a period moving forward. The plaintiff responds that the defendant's claim is moot because the court accounted for and fully credited the defendant for all child support voluntarily paid by permitting the defendant to reduce his future child support obligations proportionally over the first year, and the defendant availed himself of that remedy. The plaintiff further argues that even if the claim is not moot, it fails on its merits because the court acted well within its discretion in crafting the remedy provided. We agree with the plaintiff that because the defendant reduced his weekly child support obligation in accordance with the court's order and, thus, has now received full credit for his voluntary child support payments, this court cannot provide the

defendant with any practical relief by reviewing this claim. Accordingly, we dismiss the claim as moot.

"Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve . . . . 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. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Schull* v. *Schull*, 163 Conn. App. 83, 98–99, 134 A.3d 686, cert. denied, 320 Conn. 930, 133 A.3d 461 (2016).

The defendant does not challenge the total amount of the arrearage ordered by the court, having stipulated that the amount owed was $91,000. He also raises no claim that he was entitled to a greater amount of credit on the basis of the voluntary payments made during the pendency of the child support proceedings. It is simply the form of the credit that the defendant takes issue with, maintaining that the court should have applied his voluntary child support payments directly against the arrearage and arguing that most courts that have addressed similar situations have applied voluntary payments to reduce directly any arrearage.[21] Nevertheless, because the defendant has now received full

[21] It is axiomatic that trial courts have "wide discretion and broad equitable power to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 381, 107 A.3d 920 (2015). Even if we were to conclude that the present claim was not moot and assumed for the sake of argument that the defendant's observation regarding credits for voluntary payments is an accurate one, the mere fact that trial courts may more often directly credit voluntary payments to reduce an arrearage is an insufficient factual basis to support a conclusion that a court that elects not to follow that procedure, as in the present case, has abused its discretion. The defendant has cited no authority that would convince us otherwise.

credit for his voluntary payments, there is no practical relief that could flow from our determination of whether he should have received that credit as an offset to the lump sum payment rather than as a reduction in his future child support payments. Even if we were to determine that the court abused its discretion in the manner in which it credited the voluntary payments, we cannot formulate a remedy that would effectively rewind the clock in this case. Any decision would be purely academic at this point because it would not alter the existing status quo, namely, that the defendant has received full credit for those voluntary payments he made. This claim, accordingly, is dismissed as moot.

VII

The defendant next claims that the court improperly ordered him to pay a lump sum to satisfy the child support arrearage rather than permitting him to satisfy that arrearage on a weekly basis, as contemplated by the child support arrearage guidelines. The plaintiff argues that the defendant's claim is frivolous because, although the guidelines prescribe the manner in which a court generally must calculate periodic payment of a child support arrearage, the court nevertheless retains discretion to order a lump sum payment. We agree with the plaintiff.

Whether the court was required to utilize the arrearage calculation formula set forth in the child support arrearage guidelines is a legal question over which our review is plenary. Although the preamble to the child support and arrearage guidelines is not part of the official regulations, and thus not binding on this court, we find it persuasive in resolving the defendant's claim. See *Maturo* v. *Maturo*, supra, 296 Conn. 92–93 (noting preamble is not part of regulations but is intended to assist in their interpretation). Specifically, section (i) of the preamble discusses the arrearage guidelines and

their intended applicability, providing in relevant part: "[General Statutes § 46b-215a] requires the development of guidelines for orders of payment on arrearages. Such guidelines are to be based on the obligor's ability to pay. The commission interprets the statute to apply only to the determination of periodic payments, *and so does not address in the regulations the determination of lump sum payments*, *which determination remains subject to the discretion of the judge or family support magistrate.*" Child Support and Arrearage Guidelines, supra, preamble, § (i), p. xix. This same position is also reflected in the regulations themselves. Subsection (a) of 46b-215a-3a, which governs the scope of the arrearage guidelines, provides in relevant part that the arrearage guidelines "shall be used to determine *periodic payments* on child support arrearages . . . . The determination of lump sum payments remains subject to the discretion of the judge or family support magistrate, in accordance with existing law." Thus, the guidelines have no applicability to orders requiring lump sum payment of arrearages, nor do the guidelines in any way curtail a trial court's discretion to order a lump sum payment, provided that the court determines that the obligor has the ability to comply with the order. General Statutes § 46b-215a (a) ("orders of payment on any arrearage and past due support shall be based on . . . the obligor's ability to pay").

In the present case, the court articulated that it ordered the $91,000 lump sum arrearage payment in the present case because it determined that the defendant had the ability to pay, given his current income and other finances, including the court's release to the defendant of $100,000 held in escrow at the time it issued its child support orders. The court indicated that it had released the funds specifically to aid the defendant in meeting his child support obligations. In short, the defendant has failed to demonstrate that the

arrearage guidelines were applicable to the lump sum order or that the court abused its discretion in ordering a lump sum rather than periodic payments. Accordingly, this claim fails.

VIII

Finally, the defendant claims that rather than having denied the plaintiff's motion for contempt on its merits, which resulted in the remedial order requiring the defendant to pay the arrearage that arose out of the court's retroactive order of child support, the court should have dismissed the plaintiff's motion for contempt in its entirety. According to the defendant, because the court's child support order did not contain any express calculation of an arrearage owed by the defendant as a result of the child support order's retroactivity or an order directing the defendant to pay such an arrearage by a date certain, there was no factual basis for a motion for contempt. The defendant asserts on appeal, therefore, that the plaintiff's motion for contempt failed to state a proper claim for contempt and also failed to comply with the specific requirements of Practice Book § 25-27.[22] Because the defendant's specific claim that the trial court should have dismissed the motion for contempt was not raised before the trial court, we decline to review it for the first time on appeal.

In the defendant's objection to the motion for contempt, he challenged the merits of the motion by arguing that he had not violated any clear and unambiguous order because the court never stated precisely when or how the arrearage should be paid. The defendant's objection asked the trial court to deny the motion for

[22] Practice Book § 25-27 (a) provides: "Each motion for contempt must state (1) the date and specific language of the order of the judicial authority on which the motion is based; (2) the specific acts alleged to constitute the contempt of that order, including the amount of any arrears claimed due as of the date of the motion or a date specifically identified in the motion; (3) the movant's claims for relief for the contempt."

contempt, which the court did, apparently for the reasons stated by the defendant. The defendant never asked the court to strike or dismiss the motion, either on the basis of the motion's legal or factual insufficiencies or on the ground that the motion did not comply with our rules of practice. As we have stated on numerous occasions, we will not entertain a claim or legal theory raised for the first time on appeal. "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . The theory upon which a case is tried in the trial court cannot be changed on review . . . [much like] an issue not presented to or considered by the trial court cannot be raised for the first time on review." (Citation omitted; internal quotation marks omitted.) *Corrarino* v. *Corrarino*, 121 Conn. App. 22, 30, 993 A.2d 486 (2010). We therefore decline to review this claim.

The judgments are affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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WELLS FARGO BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* LIAQUAT ALI
(AC 40165)

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

Argued October 15—officially released October 30, 2018

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

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

MALEEK JONES *v.* COMMISSIONER OF CORRECTION
(AC 38986)

Prescott, Elgo and Beach, Js.

Argued October 17—officially released October 30, 2018

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

Per Curiam. The judgment is affirmed.

A BETTER WAY WHOLESALE AUTOS, INC.
v. MICHAEL A. THIBODEAU ET AL.
(AC 40509)

Lavine, Sheldon and Moll, Js.

Argued October 16—officially released October 30, 2018

Plaintiff's appeal from the Superior Court in the judicial district of Waterbury, *M. Taylor*, *J.*

Per Curiam. The judgment is affirmed.

TIMOTHY MOORE *v.* COMMISSIONER
OF CORRECTION
(AC 39927)

Sheldon, Prescott and Bear, Js.

Argued October 16—officially released October 30, 2018

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

Per Curiam. The judgment is affirmed.

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Professional negligence; whether trial court properly granted motion for summary judgment on ground of res judicata; whether prior judgment in nuisance cause of action precluded subsequent negligence claim that was not pleaded in nuisance action but was predicated on same nucleus of fact; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

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.
Gonzalez *v.* Commissioner of Correction (Memorandum Decision) . . . 903
Grant *v.* Commissioner of Correction (Memorandum Decision) . . . 904
Guddo *v.* Guddo . . . 283
Dissolution of marriage; contempt; reviewability of unpreserved claim that hearing on motion for contempt was unfair in that at time of the hearing, both parties were represented by same law firm, which created conflict of interest, and that law firm violated numerous professional rules of conduct; failure of plaintiff to raise claim before trial court; whether it would have been appropriate to afford extraordinary level of review to claim.
In re Madison M.. . . . 512
Termination of parental rights; appeal from termination of respondent father's parental rights pursuant to statute (§ 17a-112 [j] [3] [B] [i]) for his failure to achieve sufficient personal rehabilitation after children previously had been found to be neglected; whether trial court erred in holding that father had been provided specific rehabilitative steps in manner that satisfied requirements of § 17a-112 (j) (3) (B) (i); whether, even if father had not been provided specific steps, such omission constituted harmless error.
Jenkins *v.* Commissioner of Correction (Memorandum Decision) . . . 905
Jones *v.* Commissioner of Correction (Memorandum Decision) . . . 906
Kirwan *v.* Kirwan . . . 713
Dissolution of marriage; claim that trial court was bound by arbitrator's finding as to defendant's gross annual income for purpose of determining child support obligation; claim that trial court's finding as to defendant's gross annual income for purpose of determining child support obligation was clearly erroneous; whether arbitrator's finding as to defendant's gross annual income for purpose of determining child support obligation was entitled to preclusive effect in trial court's adjudication of child support; whether trial court's finding that defendant earned $400,000 in gross income from employment was clearly erroneous; claim that trial court improperly determined amount of gross rental income defendant received from property that was awarded to him; claim that trial court abused its discretion in calculating defendant's gross income when it failed to take into account his payment of life insurance premiums; whether trial court abused its discretion in rendering child support order; claim that trial court was required to provide explanation for child support order; whether claim that trial court failed to credit voluntary child support payments made by defendant was moot; claim that trial court improperly ordered defendant to pay lump sum to satisfy child support arrearage rather than permitting him to satisfy arrearage on weekly basis; whether child support arrearage guidelines were applicable to lump sum child support order; reviewability of claim that trial court should have dismissed, rather than denied, motion for contempt.
Knott *v.* Commissioner of Correction (Memorandum Decision) . . . 902
Langston *v.* Commissioner of Correction. . . . 528
Habeas corpus; whether habeas court properly dismissed habeas petition as untimely filed; claim that petitioner's untimely petition did not violate spirit of statute (§ 52-470 [d] and [e]) because it concerned issues that were litigated for several years; claim that good cause existed for filing untimely petition where, in withdrawing prior timely petition, petitioner claimed he was following advice of former attorney and did not understand consequences of his decision.
Li *v.* Yaggi . . . 691
Contracts; whether trial court's finding that plaintiffs breached real estate contract by failing to diligently pursue financing was clearly erroneous; whether trial court improperly concluded that agreement required plaintiffs to provide written notice of termination; mortgage contingency clauses, discussed; reviewability of claim that trial court's award of attorney's fees was unreasonable; reviewability of claim that plaintiffs were equitably estopped from claiming that they intended their e-mail to terminate agreement.
Lindsay *v.* Commissioner of Correction (Memorandum Decision) . . . 903
Martinez *v.* Premier Maintenance, Inc. . . . 425
Employment discrimination; whether trial court improperly granted motion for summary judgment; whether trial court improperly applied pretext model of analysis under McDonnell Douglas Corp. *v.* Green *(411 U.S. 792) and* Texas Dept. of Community Affairs *v.* Burdine *(450 U.S. 248), rather than mixed-motive model of analysis under* Price Waterhouse *v.* Hopkins *(490 U.S. 228) in determin-*

ing whether plaintiff established prima facie case of employment discrimination in violation of statute ([Rev. to 2011] § 46a-60 [a] [1]); whether trial court properly determined that there were no genuine issues of material fact as to whether defendant harbored bias or discriminatory intent on basis of plaintiff's religion; whether trial court improperly granted motion for summary judgment on claim that defendant retaliated against plaintiff in violation of statute ([Rev. to 2011] § 46a-60 [a] [4]) for having referred to coworker as pastor; claim that plaintiff engaged in protected activity when he referred to coworker as pastor; claim that plaintiff raised genuine issue of material fact that his reference to coworker as pastor constituted informal complaint when defendant fired coworker.

Moore *v.* Commissioner of Correction (Memorandum Decision) 907

Muckle *v.* Pressley. 488

Negligence; action to recover damages for diminished value of motor vehicle; claim that trial court, in awarding damages, improperly denied claim for prejudgment interest and that applicable statutes (§§ 37-3a and 37-3b) do not extinguish common-law right to prejudgment interest in this type of civil action; whether, under present statutory framework, trial court properly denied request for prejudgment interest; whether, under § 37-3a, prejudgment interest may be recovered in negligence actions; whether § 37-3b provides for award of only postjudgment interest in negligence cases; whether plaintiff was entitled to prejudgment interest pursuant to statute (§ 52-192a) that governs offers of compromise; whether current statutory framework limits automatic award of interest in negligence actions to postjudgment time periods; claim that §§ 37-3a and 37-3b have not abrogated common-law right to prejudgment interest; whether plaintiff established that prejudgment interest in negligence cases existed under common law.

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.*

Roberson *v.* Commissioner of Correction (Memorandum Decision) 904

Robles *v.* West Avenue Dental, P.C.. 379

Negligent supervision; reviewability of claim that trial court misconstrued jury's original verdict as ambiguous and erred in returning jury for further deliberations with instructions that it could not return plaintiff's verdict without awarding plaintiff damages; failure of defendants to object to jury instructions given by court or to court's decision to return jury for further deliberations.

Seaside National Bank & Trust *v.* Lussier 498

Foreclosure; request for continuance pursuant to applicable rule of practice (§ 17-47); claim that trial court improperly granted motion for summary judgment as to liability; claim that trial court violated defendant's constitutional right to procedural due process by denying defendant opportunity to depose plaintiff's affiant; claim that trial court abused its discretion in denying request for continuance and granting motion for protective order; whether affidavit submitted by defendant in opposition to motion for summary judgment provided sufficient evidence to create genuine issue of fact regarding liability; whether trial court abused its discretion by denying defendant opportunity to depose plaintiff's affiant; whether trial court abused its discretion in overruling defendant's objection to plaintiff's motion for judgment of strict foreclosure.

Seven Oaks Enterprises, L.P. *v.* DeVito. 534

Contracts; breach of implied covenant of good faith and fair dealing; whether trial court erred in denying motions to set aside verdict and for judgment notwithstanding verdict as to breach of contract claim; claim that plaintiff company did not have power to enforce note because it could not satisfy requirements of statutory (§ 42a-3-309) provision governing enforcement of lost, destroyed, or stolen instruments; claim that trial court abused its discretion in denying motion for judgment notwithstanding verdict and in refusing to set aside verdict in favor of plaintiffs as to their claims of breach regarding management contract;

claim that neither plaintiff had right to enforce management contract; reviewability of claim that alleged breaches did not cause any loss to plaintiffs.

Smith *v.* BL Cos. . . . 656

Professional negligence; whether trial court properly granted motion for summary judgment on ground of res judicata; whether prior judgment in nuisance cause of action precluded subsequent negligence claim that was not pleaded in nuisance action but was predicated on same nucleus of fact; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

Sosa *v.* Commissioner of Correction (Memorandum Decision) . . . 903

State *v.* Bailey (Memorandum Decision) . . . 905

State *v.* Carter (Memorandum Decision) . . . 902

State *v.* Correa . . . 308

Conspiracy to possess controlled substance with intent to sell; conspiracy to possess controlled substance with intent to sell by person who is not drug-dependent; conspiracy to operate drug factory; claim that trial court improperly denied motion to suppress evidence seized from defendant's motel room after police conducted warrantless canine sniff of front door of motel room; unpreserved claim that warrantless dog sniff outside door to motel room violated defendant's rights under article first, § 7, of state constitution; claim that police were required to obtain warrant before conducting dog sniff search of pathway outside of defendant's motel room; whether defendant demonstrated reasonable expectation of privacy on outside of door to motel room, which was open, shared walkway that was located outside of structure and visible to and accessible by any member of public; whether defendant established plain error; claim that conduct of police in opening door to motel room and conducting visual sweep of room without warrant was unlawful under federal and state constitutions; whether trial court properly concluded that search was lawful under exigent circumstances exception to warrant requirement; whether probable cause existed to search motel room; whether, under totality of circumstances, reasonable, well trained police officer reasonably would have believed that immediate entry into motel room was necessary to prevent destruction of evidence.

State *v.* Gayle (Memorandum Decision) . . . 906

State *v.* Meadows . . . 287

Criminal violation of standing criminal protective order; threatening in second degree; claim that conviction of two counts of criminal violation of standing criminal protective order violated defendant's right to be free from double jeopardy; whether offenses charged in subject counts arose out of same act; whether defendant's conversation with victim was separable into distinct acts, each punishable as separate offenses under applicable statute (§ 53a-223a); claim that trial court erroneously instructed jury as to second count of criminal violation of standing criminal protective order by providing jury with incorrect definition of "harassing conduct," instead of using higher standard set forth in State *v.* Larsen *(117 Conn. App. 202); claim that defendant's conviction of threatening in second degree pursuant to statute ([Rev. to 2015] § 53a-62 [a] [3]) should be reversed; whether statute violated first amendment to United States constitution; claim that true threats doctrine required that defendant possessed subjective intent to threaten victim; whether objective standard for true threats doctrine remained valid.*

State *v.* Mendez . . . 476

Felony murder; robbery in first degree; reviewability of claim that trial court improperly granted appellate counsel's motion for leave to withdraw appearance filed pursuant to applicable rule of practice (§ 62-9 [d]); failure of defendant to comply with § 62-9 (d) by filing motion for review of trial court's decision; failure of defendant to raise or adequately brief any claim that directly challenged judgment of conviction.

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

State *v.* Montanez . . . 589

Murder; conspiracy to violate dependency-producing drug laws; carrying pistol without permit; criminal possession of firearm; violation of probation; unpreserved claim that trial court improperly denied motion for mistrial after jury reported to court that there was bullet hole in window in jury deliberation room; claim that trial court abused its discretion by inquiring of jury as group as to whether jury could follow court's instruction and remain fair and impartial; claim that bullet hole incident was presumptively prejudicial to defendant's case; whether

trial court abused its discretion in concluding that testimony about drive test survey data was admissible in evidence under test for admissibility of scientific evidence in State *v.* Porter *(241 Conn. 57); whether trial court improperly concluded that testimony about drive test survey data was reliable and relevant under* Porter*; harmlessness of admission of drive test survey data.*

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.

Walenski *v.* Connecticut State Employees Retirement Commission 457

Administrative appeal; subject matter jurisdiction; spousal retirement benefits pursuant to State Employees Retirement Act (§ 5-152 et seq.); claim that trial court improperly determined that it lacked subject matter jurisdiction over appeal; law of case doctrine; claim that trial court improperly dismissed appeal because plaintiff appealed from final decision by administrative agency in accordance with applicable statute (§ 4-166 [5] [A] and [C]); whether appeal was taken from agency determination in contested case; whether plaintiff possessed statutory or regulatory right to have defendant Connecticut State Employees Retirement Commission decide her rights or privileges in hearing; whether governing statutes or applicable regulations required commission to hold hearing to determine plaintiff's rights or privileges in hearing; whether fact that hearing was in fact held before commission rendered appeal as having been taken from final decision under act.

Wells Fargo Bank, National Assn. *v.* Ali (Memorandum Decision) 906

Wiggins *v.* Commissioner of Correction (Memorandum Decision) 901

SUPREME COURT PENDING CASES

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

STATE *v.* DARNELL MOORE, SC 19869
Judicial District of New London

Criminal; Voir Dire Panels; Whether Census Data Probative of Claim that African-American Males Underrepresented in Jury Pool; Whether Collection of Demographic Data to Analyze Diversity of Jury Pools Necessary Given General Statutes § 51-232 (c)'s Directive to Enforce Nondiscrimination in Jury Selection. The defendant, an African-American male, appealed to the Appellate Court from his murder conviction. He argued that the trial court violated his sixth amendment and equal protection rights in denying his motion to strike the voir dire panel from which the jurors for his trial were to be selected for its failure to reflect a fair cross section of potential jurors in the community due to its lack of African-American men. He claimed that there was a disparate impact on how juries were selected in New London county and that the Judicial Branch demonstrated a wilful blindness in regard to General Statutes § 51-232 (c)'s directive to enforce nondiscrimination in jury selection. That statute provides that each prospective juror shall be given a confidential questionnaire that contains questions regarding the juror's race and ethnicity and also states that such information is required "solely to enforce nondiscrimination in jury selection" and need not be furnished if the juror finds it objectionable to do so. The Appellate Court (169 Conn. App. 470) affirmed the conviction, concluding that the defendant's rights were not violated. It reasoned that the defendant failed to present evidence that the representation of African-American males in voir dire panels was not fair and reasonable in relation to the number of such persons eligible to serve as jurors. It also stated that the defendant failed to provide evidence of the racial and ethnic characteristics of all the prospective jurors in his case or in the entire New London jury pool. Moreover, it found that the census data that he relied on in support of his motion, which showed the population of African-Americans in the state and in New London, was not probative of the percentage of African-American males eligible for jury service. It additionally found that the defendant's equal protection claim failed because he did not present evidence of discriminatory intent and did not demonstrate that substantial underrepresentation of African-American males had occurred over a significant period of time. The Appellate Court indicated that the evidence showed that

Judicial Branch officials were unaware of the racial and ethnic characteristics of persons summoned for jury duty and that the information in the juror questionnaires was not retained or recorded. Finally, the Appellate Court declined the defendant's request that it exercise its supervisory authority over the administration of justice to require the collection of demographic data so that the diversity of jury panels in the state could be analyzed. It found that the defendant's claims about the jury panel at issue were unproven and noted that § 51-232 (c) does not require prospective jurors to provide race and ethnicity information. The defendant appeals, and the Supreme Court will decide whether the Appellate Court properly found that the census data was not probative of the claim that African-American males were underrepresented in the jury pool. It will also decide whether the Appellate Court properly declined, in light of the provisions of § 51-232 (c), to exercise its supervisory authority over the administration of justice to enforce the collection of demographic data in order to analyze the diversity of the state's jury panels.

STATE *v.* JOHN WHITE, SC 20168
Judicial District of Waterbury

Criminal; Whether Trial Court Properly Denied Defendant's Motion for Public Funds to Hire DNA Expert; Whether Trial Court Properly Admitted Evidence of Victim's Post-Identification Confidence in the Certainty of her Identification. The defendant was charged with assault in the first degree in connection with a May, 2009 attack on a woman who was stabbed multiple times with a box cutter. The victim reported that her assailant was wearing a red hooded sweatshirt, and the police recovered a box cutter and a red hooded sweatshirt nearby. Four years after the attack, the victim identified the defendant in a double-blind sequential photographic array procedure, writing on the defendant's picture at the time she made the identification that she was "pretty certain that this is the young man that stabbed me six times." Shortly after making the identification, the victim told a detective that she was absolutely certain of her identification, but that she had "put it down wrong." After jury selection began, the state gave notice of its intent to offer DNA evidence, and, during the trial, the state offered evidence of DNA analysis that concluded that both the defendant's and the victim's DNA were found on the red sweatshirt. The defendant was convicted following a trial to a jury, and he appeals, claiming that the trial court abused its discretion by denying his motion to preclude the victim from testifying at trial that she was "absolutely

certain" that the defendant was her assailant when she signed the photograph. The defendant claims that the evidence of the victim's post-identification procedure confidence in her identification was irrelevant and that its admission was more prejudicial than probative. The defendant also claims that the trial court abused its discretion and violated his constitutional rights when, after the state gave untimely notice of its intent to rely on DNA evidence at trial, it denied his motion for an award of public funds so that he could hire a DNA expert. In denying the motion, the court refused to find that the defendant was indigent, noting that it is the responsibility of the Office of the Chief Public Defender to make determinations as to indigency, and it cited *State* v. *Wang*, 312 Conn. 322 (2014), which held that a defendant seeking public funding for defense costs must request the funding from the Public Defender Services Commission. The defendant claims on appeal that, although he could afford to retain a private attorney and an expert in eyewitness identification, he was nonetheless indigent insofar as he did not have the resources to pay for the unexpected cost of hiring a DNA expert at a late juncture in the proceedings. The defendant argues that the need for a DNA expert for the defense in this case was clear because the DNA evidence was central to the case and because the DNA analysis involved was complex. Finally, the defendant urges that the state is constitutionally required to provide an indigent defendant with funding for ancillary services that are reasonably necessary to mount an adequate and effective defense, regardless of whether the defendant is self-represented or represented by a public defender, by assigned counsel, or by private counsel.

STATE *v.* LIONEL G. DUDLEY, SC 20177
Judicial District of New London

Criminal; Decriminalization; Whether Trail Court Erred in Refusing to Erase Record of Probation Violation Finding Pursuant to General Statutes § 54-142d Following Erasure of Record of Defendant's Marijuana Conviction. In 2010, the defendant was convicted of possession of marijuana and found to have violated the terms of his probation for a prior conviction when he pleaded guilty to the charge of possession of marijuana. In 2015, the defendant moved that the record of the marijuana conviction be erased, citing *State* v. *Menditto*, 315 Conn. 861 (2015). In *Menditto*, the Supreme Court held that, because the legislature decriminalized possession of less than one-half ounce of marijuana in 2011, a defendant convicted of possessing less than a one-half ounce of marijuana was entitled to erasure

of the record of the conviction pursuant to General Statutes § 54-142d. Section 54-142d provides that "[w]henever any person has been convicted of an offense . . . and such offense has been decriminalized subsequent to the date of such conviction, such person may file a petition with the [S]uperior [C]ourt . . . for an order of erasure, and the Superior Court . . . shall direct all . . . records . . . pertaining to such case to be physically destroyed." The trial court here granted the defendant's motion to erase the record of his marijuana conviction. Thereafter, the defendant filed a motion asking for the erasure of the record of the judgment revoking his probation, arguing that the only basis for finding him in violation of probation was the possession of marijuana conviction which had since been erased. The trial court denied the motion, noting that a defendant may be found in violation of probation without any conviction and that all that was necessary to support a judgment of violation of probation was a finding by the preponderance of the evidence that the defendant failed to satisfy the condition of his probation that he not violate any laws of the United States or any state. The defendant appeals, and the Supreme Court will decide whether the trial court properly found that the record pertaining to the probation violation adjudication should not be erased pursuant to § 54-142d following the erasure of the marijuana conviction on which it was predicated.

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

John DeMeo
Chief Staff Attorney

Application for Reinstatement of Attorney

Pursuant to Practice Book Section 2-53, a hearing has been scheduled for November 19, 2018, regarding Maurizio D. Lancia's (FBT-CV12-6027678-S) application for reinstatement to the Connecticut Bar. The hearing will start at 10:00 am in Room 401 of the New Haven Judicial District Courthouse, located at 235 Church Street in New Haven.