

**SUPREME COURT
STATE OF CONNECTICUT**

JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

S.C. 19245

REBECCA NATION-BAILEY

v.

ADRIAN PETER BAILEY

BRIEF OF PLAINTIFF-APPELLANT

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TO BE ARGUED BY:

DAVID N. RUBIN

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STATEMENT OF ISSUE

1. The Appellate Court incorrectly determined that the trial court improperly suspended the payment of unallocated alimony and support payments for four months, rather than terminating such payments in accordance with § 3(B) of the separation agreement.

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1, 3, 4, 5, 6, 7, 8, 9, 10, 11

STATEMENT OF FACTS

The parties were divorced in the Superior Court for the Judicial District of Stamford-Norwalk on February 21, 2007. The judgment of divorce incorporated by reference the Separation Agreement of the parties dated February 21, 2007. (MOD, p. 1) The parties had intermarried on July 4, 1999 and had one child, a boy, born on January 7, 2004. The judgment of divorce provided that the defendant would pay a minimum monthly payment of unallocated alimony and child support of \$3500 per month. Section 3 of the Separation Agreement addressed Alimony and Child Support. Section 3.A provided:

"A. The Husband shall pay to the Wife unallocated alimony and child support in the amount of fifty per-cent (50%) of his gross annual compensation from employment (as defined below) provided however that the amount of said unallocated alimony and child support shall not be less than \$3,500 per month."

Section 3.B addressed the issue of modification and the term of unallocated alimony and child support:

"B. Unallocated alimony and child support shall be paid until the death of either party, the Wife's remarriage or cohabitation as defined by Conn. General Statutes §46b-86(b), or until August 1, 2011."

In the event of termination of the alimony payments, Section 3.F provided:

"F. In the event of the termination of the alimony payments during the minority of the child, the parties shall determine the amount of child support to be paid by the Husband during his lifetime to the Wife for the support of child and in the event they are unable to agree, the amount of such child support payments shall be determined by a court of competent jurisdiction. Said amount shall be paid retroactive to the date of the termination of alimony."

At the time of the entry of the divorce judgment, the defendant filed a sworn Financial Affidavit dated February 21, 2007 (Tr. 3/20/12, p. 3) in which he stated his occupation was a self-employed software developer and that his gross earnings were \$1,590.94 per week and his net earnings were \$1,315.54 per week. On May 25, 2010, the

defendant filed a Motion for Modification (# 130.) In the motion, he represented that "Defendant has suffered loss of income. Plaintiff has been receiving substantial, previously-undisclosed income." The sole relief sought by the defendant in the motion was: " Plaintiff to pay alimony to Defendant, plus child support and other expenses." While the defendant never requested in the motion a modification of his alimony and child support obligations in Section 3 of the Separation Agreement, the parties and the court below treated the motion as a motion for modification of the defendant's alimony and child support obligation (Tr. 3/20/12, p. 40). On April 21, 2011, the defendant filed a Motion To Enforce Termination of Unallocated Support And For Other Relief (# 148.01). The motion alleged that the plaintiff had cohabited with Steven Cooper in December, 2007 and requested termination of unallocated alimony and child support as of that date.

The foregoing motions were heard by the court (Malone, J.) on March 20 and March 21, 2012. The evidence presented included the following:

- a. the defendant had failed to make any of the minimum payments of unallocated alimony and child support due from August 2009 to August 2011. This was a total of 25 payments due on the first of each of the 25 months from August 2009 through August 2011. The total of the minimum payments of unallocated alimony and child support which the defendant failed to make was \$87,500 (Tr. 3/20/12, pp. 41, 117, Tr. 3/21/12, p. 41);
- b. the plaintiff cohabitated with an unrelated male for 4 months from December 2007 through March 2008 and the unrelated male made certain financial contributions to the plaintiff's expenses during that period of time (MOD, p. 2);
- c. the defendant had been a self employed software developer through 2009 at which time his income declined (Tr. 3/20/12, pp. 39-40);

d. the plaintiff was unemployed and had no income at the time of the divorce and at the time of the instant proceeding (Tr. 3/20/12, p. 82);

e. the plaintiff's suffers from medical conditions that affect her ability to work (Tr. 3/20/12, pp. 83-84);

f. the plaintiff survives financially based upon loans she receives from her mother (Tr. 3/20/12, pp. 85-90).

The trial court issued its Memorandum of Decision on April 17, 2012. The trial court made the following findings:

a. "The court finds that there has been a substantial change in circumstances and find that a modification of alimony shall enter. The court further finds that the defendant has been enabled monetarily by his mother and his girlfriend who pay his living expenses. He has not taken the appropriate steps to obtain other forms of employment. The court finds that a person with his skills and of 46 years of age and in good health has a minimum earning capacity of \$40,000.00 annually. Therefore, the defendant is ordered to pay the plaintiff the sum of \$200.00 a week retroactive to May 24, 2010." MOD, pp. 1-2.

b. "...the court finds that there has been a substantial change of circumstances as a result of the plaintiff's relationship with Mr. Cooper for a period of approximately four months. The parties judgment refers in such a situation to the language of § 46b-86(b) C.G.S. Therefore, the court hereby suspends the unallocated alimony/child support paid by the defendant to the plaintiff as of April 18, 2011 for a period of four months (December 2007 to March 20, 2008) pursuant to § 46b-86(b) C.G.S." MOD, pp. 2-3.

On July 23, 2013, the Appellate Court issued its decision overturning the judgment of the trial court finding that unallocated alimony and child support terminated upon the

cohabitation of the plaintiff. Nation-Bailey v. Bailey, 144 Conn.App. 319, 74 A.3d 433 (2013). On December 4, 2013, the Supreme Court granted the plaintiff's certification to appeal.

LEGAL ARGUMENT

Standard of Review:

The Standard of Review applicable to this appeal is as follows. The court must construe the applicability of C.G.S. § 46b-86(b) to the facts of this case. Whether C.G.S. §46b-86(b) applies to the facts of this case is a question of law over which the Supreme Court affords plenary review. Krichko v. Krichko, 108 Conn.App. 644, 648, 948 A.2d 1092 (2008).

I. THE APPELLATE COURT INCORRECTLY DETERMINED THAT THE USE OF THE WORD "UNTIL" IN § 3 (B) OF THE SEPARATION AGREEMENT MANDATED THE PERMANENT CESSATION OF UNALLOCATED ALIMONY AND CHILD SUPPORT UPON A FINDING OF COHABITATION BY THE PLAINTIFF.

A. The Separation Agreement is to be interpreted as a contract.

In Isham v. Isham, 292 Conn. 170, 180, 972 A.2d 228 (2009), the court held that: "[A] separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction...[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and...the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract...."

B. The Separation Agreement did not provide that the term of alimony was non-modifiable so the trial court properly exercised its authority to suspend unallocated alimony and child support during the time of the plaintiff's cohabitation and to re-instate unallocated alimony and child support when the plaintiff was no longer cohabiting.

The trial court and the Appellate Court considered a Separation Agreement entered into by the parties on February 21, 2007 which provided in relevant part that: "unallocated alimony and child support shall be paid until the death of either party, the Wife's remarriage or cohabitation as defined by Conn. General Statutes §46b-86(b) or until August 1, 2011." Nowhere in the Separation Agreement was it provided that the payment of unallocated alimony and child support was non-modifiable as to term or amount. The trial court granted the defendant's motion to modify unallocated alimony and child support based on a change in his financial circumstances due to loss of income from self-employment. The payment of unallocated alimony and child support was modified to \$200 a week retroactive to May 24, 2010. The trial court also made a finding that the plaintiff cohabited with Steven Cooper for a period of 4-6 months in 2007-2008. Regarding the effect of the cohabitation on the plaintiff's finances, the trial court found that: "The plaintiff and Mr. Cooper shared cell phone plan payments, food and restaurant costs. Mr Cooper paid \$2000 to the landlord (50% of one month's rent) and \$1000.00 directly to the plaintiff as compensation." The court stated: "Therefore, the court finds that there has been a substantial change of circumstances as a result of the plaintiff's relationship with Mr. Cooper for a period of approximately four months. The parties judgment refers in such a situation to the language of §46b-86(b) C.G.S. Therefore, the court hereby suspends the unallocated alimony/child support paid by the defendant to the plaintiff as of April 18, 2011 for a period of four months

(December 2007 to March 20 2008) pursuant to §46b-86(b) C.G.S.”

The trial court concluded pursuant to the Separation Agreement that the alimony provision of Section 3 was modifiable and the court found “there has been a substantial change in circumstances and finds that a modification of alimony shall enter.” MOD, p. 1. In reaching this conclusion the court had before it the financial affidavits of both parties from the date of divorce; the financial affidavits of both parties from 2010 and the financial affidavits of both parties from the date of the instant hearing. It also heard and considered the testimony of the parties including their ages, health, employment histories, occupations, standards of living and estates and the length of the marriage

The key legal issue presented by the Separation Agreement is the simple fact that even though the Separation Agreement contained a termination date for alimony, there was no provision that the term of alimony was nonmodifiable. As the Appellate Court held in Pite v. Pite, 135 Conn.App 819, 825, 43 A.3d 229 (2012):

“It is true that provisions for nonmodification are generally not favored and are upheld only if they are clear and unambiguous. If an award is intended to be nonmodifiable, it must contain express language to that effect.... There is no given set of words that must be used to preclude modification; an order is nonmodifiable if the decree distinctly and unambiguously expresses that it is.... In making this determination, we look only at the dissolution decree itself.” (Citations omitted; internal quotation marks omitted.) Sheehan v. Balasic, 46 Conn.App. 327, 332, 699 A.2D 1036 (1997), appeal dismissed, 245 Conn. 148, 710 A.2d 770 (1998).

“Section 46b-86 (a) “suggests a legislative preference favoring the modifiability of orders for periodic alimony ... [and requires that] the decree itself must preclude modification for this relief to be unavailable.... If an order for periodic alimony is meant to be nonmodifiable, the decree must contain language to that effect.... Such a preclusion of modification must be clear and unambiguous.... If a provision purportedly precluding modification is ambiguous, the order will be held to be modifiable.... In determining whether the alimony award is modifiable or nonmodifiable, only the dissolution decree itself may be used.” (Citations omitted; internal quotation marks omitted.) Rau v. Rau, 37 Conn.App. 209, 211-12, 655 A.2d 800 (1995).”

See also Burke v. Burke, 94 Conn.App. 416, 422-24, 892 A.2d 964 (2006); Lilley v. Lilley, 6 Conn.App. 253, 255-56, 504 A.2d 563, cert. denied, 200 Conn. 801, 509 A.2d 516 (1986).

C. The use of the word “until” in § 3 (B) of the Separation Agreement does mean that unallocated alimony and child support will stop upon the plaintiff’s cohabitation but it does not mean that the court is precluded from re-instating unallocated alimony and child support after the plaintiff ceases cohabiting.

The Appellate Court decision in the instant case held: “Because the agreement clearly provides that alimony terminates upon death of either party, the remarriage or cohabitation of the plaintiff as defined in §46b-86 (b), or on August 1, 2011, we conclude that the court improperly modified the unallocated alimony and child support order by applying §46-b-86(b) instead of terminating such order as of the initial date of the plaintiff’s cohabitation, as required by § 3(B) of the agreement incorporated by reference in the judgment.” Nation-Bailey v. Bailey, 144 Conn.App. 319, 324-25, 74 A.3d 433 (2013)

However, contrary to the Appellate Court’s description, the Separation Agreement never stated that alimony “terminated” on cohabitation. The use of the word “until” was interpreted by the Appellate Court as the equivalent of permanent termination of alimony upon cohabitation. However, the Supreme Court has firmly held that even if the alimony provision states that alimony terminates upon a specific event or date, if the decree does not state explicitly that the term of alimony is “nonmodifiable”, then even an alimony order with a specific termination date can be modified to extend the order after the termination date or event. In Scoville v .Scoville, 179 Conn. 277, 279-890, 426 A.2d 271 (1979), the court held:

“Periodic alimony is indefinite as to amount or duration. Section 46b-86 of the General Statutes provides in relevant part : “(a) Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent

alimony or support pendente lite may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party." (Emphasis added.) This statute authorizes the modification of periodic alimony for the future; Sanchione v. Sanchione, 173 Conn. 397, 404, 378 A.2d 522 (1977); it also suggests a legislative preference favoring the modifiability of orders for periodic alimony. According to the statutory language, the decree itself must preclude modification for this relief to be unavailable....We conclude that in that part of the instant order stating "(a)t the end of the three year period, the payment order of alimony shall terminate," it is implicit that during that period there be no intervening material change in circumstances warranting modification."

Our courts have noted the definitions of the words "until," "terminate," and "nonmodifiable." "Until" is a word of limitation. "Black's Law Dictionary (4th Ed. 1968) defines ... "until" in pertinent part as "[a] word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist." Harbour Pointe, LLC v. Harbour Landing Condominium Association, Inc. et al., 300 Conn. 254, 285, 14 A.3d 284 (2011).

In Whitford v. Lee, 97 Conn. 554, 561, 117 A.554 (1922), the Supreme Court held: "In Webster et al v. French et al., 12 Ill. 302, 304, the court, speaking of the word "until," says that- 'It and the words "at," "before," "within," and the like" are most generally used as words of limitation, and indeed almost universally so, unless there are other controlling expressions in the connection, showing that a different meaning was intended. 'Before' the 1st of July and 'until' the 1st of July carry nearly, if not quite, the same meaning."

In Lagassey v. State, 50 Conn.Supp. 130, 137, 913 A.2d 1153 (2005), the court held: "The word "until" is defined by Merriam-Webster's Collegiate Dictionary (10th Ed. 1993) as "a function word to indicate continuance (as of an action or condition) to a specified time...."

Termination is defined as the "end." "Terminate," means to "come to a limit in time;

to end.” Webster’s New International Dictionary (2d Ed.)” Merchant’s Bank & Trust Co. v. New Canaan Historical Society, 133 Conn. 706, 714, 54 A.2d 696, 700 (1947). In Perruccio v. Allen, 156 Conn. 282, 286, 240 A.2d 912 (1968), the court held: “Webster’s Third New International Dictionary defines ‘termination’ as ‘end in time or existence: close, cessation, conclusion *** the act of terminating *** or bringing to an end or concluding.’ ...Black’s Law Dictionary (4th Ed.)... defines ‘terminate’ as ‘(t)o put an end to; to make to cease; to end.’”

Neither the use of term “until” nor the use of the term “termination” rise to the level of the explicit statement of non-modifiability required under Scoville v. Scoville, supra, which itself specifically rejects the word “termination” as an explicit statement of non-modifiability. As there is no doubt that under the above stated cases, the alimony clause in this case is modifiable as to term, there was no prohibition for the trial court to find that after the plaintiff’s cohabitation ended (four months) and as of the time of the court’s decision, there had substantial changes of circumstances justifying a modification of unallocated alimony and child support.

D. The Separation Agreement includes by reference all of the provisions of C.G.S. § 46b-86(b) including the trial court’s remedial authority to modify, suspend or terminate alimony upon a finding of cohabitation by the party receiving alimony.

A divided Appellate Court panel has decided a question of law regarding the interpretation of Conn. General Statutes § 46b-86 which limits the liberal remedial purpose of the statute which is a question of substance not heretofore determined by the supreme court. A question of great public importance is involved including the validity of thousands of separation agreements and the significant change in the meaning of Conn.General Statutes § 46b-86(b). The trial court correctly held that “The parties judgment refers in such

a situation [as the plaintiff's relationship with Mr. Cooper] to the language of § 46b-86(b) C.G.S." Under the statute, the court may modify said judgment and "suspend, reduce or terminate" the payments thereunder

In the dissent, Justice Borden states: "Thus, the issue in this case is whether the language of the separation agreement, as incorporated into the judgment of dissolution sought to be modified—"[u]nallocated alimony and child support shall be paid until the death of either party, the [plaintiff's] remarriage or cohabitation as defined by Conn.General Statutes § 46b-86(b)"—gave the court the full panoply of remedies provided by § 46b-86(b), including the power to "modify...and suspend...the payment of periodic alimony." I would answer that question in the affirmative." Nation-Bailey v. Bailey, 144 Conn.App. 319, 331, 74 A.3d 433 (2013)

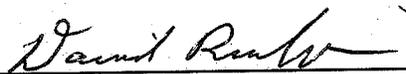
The majority's interpretation of the statute eviscerates the rights of the plaintiff and many other people for one simple reason: as opposed to C.G.S. §46b-86(a) which limits the modification of alimony to "a showing of a substantial change in the circumstances of either Party", C.G.S. §46b-86(b) provides that if the alimony recipient is living with another person, alimony may be modified because the living arrangements "alter the financial needs of [the alimony recipient." The latter standard is a far easier standard to prove, that financial needs have been "altered" rather than that there has been a "substantial change of circumstances." The standard under the cohabitation statutes allow the court, as in this case, in its discretion to modify, suspend or terminate alimony depending upon the particular circumstances of the case. Judge Malone found that the cohabitant in this case shared cell phone, restaurant and food bills and one month's payment of rent. Based upon the statutory language that is specifically referenced in the Separation Agreement, alimony

could be modified or suspended proportionate to the specific circumstances that have altered the financial needs of the parties in each case. Whereas the Appellate Court majority comes to the draconian conclusion that any altering of financial needs results in a full termination of alimony if a Separation Agreement provides that cohabitation is a modifiable event. Thus, thousands of Separation Agreements in this state provide that cohabitation could be a termination event if the court so finds upon the application of C.G.S. § 46b-86. Those parties would find under the Appellate Court's interpretation of the law that the central protection of the equitable protection allowing for modification rather than termination under the statute will not be available to them under the Appellate Court's decision.

II. CONCLUSION

For all the reasons set forth herein, the plaintiff moves that the court overturn the determination of the Appellate Court and hold that the trial court acted properly in suspending the payment of unallocated alimony and support payments for four months rather than terminating such payments.

THE PLAINTIFF-APPELLANT
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1. Connecticut General Statute §46b-86

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§ 46b-86. [Effective 10/1/2013](Formerly Sec. 46-54). Modification of alimony or support orders and judgments.

Connecticut Statutes

Title 46B. FAMILY LAW

Chapter 815J. DISSOLUTION OF MARRIAGE, LEGAL SEPARATION AND ANNULMENT

Current through the 2013 Legislative Session

§ 46b-86. [Effective 10/1/2013] (Formerly Sec. 46-54). Modification of alimony or support orders and judgments

- (a) Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a, unless there was a specific finding on the record that the application of the guidelines would be inequitable or inappropriate. There shall be a rebuttable presumption that any deviation of less than fifteen per cent from the child support guidelines is not substantial and any deviation of fifteen per cent or more from the guidelines is substantial. Modification may be made of such support order without regard to whether the order was issued before, on or after May 9, 1991. In determining whether to modify a child support order based on a substantial deviation from such child support guidelines the court shall consider the division of real and personal property between the parties set forth in the final decree and the benefits accruing to the child as the result of such division. After the date of judgment, modification of any child support order issued before, on or after July 1, 1990, may be made upon a showing of such substantial change of circumstances, whether or not such change of circumstances was contemplated at the time of dissolution. By written agreement, stipulation or decision of the court, those items or circumstances that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court. This section shall not apply to assignments under section 46b-81, as amended, or to any assignment of the estate or a portion thereof of one party to the other party under prior law. No order for periodic payment of permanent alimony or support may be subject to retroactive modification, except that the court may order modification with respect to any period during which there is a pending motion for modification of an alimony or support order from the date of service of notice of such pending motion upon the opposing party pursuant to section 52-50. If a court, after hearing, finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82, as amended.
- (b) In an action for divorce, dissolution of marriage, legal separation or annulment brought by a spouse, in which a final judgment has been entered providing for the payment of

periodic alimony by one party to the other spouse, the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith.

- (c) When one of the parties, or a child of the parties, is receiving or has received aid or care from the state under its aid to families with dependent children or temporary family assistance program, HUSKY Plan, Part A, or foster care program as provided in Title IV-E of the Social Security Act, or when one of the parties has applied for child support enforcement services under Title IV-D of the Social Security Act as provided in section 17b-179, such motion to modify shall be filed with the Family Support Magistrate Division for determination in accordance with subsection (m) of section 46b-231.

Cite as Conn. Gen. Stat. § 46b-86

Source:

(P.A. 73-373, S. 23; P.A. 78-230, S. 39, 54; P.A. 86-359, S. 2, 44; P.A. 87-104; P.A. 89-360, S. 12, 45; P.A. 90-188, S. 1; 90-213, S. 46, 56; P.A. 91-76, S. 1, 7; June 18 Sp. Sess. P.A. 97-2, S. 105, 165; P.A. 01-135, S. 2, 3.)

History. Amended by P.A. 13-0213, S. 4 of the 2013 Regular Session, eff. 10/1/2013.

Amended by P.A. 11-0214, S. 8 of the 2011 Regular Session, eff. 10/1/2011.

Amended by P.A. 10-0036, S. 6 of the February 2010 Regular Session, eff. 7/1/2010.

P.A. 78-230 added Subsec. (b) re changes in alimony when recipient is living with another person and changed circumstances alter recipient's financial needs; Sec. 46-54 transferred to Sec. 46b-86 in 1979 and internal reference to Sec. 46-51 revised to reflect its transfer; P.A. 86-359 added Subsec. (c) re referral of motion to modify to family support magistrate where one of parties or child is receiving or has received aid from AFDC program or foster care program or where one of parties has applied for child support enforcement services under Title IV-D; P.A. 87-104 provided that (1) after date of judgment, modification may be made upon showing of substantive change in circumstances, whether or not such change of circumstances was contemplated at the time of dissolution and (2) those items that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court; P.A. 89-360 amended Subsec. (c) by changing "referred to" to "filed with" and added "determination in accordance with subsection (m) of section 46b-231"; P.A. 90-188 amended Subsec. (a) by adding provision permitting modification of child support order if it substantially deviates from the child support guidelines established under Sec. 46b-215a unless inequitable or inappropriate, and prohibiting retroactive modification of order of periodic payment or permanent alimony or support, except during period of pending motion for modification; P.A. 90-213 added provision that modifications can be made pursuant to this section to support orders issued before or after July 1, 1990; P.A. 91-76 amended Subsec. (a) by adding provision re rebuttable presumption that deviation of

CERTIFICATE OF SERVICE

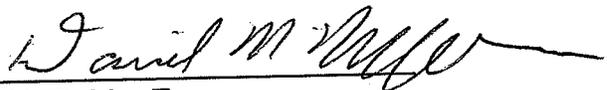
This is to certify that a copy of the foregoing was mailed by first class mail,
postage prepaid on January 21, 2014 to the following:

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This is also to certify that the foregoing complies with all of the provisions of Practice Book
Sections 62-7, 66-3 and 67-2.



David N. Rubin, Esq.