APPELLATE COURT

STATE OF CONNECTICUT

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A.C. 27995

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AJAI BHATIA,

Plaintiff-Appellee

v.

MARLENE DEBEK,

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT MARLENE DEBEK

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TABLE OF CONTENTS

STATEMENT OF THE PRINCIPAL ISSUES

1. Whether the trial court erred by denying the defendant Marlene Debek her statutory and common-law entitlement to immunity from the plaintiff Ajai Bhatia's claim of malicious prosecution for reporting what she in good faith believed was her daughter's disclosure of sexual abuse by the plaintiff.
2. Whether the trial court erred by finding malicious prosecution despite the undisputed evidence and legal precedents demonstrating that

   (i) the defendant did not "initiate" the prosecution because it was initiated by the State of Connecticut only after an independent investigation by the Connecticut Department of Children and Families ("DCF") and law enforcement;

   (ii) the criminal proceedings which resulted in a hung jury on the charge of risk of injury to a minor did not terminate "in favor of the plaintiff";

   (iii) the several expert evaluations and the defendant's legal responsibility to protect her daughter provided ample probable cause for her report to state authorities; and

   (iv) the undisputed record evidence fails to establish the elements of malice.
3. Whether the trial court abused its discretion by rejecting the defendant's motion to open judgment while refusing to hear the evidence underlying it.
4. Whether the trial court's award of damages lacks evidentiary support and "shocks the sense of justice."

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF THE NATURE OF THE PROCEEDINGS AND OF THE FACTS

1. Nature of the Proceedings

This appeal is from a judgment against the defendant Marlene Debek entered on June 16, 2006, by the Superior Court for the District of Middlesex ("the trial court") on the plaintiff Ajai Bhatia's claim of malicious prosecution. *Bhatia v. Debek*, No. CV-04-400079-1S (Conn. Super. Ct. June 16, 2006) ("slip op.") (copy attached at A1). The defendant also appeals from the trial court's denial of the defendant's motion to open judgment and from its damages award of more than $3.5 million.

The case stems from a report that the defendant made to Connecticut authorities in 2001, stating that her daughter ("T.B."),[1] then five years old, had told her that the child's father – the plaintiff – had touched her vagina with his fingers for "a long time." The trial court concluded that this report amounted to malicious prosecution based principally on a deeply inaccurate reading of the May 2, 2005 decision of the Superior Court, Family Division (hereinafter "Family Court") in a custody proceeding between the parties, *Bhatia v. Debek*, No. NNH FA 00-04005618S (Conn. Super. Ct. May 2, 2005) ("Family Ct. Op.") (copy attached at A10). Contrary to the trial court's interpretation, the Family Court did not find that the defendant fabricated her report. What the Family Court found is that it is "entirely possible" that T.B. told her mother that the plaintiff had touched her vagina and that she had not liked it. *Id.* at 38 (A47). The Family Court further found that the defendant sincerely believed that the plaintiff had sexually abused T.B. *Id.* at 45-46 (A54-A55). And the defendant's belief was eminently reasonable. Dr. John Leventhal, a founder of the nationally renowned Yale-New Haven Child Abuse and

[1] The child will be referred to herein as "T.B." to protect her privacy.

Sex Abuse Clinic, concluded "to a standard of reasonable medical probability that [T.B.] was sexually abused," and both the State's abuse team coordinator and the DCF investigating social worker concluded that T.B. disclosed sexual abuse to them when they interviewed the child. *Id.* at 15-18 (A24-A27).

The trial court concluded that the defendant acted maliciously and without probable cause, and that conclusion was erroneous for at least two reasons. First, the defendant is immune from the claim of malicious prosecution under Connecticut law because the Family Court opinion and the trial evidence in this case both establish that the defendant reported to State authorities her good faith belief that the plaintiff had sexually abused T.B. Conn. Gen. Stat. § 17a-101e(b); *McHale v. W. B. S. Corp.,* 187 Conn. 444, 448 (1982). Second, even if immunity did not apply – which it does – the trial court erred as a matter of both law and fact by holding that the plaintiff had proved the elements of malicious prosecution. For these reasons, the trial court's judgment against the defendant should be reversed.

Alternatively, this Court should vacate the trial court's denial of the defendant's motion to open judgment as an abuse of discretion or, at the least, vacate the trial court's damages award as both lacking evidentiary foundation and shocking the sense of justice. Either of those determinations would require that the case be remanded for further proceedings.

2. Statement of Facts

The parties are the parents of the minor child T.B., born in August 1996. Since October 2000, they have been involved in a series of court proceedings regarding visitation and custody of T.B. Throughout those proceedings, the defendant

consistently has reported that the plaintiff threatened her and others in the past and that she feared physical harm from him. *E.g.*, Family Ct. Op. at 6-7 (A15-A16).

a. <u>The Factual Record</u>

The defendant, appearing *pro se* in the trial court,[2] testified as follows. In early October 2001, T.B. told her that the plaintiff had touched T.B.'s vagina with his fingers for "a long time" while she was standing on a bed at the plaintiff's house before they went to a carnival. A83-A84, A87, A92 (Trial Tr. at 123:27-124:4, 127:7-15, 132:11-18). The defendant spent the next two days "trying to figure out what [T.B.] was telling [her]," and then called a counselor at the Fairfield Child Guidance Center whom T.B. had been seeing, told the counselor what T.B. had told her, and asked for advice on what to do. A84, A89, A92 (Trial Tr. at 124:16-18; 129:21-23, 132:18-22). At the direction of the counselor, the defendant then called DCF. A84, A92 (Trial Tr. at 124:16-19, 132:21-24). She reported to a DCF hotline worker what T.B. had told her, and the hotline worker told her to call the local police as well as T.B.'s pediatrician. A92-A93 (Trial Tr. at 132:22-133:3). Following that direction, the defendant contacted T.B.'s pediatrician and the police. A93-A94 (Trial Tr. at 133:2-3, 133:27-134:2).

None of this testimony was disputed. The plaintiff testified that he had not sexually abused T.B., but he did not contradict the defendant's description of the events leading up to her report. Nor did the trial court discredit the defendant's testimony in that regard.

The trial court drastically limited the defendant's testimony about the circumstances relevant to the malicious prosecution claim, holding that the trial court

[2] The plaintiff was represented by counsel.

was barred by collateral estoppel from re-adjudicating facts found by the Family Court in its May 2005 decision. A88-A90, A97-A98 (Trial Tr. at 128:15-130:6, 137:14-138:4).[3] The trial court informed the defendant that she was bound by those findings and made clear that it would not hear testimony elaborating on the issues of fact addressed in that opinion. *Id*.; Slip op. at 7 (A7). Nonetheless, the court strongly disparaged the defendant's previous claims of fear of the plaintiff, stating incorrectly that her fears of his kidnapping T.B. or harming her and the child lacked any "basis whatsoever." Slip op. at 2 (A2). As with other issues addressed to a varying degree in the Family Court opinion, the trial court prohibited the defendant from testifying regarding the "basis" for her fears. Had the allowed the defendant, she would have explained with specificity why she feared that the plaintiff would kidnap T.B. or harm them both.

b. <u>The Family Court's Findings</u>

Because the trial court purported to adopt the Family Court's findings, the relevant findings of that court are summarized here.

Consistent with the defendant's testimony during the malicious prosecution trial, the Family Court found that the defendant contacted the Fairfield Child Guidance Center on October 9, 2001, and told a supervisor who had recently met with T.B. that T.B. had

[3] It is not necessarily true that collateral estoppel is legally binding here, because the Family Court did not make findings on the elements necessary to prove malicious prosecution, let alone on the defendant's entitlement to immunity from that claim. *See, e.g., R&R Pool & Patio, Inc. v. Zoning Bd. of Appeals,* 257 Conn. 456, 466 (2001) (collateral estoppel applies to an issue that was "*actually litigated* and *necessarily determined* in a prior action between the same parties upon a different claim·. . . For an issue to be subject to collateral estoppel, it must have been *fully and fairly litigated in the first action.* It also must have been actually decided and the decision must have been necessary to the judgment.") (internal quotation marks omitted, emphasis in original). However, the defendant does not contest the trial court's reliance on the
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told the defendant "'that some time ago, in the apartment, before going to the carnival, daddy held my shirt and touched my vagina. It made me feel uncomfortable.'" Family Ct. Op. at 14 (A23). On October 10, 2001, the defendant contacted DCF and reported that T.B. had told her that the plaintiff had taken her to a carnival and touched her vagina "for a long time," and DCF told her to contact the police. *Id.* at 15 (A24). On October 11, 2001, the defendant contacted the police and reported that the plaintiff had sexually molested T.B. by touching her vagina for an extended period. *Id.*

The Family Court found that the police "commenced their own investigation," which included an interview of T.B. by the State's abuse team coordinator, Ms. Lisa Radigan, *id.*, a social worker employed by the Yale-New Haven Child Abuse and Sex Abuse Clinic (hereinafter the "Yale-New Haven Clinic"), A105 (Tr. of 6-9-03 at 105:16-24, *State of Connecticut v. Bhatia*, No. CR01-0120348-S (Conn. Super. Ct.) (hereinafter "Crim. Tr."). Ms. Radigan reported that T.B. told her that the plaintiff had touched her vagina with both hands when she had no clothes on, had similarly touched her another time when she was wearing a bathing suit, had digitally penetrated the inside of her genital area, and had "told her not to tell, that it was a secret." Family Ct. Op. at 15-16 (A24-A25). Ms. Radigan further reported that she found T.B.'s statements consistent and credible. *Id.* at 16 (A25).

Also part of the police investigation was a physical examination of T.B. by Dr. John Leventhal, professor of pediatrics as well as co-founder and medical director of the Yale-New Haven Clinic. *Id.* at 16-17 (A25-26); A103-A104 (Crim. Tr. of 6-9-03 at 98:14-

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Family Court's findings because, as demonstrated herein, they preclude rather than support a finding of malicious prosecution.

27, 104:20-23). Although the physical examination revealed "nothing remarkable," Dr. Leventhal, a nationally recognized expert in the field of child sex abuse and a member of the Yale faculty since 1979, testified before the Family Court that, based both on Ms. Radigan's report and his experience, "it was his opinion to a standard of reasonable medical probability that [T.B.] was sexually abused." Family Ct. Op. at 16-17 (A25-A26).

In addition, DCF's own investigating social worker, Ms. Aimee Bloch, reported that T.B. disclosed sexual abuse to her, demonstrated how the plaintiff had put his hand on her vagina by using a doll, and did not appear to have been coerced.[4] Family Ct. Op. at 17-18 (A26-A27).

With respect to whether the plaintiff sexually abused T.B., the Family Court found:

> It is entirely possible that the child discussed with her mother time spent with her father and she stated he touched her vagina. From there, the inference was made by [the defendant] that it was sexual in nature.

Id. at 38 (A47); *see also id*. at 25 (A34) ("In the testimony of the abuse [in the criminal trial of the plaintiff] it seemed that the child was clear that it occurred after a certain

[4] The Family Court stated that DCF subsequently reversed its finding of abuse on the ground that it had relied on reporting solely from the defendant. Family Ct. Op. at 26 (A35). The claim that DCF's original finding was based solely on the defendant's reports appears to be contradicted by the reports of the State's abuse team coordinator and the DCF investigating social worker, both of which were based on interviews with the child, not her mother. It is noteworthy in this regard that the plaintiff has a history of threatening lawsuits against professionals who have worked with T.B. *E.g., id.* at 11 (A20) (plaintiff caused T.B.'s counseling at the Yale Child Study Center to be terminated after he threatened to sue), 33 (A42) (plaintiff threatened to "sue everyone for not doing
(footnote continued on next page)

watershed event of August 22, 2001 and that she did not tell her mother after the first time her father touched her vagina but did after the second time because she wanted it to stop."). Despite its skepticism toward the sexual abuse allegation, the Family Court found that the defendant "profoundly believes all of the things she says about the plaintiff." *Id.* at 46 (A55).[5]

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their job" during appointment with clinical psychologist who met with T.B. in advance of therapeutic visitation sessions).

[5] The Family Court nevertheless found that the defendant lacked credibility with regard to her testimony about T.B.'s disclosure to her. Family Ct. Op. at 38, 44-45 (A47, A53-A54). Also inconsistent was that court's finding that "[n]othing substantial that the plaintiff has said or done in this case has undermined his credibility," *id.* at 38 (A47), despite its recognition that the plaintiff's statements to that court, DCF, and other entities that the defendant was a drug addict, an alcoholic, and a prostitute were wholly false, *id.* at 41 (A50).

The difficulty family courts face with responding to child sexual abuse claims has been widely noted by experts in the field. *See generally* Dallam, S.T. & Silberg, J.L., *Myths that Place Children at Risk During Custody Disputes*, Sexual Assault Report 9(3), 33-47 (Jan/Feb. 2006) (describing misconceptions about truthfulness of claims of child abuse and child sexual abuse in divorce and custody litigation), available at http://www.leadershipcouncil.org/1/res/cust_myths.html. Commentators have noted that some courts treat such claims with deep skepticism and sometimes even punitiveness. *See, e.g.,* John E. B. Myers, *A Mother's Nightmare – Incest: A Practical Legal Guide for Parents and Professionals* 107-08 (Sage 1997) (noting that if a mother fails to prove alleged abuse, she is often branded a false accuser and penalized by loss of custody); Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce,* 4 J. Child Sexual Abuse 17-18 (1995) (finding that out of 215 divorce cases with sexual abuse allegations, 40 parents – mostly mothers – were sanctioned for making the allegations, including being jailed, losing custody to the alleged offender, and losing visitation or having it limited. At the same time, these cases scored *higher* on a composite scale of likelihood of sexual abuse and were more likely to include medical evidence than cases in which such sanctions were not imposed). Judicial skepticism of child sexual abuse allegations often is based on empirically unsubstantiated assumptions about the frequency of false sexual abuse allegations by custody litigants, especially mothers. Nico Trocmé & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 Child Abuse & Neglect 1333, 1342 (2005) (finding that only 12% of allegations by custodial parents against noncustodial parents were deemed by evaluators to be deliberately fabricated; that custodial mothers and children are *least likely* to fabricate; and that noncustodial fathers more frequently fabricate).

The Family Court declined to make an actual finding on whether abuse in fact occurred, explaining, "[t]he court concludes that it is not important for it to determine the ultimate question of whether sex abuse occurred for the purpose of understanding the psychological state of [T.B.], because for her it did occur," *id.* at 45 (A54), and that "[w]hat really occurred between the plaintiff and his daughter . . . only he will know," *id.* at 43 (A52). But it found that what "most likely" occurred was that T.B. told the defendant that the plaintiff had touched her bottom with his hand and that she did not like it, and that the defendant interpreted this as sexual abuse:

> On at least one occasion, the plaintiff's hand was on his daughter's bottom, whether by helping her pull up a bathing suit, tucking a shirt tail in her pants or the like. [T.B.] did not like it. She did not tell him but told the person she feels safest with, her mother. Her mother was, at the time [T.B.] gave her this information, predisposed to believe that the father would sexually abuse his daughter.[6]

Id.[7]

c. <u>Criminal Proceedings</u>

Following an independent investigation of the defendant's report of sexual abuse, the State of Connecticut indicted the plaintiff on charges of sexual assault in the first degree and risk of injury to a minor. *See id*. at 24 (A33). He was tried before a jury in 2003. *See id.* The jury returned a verdict of not guilty on the first charge but was hung

[6] The Family Court did observe that T.B. repeatedly stated that the plaintiff had touched her vagina, both in the Family Court and the Criminal Court as well as to the State's abuse team coordinator and the DCF investigating social worker. Family Ct. Op. at 15-18, 25-26 (A24-A27, A34-A35).

[7] The Family Court resolved the custody dispute before it by placing T.B. in the legal custody of DCF and the foster care of the defendant's brother and his family, allowing both parties only supervised visitation. Family Ct. Op. at 56-61 (A65-A70). Since then, (footnote continued on next page)

on the risk-of-injury charge. *Id.* at 24-25 (A33-A34). The State elected not to retry the plaintiff on the risk-of-injury charge after T.B. refused to testify in the plaintiff's presence a second time. A107 (Crim. Tr. of 11-3-03 at 3) (prosecutor's statement to court: "The minor/complaining victim made it perfectly clear to the State, myself, Victim's Advocate as well as to her guardian *ad litem* that she would not testify in a court of law if [the plaintiff] were in fact present. . . . And without the complaining victim's testimony the State will note for the record that it will – is unable to proceed with the prosecution of this case against [the plaintiff]."); *accord* A79 (Trial Tr. at 58:7-17) (reading criminal trial transcript).

d. <u>This Action</u>

In September 2004, the plaintiff filed this action, claiming malicious prosecution and intentional infliction of emotional distress. The plaintiff later dismissed his intentional infliction of emotional distress claim. A80 (Trial Tr. at 102:12-23). After a bench trial, the lower court ruled in the plaintiff's favor on the malicious prosecution claim and awarded him $3,544,500 in damages, comprised of $500,000 for lost income, $130,000 in attorneys fees related to the criminal action, $4,500 for bail bond premium, and $2,500,000 in noneconomic damages.

In its brief review of the facts, the court below misstated the Family Court findings. Specifically, it stated that "[i]n the child custody case [the Family Court] concluded that the plaintiff had not molested [T.B.]." Slip op. at 6 (A6). To the contrary, the Family Court stated, "[w]hat really occurred between the plaintiff and his daughter,

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the Superior Court, Juvenile Division has returned T.B. to the defendant (legal custody remains with DCF), but the plaintiff continues to be limited to supervised visitation.

at this point, only he will know . . . ," Family Ct. Op. at 43 (A52), and further, "[t]he court concludes that it is not important for it to determine the ultimate question of whether sex abuse occurred . . . ,"[8] *id*. at 45 (A54). Even the passage from the Family Court decision quoted by the court below expressly construes the evidence in the light "most favorable" to the plaintiff. Slip op. at 5 (A5).[9] The trial court nevertheless concluded – without ever undertaking any serious analysis of the elements of malicious prosecution in view of the facts – that the defendant was guilty of malicious prosecution. The sum total of the court's discussion of the elements of malicious prosecution as applied to the facts of the case was as follows:

> The defendant instigated the criminal proceedings against the plaintiff without probable cause. She did so with malice in that her motive was to harm the plaintiff and to keep him from having any contact with their daughter. In the court custody battle, the defendant used the claim of sexual abuse as the final weapon in her arsenal against the plaintiff when her other weapons, false claims of physical violence and danger of flight to India, were not effective and she was facing incarceration for contempt of court. The proceedings terminated in favor of the plaintiff. Therefore, the defendant is liable for malicious prosecution.

Slip op. at 7-8 (A7-A8).

[8] Nevertheless, the Family Court found that it was "entirely possible" that the child told the defendant that the plaintiff touched her vagina. Family Ct. Op. at 38 (A47).

[9] The Family Court stated that the "inferences" from T.B.'s testimony in the criminal trial "most favorable to [the plaintiff]" were that T.B. testified after much practice with the defendant, the prosecutor and others, and that there was a connection between rewards from the defendant and T.B. doing well in her testimony. Family Ct. Op. at 25 (A34).

ARGUMENT

I. The Defendant, as a Person Who Reported Her Good Faith Belief that Her Child Had Been Abused, is Immune from Liability for Malicious Prosecution.

Although the defendant asserted immunity under Connecticut law as a defense to the malicious prosecution claim, A109 (Br. of the Def. at 18, *Bhatia v. Debek*, No. MMX-CV-04-4000791-S (Conn. Super. Ct. filed May 19, 2006)),[10] the trial court failed to address the defense in its decision. That failure constitutes legal error, and the standard of review is *de novo*. *See Aetna Life & Cas. Co. v. Bulaong*, 218 Conn. 51, 58 (1991).

A. Immunity Under Conn. Gen. Stat. § 17a-101e(b).

Recognizing the importance of safeguarding children from abuse,[11] Connecticut law confers immunity on persons who report suspected abuse in good faith. Under Connecticut General Statute § 17a-101e(b), such persons "shall be immune from any

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[10] As a *pro se* litigant at trial, the defendant was entitled to "great latitude," *Bitoni v. Tucker*, 162 Conn. 626, 627 (1972), and her assertion of immunity in her post-trial brief should be treated as sufficient to preserve the issue for appeal. *See, e.g., Higgins v. Hartford County Bar*, 109 Conn. 690 (1929) ("[N]ot only [the Connecticut Supreme Court], but our highest trial court, so far as they properly can, will endeavor to see that [a *pro se*] plaintiff shall have the opportunity to have his case fully and fairly heard, and will endeavor to aid a result . . . brought about by plaintiff's lack of legal education and experience, rather than to deny him an opportunity to be heard through a too strict construction of a rule of practice."); *accord, e.g., Oliphant v. Commissioner of Correction*, 274 Conn. 563, 569-70 & n.5 (2005) (citing *Higgins* and *Estelle v. Gamble,* 429 U.S. 97, 106 (1976)).

[11] Connecticut General Statute § 17a-101(a) provides:

> The policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect . . . and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

liability, civil or criminal, which might otherwise be incurred or imposed."[12] *See also Manifold v. Ragaglia*, 272 Conn. 410, 421 (2004) (explaining that section 17a-101e serves "[t]o encourage and facilitate compliance with the reporting statute"). This statutory immunity "is not limited to mandated reporters [such as medical personnel and teachers], but is ***broad enough to cover one parent's report of another parent***." *Snyder v. Cedar*, 2006 WL 539130, at *14 (Conn. Super. Ct. Feb. 16, 2006) (unpublished opinion attached at A126) (had a mother directly reported the father's alleged child abuse to authorities, she would be entitled to immunity from civil liability) (emphasis supplied).

To determine whether a person reported suspected abuse in good faith, Connecticut courts apply a "***subjective standard*** of honesty of fact in the conduct or transaction concerned." *Henowitz v. BJ's Kid World*, *LLC*, 2006 WL 2194502, at *4 (Conn. Super. Ct. July 19, 2006) (unpublished opinion attached at A115) (internal quotation marks omitted, emphasis added); *see also id.* ("the term 'good faith' has a well defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking means being faithful to one's duty or obligation") (emphasis added).

[12] Section 17a-101e(b) provides in full:

> Any person, institution or agency which, in good faith, makes, or in good faith does not make, the report pursuant to sections 17a-101a to 17a-101d, inclusive, and 17a-103 shall be immune from any liability, civil or criminal, which might otherwise be incurred or imposed and shall have the same immunity with respect to any judicial proceeding which results from such report provided such person did not perpetrate or cause such abuse or neglect.

The Family Court opinion on which the trial court relied contains abundant evidence that the defendant was sincere in her belief that T.B. had been sexually abused by the plaintiff. Specifically, the Family Court found that it was "entirely possible" that T.B. told the defendant that the plaintiff touched her vagina and that "[f]rom there, ***the inference was made by the defendant that it was sexual in nature***." *Id.* at 38 (A47) (emphasis added); *see also id.* at 45 (A54) (finding it "most likely" that T.B. told her mother that the plaintiff had touched her bottom with his hand and that she did not like it and that the defendant "***construed what [T.B.] told her as sexual abuse***") (emphasis added). And the Family Court emphasized that the defendant "***profoundly believes all of the things she says about the plaintiff***." *Id.* at 46 (A55) (emphasis added).[13]

[13] The Family Court, while recognizing that the defendant had not maliciously fabricated the allegations, adopted the view proffered by some of the evaluators that the defendant was deluded in her beliefs. *See* Family Ct. Op. at 21, 46 (A30, A55). Extensive scholarly work has considered this phenomenon which posits a pathological explanation (often under the discredited theory of "parental alienation syndrome") for mothers who sincerely allege child sexual abuse. *See, e.g.*, American Psychological Ass'n Presidential Task Force on Violence in the Family, *Violence and the Family* 40, 100 (1996) ("Although there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with their children's attachment to their fathers, the term is still used by some evaluators and courts to discount children's fears in hostile and psychologically abusive situations." "Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving inappropriate pathological labels to women's responses to chronic victimization. Terms such as 'parental alienation' may be used to blame the women for the children's reasonable fear of or anger toward their violent father"); Hope Fields & Erika Rivera Ragland, Update Newsletter *Parental Alienation Syndrome: What Professionals Need to Know* (National Center for Prosecution of Child Abuse (NCPCA)) Nov. 7, 2003, at 4 (published by the American Prosecutors Research Institute and National District Attorneys Association, at www.ndaa.org/publications/newsletters/update_volume_16_number_6_2003.html) ("[Parental alienation syndrome] is an unproven theory that can threaten the integrity of the criminal justice system and the safety of abused children"); Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, The Judges' Journal, at 38, 39, 40-41 (Fall 1997) ("Through
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The expert opinion of Dr. Leventhal provides further evidence that the defendant made her reports based on her actual belief that T.B. had suffered abuse. That a prominent expert in the field of child sexual abuse concluded that T.B. likely was abused as the defendant reported strongly supports the conclusion that the defendant had good reason to believe what her daughter was telling her. The State abuse team coordinator's report that T.B. consistently and credibly told her that the plaintiff had touched her vagina and the DCF investigating social worker's report that T.B.'s similar disclosure to her did not appear to have been coerced constitute further support.

Moreover, that the defendant, as T.B.'s mother, has a common-law duty to protect her child from abuse, *State v. Miranda*, 245 Conn. 209, 217 (1998), *Durrant v. Board of Educ. of City of Hartford*, 96 Conn. App. 456, 469 (2006) (citing *State v. Miranda,* 274 Conn. 727, 779 (2005)), *certification granted in part*, 280 Conn. 915 (Conn. 2006), further buttresses the conclusion that the defendant contacted the authorities in good faith. Breach of a parent's duty of protection can constitute a basis for criminal liability. *Miranda*, 245 Conn. at 217; *accord State v. Miranda*, 274 Conn. 727, 780 n.8 (2005) (Katz, J., dissenting) (citing cases). In addition, a parent may have her parental rights terminated for failing to protect her child. *See, e.g.,* Conn. Gen. Stat. § 17a-112(j) (providing for termination of parental rights in cases of, *inter alia*, neglect or lack of care by parent and denial "by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, [of] the care . . .

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the use of spurious and discredited psychological 'syndromes,' an abusive parent may successfully portray the protective parent as mentally unstable and undeserving of custody." "In a worst case scenario, the diagnosis [of parental alienation] can result in the protective mother's loss of the child to foster care").

necessary for [a] child's physical, educational, moral, or emotional well-being")[14]; *In re Tabitha T.*, 51 Conn. App. 595, 598, 603 (1999) (affirming termination of parental rights based in part on a mother's failure to protect children from sexual abuse by older brothers); *accord In re Lauren R.*, 49 Conn. App. 763, 773 (1998).

Indeed, if the defendant had failed to notify DCF when she "profoundly believe[d]" her daughter had been abused, Family Ct. Op. at 46 (A55), the defendant also would have risked charges of neglect or risk of injury to her child. *See, e.g., In re Antonio M.*, 56 Conn. App. 534 (2000) (even though trial court could not conclusively state that child was victim of sexual abuse, it did not err in terminating parental rights for failure to protect child from physical and emotional injury). Because, as the Family Court found,

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[14] Section 17a-112(j) provides, in relevant part:

> The Superior Court, upon hearing and notice as provided in sections 45a-716 and 45a-717, may grant a petition [for termination of parental rights] filed pursuant to this section if it finds by clear and convincing evidence . . . (3) . . . that . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected or uncared for in a prior proceeding, or (ii) is found to be neglected or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child; (C) the child has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights.

the defendant sincerely believed that T.B. had suffered sexual abuse, her reports to DCF and the police were not simply permitted, but required given her legal duty to protect her child.

The only evidence the plaintiff introduced in support of his claim that the defendant acted in bad faith was his own testimony that he was falsely arrested. The plaintiff's own belief (even assuming his testimony to be true) that his arrest was false does not bear on whether the defendant believed that the plaintiff had committed sexual abuse when she made her reports.

The trial court clearly erred as a matter of law in failing to address the defendant's assertion of immunity under Connecticut law. Because the record is replete with evidence that she is entitled to the immunity afforded by Connecticut General Statute § 17a-101e(b), the judgment of malicious prosecution should be reversed.

B. Immunity under Connecticut Common Law

Connecticut's malicious prosecution jurisprudence is also informed by a commitment to the important "policy of encouraging private citizens to assist in law enforcement." *McHale*, 187 Conn. at 448. In *McHale*, the Connecticut Supreme Court recognized a "limited immunity" against liability for malicious prosecution and adopted a "good faith" standard for analyzing the first element of a malicious prosecution claim – having "initiated" a criminal proceeding. *Id.* at 450. "[I]f the defendant has made a full and truthful disclosure and has left the decision to prosecute entirely in the hands of the public officer, he cannot be held liable for malicious prosecution." *Id*. at 448; *accord Brodrib v. Doberstein*, 107 Conn. 294 (1928). Even if the information in the defendant's report later proves to be false, so long as the defendant believed it to be true when she

made the report she may not be liable for malicious prosecution. *McHale,* 187 Conn. at 449; *accord Restatement (Second) of Torts* § 653 cmt. g (1997) (absent proof that the defendant brought pressure to bear on the State's decision of whether to prosecute, "the informer is not liable . . . even though the information proves to be false and his belief was one that a reasonable man would not entertain") (cited in *McHale*, 187 Conn. at 448-49).

This limited immunity serves to prevent a "chilling effect on the willingness of a private person to undertake any involvement in the enforcement of the criminal laws." *McHale*, 187 Conn. at 450. That goal is especially important with regard to criminal laws designed to protect children from sexual and other abuse. *See, e.g.,* Conn. Gen. Stat. § 17a-101(a) ("The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect . . ."); *accord Zamstein v. Marvasti*, 240 Conn. 549, 559 (1997) ("The legislature has expressed the strong public policy of encouraging medical professionals and other persons to report actual and suspected child abuse to the appropriate authorities and agencies," which is codified in Conn. Gen. Stat. § 17a-101).

As previously noted, the Family Court found – and the evidence amply supports – that the defendant reported her good faith belief that T.B. had been abused. Because the trial court adopted the Family Court's findings as its own and the plaintiff introduced no evidence inconsistent with the Family Court's findings, as a matter of law the defendant is entitled to common-law immunity from any claim of malicious prosecution based on her reports of abuse.

II. The Record Cannot Support a Finding of Malicious Prosecution.

Because the defendant is immune from the claim of malicious prosecution under both Connecticut General Statute § 17a-101e(b) and Connecticut malicious prosecution jurisprudence, the Court need go no further in its analysis and should reverse on grounds of immunity alone. However, even if the trial court's ruling survives the immunity analysis, the decision must be reversed for several other legal and factual errors. In particular, the evidence contradicts the trial court's findings that the defendant initiated the criminal prosecution of the plaintiff, that the prosecution ended favorably to the plaintiff, that the defendant lacked probable cause to make her reports, and that she acted with malice. The court's legal determinations are reviewed *de novo*. *Aetna Life & Cas. Co.*, 218 Conn. at 58. Its factual findings are reviewed for clear error. *Frillici v. Town of Westport,* 264 Conn. 266, 277 (2003) ("A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") (internal quotation marks omitted, ellipsis in original).

A. Legal Standard for Malicious Prosecution

To prove malicious prosecution, the plaintiff was required to establish by a preponderance of the evidence that

> (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice.

McHale, 187 Conn. at 447. The plaintiff bore the burden of proving ***each and every element*** of the tort. *Id.* The trial court erred in concluding that the plaintiff had met that burden with regard to any of the elements of malicious prosecution.

B. There is No Evidence that the Defendant Initiated the Criminal Proceedings.

To be liable for malicious prosecution, an individual must have "initiated" a criminal proceeding, i.e., "insisted that the plaintiff should be prosecuted, that is . . . he [must have] brought pressure of [some] kind to bear upon the public officer's decision to commence the prosecution." *McHale*, 187 Conn. at 448; *see also Zenik v. O'Brien*, 137 Conn. 592, 596 (1951) (a defendant would not be entitled to immunity where he "not only expressed to the officer his opinion of the plaintiff's guilt but . . . was also insistent that the plaintiff should be arrested for the crime"). But pressure alone is not enough: "A person is deemed to have initiated a proceeding if his direction or request, or pressure of any kind by him, was ***the determining factor*** in the officer's decision to commence the prosecution." *Zenik*, 137 Conn. at 596 (emphasis added). The record here contains no evidence that the defendant in any way pressured the State to prosecute the plaintiff, let alone that any pressure by her was the "determining factor" in the decision to prosecute.

The trial court's sole discussion of the initiation element is confined to a single sentence: "[t]he defendant instigated the criminal proceedings against the plaintiff without probable cause." Slip op. at 7 (A7). That statement is supported by no analysis whatsoever and cites no evidence of any pressure by the defendant. *See id*. Indeed, no such evidence exists.

The evidence regarding the defendant's interaction with the State shows only the undisputed fact that she reported her daughter's complaint to DCF and then, following DCF's instruction, reported it to the police. *See* Family Ct. Op. at 15 (A24). DCF and the police then "commenced their own investigation," *id.*, leading to two separate direct evaluations of T.B. by DCF's investigating social worker and by Dr. Leventhal and the State abuse team coordinator. There is no evidence that the defendant even intended to bring about a criminal proceeding against the plaintiff — rather than simply to follow DCF's instruction. Moreover, the State decided to prosecute the plaintiff only after the police referred the defendant's report to DCF and DCF substantiated the allegation of abuse based on its own investigation. *See id.* Indeed, "it is the duty of DCF to investigate and make the ultimate decision regarding any abuse allegations." *Henowitz*, 2006 WL 2194502, at *3 (unpublished opinion attached at A115) (internal citations omitted).

Furthermore, nothing in the record suggests that the defendant's report to State authorities was the "determining factor" in the State's decision to prosecute the plaintiff. To the contrary, that the State conducted its own independent investigation makes clear that the results of that investigation, rather than the defendant's report, formed the basis for the State's decision to go forward with the prosecution. Absent evidence that the determining factor was the defendant's report, there is no basis for finding that she initiated the prosecution. *See Zenik*, 137 Conn. at 596; *Wolf v. Gubernat*, 1993 WL 512408, at *3 (Conn. Super. Ct. Dec. 07, 1993) (unpublished opinion attached at A145) (finding no initiation where "the police mounted their own investigation" and the

defendant's actions "were not the determining factors in the officers' or for that matter the State's Attorney's decision to arrest and prosecute the plaintiff").

Given the total lack of any evidence that the defendant initiated the criminal prosecution against the plaintiff, the trial court clearly erred in finding that the plaintiff proved the first element of his malicious prosecution claim.[15]

C. The Hung Jury Negates a Finding that the Proceedings Terminated "in Favor of" the Plaintiff.

As the trial court recognized, the State's criminal prosecution of the plaintiff resulted in a hung jury on the charge of risk of injury to a minor. The State subsequently declined to retry the plaintiff because T.B. refused to testify a second time with him in the same room. A107 (Crim. Tr. of 11-3-03 at 3); *accord* A79 (Trial Tr. at 58:7-17). Although the defendant argued that the fact of the hung jury precluded the malicious prosecution claim, A110 (Br. of the Def. at 20), the trial court ignored the issue in its decision. In so doing, the court committed legal error.

"[P]rosecution resulting in a hung jury cannot support a claim for malicious prosecution." *Bontatibus v. Ayr*, 386 F. Supp. 2d 28, 32 (D. Conn. 2005) (citing *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980)); *see also Milton v. Alvarez*, 2005 WL 1705523, at *4 (S.D.N.Y. July 19, 2005) (unpublished opinion attached at A119) ("A hung jury leaves the defendant's guilt open and a claim for malicious prosecution based on that prosecution must fail") (also citing *Singleton*). The trial court therefore erred as a matter of law in concluding that the "proceedings

[15] Proceedings before the Superior Court, Juvenile Division after the malicious prosecution trial, which the defendant attempted to bring to the trial court's attention through a motion to open judgment, further support her claim of good faith. The trial court abused its discretion in denying that motion, as explained in section III, *infra*.

terminated in favor of the plaintiff," slip op. at 8 (A8). That the State's prosecution of the plaintiff on the risk-of-injury charge resulted in a hung jury therefore is another bar to the claim of malicious prosecution and an additional independent basis for reversal.

D. The Defendant Had Probable Cause to Report Suspected Abuse.

The question of probable cause arises ***only*** "[o]nce the initiation threshold is crossed." *McHale*, 187 Conn. at 450. Because, as explained above, the plaintiff failed to introduce evidence sufficient to cross the initiation threshold, the trial court erred as a matter of law in reaching probable cause.

But even if this Court finds that the defendant initiated the criminal prosecution, the record compels the finding that she had probable cause to do so. "[T]he existence of probable cause is an ***absolute protection*** against an action for malicious prosecution." *Vandersluis v. Weil*, 176 Conn. 353, 356 (1978) (quoting *Brodrib*, 107 Conn. at 296) (emphasis added).[16]

Whether probable cause exists is based on a reasonable person standard: a person has probable cause for initiating criminal proceedings if he or she acts "with 'the

[16] Although there is no evidence that the defendant acted with malice, *see* section II.E, *infra*, the rule is that lack of probable cause may not be inferred from a finding of malice. *Vandersluis*, 176 Conn. at 356. The Connecticut Supreme Court explained more than a century ago:

> It is looking for too much in human nature to expect that in all cases they will be instituted solely with reference to the public good. Other motives and other feelings will inevitably influence action. The law is interested in having offenders prosecuted and punished. Hence, unless there is a want of probable cause, the law does not concern itself with the motives of the [party who initiated the prosecution] . . .

Thompson v. Beacon Valley Rubber Co., 56 Conn. 493 (1888).

knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action.'" *McHale*, 187 Conn. at 450-51 (citing *Vandersluis*, 176 Conn. at 356; *Zenik*, 137 Conn. at 597). In the context of a malicious prosecution claim, "[a]lthough want of probable cause is negative in character, the burden is upon the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no reasonable ground for instituting the criminal proceeding." *Zenik*, 137 Conn. at 597. The plaintiff here did not – and could not – meet that burden.

Again, the trial court's sole discussion of this element as applied to the facts of the case was the single sentence quoted above: "[t]he defendant instigated the criminal proceedings against the plaintiff without probable cause." Slip op. at 7 (A7). The court failed to undertake any meaningful analysis of the law in view of the facts. And, again contrary to the trial court's characterization, the Family Court decision *supports* rather than negates a finding of probable cause. As set forth above, the Family Court found it "entirely possible" that T.B. told her mother that the plaintiff had touched her vagina. Family Court. Op. at 38 (A47). Even under the scenario that the Family Court found "most likely" – that T.B. had told the defendant that the plaintiff touched her bottom in a way that she did not like, *id.* at 45 (A54) – a reasonable and responsible parent in all likelihood would have interpreted those circumstances as indicating at least the possibility of abuse and responded as the defendant did – by contacting authorities to ascertain what he or she should do.[17] That Dr. Leventhal concluded "to a standard of

[17] In addition to a reasonable parent's concern for his or her child's well-being, the legal duty that parents have to protect their children – the breach of which can lead to criminal liability and/or termination of parental rights – would militate in favor of reporting, as explained above. *See supra* at 14.

reasonable medical probability" that T.B. was sexually abused, *id.* at 17 (A26) – and that the DCF investigating social worker and the State abuse team coordinator found no reason to disbelieve T.B.'s report that the plaintiff had touched her vagina, *see id*. at 15-19 (A24-28) (finding, respectively, that T.B.'s report was credible and consistent, and that T.B. did not appear to have been coerced) – further strengthen the validity of the defendant's response to her daughter's complaint.

Nor could a finding of lack of probable cause be supported by the State's decision not to retry the plaintiff. *See Restatement (Second) of Torts* § 665(2) (1997) ("The abandonment of criminal proceedings by a public prosecutor acting on his own initiative after the prosecution has passed into his control, is not evidence that the private prosecutor acted without probable cause."). As set forth above, the State elected not to pursue a retrial on the risk-of-injury charge only because T.B. refused to testify a second time in the presence of the plaintiff. A107 (Crim. Tr. of 11-3-03 at 3); *accord* A79 (Trial Tr. at 58:7-17). *See Restatement (Second) of Torts* § 665 cmt. b (1997) ("If the prosecution of proceedings has passed out of the control of the person who initiated them into that of the public prosecutor, the abandonment of the proceedings by the latter is not a matter to be considered by the court in determining the existence of probable cause, if the public prosecutor acts on his own initiative.").

Thus, although the plaintiff bore the burden with regard to probable cause, *see McHale,* 187 Conn. at 447, there is ample evidence of probable cause for the defendant's reports to the authorities.

E. The Trial Court Clearly Erred in Concluding that the Defendant Acted with Malice.

A person acts with malice if he or she "act[s] with an improper or unjustifiable motive." *Carrubba v. Moskowitz*, 81 Conn. App. 382, 397 (2004), *aff'd* 274 Conn. 533 (2005). The trial court's finding that the malice element is met here is flatly contradicted by the Family Court findings on which the trial court purported to rely.

As described above, the defendant testified that T.B. told her that the plaintiff had touched T.B.'s vagina. A83-A84, A87, A92 (Trial Tr. at 123:27-124:4, 127:7-15, 132:11-14). The DCF investigating social worker and the State abuse team coordinator reported that T.B. stated the same to them, and Dr. Leventhal concluded that in all likelihood the plaintiff sexually abused T.B. Family Ct. Op. at 15-19 (A24-28). The Family Court found it "entirely possible" that T.B. told the defendant that the plaintiff had touched T.B.'s vagina. *Id.* at 38 (A47). It further found that the defendant interpreted what T.B. told her that the plaintiff had done as sexual abuse. *Id.* at 45 (A54). The defendant then reported her interpretation to DCF and the police. *Id.* at 15 (A24). The Family Court further found without qualification that the defendant "profoundly believes" everything that she said about the plaintiff. *Id.* at 46 (A55). The trial court's acceptance of those findings leaves no room for a conclusion that the defendant acted with malice.

* * *

In sum, the plaintiff failed to meet his burden of proving ***any*** of the elements of malicious prosecution. The trial court's conclusion that he did is the product of multiple errors of law and fact, each of which supplies an independent ground for reversal. Because the record does not support judgment against the defendant on the malicious

prosecution claim, this Court should reverse and remand the case with an instruction that the trial court enter judgment in favor of the defendant.

III. The Trial Court Abused its Discretion in Denying the Defendant's Motion to Open Judgment.

Shortly after the trial court ruled against the defendant, she moved to open the judgment on the ground that new evidence substantially undercut the ruling and warranted further consideration on a reopened record.[18] The defendant argued that findings and directions made by the Superior Court, Juvenile Division ("Juvenile Court") during a June 15, 2006 hearing, as well as contemporaneous reports of DCF, demonstrated a continuation of the plaintiff's behavior that is consistent with the defendant's report of sexual abuse, and that they further supported a finding that the defendant had probable cause for making the report. The Juvenile Court's findings and the State reports support the defendant's contention that she had probable cause (if the probable cause element is reached) for notifying authorities of her belief that the plaintiff had sexually abused T.B. The motion to open judgment therefore is supported by a "good and compelling reason," and should have been granted. *E.g., Hirtle v. Hirtle*, 217 Conn. 394, 398 (1991) (opening judgment is warranted upon the showing of a "good and compelling reason").

To be sure, a trial court has substantial discretion in ruling on a motion to open judgment, and its decision is reviewed for abuse of discretion. *Id.* Here, however, the court abused that discretion by denying the defendant's motion based purely on a false assumption about what the new evidence showed rather than actually considering it to

[18] The motion was filed under seal and is contained in the record before this Court.

determine what it in fact revealed. *See* A114 (Tr. of 8-8-06 Hr'g on Mot. to Open J. at 8:14-17) ("if any court or DCF has made a finding [that might support probable cause] it is not because it actually happened, but because a [sic] continuing result of the brainwashing [by the defendant]").[19] Confidentiality rules governing DCF reports precluded the defendant from attaching the relevant reports to the motion, but that evidence could have been disclosed in an evidentiary hearing as the defendant requested.

The trial court should have examined the new evidence rather than making assumptions about its contents and then denying the motion to open judgment based on those incorrect assumptions. Accordingly, in the event that this Court does not reverse the malicious prosecution ruling, it should vacate the trial court's denial of the motion to open judgment as an abuse of discretion and instruct the trial court to examine the new evidence and then decide the motion.

IV. The Trial Awarded Damages without Sufficient Proof.

Even if this Court were to uphold the trial court's malicious prosecution ruling – which it should not for the reasons above – it should vacate the damages award as both unsupported by the evidence and shocking to the conscience. The Court reviews a damages award to determine if it is supported by a reasonable basis in the evidence. *See Griffin v. Nationwide Moving & Storage Co*., 187 Conn. 405, 423 (1982); *see also Johnson v. Flammia*, 169 Conn. 491, 501 (1975) ("To authorize a recovery of more than nominal damages, facts must exist and be shown by the evidence which affords a

[19] The evidence defendant would have offered is not from T.B.; it includes testimony from DCF officials.

reasonable basis for measuring the plaintiff['s] loss."). The plaintiff bore the burden of proving "the nature and extent" of the alleged loss underlying his claimed damages. *Johnson*, 169 Conn. at 501.

The trial court awarded a staggering amount of damages based on nothing more than vague and indefinite testimony by the plaintiff. The trial court awarded $130,000 for fees the plaintiff allegedly owed his criminal attorneys, yet the plaintiff introduced no documentation supporting the amount and could not even state with any degree of certainty how much he had paid to the attorneys or how much he still owed. A74-A75 (Trial Tr. at 17:13-18:2).[20] Regarding the $500,000 it awarded in lost wages, the court

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[20] The plaintiff testified in response to his attorney's questions regarding his criminal trial attorney fees as follows:

Q Let me start with your attorney fees. How much have you paid the firm Meehan, Meehan and Gavin so far for the services that they provided you in defending your criminal case?

A Approximate, close to 75, 80,000 already.

Q Do you owe them more money?

A Yes, I do.

Q How much do you still owe in addition to the 75 to 80,000 you've paid?

A Approximately an additional, close to $40,000.00 or more with interest.

Q So that the total bill was approximately $120,000.00, is that correct?

A It was 130, maybe more. I don't have the exact figure, but it's close, it was more than 150 because the three attorneys on the –

Q. Right.

A. -- on the payroll.

A74-A75 (Trial Tr. at 17:13-18:2).

wrongly excluded evidence of the plaintiff's history of repeated termination from employment, which undermined or at least called into question his claim that the criminal prosecution was the reason he lost the job on which the court based the award for lost wages.[21] And the court's award of $2.5 million in noneconomic damages is

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[21] *See* A77-A78 (Trial Tr. at 27:12-28:26):

BY MS. DEBEK:

Q Ajai, did you, did you file a grievance against AmSouth Bank?

ATTORNEY WILLIAMS: Objection, irrelevant.

THE COURT: Sustained.

BY MS. DEBEK:

. . .

Q Were you fired from . . . Were you fired from AmSouth Bank, First Union Bank, Barnett Bank, and I have a list of others. Were you fired from all those banks Ajai that –

A I don't think so –

Q – you were working for?

A – no, I didn't get fired. There were a lot of mergers and the Barnett Bank was because I moved to Florida to be with you and that was the biggest mistake I made and that's . . .

MS. DEBEK: Your Honor, could you just please ask him to answer the question without elaborating?

THE COURT: If you could answer –

MS. DEBEK: Because I have quite a bit of –

THE COURT: – yes or no.

MS. DEBEK: – I have quite a bit of material to go through. I'd just appreciate a yes or no answer.

THE COURT: Okay. And again, what is this relevant to ma'am?

(footnote continued on next page)

unreasonable and "shocks the sense of justice" given that the plaintiff withdrew his claim of intentional infliction of emotional distress, the defendant is a single mother and that, as set forth above, the evidence shows that she acted based on her good faith belief that her daughter had been sexually molested. *See Ham v. Greene,* 248 Conn. 508, 536 (1999) ("'The only practical test to apply to [a damages award] is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the [trier of fact] was influenced by partiality, prejudice, mistake or corruption.'") (quoting *Mather v. Griffin Hosp.,* 207 Conn. 125, 138-39 (1988), alteration in original).[22]

MS. DEBEK: Your Honor, the plaintiff is trying to gain sympathy from the Court. Trying to establish that, that he, the reason he lost his job is because of duress and I'm trying to show you that he has a pattern of losing jobs every couple of months and then filing lawsuits against the companies where he's worked.

I just want to show the pattern. I believe that this, I didn't, I guess, I'm not an attorney so I don't know the rules and preferences of the Court. But, I'd like to show that in fact what the plaintiff is doing to me is malicious prosecution as he has since he came to this country.

ATTORNEY WILLIAMS: Your Honor, that's irrelevant.

THE COURT: I would agree. Sustain the objection.

While this argument by a lay person for admissibility was concededly inartful, the relevance of this history to the damages question should have been obvious. The defendant should have been given greater, not lesser, latitude as a *pro se* litigant facing a lawyer on the other side. *See, e.g., Bitoni*, 162 Conn. at 627, *accord, e.g., Oliphant*, 274 Conn. at 569-70 (quoting *Higgins*)

[22] The court's hostility to the defendant throughout this proceeding was palpable. Although in Connecticut there is an "established policy to allow great latitude to a litigant who, either by choice or necessity, represents himself in legal proceedings, so far as such latitude is consistent with the just rights of any adverse party," *Bitonti*, 162 Conn. at 627, *accord, e.g., Oliphant*, 274 Conn. at 569-70 (quoting *Higgins*), the trial court afforded the defendant no leeway in recognition of her *pro se* status and often held her (footnote continued on next page)

Because the trial court abused its discretion in awarding over $3.5 million in damages, in the event that this Court upholds the malicious prosecution ruling it should vacate that award and remand the case for re-evaluation of damages based on the evidence in the record, and should permit introduction of evidence demonstrating the plaintiff's history of dismissals from employment.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the foregoing reasons, the Court should reverse the trial court's entry of judgment against the defendant on the claim of malicious prosecution. In the alternative, the Court should vacate the trial court's denial of the motion to open judgment and its damages award and remand the case for reconsideration of the motion to open judgment and, if it denies that motion, for re-evaluation of damages

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to higher standard than counsel for the plaintiff. For example, the court sustained the plaintiff's objections to the form of the defendant's questioning without suggesting how she might rephrase the questions or even directing her to rephrase them. A81-A82 (Trial Tr. at 117:23-118:7). It overruled objections that the defendant made on the ground that she did not identify the applicable evidentiary rule – even where the rule should have been obvious to a trial court familiar with the rules of evidence – while it supplied grounds for an objection made by counsel for the plaintiff. *Compare, e.g.*, A72-A73 (Trial Tr. at 9:18-10:9) (overruling the defendant's objection to testimony that plainly drew a legal conclusion) *with* A92 (Trial Tr. at 132:4-8) (supplying ground for objection made by the plaintiff's attorney). And after discouraging the defendant from making objections by repeatedly overruling them even when they were valid, the court sat by and allowed objectionable questions and testimony from the plaintiff. *E.g.*, A75 (Trial Tr. at 18:21-27) ("Q [by plaintiff's counsel] And in fact, did you loose [sic] your job? A [by plaintiff] Yes, I did. Q And was that in any way attributed to the fact of the nature of the charges that had been brought against you? A Yes. My boss said there's too much publicity going on and this is going to be set for a trial and indirectly they let me go.") (leading and hearsay); A76 (Trial Tr. at 21:2-3) ("Q Do you find that humiliating? A Yes.") (leading); A76 (Trial Tr. at 21:22-23) ("Q Now, did the process of having to go through that add to your emotional distress? A Tremendously.") (leading). In addition, the court refused to permit the defendant to call the plaintiff as her own witness after he had testified during the presentation of his case, even though the defendant explained that she had believed that her cross-examination of him must be confined to the scope of his direct examination by his attorney (which is the general rule). A99-A101 (Trial Tr. at 156:2-158:27).

based on the evidence in the record and permit introduction of evidence demonstrating the plaintiff's history of dismissals from employment.

Respectfully submitted,

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January 25, 2007

CERTIFICATE OF COMPLIANCE

In accordance with Connecticut Practice Book Rules 62-7 and 67-2, I hereby certify that the foregoing brief is in compliance with all of the requirements of Connecticut Practice Book Rule 67-2.

_____
Robert A. Solomon

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2007, copies of the foregoing Brief of Defendant-Appellant Marlene Debek and accompanying Appendix were mailed, first-class, postage prepaid, to the parties listed below:

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