KEYIN T. WORTH ET AL. *v.* COMMISSIONER OF TRANSPORTATION ET AL.
(AC 32261)

Lavine, Alvord and McDonald, Js.

Argued March 17, 2011—officially released May 15, 2012

(Appeal from Superior Court, judicial district of Hartford, Hon. Richard M. Rittenband, judge trial referee)

Keyin T. Worth, pro se, the appellant (named plaintiff).

Charles H. Walsh, assistant attorney general, with whom, on the brief, was *Richard Blumenthal*, former attorney general, for the appellee (defendants).

Opinion

LAVINE, J. The self-represented plaintiff, Keyin T. Worth, appeals from the judgment of the trial court, *Hon. Richard M. Rittenband*, judge trial referee, granting the motion to dismiss filed by the defendants, the department of transportation (department) and Joseph F. Marie, former commissioner of transportation.[1] On appeal, the plaintiff claims that the court erred in concluding that she may not take advantage of the accidental failure of suit statute, General Statutes § 52-592 (a).[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff is the owner of real property located at 315 New Hartford Road in Barkhamsted (property) where she operates a retail business. In August, 2003, the department repaved a portion of Route 44 that abuts the property. When the repaving project was completed, the plaintiff noticed that storm water emanating from the highway was flooding her driveway. The plaintiff notified the department of the flooding, and the department attempted to fix the problem with little success. The plaintiff sought permission from the claims commissioner, pursuant to General Statutes § 4-160, to bring an action against the defendants. On September 5, 2007, the claims commissioner again granted the plaintiff permission to initiate an action against the defendants, finding that the department had not undertaken meaningful efforts to ameliorate the flooding until January, 2006.

I

FIRST ACTION[3]

In March, 2006, after receiving permission from the claims commissioner, the plaintiff commenced an action (first action), with the aid of counsel, against Steven E. Korta, who was at that time the commissioner of transportation, the state of Connecticut, the department and her neighbors[4] to recover damages caused by the flooding on her property and to enjoin further damage to the property. See *Worth* v. *Korta*, 132 Conn. App. 154, 31 A.3d 804 (2011), cert. denied, 304 Conn. 905, A.3d (2012). The file reveals that the first action was subject to a scheduling order. The defendants sought discovery from the plaintiff by way of interrogatories and requests for production (written discovery) on May 9, 2008. The plaintiff repeatedly sought an extension of time in which to comply with the defendants' written discovery. On October 16, 2008, the defendants filed a motion for order of compliance due to the plaintiff's failure to comply with their written discovery. On November 3, 2008, the court, *Prescott*, *J.*, ordered the plaintiff, who was then representing herself, to comply with the written discovery by December 15, 2008.

The plaintiff failed to comply with Judge Prescott's

order. On January 6, 2009, the defendants filed a motion for a judgment of dismissal in which they represented that the plaintiff had failed to comply with Judge Prescott's November 3, 2008 discovery order and also that "the plaintiff . . . failed to appear for a December 29, 2008[5] deposition in response to a subpoena duly served on December 13, 2008."[6] The defendants argued that the plaintiff has "frustrated the ends of justice by failing to provide meaningful discovery to the state and thwarting the state's ability to defend itself against the claims in the" operative complaint. With their motion to dismiss, the defendants submitted a copy of the scheduling order indicating that written discovery was to be completed by September 30, 2008, and that the depositions of fact witnesses were to be taken by December 30, 2008. On January 21, 2009, the court, *Elgo*, *J.*, ordered that a "nonsuit shall enter against the plaintiff."[7]

On May 6, 2009, the plaintiff filed a motion to open the judgment of nonsuit. On the standard judicial form entitled motion to open judgment, the plaintiff stated that the judgment should be opened for the following reasons: "1. mistakes, accident, and other causes existed at the time of the judgment. 2. Good cause and timeliness existed at the time of the judgment." The plaintiff attached a twelve page memorandum of law, affidavit and numerous exhibits to her motion to open. In her memorandum, the plaintiff represented that she had a good cause of action and was prevented by mistake and reasonable cause due to (1) her counsel's sudden withdrawal without reason,[8] (2) her never having received the modified scheduling order, (3) the misleading implications of settlement negotiations[9] and (4) the defendants' counsel being permitted to attend her deposition that was noticed by counsel for the defendant neighbors.[10]

The defendants objected to the motion to open and set aside the judgment of nonsuit. The defendants asserted "that good cause does not exist for reopening the judgment because the plaintiffs still have not complied with the court's November 3, 2008 discovery order, because the plaintiffs filed the motion four weeks prior to trial and because the reasons set forth in the motion are not supported by the facts of the case." The defendants set forth their version of the procedural history in a twenty-seven point list. The court, *Domnarski*, *J.*, denied the motion to open the judgment of nonsuit and sustained the defendants' objection thereto on May 26, 2009. The plaintiff did not appeal from Judge Domnarski's ruling.

II

PRESENT ACTION

On January 19, 2010, the plaintiff commenced the present action against the defendants pursuant to the accidental failure of suit statute, § 52-592. The plaintiff

sought an injunction and damages resulting from the 2003 repaving by the department, which allegedly caused flooding on her property. On April 5, 2010, the defendants filed a motion to dismiss the present action arguing, inter alia, that the plaintiff could not rely on the accidental failure of suit statute.[11] The defendants attached documents to their motion to dismiss to establish that the judgment of nonsuit that entered in the first action was not the result of inadvertence, mistake or excusable neglect. On April 26, 2010, the same day that the motion to dismiss was to be heard at short calendar, the plaintiff appeared in court with an objection to the motion to dismiss.[12]

On April 27, 2010, Judge Rittenband granted the defendants' motion to dismiss on two grounds. The court first noted that Practice Book § 10-31[13] provides that the party opposing a motion to dismiss must file its objection within five days of the date that the motion to dismiss appears on the short calendar.[14] The court found that the plaintiff had failed to comply with § 10-31 and that the defendants would not waive their objection to the untimely presentation of an objection. As to the merits of the motion to dismiss, the court concluded that the plaintiff was attempting to "resurrect" her first action by suing Marie, who was then commissioner of transportation. The court found that the plaintiff did not plead any facts supporting claims of inadvertence, mistake or excusable neglect to support the application of the accidental failure of suit statute. The plaintiff appealed from the judgment of dismissal. Subsequently, she filed a motion to open the judgment and a motion to reconsider. The court denied both motions. Additional facts will be set forth as necessary.

III

APPEAL

The plaintiff claims that the court improperly concluded that she may not avail herself of the accidental failure of suit statute because she failed to plead facts to establish that the first action was not tried on its merits due to a mistake, inadvertence or excusable neglect. We conclude that that the court properly dismissed the action on the basis of the facts presented by the defendants.[15]

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss [is] de novo." (Internal quotation marks omitted.) *Waterbury Twin, LLC* v. *Renal Treatment Centers–Northeast, Inc.*, 292 Conn. 459, 466–67, 974 A.2d 626 (2009). "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal

quotation marks omitted.) *Merrill* v. *NRT New England, Inc.*, 126 Conn. App. 314, 318, 12 A.3d 575, cert. granted on other grounds, 300 Conn. 925, 15 A.3d 629 (2011).[16] "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Mulcahy* v. *Mossa*, 89 Conn. App. 115, 120, 872 A.2d 453, cert. denied, 274 Conn. 917, 879 A.2d 894 (2005).

"[If] the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citations omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009). "[W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." Id., 652. "Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Internal quotation marks omitted.) *Merrill* v. *NRT New England, Inc.*, supra, 126 Conn. App. 318.

In the present action, the court found that the complaint failed to allege facts to establish that the first action was not tried on its merits due to inadvertence, mistake or excusable neglect. Although the plaintiff failed to file an objection to the defendants' motion to dismiss in accordance with Practice Book § 10-31, the transcript of the short calendar hearing reveals that the court was solicitous of the self-represented plaintiff. See *Keating* v. *Ferrandino*, 125 Conn. App. 601, 604, 10 A.3d 59 (2010) ("policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally" [internal quotation marks omitted]). Even though the defendants did not waive an objection to the plaintiff's failure to file a timely objection to their motion to dismiss, the court read the plaintiff's objection, asked questions pertaining to it and permitted the plaintiff to present an argument. In

its memorandum of decision, the court made certain factual findings, including that the plaintiff failed to comply with discovery orders in the first action, and drew a legal conclusion on the basis of those findings.

The parties do not dispute that the plaintiff failed to respond to the defendants' written discovery and to attend a deposition noticed for December 29, 2008. At short calendar, the plaintiff argued that she did not answer the defendants' discovery on the basis of advice she purportedly received from Thomas Willcutts, an attorney whom she had retained for the purposes of settlement negotiations only.[17] The court found that the plaintiff "was nonsuited in [the first action] for failure to comply with discovery. She then moved to open the nonsuit and that was denied by [Judge Domnarski] because at that point she still had not complied with the discovery. [Judge Domnarski] did not accept that what she did or failed to do was inadvertent, a mistake, or excusable neglect."[18] At the time of the short calendar argument, the plaintiff still had not complied with the defendants' written discovery, and for that reason, Judge Rittenband concluded that she could not take advantage of the accidental failure of suit statute. The issue before us is whether that conclusion is legally correct.

The accidental failure of suit statute provides that if any action has failed one or more times to be tried on its merits because the action has been dismissed for want of jurisdiction, or if a judgment of nonsuit has been rendered, the plaintiff may commence a new action within one year after the determination of the original action. General Statutes § 52-592 (a).[19] Our Supreme Court has "emphasized [however] that § 52-592 (a) does not authorize the reinitiation of all actions not tried on . . . [their] merits . . . . In concluding that even disciplinary dismissals are not excluded categorically from the relief afforded by § 52-592 (a), we have noted the fact-sensitive nature of the inquiry and held that, [t]o enable a plaintiff to meet the burden of establishing the right to avail himself or herself of the statute, a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was a matter of form in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as *mistake*, *inadvertence or excusable neglect*. . . . Indeed, even in the disciplinary context, only egregious conduct will bar recourse to § 52-592." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 50–51, 12 A.3d 885 (2011).

In the disciplinary dismissal context, our Supreme Court has "observed that, [a] trial court, for example, might find an attorney's misconduct to be egregious if the attorney represented that his nonappearance was caused by difficulties with his car without disclosing

that he had ready access to alternative transportation. A trial court might make a similar finding if, in one case, the attorney repeatedly, and without credible excuse, delayed scheduled court proceedings. Nonappearances that interfere with proper judicial management of cases, and cause serious inconvenience to the court and to opposing parties, are categorically different from a mere failure to respond to a notice of dormancy pursuant to Practice Book § 251 [now § 14-3] . . . or a single failure to appear, in a timely fashion, after a luncheon recess." (Citation omitted; internal quotation marks omitted.) Id., 50 n.17.

The crux of the plaintiff's claim at the hearing on the motion to dismiss is that there was a misunderstanding among counsel for the defendants, Willcutts and the plaintiff as to whether the first action would be settled. She claimed that Willcutts told her that there was a possible settlement discussion and that it was meaningless for her to respond to the defendants' discovery requests, but she did not indicate when Willcutts allegedly told her.[20] The plaintiff referred to no court document or conversation with the defendants' counsel that could have been interpreted mistakenly to have excused her from complying with the November 3, 2008 court order to comply with written discovery. Importantly, the plaintiff overlooks Judge Prescott's November 3, 2008 order that she comply with the defendants' written discovery. When a party is under a court order, she may not resort to self-help.

"In Connecticut, the general rule is that a court order must be followed until it has been modified or successfully challenged. . . . Our Supreme Court repeatedly has advised parties against engaging in self-help and has stressed that an order of the court must be obeyed until it has been modified or successfully challenged." (Citations omitted; internal quotation marks omitted.) *Behrns* v. *Behrns*, 124 Conn. App. 794, 809, 6 A.3d 184 (2010). There is no motion or request in the file that the plaintiff sought a modification of Judge Prescott's discovery order that she comply with the defendants' written discovery by December 15, 2008. And even if the plaintiff were confused as to whether she was required to comply with that order, Judge Elgo's judgment of nonsuit should have made clear to her that failing to comply with written discovery was done at her peril. Certainly, at the end of January, 2009, the plaintiff should have been aware that she needed to comply with the order, yet she failed to do so. The plaintiff waited almost four months to file a motion to set aside the judgment of nonsuit, but did not help her cause because she still had not complied with the written discovery. We conclude therefore that Judge Rittenband properly granted the defendants' motion to dismiss. The record in this case reveals that the facts before the court demonstrated that the first action was not nonsuited due to mistake, inadvertence or excus-

able neglect. The court therefore properly concluded that the plaintiff was prevented from availing herself of the accidental failure of suit statute.

The plaintiff cites *Stevenson* v. *Peerless Industries, Inc.*, 72 Conn. App. 601, 806 A.2d 567 (2002), in support of her claim that her failure to comply with the court order was excusable neglect. In *Stevenson*, George Stevenson brought an action against Peerless Industries, Inc., and Peerless Sales Company (collectively Peerless) for injuries he sustained when a wall mounted television fell on him. Id., 603. Peerless sent discovery requests to Stevenson, which he failed to answer. Id. Peerless filed a motion for a judgment of nonsuit for failure to comply with the discovery requests. Id. Stevenson did not respond to the motion for a judgment of nonsuit, and the trial court granted the motion. Id. Stevenson did not attempt to open the judgment of nonsuit, but he did bring an action pursuant to the accidental failure of suit statute and Peerless moved to dismiss. Id., 604.

In his objection to the motions to dismiss, Stevenson argued that he had "failed to respond to the discovery requests due to miscommunication with one of his attorneys, who practiced in Pennsylvania and had been retained to handle [Stevenson's] workers' compensation claim. [Stevenson] argued that he could not comply adequately with the discovery requests without receiving certain documents and assistance from Pennsylvania counsel. [Stevenson] attached copies of facsimiles that he had sent to Pennsylvania counsel seeking assistance to comply with discovery. Apparently, Pennsylvania counsel misunderstood the time frame for answering discovery requests in Connecticut. [Stevenson] also argued that once he received the answers to the discovery requests from Pennsylvania counsel, counsel's secretary failed to recognize them as such and failed to prepare a motion to open the judgment, as instructed. Moreover, [Stevenson] claimed that the mistakes that occurred in pursuing his case did not constitute 'egregious conduct' and that he therefore was entitled to avail himself of the accidental failure of suit statute." Id., 604–605.

In reversing the trial court's judgment granting the motion to dismiss, this court held that "it should be noted that this case does not involve a situation that resulted in considerable delay or inconvenience to the court or to opposing parties. . . . Moreover, [Stevenson] has provided a credible excuse for his failure to respond, that is, miscommunication with his Pennsylvania counsel. It does not appear that [Stevenson] failed to respond to Peerless' request for dilatory reasons or as a delay tactic, particularly when viewed in light of the fact that this case has not been plagued by years of unnecessary litigation. We further note that [Stevenson] asserts that he is prepared to comply with all requests."

(Citation omitted.) Id., 610.

The facts of *Stevenson* are distinguishable from the facts of the present action in a number of ways. Peerless never sought an order of compliance against Stevenson. The plaintiff, however, was ordered by Judge Prescott to answer the defendants' written discovery by December 15, 2008, approximately one month before she was nonsuited. The plaintiff was not represented by counsel concerning her litigation with the defendants and, therefore, was not the victim of her lawyer's errors. The only thing the plaintiff points to in support of her claim that she is entitled to avail herself of the accidental failure of suit statute is her wholly unsupported claim that Willcutts told her it would be meaningless for her to comply with the court order.[21] Finally, there is nothing in the record which suggests that the plaintiff, unlike Stevenson, is willing to comply with any discovery requests. On the basis of our review of the record, we conclude that the court properly determined that the plaintiff's failure to comply with the November 3, 2008 court order was not attributable to any mistake, inadvertence or excusable neglect and therefore properly granted the motion to dismiss.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

[1] Beautiful Things Boutiques, Inc., of which Worth is the sole shareholder, also asserted claims against the defendants, but withdrew its causes of action on April 8, 2010. In this opinion, plaintiff refers to Worth.

[2] The plaintiff also claims that the court (1) abused its discretion by granting the defendants' motion to dismiss because she failed to comply with Practice Book § 10-31 (b), which requires that an objection to a motion to dismiss to be filed five days before the motion appears on the short calendar, (2) abused its discretion in denying her motion to open or set aside the judgment and (3) was biased against her. We decline to review those additional claims for the following reasons.

Although the court found that the plaintiff failed to comply with Practice Book § 10-31 (b), that was only one of two grounds on which it granted the defendants' motion to dismiss. We conclude that the court properly found that the first action was not tried on its merits due to mistake, inadvertence or excusable neglect. A judgment of nonsuit entered against the plaintiff due to her failure to comply with discovery requests, despite a court order. The plaintiff, therefore, could not avail herself of the accidental failure of suit statute. Because we affirm the judgment on that basis, we need not address the timeliness issue.

As to the claim regarding the denial of the plaintiff's motion to open the judgment of dismissal, it is not properly before us. On May 14, 2010, the day the plaintiff filed the present appeal, she also filed a motion to open the judgment of dismissal. The court denied the motion to open on June 4, 2010. Practice Book § 61-9 provides in relevant part: "Should the trial court, subsequent to the filing of the appeal, make a decision which the appellant desires to have reviewed, the appellant shall file an amended appeal form in the trial court . . . ." The plaintiff did not file an amended appeal to include a claim regarding the denial of her motion to open. We therefore will not review the claim. See *Jewett* v. *Jewett*, 265 Conn. 669, 673 n.4, 830 A.2d 193 (2003).

As to the claim that the court was biased against her, the plaintiff did not raise the claim in the trial court. Practice Book § 60-5 provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . ." Furthermore, Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall

be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time." The plaintiff did not avail herself of § 1-23 and raises a claim of bias for the first time in her brief. We therefore decline to address it. See *Pagni* v. *Corneal*, 13 Conn. App. 468, 472–73, 537 A.2d 520, cert. denied, 207 Conn. 810, 541 A.2d 1239 (1988).

[3] See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"). The facts in the first action provide a procedural context for this appeal.

[4] In the first action, the plaintiff also alleged that her neighbors Roberta M. Choquette, Armand R. Choquette and Doe One to Ten diverted water onto the property.

[5] The subpoena in the file orders the plaintiff to appear for a deposition on December 29, 2008. In her brief to this court, the plaintiff represented that the deposition was to be held on December 26, 2008. The dissent has embraced the plaintiff's representation that the deposition was noticed for December 26, 2008.

[6] Our review of the file discloses that the defendants had noticed the plaintiff's deposition at least once prior to December 29, 2008, specifically, on September 9, 2008.

[7] The first action against the remaining defendants proceeded to trial. See footnote 4 of this opinion. Judgment was rendered in favor of the remaining defendants. See *Worth* v. *Korta*, supra, 132 Conn. App. 155.

[8] Our review of the file disclosed that the plaintiff's counsel, Vincent F. Sabatini, filed a motion to withdraw his appearance on July 30, 2008, in which he represented that there had been an irreconcilable breakdown of the attorney-client relationship. The plaintiff attached a copy of the transcript of the September 8, 2008 short calendar argument on the motion to withdraw before the court, *Dubay*, *J.* During the argument, the plaintiff stated: "At this point in time I would need to hear from him as to how the communication broke. It is a detriment to me." The court asked the plaintiff whether she would retain new counsel, and she stated: "No. That's the reason why I need to address the court that temporarily I probably need to go on pro se and I need to have all my files back. There are discrepancies." The court granted Sabatini's motion to withdraw as the plaintiff's counsel.

[9] The plaintiff attached to the motion to open the judgment an undated letter to the defendants' counsel, in which she stated in part: "I wish to have the deposition scheduled for Monday rescheduled because I would like to be represented by an attorney at my deposition and due to the inconvenient timing in the only busiest two weeks for retail business as I presented to you on my letter, dated December 5, 2008. If attorney [Thomas] Willcutts' efforts to settle the case fail, I expect to have a new attorney representing me in the case shortly. Attorney Willcutts has indicated to me that he should be able to determine within a week's time if he can settle the case. I can be available for a deposition by mid-January if we cannot settle this case. I will not attempt to avoid my deposition due to a deviation in the scheduling order."

[10] The plaintiff attached to her motion to open the judgment a December 5, 2008 letter to her from the defendants' counsel. The letter states in part: "[T]he defendants still need to take your deposition. You are required to provide me with discovery materials on or before December 15, 2008. I will require time to review those materials. Therefore, your deposition will have to occur after that date. The defendants have consulted with each other and determined that the deposition needs to occur on either December 23, 2008 or December 29, 2008. Please let me know which of those two dates you would prefer . . . ."

The plaintiff responded to the defendants' counsel in a letter dated December 5, 2008, stating in part: "In your letter, multiple times you expressed 'the defendants.' I am not clear who these defendants you are referring to. Up until today, neither you nor Attorney Ronald D. Williams has attempted to schedule any depositions with me since the filing of my complaint. If you were referring to the defendants Choquettes, I was never notified that you have been now legally representing them. Could you please be so kind to identify to me under which Connecticut Practice Book Court rules or under what Connecticut General Statute that the Attorney General's office is allowed to legally represent codefendants and any civilian defendants of tortious acts."

On December 26, 2008, the plaintiff filed a motion to quash the December

11, 2008 subpoena ordering her to appear for a deposition on December 29, 2008. In her motion to quash, the plaintiff represented in part that she "was served deposition subpoena by the State defendants. . . . In the subpoena, the State defendants failed to identify who and how many deposing attorneys will be. . . . The State defendants appeared to attempt to allow the Choquettes defendants' legal counsel to participate in the same deposition without the plaintiffs' consent. The Choquettes defendants are not state employees but civilians. . . ." The record reflects that the motion to quash was not adjudicated.

[11] The defendants also argued that if the accidental failure of suit statute is available to the plaintiff, the plaintiff is barred from suing the state pursuant to the doctrine of sovereign immunity. The plaintiff did not obtain permission from the claims commissioner to sue the department or Marie in the present action. In light of our disposition of this case on the issue of the accidental failure of suit statute, we need not decide that issue.

[12] The plaintiff's objection to the motion to dismiss is not contained in the record or the file.

[13] Practice Book § 10-31 (b) provides in relevant part: "Any adverse party who objects to [a motion to dismiss] shall, at least five days before the motion is to be considered on the short calendar, file and serve . . . a memorandum of law . . . ."

[14] The transcript of the short calendar argument on the defendants' motion to dismiss reveals that despite the plaintiff's failure to file her objection timely in the clerk's office and the defendants' refusal to waive any objection to the plaintiff's failure to comply with the rules of practice, the court permitted the plaintiff to present extensive argument to oppose the motion to dismiss.

[15] This court may "sustain a right decision although it may have been placed on a wrong ground." (Internal quotation marks omitted.) *LaBow* v. *LaBow*, 69 Conn. App. 760, 761 n.2, 796 A.2d 592, cert. denied, 261 Conn. 903, 802 A.2d 853 (2002).

[16] Inasmuch as this opinion will become precedent, it is important to emphasize that the issue in this case is not whether the trial court had subject matter jurisdiction. Without question the court had jurisdiction to hear the action and to adjudicate whether the plaintiff could avail herself of the accidental failure of suit statute. We digress to bring to the attention of the bar and the trial court, again, that a motion to dismiss is not the appropriate procedural means to challenge an action commenced pursuant to the accidental failure of suit statute. The appropriate challenge is "by way of a properly pleaded special defense; see Practice Book § 10-50 . . . ." *LaBow* v. *LaBow*, 85 Conn. App. 746, 750, 858 A.2d 882 (2004), cert. denied, 273 Conn. 906, 868 A.2d 747 (2005).

"[A]lthough a motion to dismiss may not be the proper procedural vehicle for asserting that an action is not saved by . . . § 52-592, our Supreme Court has held that a trial court may properly consider a motion to dismiss in such circumstances when the plaintiff does not object to the use of the motion to dismiss." *Henriquez* v. *Allegre*, 68 Conn. App. 238, 241 n.6, 789 A.2d 1142 (2002). In the present action, the plaintiff did not object to the motion to dismiss on procedural grounds.

[17] The plaintiff represented that Willcutts advised her that there was no reason to comply with the defendants' discovery because the case likely would settle. The plaintiff did not present testimony or an affidavit from Willcutts at the short calendar argument supporting that assertion.

[18] The plaintiff failed to appeal from the judgment of nonsuit or the denial of her motion to open the judgment of nonsuit. The defendants do not claim that the plaintiff is collaterally estopped from claiming that she failed to comply with discovery due to inadvertence, mistake or excusable neglect. The issue is therefore not before us.

[19] General Statutes § 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because. . . the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

[20] To refute the plaintiff's claim, the defendants submitted to the court an October 29, 2008 letter their counsel, Charles H. Walsh, sent to the plaintiff. In the letter, Walsh told the plaintiff that the attorney trial referee unsuccess-

fully attempted to mediate a settlement and therefore he did not see any reason for additional mediation. The defendants also submitted to the court a December 23, 2008 letter from Walsh to Willcutts in which Walsh told Willcutts that litigation in the first action was going to continue while the plaintiff attempted to effect a settlement in the matter.

[21] We note that most often a settlement offer is predicated on the information provided by a plaintiff in response to written discovery. "Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeing disclosure. . . ." Practice Book § 13-2.