MCDONALD, J. dissenting. As the majority states, the trial court granted the defendants' motion to dismiss finding that the plaintiff had not pleaded any facts supporting claims of inadvertence, mistake or excusable neglect to support the application of General Statutes § 52-592 (a) and because the plaintiff failed to file her opposition to the motion to dismiss at least five days before the motion was to be considered. The majority, however, upholds the dismissal on other grounds, not affirming on the grounds relied on by the trial court. In doing so, the majority observes "[t]his court may 'sustain a right decision although it may have been placed on a wrong ground.' " See footnote 15 of the majority opinion.

I

The majority upholds the dismissal "on the basis of the facts presented by the defendants" at the hearing of the motion to dismiss, where there was no evidentiary hearing. The plaintiff argued before the trial court at the hearing of the motion to dismiss that there was a question of material fact concerning miscommunication, unanswered telephone calls and misunderstanding about her deposition because the plaintiff was between attorneys at the time. She claimed she had moved to quash her deposition subpoena but her motion had not been heard. The plaintiff also claimed the defendants emphasized her failure to appear at the deposition in seeking dismissal. The plaintiff also claimed that she did not, after the nonsuit, respond to the written discovery requests on advice of counsel. At the hearing, counsel for the defendants told the trial court that because an attorney, who had been retained only for settlement purposes, approached him about the deposition date, what that counsel said was "irrelevant," and the defendants' counsel stated that the plaintiff would have to get the court's permission to change the date.

At the hearing on the motion to dismiss in this case, the plaintiff stated she had evidence she could present concerning her deposition scheduled unilaterally and absolutely by the defendants on December 26, 2008, in one of the major retail periods.[1] The court did not respond to her offer after the defendants' attorney admitted he had discussions with an attorney for the plaintiff about the deposition being noticed for December 26, and contested some of the plaintiff's assertions concerning the deposition. Also, during the hearing, the defendants' counsel told the trial court that the deposition was a "red herring," it was something the plaintiff had thrown out, and the real issue was that the plaintiff failed to comply with the court's order of discovery. The defendants' counsel also stated regarding the deposition that "[the plaintiff] failed to show

up for. And, again, no explanation was given as to why she didn't show up."

The defendants stated in their brief that the plaintiff's nonsuit of January 21, 2009, resulted from the plaintiff's failure to comply with a court order of November 3, 2008.[2] Contrary to the defendants' brief and counsel's red herring statements, the plaintiff's failure to appear for her deposition was also made a ground by the defendants to move for dismissal, which led to the nonsuit and later dismissal. Appended to the defendants' brief in this case is a copy of the defendants' objection to the plaintiff's motion to set aside the January, 2009 nonsuit. In paragraph 21 of the objection, the defendants stated: "On January 6, 2009, the state moved for a judgment of dismissal based upon the [p]laintiff's failure to comply with the court's November 4, [sic] 2008 order *and the* [*p*]*laintiff Worth's failure to appear for her deposition*." (Emphasis added.) The record in this appeal also contains a full copy of that objection which included paragraph 21.[3]

After some other dialogue with the defendants' counsel and the plaintiff, the court improperly recessed the hearing without taking any evidence. Thereafter, the trial court made no factual finding that the plaintiff could not present proof required by § 52-592 (a), but instead dismissed the plaintiff's case because she did not plead any facts supporting a finding of inadvertence, mistake or excusable neglect.

Our Supreme Court has held a motion to dismiss, as in this case, cannot be decided in a factual vacuum and that a plaintiff must be given an opportunity to make a factual showing that the prior dismissal occurred in circumstances such as mistake, inadvertence or excusable neglect. *Ruddock* v. *Burrowes*, 243 Conn. 569, 576–77, 706 A.2d 967 (1998); see also *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 50, 12 A.3d 885 (2011). Our Supreme Court has held the parties are entitled to an evidentiary hearing on a critical factual issue. *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009); see also *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 422 n.17, 35 A.3d.188 (2012). In this case, the critical factual issue is whether the dismissal of the previous case was the result of blatant and egregious conduct on the part of the plaintiff. Anything less than blatant and egregious conduct would not support the harsh result of dismissing her case. See *Plante* v. *Charlotte Hungerford Hospital*, supra, 51.

In upholding the dismissal, the majority cites *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525–27, 294 A.2d 633 (1972), for its justification in taking judicial notice of parts of the record of *Worth* v. *Korta*, 132 Conn. App. 154, 31 A.3d 804 (2011), a related appeal. *Karp* held that a court may take judicial notice of other court files, but held the court could not consider them as part of the record in the case at bar. *Karp* v. *Urban*

Redevelopment Commission, supra, 528. In this case, the result arrived at by the majority is reached by considering material outside the record of this case at the time the case was argued. Moreover, the materials considered by the majority did not constitute undisputed evidence[4] establishing conclusively that the plaintiff acted in a blatant and egregious manner as required by *Conboy* v. *State*, supra, 292 Conn. 652, cited by the majority, to dispense with an evidentiary hearing.[5] At best, these documents may raise an issue of fact but do not prove it conclusively. See id., 656. Also, the issue of whether the plaintiff's conduct was blatant and egregious concerned the plaintiff's state of mind which is "not ordinarily subject to determination on the basis of documentary proof alone." (Internal quotation marks omitted.) Id., 654. The issue also goes to the merits of the § 52-592 action, which should not be determined in considering a pretrial motion to dismiss. Id., 653.

Moreover, the trial court made no finding that the plaintiff could not prove her conduct was not blatant and egregious. The majority concludes, however, "[t]he record in this case reveals that the facts before the court demonstrate that the first action was not nonsuited due to mistake, inadvertence or excusable neglect." A court cannot arrive at the conclusion as to the critical fact whether the plaintiff acted in a blatant and egregious manner to cause the nonsuit, in the absence of evidence. Arguments of counsel and self-represented parties are not evidence. I therefore believe the majority, when exercising the powers of a trial court, did so without evidence.

Finally, an appellate court has no jurisdiction to arrive at factual conclusions as a fact finder does. The trial court alone has the jurisdiction to hear and evaluate evidence. Our Supreme Court has stated, when asked to substitute its conclusion as to a factual finding, its refusal to do so "does not constitute an abdication of our responsibility for appellate review. To the contrary it evidences a recognition on our part that by constitutional charter we are limited to corrections of errors of law; *Styles* v. *Tyler*, 64 Conn. 432, 450, 30 A. 165 (1894) . . . ." (Internal quotation marks omitted.) *Kaplan* v. *Kaplan*, 186 Conn. 387, 392, 441 A.2d 629 (1982). In *Kaplan*, the court stated: "The fact-finding function is vested in the trial court . . . . Appellate review . . . is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court." Id., 391. In *Appliances, Inc.* v. *Yost*, 186 Conn. 673, 676–77, 443 A.2d 486 (1982), the court stated: "It is well settled that [t]his court cannot find facts, nor, in the first instance, draw conclusions of facts from primary facts found, but can only review such findings to see whether they might legally, logically and reasonably be found. *Wiegert* v. *Pequabuck Golf Club, Inc.*, 150 Conn. 387, 391, 190 A.2d 43 [1963]; *State* v. *Hudson*, [154 Conn. 631, 634, 228 A.2d 132

(1967)]. *State* v. *Clark*, 160 Conn. 555, 556, 274 A.2d 451 (1970); see *Kaplan* v. *Kaplan*, [supra, 391]; *Brody* v. *Dunnigan*, 162 Conn. 605, 608, 291 A.2d 227 (1971); *Waterford* v. *Grabner*, 155 Conn. 431, 434, 232 A.2d 481 (1967); *Culinary Institute of America, Inc.* v. *Board of Zoning Appeals*, 143 Conn. 257, 261, 121 A.2d 637 (1956); *Claffey* v. *Bergin*, 121 Conn. 695, 696, 182 A. 16 (1936)."

This court has stated: "[The Appellate Court] cannot find facts or draw conclusions of fact from primary facts found, but can only review such findings to determine whether they could legally, logically and reasonably be found thereby establishing that the trial court could reasonably conclude as it did. . . . It is . . . not the onus of this court to search the record and transcripts to determine whether the trier of fact could have reached a conclusion other than the one it did. Rather, this court must focus on the conclusion of the trial court, as well as the path by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citations omitted.) *Zolan, Bernstein, Dworken & Klein* v. *Milone*, 1 Conn. App. 43, 47, 467 A.2d 938 (1983).

Because I do not agree with the majority, I would accordingly reverse the judgment of dismissal.

II

A

The majority does not affirm the dismissal on a finding the plaintiff failed to plead facts to support a claim of inadvertence, mistake or excusable neglect. See footnote 15 of the majority opinion. I would reverse the judgment of dismissal granted on these grounds.

The only reference to facts regarding § 52-592 in the self-represented plaintiff's complaint is the statement "[p]ursuant to . . . § 52-592 . . . the plaintiffs . . . file complaints against [the] defendants." Dismissal, however, required a finding that the plaintiff could not establish, as a matter of law and fact, the requisites for § 52-592 relief, rather than there was a defective pleading. See *Gurliacci* v. *Mayer*, 218 Conn. 531, 544, 590 A.2d 914 (1991).

There is a substantial difference in the requirements and the effect between granting a dismissal and granting a motion to strike, which would be the proper means to attack a failure to plead essential facts. In this case, I would reverse a judgment of dismissal based on insufficient pleadings grounds and I would not find that the self-represented plaintiff consented[6] to the use of the motion to dismiss. Our Supreme Court recently addressed the "ongoing confusion" regarding the distinction between the jurisdictional and statutory basis for the motions, and referred to the inconsistent cases addressing the use of motions to dismiss and motions to strike as instructive. *In re Jose B.*, 303 Conn. 569,

572, 34 A.3d 975 (2012). A self-represented layperson could not be expected to recognize these distinctions and knowingly consent to the dismissal hearing if she failed to object.[7]

In *In re Jose B.*, our Supreme Court stated: "We now agree with the concurring justice in *In re Matthew F.* [297 Conn. 673, 708, 4 A.3d 248 (2010)] that, to the extent that these cases are inconstant, the better rule is set forth in *Gurliacci* [supra, 218 Conn. 531]. . . . Accordingly, we conclude that the failure to allege an essential fact under a particular statute goes to the legal sufficiency of the complaint, not to the subject matter jurisdiction of the trial court. . . . This conclusion is consistent with the rule that every presumption is to be indulged in favor of jurisdiction . . . is consistent with the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . by allowing the litigant, if possible, to amend the complaint to correct the defect . . . and avoids the bizarre result that the failure to prove an essential fact at trial deprives the court of subject matter jurisdiction." (Citations omitted; internal quotation marks omitted.) *In re Jose B.*, supra, 303 Conn. 579.

B

The majority does not affirm the judgment of dismissal on the trial court's finding that the plaintiff failed to file her written objection to the defendants' motion to dismiss more than five days before the scheduled hearing date as required by Practice Book § 10-31. I believe this was also improper.

The hearing was not actually delayed by the filing on the day of the argument.[8] The procedural deficiency did not result in the matter not being resolved within a day by the trial court. Nor does it appear that the defendants were prejudiced by the late filing since neither party sought a continuance.

In *Burton* v. *Planning Commission*, 209 Conn. 609, 616–18, 553 A.2d 161 (1989) (*Shea*, *J.*, dissenting), Justice Shea would have afforded room for the trial court to exercise reasonable discretion, considering lack of any prejudice to a defendant and the fact there was no delay, to alleviate the harshness of a mandatory dismissal of the plaintiff's case. Id. Justice Shea cited the design of our rules to interpret them liberally where strict adherence will work injustice. Id., 617–18. Justice Shea also noted foresightedly in his dissent that the Supreme Court opinion merely invited legislative intervention when the rules needlessly thwarted the goal of arriving at the merits. In *Burton*, Justice Shea found a needlessly unjust outcome where the plaintiff, although self-represented, was an attorney. See id., 616–18. In this case, the plaintiff was attempting to represent herself and was not an attorney. Our Chief Justice has

publically addressed the plight of self-represented parties in difficult economic times forced to represent themselves and the need for our court system to ensure that there be justice.[9]

On these grounds, I respectfully dissent.

[1] "For some retailers, the holiday season can represent anywhere between 25-40 [percent] of annual sales. In 2010, holiday sales represented 19.4 [percent] of total retail industry sales." National Retail Federation, "Holiday FAQs," available at http://www.nrf.com/modules.php?name=Pages&sp_id=1140 (last visited May 1, 2012).

[2] In the defendants' appendix to their brief, in paragraph 16 of the defendants' objection to the motion to open the nonsuit the following appears: "On November 3, 2008, the court ordered the plaintiffs to provide responses to the state's interrogatories and production request on or before December 15, 2008."

[3] See objection to motion to open, exhibit 2 appended to the defendants' memorandum of law in support of their motion to dismiss.

[4] Relying on material in *Worth* v. *Korta*, supra, 132 Conn. App. 154, the majority finds the parties' agreement that December 26, 2008, was the date of the deposition was wrong, in that it was scheduled for December 29, 2008.

[5] The majority points to written materials found in *Worth* v. *Korta*, 132 Conn. App. 154, supra, as supporting dismissal. It notes in footnote 10 of its opinion, that on December 5, 2008, the plaintiff was to choose a deposition date of December 23 or 29, 2008. The majority also notes in footnote 9 of its opinion that the plaintiff wished to have her deposition rescheduled because she wished to have a new attorney present and due to inconvenient timing in the only two busiest weeks for retail business. She stated she could be available by mid-January if no settlement is reached. The plaintiff added, "I will not attempt to avoid my deposition due to a deviation in the scheduling order."

As the majority also notes, on December 26, 2008, the plaintiff filed a motion to quash her subpoena for the deposition on December 29, 2008, in part because other defendants' counsel would participate. Other grounds given for the motion to quash, such as the claim that the deposition was scheduled at the busiest time of the retail season for the plaintiff, were not set out by the majority.

The majority also referred in footnote 20 of its opinion to correspondence with the plaintiff from counsel for the defendants to the effect that counsel could not consent to her request for a continuance without the plaintiff proposing a trial date and to counsel's letter to Attorney Willcutts dated December 23, 2008, stating that the case would proceed.

[6] Our Supreme Court recently noted in *State* v. *Ryder*, 301 Conn. 810, 819 n.5, 23 A.3d 694 (2011), that "[i]t is the established 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 in favor of the pro se party. . . . A party who, unskilled in [legal] matters, seeks to remedy some claimed wrong by invoking processes which are at best technical and complicated, is very ill advised and assumes a most difficult task. Our courts, however, have always been lenient toward such a one, relaxing the rules wherever it can be done with propriety . . . ." (Citation omitted; internal quotation marks omitted.)

[7] The plaintiff's written objection to the dismissal at the trial court, however, can not be found in the record. See footnote 8 of this dissenting opinion.

[8] As the majority recognizes, the plaintiff's opposition memorandum was in the trial court's possession at the hearing.

[9] "I . . . believe that we . . . have to recognize that access is no longer just making sure that poor people have legal representation . . . . I believe that we need to address this trend of self-representation . . . . Until that issue is resolved, however, I feel strongly that it is the Judicial Branch's responsibility to ensure that justice is accessible in our state courts." Chief Justice Chase T. Rogers: The Newman Lecture on Law and Justice, Connecticut Lawyer, Vol. 20, No. 9 (May/June 2010) p. 29.