CHRISTINE DOWNING *v.* EMMANUEL DRAGONE ET AL.
(AC 39942)

DiPentima, C. J., and Lavine and Pellegrino, Js.

Syllabus

The plaintiff, a professional auctioneer, sought to recover damages for, inter alia, breach of contract from the defendant automobile retail company, D Co., and the defendant E, who operated D Co. with his brother. The parties disagreed as to the appropriate amount of compensation due to the plaintiff for the work that she had performed in connection with D Co.'s classic automobile auction. At trial, E testified that the plaintiff should receive her standard auction fee, plus expenses, that she allegedly requested during a prior meeting with E and his brother. The plaintiff testified that her standard fee did not apply and that the defendants owed her a certain percentage of the gross auction proceeds pursuant to an unsigned, written agreement that she had drafted. The court found that the alleged agreement was an implied in fact contract and that E was charged with knowledge of its contents, including its compensation provision, because E testified that he had that contract on his desk but did not read it until four months after the auction. The court concluded that the plaintiff was entitled to receive a certain percentage of the gross auction proceeds and rendered judgment in part for the plaintiff on her breach of contract claim, from which the defendants appealed to this court. *Held* that the trial court's decision rested on a clearly erroneous factual finding that was not supported by any evidence in the record; there was no evidence from which the trial court could have found that E testified that he had the written contract on his desk but did not read it until four months after the auction, and because the court substantially relied on that factual finding when it found in favor of the plaintiff on her breach of contract claim and, more specifically, when it reasoned that E was charged with knowledge of the contents of the contract, including its compensation provision, a new trial on the breach of contract claim was necessary.

Argued February 22—officially released September 11, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Lee*, *J.*; judgment for the plaintiff in

part, from which the defendants appealed to this court. *Reversed in part*; *new trial.*

Edward T. Murnane, Jr., for the appellant (defendant Dragone Classic Motorcars, Inc.).

Jeffrey Hellman, for the appellee (plaintiff).

Opinion

LAVINE, J. The plaintiff, Christine Downing, brought this action to recover money owed for services she is alleged to have rendered in accordance with an agreement she had with the defendant Dragone Classic Motorcars, Inc.[1] After a trial to the court, the court found in favor of the plaintiff on her breach of contract claim and rendered judgment accordingly. On appeal, the defendant principally claims that the trial court based its legal conclusions on a clearly erroneous finding of fact.[2] We agree with the defendant and, therefore, reverse in part the judgment of the trial court and remand the case for further proceedings.

[1] The plaintiff also commenced this action against the named defendant, Emmanuel Dragone (Emmanuel). The trial court did not find Emmanuel to be liable under either count of the plaintiff's two count complaint. The court rendered judgment only against Dragone Classic Motorcars, Inc. Counsel for Emmanuel and Dragone Classic Motorcars, Inc., filed an appeal on behalf of both defendants. Emmanuel, however, did not file a separate brief in this appeal, and he is not personally aggrieved by the trial court's judgment. See General Statutes § 52-263. We therefore refer to Dragone Classic Motorcars, Inc., as the defendant in this opinion.

[2] The defendant also claims that the plaintiff: (1) failed to prove "mutual assent or a meeting of the minds, as required to form an express or implied contract"; (2) "failed to prove what her services were reasonably worth"; (3) "harbored a secret intention that [was] not an enforceable contract provision"; and (4) needed to present expert testimony to establish "industry standards" and "to explain the phrase 'gross auction proceeds.' " Because we conclude that the trial court based its legal conclusions substantially on a clearly erroneous factual finding, we do not address these additional claims. Additionally, the defendant withdrew its claim that the trial court "relied on an exhibit for identification to calculate damages," after conceding that the exhibit was, in fact, admitted as a full exhibit.

The trial court's memorandum of decision and the record reveal the following relevant facts and procedural history. The plaintiff is an experienced auctioneer. While working as an auctioneer, she met George Dragone (George). George and his brother, Emmanuel Dragone (Emmanuel), operate the defendant company, a used and classic car retail business. In the summer of 2011, George told the plaintiff that the defendant was considering staging its first, "very upscale" auction of classic cars. On January 4, 2012, Emmanuel sent the plaintiff an e-mail, "saying that [he and George] had decided to hold two auctions in the coming year, and that they would like her to serve as their auctioneer."

On January 26, 2012, George and Emmanuel held an initial meeting regarding the planned auctions, which the plaintiff attended. The first auction was set to take place on May 12, 2012,[3] and also would be the plaintiff's first auction of classic cars. During the initial meeting, the parties discussed the plaintiff's expected compensation. According to Emmanuel, "[the plaintiff] told him . . . that she charged $2500 to conduct an auction, and that this is what he believed [they] owed her, plus expenses." The plaintiff testified, however, "that $2500 is her standard fee for services on auction day," and because the May auction involved setting up a "first-time auction," she would need to do additional work. Because of this, she informed Emmanuel that she, therefore, required greater compensation. The court found that, on January 26, 2012, "[the plaintiff] advised [Emmanuel] . . . that she would require a fee of 1 percent of the auction's gross [proceeds], with a minimum of $30,000, which she said was standard when an auctioneer also sets up the auction." She testified that, following the initial discussion, she drafted a written contract reflecting "that their agreement was for 1 percent of gross [auction proceeds], plus expenses."

[3] The auction was eventually held on May 19, 2012.

At trial, the court admitted into evidence a document that the plaintiff claimed set forth the terms of her agreement with the defendant (document). The document, dated February 2, 2012, was titled, "Agreement for Christine Downing to serve as Auction Consultant for Dragone Classic Auctions (DCA) for their inaugural auction to be held on May 12, 2012." The document stated that she "contract[ed] to provide" certain services in connection with the auction and, specifically, "provide[d] for compensation of 1 percent of gross auction proceeds, with a minimum payment of $30,000, payable one-third by April 1, [2012], and the balance within ten days after the auction."[4] The court found that this document "[did] not contain signature lines for either party," and neither party signed it.

The court found that the plaintiff "admitted that the document contained some terms that she had not discussed with [Emmanuel], but also stated that she did not hear anything from him or anyone else contradicting the terms. She maintained that they had discussed, and he had agreed, to compensation of 1 percent of the [gross] auction sales." Additionally, the court found that "[the plaintiff] testified that she tried to hand this document to [Emmanuel] but was told to put it on his desk. [Emmanuel] testified that he had the document on his desk but did not read it until four months after the auction."

The court credited the plaintiff's testimony that she devoted substantial time—approximately 420 hours—to the planning and organization of the May auction.

[4] The portion of the document allegedly addressing the plaintiff's compensation provided as follows: "As compensation for the above duties, I require [1 percent] of the gross auction proceeds, with a minimum payment of $30,000. I would like [one third] of the minimum, $10,000, to be paid by April 1, 2012. The remaining balance is due within [ten] days of the auction, which is May 22, 2012. If you wish to make any amendments or additions to this agreement, please notify me within [ten] days of your desire to do so."

On the basis of the evidence, the court found that "[the plaintiff] substantially performed the obligations listed in [the document], including . . . conducting the automobile auction itself." It further determined that "[a]pproximately $4.1 million in gross sales was realized [during the auction] and subsequent related sales." And although the plaintiff made demands for payment and attempted to set up meetings with George and Emmanuel for six months after the auction, her efforts were to no avail.[5]

On June 6, 2013, the plaintiff commenced the underlying action. In a two count complaint directed against Emmanuel and the defendant; see footnote 1 of this opinion; she alleged (1) breach of contract[6] and (2) unjust enrichment. In its memorandum of decision filed on December 7, 2016, the court found against the defendant on count one, and in favor of the defendant on count two.[7] This appeal followed. Additional facts will be set forth as necessary.

As an initial matter, we address the plaintiff's claim that the defendant waived all of its claims on appeal by failing to include them in the preliminary statement of issues. The defendant's preliminary statement presented the following issues for appeal: "(1) Did the trial court err in rendering judgment for the plaintiff?; [and]

[5] The court found that, although the defendant's financial manager prepared a check for approximately $3800, representing a fee of $2500 plus expenses, the plaintiff did not receive this check, and it was not cashed.

[6] In count one of her complaint, the plaintiff alleged that "[a] written contract" outlined her obligations and compensation according to the parties' agreement and that she "performed the duties outlined in the contract." Notwithstanding her allegations, the trial court found that an implied in fact contract existed under the circumstances. See footnote 8 of this opinion. On appeal, the defendant does not argue that the court could not make such a finding due to the plaintiff's allegations.

[7] Because the court rendered judgment for the defendant on the unjust enrichment count and the plaintiff did not file an appeal or cross appeal, we do not discuss the second count further in this opinion.

(2) Such other issues as may become apparent upon a review of the record." The plaintiff argues that she was prejudiced by the defendant's preliminary statement because (1) she could not timely file a corresponding preliminary statement of issues and (2) was forced to pay expedited pricing for portions of the transcript.

Practice Book § 63-4 (a) provides in relevant part: "Within ten days of filing an appeal, the appellant shall also file with the appellate clerk the following:

"(1) A preliminary statement of the issues intended for presentation on appeal. . . .

"Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the [appellate] court may refuse to consider such issue."

Although we do not condone the defendant's inadequate presentation of the issues for review in its preliminary statement, we review the merits of its central claim; see footnote 2 of this opinion; because we conclude that the plaintiff has failed to demonstrate that she was prejudiced. She fully responded to the defendant's claims in her appellate brief and presented oral argument before this court. See, e.g., *Mickey* v. *Mickey*, 292 Conn. 597, 603 n.9, 974 A.2d 641 (2009) (plaintiff failed to raise alternative grounds to affirm in preliminary statement, but Supreme Court reviewed claims because defendant was not prejudiced by procedural defect).

We now turn to the dispositive issue raised in this appeal. The defendant claims that the trial court based its legal conclusions on a clearly erroneous factual finding. More specifically, the defendant argues that the trial court imputed to Emmanuel knowledge of the contents of the document submitted into evidence by the plaintiff, which described her compensation as being 1 percent of the gross auction proceeds, with a minimum

payment of $30,000. The defendant contends that the trial court reached this decision on the basis of its finding that "[Emmanuel] testified that he had the document on his desk but did not read it until four months after the auction." According to the defendant, this latter finding is clearly erroneous and was the "linchpin" of the trial court's reasoning. We agree.

In its memorandum of decision, the court found that an implied in fact contract existed between the parties.[8] According to the court, "[t]he fact that [Emmanuel] claim[ed] that he did not read the contract until several months after the auction [was] no defense to [the plaintiff's] claim for compensation." The court determined that "the evidence showed that [the plaintiff] gave [Emmanuel] the contract, which specified compensation of 1 percent of gross proceeds of the auction, with a minimum payment of $30,000. There [was] no question that the [defendant] knew that [the plaintiff] expected to be paid for her services and that she, in fact, did

[8] The court "[found] that the defendants breached an implied contract" but did not specify whether it was one implied in fact or one implied in law. "The term 'implied contract' . . . often leads to confusion because it can refer to an implied in fact contract or to an implied in law contract." *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006).

The plaintiff argues in her appellate brief, and conceded during oral argument before this court, that "the court found the existence of an implied in fact contract." As noted by our Supreme Court, "an implied in law contract is another name for a claim for unjust enrichment." *Vertex, Inc.* v. *Waterbury*, supra, 278 Conn. 574. The trial court determined that the plaintiff had failed to prove the value of her services to the defendants and, therefore, could not prevail on her unjust enrichment claim, and that "such an award would be duplicative and inconsistent with an award for breach of contract and would not be allowed." See, e.g., *Connecticut Light & Power Co.* v. *Proctor*, 158 Conn. App. 248, 251 n.7, 118 A.3d 702 (2015) ("[a] court . . . cannot grant relief on a theory of unjust enrichment unless the court first finds that there was no contract between the parties"), aff'd, 324 Conn. 245, 152 A.3d 470 (2016). Because "an implied in law contract is another name for a claim for unjust enrichment"; *Vertex, Inc.* v. *Waterbury*, supra, 574; and the court found against the plaintiff on her claim for unjust enrichment, we, too, understand the court to have found that an implied in fact contract existed under the circumstances.

provide substantial services in preparation for, and in the conduct of, the classic car auction." It reasoned that "[Emmanuel] [was] charged with knowledge of the contents of the contract" because the plaintiff gave it to him, and he simply did not read it. The court thus concluded that the plaintiff was "entitled to receive compensation of 1 percent of the gross auction proceeds," which it found to be $41,000.

We now set forth the relevant legal principles governing our review. "[W]here the factual basis of the [trial] court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *LeBlanc* v. *New England Raceway, LLC*, 116 Conn. App. 267, 280, 976 A.2d 750 (2009). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 258–59, 152 A.3d 470 (2016). "It is well settled that the existence of an implied in fact contract is a question of fact for the trier." Id., 258.

"Where . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous

findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's fact finding process, a new hearing is required." (Internal quotation marks omitted.) *LeBlanc* v. *New England Raceway, LLC*, supra, 116 Conn. App. 281; see also *DiNapoli* v. *Doudera*, 28 Conn. App. 108, 112, 609 A.2d 1061 (1992).

The defendant concedes that "the plaintiff performed work as an auctioneer for the defendant [and] that the plaintiff performed some work in helping to organize and prepare for the [car] auction." According to the defendant, the only disagreement between the parties "concerns the amount of the plaintiff's compensation."

We thoroughly have reviewed the record and conclude that the trial court's decision rests on a clearly erroneous factual finding. There is no evidence from which the trial court could have found that "[Emmanuel] *testified* that he had the document on his desk *but did not read it until four months after the auction*."[9] (Emphasis added.) The plaintiff, in fact, conceded during oral argument before this court that this latter finding was an "error." The trial court relied on this factual

[9] During direct examination, Emmanuel testified in relevant part as follows:

"[The Plaintiff's Counsel]: Showing you what's been marked exhibit 1 [the document]. Do you recognize it?

"[Emmanuel]: Yes.

"[The Plaintiff's Counsel]: Okay. And when did you first receive exhibit 1?

"[Emmanuel]: It was placed on my desk four months after the auction.

"[The Plaintiff's Counsel]: Okay. You're claiming you did not receive it on or about February 2, 2012?

"[Emmanuel]: Absolutely not.

"[The Plaintiff's Counsel]: Okay. But you did receive it afterwards?

"[Emmanuel]: Four months after the auction.

* * *

"[The Plaintiff's Counsel]: [Emmanuel], how did you receive this document?

"[Emmanuel]: It was placed on my desk four months after the auction; it was just laying on my desk in Westport.

"[The Plaintiff's Counsel]: Do you know who placed it on your desk?

finding when it found in favor of the plaintiff on her breach of contract claim.[10] Significantly, the court reasoned that "[Emmanuel] [was] charged with knowledge of the contents of the contract," specifically, the portion dealing with the alleged compensation provision, despite "[his claim] that he did not read the contract until several months after the auction . . . ." The court's memorandum of decision, therefore, demonstrates that, in imputing the terms of the document to the defendant, the court relied on what it thought to be Emmanuel's own testimony. More specifically, the court relied on "[*Emmanuel's claim*] *that he did not read the contract until several months after the auction* . . . ."[11] At trial, Emmanuel did not so testify. Accordingly, we conclude that the trial court's reasoning substantially relied on a clearly erroneous factual finding,

"[Emmanuel]: It either had to be [the plaintiff] or David Bate [a former employee]. There was no one else that had any knowledge of this."

[10] It is significant that, under the present circumstances, the trial court did not rely on a credibility determination. See, e.g., *Stewart* v. *King*, 121 Conn. App. 64, 74 n.5, 994 A.2d 308 (2010) (court made no credibility determinations, but ruling on claim "include[d] implicit findings that it resolved any credibility determinations and issues involving the testimony in a manner that supports its ruling"); *LeBlanc* v. *New England Raceway, LLC*, supra, 116 Conn. App. 274 ("[a]s a reviewing court [w]e must defer to the trier of fact's assessment of the credibility of the witnesses" [internal quotation marks omitted]). Rather, the trial court's memorandum of decision demonstrates that its legal reasoning was substantially based on *specific testimony* that it attributed to Emmanuel that did not, in fact, take place at trial.

[11] Our conclusion is further supported by statements made by the trial court during oral argument. In one instance, the following colloquy occurred between the court and counsel for the plaintiff:

"[The Plaintiff's Counsel]: Let's also look a little bit at some of the things that are undisputed. [Emmanuel] admits that he received exhibit 1 [the document]. He said it was on his desk. [The plaintiff] said she left it on his desk. The only thing they disagree about is when it was left on his desk. She says it was left on his desk in February, [2012], long before the auction. He says it was left on his desk after the auction, months after his—

"The Court: I don't think so. *I understood* [*Emmanuel*] *as like he saw it after the auction.*

"[The Plaintiff's Counsel]: I think that's correct, Your Honor. I think you're correct." (Emphasis added.)

Later on, when counsel for the plaintiff explained why the defendant breached a contract between the parties, the court also stated in relevant part: "And I think it's important that [*Emmanuel*] *did acknowledge that he*

requiring a new trial. See, e.g., *DiNapoli* v. *Doudera*, supra, 28 Conn. App. 112–13 (new hearing in damages required where trial court "substantially based" its award on clearly erroneous factual findings); cf. *LeBlanc* v. *New England Raceway, LLC*, supra, 116 Conn. App. 281–82 (even if factual finding was incorrect, it was harmless because this court "[was] not persuaded that [the] finding formed the basis of the [trial] court's judgment").[12]

In reaching its decision, the trial court relied on this court's decision in *Sandella* v. *Dick Corp.*, 53 Conn. App. 213, 729 A.2d 813, cert. denied, 249 Conn. 926, 733 A.2d 849 (1999). In *Sandella*, this court held that the jury reasonably could have inferred that an "implied contract" existed between the parties on the basis of a letter in the cross claim defendant's possession that it neither signed nor returned. See id., 216–17, 219–22. This court noted that the jury reasonably could have determined that the cross claim defendant's "failure to decline the conditions [set forth in the letter] was an implied acceptance of its conditions." Id., 220. *Sandella* did not involve a situation where the trier of fact relied on a clearly erroneous factual finding, however, and is, therefore, distinguishable.

The judgment is reversed in part and the case is remanded for a new trial only as to count one of the plaintiff's complaint. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

had the contract somewhere on his desk or somewhere. He hasn't said, [*I've*] *never seen this before*." (Emphasis added.)

[12] The plaintiff argues that we may affirm the trial court's judgment on the alternative ground that she sufficiently proved a breach of an express contract. The trial court did not find that an express contract existed. As an appellate court, we may not find facts. See, e.g., *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 106, 84 A.3d 828 (2014) ("[i]t is elementary that neither [the Supreme Court] nor the Appellate Court can find facts in the first instance"); *Positive Impact Corp.* v. *Indotronix International Corp.*, 96 Conn. App. 361, 364, 900 A.2d 535 (existence of contract is question of fact), cert. denied, 280 Conn. 915, 908 A.2d 538 (2006).

STATE OF CONNECTICUT *v.* LAURENTIU LUGOJANU
(AC 40691)
(AC 40824)

Alvord, Sheldon and Norcott, Js.

Syllabus

The defendant, who had been convicted of conspiracy to commit home invasion following a plea of guilty, appealed to this court from the trial court's dismissal of his motion to correct an illegal sentence. The defendant claimed that his sentence of twenty years of incarceration followed by a five year term of probation effectively constituted a twenty-five year sentence, which exceeded the twenty year limit for a class B felony authorized by statute (§ 53a-35a). After the trial court rendered judgment dismissing the motion in its entirety for lack of subject matter jurisdiction, the defendant appealed to this court, which consolidated the appeal from that judgment from the defendant's separate appeal from certain postjudgment rulings. *Held*:

1. The defendant's claim that the trial court erred in not granting his motion to correct because his sentence exceeded the statutory limit for a class B felony was unavailing: pursuant to the rule of practice (§ 43-22) concerning motions to correct, the trial court has limited jurisdiction to correct an illegal sentence at any time if the sentence exceeds the relevant statutory maximum limits, and although the defendant's claim that his sentence exceeded the statutory limit failed on its merits, as his sentence did not violate the statute (§ 53a-28 [b] [5]) that specifies that a defendant can be sentenced to a term of imprisonment but have that sentence suspended while he serves a period of probation, nor did it violate the requirement in § 53a-35a that the sentence of imprisonment for a class B felony shall be not more than twenty years, or the requirement in the statute pertaining to terms of probation (§ 53a-29 [d]) that the period of probation for a class B felony shall not be more than five years, the defendant's claim fell within the trial court's limited jurisdiction under the rule of practice governing motions to correct; accordingly, the trial court should have denied, rather than dismissed, the motion to correct as to that claim.
2. The trial court properly dismissed the defendant's motion to correct an illegal sentence as to his remaining claims; the defendant's claim that there was a disparity between his sentence and the sentences received by the other participants in the underlying crime did not fall within the limited purview of the rule of practice (§ 43-22) governing motions to correct an illegal sentence, and the events underlying the defendant's claim that the prosecutor improperly increased the length of his recommended sentence after the defendant rejected a prior plea offer and

elected a jury trial occurred during plea negotiations, not at the sentencing stage, and did not implicate the court's jurisdiction under § 43-22.

Argued May 24—officially released September 11, 2018

Procedural History

Substitute information charging the defendant with the crime of conspiracy to commit home invasion, brought to the Superior Court in the judicial district of New Haven, where the defendant was presented to the court, *Fasano*, *J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *Clifford*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court; subsequently, the court, *Clifford*, *J.*, denied, inter alia, the defendant's motion for reconsideration, and the defendant filed a separate appeal to this court; thereafter, this court consolidated the appeals. *Improper form of judgment; judgment directed.*

Laurentiu Lugojanu, self-represented, the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Laurentiu Lugojanu, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence under Practice Book § 43-22.[1] The defendant claims that the trial court erred in not granting his motion because (1) his sentence exceeded the statutory limit for a class B felony, (2) there was a disparity

[1] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

between his sentence and the sentences received by the other participants in the underlying crime, and (3) the prosecutor vindictively increased the length of the defendant's recommended sentence under the plea deal offered to him after the defendant invoked his right to a jury trial.[2] The state argues that the trial court properly dismissed the defendant's second and third claims in support of his motion to correct because it lacked subject matter jurisdiction over those claims pursuant to § 43-22. As for the defendant's first claim in support of his motion to correct, by contrast, the state contends that that claim should have been denied on the merits rather than dismissed because, although the claim was unfounded in law or in fact, it fell within the court's limited subject matter jurisdiction under § 43-22. We agree with the state and, thus, reverse the court's judgment of dismissal with respect to the defendant's first claim only and remand this case with direction to render judgment denying that claim on the merits. The court's judgment of dismissal is affirmed in all other respects.

The following facts are relevant to this appeal. On or about May 7, 2009, the defendant and two other individuals were arrested and charged, inter alia, with home invasion in violation of General Statutes § 53a-100aa. Subsequently, the defendant and the others were offered plea deals involving recommended sentences of ten years incarceration in exchange for guilty pleas to conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 and 53a-100aa. Although the other two individuals accepted such plea deals, the defendant rejected the state's offer and exercised his right to proceed to jury trial.

After unsuccessfully prosecuting a motion to suppress identification evidence, the defendant reinitiated plea negotiations with the state. The prosecutor

[2] The defendant filed two appeals, which this court ordered consolidated.

responded by offering the defendant a revised plea deal involving a recommended sentence of twenty years incarceration, execution suspended after twelve years, followed by five years of probation in exchange for his plea of guilty to conspiracy to commit home invasion. On January 31, 2012, the defendant accepted this offer and pleaded guilty under the *Alford* doctrine.[3]

Notwithstanding this agreement, the defendant, at sentencing on April 5, 2012, asked the court to reinstate the original plea deal that he initially had been offered, but which he had rejected, for a recommended sentence of ten years incarceration in exchange for his guilty plea to conspiracy to commit home invasion. The court responded by noting that the defendant had rejected that offer and had "substantially [gone] through the trial." The court then imposed sentence as agreed to in the second plea deal, which the defendant had accepted. The defendant subsequently filed a motion to correct an illegal sentence under Practice Book § 43-22. The motion was dismissed for lack of subject matter jurisdiction. This appeal followed.

Because the trial court dismissed the defendant's claims for lack of subject matter jurisdiction, we first set forth general legal principles and our standard of review as to jurisdiction. "[T]he jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." (Internal quotation marks omitted.) *State* v. *Tabone*, 279 Conn. 527, 533, 902 A.2d 1058 (2006). Practice Book § 43-22 provides such authority, stating that "[t]he judicial authority may at any time correct an illegal sentence . . . or it may correct a sentence imposed in an illegal manner

[3] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

. . . .” (Internal quotation marks omitted.) *State* v. *Tabone*, supra, 279 Conn. 534. “An illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant’s right against double jeopardy, is ambiguous, or is internally contradictory.” (Internal quotation marks omitted.) Id. “[I]f the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it. . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack.” (Emphasis omitted; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 243, 170 A.3d 139 (2017). “Our determination of whether a motion to correct falls within the scope of Practice Book § 43-22 is a question of law and, thus our review is plenary.” *State* v. *Osuch*, 124 Conn. App. 572, 578–79, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010).

The defendant first claims that his sentence was illegal because it exceeded the statutory limit for a class B felony. Specifically, the defendant claims that a twenty year sentence of imprisonment followed by a five year term of probation effectively constitutes a twenty-five year sentence thus exceeds the twenty year limit for a class B felony authorized by General Statutes § 53a-35a (6). We disagree.

“Absent a statutory prohibition, a term of imprisonment with the execution of such sentence of imprisonment suspended after a period set by the court and a period of probation is an authorized sentence.” *State* v. *Dupree*, 196 Conn. 655, 660–61, 495 A.2d 691, cert. denied, 474 U.S. 951, 106 S. Ct. 318, 88 L. Ed. 2d 301 (1985). The plain language of the statute concerning authorized sentences, General Statutes § 53a-28 (b) (5), specifies that a defendant can be sentenced to a term

of imprisonment, but have that sentence suspended while he serves a period of probation.[4] In the present case, the defendant's maximum exposure to imprisonment under such a sentence is twenty, not twenty-five, years. Moreover, § 53a-35a expressly states that "the *sentence of imprisonment* shall be a definite sentence and . . . the term shall be . . . (1) [f]or a class B felony other than manslaughter in the first degree with a firearm . . . a term not less than one year nor more than twenty years . . . ." (Emphasis added.) Furthermore, the statute concerning periods of probation, General Statutes § 53a-29 (d), expressly states that "the *period of probation* . . . (1) [f]or a class B felony, [shall be] not more than five years." (Emphasis added.) The defendant's sentence does not violate any of these provisions. We agree with the state, however, that the defendant's claim that his sentence exceeds the statutory maximum falls within the court's narrow jurisdiction to correct an illegal sentence under Practice Book § 43-22. See *State* v. *Tabone*, supra, 279 Conn. 533–34. An appellate court, however, "can sustain a right decision although it may have been placed on a wrong ground." (Internal quotation marks omitted.) *State* v. *Osuch*, supra, 124 Conn. 583. The form of the trial court's judgment is improper as the court should have denied on the merits, rather than dismissed, this part of the defendant's motion.

The defendant's remaining claims were properly dismissed for lack of jurisdiction. The defendant asserts that the disparity between his sentence and those of the other individuals involved in the underlying crime brings his claim within the purview of Practice Book

[4] General Statutes § 53a-28 (b) provides in relevant part: "Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (5) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a period of probation or a period of conditional discharge . . . ."

§ 43-22. As previously noted, jurisdiction under § 43-22 is narrow, applying only to limited claims. See *State* v. *Tabone*, supra, 279 Conn. 534. "Connecticut courts have considered four categories of claims pursuant to [Practice Book] § 43-22. The first category has addressed whether the sentence was within the permissible range for the crimes charged. . . . The second category has considered violations of the prohibition against double jeopardy. . . . The third category has involved claims pertaining to the computation of the length of the sentence and the question of consecutive or concurrent prison time. . . . The fourth category has involved questions as to which sentencing statute was applicable. . . . [I]f a defendant's claim falls within one of these four categories the trial court has jurisdiction to modify a sentence after it has commenced. . . . If the claim is not within one of the categories, then the court must dismiss the claim for a lack of jurisdiction and not consider its merits." (Internal quotation marks omitted.) *State* v. *Robles*, 169 Conn. App. 127, 133, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017); see also *State* v. *Mollo*, 63 Conn. App. 487, 490, 776 A.2d 1176 ("a sentence imposed within statutory limits is generally not subject to review"), cert. denied, 257 Conn. 904, 777 A.2d 194 (2001). The defendant's claim regarding the disparity of sentences does not fall within the narrow scope of the trial court's jurisdiction, and thus the court properly dismissed that claim.

The defendant finally claims that the prosecutor acted vindictively in increasing his plea offer after the defendant exercised his right to a jury trial. The defendant notes that "as a direct result of [his] trial contemplation, the prosecution doubled [his] offer from [ten] years, to [twenty] years with [five] years [of] probation." The court's jurisdiction under Practice Book § 43-22 is not implicated because these events occurred during

plea negotiations, not the sentencing stage of his criminal prosecution. See *State* v. *Robles*, supra, 169 Conn. App. 133; see also *State* v. *Francis* 322 Conn. 247, 264, 140 A.3d 927 (2016) ("[i]n light of the limited and straightforward nature of the claims that may be raised in a motion to correct, the potential merits of such a motion frequently will be apparent to the court . . . from a simple review of the sentencing record"). Accordingly, the trial court properly dismissed this claim.

The form of the judgment is improper, the judgment dismissing the motion to correct an illegal sentence is reversed in part only as to the defendant's claim that his sentence exceeded the statutory maximum limit for a class B felony, and the case is remanded with direction to render judgment denying the motion as to that claim; the judgment is affirmed in all other respects.

SANDRA M. HIRSCH, TRUSTEE *v.* WILLIAM S. WOERMER (AC 40653)

Keller, Elgo and Beach, Js.

Syllabus

The plaintiff trustee sought to foreclose a mortgage on certain real property owned by the defendant. In response, the defendant filed three special defenses, including a claim of unconscionability of the initial loan. The trial court granted the plaintiff's motion to strike the special defenses and, thereafter, rendered judgment in the plaintiff's favor. The defendant subsequently filed motions to open the judgment and to amend his answer with an additional special defense of a violation of the Connecticut Abusive Home Loan Lending Practices Act (§ 36a-746 et seq.), which the trial court denied. The court rendered a judgment of foreclosure by sale, from which the defendant appealed to this court. *Held*:

1. The trial court properly granted the plaintiff's motion to strike the defendant's special defense of unconscionability; the defendant failed to sufficiently plead facts to support his special defense on procedural grounds in that he did not allege facts constituting unfair surprise that related to the making, validity, or enforcement of the mortgage or note, and

his assertion that the loan was predatory because of its term of one year with an interest rate of 15 percent, and points of 5 percent, alone, was not sufficient to render the contract unenforceable on the ground of substantive unconscionability, as claims of an unconscionable interest rate are not enough to sustain the special defense without facts related to the defendant's financial circumstances, the type of property for which the loan would be utilized, whether the property was associated with a second mortgage, or the income-producing capacity of the property, which the defendant failed to provide.

2. The trial court did not abuse its discretion when it denied the defendant's motion to open the judgment; that court was not required to open the judgment to consider a claim not previously raised, the proposed special defense alleged for the first time the violation of a statute, which the defendant did not raise until two months after the judgment was rendered against him, he did not offer any authority to support his claim that the court abused its discretion in denying his motion to open but merely argued that his proposed amended answer and special defenses included allegations that the loan was unconscionable because it allegedly violated certain statutes, and there was no indication that such a claim was unavailable to him prior to when judgment was rendered or that new evidence was discovered, nor did the defendant offer any evidence that there was a good and compelling reason for the modification to his special defenses after judgment was rendered.

Argued May 17—officially released September 11, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Hon. John F. Cronan*, judge trial referee, granted the plaintiff's motion to strike the defendant's special defenses; thereafter, the court granted the plaintiff's motion for judgment and rendered judgment in part thereon; subsequently, the court denied the defendant's motion to open the judgment; thereafter, the court denied the defendant's motion to amend; subsequently, the court granted the plaintiff's motion for judgment of foreclosure by sale and rendered judgment thereon, from which the defendant appealed to this court; thereafter, the court denied the defendant's motion for articulation. *Affirmed.*

Robert M. Singer, for the appellant (defendant).

Harry Hirsch, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, William S. Woermer, appeals from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, Sandra M. Hirsch, Trustee. On appeal, the defendant claims that the court improperly (1) granted the plaintiff's motion to strike his special defense of unconscionability and (2) denied his motion to open. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff holds a note from the defendant, which is now in default, for the original principal amount of $73,200 secured by a mortgage on real property located in Branford. The mortgage was dated March 31, 2015, and recorded on the Branford land records.

The plaintiff initiated this foreclosure action on May 3, 2016. On October 5, 2016, the defendant filed an answer and three special defenses on the basis of lack of standing, invalid mortgage, and unconscionability. On October 11, 2016, the plaintiff filed an amended complaint, and subsequently moved to strike the defendant's three special defenses on December 15, 2016. On January 30, 2017, the defendant filed an objection.

On January 31, 2017, the court granted the plaintiff's motion to strike. In striking the special defense of unconscionability, the court stated that "the defendant's claim that the initial loan was 'outrageous and unconscionable' is without any statutory or case law basis. There is nothing in the record that indicates that the defendant was tricked or coerced into entering the original instrument."

The plaintiff filed a motion for judgment on the pleadings[1] in March, 2017. In support of the motion, the plaintiff argued that the defendant admitted liability on the complaint and had no valid special defense. On March 20, 2017, the court granted the plaintiff's motion and rendered judgment in her favor.

On May 15, 2017, the defendant filed a motion to open the judgment.[2] In addition, the defendant filed a motion for permission to amend on May 15, 2017.[3] Specifically, the defendant requested permission to file a proposed amended special defense and a counterclaim alleging a violation of General Statutes § 36a-746 et seq., the Connecticut Abusive Home Loan Lending Practices Act (act). In response, the plaintiff filed separate objections on May 25, 2017, to the defendant's motion to open and the motion to amend. At the hearing

[1] Our Practice Book does not provide for a motion for judgment on the pleadings. Our Supreme Court, however, recognized the motion in *DelVecchio* v. *DelVecchio*, 146 Conn. 188, 191, 148 A.2d 554 (1959). See *Sewer Commission* v. *Norton*, 164 Conn. 2, 5, 316 A.2d 775 (1972); *Boucher Agency, Inc.* v. *Zimmer*, 160 Conn. 404, 408–409, 279 A.2d 540 (1971).

[2] In his motion to open, the defendant argued as follows: "The defendant herein moves that the judgment on the pleadings be opened. The defendant is filing herewith the following:

"Motion for Order to Amend Special Defense & Counterclaim

"The subject mortgage was in violation of An Act Concerning Abuse Home Lending Practices, [General Statutes § 36a-746 et seq.]. Attached hereto is the following:

"a. U.S. Department of Treasury Yield Curve Rate—showing Treasury Bond Rate of 2.61 [percent] on March 31, 2016;

"b. FreddieMac.com [thirty] year fixed rate mortgage—rate in April 3.61 [percent];

"c. [Office of Legislative Research] Research Report 2002-R-0855 entitled 'Predatory Lending Laws';

d. Relevant Portions of Chapter 669 of the Connecticut General Statutes, including Connecticut Abusive Home Loan Lending Practices, [§ 36a-746 et seq.]."

[3] The defendant's motion to amend stated as follows: "Pursuant to Practice Book [§] 10-60, the [defendant], through his attorney, hereby moves that he be allowed to add a special defense and file a counterclaim. The mortgage is in violation of [General Statutes §] 36a-746, and the statute provides for a defense and counterclaim per [General Statutes §] 36a-760i."

on the motion to open and motion to amend, the plaintiff argued that the act does not provide a private right of action; rather the act describes activities that are regulated by the Commissioner of Banking. Following the hearing, the court denied both motions on May 31, 2017. Thereafter, on June 2, 2017, the plaintiff filed a motion for judgment of foreclosure by sale, and on July 3, 2017, the court rendered a judgment of foreclosure by sale, determining the amount of debt and setting the sale date as September 2, 2017. This appeal followed.

I

The defendant first claims that the court improperly granted the plaintiff's motion to strike his special defense of unconscionability. We disagree.

In his answer, the defendant claimed that the mortgage and note are unconscionable for one or more of the following reasons: "(a) the attorney performing the closing is the same attorney foreclosing on the property; (b) the attorney performing the closing failed to provide a retainer agreement; (c) the loan is predatory for one or more of the following reasons: (1) the term is for just over [one] year, (2) the interest rate is 15 [percent], and (3) the points charged were in excess of 5 [percent]."

At the outset, we set forth our well-established standard of review. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary. . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.)

TD Bank, N.A. v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 326, 71 A.3d 541 (2013).

"A motion to strike does not admit legal conclusions. . . . Conclusions of law, absent sufficient alleged facts to support them, are subject to a motion to strike. The trial court may not seek beyond the complaint for facts not alleged, or necessarily implied . . . . Historically, defenses to a foreclosure action have been limited to payment, discharge, release or satisfaction . . . or, if there had never been a valid lien. . . . A valid special defense at law to a foreclosure proceeding must be legally sufficient and address the making, validity or enforcement of the mortgage, the note, or both. . . . Where the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles. . . . [O]ur courts have permitted several equitable defenses to a foreclosure action. [I]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had . . . ." (Citation omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 629, 172 A.3d 837 (2017), cert. granted, 328 Conn. 904, 177 A.3d 1160 (2018).

We first note that the defense of unconscionability is a recognized defense to a foreclosure action. See id., 629 ("equitable defenses that our Supreme Court has recognized in foreclosure actions include unconscionability . . . abandonment of security . . . and usury" [internal quotation marks omitted]); *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 411, 867 A.2d 841 (2005). "The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise. . . . As applied to real estate mortgages, the doctrine of unconscionability draws heavily on its counterpart in the Uniform Commercial Code which,

although formally limited to transactions involving personal property, furnishes a useful guide for real property transactions. . . . As Official Comment 1 to § 2-302 of the Uniform Commercial Code suggests, [t]he basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . Unconscionability is determined on a case-by-case basis, taking into account all of the relevant facts and circumstances." (Internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, supra, 411. "The classic definition of an unconscionable contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." (Internal quotation marks omitted.) *R.F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 741, 3 A.3d 957 (2010).

Claims of unconscionability fall into two categories: substantive and procedural. "Substantive unconscionability focuses on the content of the contract, as distinguished from procedural unconscionability, which focuses on the process by which the allegedly offensive terms found their way into the agreement." (Internal quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 87 n.4, 612 A.2d 1130 (1992), quoting J. Calamari & J. Perillo, Contracts (3d Ed.) § 9-37. Procedural unconscionability is intended to prevent unfair surprise and substantive unconscionability is intended to prevent oppression. *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998).

"The doctrine of unconscionability, as a defense to contract enforcement, generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an

absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . .'' (Internal quotation marks omitted.) *R.F. Daddario & Sons, Inc.* v. *Shelansky*, supra, 123 Conn. App. 741; see also *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 29, A.3d. (2018).

On our review of the pleadings, we conclude that the defendant has failed to sufficiently plead facts to support his special defense of unconscionability on procedural or substantive grounds. The defendant alleged that the attorney performing the closing is the same attorney foreclosing on the property and that the attorney performing the closing failed to provide a retainer agreement. To the extent that the allegations implicate procedural unconscionability, the defendant has not sufficiently alleged facts constituting unfair surprise that relate to the making, validity, or enforcement of the mortgage or the note.

As to substantive unconscionability, the defendant asserts that the loan is predatory because of the one year term with a 15 percent interest rate and points in the amount of 5 percent. These allegations, alone, however, are not sufficient to render the contract unenforceable on the ground of substantive unconscionability. In *Cheshire Mortgage Service, Inc.* v. *Montes*, supra, 223 Conn. 85, 94, our Supreme Court held that a mortgage with an annual interest rate of 18 percent was neither procedurally nor substantively unconscionable. Furthermore, in *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 803, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006), this court held that a defendant's ''bald assertion'' that a default interest rate of 18 percent was unconscionable, ''without more, was insufficient to establish that the default interest rate . . . was unconscionable.'' As the United States District Court for the District of Connecticut has noted, in cases

analyzing whether an interest rate is substantively unconscionable, unpaid property taxes in Connecticut are subject to an annual interest rate of 18 percent, which suggests that such a rate is not unconscionable in and of itself. See *Pierce* v. *Emigrant Mortgage Co.*, Docket No. 3:04cv1767 (JCH), 2007 WL 4800725, *6 n.1 (D. Conn. December 27, 2007) ("the Connecticut legislature's imposition of an 18 [percent] rate for unpaid taxes suggests that such a rate is not unconscionable *per se*"); see also General Statutes § 12-146.

Furthermore, our Supreme Court has noted that "[w]hether interest rates are unconscionable is a question that should not be decided simply by judicial surmise about prevailing prime interest rates. The financial circumstances of the borrower, the increased risk associated with a second mortgage, and the income-producing capacity of the mortgaged property are some of the questions of fact that might appropriately be explored to shed light on whether a designated interest rate is or is not unconscionable." (Footnote omitted.) *Hamm* v. *Taylor*, 180 Conn. 491, 495, 429 A.2d 946 (1980).

Accordingly, if a bald allegation of an annual or default interest rate of 18 percent is not enough to establish unconscionability, it follows that the mere allegation of an annual interest rate of 15 percent likewise is not enough to establish unconscionability. The other alleged predatory terms, including the points "in excess of 5 [percent]" and the term of the loan for "just over [one] year," do not tip the scale to support a defense on substantive unconscionability. See *Hottle* v. *BDO Seidman, LLP*, 268 Conn. 694, 721, 846 A.2d 862 (2004); *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 352. To survive a motion to strike, the defendant must plead additional facts for such terms to be sufficient to support the defense of unconscionability. As this court stated in *R.F. Daddario & Sons, Inc.* v. *Shelansky*, supra, 123 Conn. App. 742, a defendant's

"mere claim that the terms of the subject note and mortgage were unconscionable is insufficient to establish [the] special defense."

In this case, the defendant has failed to provide any information about his financial circumstances, the type of property that the loan would be utilized for, whether the property was associated with a second mortgage, or the income-producing capacity of the property. Furthermore, the defendant has not alleged any facts that he was unfairly surprised by the terms of the note, that he was misled; see *Monetary Funding Group, Inc.* v. *Pluchino*, supra, 87 Conn. App. 412; or any other facts that would support that there was an absence of meaningful choice on the part of the defendant. *Bender* v. *Bender*, 292 Conn. 696, 732, 975 A.2d 636 (2009).

Construed in the light most favorable to the defendant, the facts alleged in his special defense do not support his claim that the note and the mortgage are unconscionable.[4] Accordingly, we conclude that the court properly granted the plaintiff's motion to strike the defendant's special defense of unconscionability.

II

The defendant's second claim of error alleges that the court improperly denied his motion to open the judgment for the purpose of amending his special defenses. In essence, the defendant argues that the court abused its discretion when it denied his motion to open because the proposed amended answer and special defenses "specifically [pleaded] that the loan

[4] To the extent that the defendant argues the merits of his special defense of unconscionability, we note that our review is restricted to the motion to strike the special defense. As we have already articulated, our review of the motion to strike is limited to the facts as set forth in the complaint and the answer. Any facts in the defendant's brief that are not included in the complaint and the answer are irrelevant to our review.

violated . . . An Act Concerning Abus[ive] Home [Loan] Lending Practices." We disagree.

We first set forth our standard of review and applicable law. "The denial of a motion to open is an appealable final judgment. . . . Although a motion to open can be filed within four months of a judgment . . . the filing of such a motion does not extend the appeal period for challenging the merits of the underlying judgment unless filed within the [twenty day period provided by Practice Book § 63-1]. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time to appeal. . . .

"The principles that govern motions to open or set aside a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . .

"Because opening a judgment is a matter of discretion, the trial court [is] not required to open the judgment to consider a claim not previously raised. The exercise of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal. . . . We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . .

In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Citation omitted; internal quotation marks omitted.) *JPMorgan Chase Bank, N.A.* v. *Eldon*, 144 Conn. App. 260, 272–73, 73 A.3d 757, cert. denied, 310 Conn. 935, 79 A.3d 889 (2013).

"The criteria for a court to open a judgment is analogous to the conditions needed for a petition for a new trial on grounds of newly discovered evidence. . . . A petition for a new trial is governed by [General Statutes] § 52-270 (a), which provides in relevant part: The Superior Court may grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . . The standard that governs the granting of a petition for a new trial based on newly discovered evidence is well established. The petitioner must demonstrate, by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, *such that it could not have been discovered earlier by the exercise of due diligence;* (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial. . . . These rules are motivated by the policy that [o]nce a judgment [is] rendered it is to be considered final and it should be left undisturbed by post-trial motions except for a good and compelling reason." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Worth* v. *Korta*, 132 Conn. App. 154, 160–61, 31 A.3d 804 (2011), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012).

We note that the defendant had the opportunity to plead over after the court granted the plaintiff's motion to strike, yet failed to do so. Instead, the defendant did not raise any allegation of a violation of the act until May, 2017, two months after judgment had been rendered against him. In his appellate brief, the defendant offers no authority to support his claim that the court abused its discretion in denying the motion to open.

Rather, he merely argues that the proposed amended answer and special defenses included allegations that the loan is unconscionable because it allegedly violated the act. There is no indication that such claims were unavailable to the defendant prior to judgment entering or that new evidence was discovered. Furthermore, the defendant failed to offer any evidence that there was a good and compelling reason for the modification to his special defenses after judgment was rendered.

As we previously stated, "the trial court [is] not required to open the judgment to consider a claim not previously raised." (Internal quotation marks omitted.) *JPMorgan Chase Bank, N.A.* v. *Eldon*, supra, 144 Conn. App. 273. The proposed special defense not only alleges for the first time the violation of a statute, the statute itself is not synonymous with the previously raised special defense of unconscionability. Accordingly, the court was not required to consider this new claim.

Making every reasonable presumption in favor of the court's action, we cannot conclude that the court acted unreasonably and in clear abuse of its discretion when it denied the defendant's motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MADELINE GRIFFIN (AC 40555)

Sheldon, Keller and Lavery, Js.

Syllabus

Convicted of the crimes of arson in the first degree, conspiracy to commit arson in the first degree and insurance fraud, the defendant appealed, claiming that the evidence was insufficient support her conviction and that the trial court improperly denied her motion to suppress certain pretrial and in-court identifications of her that were made by witnesses to the fire. The defendant's conviction resulted from an arson at her

mother's home after which the defendant's mother filed a homeowner's insurance claim for damage to her home. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion to suppress the identifications of her that were made to the police and in court by witnesses to the fire; the photographic arrays that the police administered to the witnesses were not unduly suggestive, as the defendant did not appear to be substantially different in age or appearance from the other women in the arrays and did not appear to be highlighted, even though she was smiling slightly in her photograph, her claim that there was an increased risk that the witnesses would select her photograph because the photographs were administered simultaneously instead of sequentially was unavailing and not borne out by appellate precedent, and this court having concluded that the arrays and procedures employed in administering them were not unconstitutionally suggestive, it was not necessary to address the defendant's claim that the identifications were unreliable, and her claim regarding the suppression of the in-court identifications, having been premised entirely on her claims that the pretrial identifications of her were suggestive and unreliable, also failed.

2. The defendant could not prevail on her claim that the evidence was insufficient to support her conviction of arson in the first degree and conspiracy to commit arson in the first degree, which was based on her assertion that there was no evidence that she started the fire with the intent to collect insurance proceeds related to the homeowner policy; a reasonable jury could have inferred from the circumstantial evidence that the defendant's conduct was part of a plan to defraud and that she possessed the requisite intent when she started the fire, as the evidence supported a finding that her mother filed an insurance claim for the property damage, that the defendant, prior to lighting the fire, stowed valuables that belonged to her and her mother in her car, and that her mother packed items in her own car and made arrangements to be away from her home when the defendant started the fire, and the defendant's claim that the evidence was insufficient to establish that she possessed the requisite mens rea to support the conspiracy conviction was unavailing, as there was sufficient evidence to support the inference that she possessed the requisite intent to commit the arson.

3. The defendant's conviction of insurance fraud as to her mother's fraudulent insurance claim could not stand, as there was no evidence that the defendant participated in the making or preparation of any statement that was provided to her mother's home insurer; the plain and unambiguous terms of the insurance fraud statute (§ 53a-215 [a] [2]) require evidence that the defendant engaged in conduct related to the making or preparing of the insurance claim, and the same evidence that supported her arson conviction could not be used to uphold her insurance fraud conviction, as that evidence, which supported an inference that the

defendant intended to defraud when she started the fire, did not reasonably support the inference that she engaged in the making or preparation of the actual statement given to the insurance company.

Argued April 25—officially released September 11, 2018

Procedural History

Substitute information charging the defendant with two counts of the crime of insurance fraud, and with the crimes of arson in the first degree and conspiracy to commit arson in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Pavia*, *J.*; thereafter, the court denied the defendant's motion to suppress certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Reversed in part; judgment directed; further proceedings.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *David R. Applegate*, assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Madeline Griffin, appeals from the judgment of conviction, rendered after a jury trial, of one count each of the crimes of arson in the first degree in violation of General Statutes §§ 53a-100, 53a-111 (a) (3) and 53a-8 (a); conspiracy to commit arson in the first degree in violation of General Statutes §§ 53a-48 (a), 53a-100 and 53a-111 (a) (3); insurance fraud in violation of General Statutes § 53a-215 (a) (1); and insurance fraud in violation of General Statutes § 53a-215 (a) (2). On appeal, the defendant claims that (1) the trial court improperly denied her motion to suppress the pretrial and in-court identifications of her

because they were the result of unnecessarily suggestive photographic arrays, and (2) the state presented insufficient evidence to convict her of arson, conspiracy to commit arson, and the insurance fraud charge pertaining to the homeowner's insurance policy of her mother. We agree with the defendant's second claim as it pertains to the insurance fraud count and, accordingly, reverse in part the trial court's judgment. We otherwise affirm the judgment.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. At about 2:45 p.m. on May 28, 2011, the defendant set fire to her mother's house in Stratford. Neighbors, including Carmen Febles, Juan Febles, and Karen Wakeley, heard an explosion and saw flames coming from the house. The defendant appeared among the neighbors, barefoot, claiming that she had been mowing the lawn when the fire started. At least one of the neighbors was familiar with the defendant. The defendant, who spoke English and Spanish, identified herself as the homeowner's daughter, and then used Carmen Febles' cell phone to call her mother's cell phone and asked the person on the other line, "Where are you?" Approximately thirty minutes later, two unidentified individuals drove to the scene, picked up the defendant, and drove away.

Meanwhile, emergency personnel arrived at the scene to extinguish the fire and investigate its origins. They determined that the fire was started intentionally through the use of gasoline as an accelerant. A K-9 unit alerted to several areas of the house where an accelerant was used, and a partially melted gasoline container was found in the house. At about the same time, a tracking K-9 searched the neighborhood. Another neighbor, Debra Hirth, who had not witnessed the fire, alerted an officer to a pair of sandals smelling of gasoline that appeared to have been thrown onto

her property. The sandals were then presented to the other K-9 unit, which alerted to the sandals as containing accelerants.

The defendant returned to the scene while police were still there and voluntarily provided a written statement to police. She claimed to have been at her home in Danbury during the fire, but had left her car parked in her mother's garage. The following items were found inside her car: a cell phone; two televisions; trophies; frozen and canned food; a safe containing multiple valuables and documents, including the mother's marriage license and jewelry; and a pocketbook containing the defendant's passport, multiple identification cards, and multiple social security cards.

The defendant later filed an insurance claim with Esurance for damage to her car. The defendant's mother filed an insurance claim with Homesite Insurance Company (Homesite) for damage to the house.

Carmen Febles and Juan Febles met with police on May 31, 2011, and gave statements concerning their encounter with the defendant on the day of the fire. Stratford police separately administered photographic arrays to Carmen Febles and Juan Febles. Both identified the defendant as the woman they encountered at the fire scene. Wakeley likewise gave a statement to police, and also identified the defendant in a photographic array as the woman she talked to at the fire scene.

In an amended information, the state charged the defendant with arson in the first degree as a principal and an accessory, conspiracy to commit arson in the first degree, and two counts of insurance fraud. Prior to trial, the defendant filed a motion to suppress the pretrial identifications made by the Febleses and Wakeley, and sought to prevent them from making in-court identifications. The court denied the motion.

After a jury trial, the defendant was convicted on all counts. The defendant was sentenced to a total effective term of twenty years of incarceration, execution suspended after twelve years, and five years of probation. One of the conditions of the defendant's probation was that she pay $337,000 in restitution to the insurer of her mother's home, Homesite Insurance Company. This appeal followed.

I

The defendant first claims that the court improperly denied her motion to suppress identifications made by the Febleses and Wakeley. Specifically, the defendant argues that the identification procedure used by police was suggestive and unreliable, and, therefore, the trial court should have suppressed the pretrial and in-court identifications of the defendant by these witnesses. We are not persuaded.

The following additional facts are relevant to the present claim. As we stated previously in this opinion, prior to trial, the defendant filed a motion to suppress evidence of pretrial identifications made by Carmen Febles, Juan Febles, and Wakeley. Additionally, she asked the court to prevent these witnesses from making in-court identifications. On October 29, 2015, the court held a hearing on the defendant's motion at which it heard testimony from two Stratford police officers, Edward Leary and Lawrence Overby, and a Milford police officer, Bruce Carney.[1] All three witnesses were shown arrays consisting of the same eight photographs appearing on a single sheet of paper, although the arrangement of the photographs in each array was different. The cover sheet attached to each array was

[1] The state did not present testimony from the police officer who administered the array to Wakeley. Nonetheless, the array and cover sheet that were completed by Wakeley and the officer who administered the array to her were before the court.

identical, each cover sheet reflected the witness' sworn statement that he or she had identified the person he or she had encountered at the fire scene, and each cover sheet contained instructions that had been initialed by each witness.[2]

Leary testified in relevant part that he administered the photographic array to Carmen Febles. He lacked a recollection of the circumstances surrounding the array, but, relying on the array and the cover sheet attached to it, he testified that he had administered the array to Carmen Febles, that he followed standard police procedures for administering the array, and that Carmen Febles had identified the defendant. He testified that it would have been the normal practice for the Stratford police to have had two officers present during the administration of the array. Moreover, Leary testified that standard police procedure would entail his reading the instructions on the cover sheet to the witness and having the witness sign his or her initials next to each instruction. He stated his belief that this procedure was followed with Carmen Febles because the cover sheet attached to the array reflected the witness' initials next to each instruction set forth thereon, and his signature appeared on the cover sheet, indicating that the witness swore before him that she understood the instructions and had identified the person selected from the array as the person she had encountered at the fire scene. Leary testified that the standard instructions indicated that a suspect may or may not be depicted in the array. Leary asserted that he would have followed protocol in administering the array and

[2] The instructions provided: (1) "I will ask you to review a set of photographs," (2) "It is important to clear innocent people and to identify the guilty," (3) "Persons in the photos may not look exactly as they did on the date of the incident, because of features like facial or head hair change," (4) "The person you saw may or may not be in the photograph," and (5) "The Police will continue to investigate this incident, whether you identify someone or not."

would not have directed Carmen Febles to choose any particular photograph. Leary also testified that Carmen Febles indicated her understanding of the instructions, and had selected the defendant's photograph from those appearing in the array by circling the defendant's photograph and signing her name near it.

Overby testified at the suppression hearing that he took part in administering the photographic array to Juan Febles. Overby testified that although another police officer, Jeff Nattrass, had administered the array to Juan Febles, he nonetheless "notarized" Juan Febles' statement that appears on the cover sheet of the array that the photograph he had selected was that of the person he had observed at the fire scene. Overby testified that, in accordance with standard police procedure, the cover sheet of the array reflects that Juan Febles had initialed next to each of the standard array instructions, one of which stated that "[t]he person you saw may or not be in the photograph." Moreover, the array reflected that Juan Febles circled the defendant's photograph in the array and signed his name near the photograph. The cover sheet reflects the defendant's signature as well as Overby's signature, as evidence that Febles had made a sworn statement to him concerning the array.

Carney testified that, at the request of the Stratford police, he constructed the arrays shown to the Febleses. He was provided the defendant's name and date of birth. Carney retrieved the driver's license photograph of the defendant that the Milford police already had in their possession, and he searched for photographs in Milford's police database that depicted females who were similar in age, race, and facial features to the defendant. Carney then changed the defendant's photograph to black and white, so that its background matched the backgrounds in the seven other photographs in the

array consisting of mug shots in the Milford police database.

At the hearing, the defendant argued that the array was unduly suggestive. She argued that only one other woman in the array appeared to be of the defendant's age, that the witnesses were shown the photographs simultaneously as opposed to sequentially, that the defendant's photograph stood out because she was smiling, and that, in composing the array, Carney did not obtain photographs by relying on physical features identified by the witnesses, but instead relied on the driver's license photograph alone to select the other photographs.

The state countered in relevant part that the array contained eight different photographs, that the defendant's photograph was not highlighted, that the witnesses were instructed that a suspect might not be in the array, and that the witnesses were not shown multiple arrays with the defendant's photograph appearing in each array. Also, although Carney used a photograph of the defendant that depicted her without curly hair, contrary to the description of the suspect by the witnesses, the state argued that all three witnesses were instructed that "persons in the photos may not look exactly like they did on the date of the incident . . . ."

The court, noting that "the defendant ha[d] the burden of proving that the identification[s] resulted from an unconstitutional procedure," found that the defendant failed to prove that the arrays were suggestive. The court rejected the defendant's arguments that the array had highlighted the defendant and relied on the police officers' testimony concerning the procedures employed. The court stated that it did not agree with the defendant that her age and appearance were substantially different from those of the other persons

depicted in the array. The court, therefore, denied the motion to suppress.

At trial, Carmen Febles, Juan Febles, and Wakeley testified about the manner in which they selected the defendant in photographic arrays that the police had administered to them prior to the time of trial, and the completed arrays were presented in evidence. Each of these witnesses testified that the police had provided them with instructions and that they had identified the person that they had encountered at the scene of the fire. Moreover, each of these witnesses made an in-court identification of the defendant.

"In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . .

"In the seminal case of *Neil* v. *Biggers*, [409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)], the [United States] Supreme Court explained the overarching concern that courts face when assessing a challenged identification procedure: It is . . . apparent that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification. . . . It is the likelihood of misidentification which violates a defendant's rights to due process . . . . Id., 198, quoting *Simmons* v. *United States*, [390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)]. As courts apply the two-pronged test to determine if a particular identification procedure is so suggestive and unreliable as to require suppression, they always should weigh the relevant factors against this standard.

In other words, an out-of-court eyewitness identification should be *excluded* on the basis of the procedure used to elicit that identification *only* if the court is convinced that the procedure was so suggestive *and* otherwise unreliable as to give rise to a very substantial likelihood of irreparable misidentification. See *Simmons* v. *United States*, supra, 384." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Marquez*, 291 Conn. 122, 141–42, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009).

"[A] claim of an unnecessarily suggestive pretrial identification procedure is a mixed question of law and fact [subject to plenary review]. With respect to our review of the facts . . . because the issue of the suggestiveness of a photographic array implicates the defendant's constitutional right to due process, we undertake a scrupulous examination of the record to ascertain whether the findings are supported by substantial evidence." (Internal quotation marks omitted.) Id., 137.

"[W]e will reverse the trial court's ruling [on evidence] only where there is an abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether [identification evidence] should be suppressed contemplates a series of factbound determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Internal quotation marks omitted.) *State* v. *Salmond*, 179 Conn. App. 605, 616, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018).

"The critical question . . . is what makes a particular identification procedure 'suggestive' enough to

require the court to proceed to the second prong and to consider the overall reliability of the identification. . . . There are . . . two factors that courts have considered in analyzing photographic identification procedures for improper suggestiveness. The first factor concerns the composition of the photographic array itself. In this regard, courts have analyzed whether the photographs used were selected or displayed in such a manner as to emphasize or highlight the individual whom the police believe is the suspect. See, e.g., *State* v. *Williams*, [203 Conn. 159, 176, 523 A.2d 1284 (1987)] (multiple photographs of same individual in same or subsequent photographic arrays possibly suggestive 'when, in the context of the entire array, the recurrence unnecessarily emphasizes the defendant's photograph'); *State* v. *Fullwood*, [193 Conn. 238, 247, 476 A.2d 550 (1984)] (to be unnecessarily suggestive, variations in array photographs must highlight defendant to point that it affects witness' selection); *State* v. *Gold*, 180 Conn. 619, 656, 431 A.2d 501 ('[when] a feature is placed on the defendant's photograph in order to make the picture conform to the witness' description of the criminal he or she had seen, the identification proceeding has been held to have been rendered highly suggestive'), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); see also *United States* v. *DeCologero*, [530 F.3d 36, 62 (1st Cir.)] (at first step in two-pronged test, court 'consider[s] whether the photo[graphic] array included, as far as was practicable, a reasonable number of persons similar in appearance to the suspect') [cert. denied, 555 U.S. 1005, 129 S. Ct. 513, 172 L. Ed. 2d 376, cert. denied, 555 U.S. 1039, 129 S. Ct. 615, 172 L. Ed. 2d 469 (2008)]; *United States* v. *Rattler*, 475 F.3d 408, 413 (D.C. Cir. 2007) (court must 'examine the suggestivity of irregularities between the subjects in the array').

"The second factor, which is related to the first but conceptually broader, requires the court to examine

the actions of law enforcement personnel to determine whether the witness' attention was directed to a suspect because of police conduct. . . . In considering this [factor, the court should] look to the effects of the circumstances of the pretrial identification, not whether law enforcement officers intended to prejudice the defendant. . . . It stands to reason that police officers administering a photographic identification procedure have the potential to taint the process by drawing the witness' attention to a particular suspect. This could occur either through the construction of the array itself or through physical or verbal cues provided by an officer. See, e.g., *State* v. *Fullwood*, supra, 193 Conn. 248 (irregularity in defendant's photograph not suggestive because it did not 'signal to the witnesses that the defendant was the person whom the police believed to be the perpetrator of the robbery'); see also *Simmons* v. *United States*, supra, 390 U.S. 385 ('[t]here is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the [law enforcement] agents in any other way suggested which persons in the pictures were under suspicion'); *State* v. *Ledbetter*, 185 Conn. 607, 612, 441 A.2d 595 (1981) (no basis for claiming that 'display itself was suggestive or that [the administering officer] was suggestive in any respect in the selection process'); *State* v. *Gold*, supra, 180 Conn. 656 ('[a] procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police' . . .)". (Citation omitted; footnote omitted.) *State* v. *Marquez*, supra, 291 Conn. 142–44.

Our Supreme Court also stressed "that this is *not* a 'best practices' test. In other words, the test does not require a court to engage in a relative value judgment of various possible identification techniques and settle on the one that it believes bears the least risk of mistake, a decision that would be prone to being revised or

second-guessed as the scientific debate evolves and new studies become available. See, e.g., *State* v. *Nunez*, 93 Conn. App. 818, 832, 890 A.2d 636 (2006) ('[t]he question . . . is not whether a double-blind, sequential identification procedure is less suggestive than the traditional procedures . . . but . . . whether the traditional procedures are unnecessarily suggestive under [the] constitution'), cert. denied, 278 Conn. 914, 899 A.2d 621, cert. denied, 549 U.S. 906, 127 S. Ct. 236, 166 L. Ed. 2d 186 (2006); see also *State* v. *Fullwood*, supra, 193 Conn. 244 ('[i]t has been generally recognized that the presentation of several photographs to witnesses, including that of the suspect . . . is by itself a nonsuggestive and constitutionally acceptable practice, in the absence of any unfairness or other impropriety in the conduct of the exhibit' . . .). Nor does this test require law enforcement personnel to alter their procedures every time a fresh scientific study suggests that a new identification procedure might lead to more reliable results. Moreover, although our analysis focuses principally on two key functional aspects of the eyewitness identification process, we stress that it is the *entire* procedure, viewed in light of the factual circumstances of the individual case, that must be examined to determine if a particular identification is tainted by unnecessary suggestiveness. The individual components of a procedure cannot be examined piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to consider the reliability of the identification itself in order to determine whether it ultimately should be suppressed." (Emphasis in original; footnote omitted.) *State* v. *Marquez*, supra, 291 Conn. 145–46.

"In evaluating the suggestiveness of a photographic array, a court should look to both the photographs themselves and the manner in which they were presented to the identifying witness. . . . We consider the

following nonexhaustive factors in analyzing a photographic array for unnecessary suggestiveness: (1) the degree of likeness shared by the individuals pictured . . . (2) the number of photographs included in the array . . . (3) whether the suspect's photograph prominently was displayed or otherwise was highlighted in an impermissible manner . . . (4) whether the eyewitness had been told that the array includes a photograph of a known suspect . . . (5) whether the eyewitness had been presented with multiple arrays in which the photograph of one suspect recurred repeatedly . . . and (6) whether a second eyewitness was present during the presentation of the array. . . . It is important to note, however, that [p]hotographs will often have distinguishing features. The question . . . is not whether the defendant's photograph could be distinguished from the other photographs . . . but whether the distinction made it unnecessarily suggestive." (Citations omitted; internal quotation marks omitted.) Id., 161.

We conclude that the photographic arrays administered to the witnesses were not suggestive. First, we address the defendant's arguments that the arrays were composed in such a manner that they unfairly highlighted her. The court considered the defendant's argument that she appeared to be a different age than the majority of the people in the array. The court, however, found that the defendant did not appear "to be substantially different in age or appearance from the other individuals who are in the array. . . . [T]he array was made in black and white so as not to highlight the defendant . . . ." The defendant also argues that her photograph in the array is the only photograph that depicts someone smiling. To be unnecessarily suggestive, a variation must highlight the defendant to the point that it affected the witnesses' selection of the defendant. See *State* v. *Fullwood*, supra, 193 Conn. 247;

see also *State* v. *Marquez*, supra, 291 Conn. 143. After our own scrupulous review of the array, we are not persuaded that the defendant looks so different from the other women in the array so as to make the array unduly suggestive. Some, but not all, of the photographs in the arrays depict females with what may be described as neutral facial expressions. In her photograph, the defendant appears to be smiling slightly but, similar to the appearance of the other females depicted in the array, her teeth are not visible. Our careful examination of the arrays does not lead us to conclude that the defendant appears to be highlighted in the array or that she was dissimilar to the other females depicted therein. Thus, our examination of the arrays does not lead us to conclude that the court erred in finding that the photographs used were not so dissimilar that they rendered the arrays suggestive.[3]

The defendant also argues that there was an increased risk that the witnesses would select the defendant's photograph because the photographs were administered simultaneously instead of sequentially.[4]

[3] The defendant cites to one case from this court and several out-of-state cases for the proposition that when the constituent photographs of an array contain individuals with disparate ages than that of the defendant, the array is suggestive. See *State* v. *Small*, 1 Conn. App. 584, 587–88, 474 A.2d 460 (1984); see also *United States* v. *Wade*, 388 U.S. 218, 232, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *United States* v. *Castro-Caicedo*, 775 F.3d 93, 98 (1st Cir. 2014), cert. denied, U.S. , 135 S. Ct. 1884, 191 L. Ed. 2d 753 (2015); *Swicegood* v. *Alabama*, 577 F.2d 1322, 1327–28 (5th Cir. 1978); *State* v. *Merrill*, 22 Ohio App. 3d 119, 122, 489 N.E.2d 1057 (1984). These cases generally note the actual variations in ages among those persons presented to a witness (or, at the very least, a finding by the trial court that a suspect was far older than the others presented). The defendant, however, made no showing, in the trial court or here, that there was *any* variation in the ages of the women in the array, relying exclusively on her argument that they *appear* different, which the trial court reasonably did not find.

[4] The arrays each contained eight photographs, but "[t]he police officers' use of an eight person photographic array is not, in and of itself, impermissibly suggestive." *State* v. *Smith*, 107 Conn. App. 666, 674, 946 A.2d 319, cert. denied, 288 Conn. 902, 952 A.2d 811 (2008).

In *State* v. *Marquez*, supra, 291 Conn. 156, our Supreme Court opined that "this continues to be an issue particularly ill suited to generic, bright line rules," and that "[d]ue process does not require the suppression of a photographic identification that is not the product of a double-blind, sequential procedure." (Internal quotation marks omitted.) The defendant, quoting from *State* v. *Guilbert*, 306 Conn. 218, 238, 49 A.3d 705 (2012), argues that "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure . . . ."[5]

There are two problems with the defendant's argument. As this court noted in *State* v. *Grant*, 154 Conn. App. 293, 311, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015), "[t]he principal issue before the court in *Guilbert* was not whether any particular identification procedures are constitutionally mandated, but whether courts are obligated to admit under specified circumstances qualified expert testimony concerning the fallibility of eyewitness identification under *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), to aid juries in their evaluation of identification evidence." The second problem is that the quotation from *Guilbert* that the defendant cites, by its very terms, pertains to *reliability*, not *suggestiveness*. Therefore, the defendant's argument that the police officers' use of simultaneous photographic arrays was suggestive is not borne out by our appellate precedent.

Considering the totality of the circumstances after our scrupulous review, the photographic arrays and the

[5] There was never any discussion before the trial court as to whether the arrays were administered using a double-blind procedure, but testimony from the suppression hearing indicates that the officer who contacted Carney was also involved in the administration of the array to Juan Febles. Regardless, the defendant has not argued on appeal that the lack of a double-blind procedure resulted in an unduly suggestive array.

procedures employed in administering them were not unconstitutionally suggestive.[6] Therefore, we do not address the defendant's claim regarding reliability. See *State* v. *Outing*, 298 Conn. 34, 56, 3 A.3d 1 (2010) (our Supreme Court "consistently has declined to consider the reliability of the identification if [it concludes] that the procedure was not unnecessarily suggestive"), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). Additionally, because the defendant's claim regarding suppression of the witnesses' in-court identifications is entirely premised on her claim that the pretrial identifications were suggestive and unreliable, it, too, must fail. Thus, the court did not abuse its discretion in denying the motion to suppress.

II

The defendant also claims that the state failed to meet its burden of proof on the elements of three of the crimes of which she was convicted, namely, that the state failed to meet its burden of proof on the arson charge, the conspiracy to commit arson charge, and the insurance fraud charge pertaining to her mother's insurance claim for the home.[7] Specifically, the defendant contends that there was no evidence that she was connected to the homeowner's insurance claim or in any way benefited from it. The defendant also argues that the state bore the burden of proving that she intended to collect insurance proceeds in order to convict her of the arson and conspiracy to commit arson counts, and failed to present sufficient evidence in this

[6] Additionally, the evidence presented reflects that the witnesses were all instructed that the suspect might not appear in the array, each was presented only with a single array, and each witness was administered the array separately. Leary testified that he did not attempt to influence the witness' selection, and each witness separately confirmed at trial that no officer attempted to influence his or her selection.

[7] At oral argument before this court, the defendant indicated that she was not claiming that there was insufficient evidence to convict her of the insurance fraud charge pertaining to her car.

regard. We agree with the defendant that the state failed to present sufficient evidence to prove that she committed insurance fraud, but disagree that, in order to be convicted of arson or conspiracy to commit arson, she must have intended to benefit from any insurance proceeds.

The defendant seeks review of her claims of insufficient evidence under the doctrine of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015); however, "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding* . . . . [Thus] we review an unpreserved sufficiency of the evidence claim as though it had been preserved." (Internal quotation marks omitted.) *State* v. *Josephs*, 328 Conn. 21, 35 n.11, 176 A.3d 542 (2018).

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider

it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 542–43, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 131, A.3d (2018).

A

We first address the defendant's claim that there was insufficient evidence to convict her of arson. Specifically, the defendant argues that her conviction should

be vacated because "there was no evidence that [the] defendant intended to collect insurance proceeds from damages to the home." We disagree.

General Statutes § 53a-111 (a) provides in relevant part: "A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined insection 53a-100,[8] he starts a fire or causes an explosion, and . . . (3) such fire or explosion was caused for the purpose of collecting insurance proceeds for the resultant loss . . . ." (Footnote added.) Thus, to obtain a conviction, the state needed to prove beyond a reasonable doubt that the defendant (1) started the fire (2) to destroy her mother's home (3) with the "intent to defraud" an insurance company. *State* v. *Woodson*, 227 Conn. 1, 9, 629 A.2d 386 (1993). The defendant does not challenge the fact that the state presented evidence that she started the fire or that the fire was intended to destroy her mother's home. Instead, the defendant argues that there was no evidence that she had she started the fire with the intent of collecting insurance proceeds related to the homeowner policy.

The defendant must have the specific intent to defraud in order to be guilty pursuant to § 53a-111 (a) (3). *State* v. *Joyce*, 243 Conn. 282, 298–99, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). Specific intent is usually proven by circumstantial evidence. *State* v. *Williams*, 169 Conn. 322, 334, 363 A.2d 72 (1975). Our Supreme Court has recognized that "intent is often inferred from conduct

[8] General Statutes § 53a-100 (a) provides in relevant part: "(1) 'Building' in addition to its ordinary meaning, includes any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy. Where a building consists of separate units, such as, but not limited to separate apartments, offices or rented rooms, any unit not occupied by the actor is, in addition to being a part of such building, a separate building . . . ."

. . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . [A]ny such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded [on] the evidence." (Internal quotation marks omitted.) *State* v. *Hedge*, 297 Conn. 621, 657–58, 1 A.3d 1051 (2010).

The record supports a rational inference that the defendant acted with the specific intent to defraud because of evidence that the defendant and her mother acted in concert before, on the day of, and after the fire. The evidence supported the finding that the defendant's mother filed an insurance claim for the property damage caused by her daughter. Prior to lighting the fire, the defendant stowed valuables belonging to both her and her mother in the trunk of her car. There was also evidence that the defendant's mother packed items in her own car and made arrangements to be away from her home when the defendant started the fire. This culmination of the circumstantial evidence could lead a reasonable jury to infer that the defendant did not start the fire simply to destroy her mother's home, but that the defendant's conduct was part of a plan to defraud and that she possessed the requisite intent when she started the fire.

The defendant also challenges her conspiracy conviction on the limited ground that the evidence was insufficient to establish that she possessed the requisite mens rea for the underlying crime. Because of our conclusion that the defendant acted with an intent to defraud, however, there is sufficient evidence to support the inference that the defendant possessed the requisite intent to commit the arson.

B

We finally address the defendant's claim that there was insufficient evidence that she violated § 53a-215

(a) (2). Specifically, she argues that the insurance fraud statute required the state to prove that she assisted or conspired with another to make or prepare a statement in connection with her mother's fraudulent insurance claim and that the state presented no evidence in this regard. We agree with the defendant.

Section 53a-215 (a) provides in relevant part: "A person is guilty of insurance fraud when the person, with the intent to injure, defraud or deceive any insurance company . . . (2) assists, abets, solicits, or conspires with another to *prepare or make any written or oral statement* that is intended to be presented to any insurance company in connection with, or in support of, any application for any policy of insurance or any claim for payment or other benefit pursuant to such policy of insurance, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such application or claim for the purposes of defrauding such insurance company." (Emphasis added.)

As there is no precedent from this court or our Supreme Court interpreting the meaning of § 53a-215 (a) (2), our resolution of this portion of the defendant's claim becomes an issue of statutory interpretation. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does

not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Footnote omitted; internal quotation marks omitted.) *State* v. *Leak*, 297 Conn. 524, 532–33, 998 A.2d 1182 (2010). "Issues of statutory construction raise questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 13, 981 A.2d 427 (2009).

Per the plain and unambiguous terms of § 53a-215 (a) (2), in order to establish guilt, the state must present evidence that the defendant engaged in conduct related to the making or preparing of the insurance claim. We agree with the state that this does not require evidence of physically filing the claim. We disagree with the state's argument, however, that the same evidence that supports the defendant's arson conviction can be used to uphold her insurance fraud conviction. Although this evidence supports the inference that the defendant intended to defraud when she started the fire, it does not reasonably support the inference that she engaged in the making or preparation of the actual statement given to Homesite. Ultimately, after a thorough review of the record, we conclude that there is no evidence that the defendant participated in the making or preparation of any statement provided to Homesite. Thus, the defendant's conviction under § 53-215 (a) (2) cannot stand.

The judgment is reversed only with respect to the defendant's conviction of insurance fraud under § 53a-215 (a) (2) and the case is remanded with direction to render a judgment of acquittal on that charge and to resentence the defendant on the conviction of arson in the first degree, conspiracy to commit arson in the first degree and insurance fraud in violation of § 53a-215 (a) (3); the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

REBECCA BISSON *v.* WAL-MART STORES, INC.
(AC 39965)

DiPentima, C. J., and Sheldon and Prescott, Js.

Syllabus

The plaintiff, a business invitee of the defendant company, brought this premises liability action against the defendant, seeking to recover damages for personal injuries she sustained when she allegedly slipped and fell on an accumulation of water while walking in the main aisle of the defendant's store. The plaintiff alleged that her fall was caused by, inter alia, the defendant's negligence and carelessness in creating the alleged dangerous and hazardous condition on the floor, and failing to properly inspect its premises to detect and remedy that condition. The defendant filed a motion for summary judgment on the ground that there was no factual basis on which a reasonable jury could find that the defendant had actual or constructive notice of the alleged defect. In support, the defendant attached an excerpt from the plaintiff's deposition and an affidavit of its employee, C. The plaintiff claimed that a genuine issue of material fact existed as to whether the defendant had constructive notice of the alleged defect and, in support of her objection, submitted a copy of C's deposition and a copy of a video recording of the events leading up to, and including, the plaintiff's fall. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. On appeal, the plaintiff claimed, inter alia, that the trial court improperly concluded that she failed to present evidence demonstrating the existence of a disputed factual issue as to the matter of constructive notice. Specifically, she claimed that C's deposition contained contradictions regarding whether she actually performed a safety sweep of the main aisle prior to the plaintiff's fall and that C's deposition testimony regarding the time that had elapsed from her safety sweep of the main aisle to the plaintiff's fall was inconsistent. *Held*:

1. The trial court properly concluded that the defendant met its initial burden of establishing the absence of a genuine issue of material fact with respect to the constructive notice element of a premises liability action for a business invitee; the defendant's evidence, particularly C's affidavit, established a forty second maximum time period between the creation of the defect and the plaintiff's fall, and that brief period of time in which the defect could have existed did not create a genuine issue of material fact with respect to the constructive notice element, as the defendant, acting through its employees' exercise of due care, did not have sufficient time to discover and remedy the alleged defect, a puddle of water on the floor of its store.

2. The trial court properly concluded that the plaintiff failed to present evidence demonstrating the existence of a disputed factual issue as to the constructive notice element: the plaintiff's attempt to inject a question of untruthfulness into C's deposition regarding whether she had performed a safety sweep was unsupported by the record, as the plaintiff's argument failed to appreciate the distinction between two different types of safety sweeps performed at the defendant's store, the plaintiff's claim that the surveillance video showed that C never looked down or directly in the area of the plaintiff's fall amounted to nothing more than speculation on behalf of the plaintiff because it was not possible to discern where C's gaze was directed when she performed her safety sweep due to the low quality of the video recording, and although C's deposition testimony regarding the time that had elapsed from her safety sweep of the main aisle to the plaintiff's fall included isolated references to both a five and ten minute time frame, C's deposition, when read as a whole, demonstrated that the plaintiff's fall occurred in the area where, approximately forty seconds prior, C had conducted a safety sweep, and that time period was confirmed by the video recording; moreover, the plaintiff's claim that the presence of snow on the ground on the day of the plaintiff's fall increased the defendant's duty to keep its premises in a reasonably safe condition was inadequately briefed and not reviewable.

Argued March 12—officially released September 11, 2018

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Tyma*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to reargue and for reconsideration, and the plaintiff appealed to this court. *Affirmed.*

Ryan K. Miller, for the appellant (plaintiff).

Michael P. Kenney, with whom, on the brief, was *Kate J. Boucher*, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. In this premises liability action, the plaintiff, Rebecca Bisson, challenges the summary judgment rendered in favor of the defendant, Wal-Mart

Stores, Inc.,[1] in which the trial court determined that (1) the defendant met its burden of establishing that no genuine issue of material fact existed regarding constructive notice of the defect alleged and (2) that the plaintiff's own evidence did not establish the existence of a genuine issue of material fact. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the plaintiff's appeal. The plaintiff commenced this premises liability action on November 13, 2013. In the amended complaint, dated March 4, 2014, the plaintiff alleged that on February 12, 2013, she entered the defendant's store in Naugatuck with her aunt. While walking in the main aisle of the store, the plaintiff slipped and fell on an accumulation of water. The plaintiff suffered immediate pain in her left knee, and an employee of the defendant quickly offered her assistance.

The plaintiff claimed that her fall was caused by the defendant's negligence and carelessness in creating the dangerous and hazardous condition on the floor, failing to remedy the condition, failing to warn the plaintiff of the condition, failing to properly inspect its premises to detect and correct the condition and failing to exercise reasonable care under the circumstances. The plaintiff also claimed to have suffered a variety of injuries in the fall as a result of the defendant's negligence and carelessness.[2] The defendant filed an answer, denying the allegations of negligence and carelessness, and raised the special defense of comparative negligence.

[1] The plaintiff named "Wal-Mart Stores, Inc." as the defendant in her initial complaint. Thereafter, the plaintiff amended the complaint to include the proper legal name of the defendant, that is, "Wal-Mart Stores East I, L.P."

[2] Specifically, the plaintiff alleged various injuries to her left knee, heart palpitations, stomach pains and nausea, difficulty sleeping, headaches and physical and emotional pain and suffering.

On July 6, 2016, the defendant filed a motion for summary judgment. Specifically, it argued that "[t]he plaintiff's negligence claim against [the defendant] fails as a matter of law because there is no factual basis upon which a reasonable jury could find that [the defendant], through its agents, servants and/or employees, had actual or constructive notice of the alleged defect at issue." Attached to the defendant's memorandum of law in support of the motion for summary judgment were an excerpt of the plaintiff's deposition and an affidavit of Jennifer Card, an employee of the defendant, who had offered assistance to the plaintiff after her fall. Card's affidavit stated: "[The plaintiff's] fall occurred in the exact area where I had performed a safety sweep less than one minute ([forty] seconds) prior . . . [and] I did not observe any water, or other liquid, on the area of the floor where [the plaintiff] fell during my safety sweep . . . ."

On August 18, 2016, the plaintiff filed an objection to the defendant's motion for summary judgment. She argued that "contradictory pieces of evidence . . . bring about a material fact as to the length of time the water, which caused the [p]laintiff to slip and fall, existed." Specifically, the plaintiff argued that Card's affidavit, which she labeled as "self-serving," was contradicted by Card's deposition. Additionally, the plaintiff contended that a surveillance video, provided by the defendant, disproved Card's statements contained in her affidavit and deposition.[3]

On September 16, 2016, the defendant replied to the plaintiff's objection. The defendant noted in its reply memorandum that the plaintiff had failed to produce the surveillance video for the trial court's inspection

[3] The plaintiff attached Card's entire deposition and affidavit to her memorandum of law opposing the defendant's motion for summary judgment. The plaintiff did not, however, include a copy of the video with her memorandum of law.

and, therefore, that video was not part of the record before the court on the summary judgment proceeding. It did note, however, that if the surveillance video were to be considered, it would support Card's deposition testimony and her affidavit.

On September 30, 2016, the plaintiff filed a surreply memorandum, in which she argued that "[t]he surveillance video depicts a different version of what is stated in . . . Card's deposition and affidavit. The [d]efendant's counsel gave this video to the undersigned, without any objection or disagreement, several months ago. It is hereby enclosed for the court's review as an addendum." Attached to the surreply was an affidavit from the plaintiff's counsel stating that he had submitted a USB flash drive to the court containing a true copy of the February 12, 2013 surveillance video from the defendant's Naugatuck store that the defendant's counsel previously had mailed to him on August 28, 2015.

The court, *Tyma*, *J.*, held a hearing on the motion for summary judgment on November 21, 2016. At the start of the hearing, the court noted that it had watched the surveillance video twice in chambers with both counsel present. The defendant's counsel argued that the video demonstrated that the claimed defect, water on the floor, had existed for no more than one minute, and more likely forty-two seconds. Specifically, the defendant relied on Card's affidavit and the surveillance video to support its contention that she had scanned the area of the plaintiff's fall approximately forty seconds prior to that event and did not see any water on the floor. Such a minimal time period could not constitute a sufficient length of time for constructive notice of the defect, according to the defendant's counsel. Further, the defendant's counsel also directed the trial court to our decision in *Hellamns* v. *Yale-New Haven Hospital, Inc.*, 147 Conn. App. 405, 82 A.3d 677 (2013), cert. granted, 311 Conn. 918, 85 A.3d 652 (2014)

(appeal withdrawn May 9, 2014), in support of the defendant's argument for summary judgment.

The plaintiff's counsel challenged the defendant's claim that there was no genuine issue as to the duration of the defect. Specifically, he argued that, given the fact that there was snow on the ground outside on the day of the plaintiff's fall in the store, a genuine issue of material fact existed as to whether the defendant had "taken reasonable steps to make sure that [its] invitees, [its] customers, were safe under the circumstances." The plaintiff's counsel also claimed that inconsistencies between Card's affidavit and her deposition regarding the nature and details of her "safety sweep" precluded the granting of summary judgment in favor of the defendant.

The court iterated that it had watched the surveillance video twice and commented that it showed Card walking down one of the main aisles of the defendant's store.[4] Specifically, it noted that Card traversed the area where the plaintiff's accident would occur. The court then stated: "And approximately forty to forty-two or forty-three seconds later, we see the plaintiff come and slip and fall in the spot where there's allegedly water. So we do know from the surveillance video that you got that it's consistent with [Card's] deposition testimony, that was about forty seconds." The plaintiff's

[4] Specifically, the court stated: "We watched the video and we timed it. So, the video shows that this store employee, Ms. Card, is walking down a Wal-Mart, in one of the main aisles in Wal-Mart, and there's people milling about. And she walks, we watched it twice, she walks by the place where allegedly water is. And approximately forty to forty-two or forty-three seconds later, we see the plaintiff come and slip and fall in the spot where there's allegedly water. So, we do know from the surveillance video that you got that it's consistent with her deposition testimony, that was about forty seconds. . . . It was forty seconds, forty-two, forty-three. It's less than a minute, no doubt about that." Later, the court noted that the video established a time frame of approximately forty seconds from the time that Card walked in the main aisle to the plaintiff's fall at that location.

counsel subsequently claimed that the video supported the claim that a reasonable person could conclude that water had been on the floor for a longer period of time.

The court then rendered an oral decision[5] granting the defendant's motion for summary judgment. It expressly based its decision on Card's affidavit, her deposition testimony and the surveillance video.[6] It concluded that the defendant had met its initial burden of demonstrating that there was no genuine issue of material fact that the defendant did not have constructive notice of the water on the floor.[7] It then determined that the plaintiff had failed to meet her burden of offering contrary evidence demonstrating the existence of a genuine issue of material fact.[8] The court subsequently denied

[5] The court, in lieu of issuing a written memorandum of decision, signed a copy of the transcript on December 5, 2016. See Practice Book § 64-1 (a).

[6] As noted, the court and the parties referred to the surveillance video at the November 21, 2016 hearing regarding the defendant's motion for summary judgment. On appeal, the parties discussed this video in their respective appellate briefs. At oral argument before this court, however, the defendant's counsel commented that the surveillance video was not part of the appellate record.

Subsequent to oral argument, we issued an order, sua sponte, instructing the trial court and counsel for the parties to rectify the record and to provide this court with a copy of the February 12, 2013 surveillance video on a USB flash drive. On May 7, 2018, the parties filed, and the trial court accepted, a stipulation that the attached USB flash drive contained a copy of the requested video. We have reviewed the surveillance video provided by the parties.

[7] Specifically, the court stated: "So based upon the evidence, particularly, the affidavit of . . . Card, and the surveillance video that I've seen . . . the defendant . . . has met its burden, initial burden of proof showing that there's no genuine issue of material fact that [the defendant] did not have constructive notice of this water on the floor. This is not an actual defect, actual notice case."

[8] Specifically, the court stated: "The plaintiff has not met [her] burden to offer contrary evidence from which a jury reasonably can conclude that [the defendant] had notice of the water on the floor and failed to take reasonable steps to remedy it after the notice. The plaintiff's entire argument, in view of the evidence, is based upon the plaintiff, in essence, making [the defendant] an insurer of the safety of all its business invitees on the premises. There's absolutely no evidence as to how long the water existed on the

the plaintiff's motion for reconsideration or reargument. This appeal followed.

We begin with our standard of review and the relevant legal principles. The fundamental purpose of summary judgment is to prevent unnecessary trials. *Stuart* v. *Freiberg*, 316 Conn. 809, 822, 116 A.3d 1195 (2015). "The standard by which we review a trial court's decision to grant a motion for summary judgment is well established. Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact *together with the evidence disclosing the existence of such an issue*. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. . . . Mere assertions of fact, whether contained in a complaint or in a brief, are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]. . . .

"As a general rule, then, [w]hen a motion for summary judgment is filed and supported by affidavits and other documents, an adverse party, by affidavit or as otherwise provided by . . . [the rules of practice], must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, summary judgment shall be entered against him. . . . Requiring the

floor prior to the plaintiff's fall. And to find otherwise would be to inject speculation into the case."

nonmovant to produce such evidence does not shift the burden of proof. Rather, it ensures that the nonmovant has not raised a specious issue for the sole purpose of forcing the case to trial. . . .

"More specifically, [t]he party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counter-affidavits and concrete evidence. . . . Our review of the trial court's decision to grant a motion for summary judgment is plenary." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Bruno* v. *Whipple*, 162 Conn. App. 186, 213–15, 130 A.3d 899 (2015), cert. denied, 321 Conn. 901, 138 A.3d 280 (2016); see also Practice Book § 17-49.

The parties do not dispute that the complaint set forth a claim of negligence based upon premises liability, that the plaintiff was a business invitee[9] and that this was

[9] "A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." (Internal quotation marks omitted.) *Gargano* v. *Azpiri*, 110 Conn. App. 502, 506, 955 A.2d 593 (2008). As a result of this status, the defendant owed the plaintiff the duty to keep its premises in a reasonably safe condition. *Baptiste* v. *Better Val-U Supermarket*, Inc., 262 Conn. 135, 140, 811 A.2d 687 (2002); *Gulycz* v. *Stop & Shop Cos.*, 29 Conn. App. 519, 521, 615 A.2d 1087, cert. denied, 224 Conn. 923, 618 A.2d 527 (1992).

a constructive notice case. Accordingly, the following relevant legal principles apply to this action. "To hold the defendant liable for her personal injuries . . . the plaintiff must prove (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Palmieri* v. *Stop & Shop Cos.*, 103 Conn. App. 121, 123–24, 927 A.2d 371 (2007); see also *Martin* v. *Stop & Shop Supermaket Cos.*, 70 Conn. App. 250, 251, 796 A.2d 1277 (2002).

Our Supreme Court has explained that "[f]or [a] plaintiff to recover for the breach of a duty owed to [him] as [a business] invitee, it [is] incumbent upon [him] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it. . . . [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. . . . In the absence of allegations and proof of any facts that would give rise to an enhanced duty . . . [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers. . . .

"*Accordingly, business owners do not breach their duty to invitees by failing to remedy a danger unless they had actual or constructive notice of that danger. To defeat a motion for summary judgment in a case based on allegedly defective conditions, the plaintiff has the burden of offering evidence from which a jury reasonably could conclude that the defendant had notice of the condition and failed to take reasonable steps to remedy the condition after such notice.*" (Citation omitted; emphasis added; internal quotation marks

omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116–17, 49 A.3d 951 (2012); see also *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 776, 918 A.2d 249 (2007); see generally *Colombo* v. *Stop & Shop Supermarket Co.*, 67 Conn. App. 62, 64, 787 A.2d 5 (2001) ("The law concerning notice in this type of case is clear. The plaintiff bore the burden of proffering some evidence, either direct or circumstantial, from which the jury could infer that the defect she allegedly encountered existed for a length of time sufficient to put the defendant on actual or constructive notice of its existence."), cert. denied, 259 Conn. 912, 789 A.2d 993 (2002).

"The controlling question in deciding whether the defendant had constructive notice of the defective condition is whether the condition had existed for such a length of time that the defendants' employees should, in the exercise of due care, have, discovered it in time to have remedied it. . . . What constitutes a reasonable length of time within which the defendant should have learned of the defect, how that knowledge should have been acquired, and the time within which, thereafter, the defect should have been remedied are matters to be determined in light of the particular circumstances of each case. The nature of the business and the location of the defective condition would be factors in this determination. To a considerable degree each case must be decided on its own circumstances." (Internal quotation marks omitted.) *Hellamns* v. *Yale-New Haven Hospital, Inc.*, supra, 147 Conn. App. 408–409; see *Considine* v. *Waterbury*, 279 Conn. 830, 870, 905 A.2d 70 (2006); see also *Gulycz* v. *Stop & Shop Cos.*, 29 Conn. App. 519, 521, 615 A.2d 1087 (whether defendant had constructive notice of condition causing defect turns on whether condition existed for length of time sufficient for defendant's employees, in exercise of due care, to discover defect in time to have remedied it), cert. denied, 224

Conn. 923, 618 A.2d 527 (1992). Nevertheless, as we will discuss in greater detail, a defect lasting under a minute has been held to be, as a matter of law, insufficient for a defendant to have discovered and remedied it, and thus fatal to a premises liability action. See, e.g., *James* v. *Valley-Shore Y.M.C.A., Inc.*, 125 Conn. App. 174, 183, 6 A.3d 1199 (2010) (no evidence that allegedly defective condition existed for such length of time that defendant's employees should have discovered it in exercise of due care and remedied it and, therefore, defendant entitled to summary judgment), cert. denied, 300 Conn. 916, 13 A.3d 1103 (2011).

First, the plaintiff argues that the court improperly concluded that the defendant met its initial burden of establishing the absence of a genuine issue of material fact. Specifically, she contends that Card's affidavit[10] was insufficient to demonstrate that no genuine issues of material fact existed.[11] We disagree.

The following additional facts are necessary for our analysis. The defendant moved for summary judgment

[10] The plaintiff describes Card's affidavit as "self-serving." We disagree with this description. Card is not a party to this action; she is an employee of the defendant. Additionally, employees of businesses frequently provide such affidavits in preparation for litigation. See, e.g., *Webster Bank* v. *Flanagan*, 51 Conn. App. 733, 749, 725 A.2d 975 (1999). Additionally, Card made a sworn statement before a notary public, subjecting her to penalty for giving false information. See id. Finally, we note that Card's affidavit comports with the requirements of Practice Book § 17-46, and the plaintiff failed to file a motion to strike her affidavit. See, e.g., *Doe* v. *West Hartford*, 328 Conn. 172, 178, 177 A.3d 1128 (2018).

[11] The plaintiff also contends that the court "flipped the burden of proof, [reading] the facts in the light most favorable to the [d]efendant, the moving party, rather than in the light most favorable to [the] [p]laintiff." The plaintiff offers no support for the bald assertion that the court improperly viewed the facts in a light most favorable to the defendant. Absent evidence to the contrary, we presume that the court acted properly. *LeSueur* v. *LeSueur*, 172 Conn. App. 767, 785–86, 162 A.3d 32 (2017); see also *Magsig* v. *Magsig*, 183 Conn. App. 182, 196, A.3d (2018) (this court will presume trial court acted properly in performance of its duties). Accordingly, we reject this meritless contention.

on July 6, 2016. It attached a memorandum of law, a portion of the plaintiff's deposition, dated August 6, 2015, and an affidavit from Card dated August 12, 2015. In her deposition, the plaintiff had stated that there was snow on the ground on February 12, 2013, and that the liquid she had slipped on looked like water, was clear and did not have carriage track marks going through it. She also noted that Card had approached her after the fall and inquired if the plaintiff was okay or wanted to speak with a manager.

Card's affidavit set forth the following: Card was working on February 12, 2013; she witnessed the plaintiff's slip and fall; the plaintiff's fall occurred in the "exact area" that Card had performed a "safety sweep less than one minute ([forty] seconds) prior"; during the "safety sweep" Card had not observed any liquid, water or otherwise, where the plaintiff's fall occurred; after the plaintiff's fall, Card noticed, for the first time, a small puddle of water at the site of the plaintiff's fall; and Card believed that the water had originated from snow melting off the boots of several children who had been standing in that area. The affidavit emphasized that "[t]he water was not on the floor for more than [forty] seconds before the fall."

We emphasize that the defendant, as the movant for summary judgment, bore the burden of establishing the nonexistence of any genuine issue of material fact and that it was entitled to judgment as a matter of law under the relevant principles of our premises liability law. See *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013); see also *Capasso* v. *Christmann*, 163 Conn. App. 248, 258–59, 135 A.3d 733 (2016).

The defendant submitted evidence that the liquid on the floor in the main aisle of the store at the site of the plaintiff's fall had been there for no more than forty

seconds following Card's safety sweep.[12] Specifically, Card's affidavit established this time frame. She averred that she had performed a safety sweep in the "exact area" of the plaintiff's fall forty seconds later. At the time of her sweep, Card observed no liquid on the floor. Card further posited that the water on the floor had come from snow melting off the boots of four to five children. Additionally, as further support for this sequence of events, the defendant had produced testimony from the plaintiff's deposition that the liquid on the floor was clear and did not have any carriage marks running through it. The unsullied nature of the spill supported the time frame claimed by the defendant.[13]

The trial court then considered whether, under our case law, a genuine issue of material fact existed with respect to the issue of constructive notice. We iterate that "[t]he controlling question in deciding whether the defendants had constructive notice of the defective condition is whether the condition existed for such a length of time that the defendants should, in the exercise of reasonable care, have discovered it in time to remedy it. . . . What constitutes a reasonable length of time is largely a question of fact to be determined in the light of the particular circumstances of a case." (Citation omitted; internal quotation marks omitted.) *Considine* v. *Waterbury*, supra, 279 Conn. 870; see also *Hellamns* v. *Yale-New Haven Hospital, Inc.*, supra, 147 Conn. App. 408–409. In the absence of evidence that the claimed defect existed for such a length of time that

[12] At the hearing before the trial court, defense counsel relied on Card's affidavit, Card's deposition testimony and the video recording from the store, to support the argument that the water had been on the floor for less than one minute.

[13] But see *Colombo* v. *Stop & Shop Supermarket Co.*, supra, 67 Conn. App. 62–65 (trial court properly directed defendant's verdict where plaintiff's only evidence as to length of time that milk was on floor was fact that it was dirty, and this court noted that to conclude otherwise would permit conclusion regarding time of defect's existence solely on conjecture and speculation).

the defendant, through exercise of due care by its employees, should have discovered and remedied it, we have affirmed the granting of summary judgment in favor of the defendant. See *James* v. *Valley-Shore Y.M.C.A., Inc.*, supra, 125 Conn. App. 179–83.

We agree with the trial court that the defendant satisfied its initial burden of demonstrating that there was no genuine issue of material fact with respect to the element of constructive notice.[14] The defendant's evidence, particularly Card's affidavit, established a forty second maximum time period between the creation of the defect and the plaintiff's fall. Under our case law, a forty second window constitutes an insufficient period of time for a business owner to discover and remedy a small puddle of water on the floor in the exercise of due care.

For example, in *White* v. *E & F Construction Co.*, 151 Conn. 110, 111–12, 193 A.2d 716 (1963), the plaintiff, an employee of a tenant in the apartment house owned by the defendant, removed laundry from an outdoor clothesline due to rain. After placing the clothes into a basket, the plaintiff proceeded to the basement stairs. Id., 112. She slipped on the wet landing and fell to the basement floor. Id. "About two minutes before the plaintiff fell, her employer had noticed that the steps were wet by reason of rain which was coming through

[14] During the hearing on the motion for summary judgment, the plaintiff's counsel argued that the defendant had not provided enough evidence regarding the question of constructive notice. The trial court disagreed: "[The defendant has] shown plenty of evidence. My question is now the burden shifts to you. You have to come forth with what evidence do you have that the water existed for a sufficient length of time such that the defendant should have been on notice of that and remedied it. What is it? The burden is on you now. [The defendant has] met [its] burden." The plaintiff's counsel disagreed that the defendant had met its initial burden of submitting evidence that there was no genuine issue of material fact as to the element of constructive notice. The court responded: "But assume [the defendant] has because I'm telling you [it] has."

the open doorway. . . . Therefore, the crucial question is whether the water had been there for such a length of time that the defendant should, in the exercise of due care, have discovered it in time to have removed it." (Citations omitted.) Id., 112–13.

The trial court directed a verdict for the defendant following the presentation of evidence. Id., 111. In affirming the judgment of the trial court, our Supreme Court stated: "The evidence reveals no more than that the condition which caused the plaintiff to fall had been present for about two minutes before the time she entered the building. This evidence would not support a finding that the condition had existed for a sufficient length of time to charge the defendant with constructive notice of it." Id., 113–14.

More recently, this court considered whether a plaintiff had established that a defendant had constructive notice in *Hellamns* v. *Yale-New Haven Hospital, Inc.*, supra, 147 Conn. App. 411–14.[15] In that case, the plaintiff slipped and fell on a puddle of water while walking in the hallway of a medical building owned by the defendant. Id., 407. "A janitor, pushing a cart with cleaning

[15] The plaintiff contends that the trial court improperly relied on our decision in *Hellamns* due to the procedural posture of that case. We acknowledge that that appeal stemmed from a judgment for the plaintiff following a court trial. *Hellamns* v. *Yale-New Haven Hospital, Inc.*, supra, 147 Conn. App. 407. In that case, we agreed with the defendant that the trial court had applied a standard of care contrary to law and that the plaintiff had failed to establish that the defendant had notice of the defect. Id., 407–14. For these reasons, we reversed the judgment of the trial court and remanded the case with direction to render judgment for the defendant. Id., 414.

Despite the procedural differences between *Hellamns* and the present case, we conclude that the guidance that the former provides regarding the matter of constructive notice informs our analysis in the latter. Specifically, the principle that "[e]vidence establishing that the defective condition existed a few seconds before the accident is insufficient to establish that the defendant had constructive notice of that defect" applies whether at the summary judgment stage or a judgment for a party subsequent to trial. Id., 413. Accordingly, we disagree with the plaintiff that the court erred in relying on *Hellamns*.

material and a warning sign, walked past the spot where the water had accumulated just prior to the plaintiff falling." Id. Following the trial, the court, acting as the fact finder, rendered judgment in favor of the plaintiff. Id.

On appeal, we agreed with the defendant that the plaintiff had failed to establish that it had notice of the defect. Id., 411. We noted that the only evidence regarding the issue of notice was the plaintiff's testimony that "a janitor walked past the puddle of water just before she fell." Id., 412. We concluded that this evidence was insufficient to support the finding that the defendant had notice of the defect and time to remedy it. Id., 413. "First, the plaintiff did not present the janitor, or any other employee . . . to establish for the court that the janitor actually saw the puddle of water before the accident. . . . *Second, the plaintiff's testimony established that a janitor passed the puddle of water only seconds before the plaintiff fell. Evidence establishing that the defective condition existed a few seconds before the accident is insufficient to establish that the defendant had constructive notice of that defect.* . . .

"Third, the plaintiff failed to establish that notice could be imputed to the defendant because the plaintiff did not present any evidence to establish that cleaning the specific hallway where the accident occurred was within the janitor's scope of employment." (Citations omitted; emphasis added.) Id.

For these reasons, we concluded in *Hellamns* that the trial court's finding that the defendant had notice of the defect was clearly erroneous and remanded the case with direction to render judgment for the defendant. Id., 414; see also *Correa* v. *Westfield America, Inc.*, Superior Court, judicial district of Middlesex,

Docket No. CV-13-6010576-S (October 2, 2014) (defendant property owner entitled to summary judgment on plaintiff's premises liability action where undisputed evidence demonstrated spill existed for only two minutes prior to fall); *Mason* v. *Wal-Mart Stores, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-10-6013281-S (May 1, 2012) (53 Conn. L. Rptr. 882, 883) (rendering judgment for defendant where plaintiff fell one minute after water had accumulated on floor from mulch bag and noting that "[i]t would be unreasonable . . . to find that the defendant has constructive notice of a hazardous condition that had been in existence for but one minute . . . [and that] [t]he defendant's store is large, and such minute-to-minute monitoring would be unfeasible").

In summary, the defendant submitted evidence that the defective condition in this case, a puddle of water, existed for, at most, forty seconds prior to the plaintiff's fall. Our Supreme Court has cautioned that "[e]vidence which goes no farther than to show the presence of a slippery foreign substance does not warrant an inference of constructive notice to the defendant." (Internal quotation marks omitted.) *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 777. Additionally, we are mindful that, under our law, business owners are not insurers of their customers' safety. Id., 790; *Hellamns* v. *Yale-New Haven Hospital, Inc.*, supra, 147 Conn. App. 410. We disagree with the plaintiff's statement that the defendant must offer "evidence of exactly how long the alleged defect was there . . . ."[16] Rather, to prevail on its motion for

[16] We have held that if a plaintiff fails to present any evidence as to the duration of the existence of a defect, the court properly may dismiss the action for failing to make out a prima facie case. *Gulycz* v. *Stop & Shop Cos.*, supra, 29 Conn. App. 521–23; see also *McCrorey* v. *Heilpern*, 170 Conn. 220, 221–22, 365 A.2d 1057 (1976) (Supreme Court reversed judgment in favor of plaintiff and remanded with direction to render judgment for defendant where plaintiff produced no evidence regarding length of time hole in floor outside plaintiff's apartment had existed); *Drible* v. *Village Improvement Co.*, 123 Conn. 20, 23–24, 192 A. 308 (1937) (trial court properly set aside jury verdict and rendered judgment for defendant where plaintiff

summary judgment, the defendant had to establish that the time period in which the defect could have existed was of such a minimal duration that its employees could not have been expected to discover and remedy it in the exercise of due care. *James* v. *Valley-Shore Y.M.C.A., Inc.*, supra, 125 Conn. App. 183.

Consistent with this case law, the brief period of time in which the defect could have existed here does not create a genuine issue of material fact with respect to the constructive notice element of a premises liability action for a business invitee. Stated differently, under these facts and circumstances, the defendant, acting through its employee's exercise of due care, did not have enough time to discover and remedy a puddle of water on the floor of its store. Therefore, the defendant met its initial burden of establishing that it was entitled to summary judgment. *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320.

Next, the plaintiff argues that the court improperly concluded that she failed to present evidence demonstrating the existence of a disputed factual issue as to the matter of notice. See, e.g., *Kurisoo* v. *Ziegler*, 174 Conn. App. 462, 468–69, 166 A.3d 75 (2017). Specifically, she contends that the evidence attached to her objection to the motion for summary judgment and her surreply established the existence of genuine issues of material fact so as to warrant the denial of the motion for summary judgment. We disagree.

The following additional facts will facilitate our discussion. The plaintiff filed her objection to the defendant's motion for summary judgment on August 18, 2016. In addition to her memorandum of law, the plaintiff filed the transcript of Card's deposition, dated August 3, 2016, and Card's August 12, 2015 affidavit,

provided no evidence as to length of time snow and ice had been on steps of building where plaintiff fell).

which had been attached to the defendant's memorandum. In the memorandum of law, the plaintiff referred to the video recording of the events leading up to, and including, her fall on February 12, 2013. The plaintiff included a copy of the video recording as an addendum to her surreply, dated September 30, 2016.

During her deposition, Card stated that employees of the defendant are required to perform safety sweeps any time they walk within the store. This obligation involves "picking up any items . . . picking up anything that is on [the store's] white tiles, putting it . . . back on the shelves." Card explained that, as a result of this requirement, she looked for potential hazards present on the floor any time she walked within the store. In contrast to this type of safety sweep, which was to be done at all times, the defendant's employees also conducted paged safety sweeps. At certain times, an overhead page informed the employees to stop their work, "walk the perimeter of [their] department, and . . . make sure everything is safe for the customers and [employees]." Card noted that she was "observant at all times."

In her deposition, Card stated that on February 12, 2013, although there had been no page, she had performed a safety sweep of the area where the plaintiff fell. Card specifically indicated that she had been looking down at the floor, and that there was "no chance" she was looking in the opposite direction, at her cell phone, or at a customer when she passed that particular spot. Although she initially claimed to have spoken with a customer for ten minutes, she immediately reconsidered her response and stated that it "was only like five minutes." After being reminded of the video recording, Card stated that she had performed the safety sweep forty seconds prior to the plaintiff's fall. After iterating that it was forty seconds, Card noted that it could have been "[m]aybe under a minute." Later, Card indicated

that the water which had caused the plaintiff to fall was not present during her safety sweep. After a further colloquy with the plaintiff's counsel, Card resolutely indicated that the fall occurred forty seconds after her safety sweep.

On appeal, the plaintiff appears to argue that Card's deposition contains contradictions regarding whether she "truly" performed a safety sweep prior to the plaintiff's fall.[17] We do not agree. As noted, Card stated in her deposition that the defendant's employees were required to perform safety sweeps whenever they were walking within the store. In addition, Card described a paged safety sweep, when employees check the perimeters of their assigned departments for any hazards following an overhead page. The plaintiff's argument fails to appreciate the two types of safety sweeps performed at the defendant's store. Although Card stated that she had not performed a paged safety sweep in the main aisle prior to the plaintiff's fall, her statement was consistent with her testimony that safety sweeps are to be done any time an employee walks in the store. The plaintiff's attempt to inject a question of untruthfulness or incredibility into Card's deposition regarding whether she had performed a safety sweep is unsupported by the record.

The plaintiff next argues that the surveillance video shows that Card "never looked down or directly in [the] area" of the plaintiff's fall. She further maintains this "fact" contradicts Card's deposition testimony and affidavit, and, therefore, creates a genuine issue of material fact. We disagree. We have reviewed the surveillance

[17] Specifically, the plaintiff argues in her brief that "[t]he fact that . . . Card says she was on a safety sweep, because she is always on a safety sweep during her entire shift, but it was not a called safety sweep by Wal-Mart, brings up a big question as to the truthfulness and credibility of those statements, which should be weighed by the trier of fact."

video recording and disagree with the plaintiff's contention that it depicts precisely where Card was looking at the time of her safety sweep in the main aisle just prior to the plaintiff's fall. Due to the presence of other shoppers, and the quality of the video, it is not possible to discern where Card's gaze was directed. This argument, therefore, amounts to nothing more than speculation on behalf of the plaintiff, which has no place in appellate review. See *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 54, 19 A.3d 215 (2011) (speculation and conjecture have no place in appellate review).

The plaintiff also argues that Card's deposition testimony regarding the time that had elapsed from her safety sweep of the main aisle to the plaintiff's fall was inconsistent, varying from forty seconds to five minutes to ten minutes. As a result, the plaintiff contends that a genuine issue of material fact exists.[18] We disagree. Despite her isolated references to a ten minute time frame, and then to a five minute time frame, Card's deposition, read as a whole, demonstrates her view that the plaintiff's fall occurred in the area where, approximately forty seconds prior, she had conducted a safety sweep.

Additionally, this forty second time period is confirmed by the video recording. When a court is presented with such evidence in deciding a motion for summary judgment, it should view the facts in the light depicted by the recording. *Scott* v. *Harris*, 550 U.S. 372, 378–81, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007);[19] see

[18] In its oral decision, the trial court acknowledged that Card's deposition testimony regarding the time between her safety sweep and the plaintiff's fall got "a little bit muddied."

[19] In *Scott* v. *Harris*, supra, 550 U.S. 374–75, the petitioner, a Georgia county police deputy, employed a certain technique to stop the respondent, an individual who had led law enforcement on a high speed pursuit for nearly ten minutes. As a result, the respondent crashed his vehicle and was rendered a quadriplegic. Id., 375. The respondent filed an excessive force action, and the petitioner moved for summary judgment on the basis of

also *Alvarez* v. *Building & Land Technology Corp.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-13-6017699-S (February 7, 2018) (video recording used to determine that there was no material issue of fact); *Carter* v. *Board of Education*, Superior Court, judicial district of New London, Docket No. CV-14-6022709-S (October 20, 2015) (citing *Scott* v. *Harris*, supra, 380, and noting that when opposing parties tell two different contradictory stories, one of which is contradicted by record so that no reasonable jury could believe it, court should not adopt that version of facts); *Sipes* v. *Serrano*, Superior Court, judicial district of Tolland, Docket No. CV-07-5001483-S (July 25, 2007) (43 Conn. L. Rptr. 832, 833) (same).

Finally, the plaintiff argues that, due to the presence of snow on the ground on the day of her fall, the defendant "should have taken steps to remedy the fact that the snow caused a heightened dangerous condition to

qualified immunity. Id., 375–76. The United States District Court for the Northern District of Georgia denied the petitioner's motion, and the United States Court of Appeals for the Eleventh Circuit affirmed that judgment. Id., 376.

In reversing the judgment of the Court of Appeals, the United States Supreme Court first noted that the parties had presented vastly different versions of the events that resulted in the respondent's injuries. Id., 378–79. It then stated that, generally, a court was obligated to view the facts in the light most favorable to the nonmoving party, the respondent in this case. Id., 378. "There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals." Id.

The United States Supreme Court further noted that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. . . . Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." Id., 380–81.

the floors, where countless numbers of its invitees were walking. If there is snow on the ground, it is foreseeable that the snow would constitute a known and foreseeable danger." To the extent that the plaintiff suggests that the presence of snow on the ground increased the defendant's duty to keep its premises in a reasonably safe condition, we conclude that this argument is inadequately briefed. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *Cadle Co.* v. *Ogalin*, 175 Conn. App. 1, 8, 167 A.3d 402, cert. denied, 327 Conn. 930, 171 A.3d 454 (2017).

Having considered and rejected the plaintiff's sundry arguments, we conclude that the court properly determined that the defendant met its initial burden of producing evidence that there was no genuine issue of material fact with respect to the constructive notice element of the plaintiff's claim. Additionally, the plaintiff failed to set forth evidence demonstrating a genuine issue of material fact regarding that issue. Accordingly, the court properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

A BETTER WAY WHOLESALE AUTOS, INC. *v.* SHANNON GAUSE (AC 40033)

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

Syllabus

The plaintiff used car dealer sought to vacate an arbitration award in favor of the defendant in connection with the defendant's purchase of a vehicle from the plaintiff in which the plaintiff failed to disclose that the vehicle was a manufacturer buyback. The defendant brought an arbitration claim against the plaintiff, alleging violations of numerous state and federal laws related to the sale of the vehicle. The arbitration submission was unrestricted. The arbitrator found that the vehicle did not have a windshield sticker or any other conspicuous display disclosing the vehicle's status as a manufacturer buyback and that the purchase order failed to clearly and conspicuously disclose its manufacturer buyback status, as required by statute (§ 42-179 [g] [1]) and state regulation (§ 42-179-9). The arbitrator concluded that the plaintiff had violated a provision (§ 42-110b [c]) of the Connecticut Unfair Trade Practices Act (CUTPA) and awarded the defendant compensatory damages, punitive damages, attorney's fees and costs. Thereafter, the plaintiff filed an application to vacate the arbitration award pursuant to the statute (§ 52-418 [a] [4]) governing the vacating of arbitration awards, and the defendant filed a motion to confirm the award. The trial court denied the application to vacate and granted the motion to confirm the award, concluding that there was no manifest disregard of the law by the arbitrator. On the plaintiff's appeal to this court, *held*:

1. Contrary to the defendant's claim that the appeal was moot because the plaintiff failed to oppose her motion to confirm the award, the plaintiff could have obtained practical relief through a reversal of the trial court's decision denying its application to vacate, as the plaintiff filed its application to vacate prior to the defendant's filing the motion to confirm, and the motion to confirm would have been denied had the application to vacate been granted; accordingly, the appeal was not moot.
2. The plaintiff could not prevail on its claim that the arbitrator's award of punitive damages constituted a manifest disregard of the law pursuant to § 52-418 (a) (4): the arbitrator found and the plaintiff conceded in its appellate brief and at oral argument before this court that the plaintiff's failure to display prominently the manufacturer buyback disclosure on the vehicle and in the purchase order constituted a per se violation of CUTPA, and the arbitrator concluded that such violations, in addition to the plaintiff's actions of restricting the defendant from testing the vehicle, inducing the defendant to execute the purchase documents before inspection and attempting to deliver a vehicle that failed to meet

safety standards, constituted a reckless indifference of the defendant's rights to warrant punitive damages under CUTPA; moreover, the arbitrator acted within his discretion in crediting the defendant's evidence of the CUTPA violations against the plaintiff's lack of evidence in rebuttal, and because the arbitrator's conclusions did not indicate an extraordinary lack of fidelity to established legal principles, this court could not second-guess his conclusions.

Argued May 29—officially released September 11, 2018

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed a motion to confirm the award; thereafter, the matter was tried to the court, *M. Taylor*, *J.*; judgment denying the application to vacate and granting the motion to confirm, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Richard F. Wareing, with whom was *Daniel S. Blinn*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, A Better Way Wholesale Autos, Inc., appeals from the judgment of the trial court denying its application to vacate an arbitration award and granting the motion to confirm that award in favor of the defendant, Shannon Gause. The plaintiff claims that the court erred because the arbitrator's award of punitive damages constituted a manifest disregard of the law pursuant to General Statutes § 52-418 (a) (4).[1] We affirm the judgment of the court.

[1] The plaintiff additionally claims that the award of a nearly 4 to 1 punitive to compensatory damages ratio "border[s] on a constitutional deprivation of property." During oral argument before this court, the plaintiff conceded that this ratio claim was not raised before the trial court; accordingly, the claim is unpreserved, and we will not address it. See, e.g., *MBNA America Bank, N.A.* v. *Bailey*, 104 Conn. App. 457, 468, 934 A.2d 316 (2007) ("[g]enerally, claims neither addressed nor decided by the trial court are not properly before an appellate tribunal").

General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district

The record reveals the following undisputed facts. The arbitration arose from the defendant's March 8, 2014 purchase of a 2004 Cadillac SRX automobile from the plaintiff, an automotive dealer engaged in selling used cars. After purchasing the vehicle, the defendant discovered that the plaintiff had failed to disclose that the vehicle was a manufacturer buyback.[2] Upon this discovery, the defendant requested copies of the purchase order from the plaintiff but was denied. Subsequently, the defendant was forced to spend additional money to repair the vehicle's defects.

The defendant brought an arbitration claim against the plaintiff on May 6, 2016, alleging violations of numerous state and federal laws in connection with the sale. In his decision, the arbitrator found that the vehicle did not have a windshield sticker or any other conspicuous display disclosing the vehicle's status as a manufacturer buyback, as required by General Statutes § 42-179 (g) (1) and § 42-179-9 of the Regulations of Connecticut State Agencies. The arbitrator also found that the purchase order for the vehicle failed to clearly and conspicuously disclose the vehicle's status as a manufacturer buyback, also required by § 42-179 (g) (1) and § 42-179-9 of the Regulations of Connecticut State Agencies. On the basis of these findings, as well as identifying a Federal Trade Commission violation and other defects,

in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[2] Manufacturer buyback refers to a nonconforming motor vehicle, commonly referred as a "lemon," which is returned to the manufacturer due to a defect. General Statutes § 42-179; see *Cagiva North America, Inc.* v. *Schenk*, 239 Conn. 1, 6, 680 A.2d 964 (1996) ("The Lemon Law [§ 42-179 et seq.] is a remedial statute that protects purchasers of new passenger motor vehicles. It was designed to compel manufacturers of passenger motor vehicles to fulfill all express warranties made to consumers, and to facilitate a consumer's recovery against the manufacturer of a defective vehicle should a dispute arise.").

the arbitrator concluded that the plaintiff had violated the Connecticut Unfair Trade Practices Act (CUTPA), specifically General Statutes § 42-110b (c). The arbitrator awarded the defendant $1279 in compensatory damages, $5000 in punitive damages,[3] and $10,817.02 in attorney's fees and costs, amounting to a total award of $17,096.02.

The plaintiff subsequently filed an application to vacate and the defendant filed a motion to confirm the award with the Superior Court. In a memorandum of decision dated December 30, 2016, the court found that the factual and legal allegations the defendant made in her arbitration submission supported the award. The court determined that the arbitrator's decision did not "represent an egregious misperformance of duty or a patently irrational application of legal principles." Accordingly, the court concluded that there was no manifest disregard of the law and, subsequently, granted the defendant's motion to confirm the arbitration award and denied the plaintiff's application to vacate. This appeal followed.

Before turning to the merits of the appeal, we must first address the defendant's claim that this appeal is moot because the plaintiff failed to oppose her motion to confirm the award. We reject this argument. "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Shays* v. *Local Grievance Committee*, 197 Conn. 566, 571, 499 A.2d 1158 (1985).

[3] The actual award of damages was $5000 in punitive damages and $1279 compensatory damages, which was slightly less than the 4 to 1 ratio that the plaintiff asserts in its appellate brief.

"General Statutes § 52-417 provides that in ruling on an application to confirm an arbitration award, the court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in [General Statutes §§ 52-418 and 52-419. . . . The trial court lacks any discretion in confirming the arbitration award, unless the award suffers from any of the defects described in . . . §§ 52-418 and 52-419." (Emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Amalgamated Transit Union Local 1588* v. *Laidlaw Transit, Inc.*, 33 Conn. App. 1, 3–4, 632 A.2d 713 (1993); see also General Statutes §§ 52-418 and 52-419. The plaintiff commenced this special statutory proceeding by filing an application to vacate pursuant to § 52-418 prior to the defendant's filing her motion to confirm. The motion to confirm would have been denied had the application to vacate been granted. Thus, the plaintiff could obtain practical relief through a reversal of the court's decision denying the application to vacate. Accordingly, the plaintiff's claim is not moot.

We turn to the plaintiff's claim that the arbitrator's award of punitive damages constituted a manifest disregard of the law pursuant to § 52-418 (a) (4).[4] The arbitra-

[4] The defendant additionally argues that the plaintiff failed to preserve the claim regarding the punitive damages awarded, thus precluding this court from reviewing that claim. We disagree and determine that the plaintiff sufficiently preserved this claim pursuant to Practice Book § 60-5. "[B]ecause our review is limited to matters in the record, we . . . will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 171, 745 A.2d 178 (2000). Although the plaintiff did not discuss the issue of punitive damages in its memorandum of law supporting its application to vacate, it did identify the awarding of punitive damages as an area of concern during oral argument on the application and the motion to confirm. Thus, such arguments are in the record.

Furthermore, we can properly review the plaintiff's argument because it is an argument, not a claim. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635 n.7, 126 A.3d 558 (2015) ("[w]e may . . . review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim

tion in this case was an unrestricted submission.[5] Of the three grounds that our Supreme Court has recognized for vacating an award based on an unrestricted submission, the plaintiff argues only that "the award contravenes one or more of the statutory proscriptions of § 52-418." *Garrity* v. *McCaskey*, 223 Conn. 1, 6, 612 A.2d 742 (1992).

"[A] claim that the arbitrators have exceeded their powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the arbitrators manifestly disregarded the law." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 85, 881 A.2d 139 (2005). "A trial court's decision to vacate an arbitrator's award under § 52-418 involves questions of law and, thus, we review them de novo." *Bridgeport* v. *Kasper Group., Inc.*, 278 Conn. 466, 475, 899 A.2d 523 (2006).

raised at trial" [internal quotation marks omitted]). In the present case, the plaintiff's argument regarding punitive damages is subsumed within its legal claim raised before the trial court that the arbitrator's award was a manifest disregard of the law. See id.; see also *State* v. *Fernando A.*, 294 Conn. 1, 31 n.26, 981 A.2d 427 (2009) ("[although] the plaintiff did not [previously] raise . . . all of the theories that he raises in his writ . . . those theories are related to a single legal claim, and . . . there is substantial overlap between these theories under the case law" [internal quotation marks omitted]). As such, this argument is sufficiently intertwined with previous claims and properly preserved for appeal.

To the extent that the plaintiff contends that its ratio claim; see footnote 1 of this opinion; is also subsumed or intertwined with its punitive damages claim, we disagree. The ratio claim is of a constitutional due process nature and not an argument within its claim under § 52-418. See, e.g., *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 580–83, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

[5] Unrestricted submission refers to the type of arbitration agreement entered into by the parties. "A submission is unrestricted when . . . the parties' arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005).

To vacate an arbitration award on the ground that the arbitrator manifestly disregarded the law, three elements must be met: "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 95, 868 A.2d 47 (2005).

Applying these elements, we disagree with the plaintiff that the award of punitive damages constituted a manifest disregard of the law. Awarding punitive damages under CUTPA is discretionary. General Statutes § 42-110g (a).[6] The arbitrator found that the plaintiff's failure to display prominently the manufacturer buyback disclosure on the vehicle and in the purchase order constituted a per se violation of CUTPA. The plaintiff conceded that this failure constituted a statutory violation, both in its appellate brief and during oral argument before this court. The arbitrator concluded that such violations, in addition to the plaintiff's actions of restricting the defendant from testing the vehicle, inducing the defendant to execute the purchase documents before inspection, and attempting to deliver a vehicle that failed to meet safety standards, constituted

[6] General Statutes § 42-110g (a) provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper."

a reckless indifference of the defendant's rights to warrant punitive damages under CUTPA. See *Ulbrich* v. *Groth*, 310 Conn. 375, 446, 78 A.3d 76 (2013) (punitive damages under CUTPA warranted where "bank's failure to inform the plaintiffs that . . . personal property located at the . . . facility at the time of the auction was not included in the sale . . . involved a conscious decision to disregard acknowledged business norms"). Furthermore, the arbitrator acted within his discretion in crediting the defendant's evidence of the CUTPA violations against the plaintiff's lack of evidence in rebuttal. Thus, because the arbitrator's conclusions do not indicate an "extraordinary lack of fidelity to established legal principles," we cannot second-guess his conclusions. *Garrity* v. *McCaskey*, supra, 223 Conn. 10; see, e.g., *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 273 Conn. 96 ("[a]s we have stated . . . courts do not review the evidence or otherwise second-guess an arbitration panel's factual determinations when the arbitration submission is unrestricted"). We therefore conclude the court properly confirmed the arbitration award and denied the application to vacate the award.

The judgment is affirmed.

JACK AJLUNI *v.* STEVE SUDHIR CHAINANI
(AC 39649)

Alvord, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, breach of his guaranty obligation to the plaintiff in connection with a promissory note executed between the plaintiff and C Co., which was secured by the defendant's written personal guaranty of payment of all of C Co.'s obligations under the note. Following C Co.'s default on the note, the plaintiff commenced an action against the defendant in California on the guaranty. Thereafter, the California court rendered a default judgment in favor of the plaintiff. The plaintiff subsequently

commenced the present action, alleging, inter alia, nonpayment of the California judgment and breach of contract related to nonpayment of the guaranty. The defendant alleged as a special defense that the action was barred by the six year statute of limitations (§ 52-576) applicable to breach of contract actions. The trial court rendered judgment in favor of the plaintiff on his breach of contract claim, concluding that the claim was not barred by the statute of limitations because the defendant repeatedly reaffirmed the existence of the debt owed to the plaintiff, thereby tolling the limitation period. In reaching its conclusion, the court relied on statements that the defendant had made to the plaintiff in several e-mails that he had sent to the plaintiff. The defendant had signed the e-mails personally and did not reference C Co., nor did he indicate that he was signing them on behalf of C Co. or in his capacity as its managing member. On the defendant's appeal to this court, *held* that the trial court's finding that the defendant reaffirmed the existence of the subject debt was not clearly erroneous, as there was adequate evidence in the record supporting that court's finding of reaffirmation and the defendant failed to provide any evidence or authority that left this court with a definite and firm conviction that the trial court committed a mistake; the statements the defendant made in the e-mails to the plaintiff unequivocally acknowledged that he owed a debt to the plaintiff, and he never expressed an intention not to pay the debt but, instead, reassured the plaintiff that it was his full intention to repay the plaintiff as soon as possible, and, therefore, the trial court properly determined that there was nothing equivocal about the defendant's reaffirmation of the existence of the subject debt.

Argued February 20—officially released September 11, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Povodator*, *J.*; judgment in part for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Roy W. Moss, for the appellant (defendant).

Benjamin M. Wattenmaker, with whom, on the brief, was *John M. Wolfson*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Steve Sudhir Chainani, appeals from the judgment of the trial court, in which

it concluded that he breached his guaranty obligation to the plaintiff, Jack Ajluni. On appeal, the defendant claims that the court improperly determined that the applicable statute of limitations did not bar the action because (1) the relation back doctrine applied to the plaintiff's claim and (2) certain communications between the plaintiff and the defendant reaffirmed the debt so as to toll the statute of limitations on the plaintiff's claim.[1] We conclude that certain e-mails exchanged between the parties reaffirmed the debt and, accordingly, affirm the judgment of the trial court.[2]

The court's memorandum of decision details the relevant facts and procedural history. "On or about August 13, 2008, the plaintiff loaned Chainani Associates, LLC (Chainani Associates) . . . a Connecticut limited liability company, the sum of $200,000, as evidenced by the [Chainani Associates'] Secured Promissory Note . . . in said principal amount. . . . The note was secured by a [mortgage] of the same date executed

[1] At the outset, we note that "[i]t is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of the trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014). As noted by the plaintiff, the defendant's analyses are primarily conclusory assertions that contain no citations to the record or application of relevant authority to the facts of this case. Despite the borderline inadequacy of the defendant's brief, however, we were able to discern the defendant's arguments and, therefore, consider the merits of his claim.

[2] Because we conclude that the trial court properly determined that the defendant's reaffirmation of the obligation tolled the statute of limitations, we need not address the court's alternative basis for concluding that the statute of limitations did not bar the action, that the relation back doctrine applies to the plaintiff's claim.

by the borrower on the borrower's real property in Stamford, Connecticut . . . . To further secure the note, the [d]efendant executed a written personal guaranty . . . of payment of all obligations of the borrower under the note. . . . [T]he maturity date of the note was November 11, 2008. . . .

"The mortgaged property was part of the borrower's adjacent properties on Summer Street consisting of two low rise office buildings that the borrower intended to redevelop with a residential tower. The loan served to finance legal, engineering, and other expenses incurred in connection with obtaining certain significant zoning and other approvals required for the project. However, by November, 2008, although the borrower had succeeded, at least in part, in obtaining approvals, the market crashed and ultimately a senior mortgage lender foreclosed on the property.

"No payment has been made on the note or pursuant to the Guaranty. On or about July 19, 2010, in the Superior Court of the state of California, county of San Mateo, the plaintiff filed an action, CIV 497018 (California action) against the defendant on the guaranty. On or about July 26, 2010, service of the California summons and complaint was made upon the defendant at his residence in New Canaan, Connecticut. The defendant did not appear in the California action. Consequently, thereafter, on motion of the plaintiff, on or about October 12, 2010, a default judgment was entered in the California action in favor of the plaintiff in the amount of $304,086.52. . . .

"[This] action was commenced in February, 2014, the single count alleging nonpayment of the California judgment and seeking to domesticate [that judgment].

"On November 18, 2014, the plaintiff filed a proposed amended complaint . . . that added additional counts for breach of contract (count two), breach of the duty

of good faith and fair dealing (count three), and unjust enrichment (count four). These additional counts allege nonpayment of the guaranty.

"In January of 2015, the plaintiff attempted to amend his complaint further, seeking to add counts alleging misrepresentation and fraud; an objection to that proposed amended complaint was sustained.

"In his answers to the various iterations of the complaint, in addition to denying material facts, the defendant asserted the lack of jurisdiction of the California court to render judgment against him, and further has alleged defenses of laches and the statute of limitations [pursuant to General Statutes § 52-576 (a)[3]] (as appropriate). The plaintiff responds by contending that the California court could assert personal jurisdiction both because the defendant had a sufficient general presence in California and because this transaction had sufficiently precise roots in California. [The plaintiff] further claims that the statute of limitations is inapplicable both because of relation back and because of the defendant's reaffirmation of the debt. He also claims that on the merits, he is entitled to recover on all of his claims.

"An evidentiary hearing took place on February 4, 2016. Both sides filed memoranda before and after the hearing." (Citation omitted; footnote added; internal quotation marks omitted.)

The court ruled in favor of the defendant on counts one, three, and four, but ruled in favor of the plaintiff on count two. Regarding count two, the court stated, inter alia, that "it is well established in Connecticut that a reaffirmation of the existence of a debt is sufficient to reset the statute of limitations." (Internal quotation

[3] General Statutes § 52-576 (a) provides: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section."

marks omitted.) The court continued: "As reflected in e-mails submitted into evidence (and the plaintiff repeatedly referred to them in connection with the jurisdictional aspect of the case), on more than one occasion within [six] years of the assertion of the direct guaranty claim in the amended complaint of November 18, 2014 . . . the defendant acknowledged the existence of the debt and expressed his intention to pay the money back (at least the principal), if and when he could—well into 2010. While an equivocal statement might be insufficient to interrupt/reset the running of the statute of limitations, there was nothing equivocal about the reaffirmation of the existence of the debt; the defendant merely hedged on if and when he would be *able* to repay it. The court does not believe that that is sufficient uncertainty to preclude operation of the legal principle; there was no equivocation with respect to the *existence* of the obligation. The defendant repeatedly reaffirmed the debt, with sufficient certainty to preclude reliance on the statute of limitations. Accordingly, the court does not find the contract claim barred by the statute of limitations." (Citation omitted; emphasis in original.)

The court then rendered judgment in favor of the plaintiff on his breach of contract claim, and awarded the plaintiff damages of $609,994.67 with per diem interest of $141.33. This appeal followed.

On appeal, the defendant claims that the court erroneously concluded that he sufficiently acknowledged the existence of the debt so as to toll the statute of limitations on the plaintiff's claim. The plaintiff responds that certain e-mails exchanged between him and the defendant reaffirmed the debt and tolled the statute of limitations. We agree with the plaintiff.

"The statute of limitations creates a defense to an action. It does not erase the debt. Hence, the defense can be lost by an unequivocal acknowledgment of the

debt, such as a new promise, an unqualified recognition of the debt, or a payment on account. . . . Whether partial payment constitutes unequivocal acknowledgment of the whole debt from which an unconditional promise to pay can be implied thereby tolling the statute of limitations is a question for the trier of fact. . . .

"A general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute. The governing principle is this: The determination of whether a sufficient acknowledgment has been made depends upon proof that a defendant has by an express or implied recognition of the debt voluntarily renounced the protection of the statute. . . . But an implication of a promise to pay cannot arise if it appears that although the debt was directly acknowledged, this acknowledgment was accompanied by expressions which showed the defendant did not intend to pay it, and did not intend to deprive himself of the right to rely on the Statute of Limitations . . . . [A] general acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of the debt has been asserted in the debtor's presence and he did not contradict the assertion. . . .

"We review the trial court's finding . . . under a clearly erroneous standard. . . . [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 the definite and firm conviction that a mistake has been committed. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Internal quotation marks omitted.)

Zatakia v. *Ecoair Corp.*, 128 Conn. App. 362, 369–70, 18 A.3d 604, cert. denied, 301 Conn. 936, 23 A.3d 729 (2011).

In reaching its conclusion that the defendant reaffirmed the existence of the debt owed to the plaintiff, the court relied on statements that the defendant made to the plaintiff in several e-mails they exchanged. For example, in an e-mail dated June 16, 2009, the defendant stated: "[*I*]*t is my full intention to get you paid as soon as possible* and our entire team is fully focused on getting the project financed or sold." (Emphasis added.) In an e-mail dated October 11, 2009, the defendant stated: "I do understand that in recent times we have all lost large amounts of money—both you and myself have lost on a multiplicity of investments. However, in view of our personal friendship and on many levels, *it is my endeavor and intent to at least get you your principal back as soon as I possibly can*." (Emphasis added.) In an e-mail dated May 10, 2010, the defendant stated: "Even though you are foreclosed out, *it is fully our intention to at least get you your full principal back as soon as possible*." (Emphasis added.) The defendant signed each of these e-mails as "Sudhir" and did not reference Chainani Associates, nor indicate that he was signing the e-mails on behalf of Chainani Associates or in his capacity as managing member of Chainani Associates.[4]

On the basis of the evidence cited by the trial court, including the evidence highlighted in the preceding paragraph, we conclude that there was adequate evidence in the record from which the court could determine that the defendant reaffirmed the existence of the

[4] We also note that in nearly every e-mail that the plaintiff sent to the defendant, the plaintiff asserted the existence of the debt, and the defendant did not contradict any of those assertions. See *Zatakia* v. *Ecoair Corp.*, supra, 128 Conn. App. 370 ("[a] general acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of the debt has been asserted in the debtor's presence and he did not contradict the assertion" [internal quotation marks omitted]).

debt. The statements that the defendant made in the e-mails to the plaintiff unequivocally acknowledged that he owed a debt to the plaintiff. Moreover, in these communications, the defendant never expressed an intention not to pay the debt. To the contrary, the defendant reassured that it was his "full intention" to payback the plaintiff as soon as possible. We thus agree with the court's determination that "there was nothing equivocal about the reaffirmation of the existence of the debt; the defendant merely hedged on if and when he would be *able* to repay it." (Emphasis in original.)

The defendant has not pointed to any evidence or authority from which we could conclude that the court's finding of reaffirmation was clearly erroneous. See footnote 1 of this opinion. Indeed, the defendant's analysis of this issue in his appellate brief is limited to three conclusory sentences and a citation to *Dwyer* v. *Harris*, 128 Conn. 397, 23 A.2d 147 (1941), which is not on point.[5] Because we have found evidence in the record

[5] The entirety of the defendant's analysis provides: "[T]he communications appear to involve *not the guaranty obligation* but the debt owed under the note by the primary obligor, Chainani Associates . . . under its mortgage note to the plaintiff. The implication of an acknowledgment by the defendant of a debt owed by [Chainani Associates] could not itself constitute a reaffirmation of [the] defendant's separate and distinct guaranty obligation. See *Dwyer* v. *Harris*, [supra] 128 Conn. 397 (1941) ([d]efendant's offer to assist in collection of debt from others not reaffirmation of debt owed by defendant). It was therefore error as a matter of law for the court to conclude that the communications constituted a reaffirmation of the debt claimed under the guaranty, such as to reset the limitations period." (Emphasis in original.)

The defendant has not directed us to any portion of the record that establishes that the e-mails exchanged between the plaintiff and the defendant involved only [Chainani Associates'] note and not the defendant's personal guaranty.

Additionally, the defendant's reliance on *Dwyer* is misplaced. In *Dwyer*, our Supreme Court held: "The trial court should have told the jury that if they found the evidence established the defendant's claim that his promise was not to pay the debt created by the note but to assist in collecting from others the money paid . . . such promise did not remove the bar of the Statute of Limitations." Id., 400. The present case is distinguishable because, here, the defendant has not promised to assist the plaintiff in collecting the

supporting the court's finding of reaffirmation, and because the defendant has not provided any evidence or authority that has left us with the definite and firm conviction that the court made a mistake, we conclude that the court properly found that the defendant reaffirmed the debt, thereby tolling the applicable statute of limitations.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, TRUSTEE *v.* WALTER J. LEWIS, JR., ET AL.
(AC 39985)

Lavine, Moll and Flynn, Js.

Syllabus

The plaintiff, C Co., sought to foreclose a mortgage on certain real property owned by the defendant L, following L's default on his mortgage payments and failure to cure the default. Prior to trial, L requested to participate in the foreclosure mediation program, but the parties were unsuccessful in reaching an amicable resolution. In response to C Co.'s amended complaint, L filed an answer and special defenses. Thereafter, C Co. filed a motion for summary judgment as to liability. In support of its motion, C Co. submitted a copy of the note and mortgage and an affidavit of its servicing agent's contested foreclosure specialist, stating that C Co. is the holder of the note and mortgage and that L defaulted on his payments. L filed an objection to the motion for summary judgment on the ground that there was a genuine issue of material fact as

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debt from Chainani Associates. Rather, the defendant personally guaranteed to pay the obligation to the plaintiff should Chainani Associates fail to repay the plaintiff in full. See *JSA Financial Corp.* v. *Quality Kitchen Corp. of Delaware*, 113 Conn. App. 52, 57, 964 A.2d 584 (2009) ("[w]e have explained that a guarantee is a promise to answer for the debt, default, or miscarriage of another" [internal quotation marks omitted]). In other words, the defendant has not made a promise to *assist in collecting the debt*, he has made a promise to *pay the debt*. Accordingly, in this case, unlike in *Dwyer*, the defendant's acknowledgments of the debt in the various e-mails could be—and were—sufficient to toll the six year statute of limitations.

to whether the mortgage was valid because the signature purporting to be his on the mortgage had been forged. In support of his objection, L attached an affidavit in which he stated that he had reviewed the mortgage submitted in connection with the motion for summary judgment and that he had not signed the mortgage. The trial court granted the motion for summary judgment as to liability, concluding first that L had abandoned his special defenses because in his objection he did not dispute the evidence presented by Co. and contested only the validity of the mortgage. In addition, the court concluded that L's affidavit was insufficient to create a genuine issue of material fact with regard to the validity of the mortgage given his explicit and implicit recognition that the mortgage was valid. The court reasoned that during his 2011 bankruptcy proceeding, L had made two judicial admissions that the mortgage was valid and that L's participation in the foreclosure mediation program constituted an implicit recognition of the validity of the mortgage. Following the assignment of the subject mortgage to W Co., the trial court granted C Co.'s motion to substitute W Co. as the plaintiff. Thereafter, the trial court granted W Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon. On L's appeal to this court, *held* that the trial court improperly granted C Co.'s motion for summary judgment as to liability, as a genuine issue of material fact existed as to whether the signature on the subject mortgage was that of L: L's statements in his affidavit in support of his opposition to the motion for summary judgment that he had reviewed the mortgage submitted in connection with the motion and that he had not signed the mortgage contradicted the evidence submitted by C Co. in support of its motion that he had executed and delivered a valid mortgage, called into question the validity of the mortgage and gave rise to a genuine issue of material fact as to the authenticity of the signature on the mortgage, and contrary to W Co.'s contention that the trial court properly deemed L's statements in his 2011 bankruptcy proceeding to be judicial admissions that were binding on the court, because those statements did not occur in the context of the present proceeding, they were not judicial admissions but, instead, were evidentiary admissions to be accepted or rejected by the trial court; moreover, the trial court improperly considered L's participation in the foreclosure mediation program as admissible evidence relating to the issue of the validity of the mortgage, as the statute (§ 49-31*l* [c] [8]) governing the foreclosure mediation program makes clear that a party's participation in the program does not result in a waiver of any rights of the mortgagee or mortgagor.

Argued May 14—officially released September 11, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief,

brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, Wilmington Savings Fund Society, FSB, as trustee for Normandy Mortgage Loan Trust, Series 2015-17, was substituted as the plaintiff; subsequently, the court granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed*; *further proceedings*.

Albert L. J. Speziali, with whom, on the brief, was *Francis R. Sablone*, for the appellant (named defendant).

Andrea C. Sisca, with whom was *Michael J. Jones*, for the appellee (substitute plaintiff).

Jeffrey Gentes filed a brief for the Connecticut Fair Housing Center as amicus curiae.

Opinion

MOLL, J. The defendant, Walter J. Lewis, Jr., who is also known as Walter J. Lewis,[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, as Trustee for Normandy Mortgage Loan Trust, Series 2015-17 (substitute plaintiff). On appeal, the defendant claims that the court improperly rendered summary judgment, as to liability only, in favor of the named plaintiff, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, as Trustee for Stanwich Mortgage Loan Trust, Series 2012-17 (original plaintiff),

[1] The complaint also named as defendants Santander Bank, N.A., formerly known as Sovereign Bank, National Association, formerly known as Sovereign Bank; and Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc. Lewis alone filed the present appeal. Accordingly, we refer to him as the defendant.

because a genuine issue of material fact exists as to whether the signature on the mortgage is his. We agree and reverse the judgment of the trial court.

The following background is relevant to this appeal. On April 15, 2014, the original plaintiff commenced this foreclosure action against the defendant. In its amended complaint, the original plaintiff alleged the following. On or about September 14, 2005, the defendant executed and delivered a note to First National Bank of Arizona in the principal amount of $500,000. On that same date, the defendant executed and delivered to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for First National Bank of Arizona, a mortgage on property located at 21 Brush Hill Road in Clinton (subject property). The mortgage was assigned to Bank of America, N.A., in February, 2012, and thereafter assigned to the original plaintiff. The defendant defaulted on his mortgage payments and failed to cure the default. The original plaintiff elected to accelerate the balance due on the note and to foreclose the mortgage on the subject property.

On May 19, 2014, the defendant requested to participate in the foreclosure mediation program. The defendant participated in the mediation program, and the parties were unsuccessful in reaching an amicable resolution. On April 9, 2015, the defendant filed an answer and special defenses, as well as a disclosure of defenses. He raised four special defenses: unclean hands, estoppel, fraud, and breach of the covenant of good faith and fair dealing.

On June 10, 2015, the original plaintiff filed a motion for summary judgment against the defendant as to liability only. In support of its motion, the original plaintiff submitted, inter alia, a copy of the note and the mortgage and an affidavit of Robert Raulerson, a contested

foreclosure specialist for the original plaintiff's servicing agent, stating that the original plaintiff is the holder of the note and the mortgage and that the defendant defaulted on his payments. On July 2, 2015, the defendant filed an objection to the motion for summary judgment in which he argued that there was a genuine issue of material fact as to whether the mortgage was valid. He contended that the signature purporting to be his on the mortgage at issue had been forged. He also claimed that the mortgage was recorded on December 18, 2006, more than one year after the mortgage allegedly was executed, i.e., September 14, 2005. In support of his objection, the defendant attached an affidavit in which he stated that he reviewed the mortgage submitted in connection with the motion for summary judgment and that he had not signed the mortgage. He further attested that the attorney who allegedly took his acknowledgement on the mortgage engaged in a fraudulent mortgage scheme in December, 2006, and January, 2007, during which time the mortgage at issue was recorded, was convicted of crimes relating to mortgage fraud and had been suspended from the practice of law.

On November 6, 2015, the original plaintiff filed a reply to the defendant's objection, essentially arguing that the defendant was precluded from challenging the validity of the mortgage. Specifically, it argued that the defendant filed for chapter 11 bankruptcy in August, 2011, and listed as a creditor in his bankruptcy petition the loan servicer for the mortgage at issue. The original plaintiff also argued that during a meeting of creditors, the defendant had admitted that there was a mortgage on the subject property and that he had retained the attorney whose acknowledgment appeared on the mortgage. It asserted that the foregoing representations constituted judicial admissions that the mortgage was valid.

On January 7, 2016, the court issued its decision granting the original plaintiff's motion for summary judgment, as to liability only, against the defendant. The court first concluded that the defendant had abandoned his special defenses because in his objection he did not dispute the evidence presented by the original plaintiff and contested only the validity of the mortgage. With regard to the validity of the mortgage, the court stated that during the defendant's 2011 bankruptcy proceeding, the defendant made two judicial admissions that the mortgage was valid, and that his affidavit was not sufficient to overcome those binding admissions. The court also reasoned that the defendant's participation in the foreclosure mediation program constituted an implicit recognition of the validity of the mortgage. The court thereupon concluded that the defendant's affidavit, in which he attested that the signature on the mortgage is not his, was insufficient to create a genuine issue of material fact given his explicit and implicit recognition that the mortgage was valid.[2]

On May 20, 2016, the original plaintiff filed a motion to substitute, in which it stated that it had assigned the mortgage to the substitute plaintiff, and attached thereto a copy of the assignment. On June 6, 2016, the court granted the motion to substitute. On December 5, 2016, the substitute plaintiff filed a motion for a judgment of strict foreclosure. On December 19, 2016, the court granted the motion, determined the amount of debt, and set the law day as January 23, 2017. This appeal followed.

"The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that

[2] On January 26, 2016, the defendant appealed from the court's granting of the motion for summary judgment. The original plaintiff filed a motion to dismiss the appeal for lack of a final judgment, and this court granted the motion.

summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312–13, 77 A.3d 726 (2013).

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 359, 143 A.3d 638 (2016).

The defendant claims that the court improperly granted the original plaintiff's motion for summary judgment because a genuine issue of material fact exists as

to whether his signature on the mortgage was forged. He contends that his affidavit, filed in connection with his objection, in which he attested that the signature on the mortgage is not his, was sufficient to demonstrate the existence of a genuine issue of material fact regarding the authenticity of the signature. In contrast, the substitute plaintiff argues that the court properly determined that there was no genuine issue of material fact as to the validity of the mortgage. The substitute plaintiff further argues that the fact that the defendant signed a foreclosure mediation certificate in which he represented that his primary residence was subject to the mortgage and participated in mediation in an attempt to negotiate a short sale supports the court's determination that the defendant implicitly recognized that the mortgage was valid.[3] We agree with the defendant.

"To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Yancey* v. *Connecticut Life & Casualty Insurance Co.*, 68 Conn. App. 556, 559, 791 A.2d 719 (2002). Here, the

[3] The substitute plaintiff also argues that the defendant did not properly raise the issue of forgery by way of a special defense. The substitute plaintiff did not characterize this claim as an alternative ground for affirmance but raised it in its brief filed in this court, and the defendant responded to the argument in his reply brief. "Given the fact that neither party would be prejudiced by our doing so, we treat [this claim] as if [it] had been properly raised as . . . [an] alternate [ground] for affirmance." (Internal quotation marks omitted.) *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010). In paragraph 4 of its amended complaint, the original plaintiff asserted that the defendant executed and delivered to MERS a mortgage on the subject property. In his answer, the defendant denied the allegations in paragraph 4 of the amended complaint. We conclude that the defendant's denial of the substitute plaintiff's allegation that he had executed the mortgage was sufficient in this case. See Practice Book § 10-50 ("No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. . . .").

defendant provided an evidentiary foundation to demonstrate the existence of a genuine issue of material fact.

In his affidavit, the defendant contradicted the evidence submitted by the original plaintiff in support of its motion for summary judgment that he had executed and delivered a valid mortgage, namely, the note, the mortgage and an affidavit from the original plaintiff's loan servicer attesting that the defendant had executed the mortgage. In his affidavit, the defendant stated that he "reviewed the mortgage attached to the plaintiff's memorandum of law," and "[t]he signature that appears on that mortgage is not mine; I did not sign it." The foregoing statements call into question the validity of the mortgage and give rise to a genuine issue of material fact as to the authenticity of the signature on the mortgage.

The substitute plaintiff argues that a mortgage containing an unauthorized signature is not automatically deemed a nullity but is enforceable under certain circumstances. Whether the mortgage is enforceable under the circumstances of the present case is a factual issue reserved for the trier of fact.

Although the substitute plaintiff argued in its brief to this court that the trial court properly deemed the defendant's statements in his 2011 bankruptcy proceeding to be judicial admissions binding on the court, the parties now agree that such statements were not judicial admissions but, rather, were evidentiary admissions.[4] We agree. Because the defendant's statements in the bankruptcy proceeding did not occur in the context of the present proceeding, they are evidentiary admissions to be accepted or rejected by the trier of fact. "Judicial

[4] The substitute plaintiff conceded this point during oral argument before this court.

admissions are conclusive only in the judicial proceeding in which made. . . . In subsequent proceedings such prior judicial admissions are merely evidentiary admissions, to be used as evidence to prove a matter in dispute in the subsequent trial." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 8.16.3, p. 530; see also *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 707–708, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

Moreover, we conclude that the court improperly considered the defendant's participation in the foreclosure mediation program as admissible evidence relating to the issue of the validity of the mortgage. General Statutes § 49-31*l* (c) (8), which governs the foreclosure mediation program, makes clear that a party's participation in the foreclosure mediation program does not result in a waiver of any rights of the mortgagee or mortgagor. Specifically, that subdivision provides: "None of the mortgagor's or mortgagee's rights in the foreclosure action shall be waived by participation in the foreclosure mediation program." General Statutes § 49-31*l* (c) (8). Simply put, holding participation in the foreclosure mediation program against a mortgagor by restricting his or her ability to contest the validity of the mortgage would run afoul of the plain language of § 49-31*l* (c) (8) and would contravene the public policy of promoting foreclosure mediation.

In sum, we conclude that the trial court improperly granted the motion for summary judgment as to liability only, as a genuine issue of material fact exists as to whether the signature on the mortgage is that of the defendant.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GERJUAN RAINER TYUS
(AC 40093)

Lavine, Sheldon and Harper, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed, claiming, inter alia, that the trial court abused its discretion in granting the state's motion to join his case for trial with that of A, who also was involved in the shooting. The defendant also had been charged with conspiracy to commit murder, but the trial court dismissed that charge prior to trial. The defendant and A had driven to a café, where A shot the victim. A later told E that he had shot someone. The defendant claimed, inter alia, that he would be substantially prejudiced if his case was joined with A's case for trial because A's statement to E would be admissible in evidence as a party admission against A. The defendant further asserted that A's statement to E could not be admitted under the coconspirator exception to the hearsay rule under the applicable provision (§ 8-3 [1]) of the Connecticut Code of Evidence (2008) because the conspiracy charge had been dismissed. The trial court also denied the defendant's motion to preclude testimony from the state's firearms examiner, S, about S's examination of and conclusions about certain firearms evidence that had been examined by another state's examiner who had since died and, thus, was not available for cross-examination. The defendant claimed that his constitutional right to confrontation would be violated if S testified about the firearms evidence. *Held*:

1. The trial court committed no error in granting the state's motion to join the defendant's case with A's case for trial, as both cases arose from the same incident, virtually all of the state's testimonial, documentary, physical and scientific evidence against the two defendants would have been admissible against either of them if they had been tried separately, their defenses were not antagonistic and each was the other's principal alibi witness; moreover, A's statement to E was admissible against the defendant under the coconspirator exception to the hearsay rule, as Connecticut follows the general American rule that the coconspirator exception is applicable in cases where no formal charge of conspiracy has been made, and the defendant presented no other basis for claiming that his case should not have been joined with A's case for trial.
2. The defendant could not prevail on his claim that the trial court violated his right to confrontation when it permitted S to testify about S's examination of and conclusions regarding the firearms evidence; the only inculpatory conclusions or statements regarding the firearms evidence were made by S in court, S conducted his own physical examination

of and formulated his own conclusions about the evidence, S did not rely on the deceased examiner's report, which was not admitted into evidence, and the defendant cross-examined S extensively.

3. The trial court did not err in denying the defendant's request for a limiting instruction to the jury regarding S's testimony; the defendant's requested instruction and the court's instruction were substantially similar, the court properly instructed the jury as to its role in assessing the credibility of expert witnesses and determining the weight to be given to expert testimony, and although the court declined to the defendant's request to highlight S's testimony, the court's instructions were correct in law, adapted to the issues and sufficient to guide the jury.

Argued May 15—officially released September 11, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of New London, where the court, *Jongbloed, J.*, granted the defendant's motion to dismiss the charge of conspiracy to commit murder and granted the state's motion to consolidate the case for trial with that of another defendant; thereafter, the matter was tried to the jury before *A. Hadden, J.*; subsequently, the court, *A. Hadden, J.*, denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Paul J. Narducci, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *David J. Smith*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Gerjuan Rainer Tyus, appeals from the judgment of conviction, which was rendered against him after a jury trial, on the charge of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant claims (1) that the trial court

abused its discretion in granting the state's motion to join his case for trial with that of his codefendant, Darius Armadore; (2) that he was deprived of his constitutional right to confrontation when the state's firearms examiner was permitted to testify regarding the findings of another firearms examiner, who was deceased, and thus unavailable to testify at trial; and (3) that the court erred in denying his request for a limiting instruction to the jury concerning the testimony of the state's firearms examiner.[1] We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In early December, 2006, the defendant was involved in an ongoing dispute with Todd Thomas regarding a piece of jewelry that Thomas' brother had given to the defendant. Thomas demanded that the defendant give him the jewelry, but the defendant refused to do so unless Thomas paid him $10,000.

On December 3, 2006, there was a drive-by shooting near the defendant's residence on Willetts Avenue in New London. In that incident, Thomas, who was a passenger in a white Lexus that was registered to his wife, fired several gunshots at the defendant with a .38 caliber firearm, striking him in the leg and the back. The defendant returned fire at Thomas, firing five gunshots with a nine millimeter firearm. Four .38 caliber cartridge casings and five nine millimeter cartridge casings were recovered from the scene of the shooting on Willetts Avenue. Later that day, while the defendant was at a

[1] The defendant also claims that the court erred when it admitted testimony and documentary evidence of cell phone data, absent any objection by the defendant or Armadore, without qualifying the witness as an expert or holding a hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), to determine its reliability. Because this claim is evidentiary in nature, and the defendant failed to preserve it at trial, we decline to review it. See *State* v. *Turner*, 181 Conn. App. 535, 549–55, 187 A.3d 454 (2018).

hospital being treated for his wounds, his close friend, Darius Armadore, who was at the hospital waiting for news of the defendant's condition, was overheard to say, "we're gonna get them niggas . . . ."

At approximately 7 p.m. on December 22, 2006, the defendant and Armadore went to Boston to visit family and pick up three girls in a silver Chevrolet Impala that the defendant had rented on December 15, 2006. When one of the three girls refused to return to Connecticut with them, the defendant and Armadore returned to Connecticut with the other two girls.

Later that evening, at approximately 11 p.m. on December 22, 2006, Thomas arrived at Ernie's Café on Bank Street in New London. Shortly after midnight on that evening, while Thomas was outside Ernie's smoking a cigarette, he was shot in the head. A light skinned African-American male was observed fleeing from the place where Thomas fell, running first down Bank Street toward the corner of Golden Street, then up Golden Street to a municipal parking lot, where he entered the passenger's side of a silver car that had been waiting there with its motor running. As soon as the fleeing man entered the waiting vehicle, it sped away. Thomas was transported to Lawrence + Memorial Hospital, where he was pronounced dead on arrival.

Later, at approximately 12:45 a.m., the defendant and Armadore arrived at Bella Notte, a nightclub in Norwich. Tracking information on records produced by their cell service providers established that their three cell phones—the defendant had two cell phones in his possession and Armadore had one—had been brought from Boston to New London at approximately 11:45 p.m. All three phones activated cell towers in New London, in the vicinity of Ernie's, minutes before a 911 call was received reporting the shooting outside of Ernie's. Thereafter, between 12:30 and 12:42 a.m., the three cell

phones were taken from New London to Norwich, where they activated a cell tower in close proximity to Bella Notte.[2] A few hours later, at approximately 4 a.m., the defendant dropped Armadore off at the apartment that he shared with his then girlfriend, Ritchae Ebrahimi. After arriving at the apartment, Armadore told Ebrahimi that he had shot someone that night.

One nine millimeter cartridge casing was recovered from the scene of Thomas' December 23, 2006 shooting outside of Ernie's. A comparison of that cartridge casing to the five nine millimeter cartridge casings recovered from the scene of the defendant's December 3, 2006 shooting on Willetts Avenue revealed that all six had been fired from the same firearm.

On November 20, 2012, the defendant and Armadore were both arrested in connection with the shooting death of Thomas on charges of murder in violation of § 53a-54a, and conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a. The conspiracy charges against both defendants were later dismissed on the ground that they were barred by the statute of limitations. The state thereafter filed long form informations charging the defendant and Armadore with murder, both as a principal and as an accessory, in violation of General Statutes §§ 53a-8 and 53a-54a (a). The cases were subsequently joined for trial, then tried together before a single jury, which returned guilty verdicts as to both defendants without specifying whether such verdicts were based on principal or accessorial liability. The court sentenced the defendant to a term of fifty-five years of incarceration. This appeal followed.[3]

[2] The defendant and Armadore claimed that they had been at Bella Notte when Thomas was shot and killed in New London.

[3] Armadore also has challenged his conviction in a separate appeal.

I

The defendant first claims that the court abused its discretion in granting the state's motion to join his case with Armadore's case for trial.[4] We disagree.

On April 7, 2015, the state filed a motion, pursuant to Practice Book § 41-19, for joinder of the defendant's and Armadore's cases for trial. The state argued that joinder of the two cases would promote judicial economy because, as the court ruled, "virtually all of the witnesses [it] would call in [the defendant]'s trial would be called in the trial of [Armadore]," and the physical and scientific evidence that it would seek to introduce in both cases would be identical. The state further argued that the respective defenses of the defendant and Armadore were not antagonistic, and thus that neither would suffer substantial injustice if their cases were tried together.

On April 27, 2015, the defendant filed an objection to the state's motion for joinder. The defendant argued that Ebrahimi's testimony that Armadore had told her, in the early morning hours of December 23, 2006, that he had shot someone earlier that morning was hearsay that would not be admissible in the state's case against him if he were tried alone and, thus, that by joining his case with the state's case against Armadore, against whom the statement was admissible as a party admission, he would be substantially prejudiced. The defendant argued that the only conceivable basis on which the state could introduce Armadore's statement to Ebrahimi against him would be pursuant to the coconspirator exception to the hearsay rule, but because the

[4] The defendant also claims that the court erred in failing to sever the two cases as the trial progressed and that the spillover effect of the evidence clearly prejudiced him. The defendant did not object to any of the evidence that he now claims prejudiced him, nor did he request a limiting instruction regarding that evidence. His claim in this regard is therefore not preserved and we decline to review it.

conspiracy charge against him had been dismissed, the statement could not properly be admitted on that basis.

The court heard argument on the state's motion for joinder on May 18, 2015. On October 6, 2015, the court orally granted the motion, explaining its ruling as follows: "The court finds that joinder of the cases will clearly advance judicial economy in this case. Virtually all of the witnesses called in one trial would be called in the trial of the other. The physical and the scientific evidence would also be virtually identical. Moreover, joinder would not substantially prejudice the rights of the defendants. Based on the court's review of the statements of the defendants as set forth by the state in its memorandum, it appears that the defenses are not irreconcilable or antagonistic. Both have admitted being with the other on the night in question, and the statements of each do not implicate the other." The court thus found that a joint trial would not be unfairly prejudicial, and so it granted the state's motion for joinder.

On appeal, the defendant claims, as he did at trial, that the joinder of his case with Armadore's was improper because Ebrahimi's testimony about Armadore's admission to her that he had shot someone on the evening of Thomas' killing was not admissible against him under the coconspirator exception to the hearsay rule, and thus that its introduction and use against him in his joint trial with Armadore caused him unfair prejudice. We are not persuaded.

Practice Book § 41-19 provides that "[t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together." The paramount concern in ordering a joint trial is whether the defendant's right to a fair trial will be impaired. "The argument for joinder is most

persuasive when the offenses are based upon the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. . . . In contrast, when the cases are not of the same character, the argument for joinder is far less compelling because the state must prove each offense with separate evidence and witnesses [thus] eliminat[ing] any real savings in time or efficiency which might otherwise be provided by a single trial." (Internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 157, 51 A.3d 1048 (2012). "A joint trial expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called to testify only once." (Internal quotation marks omitted.) *State* v. *Madore*, 96 Conn. App. 235, 240, 899 A.2d 721, cert. denied, 280 Conn. 907, 907 A.2d 92 (2006).

"A separate trial will be ordered where the defenses of the accused are antagonistic, or evidence will be introduced against one which will not be admissible against others, and it clearly appears that a joint trial will probably be prejudicial to the rights of one or more of the accused. . . . [T]he phrase prejudicial to the rights of the [accused] means something more than that a joint trial will probably be less advantageous to the accused than separate trials." (Internal quotation marks omitted.) Id., 239–40.

"[I]t is the defendant's burden on appeal to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . . . [I]n deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate

court may not disturb." (Citation omitted; internal quotation marks omitted.) *State* v. *Devon D.*, 321 Conn. 656, 665, 138 A.3d 849 (2016).

In this case, it is undisputed that the state's cases against the defendant and Armadore arose from the same criminal incident—the shooting death of Thomas—and that virtually all of the state's testimonial and documentary evidence at their joint trial, as well as all of its physical and scientific evidence against the two defendants, would have been admissible against either of them had they been tried separately. The defendants' defenses to the charges against them were not antagonistic. In fact, they each served as the other's principal alibi witness, insisting that they had been together at Bella Notte in Norwich when Thomas was shot and killed in New London.

The defendant argued before the trial court, and now reiterates before us, that Armadore's statement to Ebrahimi about shooting someone on the evening of Thomas' shooting could only have been admitted into evidence against him if it qualified for admission under the coconspirator exception to the hearsay rule. He insists, however, that that exception did not apply in this case because, by the time the joint trial began, the conspiracy charges against him and Armadore had been dismissed. The defendant asserted no other evidentiary basis for excluding Armadore's admission to Ebrahimi, and in fact conceded that it could have been admitted against him under the coconspirator exception had his conspiracy charge still been pending at the time.[5]

[5] In his objection to the state's motion for joinder, the defendant conceded, for purposes of its objection, that "the state will be able to show that Armadore's statement was made (1) while the conspiracy was ongoing and (2) in furtherance of the conspiracy." The defendant also "assumes that the state will also have made the threshold showing of the existence of a conspiracy in order that this statement [may] be properly offered, let alone admitted."

The defendant's argument that joinder of his case and Armadore's for trial was improper must be rejected because the central premise on which that argument rests, which is that in the absence of a pending charge of conspiracy, Armadore's admission to Ebrahimi was not admissible against the defendant under the coconspirator exception to the hearsay rule, is completely unfounded as a matter of law. At all times relevant to this case, the coconspirator exception to the hearsay rule has been codified in § 8-3 of the Connecticut Code of Evidence (2008), which provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Statement by a party opponent. A statement that is being offered against a party and is . . . (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy . . . ." So phrased, the rule lists no requirement that limits its application to criminal cases involving charges of conspiracy. To the contrary, consistent with Connecticut's pre-code case law which the Code of Evidence was designed to adopt and codify, the rule's official commentary expressly explains the rule's scope: "(1) Statement by party opponent. Sections 8-3 (1) sets forth six categories of party opponent admissions that were excepted from the hearsay rule at common law . . . . (D) The fourth category encompasses the hearsay exception for statements of coconspirators. . . . The exception is applicable in civil and criminal cases alike. See *Cooke* v. *Weed*, 90 Conn. 544, 548, 97 A. 765 (1916)." Conn. Code Evid. (2008) § 8-3 (1), commentary.

In light of such controlling authority, it is apparent that Connecticut follows the general American rule as to the applicability of the coconspirator exception to the hearsay rule in cases where no formal charge of conspiracy has been made. That rule has been aptly

summarized as follows: "A conspiracy need not be formally charged for coconspirator statements to be admissible if a conspiracy in fact exists. Likewise, the declarant need not be charged, and acquittal of conspiracy charges does not preclude use of his or her statement. The evidence is similarly admissible in civil cases, where the conspiracy rule applies to tortfeasors acting in concert." (Footnotes omitted.) 2 K. Broun, McCormick on Evidence (7th Ed. 2013) § 259, pp. 294–95. Accordingly, because the defendant presented no other basis for claiming that his case should not have been joined with Armadore's case for trial, we conclude that the trial court committed no error in ordering joinder in this case.

II

The defendant next claims that the court erred in admitting the testimony of the state's firearms examiner, James Stephenson, because Stephenson's opinions regarding the firearms evidence in this case were assertedly based on the findings and conclusions of the primary examiner of the evidence in this case, Gerald Petillo, who died before trial. The defendant claims that Stephenson did not conduct "a true independent examination" of the evidence, but, rather, in formulating his conclusions, he relied on Petillo's findings and conclusions. The defendant argues that because Stephenson's testimony was based on Petillo's findings and conclusions, and Petillo was unavailable for cross-examination, Petillo's findings and conclusions constituted testimonial hearsay, and the admission of evidence on the basis of that hearsay, specifically, Stephenson's testimony, violated his constitutional right to confrontation. We disagree.

In *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States

Supreme Court held that testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. Id., 68. The United States Supreme Court's subsequent decisions in *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), extended the holding in *Crawford* to apply the confrontation clause in the specific context of scientific evidence.

In *Melendez-Diaz*, the court held that certificates signed and sworn to by state forensics analysts, which set forth laboratory results of drug tests that were done by those analysts and which were admitted into evidence in lieu of live testimony from the analysts themselves, were testimonial within the meaning of *Crawford*, and thus that they were improperly admitted because the defendant did not have an opportunity to cross-examine those analysts. *Melendez-Diaz* v. *Massachusetts*, supra, 557 U.S. 311.

In *Bullcoming*, the court held that the confrontation clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial statement by an analyst, certifying to the results of a blood alcohol concentration test he performed, through the in-court testimony of another scientist "who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming* v. *New Mexico*, supra, 564 U.S. 652. In short, an accused has the right "to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Id.

Thus, in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the trial court's violation of the defendant's confrontation rights occurred because certain inculpatory statements were admitted that were testimonial in nature

and were made against the defendant by an individual who was not subject to cross-examination. See *State* v. *Buckland*, 313 Conn. 205, 215–16, 96 A.3d 1163 (2014), cert. denied, U.S. , 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015). Those circumstances are not present in this case.

Here, the defendant and Armadore filed a joint motion in limine to preclude Stephenson's testimony on the ground that his testimony would not be based on his own independent examination of the firearms evidence in this case, but, rather, would be based on the examination of that evidence by Petillo, who was not available for cross-examination by the defendant, and thus that his constitutional right to confrontation would be violated if Stephenson were permitted to so testify. The court held a hearing outside of the presence of the jury on the defendants' motion to preclude Stephenson's testimony. Stephenson testified that when firearms comparisons are made, the technical reviewer would "go in, using the comparison microscope, look at the comparisons himself to make a determination as to whether the conclusions were correct that were going to be issued in the report." The technical reviewer would make an independent determination concerning the comparisons that were made. Stephenson acted as the technical reviewer of Petillo's conclusions in this case. In that capacity, Stephenson examined the firearms evidence himself and formulated his own opinions as to the evidence he was examining. In this case, Petillo had performed various tests on the firearms evidence that had been collected and authored a report containing his findings and analysis. Stephenson physically examined the cartridge cases in this case and in the incident on December 3, 2006. He did not merely verify what Petillo had concluded, but came to his own conclusions on the basis of his examination of the evidence before him.

The trial court concluded that "this case is in stark contrast to [*Melendez-Diaz* and *Bullcoming*]. This is not a situation in which the state attempts to elicit testimony from the deceased examiner. . . . [Stephenson] conducted his own independent examination and reached his own independent conclusions. He is clearly entitled to testify as to those findings because he is available and he made conclusions and he will be cross-examined." On that basis, the court concluded that Stephenson's testimony was admissible. We agree.

Here, the only inculpatory conclusions or statements regarding the firearms evidence that were presented to the jury were made by Stephenson in court. Stephenson did not rely on Petillo's report in formulating his own conclusions, nor was Petillo's report admitted into evidence. Although Stephenson reviewed Petillo's report, he conducted his own physical examination of the evidence in this case and came to his own conclusions, which happened to be consistent with Petillo's conclusions. The defendant cross-examined Stephenson extensively. Because the defendant was afforded a full opportunity to confront Stephenson regarding his examination of, and conclusions regarding, the firearms evidence in this case, his claim that he was denied his constitutional right to confrontation is without merit.

III

The defendant also claims that the court erred in denying his request for a limiting instruction to the jury regarding Stephenson's testimony. Specifically, the defendant claims that a "limiting instruction was necessary given the problems with firearms identification." In response, the state contends that the court's general instruction on expert testimony was sufficient to guide the jury in its assessment of Stephenson's testimony. We agree with the state.[6]

[6] The defendant asks this court to exercise its supervisory authority over the administration of justice to create a rule requiring trial courts to give a cautionary instruction warning juries that firearms identification testimony

"We review nonconstitutional claims of instructional error under the following standard. While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." (Citation omitted; internal quotation marks omitted.) *State* v. *Crosby*, 182 Conn. App. 373, 410–11, A.3d (2018).

Here, the defendant filed a written request for a limiting instruction regarding Stephenson's testimony "to ensure the jury retains its fact-finding function and does not place undue weight on the conclusions expressed by the forensic firearm examiner." The defendant asked that the jury be instructed as follows: "You are also to consider each expert witness' general credibility in accordance with the instruction on credibility applicable to all witnesses.

"Amongst the expert witness testimony you heard in this case was the testimony of a forensic firearm exam-

is not scientifically definitive. He argues: "Given that jurors often give undue reliance on expert opinions [on firearms identification], an instruction is necessary to protect future defendants against the risk of wrongful convictions."

"The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 765, 91 A.3d 862 (2014). We are unpersuaded that the issue at hand calls for such an extraordinary remedy.

iner, James Stephenson. Mr. Stephenson expressed various opinions about certain bullet casing and projectile evidence in this case. Please understand that Mr. Stephenson's opinions in this case are not to be treated by you as scientifically definitive. By that I mean that the probability of his opinion being correct is for you, and you alone, to determine. Your determination of that issue should be guided by the principles that apply to weighing the testimony of any expert witness, including the witness' general credibility."

The trial court declined to give the instruction requested by the defendant, explaining: "In regard to the request to charge regarding expert testimony, I do believe that the charge that I have included in my proposal does, in fact, convey all of the appropriate information that's requested by [defense counsel] in his request to charge, and I do not intend to alter it in order to adopt the specific language that is suggested by [him]."

The court thereafter instructed the jury concerning expert testimony as follows: "In this case, certain witnesses have taken the [witness] stand, given their qualifications and testified as expert witnesses. A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training or education sufficient to qualify him or her as an expert on the subject to which the testimony relates. An expert is permitted not only to testify to facts that he or she personally observed, but also to state an opinion about certain circumstances. This is allowed because an expert, from experience, research and study, [is] supposed to have a particular knowledge on the subject of the inquiry and be more capable than a layperson of drawing conclusions from facts and basing his or her opinion upon them.

"Such testimony is presented to you to assist you in your deliberations. No such testimony is binding upon

you, however, and you may disregard such testimony either in whole or in part. It is for you to consider the testimony with the other circumstances in the case, and using your best judgment, determine whether you will give any weight to it, and, if so, what weight you will give to it. The testimony is entitled to such weight as you find the expert's qualifications in his or her field entitle it to receive, and it must be considered by you, but it is not controlling upon your judgment."

A comparison of the defendant's requested instruction with the instruction given to the jury reveals that they are substantially similar. The court properly instructed the jury as to its exclusive role in assessing the credibility of expert witnesses and determining the weight to be given to expert testimony. Although the court declined to highlight Stephenson's testimony specifically, as requested by the defendant, there was no substantive difference between the substance of the defendant's requested instruction and the instruction given by the court. Because the court's instructions were correct in law, adapted to the issues and sufficient to guide the jury, we cannot conclude that they were improper.

The judgment is affirmed.

In this opinion the other judges concurred.