IN RE MADISON M. ET AL.*
(AC 41469)

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

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights with respect to his three minor children pursuant to statute (§ 17a-112 [j] [3] [B] [i]) on the basis of his failure to achieve a sufficient degree of personal rehabilitation. The petitioner, the Commissioner of Children and Families, had filed neglect petitions and an order of temporary custody for each of the three children. The father was on the run from the law at that time, but the

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

Department of Children and Families, nevertheless, unsuccessfully attempted to contact him by calling several numbers on file, leaving a message with a friend, and sending letters to addresses associated with him. The children were adjudicated neglected and placed in the custody of the petitioner, and specific steps were ordered for the father. When the department later contacted the father by phone, he refused to provide the department with his location and was uncooperative. After approximately one year of evading detection, the father was arrested, incarcerated, and appeared before the court at an evidentiary hearing, at which time the previously ordered specific steps, which were not physically delivered to the father, were admitted as an exhibit, and the court approved the permanency plans of termination of parental rights and adoption. In the months leading up to the trial on the petitions to terminate the father's parental rights, the department sent several letters to him but received no reply. Thereafter, the trial court granted the termination petitions with respect to all three children, finding that the father had failed to achieve sufficient personal rehabilitation. The court also found that the father had been provided the specific steps, as required by § 17a-112 (j) (3) (B) (i), and, alternatively, in light of his absconding and refusal to cooperate with the department's investigation, the failure to provide him with the steps was harmless error. *Held* that the trial court did not err in concluding that the respondent father had been provided specific rehabilitative steps in a manner that satisfied the requirements of § 17a-112 (j) (3) (B) (i): under the circumstances of the present case, where the father had evaded detection intentionally and refused to respond to the department's repeated inquiries, and where the previously ordered steps were admitted as an exhibit during the evidentiary hearing, at which time the steps would have been accessible to the father and his attorney, physical delivery of the steps to the father was not a necessary measure, and the petitioner's efforts were more than sufficient to ensure that he knew specific steps had been ordered and that those steps were important to preserving his parental rights; moreover, even if the respondent father had not been provided the specific steps, such an omission would constitute harmless error, as the father would have been unable to observe certain specific steps, such as obtaining adequate housing and income, avoiding involvement with the criminal justice system, maintaining a safe and nurturing home environment, and developing a cohesive relationship with his children because of his incarceration and the allegations that he had sexually abused his children, and the physical delivery of specific steps would have been a futile endeavor in light of the father's attitude toward the department and reluctance to change for the better, the court having found that the father was not ready to assume a responsible position in the lives of the children, that he was initially separated from his children because of his untreated substance abuse issues and general criminality, and that there was no indication that he had any intention

of addressing those problems or becoming a stable and dependable figure in the lives of his children.

Argued September 6—officially released October 18, 2018**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgments terminating the parental rights of the respondent father, from which the respondent father appealed to this court. *Affirmed.*

David J. Reich, for the appellant (respondent father).

Cynthia E. Mahon, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, *Jane Rosenberg*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

DiPENTIMA, C. J. The respondent, Donald S., appeals from the judgments of the trial court terminating his parental rights with respect to his minor children, Madison M., Deanna S., and Emma Grace S.[1] On appeal, the respondent claims that he was not provided the specific steps mandated by General Statutes § 17a-112 (j) (3) (B) (i) and, consequently, was unable to achieve a level of rehabilitation that would reasonably encourage a belief that at some future date he could assume a responsible position in the lives of his children.[2] Additionally, the respondent contends that the failure to

** October 18, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The children's mother consented to the termination of her parental rights and did not participate in this appeal.

[2] On September 5, 2018, the attorney for the minor children filed a statement pursuant to Practice Book § 67-13, adopting the position of the petitioner, the Commissioner of Children and Families.

provide him with the specific steps did not constitute harmless error. We do not agree with either argument and, therefore, affirm the judgments of the trial court.

The following factual findings of the trial court, which are not challenged, and procedural history are relevant to our consideration of the issues raised on appeal. Prior to the filing of the neglect petitions, the Department of Children and Families (department) had received numerous reports that the respondent and the children's mother were not acting as responsible parents. In 2011, the department substantiated separate instances in which the parents had failed to follow up on important medical appointments for Madison and Deanna. The next year, the department also substantiated a report that the parents had cancelled appointments for Emma Grace, only three months old at the time, against the advice of her doctor. Then, in 2013, Emma Grace missed multiple appointments with medical specialists, as well as appointments with her pediatrician.

The parents were arrested in September, 2014, on charges of risk of injury to a child; see General Statutes § 53-21; after Deanna, then six years old, was found wandering alone outside in a dirty and disheveled condition. Several months later, in April, 2015, the department received a report from Deanna's school that there was a six inch red mark on her backside. Deanna told school staff that the respondent had struck her with a knife and that he sometimes hits her with a belt. She also told school staff that "it hurts" when he hits her, but that she was "not afraid to go home." (Internal quotation marks omitted.) Following an investigation, however, "the department decided not to substantiate either parent for neglect."

During this time, the respondent was cooperative with the department's investigation. In May, 2015, he

informed the assigned investigative social worker that Madison had been exhibiting behavioral issues at school and scheduled a meeting to address her individualized needs. Then, on June 2, 2015, he contacted the department to notify officials that Emma Grace had been injured when the stroller she was in fell down a flight of stairs onto pavement. Two days later, on June 4, 2015, however, the department received reports that the respondent had been arrested on June 3, 2015, for breach of peace and interfering with a police officer, stemming from an incident at the family's home. The department's follow-up investigation revealed that the respondent had been drinking and acting "nasty" toward the mother. She told him to leave, but he refused. He later passed out in the backyard. When he woke up, he began ringing neighbors' doorbells and screaming. At some point, the mother called the police, and he was arrested. In connection with this incident, a protective order was issued, and the respondent moved out of the family's home.

The next day, June 5, 2015, the respondent attended an evaluation at Wheeler Clinic for mental health and substance abuse issues. It was recommended that he enroll in an intensive outpatient program at its facility. He agreed and successfully completed the program in July, 2015. The respondent was then referred to a relapse prevention group. Shortly after enrolling in this program, however, he was discharged "unsuccessfully" after he notified Wheeler Clinic staff that he was moving to New Haven.

In August, 2015, the respondent again was arrested, this time on motor vehicle charges. He failed to appear in court on these charges, as well as the criminal charges from the June 3, 2015 incident. Then, in October, 2015, police began an investigation into allegations made by the mother that the respondent had sexually assaulted Madison. Although the police eventually concluded that

there was insufficient evidence to charge him, it was at this time that the respondent's whereabouts became unknown to the department.

In December, 2015, department social worker Brenda Matta was assigned to the children's case. She attempted to contact the respondent by using phone numbers that the department had listed for him but was unsuccessful. She also contacted a friend of the respondent and left a message for him; her call was not returned. After searching the state Judicial Branch website, Matta found two addresses for the respondent and sent letters to these locations. She received no reply.

On December 18, 2015, following a report that the mother and her new husband were consuming large amounts of alcohol while caring for the children, the department invoked a ninety-six hour hold on all three children. Four days later, petitions were filed alleging that the children were neglected. The same day, the petitioner, the Commissioner of Children and Families, also sought and obtained an ex parte order of temporary custody for each of the three children. In granting the orders of temporary custody, the court also ordered preliminary specific steps for the respondent and the mother. Matta testified that, at the time, the whereabouts of the respondent remained unknown, and notice of the orders of temporary custody was made by publication.

A preliminary hearing on the ex parte orders of temporary custody was held on December 29, 2015; neither parent attended. At the preliminary hearing on the orders of temporary custody, the court found that abode service had been made on the mother and sustained the orders without prejudice to the respondent, as publication was still pending. On January 27, 2016, a preliminary hearing on the neglect petitions was held,

which neither parent attended. After finding proper service and compliance with Practice Book § 17-21, the court entered defaults against both parents for failing to appear, adjudicated the children to be neglected and ordered the petitioner to file a motion to review the permanency plan by September 13, 2016.[3] The children were committed to the care of the petitioner and specific steps were again ordered for each parent.

Finally, in February, 2016, the department was able to speak with the respondent after an official from Deanna's school contacted Matta and informed her that they had received a phone call from an individual claiming to be Deanna's father. Matta called the number the school provided and spoke with an individual who identified himself as the respondent. During their conversation, the respondent said he wanted to see his children but refused to provide his address. He became loud, threatening, and verbally abusive, before hanging up. Sometime between March and July, 2016, Matta attempted to contact him again at the same number but was unsuccessful.

In July, 2016, after nearly a year of evading detection, the respondent was arrested and incarcerated. Two months later, Madison informed her therapist that the respondent had sexually abused her and her two sisters, and the therapist reported the allegations of sexual abuse to the department. On September 16, 2016, the petitioner, pursuant to Practice Book § 34a-23, filed a motion for emergency relief seeking an order suspending the respondent's visits with the three children

[3] "The statutes governing permanency plans were adopted to comply with federal law regulating state access to federal funding for children who have been removed from their parents . . . . In order to continue to receive federal funds, Congress requires states to review permanency plans every twelve months. 42 U.S.C. § 622 (a) and (b) (8) (A) (ii) (2012)." (Citation omitted.) *In re Mindy F.*, 153 Conn. App. 809, 812–13 n.5, 104 A.3d 799 (2014), cert. denied, 315 Conn. 913, 106 A.3d 306 (2015); see also Practice Book § 35a-14.

until the department completed an investigation into the allegations of sexual abuse.[4] The court granted the petitioner's motion ex parte the same day it was filed. Following an investigation into the allegations, the respondent was arrested and charged with multiple felonies. The charges remained pending as of the date of the court's decision to terminate the respondent's parental rights.

Approximately one month after issuing the emergency ex parte order suspending the respondent's visitation rights, the court held a hearing on the petitioner's motion to review the permanency plan.[5] At this hearing, the petitioner notified the court for the first time that the respondent was incarcerated. The hearing was continued until November 9, 2016, at which time the respondent appeared and was appointed counsel. Initially, the respondent, through counsel, objected to the petitioner's motion; however, at the evidentiary hearing on December 7, 2016, the respondent withdrew his objection. During the hearing, and in the presence of the respondent and his attorney, the petitioner introduced as an exhibit a social study in support of her motion to review the permanency plan, which included the specific steps ordered by the court on January 27, 2016. At the end of the hearing, the court approved the permanency plans of termination of parental rights and adoption.

Upon learning that the respondent was incarcerated, Matta began sending letters to him once a month. The letters identified her as the social worker assigned to the family's case, requested the respondent's participation in the case, and provided him with her direct line. He did not respond to these letters. In December, 2016,

[4] Prior to this order, the respondent had not visited with children at any point while they were in the custody of the petitioner.

[5] See footnote 3 of this opinion.

Matta was able to speak with the respondent over the phone, at which time he told her that he did not want the department to contact him anymore. Despite this statement, Matta continued to send him letters. She spoke with the respondent once more in May, 2017, this time seeking information for the termination of parental rights social study. During their conversation, the respondent became angry and stopped answering questions.

On April 27, 2017, petitions were filed seeking to terminate the parental rights of the respondent. The petitions alleged grounds for termination pursuant to §§ 17a-112 (j) (3) (B) (i) and (C). On October 24 and 30, 2017, a trial was held on the petitions to terminate. Following the presentation of evidence and closing arguments, the court ordered posttrial briefs addressing the issue of whether the respondent had been provided the specific steps, as required by statute, and heard oral argument from the parties on December 6, 2017.

In a thorough and well reasoned memorandum of decision, dated February 7, 2018, the trial court granted the termination petitions with respect to all three children and rendered judgments accordingly.[6] In its decision, the court found that there was clear and convincing evidence that the department had made reasonable efforts to locate the respondent, and that he had been unwilling or unable to benefit from reunification efforts. Further, the court found that the respondent had failed to achieve a degree of personal rehabilitation that would encourage a belief that, within a reasonable time, he could assume a responsible position in the lives of his children.[7] See General Statutes § 17a-112 (j)

[6] On May 23, 2018, the trial court issued a corrected memorandum of decision, which fixed an error regarding the date on which it held a hearing on the motion to review the permanency plan.

[7] The court found that the petitioner had not met her burden of proof to establish grounds for termination under § 17a-112 (j) (3) (C). Specifically, the court considered evidence that a previous investigation into claims of sexual molestation by the respondent concluded that "the mother was

(3) (B) (i). Concomitantly, the court found that the respondent had been provided the specific steps as required by statute and, alternatively, in light of his absconding and refusal to cooperate with the department's investigation, failure to provide him with the steps was harmless error. This appeal followed. Additional facts will be set forth as necessary.

The issue presented on appeal is whether the trial court erred in holding that the respondent had been "provided" specific rehabilitative steps in a manner that satisfies the requirements of § 17a-112 (j) (3) (B) (i) and, if so, whether failing to provide him with the steps was harmless. "Our review of the court's interpretation of this statute is plenary." *In re Unique R.*, 170 Conn. App. 833, 845, 156 A.3d 1 (2017).

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [Commissioner of Children and Families] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds." (Internal quotation marks omitted.) *In re Mariana A.*, 181 Conn. App. 415, 427, 186 A.3d 83 (2018). "Because a respondent's fundamental right to parent his or her

instigating [Madison] to make the allegation." Additionally, the court noted "the vague nature of the current allegations, questions about [the respondent's] opportunity to abuse the children after their statements of affection for him, and the court's lack of opportunity to hear from police or the forensic interviewer about the children's statements or to hear testimony from the children themselves in order to assess the reliability and credibility of those allegations . . . ." (Footnote omitted.) We do not address this issue on appeal, as the petitioner did not present it as an alternative ground to affirm.

child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 527, 175 A.3d 21 (2018), cert. denied sub nom. *Morsy E.* v. *Commissioner of Children & Families* (U.S. October 1, 2018) (No. 17-1549).

"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, including the question of whether the language actually does apply. . . . 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. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 729–30, 120 A.3d 1177 (2015).

Pursuant to § 17a-112 (j) (3) (B), parental rights may be terminated if "the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the

return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .'' Further, in *In re Elvin G.*, 310 Conn. 485, 500–506, 78 A.3d 797 (2013), overruled in part on other grounds by *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015), our Supreme Court concluded that the specific steps requirement found in subparagraph (B) applies to both clauses (i) and (ii), and, in most cases, when seeking to terminate parental rights under either ground, the petitioner must show by clear and convincing evidence that steps had been ordered and provided to the respondent. Neither the statute nor our case law, however, establishes a definition of the term ''provided.''

The respondent argues that ''provided,'' as it is used in the context of this statute, requires physical delivery of the specific steps to the parent. In this regard, the respondent contends that at some point following his appearance in this case at the November, 2016 hearing, the petitioner or the court should have given him a copy of the previously ordered specific steps or, at the very least, communicated those steps, and their significance, to him. He claims that failure to do so was tantamount to noncompliance with the requirements of § 17a-112 (j) (3) (B) (i), for which we must reverse the judgments of termination. We are not persuaded.

As our Supreme Court explained in *In re Elvin G.*, supra, 310 Conn. 507–508, the ''[s]pecific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could

fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citation omitted.) In some respects, "[t]he specific steps are [simply] a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B)." (Internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App. 308, 329, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015). Indeed, when "determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department." (Internal quotation marks omitted.) *In re Jazmine B.*, 121 Conn. App. 376, 390–91, 996 A.2d 286, cert. denied, 297 Conn. 924, 998 A.2d 168 (2010).

The petitioner contends that just as General Statutes § 45a-716,[8] which § 17a-112 incorporates by reference, allows for multiple means of legal service, we should

[8] "Except as provided in subsection (d) of this section, notice of the hearing and a copy of the petition, certified by the petitioner, the petitioner's agent or attorney, or the clerk of the court, shall be served at least ten days before the date of the hearing by personal service or service at the person's usual place of abode on the persons enumerated in subsection (b) of this section who are within the state, and by first class mail on the Commissioner of Children and Families and the Attorney General. If the address of any person entitled to personal service or service at the person's usual place of abode is unknown, or if personal service or service at the person's usual place of abode cannot be reasonably effected within the state, or if any person enumerated in subsection (b) of this section is out of the state, a judge or the clerk of the court shall order notice to be given by registered or certified mail, return receipt requested, or by publication at least ten days before the date of the hearing. Any such publication shall be in a newspaper of general circulation in the place of the last-known address of the person to be notified, whether within or without this state, or, if no such address is known, in the place where the petition has been filed." General Statutes § 45a-716 (c).

construe "provide" in a similar flexible and administratively efficient fashion. For her part, the petitioner claims that this position is logically consistent with the plain meaning of "provide," which is defined as "to supply or make something available . . . ." See Merriam-Webster's Collegiate Dictionary (11th Ed. 2003); see also *Vazquez* v. *Buhl*, 150 Conn. App. 117, 129, 90 A.3d 331 (2014) ("[a]ccording to one dictionary, the definition of 'provide' is to: 'make (something) available' or 'supply (something that is wanted or needed) . . . .' "). From this common definition, it is argued, one cannot necessarily infer that "provide" requires a direct conveyance from one person to another.

Although we find merit in this position, we are reluctant to graft into the statute a one-size-fits-all definition prescribing the efforts the petitioner must undertake in order to ensure that a respondent is apprised of the specific steps. Rather, it is more consistent with our jurisprudence in this area that this issue be addressed on a case-by-case basis in light of the particular facts before the court. See, e.g., *In re Stanley D.*, 61 Conn. App. 224, 231, 763 A.2d 83 (2000) (noting that for purposes of § 17a-112 "reasonable time" is factual determination to be made on case-by-case basis). In this regard, there might be some circumstances where merely making the specific steps available in the court file would be inadequate given the respondent's involvement in the case and cooperation with the department. Conversely, where the respondent has evaded detection intentionally and/or refused to respond to the department's inquiries, we do not believe that physical delivery of the steps is a necessary measure. The upshot of this approach is that the court balances the respondent's willingness to participate in the proceedings against the petitioner's efforts to notify the parent of the actions needed to facilitate reunification and avoid termination.

Applying this approach to the unchallenged facts of this case, we conclude that the respondent was provided with the specific steps, as required by § 17a-112 (j) (3) (B) (i). In December, 2015, when the children were first placed in the custody of the petitioner, the respondent was on the run from the law. During the initial stages of these proceedings, the department attempted to contact him by calling several numbers on file, leaving a message with a friend, and sending letters to addresses associated with him. Further, once contact was made with the respondent in February, 2016, he refused to provide the department with his location, became argumentative, and eventually hung up on the department social worker. After he was incarcerated and appeared in court, the previously ordered steps were admitted as an exhibit during the December, 2016 evidentiary hearing. At this time, the steps would have been accessible to the respondent and his attorney, if they had not been already. Finally, in the months leading up to the October, 2017 trial, the department sent several letters to the respondent asking for his cooperation with the termination of parental rights social study, but received no reply. Accordingly, given the respondent's recalcitrance throughout this process, the petitioner's efforts were more than sufficient to ensure that he knew specific steps had been ordered and that those steps were important to preserving his parental rights. To require physical delivery of the steps in this circumstance would only encourage respondents to take a contentious or evasive posture during the pendency of their case.

Even if we were to determine, however, that the respondent had not been provided the specific steps, such an omission simply would constitute harmless error in this context. As in *In re Elvin G.*, supra, 310 Conn. 509–17, where hindsight demonstrates that the respondent would have been unable or unwilling to

observe specific steps, had they been provided, the absence of such steps does not vitiate an otherwise valid judgment. Here, the steps ordered in December, 2015, and January, 2016, required the respondent to obtain adequate housing and income, avoid involvement with the criminal justice system, and maintain a safe, stable and nurturing home environment, all of which he could not accomplish given his incarceration. Moreover, following new allegations of sexual abuse, the respondent was no longer permitted to visit with the children, which in turn prevented him from developing a cohesive relationship with them, which was another required step. Finally, many of the steps mandated that the respondent cooperate and communicate regularly with the department, which as evidenced in the record, he failed to do repeatedly.

We find our conclusion of harmless error further supported by the fact that the respondent does not contest the trial court's finding that he failed to rehabilitate. In deciding to terminate his parental rights, the trial court found that the respondent was not ready to assume a responsible position in the lives of the children, especially in view of the childrens' ages and particular needs. Additionally, the court noted that it was the respondent's untreated substance abuse issues and general criminality that initially led to his separation from the children. There was no indication from his conduct throughout the proceedings, even following his incarceration, that he had any intention of addressing these problems or becoming a stable and dependable figure in the lives of his children. As such, any physical delivery, if required, of specific steps would have been a futile endeavor in light of the respondent's attitude toward the department and reluctance to change for the better. See *In re Jazmine B.*, supra, 121 Conn. App. 390–91 ("[i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may

consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department" [internal quotation marks omitted]).

The judgments are affirmed.

In this opinion the other judges concurred.

RICHARD LANGSTON *v.* COMMISSIONER OF CORRECTION (AC 40312)

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

Syllabus

The petitioner, who had been convicted of various crimes, sought a writ of habeas corpus claiming, inter alia, ineffective assistance of trial counsel. Thereafter, the respondent Commissioner of Correction requested that the habeas court issue an order to show cause as to why the petition should not be dismissed as untimely pursuant to statute (§ 52-470 [d] and [e]). The habeas court, after a hearing on the request for an order to show cause, rendered judgment dismissing the habeas petition as untimely filed, from which the petitioner, on the granting of certification, appealed to this court. On appeal, he claimed that the habeas court improperly concluded that he failed to show good cause for the delay in filing his habeas petition. Specifically, he claimed that his untimely petition did not violate the spirit of § 52-470 because it concerned issues that had been litigated for several years and that, in withdrawing a prior petition, he was following the advice of his former attorney and did not understand the consequences of his decision. *Held* that the habeas court properly dismissed the habeas petition and determined that the petitioner failed to establish good cause for the delay in filing his untimely habeas petition; the fact that the petitioner litigated previous habeas claims did not excuse his tactic of voluntarily withdrawing a prior petition just days before a motion to dismiss was to be heard and less than one month before trial, nor did it explain his failure to refile his case before the statutory deadline, and the petitioner failed to adduce sufficient evidence at the hearing on the request for an on order to show cause in support of his claim that his prior counsel failed to advise the petitioner of the time constraints governing the present habeas petition.

Argued September 17—officially released October 23, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, with whom, on the brief, was *Christopher Y. Duby*, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David M. Carlucci*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Richard Langston, appeals from the dismissal of his petition for a writ of habeas corpus as untimely under General Statutes § 52-470 (e). The petitioner argues that he established good cause for the delayed filing of his untimely petition, and the habeas court's judgment of dismissal was improper.[1] We are not convinced and, thus, affirm the judgment of the habeas court.

The following facts are relevant to this appeal. In May, 1999, the petitioner was convicted of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), criminal possession of a firearm in violation of General Statutes § 53a-217 and commission of a class

[1] The petitioner also argued on appeal that the habeas court erred in granting the request of the respondent Commissioner of Correction for an order to show cause because the pleadings had not been closed when the motion was filed. The petitioner abandoned this claim at oral argument, however, acknowledging that the recent decision by our Supreme Court in *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 189 A.3d 578 (2018), was dispositive and foreclosed further review. See id., 724–25 (holding that § 52-470 did not divest habeas court of discretion to act on motion filed by respondent prior to close of pleadings).

A, B, or C felony with a firearm in violation of General Statutes § 53-202k. The trial court imposed a total effective sentence of twenty-five years of incarceration. On appeal, the conviction was affirmed. *State* v. *Langston*, 67 Conn. App. 903, 786 A.2d 547, cert. denied, 259 Conn. 916, 792 A.2d 852 (2002).

In 2002, the petitioner filed his first petition for a writ of habeas corpus alleging, inter alia, ineffective assistance of trial counsel. Although the petition was granted by the habeas court, on appeal that judgment was reversed and certification to our Supreme Court was denied. See *Langston* v. *Commissioner of Correction*, 104 Conn. App. 210, 224, 931 A.2d 967, cert. denied, 284 Conn. 941, 937 A.2d 697 (2007). Thereafter, in March, 2008, the petitioner filed a federal petition for a writ of habeas corpus, which was denied in March, 2012. *Langston* v. *Murphy*, United States District Court, Docket No. 3:08CV410 (DJS) (D. Conn. March 7, 2012). Then, in May, 2012, he filed a second petition for a writ of habeas corpus in state court. The petition was withdrawn on September 22, 2014, three days prior to a hearing on a motion to dismiss and less than one month before the scheduled trial date.

On December 3, 2014, the petitioner filed a new petition for a writ of habeas corpus in state court, which is the subject of the present appeal and alleged, inter alia, ineffective assistance of trial counsel. Following the appearance of counsel and the filing of an amended petition, the respondent Commissioner of Correction filed a request for an order to show cause as to why the present petition should not be dismissed as untimely pursuant to § 52-470 (d) and (e).[2] The petitioner filed

[2] General Statutes § 52-470 (d) provides: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review;

an objection, and a hearing was held on February 8, 2017. In its memorandum of decision, dated March 23, 2017, the habeas court found that the petition was untimely because it was filed after the October 1, 2014 deadline[3] and the petitioner had failed to show good cause for the delay. Accordingly, the habeas court dismissed the petition. Thereafter, the court granted the petition for certification to appeal, and this appeal followed.

"The conclusions reached by the [habeas court] in its decision to dismiss the habeas petition are matters of law, subject to plenary review . . . Thus, [where] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, 170 Conn.

(2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law."

General Statutes § 52-470 (e) provides: "In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section."

[3] With respect to this case, October 1, 2014, was the latest of the three deadlines provided in § 52-470 (d).

App. 747, 753, 155 A.3d 823, cert. denied, 352 Conn. 902, 155 A.3d 1271 (2017). "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

The petitioner does not dispute the finding that his petition is untimely. Rather, on appeal, he argues that the habeas court erred in concluding that he failed to show good cause for the delay. Specifically, the petitioner contends that (1) this untimely petition does not violate the spirit or purpose of § 52-470 because it concerns issues that have been litigated consistently since 1999, and (2) in withdrawing his prior petition, he was following the advice of his former attorney and did not understand the consequences of this decision. We are not persuaded.

"For the purposes of . . . [§ 52-470 (e)], good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section." General Statutes § 52-470 (e). The parties also agree that good cause has been defined as a "substantial reason amounting in law to a legal excuse for failing to perform an act required by law . . . [a] [l]egally sufficient ground or reason." (Internal quotation marks omitted.) *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 591, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997).

The essence of the petitioner's first argument is that subsections (d) and (e) of § 52-470 were enacted to curtail stale claims brought years after final judgment

had been rendered in a prior habeas action, rather than to punish minor procedural missteps. The petitioner contends that he has challenged his convictions continuously for almost two decades and this petition, although technically untimely, is not representative of the vexatious or frivolous claims that the 2012 reforms to § 52-470 were implemented to address. We disagree. The petitioner voluntarily withdrew his prior petition just days before a motion to dismiss was to be heard, and on the relative eve of trial. The fact that the petitioner has litigated previous habeas claims does not excuse or justify this tactic, nor does it explain his failure to refile this case before the October 1, 2014 deadline. We cannot conclude that this argument demonstrates good cause for this untimely petition.

In his second argument, the petitioner implicitly concedes that it was unwise of him to have withdrawn his prior petition. He contends, nevertheless, that he should not be held accountable for this decision because he was acting at the direction of his erstwhile counsel. At the show cause hearing in the present case, however, the petitioner's prior counsel did not testify and the habeas court concluded that there was insufficient evidence to ascertain whether counsel had failed to apprise the petitioner of the time constraints governing his subsequent petition. Accordingly, we cannot conclude the habeas court erred in dismissing the petition for a writ of habeas corpus given the petitioner's failure to adduce evidence in support of this claim.

The judgment is affirmed.

SEVEN OAKS ENTERPRISES, L.P., ET AL. *v.* SHERRY DEVITO ET AL.
(AC 38325)

Lavine, Alvord and Beach, Js.

Syllabus

The plaintiffs, E Co., a limited partnership, and M Co., brought this action for, inter alia, breach of contract against the defendant D in connection with a promissory note and a management contract arising from the purchase of a limited liability company, L Co., by D from E Co. Payment for the purchase consisted of a certain sum in cash and the remaining $1.325 million by a promissory note. D executed the note both as manager of L Co. and individually. The purchase agreement was executed by D individually and by E Co., and C, who was the president and managing member of M Co., signed the purchase agreement on behalf of M Co., which in turn acted in its capacity of E Co.'s general partner. D and C also personally executed a management contract, which was attached to and expressly incorporated into the purchase agreement, and which included provisions that C was not to be removed as comanager so long as any debt was owed to E Co., and that C was to be compensated for his services as comanager. D subsequently unilaterally executed amendments to the operating agreement of L Co., which removed C as comanager and provided no compensation to C. D did not pay any of the $1.325 million owed on the note or anything to C for compensation under the management contract, and the plaintiffs subsequently brought claims for, inter alia, breach of contract regarding D's failure to make payments on the note, breach of the management contract and breach of the implied covenant of good faith and fair dealing. Thereafter, E Co. assigned to M Co. any and all claims, rights, and title to any and all defaulted loans and damages related to the sale of L Co. During a trial before a jury, the plaintiffs introduced a copy of the note into evidence, rather than the original. The jury returned a verdict in favor of the plaintiffs and awarded them $1.325 million in damages. The trial court denied D's motions to set aside the verdict and for judgment notwithstanding the verdict, and rendered judgment in accordance with the verdict, from which D appealed to this court. On appeal, D claimed, inter alia, that the plaintiffs did not have the right to enforce the note because M Co. could not satisfy the requirements of the statutory (§ 42a-3-309) provision governing the enforcement of lost, destroyed, or stolen instruments. *Held*:

1. The trial court erred in denying the motions to set aside the verdict and for judgment notwithstanding the verdict as to the plaintiffs' claim that D breached the contract by failing to make payments on the note, as the plaintiffs were not entitled to enforce the note at the time of trial:

a. E Co. lacked the ability to enforce the note after it assigned the note to M Co. approximately one year after the present action was commenced; although E Co., which was a party to both the note and the purchase agreement, was clearly the only party entitled to enforce the note at the time the present action was commenced and prior to the transfer of the note, E Co.'s assignment of the note to M Co. extinguished all rights E Co. had to enforce the note.

b. M Co., which was neither a holder nor a nonholder in possession, did not have the power to enforce the note because it could not satisfy the requirements of § 42a-3-309, as it was not in possession of the note when it was lost: the plain language of that statute compelled the conclusion that the only person who can enforce a note is the person in possession of that note when it was lost, the plaintiffs' public policy arguments were unavailing in light of the clear language of § 42a-3-309, and the common law of assignments did not displace the clear provisions of § 42a-3-309 because that statute was directly applicable to the situation underlying the present case and the legislature did not act to revise that statute, which was clear and unambiguous; moreover, in the present case, there was no evidence presented from which the jury reasonably could have inferred that the note was lost while in M Co.'s possession, and the jury found, instead, that the note was lost while in the possession of E Co., which then assigned the note to M Co.

2. D could not prevail on her claim that the trial court abused its discretion in denying her motion for judgment notwithstanding the verdict and in refusing to set aside the verdict in favor of the plaintiffs as to their claims of breach regarding the management contract, which was based on her assertion that neither plaintiff had a right to enforce the management contract: E Co. was the only party that could enforce the management contract, which was signed by C only on the plaintiffs' side and was expressly incorporated into the purchase agreement, to which E Co., but not M Co., was a party, as the note, which was part of the overall purchase transaction, was issued to E Co. but not to M Co., and the assignment, which was signed by C only, did not have the effect of transferring to M Co. the ability to enforce the terms of the management contract because the management contract stated that no assignment could be effected without the prior written consent of D; moreover, D having abandoned her claim in the trial court that there was insufficient evidence to support the claims of damages regarding the management contract, her claim on appeal that the alleged breaches did not cause any loss to the plaintiffs was not reviewable, and because the jury found in favor of the plaintiffs on more than one count but awarded only a total amount of $1.325 million in undifferentiated damages, and no special interrogatories were submitted showing which road the jury went down, this court presumed that the jury found damages of $1.325 million, whether based on breach of the note or breach of the management contract, and the verdict had to stand.

Argued January 29—officially released October 23, 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, where the named defendant filed a counterclaim; thereafter, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the motion to dismiss filed by the defendant Robert DePaolo; subsequently, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the defendants' motion to reargue; thereafter, the action was withdrawn as to the defendant Robert DePaolo; subsequently, the matter was tried to the jury before *Lee*, *J.*; verdict for the plaintiffs on the complaint and the counterclaim; thereafter, the court, *Lee*, *J.*, denied the named defendant's motions to set aside the verdict and for judgment notwithstanding the verdict, and rendered judgment in accordance with the verdict, from which the named defendant appealed to this court. *Reversed in part*; *judgment directed.*

Ridgely Whitmore Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellant (named defendant).

Ryan O'Neill, with whom, on the brief, was *Mark Sherman*, for the appellees (plaintiffs).

Opinion

BEACH, J. The defendant Sherri DeVito[1] appeals from the judgment of the trial court rendered, after a jury trial, in favor of the plaintiffs, Seven Oaks Enterprises, L.P. (SOE), and Seven Oaks Management Corporation

[1] Robert DePaolo was also named as a defendant in this action. The plaintiffs withdrew their complaint as to DePaolo before the trial commenced. All references to the defendant in this opinion are to DeVito alone. The defendant's first name has been spelled in the record as both "Sherry" and "Sherri." Her submissions to this court use the spelling "Sherri." We retain the spelling "Sherry" in the case caption but use "Sherri" in this opinion when necessary.

(SOM), on two counts alleging breach of contract and one count alleging breach of the implied covenant of good faith and fair dealing. The jury awarded $1.325 million in damages to the plaintiffs. On appeal, the defendant claims that the trial court (1) abused its discretion in denying the defendant's motion to set aside the verdict and her motion for judgment notwithstanding the verdict because the plaintiffs did not produce the original note at trial, there was insufficient evidence that the note was lost, and the plaintiffs did not have the right to enforce the note; (2) incorrectly instructed the jury regarding SOM's right to enforce the note; (3) lacked subject matter jurisdiction over SOE because it did not have the legal capacity to commence and continue the action; and (4) abused its discretion in denying her motion for judgment notwithstanding the verdict and in refusing to set aside the verdict because neither plaintiff had a right to enforce the management contract, the alleged breaches did not cause any loss to the plaintiffs, and the jury could not determine with reasonable certainty the amount of damages sustained. We affirm the judgment as to SOE's claim regarding breach of the management contract and reverse as to SOE's claim of breach of contract regarding the note and all of SOM's claims.

The following facts, which the jury reasonably could have found or are undisputed, and procedural history are pertinent to our decision. This dispute concerns a note and a management contract arising from the purchase of a limited liability company by the defendant. Prior to the events in issue, Murray Chodos had purchased a residential property located at 516 Round Hill Road, Greenwich, in 1999. A limited liability company, 516, LLC, had been created to own the property, and SOE was the sole owner of 516, LLC.

SOM was the general partner of SOE and Chodos was the president and managing member of SOM.

Chodos met the defendant and her husband in late 2005 or early 2006. Chodos helped the defendant and her husband obtain life insurance policies and referred the defendant to an attorney, who could draft trusts for their children. In October, 2006, Chodos agreed to sell 516, LLC, to the defendant. The defendant purchased 516, LLC, from SOE for $4 million. Payment consisted of $2.675 million in cash by wire transfer and the remaining $1.325 million by a promissory note (note), which listed property located at 516 Round Hill Road as collateral. The purchase agreement was executed by the defendant individually and by SOE. Chodos signed the purchase agreement on behalf of SOM, which in turn acted in its capacity as SOE's general partner. On the defendant's side, the note was executed by the defendant both as manager of 516, LLC, and individually.

In addition, the purchase agreement provided that until the note was paid, Chodos was to be the comanager of 516, LLC, pursuant to a management contract, which was attached to and expressly incorporated into the purchase agreement. The defendant and Chodos personally executed the management contract, which included provisions that Chodos was not to be removed as comanager so long as any debt was owed to SOE, that Chodos was to be compensated for his services as comanager, and that he would have all powers available to the manager under the operating agreement of 516, LLC.

On April 4, 2008, the defendant, unknown to Chodos or to the plaintiffs, unilaterally executed an amendment to the operating agreement of 516, LLC. The amendment removed Chodos as comanager, provided Chodos with no voting rights, and provided no compensation to Chodos. On May 1, 2008, the defendant executed another amendment to the operating agreement. This amendment recognized a mortgage of $365,000 in favor

of Allied International Fund, Inc. (Allied), and placed the Allied security interest above SOE's note in priority.

The defendant did not pay any of the $1.325 million owed on the note or anything to Chodos for compensation under the management contract. In April, 2010, the plaintiffs initiated this action against the defendant. On December 31, 2011, SOE executed a "Bill of Sale and Assignment" (assignment), which assigned to SOM "any and all claims, rights and title to any and all defaulted loans and damages relating to the sale of 516, LLC." The plaintiffs alleged four counts: (1) breach of contract for the defendant's breach of the management contract; (2) breach of the implied covenant of good faith and fair dealing for the defendant's bad faith breaches of the management contract; (3) breach of contract regarding the defendant's failure to make payments on the note; and (4) reckless and wanton misconduct by the defendant. The defendant raised several special defenses and counterclaims. There are no claims on appeal regarding the special defenses and counterclaims.

The trial commenced on January 23, 2015. The plaintiffs withdrew their claim of reckless and wanton misconduct before the jury was charged. On February 6, 2015, the jury returned a verdict in favor of the plaintiffs on all three remaining counts, as well as the defendant's special defenses and counterclaims. It awarded the plaintiffs $1.325 million in damages. The verdict did not attribute damages to any specific count or counts.[2] At the same time, the jury provided answers to a set of written jury interrogatories. On February 23, 2015, the defendant filed a motion for judgment notwithstanding the verdict and a motion to set aside the verdict, which

[2] Judgment was not rendered in favor of the plaintiffs on the second count, which alleged breach of the covenant of good faith and fair dealing, apparently in light of the plaintiffs' verdict as to the first count, which alleged breach of contract on the same facts.

motions the court denied on August 21, 2015. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the trial court abused its discretion in denying her motion to set aside the verdict and her motion for judgment notwithstanding the verdict because the plaintiffs did not produce the original note at trial, there was insufficient evidence that the note was lost, and the plaintiffs did not have the right to enforce the note; that the court incorrectly instructed the jury regarding SOM's right to enforce the note; that the court lacked subject matter jurisdiction over SOE because SOE did not have the legal capacity to commence and continue the action; and that the court abused its discretion in denying her motion for judgment notwithstanding the verdict and in refusing to set aside the verdict because neither plaintiff had a right to enforce the management contract, the alleged breaches did not cause any loss to the plaintiffs, and the jury could not have determined with reasonable certainty the amount of damages required. We consider the claims in a different order for the purpose of clarity, and, in light of our conclusions, it is not necessary to address several of them.

We begin with our standard of review. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing

party, the jury could reasonably have reached the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion . . . .'' (Internal quotation marks omitted.) *Rendahl* v. *Peluso*, 173 Conn. App. 66, 94–95, 162 A.3d 1 (2017).

''The standards for appellate review of a directed verdict are well settled. Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . The foregoing standard of review also governs the trial court's denial of the defendant's motion for judgment notwithstanding the verdict because that motion is not a new motion, but [is] the renewal of [the previous] motion for a directed verdict.'' (Citation omitted; internal quotation marks omitted.) *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017).

I

We first consider various issues regarding the third count of the operative complaint, which alleged nonpayment of the note. The jury indicated in its answers to interrogatories that it had found that SOE and the defendant originally had been the parties to the note, that SOE possessed the note when it was lost, that the note nonetheless had effectively been assigned to SOM,

and that the defendant failed to make payments on the note. A note, of course, is a form of contract, and principles of contract construction are used to interpret its language. *Federal National Mortgage Assn.* v. *Bridgeport Portfolio, LLC*, 150 Conn. App. 610, 620, 92 A.3d 966, cert. denied, 312 Conn. 926, 95 A.3d 523 (2014). "The standard of review for contract interpretation is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Meeker* v. *Mahon*, 167 Conn. App. 627, 632, 143 A.3d 1193 (2016). "In ascertaining the contractual rights and obligations of the parties, we seek to effectuate their intent, which is derived from the language employed in the contract, taking into consideration the circumstances of the parties and the transaction. . . . We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract." (Internal quotation marks omitted.) *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 197, 118 A.3d 675, cert. denied, 318 Conn. 905, 122 A.3d 634 (2015). "Furthermore, [i]n giving meaning to the language of a contract, we presume that the parties did not intend to create an absurd result." (Internal quotation marks omitted.) *South End Plaza Assn., Inc.* v. *Cote*, 52 Conn. App. 374, 378, 727 A.2d 231 (1999).

A

Prior to the transfer of the note, which occurred after this action was initiated, SOE was clearly entitled to enforce the note, as the parties to the purchase

agreement, which referenced the note, were the defendant and SOE,[3] and the parties to the note were, as lender, SOE, and, as borrowers, 516, LLC, the defendant, and a guarantor.[4] Prior to the transfer of the note, then, SOE[5] was the only plaintiff able to enforce the note. The plaintiffs do not claim to the contrary.

Approximately one year after the action was commenced, SOE transferred the note to SOM. The next question is whether SOE, SOM, or both entities retained the power to enforce the note. The assignment provided in pertinent part that SOE "does hereby grant, convey, sell, assign, and transfer over to [SOM] all [SOE's] right,

[3] The opening paragraph of the purchase agreement provides in part that "[t]his membership interest purchase agreement . . . is entered into as of this [19th] day of October, 2006 by and between [SOE] . . . and [the defendant] . . . ."

[4] The guarantor of the note has played no role in this appeal.

[5] The defendant argues that SOE did not have standing to pursue this action because it was a Delaware limited partnership that was not registered in Connecticut, and it had transacted business in this state. See General Statutes §§ 34-38*l* and 34-38o. Section 34-38o (a), however, provides in relevant part that "[a]ny foreign limited partnership may . . . sell and convey real and personal property in this state for its lawful uses and purposes . . . without such action constituting transacting business in this state for the purposes of this chapter." Under the then current statutory provision, "[a] limited liability company membership interest is personal property." General Statutes (Rev. to 2015) § 34-169.

The defendant argues, however, that because Chodos, as owner of SOE, which owned 516, LLC, "did substantial work in preparing the property for development at 516 Round Hill Road, Greenwich, and in obtaining the necessary permits for its eventual development," and because Chodos "also claimed that he retained the right to co-manage" 516, LLC, for SOE's benefit, SOE transacted business in this state. These arguments, however, do not reflect the distinct statuses of partnerships and partners, corporations and shareholders, limited liability companies and members, and the individuals who own them. The jury found that the plaintiffs had proved they were "in good standing at the time of the formation of the contracts" and, thus, apparently found that SOE was not transacting business in this state. The jury's action finds some support in the evidence: the only specific transactions by SOE involved real and personal property transactions, which § 34-38o exempts from the meaning of transacting business. Additionally, Chodos testified that the sole purpose of SOE was to act as a "holding company" of other entities.

title, and interest in and to . . . any and all claims, rights and title to any and all defaulted loans and damages relating to the sale of 516, LLC." The note was referenced in the purchase agreement, and the note itself referenced 516, LLC. Where no interest in the assigned property is retained or the assignment is otherwise qualified, the assignment extinguishes all of the assignor's rights in the assigned matter. *Bozelko* v. *Milici*, 139 Conn. App. 536, 539, 57 A.3d 762 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013). The first paragraph of the note specified that the defendant "acknowledges that [SOE] may transfer this [n]ote . . . ." The assignment clearly stated that SOE was assigning its "claims, rights and title to any and all defaulted loans and damages relating to the sale of 516, LLC." SOE's assignment of the note to SOM extinguished all rights SOE had to enforce the note. Therefore, from December 31, 2011, onward, SOE lacked the ability to enforce the note.[6]

B

The jury reported in its answers to interrogatories that SOE transferred the note to SOM, and apparently concluded that SOM was entitled to enforce the note. The trial court determined, in its memorandum of decision dated August 21, 2015, on the defendant's motion

[6] At trial, the court engaged in the following colloquy with the plaintiffs' counsel:

"The Court: [Plaintiffs' counsel], why is [SOE] the plaintiff if it has assigned its interest?

"[The Plaintiffs' Counsel]: Well, initially, when . . . this case was started in 2010, they were in existence.

"The Court: I see. . . . They're just in the caption, I believe.

"[The Plaintiffs' Counsel]: That's right. They're in the caption. It remained that way; and again . . . at the end of the day . . . once we approve the assignment and all these claims have been assigned, technically, it will be [SOM] that will have the right to recoup any judgment found in our favor."

The court then deferred considering the issue of whether SOE should remain as a plaintiff, at least regarding its ability to enforce the note after the assignment, but then never specifically addressed the issue.

for judgment notwithstanding the verdict, that "[t]here was sufficient evidence for the jury to have found that, in accord with General Statutes § 42a-3-309, SOE was in possession of the note when it was lost, its whereabouts are unknown, and the entity is entitled to enforce the note. The jury further found that SOE transferred the right to enforce the note to SOM. Again, the jury could have reasonably and legally reached the conclusion that the plaintiffs were in possession of the note, and entitled to enforce it despite failing to produce the original. The defendant has not submitted evidence to the contrary."[7] (Footnote omitted.)

The plaintiffs argue that the verdict was proper, in light of the jury's findings, and supported by the evidence, because the note was lost while in the possession of SOE, and that SOE assigned all rights under the note to SOM.[8] The defendant claims that SOM did not have the power to enforce the note because it could not satisfy the requirements of § 42a-3-309, the provision for the enforcement of lost, destroyed, or stolen instruments under article 3 of the Uniform Commercial Code (UCC). We agree with the defendant.

Our analysis of the UCC involves questions of statutory interpretation over which our review is plenary.

[7] In the trial court's memorandum of decision on the defendant's motion to set aside the verdict, also dated August 21, 2015, the court further concluded: "The defendant contends that there is no evidence that SOM ever possessed the note, but that is beside the point. The documents reflecting the assignment of rights in the note were admitted into evidence, and the jury was instructed on the alleged assignment of the right to enforce the note to SOM, not any assignment of the note itself. The defendant has not met the burden of proving that the assignment of rights was invalid, or that a reasonable jury could not find that SOM was entitled to enforce the note. Accordingly, the verdict will not be set aside on the ground that the original note was not produced, considering that the plaintiffs submitted sufficient evidence for the jury to reach its specific conclusion that [the] plaintiffs had the right to enforce the note against [the] defendant." (Footnote omitted.)

[8] The defendant claims that there was insufficient evidence to support the conclusion that the note was "lost" pursuant to the provisions of § 42a-3-309. In light of our disposition of the issue, we need not decide this claim.

W & D Acquisition, LLC v. *First Union National Bank*, 262 Conn. 704, 709, 817 A.2d 91 (2003). "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, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, [we first] 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." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 774–75, 160 A.3d 333 (2017).

Article 3 of the UCC governs negotiable instruments, including notes. See General Statutes § 42a-3-102; see also *Valley National Bank* v. *Marcano*, 174 Conn. App. 206, 211, 166 A.3d 80 (2017). To determine whether SOM had standing to enforce the terms of the note, we consider the text of General Statutes §§ 42a-3-301[9] and 42a-3-309.[10] Because SOM presented no evidence that

[9] General Statutes § 42a-3-301 provides that a " '[p]erson entitled to enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 42a-3-309 or 42a-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

[10] General Statutes § 42a-3-309 provides: "(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

it possessed the original note at the time of trial, and the plaintiffs do not make that claim in any event, SOM was neither a holder nor a nonholder in possession. See General Statutes § 42a-1-201 (21). Therefore, in order to enforce the note, SOM must meet the criteria of § 42a-3-309. See General Statutes § 42a-3-301.

In a different context, our Supreme Court considered the language of § 42a-3-309 (a) in *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 759–60, 680 A.2d 301 (1996). In that case, the defendant contended that the plaintiff could not obtain a judgment of strict foreclosure under §§ 42a-3-301 and 42a-3-309. Id., 759. Specifically, the defendant claimed that because the plaintiff never proved it possessed the original note, it could not satisfy the requirement of § 42a-3-309 to show possession to enforce a lost note. Id. Our Supreme Court rejected this claim, noting that "[i]t is well established . . . that the [mortgagee] is entitled to pursue its remedy at law on the notes, or to pursue its remedy in equity upon the mortgage, or to pursue both." (Internal quotation marks omitted.) Id. The defendant did not dispute that it executed the note and mortgage and that the debt existed. Id. The plaintiff chose its equitable remedy, foreclosure of the mortgage. Id.

In deciding the case, however, our Supreme Court observed that because the plaintiff had "chosen to pursue the equitable action of foreclosure of the mortgage, rather than a legal action on the note, the fact that

"(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, section 42a-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means."

[the plaintiff] never possessed the lost promissory note [was] not fatal to its foreclosure of the mortgage. . . . [W]hatever restrictions §§ 42a-3-301 and 42a-3-309 might put upon the enforcement of personal liability based solely upon a lost note, they [did] not prohibit [the plaintiff] from pursuing an action of foreclosure to enforce the terms of the mortgage." Id., 759–60. Our appellate courts have not addressed whether an assignee may pursue an action on a lost note it never possessed,[11] but courts in other jurisdictions, and our Superior Courts, have done so.

In *Dennis Joslin Co., LLC* v. *Robinson Broadcasting Corp.*, 977 F. Supp. 491, 495 (D.D.C. 1997) (*Dennis Joslin*), the District Court held that the District of Columbia's version of UCC § 3-309 precluded the plaintiff from recovering on a note it did not possess at the time the note was lost. The court noted that both UCC § 3-309 (1990) and its predecessor, the original UCC § 3-804 (1952), "are intended to protect defendants from being obligated to two persons or entities with conflicting claims—the original holder who lost the instrument and a subsequent holder who innocently acquired the lost note." Id., 494. After attempting to discern the intent behind the revision, the court nonetheless concluded "that the language of [UCC § 3-309 (1990)] clearly states that the person suing on a lost note is entitled to enforce the note only if that person was in possession of the instrument *when loss of possession occurred*." (Emphasis in original; internal quotation marks omitted.) Id., 494–95. The court acknowledged that although "there does not appear to be a logical reason to distinguish between a person who was in possession at the time of the loss and one who later comes into possession of the rights to the note, the plain language of the provision

[11] We note that the defendant consistently has relied on precedents in foreclosure actions, which have limited persuasive value in the present context.

mandates that the plaintiff suing on the note must meet two tests, not just one: it must have been *both* in possession of the note when it was lost and entitled to enforce the note when it was lost." (Emphasis in original.) Id., 495.

In 2002, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, the drafters of the model UCC, revised § 3-309[12] with the intent of rejecting the result in *Dennis Joslin*. Uniform Commercial Code § 3-309 (2003) official comment 2. The District of Columbia adopted this revision in 2013. D.C. Code § 28:3-309 (2013). Connecticut has not adopted this revision. Had it done so prior to the events in issue, SOM might well have been entitled to enforce the note. Because the legislature has not acted, we look to other nonbinding authorities regarding the application of UCC § 3-309 (1990).

In *Atlantic National Trust, LLC* v. *McNamee*, 984 So. 2d 375, 377–78 (Ala. 2007) (*Atlantic National Trust*), the Supreme Court of Alabama rejected the *Dennis Joslin* court's interpretation of UCC § 3-309 (1990).[13] The court reasoned that Alabama's version of the UCC was silent regarding the rights of assignees, and supplemented the statute with the common law pursuant to § 1-103 of the UCC. Id., 378. Because under Alabama common law, an assignee has "the same rights, benefits, and remedies that the assignor possesses," the court held that an assignee could enforce a lost note under

[12] UCC § 3-309 (a) (2003) was revised to state that "[a] person not in possession of an instrument is entitled to enforce the instrument if . . . the person seeking to enforce the instrument . . . was entitled to enforce the instrument when loss of possession occurred; or . . . has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred . . . ."

[13] At the time, Alabama's version of UCC § 3-309 was the 1990 revision. Alabama has since adopted the 2002 revision noted in footnote 12 of this opinion. Ala. Code § 7-3-309 (1975).

UCC § 3-309 (1990). (Internal quotation marks omitted.) Id.

Some courts have interpreted the 1990 revision of UCC § 3-309 in the same manner as *Dennis Joslin*. See *In re Harborhouse of Gloucester, LLC*, 505 B.R. 365, 369–72 (Bankr. D. Mass.), aff'd, 523 B.R. 749 (B.A.P. 1st Cir. 2014); *In re Kemp*, 440 B.R. 624, 632–33 (Bankr. D.N.J. 2010); *McKay* v. *Capital Resources Co., Ltd.*, 327 Ark. 737, 740–41, 940 S.W.2d 869 (1997); *Zullo* v. *HMC Assets, LLC*, Docket No. 16 MISC 000413 (RBF), 2017 WL 2720319, *9 (Mass. Land June 22, 2017); *Emerald Portfolio, LLC* v. *Outer Banks/Kinnakeet Associates, LLC*, 790 S.E.2d 721, 725 (N.C. App. 2016); *U.S. Bank, N.A.* v. *Jones*, 71 N.E.3d 1233, 1239–40 (Ohio App. 2016).[14] Other courts have rejected that interpretation, supplementing the statute with the common law of assignments. See *In re Caddo Parish-Villas South, Ltd.*, 250 F.3d 300, 301–302 (5th Cir. 2001) (applying Louisiana law); see also *Southeast Investments, Inc.* v. *Clade*, Docket No. 3:97-CV-1799-L, 1999 WL 476865, *3 (N.D. Tex. July 7, 1999), aff'd, Docket No. 99-11085, 2000 WL 423350 (5th Cir. April 3, 2000) (decision without published opinion, 212 F.3d 595 [5th Cir. 2000]); *National Loan Investors, L.P.* v. *Joymar Associates*, 767 So. 2d 549, 551 (Fla. App. 2000); *NAB Asset Venture II, L.P.* v. *Lenertz, Inc.*, Docket No. C4-97-2181, 1998 WL 422207, *3 (Minn. App. July 28, 1998); *YYY Corp.* v. *Gazda*, 145 N.H. 53, 60–61, 761 A.2d 395 (2000); *Bobby D. Associates* v. *DiMarcantonio*, 751 A.2d 673, 675–76 (Pa. Super. 2000); *JP Morgan Chase Bank, N.A.* v. *Stehrenberger*, Docket No. 70295-5-I, 2014 WL 1711765, *3–4 (Wn. App. April 28, 2014) (decision without published opinion, 180 Wn. App. 1047), cert. denied, 181 Wn. 2d 1017, 337 P.3d 325 (2014).[15]

[14] Arkansas and Ohio have since updated their versions of § 3-309 to the 2002 revision. Ark. Code Ann. § 4-3-309 (2005); Ohio Rev. Code Ann. § 1303.38 (West 2016).

[15] Florida, Minnesota, New Hampshire, and Texas have also updated their versions of § 3-309 to the 2002 revision. Fla. Stat. § 673.3091 (2004); Minn.

Our Superior Court's decisions regarding an assignee's entitlement to enforce a lost note under § 42a-3-309 have likewise split along the *Dennis Joslin/Atlantic National Trust* divide. See *Cadle Co. of Connecticut, Inc.* v. *Messick*, Superior Court, judicial district of Middlesex, Docket No. CV-00-092983-S (June 26, 2001) (30 Conn. L. Rptr. 21, 22–23, 24) (citing implications of holding in *New England Savings Bank* v. *Bedford Realty Corp.*, supra, 238 Conn. 759–60, in which court granted motion for summary judgment where plaintiff did not have possession of note at time it was lost); *Eastern Savings Bank, FSB* v. *Pellicano*, Superior Court, judicial district of Fairfield, Docket No. CV-96-334043-S (February 24, 1998) (declaring without analysis that § 42a-3-309 does not prevent assignee from enforcing obligation where note was lost while in assignor's possession). One Superior Court decision allowed a bank to enforce a note that it never possessed because it merged with another bank that had lost the note. *Webster Bank* v. *River Road Antiques, LLC*, Superior Court, judicial district of Tolland, Docket No. CV-04-0084651-S (May 5, 2008) (45 Conn. L. Rptr. 539, 541–42).

The plain language of the statutes persuades us that *Dennis Joslin* and its progeny properly interpret and apply UCC § 3-309 (1990), especially in light of our Supreme Court's holding in *New England Savings Bank*. As previously stated, the application of § 42a-3-301, in the circumstances of the present case, leads to the conclusion that SOM is entitled to enforce the note only if it satisfies the standards stated in § 42a-3-309. Subsection (a) of § 42a-3-309, in turn, provides that "[*a*] *person* not in possession of an instrument is entitled to enforce the instrument if (i) *the person* was in possession of the instrument and entitled to enforce it when

Stat. § 336.3-309 (2003); N.H. Rev. Stat. Ann. § 382-A:3-309 (2004); Tex. Bus. & Com. Code Ann. § 3.309 (Vernon 2005).

loss of possession occurred . . . .'' (Emphasis added.) The only logical construction of the statutory language compels the conclusion that the only person who can enforce the note is the person in possession of the note when it was lost. When the text of a statute is clear, we do not adopt a different meaning or interpretation, unless the clear meaning is absurd, regardless of whether we agree or disagree with underlying policy. *State* v. *Lima*, 325 Conn. 623, 631, 159 A.3d 651 (2017).

There are, of course, dueling policies. The defendant maintains that if only the person who lost the note is entitled to enforce the note, the debtor is better protected against the prospect of paying twice. See General Statutes § 42a-3-309 (b); see also *In re Harborhouse of Gloucester, LLC*, supra, 505 B.R. 372; *McKay* v. *Capital Resources Co., Ltd.*, supra, 327 Ark. 741. On the other hand, as the plaintiffs suggest, if it is possible to enforce a note to which the right to enforce the note, but not the physical note, has been assigned, then fairness is promoted because unjust enrichment is prevented. See, e.g., *National Loan Investors, L.P.* v. *Joymar Associates*, supra, 767 So. 2d 551. In light of the clear language of the statute, the plaintiffs' policy arguments cannot prevail.

The plaintiffs also argue that assignability is favored by the common law, and that common law may be used to supplement the UCC. See, e.g., *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 471, 52 A.3d 702 (2012) (''[a]ssignability of rights is clearly favored with respect to contracts generally''). Connecticut courts also recognize that assignees step into the shoes of the assignor, even under the UCC. See, e.g., *National Loan Investors Ltd. Partnership* v. *Heritage Square Associates*, 54 Conn. App. 67, 73, 733 A.2d 876 (1999) (*National Loan Investors*). *National Loan Investors*, however, only considered the extent to which the UCC codifies the common law, not the extent to which it is supplemented

by it. See id., 73–74. It cites General Statutes § 42a-3-203, which provides in part that "an instrument is transferred when it is *delivered* . . . ." (Emphasis added.) Absent delivery, there is no transfer. Where the UCC expressly addresses an issue, the common law does not supplant the code. See *Bead Chain Mfg. Co.* v. *Saxton Products*, *Inc.*, 183 Conn. 266, 270, 439 A.2d 314 (1981) ("[w]hile it is true that the [UCC] incorporates, by reference, supplementary general principles of contract law and of the law merchant . . . such supplemental bodies of law cannot displace those provisions of the [UCC] that are directly applicable" [citation omitted]). Because § 42a-3-309 is directly applicable to the situation underlying the present case, the common law of assignments does not displace its clear provisions.

We also note that although the UCC has been revised by The American Law Institute and the National Conference of Commissioners on Uniform State Laws, and the revision has been available for the legislature to adopt for sixteen years, our legislature has thus far not acted on the proposed revision.[16] This court is "not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, supra, 325 Conn. 776. "[C]ourts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) *Tuxis Ohr's Fuel*, *Inc.* v. *Administrator*, *Unemployment Compensation Act*, 309 Conn. 412, 435, 72 A.3d 13 (2013). "If the legislature

[16] The implications of the *New England Savings Bank* decision are likewise telling because the decision would have put the legislature on notice regarding § 42a-3-309.

believes we have mistaken its silence, it can easily overrule us." *Maio* v. *New Haven*, 326 Conn. 708, 722, 167 A.3d 338 (2017). Thus, the common law of assignments does not supplement § 42a-3-309 (a) because the statute is clear and unambiguous and the legislature has not acted otherwise.

We now apply § 42a-3-309 to the facts of this case. In the course of Chodos' testimony at trial, the plaintiffs introduced a copy of the note into evidence, rather than the original. The copy did not show an endorsement from SOE to SOM, nor was it endorsed in blank. The plaintiffs also introduced the assignment, which transferred SOE's entire interest in the note to SOM. There was no evidence presented from which the jury reasonably could infer that the note was lost while in SOM's possession. Chodos never claimed to have delivered the note from SOE to SOM. The jury found, in its answers to interrogatories, that the note was lost while in the possession of SOE, and that SOE then assigned the note to SOM. In denying the defendant's posttrial motions, the court recognized that sequence, and the plaintiffs argue in their appellate brief, not that SOM was a holder of the note in any way but rather that the law allowed assignment of the proceeds of a note without physical transfer of the note. The court, then, erred in denying the motions to set aside the verdict and for judgment notwithstanding the verdict, because neither SOE nor SOM was entitled to enforce the note.

II

We next consider the issues regarding the management contract. The defendant claims that the trial court abused its discretion in denying her motion for judgment notwithstanding the verdict and in refusing to set aside the verdict in favor of SOE and SOM as to their claims of breach regarding the management contract. The defendant argues that there was no evidence that

the breach of the management contract caused any loss, and that neither the breach of the management contract nor the breach of the implied covenant of good faith and fair dealing, if any, resulted in damages that could be fairly ascertained.

A preliminary question is whether either SOM or SOE were parties to the management contract. The management contract was signed only by Chodos on the plaintiffs' side; the management contract was expressly incorporated into the purchase agreement, to which SOE was a party. In regard to the purchase agreement, SOM is not listed as a seller either in the opening paragraph or in the list of parties to be noticed in § 12 of the agreement. SOM appears in the purchase agreement only on the signature page, where Chodos, as the duly authorized president of SOM, signed for SOM, which was SOE's general partner. Because partnerships are entities distinct from their partners; General Statutes § 34-313; SOM's status as general partner did not have the effect of making SOM a party to the purchase agreement. Nor did SOM's purported status as the manager of 516, LLC, bestow party status because a limited liability company's manager has standing to enforce a contract only "where the object of the proceeding is to enforce a . . . manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement."[17] General Statutes (Rev. to 2015) § 34-134. Similarly, the note, which was part of the overall purchase transaction, was issued to SOE only. SOM does not appear in that document at all. Finally, as we have noted, the management contract, which also was signed at the October 19, 2006 closing, was executed by the defendant and Chodos.[18] The management contract provided that the defendant could

[17] The operating agreement of 516, LLC, is both silent as to the standing of managers and irrelevant because 516, LLC, is not a party to this action.

[18] The defendant argues that because Chodos signed the management contract without reference to any agency capacity, neither SOE nor SOM has the power to enforce it; the management contract, however, was inte-

not terminate the management contract "for any reason while any debt is owed to [SOE]." SOM was not mentioned at all in the management contract. Thus, at least prior to the assignment from SOE to SOM, SOM did not have the ability to enforce or to pursue damages arising from the management contract.

We must then consider the effect, if any, of the assignment on the right to enforce the management contract.[19]

grated into the purchase agreement. Section 18 of the purchase agreement provided that "[u]ntil such time as [the defendant] has paid all sums due under the [n]ote, Murray Chodos shall be a [c]o-[m]anager of 516, LLC, pursuant to the instrument attached hereto *and made a part hereof* as [e]xhibit B." (Emphasis added.) Although the defendant denied signing the management contract at trial, she does not dispute that issue on appeal. Because the purchase agreement, which the defendant admitted signing, clearly incorporated the management contract, the defendant's argument that SOE was a stranger to the management contract fails.

Additionally, the jury was instructed that, under General Statutes § 42a-3-117, "the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement." The jury's subsequent finding that SOE was a party to the management contract because it was executed as part of the same transaction as the note is consistent with our observation that the management contract was integrated into the purchase agreement, as the purchase agreement also was executed at the same time. SOE's subsequent assignment of the note has no necessary effect on its ability to enforce the management contract. Because SOM was not a party to the purchase agreement or the note, however, it was likewise not a party to the management contract.

[19] The defendant has not specifically argued that the assignment failed to convey SOE's rights regarding the enforcement of the management contract, but we consider the issue briefly because of the disagreement concerning the plaintiffs' standing to enforce it.

We note that the plaintiffs did not allege in their complaint that SOE had assigned the management contract to SOM; rather, the complaint seems to allege that SOE and SOM were both parties to the management contract. "It is axiomatic that the parties are bound by their pleadings." (Internal quotation marks omitted.) *Harborside Connecticut Ltd. Partnership* v. *Witte*, 170 Conn. App. 26, 34, 154 A.3d 1082 (2016). Likewise, the jury was never charged with deciding whether the management contract was assigned, as opposed to the note; the issue was not a subject of the jury interrogatories. Finally, although Chodos testified that the assignment was

The assignment purported to assign "any and all claims, rights and title to any and all defaulted loans and damages relating to the sale of 516, LLC"; but the management contract itself stated that no assignment could be effected "without the prior written consent of the [m]anager and the [c]o-[m]anager." Because the assignment was signed by Chodos alone—as agent for SOM on behalf of SOE—and not by the defendant, the "manager" of 516, LLC, the assignment document was ineffective to transfer SOE's rights under the management contract to SOM. Therefore, the assignment did not have the effect of transferring to SOM the ability to enforce the terms of the management contract. Only SOE, then, retained any right to enforce the management contract.[20]

The defendant's claim that the trial court abused its discretion in denying the motion to set aside the verdict on this ground is, however, unreviewable. The defendant claimed in her motion to set aside the verdict that there was insufficient evidence to support the claims for damages arising from breach of the management contract, but the motion itself was, in its entirety, a list

meant to assign "everything" to SOM, Chodos' list of "everything" included "the binder issued by the Secretary of State of Delaware, the seal, any books and records that we would have had . . . ." Chodos was later asked if the *note* was intended to be included in the assignment. He replied, "Everything pursuant to the sale of 516, LLC, was intended to be transferred to the successor entity as we closed the former entity formally." The language of the assignment itself is not so broad: the management contract was not necessarily part of a claim, right, or title "*to any and all defaulted loans and damages* . . . ." (Emphasis added.)

Chodos' answer was in reply to a question about the intent to transfer the note, which the plaintiffs alleged had been assigned. The plaintiffs have never claimed, even on appeal, that the management contract was assigned.

[20] The defendant argues that SOE did not have standing because it had dissolved and wound up its affairs prior to trial. Although Chodos testified that SOE had wound up its affairs, our holding that the management contract was not properly assigned leaves SOE with the two claims of breach regarding the management contract before SOE was terminated. See General Statutes §§ 34-373 and 34-374 (c).

of issues. The relevant claim, in its entirety, was the following: "5. There is insufficient evidence to support the verdict on the claim that [the] defendant, Sherri DeVito, breached any agreement not to change the operating agreement *and*, *also*, *there was insufficient evidence to support any damage claim arising from the breach of contract claim*, *including lack of standing*." (Emphasis added.) Her corresponding brief to the trial court did not address the claim of insufficient evidence to support damages at all. In its memorandum of decision, the trial court acknowledged that "[t]he defendant originally listed nine grounds in her motion to set aside the verdict but has only briefed four . . . . Accordingly, the court addresses those four grounds." The defendant did not request the trial court to rule further on the issue. See Practice Book § 60-5.

The trial court's memorandum of decision did not address the defendant's claim because she did not brief the issue. On appeal, the defendant has not challenged the trial court's apparent finding of abandonment, but claims an abuse of discretion for failure to set aside the verdict for insufficient evidence. "Both our Supreme Court and this court have stated the principle that, when a party abandons a claim or argument before the trial court, that party waives the right to appellate review of such claim because a contrary conclusion would result in an ambush of the trial court." (Internal quotation marks omitted.) *State* v. *Martone*, 160 Conn. App. 315, 327, 125 A.3d 590, cert. denied, 320 Conn. 904, 127 A.3d 187 (2015). Therefore, because the defendant abandoned her claim in the trial court that there was insufficient evidence to support the claims of damages regarding the management contract, her claim is unreviewable here.

We briefly address the award of $1.325 million in damages. Neither party requested that the jury award damages as to the individual counts, and the jury simply

awarded undifferentiated damages in the amount of $1.325 million. In such circumstances, "an appellate court will presume that the jury found every issue in favor of the prevailing party . . . and decline further appellate review. . . . Where there was an error free path available to the jury to reach its verdict, and no special interrogatories were submitted showing which road the jury went down, any judgment rendered on such a verdict *must* be affirmed." (Emphasis in original; internal quotation marks omitted.) *Brown* v. *Bridgeport Police Dept.*, 155 Conn. App. 61, 69, 107 A.3d 1013 (2015). In the circumstances of this case, because the jury found in favor of the plaintiffs on more than one count but awarded only a total amount of $1.325 million in damages, we presume that the jury found damages of $1.325 million, whether based on breach of the note or breach of the management contract. Accordingly, the verdict must stand.

The judgment is reversed as to SOE's claim of breach of contract regarding the note and all of SOM's claims, and the case is remanded with direction to render judgment in favor of the defendant on those claims; the judgment is affirmed as to SOE's claim regarding breach of the management contract.

In this opinion the other judges concurred.

ISMAEL AGOSTO *v.* PREMIER MAINTENANCE, INC.
(AC 40184)

Lavine, Alvord and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant company for, inter alia, religious discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) following the termination of his employment. M, who served as the chaplain at a certain church,

recommended the plaintiff, who served as the pastor at the same church, to C, who was M's supervisor, to fill a vacant cleaner/porter position at certain apartments that were managed by the defendant's customer, W Co. C, who knew that the plaintiff was a pastor, hired the plaintiff as part of the defendant's cleaning crew. Subsequently, C learned that M, as the cleaning crew's supervisor, would assign the plaintiff less demanding tasks than to other members of the crew and would permit the plaintiff to take frequent breaks from work to talk with the tenants of the apartments about, inter alia, God, religion and church. C gave M a warning about his performance as a supervisor, instructed the plaintiff to focus on work and to minimize his interaction with tenants during work hours, and issued a written warning to the plaintiff, which the plaintiff refused to sign or to respond to with comments. Thereafter, C complied with a request from H, who was employed by W Co. as the manager of the apartments, to terminate the plaintiff and M from their respective positions. The plaintiff's notice to the defendant regarding his unemployment compensation claim acknowledged that he was discharged for spending too much time talking with tenants. The trial court rendered summary judgment in favor of the defendant, concluding, inter alia, that the plaintiff had failed to establish a prima facie case of employment discrimination or retaliation, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court improperly concluded that the pretext model of employment discrimination analysis under *McDonnell Douglas Corp.* v. *Green* (411 U.S. 792) and *Texas Dept. of Community Affairs* v. *Burdine* (450 U.S. 248) applied to its adjudication of the defendant's motion for summary judgment, rather than the mixed-motive model of employment discrimination analysis under *Price Waterhouse* v. *Hopkins* (490 U.S. 228); the plaintiff did not allege or present facts that he was terminated from his employment for both legitimate and illegitimate reasons but, instead, claimed that the reason for his employment termination offered by the defendant, namely, his excessive socialization with tenants of the apartments, was a pretext for illegal religious discrimination, and, therefore, the pretext model of analysis applied.
2. The trial court properly determined that there were no genuine issues of material fact as to whether the circumstances under which the plaintiff was discharged from employment gave rise to a prima facie inference of discrimination; although H, who was employed by W Co. and not by the defendant, warned the plaintiff about using certain religious terms when engaging tenants in conversation, remarks made by someone other than the person who discharged the plaintiff may have little tendency to show that the decision maker was motivated by the discriminatory sentiment expressed in the remark, the written warning the plaintiff received from C contained no references to religion or church, C did not speak of the plaintiff's protected group in ethnically or religiously

degrading terms, the plaintiff failed to present any evidence that the defendant treated other employees more favorably than it treated him, as M gave the plaintiff preferential treatment, and the uncontested evidence presented by the defendant demonstrated that the plaintiff's discharge was not related to his religion but was, instead, the result of the plaintiff's failure to comply with the defendant's nondiscriminatory policy of limiting the plaintiff's interaction with tenants during work hours and W Co.'s request that the plaintiff not work at any of the properties that it managed because it was dissatisfied with his performance.

3. The trial court properly rendered summary judgment on the plaintiff's retaliation claim; the plaintiff's allegations and the facts of the present case did not constitute a protected activity, as the record contained no facts presented by the plaintiff that his continued reference to himself as the pastor or his continued reference to M as the chaplain, in contravention of the defendant's instructions that he not do so, was an informal means of complaint, and the plaintiff's refusal to sign his warning notice was also not an informal protest given that his failure to document his protest in the employee's remarks section indicated his agreement with the report as stated.

Argued April 17—officially released October 23, 2018

Procedural History

Action to recover damages for, inter alia, alleged religious discrimination, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James F. Sullivan, with whom was *Jake A. Albert*, for the appellant (plaintiff).

Angelica M. Wilson, with whom, on the brief, was *Glenn A. Duhl*, for the appellee (defendant).

Opinion

PELLEGRINO, J. The plaintiff, Ismael Agosto, appeals from the summary judgment rendered by the trial court in favor of the defendant, Premier Maintenance, Inc., on all counts of the second revised complaint in which the plaintiff alleged religious

discrimination in violation of the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq. On appeal, the plaintiff claims that the trial court improperly (1) utilized the pretext/*McDonnell Douglas-Burdine* model; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); rather than the mixed-motive/*Price Waterhouse* model of analysis; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 246, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989);[1] when adjudicating the defendant's motion for summary judgment, (2) improperly concluded that there were no genuine issues of material fact as to the circumstances under which he was discharged from employment that give rise to a prima facie inference of religious discrimination and (3) improperly concluded that there were no genuine issues of material fact that he was not engaged in a protected activity that gave rise to a claim of retaliatory discharge. We disagree, and thus affirm the judgment of the trial court.

The plaintiff commenced the present action in November, 2013. He alleged three counts against the defendant: employment discrimination in violation of General Statutes (Rev. to 2011) § 46a-60 (a) (1);[2] discriminatory retaliation in violation of § 46a-60 (a) (4); and aiding and abetting discrimination in violation of § 46a-60 (a) (5). The plaintiff alleged that the defendant employed him to be a cleaner/porter at the Enterprise-Schoolhouse Apartments (apartments) in Waterbury from March 13, 2012, until August 3, 2012. The apartments were managed by WinnResidential, a client of

[1] See *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104–109, 671 A.2d 349 (1996) (differentiating disparate employment treatment models).

[2] Hereinafter, unless otherwise indicated, all references to § 46a-60 in this opinion are to the 2011 revision of the statute.

the defendant. Sandino Cifuentes was the plaintiff's supervisor.

The plaintiff alleged that he was the pastor of Tabernacle of Reunion Church (church). Cifuentes knew that he was the pastor of the church. The plaintiff alleged that he was part of a cleaning crew that was led by Luis Martinez, who was the chaplain at the church, and that Cifuentes had informed Martinez that while he was working, Martinez should not refer to the plaintiff as "pastor" or give him the respect ordinarily afforded a pastor. While he was at work, the plaintiff frequently greeted tenants by stating "God bless," but in giving such greetings, he was never delayed for more than a minute or two. On June 14, 2012, Cifuentes warned the plaintiff about interacting with tenants of the apartments.

On or about June 22, 2012, Carolyn Hagan, the manager of the apartments, e-mailed Cifuentes, relaying information she had received from Daisy Alejandro, assistant manager of the apartments. Tenants Enrique Cintron and his wife, Jorge Cintron, had informed Alejandro that, during a church service, the plaintiff had read the names of tenants who were in jeopardy of being evicted. The plaintiff alleged that the Cintrons had lodged the complaint against him in retaliation for his having corrected them for inappropriately playing music in the church. He also alleged that at no time had he read the names of tenants who were in danger of being evicted.

The plaintiff further alleged that on or about June 26, 2012, Hagan requested that Cifuentes remove the plaintiff from his position. Cifuentes discharged the plaintiff from the defendant's employ on August 3, 2012, for the reasons that the plaintiff spent too much time talking to the tenants and Hagan's accusation that the plaintiff had read the names of tenants in jeopardy of

eviction from the apartments. Also, the plaintiff alleged that Wendy Smart, a representative of the defendant, signed a statement stating that the plaintiff "[o]verstepped the boundaries of church and work."[3] (Internal quotation marks omitted.)

In count one, the plaintiff claimed that, through its agents, the defendant had violated the act by interfering with his privilege of employment on the basis of his religion. The defendant exhibited ill will, malice, improper motive, and indifference to his religion. In count two, the plaintiff alleged that he held a bona fide religious belief and that the defendant's agents were aware that the plaintiff was the pastor and Martinez was the chaplain of the church. The defendant's agents retaliated against him for practicing his religious beliefs and customs by using the terms "pastor" and "chaplain." In count three, the plaintiff alleged that the defendant aided and abetted the unlawful conduct of its agents, who discriminated against him on the basis of his religious beliefs.

On March 30, 2015, the defendant filed an answer in which it denied the material allegations of the complaint and alleged nine special defenses. The fourth special defense to all counts of the complaint alleged: "All actions taken by [the defendant] with respect to [the] [p]laintiff and [the] [p]laintiff's employment were undertaken for legitimate, nondiscriminatory business reasons." The plaintiff filed a general denial of the defendant's special defenses.

The defendant filed a motion for summary judgment on July 8, 2016. The defendant claimed that the plaintiff could not establish a prima facie case of employment discrimination and retaliation under the act. Even if the plaintiff were able to establish a prima facie case of

[3] The record reflects that this statement was made in connection with the plaintiff's claim for unemployment compensation.

employment discrimination and retaliation, those claims would fail because the defendant had a legitimate, nondiscriminatory, nonretaliatory basis for terminating the plaintiff's employment, and the plaintiff cannot demonstrate that the basis is a pretext. The defendant further contended that the plaintiff's claim that it aided and abetted its agent's discriminatory conduct failed because (1) the plaintiff could not establish a material issue of fact as to his discrimination and retaliatory discharge claims, which are predicates to a claim of aiding and abetting, and (2) the defendant cannot be liable for aiding and abetting agents who are not parties to the present action. The defendant appended affidavits from Cifuentes, Hagan, Alejandro and Joseph Deming, superintendent of the apartments, and other documents to its memorandum of law in support of summary judgment.

The plaintiff filed an objection to the defendant's motion for summary judgment on October 3, 2016. He asserted that there were genuine issues of material fact and that he had demonstrated a prima facie case of employment discrimination, retaliatory discharge and aiding and abetting under the act. The plaintiff attached his own affidavit to his memorandum of law. The defendant filed a reply to the plaintiff's objection in which it contended that the plaintiff had failed to present evidence that could persuade a rational fact finder that the defendant's legitimate, nondiscriminatory reason for terminating the plaintiff's employment is false or pretextual.

The parties argued the motion for summary judgment on November 7, 2016. The court issued its memorandum of decision on February 15, 2017. The court set forth the procedural history of the case and identified the exhibits the defendant had submitted in support of summary judgment. After setting forth the standards for summary judgment and the legal principles governing

employment discrimination claims, the court found that the defendant was entitled to summary judgment on each count of the complaint by meeting its burden of proving the absence of a genuine issue of material fact.[4]

With respect to the plaintiff's claim of employment discrimination, the court cited the controlling statute. Section 46a-60 (a) provided in relevant part: "It shall be a discriminatory practice . . . (1) [f]or an employer . . . to discharge from employment any individual . . . because of the individual's . . . religious creed . . . ." The court found that the plaintiff alleged that on March 13, 2012, he was hired by the defendant to be a cleaner/porter at the apartments, and that he is the pastor at the church. During the course of his duties at the apartments, the plaintiff frequently greeted tenants with the phrase "God bless" and spent time talking with them. Cifuentes warned the plaintiff on June 14, 2012, about interacting with tenants as he had been doing. On June 22, 2012, Hagan received information that the plaintiff, during a service at the church, read the names of tenants who were in jeopardy of being evicted from the apartments. On June 26, 2012, Hagan requested that Cifuentes terminate the plaintiff from his position. Cifuentes discharged the plaintiff on August 3, 2012, on the basis of his spending too much time talking with tenants and acting inappropriately when he read the names of tenants at church. The court concluded that the plaintiff had not demonstrated that his firing occurred under circumstances giving rise to a prima facie inference of discrimination. The plaintiff merely had "alleged the conclusory statement that [b]ecause [the] [d]efendant disapproved of [the] plaintiff's use of religious terms while at work and was aware of his

[4] Although the plaintiff claims on appeal that the court improperly determined that there were no genuine issues of material fact, he does not take issue with the court's summary of the facts at issue.

status as a pastor, [the] plaintiff has shown direct evidence of discriminat[ory] motive." (Internal quotation marks omitted.) The court concluded that the plaintiff had not satisfied a prima facie case of employment discrimination under § 46a-60 (a) (1). The defendant demonstrated the absence of any genuine issue of material fact regarding the lack of circumstances giving rise to an inference of religious discrimination.

As to the retaliatory discharge claim alleged in count two, the court cited § 46a-60 (a) (4). Section 46a-60 (a) provided in relevant part: "It shall be a discriminatory practice . . . (4) [f]or any . . . employer . . . to discharge, expel or otherwise discriminate against any person . . . because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ." The defendant asserted that the plaintiff had failed to allege that he had engaged in a protected activity. The plaintiff responded that he engaged in a protected activity when he openly used religious terms at work, spoke out against the defendant by communicating with Martinez and referred to him as chaplain, contrary to the defendant's instructions, and that the defendant retaliated against him by firing him. The court concluded that the protected activity the plaintiff claimed was not a protected activity under the act and, therefore, he had failed to establish a prima facie case of retaliation.

In regard to count three, § 46a-60 (a) provided in relevant part: "It shall be a discriminatory practice . . . (5) [f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so . . . ." The court found that the plaintiff alleged that the defendant aided and abetted discriminatory conduct, but because the plaintiff failed to assert successfully a prima facie

case of employment discrimination, he could not successfully assert a claim of aiding and abetting. Furthermore, the defendant cannot discriminate against the plaintiff and at the same time aid and abet itself in discriminating against him. The court concluded that the plaintiff's allegations of aiding and abetting failed. Although the plaintiff mentioned the defendant's employee, he did not name the employee as a defendant. The case was commenced against the defendant only. The court, therefore, granted the defendant's motion for summary judgment.

We begin with the standard of review and the legal principles that guide our analysis of appeals from the granting of a motion for summary judgment. "The law governing summary judgment and the accompanying standard of review are well settled. Practice Book § [17-49] requires that 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. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Marasco* v. *Connecticut Regional Vocational-Technical School System*, 153 Conn. App. 146, 154, 100 A.3d 930 (2014), cert. denied, 316 Conn. 901, 111 A.3d 469 (2015).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes

any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . .

"The 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 counteraffidavits and concrete evidence. . . .

"[T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact. . . .

"Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely

on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Walker* v. *Dept. of Children & Families*, 146 Conn. App. 863, 869–71, 80 A.3d 94 (2013), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014). "Requiring the 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." (Internal quotation marks omitted.) Id., 871. "The fundamental purpose of summary judgment is preventing unnecessary trials." *Stuart* v. *Freiberg*, 316 Conn. 809, 822, 116 A.3d 1195 (2015).

"The burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is de minim[i]s. . . . Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination is whether the circumstances giv[e] rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." (Citation omitted; internal quotation marks omitted.) *Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 37–38 (2d Cir. 1994). "Though caution must be exercised in granting [a motion for] summary judgment where intent is genuinely in issue . . . summary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact." (Citation omitted.) Id., 40.

"On appeal, [an appellate court] must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . [Appellate] review of

the trial court's decision to grant [a] defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 10, 950 A.2d 1247 (2008).

I

The plaintiff first claims that the court improperly concluded that the pretext/*McDonnell Douglas-Burdine* model of analysis applied to its adjudication of the defendant's motion for summary judgment rather than the mixed-motive/*Price Waterhouse* model of analysis. We do not agree.

"Connecticut statutorily prohibits discrimination in employment based upon race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, and learning disability or physical disability. General Statutes § 46a-60 (a) (1)." *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 102, 671 A.2d 349 (1996). Our courts look to federal precedent for guidance in applying the act. *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 202, 596 A.2d 396 (1991).

"The legal standards governing discrimination claims involving adverse employment actions are well established." *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015). Generally, there are four theories of employment discrimination under federal law. *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 103. In the present case, the plaintiff alleges religious discrimination on the basis of disparate treatment. "[D]isparate treatment simply refers to those cases where certain individuals are treated differently than others. . . . The principal inquiry of a disparate treatment case is whether the plaintiff was subjected to different treatment because of his . . . protected status." (Citation omitted; footnote omitted; internal

quotation marks omitted.) Id., 104. "Under the analysis of the disparate treatment theory of liability, there are two general methods to allocate the burdens of proof: (1) the mixed-motive/*Price Waterhouse* model . . . and (2) the pretext/*McDonnell Douglas-Burdine* model." (Citation omitted.) Id., 104–105; see footnote 1 of this opinion.

"A mixed-motive [*Price Waterhouse*] case exists when an employment decision is motivated by both legitimate and illegitimate reasons. . . . In such instances, a plaintiff must demonstrate that the employer's decision was motivated by one or more prohibited statutory factors. Whether through direct evidence or circumstantial evidence, a plaintiff must submit enough evidence that, if believed, could reasonably allow a [fact finder] to conclude that the adverse employment consequences resulted because of an impermissible factor. . . .

"The critical inquiry [in a mixed-motive case] is whether [a] discriminatory motive was a factor in the [employment] decision at the moment it was made." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 105. "Under [the mixed-motive] model, the plaintiff's prima facie case requires that the plaintiff prove by a preponderance of the evidence that he . . . is within a protected class and that an impermissible factor played a motivating or substantial role in the employment decision. . . . Once the plaintiff has established his prima facie case, the burden of production and persuasion shifts to the defendant. [T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [the impermissible factor] into account. . . .

"If a plaintiff cannot prove directly the reasons that motivated an [adverse] employment decision, the plaintiff may establish a prima facie case under the *McDonnell Douglas-Burdine* or pretext model of analysis. . . .

[T]o establish a prima facie case of discrimination . . . the [plaintiff] must demonstrate that (1) he is in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination. . . . The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor. . . .

"Under the *McDonnell Douglas-Burdine* model, the burden of persuasion remains with the plaintiff. . . . Once the plaintiff establishes a prima facie case, however, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating (not proving) some legitimate, nondiscriminatory reason for the plaintiff's [discharge]. . . . Because the plaintiff's initial prima facie case does not require proof of discriminatory intent, the *McDonnell Douglas-Burdine* model does not shift the burden of persuasion to the defendant." (Citations omitted; internal quotation marks omitted.) *Jones* v. *Dept.* of *Children & Families*, 172 Conn. App. 14, 24–25, 158 A.3d 356 (2017)

In its memorandum of decision, the court noted the two models of analysis utilized in employment discrimination cases. As stated in a footnote of its decision, the court elected to utilize the pretext/*McDonnell Douglas-Burdine* model of analysis after finding that the plaintiff was not claiming that he was discharged from employment due to mixed motives of legitimate and illegitimate reasons. The court found that the plaintiff claimed that the reason for his employment termination offered by the defendant, namely, his excessive socialization with tenants of the apartments, is a pretext for illegal religious discrimination.

On the basis of our plenary review of the plaintiff's complaint and his affidavit in opposition to the defendant's motion for summary judgment, we conclude that

the plaintiff did not allege or present facts that he was fired for both legitimate and illegitimate reasons. We, therefore, agree with the trial court that the pretext/*McDonnell Douglas-Burdine* model of analysis applied to the adjudication of the defendant's motion for summary judgment.

II

The plaintiff's second claim on appeal is that, even if the court properly determined that the pretext/*McDonnell Douglas-Burdine* model of employment discrimination analysis was appropriate, the court improperly found that the defendant had demonstrated the absence of any genuine issue of material fact as to whether the circumstances under which he was discharged from employment gave rise to a prima facie inference of discrimination. We do not agree.

Under the pretext/*McDonnell Douglas-Burdine* model of analysis, "the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . This burden is one of production, not persuasion . . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 142 Conn. App. 756, 769–70, 66 A.3d 911 (2013), rev'd in part on other grounds, 316 Conn.

65, 111 A.3d 453 (2015); see also *Craine* v. *Trinity College*, 259 Conn. 625, 636–37, 791 A.2d 518 (2002).

Circumstances contributing to a permissible inference of discriminatory intent under the fourth prong of the *McDonnell Douglas-Burdine* model include: (1) the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; (2) the employer's criticism of the plaintiff's performance in ethnically degrading terms or invidious comments about others in the employee's protected group; (3) the more favorable treatment of employees not in the protected group; or (4) the sequence of events leading to the plaintiff's discharge or the timing of the discharge. See *Chambers* v. *TRM Copy Centers Corp.*, supra, 43 F.3d 37.

The defendant set forth the following facts in support of its motion for summary judgment.[5] The defendant employed the plaintiff as a cleaner/porter at the apartments from March, 2012 through August 3, 2012. The apartments are managed by the defendant's long-standing customer, WinnResidential, for whom it provided cleaning and maintenance services at numerous locations. At all relevant times, the defendant employed a five member "crew" to provide cleaning and maintenance services at the apartments. The crew consisted of four cleaners/porters and one working supervisor, who reported to Cifuentes.[6]

While he was employed by the defendant, the plaintiff was supervised by Martinez, a friend and colleague of the plaintiff from the church. Martinez referred and

[5] Attached to its memorandum of law in support of the motion for summary judgment were numerous exhibits, including some of the plaintiff's employment records and affidavits from Cifuentes, Hagan, Alejandro and Deming.

[6] Cifuentes was responsible for ensuring that the defendant's employees delivered superior services to its customers. He visited employees at their job sites one to three times a month. He also served as the liaison between the defendant and its customers with respect to complaints.

recommended the plaintiff to Cifuentes to fill a vacant position on the crew. Martinez informed Cifuentes that the plaintiff was his friend and a leader of his church. Prior to hiring the plaintiff, Cifuentes cautioned Martinez that if the defendant hired the plaintiff, Martinez could not treat him any differently than Martinez treated other members of the crew. He instructed Martinez to treat all members of the crew fairly and equally and not to give preferential treatment to any of the members of the crew, even if the crew member was a friend outside of work. In addition, to ensure that the crew delivered efficient and reliable high quality services the defendant and its customers expected, the defendant's employees were trained and instructed to limit their interaction with tenants and its customers' employees at customer work locations.

In May and early June, 2012, Cifuentes received complaints from members of Martinez' crew that Martinez was not distributing work assignments fairly. The members of the cleaning crew complained that Martinez frequently assigned "easy" jobs to the plaintiff while other members of the crew were assigned more demanding work. He also permitted the plaintiff to take extra breaks and to spend time talking and socializing with tenants of the apartments during working hours, instead of working. After he received the complaints from members of the crew, Cifuentes reminded Martinez of his responsibilities as a supervisor of the crew and of the importance of treating all members of the crew equally. Cifuentes informed Martinez that he had received several complaints from members of the crew that Martinez was giving the plaintiff preferential treatment and permitting him to socialize with tenants instead of working. Cifuentes reminded Martinez that, as supervisor, it was his responsibility to ensure that the plaintiff focused on work and minimized his interaction with tenants during working hours. Cifuentes reminded

Martinez that he should not treat the plaintiff more favorably than he treated other members of his crew.

In June, 2012, Cifuentes learned that Alejandro observed the plaintiff on many occasions standing in the lobby talking with tenants when he should have been working, frequently taking breaks from work to talk with tenants and to engage in conversations about God, religion and church. The plaintiff walked away from tenants with whom he was speaking when Alejandro got closer to him. Deming witnessed similar conduct on the part of the plaintiff. In addition, Cifuentes learned that Alejandro had received complaints from members of Martinez' crew that Martinez was assigning "easy" jobs to the plaintiff, while they were assigned more difficult and demanding tasks. According to Deming, the plaintiff and Martinez were not performing to WinnResidential standards and work was not being completed or timely done.

Also in June, Hagan, Alejandro and Deming discussed staff performance. It was at this time that Hagan learned that Martinez was giving preferential treatment to the plaintiff. She believed that Martinez' treatment of the plaintiff was not conducive to a good working environment because Martinez, as supervisor, should have treated each member of the crew equally and fairly. The fact that Martinez was not treating them fairly and equally led other members of the crew to complain to Alejandro. Hagan reported Martinez' and the plaintiff's conduct to Cifuentes and requested that he address the complaints with them.

On June 14, 2012, Cifuentes met first with Martinez and then with both the plaintiff and Martinez. When he met with Martinez, Cifuentes expressed his concern about Martinez' performance as a supervisor and gave him a verbal warning. He admonished Martinez to treat all members of the cleaning crew equally and to limit

the plaintiff's nonwork interactions with the tenants of the apartments. When Cifuentes met with the plaintiff and Martinez together, he instructed the plaintiff to focus on work and to minimize his interaction with tenants of the apartments during work hours. Cifuentes issued a written warning to the plaintiff. The plaintiff refused to sign the warning or make comments in the space provided.

On June 22, 2012, Hagan sent an e-mail message to Cifuentes concerning an incident involving the plaintiff and Martinez. It had come to Hagan's attention via complaints from tenants that, during a service at the church, the plaintiff had read the names of tenants who were going to be evicted from their apartments due to "bad" housekeeping, nonpayment of rent, and for being "bad" tenants. Hagan was concerned that someone had accessed this private and confidential information from the management office and was misusing it. She considered it a violation of WinnResidential's policy regarding professional conduct and its restrictions on the use of information viewed or obtained while performing job responsibilities.[7] On or about June 26, 2012, Hagan requested that Cifuentes remove the plaintiff and Martinez from their positions.

In his affidavit, Cifuentes attested that the defendant viewed WinnResidential's concerns as a serious issue because the defendant strove to provide the best possible service to its customers. It is the defendant's custom and practice to comply, as soon as practicable, with a customer's legitimate request for removal of its employees from a work site. Given WinnResidential's request, as well as his ongoing concern about the way in which the plaintiff and Martinez were performing, Cifuentes determined that it was necessary to replace them as

[7] Hagan also relayed information to Cifuentes that was critical of Martinez alone.

soon as the defendant was able to hire qualified replacements. As a result of the defendant's hiring requirements, which include drug testing and background checks, it took the defendant approximately six weeks to hire qualified replacements.

Cifuentes further attested that it is very important to the defendant that WinnResidential be satisfied with the quality of workers the defendant assigns to properties WinnResidential manages. The defendant was concerned that failing to accommodate Hagan's request that the plaintiff and Martinez be removed would "put the whole account in jeopardy," which could have cost five other people to lose their jobs.

On August 3, 2015, Cifuentes fired both the plaintiff and Martinez.[8] The plaintiff's termination report states that he had "been warned in the past regarding his conduct while at work, particularly keeping his interactions with residents to a minimum," and that "due to ongoing conduct and performance issues," the plaintiff's employment was terminated. On a Department of Labor form titled "Notice to Employer of Hearing and Unemployment Compensation Claim," and dated August 8, 2012, the plaintiff wrote: "I was discharged for talking excessively to building residents."

The plaintiff opposed the defendant's motion for summary judgment by presenting facts that are for the most part consistent with those presented by the defendant. The plaintiff represented that at the time the defendant hired the plaintiff, Cifuentes was aware that the plaintiff was the pastor of the church and that Martinez was a chaplain. Cifuentes had told Martinez that while he was at work, Martinez could not refer to the plaintiff as "pastor" or give him the respect ordinarily given to

[8] Martinez also commenced an employment discrimination cause of action against the defendant. See *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, A.3d (2018).

a pastor. In June, 2012, Hagan was advised by other members of the crew that Martinez was giving the plaintiff easier work. Consequently, Hagan met with the plaintiff and Martinez to address complaints she had received from tenants. Hagan warned the plaintiff about speaking to tenants and using terms such as "God bless" while he was at work. Hagan reported to Cifuentes "what she heard about [the plaintiff] from [Alejandro] and the [Cintrons]."[9]

On June 26, 2012, Hagan requested that the plaintiff and Martinez be removed from their positions. Cifuentes fired the plaintiff on August 3, 2012. Martinez was present at the time the plaintiff was fired. When Martinez referred to the plaintiff as pastor, Cifuentes allegedly became angry and fired Martinez as well. The plaintiff also attested that during his term of employment he had no performance or conduct issues.[10]

In deciding the defendant's motion for summary judgment as to count one of the complaint, the court recited the evidence submitted by the parties and concluded that the pretext/*McDonnell Douglas-Burdine* model of analysis applied. For purposes of the motion for summary judgment, the defendant assumed that the plaintiff met the first three prongs of employment discrimination under the model, i.e., that the plaintiff was a member of a protected class, he was qualified for the position,

[9] In his affidavit, the plaintiff denied that during a church service he published the names of tenants who were in jeopardy of being evicted. He claimed that the Cintrons reported that information in retaliation for his having corrected them during a church service about playing music at an inappropriate time. We do not consider the dispute between the Cintrons and the plaintiff a material fact. The material fact is whether the defendant fired the plaintiff because he excessively interacted with tenants of the apartments when he was to be working.

[10] The defendant contradicted the plaintiff's representation about performance and conduct issues by noting that the plaintiff failed to abide by the defendant's policy that employees limit their interaction with tenants and employees of its customers during working hours.

and he suffered an adverse employment action by the defendant. The court agreed with the defendant that the plaintiff had not demonstrated that the termination of his employment occurred under circumstances giving rise to an inference of discrimination. The court found that the plaintiff simply alleged the conclusory statement that "[b]ecause [the] [d]efendant disapproved of [the] plaintiff's use of religious terms while at work, and was aware of his status as a pastor, [the] plaintiff has shown direct evidence of discriminat[ory] motive." (Internal quotation marks omitted.) The court concluded, therefore, that the plaintiff did not satisfy a prima facie case of employment discrimination under § 46a-60 (a) (1), and that the defendant had met its burden of showing the absence of any genuine issue of material fact regarding the lack of circumstances giving rise to an inference of discrimination

On appeal, the plaintiff argues that the court erred in concluding that there were no genuine issues of material fact because the trial court should be cautious when granting a motion for summary judgment when an employer's motive is in question. See *Tryon* v. *North Branford*, 58 Conn. App. 702, 707, 755 A.2d 317 (2000). The plaintiff cites the affidavits of Hagan and Alejandro as the basis of his claim of having established a prima facie case of discrimination. Both Hagan[11] and Alejan-

[11] Hagan attested in relevant part:

"7. During the course of their employment with [the defendant], [the plaintiff] and Martinez were not to be engaging in any activities at WinnResidential associated with their positions at the . . . [c]hurch, where [the plaintiff] was a pastor and Martinez was a chaplain.

"8. In May and June of 2012, WinnResidential received various complaints about Martinez and [the plaintiff].

"9. In or about June of 2012, staff performance was discussed among . . . Deming . . . Alejandro . . . and me. It was brought to my attention that Martinez gave preferential treatment to [the plaintiff]. He called him [p]astor in the workplace. We did not want him to do that because it was a title of respect and authority while Martinez was to be the supervisor. It was also not conducive to a good working environment because the supervisor should be treating each of his subordinates fairly and equally—it was

dro[12] attested that the plaintiff engaged tenants of the apartments in conversations about God and church; Hagan warned the plaintiff about using the term "God bless" and engaging tenants in conversation. The plaintiff argues that the warning gives rise to an inference of discrimination against the plaintiff on the basis of his religion.

"[R]emarks made by someone other than the person who made the decision adversely affecting the plaintiff may have little tendency to show that the decision-

creating a problem, as the other three workers were complaining to [Alejandro]. I also was concerned about [f]air [h]ousing [l]aws where religion was not to be discussed at all. It was also brought to my attention that [the plaintiff] engaged in excessive interaction with [apartment tenants] during working hours when he should be working, not socializing. . . .

"11. It was also reported to me that [the plaintiff] was talking to residents about church, religion and God when he was to be working. . . .

"18. On or about June 26, 2012, I told . . . Cifuentes that WinnResidential did not want Martinez or [the plaintiff] to work at [the apartments] or any of its other properties."

[12] Alejandro attested in relevant part:

"9. In or about June of 2012, other [of the defendant's cleaners working at the apartments] expressed their concern to me about [the plaintiff's] excessive interaction with [tenants] during working hours.

"10. I personally saw [the plaintiff] standing in the lobby talking with residents when he should be working. I heard [the plaintiff] talking to residents about church and God when he was to be working. This happened on several occasions. He had been aware that he was not to do this during work hours, and when I arrived, he would start walking away from the persons with whom he was speaking.

"11. Two cleaners complained to me that Martinez assigned [the plaintiff] 'easy' jobs and assigned them the more difficult and demanding jobs. They also complained that Martinez was giving [the plaintiff] preferential treatment, that is, he was given less strenuous work. . . .

"13. Several cleaners complained to me that [the plaintiff] would frequently take breaks from working to speak to residents and engage in conversations about God, religion and church. I also personally observed that.

"14. On or about June 7, 2012, WinnResidential received complaints from its residents, [the Cintrons]. They told Maria Robalino, who was [the] WinnResidential residence service coordinator, that [the plaintiff] read a list of names at their church of WinnResidential residents who were going to be evicted from their units for reasons including bad housekeeping, which is unclean apartments."

maker was motivated by the discriminatory sentiment expressed in the remark." *Tomassi* v. *Insignia Financial Group, Inc.*, 478 F.3d 111, 115 (2d Cir. 2007), abrogated in part on other grounds by *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167, 177–78, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). We first note that both Hagan and Alejandro were employed by WinnResidential; they were not employed by the defendant. Second, Cifuentes' job was to ensure that the defendant's employees performed services to the satisfaction of its customers. He received complaints from Hagan that the plaintiff was talking to tenants about church and God during working hours. Cifuentes warned the plaintiff that during working hours he was to keep his interaction with the tenants to a minimum. Cifuentes was motivated to fire the plaintiff in June, 2012, when Hagan informed him that WinnResidential did not want the plaintiff, or Martinez, to work at any of its properties because the plaintiff received preferential treatment from Martinez, he spent time socializing with tenants when he was supposed to be working, and he discussed God and church with the tenants during working hours. Also, tenants reported that during a church service, the plaintiff published a confidential list of names of tenants who were in danger of eviction. Cifuentes understood that, if WinnResidential was not happy with the manner in which the plaintiff was doing his job and wanted him dismissed, the defendant risked losing the account if it did not fire him.

"Circumstances contributing to a permissible inference of discriminatory intent may include [1] the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position . . . or [2] the employer's criticism of the plaintiff's performance in ethnically degrading terms . . . or its invidious comments about others in the employee's protected group . . . or [3]

the more favorable treatment of employees not in the protected group . . . or [4] the sequence of events leading to the plaintiff's discharge . . . or the timing of the discharge . . . ." (Citations omitted.) *Chambers* v. *TRM Copy Centers Corp.*, supra, 43 F.3d 37.

The plaintiff does not dispute that the defendant had a policy that its employees keep their interactions with tenants of the apartments to a minimum during working hours. He also does not dispute that his conversations with tenants were disfavored by WinnResidential and created a business problem for the defendant. He was warned about his behavior and knew that he was not to discuss church and God with tenants when he was to be working. Cifuentes attested that he had informed the plaintiff of the complaints that he had received from Hagan and others. The plaintiff does not take issue with the contents of Cifuentes' affidavit. The written warning the plaintiff received contains no references to religion or church. Cifuentes did not speak of the protected group in ethnically or religiously degrading terms. No matter what the topic, religion or otherwise, the defendant's policy was for its employees not to socialize with tenants during working hours. No discriminatory intent can be inferred from the defendant's policy.

As to the third *Chambers* factor, the plaintiff has failed to point to any evidence that the defendant treated other employees more favorably than it treated him. To the contrary, Martinez gave the plaintiff preferential treatment. This factor weighs against the plaintiff.

The plaintiff claims that the sequence of events leading to his firing leads to an inference of discriminatory intent on the basis of religion. Significantly, we note that Cifuentes hired the plaintiff in March, 2012, upon the recommendation of Martinez. Cifuentes knew at that time that the plaintiff was the pastor of the church and that Martinez was chaplain in the church. At the

time he hired the plaintiff, Cifuentes warned Martinez that, as crew supervisor, he had to treat all members of the crew fairly. Within three months, Cifuentes received information from Hagan that Martinez was giving the plaintiff preferential treatment by assigning him less challenging tasks than he assigned to other members of the crew. Martinez gave the plaintiff breaks when he could talk to tenants about God and church. On June 14, 2012, Cifuentes warned both the plaintiff and Martinez that the plaintiff needed to focus on his work and not socialize with tenants during working hours. On June 26, 2012, Hagan informed Cifuentes that WinnResidential did not want the plaintiff to work at the apartments. Cifuentes decided that he would fire the plaintiff when he found a qualified replacement. Cifuentes met with the plaintiff on August 3, 2012, and discharged him from employment. The evidence presented by the defendant demonstrates that the plaintiff's discharge was not related to his religion but, instead, concerned his failure to comply with the defendant's policy of limiting his interaction with tenants during working hours. Moreover, WinnResidential, the defendant's customer, was dissatisfied with the plaintiff's performance and requested that he not work at any of the properties that it managed. The plaintiff failed to produce any concrete evidence to contradict the facts presented by the defendant. For the foregoing reasons, the plaintiff's claim fails.

III

The plaintiff's third clam is that the court improperly rendered summary judgment because the defendant failed to show the absence of any genuine issue of material fact as to whether he had engaged in a protected activity with regard to the plaintiff's claim of retaliation under § 46a-60 (a) (4). We disagree.

In count two of the complaint, the plaintiff realleged his claim of employment discrimination and, among

other things, that he held a bona fide religious belief and that he was the pastor of the church. He also alleged that the defendant and its agents knew that he was the pastor of the church and that Martinez was the chaplain in the church. He also alleged that the defendant and its agents retaliated against him for practicing his religious beliefs, including, but not limited to, using the terms "pastor" and "chaplain."

In ruling on the defendant's motion for summary judgment, the trial court found that the plaintiff alleged that he had engaged in a protected activity when he "openly used religious terms at work that he was legally permitted to use," "spoke out against [the] defendant by communicating with Martinez, and referring to him as chaplain, contrary to what [the] defendant instructed him to do," and "because of [the] plaintiff's engagement in this protected activity, [the] defendant retaliated against him by terminating his employment." (Internal quotation marks omitted.) The court, however, concluded that the protected activity cited by the plaintiff is not protected under the act. The plaintiff, therefore, has not presented evidence that he engaged in a protected activity and has failed to establish a prima facie case of retaliation. Thus, the defendant has met its burden of showing the absence of any genuine issue of material fact regarding its alleged retaliation against the plaintiff. The court, therefore, granted the motion for summary judgment with respect to the plaintiff's retaliation claim.

Section 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (4) [f]or any . . . employer . . . to discharge . . . or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

A prima facie case of retaliation requires a plaintiff to show (1) that he or she participated in a protected activity that is known to the defendant, (2) an employment action that disadvantaged the plaintiff and (3) a causal relation between the protected activity and the disadvantageous employment action. See *Hebrew Home & Hospital, Inc.* v. *Brewer*, 92 Conn. App. 762, 770, 886 A.2d 1248 (2005). "The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination." (Internal quotation marks omitted.) *Jarrell* v. *Hospital for Special Care*, 626 Fed. Appx. 308, 311 (2d Cir. 2015). "The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of [coworkers] who have filed formal charges." (Internal quotation marks omitted.) *Matima* v. *Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000).

"An employee's complaint may qualify as protected activity . . . so long as the employee has a good faith, reasonable belief that the underlying challenged actions of the employer violated the law." (Internal quotation marks omitted.) *Kelly* v. *Howard I. Shapiro & Associates Consulting Engineers, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013). "The reasonableness of the plaintiff's belief is to be assessed in light of the totality of the circumstances." *Galdieri-Ambrosini* v. *National Realty & Development Corp.*, 136 F.3d 276, 292 (2d Cir. 1998).

We agree with the trial court that the plaintiff's allegations and the facts of the present case do not constitute a protected activity, and the plaintiff also did not establish that the defendant knew that the plaintiff was engaged in a protected activity. On appeal, the plaintiff claims that his continuing to use religious terms during working hours in contravention of the defendant's

instructions that he not do so was a form of informal protest.[13] The plaintiff also claims that his refusal to sign the warning notice Cifuentes presented to him was an informal protest. The defendant points out, however, that the space provided on the warning notice provided the plaintiff with a means of protesting the defendant's alleged discrimination and would have been a protected activity, but the plaintiff did not take advantage of the opportunity. The form clearly states that the "absence of any statement on the part of the EMPLOYEE indicates his/her agreement with the report as stated."

On the basis of the plaintiff's very own words in the record, we cannot conclude that he had a good faith belief that he was engaged in a protected activity by continuing to use religious terms as an informal protest. Cifuentes wrote on the warning form that he gave the plaintiff on June 14, 2012, "[e]mployee has been seen several times spending too much time talking to residents instead of working." On his claim for unemployment compensation, the plaintiff stated as the reason for his termination: "I was discharged for talking excessively to building residents." The record contains no facts presented by the plaintiff that he continued to use the terms "pastor" and "chaplain" as an informal means of complaint. We, therefore, conclude that the court properly granted the motion for summary judgment in favor of the defendant on the plaintiff's retaliatory discharge claim.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

[13] On appeal, the plaintiff claims that he referred to Martinez as "chaplain" when they were at work, but there is no evidence to that effect, and more importantly, the plaintiff did not allege that he called Martinez "chaplain" during working hours.

[14] The resolution of the plaintiff's religious discrimination claim is limited to the facts of this case. The plaintiff's claim does not turn on the use of religious titles and honorifics in the workplace, and we offer no opinion in that regard.

STATE OF CONNECTICUT *v.* ELIZARDO MONTANEZ (AC 40359)

Alvord, Prescott and Beach, Js.

Syllabus

Convicted of the crimes of murder, conspiracy to violate the dependency-producing drug laws, carrying a pistol without a permit and criminal possession of a firearm, the defendant appealed. The defendant, whose probation also was revoked, claimed, inter alia, that the trial court violated his right to due process and a fair trial when it denied his motion for a mistrial after the jury reported that there was a bullet hole in a window in the jury deliberations room that had not been there the day before. Defense counsel claimed that there was no cure for the potential bias that may have developed in the jurors' minds as a result of their discovery of the bullet hole. The trial court instructed the jury as a group that the matter was unrelated to and not part of the evidence in the case, and that it could infer no negative inference against the defendant as it deliberated. The court thereafter denied the defendant's motion for a new trial. On appeal, the defendant claimed that the trial court's response to the jury's report of the bullet hole was insufficient under *State* v. *Brown* (235 Conn. 502), and that the bullet hole incident had resulted in substantial and irreparable prejudice to his case. The defendant also claimed that the trial court improperly determined that testimony by an FBI agent, W, about drive test survey data, which measures cell phone signals in relation to the location of a crime and plots those signals on a map, was admissible under the test for the admissibility of scientific evidence in *State* v. *Porter* (241 Conn. 57). *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court improperly denied his motion for a mistrial, which was based on his assertion that the court abused its discretion by inquiring of the jury as a group as to whether it could follow the court's instruction and remain fair and impartial: that court complied with *Brown*'s mandate that it conduct a preliminary inquiry of the jury on the record, as the factual basis on which the court relied was established on the record with both parties' knowledge and participation, the jury experienced the bullet hole incident as a group and, thus, the court properly inquired of the jury as a group, and the defendant presented no authority that the court was required to question the jurors individually, as a court may fulfill its obligation under *Brown* by informing both parties of the allegations, providing them with an adequate opportunity to respond and stating on the record its reasons for conducting a limited proceeding; moreover, the bullet hole incident was not presumptively prejudicial, as it did not pertain directly to the merits of the matter, the court issued a curative instruction to the jury that the bullet hole was unrelated to

the case and that the jury may infer no negative inference against the defendant, the court reminded the jury that the deliberation process must continue based only on the evidence that was presented, and the jury sent the court a note after it returned to the deliberations room that indicated that it could continue to deliberate without any prejudice to the defendant.

2. The trial court did not abuse its discretion in concluding that W's testimony about drive test survey data was admissible in evidence under *Porter*: W's methodology was reliable, as he testified that he and other members of the FBI used drive test data on a daily basis to locate fugitives, recover evidence and find victims, he testified that the cell phone handset had never not been where the record said it would be, and the court properly credited his testimony that the cell phone industry routinely relies on drive tests that are conducted in the same manner as W's test to design, maintain and optimize cell phone networks; moreover, W's testimony was relevant and satisfied the fit requirement of *Porter*, as W testified that the technology, towers, sectors and azimuths were the same for the relevant towers from the time the crime occurred through the time when he conducted the drive test, and he testified that he expected the signal strength to be the same during that time period, there was an unobstructed view of the cell tower in question, day-to-day weather had a negligible impact on cell service and older technology did not undergo a lot of change; furthermore, even if the challenged evidence was admitted improperly, any error was harmless and did not substantially affect the jury's verdict, as it was not vital to the state's case, other unchallenged evidence corroborated W's testimony on material points, the defendant did not challenge historical cell site location evidence and had a full opportunity to cross-examine W, and even without the drive test survey data, the state had a strong case against the defendant.

Argued April 19—officially released October 23, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to violate the dependency-producing drug laws, carrying a pistol without a permit and criminal possession of a firearm, and information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, where the court, *Pavia*, *J.*, ordered that the charges of criminal possession of a firearm and violation of probation be tried to the court; thereafter,

the charges of murder, conspiracy to violate the dependency-producing drug laws and carrying a pistol without a permit were tried to a jury; subsequently, the court denied the defendant's motions to preclude certain evidence and for a mistrial; thereafter, the charge of violation of probation was tried to the court; verdict of guilty of murder, conspiracy to violate the dependency-producing drug laws and carrying a pistol without a permit; subsequently, the charge of criminal possession of a firearm was tried to the court; thereafter, the court denied the defendant's motion for a new trial; judgment of guilty of murder, conspiracy to violate the dependency-producing drug laws, carrying a pistol without a permit and criminal possession of a firearm, and judgment revoking the defendant's probation, from which the defendant appealed. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Joseph T. Corradino*, senior assistant state's attorney for the appellant (state).

Opinion

ALVORD, J. The defendant, Elizardo Montanez, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a (a), conspiracy to violate the dependency-producing drug laws in violation of General Statutes §§ 53a-48 and 21a-277 (a), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and, following a court trial, of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant also appeals from the judgment revoking his probation after the trial court found him to be in violation of his probation in violation of General Statutes § 53a-32. On appeal, the defendant

claims that (1) he was denied his right to due process and trial by a fair and impartial jury when the court denied his request for a mistrial after a bullet hole was discovered in the jury room during deliberations, and (2) the trial court abused its discretion in concluding that drive test survey data is admissible under the test for admissibility of scientific evidence set forth in *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). We affirm the judgments of the trial court.

The jury reasonably could have found the following facts. At the defendant's request, Jesus Gonzalez contacted the victim, Ernesto Reyes-Santos, on April 7 or 8, 2014, to ask him to bring heroin from New York to Bridgeport. Gonzalez knew the victim through their heroin sales together. The victim would supply Gonzalez with heroin, and Gonzalez would bring customers to the victim. Gonzalez had also known the defendant for a long time, and the defendant became involved with Gonzalez and the victim's heroin business. The defendant told an acquaintance, Valerie Gomez-Delavega, with whom he socialized daily, that Gonzalez had someone coming from New York with drugs that the defendant needed her to try. He also told her that they were going to rob the person from New York and that they would have to kill him so that no one would retaliate.

On April 9, 2014, Gonzalez agreed to meet the victim in Bridgeport on Davis Avenue, near where Gonzalez lived. Gonzalez drove his white Jeep Cherokee to the meeting spot at about 9 p.m., and the defendant walked from around the corner and got into the Jeep's front passenger seat. The victim arrived and got into the Jeep's backseat, sitting behind the passenger seat. The victim then "had words with the defendant." The defendant wanted to bring the heroin somewhere to have someone try it. The victim refused and exited the Jeep.

The defendant also exited the Jeep and shot the victim, who later died of the gunshot wound at a hospital.[1]

Gonzalez then drove home and, at 9:24 p.m., called the defendant, who came to Gonzalez' house. When he arrived, the defendant pointed a gun at Gonzalez and said that if Gonzalez told anyone what happened he would kill him. The defendant also took Gonzalez' cell phone. The day after the victim was shot, the defendant asked Gomez-Delavega whether she had heard about the killing. He told her that they robbed the victim and that he had shot and killed him. The defendant said that he pulled the trigger and shot the victim as the victim reached for the gun, and that the victim fell out of the Jeep.

A couple of days later, the defendant told Gonzalez to get rid of the Jeep and said that he would pay Gonzalez for it. Gonzalez parked it somewhere with the key in it and never saw it again. When Gonzalez asked the defendant why he did it, the defendant responded that "he was mad." Gonzalez told his girlfriend, Latasha Vieira, that the Jeep had been stolen, and Vieira reported it stolen to the police on May 8, 2014. Sometime after that date, the defendant went to the Walmart pharmacy where Vieira worked to find out whether Gonzalez had told her anything, and he asked her to leave with him after work. Vieira said no, and the defendant grabbed her as she walked away. She pushed him back and told him to leave and not come back.

The defendant was arrested on July 14, 2014.[2] Thereafter, the defendant was tried before a jury and found

[1] Police officers were dispatched to the scene and arrived to find the victim lying in the street. The victim was transported to the hospital where he died. The cause of death was determined by autopsy as "a gunshot wound to the trunk."

[2] Gonzalez, who testified that he was originally charged with a number of offenses arising out of the events on April 9, 2014, including murder and conspiracy to commit murder, entered into a cooperation agreement with the state and ultimately pleaded guilty as a second offender to sale of narcotics in violation of General Statutes § 21a-277 (a).

guilty of murder, conspiracy to commit a violation of the dependency-producing drug laws, and carrying a pistol without a permit.[3] The court sentenced the defendant to a total effective term of fifty-two and one-half years of incarceration, followed by seven and one-half years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that he was denied his right to a fair trial by an impartial jury after his motion for a mistrial was denied. Specifically, he claims that jurors, during deliberations, "discovered bullet holes in the jury room" and that "there was no conceivable cure for the potential bias that may have developed in jurors' minds as a result of this interference into the required solemnity of the trial process." The state responds that "the jurors were not in the deliberation room when the hole was created, and . . . there was no evidence that the incident was related to this case. Moreover, the trial court's thorough canvass of the jurors confirmed that they could continue deliberations without any prejudice to the defendant." Accordingly, the state argues that the court acted within its discretion in denying the motion for a mistrial. We agree with the state.

The following additional facts and procedural history are relevant to the defendant's claim. On the afternoon of January 28, 2016, the jury's second day of deliberations, the jury delivered a note to the court requesting to go home for the day. The court agreed to release the jury for the day, and when the jury entered the courtroom, the court released the jury for the evening. At that time, the court asked: "Is there a question?" One of the jurors responded, stating: "There's a bullet

[3] The defendant was tried before the court and convicted of criminal possession of a firearm and violation of probation.

hole in our window and the ceiling, and it's really disconcerting, and it wasn't there yesterday." The court responded: "All right. So, the maintenance has been notified. I know that you had asked to see a marshal, and maintenance has been notified. They're going to check it out. I'll give you an update tomorrow when we figure out exactly what it is, okay?" After the jurors were released for the day and exited the courtroom, the court addressed counsel: "Nobody has seen it yet. We'll have maintenance take a look. I'm not saying that it's a bullet hole; I don't know what it is, but let's have somebody look at it and then we'll give them an update. They're obviously concerned about it; they've mentioned it to the marshals; they've mentioned it here. The only question is whether we use a different room, then, for purposes of deliberation. If it's bothering them, I certainly don't want to distract them or—the word disconcerting, you know, you just don't want that. But I think it might make them feel better if we at least tell them what it is, one way or the other; so, we'll address that tomorrow, okay?"

The next morning, defense counsel made an oral motion for a mistrial pursuant to Practice Book § 42-43. He argued, in part: "The Practice Book says that upon motion of a defendant, the judicial authority may declare a mistrial at any time during the trial if there occurs during the trial an error or legal defect in the proceedings, or any conduct inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant's case.

"And it's very concerning that this incident could cause irreparable damage. The jurors have not been interviewed yet, and I don't think we're going to interview them one by one, but there has to be a natural concern here that a young man was on trial for a shooting death is now being—his guilt or innocence is going

to be determined by a group of twelve that believed possibly that someone is firing a gun into the jury room."

The state opposed the motion, arguing that there was no connection between the bullet hole incident and the case before the jury. It further contended that any potential prejudice could be avoided by an instruction to the jury that it should not hold the incident against the defendant and should decide the case only on the basis of what it heard in court. In its ruling, the court stated: "I am going to deny the motion as it stands right now. We haven't inquired of the jury. The jurors brought it to our attention, and we addressed it immediately. I'm going to give them an instruction now. I'm going to inquire in terms of whether they're able to follow that instruction. I think that perhaps based on their response to that, that may warrant further discussion on this motion. But right now, on the four corners of the evidence that we have, the motion is denied. Now, I do want to put some things on the record in terms of how this occurred and the surrounding circumstances. But I think that perhaps first we'll address the jury and then just so that the record's very clear, let's put some things on the record so it's there for any further review, okay?"

After the jury entered the courtroom, the court gave the following instruction: "So, in response to where we ended yesterday, I obviously was concerned with what you had brought to my attention. We brought that to the attention of the police department, both the local and the state police. It is being reviewed and investigated by them right now, which is one of the main reasons that we are not in that courtroom right now. We also obviously don't want that to be a distraction to you at all. It is, as I said, being reviewed, and they will look into that fully, and I appreciate your bringing that to our attention.

"Now, in terms of this case itself, I'm giving you this instruction. The fact that obviously you brought this issue to our attention, and that it is being reviewed and investigated right now, is completely and totally unrelated to the case at hand, all right? There is zero suggestion that it relates to this case, and it is certainly not part of the evidence in this case. So, I am instructing you that you must keep that out of your mind as you're deliberating.

"The defendant is entitled to his presumption of innocence and to the fact that you can impartially look at and review all of the evidence that has been presented in this case. That also means that you may infer no negative inference upon the defendant in any way in relation to this issue.

"The deliberation process must continue based only on the evidence that was presented here in this courtroom while the court was in session. And you must not concern yourself with this issue at all in your deliberations. So, having said that, I'm going to ask all members of the jury to go back and report to me whether or not, and you don't have to do this individually, this can be done as a whole, whether or not you feel that you could follow that instruction; whether you could at this point continue to deliberate on this matter based only on the evidence presented in this courtroom while the court was in session, and not concern yourself in any manner whatsoever with this other issue and not hold it in any way against the defendant, all right? So, I'm going to ask that you all retire and write that in a note to me if you could. Thank you."

After the jury exited, the court inquired of counsel whether there was "[a]nything else that you'd like me to indicate to them . . . ." Both counsel responded in the negative, and defense counsel replied: "I think you

covered it." The court followed up with defense counsel, remarking: "I know it's your motion right now. If there's a specific inquiry that you think I didn't make, then obviously you could let me know." Defense counsel responded: "No, I think what you did is sufficient because the ultimate question at this moment in time is whether they can continue to serve and follow the court's instructions, and disregard yesterday's incident. That is the ultimate question. So, I think what you did is sufficient."

The court then placed the following on the record: "So, one thing I wanted to address was really just the sequence of events that the jury brought to the court's attention at the end of the day; the fact that they believed that there was in fact a bullet hole through the window; that I asked counsel to remain present so that we could all see it for ourselves. We all did, I think both state's attorneys, defense, myself, went back into the jury room. We went back into the jury room, and I wanted to make this clear for the record. After the clerk had gone in and taken out all of the exhibits, had taken out the notebooks, and had been able to secure what was a chalkboard in a situation where nobody could view or see the chalkboard. Ultimately, that chalkboard had to be transported down to this jury room, and what the clerks did was, they put large paper that was secured and taped around both sides of the chalkboard, and it was transported in that fashion. I certainly did not see anything, counsel did not see anything, and all of the evidence remains secure and away from anybody's ability to review it."

At this point, the jury delivered a note, which the court read aloud and marked as the court's exhibit seven. The note, signed by the foreperson, stated: "We are fine with continuing our deliberations without any

prejudice." The court then indicated that it would continue making a record of the incident before hearing any further argument from counsel.

The court continued: "So, the marshals were there for the viewing. At that point, we called in the state police, as they do have jurisdiction. As circumstance had it, the Bridgeport police crime scene unit came in to have a warrant signed, and they were able to inquire as to whether there had been any reports of shots fired or any complaints that had occurred last night or in the immediate vicinity to the trial. And they had indicated that they did not, and so the state police took over the investigation and they continued to do that throughout the night. It is my understanding that they are in the courtroom now. I believe the major crime squad is here. They have blocked off the courtroom so that they can try to secure the evidence and complete the investigation. I know that we have additional presence in the building today in terms of just making sure that security is okay as they continue this investigation. There is an article that apparently just hit the [news]papers relating to this incident."

The court then discussed with counsel the newspaper articles describing the incident, and the court indicated that the jury would be instructed that it may not review any media reports. The court further noted that the articles had been released after the jurors had reported for the day, and thus, they would not have seen them. After agreeing with the court that the record should reflect that "it would likely be impossible for the jurors to see" a particular article that included the defendant's name, defense counsel stated: "Other than that, I don't have anything else that needs to be added. I think the court covered it well, and your review is accurate." The jury continued its deliberations until it returned with a question regarding proximate cause. The court further instructed the jury regarding proximate cause, and the

jury recommenced deliberations. That afternoon, January 29, 2016, the jury returned its verdict.

On February 1, 2016, the defendant filed a motion for a new trial, arguing in part that the court had improperly denied his motion for a mistrial because the bullet hole incident had resulted in "substantial and irreparable prejudice to the defendant's case." During oral argument on the motion for a new trial, defense counsel represented that he became aware that the jurors had tried to determine the direction from which the bullet may have been shot and that the jurors had requested a state trooper escort to their cars after returning their verdict. The state responded by repeating that the jury was not in the room when the bullet was fired, and that the jury "satisfying an itch of curiosity" in looking at the building could not "fairly be said to have affected the determination on the verdict in this case."

The court addressed defense counsel's argument by remarking that no one knew when the "small hole" discovered by the jurors[4] was made, but that "there was no suggestion" that it was made while the court was in session or while the jurors were there. The court further stated that once it was brought to the court's attention, the jurors were released for the day and that they returned to deliberations the next day in a different room. The court had inquired of the jury and instructed it that "the hole, whatever it turned out to be, had no bearing upon this case or upon the defendant, [and] that they cannot consider it for purposes of their deliberations." The court stated that it had asked the jury to "go back and, in fact, deliberate, so to speak, as to whether they could continue to deliberate without any prejudice to the defendant and with incorporating the

[4] The defendant's principal brief to this court also includes a photograph above an explanatory caption depicting the affected window. The photograph was not made an exhibit at trial.

court's instructions that that bullet hole had—if, in fact, it is a bullet hole—but that hole that was found had nothing to do with this case or with the defendant or with anybody associated with the defendant."

The court continued: "The jurors did come out and provided a note to the court in which they not only indicated that, yes, they could continue to deliberate, but, just to make it clear that they fully understood the instructions, said that they could continue—that they understood the court's instructions and could continue to deliberate. And they used . . . the word, to my memory right now, without any prejudice to the defendant. So, you know, that—that certainly, one, shows that—that they could follow the court's instructions and, two, that they understood that it could not have any bearing against the defendant in terms of their deliberations.

"I will also indicate that the jurors had deliberated for a period of time. So, it's not as if they just came in and they were only deliberating for forty-five minutes. They, in fact, had asked for some playback, they received that playback both the day before and on the day in question. So, there was more to their deliberations than just that one moment in time certainly. That, additionally, with regard to whether or not the jurors had—had gone out to see the—the window from the outside of the courthouse, I agree with the state that there's no suggestion that—that there's any misconduct involved. They certainly didn't go and do any investigation with regard to an issue that they needed to deliberate on. I'm going to say this because I'm not sure that it—that this is clear for the record, that where the jurors park in Bridgeport requires them to walk outside by the area where you would see the window that is in question here. So, again, I don't think that there's anything on the record to suggest that the jurors said, let's go meet and look at the window, but that the record would be that they, in fact, need to walk by it in order

to get to their cars. So, whether or not they were looking at the window in conjunction with walking to their car, you know, I—I can't speak to that. But I just want it clear for the record that that's the way that they would need to go.

"And in terms of requesting the escort to their cars, I think we all know, from having done cases and certainly on some of the more serious cases, that after the verdicts are rendered, sometimes the juries do not appreciate having to walk on their own outside where there is some attention, both by way of media or family. And so that request was—was certainly agreed to and accommodated. But again, in no way was there ever a suggestion by any party or any side that there was any misconduct or any concern that related to that specific bullet hole if, in fact, it is a bullet hole. So, with that factual understanding on the record for any appellate purposes, I am denying the motion for a new trial." The state also placed on the record that the layout of the courthouse required the jurors to use the public entrances and corridors, a fact with which the court agreed.

We begin with our standard of review. "In our review of the denial of a motion for mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Berrios*, 320 Conn. 265, 274, 129 A.3d 696 (2016).

"[J]ury impartiality is a core requirement of the right to trial by jury guaranteed by the constitution of Connecticut, article first, § 8, and by the sixth amendment to the United States constitution. . . . In essence, the right to jury trial guarantees to the criminally accused

a fair trial by a panel of impartial, indifferent jurors. . . . The modern jury is regarded as an institution in our justice system that determines the case solely on the basis of the evidence and arguments given [it] in the adversary arena after proper instructions on the law by the court. . . . The United States Supreme Court has noted, however, that the [c]onstitution does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. . . . Were that the rule, few trials would be constitutionally acceptable. . . . We have recognized, moreover, that [t]he trial court, which has a first-hand impression of [the] jury, is generally in the best position to evaluate the critical question of whether the juror's or jurors' exposure to improper matter has prejudiced a defendant." (Internal quotation marks omitted.) *State* v. *Ciullo*, 140 Conn. App. 393, 417–18, 59 A.3d 293 (2013), aff'd, 314 Conn. 28, 100 A.3d 779 (2014).

Appellate review of a trial court's preliminary inquiry into claims of jury misconduct or bias is governed by *State* v. *Brown*, 235 Conn. 502, 668 A.2d 1288 (1995). In *Brown*, our Supreme Court invoked its supervisory authority over the administration of justice to hold that "a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case, regardless of whether an inquiry is requested by counsel." (Internal quotation marks omitted.) *State* v. *Anderson*, 255 Conn. 425, 436, 773 A.2d 287 (2001). "The form and scope of such inquiry is left to the discretion of the trial court based on a consideration of multiple factors, including: (1) the private interest of the defendant; (2) a risk and value assessment of additional procedural safeguards; and (3) the government's interest. . . . In outlining these factors, we also [have] acknowledged, however,

that [i]n the proper circumstances, the trial court may discharge its obligation simply by notifying the defendant and the state of the allegations, providing them with an adequate opportunity to respond and stating on the record its reasons for the limited form and scope of the proceedings held. . . . Accordingly, [a]ny assessment of the form and scope of the inquiry that a trial court must undertake when it is presented with allegations of jur[or] [bias or] misconduct will necessarily be fact specific." (Citation omitted; internal quotation marks omitted.) *State* v. *James H.*, 150 Conn. App. 847, 853, 95 A.3d 524, cert. denied, 314 Conn. 913, 100 A.3d 404 (2014). "Our role as an appellate court is limited . . . to a consideration of whether the trial court's review of alleged jury misconduct can fairly be characterized as an abuse of its discretion." (Internal quotation marks omitted.) *State* v. *Anderson*, supra, 436.

Our Supreme Court subsequently considered whether the preliminary inquiry required in *Brown* was sufficient in cases involving allegations of racial bias on the part of a juror. *State* v. *Santiago*, 245 Conn. 301, 340, 715 A.2d 1 (1998). Exercising its supervisory authority, the court concluded that *Brown* "[did] not go far enough" and held that "[s]uch inquiry should include, at a minimum, an extensive inquiry of the person reporting the conduct, to include the context of the remarks, an interview with any persons likely to have been a witness to the alleged conduct, and the juror alleged to have made the remarks." Id.

Our Supreme Court declined to so exercise its supervisory authority in *State* v. *Dixon*, 318 Conn. 495, 509, 122 A.3d 542 (2015), to require a specific scope of questioning in situations involving concerns about juror bias due to fear. In *Dixon*, the jury delivered a note to the court, stating: "One of the court attendees approached/spoke to one of the jur[ors] at a public place yesterday, 5/17 late night. The one jur[or] told that individual . . .

the jury cannot speak to anyone. Is this an issue? *We have safety concerns.*" (Internal quotation marks omitted.) Id., 502. With respect to the contact with the attendee, the court held an in camera hearing, first questioning under oath the jury's foreperson, then the author of the note, and then each of the remaining jurors. Id., 503–504. The court inquired, inter alia, whether the contact influenced each juror's vote in the verdict. Id., 508. The court also inquired of the foreperson and the juror who authored the note about safety concerns raised by the jurors. "Both seemed to indicate that, although the jurors had raised questions about the safety issues involved in serving on a jury in a murder trial, none raised any specific concerns about this case in particular." Id. Our Supreme Court concluded that the trial court did not abuse its discretion in the manner in which it conducted a hearing to address the note, and further reasoned that "[a]llegations of fear do not give rise to the same concerns about prejudice as those raised by allegations of racial bias and, therefore, an inquiry pursuant to *State* v. *Brown*, supra, 235 Conn. 526, is sufficient." *State* v. *Dixon*, supra, 509.[5]

In support of the defendant's claim on appeal that his right to a fair trial by an impartial jury was violated when the trial court denied his motion for a mistrial, the defendant in the present case argues that a *Brown* inquiry is not sufficient in the present case. Specifically, he argues that "an external interference of the scope presented here—a real, ascertainable threat to the safety of the jury during its deliberations, as opposed to more innocuous disruptions . . . requires a concrete,

[5] The defendant requests that this court "reconsider" the determination made in *Dixon*. "It is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Madera*, 160 Conn. App. 851, 861–62, 125 A.3d 1071 (2015).

thorough procedure to ferret out bias to the defendant." Alternatively, he argues that the trial court's response was not sufficient to satisfy *Brown*. The state asserts that these arguments are unpreserved and unreviewable. The defendant maintains that his arguments are preserved, but seeks review under *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), in the event that this court determines otherwise.[6]

We conclude that the arguments raised by the defendant in this appeal were not asserted before the trial court, which had expressly asked defense counsel whether there was any inquiry it did not make, and therefore, such arguments are unpreserved. "Arguments asserted in support of a claim for the first time on appeal are not preserved." *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 181, 143 A.3d 1106, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016). The defendant's claim, however, is reviewable pursuant to *Golding* because the record is adequate for our review and the claim is of constitutional magnitude. See *State* v. *Biggs*, 176 Conn. App. 687, 706, 171 A.3d 457, cert. denied, 327 Conn. 975, 174 A.3d 193 (2017). The defendant's claim fails on the merits because we hold, as further discussed, that there is no violation of constitutional law.

[6] Under *State* v. *Golding*, supra, 213 Conn. 239–40, "[a defendant] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Biggs*, 176 Conn. App. 687, 705–706, 171 A.3d 457, cert. denied, 327 Conn. 975, 174 A.3d 193 (2017).

We first conclude, pursuant to *Dixon*, that *Brown* provides the proper framework for analyzing the defendant's claim. The defendant, in an effort to demonstrate that the precautions taken in the present case were "wanting," directs this court's attention to cases in which the trial court questioned jurors individually in response to some allegation of juror misconduct or outside influence. See *State* v. *Berrios*, supra, 320 Conn. 269–71, 298–99 (after defendant's mother approached juror outside courthouse to tell him that police officer who testified was lying, court conducted individual voir dire of jurors before determining that jury remained fair and unbiased); *State* v. *Anderson*, supra, 255 Conn. 437–38 (after juror made statements, inter alia, that he "knew the defendant from the street" and that he was "not a nice guy," court conducted interviews with each juror to determine whether they could remain impartial); *State* v. *Santiago*, supra, 245 Conn. 339 (hearing inquiring into alleged racial bias would permit court to observe juror's demeanor under cross-examination and to evaluate his answers in light of particular circumstances of case).

In the present case, as the state emphasizes, the bullet hole incident was experienced by the jury as a group, and, thus, the trial court did not abuse its discretion in inquiring of the jury as a group whether it could follow the court's instruction and remain fair and impartial. As our Supreme Court has noted, "[a]ny assessment of the form and scope of the inquiry that a trial court must undertake when it is presented with allegations of jur[or] [bias or] misconduct will necessarily be fact specific." (Internal quotation marks omitted.) *State* v. *West*, 274 Conn. 605, 648, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005). Moreover, the defendant presents this court with no authority suggesting that a trial court is required to question jurors individually. To the contrary, *Brown*

makes clear that in some instances, the trial court may fulfill its obligation by informing both parties of the allegations, providing them with an adequate opportunity to respond, and stating on the record its reasons for conducting a limited proceeding. *State* v. *Brown*, supra, 235 Conn. 529.

The defendant argues that the bullet hole incident in the present case should be presumed prejudicial.[7] "Under *Remmer* [v. *United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954)], prejudice is not presumed unless the court is implicated in the alleged conduct,

[7] The defendant also proffers a related argument that certain intrusions are so disruptive that no actual prejudice must be demonstrated. He argues: "Where exposure to extreme prejudicing circumstances may have a deleterious effect on the jury's ability to remain fair and objective, a new trial may be necessary, even absent an affirmative showing that the verdict was affected." The cases cited by the defendant in support of this proposition are distinguishable. See *Sheppard* v. *Maxwell*, 384 U.S. 333, 353, 355, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (no showing of prejudice required where "bedlam reigned" during trial, jurors were "forced to run a gauntlet of reporters" every time they entered or exited the courtroom, and photos of jurors along with addresses were published in newspaper resulting in jurors receiving anonymous letters, which "should have made the judge aware that this publicity seriously threatened the jurors' privacy"); *Estes* v. *Texas*, 381 U.S. 532, 538, 544, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (finding extensive television coverage had "set [the case] apart in the public mind as an extraordinary case" and holding such coverage was inconsistent with concepts of due process, where forty-eight states and federal rules had deemed use of television improper in the courtroom, and four of selected jurors had viewed all or part of broadcasts of previous hearings in the case); *Turner* v. *Louisiana*, 379 U.S. 466, 468, 473, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965) (two key witnesses for the prosecution, who were deputy sheriffs and whose credibility was central issue in trial, were also in charge of jury throughout trial, ate meals with jury, ran errands for them, and drove them to their lodgings each night; *Irvin* v. *Dowd*, 366 U.S. 717, 728–29, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (The court vacated the judgments of conviction where "[t]wo-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he could not . . . give the defendant the benefit of the doubt that he is innocent. Another stated that he had a somewhat certain fixed opinion as to petitioner's guilt." [Internal quotation marks omitted.]).

or there was an external interference with the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried." *State* v. *Biggs*, supra, 176 Conn. App. 710; see also *State* v. *Berrios*, supra, 320 Conn. 292 (concluding that "the *Remmer* presumption is still good law with respect to external interference with the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried" [footnote omitted]). "[T]he improper contact must pertain directly to the merits of the matter, rather than merely relate to the trial more topically." *State* v. *Berrios*, supra, 292 n.25. In the present case, the bullet hole incident in the jury room was determined by the court to be "completely and totally unrelated to the case at hand," and the jury was instructed further that "[t]here is zero suggestion that it relates to this case . . . ." Accordingly, we conclude that the external interference did not pertain directly to the merits of the matter and was not presumptively prejudicial.

The defendant argues that three circumstances contributed to prejudice in the present case: "(1) an initial threat in the form of gun violence; (2) a substantive correlation between the shooting and the alleged threatening involvement of the defendant; and (3) provable fear after trial." Specifically, he argues that "[t]he state's case-in-chief involved allegations of the defendant's purported efforts to silence witnesses and obstruct the police investigation." Those efforts included threatening Gonzalez at gunpoint. As we noted previously, however, the court issued a curative instruction to the jury that the bullet hole was unrelated to the case and that "you may infer no negative inference upon the defendant in any way in relation to this issue."[8] It further

[8] To the extent that the defendant challenges the trial court's finding that the bullet hole was unrelated to his case, he failed to object to the court's instruction on this basis. Moreover, at the conclusion of the trial court's

reminded the jury that "[t]he deliberation process must continue based only on the evidence that was presented here in this courtroom while the court was in session." After receiving the curative instruction, the jury indicated that it could continue to deliberate without any prejudice to the defendant. It is well established that "[i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions." (Internal quotation marks omitted.) *State* v. *Necaise*, 97 Conn. App. 214, 225, 904 A.2d 245, cert. denied, 280 Conn. 942, 912 A.2d 478 (2006).

The defendant also points to the fact that jurors requested a police escort to their cars after returning their verdict. The trial court addressed this claim by noting that it is not uncommon for jurors in cases involving serious charges to feel uncomfortable leaving the courthouse, walking by media and family, after returning their verdict. We reiterate that "[t]he trial court, which has a first-hand impression of [the] jury, is generally in the best position to evaluate the critical question of whether the juror's or jurors' exposure to improper matter has prejudiced a defendant." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 140 Conn. App. 418. Accordingly, we decline to disturb the trial court's assessment.

We conclude that the initial inquiry in the present case complies with *Brown*'s mandate that the court conduct "a preliminary inquiry, on the record . . . ." *State* v. *Brown*, supra, 235 Conn. 526. We note that the factual basis on which the court relied was established on the record, with both parties' knowledge and participation. See *State* v. *Stuart*, 113 Conn. App. 541, 555, 967 A.2d 532 (concluding that court did not abuse its discretion in concluding that no further inquiry was

recitation of its findings on the record, defense counsel replied: "I think you covered it."

required beyond "limited inquiry" to the jury and curative instruction, where "on the record, the court immediately informed counsel of the submission to the jury of the exhibits at issue, [which had been marked as an exhibit for identification only] and extended the opportunity to comment"), cert. denied, 293 Conn. 922, 980 A.2d 914 (2009); cf. *State* v. *Kamel*, 115 Conn. App. 338, 348, 972 A.2d 780 (2009) ("court's ex parte interactions with the jurors and its unilateral determination that they did not consider the brass knuckles [which had been marked for identification only] during their deliberations further failed to fulfill the requirements of *Brown* because any preliminary inquiry must be conducted on the record").

Moreover, the court noted, just before issuing its inquiry to the jury, that "perhaps based on their response" to the court's question, it "may warrant further discussion on this motion." The inquiry itself addressed the central issue, whether the jury believed that it could follow the court's instruction and continue to deliberate based only on the evidence presented in the courtroom, and not concern itself in any manner with the bullet hole and not hold it against the defendant. After issuing the question, the court again sought counsel's input, specifically requesting that defense counsel let the court know if he thought there was any inquiry it did not make. Defense counsel responded: "No, I think what you did is sufficient because the ultimate question at this moment in time is whether they can continue to serve and follow the court's instructions, and disregard yesterday's incident. That is the ultimate question. So, I think what you did is sufficient."

The jury responded to the court's question that it was "fine with continuing our deliberations without any prejudice." In light of the court's curative instruction, the jury's assurance that it could deliberate without

prejudice to the defendant, the input the court sought from counsel, and the defendant's failure to request any further inquiry, the court did not abuse its discretion in conducting its inquiry. See *State* v. *Necaise*, supra, 97 Conn. App. 225 (noting that defendant did not request further inquiry in concluding that "this case is one of those in which the failure to hold an evidentiary hearing does not violate the defendant's constitutional rights"); *State* v. *Bangulescu*, 80 Conn. App. 26, 51, 832 A.2d 1187 (noting defendant's failure to seek any additional questioning or investigation by court despite opportunities to do so in concluding that court did not abuse its discretion in conducting cursory inquiry), cert. denied, 267 Conn. 907, 840 A.2d 1171 (2003). Moreover, after the jury answered the court's question and the court placed additional facts on the record, defense counsel responded to the court: "I think the court covered it well, and your review is accurate."

As stated previously, "[o]ur Supreme Court has recognized that [t]he trial court, which has a first-hand impression of [the] jury, is generally in the best position to evaluate the critical question of whether the juror's or jurors' exposure to improper matter has prejudiced a defendant." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 140 Conn. App. 419. We conclude that the court did not abuse its discretion in denying the defendant's motion for a mistrial.

II

The defendant's second claim on appeal is that the trial court abused its discretion in concluding that drive test survey data was admissible because it was reliable and relevant under *State* v. *Porter*, supra, 241 Conn. 57. We conclude that the trial court did not abuse its discretion.

The following additional facts and procedural history are relevant to the defendant's claim. On January 18,

2016, the state disclosed that it intended to proffer the expert testimony of Special Agent James J. Wines of the New Haven bureau of the Federal Bureau of Investigation (FBI) regarding cell site location information and drive test survey data. The next day, the defendant filed a motion to preclude Wines' testimony and a request for a *Porter* hearing as to Wines' testimony regarding the drive test survey data, arguing that such testimony was neither generally accepted nor relevant to the case. Specifically, the defendant argued that the drive test was not conducted until December, 2015, approximately twenty months following the shooting in April, 2014.

The court held a hearing outside of the presence of the jury on January 25, 2016. Defense counsel represented at the outset that the defendant was not challenging the use of cell site technology evidence. Rather, the motion solely challenged the drive test survey data. The court granted the defendant's request for a *Porter* hearing, and the state proffered Wines' testimony. Wines, a member of the FBI's cellular analysis survey team (CAST), explained the drive test he conducted. After placing a scanner in his car, Wines conducted the test by driving around the Black Rock area where the crime occurred and surrounding areas while the tool is "scanning the environment and taking measurements of all of the signals from the different cell phone towers that it sees as it's driving around." The measurements were then "plotted using a mapping software program to give the actual coverage area of a particular tower."[9]

[9] Wines testified that he received training from the FBI regarding how to set up and use the scanner to collect measurements. Another component of his training involved conducting drive tests and presenting the results in a moot court. Wines testified that although he had participated in a drive test for one prior case, this case was his first time testifying in court as to his analysis. He explained that other CAST members conduct and testify as to drive tests "on a regular basis all around the country."

Wines testified that he believed a drive test would produce "an accurate representation of the coverage area of the particular sectors" in which he was interested because "the towers, the sectors, the orientation technology and the azimuths of the particular towers . . . had not changed from April of 2014 until December of 2015." Using one Sprint tower as an example, he testified that "the tower itself was the same, the sectors were the same, and the azimuths were the same, and the technology was the same. So, based upon that and based upon my training and experience, I would expect that the . . . radio frequency [RF] footprint of that particular tower or that particular sector would be the same in December of 2015 as it was in April of 2014."[10]

For purposes of the hearing only, the state marked an exhibit containing seven slides that Wines prepared depicting the drive test survey data. The slides illustrated the dominant and possible coverage areas for one Sprint cell sector, one AT&T cell sector, and one T-Mobile cell sector. The first slide showed the dominant and possible coverage area of Sprint tower 533, sector 3, azimuth 205. Wines testified that a handset making a call registering on that sector likely would be in the dominant coverage area, which has the "strongest clearest signal . . . ." Within the possible coverage area, Wines stated that "there are other towers and sectors which would have dominant coverage," which creates "an overlap area."

Wines testified that the cell phone industry routinely relies on drive test analysis, conducted in the same manner that he conducted his drive test, to "design, maintain and optimize their network so that they can provide the best coverage to their customers." He stated that drive test analysis was not developed solely for

[10] Wines testified that the cell signal comes off the tower as a radio wave, and the RF footprint of the signal is what is measured by the scanner.

purposes of litigation but rather for carriers to optimize and maintain their cell networks. He testified: "[T]he cell phone industry is a multibillion-dollar industry, and there's a lot of competition between carriers. So, for example, if I had a Sprint phone and I kept dropping calls when I moved from one area to another, I would likely port my number over to another carrier, say, Verizon or T-Mobile, with the expectation I would get better cell phone coverage. So, the carriers don't want to lose customers. They don't want to lose their revenue stream, so they spend a considerable amount of time, effort, and resources to optimize their networks to provide the best coverage possible."

On cross-examination, Wines testified that although he was not aware of any scientific publications or scholarly articles addressing drive test analysis, he was aware that "radio frequency theory has been in existence for 150 years; cell phones have been [in] existence . . . since the 1980s, and the way that cell phones communicate with towers has been generally accepted. All the drive test is, is a measurement of signal and plotting that signal on a map. I don't know of a scientific review; it's simply a collection or measurement of signal and then plotting that signal on a map." He further testified that "on a daily basis around the country, myself and other members of my team use drive test data . . . to locate fugitives, recover evidence, find victims; it works in a real world setting on a daily basis." In response to questioning regarding a rate of error, Wines stated: "I don't know about a rate of error, but in my own personal experience the handset has never not been where the record said it would be." With respect to the factors affecting whether a cell phone would connect with the closest tower, Wines testified that although topography could be a factor, "in this particular case there's a clear line of sight from the tower to the location where the incident occurred, so topography would not be an issue

in this particular case." Wines stated that "day-to-day weather has negligible effect on cell service," but that a "catastrophic weather event" that physically damaged the tower could play a role. He further testified that call overload to a tower would not send a handset to a different tower—if the tower was at capacity, the call would not go through.

Wines testified that he would not have conducted a drive test analysis in this case if something was different as to a tower.[11] Regarding signal strength between April, 2014, and December, 2015, Wines testified: "I could not say that they are exactly the same, but I would expect them to be very similar." Wines testified that he reviews the status of the towers through lists provided by the carriers, and that although he did not specifically know whether any improvements were made to the equipment, some of the technology from the Sprint and AT&T towers were 2G and 3G, and that is "not a technology that undergoes a lot of change because it's an older technology."

The court issued an oral ruling, finding that Wines' drive test analysis satisfied the first prong of *Porter*, in that it was "a procedure rooted in science," and was "supported and followed by police, law enforcement, FBI as well as the phone companies . . . ." It further found that "it has been used for many years in a whole variety of means and methods," and that it was "not based on any subjective or speculative analysis." Turning to the second prong, the court found, for purposes of the initial inquiry, that the proffered evidence was relevant. The court noted: "I am not saying that everything that was addressed here or that the state indicated

[11] Wines gave the following example: "About two months [ago] I did an analysis on a case in New London that . . . involved analyzing Nextel phone records, and I did not conduct a drive test in that case because the Nextel network is no longer in existence."

that they intended to question this witness on are necessarily permissible. I think we have to see what is objected to and what's not objected to." The court further found that "the issues of its effectiveness or its reliability go more to weight than it does to admissibility; but again, anytime that the defense deems it appropriate with regard to each individual question, they should in fact object if they think that the evidence is not properly admissible."

Following the court's ruling, the jury returned to the courtroom, and the state began its direct examination of Wines. Wines testified as to the historical cell site analysis and drive test he conducted. The state introduced a PowerPoint presentation created by Wines, which depicted the cell site analysis and drive test survey data.[12] Defense counsel did not object to the introduction of the presentation, nor did he object to any of the state's questions to Wines.

According to the defendant, Wines "claimed to be able to eliminate the possibility that the cellular handset associated with the defendant was anywhere other than within the coverage area of a cell tower near the location of the shooting during the relevant time period." Through Wines' drive test survey data, the state posits that it was able to show that Gonzalez' phone "was located somewhere in the coverage area of the BJ's [Wholesale Club] tower just before the shooting and that the crime scene was also in that coverage area."[13] According to the state, "[t]he drive test results further showed that both [Gonzalez'] and the defendant's phones were located somewhere in the coverage area

[12] Wines' analysis relied on call detail records from Sprint and AT&T for two cell phone numbers associated with Gonzalez, and call detail records from T-Mobile for a cell phone number associated with the defendant.

[13] Wines testified that cell towers for T-Mobile, Sprint, and AT&T were located on a water tower in the BJ's parking lot, which was 0.39 miles from the crime scene.

of the BJ's tower minutes after the shooting, and that the crime scene was also in that coverage area." Wines testified that while "the call detail record reflects which tower the handset selected . . . the drive test results reflect the RF footprint of that particular tower and sector, and the handset could not have been anyplace else except within that RF footprint in order to make or receive a call."

Before addressing the merits of the defendant's argument, we begin with the applicable legal principles and standard of review governing our analysis. In *State* v. *Porter*, supra, 241 Conn. 57, "this court followed . . . *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . Following [*Porter*], scientific evidence, and expert testimony based thereon, usually is to be evaluated under a threshold admissibility standard [relating to] the reliability of the methodology underlying the evidence . . . .

"[I]n *State* v. *Porter*, supra, 241 Conn. 78–80, we expressly recognized that, because the term scientific evidence houses such a large and diverse variety of topics, the formulation of a mechanical evidentiary standard of admissibility designed to apply universally to the many forms scientific evidence may take is an unworkable concept. Rather, the better formulation is a general, overarching approach to the threshold admissibility of scientific evidence . . . . In accordance with this philosophy, we set forth in *Porter* a number of different factors, nonexclusive and whose application to a particular set of circumstances could vary, as relevant in the determination of the threshold admissibility of scientific evidence. . . . In particular, we recognized the following considerations: general acceptance

in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies [on] subjective judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation. . . .

"In *Porter*, we also set forth a fit requirement for scientific evidence. . . . We stated that the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 231–32, 49 A.3d 705 (2012).

"[I]t is well established that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . [Accordingly] [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Haughey*, 124 Conn. App. 58, 72, 3 A.3d 980, cert. denied, 299 Conn. 912, 10 A.3d 529 (2010). "Because a trial court's ruling under *Porter* involves the admissibility of evidence, we review that ruling on appeal for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Victor O.*, 301 Conn. 163, 173, 20 A.3d 669, cert. denied, 565 U.S. 1039, 132 S. Ct. 583, 181 L. Ed. 2d 429 (2011).

On appeal, the defendant argues that the state failed to "meet its burden of showing that its drive test survey data met even minimal reliability and relevance requirements under *Porter*." With respect to reliability, the defendant argues that the state (1) presented no studies supporting the accuracy of Wines' technique, (2) "provided no basis for Wines' conclusions about the cell site coverage at the time of the shooting in April, 2014," and (3) "did not provide information by which the trial court could judge the reliability of the method Wines used to arrive at his conclusions," where Wines conceded that certain factors may interfere with towers' signal strength. With respect to relevancy, the defendant argues that the state did not meet its burden, where "all the drive test survey data revealed was the coverage area of selected cell towers nearly two years after the incident at issue," and therefore the evidence lacked a valid scientific connection to the question before the jury.

With respect to reliability, we conclude that the court did not err in concluding that Wines' methodology satisfied *Porter*'s first prong. The defendant challenges Wines' testimony on grounds that the state did not present any studies in support of his technique and that Wines himself could not provide a rate of error, thereby failing to demonstrate the accuracy of his approach.[14] We first note that "[p]eer review and publication is . . .

[14] We find the sole case cited by the defendant regarding reliability in the context of cell site location evidence distinguishable, given that it does not address drive test survey data, but rather involves "granulization theory," a method of estimating "the range of each antenna's coverage based on the proximity of the tower to other towers in the area" and predicting "where the coverage area of one tower will overlap with the coverage area of another." *United States* v. *Evans*, 892 F. Supp. 2d 949, 952 (N.D. Ill. 2012). Moreover, other courts considering the issue have reached the opposite conclusion of the court in *Evans*. See *United States* v. *Machado-Erazo*, 950 F. Supp. 2d 49, 57 (D.D.C. 2013); *United States* v. *Davis*, Docket No. 11-60285-CR, 2013 WL 2156659, *6–7 (S.D. Fla. May 17, 2013).

only one of several nonexclusive factors. . . . No single *Porter* factor is dispositive." (Citation omitted.) *Hayes* v. *Decker*, 263 Conn. 677, 685 n.2, 822 A.2d 228 (2003); id. (trial court "improperly treated *Porter* as a mechanical factor test" in ruling that expert opinion was inadmissible because it was not supported by treatises or studies).

Although our appellate courts have yet to address the issue of reliability of drive test survey data, this court has previously remarked generally that "the precision of drive testing makes it the preferred method for determining the shape and size of a cell sector . . . ." *State* v. *Steele*, 176 Conn. App. 1, 23–24, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017). Certain federal courts have had occasion to consider the admissibility of drive test survey data under the *Daubert* standard, and have declined to find drive test data unreliable on the basis of a lack of scientific testing and publications. See, e.g., *United States* v. *Morgan*, 292 F. Supp. 3d 475, 484 (D.D.C. 2018) (noting, in finding drive testing testimony sufficiently reliable, that "the *Daubert* inquiry is flexible, and a [c]ourt should not automatically exclude evidence because it is too new, or of too limited outside interest, to generate extensive independent research or peer-reviewed publications"); *United States* v. *Allums*, Docket No. 2:08-CR-30 TS, 2009 WL 806748, *2 (D. Utah March 24, 2009) (finding drive test methodology admissible despite expert being unable to identify rate of error or any peer review process the methodology has undergone); see also *United States* v. *Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329, *4 (D. Conn. November 19, 2014) (concluding, in different context of estimating coverage area, that expert's methods were "not rendered unreliable merely because they have not been validated by scientific peer review").

Courts considering drive test survey data have looked to evidence presented that the data is successfully used to locate missing persons and fugitives as a type of "field testing" that can demonstrate reliability. See *United States* v. *Allums*, supra, 2009 WL 806748, *2 ("the [c]ourt finds that the success achieved by [the agent] and others in catching fugitives while using this methodology is sufficient to establish the methodology's reliability"); see also *State* v. *Steele*, supra, 176 Conn. App. 23 (noting that drive testing has been used by law enforcement agencies to track suspects and fugitives). Ultimately, a number of courts have determined that drive test survey data satisfies the *Daubert* factors. See, e.g., *United States* v. *Frazier*, Docket No. 2:15-cr-044-GMN-GWF, 2016 WL 4994956, *3 (D. Nev. September 16, 2016).

We find these federal decisions persuasive in evaluating whether the trial court properly determined that Wine's methodology was reliable. Here, Wines testified during the *Porter* hearing that he and other members of the FBI CAST team use drive test data on a daily basis to locate fugitives, recover evidence, and find victims. He also testified to his own personal experience with the accuracy of drive testing, that "the handset has never not been where the record said it would be." We also find no error in the trial court's crediting, as a consideration weighing in favor of reliability, Wines' testimony that the cell phone industry routinely relies on drive tests, conducted in the same manner that he conducted his test, to "design, maintain and optimize their network . . . ." See *T-Mobile Central, LLC* v. *Unified Government of Wyandotte County/Kansas City, Kansas*, 528 F. Supp. 2d 1128, 1166 (D. Kan. 2007) (noting that "drive tests are widely used throughout the wireless industry and are generally recognized as reliable and accurate"), aff'd in part, 546 F.3d 1299 (10th Cir. 2008).

Although the defendant argues that Wines' alleged inability to account for "various factors [that] may interfere with the signal strength of cell towers" goes to both reliability and relevancy, it more appropriately is analyzed under the relevance prong of *Porter*. See *United States* v. *Morgan*, supra, 292 F. Supp. 3d 485.[15] In fact, during the *Porter* hearing, defense counsel acknowledged the issue as one of relevancy.

We conclude that the trial court did not err in concluding that the state's proffered evidence was relevant.

[15] We note that courts have treated arguments regarding variables that could affect signal strength in different manners, some analyzing the issue as either one of reliability or relevance under *Daubert*, and others treating such arguments as going to the weight of the evidence to be raised on cross-examination. One federal court addressed the reliability of drive test testimony in the context of a fifteen month delay between the date of the crime and the date the FBI agent conducted the drive test. *United States* v. *Cervantes*, Docket No. CR 12-792 YGR, 2015 WL 7734281, *11 (N.D. Cal. December 1, 2015). The court originally found the government's explanation inadequate that the agent "would not have conducted the . . . drive-test" if any of the towers or antennas had been replaced or adjusted in the intervening period. (Internal quotation marks omitted.) *United States* v. *Cervantes*, Docket No. 12-cr-00792-YGR, 2015 WL 5569276, *4 (N.D. Cal. September 22, 2015). The court permitted the government to submit a supplemental declaration to the extent that it intended to offer opinions that were based on the drive tests. Id. The government thereafter submitted a supplemental affidavit, in which the agent stated that the "cell towers at issue were located at the same locations at the time of the crime as at the time of the field experiment." *United States* v. *Cervantes*, supra, 2015 WL 7734281, *11. The declaration further stated that "cell tower locations and sector azimuths during the time frame of the crime were examined and compared to cell tower locations and sector azimuths during the time frame of the measurements." (Internal quotation marks omitted.) Id. In light of the declaration, the court denied the defendant's motion to exclude or limit the FBI agent's testimony. Id., *12.

The court in *Morgan* addressed the claim that "any testimony regarding the drive test results is based on the incorrect premise that a drive test conducted six months after an alleged event, at a different time of year and at a different time of day, can *accurately* depict the coverage area of a cell sector." (Emphasis in original.) *United States* v. *Morgan*, supra, 292 F. Supp. 3d 485–86. The court concluded that cross-examination of the expert and presentation of conflicting expert testimony would cure any possible prejudice. Id., 486.

Wines testified that the technology, towers, sectors, and azimuths[16] were the same for the relevant towers from April, 2014, when the crime occurred, through December, 2015, when he conducted the drive test. He also testified that weather has a negligible impact on cell service and that there was an unobstructed view of the tower in question, such that topography would not be a factor in this case. Wines did not know "specifically whether or not there were any improvements" to the towers, but he was able to opine that "for example, with the Sprint tower, the type of [2G] technology . . . is not a technology that undergoes a lot of change because it's an older technology." Wines further opined that although he could not say that signal strength was exactly the same from April, 2014, to December, 2015, he "would expect them to be very similar." Such testimony is sufficient to satisfy the fit requirement of *Porter*.

We reiterate that "the purpose of the *Porter* hearing is to ascertain the *validity*, not the *weight*, of the methodology underlying the proffered scientific evidence." (Emphasis in original.) *Fleming* v. *Dionisio*, 317 Conn. 498, 512, 119 A.3d 531 (2015). Challenges to Wines' alleged inadequacies in accounting for different variables were legitimate material for cross-examination of Wines at trial. See *United States* v. *Allums*, supra, 2009 WL 806748, *2 (arguments that expert failed to account for weather conditions or possibility of high call volumes on days that defendant placed calls "would be appropriately raised on cross-examination").

We conclude that the court did not abuse its discretion in admitting the state's scientific evidence under *Porter*. The court therefore properly denied the defendant's motion in limine. Moreover, even if we assume,

[16] Wines defined the azimuth as "the direction that the signal is coming off of a particular sector."

arguendo, that the challenged evidence was improperly admitted, the defendant has failed to show that any such impropriety was harmful.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the [impropriety] was harmful." (Internal quotation marks omitted.) *State* v. *Guilbert*, supra, 306 Conn. 265. "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017).

We first note that the disputed evidence, "while compelling, was not vital to the state's case." *State* v. *Bonner*, 290 Conn. 468, 501, 964 A.2d 73 (2009). The heart of the challenged evidence before the jury consisted of Wines' conclusion, on the basis of his drive test survey data, that the cell phone associated with the defendant accessed a tower with a coverage area near the location of the shooting during the relevant time period, and that the phone could not have been anywhere else except within that coverage area in order

to make that connection. There was, however, significant unchallenged evidence corroborating Wines' testimony on material points. See *State* v. *Bouknight*, 323 Conn. 620, 628, 149 A.3d 975 (2016) (any error harmless where, inter alia, state presented ample evidence corroborating challenged exhibits). Although the defendant challenged Wines' use of the drive test survey data, the defendant expressly did not challenge the historical cell site location evidence, from which the jury could conclude that shortly after the shooting, the defendant's cell phone accessed a tower that was located 0.39 miles from the crime scene. See *State* v. *Edwards*, supra, 325 Conn. 134 (erroneous admission of police officer's testimony as to historical cell site location evidence was harmless, where "the jury still could conclude from the cell phone records themselves that the defendant's cell phone accessed cell towers in Rocky Hill and Wethersfield on the date of the robbery, which coincides with the victim's testimony that she was followed from the grocery store in Rocky Hill and robbed at her home in Wethersfield"). Further, the court did not limit the defendant's ability to challenge Wines' drive test survey data evidence. The defendant had a full opportunity to cross-examine Wines. See *State* v. *Bonner*, supra, 501 (any error harmless where defendant had "full opportunity to cross-examine" witnesses whose testimony was challenged).

Finally, even without the drive test survey data, the state had a strong case against the defendant. The jury had before it evidence that on the night of the shooting, the defendant was in telephone contact with Gonzalez, who was also in contact with the victim. Gonzalez' testimony put the defendant at the scene of the crime, and, as referenced previously, the historical cell site location evidence showed the defendant's phone accessing a cell tower near the crime scene shortly after the shooting. The jury also had before it the testimony

of a number of individuals regarding incriminating statements the defendant had made both before and after the murder. See id. (error harmless where witness testified that defendant had confessed guilt to her). Gomez-Delavega testified that the defendant told her he was planning to rob the victim and that he would have to kill him to prevent retaliation. Moreover, after the murder, the defendant told Gomez-Delavega that he had, in fact, shot and killed the victim. The defendant also told Gonzalez that he would kill him if he told anyone and made Gonzalez get rid of the Jeep. The jury also heard testimony from Vieira that the defendant had approached her at her job, asking her whether Gonzalez had told her anything.

For the previously discussed reasons, we conclude that any improper admission of the drive test survey evidence did not substantially affect the jury's verdict and it therefore was harmless.

The judgments are affirmed.

In this opinion the other judges concurred.

KIMBERLY CHAMERDA ET AL. *v.* JOHN OPIE ET AL. (AC 40573)

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

Syllabus

The plaintiff C sought to recover damages from the defendants, O and N, for slander of title in connection with certain property that she had inherited from E. In 1984, O purchased lot 15 from H and W, who had inherited the land from the estate of their father, K. K also had owned two adjacent parcels to the east of lot 15, lots 19 and 23, however, he sold lot 23 to E and her husband, and he divided lot 19, which was located in between lots 15 and 23, along the ridgeline of a building on the property and quitclaimed the eastern part to E. A partnership that K and E had formed operated a business out of the building on lot 19. When K divided lot 19, he also executed a will by which he left his interests in the partnership to E and lot 15, as well as the residue and

remainder of his estate, to H and W. Following K's death, his will was admitted to probate and an executor was appointed, who initially issued two certificates of title for lot 19, stating his opinion that E had owned both lot 19 west and lot 19 east, but later included lot 19 west as part of K's estate. The executor never closed the estate. From the time he purchased lot 15 until some point in 2003, O believed that E owned all of lot 19. In 2003, however, a surveyor advised him that nothing existed in the town's land records to prove E's ownership of lot 19 west, and O hired N to investigate. N discovered that lot 19 west remained in K's open estate, opined that it should have been devised to H and W as part of the residue of K's estate, and drafted a quitclaim deed for W to sign that conveyed to O whatever interests she had in lot 19 west. The signed deed was recorded in the land records on April 28, 2005, along with a survey. Thereafter, E died testate, leaving lot 23 and her interests in the partnership to C. In 2008, N filed a motion for a hearing in the Probate Court on behalf of O to determine who was entitled to lot 19 west. The Probate Court denied the motion, and N filed an appeal on behalf of O and W with the trial court, which remanded the matter to the Probate Court for a hearing. Concomitant with the appeal, N recorded a notice of lis pendens on the land records. Following a hearing held in 2011, the Probate Court issued a decision, concluding that lot 19 west belonged to the partnership and that K intended to transfer his interests therein to E as a partnership asset. N then filed an appeal with the trial court on behalf of O, W and the successors in interest to H and her estate, and recorded a second notice of lis pendens. Thereafter, the appeal was withdrawn and releases of the notices of lis pendens were recorded pursuant to an agreement reached by the parties, and, in 2013, C commenced the present action against the defendants for slander of title. Subsequently, the defendants filed separate motions for summary judgment, arguing that the statute of limitations had passed and that the alleged wrongful conduct was absolutely privileged. The trial court denied the motions, and the defendants thereafter filed a joint motion to dismiss for lack of subject matter jurisdiction, which the trial court granted. From the judgment rendered thereon, C appealed to this court. *Held*:

1. The trial court had subject matter jurisdiction over C's slander of title claims, as C had standing to bring those claims and the defendants' actions and statements in preparing and recording the quitclaim deed and survey were not absolutely privileged: C, as a specific devisee of E, had a salable interest in lot 19 west that was adversely affected by the defendants' preparation and recording of the deed and survey, as the law giving rise to the tort of slander of title clearly contemplates a wider range of interests sufficiently cognizable to confer standing, E took title, albeit contested, in lot 19 west immediately upon K's demise and C produced evidence of a potential sale and the difficulty she had in effecting that sale because of the challenged actions; moreover, the

preparation and recording of the deed and survey were too remote in time from the probate action to be related thereto and too dissimilar in nature to the kinds of statements the doctrine of absolute immunity was meant to protect as privileged, as the evidence indicated that the defendants failed to obtain a deed from both H and W, which suggested that they were less concerned about actually obtaining title to lot 19 west than with challenging C's title, that the defendants' actions were undertaken approximately five years prior to the bringing of the probate action and that the deed and survey were recorded for the purpose of obtaining O's standing for some nebulous action that had yet to coalesce until E had died, and although our state statutes expressly permit the use of notices of lis pendens in the manner they were used in this case, our statutes specifically discourage the abuse of the land records for purposes of slandering title, and given the defendants' admissions that the purpose of the deed and survey was to confer on O the ability to call into legal question the validity of E's title after she died, these actions were distinct from the preparation and recording of the notices of lis pendens related to a specific judicial proceeding.

2. The trial court should have granted the defendants' motions for summary judgment because C's slander of title claims were time barred under the applicable three year statute of limitations (§ 52-577): pursuant to § 52-577, the limitations period began to run, as a matter of law, upon the recording of the quitclaim deed and survey on April 28, 2005, which, under the statute, was the occurrence of the act complained of, and, therefore, because C challenged the dismissal of her claims only on the basis of the preparation and recording of the deed and survey, and because the recording thereof was a single occurrence completed some eight years before the commencement of the present action, C's claims were untimely; moreover, there was no merit to C's claim that equity demanded that this court recognize the defendants' actions to be a continuing course of conduct such that the limitations period was tolled until the release of the notices of lis pendens, as O's failure to withdraw the deed and survey was not a continuing breach of a continuing duty because there clearly was no special relationship between the parties and there was no later wrongful conduct related to the alleged prior wrongful acts.

Argued May 24—officially released October 23, 2018

Procedural History

Action to recover damages for slander of title, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Agati*, *J.*, denied the defendants' motions for summary judgment; thereafter, the court, *A. Robinson*, *J.*, granted the

defendants' motion to dismiss and rendered judgment thereon, from which the named plaintiff appealed to this court. *Improper form of judgment*; *judgment directed.*

David L. Weiss, for the appellant (named plaintiff).

James E. O'Donnell, for the appellee (named defendant).

Nadine M. Pare, for the appellee (defendant Norbert W. Church, Jr.).

Opinion

DiPENTIMA, C. J. The plaintiff Kimberly Chamerda[1] inherited certain real property from her aunt, Elsie Nemeth. The defendant John Opie, who owned an adjacent parcel, hired the defendant Norbert W. Church, Jr., an attorney, to commence a legal challenge to the plaintiff's ownership of part of the property. After that action eventually was withdrawn, the plaintiff brought the present action in the Superior Court against Opie and Church for slander of title. The plaintiff now appeals from the judgment of dismissal for lack of subject matter jurisdiction, claiming that the trial court erred by (1) concluding that the defendants were entitled to absolute or qualified immunity, or both, and (2) failing to apply the law of the case doctrine to bar the defendants from raising the immunity defense in their joint motion to dismiss where they had made nearly identical arguments in earlier motions for summary judgment. In addition to responding to the plaintiff's claims on appeal, the defendants raise an alternative ground on which to affirm the judgment: They claim that the court erred by denying their motions for summary

[1] Paul Gouin, the successor executor of the estate of Elsie Nemeth, was also a plaintiff at the trial court. All of Gouin's claims were dismissed, stricken, or abandoned. See *Chamerda* v. *Opie*, Superior Court, judicial district of New Haven, Docket No. CV-13-6037328-S (August 28, 2014) (58 Conn. L. Rptr. 865). He is not a participant in this appeal, and, therefore, we refer in this opinion to Chamerda as the plaintiff.

judgment where their actions were privileged or the statute of limitations had run, or both. Although we agree with the plaintiff that the trial court erred in concluding that the challenged actions were absolutely privileged and therefore that it lacked subject matter jurisdiction, we nevertheless agree with the defendants that they were entitled to summary judgment on the statute of limitations ground. Accordingly, the form of the judgment is improper; we reverse the judgment of dismissal and remand the case to the trial court with direction to render judgment in favor of the defendants.

The relevant facts and procedural history are as follows. In 1984, Opie purchased 15 Buena Vista Road in Branford from Beatrice Hull and Ruth Warner, sisters who had inherited that land from the estate of their father, Howard Kelsey. In addition to lot 15, which had been his residence, Kelsey once owned the two adjacent parcels to the east, lots 19 and 23. In 1960, however, Kelsey sold lot 23 to Elsie Nemeth and her husband, which they then used as their residence. Between the two homes, on lot 19, was a building known as the Vernon Glove Factory (factory). Kelsey and Nemeth formed a partnership to operate a business called the Vernon Glove Company (company) out of the factory.

On March 8, 1974, Kelsey divided lot 19 along the roof ridgeline of the factory. He quitclaimed the eastern part to Nemeth, with certain conditions.[2] On the same day, March 8, 1974, Kelsey executed a will by which he left his partnership interests in the company to Nemeth,

[2] Specifically, the deed provided that (1) "Nemeth shall not disturb [the company's] operation, claim rent, lease, sell said property or in any other way exercise ownership to the detriment of said [company]" and (2) in the event of either party's disposal of his or her interest in the company, "the buildings housing said [company] shall be razed within twelve . . . months of said happening at the expense of said [company] or sole ownership."

also with conditions.[3] He left lot 15, as well as the residue and remainder of his estate, to Hull and Warner.[4]

Three years later, on March 14, 1977, Nemeth quitclaimed lot 19 east back to Kelsey so that they could remove the conditions on the original deed; Kelsey immediately quitclaimed lot 19 east back to Nemeth, without conditions. Shortly thereafter, on May 23, 1977, Kelsey died. On June 23, 1977, the Branford Probate Court admitted Kelsey's will and appointed Attorney Frank J. Dumark as executor. Dumark initially issued two certificates of title, stating an opinion that Nemeth had owned both lot 19 west and lot 19 east. Later, however, he included lot 19 west as part of Kelsey's estate.

Years later, Dumark's administration account was filed; it did not propose distribution for any of the real property in Kelsey's estate. On February 11, 1981, the Branford Probate Court issued an order stating that there were other assets to be had that would be in the best interests of the beneficiaries of the estate and that the administration account would not be accepted as a final account but, instead, would remain an interim account. Dumark never closed the estate, and it remained open for twenty-five years.

From the time Opie purchased lot 15 until some point in 2003, he believed that Nemeth owned all of lot 19.

[3] Specifically, Kelsey's will provided: "I bequeath and devise all of my right, title and interest in [the company] and in and to all of the assets, real and personal, tangible and intangible owned by it, as shown by its books of account, to my partner, Elsie V. Nemeth, in fee; provided however that this gift shall be subject to all debts, obligations and claims of every sort outstanding against said [company] at the time of my death."

[4] Specifically, Kelsey's will provided: "To my daughters, Beatrice K. Hull and Ruth K. Warner, per stirpes, as tenants in common, I devise in fee my residence located on the sought side of Buena Vista Road in Branford . . . commonly known as 15 Buena Vista Road . . . . All the rest, residue and remainder of the property which I may own . . . I bequeath and devise in equal shares to my daughter, Beatrice K. Hull and my daughter, Ruth K. Warner . . . ."

In 2003, however, Opie had his property surveyed in preparation for the construction of a deck. The surveyor advised him that nothing existed in the land records to prove Nemeth's ownership of lot 19 west. Opie then hired Church to investigate; Church discovered that lot 19 west remained in Kelsey's open estate and opined that it should have been devised to Hull and Warner as part of the residue of Kelsey's estate. Church drafted a quitclaim deed for Warner to sign that conveyed to Opie whatever interests she may have had in lot 19 west. The signed deed was recorded on April 28, 2005, along with the survey.

On November 9, 2006, Nemeth died testate, leaving her home and interests in the company to the plaintiff.[5] On December 27, 2007, the executrix of Nemeth's estate requested that the Branford Probate Court issue a revised certificate of devise transferring to Nemeth, and thus to her estate, lot 19 west. On March 5, 2008, however, Church filed a motion for a hearing in the Branford Probate Court on behalf of Opie to determine who was entitled to lot 19 west. The motion argued that the Probate Court had never issued a certificate of devise, that Kelsey's estate remained open, that Warner and Hull had an interest in lot 19 west as residue of Kelsey's estate, and that Opie was Warner's successor in title.

The Branford Probate Court reviewed the archived record and discovered a certificate of devise for lot 19 west in favor of Nemeth. The court noted, however, that this certificate was not part of the official records and was not recorded on the Branford Land Records. Nevertheless, the court denied the request for a hearing on the ground that the certificate demonstrated that

[5] Specifically, Nemeth's will provided: "To my niece, Kimberly Chamerda . . . I devise and bequeath the real property located at 19 Buena Vista Road, Branford . . . if owned by me at the time of my death."

the original Probate Court determined that Kelsey devised the property to Nemeth.

On July 23, 2008, Church appealed the denial of the hearing request to the Superior Court on behalf of both Opie and Warner. Concomitant with that appeal, Church filed a notice of lis pendens on July 25, 2008. On July 2, 2010, the trial court, *Hon. William L. Hadden, Jr.*, judge trial referee, remanded the case to the Branford Probate Court for "an evidentiary hearing . . . to determine who is entitled to a certificate of devise as to [lot 19 west]."

That hearing was held in the spring of 2011; the Branford Probate Court issued its decision on July 20, 2011. The court, having heard the evidence and reviewed the arguments de novo, concluded that lot 19 west belonged to the company and therefore that Kelsey intended to transfer his interests therein to Nemeth as a company asset. See footnote 3 of this opinion.

On August 17, 2011, Church appealed the July 20, 2011 decision to the Superior Court on behalf of Opie, Warner, and the successors in interest to Hull and her estate. Accordingly, a second notice of lis pendens was recorded on August 26, 2011. Pursuant to an agreement reached by the parties, on June 28, 2012, the appeal was withdrawn and releases of the notices of lis pendens were recorded. On April 1, 2013, the plaintiff commenced this action against the defendants for slander of title.

On June 3, 2015, Church filed a motion for summary judgment, as did Opie on August 6, 2015. In both motions, the defendants argued that the statute of limitations had passed and that the alleged conduct was absolutely privileged. The plaintiff objected to those motions on December 4, 2015; the court denied them in a written decision dated April 25, 2016. In its decision, the court recited the applicable law and stated that

"[t]he court concludes that [there] are issues of fact which deny the granting of summary judgment."

On January 27, 2017, the defendants filed a joint motion to dismiss for lack of subject matter jurisdiction, to which the plaintiff objected. In that motion, the defendants raised substantively the same immunity argument set forth in their motions for summary judgment, but this time couched in terms of subject matter jurisdiction. On June 5, 2017, the court granted the motion to dismiss.[6] On June 23, 2017, the plaintiff appealed.

As a preliminary matter, we must clarify what is and what is not being challenged in this appeal. The original bases for the plaintiff's claims for slander of title as alleged in the operative complaint, the third amended complaint, dated February 11, 2015, are as follows: (1) the drafting of the June, 2003 survey, which was revised on December 6, 2004, and recorded on April 28, 2005; (2) the drafting of the quitclaim deed, dated May 26, 2004, and the recording thereof on April 28, 2005; (3)

[6] Specifically, in granting the motion to dismiss, the court stated in relevant part: "The undersigned concludes that the law of the case doctrine does not apply on th[ese] issues. Therefore, the prior ruling of the court, *Agati*, *J.*, that there were disputed issues of fact preventing the entry of judgment, is inapplicable to the present issue, whether the action is barred by the absolute immunity doctrine. Although there is no Connecticut Appellate Court case directly on point, other jurisdictions have considered and decided whether a notice of lis pendens is protected by the doctrine of absolute immunity. At one point, a majority of jurisdictions concluded that absolute immunity applies. . . . However, recently, the trend appears to be that qualified immunity applies. Because none of the indicia that must be present to preclude the application of the doctrine of qualified immunity and because there is persuasive Superior Court authority which suggests that the filing of a lis pendens is absolutely privileged, this court grants the motion to dismiss."

The defendants filed a subsequent motion for articulation to clarify whether the court dismissed the case in full. The court granted that motion, noting that "[i]t was the intention of the [court] to dismiss the entire case. The coding, as judgment in part, was erroneous." Although it is unclear from this record, the granting in full of the motion to dismiss suggests that the court agreed that the defendants' actions with respect to the deed and survey were privileged.

the drafting of the first notice of lis pendens, dated July 23, 2008, and the recording thereof on July 25, 2008; (4) the drafting of the second notice of lis pendens, dated August 17, 2011, and the recording thereof on August 26, 2011; and (5) the prosecution of the Probate Court appeal proceedings, namely, the motion for a hearing, dated March 5, 2008, the first appeal, dated July 23, 2008, and the second appeal, dated August 17, 2011. On appeal, the plaintiff asserts that her slander of title claims are founded only on the drafting and recording of the deed and survey, and that she briefed her appeal accordingly.[7]

Consequently, the plaintiff's claims on appeal, properly stated, are that the trial court erred by (1) improperly granting the motion to dismiss for lack of subject matter jurisdiction on the ground that the preparation and recording of the deed and survey were absolutely privileged[8] and (2) failing to apply the law of the case doctrine to bar the defendants from arguing anew that the preparation and recording of the deed and survey were absolutely privileged in their motion to dismiss. The defendants challenge these arguments; further, as an alternative ground on which to affirm the judgment,

[7] Indeed, the plaintiff states in her appellate brief that "[w]hether or not the certificates of lis pendens are barred by the doctrine of absolute immunity has no bearing whatsoever as to whether there is subject matter jurisdiction for the [p]laintiff's slander of title claims arising from the wrongful preparation and recording of the [d]eed and [s]urvey as alleged by the [p]laintiff in the [t]hird [a]mended [c]omplaint." Later, she states that "the preparation and recording of the [d]eed and [s]urvey . . . are the factual basis of the [p]laintiff's slander of title claims." This mirrors her apparent concessions before the trial court that the notices of lis pendens are absolutely privileged.

[8] At common law, "communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, 200 Conn. 243, 245–46, 510 A.2d 1337 (1986); see also *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 719 n.2, 161 A.3d 630 (2017) (discussing distinctions between terms "absolute immunity," "absolute privilege," and "litigation privilege").

the defendants contend that the statute of limitations bars the plaintiff's claim. Because we agree with the defendants that the statute of limitations applies to bar the plaintiff's claims for slander of title insofar as they were founded upon the deed and survey, and because the plaintiff challenges only those actions on appeal, we conclude that the defendants were entitled to summary judgment and, accordingly, do not reach the other claims.

I

First, we must determine whether the trial court had subject matter jurisdiction over the plaintiff's claims with respect to the deed and survey. We do so even though the motion to dismiss was filed subsequent to the motion for summary judgment because "[s]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction." (Internal quotation marks omitted.) *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 648, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013). Specifically, in this case, we must determine whether (1) the plaintiff has standing and (2) the recording of the deed and survey were "communications uttered or published in the course of judicial proceedings" such that they "are absolutely privileged so long as they are in some way pertinent to the subject of the controversy." (Internal quotation marks omitted.) *Petyan v. Ellis*, 200 Conn. 243, 245–46, 510 A.2d 1337 (1986).

"In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law,

our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 735, 166 A.3d 832, cert. denied, 327 Conn. 926, 171 A.3d 59 (2017).

A

The defendants contend that the plaintiff lacks standing because she "did not have any interest in or title to [lot 19 west] until after title was determined at the conclusion of the appeal from the decision of the Probate Court dated July 20, 2011, and the issuance of the only valid [c]ertificate of [d]evise from the [e]state of Howard Kelsey to Elsie Nemeth on July 17, 2012." We disagree.

It is well established that "[a] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [T]he court has a duty to dismiss, even on its own initiative, any appeal that it lacks jurisdiction to hear. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of the question of [a] plaintiff's standing is plenary." (Citation omitted; internal quotation marks omitted.) *Fountain Pointe, LLC* v. *Calpitano*, supra, 144 Conn. App. 644.

The defendants' standing argument misconstrues the law. First, "[a]ny kind of legally protected interest in

land . . . may be disparaged if the interest is transferable and therefore salable or otherwise capable of profitable disposal. It may be real or personal, corporal or incorporeal, in possession or reversion. It may be protected either by legal or equitable proceedings and may be vested or inchoate. It may be a mortgage, lease, easement, reversion or remainder, whether vested or contingent, in land or chattels, a trust or other equitable interest. . . . This does not purport to be a complete catalogue of legally protected interests in land . . . capable of disparagement. There may be other interests recognized by the law of property that are salable or otherwise capable of profitable disposal and to which the rule stated in this Section is therefore applicable." Restatement (Second) of Property, § 624, comment (d), p. 344 (1977); see also W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) §128, pp. 965–66.

Thus, although "[n]othing vests by reason of [a will] during the life of the testator"; (emphasis omitted; internal quotation marks omitted) *Zanoni* v. *Hudon*, 42 Conn. App. 70, 75, 678 A.2d 12 (1996), citing 79 Am. Jur. 2d, Wills, § 7 (1975); the law giving rise to the tort of slander of title clearly contemplates a wider range of "interests" sufficiently cognizable to confer standing. Moreover, although it is true that a certificate of devise merely perfects an extant title, Nemeth took title, albeit contested, imperfect and not absolute, in lot 19 west immediately upon Kelsey's demise. See *Cardillo* v. *Cardillo*, 27 Conn. App. 208, 212, 605 A.2d 576 (1992) ("It is fundamental jurisprudence that title to real estate vests immediately at death in a deceased's heirs, or in devisees upon the admission of the will to probate. . . . The recording of a probate certificate of devise or descent is necessary only to perfect marketable title. That certificate furnishes evidence that the heir's or devisee's title is no longer in danger of being cut off

by a probate sale to pay debts of the estate and also because it furnishes a record of who received the title. Such a probate certificate is not a muniment of title, however, but merely a guide or pointer for clarification of the record." [Citations omitted.]). The plaintiff also produced evidence of a potential sale and the trouble she had in effecting the same. Thus, construing the evidence in the light most favorable to the plaintiff, as we must; see generally *Padawer* v. *Yur*, 142 Conn. App. 812, 818, 66 A.3d 931, cert. denied, 310 Conn. 927, 78 A.3d 145 (2013); Nemeth had a salable interest in lot 19 west that was adversely affected by the preparation and recording of the deed and survey, as did her specific devisee, the plaintiff.

B

Having concluded that the plaintiff had standing to bring the slander of title claims, we must determine whether the preparation and recording of the deed and survey, the only activities challenged here, were absolutely privileged[9] such that the court lacked subject matter jurisdiction. See *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 723, 161 A.3d 630 (2017) ("absolute immunity implicates the trial court's subject matter jurisdiction"). We conclude that the defendants' actions were not absolutely privileged.

"As the doctrine of absolute immunity concerns a court's subject matter jurisdiction . . . we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . The question before us is whether the facts as

[9] We note that the court concluded that the preparation and recording of the notices of lis pendens were entitled to qualified immunity. We read *Simms* v. *Seaman*, 308 Conn. 523, 569 n.30, 69 A.3d 880 (2013), as a rejection of the doctrine of qualified immunity. Accordingly, we analyze the defendants' claims in terms of absolute immunity.

alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive dismissal on the grounds of absolute immunity. . . .

"Connecticut has long recognized the litigation privilege . . . [and has extended it] to judges, counsel and witnesses participating in judicial proceedings. . . . In *Simms* [v. *Seaman*, 308 Conn. 523, 531, 69 A.3d 880 (2013), our Supreme Court] noted that the doctrine of absolute immunity originated in response to the need to bar persons accused of crimes from suing their accusers for defamation. . . . The doctrine then developed to encompass and bar defamation claims against all participants in judicial proceedings, including judges, attorneys, parties, and witnesses. . . . [Our Supreme Court] further noted that, [l]ike other jurisdictions, Connecticut has long recognized the litigation privilege, and that [t]he general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action in slander . . . .

"Furthermore, in *Rioux* v. *Barry*, [283 Conn. 338, 343–44, 927 A.2d 304 (2007), our Supreme Court] explained that [t]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be

thwarted if those persons whom the common-law doctrine [of absolute immunity] was intended to protect nevertheless faced the threat of suit. . . .

"In *Simms* v. *Seaman*, supra, 308 Conn. 540–45, [our Supreme Court] further discussed the expansion of absolute immunity to bar retaliatory civil actions beyond claims of defamation. For example, we have concluded that absolute immunity bars claims of intentional interference with contractual or beneficial relations arising from statements made during a civil action. See *Rioux* v. *Barry*, supra, 283 Conn. 350–51 (absolute immunity applies to intentional interference with contractual relations because that tort comparatively is more like defamation than vexatious litigation). We have also precluded claims of intentional infliction of emotional distress arising from statements made during judicial proceedings on the basis of absolute immunity. See *DeLaurentis* v. *New Haven*, 220 Conn. 225, 263–64, 597 A.2d 807 (1991). Finally, we have most recently applied absolute immunity to bar retaliatory claims of fraud against attorneys for their actions during litigation. See *Simms* v. *Seaman*, supra, 545–46. In reviewing these cases, it becomes clear that, in expanding the doctrine of absolute immunity to bar claims beyond defamation, this court has sought to ensure that the conduct that absolute immunity is intended to protect, namely, participation and candor in judicial proceedings, remains protected regardless of the particular tort alleged in response to the words used during participation in the judicial process. Indeed, we recently noted that [c]ommentators have observed that, because the privilege protects the communication, the nature of the theory [on which the challenge is based] is irrelevant. . . .

"It is well settled that communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy. . . . As to the

relevance of the statements or documents produced . . . we note that our law provides for a very generous test for relevance." (Citations omitted; internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 724–27.

In this case, the defendants contend that the preparation and recording of the deed and survey are privileged because the deed was prepared and recorded for the express purpose of conferring standing on Opie to bring his claim in the Probate Court, and the survey was prepared and recorded because it was referenced in the deed. The plaintiff, conversely, argues that the preparation and recording of the deed and survey are (1) too remote in time from the probate action to be related thereto and (2) too dissimilar in nature to the kinds of statements the doctrine of absolute immunity was meant to protect to be privileged. We agree with the plaintiff.

The actions the court specifically addressed in granting the defendants' motion to dismiss were the preparation and recording of the two notices of lis pendens. These actions are immune in part due to statutory imprimatur. See General Statutes § 52-325. Moreover, they necessarily are relevant to specific litigation because they must give notice of "actions intended to affect real property." See General Statutes § 52-325 (b). Additionally, the notices of lis pendens necessarily identified in their text the specific legal actions to which they were related.

The actions challenged in this appeal, however, are entirely different and do not square with the purpose for the privilege. First, the defendants failed to obtain a deed from both of Kelsey's daughters, suggesting that they were less concerned about actually obtaining title than with challenging the plaintiff's title. Second, the defendants' actions were undertaken some five years

prior to the bringing of the probate action. Although this does not, in and of itself, exclude the preparation and recording of the deed and survey from the purview of the privilege, the remoteness in time does bear on the legitimacy of the connection between the actions and the judicial proceedings. The defendants' failure within several years to initiate any legal action once they had obtained what they concluded was sufficient standing undermines their arguments. More problematic is the notion that the deed and survey were recorded for the purpose of obtaining standing for some nebulous action that had yet to coalesce until the apparent owner had died.[10]

Second, the actions at issue are different in nature because although our statutes expressly permit the use of notices of lis pendens in the manner they were used here, our statutes specifically discourage the abuse of the land records for purposes of slandering title. See General Statutes § 47-33j.[11] Given the defendants' admissions that the purpose of the deed and survey was to

[10] Arguably, with the evidence at his disposal, Opie already may have had sufficient standing to bring a quiet title action. See, e.g., *Fountain Pointe, LLC* v. *Calpitano*, supra, 144 Conn. App. 644–45 ("An action to quiet title 'may be brought by any person claiming title to, or any interest in, real or personal property, or both,' against any person who may 'claim to own the property, or any part of it, or to have any estate in it . . . adverse to the plaintiff, or against any person in whom the land records disclose any interest, lien, claim or title conflicting with the plaintiff's claim, title or interest, for the purpose of determining such adverse estate, interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. . . .' General Statutes § 47-31 (a). Furthermore, § 47-31 (a) provides: 'Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property.' Thus, under § 47-31, any person having *any* interest in real property that is affected by a mortgage, the validity of which is being challenged, may bring an action to quiet title and seek to have the court declare the mortgage invalid." [Emphasis in original.]).

[11] General Statutes § 47-33j provides: "No person may use the privilege of recording notices under sections 47-33f and 47-33g for the purpose of slandering the title to land. In any action brought for the purpose of quieting title to land, if the court finds that any person has recorded a claim for that purpose only, the court shall award the plaintiff all the costs of the action,

confer on Opie the ability to call into legal question the validity of Nemeth's title whenever he so chose to do so, i.e., after she died, these actions are distinct from the preparation and recording of the notices of lis pendens related to a specific judicial proceeding. Although the test for relevance is very generous, we must balance it against the requirement to construe the evidence in the light most favorable to jurisdiction. When we do so, this case falls outside the limits of legal generosity, and the plaintiff has colorable claims for slander of title.

Therefore, weighing the evidence in the light most favorable to jurisdiction, we conclude that the defendants' actions and statements in preparing and recording the deed and survey were not absolutely privileged. Therefore, the trial court had subject matter jurisdiction over this case.

II

Next, we turn to the defendants' alternative ground to affirm that, even if their actions were not absolutely privileged, the court should have granted their motions for summary judgment because the plaintiff's claims were time barred. We conclude that this alternative ground is properly before this court and agree with the defendants that they were entitled to summary judgment.

A

First, we must consider whether we may properly address the alternative ground at all. Practice Book § 63-4 (a) (1) provides in relevant part: "If any appellee wishes to . . . (A) present for review alternative grounds upon which the judgment may be affirmed

including such attorneys' fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting the claim shall pay to the plaintiff all damages the plaintiff may have sustained as the result of such notice of claim having been so recorded."

. . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue." Nevertheless, even where an alternative ground on which to affirm has been identified in a § 63-4 (a) (1) statement, in most cases,[12] "[t]he appellee's right to file [such] statement has not eliminated the duty to have raised the issue in the trial court . . . ." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 390 n.11, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000).

In this case, the defendants properly filed § 63-4 (a) (1) statements identifying the alternative ground at issue. Counsel for Opie conceded at oral argument before this court, however, that the defendants did not file a cross appeal to challenge the trial court's denial of their motions for summary judgment.[13] Nevertheless, all parties had ample opportunity to address the underlying legal issues because they were raised repeatedly in briefing and argument before the trial court and this court. See *DeBeradinis* v. *Zoning Commission*, 228 Conn. 187, 198, n.7, 635 A.2d 1220 (1994). Accordingly, we conclude that we may address the alternative ground on which to affirm without prejudice to the plaintiff.

[12] But see *Blumberg Associates. Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 164, 84 A.3d 840 (2014) ("[t]reatment of [unpreserved, alternative grounds for affirmance] claims depends on three variables: (1) whether the claim was raised in the trial court; (2) whether the claim was raised on appeal; and (3) whether the appellant would be entitled to a directed judgment if it prevailed on the claim that it raised on appeal, or whether, instead, there would be further proceedings in the trial court").

[13] See *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) ("the trial court's partial denial of the defendants' motion for summary judgment, which had been filed on the basis of [a] colorable claim of absolute immunity, constitutes an appealable final judgment").

B

We turn therefore to the legal principles governing the defendants' claim. "Practice Book § 17-49 provides that 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 moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to [deny] the defendant's motion for summary judgment is plenary. . . .

"Public policy generally supports the limitation of a cause of action in order to grant some degree of certainty to litigants. . . . The purpose of [a] statute of limitation . . . is . . . to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. . . . Therefore, when a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature

of the cause of action or of the right sued upon." (Citations omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 198–99, 931 A.2d 916 (2007).

1

The issue of which limitations period applies to a slander of title claim is an issue of first impression and a question of law over which our review is plenary. See *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 29, 148 A.3d 1123 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017). Slander of title is foremost a creature of the common law but also is referenced in the Marketable Title Act, General Statutes § 47-33b et seq. See footnote 11 of this opinion. Section 47-33j, however, does not include a specific limitations period, so we must "borrow the most suitable statute of limitations on the basis of the nature of the cause of action . . . ." *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 199. The defendants argue that General Statutes § 52-597[14] or, in the alternative, General Statutes § 52-577[15] should apply to bar the plaintiff's action. Although the plaintiff disagrees, she does not offer any alternative statute. We conclude that § 52-577 provides the appropriate limitations period.

The tort of slander of title is defined as "the uttering or publication of a false statement derogatory to the plaintiff's title, with malice, causing special damages as a result of diminished value of the plaintiff's property in the eyes of third parties. The publication must be false, and the plaintiff must have an estate or interest in the property slandered. Pecuniary damages must be

[14] General Statutes § 52-597 provides: "No action for libel or slander shall be brought but within two years from the date of the act complained of."

[15] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

shown in order to prevail on such a claim." (Internal quotation marks omitted.) *Elm Street Builders, Inc.* v. *Enterprise Park Condominium Assn., Inc.*, 63 Conn. App. 657, 669–70, 778 A.2d 237 (2001), quoting 50 Am. Jur. 2d, Libel and Slander § 554 (1995); see also *CHFA-Small Properties, Inc.* v. *Hussein Elazazy*, 157 Conn. App. 1, 18, 116 A.3d 814 (2015); *Fountain Pointe, LLC* v. *Calpitano*, supra, 144 Conn. App. 653–55; *Gilbert* v. *Beaver Dam Association of Stratford, Inc.*, 85 Conn. App. 663, 672–73, 858 A.2d 860 (2004), cert. denied, 272 Conn. 912, 866 A.2d 1283 (2005).

In dicta[16] in *Bellemare*, our Supreme Court analogized the claim in that case, a violation of General Statutes § 49-8,[17] to a slander of title claim in determining that the three year limitation on tort claims applied. Specifically, the court noted: "Slander of title is a *tort* whereby the plaintiff's claim of title [to] land or other property is disparaged by a letter, caveat, mortgage, lien or some other written instrument . . . . A cause of action for slander of title consists of any false communication which results in harm to interests of another having pecuniary value . . . . Such an action lies in tort and is akin to an action for damages pursuant to § 49-8." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 202.

[16] This court explicitly has held that our Supreme Court's discussion of slander of title in *Bellemare* was dicta insofar as it purportedly created a new element of the tort. See *Fountain Point, LLC* v. *Calpitano*, supra, 144 Conn. App. 654–55 ("The court's discussion of slander of title analogized the similarities between an action for damages under § 49-8 with the common-law tort of slander of title in order to bolster its holding that the three year tort statute of limitations was applicable. . . . We do not consider our Supreme Court's discussion of slander of title in *Bellemare* to have intended to lay down in positive form an additional element to a statutory slander of title cause of action." [Citation omitted; internal quotation marks omitted.]).

[17] General Statutes § 49-8 governs the release of satisfied or partially satisfied mortgages, ineffective attachments, lis pendens or liens.

Although dicta, this discussion of § 52-577 in connection with slander of title claims counsels in favor of applying the three year limitations period. See W. Keeton, supra, § 128, p. 963 ("Because of the unfortunate association with 'slander,' a supposed analogy to defamation has hung over the tort like a fog, and has had great influence upon its development. On the other hand, the action seems to have been recognized from the beginning as only loosely allied to defamation, and to be rather an action on the case for the special damage resulting from the defendant's interference." [Footnote omitted.])[18]

2

Having concluded that § 52-577 applies, we next must determine the point at which the three year limitations period began to run. The plaintiff argues, essentially, that (1) as a matter of law, the statute of limitations does not begin to run until the defendants ceased to assert their claims against the plaintiff, and (2) in the alternative, the "continuing course of conduct" doctrine applies such that the limitations period does not begin to run until the cessation of all the conduct complained of, up to and including the second probate appeal and associated lis pendens. We disagree.

The plaintiff first suggests that, as a matter of law, the limitations period commences only after the defendants ceased to assert their claims against her. In support of her argument, the plaintiff cites to a single case from the United States District Court for the Western District

[18] But see 50 Am. Jur. 2d, Libel and Slander § 529 ("In the absence of a statute expressly referring to actions for slander of title, the statute of limitations applicable to actions for libel and slander often applies to actions for slander of title. Slander of title claims, however, may be governed by the limitation period for an action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated, or by a general statute of limitations for actions with no prescribed limitations." [Footnotes omitted.]).

of Virginia, *Warren* v. *Bank of Marion*, 618 F. Supp. 317, 322 (W.D. Va. 1985) ("[u]nder the rule here adopted, this cause of action did not fully accrue and the limitations period did not begin to run until the defendants released their claim against [the plaintiff's] property"). She urges us to adopt its analysis. We decline to do so.

We note that other jurisdictions have considered this question with differing conclusions. In some jurisdictions, the statute of limitations begins to run from the time of the act complained of. See, e.g., *Hosey* v. *Central Bank of Birmingham, Inc.*, 528 So. 2d 843, 844 (Ala. 1988); *Old Plantation Corp.* v. *Maule Industries, Inc.*, 68 So. 2d 180, 182–83 (Fla. 1953); *Boaz* v. *Latson*, 260 Ga. App. 752, 759, 580 S.E.2d 572 (2003), rev'd in part on other grounds, 278 Ga. 113, 598 S.E.2d 485 (2004); *Walley* v. *Hunt*, 212 Miss. 294, 309, 54 So. 2d 393 (1951); *Pro Golf Mfg., Inc.* v. *Tribune Review Newspaper Co.*, 570 Pa. 242, 247, 809 A.2d 243 (2002). In other jurisdictions, the limitations period begins to run when the plaintiff reasonably could be expected to discover the existence of a claim. See, e.g., *Stalberg* v. *Western Title Ins. Co.*, 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43 (1991); *LaBarge* v. *Concordia*, 23 Kan. App. 2d 8, 18, 927 P.2d 487 (1996). In still others, the limitations period begins to run upon pecuniary loss. See, e.g., *State* v. *Mabery Ranch, Co., LLC*, 216 Ariz. 233, 249, 165 P.3d 211 (Az. App. 2007); *Rosenbaum* v. *New York*, 8 N.Y.3d 1, 12, 861 N.E.2d 43, 828 N.Y.S.2d 228 (2006); *Ellis* v. *Waldrop*, 656 S.W.2d 902, 904–905 (Tex. 1983); *Valley Colour* v. *Beuchert Builders, Inc.*, 944 P.2d 361, 364 (Utah 1997). Finally, in some jurisdictions, the limitations period begins to run only after the defendant ceases to maintain the adverse claim. See, e.g., *Green* v. *Chamberlain*, 60 So. 2d 120, 124 (La. App. 1952); *New England Oil & Pipe Line Co.* v. *Rogers*, 154 Okla. 285, 7 P.2d 638 (Okla. 1931); *Chesboro* v. *Powers*, 78

Mich. 472, 479, 44 N.W. 290 (1889); *Nolan* v. *Kolar*, 629 S.W.2d 661, 663 (Mo. App. 1982).

The jurisprudence of this state's appellate courts, however, consistently has endorsed the theory that the relevant limitations period begins to run at the occurrence of the act complained of. "This court has determined that [§] 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs. . . . Moreover, our Supreme Court has stated that [i]n construing our general tort statute of limitations . . . § 52-577, which allows an action to be brought within three years from the date of the act or omission complained of, we have concluded that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred. . . . The three year limitation period of § 52-577, therefore, begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury." (Citation omitted; internal quotation marks omitted.) *Valentine* v. *LaBow*, 95 Conn. App. 436, 444, 897 A.2d 624, cert. denied, 280 Conn. 933, 909 A.2d 963 (2006); *PMG Land Associates, L.P.* v. *Harbour Landing Condominium Assn., Inc.*, 135 Conn. App. 710, 717–18, 42 A.3d 508 (2012). Indeed, "[§] 52-577 is a statute of repose in that it sets a fixed limit after which the tortfeasor will not be held liable and *in some cases will serve to bar an action before it accrues*."[19] (Emphasis added; internal quotation marks omitted.) *Targonski* v. *Clebowicz*, 142 Conn. App. 97, 108, 63 A.3d 1001 (2013).

[19] For this reason, we also reject the plaintiff's argument that the limitations period should not have begun until she had actual notice of the filing of the deed and survey. Also, as discussed previously, our appellate courts have rejected the "discovery" theory for accrual adopted by other jurisdictions. See part II B 1 of this opinion.

Closer to the specific legal questions at issue in this case, this court previously has determined that, in the context of an ineffective lis pendens, the § 52-577 limitations period begins to run when the lis pendens is rendered ineffective, not when it is released. See *PMG Land Associates, L.P.* v. *Harbour Landing Condominium Assn., Inc.*, 172 Conn. App. 688, 694–95, 161 A.3d 596, cert. denied, 326 Conn. 911, 165 A.3d 1252 (2017). Although the deed and survey were never rendered "slanderous," that case applies with equal force to the legal instruments at issue in this case. Inasmuch as the plaintiff has alleged that the preparation and recording of the deed and survey were inherently "slanderous," the statute of limitations began to run, as a matter of law, upon the recording thereof on April 28, 2005.

The plaintiff, however, also implies that the equities demand that we recognize the defendants' actions to be a continuing course of conduct such that the limitations period was tolled until the release of the notices of lis pendens. We disagree.

"[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . .

"In certain circumstances . . . we have recognized the applicability of the continuing course of conduct doctrine to toll a statute of limitations. Tolling does not enlarge the period in which to sue that is imposed by a statute of limitations, but it operates to suspend or

interrupt its running while certain activity takes place. . . . Consistent with that notion, [w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed. . . .

"[I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such a wrong . . . . Where we have upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act. . . . Therefore, a precondition for the operation of the continuing course of conduct doctrine is that the defendant must have committed an initial wrong upon the plaintiff. . . . A second requirement for the operation of the continuing course of conduct doctrine is that there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. . . . The doctrine of continuing course of conduct as used to toll a statute of limitations is better suited to claims where the situation keeps evolving after the act complained of is complete . . . .

"In sum, [i]n deciding whether the trial court properly granted the defendant's motion for summary judgment, we must determine if there is a genuine issue of material fact with respect to whether the defendant: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty. . . . [I]f there is no genuine issue of material fact with

respect to any one of the three prongs . . . summary judgment is appropriate." (Citations omitted; internal quotation marks omitted.) *Vaccaro* v. *Shell Beach Condominium, Inc.*, supra, 169 Conn. App. 44–45; see also *Targonski* v. *Clebowicz*, supra, 142 Conn. App. 108–109.

Opie's failure to withdraw the deed and survey was not a continuing breach of a continuing duty. First, there clearly was no special relationship between the parties in this case. Second, there was no "later wrongful conduct . . . related to a prior act." (Internal quotation marks omitted.) *Vaccaro* v. *Shell Beach Condominium, Inc.*, supra, 169 Conn. App. 44. Under similar circumstances, our appellate courts have concluded that the failure to rectify the existence of an injurious instrument on the land records is a single occurrence. See *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 202–205 (failure to deliver release of mortgage lien not continuing course of conduct); *PMG Land Associates, L.P.* v. *Harbour Landing Condominium Assn., Inc.*, supra, 172 Conn. App. 695–98 (failure to release lis pendens not continuing course of conduct).

Accordingly, because the plaintiff does not challenge the dismissal of her claims insofar as they are not premised on the preparation and recording of the deed and survey, and because the recording thereof was a single occurrence completed some eight years before the commencement of the present action, her claims are untimely, and the trial court should have granted the defendants' motions for summary judgment.

III

Finally, in light of our conclusions and under the unusual circumstances of this case, we briefly must determine what disposition is proper. In *Bruno* v. *Travelers Cos.*, supra, 172 Conn. App. 729, we held that

where a court concludes that certain conduct is absolutely privileged, it should dismiss claims premised on such conduct. Thus, the court here properly dismissed the plaintiff's claims with respect to the actions not challenged in this appeal, namely the preparation and recording of the two notices of lis pendens and the prosecution of the probate appeals. Although the preparation and recording of the deed and survey were not privileged and thus do not implicate subject matter jurisdiction in the same way, the court should have granted summary judgment as to those claims because they were time barred.

The form of the judgment is improper, the judgment dismissing the action is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.