STATE OF CONNECTICUT *v.* PATRICIA DANIELS
(AC 40321)

Lavine, Bright and Bear, Js.

Syllabus

Convicted, after a jury trial, of the crimes of, inter alia, reckless manslaughter in the first degree and misconduct with a motor vehicle, which involves the criminally negligent operation of a motor vehicle, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which her vehicle hit the victim's vehicle, causing it to hit a tree, which resulted in the victim's death. The jury also had found the defendant guilty of intentional manslaughter in the first degree, but the court vacated her conviction of that charge at sentencing. On appeal, the defendant claimed that the jury's verdicts were legally inconsistent in that each of the alleged crimes required a mutually exclusive mental state and that the trial court erred when it failed to exclude certain testimonial hearsay. *Held*:

1. The defendant could not prevail on her claim that the jury's guilty verdicts on the charges of intentional and reckless manslaughter were legally inconsistent because they required findings that the defendant simultaneously acted intentionally and recklessly with respect to one act and one alleged victim; in finding the defendant guilty of both intentional and reckless manslaughter, the jury reasonably could have found that the defendant specifically intended to cause serious physical injury to the victim, which satisfied the mental state required for intentional manslaughter, and that, in doing so, she consciously disregarded a substantial and unjustifiable risk that her actions created a grave risk of

death to the victim, which satisfied the mental state required for reckless manslaughter, and, therefore, because the guilty verdicts on the charges of intentional and reckless manslaughter required findings that the defendant simultaneously acted intentionally and recklessly with respect to different results, the verdicts were not legally inconsistent.

2. The defendant could not prevail on her claim that the mental states required for the crimes of intentional manslaughter and criminally negligent operation of a motor vehicle were mutually exclusive and that the guilty verdicts on those charges were legally inconsistent, as the mental states required for each crime were not mutually exclusive; the defendant could have intended to cause serious physical injury to the victim, as required for intentional manslaughter, while, at the same time, failing to perceive a substantial and unjustifiable risk that the manner in which she operated her vehicle would cause the victim's death, as required for criminally negligent operation of a motor vehicle, and, thus, the mental state elements for each crime did not relate to the same result.

3. The jury's guilty verdicts as to the crimes of reckless manslaughter and criminally negligent operation of a motor vehicle were legally inconsistent: although the state claimed on appeal that the jury could have viewed the defendant's two strikes of the victim's vehicle each as separate acts, it never made that argument to the jury and, instead, argued that the strikes constituted one continuous act, and, thus, it was bound by the theory it had presented to the jury, and the mental state element for each crime was mutually exclusive when examined under the facts and theory of the state argued at trial, as the defendant could not have consciously disregarded a substantial and unjustifiable risk that her actions would cause the victim's death, as required for reckless manslaughter, while simultaneously failing to perceive a substantial and unjustifiable risk that her actions would cause the victim's death, as required for criminally negligent operation of a motor vehicle; accordingly, because the mental state elements for each crime related to the same result, the verdicts were legally inconsistent, and a new trial on those charges was necessary; furthermore, this court declined the state's request to reinstate the intentional manslaughter conviction but, rather, consistent with the defendant's request for a retrial on the three charges of intentional and reckless manslaughter, and criminally negligent operation of a motor vehicle, the case was remanded for a new trial on those charges.

4. The defendant's unpreserved claim that the trial court erred when it failed to exclude certain testimonial hearsay was not reviewable, as it failed under the second prong of *State* v. *Golding* (213 Conn. 233) in that the admission of an out-of-court statement for purposes other than its truth raised no confrontation clause issue and was not of a constitutional magnitude; the statement at issue—that a vehicle in photographs obtained by the police was a certain newer model—was not hearsay because it was not offered for the truth of the matter asserted, that the

vehicle was a certain newer model but, rather, was offered to show its effect on the listener, a police officer, and to demonstrate the route that the police took in deciding to obtain a list of certain vehicles and in conducting their investigation, which included investigating fifteen model years of two vehicle models and not just a certain newer model.

Argued March 4—officially released July 2, 2019

Procedural History

Substitute information charging the defendant with two counts of the crime of manslaughter in the first degree, and with the crimes of misconduct with a motor vehicle, risk of injury to a child, and evasion of responsibility in the operation of a motor vehicle, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty; thereafter, the court vacated the conviction as to one count of manslaughter in the first degree, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

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

Opinion

BRIGHT, J. The defendant, Patricia Daniels, appeals from the judgment of conviction, rendered by the trial court following a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3) (reckless manslaughter) and misconduct with a motor vehicle in violation of General Statutes § 53a-57 (a) (criminally negligent operation).[1] The defendant also

[1] The defendant also was convicted of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and evasion of responsibility in the operation of a motor vehicle in violation of General Statutes § 14-224 (a). The judgment as to those convictions is not challenged.

had been convicted of manslaughter in the first degree in violation of § 53a-55 (a) (1) (intentional manslaughter), but at sentencing the trial court vacated her conviction of that charge. On appeal, the defendant claims that (1) the jury's verdict was legally inconsistent because each of these crimes requires a mutually exclusive mental state, and (2) the court erred in failing to exclude testimonial hearsay. We agree that the verdict is legally inconsistent, and, therefore, we reverse in part the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, are relevant to this appeal. The victim, Evelyn Agyei, left her Bridgeport home at approximately 6 a.m. on December 4, 2014. Her eleven year old son accompanied her. Agyei and her son got into her Subaru Outback (Subaru), Agyei driving and her son in the back seat on the passenger's side. After traversing some back roads, they took Bond Street and arrived at the intersection of Bond Street and Boston Avenue. Agyei stopped at the red light and then proceeded to make a right turn onto Boston Avenue, staying in the right lane. As she was making the right turn, her son looked to the left and saw a white BMW sport utility vehicle (BMW) approximately two streets down, traveling at a high rate of speed in the left lane.

After Agyei got onto Boston Avenue, the driver of the BMW pulled alongside Agyei's vehicle. Agyei's son saw the BMW logo on the hood; however, he could not see the driver or the license plate. The driver of the BMW then moved into the right lane, hitting Agyei's Subaru once on the driver's side and causing her to begin to lose control of the vehicle. The driver of the BMW then moved behind the Subaru and ran into it from behind, causing the vehicle to cross the median, proceed under a fence, and hit a tree. Tragically, Agyei died from her injuries, and her son, who also was

injured, continues to have vision problems as a result of the injuries he sustained.

After an investigation, which included obtaining a video of the incident from a nearby high school that had surveillance cameras in the area, the police, having concluded that the defendant was the driver of the BMW that hit the Subaru, causing Agyei's death and the injuries to Agyei's son, arrested the defendant.[2] Ultimately, she was charged, in a long form information, with, inter alia, intentional manslaughter, reckless manslaughter, and criminally negligent operation of a motor vehicle; the jury found her guilty of these charges, among others. See footnote 1 of this opinion. The court accepted the jury's verdicts and rendered judgment accordingly. On the date of sentencing, upon the request of the state,[3] the court vacated the defendant's conviction of intentional manslaughter, and it, thereafter, sentenced the defendant to twenty years incarceration,

[2] There is no indication in the record as to why the defendant engaged in the conduct that led to her arrest and conviction.

[3] At the sentencing hearing, the state argued in relevant part: "Based on the Supreme Court's recent decisions in *State* v. *Polanco*, [308 Conn. 242, 61 A.3d 1084 (2013)], [*State* v.] *Miranda*, [317 Conn. 741, 120 A.3d 490 (2015)], and [*State* v.] *Wright*, [320 Conn. 781, 135 A.3d 1 (2016)], the state is asking that Your Honor enter an order to vacate the conviction on the intentional manslaughter under the legal theory of vacatur and that Your Honor sentence the defendant on the remaining counts, the reckless manslaughter . . . and misconduct with a motor vehicle. I think that goes along with the spirit of the state's intent during the beginning of this case. The state did have the belief when we initially filed our long form information that we [would proceed] on both a legal theory of intentional and reckless manslaughter based on the fact that the defendant's vehicle came into contact with the Agyei vehicle twice. But, in light of the convictions, we'd ask that she be sentenced solely on the reckless manslaughter and that Your Honor vacate the intentional manslaughter for sentencing purposes."

The cases relied on by the state in support of its motion to vacate each involve cumulative convictions that violated double jeopardy protections. In *Polanco*, our Supreme Court held that vacatur was the appropriate remedy for double jeopardy violations involving cumulative convictions for both greater and lesser included offenses. *State* v. *Polanco*, supra, 308 Conn. 245. In *Miranda*, the court held that vacatur was the appropriate remedy for double jeopardy violations involving cumulative convictions of capital felony

execution suspended after sixteen years, with five years of probation.[4] The defendant raises two claims on appeal—(1) the jury's verdicts of guilty on the crimes of intentional and reckless manslaughter and criminally negligent operation were legally inconsistent because each of these crimes requires a mutually exclusive mental state, and (2) the court erred in failing to exclude testimonial hearsay—and requests that we reverse the judgment of the trial court and order a new trial on all charges and, alternatively, on the charges of intentional manslaughter, reckless manslaughter, and criminally negligent operation. Additional facts will be set forth as necessary.

I

INCONSISTENT VERDICTS

The defendant first claims that the jury's verdicts on the counts of intentional manslaughter, reckless manslaughter, and criminally negligent operation were legally inconsistent because they each require a mutually exclusive mental state.[5] She argues that it was logically impossible for the defendant to have possessed

and felony murder, where both convictions involved the murder of a single victim. *State* v. *Miranda*, supra, 317 Conn. 753. In *Wright*, the court held that vacatur was the appropriate remedy for the double jeopardy violation caused by the conviction of three counts of conspiracy arising from a single agreement with multiple criminal objectives. *State* v. *Wright*, supra, 320 Conn. 830.

Following the state's motion to vacate the intentional manslaughter conviction in the present case, the defendant objected, stating, in part, that she wanted to preserve the record for appeal; she also requested a mistrial on the ground that the state had overcharged in this case; the court denied the defendant's request, and it vacated the defendant's conviction of intentional manslaughter.

[4] Specifically, the court sentenced the defendant to twenty years incarceration, execution suspended after sixteen years, followed by five years probation on the manslaughter in the first degree count, five years incarceration on the misconduct with a motor vehicle count, ten years incarceration on the risk of injury to a child count, and ten years incarceration on the evasion of responsibility count. The court ordered all sentences to run concurrently.

[5] Because the defendant did not raise this claim in the trial court, she seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d

three forms of intent, simultaneously, for a single act, involving a single victim. The defendant explains that, at trial, the state's theory of the case was that her action in twice hitting Agyei's vehicle was one single act, which caused Agyei's death. She argues that the state tried the case under the theory that each of the three relevant counts of the information were charged in the alternative, one being intentional, one reckless, and one negligent. She contends that the fact that the jury found her guilty of all three charges, each requiring a different mental state, and that the state, thereafter, requested that the court vacate the intentional manslaughter conviction, demonstrates that the verdicts were legally inconsistent. After setting forth our standard of review and the general legal principles involved, we will consider the relevant mental element of each of these crimes in order to ascertain whether convictions of all three crimes would be legally inconsistent.

"It is well established that *factually* inconsistent verdicts are permissible. [When] the verdict could have been the result of compromise or mistake, we will not probe into the logic or reasoning of the jury's deliberations or open the door to interminable speculation. . . . Thus, claims of legal inconsistency between a conviction and an acquittal are not reviewable [on appeal]. . . . We employ a less limited approach, however, when we are confronted with an argument that [two or more convictions] are inconsistent as a matter of law or when the [convictions] are based on a legal impossibility. . . . A claim of legally inconsistent convictions, also referred to as mutually exclusive convictions, arises when a conviction of one offense requires a finding that negates an essential element of another

823 (1989) as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015), which governs our consideration of unpreserved constitutional claims. The state concedes that the defendant is entitled to such review, but argues that a constitutional violation does not exist.

offense of which the defendant also has been convicted. . . . In response to such a claim, we look carefully to determine whether the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted. If that is the case, the [convictions] are legally inconsistent and cannot withstand challenge. . . . Whether two convictions are mutually exclusive presents a question of law, over which our review is plenary." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Nash*, 316 Conn. 651, 659, 114 A.3d 128 (2015).

"[C]ourts reviewing a claim of legal inconsistency must closely examine the record to determine whether there is any plausible theory under which the jury reasonably could have found the defendant guilty of [more than one offense]." Id., 663. Nevertheless, the state is bound by the theory it presented to the jury. See *State* v. *Chyung*, 325 Conn. 236, 255–56, 157 A.3d 628 (2017) (where state argued defendant engaged in only one act, rather than two, principles of due process prohibited state from relying on different theory on appeal).

A

Intentional Manslaughter and Reckless Manslaughter

We first consider whether the charges of intentional manslaughter and reckless manslaughter were legally inconsistent under the facts of this case and in view of the state's theory.[6] We conclude that they were not

[6] The state suggests in its brief that we need not consider whether the two manslaughter verdicts are legally inconsistent because the court vacated the intentional manslaughter conviction. We disagree. Accepting the state's argument would mean that a review of potentially legally inconsistent verdicts could be thwarted by the state requesting that the trial court vacate one of the convictions. That is not consistent with our jurisprudence. See *State* v. *Chyung*, supra, 325 Conn. 240 (despite trial court's vacatur of manslaughter in first degree conviction, Supreme Court also vacated inconsistent murder conviction and remanded case for new trial on both counts, holding "legally inconsistent verdicts involve jury error . . . because there

legally inconsistent because the mental state element for each of these crimes related to different results.

The following additional facts and procedural history inform our review. As set forth previously in this opinion, the state charged the defendant with, inter alia, intentional manslaughter and reckless manslaughter. As to intentional manslaughter, the state charged in relevant part that, "on or about the 4th day of December, 2014, at approximately 6:30 a.m., at or near Boston Avenue within [Bridgeport] . . . PATRICIA DANIELS, with the intent to cause serious physical injury to another person, caused the death of EVELYN AGYEI, in violation of [§] 53a-55 (a) (1) . . . ."

As to reckless manslaughter, the state charged in relevant part that, "on or about the 4th day of December, 2014, at approximately 6:30 a.m., at or near Boston Avenue within [Bridgeport] . . . PATRICIA DANIELS, under circumstances evincing an extreme indifference to human life, recklessly engaged in conduct which created a grave risk of death to one EVELYN AGYEI, and thereby caused the death of . . . EVELYN AGYEI, in violation of [§] 53a-55 (a) (3) . . . ."

During closing and rebuttal argument, the state specifically argued to the jury: "[The defendant] knowingly and recklessly got behind the wheel of her BMW; she intentionally rammed that car off the road. And, by the way, if you don't believe it was intentional, she recklessly ran that vehicle off the road." It also argued: "We've proven beyond a reasonable doubt, based on the video of that white BMW ramming, the intentional ramming into Evelyn Agyei's car. That's intentional conduct. But intent is a question of fact for you to decide. The state recognizes that because, if you disagree that it was intentional, we also submit and argue in the

is no way for the trial court or this court to know which charge the jury found to be supported by the evidence, neither verdict can stand").

alternative . . . that that conduct was, at the very least, reckless. She had a reckless disregard for Evelyn Agyei's life . . . ."[7]

Although the state clearly contended that these crimes were charged in the alternative, neither it nor the defendant requested that the court specifically instruct the jury to consider each charge in the alternative. To be clear, the defendant has not claimed on appeal that the state's argument that the jury should consider the charges in the alternative, itself, precluded the jury from finding her guilty of both charges; rather, her argument is that because each of the charges required a mutually exclusive mental state, the jury was precluded from finding guilt on both charges because one intent negates the other. The defendant argues that the guilty verdicts on the counts of intentional manslaughter and reckless manslaughter were legally inconsistent because she could not have engaged in both intentional and reckless conduct simultaneously, involving only one act and one alleged victim. She contends that it was legally impossible for the jury to have found every element of both crimes because, under the state's theory of the case, each of the charges required a mutually exclusive finding with respect to her mental state. We disagree.

Section 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

[7] The state made no argument to the jury concerning criminally negligent operation. The court, however, instructed the jury on that crime.

Pursuant to General Statutes § 53a-3 (11): "A person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." Additionally, pursuant to General Statutes § 53a-3 (13): "A person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ."

In support of her claim that intentional manslaughter and reckless manslaughter require mutually exclusive mental states, the defendant relies, in part, on *State* v. *King*, 216 Conn. 585, 583 A.2d 896 (1990). In *Nash*, our Supreme Court discussed *King* at length and explained: In *King*, the defendant had "claimed that his convictions of attempt to commit murder and reckless assault of the same victim based on the same conduct were legally inconsistent because they required mutually exclusive findings with respect to his mental state. . . . We agreed with this claim, explaining that King's conviction for attempt to commit murder required the jury to find that he acted with the *intent to cause the death of the victim*, whereas his conviction for reckless assault required the jury to find that he *acted recklessly and thereby created a risk that the victim would die*. . . . We further explained that the statutory definitions of intentionally and recklessly are mutually exclusive and inconsistent. . . . Reckless conduct is not intentional conduct because [a person] who acts recklessly does not have a conscious objective to cause a particular result. . . . Thus, we observed that [t]he *intent to cause death required for a conviction of attempted*

murder [under General Statutes §§ 53a-49 and 53a-54a (a)] . . . necessitated a finding that the defendant *acted with the conscious objective to cause death* . . . [whereas] [t]he *reckless conduct necessary to be found for a conviction of assault* under [General Statutes § 53a-59 (a) (3)] . . . required a finding that *the defendant acted without such a conscious objective*. . . . We concluded, therefore, that the jury verdicts [with respect to attempt to commit murder and reckless assault in the first degree] each of which requires a mutually exclusive and inconsistent state of mind as an essential element for conviction cannot stand." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Nash*, supra, 316 Conn. 660–61.

The defendant also relies on *State* v. *Chyung*, 325 Conn. 236, 157 A.3d 628 (2017). In *Chyung*, the jury found the defendant guilty of murder, in violation of § 53a-54a, and of reckless manslaughter in the first degree with a firearm, in violation of General Statutes §§ 53a-55a (a) and 53a-55 (a) (3), for the shooting death of his wife. Id., 239, 239 n.1.

Section 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with *intent to cause the death* of another person, he causes the death of such person . . . ." (Emphasis added.) Section 53a-55a (a) provides in relevant part: "A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a . . . firearm. . . ." As noted previously, § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, *he recklessly engages in conduct which*

creates a grave risk of death to another person, and thereby causes the death of another person." (Emphasis added.)

The court in *Chyung* found that the jury's guilty verdicts as to both charges were legally inconsistent because the defendant could not act both intentionally and recklessly with respect to the same victim, the same act, and the same result simultaneously. *State* v. *Chyung*, supra, 325 Conn. 247–48. Our Supreme Court explained that to find the defendant guilty of the crime of intentional murder, the jury was required to find that the defendant had the *specific intent to kill the victim*, his wife, but, to find the defendant guilty of reckless manslaughter, the jury was required to find that he acted recklessly, meaning, that he *acted without a conscious objective to cause the death of the victim*, but consciously disregarded the risk of his actions, thereby putting the life of the victim in grave danger. Id., 246–48. The court concluded that a defendant cannot act with a *conscious disregard* that his actions will create *a grave risk of death* to another, while, at the same time, specifically *intending to kill* that person. Id. The "defendant cannot simultaneously act intentionally and recklessly with respect to the same act and the same result . . . ." Id., 247–48.

Although the defendant argues that both *King* and *Chyung* are controlling in this case, the state contends that the defendant's claim is governed by *State* v. *Nash*, supra, 316 Conn. 659–70. In *Nash*, the jury found the defendant guilty of, among other things, both intentional and reckless assault in the first degree pursuant to General Statutes § 53a-59 (a) (1) and (a) (3), respectively,[8] and the court rendered judgment in accordance

[8] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or dangerous instrument . . . or (3) under circumstances evincing an extreme indifference to human

with the jury's verdicts. Id., 656–57. On appeal, the defendant claimed in part that the jury's verdicts of guilty on both intentional and reckless assault were legally inconsistent because each crime required a mutually exclusive state of mind. Id., 657. Our Supreme Court disagreed, explaining that the two mental states required for intentional and reckless assault in the first degree *related to different results*. Id., 666. More specifically, the court explained, "in order to find the defendant guilty of [*both* intentional and reckless assault in the first degree], the jury was required to find that *the defendant intended to injure another person and that, in doing so, he recklessly created a risk of that person's death*. In light of the state's theory of the case, there was nothing to preclude a finding that the defendant possessed both of these mental states with respect to the same victim at the same time by virtue of the same act or acts. In other words, the jury could have found that the defendant intended only to injure another person when he shot into [the victim's] bedroom but that, in doing so, he recklessly created a risk of that [victim's] death in light of the circumstances surrounding his firing of the gun into the dwelling. Accordingly, because the jury reasonably could have found that the defendant simultaneously possessed both mental states required to convict him of both intentional and reckless assault, he cannot prevail on his claim that the convictions were legally inconsistent." (Emphasis added; footnotes omitted.) Id., 666–68.

The court in *Nash* went on to examine and compare § 53a-59 (a) (1) and (3): "Intentional assault in the first degree in violation of § 53a-59 (a) (1) requires proof that the defendant (i) had the intent to cause serious physical injury to a person, (ii) caused serious physical injury to such person or to a third person, and (iii)

life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."

caused such injury with a deadly weapon or dangerous instrument. Reckless assault in the first degree in violation of § 53a-59 (a) (3) requires proof that the defendant (i) acted under circumstances evincing an extreme indifference to human life, (ii) recklessly engaged in conduct that created a risk of death to another person, and (iii) caused serious physical injury to another person. As we previously explained, the mental state elements in the two provisions—'intent to cause serious physical injury' and 'recklessly engag[ing] in conduct which creates a risk of death'—do not relate to the same result. Moreover, under both provisions, the resulting serious physical injury is an element of the offenses that is separate and distinct from the mens rea requirements." Id., 668–69. The court then held: "Because the defendant's convictions for intentional and reckless assault in the first degree required the jury to find that the defendant acted intentionally and recklessly with respect to different results, the defendant cannot prevail on his claim that those convictions are mutually exclusive and, therefore, legally inconsistent.[9]" Id., 669.

The court in *Nash* provided an example of where a single act, directed to a single victim, could result in a conviction of both intentional and reckless assault in the first degree: "For example, if A shoots B in the arm intending only to injure B, A nevertheless may recklessly expose B to a risk of death if A's conduct also gave rise to an unreasonable risk that the bullet would strike B in the chest and thereby kill him. In such circumstances, a jury could find both that A intended

[9] "We emphasize that our conclusion that the defendant's convictions of intentional and reckless assault in the first degree were not mutually exclusive does not mean that a defendant lawfully may be punished for both offenses. . . . [T]he trial court in the present case merged the two assault convictions for purposes of sentencing and sentenced the defendant only on his intentional assault conviction. The defendant has not claimed that this approach violates his right against double jeopardy." (Citation omitted.) *State* v. *Nash*, supra, 316 Conn. 669–70 n.19.

to injure B and, in doing so, recklessly created an undue risk of B's death." Id., 666 n.15. We conclude that the same analysis applies in the present case.[10]

Intentional manslaughter in violation of § 53a-55 (a) (1) requires proof that the defendant (i) had the *intent to cause serious physical injury* to a person, and (ii) caused the death of such person or of a third person. Reckless manslaughter in violation of § 53a-55 (a) (3) requires proof that the defendant (i) acted under circumstances evincing an extreme indifference to human life, (ii) *recklessly engaged in conduct that created a grave risk of death* to another person, and (iii) caused the death of another person. Guided by our Supreme Court's analysis in *Nash*, we conclude that the mens rea elements in the two provisions, namely, the "intent to cause serious physical injury" and "recklessly engag[ing] in conduct which creates a grave risk of death"; General

[10] We recognize that the differences between *King*, *Chyung*, and *Nash* are subtle. For example, in *King*, the jury necessarily would have to have found that the defendant acted with the specific intent to cause the death of the victim (attempted murder), and, at the same time, acted without the conscious objective to create a risk of death for the victim (reckless assault). See *State* v. *King*, supra, 216 Conn. 585. It is impossible to possess both mental states simultaneously.

In *Chyung*, the jury necessarily would have to have found that the defendant had the specific intent to kill the victim (murder), and simultaneously, that the defendant acted without the conscious objective to create a grave risk of death for the victim (reckless manslaughter). See *State* v. *Chyung*, supra, 325 Conn. 236. Again, it is impossible to have both intents simultaneously.

In *Nash*, however, the jury would have to have found that the defendant intended to cause *serious physical injury* to the victim (intentional assault), and, at the same time, that the defendant acted without the conscious objective of creating a *grave risk of death* for the victim, resulting in the victim's serious physical injury (reckless assault). See *State* v. *Nash*, supra, 316 Conn. 666–67. Intentional assault requires *a specific intent to cause serious physical injury*; reckless assault requires *recklessly creating a grave risk of death*, which results in serious physical injury. One can intend to cause serious physical injury to a victim, while, at the same time, consciously disregarding the fact that he or she is putting that victim's life in grave danger, ultimately resulting in serious physical injury to the victim.

Statutes § 53a-55 (a); do not relate to the same result. In finding the defendant guilty of both intentional and reckless manslaughter, the jury in the present case reasonably could have found that the defendant *specifically intended to cause serious physical injury to Agyei* and that, in doing so, she *consciously disregarded* a substantial and unjustifiable risk *that her actions created a grave risk of death to Agyei*. See *State* v. *Nash*, supra, 316 Conn. 666–67.

Because the jury's guilty verdicts on the charges of intentional and reckless manslaughter required findings that the defendant simultaneously acted intentionally and recklessly with respect to *different results*, we conclude that the defendant cannot prevail on her claim that the verdicts on those charges were legally inconsistent.

B

Intentional Manslaughter and Criminally Negligent Operation

The defendant also claims that the verdicts on the counts of intentional manslaughter and criminally negligent operation were legally inconsistent. We disagree.

As stated previously in this opinion: intentional manslaughter in violation of § 53a-55 (a) (1) requires proof that the defendant (i) had the *intent to cause serious physical injury* to a person, and (ii) caused the death of such person or of a third person.

Criminally negligent operation in violation of § 53a-57 (a) provides: "A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person." General Statutes § 53a-3 (14) provides that "[a] person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive

a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . .'' (Internal quotation marks omitted.) See *State* v. *Gonsalves*, 137 Conn. App. 237, 244, 47 A.3d 923, cert. denied, 307 Conn. 912, 53 A.3d 998 (2012).

''Under § 53a-57, the state was required to prove that the defendant was operating a motor vehicle, that [s]he caused the death of another person, and that [s]he *failed to perceive a substantial and unjustifiable risk that the manner in which* [*s*]*he operated* [*her*] *vehicle would cause that death.* The failure to perceive that risk must constitute a gross deviation from the standard of care that a reasonable person would observe in the situation. . . . Further, [t]o prove causation, the state is required to demonstrate that the defendant's conduct was a proximate cause of the victim's death—i.e., that the defendant's conduct contributed substantially and materially, in a direct manner, to the victim's injuries and that the defendant's conduct was not superseded by an efficient intervening cause that produced the injuries.'' (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Jones*, 92 Conn. App. 1, 7–8, 882 A.2d 1277 (2005).

Considering the plain language of each statute, we are persuaded that, as in *Nash*; see part I A of this opinion; the mental state requirements for each statute are not mutually exclusive. One can *intend to cause serious physical injury to another*, while, at the same time, *failing to perceive a substantial and unjustifiable risk* that the manner in which she operated her vehicle would cause the victim's death. The mental state elements in the two provisions—*failing to perceive a substantial and unjustifiable risk that your manner of operation would cause death* and an *intent to cause*

serious physical injury—do not relate to the same result. Because the defendant's convictions of intentional manslaughter and criminally negligent operation required the jury to find that the defendant acted intentionally and criminally negligent with respect to different results (*failing to perceive a substantial and unjustifiable risk of death* and *intending to cause serious physical injury*), the defendant cannot prevail on her claim that the mental states required for those crimes are mutually exclusive and, therefore, that the verdicts are legally inconsistent. See *State* v. *Nash*, supra, 316 Conn. 668–69.

C

Reckless Manslaughter and Criminally Negligent Operation

The defendant also claims that the jury's verdicts with respect to the crimes of reckless manslaughter and criminally negligent operation are legally inconsistent. The state argues on appeal that the jury could have viewed each strike of Agyei's vehicle as a separate act, with a separate mental state. It conceded during oral argument before this court, however, that if we view both strikes of the collision as one act, the mental elements of these two counts are mutually exclusive. We are not persuaded by the state's argument that the jury could have viewed each strike as a separate act because the state never made such an argument to the jury; rather, it consistently argued that this was one continuous act. As our Supreme Court repeatedly has stated, the state is bound by the theory it presented to the jury; on appeal, it may not rely on a theory of the case that differs from the theory that was presented to the jury. See *State* v. *Chyung*, supra, 325 Conn. 256 ("[c]onstitutional [p]rinciples of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented at trial" [internal quotation marks omitted]);

State v. *King*, 321 Conn. 135, 149, 136 A.3d 1210 (2016) (same). We agree with the defendant that the state of mind element in each of these charges is mutually exclusive and, therefore, that the verdicts of guilty as to both of these charges were legally inconsistent.

For the defendant to be found guilty of reckless manslaughter, the state needed to prove that she *was aware of and consciously disregarded a substantial and unjustifiable risk* that her actions would create *a grave risk of death* to another person, namely Agyei. See General Statutes § 53a-55 (a) (3). For her to be found guilty of criminally negligent operation, the state needed to prove that she *failed to perceive a substantial and unjustifiable risk* that the manner in which she operated her vehicle *would cause Agyei's death*. See General Statutes § 53a-57; *State* v. *Jones*, supra, 92 Conn. App. 7–8. We conclude that the mental states required under these two provisions are mutually exclusive.

"The [penal] code . . . distinguishes reckless from criminally negligent conduct. A person acts *recklessly* if he is aware of and *consciously disregards* a substantial and unjustifiable risk, and acts with *criminal negligence* . . . when he *fails to perceive* a substantial and unjustifiable risk." (Emphasis altered; internal quotation marks omitted.) *State* v. *Bunkley*, 202 Conn 629, 639, 522 A.2d 795 (1987). In the Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-3 (West 2007), commission comments, the commission briefly explains the difference between reckless conduct and criminal negligence under our penal code. As to reckless conduct, the commission stated: "This concept, much like the concept of recklessness under the present reckless driving statute, requires *conscious disregard* of a substantial and unjustifiable risk. But this disregard must be a gross deviation from the standard of a reasonable man." (Emphasis

added.) Commission to Revise the Criminal Statutes, Penal Code Comments, supra, § 53a-3, commission comment. As to criminal negligence, the commission comments provide: "This concept involves a *failure to perceive* a substantial and unjustifiable risk. And, as in the concept of recklessness, the failure to perceive must be a gross deviation from the standard of a reasonable man; thus it requires a greater degree of culpability than the civil standard of negligence." (Emphasis added.) Id.

Considering the plain language of both §§ 53a-55 (a) (3) and 53a-57 (a), we are persuaded that the mental state element for each statute is mutually exclusive when examined under the facts and theory of the state in the present case. The defendant could not have *consciously disregarded* a substantial and unjustifiable risk that her actions would cause Agyei's death, while, simultaneously, *failing to perceive* a substantial and unjustifiable risk that her actions would cause Agyei's death. The mental state elements in the two provisions relate to the same result. Accordingly, the verdicts of guilty as to the crimes of reckless manslaughter and criminally negligent operation were legally inconsistent.

II

TESTIMONIAL HEARSAY

The defendant next claims that the court erred in failing to exclude testimonial hearsay. She argues that the testimony of now former Bridgeport Detective Paul Ortiz, relying on statements made by someone at the BMW dealership, amounted to testimonial hearsay. Because this claim was not preserved at trial, the defendant 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, 120 A.3d 1188 (2015).[11] We

[11] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are satisfied: "(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 . . .

conclude that the record is adequate for review, but that the claim is unreviewable under *Golding*'s second prong because it is not of constitutional magnitude. See *State* v. *Carpenter*, 275 Conn. 785, 820–21, 882 A.2d 604 (2005) (defendant's claim not reviewable under *Golding*'s second prong because admission of out-of-court statements for purposes other than their truth raises no confrontation clause issues), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006).

The following additional facts inform our analysis. As part of their investigation of the collision involving Agyei's vehicle, the police obtained a video of the incident from Harding High School, which had surveillance cameras in the area. The footage from the video showed a white sport utility vehicle (SUV) hitting a darker colored vehicle. Detective Arthur Calvao of the Bridgeport Police Department printed out several still photographs from certain relevant frames of the video, which depict a white SUV striking a dark colored vehicle from the side and then from the rear. Although the investigators were unable to identify the make and model of the white SUV from the video or the photographs, Ortiz, the lead detective on this matter, interviewed Agyei's son, who insisted that the vehicle that hit his mother's vehicle was a white BMW.

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." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of Golding by eliminating word "clearly" before words "exists" and "deprived" [internal quotation marks omitted]).

We note that, although raising a claim for the first time on appeal can amount to an ambush on the state and the trial court, "our Supreme Court has reviewed a confrontation claim under the bypass rule of *State* v. *Golding*, [supra, 213 Conn. 233], even when there was a claim of waiver. *State* v. *Smith*, 289 Conn. 598, 619, 960 A.2d 993 (2008); see also *State* v. *Holley*, 327 Conn. 576, 590, 175 A.3d 514 (2018)." *State* v. *Walker*, 180 Conn. App. 291, 301, 183 A.3d 1, cert. granted, 328 Conn. 934, 183 A.3d 634 (2018).

One of the Bridgeport police detectives then went to a BMW dealership and showed the still photographs to personnel there, who identified the white SUV as a newer model BMW X3. The police, thereafter, obtained a list of the owners of all 2000-2014 BMW X3s and X5s registered in Connecticut from the Department of Motor Vehicles, and they began visiting the homes of the people on the list, asking to inspect their BMWs. If the vehicle had no damage, the police crossed it off their list. If the vehicle had front end damage, the police spoke further with the owner, and towed the vehicle to the police department for further inspection.

One of the vehicles examined by the police belonged to the defendant. Ortiz observed that the defendant's vehicle had damage to its front end that was consistent with the collision being investigated. The defendant admitted to Ortiz that she had driven west on Boston Avenue between 6 a.m. and 6:30 a.m. on December 4, 2014.[12] Ortiz then called for a tow truck, which took the defendant's BMW to the police department. The front bumper of the vehicle was sent to the state forensic laboratory for testing.

Alison Gingell, a forensic examiner at the state laboratory, performed testing on the bumper, and she compared a paint sample from Agyei's Subaru with a paint particle she found stuck on the bumper of the defendant's BMW. After analysis, Gingell concluded that the samples were similar in color, texture, structure, chemical type, and elemental composition.

The defendant argues that "Ortiz testified that a Bridgeport police detective visited a [BMW] dealership

[12] The defendant's location at or near the scene of the collision also was confirmed by Special Agent James Wines, from the Federal Bureau of Investigation, who, after investigating the defendant's cell phone records, concluded that the defendant was in a cellular phone tower area that included the scene of the collision at the time of the collision on December 4, 2014.

. . . and showed members of the staff there [photographs] of the BMW. Those individuals '*determined that it was an X3 BMW, a new model.*' . . . This statement by an employee of [the dealership] is testimonial hearsay." (Citation omitted; emphasis added.) She also argues: "The admission of this testimony violated the defendant's right of confrontation because she never had the chance to cross-examine the person from the dealership to test the basis of this information." The state responds that the statement of the dealership employee was not hearsay because it was not offered for the truth of the matter asserted. It argues: "Because the purpose of the statement was not to show that the vehicle in the [photograph] was, in fact, a BMW X3 but, instead, [was] merely to show how the police investigation proceeded, it was not hearsay and raised no legitimate confrontation clause issue." We agree with the state.

"It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

"Under *Crawford* v. *Washington*, [541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], hearsay statements of an unavailable witness that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had

the opportunity to cross-examine the unavailable witness. Nontestimonial statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence. *Davis* v. *Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Thus, the threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature, questions of law over which our review is plenary." *State* v. *Smith*, 289 Conn. 598, 618–19, 960 A.2d 993 (2008).

"As a general matter, a testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in *Crawford*, the court did describe three core classes of testimonial statements: [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [and] . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .

"Subsequently, in *Davis* v. *Washington*, supra, 547 U.S. 822, the United States Supreme Court elaborated on the third category and applied a primary purpose test to distinguish testimonial from nontestimonial statements given to police officials, holding: Statements are nontestimonial when made in the course of police

interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. . . .

"In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant. . . . [I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution. . . . We further emphasized that this expectation must be reasonable under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* to its logical extreme." (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 622–24.

In the present case, the defendant asserts that the statement of the dealership employee or employees, as offered by Ortiz, was testimonial hearsay under the third category recognized in *Crawford*. See id. Before we consider whether the statement was testimonial, however, we first must determine whether it amounted to hearsay. See id., 618–19 (threshold inquiry that determines nature of claim is whether statement was hearsay); see also *State* v. *Carpenter*, supra, 275 Conn.

820–21 (if statement is not hearsay, defendant not entitled to review of unpreserved claim under *Golding*).

The Connecticut Code of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." Conn. Code Evid. § 8-1 (3). "An out-of-court statement is hearsay when it is offered to establish the truth of the matters contained therein. . . . A statement offered solely to show its effect upon the hearer, [however], is not hearsay." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 195, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). We conclude that the statement was not hearsay because it was not offered for the truth of the matter asserted, but, rather, it was offered to show its effect on the listener.

During Ortiz' testimony at the defendant's trial, the following colloquy occurred on direct examination:

"[Prosecutor]: Did you know . . . whether . . . you were looking for any particular model type [of vehicle]?

"[Ortiz]: Well, a little while after, we did, yes.

"[Prosecutor]: And . . . what led you to that conclusion?

"[Ortiz]: We had one of our detectives go to the BMW dealership and show the photos to personnel at the . . . Helmut's BMW, and *they were able to—they determined it was an X3 BMW, a newer model.*

"[Prosecutor]: Now, in relation to that investigation, what, if anything, did your detective bureau take in terms of steps of locating this particular vehicle?

"[Ortiz]: We were able to obtain a list of all the BMWs in the state of Connecticut; all the X3s, the X5s from years 2000 to 2014."[13] (Emphasis added.)

The defendant argues that the statement of the dealership employee was offered for the truth, and it served to bolster the state's claim "that the BMW in the picture was the defendant's BMW." She contends that "[t]he defense was unable to find out how certain the employee . . . was that the car in the still photograph was a BMW X3. The defense was not able to find out whether the BMW resembled an earlier model, though they thought it was a later model.[14] Had the defense been able to ascertain this information, it may have helped convince the jury that the BMW in the video was not the defendant's vehicle." (Footnote added.) We conclude that the statement was not hearsay.

[13] On cross-examination by defense counsel, the following colloquy occurred:

"[Defense Counsel]: Now . . . in response to questions from the state, you talked about efforts made to locate the vehicle involved in this collision, correct?

"[Ortiz]: That's correct, sir.

"[Defense Counsel]: And your efforts were informed at least on December 4th, primarily by two sources of information; your . . . interview with the young man at the hospital—with [Agyei's son], the eleven year old?

"[Ortiz]: Yes, the victim.

"[Defense Counsel]: Who told you that he thought . . . a white BMW had collided with the car, correct?

"[Ortiz]: He was certain it was a BMW, yes.

"[Defense Counsel]: And you saw, also, a videotape with a white vehicle as well, correct?

"[Ortiz]: That's correct, sir.

"[Defense Counsel]: And you testified here today that you went to a BMW dealer to identify the vehicle, correct?

"[Ortiz]: I didn't go, but one of the detectives went there and interviewed someone that works there, yes."

[14] The defendant does not explain why she "was not able to find out whether the BMW resembled an earlier model, though [the personnel at this dealership] thought it was a later model." We can ascertain no reason why she could not have showed the still photographs to an expert to ascertain an opinion on the year, make, and model of the white vehicle in the photos.

In the present case, Ortiz was testifying as to the procedure that the police used to conduct their investigation. As part of their investigation, after producing still photographs of the collision and interviewing Agyei's son, learning from him that the vehicle that hit his mother's vehicle was a white BMW, the police took those still photographs to a BMW dealership to see if someone could ascertain the year, make, and model of the vehicle from the photos. They then used that information to obtain a list of similar vehicles from the Department of Motor Vehicles. The statement that personnel at the dealership "*were able to—they determined it was an X3 BMW, a newer model*"; (emphasis added); was offered to demonstrate, not that the vehicle, in fact, was a newer model X3 or that it was the defendant's vehicle. Rather, it was used to demonstrate the route that the police took in deciding to obtain a list of 2000-2014 X3 and X5 BMWs and in conducting their investigation, which included investigating fifteen model years of X3s and X5s, and not just newer model X3s.

We conclude, therefore, that the defendant's evidentiary claim fails under *Golding*'s second prong because the admission of an out-of-court statement for purposes other than its truth raises no confrontation clause issue. See *State* v. *Carpenter*, supra, 275 Conn. 821, citing *Crawford* v. *Washington*, supra, 59–60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 [1985]).

III

CONCLUSION

We have determined, under the facts of this case as pursued by the state that (1) the jury's verdicts of guilty on the charges of intentional manslaughter and reckless manslaughter are not legally inconsistent, (2) the jury's verdicts of guilty on the charges of intentional manslaughter and criminally negligent operation are not

legally inconsistent, (3) the jury's verdicts of guilty on the charges of reckless manslaughter and criminally negligent operation are legally inconsistent, and (4) the defendant's testimonial hearsay claim fails under *Golding*'s second prong.

We next consider the remedy and whether this case must be remanded to the trial court, and, if so, the appropriate remand order. Because of the inconsistency in the verdicts, we have no way of knowing whether the jury, if it properly had considered the mental elements of each crime, would have found the defendant guilty of reckless manslaughter or criminally negligent operation. Setting aside one of the convictions, therefore, will not cure the problem. Moreover, it is not for this court, on appeal, to make a factual determination as to the defendant's mental state or states at the time the collision occurred. The inconsistent verdicts, therefore, require that we vacate the defendant's convictions on the charges of reckless manslaughter and criminally negligent operation, and order a new trial thereon.[15] See *State* v. *King*, supra, 216 Conn. 594–95. On retrial, if properly supported by the evidence and pursued by the state pursuant to the same theory, the trial court may submit both counts to the jury, but it should instruct the jury that criminally negligent operation and reckless manslaughter can be found only in the alternative. The court also should make clear to the jury that it may find the defendant guilty of either criminally negligent operation or reckless manslaughter, but it may not convict her of both. See id.

The state, citing to *State* v. *Polanco*, 308 Conn. 242, 262–63, 61 A.3d 1084 (2013), argues, in a footnote in its brief, that if we conclude that the reckless manslaughter and misconduct with a motor vehicle convictions are inconsistent, we should remand with direction to reinstate the intentional manslaughter conviction. To the

[15] The defendant's convictions of risk of injury to a child and evasion of responsibility in the operation of a motor vehicle remain intact.

extent that the state is asking for the conviction of intentional manslaughter to be reinstated, and not simply that the state be permitted to retry the defendant on that charge, we decline to do so. The state moved at sentencing to vacate the conviction on that charge partly because doing so went "along with the spirit of the state's intent during the beginning of this case." See footnote 3 of this opinion. Under these circumstances, the most the state can ask for is what the defendant has requested—a retrial on all three of the charges related to Agyei's death. In the concluding paragraph of her appellate brief, the defendant requests "that she be granted a new trial on all the charges. Alternatively, she requests a new trial on the charges of intentional manslaughter [first], reckless manslaughter [first], and misconduct with a motor vehicle." Accordingly, we order a retrial on all three charges.

The judgment is reversed in part, the convictions of reckless manslaughter and criminally negligent operation are vacated, and a new trial is ordered as to those counts and the count of intentional manslaughter consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

THOMAS G. STONE III *v.* EAST COAST SWAPPERS, LLC
(AC 40855)

Alvord, Bright and Norcott, Js.

Syllabus

The plaintiff sought to recover damages from the defendant motor vehicle repair shop for violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) in connection with the purchase and installation of a modified engine in a car owned by K. The plaintiff had loaned K the money to pay the defendant for the requested work, however, the engine was never installed because K did not want to pay

for certain additional costs. When K failed to repay the loan, the plaintiff obtained a judgment against K and secured a lien on K's car, which remained in the defendant's possession. The plaintiff informed the defendant of his status as a second position lienholder on the car's title and his claim related to the car. Subsequently, S, a co-owner of the defendant, sold the car at an auction on the advice of counsel. S provided notice of the auction to K and the company that had financed K's purchase of the car, and published notice in a local newspaper, but he did not provide notice to the plaintiff. In his complaint, the plaintiff alleged that the defendant had violated CUTPA by refusing to perform the work that had been paid for and by failing to provide the plaintiff with statutory notice of the auction. Following a trial, the trial court concluded that the plaintiff had proven a CUTPA violation and awarded him $8300 in damages. The court, however, declined to award punitive damages and attorney's fees, concluding that the plaintiff had not proven the evil motive or malice necessary to award punitive damages, and that he was not entitled to attorney's fees. On appeal to this court, the plaintiff claimed that the trial court erred by failing to award him attorney's fees. *Held*:

1. The plaintiff could not prevail on his claim that this court should recognize a rebuttable presumption in the context of attorney's fees for CUTPA violations, whereby the prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such an award unjust; this court was not persuaded by the plaintiff's arguments in support of such a rebuttable presumption and was bound by the plain language of the statute (§ 42-110g [d]) that provides for the award of attorney's fees under CUTPA and by *Staehle* v. *Michael's Garage, Inc.* (35 Conn. App. 455), in which this court held that the language of § 42-110g (d) is clear and unambiguous that the decision to award attorney's fees is within the sole discretion of the trial court.
2. The trial court did not abuse its discretion in declining to award attorney's fees to the plaintiff; contrary to the plaintiff's claim that the trial court erred by conflating the analyses for awarding attorney's fees and punitive damages, nothing in the court's memorandum of decision or articulation suggested that it improperly required the plaintiff to show, in order to be entitled to recover attorney's fees, that the defendant acted with malice, reckless disregard or evil intent, and, therefore, this court could not conclude that there was a manifest abuse of discretion by the trial court or that injustice appeared to have been done.

Argued January 31—officially released July 2, 2019

Procedural History

Action to recover damages for, inter alia, a violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Huddleston, J.*,

granted in part the defendant's motion to strike; thereafter, the matter was tried to the court, *Noble*, *J.*; judgment for the plaintiff, from which the plaintiff appealed to this court; subsequently, the court, *Noble*, *J.*, issued an articulation of its decision. *Affirmed*.

William J. O'Sullivan, with whom was *Michelle M. Seery*, for the appellant (plaintiff).

Juri E. Taalman, with whom, on the brief, was *Joseph R. Serrantino*, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Thomas G. Stone III, appeals from the judgment of the trial court, rendered after a trial to the court, finding that the defendant, East Coast Swappers, LLC, had violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and awarding the plaintiff compensatory damages, but declining to award punitive damages and attorney's fees. On appeal, the plaintiff claims that the court erred when it failed to award him attorney's fees. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. Patrick Keithan, at the time, the plaintiff's son-in-law, purchased a 2008 Mitsubishi Lancer Evolution in February, 2010, from a dealership in Savannah, Georgia. Keithan was in the military service and stationed in Georgia. He financed the purchase of the car, in part, through a loan from Wachovia Dealer Services, Inc.,[1] in the amount of approximately $24,362.49.

Shortly thereafter, the car's engine experienced performance issues, for reasons not disclosed at trial. Keithan towed the car from Georgia to Windsor Locks,

[1] It is undisputed that Wells Fargo Auto Finance succeeded in interest to Wachovia Dealer Services, Inc., and that it subsequently acquired the debt.

Connecticut, where the defendant, a motor vehicle repair shop, was located. The defendant first replaced the car's turbocharger for $2000, which Keithan paid for by credit card. Following the replacement of the turbocharger, the engine still was found to be inoperable. Keithan returned to Georgia to fulfill his military service obligations and left the car with the defendant.

Keithan ultimately decided that he wanted the defendant to install a Buschur Racing short block.[2] Paul Scott, a co-owner of the defendant, drafted an estimate for this work, which he forwarded to Keithan. The estimate, dated August 17, 2010, referenced the purchase of the Buschur Racing short block and its installation, and estimated a cost of $9028.89.

The plaintiff loaned Keithan $9000 to pay the defendant. The plaintiff's wife prepared a promissory note for the loan, which contemplated the title and car being held by the plaintiff while the note remained unpaid. The note, dated September 14, 2010, was executed by Keithan and his wife, the plaintiff's daughter. Keithan's wife then forwarded a check to the defendant in the amount of $9028.89.

On October 11, 2010, the defendant shipped the car's engine to Buschur Racing, which performed the requested work on the engine and returned the modified engine to the defendant. The modified engine, however, was never installed in the car.[3] As Scott started to prepare the modified engine for installation, his foreman

[2] A short block is a component of an engine upon which other components are assembled. Prior to the plaintiff's request for a Buschur Racing short block, the defendant had provided an estimate for an original equipment manufacturer short block. This estimate contained a waiver of advanced estimate. At trial, the defendant argued that the original equipment manufacturer estimate, containing the waiver and Keithan's signature, constituted authorization to undertake any repair without regard for the statutory requirements. The trial court was not persuaded. See footnote 11 of this opinion.

[3] At trial, Scott testified that, although the $9028.89 estimate stated that it included installation, he intended the word "installation" on the estimate

came to him with an additional parts request to discuss with Keithan. These were components that the foreman had learned were damaged as he took the original engine apart to prepare it for transmittal to Buschur Racing. When this request was communicated to Keithan,[4] he did not want to pay the extra money. The car continued to remain in the defendant's possession.

Keithan never repaid the plaintiff any portion of the loan. The plaintiff first attempted to obtain title to the car to identify him as a second position lienholder by filing a title application with the Motor Vehicle Division of the Georgia Department of Revenue.[5] In February and April, 2011, the plaintiff traveled from Maryland, where he resided, to the defendant's location in Connecticut. Scott refused to allow the plaintiff to look at the car or the modified engine. On September 1, 2011, Victoria L. Abalan, a co-owner of the defendant, sent a letter to Keithan, in which she indicated that she had been contacted by the plaintiff and had received a copy of the plaintiff's title application. The letter from Abalan to Keithan referenced the sum of $14,151.71 being owed to the defendant, which represented the costs of additional shipping, engine parts,[6] and storage over the previous year.

The plaintiff filed an action against Keithan in Maryland and obtained a judgment in the amount of $10,348. This judgment permitted him to eventually secure a lien on the car subsequent in right to that of Wells Fargo

to include the removal of the car's original engine and not the subsequent installation of the modified engine.

[4] The record is unclear as to when the additional parts request was communicated to Keithan.

[5] This was unsuccessful because the title application required the signature of Keithan, which was missing. The plaintiff did, however, subsequently obtain a judgment lien on the car, securing his position as a second position lienholder.

[6] There was no evidence that the defendant actually purchased or installed the additional parts referenced in the letter.

Auto Finance (Wells Fargo). See footnote 1 of this opinion. The lien was reflected in a certificate of title, dated June 29, 2012, which was issued by the Georgia Department of Revenue.

On July 13, 2012, the defendant filed a "Notice of Intent to Sell" or an "Artificer's Lien"[7] with the Connecticut Department of Motor Vehicles, which claimed a lien of $1792. In December, 2012, the Connecticut Department of Motor Vehicles issued to the defendant a form H-76, an "Affidavit of Compliance and Ownership Transfer," for use in providing valid title to a purchaser for a vehicle subject to an artificer's lien.

In December, 2012, extensive communications took place between the plaintiff, the plaintiff's wife, and the defendant's owners, regarding the plaintiff obtaining the car in satisfaction of his lien. During these communications, the plaintiff informed the defendant that he had secured status as a second position lienholder on the Georgia title. The plaintiff, however, had not provided the defendant with a copy of the new Georgia title.

Keithan filed for bankruptcy in Maryland and secured the discharge of the plaintiff's judgment. The security interest of Wells Fargo was identified as $10,700 at the time of the bankruptcy petition. The bankruptcy petition, which was obtained by the defendant's counsel, identified the plaintiff as an unsecured creditor.

By June, 2013, both parties had retained counsel who exchanged communications regarding their clients' respective claims related to the vehicle. In September,

[7] A motor vehicle repair shop may apply to obtain an artificer's lien if it claims a lien on a motor vehicle in its custody upon which it has completed authorized work that is properly recorded on an invoice and if there is no application pending to dissolve the lien within thirty days after completion of the work. See Form H-100A, Connecticut Department of Motor Vehicles, available at https://www.ct.gov/dmv/lib/dmv/20/29/h-100a.pdf (last visited June 26, 2019).

2013, the plaintiff commenced the underlying action against the defendant, setting forth a claim of unjust enrichment[8] and alleging that the defendant had violated CUTPA.[9]

On November 9, 2013, Scott, on the advice of his counsel, sold the car at an auction for $19,000. Although he had provided notice to Keithan and Wells Fargo, and published notice in a local newspaper, Scott did not provide notice of the auction to the plaintiff.

In December, 2016, the plaintiff filed the operative single count complaint[10] alleging that the defendant had violated CUTPA by refusing to perform the work that had been paid for, i.e., by failing to install the modified engine in the car and by failing to provide the plaintiff, a lienholder, with statutory notice of the auction. A trial to the court took place on January 24, 25 and 26, 2017.

In its memorandum of decision, the court concluded that "[the plaintiff] has proven a violation of CUTPA,[11]

[8] In March, 2014, the defendant moved to strike both counts of the plaintiff's complaint. In September, 2014, the trial court granted the defendant's motion with respect to the plaintiff's unjust enrichment claim.

[9] Specifically, the plaintiff alleged that the defendant had violated General Statutes § 14-65f (a) when it "obtained payment from Keithan, using [the plaintiff's] funds, through the artifice of falsely promising to install a new [e]ngine in the [v]ehicle, and sought to perpetuate this ruse in its communications with [the plaintiff's] agent, by deliberately attempting to pass off a used engine as new."

[10] The plaintiff's second amended complaint is the operative complaint in this matter.

[11] The court found that the defendant violated General Statutes §§ 14-65f and 49-61. Section 14-65f provides in relevant part: "Prior to performing any repair work on a motor vehicle, a motor vehicle repair shop shall obtain a written authorization to perform the work . . . that includes an estimate in writing of the maximum cost to the customer of the parts and labor necessary for the specific job authorized. . . . If the repair shop is unable to estimate the cost of repair because the specific repairs to be performed are not known at the time the vehicle is delivered to the repair shop, the written authorization required by this section need not include an estimate of the maximum cost of parts and labor. In such a case, prior to commencing any repairs, the repair shop shall notify the customer of the work to be performed and the estimated maximum cost to the customer of the necessary

has not proven the evil motive or malice necessary to award punitive damages and exercises its discretion by finding that the plaintiff is not entitled to an award of attorney's fees. Damages are awarded in the amount of $8300."

In declining to award punitive damages and attorney's fees, the court reasoned: "The court finds as a matter of fact that the plaintiff has not proven that [the defendant's] actions constituted a reckless indifference to the rights of [the plaintiff], an intentional and wanton violation of his rights, malice or evil. [The defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but had never been provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing, which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the

parts and labor, obtain the customer's written or oral authorization and record such information on the invoice. . . ." The court found that, although an oral authorization was provided by Keithan with respect to the defendant's estimate for the Buschur Racing short block, the estimate's explicit inclusion of a fixed cost for the "installation" of the modified engine was a misrepresentation on the part of the defendant.

In addition, § 49-61 provides in relevant part: "Within ten days of receipt of such information relative to any lienholder, the bailee shall mail written notice to each lienholder by certified mail, return receipt requested, stating that the motor vehicle is being held by such bailee and has a lien upon it for repair and storage charges. . . . [I]f the last usual place of abode of the bailor is known to or may reasonably be ascertained by the bailee, *notice of the time and place of sale shall be given by mailing the notice to* him by certified mail, return receipt requested, at least ten days before the time of the sale, and similar notice shall be given to any officer who has placed an attachment on the property and, *if the property is a motor vehicle . . . any lienholder*." (Emphasis added.) The court found that the defendant violated § 49-61 by failing to provide written notice of the auction to the plaintiff. The court concluded that the foregoing conduct, which destroyed the plaintiff's lien, violated CUTPA.

Although, in its brief to this court, the defendant challenges the trial court's determination as to its liability under CUTPA, the defendant did not file a cross appeal. Therefore, this appeal relates solely to the issue of whether the court erred by failing to award attorney's fees to the plaintiff.

vehicle at auction. The court cannot find, therefore, that [the defendant's] actions warrant punitive damages. For similar reasons, the court exercises its discretion and does not award [attorney's] fees to the plaintiff." This appeal followed.

On January 25, 2018, after filing the present appeal, the plaintiff filed a motion for articulation in which he requested that the trial court articulate the factual and legal basis for its decision declining to award attorney's fees. Specifically, the plaintiff requested that the court clarify its use of the phrase "for similar reasons" in its memorandum of decision.[12]

The court issued an articulation on February 15, 2018, in which it stated: "The use of the phrase 'similar reasons' was meant to signify that the court relied on the *same* reasons enumerated in the preceding sentences, to wit, '[the defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but had never been provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing, which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the vehicle at auction.' " (Emphasis in original.)

We begin by setting forth the standard of review and legal principles that guide our analysis of the plaintiff's claim. General Statutes § 42-110g (d) provides in relevant part: "In any action brought by a person under this section, the court *may* award, to the plaintiff, in addition to the relief provided in this section, costs and

[12] In his motion, the plaintiff stated that "[t]he foregoing language suggests, though imprecisely, that the court relied upon the same facts for its decision to decline [attorney's] fees as for its conclusion that the defendant's actions did not warrant [punitive damages]. . . . [I]t is necessary that the trial court clarify . . . whether its decision flowed from the same factual findings that underlie its decision regarding [punitive damages] or whether the court relied on other, similar but as yet unidentified, reasons."

reasonable [attorney's] fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ." (Emphasis added.)

"Awarding . . . attorney's fees under CUTPA is discretionary; General Statutes § 42–110g (a) and (d) . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . [T]he term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds." (Internal quotation marks omitted.) *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, 109 Conn. App. 308, 315, 951 A.2d 26 (2008).

The plaintiff first argues that this court should recognize a rebuttable presumption in the context of attorney's fees for CUTPA violations, whereby the prevailing plaintiff "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust." We decline to recognize such a presumption.

The plaintiff, citing *Gill* v. *Petrazzuoli Bros., Inc.*, 10 Conn. App. 22, 32, 521 A.2d 212 (1987), argues that this court should recognize such a presumption because "the legislative history [of CUTPA] reflects the force of the legislature's opinion that plaintiff's fees are 'extremely necessary' to make CUTPA an effective mechanism to accomplish its policy to encourage plaintiffs to pursue private-attorney-general actions," and the United States Supreme Court has interpreted a "private-attorney-general discretionary fee-shifting provision" in the context of Title VII cases as creating a rebuttable presumption that attorney's fees should be awarded to the prevailing party. See *Newman* v. *Piggie Park*

Enterprises, *Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). The plaintiff also notes that our Supreme Court has applied this presumption in the context of a claim under 42 U.S.C. § 1983. See *New England Estates*, *LLC* v. *Branford*, 294 Conn. 817, 857, 988 A.2d 229 (2010).

Consequently, he argues: "The rationale supporting the presumption that the prevailing plaintiff should ordinarily be awarded an attorney's fee [in Title VII cases] applies with equal force to fee awards under CUTPA, given that CUTPA's purpose to encourage private-attorney-general actions is like that of Title VII and similar federal statutes. The rationale is particularly true to Connecticut's legislative understanding and intent that plaintiff's fees are 'extremely necessary,' as a tool for overcoming hesitancy to pursue CUTPA litigation." We are not persuaded.

Title VII protects civil rights, which hold an especially valued status in our law. See *Newman* v. *Piggie Park Enterprises*, *Inc.*, supra, 390 U.S. 402 (stating that plaintiff who brings civil rights action is "vindicating a policy that Congress considered of the highest priority"). The plaintiff has identified no authority that suggests that any court has ever put protection from unfair trade practices on the same plane. Furthermore, the presumption in favor of an award of prevailing party attorney's fees in Title VII cases has existed since 1968, yet our legislature did not include such a presumption when it first provided for the remedy of attorney's fees in 1973, nor has it amended the statute to incorporate the Title VII presumption over the last forty-five years. Finally, courts review a failure to award attorney's fees to a prevailing party in a Title VII case under a plenary standard. See *New England Estates*, *LLC* v. *Branford*, supra, 294 Conn. 857. By contrast, our jurisprudence is clear that the decision to award attorney's fees to a prevailing CUTPA plaintiff is reviewed under an abuse

of discretion standard. See *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 109 Conn. App. 315.

The plaintiff also contends that recognizing such a presumption is appropriate because "Connecticut courts . . . have imposed judicial guidance on the exercise of discretion in determining the *amount* of fee awards under CUTPA . . . ." (Emphasis in original.) Specifically, the plaintiff points to this court's decision in *Steiger* v. *J. S. Builders, Inc.*, 39 Conn. App. 32, 663 A.2d 432 (1995), which applied a twelve factor test, that had been developed by federal courts for use in Title VII cases, for calculating attorney's fees under CUTPA. The court's initial decision of whether to award attorney's fees, however, is distinct from its subsequent calculation of the award of attorney's fees. We are, therefore, not persuaded.

In *Staehle* v. *Michael's Garage, Inc.*, 35 Conn. App. 455, 461, 646 A.2d 888 (1994), also a CUTPA action, this court concluded that "[§ 42-110g (d)] contains *no standard* by which a court is to award attorney's fees, thus leaving it to the *sole discretion* of the trial court to determine if attorney's fees should be awarded and the amount of such an award." (Emphasis added.)

As this court noted in *Staehle*, the use of the word "may" in § 42-110g (d) "indicates that the statute does not provide a mandatory award of fees to the plaintiff; rather, the court has the discretion to award attorney's fees. The language of the statute is clear and unambiguous; the awarding of attorney's fees is within the discretion of the trial court." Id., 459.

The rebuttable presumption that the plaintiff contends that we should recognize, whereby a plaintiff "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust," is in conflict with this court's holding in *Staehle* and

contrary to the plain language of the statute. With the operation of such a presumption, the trial court would lose its statutory discretion in determining whether to award attorney's fees.

We are bound by this court's decision in *Staehle* and the plain language of the statute.[13] To the extent that the plaintiff's claims raise legitimate policy concerns that warrant a different outcome, it is the role of the legislature, not this court, to address those policy considerations. See *Bennett* v. *New Milford Hospital, Inc.*, 117 Conn. App. 535, 549, 979 A.2d 1066 (2009), aff'd, 300 Conn. 1, 12 A.3d 865 (2011).

The plaintiff next argues that, even if this court does not recognize a presumption in the award of attorney's fees under CUTPA, the trial court's failure to assess attorney's fees in this case constituted an abuse of discretion. Specifically, the plaintiff argues that the court erred by conflating the analyses for awarding attorney's fees and punitive damages, thereby improperly requiring the plaintiff to show, in order to be entitled to attorney's fees, that the defendant acted with malice, reckless disregard, or evil intent.[14] We disagree.

In its articulation, the trial court listed the following factual findings to support its decision not to award attorney's fees: "[The defendant] had been given an application for a title listing [the plaintiff] as a second position lienholder but [the defendant] had never been

[13] Moreover, we note that the legislature has not amended the language of § 42-110g (d) subsequent to this court's decision in *Staehle* to indicate that it intends attorney's fees to be awarded in a manner other than in accordance with the trial court's discretion.

[14] "In order to award punitive or exemplary damages [under CUTPA], evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 446, 78 A.3d 76 (2013).

provided with the actual title. [The defendant] did make the effort to review Keithan's bankruptcy filing which listed [the plaintiff] as an unsecured creditor. [The defendant] did consult with counsel before selling the vehicle at auction."

Although the court relied on the same factual findings in its decision not to award punitive damages, nothing in the court's memorandum of decision or articulation suggests that the court improperly required the plaintiff to show, in order to be entitled to recover attorney's fees, that the defendant acted with malice, reckless disregard, or evil intent. We, therefore, cannot conclude that "abuse [of discretion] is manifest or [that] injustice appears to have been done." See *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 109 Conn. App. 315; *Thames River Recycling, Inc.* v. *Gallo*, 50 Conn. App. 767, 800, 720 A.2d 242 (1998). Accordingly, we conclude that the trial court did not abuse its discretion in declining to award attorney's fees to the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* JOSEPH R. PONGER ET AL.
(AC 41014)

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

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant T and her former spouse, P. T and P had executed a mortgage deed, and P had executed a note in favor of a predecessor in interest of the plaintiff. The note was later assigned to the plaintiff. After P failed to make payments pursuant to the note, the plaintiff advised him that the note and mortgage were in default, and mailed notice of the default addressed to him, but not to T, at the address of the property at issue, at which P no longer lived at the time that the plaintiff mailed the notice to him there. In the absence of a cure of the

default, the plaintiff thereafter elected to accelerate the amount due under the note. T claimed that the plaintiff had failed to provide her with proper notice of the default and acceleration of the note when it sent notice to the property that was addressed to P. The trial court rendered judgment of strict foreclosure for the plaintiff, concluding, inter alia, that the notice of default and acceleration was sent to T as a joint tenant of the mortgaged property and a joint obligor on the mortgage deed. On T's appeal to this court, *held* that the trial court properly rendered judgment of strict foreclosure for the plaintiff, as that court correctly concluded that the notice requirement under the mortgage was satisfied because notice to one joint tenant or joint obligor constitutes notice to the other; because T conceded that, at all relevant times, she and P were joint tenants with respect to the subject property, it was not in dispute that T and P continued as joint obligors under the mortgage, and T did not dispute that her signature was on the mortgage, notice to P constituted notice to T.

Argued November 29, 2018—officially released July 2, 2019

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion for summary judgment as to liability as against the named defendant; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, accepted the parties' stipulation of facts, and the matter was tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment of strict foreclosure, from which the defendant Theresa Ponger appealed to this court. *Affirmed.*

Colin B. Connor, for the appellant (defendant Theresa Ponger).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

SULLIVAN, J. The defendant Theresa Ponger appeals from a judgment of strict foreclosure rendered by the

trial court.[1] On appeal, the defendant's principal claim is that the court erred when it concluded that the plaintiff, Deutsche Bank National Trust Company, as Trustee, in Trust, for Registered Holders of Long Beach Mortgage Loan Trust 2006-WL3, Asset-Backed Certificates, Series 2006-WL3, had provided notice of default and acceleration to her when it sent notice to the subject property addressed to her former spouse, Joseph R. Ponger (Ponger), who no longer resided at the property. Because the court correctly held that the notice requirement under the mortgage was satisfied because notice to one joint tenant or joint obligor constitutes notice to the others, we affirm the judgment of the trial court.

The parties stipulated to the following relevant facts. On September 7, 2005, Ponger executed a note in favor of Long Beach Mortgage Company in the principal amount of $420,000. The note was endorsed in blank and supplied to the plaintiff prior to the commencement of this action. Also on September 7, 2005, Ponger and the defendant executed a mortgage deed in favor of Long Beach Mortgage Company on property located at 23 Macintosh Road, Norwalk. The mortgage was recorded in the Norwalk land records on September 13, 2005.[2] The plaintiff is the present holder of the note.

On or about December 6, 2013, by letter addressed to Ponger at 23 Macintosh Road, Norwalk, Connecticut

[1] Joseph R. Ponger was also a defendant at trial but does not appeal from the judgment of strict foreclosure. In this opinion, we refer to Theresa Ponger as the defendant and to Joseph R. Ponger as Ponger. Several subsequent encumbrancers also were named as defendants, but they are not parties to this appeal.

[2] By virtue of assignments of the mortgage from Long Beach Mortgage Company to Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Trust 2006-WL3, dated April 7, 2010, and recorded June 11, 2010, in volume 7200 at page 113 of the Norwalk land records, and thereafter from Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Trust 2006-WL3 to the plaintiff, dated August 20, 2015, and recorded October 9, 2015, in volume 8244 at page 101 of the Norwalk land records, the plaintiff became the mortgagee of record.

06857, the plaintiff advised him that the note and mortgage were in default due to his failure to make the required monthly payments.[3] Notice of the aforementioned default was not addressed to the defendant.[4] In the absence of a cure of the default, the plaintiff elected to accelerate the amount due under the note. On April 15, 2014, the plaintiff provided Ponger and the defendant notice of their rights under the General Statutes as they relate to the Emergency Mortgage Assistance Program. See General Statutes § 8-265cc et seq. The record further indicates that Ponger failed to make payments pursuant to the note from July 1, 2013, to the date of the joint stipulation, May 9, 2017.

The present action was commenced on October 13, 2015, approximately eighteen months after the Emergency Mortgage Assistance Program notice was mailed to the subject property. On May 5, 2016, after the expiration of the court approved foreclosure mediation period, the defendant filed a timely answer asserting, as a special defense, that the plaintiff had failed to provide her with proper notice of default and acceleration. Thereafter, on June 2, 2016, the plaintiff filed a motion for summary judgment as to both Ponger and the defendant. The court granted the motion with respect to Ponger but denied the motion with respect to the defendant. On May 16, 2017, the parties filed a joint stipulation of facts with the court as to the remaining

[3] The notice provision of the subject mortgage provides in relevant part: "Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender." The subject mortgage defines the "[b]orrower" as "Joseph Ponger and Theresa Ponger."

[4] Relatedly, the defendant claims that the court erred when it concluded that the plaintiff's admission that notice was not individually addressed to the defendant did not preclude judgment of strict foreclosure. Because the plaintiff's admission is not legally significant as to the defendant's claim on appeal, we decline to address it.

issues in dispute. On September 6, 2017, the court issued its memorandum of decision finding in favor of the plaintiff. The court determined that "[r]esolution of this issue is controlled squarely by *Citicorp Mortgage, Inc.* v. *Porto*, 41 Conn. App. 598, 600–604, 677 A.2d 10 (1996),"[5] and, thus, concluded in relevant part that the "notice of default and acceleration was sent to [the defendant] as a joint tenant of the mortgaged property and a joint obligor on the mortgage deed." Thereafter, the court rendered judgment of strict foreclosure against both Ponger and the defendant, and set the law day for January 16, 2018. This appeal followed. Additional facts and procedural history will be set forth as necessary.

The defendant's principal claim on appeal is that the court erred when it concluded that the notice requirement provision of the subject mortgage had been satisfied as to the defendant when the plaintiff provided notice addressed exclusively to Ponger.[6] Specifically, the defendant claims that, because she is a "[b]orrower" under the terms of the mortgage, and because the notice provision of the mortgage requires notice of default and acceleration to be given to the "[b]orrower," the

[5] The principal issue before the trial court essentially was identical to the issue now presented on appeal, namely, whether the plaintiff was required to provide the defendant with individual notice of default and acceleration pursuant to the notice provision in the subject mortgage.

[6] In addition, the defendant claims that, even assuming arguendo that she received the notice sent by the plaintiff to Ponger, the notice failed to comply with certain requirements set forth in the mortgage deed and, thus, was deficient. The defendant failed to raise this distinct claim before the trial court and, therefore, we decline to review it. See *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229–30, 131 A.3d 771 (2016) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." [Internal quotation marks omitted.]).

plaintiff was required to provide her individually with notice. The defendant further claims that the court improperly applied the legal principles set forth in *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 600, because the present case is distinguishable, and, as a result of the improper application of *Citicorp Mortgage, Inc.*, a necessary condition precedent to the foreclosure action was not met.[7] We disagree.

As an initial matter, we note that the defendant's claim presents a mixed question of law and fact. "Where the question whether proper notice was given depends upon the construction of a written instrument or the circumstances are such as lead to only one reasonable conclusion, it will be one of law, but where the conclusion involves the effect of various circumstances capable of diverse interpretation, it is necessarily one of fact for the trier." (Internal quotation marks omitted.) *Sunset Mortgage* v. *Agolio*, 109 Conn. App. 198, 202, 952 A.2d 65 (2008). Because the plaintiff claims "that the facts found were insufficient to support the court's legal conclusion, this issue presents a mixed question of law and fact to which we apply plenary review." *Winchester* v. *McCue*, 91 Conn. App. 721, 726, 882 A.2d 143, cert. denied, 276 Conn. 922, 888 A.2d 91 (2005).

We begin by addressing the defendant's claim that the court erred when it applied the legal principles set forth in *Citicorp Mortgage, Inc.*, to the present case. In *Citicorp Mortgage, Inc.*, this court addressed whether notice to one joint tenant constituted notice to the others under similar, but not identical, circumstances. There, the defendant and his spouse were living apart, and neither the defendant nor the spouse resided at the subject property at the time notice was delivered.

[7] Additionally, in her brief the defendant argues that the court erred when it concluded that she and Ponger were joint tenants as to the subject property. At oral argument, however, the defendant conceded that, at all relevant times, she remained a joint tenant to the subject property.

Similar to the notice provision in the present case, the relevant notice provision provided: "Unless applicable law requires a different method, any notice that must be given to me under this note will be given by delivering it or by mailing it first class to me at the property address above or at a different address if I give the note holder notice of my different address." (Internal quotation marks omitted.) *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 600 n.4. Unlike like the present case, in which the defendant is a signatory only on the subject mortgage, the defendant in *Citicorp Mortgage, Inc.*, was both a signatory on the note and a signatory on the corresponding mortgage.

This court concluded that, although "proper notice of acceleration is a necessary condition precedent to an action for foreclosure . . . the plaintiff provided the defendant with proper notice by mailing the notice of acceleration to [a joint tenant of the defendant]." Id., 603. This court further concluded that, "[w]hile it appears that service of a notice upon one tenant in common is not usually regarded as binding upon the others, unless they are engaged in a common enterprise, the rule is different where the relation is that of a joint tenancy. In such a case, it is said that notice to one of them is binding upon all. 20 Am. Jur. 2d, Cotenancy and Joint Ownership § 113 (1995)." (Internal quotation marks omitted.) *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 603.

Largely informed by our Supreme Court's decision in *Katz* v. *West Hartford*, 191 Conn. 594, 600, 469 A.2d 410 (1983), which reaffirmed long-standing precedent that "[i]n the case of cofiduciaries [and joint tenants] notice to one is deemed to be notice to the other," this court's decision in *Citicorp Mortgage, Inc.*, also restated the long-standing principle that "[n]otice to one of two *joint obligors* conveys notice to the other with respect to matters affecting the joint obligation.

United States v. *Fleisher Engineering & Construction Co.*, 107 F.2d 925, 929 (2d Cir. 1939)." (Emphasis added.) *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 603–604. Despite the foregoing, the defendant claims that the trial court misapplied the aforementioned standards because, unlike the defendant in *Citicorp Mortgage, Inc.*, who was both a signatory on the note and corresponding mortgage, she was not a signatory on the subject note. We find the defendant's claim unpersuasive.

In a recent decision, this court addressed a similar claim. See *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 199 A.3d 57 (2018), cert. denied, 331 Conn. 903, 202 A.3d 373 (2019).[8] In *Citibank, N.A.*, the defendant argued that, because he was a signatory on the subject mortgage but not a signatory on the corresponding note, notice to his former spouse, who was the sole signatory on the note, was not effective as to him. Id., 250 n.21. This court held that, because the defendant signed the mortgage instrument, thereby pledging the property as security for the debt obligation created by the note, which was signed by the former spouse, the defendant was a joint obligor as to the mortgage and that the notice provided to his former spouse, despite their contrasting endorsements, satisfied the notice requirements under the mortgage. Id., 249–50, 250 n.21.

Critically, at oral argument before this court, the defendant conceded that, at all relevant times, she and Ponger were joint tenants with respect to the subject property.[9] See *Katz* v. *West Hartford*, supra, 191 Conn. 600. Furthermore, it is not in dispute that the defendant

[8] *Citibank, N.A.* v. *Stein*, supra, 186 Conn. App. 224, was officially released two days prior to oral argument. We note that neither the plaintiff nor the defendant chose to submit invited post argument memoranda to address its relevancy. See Practice Book § 67-10.

[9] See footnote 7 of this opinion.

and Ponger continued as joint obligors under the subject mortgage. See *Citicorp Mortgage, Inc.* v. *Porto*, supra, 41 Conn. App. 603–604. Further still, the defendant has not challenged the stipulation or otherwise disputed that her signature is on the mortgage. Accordingly, we conclude that the present case falls squarely within the ambit of this court's decision in *Citicorp Mortgage, Inc.*, and, therefore, the notice to Ponger constituted notice to the defendant.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

TREVELLE DINHAM *v.* COMMISSIONER OF CORRECTION
(AC 41625)

Keller, Elgo and Harper, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of manslaughter in the first degree with a firearm, sought a writ of habeas corpus. The habeas court rendered judgment dismissing the habeas petition for lack of subject matter jurisdiction and for the failure to state a claim on which habeas relief could be granted, from which the petitioner, on the granting of certification, appealed to this court. On appeal, he claimed, inter alia, that the habeas court improperly dismissed his claims that the respondent, the Commissioner of Correction, misconstrued and misapplied the statute (§ 54-125a) pertaining to parole suitability hearings and the application of risk reduction credit toward the advancement of a parole eligibility date, and the statute (§ 18-98e) pertaining to risk reduction credit. Specifically, the petitioner claimed that the respondent had misinterpreted and misapplied certain 2013 amendments to § 54-125a, as set forth in No. 13-3 of the 2013 Public Acts (P.A. 13-3) and No. 13-247 of the 2013 Public Acts (P.A. 13-247), which made a parole suitability hearing discretionary rather than mandatory and eliminated the use of risk reduction credits to advance the parole eligibility date of inmates convicted of certain crimes, including manslaughter in the first degree with a firearm, and certain 2015 amendments to § 18-98e, as set forth in No. 15-216 of the 2015 Public Acts (P.A. 15-216), which

prohibited inmates who committed certain crimes, including manslaughter in the first degree with a firearm, from earning any risk reduction credit in the future. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly dismissed his claim that, when he pleaded guilty in 2012 to manslaughter in the first degree with a firearm, he relied on governmental representations that he would receive risk reduction credits to advance his parole eligibility date and reduce the total length of his sentence: although the petitioner claimed in his appellate brief that he had pleaded guilty to manslaughter in the first degree with a firearm, which carried a twenty-eight year term of imprisonment, rather than murder, which carried a twenty-five year term of imprisonment, on the basis of representations by either the trial court or the prosecutor that, if he pleaded guilty to the manslaughter charge, he would be eligible to earn risk reduction credits that would advance his parole eligibility date and would reduce the total length of his sentence to under twenty-five years, the petitioner failed to plead in his amended habeas petition any factual basis on which his claim relied, as the petitioner only broadly alleged that he had a liberty interest in being able to rely on governmental representations when deciding how to resolve his pending criminal case, without any factual allegations of what the representations were or who made them; accordingly, the habeas court did not err in dismissing the petitioner's claim for failure to state a claim on which habeas relief could be granted.

2. The habeas court properly dismissed the petitioner's claim that the respondent misconstrued and misapplied P.A. 13-247, P.A. 13-3 and P.A. 15-216, which was based on his claim that those public acts amending the applicable statutes were substantive rather than procedural in nature and, therefore, should not apply retroactively to him; the petitioner's claim related to P.A. 13-247 was not ripe for adjudication because the petitioner had not yet been denied a hearing and, thus, it was impossible to determine whether a hearing would take place in the future, and with respect to P.A. 13-3 and P.A. 15-216, the petitioner had to assert a cognizable liberty interest sufficient to invoke the habeas court's subject matter jurisdiction, which he failed to do, as he did not have a constitutionally protected liberty interest in certain benefits, such as good time credits, risk reduction credits, and early parole consideration, because the statutory scheme pursuant to which the respondent was authorized to award those benefits was discretionary in nature, and, therefore, the habeas court lacked subject matter jurisdiction over the petitioner's claims.

3. The petitioner could not prevail on his claim that the habeas court improperly dismissed certain counts in his petition for lack of subject matter jurisdiction and for the failure to state a claim on which habeas relief could be granted, which was based on his assertion that his claims established a cognizable liberty interest by alleging that the respondent,

through his customary practices, had created a liberty interest: there is no liberty interest in earning risk reduction credit or having it applied to further an inmate's parole eligibility date due to the discretionary nature of the respective statutory schemes, there is no liberty interest in parole or the procedure by which parole is granted or denied, and it would be contrary to our case law to hold in the present case that the petitioner has a vested liberty interest in earning future risk reduction credits, in having those credits utilized to advance his parole eligibility date, and in having a mandatory parole suitability hearing, when those interests were not assured by statute, judicial decree, or regulation; moreover, the legislature has made it clear in its amendments to §§ 54-125a and 18-98e that the respondent is no longer authorized to utilize risk reduction credits to advance an inmate's parole eligibility date and that he may no longer issue risk reduction credits to inmates such as the petitioner, and this court will not interfere with the legislature's clear mandate.

Argued February 5—officially released July 2, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*, judge trial referee, sua sponte, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, for the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Trevelle Dinham, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner argues that the court improperly dismissed his claims for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief can be granted. Specifically, the petitioner argues that the court improperly dismissed his claims that (1) he

relied on "governmental representations" that he would receive risk reduction credit when he pleaded guilty to manslaughter in the first degree with a firearm, (2) the respondent, the Commissioner of Correction, misconstrued and misapplied several statutes pertaining to the petitioner receiving a parole suitability hearing, earning risk reduction credit in the future, and applying risk reduction credit toward the advancement of the petitioner's parole eligibility date, and (3) the respondent's customary practices have created a vested liberty interest in receiving a parole suitability hearing, earning future risk reduction credits, and applying risk reduction credits to advance his parole eligibility date. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to the resolution of this appeal. On April 2, 2012, the petitioner pleaded guilty to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, which he committed on or about September 24, 1999,[1] and for which he was sentenced to twenty-eight years of imprisonment. Thereafter, the then self-represented petitioner commenced this action by filing a petition for a writ of habeas corpus. On November 15, 2017, the petitioner, after obtaining counsel, filed an eighteen count amended habeas petition. On March 19, 2018, the court, sua sponte, dismissed the amended petition for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief may be granted.[2] See

[1] The court's memorandum of decision states that the offense occurred on or before August 29, 2009. This appears to be an error that does not affect the propriety of the court's judgment.

[2] Prior to dismissing the amended petition, the court notified the parties that they should be prepared to present arguments, at any time, addressing the court's subject matter jurisdiction.

Practice Book § 23-29.[3] Instead of addressing the petitioner's claims individually, the court broadly determined that it lacked subject matter jurisdiction over the habeas petition and that the petition had failed to state a claim upon which habeas relief can be granted.[4] The court granted the petitioner's petition for certification to appeal.[5] The petitioner timely filed the present appeal, challenging the dismissal of ten of his claims. Additional facts will be set forth as necessary.

Before addressing the petitioner's individual claims, we first set forth the standards of review and relevant legal principles applicable to the petitioner's appeal. "Subject 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 . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 784–85, 169 A.3d 851, cert. denied, 327 Conn. 978, 174

[3] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion . . . dismiss the [habeas] petition, or any count thereof, if it determines that . . . (1) the court lacks jurisdiction . . . (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ."

[4] The court concluded in its memorandum of decision that "[b]ecause the petitioner has no right to earn and receive discretionary [risk reduction credit], and any changes, alterations and even the total elimination of [risk reduction credit] at most can only revert the petitioner to the precise measure of punishment in place at the time of the offense, the court concludes that it lacks subject matter jurisdiction over the habeas corpus petition and that the petition fails to state a claim for which habeas corpus relief can be granted."

[5] Specifically, the court certified the appeal on two grounds: "(1) Did the habeas court err in concluding that it lacked subject matter jurisdiction?; and (2) Did the habeas court err in concluding that the petition failed to state a claim upon which habeas corpus relief can be granted?"

A.3d 800 (2017). "[I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 368, 163 A.3d 597 (2017). "With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 342, 199 A.3d 1127 (2018).

"Likewise, [w]hether a habeas court properly dismissed a petition pursuant to Practice Book § 23-29 (2), on the ground that it fails to state a claim upon which habeas corpus relief can be granted, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 368. "In reviewing whether a petition states a claim for habeas relief, we accept its allegations as true." *Coleman* v. *Commissioner of Correction*, 137 Conn. App. 51, 55, 46 A.3d 1050 (2012). For ease of discussion, we next provide a brief summary of the relevant laws pertaining to the petitioner's ability to receive a parole suitability hearing, to earn future risk reduction credit, and to apply his earned risk reduction credit toward the advancement of his parole eligibility date.

Pursuant to No. 04-234 of the 2004 Public Acts, codified at General Statutes § 54-125a (e), the Board of Pardons and Paroles (board) was *required* to hold a parole suitability hearing for any person eligible for parole who had completed 85 percent of his or her sentence. General Statutes (Rev. to 2013) § 54-125a (e) subsequently was amended by No. 13-247 of the 2013 Public Acts (P.A. 13-247), to make the board's parole suitability hearing discretionary, rather than mandatory.[6] If the board declines to hold a hearing, however, § 54-125a (e) requires the board to document specific reasons for declining to hold a hearing and to provide those reasons to the person denied a hearing.

As to risk reduction credits, our Supreme Court has summarized the relevant statutes as follows: "In July, 2011 . . . General Statutes § 18-98e[7] became effective, pursuant to which the respondent had discretion to award risk reduction credit toward a reduction of an inmate's sentence, up to five days per month, for positive conduct. General Statutes § 18-98e (a) and (b). The respondent also was vested with discretion to revoke such credit, even credit yet to be earned, for good cause. See General Statutes § 18-98e (b). At the same time, the legislature amended the parole eligibility provision to provide: 'A person convicted of . . . an offense . . . where the underlying facts and circumstances of the offense involve the use, attempted use or threatened

[6] General Statutes (Rev. to 2013) § 54-125a (e), as amended by P.A. 13-247, § 376, provides in relevant part: "The Board of Pardons and Paroles *may* hold a hearing to determine the suitability for parole release of any person whose eligibility for parole release is subject to the provisions of subdivision (2) of subsection (b) of this section upon completion by such person of eighty-five per cent of such person's definite or aggregate sentence. . . . If a hearing is not held, the board shall document the specific reasons for not holding a hearing and provide such reasons to such person. . . ." (Emphasis added.)

[7] Section 18-98e was amended by No. 15-216 of the 2015 Public Acts, as subsequently addressed in this opinion. Section 18-98e was also amended in 2018. See footnote 9 of this opinion.

use of physical force against another person shall be ineligible for parole under subsection (a) of this section until such person has served not less than eighty-five per cent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e.*' . . . General Statutes (Rev. to 2011) § 54-125a (b) (2), as amended by Public Acts 2011, No. 11-51, § 25 (P.A. 11-51). The subsection of § 54-125a addressing parole hearings was similarly amended to account for earned risk reduction credit. General Statutes (Rev. to 2011) § 54-125a (e), as amended by P.A. 11-51, § 25. Accordingly, under the 2011 amendments, earned risk reduction credit was to be applied to an inmate's definite sentence to advance the inmate's end of sentence date, and the parole eligibility date calculated as a percentage of the sentence would advance in similar measure. . . .

"Under the 2011 amendments to § 54-125a and § 18-98e, any risk reduction credit earned by an inmate, and not subsequently revoked, would have both reduced his sentence and rendered him eligible for a hearing to determine whether he should be granted parole after he had served 85 percent of that reduced sentence.

"Effective July 1, 2013, the legislature again amended § 54-125a. Specifically, with regard to offenses like one of those of which the petitioner was convicted, the legislature eliminated the language that permitted the parole eligibility date to be advanced by the application of any earned risk reduction credit. See [Public Acts 2013, No. 13-3, § 59 (P.A. 13-3)]." (Emphasis in original; footnote altered.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 363–65.

General Statutes (Rev. to 2015) § 18-98e (a) subsequently was amended by No. 15-216 of the 2015 Public

Acts (P.A. 15-216),[8] so that inmates convicted of certain violent crimes, including manslaughter in the first degree with a firearm, were ineligible to earn risk reduction credits in the future.[9] Mindful of the foregoing legal principles, we now turn to the specific claims raised by the petitioner in this appeal.

I

The petitioner's first argument is that the court improperly dismissed his claims that, when he pleaded guilty in 2012 to manslaughter in the first degree with a firearm, he relied on "governmental representations"[10] that he would receive risk reduction credits to advance his parole eligibility date and reduce the total length of his sentence.[11] Specifically, the petitioner claims in his appellate brief that he pleaded guilty to manslaughter in the first degree with a firearm, which carried a twenty-eight year term of imprisonment, rather than

[8] General Statutes § 18-98e (a), as amended by P.A. 15-216, § 9, provides in relevant part: "Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date, *except a person sentenced for a violation of section . . . 53a-55a . . .* may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006." (Emphasis added.)

[9] Additional amendments were made to § 18-98e pursuant to No. 18-155 of the 2018 Public Acts, but they are of no consequence to the matters raised in this appeal.

[10] We note that the petitioner, at points in his appellate brief, utilizes "representations" and "promise" interchangeably. We do not believe these words to be synonymous. Although either the prosecutor or the court may have in fact represented that the petitioner would be eligible to earn risk reduction credits, which would have been an accurate statement of the law at the time the petitioner pleaded guilty, such statements cannot reasonably be construed as a promise, which would imply that the prosecutor or the court had entered into a binding agreement with the petitioner.

[11] In his brief, the petitioner frames the issue as "whether [the habeas court] improperly dismissed counts twelve and sixteen of" his operative petition.

murder, which carried a twenty-five year term of imprisonment, because either the court or the prosecutor represented that, if he pleaded guilty to the manslaughter charge, he would be eligible to earn risk reduction credits that would advance his parole eligibility date and would reduce the total length of his sentence to under twenty-five years. The petitioner, relying on *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971),[12] argues that his operative petition states a cognizable liberty interest by virtue of his "right to rely on governmental representations," which confers subject matter jurisdiction on the court. Moreover, he asserts that the facts pleaded in his petition state a claim upon which habeas relief can be granted. We disagree.

The petitioner failed to plead in his amended petition any factual basis upon which his claim relies. The petitioner only broadly alleged, citing to *Santobello*, that he has a liberty interest in "being able to rely on governmental representations in the decision how to resolve his pending case," without any factual allegations of what the representations were or who made them. "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what

[12] In *Santobello* v. *New York*, supra, 404 U.S. 258, the defendant had reached a plea agreement with the prosecutor in which the prosecutor would permit him to plead guilty to a lesser offense and would not make a recommendation as to the length of the sentence. At the defendant's sentencing, a different prosecutor who did not negotiate the plea agreement recommended the maximum sentence, which the court imposed, in violation of the agreement. Id., 259–60. The United States Supreme Court held that, "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to [e]nsure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id., 262.

he has alleged is basic." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 262, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012). "[A] habeas petitioner is limited to the allegations in his petition, which are intended to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 789, 114 A.3d 925 (2015). Accordingly, we conclude that the court did not err in dismissing the petitioner's claims for failure to state a claim upon which habeas relief can be granted.[13]

II

The petitioner next argues that the court improperly dismissed several counts of his operative habeas petition, which allege that three public acts amending §§ 54-125a or 18-98e are substantive rather than procedural in nature and, therefore, should not apply retroactively to him.[14] Specifically, the petitioner claims that the respondent has misinterpreted and misapplied (1) P.A. 13-247, which amended General Statutes (Rev. to 2013) § 54-125a (e) to make a parole suitability hearing discretionary rather than mandatory, (2) P.A. 13-3, which

[13] In the petitioner's appellate brief, he insinuates that we should look to the facts pleaded in his initial petition, which he believes sets forth the factual basis for his claim. We are mindful, however, that "[w]hen an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment . . . ." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017). Thus, the petitioner's amended petition supersedes his initial petition and, accordingly, he cannot rely on the factual allegations made solely in his initial petition. See, e.g., *Wesley* v. *DeFonce Contracting Corp.*, 153 Conn. 400, 404, 216 A.2d 811 (1966) (amended complaint "entirely supersedes" original complaint).

[14] The petitioner framed the issue in his appellate brief as whether "the habeas court improperly dismissed counts two, six, and eighteen of the petitioner's amended petition for a writ of habeas corpus."

amended General Statutes (Rev. to 2013) § 54-125a to eliminate the use of risk reduction credits to advance the parole eligibility date of inmates convicted of certain crimes, including manslaughter in the first degree with a firearm, and (3) P.A. 15-216, which amended General Statutes (Rev. to 2015) § 18-98e to prohibit inmates who committed certain crimes, including first degree manslaughter with a firearm, from earning any further risk reduction credit. We disagree.

As to the petitioner's claim regarding P.A. 13-247, even though it is unclear on what basis the court relied in concluding that it lacked subject matter jurisdiction and that the petition had failed to state a claim upon which habeas relief could be granted, our plenary review leads us to conclude that, as argued by the respondent in his principal brief, there is another basis for finding a lack of subject matter jurisdiction, namely, that the petitioner's claim is not ripe for adjudication. "The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, supra, 176 Conn. App. 785. "[A] trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire. . . . [R]ipeness is a sine qua non of justiciability . . . ." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 387–88. In *Perez*, our Supreme Court stated that, even if the petitioner in that case had stated a statutory claim upon which habeas relief could be granted, his challenge to P.A. 13-247 would not be ripe for adjudication because it was impossible to determine whether the board would decline to conduct a hearing on the petitioner's parole

eligibility date.[15] Id. In the present case, the petitioner also has not yet been denied a hearing, and it is impossible to determine whether a hearing will take place in the future.[16] Accordingly, the petitioner's claim related to P.A. 13-247 is not ripe for review.

Turning to P.A. 13-3 and P.A. 15-216, in his appellate brief, the petitioner cites to *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 786 A.2d 1091 (2002), for the proposition that this court must hold that the public acts relevant to his claim are substantive in nature and, therefore, cannot be applied retroactively to him.[17] In *Johnson*, our Supreme Court determined that the petitioner had made a cognizable *ex post facto claim*, which

[15] Our Supreme Court first determined that the petitioner in that case had failed to state a claim upon which habeas relief could be granted. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 387.

[16] The petitioner, citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152–53, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), argues that, even if an injury has not yet been suffered, the case is ripe for review because the respondent's interpretation of P.A. 13-247 impacts his present actions while incarcerated. In *Abbott Laboratories*, the United States Supreme Court held that a challenge to a *federal regulation* before it was enforced was ripe for adjudication where a drug manufacturer either had to comply with the regulation or wait until it was a defendant in an enforcement action, where it would face serious civil and criminal penalties for failing to comply, before challenging the regulation. Id., 153. We do not find these considerations applicable in the present case.

[17] Even if we were to acquiesce to the petitioner's request to engage in a statutory analysis of the pertinent public acts to determine if they are substantive or procedural in nature and, thus, whether they should apply retroactively to the petitioner, he has not adequately briefed the issue. The petitioner simply distinguishes a substantive statute from a procedural statute and concludes that the relevant public acts are substantive statutes without providing any analysis of the language at issue in the statutes and without citing to any legislative history to evince the legislature's intent. See, e.g., *Andersen Consulting, LLP* v. *Gavin*, 255 Conn. 498, 517–18, 767 A.2d 692 (2001) (discussing test to determine whether statute applies retroactively or prospectively). "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

invoked the habeas court's subject matter jurisdiction. Id., 818–19. An ex post facto claim, however, is not dependent on the existence of a cognizable liberty interest. See *Breton* v. *Commissioner of Correction*, 330 Conn. 462, 471, 196 A.3d 789 (2018) ("[t]he presence or absence of an affirmative, enforceable right is not relevant . . . to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred" [internal quotation marks omitted]); see also *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 261, 914 A.2d 1034 (2007).

In the present case, the petitioner has stated that his claim is *not* an ex post facto claim but, rather, a statutory interpretation claim. Accordingly, *Johnson* is materially distinguishable from the present case. Citing to *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 387–88, the petitioner asserts that his claim is not controlled by the question of whether he has alleged a cognizable liberty interest in receiving risk reduction credit. In essence, the petitioner asks for this court to reach the merits of his claim without him first alleging a cognizable liberty interest sufficient to establish a basis for the court's subject matter jurisdiction. Such a reading of *Perez* would run contrary to our jurisprudence, which has consistently held that "[i]n order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, supra, 186 Conn. App. 342. Accordingly, the petitioner must assert a cognizable liberty interest sufficient to invoke the habeas court's subject matter jurisdiction.

"Our appellate courts have concluded, consistently, that an inmate does not have a constitutionally protected liberty interest in certain benefits—such as good

time credits, risk reduction credits, and early parole consideration—if the statutory scheme pursuant to which the [respondent] is authorized to award those benefits is discretionary in nature." *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 86–87, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018); see *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370–73 (no liberty interest in risk reduction credits or application of risk reduction credits to advance parole eligibility date); see also *Rivera* v. *Commissioner of Correction*, 186 Conn. App. 506, 514, 200 A.3d 701 (2018), cert. denied, 331 Conn. 901, 201 A.3d 402 (2019), and cases cited therein. Because the petitioner has failed to assert a cognizable liberty interest in his claims, we conclude that the court lacked subject matter jurisdiction over them.

III

Finally, the petitioner claims that the court improperly dismissed five counts in his petition for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief can be granted because his claims established a cognizable liberty interest by alleging that the respondent, through his customary practices, has created a liberty interest.[18] We are not persuaded.

As previously mentioned, our Supreme Court has held that, "[i]n order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, supra, 186 Conn. App. 342. There is no liberty interest in earning risk reduction credit or having it applied to further an

[18] The petitioner claims in his appellate brief that "the habeas court improperly dismissed counts three, four, seven, nine, and seventeen of the petitioner's amended petition for a writ of habeas corpus."

inmate's parole eligibility date due to the discretionary nature of the respective statutory schemes. See part II of this opinion. Furthermore, there is no liberty interest in parole or the procedure by which parole is granted or denied. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 373 ("[w]here . . . an inmate has no vested liberty interest in parole itself, then it follows that the procedure by which the board exercises its discretion to award or deny the petitioner parole does not implicate a vested liberty interest"). Thus, it would be contrary to our case law to hold in the present case that the petitioner has a vested liberty interest in earning future risk reduction credits, in having those credits utilized to advance his parole eligibility date, and in having a mandatory parole suitability hearing, all of which are not assured either by statute, judicial decree, or regulation.

The petitioner primarily relies on two federal cases to support the proposition that the respondent's customary practices created a cognizable liberty interest sufficient to confer subject matter jurisdiction over his petition. First, he cites to *Vitek* v. *Jones*, 445 U.S. 480, 487–88, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), in which the United States Supreme Court held that an inmate had a cognizable liberty interest in not being transferred to a mental health facility for treatment. Specifically, the court found that such a liberty interest was created from an expectation based on Nebraska statutes and the prison's practice that an inmate would not be transferred unless he suffered from a mental disease or defect that could not be treated at the prison. Id., 489–90. Importantly, the court also factored into its conclusion the stigma created by an involuntary confinement to a mental health institution, which it opined could negatively impact the inmate. Id., 492.

Second, the petitioner cites to *Arsberry* v. *Sielaff*, 586 F.2d 37, 47 (7th Cir. 1978), in which the plaintiffs

claimed that, on the basis of prison policy and customs, they were entitled to earn good time credit during their segregation from the general prison population. The court acknowledged that, absent a liberty interest protected by the United States constitution, it must look primarily to state law to determine if a liberty interest was created. Id., 45–46. In addition to state statutes and prison administrative regulations, the court determined that a liberty interest may also be found in official policies or practices if a prisoner could show "some restriction upon the prison officials' discretion to remove the benefit sought." Id., 46–48. In light of new evidence that four prison directives provided guidelines for denying good time credit in the event a prisoner was segregated from the general prison population, the court remanded the case to the trial court for an evidentiary hearing as to whether the directives created a state law entitlement. Id., 47.

A key distinction between the cases relied on by the petitioner and the present case is that, when looking to our state law, the *legislature* has barred the respondent from awarding further risk reduction credits to the petitioner or from applying the credits the petitioner has earned to advance his parole eligibility date. Indeed, the legislature has made it clear in its amendments to §§ 54-125a and 18-98e that the respondent is no longer authorized to utilize risk reduction credits to advance an inmate's parole eligibility date and that he may no longer issue risk reduction credits to inmates such as the petitioner. In other words, if we were to hold in this case that a liberty interest has been created in the earning of future risk reduction credit, the application of risk reduction credit to advance the petitioner's parole eligibility date, and in receiving a parole suitability hearing, we would usurp the power vested in the legislature, which broadly dictates to the respondent, a member of the executive branch, how to administer

and apply risk reduction credit and conduct parole suitability hearings. "Because the ultimate power rests in the people and has been allocated to the separate branches of government, it is our duty to ensure that each branch, including the judiciary, does not usurp the power of its coequal branches. It is especially important that we take pains to restrain *this branch*, because a usurpation of legislative or executive power is, in effect, a usurpation of the people's power." (Emphasis in original.) *State* v. *Peeler*, 321 Conn. 375, 464, 140 A.3d 811 (2016) (*Zarella*, *J.*, dissenting). Therefore, we decline to interfere with the legislature's clear mandate. Accordingly, the court properly dismissed the petitioner's operative habeas petition for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas corpus relief can be granted.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ERNEST FRANCIS (AC 41183)

DiPentima, C. J., and Alvord and Conway, Js.

Syllabus

The defendant, who previously had been convicted of the crime of murder and sentenced to fifty years of incarceration, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. Prior to sentencing, the sentencing court was provided with a presentence investigation report detailing the defendant's prior criminal history, including that he previously had been convicted of conspiracy to sell cocaine and assault in the second degree. During the sentencing hearing, the prosecutor advised the court that the report was not accurate and that the defendant in fact previously had been convicted of conspiracy to possess cocaine and assault in the third degree. In reciting the facts on which it based its sentence, the sentencing court stated, inter alia, that the defendant had inflicted a graze wound on the victim before he fatally stabbed him in the chest. In his motion to correct, the defendant alleged that his sentence was illegal because

the court substantially relied on materially false information regarding his prior criminal history and misconstrued the evidence at trial surrounding the underlying crime. In denying the motion, the trial court concluded that there was no indication that the sentencing court substantially relied on materially inaccurate information. On the defendant's appeal to this court, *held* that the trial court properly denied the defendant's motion to correct an illegal sentence, as neither the purported inaccuracies contained in the presentence investigation report nor the sentencing court's account of the manner in which the underlying murder occurred supported the conclusion that the defendant's sentence was imposed in an illegal manner: although the sentencing court incorrectly noted that the defendant had been convicted of conspiracy to sell cocaine, this error was not a substantial factor in its determination of the appropriate sentence, as the court expressly considered the fact that the defendant had incurred three separate felony convictions by the age of nineteen, that he was involved in drugs and that he was on probation when he murdered the victim, and those considerations were not impugned by any discrepancy between the defendant's actual criminal record and the record that was provided in the report, and, therefore, the record demonstrated that the court did not substantially rely on those inaccuracies in imposing its sentence; moreover, the sentencing court's recitation of the evidence regarding the manner in which the defendant committed the underlying offense was not materially inaccurate, nor was the disputed fact that the victim sustained a graze wound substantially relied on by the court, as the defendant's sentence clearly was predicated on his killing the victim by stabbing him in the chest and not on the graze wound.

Argued March 13—officially released July 2, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, and tried to the jury before *Miano*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Supreme Court, which affirmed the judgment; thereafter, the court, *Dewey*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

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

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, *Rita M. Shair*, senior assistant state's attorney, and *Elizabeth S. Tanaka*, former assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Ernest Francis, appeals from the judgment of the trial court denying his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22. On appeal, the defendant claims that his sentence was imposed in an illegal manner because the court substantially relied on materially inaccurate information concerning his prior criminal history and the manner in which he had committed the underlying crime. We disagree and, thus, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendant was convicted of murder in violation of General Statutes § 53a-54a (a), and, on April 15, 1992, was sentenced to fifty years of incarceration. See *State* v. *Francis*, 228 Conn. 118, 635 A.2d 762 (1993). Prior to sentencing, the court, *Miano*, *J.*, was provided with a presentence investigation report (presentence report) detailing the defendant's prior criminal history. The presentence report indicated that the defendant had been convicted previously of conspiracy to sell cocaine and assault in the second degree. During sentencing, the prosecutor informed the court of the details surrounding the apparent conviction of conspiracy to sell cocaine and noted that there seemed to be a discrepancy between the offense of which he was charged initially, conspiracy to sell cocaine, and the offense of which he was convicted, conspiracy to possess cocaine. The prosecutor also advised the court that the defendant had not been convicted of assault

in the second degree, as indicated in the report, but, rather, assault in the third degree.

In discussing the reasons for its sentence, the court, *Miano*, *J.*, reviewed the events that transpired on the day the defendant murdered the victim. In so doing, the court indicated that the defendant had stabbed the victim more than once during the underlying altercation. After recounting the relevant facts based on the evidence at trial, the court noted that the defendant, at the age of nineteen, had three felony convictions. After noting that one of "[t]he purposes of sentencing" is deterrence, the court sought to send a message to "the young men like the defendant that appear macho, that are involved in drugs, that have cars, attractive new cars, that have jewelry, that have money, [and] that have attractive ladies," that "[they] have to think before they commit such an act like this." Thereafter, the court sentenced the defendant to fifty years of incarceration.

On December 30, 2016, the defendant filed the motion to correct an illegal sentence that is the subject of the present appeal.[1] In the memorandum of law accompanying his motion, the defendant alleged that his sentence was illegal because the trial court substantially

[1] The present motion is predicated on the same grounds as an earlier motion to correct an illegal sentence that the defendant, then self-represented, filed on July 12, 2010, and amended on October 12, 2010. That motion was denied by the trial court, *Gold*, *J.*, and the defendant appealed to this court, which reversed the trial court's judgment on the ground that the trial court was required to follow the procedure set forth in *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), before it properly could deny the defendant's request for the appointment of counsel. See *State* v. *Francis*, 148 Conn. App. 565, 590–91, 86 A.3d 1059 (2014), rev'd, 322 Conn. 247, 140 A.3d 927 (2016). The state appealed to our Supreme Court, which reversed the judgment of this court on the ground that the "*Anders* procedure is not strictly required to safeguard the defendant's statutory right to counsel in the context of a motion to correct an illegal sentence." *State* v. *Francis*, 322 Conn. 247, 250–51, 140 A.3d 927 (2016). The court concluded, however, that the trial court "improperly failed to appoint counsel to assist the defendant in determining whether there was a sound basis for him to file such a motion," and, thus, remanded the

relied on materially false information regarding his prior criminal history and misconstrued the evidence at trial surrounding the underlying crime. On August 10, 2017, the court, *Dewey*, *J.*, denied the defendant's motion, concluding, inter alia, that there was no indication that the sentencing court substantially relied on materially inaccurate information. This appeal followed. Additional facts will be set forth as needed.

The defendant claims that the trial court improperly concluded that the sentencing court did not substantially rely on materially inaccurate information regarding his prior criminal history and the manner in which the underlying offense was committed. We do not agree and, therefore, affirm the judgment of the trial court.

We begin our analysis of the defendant's claim by setting forth our standard of review and applicable legal principles. Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Bozelko*, 175 Conn. App. 599, 609, 167 A.3d 1128, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates

case to the trial court so that counsel could be appointed to represent the defendant. Id., 251.

a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . *or his right to be sentenced by a judge relying on accurate information or considerations solely in the record*, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Emphasis added; internal quotation marks omitted.) *State* v. *Jason B.*, 176 Conn. App. 236, 243–44, 170 A.3d 139 (2017).

"[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence. . . . To prevail on such a claim as it relates to a [presentence report], [a] defendant [cannot] . . . merely alleg[e] that [his presentence report] contained factual inaccuracies or inappropriate information. . . . [He] must show that the information was materially inaccurate and that the [sentencing] judge relied on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Petitpas*, 183 Conn. App. 442, 449–50, 193 A.3d 104, cert. denied, 330 Conn. 929, 194 A. 3d 778 (2018).

In claiming that his sentence was imposed in an illegal manner, the defendant points to several purported inaccuracies in the presentence report. Specifically, he

asserts that the report incorrectly indicated that he had been convicted of conspiracy *to sell* cocaine, when in fact he was convicted of conspiracy *to possess* cocaine. The defendant argues that the record demonstrates substantial reliance on this inaccuracy in light of the sentencing court's description of him as a drug dealer who had "new cars," "jewelry," "money" and "attractive ladies," despite the fact that he never had been convicted of selling drugs. Further, the defendant submits that, although the prosecutor informed the court of the inaccuracy in the presentence report concerning his assault conviction, the state failed to correct the portion of the report that erroneously indicated that the victim of that assault was an elderly person and that the defendant's sentence for this conviction had been illegal.[2] The defendant contends that the court substantially relied on these errors when it intimated that the defendant was a "violent predator attacking the weak and infirm," rather than just a child caught up in "a senseless and tragic neighborhood fight."

Additionally, the defendant claims that the court substantially relied on an inaccurate account of the manner in which the underlying murder offense occurred. In particular, the defendant argues that the evidence at trial indicated that the victim had sustained only a single stab wound during the altercation that resulted in his death. During its recitation of the evidence, however, the sentencing court stated that the victim had suffered a "graze" wound prior to being fatally stabbed in the chest. The defendant contends that this material inaccuracy was substantially relied on by the court and served to portray the defendant as a "more determined and violent individual than the evidence actually showed."

[2] The defendant argues that because he was convicted of assault in the third degree, which was a class A misdemeanor punishable by no more than one year in prison, the four year sentence he received was illegal and, thus, an inaccuracy that the court substantially relied on.

With respect to the presentence report, we conclude that the trial court did not abuse its discretion in concluding that the sentencing court did not substantially rely on the inaccuracies concerning the defendant's prior criminal history. Although the sentencing court incorrectly noted that the defendant had been convicted of conspiracy to sell cocaine, this error was not a substantial factor in the court's determination of the defendant's appropriate sentence. Rather, as it relates to the defendant's prior criminal history, the court expressly considered the fact that the defendant had incurred three separate felony convictions by the age of nineteen,[3] that he was "involved in drugs" and that he was on probation when he murdered the victim. None of those considerations is impugned by any discrepancy between the defendant's actual criminal record and the record that was provided in the presentence report. Similarly, the court made no mention at all of the defendant's purported prior assault of an elderly person. Thus, despite the state's failure to correct all of the errors in the presentence report relating to the defendant's criminal history, the record demonstrates that the court did not substantially rely on these inaccuracies in imposing its sentence.[4] See *State* v. *Petitpas*, supra, 183 Conn. App. 449–50.

[3] The defendant's three felony convictions were (1) possession of narcotics in violation of General Statutes (Rev. to 1989) § 21-279 (a), (2) conspiracy to possess cocaine in violation of General Statutes § 53a-48 (a) and General Statutes (Rev. to 1989) § 21-279 (a), and (3) murder in violation of § 53a-54a (a). Despite the fact that the court referred to the second conviction as conspiracy to sell cocaine, the actual conviction the defendant received nonetheless was a felony conviction.

[4] We also disagree with the defendant's assertion that because his previous sentence for assault in the third degree allegedly was illegal, the sentencing court was not permitted to rely on the fact that he was on probation when he committed the underlying murder. Regardless of the merits of the defendant's argument that his sentence for his conviction of assault in the third degree was illegal, the defendant does not dispute that he was on probation when he committed this murder; accordingly, this fact was not materially inaccurate when it was relied on by the sentencing court.

Further, we agree with the trial court that the sentencing court's summarization of the evidence regarding the manner in which the defendant committed the underlying offense was not materially inaccurate, nor was the disputed fact—namely, whether the victim sustained a "graze" wound—substantially relied on by the court. At trial, several witnesses testified that the defendant made multiple stabbing motions toward the victim prior to inflicting the lethal blow.[5] Although the defendant is correct that the evidence indicated that the victim sustained a single fatal injury, the court's statement that the victim was "grazed" prior to being stabbed to death was not without a modicum of support in the record. See *State* v. *Francis*, supra, 228 Conn. 121. Moreover,

[5] "On August 12, 1990, the defendant and the victim met again. At approximately 4 p.m. on that day, two witnesses, Jennifer Green and Sandra Brown, were on the porch of Brown's residence at 165 Homestead Avenue in Hartford. At that time, they saw a young man, later determined to be the victim, walking toward them on Homestead Avenue, holding an 'ice pop' in his hand. At the same time, two additional witnesses, Victor Lowe and Fred Faucette, were standing on the sidewalk of Homestead Avenue. They also noticed the victim.

"All four witnesses then observed a red Mitsubishi automobile drive up Homestead Avenue, pass the victim, stop suddenly, back up and halt near him. The defendant then emerged from the driver's side of the car and approached the victim. An argument ensuedbetween the two men. This confrontation occurred twenty to forty feet from Lowe and Faucette.

"While the defendant and victim exchanged words, the four witnesses observed, from different vantage points, that the defendant held his right hand behind his back. From where they were located, both Green and Brown observed that the defendant's hand, which was behind his back, was on the handle of a knife. Upon seeing the knife, Brown commented to Green, 'He wouldn't dare do that.'

"After further words had been exchanged, the victim agreed to fight the defendant. The victim did not, however, make any physical movement toward the defendant. The defendant then pulled the knife from behind his back and began to make stabbing motions at the victim. One of these stabbing motions cut the victim's ice pop in half as the victim was retreating.

"The victim ran into a nearby yard where he was pursued by the defendant. There, the defendant stabbed the victim in the upper left portion of his chest, causing his death. The defendant then reentered the car and left the scene. He was arrested in Miami, Florida, on August 17, 1990." *State* v. *Francis*, supra, 228 Conn. 120–21.

the defendant's sentence clearly was predicated on his killing the victim by stabbing him in the chest, not on the disputed graze wound.

Neither the purported inaccuracies contained in the defendant's presentence report nor the court's account of the manner in which the underlying murder occurred support the conclusion that the defendant's fifty year sentence was imposed in an illegal manner. Consequently, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

SHARAY FREEMAN *v.* A BETTER WAY WHOLESALE AUTOS, INC.
(AC 41675)

Keller, Bright and Devlin, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) for the defendant's failure to refund a deposit made by the plaintiff in connection with an attempted sale of a used vehicle. After the trial court rendered judgment in favor of the plaintiff, the defendant appealed to this court, which affirmed the trial court's judgment. Subsequently, the plaintiff filed a motion for supplemental attorney's fees and costs, which the trial court granted in part, and the defendant appealed to this court. The defendant claimed that the trial court erred in awarding the plaintiff supplemental attorney's fees and abused its discretion in the amount of attorney's fees it had awarded. *Held* that the trial court properly granted in part the plaintiff's motion for supplemental attorney's fees; that court having fully addressed the arguments raised in this appeal, this court adopted the trial court's concise and well reasoned memorandum of decision as a proper statement of the relevant facts and applicable law on the issues.

Argued May 29—officially released July 2, 2019

Procedural History

Action to recover damages for, inter alia, violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant was defaulted for failure to comply with a court order; thereafter, the court, *Huddleston*, *J.*, granted the defendant's motion to open the default; subsequently, the matter was tried to the court; judgment for the plaintiff, from which the defendant appealed to this court; thereafter, the court, *Huddleston*, *J.*, granted in part the plaintiff's motion for attorney's fees and costs; subsequently, this court dismissed in part and affirmed in part the judgment of the trial court; thereafter, the Supreme Court denied the defendant's petition for certification to appeal; subsequently, the court, *Huddleston*, *J.*, granted in part the plaintiff's motion for supplemental attorney's fees and costs, and the defendant appealed to this court. *Affirmed.*

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

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

Opinion

PER CURIAM. The defendant, A Better Way Wholesale Autos, Inc., appeals from the judgment of the trial court awarding supplemental attorney's fees to the plaintiff, Sharay Freeman. In the underlying action, the plaintiff brought a two count complaint in which she claimed a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and fraudulent misrepresentation related to the defendant's failure to refund the plaintiff's $2500 deposit for an attempted sale of a used vehicle. The trial court found in favor of the plaintiff on both counts, and this court affirmed the judgment on appeal. See *Freeman* v. *A*

Better Way Wholesale Autos, Inc., 174 Conn. App. 649, 651, 166 A.3d 857, cert. denied, 327 Conn. 927, 171 A.3d 60 (2017). On August 17, 2017, the plaintiff filed with the trial court a motion for supplemental attorney's fees. After an evidentiary hearing, the trial court subsequently granted in part the plaintiff's motion for supplemental attorney's fees and awarded her $49,980.

In the present appeal, the defendant claims that the court (1) erred in awarding the plaintiff supplemental attorney's fees, and (2) abused its discretion in awarding attorney's fees in the amount of $49,980. We disagree.

Our examination of the record on appeal and the briefs and arguments of the parties persuades us that the judgment of the trial court should be affirmed. Because the trial court's memorandum of decision fully addresses the arguments raised in the present appeal, we adopt its concise and well reasoned decision as a proper statement of the relevant facts and the applicable law on the issues. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-13-6045900-S (May 3, 2018) (reprinted at 191 Conn. App. 113, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *National Waste Associates, LLC* v. *Travelers Casualty & Surety Co. of America*, 294 Conn. 511, 515, 988 A.2d 186 (2010); *Tuite* v. *Hospital of Central Connecticut*, 141 Conn. App. 573, 575, 61 A.3d 1187 (2013); *Nestico* v. *Weyman*, 140 Conn. App. 499, 500, 59 A.3d 337 (2013);*Green* v. *DeFrank*, 132 Conn. App. 331, 332, 33 A.3d 754 (2011).

The judgment is affirmed.

APPENDIX

SHARAY FREEMAN *v.* A BETTER WAY WHOLESALE AUTOS, INC.*

Superior Court, Judicial District of Hartford
File No. CV-13-6045900-S

Memorandum filed May 3, 2018

Proceedings

Memorandum of decision on plaintiff's motion for supplemental attorney's fees and costs. *Motion granted in part.*

Daniel S. Blinn, for the plaintiff.

Kenneth A. Votre, for the defendant.

Opinion

HUDDLESTON, J. The plaintiff, Sharay Freeman, seeks $65,791.24 in supplemental attorney's fees and costs pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., incurred in defending an appeal by the defendant, A Better Way Wholesale Autos, Inc. The court previously found the defendant liable under CUTPA and common-law fraud for misleading the plaintiff about the refundability of a $2500 deposit on a used car. (# 132.) The plaintiff was awarded $2500 in compensatory damages, $7500 in punitive damages, and, in a subsequent decision, $26,101.50 in attorney's fees. (# 148.) The Appellate Court affirmed the judgment, and the Supreme Court denied the defendant's petition for certification to appeal. See *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 166 A.3d 857, cert. denied, 327 Conn. 927, 171 A.3d 60 (2017).

* Affirmed. *Freeman* v. *A Better Way Wholesale Autos, Inc.*, 191 Conn. App. 110, A.3d (2019).

The defendant objects to the motion for supplemental attorney's fees. (# 153.) The court heard argument on the motion on April 3, 2018, and held an evidentiary hearing on April 13, 2018, at which the plaintiff's appellate attorney testified. For the reasons stated below, the court awards the plaintiff reasonable supplemental attorney's fees of $49,980.

The plaintiff's request for appellate attorney's fees is governed by General Statutes § 42-110g (d), which provides in relevant part: "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ." As courts have often observed, "[t]he public policy underlying CUTPA is to encourage litigants to act as private attorneys general and to engage in bringing actions that have as their basis unfair or deceptive trade practices. . . . In order to encourage attorneys to accept and litigate CUTPA cases, the legislature has provided for the award of attorney's fees and costs." (Citation omitted; internal quotation marks omitted.) *Jacques All Trades Corp.* v. *Brown*, 42 Conn. App. 124, 130–31, 679 A.2d 27 (1996), aff'd, 240 Conn. 654, 692 A.2d 809 (1997).

Although § 42-110g (d) does not expressly state that attorney's fees may be awarded for appellate work, Connecticut's courts have consistently construed both contractual and statutory provisions for attorney's fees to encompass appellate attorney's fees unless the relevant language clearly indicates otherwise. See *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 333–38, 63 A.3d 896 (2013); id., 337 ("[w]e . . . will construe an attorney's fee provision that is silent with respect to appellate attorney's fees as encompassing such fees in the absence of contractual language to the contrary");

Gagne v. *Vaccaro*, 118 Conn. App. 367, 369–70, 984 A.2d 1084 (2009); id., 370–71 ("[a]lthough [General Statutes] § 52-249 . . . does not specifically provide for appellate attorney's fees . . . we construe the provision for attorney's fees in § 52-249 as extending to attorney's fees incurred on appeal as well as at the trial level" [citations omitted; internal quotation marks omitted]); *Crowther* v. *Gerber Garment Technology, Inc.*, 8 Conn. App. 254, 271–72, 513 A.2d 144 (1986) (allowing appellate attorney's fees under General Statutes § 31-72 in civil action to collect wages).

Whether any attorney's fees should be awarded in a CUTPA case is a matter of discretion for the trial judge. *Steiger* v. *J. S. Builders, Inc.*, 39 Conn. App. 32, 36, 663 A.2d 432 (1995). "A court has few duties of a more delicate nature than that of fixing counsel fees." (Internal quotation marks omitted.) *Krack* v. *Action Motors Corp.*, 87 Conn. App. 687, 694, 867 A.2d 86, cert. denied, 273 Conn. 926, 871 A.2d 1031 (2005).

After the trial, this court determined that an award of attorney's fees was warranted in this case. The defendant now argues that it would be unduly punitive to award *any* additional fees for the appeal.

The court disagrees. CUTPA's attorney's fee provision is intended to enable private parties to obtain counsel to enforce the statutory prohibition on unfair trade practices. That purpose could be thwarted if fees are not awarded for the successful defense of a CUTPA judgment on appeal. In consumer cases under CUTPA, there is often an imbalance of resources between the consumer plaintiff and the business defendant. If statutory fees were not available to such a plaintiff for an appeal, the defendant could exhaust the plaintiff's resources and force the plaintiff to abandon or severely compromise a meritorious claim. The court will therefore award reasonable supplemental attorney's fees for the appeal and for this fee proceeding.

The plaintiff was represented at trial by Daniel S. Blinn and on appeal by Blinn and Richard F. Wareing. In an affidavit, Blinn attested that he does not handle appellate work on a regular basis, and his two lawyer office lacks the resources to handle all the appeals arising from judgments obtained against this defendant. Blinn therefore recommended that the plaintiff engage Wareing, an experienced appellate advocate with whom Blinn had previously worked, as cocounsel with primary responsibility for the appeal. Wareing agreed that he would be paid for his services only if the plaintiff prevailed on appeal and that his fees would be limited to the amount, if any, awarded by the court after the appeal.

Both Blinn and Wareing submitted affidavits and billing records in support of the motion for supplemental attorney's fees. At the initial hearing on the motion, the defendant did not object to the court's consideration of Blinn's affidavit and billing record but did object to Wareing's affidavit as hearsay. The court subsequently held a hearing at which Wareing testified and was subjected to cross-examination. His billing record was submitted as an exhibit at the hearing.

Although the defendant does not argue that the plaintiff unreasonably engaged appellate counsel, the defendant does challenge the amount requested. More specifically, it argues that (1) Wareing's requested hourly rate is too high, (2) the amount requested is excessive and unreasonable in light of the actual damages of $10,000, (3) the plaintiff should not receive attorney's fees for her opposition to the petition for certification, and (4) some of the billing entries are questionable. Before deciding these specific claims, the court addresses the standard that applies to awards of attorney's fees under CUTPA.

"[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of

hours reasonably expended on the litigation times a reasonable hourly rate." (Internal quotation marks omitted.) *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 317, 61 A.3d 1164 (2013). "The courts may then adjust this lodestar calculation by other factors [outlined in *Johnson* v. *Georgia Highway Express*, *Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)]." (Internal quotation marks omitted.) *Carrillo* v. *Goldberg*, supra, 317; see *Steiger* v. *J. S. Builders*, *Inc.*, supra, 39 Conn. App. 35–39 (adopting *Johnson* analysis). "The *Johnson* court set forth twelve factors for determining the reasonableness of an attorney's fee award, and they are: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the 'undesirability' of the case; the nature and length of the professional relationship with the client; and awards in similar cases." *Laudano* v. *New Haven*, 58 Conn. App. 819, 823 n.9, 755 A.2d 907 (2000). Although courts often describe the *Johnson-Steiger* factors as the basis for an "adjustment" of the lodestar, as a practical matter, most of these factors "usually are subsumed within the initial calculation of hours reasonably expended, at a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 n.9, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

In applying the *Johnson-Steiger* factors, the court should bear in mind the public policy underlying the statute that provides for the fee award at issue. See *Costanzo* v. *Mulshine*, 94 Conn. App. 655, 664–65, 893 A.2d 905, cert. denied, 279 Conn. 911, 902 A.2d 1070 (2006). A trial court abuses its discretion by "seizing from the full panoply of relevant factors merely one

factor to the exclusion and disregard of the others." *Rodriguez* v. *Ancona*, 88 Conn. App. 193, 203, 868 A.2d 807 (2005).

Turning to the task of determining reasonable supplemental fees in this case, the court considers the evidence of Blinn's affidavit and billing records, and Wareing's testimony and billing records. The court also takes judicial notice of the appellate pleadings.[1] This includes motions, briefs, appendices, and the petition for certification and opposition thereto, which this court has fully reviewed to determine the reasonableness of the time expended in discrete tasks. The court also considers its own knowledge of appellate practice and procedure and fees customarily charged in Connecticut.

The first step in determining reasonable attorney's fees is deciding upon a reasonable hourly rate for the lawyers involved. Blinn requests an hourly rate of $375, the rate the court previously approved for his work. The defendant does not challenge this rate. The court finds that $375 is an appropriate hourly rate for Blinn, an experienced and skillful consumer advocate, for the reasons stated in the court's decision of March 18, 2016.

Wareing also requests an hourly rate of $375. If the only factors to be considered were his skill, experience, and reputation, that rate would be warranted. He has considerable appellate experience and is respected as

[1] At the hearing on April 13, 2018, the court advised the parties that it intended to take judicial notice of the appellate pleadings. The defendant objected on the ground of relevance, asserting that consideration of the appellate briefs would lead to this court's consideration of the merits of the arguments made to the Appellate Court. The court overruled the defendant's objection. In deciding an attorney's fee motion, the court is required to consider the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly, among other factors. The pleadings in the Appellate Court and Supreme Court are directly relevant to those factors.

an appellate lawyer, reflected in the fact that he has served on the faculty of the Connecticut Bar Association's Appellate Advocacy Institute. The hourly rate of $375 is within the range customarily charged by attorneys in Connecticut and is what Wareing charged at a previous firm, which he left in 2013. But Wareing testified that his usual hourly rate now is $225 to $275, depending on the nature of the matter and the relationship with the client. He explained, on cross-examination, that he and his current partners made a business decision to charge fees that were lower than rates they had previously charged at another firm. Their purpose in doing so was to avoid disputes with clients over fees, to avoid having to write off time to satisfy clients, and to avoid having to "chase" clients for fees. He testified that with the lower rates, his firm now requires a substantial retainer, and most clients pay their bills within thirty to sixty days.

From Wareing's testimony, the court infers that although higher hourly rates may be charged in the marketplace, such higher hourly rates also lead to disputes with clients about bills and result in some bills being reduced to maintain client relationships. The court concludes that the fees Wareing currently charges to clients—from $225 to $275 an hour—represent a reasonable range of hourly rates for his services in this case.

The plaintiff argues that Wareing should receive $375 per hour because his fee in this case was both contingent and likely to be delayed. In Wareing's usual practice, at the lower rates he now charges, his fees are generally fixed, not contingent, and he requires both a substantial retainer and prompt payment. In this case, he agreed that he would look solely to an award of statutory attorney's fees. In so doing, he assumed the risk of losing on appeal, the risk of the court denying or reducing his requested fees, and the risk that any

fees awarded might be long delayed. The court agrees that the contingent nature of his fees and the delay in recovering them warrant consideration, but it is not persuaded that those factors justify an hourly rate that is $100 to $150 more than the rate he charges to paying clients. In light of Wareing's testimony and the court's own knowledge of the wide range of reasonable rates and billing arrangements in this marketplace, the court concludes that an hourly rate of $275, which is at the upper end of Wareing's current rates, is a reasonable rate for his work on the appeal in this case.

Both Blinn and Wareing have paralegals who performed some tasks related to the appeal. The plaintiff is requesting the rate of $125 per hour for Blinn's paralegal, Lori Miner, the rate of $100 per hour for Wareing's paralegal, Josephine Salafia, who has twenty years experience as a litigation paralegal, and the rate of $40 per hour for Traci Parent, a legal assistant at Wareing's firm since September, 2014. The court finds these rates to be reasonable based on Blinn's affidavit, Wareing's testimony, and the court's own knowledge of fees customarily charged for paralegals and legal assistants. The defendant has not contested the rates sought for these individuals, but has contended that some of their time was not reasonably billed. The court will address those issues in relation to the various tasks challenged.

The court next examines the time reasonably spent on the appeal. The defendant does not challenge any of the time entries by Blinn. Blinn exercised billing judgment to delete charges for duplicative services, such as his attendance at oral argument. The charges he did request are for tasks that were reasonable. He attended the preargument conference, kept the plaintiff apprised of the status of the appeal, consulted with Wareing briefly as issues arose during the appeal, reviewed Wareing's drafts of motions, the brief, and

objections, mooted Wareing for oral argument, and prepared and presented the pending attorney's fee motion. Based on his fee affidavit and time records, the court concludes that Blinn reasonably spent 24.5 hours on the appeal and the fee motion. In addition, according to Wareing's testimony, both Wareing and Blinn spent five hours preparing for and attending the evidentiary fee hearing on April 13, 2018. The court finds that the lodestar for Blinn's attorney's fees is $11,062.50, based on 29.5 hours at $375 per hour.

The defendant argues that the time spent by Wareing in motion practice, in preparing the brief, and in preparing for argument was excessive. Wareing's billing record indicates that he spent eleven hours on motions and objections related to the defendant's failure to file its brief on time, 7.5 hours reviewing the trial court record, including the transcript and the court's decisions, 86.3 hours in legal research and writing the appellate brief, 22.8 hours preparing for and attending oral argument, 15.7 hours responding to the defendant's petition for certification, and 2.8 hours preparing his fee affidavit. In addition, he spent five hours preparing for and attending the hearing on this fee motion. His total time spent on the appeal and fee motion equaled 151.1 hours.

The time spent on the appellate motion practice requires some context. The defendant's brief was due on April 20, 2016. On that date, the defendant's attorney moved for an extension of seven days, to April 27, 2016, which was granted. That deadline came and went. The plaintiff's attorneys noted that the defendant's brief had not been filed. On July 7, 2016, the plaintiff moved to dismiss the appeal for failure to file a timely brief. In response, the defendant's counsel filed two improper motions to extend time, which were summarily denied by the appellate clerk, and subsequently filed the proper

motion, a motion for leave to file a late brief.[2] The plaintiff's attorneys objected to the motion. The court issued a nisi order, stating that the appeal would be dismissed if the defendant's brief was not filed by August 2, 2016. On August 2, 2016, the defendant filed a brief and appendix that was rejected by the appellate clerk for failure to number the pages of the appendix and failure to include a judgment file. The defendant then filed a motion for extension of time to file a corrected brief. The appellate clerk issued a second nisi order, stating that the appeal would be dismissed unless a complying appellant's brief and appendix were filed by August 17, 2016. The defendant filed a complying brief and appendix on August 16, 2016.

Each of the defendant's failures to comply with court rules and deadlines required the plaintiff's attorneys to consider the defendant's procedural misstep and decide whether and how to respond to it. The plaintiff's judgment was automatically stayed by Practice Book § 61-11 (a), and she could not enforce the judgment until the appeal was concluded. The plaintiff's attorneys reasonably moved to dismiss the appeal when the defendant's brief was more than two months late. Each motion subsequently filed by the defendant in an attempt to cure previous defects required the plaintiff's attorneys to read the motion and consider whether to object. The plaintiff's attorneys reasonably decided to object to the defendant's motion to file a late brief to rebut the defendant's assertion, in that motion, that the lapse was caused by a departing associate who had

[2] Practice Book § 66-1 governs appellate motions for extension of time. Practice Book § 66-1 (c) authorizes the appellate clerk to grant or deny motions for extension of time "promptly upon their filing." Practice Book § 66-1 (e) provides in relevant part that "[n]o motion under this rule shall be granted unless it is filed before the time sought to be extended by such motion has expired." If a deadline has been missed, as was the case here, Practice Book § 60-2 (5) authorizes the court having jurisdiction over the appeal to grant a motion for leave to file a late brief "for good cause shown."

failed to calendar the deadline correctly. As the plaintiff pointed out in the objection, the defendant's lead attorney had himself signed the motion for extension of time that requested the April 27 due date. The plaintiff also argued that the defendant's excuse represented gross negligence, not good cause for relief, because the defendant had offered the same excuse for missed deadlines in at least five other cases in 2016. Although ultimately unsuccessful, these were not frivolous arguments, and they had the effect of moving the appeal forward.

In total, Wareing spent eleven hours drafting the various motions and objections related to the defendant's failure to file a timely brief. For the objection to the motion to file a late brief, Blinn's paralegal, Miner, also spent an hour on a footnote that documented the five other recent cases in which the defendant had attributed a missed deadline to a departing associate's failure to calendar matters properly. The motion to dismiss is only two pages long and is not complicated. Similarly, the objection to the motion to file a late brief is only three pages long, and the footnote described above is a substantial portion of it. The court will reduce Wareing's time on this motion practice from eleven hours to four hours and Miner's time from one hour to a half hour for drafting the footnote.

The time Wareing spent reviewing the trial court record was reasonable, and the defendant does not argue otherwise. The defendant does argue that the time spent drafting the brief was unreasonable, claiming that no one would reasonably spend the time Wareing spent on the brief for a case with damages of only $10,000. The court credits Wareing's testimony to the contrary. He testified that some of his commercial clients are willing to spend substantial sums on appeals, even when the amount of money at issue is small, if the legal principle at issue is important to them. The court further observes that the defendant in this case

was willing to incur its own attorney's fees and to risk that it would be required to pay the plaintiff's attorneys as well, even though the amount at issue when the defendant filed its appeal was only $10,000.[3]

Wareing credibly testified that the time required to research and draft the appellate brief was driven largely by the fact that the defendant raised eight issues on appeal and claimed that there was "no evidence" to support the trial court's findings. Wareing had to analyze each of those eight issues, determine the appropriate standard of appellate review, research the relevant law, review the trial record to marshal the evidence that supported the court's findings, and provide a legal analysis of each issue. As Wareing testified, "the more arguments an appellant makes, the more work the appellee has to do to swat back those arguments."[4]

Moreover, our appellate courts frequently remind appellate litigators that "[w]riting a compelling legal argument is a painstaking, time-consuming task. Good legal analysis is premised on knowing the controlling rules of law. An effective appellate advocate must apply the rules of law to the facts at hand by applying or distinguishing existing legal precedent. . . . To write

[3] The court had not yet heard the attorney's fee motion when the defendant filed its appeal on October 30, 2015.

[4] Both state and federal appellate courts have frequently advised appellants to limit the number of issues raised on appeal to one, two, or three issues. See, e.g., *State* v. *Pelletier*, 209 Conn. 564, 566–67, 552 A.2d 805 (1989) (a "torrent of claimed error . . . serves neither the ends of justice nor the defendant's own purposes as possibly meritorious issues are obscured by the sheer number of claims"); *Mozell* v. *Commissioner of Correction*, 87 Conn. App. 560, 563, 867 A.2d 51 ("[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible" [internal quotation marks omitted]), cert. denied, 273 Conn. 934, 875 A.2d 543 (2005); see also *Jones* v. *Barnes*, 463 U.S. 745, 752, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) ("multiplying assignments of error will dilute and weaken a good case and will not save a bad one" [internal quotation marks omitted]).

a good brief and to comply with the rules of practice, counsel must state the rules of law, [and] provide citations to legal authority that support the claims made . . . .'' (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 729, 138 A.3d 868 (2016); see also *Desmond* v. *Yale-New Haven Hospital, Inc.*, 181 Conn. App. 201, 212–13, 185 A.3d 665 (quoting *Buhl*), cert. denied, 330 Conn. 902, 191 A.3d 1001 (2018). It was not inherently excessive to spend 86.3 hours performing the ''painstaking, time-consuming task'' of writing persuasive arguments for the eight appellate issues raised by the defendant. It averaged only 10.8 hours per issue.

Although the court does not find the time claimed by Wareing to be inherently excessive, there is nevertheless a discrepancy between Wareing's testimony and his time records. Wareing testified that he spent ''just north of'' two hours per page in drafting the brief. Including the counterstatement of the issues and the body of the brief, the brief was just over thirty-four pages. Based on Wareing's testimony, writing the brief would require slightly more than sixty-eight hours, but Wareing's billing records indicate that he actually spent 86.3 hours working on the brief. On cross-examination, he was asked if he would be surprised if his records showed that he spent 100 hours on the brief, and he said that he would be very surprised. The court infers from Wareing's testimony that the time spent on the brief was somewhat greater than he remembered and somewhat greater than he would ordinarily expect to spend. The court further notes that some of his time entries are vague. Taking into account these facts, the court finds that Wareing reasonably spent eighty hours preparing the brief.

Oral argument in the appeal was originally scheduled for March 20, 2017. Between March 10 and March 17, Wareing reasonably spent about ten hours preparing for oral argument, including time spent with Blinn in

mooting.[5] Two unforeseen circumstances then increased the time attributed to oral argument. First, the Appellate Court issued an order directing the parties to be prepared to address whether the court should dismiss the portion of the appeal challenging the award of attorney's fees because the plaintiff had not amended his appeal, which was filed before the attorney's fee decision was issued by this court, to include an appeal of the attorney's fee decision. This was an issue that all counsel in the case had overlooked, and Wareing spent about three hours on March 19 preparing to address it. Then, on March 20, 2017, while the parties were waiting to present their arguments, the Appellate Court's recording system malfunctioned. The attorneys had to wait while attempts were made to get it working, but eventually the argument was rescheduled for March 28, 2017. Wareing spent 2.7 hours on March 27, refreshing his preparation, and 3.6 hours on March 28, reviewing his notes, attending court, and presenting his argument. The defendant has objected to the time spent on March 27 and 28, claiming that Wareing unreasonably spent an additional 6.3 hours preparing for an argument that he had been prepared to give a week earlier. The court disagrees. The time spent on March 27 to refresh his preparation was reasonable, and the time spent on March 28 was primarily spent attending court, waiting for the case to be called, and presenting the argument. In the circumstances of this case, where an additional issue was raised by the court and where the argument had to be rescheduled through no fault of

[5] A "mooting," or "moot court," is a "practice session for an appellate argument in which a lawyer presents the argument to other lawyers, who first act as judges by asking questions and who later provide criticism on the argument." Black's Law Dictionary (8th Ed. 2004) p. 1029. "[A]n appellate advocate who does not participate in a moot court before oral argument is like an actor who skips dress rehearsal or a quarterback who sits out the preseason." (Internal quotation marks omitted.) D. Knibb, Federal Court of Appeals Manual (6th Ed. 2019) § 33:11.

any party, the time spent preparing for oral argument was reasonable.

After the Appellate Court issued its decision, affirming the judgment on the merits and dismissing the appeal as to the attorney's fee issue, the defendant filed a petition for certification to the Supreme Court. Wareing spent 15.7 hours preparing an opposition to the petition. The defendant did not challenge the amount of time spent opposing the petition, but it argued that time spent on the petition could not properly be considered because the Supreme Court had not decided the petition when the plaintiff filed the motion for supplemental fees. That argument is unavailing now because the Supreme Court denied certification while the fee motion was pending. The court finds that the time spent drafting the opposition to the petition was reasonable.

Finally, Wareing spent 2.8 hours preparing his fee affidavit. In addition, he spent five hours on April 13, 2018, preparing for and attending the hearing on the fee motion. The defendant has not challenged that time, and the court finds that it was reasonable.

Adding up all the components of the appellate process, the court finds that Wareing reasonably expended 137.8 hours in defending the judgment on appeal and pursuing this motion. The lodestar for Wareing is calculated to be $37,895.

Paralegals in Blinn's office and in Wareing's office assisted in posttrial work, including the appeal and the fee motion. Blinn's paralegal, Miner, drafted a bill of costs, part of the objection to the motion for leave to file a late brief, and portions of the fee motion. Such tasks are reasonably done by a paralegal. After excluding a half hour for the footnote, the court finds that Miner reasonably spent 4.5 hours on tasks requiring a paralegal's experience and knowledge. Her lodestar figure is $562.50.

Wareing claims $200 in fees for two hours spent by his paralegal, Salafia, who retrieved and analyzed pleadings filed in the Appellate Court and drafted correspondence to the court regarding oral argument dates. The defendant has not challenged any of Salafia's time. The court finds that Salafia's lodestar is $200.

Wareing also claims $260 for 6.5 hours spent by his legal assistant, Traci Parent, in preparing the appellee's appendix. The defendant challenges this time as spent on ministerial tasks. The court disagrees. Practice Book §§ 67-2, 67-4, 67-5 and 67-8 prescribe specific standards for the format and contents of an appendix. Failure to follow the rules can result in rejection of the appendix.[6] Under Practice Book § 67-8 (c), the appellee is required to analyze the appellant's appendix and to provide any required documents that the appellant has omitted from its appendix. The appellee may also include "any other portions of the proceedings below that the appellee deems necessary for the proper presentation of the issues on appeal." Practice Book § 67-8 (c). Wareing testified that the defendant's appendix did not include any of the transcripts and other portions of the record that Wareing deemed necessary to counter the defendant's argument that no evidence supported the trial court's judgment. However, Practice Book § 67-8 (b) (2) cautions that "[t]o reproduce a full transcript or lengthy exhibit when an excerpt would suffice is a misuse of an appendix." The preparation of an appendix thus requires the exercise of judgment to include enough, but not too much, of the trial court record. It is not unreasonable to assign the task of preparing the appendix to a legal assistant working under the supervision and review of the appellate attorney.[7] The court finds that Parent's lodestar is $260.

[6] In fact, the defendant's brief and appendix were rejected because the defendant's appendix was not properly paginated and did not include the judgment file. See Practice Book §§ 67-2 (c) and 67-8 (b) (1).

[7] Wareing reasonably spent 1.6 hours reviewing the appendix. This was included in the court's analysis of the time spent preparing the brief.

Combining the lodestars for all the timekeepers, the total lodestar for the appeal and this fee motion is $49,980. The court now considers the *Johnson-Steiger* factors to determine whether that lodestar should be adjusted.

The court has already addressed, in its analysis of the reasonable lodestar, several of the *Johnson-Steiger* factors, including the time and labor required, the customary fee for similar work in the community, whether the fee is fixed or contingent, and the experience, reputation, and ability of the attorneys. No adjustment is required because these factors are subsumed within the lodestar. See *Hensley* v. *Eckerhart*, supra, 461 U.S. 434 n.9.

As to the novelty or difficulty of the questions, Wareing testified that the appeal was "medium" in complexity. The defendant argues that the court previously found that the issues presented at trial were not novel or difficult, arguing that the appeal is no more complicated than the trial. Wareing testified, however, that the appeal presented challenges both because of the number of issues presented and because of inconsistencies in the defendant's appellate arguments that he had to address. No lodestar adjustment is needed for an appeal of average complexity.

As to the skill required to perform the legal service properly, the court finds that appellate practice requires knowledge of and attention to appellate rules and procedure in addition to knowledge of the substantive areas of law involved. Blinn appropriately sought to cocounsel with Wareing because Wareing had more extensive appellate experience than Blinn and because appeals are time-consuming endeavors. No adjustment is needed for this factor because it, too, is subsumed within the lodestar analysis.

There was little evidence on the preclusion of other employment, other than the obvious fact that there are only so many hours in a day and time spent on one client's case is time not spent on other clients' cases. Nor was there evidence of any time limitations imposed by the client or the circumstances. As to the nature and length of the professional relationship with the client, there was no evidence that Blinn had represented the plaintiff in other cases. Wareing testified that he had never met the plaintiff, but communicated with her through Blinn. No adjustment is warranted on the basis of these factors.

The defendant focuses on "the amount involved and the results obtained," arguing that the fees requested are so disproportionate to the damages awarded that a substantial reduction is required. The defendant has made this argument unsuccessfully earlier in this case and in other cases. See *Franco* v. *A Better Way Wholesale Autos*, *Inc.*, Civil Action No. 3:14-cv-00422 (VLB), 2016 WL 3064051, *3 (D. Conn. May 31, 2016) ("Defendants also argue that the attorney's fees are disproportionate to the damages awarded. This objection lacks an arguable basis in law"), aff'd, 690 Fed. Appx. 741 (2d Cir. 2017). Other than a perfunctory citation to *Steiger*, the defendant fails to cite any authority in support of its claim that the fee award should be limited in proportion to the award of damages. The failure to brief an argument adequately is, in itself, a reason to reject the argument. See *State* v. *Buhl*, supra, 321 Conn. 724–29 (discussing qualities of adequate briefing); see also *A Better Way Wholesale Autos*, *Inc.* v. *Rodriguez*, 176 Conn. App. 392, 407, 169 A.3d 292 (2017) (declining to review attorney's fee issue because of inadequate briefing), cert. denied, 327 Conn. 992, 175 A.3d 1248 (2018).

The defendant ignores the extensive body of law governing attorney's fee awards. First, it fails to address

the text of CUTPA, which expressly provides that a fee award is to be "based on the work reasonably performed by an attorney and not on the amount of recovery." General Statutes § 42-110g (d). It also fails to address the many cases in which our appellate courts have rejected a proportionality argument. For instance, in *Simms* v. *Chaisson*, 277 Conn. 319, 890 A.2d 548 (2006), the Supreme Court rejected a proportionality argument and affirmed an attorney's fee award of $65,286.80 pursuant to General Statutes § 52-571c[8] in a case where two plaintiffs had been awarded only nominal damages of $10 each under that statute. In that case, which involved racial intimidation by the defendants, the Supreme Court determined that "there is a strong public policy reason for giving courts discretion to award substantial attorney's fees when the plaintiff's claim for damages and recovery is not large. Courts have recognized that the cumulative effect of small violations of one's civil rights may not be minimal to society as a whole." Id., 334. This principle has been applied to support substantial awards of attorney's fees under other statutes to vindicate the purpose underlying the particular statute. For instance, in *Costanzo* v. *Mulshine*, supra, 94 Conn. App. 663–64, the Appellate Court held that the trial court had abused its discretion in awarding only $1500 in attorney's fees pursuant to General Statutes § 52-251a without determining whether the requested fees of $15,000 were reasonable. The trial court had reduced the requested fees in part because the damages awarded were only $1650. The Appellate Court concluded that the court had erred in its "consideration of the disputed amount as a gauge for the proper amount of attorney's fees"; id., 663; and that it had failed to consider the policy underlying § 52-251a, which

[8] Section 52-571c (a) authorizes a civil action for damages resulting from intimidation based on bigotry or bias. Subsection (b) of that section requires the court to award treble damages and permits it to award, in its discretion, a reasonable attorney's fee.

allows a prevailing plaintiff to recover attorney's fees if a defendant transfers a matter from the small claims division to the regular civil docket in Superior Court. The Appellate Court commented that the attorney's fee provision served to deter defendants from "turning a relatively clear-cut case into a pitched legal battle"; (internal quotation marks omitted) id., 665; *and* to "reward those attorneys who represent small claims plaintiffs even though the monetary value of the representation may be relatively insignificant for the time and effort required." Id., 665 n.7. In *Krack* v. *Action Motors Corp.*, supra, 87 Conn. App. 689, the Appellate Court affirmed an award of attorney's fees under § 52-251a that was ten times the amount originally in dispute in the small claims division. The rationale applies equally to CUTPA cases. The availability of statutory attorney's fees under CUTPA serves both to deter unfair trade practices and to compensate attorneys for taking on small cases to enforce the public policy of protecting consumers from unfair and deceptive conduct.

Moreover, the court considers the "amount at issue" in conjunction with the "results obtained." The plaintiff prevailed on all issues on appeal and successfully opposed a further appeal to the Supreme Court. The court also considers the economic "undesirability" of a case involving such a small monetary claim. Few lawyers are willing to take on such cases because payment for them is uncertain and is likely to be long delayed. The court finds that the success achieved and the economic undesirability of the case counterbalance the factor of the "amount involved." No adjustment to the lodestar is warranted on these factors.

The parties did not provide evidence about awards in similar cases. The court observes that in a somewhat similar case, *Creative Masonry & Chimney, LLC* v.

Johnson, Superior Court, judicial district of New Britain, Docket No. CV-09-5011943, 2013 WL 6131685 (October 23, 2013) (*Swienton*, *J.*), the court awarded appellate attorney's fees of $46,888,48. In the proceedings leading up to that decision, a jury had awarded the plaintiff $7700 in compensatory damages under CUTPA, and the trial court had awarded $23,100 in punitive damages and $56,380 in trial attorney's fees, as well as costs and prejudgment interest. *Creative Masonry & Chimney, LLC* v. *Johnson*, 142 Conn. App. 135, 138, 64 A.3d 359, cert. denied, 309 Conn. 903, 68 A.3d 658 (2013). As in this case, the defendant in that case appealed; the Appellate Court affirmed; and the Supreme Court denied certification. To the extent that awards in similar cases are a factor, no adjustment to the lodestar is warranted.

Finally, the court addresses the plaintiff's request for costs. The plaintiff seeks $393.74 for Blinn, consisting of travel expenses for the preargument conference and transcript costs, and $337.50 for Wareing for copying the appeal brief and appendix. Costs on appeal are governed by General Statutes § 52-257 (d) and Practice Book § 71-2, which requires a bill of costs to be filed with the appellate clerk. The Appellate Court has held that nontaxable costs are not available under CUTPA. See *Taylor* v. *King*, 121 Conn. App. 105, 133–35, 994 A.2d 330 (2010) (no statutory authority for expert witness fees under CUTPA other than fees taxable under General Statutes § 52-260); *Metcoff* v. *NCT Group, Inc.*, 52 Conn. Supp. 363, 378–79, 50 A.3d 1004 (2011) (nontaxable costs not available under CUTPA), aff'd, 137 Conn. App. 578, 49 A.3d 282, cert. denied, 307 Conn. 924, 55 A.3d 566 (2012). Several trial court decisions have reasonably questioned whether CUTPA should be construed, as a remedial statute, to include nontaxable costs. See *Metcoff* v. *NCT Group, Inc.*, supra, 379 (collecting cases). This court is nevertheless bound by the decisions of the Appellate Court.

In summary, the plaintiff is awarded attorney's fees of $49,980 for the time reasonably expended by her attorneys on appeal and on the fee motion. The request for expenses is denied.

IN RE LEO L. ET AL.*
(AC 42478)

Elgo, Moll and Norcott, Js.

Syllabus

The intervenor, the maternal grandfather of the minor children, L and D, appealed to this court from the judgment of the trial court denying his motion to transfer to himself and his fiancée the guardianship of the children, who had been placed with nonrelative foster parents. The trial court also had terminated the parental rights of the children's parents. The intervenor claimed that the trial court abused its discretion and erroneously determined that the transfer of guardianship would not be in the children's best interests. *Held* that the trial court did not abuse its discretion in denying the intervenor's motion to transfer guardianship: that court, which made findings that were not challenged by the intervenor, that the children referred to their foster parents as "mom" and "dad," were succeeding in school, and were thriving with their foster family in a stable environment for the first time in their young lives, did not err in determining that the transfer of guardianship of the children to the intervenor would not be in the children's best interests, and although the trial court acknowledged the existence of evidence that weighed in favor of the intervenor's motion, it had the authority to weigh the evidence elicited in the intervenor's favor and, on the basis of all of the evidence before it, determined that transferring guardianship was not in the children's best interests, and it was not within the province of this court to second-guess that reasoned determination; moreover, the intervenor's claim that the court failed to acknowledge certain evidence of the foster father's alleged violence and abuse toward the children and the foster parents' move to Massachusetts with the children was unavailing, as the trial court explicitly stated that its decision to

* 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.

deny the intervenor's motion was made in light of all the facts before it, and that statement was entitled to deference.

Argued May 13—officially released June 26, 2019**

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 Middlesex, Child Protection Session, where the court, *Woods*, *J.*, granted the maternal grandfather's motion to intervene; thereafter, the matter was tried to the court; judgments terminating the respondents' parental rights and denying the intervenor's motion to transfer guardianship, from which the intervenor appealed to this court. *Affirmed*.

Christopher DeMatteo, for the appellant (intervenor).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

MOLL, J. The intervening grandfather, Eugene L. (intervenor), appeals from the judgment of the trial court denying his motion to transfer the guardianship of his two minor grandchildren, Leo L. and Dakota F. H., to himself and his fiancée, Crystal H. On appeal, the intervenor contends that the court erroneously determined that the transfer of guardianship would not be in the children's best interests and, thus, abused its discretion in denying his motion. We disagree and, accordingly, affirm the judgment of the trial court.

** June 26, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

The following procedural history and facts, as set forth in the trial court's memorandum of decision, are relevant to our disposition of the intervenor's claim. Leo L. and Dakota F. H. are the children of Monique L., and the intervenor is their maternal grandfather. On August 4, 2016, the children were committed to the care and custody of the Department of Children and Families (department) upon being adjudicated neglected. Shortly thereafter, on August 10, 2016, they were placed with nonrelative foster parents in whose care they have remained.

In September, 2017, the department changed its plan for the children from reunification with their mother to the termination of parental rights and eventual adoption. On September 27, 2017, after the intervenor had learned of the department's intentions, he successfully moved to intervene in the case. On December 21, 2017, Monique L. consented to the termination of her parental rights with respect to the children.[1] On January 8, 2018, pursuant to Practice Book § 35a-12A,[2] the intervenor

[1] On February 23, 2018, Leo L.'s father also consented to the termination of his parental rights by telephone. On July 19, 2018, the putative father of Dakota F. H. was defaulted for failure to appear.

[2] Practice Book § 35a-12A provides: "(a) Motions to transfer guardianship are dispositional in nature, based on the prior adjudication.

"(b) In cases in which a motion for transfer of guardianship seeks to vest guardianship of a child or youth in any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. In such cases, there shall be a rebuttable presumption that the award of legal guardianship to that relative shall be in the best interests of the child or youth and that such relative is a suitable and worthy person to assume legal guardianship. The presumption may be rebutted by a preponderance of the evidence that an award of legal guardianship to such relative would not be in the child's or youth's best interests and such relative is not a suitable and worthy person.

"(c) In cases in which a motion for transfer of guardianship, if granted, would require the removal of a child or youth from any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the

moved to transfer guardianship of the children to himself and Crystal H. Following a four day trial during the period of February to June, 2018, the trial court issued a memorandum of decision denying the motion on the basis that, while the intervenor and his fiancée might be suitable and worthy guardians, the requested transfer of guardianship would not be in the children's best interests.[3]

In support of its ruling, the court made the following relevant factual findings. The children had transitioned well into their foster home. The current foster parents are seeking to adopt the children. The children refer to their foster parents as "mom" and "dad" and have maintained a close relationship with them. Although Leo L. initially expressed hesitation about being adopted, that reluctance was no longer present. Indeed, both children indicated a desire to be adopted by, or otherwise to remain with, their foster parents. The court also found that Leo L. was enjoying school and was "meeting grade level expectations" and that Dakota F. H. had "greatly improved her academic skills" while in the care of her foster parents. When concerns arose regarding the ability of Dakota F. H. to self-regulate, she engaged in therapy that improved her interactions with others.

time of the motion, the moving party has the initial burden of proof that an award of legal guardianship to, or an adoption by, such relative would not be in the child's or youth's best interest and that such relative is not a suitable and worthy person. If this burden is met, the moving party then has the burden of proof that the movant's proposed guardian is suitable and worthy and that transfer of guardianship to that proposed guardian is in the best interests of the child.

"(d) In all other cases, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child."

[3] The court's memorandum of decision on the intervenor's motion to transfer guardianship was issued simultaneously with a memorandum of decision on the department's petitions for termination of parental rights. The latter decision is not at issue in this appeal.

Additionally, the court found that the children had "grown, matured, and adjusted to their current living placement" and that they had lived with their foster parents for more than two years. They also had bonded with their foster sibling. Against these findings, the court emphasized the stability that the foster family had provided the children: "Although other living arrangements might also provide the children with love, affection, safety, and guidance, the court notes that the children's preadoptive placement provides all of these things and that disrupting their current placement would introduce great instability into their lives." Furthermore, the court noted that the intervenor had declined three prior opportunities to obtain guardianship of the children.[4] This appeal followed. Additional facts will be set forth as necessary.

On appeal, the intervenor generally does not challenge the factual findings underpinning the court's determination that a transfer of guardianship would not be in the children's best interests.[5] Rather, he maintains

[4] The court found that, prior to the birth of Dakota F. H., Monique L. took Leo L. to South Carolina where he was retrieved by the intervenor because of Monique L.'s physical neglect of Leo L. Monique L. eventually returned to Connecticut and regained care of Leo L. In February, 2016, the children moved in with the intervenor and Crystal H. but were removed after a few months as a result of Crystal H.'s inability to manage the children alone.

[5] The intervenor claims, however, that the court erred in finding that Leo L. wanted to be adopted by his foster parents. Specifically, the intervenor asserts that, although Leo L. stated that he wanted to be adopted by his foster parents, he also stated that he was considering living with the intervenor and Crystal H., such that he could not choose between them. As the department points out, Leo L.'s therapist testified at trial that, although Leo L. made these claims, it was her opinion that he did so because he thought that living with the intervenor would be the only way to maintain contact with him.

A trial court's factual findings will not be set aside unless they are clearly erroneous. *Kirwan* v. *Kirwan*, 185 Conn. App. 713, 726, 197 A.3d 1000 (2018). "A finding of fact is clearly erroneous when there is *no evidence* in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis in original; internal quotation marks omitted.) Id. Because there is evidence in the

that the court failed to consider certain evidence adduced at trial that undermined its determination that placement with the intervenor and Crystal H. would not be in the children's best interests. Specifically, the intervenor points to testimony from both Crystal H. and a department social worker regarding the foster father's alleged anger and use of violence toward the children. The intervenor also relies on evidence that the foster parents moved the children to Massachusetts during the trial, which he claims was "surprising and deceitful" and not in the children's best interests, particularly in light of a department policy that proscribes the removal of foster children from Connecticut without prior department approval. The intervenor submits that this evidence requires the conclusion that the court abused its discretion in denying his motion. We are not persuaded.

We begin our analysis with the standard of review and applicable legal principles. The adjudication of a motion to transfer guardianship pursuant to General Statutes § 46b-129 (j) (2)[6] requires a two step analysis.

record to support the trial court's factual finding, we do not disturb it on appeal. See *In re Janazia S.*, 112 Conn. App. 69, 92, 961 A.2d 1036 (2009).

[6] General Statutes § 46b-129 (j) (2) provides: "Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may (A) commit such child or youth to the Commissioner of Children and Families, and such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court; (B) vest such child's or youth's legal guardianship in any private or public agency that is permitted by law to care for neglected, uncared for or abused children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage; (C) vest such child's or youth's permanent legal guardianship in any person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage in accordance with the requirements set forth in subdivision (5) of this subsection; or (D) place the child or youth in the custody of the parent or guardian with protective supervision by the Commissioner of Children and Families subject to conditions established by the court."

"[T]he court must first determine whether it would be in the best interest[s] of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . [Second,] [t]he court must then find that the third party is a suitable and worthy guardian. . . . This principle is echoed in Practice Book § 35a-12A (d), which provides that the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child." (Citation omitted; internal quotation marks omitted.) *In re Mindy F.*, 153 Conn. App. 786, 802, 105 A.3d 351 (2014), cert. denied, 315 Conn. 913, 106 A.3d 307 (2015).

"To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment. . . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial

court] when they are based on reliable evidence." (Internal quotation marks omitted.) *In re Anthony A.*, 112 Conn. App. 643, 653–54, 963 A.2d 1057 (2009).

We have reviewed the evidence presented to the trial court that relates to the intervenor's specific claims on appeal. By way of summary, the parties submitted conflicting evidence regarding whether the foster father had exhibited anger and violence toward the children. The intervenor presented evidence that the foster father yelled and swore at the children in March, 2018. He further proffered testimony from Crystal H. that she overheard Leo L. describe physical abuse by his foster father in April and June, 2018. The department offered evidence of its investigation with respect to these allegations. This evidence included testimony that Leo L. had admitted to manufacturing the allegation of physical abuse by his foster father and that, following an inquiry into the claim, the department ultimately found it to be unsubstantiated.[7] Furthermore, a department social worker testified that the children appeared comfortable around, played with, and did not fear their foster father.

With respect to the foster parents' move from Connecticut to Massachusetts, the record reveals that the foster parents relocated with the children in May, 2018, without the department's knowledge and in violation of a department policy that requires foster parents to obtain department permission prior to moving foster children out of state. The record also shows, however, that, although the foster parents did not inform the department of the move at the time it occurred, the

[7] Testimony from trial also revealed complaints from Leo L. and Dakota F. H. that their foster father had struck them on the buttocks with a wooden spoon in early June, 2018. The foster father denied the claim and stated that he would hit a wooden spoon against his own hand in order to threaten discipline. A department social worker testified that when she observed the children with their foster father after these allegations, the children were affectionate and loving with him.

department knew in advance that it was the foster parents' intention to move from Connecticut. For their contravention of department policy, the department issued the foster parents a regulatory violation.

This court does not make credibility determinations, and it is the trial court's role to weigh the evidence presented and determine relative credibility when it sits as a fact finder. See *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 495, 144 A.3d 447 (2016). Here, the trial court had the authority to weigh evidence elicited in the intervenor's favor. See *In re Bianca K.*, 188 Conn. App. 259, 270, 203 A.3d 1280 (2019) ("[I]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." [Internal quotation marks omitted.]). In addition, we have held that "a trial court may rely on the relationship between a child and the child's foster parents to determine whether a different placement would be in the child's best interest." *In re Athena C.*, 181 Conn. App. 803, 821, 186 A.3d 1198, cert. denied, 329 Conn. 911, 186 A.3d 14 (2018). The court made findings, unchallenged by the intervenor, that the children referred to their foster parents as "mom" and "dad," were succeeding in school, and were thriving with their foster family in a stable environment for the first time in their young lives. Although we acknowledge, as the trial court did, the existence of evidence that weighed in favor of the intervenor's motion, the court, on the basis of all of the evidence before it, decided that transferring guardianship was not in the children's best interests. It is not our province to second-guess that reasoned determination. See id., 820.

Finally, the intervenor contends that because the court failed to acknowledge the evidence of the foster

father's alleged violence and abuse toward the children and the foster parents' move to Massachusetts with the children in its memorandum of decision, it failed to consider that evidence in conducting the "best interests" analysis. We do not agree. The court explicitly stated that its decision to deny the intervenor's motion was made "[i]n light of all the facts before it . . . ." That statement is entitled to deference. See id. ("[T]he [trial] court considered all the evidence before it to decide whether immediately transferring guardianship to the grandmother would be in the best interest of the child. We will not, on appeal, second-guess the court's determination that it was not.").

In sum, we conclude that the court did not err in determining that the transfer of guardianship of Leo L. and Dakota F. H. to the intervenor and Crystal H. would not be in the children's best interests. Accordingly, the court did not abuse its discretion in denying the intervenor's motion to transfer guardianship.

The judgment is affirmed.

In this opinion the other judges concurred.