ROBERT CLASBY ET AL. *v.* EDWARD ZIMMERMAN ET AL.

(AC 41463)

Lavine, Prescott and Elgo, Js.

Syllabus

The defendant general contractor, B Co., appealed to this court from the judgment of the trial court denying its application to confirm an arbitration award made in connection with a prior action the plaintiff homeowners had brought against B Co. and its owners, the defendants E and L. The plaintiffs had hired B Co. to raise and remodel their home, and, after becoming dissatisfied with B Co.'s work, they commenced the underlying action seeking damages for, inter alia, breach of contract. Prior to trial, the parties, in an effort to settle their issues and allow B Co. to complete the project, signed a stipulation that included an agreement to resolve their disputes through arbitration, and the plaintiffs

thereafter withdrew their action. The arbitration agreement provided, inter alia, that the parties would submit their issues regarding the renovations to an arbitration panel, which was given broad oversight authority to determine what work remained to be done on those issues and the price to be paid for that work, and that the plaintiffs agreed to pay the amount determined by the panel to be due for the completion of the project. In February, 2017, the panel issued an award, which expressly stated that it was final as to those costs that had been proven but that it was interim as to those costs yet to be proven to complete the project. The award further specified that the cost to complete certain cabinetry work was $76,500, of which $24,643.50 had been paid to date by the plaintiffs, and noted the remaining balance due for the cabinetry. Neither party filed a motion to vacate, modify or correct the February, 2017 award. Thereafter, in light of an ongoing dispute between the parties concerning B Co.'s claim that, pursuant to the February, 2017 award, it was entitled to be paid the entire $76,500 for the cabinetry work, the panel issued a second award in August, 2017. In the August, 2017 award, the panel found that the parties had agreed to a design change that had reduced the cost of the cabinetry by approximately $20,000 and clarified that, contrary to B Co.'s claim, because the cabinetry work had not been completed when the panel issued the February, 2017 award, the $76,500 cost it attributed to the cabinetry had not been a final determination, as the actual cost to complete the cabinetry had been unknown and unproven at the time. Neither party filed a motion to vacate, modify or correct the August, 2017 award. Subsequently, B Co. filed an application to confirm the February, 2017 award. B Co. also sought an order vacating the August, 2017 award, and an order that the plaintiffs pay B Co. the entire $76,500 cost of the cabinetry work as set forth in the February, 2017 award, rather than the reduced amount reflecting the actual cost of the cabinetry work as set forth in the August, 2017 award. The trial court denied B Co.'s application to confirm the award, and B Co. filed an amended appeal with this court. *Held*:

1. The trial court improperly denied B Co.'s application to confirm the February, 2017 award; where, as here, B Co. filed a timely application to confirm the February, 2017 award within one year after it was rendered, and the parties failed to timely file any motion to vacate, modify or correct that award as required by the thirty day statutory (§ 52-420) limitation period, the court was required, pursuant to statute (§ 52-417), to confirm the award unless it was vacated, modified or corrected.
2. The trial court correctly denied B Co.'s request that it vacate the August, 2017 award and hold the plaintiffs responsible for the cost of the cabinetry work as set forth in the February, 2017 award: because B Co. failed to timely file an application to vacate, modify or correct the August, 2017 award, which reduced the cost of the cabinetry work by more than $20,000 and clarified that the $76,500 for the cabinetry work in the February, 2017 award had been an interim placeholder pending the determination of the actual cost, B Co. thereby consented to its

terms, the trial court lacked any authority to invalidate the award, which was binding on the parties and not subject to judicial scrutiny, and the court was required to defer to the arbitration panel's clarification; moreover, the February, 2017 award expressly provided, with respect to the cost of the uncompleted cabinetry work, that it was an interim determination on the basis of the evidence available to that date, such that it was reasonable to conclude that the $76,500 cost was not intended to reflect a final and binding determination, and the parties were on notice that the cost was subject to modification by the arbitration panel, which had been granted broad authority by the parties in their submission.

Argued February 4—officially released July 9, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim; thereafter, the plaintiffs withdrew the action in accordance with the parties' stipulation to enter into binding arbitration and the defendants withdrew their counterclaim; subsequently, the arbitrators issued certain awards and entered certain orders; thereafter, the court, *Genuario*, *J.*, denied the application to confirm the arbitration award filed by the defendant Bradford Estates, LLC, and rendered judgment thereon, from which the defendant Bradford Estates, LLC, appealed to this court; subsequently, the court denied the motion for reconsideration filed by the defendant Bradford Estates, LLC, and the defendant Bradford Estates, LLC, filed an amended appeal with this court. *Reversed in part*; *judgment directed.*

Lawrence F. Reilly, with whom was *James A. Alissi*, for the appellant (defendant Bradford Estates, LLC).

Thomas B. Noonan, for the appellees (plaintiffs).

Opinion

PRESCOTT, J. The defendant, Bradford Estates, LLC,[1] is a general contracting business hired by the plaintiffs, Robert Clasby and Krista Clasby, to raise and remodel their shoreline home, which was extensively damaged by Hurricane Sandy. The parties agreed to arbitrate disputes that arose during the construction project, and the defendant now appeals from the judgment of the trial court denying its application to confirm a February 4, 2017 arbitration award.[2] The defendant contends that the February 4, 2017 award conclusively established that the defendant was entitled to collect from the plaintiffs a balance of $51,856.65 in materials and labor for certain cabinetry work.

The defendant's claim on appeal is essentially twofold. First, he claims that, because no timely application to vacate, modify or correct the February 4, 2017 award was ever filed, the court was obligated to grant the defendant's application to confirm the award. Second, the defendant claims that, by denying its application to confirm the February 4, 2017 award, the court effectively and improperly gave legal effect to a subsequent award issued by the arbitration panel on August 23, 2017, in which the arbitration panel clarified that the February 4, 2017 award was not a final determination with respect to the cost of the cabinetry work and reduced the amount that the defendant was entitled to collect for the cabinetry work by more than $20,000.

[1] Edward Zimmerman and Laurel H. Zimmerman own and operate Bradford Estates, LLC. They were named as additional defendants in the underlying action, but the appeal was filed only on behalf of Bradford Estates, LLC, and the Zimmermans have not personally participated in the appeal. Accordingly, we refer to Bradford Estates, LLC, as the defendant throughout this opinion.

[2] The defendant amended the appeal to challenge the court's denial of a motion for reconsideration. Because we conclude that the trial court should have granted the application to confirm, we do not address whether it abused its discretion in denying the motion for reconsideration.

We agree with the defendant that the trial court "had no choice" but to grant the defendant's timely application to confirm the award because neither party filed a timely application to vacate, modify or correct the February 4, 2017 arbitration award. See *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 472, 139 A.3d 774, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). Nevertheless, we do not agree with the remaining aspect of the defendant's claim that confirmation of the February 4, 2017 award necessarily invalidates or renders legally inoperative the arbitration panel's August 23, 2017 award, particularly with respect to its modification of the balance owed to the defendant for the cabinetry work. In other words, we conclude that the trial court properly denied the defendant's request for an order directing the plaintiffs to pay the defendant an additional $21,463 for cabinetry work.[3] For the reasons that follow, we affirm in part and reverse in part the judgment of the trial court, and remand the matter with direction to grant the application to confirm the February 4, 2017 award, but to deny the remainder of the relief requested in the application.

The record reveals the following facts, as found by the arbitration panel or as undisputed in the record.[4]

[3] In its principal appellate brief, the defendant asks this court for the following relief on appeal: to "reverse the decision of the trial court and direct that judgment enter confirming the February Arbitration Award's award of $51,856.65 for 'Cabinetry—labor and materials,' and order the plaintiffs' counsel to pay $21,463 to the defendant."

[4] The factual record before us includes the pleadings filed with the trial court and the transcript of the hearing on the defendant's application to confirm the arbitration award. No evidence was offered at that hearing. The defendant attached to its application redacted copies of the parties' stipulation and the February 4, 2017 arbitration award, and the plaintiffs attached unredacted copies of the same to their responsive pleading. The plaintiffs also attached copies of Schedule A, which is referenced in the stipulation, and the arbitration panel's August 23, 2017 award. Although the defendant moved to strike the unredacted versions of the stipulation and awards from the record for violating the confidentiality provisions of the parties' arbitration agreement, there is no indication in the record that the trial court acted on the motion to strike. In any event, the defendant does

The plaintiffs hired the defendant to renovate and remodel their shoreline home in Darien, which had suffered significant damage from Hurricane Sandy. The project included raising the home above the existing foundation and redesigning and strengthening the foundation to comply with new regulations. The relationship between the parties, however, soon deteriorated.[5] The plaintiffs became dissatisfied with many aspects of the project, including the cost, quality, and progress of the renovations. The defendant eventually withdrew from the project after it was halfway completed.

The plaintiffs commenced a civil action against the defendant in January, 2014. In their operative complaint, the plaintiffs alleged causes of action sounding in breach of contract, a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., fraud, conversion, breach of the covenant of good faith and fair dealing, and negligence. The plaintiffs also sought to pierce the corporate veil between the defendant and the Zimmermans. The defendants filed an answer, special defenses, and a counterclaim alleging defamation per se.

After several years of litigation, on April 29, 2016, the parties signed a stipulation that included an agreement to resolve their disputes through private arbitration in

not argue on appeal that the unredacted stipulation and awards are not part of the record or that this court should not rely on them in resolving this appeal.

[5] The arbitration panel made the following findings in its February 4, 2017 award regarding the root cause of the breakdown in the parties' relationship. "The arrangement that the [plaintiffs] say they relied on, that is a contract subject to modification during the construction, requires construction experience, agreement, trust, mutual interest, and great communication to be successful. These requirements were lacking between the parties. Even worse, the parties had no procedure for documenting any changes they made. From the outset, Ed Zimmermann's poor communication skills, coupled with the [plaintiffs'] inexperience, were a recipe for disaster. The parties had many misunderstandings, which gave rise to increasing anger and suspicion on all sides."

lieu of a trial. The plaintiffs withdrew their complaint, and the defendant withdrew its counterclaim. The parties agreed to submit their issues to a three member arbitration panel with the intent that the defendant would return to the project and finish the renovations to the plaintiffs' home under the direction and supervision of an engineer and a building professional, both of whom also would serve as members of the arbitration panel.[6] The stipulation refers to a "Schedule A," which was a chart that listed a variety of existing construction issues, the parties' positions relative to those issues, and any agreed upon resolution already reached by the parties. Pursuant to the stipulation, the plaintiffs agreed to pay "any remaining amounts determined by the [a]rbitrators to be due for the completion of the [p]roject" and to "place in escrow with their counsel an ever-

[6] The stipulation provided in relevant part: "2. The parties agree to appoint an arbitrator and two neutral supervisors . . . to adjudicate the building and structural issues submitted to them, and to supervise, monitor, manage and instruct (where applicable) [the defendant] and its subcontractors in their work as described herein.

* * *

"8. The [a]rbitrators shall have the authority to decide how [the] [p]laintiffs' [p]roject will be completed. In furtherance of that authority, the [a]rbitrators shall have the following duties: (1) determine what documents are controlling with regard to the parties' agreement and/or the [p]roject; (2) determine if the parties amended or changed the agreement and if so what were those changes; (3) determine whether such amendments are legally binding upon the parties; (4) determine, if the parties agreed to any changes, how those affect the price; (5) determine who should be responsible for any increase/decrease in cost for materials attributable to changes in market prices since 2013; (6) determine the standard to which the work is to be performed at the [plaintiffs'] home by [the defendant]; (7) resolve issues of credibility between the parties; (8) determine the price to be paid by the [plaintiffs] to [the defendant] for the completion of the [p]roject as decided under (1), (2), and (3) above; (9) resolve questions to be set forth in a Schedule A; (10) resolve any other issues that may arise concerning this stipulation; [and] (11) take any other action as may be deemed necessary to effectuate the intent of this stipulation.

"9. The [e]ngineering and [b]uilding [s]upervisors shall oversee [the defendant's] work and oversee the implementation of the [a]rbitrators' decisions as described herein and be responsible for answering any questions and resolving any problems that arise during the course of the [p]roject. . . ."

green $100,000 to secure payments to [the defendant] under [the] [s]tipulation . . . .”[7] The parties granted broad oversight authority to the arbitration panel, including the right to determine when the project was completed, at which time the parties agreed to exchange releases from liability.

The parties submitted evidence to the arbitration panel, and the panel conducted several days of hearings. The parties submitted simultaneous posthearing briefs on January 6, 2017. On February 4, 2017, the arbitration panel issued an award with the seemingly contradictory title “Interim Award/Final Award.” By way of explanation, the arbitrators expressly provided that the award should be viewed as final “as to allocations of costs of items proven to date,” but interim “as to costs to complete.” Later in the award, in a section addressing the costs to complete the project, the arbitrators again discussed, albeit in somewhat different terms, the interim aspects of the award. In particular, they stated that the award was interim “as to the attribution to the parties of costs to complete the project, but is a final award as to each credit and/or cost accounted for” in a spreadsheet appended to the award.[8]

The spreadsheet attached to the award listed a variety of specific items that remained to be completed. Associated with each enumerated item was (1) a “cost,” representing a total cost that the arbitrators assigned to

[7] The term “evergreen” is not defined in the stipulation but appears to reflect the parties’ intent that, as payments were made periodically to the defendant or its contractors from the escrow account, the plaintiffs would replenish the account with additional funds necessary to keep the balance of the escrow account at $100,000.

[8] The award indicates that the spreadsheet is “entitled 16 Plymouth Rd.—Costs to Complete.” Although the spreadsheet at the end of the award does not bear this designation, the parties have not raised that as an issue or provided us with any indication that the arbitrators were referring to a different spreadsheet other than the one provided.

complete the item, (2) a "paid to date" amount, reflecting the amount the plaintiffs already had paid toward completion of that item; and (3) a "balance," or the difference between the "cost" and the "paid to date" amount. Item 21 of the spreadsheet pertained to "Cabinetry—labor/material" and listed a cost of $76,500, a paid to date amount of $24,643.50, and a balance of $51,856.65.[9]

Neither party timely filed an application to vacate, modify or correct the February 4, 2017 award.[10] The defendant resumed its work completing the remaining renovations under the terms of the stipulation, including the cabinetry work.

On August 23, 2017, the arbitration panel issued another arbitration award titled "Interim Award (revised)." That award attempted to resolve the parties' ongoing dispute regarding payment for the cabinetry work referenced in item 21 of the spreadsheet appended to the February 4, 2017 award.[11] The August 23, 2017 award provided in relevant part: "Despite numerous discussions between the [supervising members of the arbitration panel] and the [defendant], [the defendant] continues to insist to the [arbitration panel] that its [February 4, 2017 award] requires that it be paid $76,500

[9] Although there appear to some be minor errors in the mathematical calculations on the spreadsheet, including with respect to the cabinetry work at issue on appeal, these technical defects were not raised by the parties.

[10] The plaintiffs filed a motion with the arbitration panel asking for reargument and reconsideration. The defendant filed an opposition in which it raised its own concerns with the award. The panel denied the motion on February 27, 2017. We need not decide whether the filing of such a motion acted to extend the thirty day statutory period set forth in General Statutes § 52-420 for filing an application to vacate, modify or correct an award because, even if it did, no such application was filed within thirty days following the denial of the motion by the arbitration panel.

[11] The item 21 cabinetry work referred to cabinets and vanities for the kitchen, bathrooms, and mudroom. Another one of the items listed on Schedule A concerned "Sun Room Cabinetry," an item that was resolved by the parties and is distinct from the cabinetry at issue in this appeal.

for cabinetry work, whether or not this amount is ever proven as the actual cost of the cabinetry. The [defendant's] position is groundless and untenable. While the [arbitration panel] found there was a contract between the parties, which included a 'total price,' because the actual costs were unknown, this price was only a placeholder for whatever the actual construction costs turned out to be." The arbitration panel explained that the spreadsheet containing the $76,500 figure representing the "cost" of cabinetry work was prepared "to show what the [plaintiffs] had already paid, as of the hearing, toward the construction's actual cost. This was the sole purpose of the [spreadsheet]. As to costs yet unknown, the [February 4, 2017 award] was interim, because it was subject to change, as any construction cost might be, for such items and events as change orders, unforeseen and/or hidden costs, and delay." The arbitration panel found that the defendant had agreed to a design change involving a reduction in the amount of cabinetry originally envisioned, noting that "had the parties added to the project, the [defendant] would have expected to be paid for additional cabinetry."

The defendant never filed a timely application to vacate, modify or correct the August 23, 2017 award. Rather, on November 22, 2017, the defendant filed an application to confirm the February 4, 2017 award, in which it also asked the court to vacate "any such subsequent order(s) from the arbitration panel which are contrary to the terms of the award originally rendered."[12] The plaintiffs filed an objection to the appli-

[12] Specifically, the defendant asked the court to issue the following order: "That any and all subsequent orders issued by one or more of the arbitrators [that] conflicts with or purports to reduce that portion of the February 4, 2017 award which awarded [the defendant] $76,500 (total) for 'Cabinetry—labor/material" is hereby declared illegal, null, and void pursuant to [General Statutes] § 52-416 et seq." (Emphasis omitted.) Additionally, the defendant sought an order from the court requiring the plaintiffs' counsel to release from escrow $21,463 to the defendant.

cation to confirm, arguing that the defendant had misinterpreted the February 4, 2017 award and, essentially, was seeking to be paid for work that it never provided.

The trial court, *Genuario*, *J.*, heard argument on January 22, 2018. It later issued an order on February 23, 2018, denying the application to confirm the February 4, 2017 award. The court's order stated: "The parties entered into an arbitration agreement intended to result in the orderly completion of the plaintiffs' home by the [defendant] under the jurisdiction of an arbitration panel. Indeed, two members of the panel were actually assigned to act as supervisors of the work. The arbitration submission is very broad, including granting the panel the power to 'take any action as may be deemed necessary to effectuate the intent of this stipulation.' The panel issued an Interim/Final award on February 4, 2017, which included a line item for cabinetry [that] the defendant claims by its terms was final and the plaintiff claims was interim. The parties returned to the panel, and, on August 23, 2017, the panel issued an award with regard to the cabinetry [that] reduced the amount after that work had been completed and the panel had been presented with additional evidence. The panel described the [defendant's] claim for the original amount as 'groundless.' The [defendant's] sole meaningful argument is that the time frame for appealing the initial award having passed, neither the parties [n]or the panel had the right to modify the award. But that argument begs the question. The issue is whether or not the February 4, [2017] award was a final or interim award, and the original submission grants the panel the authority to deal with such issues in order to 'effectuate the intent' of the parties. The [defendant], having agreed to grant the panel such broad authority and participated in the process accordingly, cannot now deprive the arbitrators of the very authority granted to them in anticipation of such disagreements. Accordingly, the

defendant's [application] to confirm the February 4, 2017 award is denied." This appeal followed.[13]

Before turning to our discussion of the defendant's claim, we remark briefly on the unusual nature of the stipulation entered into by the parties. As noted by the trial court, the parties used very broad language in their stipulation defining the powers of the arbitration panel, which included expansive authority to resolve, perhaps on a daily basis, any disputes arising from changes in costs and how those changes would affect the amount the plaintiffs owed the defendant for work performed. The broad and sometimes imprecise language used in the submission increases the difficulty of determining the proper legal effect to afford to the arbitration panel's arbitration awards, neither of which is characterized as having completely resolved the parties' disputes. Ordinarily, private arbitrators are utilized by parties as an alternative to litigation with the hope of expedited resolution of then-existing disputes with defined, articulable contours. It would seem to fall outside the usual role of an arbitrator to act not only as an adjudicator but, like in the present case, as a quasi-special master, with extensive powers to oversee and direct completion of a construction project in which factual and legal issues, potentially uncontemplated by the parties in drafting their submission, might later arise. This dual role, in which supervising members of the arbitration panel would make immediate, on-site decisions regarding the construction project and then potentially later would be asked to adjudicate the financial responsibilities with respect to those choices, creates a risk of conflicts of interest that render this type of arbitration

[13] On March 23, 2018, the defendant filed a motion for reconsideration and to reargue. The court denied the motion without comment the same day. The defendant amended the present appeal to include a challenge to the court's denial of the motion for reconsideration. See footnote 2 of this opinion.

agreement problematic. Nevertheless, as a creature of contract, the parties are largely in control of the type of submission by which they agree to be bound. Fortunately, although the unusual nature of the arbitration proceedings in this case challenges our review process, it does not thwart it.

I

We turn first to the defendant's claim that the court lacked the discretion to deny its application to confirm the arbitration award. The defendant argues that, pursuant to the statutory framework governing arbitrations in Connecticut, once an arbitration award is rendered, and the thirty day period for filing an application to vacate, modify or correct the award lapses, a timely application to confirm the award ordinarily must be granted by the court. We agree.[14]

We begin with general legal principles, including the standard that governs our review of the court's denial of the application to confirm the arbitration award. "Arbitration is favored by courts as a means of settling differences and expediting the resolution of disputes. . . . There is no question that arbitration awards are generally upheld and that we give great deference to an arbitrator's decisions since arbitration is favored as a means of settling disputes. . . . The limited scope of judicial review of awards is clearly the law in Connecticut." (Citations omitted; internal quotation marks omitted.) *Wolf* v. *Gould*, 10 Conn. App. 292, 296, 522 A.2d 1240 (1987). Whether the circumstances presented require a court to grant an application to confirm an arbitration award as a matter of law presents a legal question over which we exercise plenary review. See *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287

[14] We recognize, of course, that if an award is not timely rendered in accordance with the provisions of General Statutes § 52-416, the award has no legal effect.

Conn. 189, 196, 947 A.2d 916 (2008) (determination of whether trial court engaged in correct level of review was question of law requiring plenary review).

The core principles of Connecticut's arbitration law are set forth in General Statutes §§ 52-408 through 52-424. "Under [General Statutes] § 52-417, a party may apply for the confirmation of an arbitration award within one year after it has been rendered."[15] *Directory Assistants, Inc.* v. *Big Country Vein, L.P.*, 134 Conn. App. 415, 420, 39 A.3d 777 (2012). "[Section] 52-417 provides that in ruling on an application to confirm an arbitration award [t]he court or judge *shall* grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in [General Statutes §§] 52-418[16] and 52-419.[17]. . . The trial

[15] General Statutes § 52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

[16] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[17] General Statutes § 52-419 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order modifying or correcting the award if it finds any of the following defects: (1) If there has been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (2) if the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits

court lacks any discretion in confirming the arbitration award unless the award suffers from any of the defects described in . . . §§ 52-418 and 52-419. . . . Furthermore, if [an application] to vacate, modify or correct is not made within the thirty day time limit specified in General Statutes § 52-420 [(b)],[18] the award may not thereafter be attacked on any of the grounds specified in §§ 52-418 and 52-419." (Emphasis added; footnotes added; internal quotation marks omitted.) *Stratek Plastics, Ltd.* v. *Ibar*, 120 Conn. App. 90, 91, 991 A.2d 577 (2010). "[Section] 52-420 (b) does not limit the thirty day filing period to applications arising out of the grounds for vacatur enumerated in § 52-418, but also applies to common-law grounds, such as a claimed violation of public policy. . . . If the motion [to vacate] is not filed within the thirty day time limit, the trial court does not have subject matter jurisdiction over the motion." (Citation omitted; internal quotation marks omitted.) *Rosenthal Law Firm, LLC* v. *Cohen*, supra, 165 Conn. App. 471.

In *Directory Assistants, Inc.* v. *Big Country Vein, L.P.*, supra, 134 Conn. App. 415, the plaintiff filed an application in the Superior Court to confirm an arbitration award. Id., 418. The defendants, who had failed to file a timely application to vacate, modify or correct the award, filed a motion to dismiss the application to confirm, arguing, inter alia, that the parties' dispute had not been arbitrable. Id. The trial court agreed with the defendant and dismissed the application to confirm the award. Id. The plaintiff appealed, and this court reversed the judgment of the trial court. Id., 422. We held that a party that failed to file a timely application

of the decision upon the matters submitted; or (3) if the award is imperfect in matter of form not affecting the merits of the controversy."

[18] General Statutes § 52-420 (b) provides: "No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion."

to vacate an arbitration award was barred from raising any claims challenging the award in a pleading filed in response to an application to confirm the award. Id. Further, we held that in the absence of a valid application to vacate, modify or correct an award, the court "lacked any discretion in confirming [the award] pursuant to § 52-417." Id.

This court applied the same rationale in *Rosenthal Law Firm, LLC* v. *Cohen*, supra, 165 Conn. App. 467. In that case, the self-represented defendant appealed from the judgment of the trial court granting an application to confirm an arbitration award, arguing that the trial court improperly had concluded that his responsive pleading, in effect, was an untimely motion to vacate the award, and that the court failed to consider the merits of his arguments.[19] Id., 468. The plaintiff argued that the court had been obligated to confirm the award because the defendant had not filed an application to vacate within thirty days of receiving notice of the arbitration award, as required by General Statutes § 52-420 (b), and, thus, the court lacked the authority to consider his arguments against confirmation. Id., 470. We agreed with the plaintiff and affirmed the judgment of the trial court. Id. We held that, because the defendant had not timely moved to vacate, modify or correct the arbitration award, "the defendant had lost the ability to raise any statutory or common-law grounds for vacating the award . . . [and] the trial court *had no choice* but to confirm the award." (Citation omitted; emphasis added.) Id., 472.

[19] Although courts have discretion to treat an opposition to a motion to confirm an arbitration award as a motion to vacate the award; see *Wu* v. *Chang*, 264 Conn. 307, 309–10, 823 A.2d 1197 (2003); it may do so only if the opposition is filed within the thirty day period prescribed in § 52-420 (b). Id., 312. "To conclude otherwise would be contrary not only to the clear intent of the legislature as expressed in §§ 52-417, 52-418 and 52-420 (b), but also to a primary goal of arbitration, namely, the efficient, economical and expeditious resolution of private disputes." Id., 313.

In the present case, the defendant filed its application to confirm the February 4, 2017 arbitration award on November 22, 2017, well within the one year period set forth in § 52-417. It is undisputed that neither party filed within the thirty day statutory time period an application with the Superior Court raising any ground to vacate, modify or correct the February 4, 2017 arbitration award. See General Statutes § 52-420 (b). Although the record shows that both parties were not fully satisfied with the arbitration panel's award, as reflected in the plaintiffs' motion for reconsideration and reargument and the defendant's opposition thereto, neither party pursued those issues further. Even if we treated the plaintiffs' objection to the defendant's application to confirm the February 4, 2017 award as an application to vacate, modify or correct the award, it was filed well outside the thirty day statutory time period for challenging the award and, therefore, could not have formed a proper basis for a decision by the trial court to deny confirmation of the award.

In denying the defendant's application to confirm the award, the trial court did not cite to any specific defect as justifying its ruling. Rather, it appears that the court was focused on the defendant's challenge to the arbitration panel's later modification and clarification of the award, which the court indicated was well within the broad authority the parties had granted to the arbitration panel in their submission. In the absence of a timely application to vacate, modify or correct the award, however, the court had no choice but to confirm the February 4, 2017 award. The court's decision to deny the application was, therefore, in error. This conclusion does not, however, fully resolve the claim on appeal.

II

The remaining aspect of the defendant's claim is that by denying its application to confirm the February 4,

2017 arbitration award, the court also improperly declined to order the plaintiffs to pay the defendant in accordance with that award and, instead, tacitly validated the arbitration panel's August 23, 2017 award, which, by its terms, modified the amount the plaintiffs owed the defendant for the cabinetry work. The premise underlying this argument is that confirmation of the February 4, 2017 award necessarily required the plaintiffs to pay any amounts listed in that award. We reject that premise for two reasons. First, the defendant failed to challenge the propriety of the August 23, 2017 award in a timely application to vacate, modify or correct the award, and, therefore, that award, which included clarification and modification of the February 4, 2017 award, is binding on the parties and not subject to judicial scrutiny. Second, by its own terms, the February 4, 2017 award was interim in nature with respect to the cost assigned to the cabinetry work, and the defendant has not directed our attention to any language in the parties' submission that limited the arbitration panel's authority to modify that initial cost estimate on the basis of evidence of the actual cost following completion of the cabinetry work. Accordingly, we reject this aspect of the defendant's claim.

By failing to timely challenge the August 23, 2017 award, the defendant consented to its terms. In its August 23, 2017 award, the arbitration panel acknowledged the defendant's claim that the February 4, 2017 award contained a final and binding determination that the defendant was entitled to be paid $76,500 for cabinetry work. The arbitration panel, however, rejected that construction of its February 4, 2017 award, describing the defendant's position as "groundless and untenable." The panel took the opportunity to clarify that, because the cabinetry work had not been completed at the time it rendered the February 4, 2017 award, the actual costs were unknown at that time, and, thus, the

$76,500 listed as the "cost" represented only "a placeholder for whatever the actual construction costs turned out to be." The panel maintained that the only figures on the spreadsheet that were final, and thus not subject to later modification, were the figures reflecting the amount the plaintiffs already had paid to date. Those figures were a final determination by the panel of the credit the plaintiffs would be due against the actual cost, which had yet to be finally determined.

In its application for confirmation of the February 4, 2017 award, the defendant argued that the court should declare the August 23, 2017 award "illegal, null, and void " because, according to the defendant, the panel lacked any authority to modify the February 4, 2017 award with respect to the cabinetry work. The defendant's arguments challenging the propriety of the August 23, 2017 award, however, could have been raised in a timely application to vacate the award. Because the defendant failed to do so, the trial court lacked any authority to invalidate the award. Instead, the court was required to give deferential treatment to the arbitration panel's own articulation and clarification of the February 4, 2017 award. See *All Seasons Services, Inc.* v. *Guildner*, 94 Conn. App. 1, 11, 891 A.2d 97 (2006) (holding that court improperly disregarded arbitrator's articulation of award and that "arbitrator's judgment that a clarification was warranted is to be given deference by the court").

Finally, even without the benefit of the panel's August 23, 2017 clarification, the February 4, 2017 award, although not a model of clarity, conveys by its terms that the "costs" set forth for the various items listed on the attached spreadsheet, including the cabinetry work, reflected only the arbitration panel's interim determination of cost on the basis of the evidence available to date. The arbitration panel stated that the award should not be viewed as final with respect to any "costs

to complete." In other words, the costs listed on the spreadsheet for items not yet completed were not final costs but, instead, were the panel's best estimate at that time based on the terms of the original contract and the defendant's initial proposal. The award was final only "as to each credit and/or cost accounted for," meaning the credit listed on the spreadsheet as representing the amount the plaintiffs had paid to date for particular items. On the basis of this language, it is reasonable to conclude that the costs listed on the spreadsheet were not intended to reflect a final and binding determination. In their submission, the parties broadly authorized the arbitration panel to determine the amount the plaintiffs would pay for the work done by the defendant and its subcontractors, and to resolve any disputes that might arise, which would include issues regarding costs and payments.

Accordingly, under any reasonable construction of the February 4, 2017 award, the parties were on notice that the amounts listed on the spreadsheet, other than those reflecting the plaintiffs' paid to date amounts, could be subject to revision or modification by the parties in consultation with the supervising arbitrators based on the actual work performed. The parties could have sought to modify or correct the award if they felt that it failed accurately to reflect the intent of the parties or improperly left issues open for further consideration. Instead, by failing to do so, they chose to be bound by the award as it was rendered. We conclude that the court correctly denied the defendant's request for an order holding the plaintiffs responsible for the cost of cabinetry work as set forth in the February 4, 2017 award, rather than pursuant to the updated determination as set forth in the unchallenged August 23, 2017 award.

The judgment is affirmed as to the trial court's denial of the defendant's request for an order directing the

plaintiffs to pay the defendant an additional amount for cabinetry work, the judgment is reversed as to the trial court's denial of the defendant's application to confirm the February 4, 2017 arbitration award, and the case is remanded with direction to grant the application to confirm that award but to deny any additional relief requested therein.

In this opinion the other judges concurred.

THOMAS MCGINTY *v.* STAMFORD POLICE DEPARTMENT ET AL.
(AC 41943)

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

Syllabus

The defendants, the Stamford Police Department and its workers' compensation insurer, appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner that the plaintiff's claim for benefits as a result of heart disease was compensable under the Heart and Hypertension Act (§ 7-433c). The defendants claimed that the board improperly affirmed the commissioner's award because the plaintiff's condition was systemic and, therefore, not compensable heart disease pursuant to § 7-433c. The plaintiff, a police officer, had retired in 2011 with a service related disability pension due to injuries he sustained during the course of his employment. In April, 2009, he had been diagnosed with coronary artery disease and hypertension and, thereafter, filed a claim for benefits pursuant to § 7-433c. On the basis of the evidence presented at the hearing, the commissioner accepted the plaintiff's claim and found his testimony and that of his cardiologist to be credible and persuasive in support of a heart disease and hypertension claim pursuant to § 7-433c. She ordered the defendants to accept liability for the plaintiff's claim and all benefits under § 7-433c to which he was entitled. After the board affirmed the commissioner's decision, the defendants appealed to this court. *Held* that the board properly affirmed the commissioner's award, as the defendants failed to demonstrate that the commissioner's finding that the plaintiff suffered from heart disease was unsupported by the record; the commissioner heard testimony from two cardiologists and found that the plaintiff presented the more credible and persuasive evidence, and the role of this court was not to retry the facts, but to determine whether the commissioner's award could be sustained in view of the factual record.

Argued May 20—officially released July 9, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District finding that the plaintiff had sustained a compensable injury and awarding, inter alia, disability benefits; thereafter, the commissioner denied the defendants' motion to correct; subsequently, the defendants appealed to the Compensation Review Board, which affirmed the commissioner's decision, and the defendants appealed to this court. *Affirmed.*

Scott Wilson Williams, for the appellants (defendants).

David J. Morrissey, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendants, the Stamford Police Department (police department), and PMA Management Corporation of New England, the workers' compensation liability insurer for the police department, appeal from the decision of the Compensation Review Board (board) affirming the finding and award (award) of the Workers' Compensation Commissioner for the Seventh District (commissioner) with respect to the claim filed by the plaintiff, Thomas McGinty, under General Statutes § 7-433c,[1] commonly referred to as the Heart and Hypertension Act.[2] On appeal, the defendants

[1] General Statutes § 7-433c (a) provides in relevant part: "Notwithstanding any provision of chapter 568 or any other general statute . . . in the event . . . a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of heath caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he . . . shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 . . . ."

[2] See *Pearce* v. *New Haven*, 76 Conn. App. 441, 443–44, 819 A.2d 878 (overruled in part by *Ciarelli* v. *Hamden*, 299 Conn. 265, 296, 8 A.3d 1093 [2017], cert. denied, 264 Conn. 913, 826 A.2d 1155 (2003).

principally claim that the board improperly affirmed the commissioner's award concluding that the plaintiff had suffered from compensable heart disease. Before the commissioner and on appeal, the defendants have argued that the plaintiff's condition, arterial sclerosis, is not a disease unique to the heart, but a systemic condition, and is, therefore, not compensable heart disease. We affirm the decision of the board.

In her May 24, 2017 award, the commissioner made the following findings of fact, which are relevant to our resolution of this appeal. The plaintiff was employed as a police officer from January 8, 1990 through April 15, 2011, when he retired with a service related disability pension due to injuries he sustained during the course of his employment.[3] The plaintiff passed a preemployment physical that did not reveal evidence of hypertension or heart disease. The plaintiff struggled to control his weight and high cholesterol. In 2007, he experienced left leg pain due to a blockage of his iliac artery, which was treated twice by angioplasty. The plaintiff was diagnosed with peripheral vascular disease. An electrocardiogram and nuclear stress test were negative for heart disease at that time.

In 2009, the plaintiff experienced shortness of breath and chest pain. The results of a stress test performed on April 2, 2009, were positive and, when compared with the prior study, revealed a new "defect." The plaintiff was diagnosed with coronary artery disease and hypertension, and medication was prescribed for the conditions. On April 24, 2009, the plaintiff underwent cardiac catheterization that revealed two vessel coronary artery disease. The plaintiff was diagnosed with atrial fibrillation on November 19, 2009, and he underwent an ablation on February 16, 2010. A cardiac catheterization performed on September 14, 2011, showed

[3] During the course of his employment with the police department, the plaintiff suffered injuries to his lower back, both knees, left shoulder, left hip, and both hands.

progression of the plaintiff's coronary artery disease, and he underwent bypass surgery in December, 2011.

On May 27, 2009, the plaintiff filed a form 30C[4] claiming that he was entitled to benefits under § 7-433c as a result of hypertension and heart disease. On May 11, 2009, the police department timely filed a form 43 contesting the claim and also filed a supplemental form 43 on June 2, 2009.[5]

Joseph R. Anthony, a cardiologist, examined the plaintiff on September 3, 2010. Anthony reported that the plaintiff had both coronary heart disease and hypertension. On July 15, 2014, Anthony gave the plaintiff a 24 percent disability impairment due to his hypertensive cardiovascular disease and a 26 percent disability impairment for his coronary heart disease. The combined rating was 44 percent. Anthony also assigned an 11 to 13 percent disability impairment for the plaintiff's ventricular tachycardia, or arrhythmia.

Martin J. Krauthamer, a cardiologist, examined the plaintiff on behalf of the defendants. Krauthamer found no evidence of hypertension in the plaintiff more than a year prior to April, 2009. He testified at the formal hearing that in 2010, the plaintiff clearly had vascular disease, but that it had not yet impacted his heart, and, therefore, the plaintiff did not have cardiovascular disease at that time. Krauthamer opined that the disease process that resulted in a blockage of the plaintiff's

[4] A form 30C is the document prescribed by the Workers' Compensation Commission to be used when filing a notice of claim pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq.

[5] Form 43 is titled: "Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits." It is a disclaimer form used by an employer to contest liability to pay compensation to an employee for a claimed injury. *Dubrosky* v. *Boehringer Intelheim Corp.*, 145 Conn. App. 261, 265 n.6, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

coronary artery was the same process that resulted in a blockage of the peripheral arteries of his groin. According to Krauthamer, the atherosclerotic process occurs separately in different parts of the body as it is a systemic disease. He assigned the plaintiff a disability rating of 8 percent due to hypertension and an 11 percent disability rating due to his premature ventricular contractions.

On the basis of the evidence presented at the formal hearing, the commissioner accepted the plaintiff's claim. She found his testimony and medical evidence to be credible and persuasive in support of a heart disease and hypertension claim pursuant to § 7-433c. The commissioner found Anthony's opinion and reports to be more credible than Krauthamer's.[6] The commissioner concluded that the plaintiff had reached maximum medical improvement on September 3, 2010, and had disability ratings of 24 percent due to hypertension, 26 percent due to coronary artery disease, and 11 percent due to arrhythmia. She ordered the defendants to accept liability for the plaintiff's heart disease and hypertension claim and all benefits under § 7-433c to which he may be entitled.

The defendants filed a motion to correct, which the commissioner denied. The defendants appealed to the board, claiming that the plaintiff's claimed heart condition was systemic and, therefore, did not constitute compensable heart disease.[7] To support their position that atherosclerosis is a systemic disease and not a distinct heart disease, the defendants relied on *Estate of Patrick L. Brooks* v. *West Hartford*, No. 4907, CRB

[6] The defendants claimed that the plaintiff had refused reasonable and necessary medical treatment, but the commissioner found that not to be the case.

[7] The defendants did not contest the awards for the plaintiff's hypertension and arrhythmia.

6-05-1 (January 24, 2006).[8] The board issued its decision on July 17, 2018, affirming the commissioner's award. The board rejected the defendants' argument that the peripheral artery disease, atherosclerosis, from which the plaintiff suffered in 2007, was not heart disease and that it was the proximate cause of his subsequent coronary ailments in 2009. The defendants argued that the plaintiff's systemic atherosclerosis was indistinguishable from the systemic sarcoidosis, which in *Estate of Patrick L. Brooks*, was deemed not to be heart disease. The board did not undertake a medical or factual analysis of atherosclerosis and sarcoidosis. Rather, it relied on "one of the primary tenets of [its] standard of appellate review . . . that the trial commissioner has the right and the duty to decide how much of the medical evidence presented to [her] is persuasive and reliable. . . . A commissioner may choose to credit all, part or none of an expert's testimony. . . . On review, this board may not second-guess a commissioner's inferences of evidentiary credibility, and we may reverse factual findings only if they are unsupported by the evidence or if they fail to include undisputed material facts." (Citations omitted.) Id.; see also *Sanchez* v. *Edson Manufacturing*, 175 Conn. App. 105, 124-26, 166 A.3d 49 (2017); *Barron* v. *City Printing Co.*, 55 Conn. App. 85, 94, 737 A.2d 978 (1999). On the basis of its review of the record, the board concluded that there was an adequate basis for the commissioner's

[8] In *Estate of Patrick L. Brooks*, the deceased firefighter died on November 12, 2002, due to myocardial sarcoidosis. A cardiologist "testified that the decedent did not have 'heart disease,' but systemic sarcoidosis that involved multiple organs, one of which happened to be the heart. Sarcoidosis is a collagen vascular illness that affects multiple parts of the body. As a result of a secondary complication of sarcoidosis, nodules created electrical conduction problems in the decedent's heart tissue, causing the organ to stop functioning. [The cardiologist] explained that the analysis as similar to the progress of metastasized cancer. Although the heart was the final common pathway, as is often the case, the systemic illness of sarcoidosis caused the decedent's death." *Estate of Patrick L. Brooks* v. *West Hartford*, supra, 4907 CRB-6-05-1.

finding that the plaintiff suffered from heart disease in 2009 and that his heart disease was separate and distinct from the peripheral artery disease he experienced in 2007.

Our review of the record and the briefs and arguments of the parties persuades us that the board properly affirmed the commissioner's award. On appeal, the defendants have failed to demonstrate that the commissioner's finding that the plaintiff suffered from heart disease is unsupported by the record. The commissioner heard testimony from two cardiologists and found that the plaintiff presented the more credible and persuasive evidence. It is not the role of this court to retry the facts, but to determine whether the commissioner's award could be sustained in view of the factual record. See *Estate of Haburey* v. *Winchester*, 150 Conn. App. 699, 719, 92 A.3d 265, cert. denied, 312 Conn. 922, 94 A.3d 1201 (2014). We, therefore, affirm the decision of the board.[9]

The decision of the Compensation Review Board is affirmed.

MEGAN MARVIN *v.* BOARD OF EDUCATION OF THE TOWN OF COLCHESTER
(AC 40951)

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

Syllabus

The plaintiff, through her mother and next friend, sought to recover damages for negligence from the defendant, the Board of Education of the Town of Colchester. The plaintiff, who was a high school student and played

[9] In the conclusion of his brief on appeal, the plaintiff stated: "the commissioner's decision should be upheld in its entirety with statutory interest as prescribed by statute." The defendants responded in their reply brief, stating that the plaintiff did not file a motion pursuant to General Statutes § 31-301 (f), the issue was not addressed by the commissioner, and was raised for the first time on appeal. We decline to address the issue. See, e.g., *Hummel* v. *Marten Transportation, Ltd.*, 114 Conn. App. 822, 826, 970 A.2d 834 (commissioner entered § 31-301 [f] order), cert. denied, 293 Conn. 907, 978 A.2d 1109 (2009).

on the school's varsity softball team, sustained injuries to her knee when she slipped and fell on a puddle of water in the women's locker room upon returning to the school from an away softball game. The plaintiff alleged that the defendant, through its agents, failed to adequately inspect and maintain the locker room floor and failed to warn the plaintiff of the unsafe condition. The defendant filed a motion for summary judgment on the ground that the plaintiff's negligence claim was barred by government immunity pursuant to the statute (§ 52-557n [a] [2] [B]) that provides immunity for discretionary acts, but not ministerial acts, of employees, agents and officers of political subdivisions of the state. The trial court granted the defendant's motion for summary judgment on the ground of government immunity and rendered judgment thereon. On appeal to this court, the plaintiff claimed that the trial court improperly render summary judgment in favor of the defendant because there remained genuine issues of material fact with respect to her claim. *Held*:

1. The plaintiff could not prevail on her claim that a genuine issue of material fact existed as to whether the inspection and maintenance of the locker room floor by the defendant's employees constituted a ministerial function, the trial court having properly determined that such function was discretionary in nature: although the plaintiff asserted that D, the softball coach and physical education teacher at the school, who was in her office adjoining the women's locker room at the time the plaintiff fell, acknowledged in her deposition testimony that she was responsible for the students' safety at the school and that she knew that she had to pay attention to the locker room floor to ensure that it was safe, D's testimony did not indicate that there was a rule, policy or directive that required her to inspect and maintain the locker room floor, and in the absence of any proof of a rule, policy or directive prescribing how D was to inspect and maintain the locker room floor, it could not be determined that she had a ministerial duty to check the floor; moreover, contrary to the plaintiff's contention that the job description of the defendant's custodians and a monthly building safety checklist are policies or directives that demonstrate that there is no discretion in how the defendant's employees inspect and maintain the locker room floor, the plaintiff failed to produce a policy, procedure or schedule within the context of the job description that refers to inspecting and maintaining the school's floors, and the job description and safety checklist do not prescribe the manner in which the inspection and maintenance of the school's floors, particularly the locker room floor, is to be carried out.
2. The plaintiff could not prevail on her claim that there remained a genuine issue of material fact as to whether she was an identifiable person subject to an imminent risk of harm and, thus, whether the identifiable person, imminent harm exception to the defense of governmental immunity applied, as she did not fall within an identifiable class of foreseeable victims, nor was she an identifiable person for purposes of the exception:

this court declined the plaintiff's request to expand the narrow identifiable class of foreseeable victims to include not only schoolchildren attending school during school hours, but also schoolchildren participating in varsity sports after school hours, and because the plaintiff was not compelled to remain after school to play softball for the school or to use the women's locker room after the game, as there is no legal obligation to participate in any school sponsored extracurricular activities, she did not fall within an identifiable class of foreseeable victims, nor was she an identifiable person; accordingly, the identifiable person, imminent harm exception to governmental immunity was not applicable to the present case.

Argued March 13—officially released July 9, 2019

Procedural History

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

James V. Sabatini, for the appellant (plaintiff).

Gary Kaisen, for the appellee (defendant).

Opinion

CONWAY, J. The plaintiff, Megan Marvin, through her mother and next friend, Carole Marvin, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Board of Education of the Town of Colchester, on the basis of governmental immunity. On appeal, the plaintiff claims that the court improperly rendered summary judgment because there remains a genuine issue of material fact with respect to (1) whether the defendant's inspection and maintenance of a locker room floor constitutes a ministerial duty for the purpose of governmental immunity, and (2) whether the plaintiff was an identifiable person subject to imminent harm, thus invoking the identifiable person, imminent harm exception to governmental immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The record, viewed in the light most favorable to the nonmoving party, reveals the following facts and procedural history. The plaintiff was a student at Bacon Academy (school), the town of Colchester's public high school, where she played on the school's varsity softball team. On the evening of May 7, 2013, upon returning to the school from an away softball game, the plaintiff slipped and fell on a puddle of water in the women's locker room, causing her to sustain injuries to her left knee.

On April 29, 2015, the plaintiff commenced the present action against the defendant. The complaint alleged, inter alia,[1] one count of negligence against the defendant pursuant to General Statutes § 52-557n (a) (1) (A).[2] The crux of the plaintiff's negligence claim was that the defendant, through its agents, failed to adequately maintain and inspect the locker room floor and failed to warn the plaintiff of the unsafe condition.

The defendant filed an answer to the complaint on September 1, 2015, denying the negligence allegation and asserting as a special defense that the plaintiff's negligence claim was barred on the basis of governmental immunity pursuant to § 52-557n (a) (2) (B).[3]

On January 25, 2017, the defendant filed a motion for summary judgment on the ground that the plaintiff's

[1] The complaint also alleged public nuisance pursuant to General Statutes § 52-577n (a) (1) (C), but the plaintiff withdrew this claim before the court ruled on the defendant's motion for summary judgment. Accordingly, the plaintiff's claims on appeal relate only to the negligence count.

[2] General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by . . . (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ."

[3] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

claim was barred by governmental immunity. In her objection to the motion, the plaintiff argued that there remained a genuine issue of material fact as to whether the inspection and maintenance of the locker room floor constituted a ministerial duty for the purpose of governmental immunity or, in the alternative, whether the plaintiff was an identifiable victim within the purview of the identifiable person, imminent harm exception to governmental immunity.

In its memorandum of decision, the court concluded that the defendant had met its burden of establishing that no genuine issue of material fact existed as to both grounds argued by the plaintiff, and, accordingly, it granted the defendant's motion for summary judgment on the basis of governmental immunity. This appeal followed. Additional facts will be set forth as necessary.

We begin our analysis by setting forth the standard of review applicable to an appeal from a trial court's ruling on a motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . ." (Internal quotation marks omitted.) *DeMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016). "Once the moving party has met its burden [of production] . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t [is] incumbent [on] the party opposing summary judgment

to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . The presence . . . of an alleged adverse claim is not sufficient to defeat a motion for summary judgment. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citations omitted; internal quotation marks omitted.) *Ferrari* v. *Johnson & Johnson, Inc.*, 190 Conn. App. 152, 156–57, A.3d (2019). We next address the plaintiff's claims on appeal in turn.

I

The plaintiff's first claim is that the court improperly concluded that she had not established a genuine issue of material fact as to whether the inspection and maintenance of the locker room floor by the defendant's employees was ministerial in nature rather than discretionary. We disagree.

As a preliminary matter, we note that it is undisputed that the defendant is a political subdivision of the state that may raise the defense of governmental immunity pursuant to § 52-557n. "With respect to governmental immunity, under . . . § 52-557n, a [political subdivision] may be liable for the negligent act or omission of [its] officer[s] acting within the scope of [their] employment or official duties. . . . The determining factor is whether the act or omission was ministerial or discretionary. . . . [Section] 52-557n (a) (2) (B) . . . explicitly shields a [political subdivision] from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . In contrast . . . officers [of a political subdivision] are not immune from liability for negligence arising out of

their ministerial acts, defined as acts to be performed in a prescribed manner without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 473–74, 200 A.3d 202 (2018). "[Our Supreme Court], on numerous occasions, has stated unequivocally that the determination of whether a governmental or ministerial duty exists gives rise to a question of law for resolution by the court." *Ventura* v. *East Haven*, 330 Conn. 613, 634, 199 A.3d 1 (2019). "[A]lthough the ultimate determination of whether governmental immunity applies is typically a question of law for the court, there may well be disputed factual issues material to the applicability of the defense, the resolution of which are properly left to the trier of fact." Id., 636 n.11.

"In order to create a ministerial duty, there must be a city charter provision, ordinance, regulation, rule, policy, or any other directive [compelling an employee of a political subdivision] to [act] in any prescribed manner." (Internal quotation marks omitted.) *Washburne* v. *Madison*, 175 Conn. App. 613, 623, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019). "In general, the exercise of duties involving inspection, maintenance and repair of hazards are considered discretionary acts entitled to governmental immunity. . . . A [political subdivision] necessarily makes discretionary policy decisions with respect to the timing, frequency, method, and extent of inspections, maintenance and repairs." (Citations omitted; internal quotation marks omitted.) *Grignano* v. *Milford*, 106 Conn. App. 648, 656, 943 A.2d 507 (2008). With these legal principles in mind, we consider the plaintiff's claim.

In the present matter, the plaintiff makes several arguments in support of her claim that there remains

a genuine issue of material fact as to whether the inspection and maintenance of the locker room floor constitutes a ministerial duty. First, the plaintiff argues that Anna DiPierro, the softball coach and physical education teacher at the school, who was in her office adjoining the women's locker room at the time the plaintiff fell, acknowledged in her deposition that she was responsible for the students' safety at the school and that she knew that she had to pay attention to the locker room floor to ensure that it was safe.[4] We disagree. Regardless of DiPierro's responsibility to keep her students safe, her testimony does not indicate that there was a rule, policy, or directive that required her to inspect and maintain the locker room floor. In fact, when asked at her deposition whether it was her responsibility to look at the locker room floor to see if an unsafe condition existed, she answered that she took it upon herself to check the floors and that it was not necessarily a responsibility assigned to her. In the absence of any proof of a rule, policy, or directive prescribing how DiPierro was to inspect and maintain the locker room floor, it could not be said that she had a ministerial duty to check the locker room floor.

Second, the plaintiff argues that the job description of the defendant's custodians and a monthly building safety checklist are policies or directives that demonstrate that there is no discretion in how the defendant's employees inspect and maintain the locker room floor.[5] We disagree. The custodians' job description only provides generally that the custodial staff "[p]erforms necessary work to maintain the cleanliness and appearance

[4] DiPierro testified at her deposition that she was unaware of any water on the locker room floor prior to the plaintiff's fall and that she cleaned up the water once the plaintiff told her that she slipped on a puddle.

[5] The plaintiff appended to her memorandum of law in opposition to the defendant's motion for summary judgment two job descriptions—one for a day custodian and one for a night custodian. Although the job descriptions vary slightly, they do not differ in any crucial respects for purposes of this appeal. For clarity, we refer to these documents solely as one job description.

of all hard surface flooring, including . . . mopping," and that the custodial staff is to maintain the cleanliness and sanitation of the building "by performing all work assignments in accordance with departmental policies, procedures and schedules . . . ." The plaintiff failed to produce a policy, procedure or schedule within the context of the job description that refers to inspecting and maintaining the school's floors. Further, Kendall Jackson, the director of educational operations for the Colchester public schools, testified at his deposition that he was not aware of any policies, procedures and schedules mentioned in the job description that had been put in writing. Jackson also testified that there was no specific policy, procedure, or directive that applied to the inspection and maintenance of the floors at the school, and that there existed only a general policy that the school should be maintained in a clean and safe condition.

As for the monthly building safety checklist, Raymond Watson, the head custodian at the school, testified at his deposition that the monthly building checklist does not specifically mention anything about floor safety.[6] Moreover, Jackson stated in an affidavit that "[t]he scheduling and the manner in which custodian[s] perform the tasks on the monthly maintenance checklist are left to the custodians' discretion."[7] In sum, the job description and monthly building safety checklist, according to Watson's and Jackson's deposition testimony, do not prescribe the manner in which the inspection and maintenance of the school's floors, particularly the locker room floor, is to be carried out and, therefore, do not create a genuine issue of material fact as to

[6] Watson also stated in his deposition that he never received anything in writing from the defendant detailing how to clean and maintain the floors at the school.

[7] We note that a copy of the building safety checklist was not before the trial court.

whether the inspection and maintenance of the floor is ministerial in nature.[8]

Finally, the plaintiff argues that her case is analogous to *Kolaniak* v. *Board of Education*, 28 Conn. App. 277, 610 A.2d 193 (1992), in which this court held that the removal of ice and snow from a school walkway was a ministerial function. In *Kolaniak*, an adult education student was injured after she fell on an icy walkway at a high school. Id., 278. Prior to the winter season, the Bridgeport Board of Education issued a bulletin to maintenance personnel at the school stating that the walkways were to be inspected and kept clean on a daily basis. Id., 279. In the present case, the defendant did not issue a comparable bulletin or directive to its custodial staff specifically instructing them to inspect and clean the locker room floor on a daily basis. Rather, the defendant only generally instructed that the school should be maintained in a clean and safe condition. Accordingly, *Kolaniak* is materially distinguishable from the present case.

We conclude that the trial court properly determined that the inspection and maintenance of the locker room floor by the defendant's employees was discretionary in nature. Accordingly, we reject the plaintiff's claim that a genuine issue of material fact exists as to whether

[8] We note that the plaintiff briefly mentions in her appellate brief that the defendant had written policies relating to "the kind of conduct or condition [the] plaintiff alleges caused the injury," but that the defendant has failed to produce these policies. Thus, she argues that a jury could draw an adverse inference against the defendant for failing to produce the written policies. The plaintiff makes only a conclusory statement and fails to cite to any legal authority. Accordingly, the plaintiff's claim is inadequately briefed. "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).

the inspection and maintenance of the locker room floor constituted a ministerial function.

II

The plaintiff's second claim is that, even if the inspection and maintenance of the locker room floor constituted a discretionary rather than ministerial function, there remains a genuine issue of material fact as to whether she was an identifiable person subject to an imminent risk of harm and, thus, whether the identifiable person, imminent harm exception to the defense of governmental immunity applies. The plaintiff argues that she is both a member of a defined class of foreseeable victims as well as an identifiable individual. We disagree.

"The imminent harm exception to discretionary act immunity [for political subdivisions and their employees] applies when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable [person]; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that [person] to that harm . . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state." (Internal quotation marks omitted.) *Washburne* v. *Madison*, supra, 175 Conn. App. 628–29.

"With respect to the identifiable victim element, we note that this exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims. . . . [W]hether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this narrowly drawn exception to qualified immunity ultimately is a question

of law for the courts, in that it is in effect a question of whether to impose a duty of care. . . . In delineating the scope of a foreseeable class of victims exception to governmental immunity, our courts have considered numerous criteria, including the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care, and the identifiability of the particular victim. . . . Other courts, in carving out similar exceptions to their respective doctrines of governmental immunity, have also considered whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts . . . whether the relationship was of a voluntary nature . . . the seriousness of the injury threatened . . . the duration of the threat of injury . . . and whether the persons at risk had the opportunity to protect themselves from harm. . . . The only identifiable class of foreseeable victims that we have recognized for these purposes is that of school children attending public schools during school hours." (Citation omitted; internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, supra, 186 Conn. App. 479–80. Mindful of these legal principles, we address the plaintiff's arguments.

The plaintiff first argues that she falls within an identifiable class of foreseeable victims. In essence, the plaintiff asks us to expand the narrow identifiable class of foreseeable victims to include not only schoolchildren attending school during school hours, but also schoolchildren participating in varsity sports after school hours. We decline the invitation to make such an alteration to our jurisprudence.

In *Durrant* v. *Board of Education*, 284 Conn. 91, 108–109, 931 A.2d 859 (2007), our Supreme Court held that the plaintiff in that case, a mother who was picking up her child from an after school program when she slipped on a puddle of water on a staircase, did not

fall within an identifiable class of foreseeable victims because she was not legally required to be present at the school. Important to the present case, the court also concluded that the *plaintiff's child* would likewise not fall within an identifiable class of foreseeable victims because he was not legally required to be at the school after school hours. Id., 104. The court further explained why schoolchildren attending school during school hours were within an identifiable class of foreseeable victims, but not the plaintiff or her child in that case. "In determining that such schoolchildren [attending school during school hours] were within such a class, we focused on the following facts: they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they were legally required to attend school rather than being there voluntarily; their parents were thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions. . . . In the present case, the plaintiff was not compelled statutorily to relinquish protective custody of her child. No statute or legal doctrine required the plaintiff to enroll her child in the after school program; nor did any law require her to allow her child to remain after school on that particular day. Contrast General Statutes §§ 10-157 and 10-220 (school boards and superintendents required to maintain schools for benefit of students); General Statutes §§ 10-184 and 10-220 (children statutorily compelled to attend school and parents statutorily obligated to send them to school). The plaintiff's actions were entirely voluntary, and none of her voluntary choices imposes an additional duty of care on school authorities pursuant to the . . . standards [set forth in *Burns* v. *Board of Education*, 228 Conn. 640, 638 A.2d 1 (1994)]." *Durrant* v. *Board of Education*, supra, 107–108.

Similarly, in the present case, the plaintiff was not legally obligated to remain after school nor were her

parents compelled statutorily to relinquish protective custody of her. The plaintiff argues that, although participation in varsity athletics is voluntary, participation in games and practices once a student is a member of a school sports team is mandatory according to the defendant's policies.[9] Although the defendant may require players to attend games and practices as a condition to participation on a school athletic team, a student's participation on an athletic team remains, at all times, purely voluntary. See *Costa* v. *Board of Education*, 175 Conn. App. 402, 408–409, 167 A.3d 1152 (plaintiff injured playing basketball during voluntary school picnic not within foreseeable class of victims), cert. denied, 327 Conn. 961, 172 A.3d 801 (2017); *Jahn* v. *Board of Education*, 152 Conn. App. 652, 668, 99 A.3d 1230 (2014) (member of school swim team injured in warm-up drill not required to participate in swim meet or swim team). Unlike school attendance, there is no legal obligation to participate in any school sponsored extracurricular activities. See *Jahn* v. *Board of Education*, supra, 668. (plaintiff failed to argue that he was legally compelled to join swim team or to participate in warm-up drills). In accordance with our prior case law, we conclude that the plaintiff does not fall within an identifiable class of foreseeable victims.[10]

The plaintiff also argues that, even if she is not within an identifiable class of foreseeable victims, she is an

[9] The plaintiff attached to her memorandum of law in opposition to the defendant's motion for summary judgment a copy of the school's student handbook, which stated that student athletes were required to attend all practices and games unless previously excused by the coach.

[10] The plaintiff also cites to *Strycharz* v. *Cady*, 323 Conn. 548, 578, 148 A.3d 1011 (2016), abrogated on other grounds by *Ventura* v. *East Haven*, supra, 330 Conn. 636–37, for the general proposition that the purpose of charging school officials with a duty of care is to ensure that schoolchildren are protected from imminent harm. At issue in *Strycharz* was whether a student who was injured after leaving school grounds *during school hours* remained a member of an identifiable class of foreseeable victims despite leaving school property. Id., 562. Because the present case involves an injury suffered on school property after school hours, *Strycharz* does not lend support to the plaintiff's argument.

identifiable individual subject to imminent harm. "Generally, we have held that a party is an identifiable person when he or she is compelled to be somewhere. See *Strycharz* v. *Cady*, [323 Conn. 548, 575–76, 148 A.3d 1011 (2016)] ('[o]ur decisions underscore . . . that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims' . . .) [abrogated on other grounds by *Ventura* v. *East Haven*, supra, 330 Conn. 636–37]. . . . Outside of the schoolchildren context, we have recognized an identifiable person under this exception in only one case that has since been limited to its facts.[11] Beyond that, although we have addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims in a number of cases, we have not broadened our definition." (Footnote in original.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436–37, 165 A.3d 148 (2017); see also *DeConti* v. *McGlone*, 88 Conn. App. 270, 274–75, 869 A.2d 271 (plaintiff injured when tree fell on car while driving not identifiable victim because no requirement for her to drive on portion of roadway where accident occurred), cert. denied, 273 Conn. 940, 875 A.2d 42 (2005).

In *St. Pierre* v. *Plainfield*, supra, 326 Conn. 423–25, the plaintiff, after participating in an aqua therapy session at a public pool, slipped on steps that were covered with water while he was on his way to the men's locker room. Our Supreme Court held that the plaintiff was not an identifiable person because he was not compelled to

[11] "Specifically, prior to the adoption of the current three-pronged identifiable person, imminent harm analysis, [our Supreme Court] concluded that an identifiable person subject to imminent harm existed among a group of intoxicated individuals who were arguing and scuffling in a parking lot when a police officer who spotted them failed to intervene until he heard a gunshot. *Sestito* v. *Groton*, 178 Conn. 520, 522–24, 423 A.2d 165 (1979). This holding, however, has been limited to its facts." *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436 n.15, 165 A.3d 148 (2017).

attend the aqua therapy session. Id., 438 ("[T]he plaintiff was in no way compelled to attend the aqua therapy sessions. . . . Under established case law, this choice precludes us from holding that the plaintiff was an identifiable person or a member of an identifiable class of persons."). As we previously discussed in this opinion, the plaintiff in the present case was not compelled to play softball for the school nor was she compelled to use the women's locker room after the game. On the basis of our prior case law, we conclude that the plaintiff was not an identifiable person nor was she within an identifiable class of foreseeable victims. Accordingly, because the identifiable victim, imminent harm exception to governmental immunity is not applicable in the present case, we reject the plaintiff's claim that the court improperly rendered summary judgment in favor of the defendant. Because the plaintiff does not qualify as an identifiable person, we need not address whether an imminent harm existed.[12] See id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARIO CHAVEZ (AC 41424)

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

Syllabus

Convicted of the crime of manslaughter in the first degree in connection with the stabbing death of the victim, the defendant appealed to this court. He claimed that the trial court improperly deprived him of his constitutional right to a fair trial when it failed to instruct the jury, sua sponte, about the inherent shortcomings of simultaneous foreign language interpretation of trial testimony, and when it instructed the jury that it could consider as consciousness of guilt evidence that he changed his shirt shortly after the victim was stabbed. *Held*:

[12] Likewise, we do not reach the argument in the plaintiff's brief that the trial court erred in finding no genuine issue of material fact as to whether the defendant had actual notice of the unsafe condition.

1. The defendant's claim, raised for the first time on appeal, that the trial court improperly failed to instruct the jury, sua sponte, regarding the inherent shortcomings of translated testimony was unavailing: although the defendant requested review of his unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233), because both counsel provided the court with proposed jury instructions, attended an in-chambers charging conference, and had a subsequent opportunity to comment on the court's proposed instructions on the record before they were given to the jury, the defendant was presented with a meaningful opportunity to review and comment on the court's instructions, and because he failed to raise the claim asserted on appeal, he waived his right to challenge the constitutionality of the instruction under *Golding*; moreover, the defendant having conceded that the trial court's failure to instruct the jury on the inherent shortcomings of simultaneous foreign language interpretation of trial testimony was an issue of first impression, and having failed to cite to any authority that stands for the proposition that a court's failure to provide, sua sponte, such an instruction constitutes a reversible error, he could not demonstrate that the court's failure to instruct the jury in that respect was an error so clear and so harmful that it constituted plain error such that a failure to reverse would result in manifest injustice.
2. The trial court did not abuse its discretion by providing a consciousness of guilt jury instruction as to the defendant's act of changing his shirt after the incident; at trial, the defendant, in testifying on his own behalf, did not dispute that he returned to his apartment after the incident to change his shirt, and the evidence presented at trial reasonably could have permitted a jury to draw the inference that the defendant's act of changing his shirt was motivated by a desire to avoid detection by law enforcement because the shirt had blood or dirt on it from the altercation with the victim.

Argued May 20—officially released July 9, 2019

Procedural History

Information charging the defendant with the crimes of murder and manslaughter in the first degree, brought to the Superior Court in the judicial district of Fairfield, and tried to the jury before *E. Richards*, *J.*; verdict and judgment of guilty of manslaughter in the first degree, from which the defendant appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Michael A. DeJoseph*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Mario Chavez, appeals from the judgment of conviction, rendered following a jury trial, of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1). On appeal, the defendant claims that the court improperly (1) deprived him of his constitutional right to a fair trial by failing to instruct the jury, sua sponte, about the "inherent shortcomings" of simultaneous foreign language interpretation of trial testimony, and (2) instructed the jury that it could consider, as consciousness of guilt evidence, that the defendant changed his shirt shortly after the victim was stabbed. We disagree and, accordingly, affirm the judgment of conviction.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. On the morning of May 27, 2012, the defendant drove a number of friends home after a night of drinking in Bridgeport. Upon arriving in the neighborhood of one of the friends, an argument developed and a physical altercation ensued between two of the passengers in the defendant's vehicle. During the fight, a small group of onlookers, who had observed the altercation from a nearby home, approached the combatants in the street. Thereafter, some of the onlookers attempted to break up the fight, while the victim approached the defendant.

The victim confronted the defendant and forcibly removed a chain worn around the defendant's neck. In response, the defendant drew a knife and stabbed the victim once in the chest. Shortly after stabbing the victim, the defendant fled the scene. Surveillance footage taken from the defendant's apartment complex showed

the defendant returning to his apartment a short time later. Surveillance footage also showed the defendant leaving the complex not long after wearing a different color shirt.

The following day, the defendant learned of the victim's death and fled the country. The defendant ultimately was apprehended and extradited to the United States where he was charged with murder and manslaughter in the first degree in connection with the victim's death.

The case was tried before a jury in October and November, 2017. The defendant testified in his own defense with the assistance of a Spanish-English interpreter. The defendant asserted that he stabbed the victim accidentally while trying to defend himself.

The defendant was found not guilty of murder but was found guilty of manslaughter in the first degree. The court sentenced the defendant to a total effective sentence of seventeen years of incarceration followed by three years of special parole. This appeal followed. Additional facts and procedural history will be provided as necessary.

The defendant first claims that the court improperly failed to instruct the jury, sua sponte, regarding the "inherent shortcomings" of translated testimony. Specifically, the defendant argues that because his testimony was translated from Spanish to English, it may have appeared less coherent or credible than a witness who testified in English. According to the defendant, the court's failure to provide an instruction on "the limitations of interpreted testimony" denied him of his constitutional right to a fair trial. We disagree.

As a preliminary matter, we note that the defendant raises this claim for the first time on appeal, requesting 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).[1] He did not request that the court instruct the jury regarding the inherent limitations or flaws in translated foreign language testimony, nor did he comment on or object to a lengthy instruction given by the court on how the jury should evaluate translated foreign language testimony.

Despite the defendant's request for review pursuant to *Golding*, "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). Our Supreme Court has held further that if a claim of instructional error has been waived under *Kitchens*, the defendant is not entitled to *Golding* review. See *State* v. *Bellamy*, 323 Conn. 400, 410, 147 A.3d 655 (2016).

In the present case, both counsel provided the court with proposed jury instructions, attended an in-chambers charging conference, and had a subsequent opportunity to comment on the court's proposed instructions on the record before they were given to the jury. Because the defendant was presented with a meaningful opportunity to review and comment on the court's instructions,[2] and having done so, failed to raise the

[1] Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error . . . (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781.

[2] The defendant does not argue otherwise.

claim he now asserts on appeal, the defendant has waived his right to challenge the constitutionality of the instruction under *Golding*.[3] See *State* v. *Kitchens*, supra, 299 Conn. 482–83.

The defendant further argues that, even if his claim is not reviewable under *Golding*, it is reversible under the plain error doctrine. See *State* v. *McClain*, 324 Conn. 802, 812–14, 155 A.3d 209 (2017) (*Kitchens* waiver does not preclude plain error review). "[T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed *error* is both *so clear* and *so harmful* that a failure to reverse the judgment would result in manifest injustice. . . . Put another way, plain error review is reserved for only the most egregious errors." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) Id.

In the present case, the defendant concedes that a trial court's failure to instruct the jury on the "inherent shortcomings" of simultaneous foreign language interpretation of trial testimony is an issue of first impression, and he can cite to no authority, binding or otherwise, that stands for the proposition that a court's failure to provide, sua sponte, such an instruction constitutes a reversible error. Because the defendant cannot demonstrate that the claimed error is, in fact, *an error*, he is unable to demonstrate that failing to instruct the jury in this respect is an error so clear and so harmful that a failure to reverse would result in manifest injustice. See *State* v. *Fagan*, 280 Conn. 69, 88, 905 A.2d 1101 (2006) (defendant could not prevail under plain

[3] Even on appeal, the defendant has failed to provide a proposed instruction that he claims should have been given to the jury.

error doctrine in part because issue raised was matter of "first impression"), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Accordingly, the defendant's first claim must fail.[4]

Next, the defendant claims that the court abused its discretion by instructing the jury that it could consider, as consciousness of guilt, evidence that the defendant changed his shirt shortly after the victim was stabbed. We disagree. "We review a trial court's decision to give a consciousness of guilt instruction under an abuse of discretion standard." *State* v. *Vasquez*, 133 Conn. App. 785, 800, 36 A.3d 739, cert. denied, 304 Conn. 921, 41 A.3d 661 (2012). "In considering consciousness of guilt instructions, our Supreme Court has observed: Generally speaking, all that is required is that the evidence have relevance . . . the fact that ambiguities or explanations may exist which tend to rebut an inference of guilt . . . does not [by itself] make an instruction . . . erroneous." (Internal quotation marks omitted.) *State* v. *Mann*, 119 Conn. App. 626, 632–33, 988 A.2d 918, cert. denied, 297 Conn. 922, 998 A.2d 168 (2010).

At trial, the defendant, in testifying on his own behalf, did not dispute that he returned to his apartment after the incident to change his shirt and, after having done so, left the apartment soon after to investigate what had happened to the victim. Despite this testimony, the defendant objected to the court's proposed consciousness of guilt instruction, claiming that the act of changing his shirt after the stabbing was "a normal activity" given the circumstances. On the basis of our review of the court's charge and the evidence presented at trial, which reasonably could have permitted a jury to draw the inference that the defendant's act of changing his

[4] In the alternative, the defendant also requests that this court use its supervisory authority to order a new trial in order to cure the inherent harm associated with translated testimony. "Supervisory authority is an extraordinary remedy that should be used sparingly . . . ." (Internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014). We decline to exercise our supervisory powers in the present case.

shirt was motivated by a desire to avoid detection by law enforcement because the shirt had blood or dirt on it from the altercation with the victim, the court did not abuse its discretion by providing the consciousness of guilt instruction as to the defendant's act of changing his shirt after the incident.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* TERENE CLARK (AC 41175)

Alvord, Elgo and Moll, Js.

Syllabus

Convicted of the crime of assault in the second degree in connection with the stabbing of the victim during an altercation in their shared apartment, the defendant appealed to this court. She claimed that the trial court improperly denied her motion to suppress an oral statement that she had made to the police during an alleged custodial interrogation in her apartment, which occurred without the officer having first advised the defendant of her constitutional rights pursuant to *Miranda* v. *Arizona* (384 U.S. 436). *Held* that the trial court properly denied the defendant's motion to suppress her statement to the police and determined that the defendant was not in police custody at the time she made her statement; under the totality of the circumstances, a reasonable person in the defendant's position would not have believed that her freedom of movement was restrained to the degree associated with a formal arrest, as the interrogation took place in the defendant's own residence, she was questioned by only one officer, whom she voluntarily escorted around the apartment while explaining the events surrounding the altercation, the interview lasted less than one hour, the officer asked the defendant only two questions, there was no indication that the officer exercised any control over the defendant, who was not handcuffed or physically restrained, and the officer did not display his weapon or otherwise present a show or threat of force before or during the questioning to compel the defendant to speak, and because the defendant was not in custody when she gave her statement, she was not entitled to an advisement of her rights under *Miranda*.

Argued April 9—officially released July 9, 2019

Procedural History

Information charging the defendant with the crime of assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Pavia*, *J.*; verdict and judgment of guilty of the lesser included offense of assault in the second degree, from which the defendant appealed to this court. *Affirmed.*

Glenn Formica, for the appellant (defendant).

Michael A. DeJoseph, senior assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Terene Clark, appeals from the judgment of conviction, rendered following a jury trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (3). On appeal, the defendant claims that the trial court erred by denying her motion to suppress her statement to the police, which she alleges was obtained in violation of her constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We affirm the judgment of the trial court.

The jury reasonably could have found the following facts.[1] In the early morning hours of June 18, 2015, the defendant and the victim were involved in an altercation at their shared apartment. At the time, the defendant and the victim had been in a relationship for approximately ten years. The victim became angry when he discovered that the defendant was in the bedroom talking on the phone to another man. The argument started

[1] We note that, although not necessary to our disposition of the defendant's claim on appeal, the defendant has not provided this court with the full trial transcript. Our recitation of the facts, therefore, is limited to the record before us.

in the bedroom and continued into the kitchen. While in the kitchen, the defendant grabbed a knife off the counter and, ultimately, stabbed the victim twice, once in the upper back and once in the leg. The victim fell to the floor and was unable to stand up. A neighbor drove the victim to the hospital while the defendant remained at the apartment.

At 2:19 a.m., Luis Moura, an officer with the Bridgeport Police Department, was dispatched to a multifamily home on Grand Street to respond to a report of a domestic dispute. Upon arrival, Officer Moura spoke to the second floor tenant, who had called the police. She reported that the dispute happened downstairs.

Officer Moura thereafter knocked on the door of the first floor apartment, and the defendant answered. Officer Moura asked her what had happened, and she responded that "he went to the hospital." Officer Moura did not know about whom the defendant was talking and again asked her what had happened. The defendant led Officer Moura to the bedroom, where she explained that she had been in that room on the phone with a male friend whom the victim did not like. The defendant stated that the victim then took her phone, knocked items off the dresser and onto the floor, and struck her twice.

After the defendant explained to Officer Moura what had happened in the bedroom, she left the bedroom and brought Officer Moura through the living room and into the kitchen. There, she explained that she feared for her life, so she had taken a knife off the counter and warned the victim to stay back. Finally, the defendant explained that the victim was injured when he walked away from her and slipped on water on the kitchen floor, falling backward onto the knife.

Officer Moura then received a phone call from Thomas Harper, an officer with the Bridgeport Police Department who had gone to the hospital to check

on the victim's condition. Officer Harper told Officer Moura that the victim had two stab wounds, one in the leg and one in the upper back, which had left the victim a paraplegic. Upon learning that the victim's injuries were inconsistent with the defendant's version of events,[2] Officer Moura placed the defendant under arrest.

The defendant subsequently was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1). Prior to trial, the defendant filed a motion to suppress all statements that she had made to the police, including her statement to Officer Moura explaining what had happened to cause the victim's injuries.[3] At a pretrial suppression hearing, the trial court denied the defendant's motion with respect to her statement as to how the victim's injuries occurred on the ground that the defendant was not in custody at the time she made this statement.

[2] At the hearing on the motion to suppress, Officer Moura testified that he found the medical information that Officer Harper had given him to be inconsistent with the version of events given to him by the defendant to the extent that "[the defendant] stated that [the victim] turned and slipped on the wet floor when he was cut once. However, with two stab wounds and [the victim becoming] permanently paralyzed, it's more [of] a deliberate action."

[3] Along with her statement as to how the victim's injuries occurred, the defendant moved to suppress two additional statements that she made to the police. The court's rulings on these two additional statements are not at issue in this appeal.

First, after Officer Moura's conversation with Officer Harper, he told the defendant that the information he had received was inconsistent with her explanation of what had happened. The defendant responded: "I was just defending myself." The court granted the defendant's motion with respect to this statement on the basis of Officer Moura's testimony that he decided to arrest the defendant after speaking to Officer Harper.

Second, after she was arrested, the defendant gave a statement to a detective at the Bridgeport Police Department. The court denied the defendant's motion with respect to this statement on the ground that she had, at that point, been advised of her *Miranda* rights and had knowingly and voluntarily waived those rights. The state ultimately did not introduce this statement into evidence at trial.

After a jury trial, the defendant was convicted of the lesser included offense of assault in the second degree in violation of § 53a-60 (a) (3). The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of seven years incarceration, execution suspended after one year, followed by five years of probation. This appeal followed.

On appeal, the defendant claims that her statement should have been suppressed because she was not advised of her rights under *Miranda* before she made it. "Under our well established standard of review in connection with a motion to suppress, we will not disturb a trial court's finding of fact unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court's memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Arias*, 322 Conn. 170, 176–77, 140 A.3d 200 (2016).

"[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question . . . rather, they must provide such warnings only to persons who are subject to custodial interrogation." (Internal quotation marks omitted.) *State* v. *Castillo*, 329 Conn. 311, 323, 186 A.3d 672 (2018). "As used in . . . *Miranda* [and its progeny], custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. . . . In determining whether a person is in custody in this sense . . . the United States Supreme Court has adopted an objective, reasonable person test . . . the initial step [of which] is to ascertain whether, in light of the objective circumstances of the interrogation . . . a reasonable person [would] have felt [that] he or she was not at liberty to terminate the interrogation and [to] leave. . . . Determining whether an individual's freedom of movement

[has been] curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. [Accordingly, the United States Supreme Court has] decline[d] to accord talismanic power to the freedom-of-movement inquiry . . . and [has] instead asked the additional question [of] whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. . . .

"Of course, the clearest example of custody for purposes of *Miranda* occurs when a suspect has been formally arrested. As *Miranda* makes clear, however, custodial interrogation includes questioning initiated by law enforcement officers after a suspect has been arrested or otherwise deprived of his freedom of action in any significant way. . . . Thus, not all restrictions on a suspect's freedom of action rise to the level of custody for *Miranda* purposes; in other words, the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. . . . Rather, the ultimate inquiry is whether a reasonable person in the defendant's position would believe that there was a restraint on [his] freedom of movement of the degree associated with a formal arrest. . . . Any lesser restriction on a person's freedom of action is not significant enough to implicate the core fifth amendment concerns that *Miranda* sought to address." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Mangual*, 311 Conn. 182, 193–95, 85 A.3d 627 (2014).

"With respect to the issue of whether a person in the suspect's position reasonably would have believed that [he] was in police custody to the degree associated with a formal arrest, no definitive list of factors governs [that] determination, which must be based on the circumstances of each case . . . . Because, however, the

[court in] *Miranda* . . . expressed concern with protecting defendants against interrogations that take place in a police-dominated atmosphere containing [inherent] pressures [that, by their very nature, tend] to undermine the individual's [ability to make a free and voluntary decision as to whether to speak or remain silent] . . . circumstances relating to those kinds of concerns are highly relevant on the custody issue. . . . In other words, in order to determine how a suspect [reasonably] would have gauge[d] his freedom of movement, courts must examine all of the circumstances surrounding the interrogation." (Internal quotation marks omitted.) *State* v. *Castillo*, supra, 329 Conn. 324–25.

"In [*State* v. *Mangual*, supra, 311 Conn. 196–97], we set forth the following nonexclusive list of factors to be considered in determining whether a suspect was in custody for purposes of *Miranda*: (1) the nature, extent and duration of the questioning; (2) whether the suspect was handcuffed or otherwise physically restrained; (3) whether officers explained that the suspect was free to leave or not under arrest; (4) who initiated the encounter; (5) the location of the interview; (6) the length of the detention; (7) the number of officers in the immediate vicinity of the questioning; (8) whether the officers were armed; (9) whether the officers displayed their weapons or used force of any other kind before or during questioning; and (10) the degree to which the suspect was isolated from friends, family and the public." (Internal quotation marks omitted.) *State* v. *Arias*, supra, 322 Conn. 177.

After applying these factors to the present case, we conclude that the trial court properly determined that the defendant was not in custody when she made her statement. The record demonstrates that Officer Moura questioned the defendant at her apartment. In *Mangual*, our Supreme Court recognized that "an encounter with

police is generally less likely to be custodial when it occurs in a suspect's home." *State* v. *Mangual*, supra, 311 Conn. 206; see also *Miranda* v. *Arizona*, supra, 384 U.S. 449–50 ("[the suspect] is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home" [internal quotation marks omitted]).

Moreover, although Officer Moura initiated contact with the defendant, the defendant voluntarily showed him around her apartment.[4] The encounter lasted less than one hour and Officer Moura asked the defendant only two questions. Although Officer Moura did not explain to the defendant that she was free to leave and was not under arrest, nothing in the record suggests that she was under any compulsion to speak to the police at that point.[5] Rather, Officer Moura testified that, during this time, the defendant was free to walk

[4] The record is unclear as to how Officer Moura initially entered the defendant's apartment. We therefore find unpersuasive the defendant's arguments that "there was never a request to enter [the apartment] by Officer Moura or an invitation by [the defendant]" and that "[t]his case is distinguishable from cases in which police actually were invited into a residence."

[5] The defendant argues that the trial court used the seriousness of the victim's injuries to determine that she should have been advised of her *Miranda* rights only after Officer Moura spoke to Officer Harper. See footnote 3 of this opinion. The defendant argues that, in doing so, the court made "a critical error of law in this case." The defendant further argues that Officer Moura should have advised her of her *Miranda* rights upon his arrival at her door because "[he] knew at the time he arrived at [the defendant's] door that she was the prime suspect in a domestic violence incident that had resulted in someone being so significantly injured that they needed treatment at the hospital." We are not persuaded by either of these arguments.

First, there is nothing in the record to support the defendant's assertion that Officer Moura knew that someone had been transported to the hospital before the defendant told him, or that he knew of the seriousness of the victim's injuries prior to Officer Harper's call. Moreover, the trial court's determination that the defendant should have been advised of her *Miranda* rights after Officer Moura spoke to Officer Harper was not based on the seriousness of the victim's injuries. Rather, the trial court based its determination that the defendant should have been advised of her *Miranda* rights after Officer Moura spoke to Officer Harper on Officer Moura's testimony that the defendant was no longer free to leave after he learned, from Officer Harper, that the victim had sustained two stab wounds, injuries that were

out of the apartment and leave.[6] The defendant was not handcuffed or physically restrained. In fact, she moved freely throughout her apartment as she made her statement to Officer Moura. These facts do not suggest any restriction on the defendant's freedom of movement, much less to the degree associated with formal arrest.

Finally, Officer Moura was the only police officer present during the encounter with the defendant. Although Officer Moura was armed, he did not display his weapon to the defendant or use any force before or during the questioning. To the contrary, the record shows that Officer Moura exercised little, if any, control over the defendant. Cf. *State* v. *Mangual*, supra, 311 Conn. 201–202 (police exercised complete control over defendant and surroundings before, during, and after questioning).

After considering all of the circumstances surrounding the questioning of the defendant, we cannot

inconsistent with the defendant's explanation of what had happened during the altercation. See footnote 3 of this opinion.

[6] The defendant argues that she was not free to leave, in part because the encounter between her and Officer Moura took place at her apartment. With respect to this argument, she contends that the court should not apply the "free to leave" test, pursuant to which "*Miranda* warnings are required only if, under the circumstances, a reasonable person would believe that he or she was not free to leave the scene of the interrogation." *State* v. *Hasfal*, 106 Conn. App. 199, 206, 941 A.2d 387 (2008); see *State* v. *Mangual*, supra, 311 Conn. 195 n.12 (noting that it has not always clearly distinguished ultimate inquiry from threshold determination of whether reasonable person in suspect's position would feel free to terminate questioning and leave).

Our Supreme Court's decision in *State* v. *Castillo*, supra, 329 Conn. 311, which also involved a police encounter at the defendant's residence, provides us with guidance on this issue. The court noted: "[N]ot all restrictions on a suspect's freedom of action rise to the level of custody for *Miranda* purposes; in other words, the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." (Internal quotation marks omitted.) *State* v. *Castillo*, supra, 324; see also *State* v. *Mangual*, supra, 311 Conn. 194–95 n.12. Accordingly, as our Supreme Court did in *Castillo*, we use the nonexclusive list of factors set forth in *Mangual* to reach our conclusion on the ultimate issue of whether a reasonable person in the defendant's position would believe that there was a restraint on her freedom of movement to the degree associated with a formal arrest. See *State* v. *Castillo*, supra, 322.

conclude that a reasonable person in the defendant's position would have believed that her freedom of movement was restrained to the degree associated with a formal arrest. Because the defendant was not in custody when she gave her statement, we further conclude that she was not entitled to an advisement of her rights under *Miranda*.[7] See *State* v. *Arias*, supra, 322 Conn. 179. Accordingly, the trial court properly denied her motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE SKYLAR F.*

(AC 42499)

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

Syllabus

The respondent father appealed to this court from the judgment of the trial court denying his motion to open the judgment of neglect concerning the father's minor child that was rendered after the father was defaulted for his failure to attend a case status conference. On appeal, the father claimed that the trial court improperly denied his motion to open because the record did not support a finding that he received actual adequate notice of a case status conference in violation of his right to due process of law. *Held*:

[7] Because we conclude that the defendant was not in custody, we need not address her claim that she was subjected to interrogation. See *State* v. *Smith*, 321 Conn. 278, 288, 138 A.3d 223 (2016) ("[t]wo threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation" [internal quotation marks omitted]). Moreover, because we conclude that there was no error, we need not conduct a harmless error analysis.

* 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.

1. The respondent father could not prevail in his claim that this court should exercise de novo review pursuant to the test articulated by the United States Supreme Court in *Mathews* v. *Eldridge* (424 U.S. 319), as he conflated the alleged due process violation in the court's rendering of a default judgment at the case status conference with the court's denial of his motion to open, from which he appealed to this court; the manifest purpose of a motion to open a default pursuant to the applicable rule of practice (§ 35a-18) and statute (§ 52-212) is to provide a mechanism by which a defaulted party has an opportunity to be heard, and because the father, by filing the motion to open, invoked his right to due process, specifically, the right to be heard as to why he failed to appear and whether he had a good defense, he was afforded a hearing and thereby exercised his right to due process, and, therefore, this court could not conclude that the father was deprived of his right to due process and reviewed the merits of his claim under the abuse of discretion standard applicable to the appeal of a denial of a motion to open a default judgment.
2. The trial court did not abuse its discretion in denying the respondent father's motion to open the default judgment: the father did not present a good defense, as the court had expressed concerns over the father's substance abuse and domestic violence, and the father addressed neither concern in his motion to open, and the father did not show that his failure to appear was the result of mistake, accident or other reasonable cause, nor did he particularly set forth the reason why he failed to appear, as the record demonstrated that the father's attorney was present when the case status conference was scheduled, had scheduled the case status conference at a particular time for the father's convenience, and did not assert that the father lacked notice of the scheduled court date, and there was no indication that the father and his attorney were unable to communicate with each other or that he was unaware of the outcome of a temporary custody hearing, at which the court scheduled the case status conference for a time requested by the father through his attorney and sustained the order of temporary custody; moreover, the father failed to abide by the requirement of the applicable rule of practice (§ 35a-18) that his written motion be verified by oath, and given that the father had actual notice of the fact that a petition of neglect was filed, was an active participant and was fully represented by counsel in a contested order of temporary custody hearing, and had elected to be absent on the day the court issued orders relating to custody of his child and the scheduling of subsequent proceedings, it was the father's burden to keep the court, his attorney and the department informed of his whereabouts and his intentions with respect to exercising responsibility for his child.

Argued May 16—officially released July 2, 2019**

** July 2, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition to adjudicate the respondents' minor chlid neglected, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the court, *Conway*, *J.*, issued an ex parte order of temporary custody and removed the minor child from the respondents' care; thereafter, the court, *Burke*, *J.*, sustained the order of temporary custody; subsequently, the respondent father was defaulted for failure to appear; thereafter, the court, *Conway*, *J.*, rendered judgment adjudicating the minor child neglected and committing the minor child to the custody of the petitioner; subsequently, the court, *Marcus*, *J.*, denied the respondent father's motion to open the judgment, and the respondent father appealed to this court. *Affirmed.*

Albert J. Oneto IV, assigned counsel, for the appellant (respondent father).

Renee Bevacqua Bollier, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ELGO, J. The respondent father appeals from the judgment of the trial court denying his motion to open the judgment of neglect that was rendered after the respondent was defaulted for his failure to attend a case status conference.[1] On appeal, the respondent claims that the court improperly denied his motion to open because the record does not support a finding that he received "actual adequate notice of the [case status] conference in violation of his rights to the due process of law." We disagree and, accordingly, affirm the judgment of the trial court.

[1] A default judgment also was rendered against Skylar's mother for her failure to appear at the case status conference, but she is not a party to this appeal. We therefore refer to the respondent father as the respondent in this opinion.

The following facts and procedural history are relevant to this appeal. Skylar was born in September, 2018. On September 28, 2018, the Department of Children and Families (department) assumed temporary custody of Skylar pursuant to a ninety-six hour administrative hold. On October 1, 2018, the petitioner, the Commissioner of Children and Families, filed a neglect petition on behalf of Skylar. On that same date, the department obtained an ex parte order of temporary custody. A trial on the order of temporary custody was heard by the court on October 12 and 19, 2018. At the close of the first day of trial, the respondent received permission to be excused from attending the second day of trial. At the close of the second day of trial, the court ruled from the bench and sustained the order of temporary custody.

After the court ruled from the bench, the parties scheduled a case status conference. The following colloquy occurred:

"The Clerk: November 27th at nine?

"[The Mother's Counsel]: I guess so.

"[The Department's Counsel]: Can [the respondent] be notified of that date, please, your honor?

"The Court: So ordered.

"[The Respondent's Counsel]: Actually, is it possible to get a three o'clock case status conference?

"[The Mother's Counsel]: That date? No. I have a trial from two to five.

"[The Respondent's Counsel]: He won't be able to make it that's a work day. He could lose his job.

"The Court: You try it for a different time?

"The Clerk: We can do December 4th at two.

"[The Respondent's Counsel]: Is it possible to do three? . . .

"The Clerk: Would nine o'clock work or no?

"[The Respondent's Counsel]: No, he'll be at work. He works until two so three is—

"The Clerk: So it doesn't matter what day?

"[The Respondent's Counsel]. Yes. It has to be three."

The case status conference then was scheduled for December 4, 2018, at 3 p.m. The respondent did not attend the scheduled case status conference, but his attorney was present. The department at that time asked the court to render a default judgment as to the adjudication of neglect against the respondent for his failure to appear and to proceed to the disposition of commitment. The respondent's attorney objected but did not indicate that the respondent did not have knowledge of the status conference. Instead, the respondent's attorney told the court that the respondent could still be at work and that he was unable to reach the respondent, who was not answering his phone. On that same date, the court adjudicated Skylar neglected and committed her to the care and custody of the petitioner.

On December 31, 2018, the respondent filed a motion for articulation in which he asked the court to articulate the factual basis for its order sustaining the ex parte order of temporary custody. On that same date, the court issued an articulation, in which it found the following relevant facts: "At the time of her birth, [Skylar's mother and the respondent] had a sibling of Skylar who had been committed to [the department] and [had] a pending termination of parental rights matter. Neither [Skylar's mother nor the respondent] addressed their issues that caused the sibling to be committed. . . . There were two expired orders of protection between [Skylar's mother and the respondent]. . . . Prior to

[the sibling's] removal, [the respondent] reportedly hit [Skylar's mother], giving her a bloody nose. Also, [Skylar's mother] sent [a department social worker] an e-mail, in June of 2018, stating that she wanted [the department] to know that she and [the respondent] had been lying and they had been living together and they have had domestic violence issues. [Skylar's mother] said that [the respondent] hit her and kicked her out of the home. [Skylar's mother] would have to sleep on the front porch or at the hospital [emergency room] areas. . . . [A department social worker] reported that for Skylar to be returned, [the respondent] would have to show that he completed an updated substance abuse evaluation and domestic violence program. He needs to avoid domestic violence. There was testimony concerning [the respondent] having a bottle in a paper bag in his car. [The respondent] testified that it was . . . nonalcoholic. The court [found] that not credible."

On the basis of the credible testimony and evidence elicited at trial, the court found that the petitioner had "sustained the burden to prove by a fair preponderance of the evidence that under the doctrine of predictive neglect, that as of the date of the ex parte [order of temporary custody], it was more likely or more probable than not, that if Skylar were allowed to be placed in the care of either [Skylar's mother or the respondent], independently or in the care of both of them, Skylar would have been in immediate physical danger from her surroundings and immediate removal was necessary and continues to be necessary to ensure her safety." (Emphasis omitted.) Accordingly, the court sustained the ex parte order of temporary custody.

On January 8, 2019, the respondent filed a motion to open the judgment committing the minor child to the petitioner's custody.[2] Following a hearing held on January 10, 2019, the court denied the respondent's motion

[2] The respondent's motion to open consisted in its entirety of the following: "Pursuant to Practice Book § 17-4 [the respondent] moves this court to open

to open. First, the court explained that the respondent had failed to comply with the requirements of Practice Book § 35a-18[3] for filing a motion to open in juvenile matters, as his motion was not verified by oath. Second, the court considered the transcript of the proceedings on October 19, 2018, and concluded that the respondent's attorney was responsible for providing the respondent with notice of the case status conference. Third, the court explained that, in its December 31, 2018 articulation, it had specified the reasons why the order of temporary custody was sustained, and the respondent's motion had not demonstrated how those things had changed. On January 22, 2019, the respondent filed the present appeal from the judgment denying his motion to open the judgment of neglect.[4]

On appeal, the respondent claims that he was "entitled to have the judgment opened as a matter of law because the record of the proceedings below did not support a finding that he received actual notice of the

the judgment by this [court] of committing the child to the care and custody of the department. In support of this motion, [the respondent] further states the following: 1. [The respondent] never received notice of the case status conference. 2. [The respondent] has a home and child care and is completely prepared to take the child home and into his care. 3. That it is in the best interests of the child to open the judgment and place the child with [the respondent]."

[3] Practice Book § 35a-18 provides in relevant part: "Any order or decree entered through a default may be set aside within four months succeeding the date of such entry of the order or decree upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a defense in whole or in part existed at the time of the rendition of such order or of such decree, and that the party so defaulted was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same, except that no such order or decree shall be set aside if a final decree of adoption regarding the child has been issued prior to the filing of any such motion. Such written motion shall be verified by the oath of the complainant and shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the party failed to appear."

[4] Pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief of the petitioner in this appeal.

status conference in violation of the due process of law." We disagree.

As a preliminary matter, the respondent contends that although ordinarily this court would be constrained to review a lower court's decision to deny a motion to open a default judgment as to whether the court acted in clear abuse of its discretion, this court should exercise de novo review pursuant to the test articulated by the United States Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).[5] The respondent argues that de novo review pursuant to *Mathews* is appropriate in cases like this one where the "lower court proceedings [show] that a litigant was denied the due process of law in a matter customarily left to the lower court's sound discretion . . . ." Specifically, the respondent contends that he was deprived of due process of law because he did not receive "actual adequate notice" of the case status conference and, thus, he was not given an opportunity to be heard. We are not persuaded.

To support his contention that this court should apply the balancing test in *Mathews* to this case, the respondent cites to this court's decision in *In Re Shaquanna M.*, 61 Conn. App. 592, 767 A.2d 155 (2001). In that case, the issue was "[w]hether the denial of a continuance [had] been shown by the respondent to have interfered with her basic constitutional right to raise her children, thereby depriving her of procedural due process . . . ."

[5] Our Supreme Court has recognized that "[t]he United States Supreme Court [in *Mathews* v. *Eldridge*, supra, 424 U.S. 335] [has] set forth three factors to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Internal quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 226 n.20, 764 A.2d 739 (2001).

Id., 600. The court in *In Re Shaquanna M.* explained that "the difference in the two analyses [of the abuse of discretion standard and the *Mathews* balancing test] relates to the lack of discretion involved in providing procedural safeguards to satisfy procedural due process when dealing with the irrevocable severance of a parent's rights, as opposed to the presence of discretion in granting or denying a continuance in the garden variety civil case with its lesser standard of proof." Id., 605.

The respondent's reliance on *In Re Shaquanna M.* is misplaced. The respondent claims that he did not receive "actual adequate notice" of the case status conference, at which the default judgment was rendered. The issue on appeal, however, is the trial court's denial of the respondent's motion to open. The respondent asserts that, as a matter of law, the trial court was required to grant the motion to open. As such, he conflates the alleged due process violation in the court's rendering a default judgment at the case status conference with the court's denial of his motion to open. The respondent contends that he "was given no opportunity to be heard in connection with the neglect petition," but that assertion is plainly incorrect. The manifest purpose of a motion to open a default pursuant to Practice Book § 35a-18 and General Statutes § 52-212 is to provide a mechanism by which a defaulted party has an opportunity to be heard. By filing the motion to open, the respondent invoked his right to due process, specifically, the right to be heard as to why he failed to appear and whether he had a good defense. Accordingly, the denial of a motion to open is inherently different from a denial of a motion for a continuance, which was the motion at issue in *In Re Shaquanna M.*, or a motion for an evidentiary hearing, which was the motion at issue in *Mathews*. *In Re Shaquanna M.*, supra, 61 Conn. App. 605.

In his brief, the respondent launches into a *Mathews* balancing test analysis focused solely on the circumstances of the case status conference, but provides no analysis of the court's consideration and disposition of the motion to open, from which he has taken this appeal. With respect to the motion to open, the burden was on the respondent to show reasonable cause or that a defense existed in whole or in part, and that there was reasonable cause that prevented him from appearing. Practice Book § 35a-18; see also General Statutes § 52-212 (a). The respondent's failure to meet that burden, as discussed more fully later in this opinion, does not obviate the fact that, by filing the motion to open, he was afforded a hearing and, thereby, exercised his right to due process. Under such circumstances, we cannot conclude that the respondent was deprived of his right to due process. We, therefore, review the merits of the respondent's claim under the abuse of discretion standard applicable to the appeal of a denial of a motion to open a default judgment.

"To open a default judgment, a moving party must show reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. General Statutes § 52-212 (a). Furthermore, § 52-212 (b) requires that [t]he complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or defendant failed to appear. It is thus clear that to obtain relief from a judgment rendered after a default, two things must concur. There must be a showing that (1) a good defense, the nature of which must be set forth, existed at the time judgment was ren-

dered, and (2) the party seeking to set aside the judgment was prevented from making that defense because of mistake, accident or other reasonable cause. . . . Since the conjunctive and meaning in addition to is employed between the parts of the two prong test, both tests must be met." (Citation omitted; internal quotation marks omitted.) *In re Ilyssa G.*, 105 Conn. App. 41, 45–46, 936 A.2d 674 (2007), cert. denied, 285 Conn. 918, 943 A.2d 475 (2008).

"Our review of a court's denial of a motion to open . . . is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) Id., 45.

As the trial court correctly observed, the respondent in the present case met neither of the two prongs required for the court to open the judgment of default. As to the first prong, the respondent did not present a good defense. In his motion to open, the respondent averred that he had "a home and child care and [was] completely prepared to take the child home and into his care." In its articulated decision sustaining the order of temporary custody, which was tried to the court just a few months prior to the date on which the respondent filed his motion to open, the court stated that there was evidence put on by the petitioner regarding concerns over the respondent's substance abuse and domestic violence. The respondent addressed neither concern in his motion to open.

As to the second prong, the respondent did not show that his failure to appear was the result of mistake, accident or other reasonable cause, nor did he "particularly set forth the reason why [he] failed to appear." Practice Book § 35a-18; see also General Statutes § 52-212 (a) and (c). Instead, the respondent simply asserted in his motion to open that he did not receive notice of the case status conference. The record before this court demonstrates that the respondent's attorney was present when the case status conference was scheduled; indeed, the respondent's attorney scheduled the case status conference for 3 p.m. for the respondent's convenience.[6] Furthermore, at the case status conference, the respondent's attorney did not assert that the respondent lacked notice of the scheduled court date. Rather, the reaction of the respondent's attorney, who asserted that the respondent could still be at work because the respondent was not answering his phone, suggests that he expected the respondent to be present at the case status conference. Moreover, the record is devoid of any indication that the respondent's attorney was unable to contact his client after the second day of trial, which the respondent specifically sought to be excused from

[6] The respondent acknowledges that, "[u]nder the law of agency, a court, under appropriate circumstances, may default a party for his failure to appear for a scheduled proceeding if the party's attorney had knowledge of the proceeding, on the theory that a party is presumed to know that which is known to his attorney." The respondent also acknowledges that the standing orders for juvenile matters direct that counsel "shall, as necessary, inform each client of the date and time of each court matter." (Emphasis omitted; internal quotation marks omitted.) The respondent nonetheless attempts to shift the burden of notice to the court and argues that it was the court's responsibility to notify the respondent of the case status conference date because, "[f]aced with an unclear and ambiguous order of notice, [the respondent's] counsel would have been justified in believing that he had been relieved of any obligation he may have had under the standing orders to notify his client of the status conference." We are not persuaded. We fail to see how the court's agreement that the respondent should be notified of the case status conference pursuant to the department's request relieves the respondent's attorney from his independent responsibility, under the theory of agency and pursuant to the standing orders for juvenile matters, to provide notice to his client.

attending. There is no indication that the respondent and his attorney were unable to communicate with each other or that the respondent was unaware of the outcome of the order of temporary custody hearing, at which time the court not only scheduled the case status conference for a time requested by the respondent through his attorney, but more importantly, sustained the order of temporary custody as to his child.

It is important to note that the circumstances of this case contrast with default judgments in which a party has never appeared in court following a finding of notice at the commencement of a case. This case is one in which the respondent had actual notice of the fact that a petition of neglect was filed, was an active participant and fully represented by counsel in a contested order of temporary custody hearing, and elected to be absent on the day the court issued orders relating to custody of his child and the scheduling of subsequent proceedings. Under such circumstances, it is the burden of the respondent to keep the court, his attorney and the department informed of his whereabouts and his intentions with respect to exercising responsibility for his child. See *In re Ilyssa G.*, supra, 105 Conn. App. 49 ("regardless of whether it was intentional or the result of negligence, the respondent's failure to keep the court, the department and his attorney informed of his whereabouts does not qualify for purposes of opening a default judgment as a mistake, accident or other reasonable cause that prevented the respondent from presenting a defense").[7] Accordingly, the respondent has

[7] To the extent that the respondent did not receive notice of the case status conference from his attorney because of his own negligence in not staying in contact with his attorney, "[n]egligence is no ground for vacating a judgment, and it has been consistently held that the denial of a motion to open a default judgment should not be held an abuse of discretion where the failure to assert a defense was the result of negligence. . . . Negligence of a party or his counsel is insufficient for purposes of § 52-212 to set aside a default judgment." (Internal quotation marks omitted.) *In re Ilyssa G.*, supra, 105 Conn. App. 48–49.

not demonstrated how his failure to appear was the result of mistake, accident or other reasonable cause.

Furthermore, the respondent failed to abide by the requirement that his motion be verified by oath. Practice Book § 35a-18 mandates that the written motion "shall be verified by the oath of the complainant." The respondent failed to meet that basic requirement. Because the respondent failed to meet either prong required for the court to open the judgment of default and further failed to have his motion verified by oath, we conclude that the court did not abuse its discretion in denying his motion to open the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.