WILTON CAMPUS 1691, LLC *v.* TOWN OF WILTON WILTON RIVER PARK 1688, LLC *v.* TOWN OF WILTON WILTON RIVER PARK NORTH, LLC *v.* TOWN OF WILTON (AC 40697)

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

Syllabus

The plaintiff property owners filed six appeals from the decisions of the Board of Assessment Appeals of the defendant town of Wilton denying their appeals from the town's tax assessments of the plaintiffs' properties. Pursuant to statute (§ 12-63c [d]), the plaintiffs were required to provide the assessor with annual income and expense reports regarding their properties by June 1, 2014. The defendant received those reports past the deadline but failed to add any late filing penalties, pursuant to § 12-63c (d), before taking the oath in signing the grand list on January 1, 2015. Instead, as had been his practice, the assessor imposed late filing penalties on the plaintiffs retroactively, pursuant to the statute (§ 12-60) that governs corrections to the grand list due to clerical omission or mistake, and issued certificates of change for the subject properties in April, 2015. Thereafter, the plaintiffs appealed to the board, which denied their appeals, and the plaintiffs appealed to the Superior Court, where the six appeals were consolidated and tried together. Subsequently, the trial court rendered judgments in favor of the defendant, from which the plaintiffs appealed to this court. The trial court concluded that although the assessor had violated the statute (§ 12-55 [b]) that requires the assessor to make any assessment required by law prior to signing the grand list, the only redress for the assessor's failure to comply

with the provisions of § 12-55 (b) was to postpone the right of the plaintiffs to appeal the action to the assessor until the succeeding grand list, and that the penalty prescribed for in § 12-63c (d) makes no provision for the removal of the penalty imposed by the legislature, regardless of the action taken by the assessor. *Held:*

1. The trial court erred in concluding that although the assessor had no statutory authority to impose late penalties after the taking the oath, the plaintiffs were without redress beyond the postponement of the right to appeal because § 12-63c did not expressly provide for the removal of the unlawful penalties: pursuant to § 12-55 (b), the imposition of a late filing penalty constitutes an assessment required by law and, as such, it must be made by the assessor prior to taking the oath, and, therefore, because the assessor did not have the statutory authority to impose the late filing penalties after he took the oath, the late adjustments were invalid and prevented any recovery of taxes based thereon; moreover, the defendant's claim that the language in § 12-55 (a), which does not explicitly reference the penalties under § 12-63c (d) as being a required penalty that must be included in the grand list, demonstrated a legislative intent to exclude, by implication, a late penalty under § 12-63c (d) as a required assessment was unavailing, as § 12-55 (a) governs the publication of grand lists and specifies what they reflect for public inspection, whereas § 12-55 (b) governs the timing of when the assessor shall equalize the assessments of property in the town and make any assessment omitted by mistake or required by law, and the defendant's position was untenable because it assumed that the assessor had the authority to add § 12-63c (d) late penalties, at any time and for an indefinite period, after signing the grand list for a particular year, which would lead to an absurd or unworkable result.
2. The trial court properly concluded that the delayed imposition of the late filing penalties did not correct a clerical omission or mistake, and, therefore, § 12-60 did not apply so as to permit the retroactive adjustment to the assessments on the basis of the late filing penalties; because the assessor's omission of the late filing penalties from the 2014 grand list at the time he signed it was of a deliberate nature, in that the assessor's practice had been to assess, pursuant to § 12-60, any late filing penalties under § 12-63c (d) retroactively, and that at the time the assessor took the oath on the grand list, he knew that he had received the plaintiffs' 2013 income and expense reports after the June 1, 2014 deadline and delayed imposition of the late penalties until approximately three months after he signed the 2014 grand list, the omission, although mistaken, was deliberate and intentional, not clerical and, therefore, was an error of substance that could not be corrected under § 12-60.
3. The defendant could not prevail on its claim, raised as an alternative ground for affirming the judgment, that the plaintiffs were not harmed by the assessor's imposition of the late filing penalties because they were able to seek review of the assessor's imposition of the penalties by appealing to the board; because the assessor was without statutory authority after he signed the grand list to impose the late penalties, which were null and void, and because the assessor could not collect

a tax on an assessment that was untimely adjusted by the imposition of late filing penalties, this court could not conclude that the statutorily unauthorized delay of the imposition of the late filing penalties was a mere procedural irregularity that, if uncorrected, would result in no harm to the plaintiffs.

Argued October 15, 2018—officially released August 13, 2019

Procedural History

Appeals from the decisions of the defendant's Board of Assessment Appeals denying the plaintiffs' appeals from the allegedly improper retroactive assessment of tax penalties on certain of the plaintiffs' real property, brought to the Superior Court in the judicial district of New Britain, Tax Session, where the appeals were consolidated and tried to the court, *Hon. Arnold W. Aronson*, judge trial referee; judgments for the defendant, from which the plaintiffs filed a joint appeal to this court. *Reversed; judgments directed.*

Matthew T. Wax-Krell, with whom were *Marci Silverman* and, on the brief, *Denise P. Lucchio*, for the appellants (plaintiffs).

Barbara M. Schellenberg, with whom were *Jonathan S. Bowman* and, on the brief, *Joseph D. Szerejko*, for the appellees (defendants).

Opinion

MOLL, J. The principal issue in this real estate joint tax appeal is whether the trial court properly rendered judgments in favor of the defendant, the town of Wilton, despite having concluded that the defendant's tax assessor (assessor) violated General Statutes § 12-55 (b) when he added late filing penalties pursuant to General Statutes § 12-63c (d)[1] against the plaintiff prop-

[1] General Statutes § 12-63c provides in relevant part: "(a) In determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor, which term whenever used in this section shall include assessor or board of assessors, may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method, as provided in [General Statutes §] 12-63b, that the owner of such property annually submit to the assessor not later than the first day of June, on a form provided by the assessor not later than forty-

erty owners[2] three months after taking and subscribing to the oath on the 2014 grand list. The plaintiffs appeal from the judgments of the trial court rendered in favor of the defendant. In their joint appeal, the plaintiffs claim that the trial court erred by rendering judgments in favor of the defendant despite having properly concluded that the assessor acted without statutory authority when he added the late filing penalties to the 2014 grand list after taking and subscribing to the oath. We agree. Accordingly, we reverse the judgments of the trial court.

The record and the parties' stipulations of fact[3] reflect the following facts and procedural background. On or

five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. Submission of such information may be required whether or not the town is conducting a revaluation of all real property pursuant to [General Statutes §] 12-62. Upon determination that there is good cause, the assessor may grant an extension of not more than thirty days to submit such information, if the owner of such property files a request for an extension with the assessor not later than May first.

* * *

"(d) Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) . . . shall be subject to *a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year*. Notwithstanding the provisions of this subsection, an assessor or board of assessment appeals shall waive such penalty if the owner of the real property required to submit the information is not the owner of such property on the assessment date for the grand list to which such penalty is added. Such assessor or board may waive such penalty upon receipt of such information in any town in which the legislative body adopts an ordinance allowing for such a waiver." (Emphasis added.)

[2] The plaintiffs are Wilton River Park 1688, LLC, Wilton Campus 1691, LLC, and Wilton River Park North, LLC, which own, respectively, the subject real properties located at 5 River Road, 15 River Road, and 7 Godfrey Place in Wilton. For ease of reference, we refer to the properties together as the "subject properties."

[3] The parties filed stipulations of fact in each of the six respective tax appeals filed in the Superior Court. With the exception of identifying the particular plaintiff and the related subject property, the stipulations of fact are identical.

before April 15, 2014, pursuant to § 12-63c (a), the assessor requested from the plaintiffs annual income and expense reports for the year 2013 for their respective subject properties and provided them with the requisite forms. At all times from April 15, 2014 through October 26, 2016,[4] including October 1, 2014, the date of the grand list at issue, the plaintiffs owned their respective subject properties. Pursuant to § 12-63c (a), the plaintiffs were required to submit their 2013 income and expense reports to the assessor on or before June 1, 2014. On June 2, 2014, the plaintiffs sent, by Federal Express overnight mail, their 2013 income and expense reports, along with a cover letter dated May 30, 2014, to the assessor, who received them on June 3, 2014.

On or before January 31, 2015, the assessor took the oath on the 2014 grand list,[5] at which time he (1) knew that he had received the plaintiffs' income and expense reports after the June 1, 2014 deadline, and (2) did not add any late filing penalties to the 2014 grand list with respect to the subject properties. The assessor's practice has been to assess, pursuant to General Statutes § 12-60,[6] any late filing penalties under § 12-63c (d)

[4] October 26, 2016, is the date of the parties' stipulations.

[5] The assessor did not receive a grand list filing extension for the 2014 grand list.

[6] General Statutes § 12-60 provides: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. In the event that the issuance of a certificate of correction results in an increase to the assessment list of any person, written notice of such increase shall be sent to such person's last-known address by the assessor or board of assessment appeals within ten days immediately following the date such correction is made. Such notice shall include, with respect to each assessment list corrected, the assessment prior to and after such increase and the reason for such increase. Any person claiming to be aggrieved by the action of the assessor under this section may appeal the doings of the assessor to the board of assessment appeals as otherwise provided in this chapter, provided such appeal shall be extended in time to the next succeeding board of assessment appeals if the meetings of such

retroactively, *after* signing the grand list for a given year.[7]

On April 29, 2015, the assessor issued certificates of change for the subject properties in connection with the 2014 grand list and sent them, respectively, to the plaintiffs' last known addresses. The certificates of change each contain the following prefatory language: "By authority of [§] 12-60 of the Connecticut General Statutes, the Assessor hereby adjusts the assessment list of 2014." Each certificate of change identifies, among other things, the "original" assessment amount, the "adjustment" amount reflecting the late filing penalty (i.e., approximately 10 percent of the original assessment),[8] and the "current" assessment amount (i.e., the original assessment amount plus the adjustment amount). The certificates of change reflect no exemptions.

Pursuant to General Statutes § 12-119, to the extent that it was necessary to do so, the plaintiffs timely filed respective appeals from the assessor's actions to the Superior Court.[9] See *Wilton River Park 1688, LLC* v.

board for the grand list have passed. Any person intending to so appeal to the board of assessment appeals may indicate that taxes paid by him for any additional assessment added in accordance with this section, during the pendency of such appeal, are paid 'under protest' and thereupon such person shall not be liable for any interest on the taxes based upon such additional assessment, provided (1) such person shall have paid not less than seventy-five per cent of the amount of such taxes within the time specified or (2) the board of assessment appeals reduces valuation or removes items of property from the list of such person so that there is no tax liability related to additional assessment."

[7] The record does not reflect any explanation for the assessor's practice.

[8] The specific penalties at issue (in the form of increases in assessed values) are as follows: (1) $1,424,520 for Wilton River Park 1688, LLC; (2) $2,712,190 for Wilton Campus 1691, LLC; and (3) $159,850 for Wilton River Park North, LLC.

[9] General Statutes § 12-119 provides in relevant part: "When it is claimed . . . that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . prior

Wilton, Superior Court, judicial district of New Britain, Docket No. CV-15-6030507-S; *Wilton Campus 1691, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030508-S; *Wilton River Park North, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030509-S. Pursuant to General Statutes § 12-111,[10] the plaintiffs also timely

to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

[10] General Statutes § 12-111 provides in relevant part: "(a) Any person . . . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals. Such appeal shall be filed, in writing, on or before February twentieth. The written appeal shall include, but is not limited to, the property owner's name, name and position of the signer, description of the property which is the subject of the appeal, name and mailing address of the party to be sent all correspondence by the board of assessment appeals, reason for the appeal, appellant's estimate of value, signature of property owner, or duly authorized agent of the property owner, and date of signature. The board shall notify each aggrieved taxpayer who filed a written appeal in the proper form and in a timely manner, no later than March first immediately following the assessment date, of the date, time and place of the appeal hearing. Such notice shall be sent no later than seven calendar days preceding the hearing date . . . . The board shall determine all appeals for which the board conducts an appeal hearing and send written notification of the final determination of such appeals to each such person within one week after such determination has been made. Such written notification shall include information describing the property owner's right to appeal the determination of such board. Such board may equalize and adjust the grand list of such town and may increase or decrease the assessment of any taxable property or interest therein and may add an assessment for property omitted by the assessors which should be added thereto . . . . When the board increases or decreases the gross assessment of any taxable real property or interest therein, the amount of such gross assessment shall be fixed until the assessment year in which the municipality next implements a revaluation of all real property pursuant to [General Statutes §] 12-62, unless the assessor

filed appeals to the Wilton Board of Assessment Appeals (board), which, subsequent to a hearing on April 5, 2016, denied their appeals, making no changes to the certificates of change. Pursuant to General Statutes § 12-117a,[11] the plaintiffs filed timely appeals from the

increases or decreases the gross assessment of the property to (1) comply with an order of a court of jurisdiction, (2) reflect an addition for new construction, (3) reflect a reduction for damage or demolition, or (4) correct a factual error by issuance of a certificate of correction. Notwithstanding the provisions of this subsection, if, prior to the next revaluation, the assessor increases or decreases a gross assessment established by the board for any other reason, the assessor shall submit a written explanation to the board setting forth the reason for such increase or decrease. The assessor shall also append the written explanation to the property card for the real estate parcel whose gross assessment was increased or decreased.

"(b) If an extension is granted to any assessor or board of assessors pursuant to [General Statutes §] 12-117, the date by which a taxpayer shall be required to submit a written request for appeal to the board of assessment appeals shall be extended to March twentieth and said board shall conduct hearings regarding such requests during the month of April. The board shall send notification to the taxpayer of the time and date of an appeal hearing at least seven calendar days preceding the hearing date, but no later than the first day of April. If the board elects not to hear an appeal for commercial, industrial, utility or apartment property described in subsection (a) of this section, the board shall notify the taxpayer of such decision no later than the first day of April."

[11] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom, with respect to the assessment list for the assessment year commencing October 1, 1989, October 1, 1990, October 1, 1991, October 1, 1992, October 1, 1993, October 1, 1994, or October 1, 1995, and with respect to the assessment list for assessment years thereafter, to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. Such citation shall be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in case of a summons in a civil action. The authority issuing the citation shall take from the applicant a bond or recognizance to such town or city, with surety, to prosecute the application to effect and to comply with and conform to the orders and decrees of the court in the premises. Any such application shall be a preferred case, to be heard, unless good cause appears to the contrary, at the first session, by the court or by a committee appointed by the court. . . . If, during the pendency of such appeal, a new assessment year begins, the applicant may amend his application as to any matter therein, including an appeal for such new year, which is affected by the inception of such new year and such

actions of the board to the Superior Court. See *Wilton River Park 1688, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034627-S; *Wilton Campus 1691, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034566-S; *Wilton River Park North, LLC* v. *Wilton*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034565-S.

The six appeals filed in the Superior Court were consolidated and adjudicated together. The parties submitted memoranda of law regarding the legal issues, as well as the stipulations of fact, accompanied by stipulated exhibits with numerous appended exhibits, which furnish the entire factual basis for the judgments of the trial court.

On July 12, 2017, the court issued its memorandum of decision, ruling in favor of the defendant. As an initial matter, the court rejected the defendant's argument that the assessor had the authority to impose the late filing penalties after signing the 2014 grand list pursuant to § 12-60, which provides in relevant part: "*Any clerical omission or mistake* in the assessment of taxes *may*

applicant need not appear before the board of tax review or board of assessment appeals, as the case may be, to make such amendment effective. The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . . If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes, together with interest and any costs awarded by the court, or, at the applicant's option, shall be granted a tax credit for such overpayment, interest and any costs awarded by the court. Upon motion, said court shall, in event of such overpayment, enter judgment in favor of such applicant and against such city or town for the whole amount of such overpayment, less any lien recording fees incurred under [General Statutes §§] 7-34a and 12-176, together with interest and any costs awarded by the court. The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased."

be corrected according to the fact by the assessors or board of assessment appeals, *not later than three years following the tax due date* relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment." (Emphasis added.) Citing *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 595–96, 489 A.2d 1034 (1985), the court reasoned that § 12-60 applies only to clerical errors, and not to errors of substance, and that, because the omission of the late filing penalties from the 2014 grand list at the time the assessor signed it was intentional, the assessor's delayed imposition of the late filing penalties "was by no means a clerical error."

The court went on to consider § 12-55 (b), which provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law. . . ." The court emphasized the requirement in § 12-55 (b) that the assessor make any assessment "required by law" prior to signing the grand list. Because § 12-63c (d) provides that a property owner who fails to submit timely income and expense reports, as required under § 12-63c (a), "shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year," the court concluded that "[t]he act of imposing the 10% penalty was not discretionary on the part of the assessor; it was mandatory." Thus, applying § 12-55 (b) to the present case, the court concluded that "[i]t is clear that the penalty should have been imposed prior to the assessor signing the completion of the grand list" on or before January 31, 2015.

The court opined that "[c]ompliance with § 12-55 (b) is imperative because a late filing of the grand list by the assessor reduces the time given to the property

owner to appeal to the Board of Assessment Appeals for relief from the action of the assessor. See *Wysocki* v. *Ellington*, 109 Conn. App. 287, 299, 951 A.2d 598 ([I]n the context of statutes relating to property tax assessment, when the statutory provision is for the benefit and protection of the individual taxpayer . . . the provision is mandatory. . . . If the provision is mandatory it must be followed or the assessment will be invalid. . . . All provisions designed to give [the taxpayer] an opportunity of a review of the assessment, whether by the assessors themselves or on appeal from their conclusions, are exclusively in his interest. [Internal quotation marks omitted.]), cert. denied, 289 Conn. 934, 958 A.2d 1248 (2008)." The court found that the assessor's delay in imposing the late filing penalties deprived the plaintiffs of the opportunity to appeal for a period of three months following the assessor's signing of the grand list. Specifically, the court opined that, "[a]s noted in General Statutes § 12-111, the plaintiffs are required to challenge the action of the assessor by filing an appeal to the [board] 'in writing, on or before February twentieth.' The imposition of the penalty by the assessor on January 31, 2015,[12] left the plaintiffs with twenty days to take their appeals instead of three months." (Footnote added.)

Notwithstanding the foregoing conclusions, the court rendered judgments in favor of the defendant, reasoning that "[a]lthough the plaintiffs seek to avoid the 10 [percent] penalty for failure to comply with § 12-55 (b), the only redress for the assessor's failure to comply with the provisions of § 12-55 (b) is to postpone the right of the plaintiffs to appeal the action of the assessor until the succeeding grand list. See § 12-55 (c):

[12] We note that this date is an error; it is undisputed that the assessor imposed the late filing penalties on April 29, 2015. This error has no impact on our analysis.

" 'If any such assessment increase notice is sent later than the time period prescribed in this subsection, such increase shall become effective on the next succeeding grand list.' The penalty prescribed for in § 12-63c (d) makes no provision for the removal of the 10 [percent] penalty imposed by the legislature, regardless of the action taken by the assessor." This joint appeal followed.

On appeal, the plaintiffs claim that the trial court erred by rendering judgments in favor of the defendant despite having correctly concluded that, pursuant to § 12-55 (b), the assessor was required to add any late filing penalties pursuant to § 12-63c (d) prior to signing the 2014 grand list. The defendant presents three alternative grounds for affirmance of the trial court's judgments: (1) the assessor made no mistake in assessing the late filing penalties at issue; (2) if the assessor made a mistake, then it was a clerical mistake that was corrected pursuant to § 12-60; and (3) the plaintiffs were not harmed by the assessor's actions. We agree with the plaintiffs' claim and do not agree with any of the defendant's alternative grounds for affirmance.

Before reaching the plaintiffs' claim on appeal, we briefly address the applicable standard of review. Resolution of the principal issue in this joint appeal requires us to analyze specific sections of chapter 203 of the General Statutes, which governs "Property Tax Assessment." Because statutory interpretation involves a question of law, our review is plenary. *Bell Atlantic NYNEX Mobile, Inc.* v. *Commissioner of Revenue Services*, 273 Conn. 240, 249, 869 A.2d 611 (2005).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case,

including the question of whether the language actually does apply. . . . In seeking to determine that meaning [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Dish Network, LLC* v. *Commissioner of Revenue Services*, 330 Conn. 280, 291, 193 A.3d 538 (2018). "Moreover, it is well settled that the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008).

I

The plaintiffs claim that the trial court erred in allowing the assessor to impose late filing penalties *after* he signed the 2014 grand list, despite properly concluding that the assessor was statutorily obligated to add the late filing penalties *prior to* signing the grand list. In response, the defendant makes the fundamental contention, which it frames as its first alternative ground for affirmance, that the assessor made no mistake in assessing the late filing penalties after signing the grand list. We agree with the plaintiffs.

The fundamental principle that municipal tax assessors may act only pursuant to statute is well established.

"Municipalities have no powers of taxation except those expressly given to them by the legislature. . . . Their powers of taxation can be lawfully exercised only in strict conformity to the terms by which they were given. . . . When a taxing statute is being considered, ambiguities are resolved in favor of the taxpayer." (Citations omitted.) *Consolidated Diesel Electric Corp.* v. *Stamford*, 156 Conn. 33, 36, 238 A.2d 410 (1968). Stated differently, "strict compliance with the statutory provisions is a condition precedent to the imposition of a valid tax." (Internal quotation marks omitted.) *Sheridan* v. *Killingly*, 278 Conn. 252, 264, 897 A.2d 90 (2006); see also *Metropolitan District* v. *Burlington*, 241 Conn. 382, 398, 696 A.2d 969 (1997) ("[i]t is well settled in Connecticut that tax assessments may only be made in strict conformity with the taxation statutes"). "Before the broad authority conferred on them by the statutes is exhausted, assessors have abundant power to correct omissions or mistakes, clerical or otherwise, independently of [§ 12-60]. . . . Once assessors have completed their duties as prescribed by statute, however, they have no authority to alter a list except to remedy a clerical omission or mistake. . . . Evidently the purpose of [§ 12-60] was to give to assessors or board of relief a limited continuing authority to correct . . . clerical omission[s] or mistake[s] . . . irrespective of whether their larger jurisdiction had been terminated." (Citations omitted; internal quotation marks omitted.) *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 594; see also *Metropolitan District* v. *Burlington*, supra, 398; *Empire Estates, Inc.* v. *Stamford*, 147 Conn. 262, 264–65, 159 A.2d 812 (1960) ("The statutes relating to the assessment of property for taxation and to the duties of assessors comprise chapter 86 of the 1949 Revision (General Statutes, c. 203). It is clear from these enactments that the duties of assessors are prescribed with particularity. The manner in which real estate is to be

described and assessed is explicitly set out. Failure of the assessors to list real estate in a manner conforming to the statutes will result in an invalid assessment and prevent recovery of the tax based on it. . . . The power of assessors to alter assessments exists only during the lawful period for the performance of their duties, before the lists are completed and filed. . . . Once the assessors have completed their duties as prescribed by statute, they have no authority to alter a list except to remedy a clerical omission or mistake." [Citations omitted.]).

Mindful of these general principles, we turn to the relevant statutory provisions. We begin with the language of § 12-55 (b), which provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and *make any assessment* omitted by mistake or *required by law*. . . ." (Emphasis added.)

The parties do not dispute that the imposition of the late filing penalties constitutes an "assessment" for purposes of § 12-55 (b). The question is, therefore, whether the assessor's imposition of the late filing penalties was "required by law." The trial court reasoned as follows: "[Section] 12-63c (d) requires that a property owner who fails to timely submit [income and expense] information (when provided with a form by the assessor as stated in subsection (a)), 'shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year.' . . . The act of imposing the 10 [percent] penalty was not discretionary on the part of the assessor; it was mandatory. See *Chamber of Commerce of Greater Waterbury, Inc.* v. *Murphy*, 179 Conn. 712, 718–19, 427 A.2d 866 (1980)." We adopt such reasoning and conclude that the imposition of the late filing penalties constitutes an "assessment . . . required by law" under § 12-55 (b). As such,

it was required to be made by the assessor "[p]rior to taking and subscribing the oath upon the grand list . . . ."[13]

Furthermore, we note that the assessor did not receive a grand list filing extension for the 2014 grand list. Pursuant to subsection (a) of General Statutes § 12-117, which is titled "Extension of time for completion of duties of assessors and board of assessment appeals," "[t]he period prescribed by law for the completion of the duties of any assessor, board of assessors or board of assessment appeals may, for due cause shown, be extended by the chief executive officer of the town for a period not exceeding one month, and in the case of the board of assessment appeals in any town in the assessment year in which a revaluation, pursuant to section 12-62, is required to be effective, such period shall be extended by said chief executive officer for a period not exceeding two months. Not later than two weeks after granting an extension as provided under this subsection, the chief executive officer shall send written notice of the extension to the Secretary of the Office of Policy and Management." "By providing a particular method to procure extensions of time for [an assessor] to complete [his or her] duties, the legislature must have intended that the time limitations for action by the [assessor] be mandatory rather than merely directory. The provisions of § 12-117 delineating the method by which an extension may be obtained make little sense if [an assessor] may, without utilizing them, validly act beyond the time limit otherwise imposed." *Albert Bros., Inc.* v. *Waterbury*, 195 Conn. 48, 55, 485

[13] We note that the foregoing conclusion is in harmony with the language of § 12-63c (d), which provides that "[a]ny owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section *for any assessment year*, who fails to submit such information as required under said subsection (a) . . . shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property *for such assessment year*." (Emphasis added.)

A.2d 1289 (1985). Thus, where an assessor makes an adjustment to an assessment after its statutory authority has expired, as here, the adjustment is invalid. Id.

In support of its argument that the assessor was not required to include the § 12-63c (d) late filing penalties at the time he took the oath on the 2014 grand list, the defendant relies on § 12-55 (a), which provides in relevant part: "On or before the thirty-first day of January of each year, except as otherwise specifically provided by law, the assessors or board of assessors shall publish the grand list for their respective towns. Each such grand list shall contain the assessed values of all property in the town, reflecting the statutory exemption or exemptions to which each property or property owner is entitled, and including, where applicable, *any assessment penalty added in accordance with* [*General Statutes §§*] *12-41 or 12-57a* for the assessment year commencing on the October first immediately preceding. . . ." (Emphasis added.) The defendant argues that by expressly providing that penalties added pursuant to §§ 12-41 or 12-57a shall be included in the grand list, the legislature necessarily meant to exclude penalties assessed pursuant to § 12-63c (d).

The defendant predicates its argument on the axiom "expressio unius est exclusio alterius," translated from Latin to mean "the expression of one thing is the exclusion of another." "Although the so-called canons of statutory construction may at times serve as useful tools in deciphering legislative meaning, to rely on any one of them as a compelling factor in the interpretive process is problematic, because as Professor Karl Llewellyn persuasively has demonstrated, 'there are two opposing canons on almost every point.' K. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed,' 3 Vand. L. Rev. 395, 401 (1950). The so-called 'canons' are not that, at least in the sense that any one

of them reliably can be determined to apply or not to apply in any given case. They are, instead, merely guides drawn from experience, to be employed or not to be employed carefully and judiciously, depending on the circumstances. See F. Frankfurter, 'Some Reflections on the Reading of Statutes,' 47 Colum. L. Rev. 527, 544–45 (1947); see also *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 455, 692 A.2d 742 (1997). 'To permit them to displace the conclusions that careful interpretation yields . . . would be a disservice to the legislative process, as well as to the judicial exercise of interpreting legislative language based upon the premise that the legislature intends to enact reasonable public policies.' *United Illuminating Co.* v. *New Haven*, supra, 455." *Burke* v. *Fleet National Bank*, 252 Conn. 1, 23–24, 742 A.2d 293 (1999). Although there are numerous cases in which certain statutory provisions have been interpreted "as demonstrating a legislative intent to exclude, by implication, other possible referents; see, e.g., *State* v. *Kish*, 186 Conn. 757, 766, 443 A.2d 1274 (1982) (statutory itemization demonstrates legislative intent to exclude unenumerated items);" courts should decline to employ the axiom "where there is no language, legislative history or statutory purpose suggesting . . . such a result." *Burke* v. *Fleet National Bank*, supra, 24. This case is such an instance. The defendant's argument in this regard also fails because it ignores that § 12-55 (a) governs the *publication* of grand lists and specifies what they reflect for "public inspection." In contrast, § 12-55 (b) governs the *timing* of when "the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law." The defendant's position is also untenable because it assumes that the assessor has the authority to add § 12-63c (d) penalties for a particular assessment year—at any time and for an indefinite

period—after he signed the grand list for that assessment year.[14] Such an interpretation yields an absurd or unworkable result in violation of General Statutes § 1-2z.

Because the assessor did not have the statutory authority to impose the late filing penalties after he took the oath on the 2014 grand list, the late adjustments are invalid and prevent any recovery of taxes based thereon. See *Empire Estates, Inc.* v. *Stamford*, supra, 147 Conn. 264. Accordingly, where the assessor had no statutory authority to act in the manner challenged, the trial court erred in its ultimate conclusion that because § 12-63c (d) does not expressly provide for the removal of unlawful penalties, the plaintiffs were without redress beyond the postponement of the right to appeal.

In sum, in the absence of the applicability of another statute permitting a later assessment, the assessor was required to add the late filing penalties "[p]rior to taking and subscribing to the oath upon the grand list . . . ." General Statutes § 12-55 (b). The assessor's failure to do so was fatal to the imposition of late penalties.

II

In addition to its first alternative ground for affirmance, which we discussed in part I of this opinion, the defendant claims, pursuant to Practice Book § 63-4 (a) (1), two additional alternative grounds on which the trial court's judgments should be affirmed, namely, (1) if the assessor made a mistake, it was a clerical mistake that was corrected pursuant to § 12-60, and (2) the plaintiffs were not harmed by the assessor's actions. We disagree with these alternative grounds for affirmance and address them in turn.

[14] Indeed, at oral argument before this court, the defendant's counsel confirmed that it is the defendant's position that the assessor may impose § 12-63c (d) penalties for a particular assessment year, where applicable, at any time for an indefinite period.

A

As its second alternative ground for affirmance, the defendant claims that, even if the assessor's delayed imposition of the late filing penalties were deemed a mistake, then it constitutes a clerical mistake that the assessor timely corrected pursuant to § 12-60. Although the defendant concedes that the omission of the late filing penalties from the 2014 grand list was intentional, it argues that any purported mistake "had [only] to do with the *administrative* procedure or method chosen to assess the penalty." (Emphasis added.) The plaintiffs contend, to the contrary, that the omission of the late filing penalties from the 2014 grand list at the time it was signed does not qualify as a clerical omission or mistake under § 12-60 because the assessor intended the omission at such time. We agree with the plaintiffs.

Section 12-60 provides in relevant part that "[a]ny *clerical omission or mistake* in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. . . ." (Emphasis added.) For purposes of this statute, "the adjective 'clerical' qualifies 'mistake' as well as 'omission.' " *Reconstruction Finance Corp.* v. *Naugatuck*, 136 Conn. 29, 32, 68 A.2d 161 (1949) (construing statutory predecessor to § 12-60).

In at least two decisions, our Supreme Court has considered, and rejected, the reliance of a municipality or a taxpayer on § 12-60 (or its statutory predecessor) to correct a purported "clerical omission or mistake" in an assessment list. Those cases are particularly instructive. In *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 30, the plaintiff had filed with the board of assessors of the borough of Naugatuck a

list of the taxable property it owned in the borough on October 1, 1947, omitting certain machinery that was exempt from state and municipal taxation at the time of filing (which occurred prior to November 1, 1947). On May 25, 1948, the United States Congress enacted a statutory amendment, to be effective as of midnight on June 30, 1947, that eliminated the exemption on which the plaintiff had relied. Id., 30–31. On June 14, 1948, the board of assessors issued a certificate of error, adding the machinery to the October 1, 1947 tax list of the plaintiff. Id., 31. On a reservation for advice before the Supreme Court of Errors, the borough argued that the addition to the plaintiff's tax list was "but the correction of a clerical error or omission" pursuant to a predecessor to § 12-60, namely, General Statutes (1949 Rev.) § 1735, which provided: "Any clerical omission or mistake in the assessment of taxes may be at any time corrected according to the fact by the assessors or board of tax review, and the tax shall be levied and collected according to such corrected assessment." *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 31–32. The Supreme Court of Errors disagreed, concluding that "[i]t was much more than that, for it concerned the very substance and extent of the assessment. . . . 'Clerical' errors are mentioned to distinguish them from, and exclude errors of substance, of judgment, or of law." Id.

In *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 587, our Supreme Court had occasion to revisit the meaning of the phrase "clerical omission or mistake" in General Statutes (Rev. to 1975) § 12-60.[15] In *National CSS, Inc.*, both the lessor and the lessee of certain computer equipment listed such equipment as taxable

[15] General Statutes (Rev. to 1975) § 12-60 provided: "Any clerical omission or mistake in the assessment of taxes may be at any time corrected according to the fact by the assessors or board of tax review, and the tax shall be levied and collected according to such corrected assessment."

personal property on the property lists they filed with the city of Stamford's tax assessor, which resulted in double taxation. Id., 588–89. Upon realizing that only the lessor was obligated under the lease agreement to pay property taxes on the computer equipment at issue, the plaintiff lessee demanded a refund of the taxes it paid on the equipment, which demand was denied by the city. Id., 588–90. The plaintiff lessee argued in relevant part that it was entitled to a refund under § 12-60. Id., 592. Our Supreme Court rejected the effort, holding that "[w]here an error is of a deliberate nature such that the party making it at the time actually intended the result that occurred, it cannot be said to be clerical. . . . Because the plaintiff's action in listing the property and paying the taxes, although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance." (Citation omitted.) Id., 596. Therefore, § 12-60 did not apply. Id., 596–97.

Applying the principles articulated in *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 29, and *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 587, to the present case in considering whether the assessor properly invoked § 12-60 in issuing the certificates of change, we consider whether the assessor's delayed imposition of the late filing penalties corrected a clerical omission or mistake. By way of review, the parties stipulated that the assessor's practice has been to assess, pursuant to § 12-60, any late filing penalties under § 12-63c (d) retroactively, i.e., *after* signing the grand list for a given year.[16] The parties further stipulated that at the time the assessor took the oath on the 2014 grand list, he knew he had received the plaintiffs' 2013 income and expense reports after the June 1, 2014 deadline. Nevertheless, for whatever reason, he delayed

[16] The trial court's memorandum of decision states that the assessor adhered to such practice for over twenty years. The parties do not challenge that statement on appeal.

adding the late filing penalties until approximately three months after he signed the 2014 grand list. On the basis of the foregoing, we conclude that because the assessor's omission of the late filing penalties at issue from the 2014 grand list at the time he signed it was "of a deliberate nature such that [the assessor] at the time actually intended the results that occurred, it cannot be said to be clerical." *National CSS, Inc.* v. *Stamford*, supra, 596. Because such omission, "although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance." Id. Accordingly, § 12-60 does not apply.[17]

In sum, we conclude that the trial court properly concluded that the delayed imposition of the late filing penalties did not correct a clerical omission or mistake; therefore, § 12-60 does not apply so as to permit the retroactive adjustment to the assessments on the basis of the late filing penalties. We reject, therefore, the defendant's second alternative ground for affirmance.

B

As its final alternative ground for affirmance, the defendant claims that the judgments should be affirmed because the plaintiffs were not harmed by the assessor's imposition of the late filing penalties. Specifically, the defendant contends that, because the plaintiffs were able to seek review of the assessor's imposition of the late filing penalties by appealing to the board, the plaintiffs have not suffered harm as a result of the timing of the assessor's actions, even if late. This argument warrants little discussion.

[17] Moreover, the fact that it has been the assessor's longtime practice to assess retroactively any late filing penalties under § 12-63c (d) provides the defendant no safe harbor. *Middletown* v. *Berlin*, 18 Conn. 189, 197 (1846) ("[a]ssessors are the officers of the law, and must obey the law; and no direction of the town, nor long continued usage, can justify a departure from the law").

In support of its argument, the defendant relies on *Murach* v. *Planning & Zoning Commission*, 196 Conn. 192, 205, 491 A.2d 1058 (1985), for the statement therein that "not all procedural irregularities require a reviewing court to set aside an administrative decision; material prejudice to the complaining party must be shown." (Internal quotation marks omitted.) The defendant's reliance on *Murach* is entirely misplaced. In *Murach*, our Supreme Court affirmed the trial court's upholding of a planning and zoning commission's unanimous decision to approve a zone reclassification, despite the fact that one of the seven voting members was a statutorily proscribed member of the commission who was, therefore, disqualified from voting. Id., 194–95. On appeal, the court reasoned that, because only five votes were required for passage of the zoning reclassification and there was no contention that the disqualified member swayed the commission in its decision making, the plaintiffs failed to show that the so-called procedural irregularity resulted in any material prejudice to them. Id., 205–206.

In contrast, in the present case, the crux of the plaintiffs' arguments on appeal is that, because the assessor was without the statutory authority to impose the late filing penalties after he signed the grand list, the late filing penalties are null and void. Because we agree and conclude that the assessor may not collect a tax on an assessment that is untimely adjusted by the imposition of late filing penalties (i.e., after the assessor signed the 2014 grand list), it can hardly be said that the statutorily unauthorized delay of the imposition of the late filing penalties was a mere procedural irregularity, which, if uncorrected, would result in no harm to the plaintiffs.[18]

[18] Relatedly, we briefly address the trial court's ultimate conclusion that "the only redress for the assessor's failure to comply with the provisions of § 12-55 (b) is to postpone the right of the plaintiffs to appeal the action of the assessor until the succeeding Grand List. See § 12-55 (c): 'If any such assessment increase notice is sent later than the time period prescribed in this subsection, such increase shall become effective on the next succeeding

The judgments are reversed and the case is remanded with direction to render judgments for the plaintiffs.

In this opinion, the other judges concurred.

GARDEN HOMES MANAGEMENT CORPORATION ET AL. *v.* TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD (AC 40519)

Keller, Moll and Lavery, Js.

Syllabus

The defendant Town Plan and Zoning Commission of the Town of Fairfield appealed to this court from the judgment of the trial court sustaining the appeal of the plaintiffs, G Co. and R Co., from the decision of the commission denying G Co.'s application to construct an affordable housing development. The commission denied G Co.'s application on several grounds, including that the record indicated that the proposed single entry, twenty foot access way width was insufficient and that it would not provide fire trucks sufficient space to turn around on-site. The plaintiffs appealed from that decision to the trial court, which reviewed the record as to each of the commission's grounds for denial to determine whether the commission had satisfied its burden under the applicable statute (§ 8-30g). The court recognized that although a twenty-four foot wide access way and a secondary point of entrance would be desirable, they were not necessary or required. The court concluded that the commission's concerns as to the twenty foot access way width did not outweigh the town's need for affordable housing, but, in the absence of a secondary access way, it was concerned that the site contained no area with adequate turnaround space for large vehicles, including fire trucks, and that such vehicles could exit only by backing up the full length of the access way. The court acknowledged

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grant list.' " This conclusion was in error because the assessor's statutory violation in the present case does not relate to the mere timing of an assessment increase notice but, rather, the assessor's failure under § 12-55 (b) to "make any assessment . . . required by law" before "taking and subscribing to the oath upon the grand list." At a minimum, the applicability of § 12-55 (c) assumes that the assessor has otherwise complied with his or her assessment duties under § 12-55 (b) (i.e., made the assessment at a time when he or she had the statutory authority to do so).

that G Co. had attempted to assuage the commission's concerns regarding that issue by offering a sketch that proposed an expanded turnaround area, and it remanded the issue of G Co.'s most recent redesign of the access way and apartment building for due consideration by the commission. The commission accepted new evidence during the public hearing, and it denied G Co.'s revised site plans. Subsequently, the trial court rendered judgment sustaining the plaintiffs' appeal, from which the commission, on the granting of certification, appealed to this court. The commission claimed that it had satisfied its burden pursuant to § 8-30g on the basis of concerns as to fire, pedestrian and traffic safety, that G Co.'s revised site plans, viewed in their entirety, did not sufficiently address the commission's prior concerns and raised new concerns as to fire safety and pedestrian and traffic safety that outweighed the town's need for affordable housing and, thus, that its denial was necessary to protect public safety. *Held* that the trial court properly sustained the plaintiffs' appeal: the record was replete with evidence of the need for affordable housing in the town, which had persisted for decades, the trial court, in addressing G Co.'s initial application, properly concluded that concern as to the inability for large vehicles to turn around upon exiting the site was the only concern that potentially could have outweighed the town's need for affordable housing and that the remaining concerns did not outweigh the town's need for affordable housing, as the record reflected that an access way width of twenty feet was adequate to comply with national fire safety standards, the commission did not prove that its denial of G Co.'s application was necessary to protect substantial public interests, the commission's concern regarding the lack of sidewalks was merely theoretical, the commission's concern as to the ratio of parking spaces per dwelling unit was merely a concern as to the convenience of parking, and a secondary access way was not necessary to adhere to national fire safety standards; moreover, the trial court properly declined to review certain evidence that it determined exceeded the scope of its remand order, as the court had issued a limited remand order directing the commission to consider potential redesigns to the turnaround area and the commission had jurisdiction on remand only over that issue, and the commission's claim that it had satisfied its burden under § 8-30g to show that its concerns on remand as to G Co.'s revised application outweighed the town's need for affordable housing was unavailing, as the court, which, upon review of G Co.'s revised site plans, had characterized the commission's concerns as to emergency vehicle maneuverability within the turnaround area as mere concern that some maneuvering would be required before such vehicles can turn around, was not convinced by the commission's concern that an emergency vehicle might not be able to turn around successfully, was persuaded that the revised turnaround area constituted a health and safety improvement to the plan and, thus, concluded that the commission's concerns as to maneuverability within the turnaround area

did not outweigh the need for affordable housing, and this court would not disturb the trial court's determination as to the adequacy of the revised turnaround area.

Argued December 5, 2018—officially released August 13, 2019

Procedural History

Appeal from the decision of the defendant denying the named plaintiff's application for approval of an affordable housing development, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the matter was tried to the court, *Bates*, *J.*, which issued a memorandum of decision reversing the decision of the defendant and remanding the matter to the defendant for further proceedings; thereafter, Garden Homes Residential, L.P., was substituted as a plaintiff; subsequently, the court rendered judgment sustaining the plaintiffs' appeal, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Melinda A. Powell, with whom were *Sarah L. Wilber* and, on the brief, *Cindy M. Cieslak*, for the appellant (defendant).

Daniel J. Krisch, with whom were *Mark K. Branse* and, on the brief, *Kenneth R. Slater*, *Jr.*, for the appellees (plaintiffs).

Opinion

LAVERY, J. The defendant, the Town Plan and Zoning Commission of the Town of Fairfield (commission), appeals from the judgment of the Superior Court sustaining the appeal of the plaintiffs Garden Homes Management Corporation (Garden Homes) and Garden Homes Residential, L.P.,[1] from the decision of the commission denying Garden Homes' application to construct an affordable housing development. On appeal,

[1] The original plaintiffs were Garden Homes, which filed an application for the approval of an affordable housing development that would be situated on two abutting parcels of land located at 92 and 140 Bronson Road in

the commission claims that (1) reversing the court's decision will serve the public interest; (2) the court improperly declined to review certain evidence presented to the commission on remand; (3) the commission has satisfied its burden under General Statutes § 8-30g on the basis of fire safety deficiencies in Garden Homes' site plans; and (4) the commission has satisfied its burden under § 8-30g on the basis of pedestrian and traffic safety concerns. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Pursuant to the Connecticut Affordable Housing Land Use Appeals Act, General Statutes § 8-30g et seq., Garden Homes applied for permission to build a ninety-five unit apartment building that would accommodate affordable housing units.[2] The proposed development would be situated on a combined 2.9 acres of abutting lots located at 92 and 140 Bronson Road in the Southport section of Fairfield. This site is bounded to the north by Interstate 95, to the east by the Mill River, to the south by Metro-North Railroad tracks, and to the west by a private residence. Consequently, the buildable area is constrained by the nearby highway and by wetlands restrictions that prohibit encroaching upon the river.

Fairfield, Sandra Conner, who owned the parcel of land located at 140 Bronson Road, and Richard Irwin, acting by and through his conservator, Robert Russo, who owned the parcel of land located at 92 Bronson Road. Subsequently, on June 2, 2016, the court granted the original plaintiffs' motion to substitute Garden Homes Residential, L.P., as a plaintiff for Conner and Irwin on the ground that Conner and Irwin conveyed title of their properties to Garden Homes Residential, L.P., in December, 2015. For convenience, unless otherwise indicated, all references to the plaintiffs in this opinion are to Garden Homes and Garden Homes Residential, L.P.

[2] Fifteen units would accommodate families with income "less than or equal to 60 percent of the area or statewide median income, whichever is less," and fourteen units would accommodate families "whose income is greater than 60 percent but less than or equal to 80 percent of the area or statewide median income, whichever is less."

Cognizant of these limitations, Garden Homes consulted Fairfield's fire marshal, William Kessler, early in the design process for direction as to compliance with safety standards. Kessler confirmed that Garden Homes' projected twenty foot wide access way would be the "minimally acceptable parameter" to provide for fire truck safety and functionality. Garden Homes, thus, submitted to the commission initial site plans that proposed a single entry, twenty foot wide access way, among other features that would make the development suitable to accommodate all ninety-five units within the buildable area.

The commission held an initial public hearing on Garden Homes' application on July 8, 9, 15, and 16, 2014. Joseph Versteeg, Garden Homes' fire code expert, testified at the public hearing that the twenty foot wide access way was adequate for fire safety purposes. He stated in relevant part: "[According to] the Technical Committee of [National Fire Protection Association, Standard 1 (NFPA 1)] and [National Fire Protection Association (NFPA)] Technical Committee members, as well as the NFPA staff, the reason for the twenty foot road width is that it facilitates two-way traffic, it also will facilitate one fire truck to pass another fire truck that has stopped either to connect with a hydrant or for whatever reason."

Laura Pulie, Fairfield's senior civil engineer, cautioned that the proposed twenty foot wide access way could be "too narrow for an emergency vehicle to pass into the site/building location, should a vehicle park along the driveway despite 'No Parking or Fire Lane' signs." Accordingly, Pulie recommended increasing the proposed access way width by four feet.

An additional concern addressed at the public hearing pertained to the adequacy of the proposed fire truck turnaround area. The site plans proposed that the 300

foot long, twenty foot wide access way would be the only route to enter and exit the property, which dead-ended at the apartment building. The concern, therefore, was that fire trucks would be able to exit the site only by backing up the full length of the access way. David Spear, a traffic engineer retained by Joel Green, attorney for the Lower Bronson Neighborhood Alliance in opposition to Garden Homes' proposal, opined: "The turnaround right here is the weak link . . . once [a fire truck] get[s] in here, they're stuck. They have to back out and back all the way out of the site." Additionally, Richard Felner, Fairfield's former fire chief, testified: "[I]f other emergency vehicles get [to the proposed access way] first, for example, an ambulance should get there first, our rescue truck comes in second, to get the ambulance back out, we have to back a truck out, and we'd have to back the ambulance out. . . . To make that swing with our ladder truck is almost, as I see it in looking at the plan, [i]s almost impossible . . . ."

During its rebuttal on the final night of the public hearing, Garden Homes submitted a revised sketch that eliminated four parking spaces and three units to afford larger vehicles sufficient space to turn around at the end of the access way. The commission did not consider this submission in reaching its decision.

After the close of the public hearing, the commission voted to deny Garden Homes' application and unanimously granted a motion to adopt, as its collective grounds for denial, the recommendations set forth in a staff report presented to the commission, with the addition of a statement that Garden Homes had not demonstrated that its application reflected adequate sewage capacity. Subsequently, on July 24, 2014, a clerk for the commission sent Garden Homes' counsel a letter that memorialized the commission's statement. The letter noted, inter alia, that "the record indicates that the

[twenty] foot paved [access way] width is insufficient for the number of dwelling units proposed and for the length of the singular access point to the proposed development." The letter also indicated that the twenty foot width of the access way would not provide fire trucks sufficient space to turn around on-site. The clerk's letter stated that the commission expressly made the following three findings: "1. There is sufficient evidence in the record to support a finding that the proposed development would pose substantial risks to public interests in health and safety. 2. Those public interests clearly outweigh the need for affordable housing. 3. There are no reasonable conditions of approval that can be made to protect those public interests. Therefore the application is denied."[3]

The original plaintiffs, Garden Homes, Sandra Conner, and Richard Irwin; see footnote 1 of this opinion;

[3] Similarly, in a recent decision also involving the commission, "a clerk for the commission . . . wrote the plaintiff's counsel a letter providing the . . . purported reasons for the commission's denial . . . . Although our case law directs that we not rely on a letter that was not adopted by the commission to evince the commission's collective decision; see *Smith-Groh, Inc.* v. *Planning & Zoning Commission*, [78 Conn. App. 216, 224–26, 826 A.2d 249 (2003)] (concluding that letter to applicant's attorney [received] from town planner, purporting to state reasons for commission's denial of application for site plan approval and special permit, was not collective statement of commission's decision, given that commission had not adopted letter, and stating that '[a]lthough the reasons outlined in the letter were discussed by the commission during either the public hearing or the special meeting, the planner could not speak for the commission'); because the parties . . . agree[d] that the letter properly [set] forth the reasons for the commission's decision and [did] not claim that the . . . letter should not be considered, we . . . for purposes of [that] case, consider[ed] the reasons set forth in the letter." (Footnote omitted.) *American Institute for Neuro-Integrative Development, Inc.* v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 337–38, 207 A.3d 1053 (2019).

Although we will take the same approach in the present case and consider the reasons set forth in the letter from the clerk, we strongly urge the commission to be mindful that it ordinarily should not rely on a letter from a representative of the commission to represent the commission's collective statement in the absence of the commission adopting such statement.

timely appealed from that decision to the Superior Court. In its September 10, 2015 memorandum of decision, the court reviewed the record as to each of the commission's grounds for denial to determine whether the commission had satisfied its burden under § 8-30g. The court began by noting that each of the concerns set forth in the commission's letter pertained to " 'substantial public interests in health, safety, or other matters' that are generally 'supported by sufficient evidence in the record.' "

The court then reviewed the commission's concerns as to several specific features of Garden Homes' site plans to determine whether that given feature would pose such a health or safety hazard as to outweigh the need for affordable housing. The court first reviewed the adequacy of the proposed twenty foot wide access way. Recognizing that a twenty-four foot wide access way would be desirable, the court nonetheless concluded that such an access way was not required. It reasoned that under applicable fire codes twenty feet was "the minimum acceptable width . . . and that level of compliance should generally be sufficient for an affordable housing project."[4] It further reasoned that even if twenty feet deviated from applicable standards, such deviation would not "create a public health or safety concern that outweighs the need for affordable housing in the community." On balance, the court, therefore, concluded that the commission's concerns as to the twenty foot access way width did not outweigh Fairfield's need for affordable housing.

The court also assessed the commission's concerns as to the proposed single entrance drive onto the site.

[4] The record indicates that Connecticut adopted the 2003 edition of NFPA 1 as the 2010 Connecticut State Fire Prevention Code. NFPA 1 fire safety standards provides: "Fire department access roads shall have an unobstructed width of not less than 20 ft (6.1 m) and an unobstructed vertical clearance of not less than 13 ft 6 in. (4.1 m)." NFPA 1, Uniform Fire Code (2003 Ed.) § 18.2.2.5.1.1, p. 1-113.

As in its assessment of the access way width, the court acknowledged that a secondary point of entrance would be desirable but concluded that it would not be necessary. It noted that neither the NFPA nor the American Association of State Highway and Transportation Officials (AASHTO) codes would require multiple means of access to accommodate Garden Homes' proposed site plans.[5] Thus, on balance, the court concluded that "the single access [way] . . . should be sufficient for an affordable housing project." Although the court determined that a secondary access way was not necessary, it nonetheless was concerned that the site otherwise contained no area with adequate turnaround space for fire trucks, among other large vehicles. Such vehicles, therefore, could exit only by backing up the full length of the access way.

At the same time, the court acknowledged that Garden Homes had attempted to assuage the commission's concerns on this issue by offering a sketch that proposed an expanded turnaround area, as well as a decrease in the total number of units. The court opined that this concern adequately could be resolved with site plan revisions and, therefore, "remand[ed] the issue of the [plaintiffs'] most recent redesign of the access way and apartment building . . . for due consideration by the commission." The court additionally noted that Garden Homes "should submit to the commission a fully engineered site plan, indicating the provision of the turning radii necessary to allow these and other large vehicles to turn around and exit the site with minimal reverse travel, both via the elimination of four parking spaces and three units, as [Garden Homes had] pro-

[5] The NFPA standards provide that one access route is adequate for developments containing one to 100 "households." NFPA 1141, Standard for Fire Protection Infrastructure for Land Development in Wildland, Rural, and Suburban Areas (2012 Ed.) § 5.1.4.1, Table 5.1.4.1 (a), p. 1141-7.

posed [during rebuttal before the commission], and by alternative means."[6]

On remand, Garden Homes submitted revised site plans to the commission, in which it proposed (1) reducing the number of housing units from ninety-five to ninety-one, and (2) replacing four parking spaces with a fire lane that would serve as a turnaround area for fire trucks and other large vehicles. The revised site plans also contained engineered turning movement counts, indicating that the largest fire truck of the Fairfield Fire Department (department) could turn around in this area by making a four count W shaped turning movement.

At the outset of the public hearing that was held on May 24, 2016, before the commission on Garden Homes' revised application, Garden Homes contended that the court's remand limited the commission's review to the

[6] The court also ordered that the commission make it a condition of approval that Garden Homes receive final approval from Fairfield's Water Pollution Control Authority (WPCA). As part of its revised site plans, Garden Homes proposed installing a two foot reinforced grass shoulder along a portion of the access way that would run against the Mill River. Garden Homes represented to the commission that the WPCA had unanimously approved this feature.

After reviewing the commission's denial of Garden Homes' revised application, the court noted: "At the same time that [Garden Homes] proposed the [turnaround] for the fire truck, it also proposed placing concrete pavers on the sides of the [entryway], allowing some additional maneuvering area for the ladder trucks entering and exiting the site. The [commission] did not act on that proposal . . . . However, as the court found in [its] first [decision] that the twenty foot width was adequate for ingress and egress, there is no legal requirement for the pavers and, therefore, there is no need to mandate their installation. Further, it now appears that any such installation of pavers might require wetlands review. Given that the pavers and the increase of the width of the road are not necessary for the approved access way, there is no reason to revisit the offer of installing them."

Because the commission did not approve Garden Homes' revised application and site plans, it did not assign conditions for approval. Thus, this matter is not dispositive in the present appeal, and we will not consider it further.

issue of the revised turnaround area. The commission, however, noted that the court determined that the commission's concerns as to Garden Homes' initial site plans pertained to substantial interests in public health and safety. The commission, therefore, interpreted the court's remand order more broadly as direction to evaluate Garden Homes' revised plans for new health and safety concerns pertaining to the department's ability to access the proposed building and to enter and exit the site. Accordingly, the commission accepted new evidence during the public hearing on the basis of that interpretation.

Such new evidence included a report prepared by Scott Bisson (Bisson report), the department's assistant chief, on Garden Homes' revised site plans, which reiterated and elaborated on the department's prior concerns as to the access way width and lack of a secondary entrance to the development, matters upon which the court already had ruled. The Bisson report also considered several matters beyond the turnaround area.[7] Fire Chief Denis McCarthy spoke at the public hearing and elaborated on the opinions set forth in the Bisson report. In light of that evidence, the commission considered whether "there is support to make findings different from those made in the initial application and, if there is not, are there reasonable changes that could be made to protect public interests in health and safety."

A clerk for the commission sent Garden Homes' counsel a letter memorializing the commission's grounds

[7] As the plaintiffs note in their brief, new matters addressed in the Bisson report included (1) roof and attic safety; (2) space to deploy ladders on the rear side of the building; (3) proximity of ladders to nearby high voltage power lines; (4) concerns as to construction style; (5) lack of fire lanes; (6) no "exterior defensive firefighting positions"; (7) pedestrian traffic exiting during an emergency; and (8) the possibility of a gas leak, transportation incident, or chemical release. (Internal quotation marks omitted.)

for denial.[8] The commission listed several points from McCarthy's testimony arguing that Garden Homes' revised plans posed fire safety concerns, namely: the department must be able to access the building; lack of secondary access way; no area of refuge during an emergency; residents will flee the property during an emergency; up to ninety-five cars could be leaving at the same time; based on McCarthy's experience, he expects to respond to an emergency approximately twenty-four times annually, or about twice per month, and all five of Fairfield's fire stations would send responders; the department will be on-site for hours; the ladder truck will not be able to access the roof; the turnaround area will not help the department access the building; despite the revised turnaround area, McCarthy opined that the plans were not safe; and McCarthy did not believe there was any alternative way to address the department's concerns.[9] The commission, therefore,

[8] We reiterate that although we will, for the purposes of this case, consider the reasons set forth in the clerk's letter, parties should not rely on a letter from a representative of the commission to represent the commission's collective statement in the absence of the commission adopting such statement. See footnote 3 of this opinion.

[9] The letter provided: "At the May [24, 2016] hearing the [c]ommission heard from . . . McCarthy. [McCarthy] urged the [c]ommission to deny the revised plan and offered his testimony:

"The size, type of construction and configuration of the project requires the [department] to be able to access the building.

"A lack of secondary access and the revised plan significantly impair the [department's] ability to access the property and its operations.

"The [department] is responsible for all the occupants of the building during an emergency and there is no place for the residents to go or assemble during an emergency response.

"[I]n an emergency, residents will attempt to flee in their cars because they want to protect their investment and avoid being trapped [on-site] for extended time.

"Up to [ninety-five] cars will be attempting to leave at the same time that a half dozen emergency apparatus would be arriving.

"The [U]niform [F]ire [C]ode and the NFPA standards require a secondary access when in the opinion of the Authority Having Jurisdiction (AHJ) a single access road could be impaired or other factors necessitate it.

"The [department] has responded fourteen times since June 2014 to the Garden Homes development on Fairchild Avenue including a structure fire.

concluded that Garden Homes' revised plans would pose substantial risks to public interests in health and safety, which outweighed the need for affordable housing, and that no reasonable conditions of approval could protect those interests.[10] Accordingly, the commission denied Garden Homes' revised site plans.

The trial court addressed that denial in a memorandum of decision dated March 3, 2017, concluding that the commission's stated concerns pertained to matters upon which the court previously had ruled and did not pertain to the subject of the court's limited remand. Additionally, the court determined that none of those concerns outweighed the need for affordable housing. Accordingly, the court sustained the plaintiffs' appeal and ordered the commission to approve Garden Homes' revised application and issue the requested permit. The

That building has [fifty-four] units. For this building, the [department] expects to respond about twenty-four times annually or twice per month. All five stations would respond to this site due to its size. Due to the limited access and space for maneuvering, all of the required equipment could not be deployed properly. This opinion is based on [McCarthy's] experience and is not imagined or theoretical. He indicated there is 'no doubt' they would be there repeatedly.

"When the [d]epartment responds, it will be there for hours.

"The ladder truck cannot access the roof.

"The turnaround [area] does not help [department] operations nor improve access to the building and is only useful when it is time to leave.

"There was further testimony from others that it is questionable that the fire trucks could even make the required multiple maneuvers in the space provided.

"[McCarthy] was asked if he thought the revised plan was safe and his response was 'no.'

"In addition, the [c]ommission asked [McCarthy] if there was any alternative available to address the concerns of the department and his response was 'no.' "

[10] The commission concluded: "1. There is sufficient evidence in the record to support a finding that the proposed development would pose substantial risks to public interests in health and safety.

"2. Those public interests clearly outweigh the need for affordable housing.

"3. There are no reasonable conditions of approval that can be made to protect those public interests."

commission then filed a petition for certification to appeal pursuant to General Statutes § 8-8 (o), which this court granted. Additional facts and procedural history will be set forth as needed.

I

We begin by setting forth guiding principles of law as to our jurisdiction over the present appeal. "Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . Thus, unless the remand order of the trial court in [a] zoning appeal constitutes a final judgment, we are required to dismiss the commission's appeal to this court for lack of subject matter jurisdiction. . . . [I]t is the scope of the remand order in [a] particular case that determines the finality of the trial court's judgment." (Citations omitted; internal quotation marks omitted.) *Barry* v. *Historic District Commission*, 108 Conn. App. 682, 688, 950 A.2d 1, cert. denied, 289 Conn. 942, 959 A.2d 1008, and cert. denied, 289 Conn. 943, 959 A.2d 1008 (2008). "Determining the scope of a remand is a matter of law . . . [over which] our review is plenary." (Internal quotation marks omitted.) *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011).

When the court's remand order dictates the outcome of the case, the court's decision "so concludes the rights of the parties that further proceedings cannot affect them. . . . A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). When the court's remand order does not decide the outcome of the case and allows the commission to retain discretion to deny the application,

a reviewing court does not have subject matter jurisdiction. *AvalonBay Communities, Inc.* v. *Zoning Commission*, 284 Conn. 124, 139–40, 931 A.2d 879 (2007) (because court remanded case to commission with instruction to consider certain factors and, therefore, implicitly required commission to conduct further evidentiary hearings, court order did not decide outcome of case, and commission retained discretion to grant or deny application and, therefore, initial memorandum of decision was not final judgment).

In the present case, the court, in its initial decision, expressly concluded that the twenty foot access way width and the single entrance complied with national fire safety standards and that neither of those two features posed concerns that outweighed the need for affordable housing. Additionally, the court expressly concluded that neither the lack of sidewalks nor the commission's concerns as to the ratio of parking spaces per unit outweighed Fairfield's need for affordable housing. As to the proposed turnaround area, however, the court determined that "[t]he ability of [fire trucks] to enter and turn around in the parking lot is an issue of health and safety. The ability of moving and large delivery trucks to do the same is an issue of health and safety to a lesser degree but should also be reviewed." The court, accordingly, issued a remand order that was limited in scope. It remanded the matter to the commission with direction to consider potential redesigns to the turnaround area that would "allow . . . large vehicles to turn around and exit the site with minimal reverse travel . . . ." At that point, the court had not issued a final judgment, as the commission was required to make evidentiary determinations as to the adequacy of potential redesigns to the turnaround area. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 130 ("[a] judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations

that are not merely ministerial" [internal quotation marks omitted]); *Barry* v. *Historic District Commission*, supra, 108 Conn. App. 690 (no final judgment when trial court remands for additional administrative evidentiary findings as precondition to final judicial resolution). Given the court's limited remand order, the only remaining matter for the commission to consider was the adequacy of the turnaround area at the end of the access way. See *West Haven Sound Development Corp.* v. *West Haven*, 207 Conn. 308, 312, 541 A.2d 858 (1988) (lower court should only review matters within scope of remand order).

Despite the court's limited remand order, the commission reevaluated Garden Homes' revised application for any potential health and safety risk that the turnaround area could pose. The commission also accepted evidence that raised issues beyond the turnaround area itself and then incorporated this new evidence into its collective statement of denial.

When the trial court addressed the decision of the commission on remand, it concluded that the commission exceeded the bounds of the limited remand and that none of these concerns outweighed Fairfield's need for affordable housing. The court stated: "To the extent the [c]ommission has raised any new health and safety concerns, the court finds those concerns do not outweigh [Fairfield's] need for affordable housing." The court, accordingly, remanded the case with instruction to grant Garden Homes' requested permit. Consequently, the court issued an appealable final judgment. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 131 (court's judgment requiring commission to approve plaintiff's application was final judgment).

The commission now appeals from this final judgment, which encompasses both of the court's memoranda of decision. In reviewing the court's rulings pursuant to § 8-30g, we, therefore, will consider the evidence

before the commission during both the initial and remand hearings.

II

The commission claims that it has satisfied its burden pursuant to § 8-30g on the basis of concerns as to fire safety and pedestrian and traffic safety. It contends that Garden Homes' revised site plans, viewed in their entirety, did not sufficiently address the commission's prior concerns and raised new concerns as to fire safety and pedestrian and traffic safety that outweigh Fairfield's need for affordable housing. The commission, thus, contends that its denial was necessary to protect public safety. We disagree.

"[Although the] commission remains the finder of fact and any facts found are subject to the sufficient evidence standard of judicial review . . . th[e] application of the legal standards set forth in § 8-30g (g) . . . to those facts is a mixed question of law and fact subject to plenary review." (Internal quotation marks omitted.) *JAG Capital Drive, LLC* v. *Zoning Commission*, 168 Conn. App. 655, 668, 147 A.3d 177 (2016). "The parameters of our review of an affordable housing appeal are circumscribed by § 8-30g (g)." *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 162 Conn. App. 678, 693, 136 A.3d 24 (2016), aff'd, 326 Conn. 55, 161 A.3d 545 (2017). Section 8-30g (g)[11] provides: "Upon an appeal taken under subsection (f) of this section, the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission, that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The

[11] Although § 8-30g (g) was the subject of technical amendments in 2017; see Public Acts 2017, No. 17-170, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

commission shall also have the burden to prove, based upon the evidence in the record compiled before such commission, that (1) (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development, or (2) (A) the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses; and (B) the development is not assisted housing. If the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it."

As the commission acknowledges in its brief, Garden Homes' application required the commission to weigh its concerns as to fire safety and pedestrian traffic against the need for affordable housing. The parties agree that both interests constitute matters of public concern. The central issue in this case, therefore, is whether Fairfield's need for affordable housing outweighs the health and safety concerns presented to the commission.

Section 8-30g (g) "requires the town, not the applicant, to marshal the evidence supporting its decision and to persuade the court that there is sufficient evidence in the record to support the town's decision and the reasons given for that decision." *JPI Partners, LLC* v. *Planning & Zoning Board*, 259 Conn. 675, 688, 791 A.2d 552 (2002). The commission maintains that it has satisfied its burden. The court was not convinced.

The commission's decision is subject to the twofold standard of review embodied in § 8-30g (g). *JAG Capital Drive, LLC* v. *Zoning Commission*, supra, 168 Conn. App. 667. "First, a reviewing court must determine whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. . . . Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted. . . . Because the sufficient evidence standard applicable to affordable housing appeals imposes a lesser burden than substantial evidence, that burden is minimal. A land use agency simply must establish that something more than a mere theoretical possibility of harm to the public interest exists." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 694–96.

"If that standard is met, the reviewing court then must conduct a plenary review of the record and determine . . . whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interests clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." (Internal quotation marks omitted.) Id., 695. This presents a high bar for the commission, as "the test we must apply under § 8-30g is not whether the [commission's] decision was reasonable, but whether the decision was necessary." *Eureka V, LLC* v. *Planning & Zoning Commission*, 139 Conn. App. 256, 275, 57 A.3d 372 (2012).

To establish that its denial is necessary, the commission's decision must be predicated on evidence in the record of both the existence of a potential harm and the probability that such harm, in fact, would occur. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 154–62. Essentially, the commission's decision must be supported by sufficient evidence, which is more than a mere possibility but not necessarily a preponderance of the evidence, that the public interest at stake will be harmed if the commission does not deny the application. *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 597, 735 A.2d 231 (1999). A commission is not entitled to reject an application on the basis of the mere possibility of harm or generalized concerns. *Carr* v. *Planning & Zoning Commission*, 273 Conn. 573, 608–609, 872 A.2d 385 (2005) (report suggesting possibility that no method of treating radionuclides would be feasible was not valid reason to deny plaintiff's application); *Kaufman* v. *Zoning Commission*, supra, 156 (denial not necessary on basis of mere possibility of harm to watershed without evidence quantifying probability of such harm); *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 703–704 (evidence of noncompliance with ordinance did not obviate need for commission to identify evidence of quantifiable probability of specific harm, without which evidence commission did not demonstrate that denial was necessary); *Eureka V, LLC* v. *Planning & Zoning Commission*, supra, 139 Conn. App. 276–77 (without evidence of likelihood that harm would occur, commission could not as matter of law determine that decision was necessary to protect interest); *Mackowski* v. *Zoning Commission*, 59 Conn. App. 608, 617, 757 A.2d 1162 (denial not necessary to prevent adverse traffic and sewer impact when record lacked specific supporting factual findings), cert. granted, 254 Conn. 949, 762 A.2d 902 (2000) (appeal withdrawn September 21, 2001). Accordingly, in determining whether

the commission has met its burden under § 8-30g, our courts review the record for specific factual findings and evidence quantifying the probability that harm will result. *Kaufman* v. *Zoning Commission*, supra, 156.

A

We begin our analysis by noting that the record is replete with evidence of the need for affordable housing in Fairfield. This need has persisted for decades. In 1989, the original Affordable Housing Plan for Fairfield acknowledged that "Fairfield's single population of unwed, divorced or widowed residents have extreme difficulties in securing affordable housing within the limits of their single income capacities." Yet, within the last ten years, Fairfield has seen little to no improvement in addressing its dire need for affordable housing. In 2011, the town's Affordable Housing Committee reported that since 1989, the town listed forty-seven affordable ownership units; 266 elderly/disabled units; nineteen permanent supportive units; and twenty-one multifamily rental units, only one of which was a one bedroom apartment. Altogether, in 2011, only 2.69 percent of the town's housing consisted of affordable housing units, down from 2.71 percent since 2000.

The record further reflects that, as of 2011, there are no affordable housing units in the Southport section of the town. As mentioned in Garden Homes' initial project description, "[a] multitude of town-produced documents over many years attests to the need for affordable housing in Fairfield," including indications that the community has been reluctant to accept "the [t]own's role in providing or supporting the development of rental or for sale housing at below market rate" and the need to provide affordable housing for young and single people. Other town documents indicated that the town "does not have a large supply of rental housing,

affordable or otherwise," and that the town particularly lacked affordable housing for persons with disabilities.

Based in part on such representations, Fairfield received a $383,457 block grant from the United States Department of Housing and Urban Development in 2012. Of the Connecticut municipalities receiving Community Development Block Grants, Fairfield has the lowest percentage of affordable housing. In 2013, the town sought public input in updating its Affordable Housing Plan. In its request, the town outlined its affordable housing situation and needs, stating: "The lack of affordable housing is a significant issue that many communities face. This is especially true in Fairfield, where the average cost of a single family home in 2012 topped $521,000. Rising housing costs and the lack of inventory among more modestly sized starter homes have meant that many young professionals and working class families are increasingly squeezed out of the local housing market. Additionally, many elderly homeowners that wish to [downsize] cannot find housing to suit their needs. Eighty-four percent of the [t]own's housing stock is comprised of single-family homes. . . . All communities thrive on diverse population; therefore the housing stock should reflect those different needs."

Garden Homes initially proposed "setting aside 30 [percent] of the [proposed] units as affordable for a period of [forty] years." It would offer "[f]ifteen . . . [units] to families whose income is less than or equal to 60 percent of the area or statewide median income, whichever is less . . . [and] [f]ourteen . . . [units] to families whose income is greater than 60 percent but less than or equal to 80 percent of the area or statewide median income, whichever is less." The proposal, therefore, would help ameliorate Fairfield's dire need for affordable housing. The commission, in its letter denying Garden Homes' revised application, acknowledged

that "we all share the view that we need more affordable housing . . . ."

The court acknowledged that the proposal qualified as an affordable housing plan under § 8-30g. Accordingly, in reviewing both Garden Homes' initial and revised application and site plans, the court considered the evidence as to the state of affordable housing in Fairfield and weighed such need against the commission's concerns. The court ultimately determined that the commission's concerns did not outweigh Fairfield's need for affordable housing. We will review both of the court's decisions, in turn.

B

We now consider whether the commission's concerns as to Garden Homes' initial application and site plans outweighed the need for affordable housing. The court concluded that concern as to the inability for large vehicles to turn around upon exiting the site was the only concern that potentially could have outweighed Fairfield's need for affordable housing. The court ruled that the remaining concerns did not outweigh Fairfield's need for affordable housing. We conclude that the court's decision was proper.

In reviewing the propriety of the court's determinations, we are cognizant that the commission bore the burden of proving that its denial was necessary to protect its interests. Speculative concerns do not suffice. See *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 708 ("speculation . . . ha[s] no place in appellate review" [internal quotation marks omitted]). Moreover, the commission's denial must be based on a quantifiable probability that such harm will occur. See, e.g., *Eureka V, LLC* v. *Planning & Zoning Commission*, supra, 139 Conn. App. 276–77 (without evidence of likelihood that harm would occur, commission could not as matter of law determine

that decision was necessary to protect interest). With these principles in mind, we conclude that the court properly determined that the commission's concerns regarding the twenty foot access way width, lack of sidewalks, proposed number of parking spaces, and lack of a secondary access way do not outweigh Fairfield's need for affordable housing.

As to the access way width, the record reflects that twenty feet is adequate to comply with national fire safety standards. Although town staff have recommended adding four feet to the access way width, in light of evidence that a width of twenty feet is adequate to accommodate fire truck passage, any inability to expand the access way beyond this width does not necessitate the commission's denial. Moreover, even if twenty feet was not the minimally acceptable access way width, the commission still would be required to prove that its denial was necessary to protect substantial public interests. See *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 703–704 (mere noncompliance with municipal ordinance did not relieve commission of need to satisfy its burden under § 8-30g). Accordingly, we agree with the court's conclusion that, on balance, any concern as to the adequacy of the twenty foot wide access way, or the desirability of increasing the width by four feet, did not outweigh the need for affordable housing.

We additionally agree with the court's determination that concern as to the lack of sidewalks did not outweigh Fairfield's need for affordable housing. The commission cited concerns that during an emergency, pedestrians might attempt to flee in the twenty foot wide right of way, which would thereby endanger the pedestrians and impede emergency vehicles entering the property. The court was not persuaded. It determined that the entrance way would be located in close proximity to the Interstate 95 on-ramp and that there

would be no sidewalks on the east side of Bronson Road, as there would be no particular place for pedestrians to walk. Accordingly, the court opined that pedestrians would not necessarily crowd the entrance way during an emergency. Moreover, the court concluded that such concern was merely theoretical. We agree that the commission's concerns were merely theoretical, and, therefore, the court properly concluded that those concerns did not outweigh Fairfield's need for affordable housing. See id., 694–96.

We also agree with the court's determination that concern as to the ratio of parking spaces to dwelling units did not outweigh Fairfield's need for affordable housing. The court considered differing testimony as to the ratio of parking space per unit. Spear recommended 1.5 parking spaces per unit because it would reduce the need to search for parking spaces during peak hours. Kermit Hua, Garden Homes' traffic engineer, advised that 1.2 parking spaces per unit would be consistent with national standards set forth in the Institute of Transportation Engineers, Parking Generation (4th Ed. 2010). The court determined that the concerns as to the ratio of parking spaces per unit were merely concerns as to the convenience of parking. The commission bears the burden of proving that its denial was necessary, in that it must be predicated upon evidence in the record as to a quantifiable probability that harm would occur. See *Kaufman* v. *Zoning Commission*, supra, 232 Conn. 154–62. We, therefore, conclude that the court properly determined that concern as to the ratio of parking spaces per unit did not outweigh Fairfield's need for affordable housing.

We also agree with the court's determination that concern as to the lack of a second access way did not outweigh Fairfield's need for affordable housing. The court determined that a secondary access way was not necessary to adhere to national fire safety standards.

It, therefore, concluded that the lack of a secondary access way did not necessarily warrant the commission's denial. On our review of the record, we conclude that the court's determination was sound, and concerns as to the lack of a secondary access way did not necessitate the commission's denial.

On this point, however, the court acknowledged the need to afford fire trucks the ability to turn around onsite so that they could leave the site without backing up the full length of the access way. It noted, however, in light of Garden Homes' proposed redesign to the turnaround area, that it might be possible to accommodate this concern via alternative plans. The court, accordingly, remanded the case for consideration of the revised turnaround area. Neither party challenges the propriety of the court's decision to remand the case for this purpose. We will not review the propriety of the court's remand order.

We conclude that the court's determinations as to Garden Homes' initial application were proper.

C

We now consider whether the commission's concerns as to Garden Homes' revised application and site plans outweighed the need for affordable housing. After reviewing the commission's decision to deny Garden Homes' revised application, the court declined to consider certain evidence that it determined exceeded the scope of its remand order. It additionally concluded that the commission, nonetheless, raised no new concerns on remand that outweighed Fairfield's need for affordable housing. On appeal to this court, the commission claims that the court improperly declined to review certain evidence and further claims that it nonetheless satisfied its burden under § 8-30g. We disagree with the commission on both matters.

On remand, the commission "should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Emphasis omitted; internal quotation marks omitted.) *West Haven Sound Development Corp.* v. *West Haven*, supra, 207 Conn. 312. A court or administrative body may consider matters that are "relevant to the issues upon which further proceedings are ordered," provided such matters are not "extraneous to the issues and purposes of the remand . . . ."[12] *Cioffoletti* v. *Planning & Zoning Commission*, 220 Conn. 362, 369, 599 A.2d 9 (1991) (concluding court did not exceed scope of remand by resolving issue on grounds not mentioned in previous decision); cf. *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 524–25, 686 A.2d 481 (1996) (revised pleadings permitted to consider new facts that occurred since original trial that relate to matter relevant to remand). Nonetheless, the burden rests with the commission in an affordable housing appeal to demonstrate that its decision is supported by sufficient evidence in the record. General Statutes § 8-30g. To this end, "[i]t is well established that in administrative . . . cases, when the party charged with the burden of proof fails to satisfy that burden, it is not entitled to a second bite at the apple on remand." (Internal quotation marks omitted.) *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 111, 890 A.2d 104 (2006).

In the present case, the court had issued a limited remand order directing the commission to consider potential redesigns to the turnaround area. The purpose of the court's order, essentially, was to ensure that fire

[12] The commission indicates that our precedent does not fully address the scope of remand in the context of a land use administrative appeal. We see no reason to consider the scope of the commission's review on the Superior Court's remand of the commission's administrative decision differently than we would the scope of the Superior Court's review on remand from the Appellate Court.

trucks could exit the site without needing to back up the entire length of the access way. If Garden Homes could propose site plan revisions that allowed for this, then a secondary access way would not be necessary.

The commission, however, mistakenly interpreted the court's order in light of the court's determination that concern as to the inability of fire trucks to turn around on-site posed a considerable concern as to public health and safety. The commission, therefore, evaluated Garden Homes' revised site plans more broadly for any new concerns pertaining to the department's ability to access the building and enter and exit the site. In doing so, the commission, in effect, rehashed matters on which the court previously had ruled.

Significantly, a key submission to the commission was the Bisson report, in which the assistant fire chief essentially reiterated the department's prior concerns as to certain features in Garden Homes' proposed plans, including the twenty foot wide access way and the lack of a secondary entrance, and took issue with matters that did not pertain to the turnaround area. By incorporating the Bisson report and other recommendations from the department into its collective statement of denial, the commission evaluated matters well beyond the ability of fire trucks to turn around on-site.

For that reason, the court concluded that the commission went well outside the bounds of the limited remand. As it stated in its memorandum of decision: "The court is surprised by the [commission's] response to the limited remand. The court ordered the remand for consideration of the proposed redesign of the building and parking area to allow a ladder truck to leave the site without having to back up the full length of the access road. The [c]ommission had not considered this proposal due to its late introduction into the hearing

process and the absence of the engineered plan. However, the [commission], instead of focusing on the issue that was remanded, used the remand to bolster its previous objections, which had been ruled on and rejected, adding considerable time and expense to the affordable housing application and project."

Specifically, the court determined that the following considerations, on which the commission had based its denial, pertained to matters beyond the adequacy of the revised turnaround area: lack of secondary access way; lack of area of refuge during an emergency; possibility that residents will flee the site during an emergency; prospective ninety-five cars leaving the site during an emergency against a half dozen emergency vehicles arriving; McCarthy's predicted twenty-four annual emergency responses to the site; prediction that the department would be on-site for hours; ladder truck's ability to access the roof; turnaround area's suitability to accommodate incoming emergency vehicles; and McCarthy's opinion as to alternative site plans to address the department's concerns. The court declined to review this evidence.

"In carrying out a mandate of [the higher court], the [lower] court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . The [lower] court cannot adjudicate rights and duties not within the scope of the remand." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, supra, 301 Conn. 714–15; *Nowell* v. *Nowell*, 163 Conn. 116, 121, 302 A.2d 260 (1972). "When a case is remanded for a rehearing, the trial court's jurisdiction and duties are limited to the scope of the order. . . . The trial court should not deviate from the directive of the remand." (Citations omitted.) *Leabo* v. *Leninski*, 9 Conn. App. 299, 301, 518 A.2d 667 (1986), cert. denied, 202 Conn. 806, 520 A.2d 1286 (1987); see also *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 146 Conn. 556,

561, 153 A.2d 453 (1959) (lower court on remand is limited to specific direction of higher court mandate); *Manchester Modes, Inc.* v. *Ellis*, 2 Conn. App. 261, 262, 477 A.2d 164 (1984) (same). The same rules apply to a trial court's remand order to an administrative committee or board. See *Shelton* v. *Statewide Grievance Committee*, supra, 277 Conn. 111.

Accordingly, the court concluded that the commission "had no jurisdiction over those issues not specifically remanded to it." We agree with the court's determination that, on remand, the commission had jurisdiction only over those issues specifically remanded to it. The court correctly concluded that the commission was not entitled to treat the court's limited remand order as a second bite at the apple. See *Shelton* v. *Statewide Grievance Committee*, supra, 277 Conn. 111. Accordingly, the court properly declined to review evidence that exceeded the scope of its remand.

Turning now to the matter that properly was before the commission on remand, we agree with the court's conclusion as to the revised turnaround area. The commission remained concerned that the revised turnaround area would assist the department only upon exiting the development and would not improve access to the building in the event of an emergency. Additionally, the commission noted that in the revised turnaround area, an emergency vehicle would need to make, at a minimum, a W shaped turning movement, and not a hammerhead, Y, or K turn, as demonstrated in the Occupational Safety and Health Administration's 2006 Fire Service Features of Buildings and Fire Protection Systems manual. It, therefore, was concerned that an emergency vehicle might have difficulty making the required turning movements in that area.

The court, upon its review of Garden Homes' revised site plans, characterized the commission's concerns as

to emergency vehicle maneuverability within the turnaround area as mere concern that "some maneuvering will be required" before such vehicle can turn around. It, therefore, was not convinced by the commission's concern that an emergency vehicle might not be able to turn around successfully, or otherwise might require a number of different turning movements, in the revised turnaround area. The court was persuaded that the revised turnaround area satisfactorily addressed its previous concerns, such that the revision constituted "a health and safety improvement" to the plan. Accordingly, the court concluded that the commission's concerns as to maneuverability within the turnaround area did not outweigh the need for affordable housing.

We see no reason to disturb the court's determination as to the adequacy of the revised turnaround area. Garden Homes provided the commission with evidence of turning movement counts, which Garden Homes' engineer calculated using radius measurement provided by the manufacturer of the department's largest fire truck. According to those plans, the department's largest fire truck could turn around by making a four count W shaped turning movement in the proposed turnaround area. The possibility that this maneuver could be difficult or that a reverse in direction could require additional turning movements is just that, a possibility. The record does not contain evidence as to the probability that such a scenario will result in harm to health and safety. See *Eureka V, LLC* v. *Planning & Zoning Commission*, supra, 139 Conn. App. 276–77 (commission required to provide evidence as to likelihood that harm would occur).

We also agree with the trial court's conclusion that "[t]o the extent the [c]ommission has raised any new health and safety concerns . . . those concerns do not outweigh [Fairfield's] need for affordable housing." Fairfield remains in dire need of affordable housing, yet

largely has ignored this need. Although the commission had before it reasonable public health and safety concerns, the commission nonetheless bore the burden of demonstrating that its denial was necessary so as to outweigh the need for affordable housing. *JAG Capital Drive, LLC* v. *Zoning Commission*, supra, 168 Conn. App. 667–68. On the basis of our review of the record, we conclude that the commission has failed to satisfy its burden and that any concerns the commission raised do not outweigh Fairfield's long time and admitted need for affordable housing. We, therefore, conclude that the court properly sustained the plaintiffs' appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

PETER WHITE *v.* LATIMER POINT CONDOMINIUM ASSOCIATION, INC., ET AL.
(AC 41345)

Keller, Bright and Flynn, Js.

Syllabus

The plaintiff, an owner of a condominium unit that is part of the defendant condominium association, sought, inter alia, a permanent injunction against the association and the defendants J and E, owners of a neighboring condominium unit, to prevent J and E from rebuilding their unit, pursuant to federal and town regulations, after the original unit sustained storm damage. The plaintiff alleged that the rebuilding plan, as approved by the association's board, would decrease the plaintiff's water views of Long Island Sound to a percentage not permitted by the association's bylaws. Although the initial rebuilding plans did project a decrease of the plaintiff's water views in violation of the bylaws, the plan that was approved actually projected an increase of the plaintiff's water views by over 2 percent with certain tree trimming and vegetation removal. After the plaintiff appeal to the association's board, which upheld the approval of the construction application, he filed an action in the Superior Court, which rendered judgment in favor of the defendants, concluding that the plaintiff had failed to establish that the actions of the association in approving the construction application of J and E were improper. The plaintiff then appealed to this court, claiming, inter alia,

that the court rendered a judgment that was neither legally correct nor factually supported by the record in that the court failed to make factual findings to support its decision. *Held* that the plaintiff failed to demonstrate that the court erred in rendering judgment in favor of the defendants, as the record could be read to support the court's conclusion that the plaintiff had failed to meet his burden; because the court's decision lacked detailed factual findings and a statement regarding its legal bases, there was no way for this court to determine whether the trial court found the plaintiff's testimony or evidence concerning the reduction in his primary water view not credible, whether it weighed the evidence and found the defendants' evidence more credible or simply more persuasive, or whether something else persuaded the court that the plaintiff had not met his burden, as the plaintiff, who argued that the court failed to make any factual findings but did not seek an articulation or rectification of the court's decision, did nothing to ensure that this court would have a record on appeal that included such factual findings and the legal bases for the court decision, there was no indication in the record that the trial court disregarded case law, as claimed by the plaintiff, and in the absence of an articulation, this court presumed that the trial court acted correctly and undertook a proper analysis of the law.

Argued March 18—officially released August 13, 2019

Procedural History

Action for, inter alia, a permanent injunction to prohibit the defendant home owners from continuing construction on a new condominium unit, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Vincent John Purnhagen, for the appellant (plaintiff).

Robert B. Flynn, for the appellees (defendants).

Opinion

BRIGHT, J. The plaintiff, Peter White, appeals from the judgment of the trial court, ruling in favor of the defendants, Latimer Point Condominium Association, Inc., (association), and Gennaro Modugno and Elizabeth Modugno, whom we collectively refer to as the

Modugnos, on the plaintiff's complaint, which was brought pursuant to General Statutes § 47-278.[1] On

[1] General Statutes § 47-278 provides: "(a) A declarant, association, unit owner or any other person subject to this chapter may bring an action to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws. The court may award reasonable attorney's fees and costs.

"(b) Parties to a dispute arising under this chapter, the declaration or the bylaws may agree to resolve the dispute by any form of binding or nonbinding alternative dispute resolution, provided: (1) A declarant may agree with the association to do so only after the period of declarant control has expired; and (2) an agreement to submit to any form of binding alternative dispute resolution must be in a record authenticated by the parties.

"(c) (1) (A) Except as otherwise provided under subdivision (2) of this subsection, before an association brings an action or institutes a proceeding against a unit owner other than a declarant, the association shall schedule a hearing to be held during a regular or special meeting of the executive board and shall send a written notice by certified mail, return receipt requested, and by regular mail, to the unit owner at least ten business days prior to the date of such hearing. Such notice shall include a statement of the nature of the claim against the unit owner and the date, time and place of the hearing.

"(B) The unit owner shall have the right to give testimony orally or in writing at the hearing, either personally or through a representative, and the executive board shall consider such testimony in making a decision whether to bring an action or institute a proceeding against such unit owner.

"(C) The executive board shall make such decision and the association shall send such decision in writing by certified mail, return receipt requested, and by regular mail, to the unit owner, not later than thirty days after the hearing.

"(2) The provisions of subdivision (1) of this subsection shall not apply to an action brought by an association against a unit owner (A) to prevent immediate and irreparable harm, or (B) to foreclose a lien for an assessment attributable to a unit or fines imposed against a unit owner pursuant to section 47-258.

"(d) (1) Any unit owner other than a declarant, seeking to enforce a right granted or obligation imposed by this chapter, the declaration or the bylaws against the association or another unit owner other than a declarant, may submit a written request to the association for a hearing before the executive board. Such request shall include a statement of the nature of the claim against the association or another unit owner.

"(2) Not later than thirty days after the association receives such request, the association shall schedule a hearing to be held during a regular or special meeting of the executive board and shall send written notice by certified mail, return receipt requested, and by regular mail, to the unit owner at least ten business days prior to the date of such hearing. Such notice shall include the date, time and place of the hearing. Such hearing shall be held not later than forty-five days after the association receives such request.

"(3) The executive board shall make a decision on the unit owner's claim and the association shall send such decision in writing by certified mail,

appeal, the plaintiff claims that the court misapplied and disregarded relevant case law, that it failed to apply properly the 10 percent rule contained in the association's bylaws,[2] that it ignored overwhelming evidence that the association failed to comply with its tree trimming schedule, and that it rendered a judgment that is neither legally correct nor factually supported by the record. We affirm the judgment of the trial court.

The record reveals the following uncontested facts and procedural history, which are relevant to the plaintiff's appeal. The plaintiff is the owner of unit 23 at the Latimer Point Condominiums (Latimer), a common interest ownership community established pursuant to General Statutes § 47-200 et seq. Latimer is situated on Fishers Island Sound in Stonington. The Modugnos are owners of unit 7 at Latimer. Unit 7 is situated between unit 23 and Fishers Island Sound. All of the unit owners at Latimer are organized as the association, and the association is governed by a board of directors (board). The association, pursuant to Article XIV of its bylaws, has in place an Architectural Control Committee (committee) that is staffed and managed by volunteers.

Because of extensive storm damage to unit 7, the Modugnos applied for approval from the committee to build a new home, elevated in height, to meet the new Federal Emergency Management Agency building standards and the town of Stonington's zoning regulations. The plaintiff objected to the application on the ground

return receipt requested, and by regular mail, to the unit owner, not later than thirty days after the hearing.

"(4) The failure of the association to comply with the provisions of this subsection shall not affect a unit owner's right to bring an action pursuant to subsection (a) of this section."

[2] Specifically, § 14.1.2 of the bylaws provides, in relevant part, that the association "shall ensure that no member's water view shall ever be diminished by more than 10 [percent] due to cumulative constructions of other units and/or the association, without the written consent of such member(s) . . . ."

that the new home would interfere substantially with his water view, by obstructing that view by more than the 10 percent allowed under the bylaws. In particular, § 14.1.2 of the bylaws provides, in relevant part, that the association "shall ensure that no member's water view shall ever be diminished by more than 10 [percent] due to cumulative constructions of other units and/or the association, without the written consent of such member(s) . . . . In the event any unit's water view is increased by action pursuant to [§] 14.2, or other means, such increase shall be included in the 10 [percent] determination." Section 14.2 provides, in relevant part, that "in order to reasonably preserve trees and vegetation on members' properties; and to enhance members' . . . existing water views from their units; the board and the [committee] shall regulate the planting, cutting, trimming and removal of trees, shrubs, hedges, and vegetation."

The committee retained Arthur Hayward, a licensed land surveyor, to conduct a primary water view analysis to determine whether the Modugnos' proposed new home would obstruct the plaintiff's primary water view to a degree greater than allowed by the bylaws. Hayward concluded that the Modugnos' proposed house would decrease the plaintiff's water view by 15.4 percent if there was no offsetting vegetation removal and trimming. With various vegetation removal and trimming, however, Hayward concluded that the plaintiff's water view after construction of the Modugnos' new house actually would increase by 41.2 percent. The plaintiff offered no contrary evidence to the committee.

On the basis of Hayward's conclusions, the committee determined that it was obliged to approve the Modugnos' proposal. Nevertheless, it did not order all of the vegetation removal suggested by Hayward. In particular, it ordered one tree trimmed, instead of removed. As a result, Hayward recalculated the effect

on the plaintiff's water view and determined that the plaintiff's water view still would be increased by a net 2.1 percent with the Modugnos' proposed house and the vegetation removal and trimming ordered by the committee. Following the committee's approval, the plaintiff appealed to the board, which upheld the committee's decision. The construction plans later were approved by the Stonington Planning and Zoning Commission, and the Modugnos proceeded to build their home.

During this process, the plaintiff filed an action in the Superior Court, pursuant to § 47-278. In count one of his amended complaint, the plaintiff alleged that the committee and the association "failed to follow and enforce the provisions of Article XIV of the bylaws for construction projects as it pertains to unit owner water view protection when it approved [the] Modugnos construction application [(application)] thereby negatively impacting the primary water view of the plaintiff's unit in contravention of the bylaws." He also alleged, in count two, that the association was in violation of § 47-278 because "the tree trimmings [were] not being carried out by the [association] as it resolved in September, 2005."[3] The plaintiff sought a temporary and permanent

[3] On appeal, the plaintiff also claims a violation of General Statutes § 47-75 (a), which provides: "Each unit owner, and the association of unit owners, shall comply with this chapter, the condominium instruments, and the rules and regulations adopted pursuant thereto. Failure to so comply shall be ground for an action to recover damages or for injunctive relief, or for any other relief to which the party bringing such action may be entitled. Such action may be brought by the association of unit owners against any unit owner or owners or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. If any such action results in a final judgment or decree in favor of the party instituting such action, such judgment or decree may incorporate a provision for reasonable attorney's fees, as specified in such judgment or decree, to be paid by the party against whom such judgment or decree is entered." The plaintiff, however, did not allege such a violation in his complaint, nor did the trial court mention this statute in its decision. Accordingly, we do not consider it.

injunction enjoining the Modugnos from "commencing or continuing with the construction" of their home,[4] an order requiring the committee and the association to follow and enforce the bylaws, monetary damages, costs and attorney's fees, as well as any other legal or equitable relief appropriate.

The case was tried to the court over five days.[5] The plaintiff's only witness was himself. Relevant to this appeal, the plaintiff testified, among other things, that he, as a layperson, calculated the loss of his primary water view from construction of the Modugnos' house as 16.3 percent without vegetation trimming and removal and 15.4 percent with such trimming and removal. The plaintiff based his calculations on a photograph of his primary water view on which he overlaid grids to calculate the loss of his water view. He also testified about a 2002 dispute with another neighbor over the trimming of chokecherry trees, which resulted in the committee in 2005 adopting a trimming schedule for those trees. He further testified that the committee had failed to trim the trees according to that schedule.

The defendants called four witnesses, including Hayward. Hayward testified about his training and experience as a licensed professional land surveyor since

[4] The defendants argue, in part, as they did before the trial court, that the plaintiff was not entitled to the injunctive relief sought because the Modugnos had completed construction of their home, rendering their specifically requested relief moot, long before trial. They argue that the plaintiff never sought a temporary injunction to stop the construction, and that the plaintiff should be prohibited from modifying his requested relief to now include a request that the court order the Modugnos to tear down a portion of their completed home. The trial court did not rule on the mootness issue because it concluded that the plaintiff had failed to meet his burden on the issue of whether the association had failed to comply with its bylaws.

[5] The court consolidated for trial this case and a similar case in which owners of another Latimer unit alleged that the Modugnos' new house improperly decreased their water view. *Wojeck* v. *Latimer Point Condominium Assn. Inc.*, Superior Court, judicial district of New London, Docket No. CV-11-6010879-S (January 7, 2014).

1975. He then testified at length regarding the method he used to reach the conclusions he reported to the committee regarding the effect the Modugnos' construction of their new house would have on the plaintiff's primary water view. In particular, he explained how he determined that the house would reduce the plaintiff's water view by 15.4 percent without any vegetation removal or trimming and would increase the plaintiff's water view by 2.1 percent with vegetation trimming and removal as specified by the committee. He also testified regarding the differences between his methodology and that used by the plaintiff.

The defendants also presented Andrew Feinstein, the chairman of the committee. Feinstein testified that he was chairman during the period when the committee approved the Modugnos' application, and had been on the committee since 2008. He testified about the process by which the Modugnos' application was approved. He also testified about the committee's process for trimming trees, and specifically about the chokecherry trees on which the plaintiff testified. He testified as to when the trimmings of the chokecherry trees took place and testified that more extensive trimming of the trees has occurred since approval of the Modugnos' construction in order to ensure that the plaintiff's primary water view is maintained.

At the conclusion of the trial, the court rendered judgment orally in favor of the defendants, concluding that the plaintiff had failed to establish that the actions of the association in approving the defendants' construction application were improper. This appeal followed.

The plaintiff claims that the court failed to apply properly the 10 percent rule contained in the bylaws, ignored overwhelming evidence that the association failed to comply with its tree trimming schedule, and

rendered a judgment that is neither legally correct nor factually supported by the record. The plaintiff also complains throughout his appellate brief that the court failed to make any factual findings, including his argument that "[b]ecause the trial court made absolutely no findings of fact in its memorandum of decision, it is impossible to determine how exactly the trial court came to its conclusion that the defendants were in substantial compliance with the bylaws. By reaching its decision without making any findings of fact in support thereof, the trial court was able to completely disregard relevant case law . . . ." He also argues that "there was no specific finding of fact by the trial court that, due to the tree trimming and vegetation removal proposed by the [committee], the [Modugnos'] 2015 building application was brought into compliance with the bylaws' [10] percent rule." On the basis of the limited record before us, we conclude that the plaintiff's claims are fatally flawed.

When the facts underlying a claim on appeal are not in dispute and that claim is subject to plenary review, "the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." (Footnote omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 396, 757 A.2d 1074 (2000). When, however, the plaintiff's claim necessarily challenges the court's factual determinations, we employ the clearly erroneous standard of review to the court's factual findings: "A finding of fact will not be disturbed unless it is clearly erroneous . . . . In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo." (Citations omitted; internal quotation marks omitted.) *MJM Landscaping, Inc.* v. *Lorant*, 268 Conn. 429, 436–37, 845 A.2d 382 (2004). Moreover, "[i]t is within the province

of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude." (Internal quotation marks omitted.) *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 737, 66 A.3d 848 (2013).

At the outset, we observe that our review of the plaintiff's claims is not foreclosed completely but, rather, is restricted severely by the following circumstances. First, we note that there is no indication in the record before us that the trial court "completely disregard[ed] relevant case law." Although the court's decision in this case lacks detailed factual findings and a statement regarding its legal bases, and although the plaintiff raises this insufficiency throughout his appellate brief, the plaintiff did nothing to help ensure that we would have a record on appeal that included such factual findings and the legal bases for the court's decision. In this case, the trial court rendered a short oral decision, which stated in relevant part: "I find on all counts for the [Modugos] and the [association]. *The plaintiff has failed to prove* that there was other than substantial compliance with the bylaws in respect to the actions of the [b]oard in approving the . . . application for the Modugno[s'] 2015 construction—the 2015 [a]pplication. . . . [J]udgment . . . enters for the defendant[s]. . . . [T]he court finds that . . . *the plaintiff has failed to prove* that the [b]oard's action approving the 2015 application was in any way improper." (Emphasis added.)

Second, although rendering judgment in favor of the defendants on the entirety of the plaintiff's complaint, the court's decision did not mention the second count of the plaintiff's complaint, regarding the tree trimming schedule, in its decision. See *United Amusements &*

Vending Co. v. *Sabia*, 179 Conn. App. 555, 560–62, 180 A.3d 630 (2018) (Appellate Court unable to review claims of error because trial court made no factual findings related to claims and appellant did not request articulation).[6]

Third, the plaintiff did not seek an articulation or a rectification of the court's decision pursuant to Practice Book § 66-5, and he failed to alert the court to the fact that its oral decision did not comply with the requirements of Practice Book § 64-1.

Practice Book § 64-1 provides in relevant part: "(a) The trial court shall state its decision either orally or in writing, in all of the following: (1) in rendering judgments in trials to the court in civil and criminal matters . . . . *The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor.* . . .

"(b) If the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has

[6] The defendants state in their brief that the plaintiff has appealed only from the court's judgment as to count one of his complaint, and that he has not appealed from the court's judgment in favor of the defendants on count two. The plaintiff did not dispute this contention in his reply brief. Although the plaintiff's appeal form does not limit his appeal to count one of his complaint, the plaintiff's briefs do not address substantively count two of his complaint, and the relief requested by the plaintiff on appeal relates solely to count one. Consequently, to the extent the plaintiff did appeal from the judgment rendered against him on count two of his complaint, we deem any claims regarding that portion of the judgment abandoned. See *Awdziewicz* v. *Meriden*, 317 Conn. 122, 125 n.3, 115 A.3d 1084 (2015) ("[when] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived" [internal quotation marks omitted]); *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 319, 50 A.3d 841 (2012) ("[a]n appellant who fails to brief a claim abandons it" [emphasis omitted; internal quotation marks omitted]), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013).

not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)." (Emphasis added.)

Practice Book § 66-5 provides in relevant part: "A motion seeking corrections in the transcript or the trial court record or seeking an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk. Any other party may oppose the motion by filing an opposition with the appellate clerk within ten days of the filing of the motion for rectification or articulation. The trial court may, in its discretion, require assistance from the parties in providing an articulation. Such assistance may include, but is not limited to, provision of copies of transcripts and exhibits. . . ."[7]

Consequently, in the present case, we lack the benefit of any findings or legal bases for the decision of the trial court, other than the court's finding that "the plaintiff has failed to prove that there was other than substantial compliance with the bylaws in respect to the actions of the [b]oard in approving the . . . application for the Modugno[s'] 2015 construction—the 2015 [a]pplication." "Where an appellant has failed to avail himself

[7] Practice Book § 61-10 (b) provides in relevant part that "[t]he failure of any party on appeal to seek articulation pursuant to Section 66-5 shall not be the sole ground upon which the court declines to review any issue or claim on appeal." The commentary to that section explains, however, that "subsection (b) is not intended to preclude the court from declining to review an issue where the record is inadequate for reasons other than solely the failure to seek an articulation, such as, for example, the failure to procure the trial court's decision pursuant to Section 64-1 (b) . . . ."

of the full panoply of articulation and review procedures, and absent some indication to the contrary, we ordinarily read a record to support, rather than to contradict, a trial court's judgment." *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991). Citing *Bell Food Services, Inc.*, this court recently reaffirmed that "our appellate courts often have recited, in a variety of contexts, that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of fact were necessary." (Emphasis in original) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, A.3d (2019); see also *Sunset Gold Realty, LLC* v. *Premier Building & Development, Inc.*, 133 Conn. App. 445, 456 n.7, 36 A.3d 243 ("[b]ecause neither of the parties requested an articulation to fortify the record, to the extent that it is unclear what the court relied on . . . we read an ambiguous trial record to support, rather than undermine, the judgment"), cert. denied, 304 Conn. 912, 40 A.3d 319 (2012).

The record in this case can be read in a number of ways to support the trial court's finding that the plaintiff failed to meet his burden of proof. The court may have found the plaintiff's testimony regarding the reduction in his primary water view not credible. Alternatively, the court simply may have found Hayward's testimony more persuasive than that of the plaintiff. As noted previously in this opinion, the plaintiff testified as a layperson. Hayward has been a licensed professional land surveyor for more than forty years. Furthermore, the court was not required to accept the plaintiff's proffered methodology over Hayward's.

Indeed, during oral argument before this court, the plaintiff's attorney specifically was asked by Judge Flynn: "Well, let me ask you something, there were two

views of the evidence, correct . . . one that the 10 percent rule was satisfied, and one that it was not?" Counsel responded: "Yes, Your Honor." Counsel then agreed that this required that he demonstrate clear error in the trial court's decision in order to be successful on appeal. Nevertheless, because there was conflicting evidence of compliance, and the court set forth no factual findings or legal bases in its decision, the plaintiff cannot demonstrate clear error, and we will not presume it. The same is true with respect to the plaintiff's argument that the committee, the board, and the court should not have relied on anticipated vegetation removal and trimming to conclude that there was compliance with the 10 percent rule. The court may have found the plaintiff's testimony and other evidence unpersuasive or it may have concluded that Feinstein's testimony was more believable.

In conclusion, the court found that the plaintiff did not prove his case; we know nothing more than that. There is no way for us to determine whether the court found the plaintiff's testimony and/or evidence completely noncredible, whether it weighed the evidence and found the defendants' evidence more credible or simply more persuasive, or whether something else persuaded the court that the plaintiff had not met his burden.

"This court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. See, e.g., *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017); *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 382, 140 A.3d 1004 (2016)." *Rose B.* v. *Dawson*, 175 Conn. App. 800, 805; 169 A.3d 346 (2017). "It is well settled that [we] do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden

demonstrating the contrary." (Internal quotation marks omitted.) *Ellen S.* v. *Katlyn F.*, 175 Conn. App. 559, 565, 167 A.3d 1182 (2017). Because the record can be read to support the court's conclusion that the plaintiff failed to meet his burden, the plaintiff has failed to demonstrate that the court erred.

The judgment is affirmed.

In this opinion, the other judges concurred.

MICHAEL DEROSE *v.* JASON ROBERT'S, INC., ET AL. (AC 40715)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff sought to confirm an arbitration award in favor of the defendants, who filed a motion to vacate the award, which was issued in connection with an employment dispute and the defendants' alleged breach of a licensed dealer agreement between the parties regarding the defendants' concrete business. The trial court granted the plaintiff's application to confirm the award, denied the defendants' motion to vacate the award and rendered judgment thereon, from which the defendants appealed to this court. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly found that the arbitrator effectively had defaulted them for their failure to appear at the final arbitration hearing, which they claim caused the court to fail to consider the merits of their challenges to the arbitration award: the arbitrator expressly found in the award that he had continued the final arbitration hearing to allow the defendants additional time to submit a rebuttal to the plaintiff's case and to present additional witnesses and that the final hearing proceeded even though the defendants did not submit their rebuttal or attend the hearing, which suggested that the arbitrator to some degree had relied on the plaintiff's unrebutted arguments as a result of the defendants' absence, and the trial court's finding that the arbitrator effectively had defaulted the defendants was supported by the evidence in the record and was not clearly erroneous; moreover, even if the trial court erred in finding that the defendants effectively had been defaulted, the defendants failed to establish that that finding affected the court's consideration of their claim on the merits.
2. The defendants could not prevail on their claim that the trial court improperly ruled on their motion to vacate the arbitration award without first providing them with an evidentiary hearing: the defendants failed to

cite any authority mandating that the court hold an evidentiary hearing prior to ruling on the motion to vacate the arbitration award, in the absence of an express statute or rule of practice requiring it, the determination of whether to hold an evidentiary hearing is within the discretion of the trial court, the relevant statute (§ 52-420 [a]) requires that any motion to vacate be heard in the manner provided by law for written motions at a short calendar session, and a party seeking a hearing on a short calendar motion generally must make that request on the short calendar claim form or by motion, which the defendants here failed to do; moreover, the defendants' claim to the contrary notwithstanding, the defendants were in fact afforded an evidentiary hearing, as the record showed that, although the court initially denied their motion without hearing evidence, it immediately reopened the proceedings after the defendants requested an opportunity for an evidentiary hearing, allowed them to create an evidentiary record by admitting into evidence four exhibits that they proffered, and permitted them to make additional legal arguments.

3. The defendants' claim that the trial court improperly granted the arbitrator's motion to quash a subpoena duces tecum, which sought to compel the arbitrator to testify and to produce his arbitration file, was not reviewable, that claim having been inadequately briefed; although the defendants' brief cited to cases for the proposition that an arbitrator may be required to testify at a hearing on a motion to vacate an arbitration award, the defendants did not provide any analysis as to how they were harmed by the granting of the motion to quash or how precluding the arbitrator's testimony constituted an abuse of discretion, especially given that the court nonetheless admitted into evidence certain correspondence between the parties and the arbitrator at the defendants' request.

4. The defendants could not prevail on their claim that the trial court erred in confirming the arbitration award because the arbitrator failed to address the entirety of the arbitration submission, which was based on their claim that the arbitrator ignored their special defenses, set-offs and counterclaim in issuing the award; although the submission was extremely broad and encompassed the defendants' special defenses, set-offs and counterclaim, and the arbitration award contained no express findings or conclusions specific to those pleadings, the defendants failed to establish that the arbitrator did not consider or decide the special defenses, set-offs and counterclaim, rather than tacitly considering and rejecting them prior to determining damages, particularly given that the defendants took no steps before the arbitrator to determine whether he had considered the entirety of the submission and presented no evidence to the trial court as to what they submitted to the arbitrator other than the pleadings in support of their special defenses, set-offs and counterclaim.

5. The trial court properly denied the defendants' motion to vacate the arbitration award on public policy grounds, which award was issued fourteen years after the parties' dispute initially arose and four years after arbitration commenced; although courts have described arbitration as an efficient system of alternative dispute resolution and the general policy favoring arbitration encompasses the concomitant policy that arbitrations proceed expeditiously, the attribution of promptness is aspirational and does not create an explicit, well-defined and dominant public policy that mandates that arbitrations be completed within a strict designated time period, and the award here did not violate a public policy of expedience as embodied by the doctrine of laches, as that doctrine is largely governed by the circumstances of the particular case and, therefore, is left to the discretion of the trial court, the defendants were unable to produce any case law in which a court vacated an arbitration award as violative of public policy because the arbitration was not completed in an expeditious manner, and even if the award here had violated a public policy of expedience in arbitration matters, the arbitrator expressly found that it was the defendants who had caused the delay in the arbitration proceedings.

6. The defendants' claim that the arbitrator's award should be vacated pursuant to statute (§ 52-418 [a] [4]) because it constituted a manifest disregard of the law was unavailing; the defendants having failed to meet their burden of demonstrating that the arbitrator ignored clearly applicable governing law or that the claimed manifest disregard of the law was anything more than their mere disagreement with the arbitrator's interpretation and application of established legal principles, it was unnecessary for this court to reach the merits of the defendants' claim.

Argued January 31—officially released August 13, 2019

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendants filed a motion to vacate the award; thereafter, the matter was tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment granting the application to confirm and denying the motion to vacate, from which the defendants appealed to this court; subsequently, the court issued an articulation of its decision. *Affirmed.*

Lori Welch-Rubin, for the appellants (defendants).

Thomas J. Weihing, for the appellee (plaintiff).

PRESCOTT, J. The defendants, Jason Robert's, Inc., and Robert D. Hartmann, Sr., appeal from the judgment of the trial court denying their motion to vacate an arbitration award and granting an application to confirm the award filed by the plaintiff, Michael DeRose. On appeal, the defendants claim that the court improperly (1) found that the arbitrator effectively had defaulted the defendants for failing to appear at the final arbitration hearing, and that this allegedly erroneous factual finding colored the court's decision-making process with respect to the motion to vacate; (2) failed to provide the defendants with an evidentiary hearing before ruling on the motion to vacate; (3) granted a motion to quash a subpoena duces tecum directed at the arbitrator and his files; (4) failed to vacate the arbitration award on the ground that the arbitrator had not addressed the entirety of the submission; (5) confirmed an award that violated public policy; and (6) confirmed an award made in manifest disregard of the law in violation of General Statutes § 52-418 (a) (4).[1] We disagree and, accordingly, affirm the judgment of the trial court.

The facts underlying the parties' long-standing dispute are set forth in our decision in *Jason Robert's, Inc.* v. *Administrator, Unemployment Compensation*

[1] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . 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."

Act, 127 Conn. App. 780, 782–85, 15 A.3d 1145 (2011). Additional facts and procedural history are set forth in the arbitrator's award and in the trial court's oral decision and subsequent articulation. "[Jason Robert's, Inc.,] is a concrete business. During the years 1998, 1999 and 2000, [it] employed [DeRose] as a concrete artisan. While [DeRose] was working for [Jason Robert's, Inc.] as an employee, he asked for a raise in salary. In order to give [DeRose] the potential to earn more money, [Jason Robert's, Inc.,] directed [DeRose] to set up a business so that he could enter into an agreement with [it] as a licensed dealer. In or about 2001, after [DeRose] had set up his own business, [Jason Robert's, Inc.,] presented him with a licensed dealer authorization (agreement), and, on May 4, 2001, [DeRose] signed the agreement and became a licensed dealer for [Jason Robert's, Inc.]

* * *

"[DeRose] was a licensed dealer of [Jason Robert's, Inc.,] during the years 2001 and 2002. During those years, [Jason Robert's, Inc.,] classified [DeRose] as an independent contractor. At the end of 2002, [DeRose] terminated the agreement because the arrangement had become unprofitable for him. After terminating the agreement, [DeRose] filed a claim for benefits under the Unemployment Compensation Act (act), General Statutes § 31-222 et seq. This claim for benefits caused . . . the administrator of the act [administrator] to issue a missing wage assignment. . . . On April 25, 2003 . . . [a field auditor of the employment security division of the state department of labor] issued [a] written report, wherein he concluded that [DeRose] was an employee [of Jason Robert's, Inc.,] during the years 2001 and 2002. In a letter dated April 29, 2003, the [administrator] informed [Jason Robert's, Inc.,] of this determination and that there would be an assessment for the contributions due in the amount of

$4366.03 plus interest. On May 16, 2003, [Jason Robert's, Inc.,] appealed this determination to the appeals division . . . . On September 12, 2007 . . . the appeals referee affirmed the determination. In its decision, the appeals referee applied § 31-222 (a) (1) (B) (ii), more commonly known as the 'ABC test,' . . . and concluded that [DeRose] was an employee of [Jason Robert's, Inc.] The referee reached this conclusion after having determined that [Jason Robert's, Inc.,] failed to satisfy any of the three prongs of the ABC test." (Footnote omitted.) Id., 782–84.

Both the Worker's Compensation Review Board (board) and the Superior Court subsequently affirmed the decision of the appeals referee. Id., 784–85. Jason Robert's, Inc., then appealed to this court claiming that, in determining whether DeRose was an employee, the board should have applied General Statutes § 42-133e (b), rather than the "ABC test" to the underlying facts. Id., 785. We disagreed and affirmed the judgment of the trial court. Id.

In 2007, during the pendency of the worker's compensation appeal, DeRose filed a civil action against the defendants.[2] The operative complaint contained seven counts in which DeRose alleged that the defendants (1) breached their agreement with him by failing to compensate him for various jobs, (2) breached the implied covenant of good faith and fair dealing, (3) made negligent misrepresentations, (4) made fraudulent misrepresentations, (5) violated several state labor statutes, (6) committed unfair trade practices, and (7) negligently inflicted emotional distress. In May, 2011,

[2] DeRose first commenced a civil action against the defendants in 2005. The 2007 action was filed with reference to the accidental failure of suit statute, General Statutes § 52-592. It is not clear from the record, however, precisely how the 2005 action was disposed of or whether it was consolidated into the 2007 action, as was requested by Jason Robert's, Inc., in a motion to consolidate.

the defendants filed an amended answer to the complaint raising a number of special defenses.[3] Jason Robert's, Inc., also filed a counterclaim against DeRose, alleging that he had breached the parties' agreement by failing to complete work or utilizing poor workmanship, and committed statutory theft by retaining funds belonging to Jason Robert's, Inc.

On June 6, 2012, the parties entered into an agreement to resolve their civil action through binding arbitration. DeRose subsequently withdrew his civil action from the Superior Court. The arbitration agreement contains a clause titled "Submission to Arbitration and Scope of Arbitration," which states as follows: "The controversy shall be submitted to a panel of one arbitrator (Attorney Daniel Portanova), who shall hear, settle and determine by arbitration the matters in controversy within the scope of the claim based upon the evidence and testimony presented. The arbitrator is permitted, but not required, to apply the rules of evidence in civil cases when considering the evidence presented. No party shall have the right or power to revoke the submission without the written consent of the other party except on the grounds as exist in law or equity for the rescission or revocation of any contract. All issues shall be submitted to and fully and finally adjudicated by the arbitrator including, but not limited to, the issue of coverage, liability, causation and damages. The arbitrator will apply the procedural and substantive law of Connecticut."

The arbitrator held hearings between July 1, 2012, and January 24, 2013, during which the parties submitted evidence, including testimony from DeRose and Hartmann. A period of inactivity then followed. By letter

[3] The defendants raised by way of special defense accord and satisfaction, failure to mitigate damages, statute of limitations, res judicata, and collateral estoppel.

dated September 25, 2014, the arbitrator notified the parties as follows: "Please be advised that I am holding [$2,100] in my trustee account regarding the above arbitration. I have attached my invoice showing that each respective party has paid [$4,500]; therefore, each party is owed a refund of [$1,050]."

DeRose sent the arbitrator a letter dated May 15, 2015, attached to which were additional documents that DeRose sought to file with the arbitrator "with the intention to restart the . . . arbitration matter." A copy of that letter and its attachments were also sent to the defendants' counsel. The defendants responded to DeRose by letter dated May 19, 2015. The defendants indicated that, because the last arbitration hearing had taken place on January 24, 2013, and DeRose, until he sent the May 15, 2015 letter, had not complied with the arbitrator's request "to submit everything," they considered the arbitration abandoned.[4] DeRose replied to the defendants by letter dated June 1, 2015. In the letter, he stated that the arbitration proceedings had never been closed, he had not abandoned the matter, and he intended to proceed to a final decision. He indicated that he had no more testimony or evidence to present and that, if the defendants failed to participate going forward, they did so at their own peril. A few days later, on June 4, 2015, DeRose sent a letter to the arbitrator stating: "It has come to my attention that [counsel for the defendants] will not file any more documents or bring any witnesses into arbitration. We therefore respectfully request that you declare the arbitration closed and issue a decision in this matter."

[4] Although the defendants state in their brief that nearly eight months passed between the time "the arbitrator had refunded his remaining retainer" and DeRose's May 15, 2015 letter, there is nothing in the record indicating whether the arbitrator ever issued a refund to the parties or whether the defendants sought any clarification or confirmation of whether the arbitrator deemed the arbitration proceedings closed or abandoned.

The arbitrator next met with the parties in March, 2016. He later sent notice to the parties by letter dated April 1, 2016, stating: "I have reviewed the file since our meeting of last week. This file will remain open for further consideration." The parties and the arbitrator met again in June, 2016. By that time, Hartmann had discharged the defendants' attorney and was proceeding as a self-represented party. Hartman made an oral motion to have the arbitration terminated, but the arbitrator denied the motion, continuing the matter until January 16, 2017.

Despite the arbitrator's decision that the arbitration would go forward, the defendants, who were now represented by their present counsel, sent DeRose a letter dated January 13, 2017, asserting that they intended to treat the arbitration as abandoned "by virtue of laches." The defendants did not attend the final January 16, 2017 arbitration hearing, despite having been duly served with subpoenas.

On February 1, 2017, the arbitrator issued a final award resolving the matter in favor of DeRose. Among other things, the arbitrator found that (1) DeRose was an employee of Jason Robert's, Inc., (2) DeRose never authorized the defendants to make deductions as was claimed by the defendants, and (3) Hartman was the individual who ultimately was responsible for the wage violations that had occurred. The arbitrator found that the defendants were liable to DeRose under General Statutes § 31-72,[5] and ordered them to pay DeRose dam-

[5] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages in accordance with the provisions of [General Statutes §§] 31-71a to 31-71i, inclusive, or fails to compensate an employee in accordance with [General Statutes §] 31-76k . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

ages, costs, and attorney's fees totaling $171,938.20.[6] Notice of the arbitrator's award issued on February 3, 2017.

On February 15, 2017, DeRose filed an application with the Superior Court for an order confirming the arbitration award. See General Statutes § 52-417.[7] On March 6, 2017, the defendants filed a motion to vacate the arbitration award pursuant to § 52-418. According to the defendants, the arbitrator's award violated clear public policy, as embodied in the equitable doctrine of laches, and contravened one or more of the statutory proscriptions set forth in § 52-418. The defendants also filed an objection to DeRose's application to confirm the arbitration award raising these same arguments. DeRose filed an objection to the motion to vacate the arbitration award, arguing that no legally cognizable reason existed to vacate the award.

The defendants served a subpoena duces tecum on the arbitrator ordering him to appear in court on July 17, 2017, and to produce the entire arbitration file maintained by him in his capacity as arbitrator. The arbitrator filed a motion to quash the subpoena, arguing that the contents of the arbitration file, which included his research and personal notes, were not relevant to any of the theories the defendants had advanced in support of their motion to vacate the arbitration award.

The parties argued the motion to quash before the court on July 17, 2017. After hearing from the parties,

[6] Specifically, the award consisted of $125,000 in damages, $45,000 in attorney's fees, and $1938.20 in costs.

[7] General Statutes § 52-417 provides in relevant part: "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 . . . 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 [General Statutes §§] 52-418 and 52-419."

the court granted the arbitrator's motion to quash the subpoena. The court also denied the defendants' motion to vacate the arbitration award and granted the application to confirm the award. The court explained as follows on the record: "The court has heard the arguments. The court has read all the papers in this file that have been filed. The court will grant the motion to quash the subpoena. The court will find that any delay in this arbitration was caused because the arbitrator gave the defendants extra time to present their case. The court finds no prejudice. The court finds that any delay [that] may have occurred did not cause any prejudice to the defendants and that the delay, if anything, was to their benefit. . . .

"The defendants were apprised of the final hearing date, and . . . Hartmann, both in his corporate and his personal capacity, [was] served by subpoenas on January 11, 2017. Hartmann and Jason Robert's, Inc., were in effect defaulted and failed to appear at the hearing. And as a result of their failure to appear at the hearing, Hartmann did not have another attorney filing an appearance on his behalf and he did not ask for a continuance and had a letter sent that the defendants were not coming to the hearing. . . . Hartmann, once again, did not appear at the final hearing, nor did any attorney representing him, and the arbitrator went forward after finding the defendants had notice of the hearing. The defendants have provided no valid reason that the arbitrator's decision should be vacated, and the [application] to confirm is granted."

The defendants immediately objected to the court having ruled without first affording them an evidentiary hearing at which, they assert, they would have called the arbitrator to testify[8] and would have offered additional

[8] The defendants never made an offer of proof as to what testimony they intended to elicit from the arbitrator.

documentary evidence. The court indicated that it would not allow the defendants to call the arbitrator to testify because "what [they were] asking for is irrelevant and improper." The court nevertheless agreed to open and reconsider its ruling and allowed the defendants an opportunity to make additional legal arguments and offer whatever documentary evidence that they believed supported their position that the award should be vacated. The defendants offered four documents, which were admitted into evidence as full exhibits, and made additional legal arguments with respect to those exhibits.[9] The defendants requested time to submit additional written briefs addressing the motion to quash and the motion to vacate the arbitration award, but the court indicated that briefs already had been filed and that it had heard enough. The court ordered that its prior rulings granting the motion to quash, denying the motion to vacate, and confirming the arbitration award would stand. This appeal followed.

On September 7, 2017, the defendants filed a motion for articulation pursuant to Practice Book § 66-5. DeRose filed an objection to the motion on November 1, 2017. The court, on November 21, 2017, granted in part the defendants' motion and articulated its decision further. Specifically, the court responded to the defendants' request that the court articulate the basis for its denial of their motion to vacate the arbitration award on the grounds that the award violated public policy and § 52-418 (a) (4). The court first indicated that the arbitration agreement at issue was unrestricted, that

[9] The exhibits were (1) the May 15, 2015 letter from DeRose's attorney to the arbitrator, (2) the June 4, 2015 letter from DeRose's attorney to the arbitrator, (3) a May 25, 2016 e-mail from the defendants' former attorney, David Volman, notifying the arbitrator that he was no longer representing Jason Robert's, Inc., and (4) the May 4, 2001 licensing agreement between DeRose and Jason Robert's, Inc.

both parties had acknowledged this fact in their respective pleadings, and that this severely limited the bases on which the court could set aside the award.[10]

With respect to the defendants' public policy argument, which was premised on the theory that recovery by DeRose in the arbitration was barred by laches, the court concluded that because "the delay at issue was the fault of the defendants, the doctrine of laches did not apply to the [present] matter." With respect to whether the award violated § 52-418 (a) (4) because the arbitrator allegedly had disregarded the procedural and substantive law of Connecticut, the court indicated that the defendants' claim, in essence, simply asserted that the arbitrator misapplied the law rather than acted with "manifest disregard of the law" in violation of § 52-418 (a) (4). The court denied the defendants' motion to vacate the award because they improperly "sought to retry the factual and legal determinations made by the arbitrator pursuant to a valid and unrestricted arbitration agreement."[11]

Before turning to our discussion of the specific claims raised by the defendants, we first set forth the very limited nature of judicial review regarding arbitration

[10] Although counsel for the defendants argued at the July 17, 2017 hearing that the parties' submission was not unrestricted because it contained a clause requiring the arbitrator to apply the substantive and procedural laws of Connecticut, counsel was not able to provide the court with any legal authority supporting that proposition. A submission is unrestricted unless it contains language that expressly restricts the breadth of the issues to be decided, reserves explicit rights, or conditions the award on court review. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 109, 779 A.2d 737 (2001). Because the defendants have not raised as a distinct claim on appeal that the trial court improperly determined that the parties' submission to arbitration was unrestricted, we view the award in this case as arising out of an unrestricted submission.

[11] The defendants filed a motion for review of the court's articulation pursuant to Practice Book § 66-7. This court granted the motion for review but denied the defendants' request to order the court to further articulate the basis for its decision.

awards. "A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration." (Internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 478–79, 899 A.2d 523 (2006). "The propriety of arbitration awards often turns on the unique standard of review and legal principles applied to decisions rendered in this forum. [Thus, judicial] review of arbitral decisions is narrowly confined. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . .

"[U]nder an unrestricted submission, the [arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact. . . . A submission is deemed restricted only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019).

"[Because] the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it . . . . [Our Supreme Court has] . . . recognized three grounds for vacating an [arbitrator's] award:

(1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citation omitted; internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 474. With these principles in mind, we now turn to the defendants' claims on appeal.

I

The defendants first claim that the court improperly found that the arbitrator effectively had defaulted the defendants for failing to appear at the final arbitration hearing. According to the defendants, this alleged erroneous factual finding "clouded [the court's] judgment when reviewing the many claims of error that formed the basis of the defendants' . . . motion to vacate." In other words, the defendants contend that, because the court found that the arbitrator's award amounted to a default judgment against the defendants in favor of DeRose, the court necessarily failed to consider properly the merits of the defendants' challenges to the arbitrator's award. We are not persuaded.

As the defendants recognize in their appellate brief, a "trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence . . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous [if] there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Lussier* v. *Spinnato*, 69 Conn. App. 136, 141, 794 A.2d 1008, cert. denied, 261 Conn. 910, 806 A.2d 49 (2002).

In the award, the arbitrator expressly found that he had continued the arbitration proceedings to allow the

defendants an opportunity to finish their rebuttal of DeRose's case and to present additional witnesses, but that the defendants failed to appear for the final arbitration hearing in defiance of duly served subpoenas. The arbitrator elected to proceed with the arbitration proceedings despite the defendants' absence. Although the arbitrator does not describe his award as a default judgment, he notes as part of his findings that DeRose previously had submitted an exhibit summarizing all of the issues under submission and that the defendants had never provided a rebuttal to this summary. Because this suggests that the defendants' absence from the final hearing resulted in the arbitrator's reliance, at least in part, on the unrebutted arguments of DeRose, it is certainly a plausible inference for the trial court to have found that, as a result of the defendants' failure to appear at the final hearing, the defendants "were *in effect* defaulted" by the arbitrator. (Emphasis added.) The court's finding regarding the perceived effect of the defendant's absence, therefore, cannot be viewed as clearly erroneous because, as indicated, there is some evidence in the record to support such a characterization.

Moreover, even if we agreed with the defendants that the court mischaracterized them as having been "in effect defaulted," the defendants have not directed us to any portion of the court's decision, or anywhere in the record, that would support their assertion that this finding affected the court's consideration of the defendants' motion to vacate in any way deleterious to the defendants. The court never indicated, for instance, that it would not consider the substance of the motion to vacate because the defendants had been defaulted by the arbitrator. Instead, the court found, on the basis of its review of the record presented, that the defendants had failed to provide a valid reason to vacate the award, implying that the court fairly considered the defendants'

arguments on their merits and rejected them. Accordingly, we are not persuaded by this claim.

II

The defendants also claim that the court improperly failed to provide them with an evidentiary hearing before ruling on their motion to vacate the arbitration award. This claim is belied by the transcript of the hearing and is, thus, without merit.

"We consistently have held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court." (Internal quotation marks omitted.) *State* v. *Nguyen*, 253 Conn. 639, 653, 756 A.2d 833 (2000). "Under this standard of review, [w]e must make every reasonable presumption in favor of the trial court's action." (Internal quotation marks omitted.) *Metropolitan District Commission* v. *Connecticut Resources Recovery Authority*, 130 Conn. App. 132, 142, 22 A.3d 651 (2011).

The defendants have not cited to any statute, evidentiary rule, or rule of practice mandating that parties are entitled to an evidentiary hearing before a court rules on a motion to vacate an arbitration award. Furthermore, General Statutes § 52-420 (a) provides in relevant part that "[a]ny application [to confirm, vacate or modify an award] under [§§] 52-417, 52-418 or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay." A party wishing to have an evidentiary hearing on a short calendar motion generally must make such a request on the short calendar claim form or by motion. See *Ridgefield Bank* v. *Stones Trail, LLC*, 95 Conn. App. 279, 287, 898 A.2d 816, cert. denied, 279 Conn. 910, 902 A.2d 1069 (2006).

Unless there is an express statutory provision or rule of practice requiring an evidentiary hearing; see, e.g., General Statutes § 49-14 (a) (mandating motion for deficiency judgment "be placed on the short calendar for an evidentiary hearing"); which is absent here, whether to hold an evidentiary hearing in a particular case and the scope of such a hearing is left to the discretion of the court.

Although the court initially ruled on the defendants' motion to vacate after hearing arguments and ruling on the motion to quash, the record shows that, once the defendants requested an opportunity for an evidentiary hearing, the court agreed to open the proceedings for the purpose of reconsideration and to allow the defendants to make an evidentiary record. Although the court indicated, consistent with its ruling on the motion to quash, that it would not allow the defendants to call the arbitrator as a witness, the court admitted as full exhibits several documents that the defendants offered into evidence and permitted additional legal arguments. Accordingly, contrary to the defendants' claim, they were afforded an evidentiary hearing. To the extent that the defendants believe the court unfairly limited the scope of that hearing, the defendants have failed to brief any such claim on appeal except to challenge the ruling on the motion to quash, which we address in part III of this opinion. The defendants have not indicated what additional evidence they were precluded from presenting to the court or how it would have changed the outcome of the court's decision. Thus, they have failed even to attempt to demonstrate how they were harmed by the alleged error. On the basis of the record presented, we conclude that the defendants' claim that they were denied an evidentiary hearing is simply untenable.

III

We next turn to the defendants' claim that the court improperly granted the arbitrator's motion to quash the

subpoena duces tecum directed at him. We decline to review this claim because it is inadequately briefed.

"[A] trial court's decision to quash a subpoena is . . . reviewed on appeal under the abuse of discretion standard." (Internal quotation mark omitted.) *Cavolick* v. *DeSimone*, 88 Conn. App. 638, 654, 870 A.2d 1147, cert. denied, 274 Conn. 906, 876 A.2d 1198 (2005). "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds. . . . In determining whether there has been an abuse of discretion, much depends upon the circumstances of each case." (Internal quotation marks omitted.) *Satchwell* v. *Commissioner of Correction*, 119 Conn. App. 614, 623–24, 988 A.2d 907, cert. denied, 296 Conn. 901, 991 A.2d 1103 (2010).

The subpoena duces tecum in the present case sought to compel the arbitrator's testimony and the production of the arbitrator's entire file, including but not limited to his legal research, personal notes, and correspondences with the parties.[12] The court granted the motion to quash

[12] In addition to commanding the arbitrator to appear to testify at the July 17, 2017 hearing, the July 7, 2017 subpoena duces tecum commanded that the arbitrator "produce at that time and place the complete and entire arbitration file maintained by you in your capacity as arbitrator . . . including but not limited to any and all written documents, such as personal notes, whether handwritten or typed made by [the arbitrator] after considering the testimony on hearing dates; all legal research conducted by [the arbitrator]; all correspondence from [the arbitrator] to the parties and their respective legal counsel, including letters, [e-mails] and the like; all submissions to [the arbitrator] from the parties or their respective legal counsel, including pleadings, correspondence, [e-mails], exhibits and the like; the billing records maintained by [the arbitrator]; [and] the return of the remaining retainers by [the arbitrator]."

the subpoena because it concluded that the contents of the arbitrator's file and his testimony were not relevant given the limited scope of the court's review of an arbitration award resulting from an unrestricted submission. The court later articulated that the defendants had not demonstrated a clear need for any additional evidence and that it was capable of deciding the motion to vacate on the basis of the record before it.

As previously indicated in part II of this opinion, even without the benefit of the subpoena, the defendants were able to admit into evidence certain correspondence between the parties and the arbitrator that were not part of the record and that they believed supported their arguments that the arbitration previously was abandoned by DeRose. Although the defendants cite to a few cases in their appellate brief supporting the general proposition that, under certain circumstances, it might be necessary for an arbitrator to testify at a hearing on a motion to vacate an award, they have failed adequately to analyze how the court abused its discretion by not allowing testimony in the present case or how they were harmed by the granting of the motion to quash. "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006). We deem this claim abandoned due to inadequate briefing and, accordingly, decline to review it.

IV

The defendants next claim that the court improperly failed to vacate the arbitration award on the ground that the arbitrator failed to address the entirety of the submission, which the defendants contend included their special defenses, set-offs, and counterclaim

pleaded in the underlying civil action. We are not persuaded.

The scope of arbitration, including the delineation of the issues to be decided, is determined and limited by the parties' submission to arbitration. See *Board of Education* v. *AFSCME*, 195 Conn. 266, 271, 487 A.2d 553 (1985). "A submission to arbitration, sometimes referred to as an agreement for submission, is a contract . . . whereby two or more parties agree to settle their respective legal rights and duties by referring the disputed matters to a third party, by whose decision they agree to be bound. . . . Technical precision in making a submission is not required and submissions are given a liberal construction in furtherance of the policy of deciding disputes by arbitration and in light of the surrounding facts and circumstance. . . . A submission to arbitrate must embrace everything necessary to give the arbitrators jurisdiction over the parties and the matter in dispute . . . . Since the award is limited by the submission, the submission agreement should show clearly what disputes are to be arbitrated. However, it will be presumed that the parties intended to grant to the arbitrators such powers as are reasonably necessary to settle the dispute fully." (Citation omitted; internal quotation marks omitted.) *Alderman & Alderman* v. *Pollack*, 100 Conn. App. 80, 82–83, 917 A.2d 60 (2007).

In the present case, the submission provided that "[a]ll issues shall be submitted to and fully and finally adjudicated by the arbitrator including, but not limited to, the issues of coverage, liability, causation and damages." This submission is very broad, evincing the parties' intent that the submission encompass not only DeRose's causes of action against the defendants, but any special defenses and counterclaims raised by the defendants as a result. The defendants argue on appeal that the arbitrator "simply chose to ignore those claims

in their entirety." Although we agree with the defendants that the arbitration award does not contain express findings or legal conclusions specifically addressing each special defense and counterclaim raised by the defendants, the defendants have failed to demonstrate that the arbitrator simply chose to ignore the special defenses and counterclaim, rather than having considered and rejected them, prior to awarding damages to DeRose.

Our standard of review requires that we make "every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings." (Internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 474. The party challenging the award, in this case the defendants, bears the burden "of producing evidence sufficient to invalidate or avoid it." Id. The defendants have failed to show beyond mere speculation that the arbitrator did not consider and fully resolve all issues properly submitted to him by the parties. The defendants do not argue on appeal that they were frustrated in doing so by the court's decision to quash the subpoena issued to the arbitrator. Moreover, they offered no other evidence before the trial court as to what evidence was submitted to the arbitrator on their counterclaim and set-off other than the pleadings. Finally, the defendants took no steps before the arbitrator after he had issued his award to ascertain whether the arbitrator had considered and decided all the defendants' special defenses, set-offs, and counterclaim. Stated another way, the defendants have failed to overcome the presumption that, by awarding damages to DeRose without awarding any express set-off or countervailing damages to the defendants, the arbitrator properly, yet tacitly, rejected any special defenses and counterclaim raised by the defendants. We conclude that the court properly rejected this claim as a basis for vacating the award.

V

The defendants next claim that the court improperly confirmed the award because the award violated public policy. The defendants identify two public policies potentially implicated by the award: the policy favoring arbitration as an efficient alternative to litigation and the equitable doctrine of laches. We are unconvinced that either provides a basis for vacating the arbitration award on the basis of "the stringent and narrow confines of the public policy exception." *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, 273 Conn. 634, 665, 872 A.2d 423, cert. denied sub nom. *Vertrue, Inc.* v. *MedValUSA Health Programs, Inc.*, 546 U.S. 960, 126 S. Ct. 479, 163 L. Ed. 2d 363 (2005).

"A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. . . . This rule is an exception to the general rule restricting judicial review of arbitral awards." (Citation omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 93, 919 A.2d 1002 (2007). "The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy. . . . A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, *the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award*. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and

[a] court's refusal to enforce an arbitrator's [award] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . .

"The party challenging the award bears the burden of proving that illegality or conflict with public policy is *clearly demonstrated*. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [a party] can prevail . . . only if it demonstrates that the [arbitrator's] award clearly violates an established public policy mandate." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *New England Health Care Employees Union*, 271 Conn. 127, 135–36, 855 A.2d 964 (2004). "[W]hen a challenge to a voluntary arbitration award rendered pursuant to an unrestricted submission raises a legitimate and colorable claim of violation of public policy, the question of whether the award violates public policy requires de novo judicial review." (Internal quotation marks omitted.) Id., 135.

In the present case, the defendants argue that the present arbitration was delayed for a number of years, and that a final award was not issued until more than fourteen years had passed since the parties' dispute initially arose. The defendants ask us to recognize that our oft-stated general policy favoring arbitration encompasses a concomitant policy that arbitrations proceed expeditiously, which the defendants contend did not happen here, as reflected by the record. It is true that courts in this state have often described arbitration as "an efficient and economical system of alternative dispute resolution"; (internal quotation marks omitted) *LaFrance* v. *Lodmell*, 322 Conn. 828, 851, 144 A.3d 373 (2016); and that arbitration is intended as a

means to "secure prompt settlement of disputes . . . ." (Internal quotation marks omitted.) *State* v. *Philip Morris, Inc.*, 279 Conn. 785, 796, 905 A.2d 42 (2006). The attribution of promptness with respect to an arbitration proceeding, however, is aspirational in nature, and in no way creates a public policy that mandates that arbitrations be completed within a strict designated time period. Private arbitration, after all, is a creature of contract; id.; and all aspects are controlled by the parties through their arbitration agreement. If parties wish to have their disputes resolved through arbitration within a particular time frame, they are free to do so contractually. In describing the expeditious nature of arbitration relative to litigation, our courts have never intimated that a protracted arbitration proceeding risked being found violative of a clearly defined and well established public policy.

The defendants similarly argue that the lengthy arbitration proceedings violate a public policy that they assert is embodied in the doctrine of laches. "Laches is purely an equitable doctrine, is largely governed by the circumstances, and is not to be imputed to one who has brought an action at law within the statutory period. . . . It is an equitable defense allowed at the discretion of the trial court in cases brought in equity." (Emphasis omitted; internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 282, 880 A.2d 985 (2005). Courts have recognized the defense of laches to preclude a plaintiff from pursuing equitable relief in the face of an inexcusable delay causing prejudice to the defendant. See *Caminis* v. *Troy*, 112 Conn. App. 546, 552, 963 A.2d 701 (2009), aff'd, 300 Conn. 297, 12 A.3d 984 (2011). But whether a delay violates the doctrine of laches is an issue left squarely to the discretion of the trial court, to be determined on the basis of the circumstances presented. Finally, it is important to note that the defendants have not directed us to any case

in which a court vacated an arbitration award as violative of public policy because the arbitration was not completed in an expeditious manner.

We conclude that neither of the purported "public policies" advanced by the defendants rises to the type of explicit, well-defined, and dominant public policy that would render an arbitrator's award unenforceable under the narrow public policy exception. Moreover, even if the defendants were able to demonstrate the existence of a public policy that would subject an arbitration award to vacatur upon a finding that an inequitable delay in the arbitration process occurred, the defendants' claim nevertheless would fail in the present case because the arbitrator attributed the primary cause of any delays in the present case to the defendants. Although we engage in plenary review of whether an explicit, well-defined, and dominant public policy is implicated by an award, we nonetheless must give deference to the factual findings of the arbitrator. See *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 201, 947 A.2d 916 (2008). We conclude that the court properly rejected the defendants' claim that the award should be vacated on public policy grounds.

VI

Finally, the defendants claim that the court improperly confirmed the arbitration award because it violated § 52-418 (a) (4). Specifically, the defendants contend that the arbitrator's award was in "manifest disregard of the law" because the arbitrator (1) applied the improper legal test in finding that DeRose was an employee of the defendants, (2) ignored the legal definition of wages as set forth in General Statutes § 31-71a (3), and (3) improperly awarded attorney's fees pursuant to General Statutes § 31-72. We conclude that the defendants have failed to demonstrate even a colorable claim that the award violates § 52-418 (a) (4).

As previously noted, § 52-418 (a) provides in relevant part that, "[u]pon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds . . . (4) . . . 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." Our Supreme Court has indicated that subdivision (4) of § 52-418 (a) is also "commonly referred to as 'manifest disregard of the law.' " *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 649, 165 A.3d 1228 (2017), citing *Garrity* v. *McCaskey*, 223 Conn. 1, 10, 612 A.2d 742 (1992).[13] It is well settled, however, "that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. . . . [T]hree elements . . . must be satisfied in order for a court to vacate an arbitration award on the ground that the [arbitrator] manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is [well-defined], explicit, and clearly

[13] In *Garrity* v. *McCaskey*, supra, 223 Conn. 2, our Supreme Court considered whether an arbitrator's alleged "manifest disregard for the law" should be recognized under Connecticut law as an independent ground for vacating an arbitration award resulting from an unrestricted submission. The court reiterated that Connecticut recognized only three grounds for vacating such an award: "(1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citations omitted.) Id., 6. The first two grounds have their origins in our common law whereas the third ground is statutory in nature. Although our Supreme Court chose not to recognize manifest disregard for the law as an *independent* ground on which to seek vacatur of an arbitration award, the court held that such an argument was cognizable under the existing statutory ground set forth in § 52-418 (a) (4). Id., 7.

applicable." (Citation omitted; internal quotation marks omitted.) *Kellogg* v. *Middlesex Mutual Assurance Co.*, supra, 649–50. We will not decide the merits of a claimed manifest disregard of the law if the proponent of an application to vacate an award cannot demonstrate "anything more than his disagreement with the [arbitrator's] interpretation and application of established legal principals." *Garrity* v. *McCaskey*, supra, 13.

Here, as in *Garrity*, it is unnecessary for us to reach the merits of this claim because the defendants have demonstrated nothing more than a disagreement with the arbitrator's interpretation and/or application of established legal principles. Id. "Such a contention is a far cry from the egregious or patently irrational misperformance of duty that must be shown in order to prove a manifest disregard of the law under § 52-418 (a) (4). Acceptance of [the defendants'] argument would turn every disagreement with an arbitrators' rulings of law [which generally are not subject to review by the courts] into an allegation of manifest disregard of the law. We have never construed § 52-418 (a) (4) so broadly and we decline to do so today." Id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAQUWAN BURTON (AC 41807)

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

Syllabus

Convicted, after a jury trial, of the crimes of murder, criminal possession of a firearm and carrying a pistol without a permit, the defendant appealed, claiming, inter alia, that the trial court improperly denied his motion to suppress certain evidence seized by the police during a warrantless search of the bedroom of his girlfriend, J, which was located in the residence of her mother, N. The defendant's conviction stemmed from

an incident in which he was driven by a friend to the victim's residence to obtain marijuana, and, during the transaction, the defendant fatally shot the victim. Approximately two months later, the police went to N's residence to arrest the defendant pursuant to an outstanding arrest warrant unrelated to the homicide of the victim. N answered the door and permitted entry into the premises by the police, who proceeded upstairs to a locked bedroom where they found the defendant, who was taken into custody and brought outside to a patrol car. J, who also was in the bedroom, was escorted downstairs by the police. N initially had declined to give the police consent to search the premises, but, after the defendant told her that a gun was in the bedroom and that she should let the police get it, she signed a consent form allowing the police to search the bedroom. J signed a similar consent form. The police proceeded to search the bedroom and seized a two-tone chrome and black nine millimeter handgun, an ammunition magazine and fifteen rounds of nine millimeter ammunition from inside a dresser drawer. Thereafter, it was determined that a nine millimeter shell casing that was found at the crime scene was in substantial agreement with the nine millimeter handgun seized from the dresser in the bedroom. Prior to trial, the defendant filed a motion to suppress the evidence seized from the bedroom, asserting that the warrantless search violated his constitutional rights and, therefore, the fruit of that illegal search had to be suppressed. Following an evidentiary hearing, the trial court denied the motion. *Held*:

1. The trial court properly denied the defendant's motion to suppress the evidence seized by the police from J's bedroom, as that court's finding that N and J voluntarily had consented to the search of the bedroom by the police was not clearly erroneous: although the defendant claimed that N and J had been coerced by the police to give their consent, in making that claim the defendant relied on certain testimony of J, N and himself that the police allegedly threatened to arrest J if she refused to consent and that the police informed N and J that, if they did not consent, the police would obtain a search warrant anyway, which the court explicitly found to be not credible, and this court had to defer to the trial court's credibility assessments; moreover, the remaining evidence presented supported the court's voluntariness finding, as it showed that although there were eight to ten armed police officers at the subject premises early in the morning seeking to arrest the defendant, who was a convicted felon, potentially a gang member, had been involved in shootings and was suspected to have a weapon, there was no evidence that the officers forcibly entered the residence of N, who had granted them access, there was no evidence that two police officers who had pointed their weapons at the defendant and J when entering the bedroom used their weapons for any other purpose, including when they asked for consent, and N and J both completed and signed a consent to search form that contained disclaimers, including that the consent was given

voluntarily and without duress, threats or promises of any kind; furthermore, the fact that N initially declined to consent to a search did not render the court's voluntariness finding clearly erroneous, as it showed that N possessed the ability and the will to make that decision despite what the defendant claimed were coercive conditions, and it was a strong indication of voluntariness that N and J decided to give the police consent only after the defendant had told N that there was a handgun in the bedroom and that she should let the police get it.

2. The defendant could not prevail on his claim that the trial court improperly excluded evidence concerning the inability of two potential eyewitnesses to identify the defendant in a photographic array as the shooter, which was based on his assertion that the court improperly determined that § 8-5 (2) of the Connecticut Code of Evidence was the hearsay exception applicable to such nonidentification evidence: because W, the lead investigator in connection with the victim's homicide, was not present when the witnesses reviewed the photographic array and the defendant sought to introduce the witnesses' nonidentification of the defendant in an assertive manner as evidence that they could not identify the defendant as the shooter, the trial court correctly concluded that W's testimony was hearsay and was admissible only if it fell within a hearsay exception, and that § 8-5 (2) of the Connecticut Code of Evidence was not applicable to W's testimony where, as here, the witnesses were not available to be cross-examined, and, therefore, in light of the defendant's failure to identify any other hearsay exception that would have applied to W's testimony, there was no basis to conclude that the trial court erred in excluding W's testimony regarding the nonidentifications by the witnesses; moreover, because certain photographic array documents that were offered into evidence by the defendant were offered for the inference of the witnesses' nonverbal assertive acts drawn from the documents, the business records exception to the hearsay rule did not apply to the inference that the witnesses could not identify the defendant from the photographic array because that fact was not contained in the documents themselves and was based on hearsay implied from a combination of the documents and the witnesses' assertive actions or inactions, and in light of the defendant's failure to identify any other hearsay exception that would have allowed for the admission of the photographic array documents, the court properly excluded them.

3. The trial court did not abuse its discretion in concluding that a video recording of an interview between an eyewitness and the police was not sufficiently reliable or trustworthy to support its admission under the residual exception to the hearsay rule set forth in § 8-9 of the Connecticut Code of Evidence: the reliability and trustworthiness of the interview was undermined by the inability of the state to question the witness as to her ability to perceive the shooter and the events on the evening of the shooting and to cross-examine her as to the critical uncertainties contained within the interview, and the evidence presented at trial failed

to corroborate in many material respects, and actually contradicted, the witness' version of the events; moreover, because the trial court properly excluded the video recording of the interview, the defendant's constitutional claim necessarily failed.

Argued February 13—officially released August 13, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, criminal possession of a firearm and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Alander*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *John P. Doyle, Jr.*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Jaquwan Burton, appeals[1] from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes §§ 53a-54a (a) and 53a-8, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the trial court improperly (1) denied his motion to suppress items of evidence seized from his girlfriend's bedroom located at her mother's residence because neither his girlfriend nor her mother provided voluntary

[1] The defendant originally appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). The appeal subsequently was transferred to this court pursuant to Practice Book § 65-1.

consent to search therein, (2) excluded evidence concerning the inability of two eyewitnesses to identify extrajudicially the defendant from a photographic array as the shooter, and (3) excluded from evidence a video recording of an interview between an eyewitness and the police. We affirm the judgment of the trial court.

The relevant facts, as reasonably could have been found by the jury, and procedural history, are as follows. On the evening of February 10, 2014, the defendant called his friend, John Helwig, and indicated that he wanted a ride to buy some marijuana. Helwig, in his gray or "greenish" car, picked up the defendant at a house on Valley Street in New Haven, at which the defendant's girlfriend, Laneice Jackson, resided with her mother, Patrice Nixon. Helwig then picked up two other males, and the defendant instructed Helwig to drive to an address in the proximity of 31 Kossuth Street in New Haven and to park on a side street. When they arrived, the defendant exited the vehicle alone and was talking on his cell phone to the victim, Kyle Brown-Edwards, about a marijuana transaction. The defendant stated to the victim that he was "right around the corner," and then the defendant walked away behind the vehicle.

Meanwhile, the victim and his friends, Joseph Cordy and Perry,[2] were present on the second floor of the victim's residence at 31 Kossuth Street. After speaking with the defendant on his cell phone, the victim, at approximately 8:30 p.m., with marijuana in his possession, proceeded to go downstairs to the front entrance of the residence. While standing in the doorway of the front entrance, the victim was shot in the face by the defendant. Cordy heard the gunshot, observed the victim at the bottom of the stairs, and then called the

[2] It is unclear whether "Perry" was this individual's first or last name because he only was referred to as Perry throughout the trial.

police. At the same time, the victim's cousin, Jeremy Brown, and Jeremy's girlfriend, Morgan Brown, were somewhere outside the residence at 31 Kossuth Street.

Approximately five minutes after he left Helwig's vehicle, the defendant sprinted back to the vehicle with a gun in his hand and, after entering the vehicle, pointed the gun at Helwig and told him to drive. Helwig then drove to his grandmother's residence. There, the defendant told Helwig that he had planned to rob the victim, but, after the victim declined "to give it up" and gave him "a weird look," he shot the victim in the face. The defendant also asked Helwig for some cleaner to remove the blood from his sneakers.

At approximately 8:30 p.m., New Haven police were dispatched to 31 Kossuth Street in response to a report of someone being shot and, upon arrival, observed that the victim had a gunshot wound to his head. The victim was transported to a hospital, and he died as a result of his injuries. Later that same night, New Haven police investigated the crime scene and seized a single nine millimeter shell casing from the floor at the bottom of the staircase near the doorway inside 31 Kossuth Street. New Haven police also seized the victim's cell phone, which was provided to them by Cordy. An examination of the victim's cell phone revealed one missed call and two completed calls on February 10, 2014, between 8:21 p.m. and 8:31 p.m., from the defendant's cell phone.

On the morning of April 3, 2014, several law enforcement officers went to 461 Valley Street to arrest the defendant pursuant to an outstanding arrest warrant unrelated to the homicide of the victim. Nixon answered the door and permitted State Trooper Chris McWilliams and New Haven Police Sergeant Karl Jacobson and Detective Martin Podsiad to enter the premises. McWilliams and Podsiad proceeded upstairs to a locked bedroom, and, after they had knocked, the defendant opened the door. The defendant was taken into custody and brought outside to a patrol car. Jackson, who also

was in the bedroom, was escorted downstairs. The officers did not have a search warrant, but they received written consent to search the bedroom from both Jackson and Nixon. The officers searched the bedroom and seized, among other things, a two-tone chrome and black nine millimeter handgun, an ammunition magazine, and fifteen rounds of nine millimeter ammunition from inside a dresser drawer.

Further investigation revealed that the nine millimeter shell casing that was found at the crime scene was in "substantial agreement" with the nine millimeter handgun seized from the dresser in the bedroom. Furthermore, the defendant's friends had seen him always carrying a particular nine millimeter gun that matched the two-tone appearance of the gun found in the dresser. Also as part of their investigation, law enforcement seized the defendant's cell phone. Thereon, they discovered a video of the defendant reacting to a television news report of the victim's murder, and pictures of himself, prior to the shooting, holding a two-tone handgun matching the one found in the dresser. The defendant thereafter was charged with murder, criminal possession of a firearm, and carrying a pistol without a permit. He pleaded not guilty and elected a jury trial.

On March 31, 2016, before trial, the defendant filed a motion to suppress the evidence seized from the bedroom at 461 Valley Street, specifically including the nine millimeter handgun, tests performed thereon, and any testimony related thereto. The defendant maintained that the warrantless search of the bedroom at 461 Valley Street violated his rights under the fourth amendment to the constitution of the United States and article first, § 7, of the constitution of Connecticut and, thus, he argued that the fruit of those searches must be suppressed. In contrast, the state argued that the searches and seizures did not violate the defendant's constitutional rights because both Jackson and Nixon provided voluntary consent to search the bedroom.

On January 30, 2017, after a two day evidentiary hearing, the court issued a memorandum of decision in which it denied the defendant's motion to suppress. Therein, the court found that the credible evidence established that the state proved that the warrantless search of the bedroom at 461 Valley Street and seizure of the handgun therein did not violate the defendant's constitutional rights because consent to search was freely and voluntarily given by Jackson and Nixon, who were the individuals with the requisite authority to do so.

Thereafter, the defendant's case proceeded to a jury trial. During the state's case-in-chief, the defendant sought to introduce testimony and documentary evidence to establish that Morgan Brown and Jeremy Brown (collectively, the Browns), who were potential eyewitnesses to the murder and not available to testify at trial, each previously had been unable to identify the defendant in a photographic array. The defendant first asked Detective Michael Wuchek, who was the lead investigator in connection with the homicide of the victim, whether the Browns were able to identify the defendant in a photographic array. The state objected, and the court excused the jury. The court heard argument and sustained the state's objection on the ground that Wuchek's testimony as to whether the Browns were able to identify the defendant was hearsay and, because they were unavailable to testify, the pretrial identification exception to the hearsay rule; see Conn. Code Evid. § 8-5 (2);[3] did not apply to his testimony. Second, still outside the presence of the jury, defense counsel made an offer of proof as to the photographic array documents shown to the Browns. Those documents included

[3] Section 8-5 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial . . . (2) The identification of a person made by a declarant prior to trial where the identification is reliable."

a single sheet containing eight photographs of individuals, including the defendant, and two instruction sheets, one purportedly signed by Morgan Brown and one purportedly signed by Jeremy Brown. Defense counsel argued that these documents were admissible pursuant to the business records exception to the hearsay rule. See Conn. Code Evid. § 8-4 (a).[4] The state objected, and the court sustained the objection on the ground that the inference drawn from the documents that the Browns were unable to identify the defendant constituted hearsay that was not excepted from the hearsay rule pursuant to § 8-5 (2) of the Connecticut Code of Evidence.

Several days later, in the course of the state's case-in-chief, the defendant filed a motion to admit into evidence the video recording of an interview between Morgan Brown and the police on the night of the victim's murder because he believed that Morgan Brown's description of the events that night contradicted the state's evidence in certain important respects. In his memorandum of law in support of his motion to admit, the defendant maintained that the video recording was admissible pursuant to the residual exception to the hearsay rule. See Conn. Code Evid. § 8-9.[5] The next day, the court, after it heard argument from both parties,

[4] Section 8-4 (a) of the Connecticut Code of Evidence provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter."

[5] Section 8-9 of the Connecticut Code of Evidence provides: "A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule."

issued an oral decision in which, after expressing doubt as to whether the defendant had established that Morgan Brown was unavailable, it denied the defendant's motion on the ground that the interview was not trustworthy and reliable because the state would be unable to cross-examine Morgan Brown about the inconsistencies therein.

The jury subsequently found the defendant guilty of all charges, and the court, after rendering judgment in accordance with the verdict, sentenced the defendant to a total effective sentence of fifty-five years incarceration and imposed a fine of $5000. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly denied his motion to suppress several items of evidence seized from Jackson's bedroom located at Nixon's residence because neither Jackson nor Nixon provided voluntary consent to search therein. Specifically, he contends that the court erroneously found that both Jackson and Nixon had provided free and voluntary consent to search the bedroom because the evidence presented at the motion to suppress hearing established that they were coerced by the law enforcement officers into providing consent. The defendant argues that the warrantless search of the bedroom by the law enforcement officers violated his constitutional rights, and, therefore, the items of evidence seized from this search should have been suppressed. We disagree.

In its memorandum of decision denying the defendant's motion to suppress, the court found the following additional facts. "Law enforcement officers . . . were seeking to serve two arrest warrants on the defendant, [who] . . . was a convicted felon and a suspected gang member. The officers also possessed information from

a confidential informant that the defendant was in possession of a weapon, [had previously been involved in shootings], and was residing with his girlfriend . . . [Jackson] . . . [i]n one of two houses in the Valley Street area of New Haven. On April [3], 2014, eight to ten law enforcement officers went to 461 Valley Street in New Haven to determine whether the defendant was at that address and to serve the arrest warrants. They arrived at approximately 6 a.m. Three of the officers approached the front door of the dwelling, while the remaining officers took up positions outside the perimeter of the house. The three officers were armed. Karl Jacobson, a sergeant with the New Haven Police Department, was armed with a handgun, while . . . Podsiad . . . and State Trooper McWilliams were armed with assault rifles. Jacobson knocked on the front door, which was eventually answered by . . . Nixon, who was the lessee of the home. Nixon opened the door and let the three officers inside the house. Jacobson asked Nixon whether the defendant was there to which Nixon replied that she did not think so. Jacobson then asked Nixon if they could look to see if the defendant was present and Nixon responded, 'go ahead.' Jacobson stayed with Nixon as Podsiad and McWilliams searched the premises for the defendant. The two officers proceeded to an upstairs bedroom and knocked on the door, which was locked. The defendant opened the door and was immediately arrested and handcuffed. Also inside the bedroom was . . . Jackson . . . .

"The defendant was eventually brought outside and placed inside a patrol car. Nixon initially declined to consent to a search of the premises. At some point, Jacobson was informed by a patrol officer that the defendant wanted to speak with him. Jacobson went to the patrol car where the defendant was in custody.

The defendant volunteered that the gun they were looking for was in the bedroom and he did not want anyone else to get in trouble for it. Jacobson informed the defendant that Nixon would not consent to a search. Upon hearing this news, the defendant asked to speak with Nixon. The defendant's request was accommodated, whereupon the defendant told Nixon that the gun was in the bedroom and to 'just let them get it.' Nixon then signed a consent form allowing the officers to search the bedroom. Jackson signed a similar consent form. Each form stated that the signer ha[d] been informed of her constitutional right not to have a search made without a search warrant and her right to refuse to consent to a search. The form also stated that permission to search [was] being given 'voluntarily and without duress, threats, or promises of any kind.' After obtaining the written consent to search from Nixon and Jackson, Podsiad searched the bedroom and seized the subject handgun located in a dresser drawer."

The court also specifically credited the testimony of the law enforcement officers and discredited the conflicting testimony of Jackson, Nixon, and the defendant. The court stated that "Nixon and Jackson disputed the above facts in important respects. Jackson testified that she returned to the bedroom prior to her signing the consent form to obtain clothes for the defendant and that it was apparent from the disarray of the room and the open dresser drawer that it had already been searched. [The court] find[s] this testimony not to be credible. It is contradicted by the testimony of Podsiad that no civilian was allowed back into the bedroom after it was initially vacated by Jackson and the defendant, as well as the testimony of Nixon . . . that Jackson did not go back upstairs.

"Nixon testified that she was coerced into consenting to a search of the bedroom because she was told by a police officer that Jackson would be arrested if the

police were required to obtain a search warrant and a handgun was found. Nixon testified that, since [Jackson] was pregnant and she was concerned that she might be arrested, she was forced to consent to the search. Jackson and the defendant offered testimony, which supported Nixon's version of events. [The court] do[es] not find any of this testimony to be credible. Rather, [the court] credit[s] the testimony of Jacobson, the lead law enforcement officer during the search and the person who witnessed the signing of the two consent forms, that neither Nixon nor Jackson [were] coerced or threatened in any way."

We turn next to the well established law and standard of review that governs the defendant's claim. Both the fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut protect individuals from unreasonable searches and seizures. "Under both the fourth amendment to the federal constitution and article first, § 7, of the state constitution, a warrantless search of a home is presumptively unreasonable." (Internal quotation marks omitted.) *State* v. *Brunetti*, 279 Conn. 39, 69, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

"A warrantless search is not unreasonable under either the fourth amendment to the constitution of the United States or article first, § 7, of the constitution of Connecticut if a person with authority to do so has freely consented to the search. . . . The state bears the burden of proving [by a preponderance of the evidence] that the consent was free and voluntary. . . . The state must affirmatively establish that the consent was voluntary; mere acquiescence to a claim of lawful authority is not enough to meet the state's burden. . . . The question whether consent to a search has in fact been freely and voluntarily given, or was the product of coercion,

express or implied . . . is a question of fact to be determined from the totality of all the circumstances. . . . We may reverse [the trial court's factual findings] on appeal only if they are clearly erroneous. . . . Thus, [w]hether there was valid consent to a search is a factual question that will not be lightly overturned on appeal." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Jenkins*, 298 Conn. 209, 249–50, 3 A.3d 806 (2010); see *State* v. *Azukas*, 278 Conn. 267, 277–78, 897 A.2d 554 (2006) (delineating principles of valid third-party consent of residence).

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . We undertake a more probing factual review when a constitutional question hangs in the balance." (Internal quotation marks omitted.) *State* v. *Davis*, 331 Conn 239, 246, 203 A.3d 1233 (2019).

"Notwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Castillo*, 329 Conn. 311, 322, 186 A.3d 672 (2018).

On appeal, it is undisputed that the law enforcement officers did not have a search warrant and that Jackson and Nixon had the authority to give and actually provided consent to search the bedroom; the issue, therefore, is whether their consent was voluntary. The defendant argues that the consent was not voluntary because, under the totality of the circumstances, Jackson and Nixon had been coerced to give their consent.[6] In support of his argument, the defendant relies on the testimony of Jackson, Nixon, and himself that the officers allegedly threatened to arrest Jackson if she refused to consent and that the officers informed them that, if they did not consent, the officers would obtain a search warrant anyway.[7] The defendant also relies on the evidence presented that Nixon initially refused to consent, there was a large number of armed officers present within the home at an early hour in the morning, and

[6] The defendant also argues that the court erroneously made three subsidiary factual findings that (1) Jackson had not returned to the bedroom to obtain clothing for the defendant, (2) Nixon and Jackson were informed that they had the right to refuse to consent to the search, and (3) no officer pointed a weapon at Nixon when they entered the home or at Nixon and Jackson when they sought consent to search the bedroom. These findings warrant little discussion because there was evidence presented at the motion to suppress hearing to support them. First, Podsiad testified that Jackson was not permitted to return upstairs, and Nixon testified that there were officers standing at the bottom of the stairs preventing anyone from going back upstairs. Second, Sergeant Jacobson testified that both Nixon and Jackson each had signed a consent to search form that contained an express disclaimer that they had "been informed of [their] constitutional rights not to have a search made without a search warrant, and [their] right to refuse to consent to such a search . . . ." Third, although there was testimony that the officers pointed their guns at Jackson when they first entered the bedroom, as they were aware that the defendant potentially was armed, there was no evidence presented that an officer pointed a gun at Jackson at any other point in time, or at Nixon at any time.

[7] See *State* v. *Brunetti*, supra, 279 Conn. 70 ("[i]t is true that, if the police had instructed the [individual who provided consent] that they would obtain a search warrant if he had refused to give consent, then such consent would have been involuntary, for constitutional purposes, because the intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant" [internal quotation marks omitted]).

Jacobson told Nixon that it was okay if she did not consent because they were applying for a warrant to search the house.

The initial problem with the defendant's claim is that he relies, in part, on the testimony of Jackson, Nixon, and himself, which the court explicitly found to be not credible. In light of the principle that we must defer to the credibility assessments of the trial court, the testimony of Jackson, Nixon, and the defendant as to the allegedly coercive statements made by the police are removed from our determination as to whether the court's voluntariness finding was clearly erroneous. See id.; see also *State* v. *Martinez*, 49 Conn. App. 738, 745–46, 718 A.2d 22 (declining to second-guess trial court's assessment that discredited individual's testimony that she did not consent to search), cert. denied, 247 Conn. 934, 719 A.2d 1175 (1998).

On the basis of the remaining evidence presented, we conclude that the court's voluntariness finding was not clearly erroneous. Although there were eight to ten armed officers at the premises early in the morning, this was due to the fact that they were seeking to arrest the defendant, who was a convicted felon, potentially a gang member, had been involved in shootings, and was suspected to have a weapon. See *State* v. *Gray-Brown*, 188 Conn. App. 446, 458–59, 204 A.3d 1161 (rejecting argument that "consent was coerced because the search occurred in the early morning and twelve police officers were present at the house" where police believed that suspect was armed and responsible for homicide), cert. denied, 331 Conn. 922, 205 A.3d 568 (2019). There was no evidence that the officers forcibly entered the home; rather, three of the officers were granted access to the premises by Nixon, and she willingly answered their question as to whether she knew if the defendant was present. See *State* v. *Reynolds*, 264 Conn. 1, 45, 836 A.2d 224 (2003) (determining that

finding of voluntary consent to search not clearly erroneous where officers requested permission to enter premises and did not use loud or threatening language or point their guns at anyone), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Although two officers pointed their weapons at the defendant and Jackson when entering the bedroom, there was no evidence that the police used their weapons for any other purpose, including when they asked for consent. See *State* v. *Jenkins*, supra, 298 Conn. 254 (presence of armed officers, although factor to be considered, "does not render the atmosphere coercive"). Further, Jackson and Nixon each completed and signed a consent to search form that contained disclaimers, including that the consent was given "voluntarily and without duress, threats, or promises of any kind."

Moreover, the fact that Nixon initially declined to consent to a search does not render the court's voluntariness finding clearly erroneous; rather, it shows that she possessed the ability and the will to make that decision despite what the defendant claims were coercive conditions. See *State* v. *Brunetti*, supra, 279 Conn. 56 ("because refusal to sign a consent to search form is one of several factors to be considered in determining the validity of consent, such refusal does not vitiate consent otherwise found to be valid in light of all of the circumstances"). Indeed, it is a strong indication of voluntariness that Jackson and Nixon decided to provide the officers consent only after the defendant told Nixon that the gun was in the bedroom and that she should "just let them get it."

Finally, Jacobson testified that after Nixon initially refused consent to search, he sent officers back to the police station to start "drafting up a [search] warrant." He did not testify, however, that he told Nixon or Jackson that he would get a warrant if they did not consent. Furthermore, he testified that after the defendant told

him there was a gun in the bedroom, Jacobson told the defendant that Nixon and Jackson were not consenting to a search so the police were going to apply for a search warrant. Jacobson never testified that any such statement was made to Nixon or Jackson, or that they were aware of Jacobson's conversation with the defendant when they consented to the search.

We conclude that the evidence presented supported the court's finding that Jackson and Nixon voluntarily consented to the officers' request for permission to search the bedroom, and, therefore, the court properly denied the defendant's motion to suppress the evidence seized by the police from the bedroom.[8]

II

The defendant next claims that the court improperly excluded evidence concerning the inability of the Browns to identify extrajudicially the defendant in a photographic array as the shooter. The defendant argues that the court improperly determined that § 8-5 (2) of the Connecticut Code of Evidence was the hearsay exception applicable to the evidence of nonidentification in the form of the testimony of Wuchek and the photographic array documents. We conclude that the court did not improperly exclude the evidence of nonidentification.

The following additional facts are relevant to our resolution of the defendant's claim. Wuchek testified as part of the state's case-in-chief. On cross-examination,

[8] The state alternatively argues on appeal that the evidence seized from the bedroom would have been admissible, even if it was seized therefrom in violation of the defendant's constitutional rights, pursuant to the inevitable discovery doctrine. See *State* v. *Shields*, 308 Conn. 678, 689 n.13, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014). We need not reach this alternative argument in light of our conclusion that the court's voluntariness finding was not clearly erroneous.

Wuchek testified that the Browns, as potential eyewitnesses, were interviewed by the police on the night of the murder. He testified that, two months after the murder, the Browns were recalled to the police station where they each separately completed a review of a photographic array. Wuchek averred that he did not administer either array. Consequently, he was not in a position to testify regarding how the Browns responded to the photographic array, and, thus, he could not confirm whether they affirmatively said that they did not see the shooter, were uncertain if the shooter was in the array, or were silent after reviewing the array. Nevertheless, he outlined that it was the then existing practice of the police to present to the witness eight photographs of people similar in appearance, including a picture of the suspect, one at a time. The witness then would state whether any of the pictures represented the individual that they saw commit the crime. After Wuchek answered that the Browns each had completed a review of a photographic array, which included a picture of the defendant, defense counsel then asked whether the Browns were able to identify the defendant from the photographic array. The state objected, and the court excused the jury.

At the outset, the court recognized that the question called for hearsay, and it stated that the relevant hearsay exception was § 8-5 (2) of the Connecticut Code of Evidence, which excepts pretrial identification evidence from the hearsay rule when the witness is available to testify at trial. The court stated that, on the basis of a conversation with counsel in chambers, it understood that the Browns both were unavailable to testify. The state then represented that it had confirmed that, to the best of its knowledge, Morgan Brown was on active duty in the United States Air Force in Texas, and Jeremy Brown also was in the state of Texas, but

not assigned to the Air Force. Defense counsel confirmed that he had not been able to verify the Browns' addresses or to contact them. Accordingly, the court determined that, because the Browns would not be available at trial for cross-examination, Wuchek's testimony as to whether they previously had been able to identify the defendant in a photographic array was not excepted from the hearsay rule pursuant to § 8-5 (2) of the Connecticut Code of Evidence.

Next, defense counsel made an offer of proof as to a pair of two page documents that constituted the one page New Haven Police Department "witness instructions—identification procedures" and a one page compilation of the photographic array. The two sheets of instructions were completed and individually signed by the Browns and New Haven Police Sergeant David Zannelli. The two photographic arrays contained eight pictures of individuals with comparable appearances, including the defendant, as well as their corresponding names. Neither photographic array contained any markings. In response to several questions posed by defense counsel, Wuchek testified that he recognized the documents, but that the photographs depicted in the arrays would have been presented separately to the Browns and that the Browns would not have been shown the names of the individuals. He testified that the police maintain the photographic array records as part of their investigation and case file. He also testified that if a witness were to identify an individual in the array, they would mark that individual's picture, and, if the witness were unable to identify an individual in the array, no marks would be made. Defense counsel then asked that the documents be admitted as business records for the purpose of establishing that the Browns could not identify the defendant. The state objected on the ground of relevancy.

The court reasoned that these documents, which did not indicate whether the Browns were able to identify any of the individuals, were relevant only if the Browns' identification or lack of identification also was admissible as evidence. Defense counsel argued that the documents were relevant because the jury could draw a reasonable inference therefrom that there was no positive identification. The court then determined that, if the documents were used for the purpose of inferring the lack of a positive identification, then that evidence was not admissible pursuant to § 8-5 (2) of the Connecticut Code of Evidence because the Browns were unavailable to be cross-examined at trial.

We turn next to the well established law and standard of review that governs the defendant's claim. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 181, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

"It is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014). Evidence offered for the purpose of establishing whether the declarant extrajudicially identified a defendant is hearsay. See *State* v. *Outlaw*, 216 Conn. 492, 496–98, 582 A.2d 751 (1990). This identification evidence may be excepted from the hearsay rule if the requirements of § 8-5 (2) of the Connecticut Code of Evidence are met. That section provides in relevant

part: "The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial . . . (2) The identification of a person made by a declarant prior to trial where the identification is reliable." Conn. Code Evid. § 8-5 (2).

Furthermore, a hearsay document may be excepted from the hearsay rule pursuant to § 8-4 (a) of the Connecticut Code of Evidence, which provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." See also General Statutes § 52-180 (governing admissibility of business entries); *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 779–80, 882 A.2d 653 (2005) (outlining three requisite conditions for admissibility of business record).

In the present case, the defendant twice sought to introduce the fact that the Browns, although they were in close proximity to 31 Kossuth Street at the time the victim was shot, were unable to identify the defendant, from a photographic array, as the shooter. He sought to introduce this fact through the testimony of Wuchek as well as through the photographic array documents. The defendant argues that the court improperly identified § 8-5 (2) of the Connecticut Code of Evidence as applicable to his offers of proof.

With respect to the testimony of Wuchek, the defendant argues that the pretrial identification hearsay exception does not apply because his answer would have revealed that the Browns failed to identify the

defendant, not that they positively identified him. He argues that the language of § 8-5 (2) of the Connecticut Code of Evidence was intended to govern only positive identifications, as opposed to a failure to make an identification. Because the defendant has identified no other hearsay exception that would have made Wuchek's testimony admissible, the defendant's argument necessarily relies on an assumption that testimony from Wuchek that the Browns did not identify the defendant when shown the photographic array would not have been hearsay at all. We disagree.

Hearsay includes not only verbal and written statements, but also "nonverbal conduct of a person, if it is intended by the person as an assertion." Conn. Code Evid. § 8-1 (1) (B); see *State* v. *Burney*, 288 Conn. 548, 561, 954 A.2d 793 (2008). For example, an out-of-court nod or shake of the head in response to a question is as much an assertion subject to the hearsay rules as if the person had answered the question verbally or in writing. See *State* v. *King*, 249 Conn. 645, 670–71, 735 A.2d 267 (1999). Similarly, testimony that a person was silent in response to a question or did not mention a particular fact may constitute hearsay when offered to prove the existence or nonexistence of the fact. Id., 672; see also *State* v. *Rosado*, 134 Conn. App. 505, 519, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012).

For example, in *King*, our Supreme Court addressed the issue of whether testimony as to the nonverbal conduct of a declarant was assertive and, thus, constituted hearsay. *State* v. *King*, supra, 249 Conn. 670–72. At the defendant's murder trial, defense counsel sought to introduce the testimony of a police officer who had shown a photographic array, which included a picture of the defendant, to the victim's younger sister, who was present at the home where the murder occurred. Id., 652–53, 670, 673. Defense counsel expected the

police officer to testify that the victim's sister "did nothing" when presented with the picture of the defendant. Id., 670 n.31. The state objected on the ground that this testimony was inadmissible hearsay because defense counsel sought to treat the silence of the victim's sister as an assertion that she could not identify the defendant. Id., 671. The trial court sustained the state's objection. Id. On appeal, our Supreme Court held that the trial court properly excluded the officer's testimony because the silence of the victim's sister was offered by defense counsel to establish only that she failed to identify the defendant from the photographic array. Id., 672. As such, the declarant's silence was "a nonverbal assertion or statement" that constituted "inadmissible hearsay." Id.

The same is true in the present case. The defendant sought to have Wuchek testify that the Browns did not identify the defendant's picture when they reviewed the photographic array. As in *King*, the defendant sought to introduce the Browns' nonidentification of the defendant in an assertive manner, as evidence that the Browns could not identify the defendant as the shooter. Because Wuchek was not present when the Browns reviewed the photographic array, it is unclear exactly how they responded, if at all, to the defendant's photograph. Nevertheless, it does not matter. Whether the Browns affirmatively excluded the defendant's picture, shook their heads when asked if they saw the shooter, or were silent, makes no difference when their nonidentification is offered in an assertive manner. Clearly, testimony as to the Browns' verbal responses or nonverbal conduct, if offered through Wuchek, would constitute hearsay because the defendant would be offering the Browns' conduct for the truth of the matter asserted. We see no reason why the same rule, as outlined in *King*, should not apply to Wuchek's testimony that the

Browns did not identify the defendant from the photographic array. Consequently, the court was correct in concluding that Wuchek's testimony regarding the Browns' nonidentification of the defendant was hearsay and was only admissible if it fell within a hearsay exception. The court also correctly concluded that § 8-5 (2) of the Connecticut Code of Evidence was not applicable to Wuchek's testimony because the Browns were not available to be cross-examined.[9] Because the defendant has not identified any other hearsay exception that would have applied to the proffered testimony, there is no basis to conclude that the court in any way erred in excluding Wuchek's testimony regarding the nonidentifications by the Browns.

With respect to the photographic array documents, the defendant argues that the court improperly determined that the pretrial identification exception, as opposed to the business records exception, was the applicable hearsay exception. The defendant offered these photographic array documents for the relevant purpose of establishing an inference that the Browns were unable to identify the defendant, from the photographic array, as the shooter.[10] When offered for that

[9] We note that the rationale for the identification exception in § 8-5 (2) of the Connecticut Code of Evidence applies with equal force to positive identifications and nonidentifications. Section 8-5 (2) of the Connecticut Code of Evidence has two requirements: that the declarant is available for cross-examination and that the identification is reliable. If the Browns had been available for trial, the opportunity to test what they said or did during their reviews of the photographic array would have been the same regardless of whether they made an identification. Similarly, the reliability of the assertion resulting from the identification procedure is the same regardless of whether it resulted in a positive identification or a nonidentification. Consequently, had the Browns been available to testify at the defendant's trial, we see no reason why § 8-5 (2) of the Connecticut Code of Evidence would not apply to their failure to identify the defendant prior to trial.

[10] The state argues on appeal that the documents were irrelevant as offered for this purpose because the circumstances under which the Browns observed the shooter had not been admitted into evidence. We disagree with the state that the court abused its discretion in determining that the business records were relevant if offered for this purpose. See *State* v.

purpose, the inference that the Browns were unable to identify the defendant constituted implied hearsay in the form of a nonverbal assertion.

This relevant inference constituted implied hearsay because, although the offered documents themselves do not establish whether the Browns were able to identify the defendant, this fact can be inferred from Wuchek's foundational testimony in conjunction with the lack of markings on the documents. See *State* v. *Jones*, 44 Conn. App. 476, 486, 691 A.2d 14 (implied hearsay occurs when "although a witness did not repeat the statements of [the declarant], his or her testimony presented to the jury, by implication, [revealed] the substance of the [the declarant's] statements"), cert. denied, 241 Conn. 901, 693 A.2d 304 (1997); *In re Jose M.*, 30 Conn. App. 381, 386, 620 A.2d 804 ("The conversation was not repeated verbatim by [the coconspirator] but, nevertheless, his testimony expressly conveyed the substance of the conversation. As such, [the coconspirator's] testimony, by implication, presented out-of-court statements that if offered as assertions or to prove the facts asserted would run afoul of the hearsay rule."), cert. denied, 225 Conn. 921, 625 A.2d 821 (1993); see also *Dutton* v. *Evans*, 400 U.S. 74, 88, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (recognizing that witness' statement included implicit identification of accused). Accordingly, we must determine whether this inference of nonverbal conduct was admissible under the business records exception as claimed by the defendant.

Fernando V., 331 Conn. 201, 212, 202 A.3d 350 (2019) (trial court's relevancy determination is subject to abuse of discretion review); see also §§ 4-1 and 4-2 of the Connecticut Code of Evidence; E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.1, pp. 144–46. This inference is relevant as exculpatory evidence as to whether the defendant was the individual who had shot the victim. If the Browns, who were in the proximity of 31 Kossuth Street when the victim was shot, were unable to identify the defendant, from a photographic array, as the shooter, this fact would tend to make it more probable that the defendant was not the shooter.

The business records exception, however, applies, at most, to the contents of the documents themselves and not to the implied hearsay drawn therefrom. "[O]nce [the criteria of business records exception] have been met by the party seeking to introduce the record . . . it does not necessarily follow that the record itself is generally admissible, nor does it mean that everything in it is required to be admitted into evidence. . . . For example, the information contained in the record must be relevant to the issues being tried. . . . In addition, the information contained in the [record] must be based on the entrant's own observation or on information of others whose business duty it is to transmit it to the entrant. . . . If the information does not have such a basis, it adds another level of hearsay to the [record] which *necessitates a separate exception to the hearsay rule in order to justify its admission*." (Emphasis added; internal quotation marks omitted.) *State* v. *George J.*, 280 Conn. 551, 593–94, 910 A.2d 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007); see *Pagano* v. *Ippoliti*, 245 Conn. 640, 651, 716 A.2d 848 (1998) (meeting notes admissible as business record but their description of statements made by meeting participant constituted inadmissible hearsay).

In the present case, the photographic array documents were offered not for the information contained therein, but for the inference of the Browns' nonverbal assertive acts that is drawn from the documents. Thus, the business records exception does not apply to the inference that the Browns could not identify the defendant from the photographic array because that fact is not contained in the documents themselves, but is based on hearsay implied from a combination of the documents and the Browns' assertive actions or inactions. Accordingly, in light of our conclusion that the business records exception does not apply to the

implied hearsay, the defendant was required to identify an applicable hearsay exception that would allow for its admission. Because the defendant has failed to identify any applicable exception, we conclude that the court properly excluded the evidence concerning the inability of the Browns to identify extrajudicially the defendant in a photographic array.

The defendant also argues that, notwithstanding its evidentiary admissibility, the evidence of nonidentification was "constitutionally admissible pursuant to the defendant's rights to due process and to present a defense." We disagree. Our conclusion that the court properly applied the rules of evidence to exclude this evidence disposes of the defendant's constitutional claim. See *State* v. *Bennett*, 324 Conn. 744, 764, 155 A.3d 188 (2017) ("[i]f . . . we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail" [internal quotation marks omitted]).

III

The defendant finally claims that the court improperly excluded from evidence a video recording of an interview between Morgan Brown and the police. The defendant argues, contrary to the court's ruling, that the video recording of the interview was admissible pursuant to the residual exception to the hearsay rule; see Conn. Code Evid. § 8-9; because there was a reasonable necessity for its admission and it was trustworthy and reliable. We disagree.

The following additional facts are relevant to our resolution of the defendant's claim. During the state's case-in-chief, the defendant filed a motion to admit the entire video recording of an interview between Morgan Brown and the police (interview), and a memorandum of law in support thereof. The interview took place at the New Haven Police Department on the night of the

murder of the victim. In the course of the interview, which later was transcribed, Morgan Brown provided the following description of events in response to a series of questions posed by New Haven police detectives. She and Jeremy Brown were sitting in a parked vehicle in front of 31 Kossuth Street when they observed a vehicle driven by a young female with a light complexion park on Ann Street. She first answered that the female driver was white, but then immediately corrected her answer to say that she was black. She described the female as wearing her hair down, not up. She further stated that she did not know what kind of car the female was driving because she "was not really paying attention to it," and there were "so many" cars because it was a busy street. Nonetheless, she gave a description of the car as a newer, plain, charcoal grey, four door car with dark tinted windows.

She stated that, approximately two to five minutes later, "a boy comes out, well, I didn't see him come out [of] the car, but you put two and two together. He walk[ed] down the street smoking a cigarette" and approached the entrance to 31 Kossuth Street. On the way to the entrance, the boy walked in front of the Browns' car and looked at them. She stated that "he looked young, but [she] did [not] really see his face," but she described the boy as black, about five feet, nine inches tall, skinny, wearing a dark hooded sweatshirt, with the hood up, jeans, and black shoes. Several questions later, she described the boy as having light skin.

After the victim opened the door, the boy entered the residence and, while the door stayed open, she "just heard the shot. He ran out [of] the house, ran across the street, hopped in the car, and they pulled off." The boy had passed them again on the way back to his car, and she did not see him with a gun. Morgan Brown then entered 31 Kossuth Street and saw the victim lying

on the ground bleeding from his head just inside the entrance.

The defendant sought to admit the entire video recording of the interview pursuant to the residual exception to the hearsay rule. See Conn. Code Evid. § 8-9. At oral argument on the motion, held outside the presence of the jury, the defendant maintained that the interview was reasonably necessary to his case because Morgan Brown was unavailable for trial, and that the interview was reliable on the basis of the circumstances. The state opposed the admission of the interview. The state disputed that admission of the video recording of the interview was necessary because defense counsel had not undertaken all efforts to procure Morgan Brown for trial. See General Statutes § 54-82i (c) (delineating procedures to summon out-of-state material witness). The state also argued that it would not have an opportunity to cross-examine Morgan Brown regarding the inconsistent statements made in the interview and that the interview is not categorically reliable because it was given to the police and recorded on video.

The court then orally denied the defendant's motion to admit the video recording of the interview. The court initially expressed its concern whether the defendant had undertaken sufficient efforts to procure Morgan Brown's attendance by way of an interstate subpoena, but it rested its decision on the sole ground that the interview failed to meet the trustworthy and reliable requirement. In particular, the court recognized that the interview occurred immediately after the shooting, was given to the police, and was video recorded, but it determined that those circumstances, alone, did not make the interview trustworthy and reliable. The court reasoned that the inability of the state to cross-examine

Morgan Brown as to the "clear ambiguities in her statement," and her ability to perceive the shooter, were fatal to the admission of the video recording of the interview.

We turn next to the law and standard of review that governs the defendant's claim. "[I]n order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Internal quotation marks omitted.) *State* v. *Jenkins*, 271 Conn. 165, 189, 856 A.2d 383 (2004); see *State* v. *Bennett*, supra, 324 Conn. 761–62 (affording abuse of discretion review to claim that court improperly determined that hearsay statement was not admissible under residual exception).

"The legal principles guiding the exercise of the trial court's discretion regarding the admission of hearsay evidence under the residual exception are well established. An [out-of-court] statement is hearsay when it is offered to establish the truth of the matters contained therein. . . . As a general rule, hearsay evidence is not admissible unless it falls under one of several well established exceptions. . . . The purpose behind the hearsay rule is to effectuate the policy of requiring that testimony be given in open court, under oath, and subject to cross-examination." (Internal quotation marks omitted.) *State* v. *Bennett*, supra, 324 Conn. 762. Section 8-9 of the Connecticut Code of Evidence, which is "[t]he residual, or catchall, exception to the hearsay rule allows a trial court to admit hearsay evidence not admissible under any of the established exceptions if: (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by the equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions. . . . [T]he residual hearsay exceptions [should be] applied in the rarest of cases

. . . .” (Citations omitted; internal quotation marks omitted.) Id.

In *Bennett*, our Supreme Court considered whether the trial court abused its discretion in denying the admission, pursuant to § 8-9 of the Connecticut Code of Evidence, of a recorded statement made by a purported eyewitness to the police on the same day that the victim had been murdered. Id., 760. There, the trial court “rested its decision solely on the ground that [the witness’] statement lacked sufficient reliability and trustworthiness.” Id., 763. Our Supreme Court concluded that the trial court had not abused its discretion in denying the admission of the witness’ statement because the witness “had never been subjected to cross-examination regarding the circumstances surrounding her observations of the incident. A declarant’s availability for cross-examination has been deemed particularly significant in determining whether hearsay evidence is supported by guarantees of trustworthiness and reliability. . . . [The witness] conceded in her statement that the lighting was too limited to make out any distinguishing features of the people at the scene. [The witness] was never subject to cross-examination to further explore her ability to properly observe the events that she reported or her ability to accurately hear the sounds and statements that she had reported (i.e., how far she was from the incident, whether she has any visual or hearing impairments, whether there were obstructions or distractions at the time). . . .

“Additionally, the evidence at trial not only failed to materially corroborate [the witness’] statement, it contradicted her statement in part. . . . None of the witnesses reported hearing any gunshots, and [the victim’s] injuries were inflicted by a knife. [The witness’] report that a man in a yellow shirt was kneeling beside the victim stating, Oh, I killed him. I killed him, was consistent with the other witnesses only insofar as they

reported that [the victim's friend] wore a yellow shirt as he knelt by [the victim]; no one reported that anyone had made statements remotely consistent with that statement or any others recounted by [the witness]. Given that [the witness'] report of this inculpatory statement constituted hearsay within hearsay, the lack of corroboration bore significantly on its indicia of reliability." (Citations omitted; internal quotation marks omitted.) Id., 763–64.

In the present case, as in *Bennett*, the eyewitness, Morgan Brown, never was subjected to cross-examination; thus, the trustworthiness and reliability of the interview is undermined by the parties' inability to question her as to her ability to perceive the events that night. We agree with the trial court that cross-examination was particularly important given the substance of Morgan Brown's interview. She told the police that the driver was a black female with a light complexion, however, it is unclear the extent to which the allegedly dark tinted windows on the female's vehicle hindered Morgan Brown's observation. She also provided a description of the car that was driven by the female, but could not recall anything distinctive about it because there were "so many" cars because it was a busy street, and she "really wasn't paying attention to it." She also told the police that the shooter had twice walked directly in front of the vehicle in which she was sitting and looked at her, but she later discounted her observation by stating that she "did [not] really see his face" and that he was wearing the hood on his sweatshirt.

The state also did not have the opportunity to cross-examine Morgan Brown as to the critical uncertainties contained within the interview. For example, she told the police that she saw the shooter walking down the street and, although she did not see what car he came from, that he must have exited the female's car. She

further stated that when the shooter rapidly exited the residence, he hopped in "the car and they pulled off." It is unclear from both of these statements which car, if any, the shooter came from and to which car he returned.

Furthermore, also as in *Bennett*, the evidence presented at trial failed to corroborate in many material respects, and actually contradicted, Morgan Brown's version of events. For instance, Morgan Brown stated that the car in which the shooter purportedly arrived was driven by a female, however, Helwig, a male, testified at trial that he was the driver of the car that the defendant arrived and left in. She also told the police that the shooter departed 31 Kossuth Street without a gun, conversely, there was evidence presented at trial to establish that the defendant sprinted back to the vehicle with a gun in his hand and, after entering the vehicle, he pointed the gun at Helwig and told him to go. Therefore, we conclude that the court did not abuse its discretion in concluding that the video recording of Morgan Brown's interview was not sufficiently reliable or trustworthy to support its admission under the residual exception.

The defendant also argues that, "the defendant's constitutional rights to present a defense and to confrontation and due process requires the admission of this evidence without strict adherence to the evidentiary rules." As noted in part II of this opinion, such a claim is without merit. See *State* v. *Bennett*, supra, 324 Conn. 764 ("[i]f . . . we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail" [internal quotation marks omitted]).

The judgment is affirmed.

In this opinion the other judges concurred.

CONNECTICUT CENTER FOR ADVANCED TECHNOLOGY, INC. *v.* BOLTON WORKS, LLC
(AC 41225)

Keller, Elgo and Bishop, Js.

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises that it had leased to the defendant tenant. The plaintiff commenced the action by service of process, with the summons and complaint having a return date of October 26, 2017, and returned process to the court on October 24, 2017. The defendant subsequently filed a motion to dismiss for lack of jurisdiction, claiming that the plaintiff had failed to comply with the statute (§ 47a-23a) that requires that process in a summary process action be returned to court at least three days before the return date. In response, on November 15, 2017, the plaintiff served on the defendant and returned to the court an amended writ of summons and complaint with a new return date of November 24, 2017. The defendant moved to dismiss the amended complaint on the grounds that the plaintiff's original failure to return process at least three days before the return date had deprived the court of jurisdiction and that that defect in service could not be cured by amending the return date. The trial court denied the motion to dismiss, concluding that the plaintiff properly had amended the complaint and the return date to comply with § 47a-23a pursuant to the statute (§ 52-72) that allows for the proper amendment of civil process that, for any reason, is defective. The court thereafter rendered judgment of possession in favor of the plaintiff, from which the defendant appealed to this court. *Held* that the trial court properly denied the defendant's motion to dismiss the amended complaint; contrary to the defendant's claim, our Supreme Court has clarified that § 52-72 permits the amendment of civil process to correct an improper return date regardless of whether the correct return date has passed, as that statute contains no language limiting its applicability to amendments sought before the passage of the correct return date, and that summary process actions constitute civil actions that fall within the scope of § 52-72, and, accordingly, the plaintiff properly amended the return date so as to comply with the mandatory process requirements of § 47a-23a.

Argued March 5—officially released August 13, 2019

Procedural History

Summary process action brought to the Superior Court in the judicial district of Hartford, Housing Session, where the court, *Shah*, *J.*, denied the defendant's

motion to dismiss; thereafter, the matter was tried to the court; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed*.

Joshua C. Shulman, for the appellant (defendant).

Natalie J. Real, with whom was *Pat Labbadia III*, for the appellee (plaintiff).

Opinion

BISHOP, J. The issue in this appeal is whether, pursuant to General Statutes § 52-72,[1] the return date of a summary process complaint can be amended to correct the plaintiff's failure to return the complaint at least three days before the return date as required by General Statutes § 47a-23a.[2] The defendant, Bolton Works, LLC, appeals from the judgment of possession rendered by the trial court in favor of the plaintiff, Connecticut Center for Advanced Technology, Inc. The defendant claims that the trial court improperly concluded that § 52-72 permits the amendment of the return date in the context of summary process actions and that the court therefore erred in denying its motion to dismiss the plaintiff's amended complaint for failure to comply with § 47a-23a. We disagree and, accordingly, affirm the judgment of the trial court.

The following procedural history is relevant to our resolution of the defendant's appeal. The plaintiff brought a summary process action against the defendant alleging termination of the lease by lapse of time.

[1] General Statutes § 52-72 provides in relevant part: "(a) Upon payment of taxable costs, any court shall allow a proper amendment to civil process which is for any reason defective.

"(b) Such amended process shall be served in the same manner as other civil process and shall have the same effect, from the date of the service, as if originally proper in form. . . ."

[2] General Statutes § 47a-23a (a) provides in relevant part: "[The] complaint [in a summary process action] . . . shall be returned to court at least three days before the return day."

The writ of summons and complaint were dated October 17, 2017, with a return date of October 26, 2017. Following service on the defendant, the plaintiff returned the process on October 24, 2017—two days before the return date. The defendant subsequently filed a motion to dismiss on the ground that the process was not returned at least three days prior to the return date as required by § 47a-23a.

To satisfy the three day requirement of § 47a-23a, the plaintiff, on November 15, 2017, filed and served an amended writ of summons and complaint with a return date of November 24, 2017. In response, the defendant filed a motion to dismiss the plaintiff's amended complaint on December 4, 2017, arguing that the failure to return the complaint in a summary process action in compliance with § 47a-23a cannot be cured by amendment and, therefore, the plaintiff's action was still subject to dismissal. The court denied this motion on December 12, 2017, concluding that the plaintiff had properly amended its complaint and the return date pursuant to § 52-72 so as to comply with § 47a-23a. The court subsequently rendered judgment of possession in favor of the plaintiff on December 28, 2017. This appeal followed.

On appeal, the defendant claims that the trial court improperly concluded that § 52-72 permits the amendment of the return date in the context of summary process actions and that the court therefore erred in denying its motion to dismiss the plaintiff's amended complaint.

The standard of review for a court's ruling on a motion to dismiss pursuant to Practice Book § 10-31 (a) (1) is well settled. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination]

of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

The defendant first contends that we are bound by this court's decision in *Arpaia* v. *Corrone*, 18 Conn. App. 539, 559 A.2d 719 (1989), which stated, in the context of a summary process action, that "[w]here return of service is not timely . . . the defect cannot be cured by amendment." (Internal quotation marks omitted.) Id., 540. We disagree.

In *Arpaia*, the defendants filed a motion to dismiss the plaintiffs' summary process action for failure to make timely return of process before the listed return date as required by § 47a-23a. Id., 539–40. The trial court denied the defendants' motion and subsequently rendered judgment of possession in favor of the plaintiffs. Id., 539. On appeal to this court, the defendants argued that the trial court had erred in denying their motion to dismiss the plaintiffs' action because the plaintiffs made return of process only two days prior to the return date, not three and, therefore, the action was subject to dismissal upon timely motion. Id., 539–40. Agreeing with the defendants, this court reversed the judgment

of possession, concluding that, because the defendants had filed a timely motion to dismiss the plaintiffs' action, thereby choosing not to waive the defect in the process, the trial court was required to grant the motion. Id. In so concluding, this court noted that, when return of service is untimely made and the return date has already passed, the defect may not be amended. Id., 541. The court reasoned that, "once the date for return has passed there is nothing before the court which can be amended." (Internal quotation marks omitted.) Id.

Although the portion of *Arpaia* pertaining to the amendment of process directly supports the defendant's claim in the present case, we disagree that it is binding on this court. To the extent that this portion of *Arpaia* was part of the court's holding and not mere dictum,[3] it was thereafter impliedly overruled by our Supreme Court in *Concept Associates, Ltd.* v. *Board of Tax Review*, 229 Conn. 618, 642 A.2d 1186 (1994).

In *Concept Associates, Ltd.*, the plaintiff appealed a tax assessment of its property by the Board of Tax Review of the town of Guilford to the Superior Court, but the return date listed on the complaint fell on a Thursday, and not a Tuesday as required by General Statutes § 52-48. Id., 620. The defendants therefore filed a motion to dismiss the appeal, arguing that the defective return date deprived the trial court of jurisdiction. Id., 621. In response, the plaintiff filed a motion to amend the improper return date pursuant to § 52-72, which the court denied on the ground that the return date had already passed. Id. Consequently, the court granted the defendants' motion to dismiss the plaintiff's appeal. Id.

On appeal to this court, the plaintiff argued that § 52-72 is the proper vehicle by which a party may amend

[3] There is no indication in the text of the *Arpaia* decision that the plaintiffs had, in fact, sought to amend the return date in that matter.

a defect of process. *Concept Associates, Ltd.* v. *Board of Tax Review*, 31 Conn. App. 793, 795, 627 A.2d 471 (1993), rev'd, 229 Conn. 618, 642 A.2d 1186 (1994). This court agreed with the defendants, however, that the plaintiff could not amend its civil process because the return date had already passed at the time the motion to amend had been filed in the trial court and, therefore, the court did not have jurisdiction to consider the matter. Id., 797. In so holding, this court relied on the decision in *Arpaia*, stating: "In *Arpaia* . . . this court held that when the return of service is not timely, it is a defect that cannot be cured by amendment. *The rationale for this proposition is that once the date for return has passed there is nothing before the court that can be amended. . . . The same rationale applies here.* The plaintiff's summons in this case failed to state a correct return date. Therefore, there was no proceeding before the trial court. The plaintiff's motion to amend the return day was filed after the date for return had passed. Thus, the plaintiff's motion attempted to amend an action that was not properly before the trial court and must fail. The trial court's dismissal of the action for lack of subject matter jurisdiction was proper." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 796–97. This court therefore affirmed the judgment of dismissal rendered by the trial court. Id., 797.

The plaintiff in that case then appealed to our Supreme Court, claiming that § 52-72 permits the amendment of process to correct an improper return date regardless of whether the correct return date has passed. *Concept Associates, Ltd.* v. *Board of Tax Review*, supra, 229 Conn. 621. In response, the defendants argued that the plaintiff's amendment was "not a proper amendment" within the meaning of § 52-72 because the plaintiff did not seek to amend the return date until after the correct return date had passed and

that, therefore, there was nothing before the court that could be amended. (Internal quotation marks omitted.) Id., 622–23. Our Supreme Court disagreed with the defendants' strict construction, pointing out that § 52-72 has no provision limiting its applicability to amendments sought prior to the passage of the relevant return date. Id., 623. The court therefore rejected the narrow interpretation of the statute advanced by the defendants, explaining that, "[a]s a remedial statute, § 52-72 must be liberally construed in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) Id. Accordingly, the court reversed this court's judgment. Id., 626.

Although our Supreme Court's decision in *Concept Associates, Ltd.* v. *Board of Tax Review*, supra, 229 Conn. 618, did not explicitly overrule the portion of *Arpaia* prohibiting amendment of process to correct an improper return date after the return date has passed, that was the practical effect of its decision. It is clear from the procedural history of *Concept Associates, Ltd.*, that both the Appellate Court and the defendants had relied on *Arpaia* to support the trial court's dismissal of the plaintiff's action. By reversing the judgment of the Appellate Court and explicitly rejecting the defendants' argument that "there [was] no longer a case before the court once the return date ha[d] passed" and, therefore, "there [was] nothing to amend," the Supreme Court implicitly overruled *Arpaia*. Id., 623. Accordingly, we reject the defendant's argument that *Arpaia* is dispositive of the present appeal.

The defendant further argues, however, that § 52-72, which permits the amendment of *civil* process, is inapplicable in the present case because summary process actions are not ordinary civil actions. According to the defendant, a summary process action is a unique cause of action that is distinct from the types of cases that the legislature intended to classify as "civil

actions." This issue requires little discussion, as the question of whether a summary process action is a civil action was recently answered by our Supreme Court in *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 158 A.3d 772 (2017).

The question before the court in *Presidential Village, LLC*, was whether summary process actions constitute "other civil actions" within the meaning of General Statutes § 52-174 (b), which provides a medical treatment report exception to the rule against the admission of hearsay. Id., 414–16. In holding that summary process actions are "civil actions," the court explained: "Black's Law Dictionary defines 'civil action' in relevant part as, '[a]n action wherein an issue is presented for trial formed by averment of complaint and denials of answer or replication to new matter . . . .' Black's Law Dictionary (Rev. 4th Ed. 1968). *The statutory process by which eviction occurs in Connecticut is consistent with this definition.* Specifically, if a tenant neglects or refuses to quit possession after having received a pretermination notice and a subsequent notice to quit; see General Statutes § 47a-23; 'any commissioner of the Superior Court may issue a writ, summons and complaint *which shall be in the form and nature of an ordinary writ, summons and complaint in a civil process* . . . .' " (Emphasis altered.) *Presidential Village, LLC* v. *Phillips*, supra, 325 Conn. 416; see also General Statutes § 47a-23a. The court further explained: "At this point, the tenant may file an answer to the complaint and may allege any special defenses, a process facilitated by a standard form provided by the Judicial Branch. See Summary Process (Eviction) Answer to Complaint, Judicial Branch Form JD-HM-5; see also Practice Book § 17-30 (rule of civil practice governing default judgment for failure to appear or plead in summary process matter). After the pleadings are closed, a trial is scheduled. See General Statutes

§ 47a-26d." *Presidential Village, LLC* v. *Phillips*, supra, 416.

In sum, summary process actions are civil actions, and, therefore, in the absence of explicit statutory language to the contrary, they fall within the scope of § 52-72. Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss the plaintiff's summary process action.

The judgment is affirmed.

In this opinion the other judges concurred.