CROSSKEY ARCHITECTS, LLC *v.* POKO PARTNERS, LLC, ET AL.
(AC 40693)

DiPentima, C. J., and Keller and Olear, Js.

Syllabus

The plaintiff, an architectural firm owned by a licensed architect, C, sought to recover damages from the defendants for the unpaid work it had performed on four projects. The plaintiff alleged claims for breach of contract, quantum meruit and unjust enrichment regarding each of the four projects, and sought to pierce the corporate veil. C had a business relationship with K and the defendant R, who together oversaw the defendant business entities and owned the majority interest in nearly all of them. K and R managed their business entities by having the businesses owned by one limited liability company while being managed and controlled by another, and at the top of that corporate structure were the defendants P Co. and M Co. The trial court noted that K rationalized his refusal to pay the plaintiff for architectural services rendered for two of the projects, including a certain reservoir project, by claiming that the plaintiff was working "on spec" or without compensation for its services unless and until the projects were ultimately approved for funding. The court found, however, that there was no credible evidence that the plaintiff or C agreed to that arrangement. The court rendered judgment in part in favor of the plaintiff and found in favor of the plaintiff on three of its claims for breach of contract, as well as on its claim for quantum meruit as to the reservoir project. The trial court also pierced the corporate veil, holding K and R personally liable for damages awarded on each count found in favor of the plaintiff, and awarded prejudgment interest pursuant to statute (§ 37-3a) on all the damages. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that the trial court improperly pierced the corporate veil and held K and R personally liable under the identity rule, which was based on their claim that the court improperly found that the identity test was satisfied based solely on its finding that K and R controlled the defendant business entities and failed to examine issues of unity of interest and corporate independence: the defendants mischaracterized the trial court's decision and failed to show that the court misapplied the identity theory, as the court properly examined control in addition to other factors, cited the correct law regarding the identity theory, found facts in support of the identity theory, and concluded that the plaintiff had proven it was entitled to compensation under the identity rule; moreover, the defendants' claim that the plaintiff presented no evidence to support the identity rule was unavailing, as the court's factual findings, including that P Co. and M Co. were the locus of power for the overall organization through which K and R maintained virtually unchecked power and control, supported

the notion that the real actors were K and R, who controlled the defendant business entities as one enterprise while improperly using the corporate form to their benefit and to the detriment of legitimate creditors; furthermore, the defendants could not prevail on their claim that the trial court failed to properly consider whether the defendant business entities served a legitimate business purpose, as the circumstances necessary for piercing the corporate veil vary according to each case and the lack of a legitimate business purpose is not a necessary component of the identity test but, rather, is an example of the exceptional circumstances under which the veil could be pierced.

2. The defendants could not prevail on their claim that the trial court improperly found that the plaintiff was entitled to damages on the theory of quantum meruit as to the reservoir project, which was based on their claim that the plaintiff's schematic plans only made possible an opportunity to incur a benefit in the future, and that because the reservoir project did not go forward, the defendants did not incur that future benefit and, instead, lost money; the trial court found credible the evidence that the plaintiff was not working "on spec," and this court would not second-guess this determination, and even though the defendants did not receive an economic gain from the outcome of the reservoir project itself, under the equitable doctrine of quantum meruit, a defendant that obtains the services requested receives a benefit, and there was sufficient evidence for the trial court properly to determine that the defendants derived a benefit from the services provided by the plaintiff, as the court found an implied in fact contract and determined that the plaintiff performed architectural services as requested under the first phase of the unsigned contract.

3. The defendants could not prevail on their claim that the trial court improperly calculated the amount of damages because no factual support existed in the record for the value of the benefit, which was based on their claim that K stated in his deposition testimony that the plaintiff's services were provided "on spec," that the defendants did not express any willingness to pay the plaintiff the price on its reservoir project invoice, and that the court found that no contract existed; the trial court did not find credible K's testimony that the plaintiff was providing services "on spec" but, instead, found that K accepted the terms of the contract by his conduct, that K was fully aware that he had an obligation to pay for services, and that the parties had an implied in fact contract, and the court's factual findings were supported by evidence from the record, including the unsigned written contract, invoices, and the testimony of witnesses for the plaintiff and the defendants, and provided a sufficient basis for the court to determine that the contract price, as expressed in the unenforceable contract, for the services rendered constitutes the measure of the value of the benefit to the defendants.

4. The defendants' claim that the trial court lacked the discretion to award statutory prejudgment interest pursuant to § 37-3a on the plaintiff's claim for quantum meruit as to the reservoir project was unavailing, as an award for damages under the doctrine of quantum meruit falls within the scope of § 37-3a: this court previously has declined to create a rule

disallowing interest under § 37-3a in an action seeking damages for unjust enrichment, and the defendants have not provided a compelling argument for disallowing statutory prejudgment interest in an action seeking damages in quantum meruit, as there is no reasonable distinction between claims sounding in unjust enrichment and those sounding in quantum meruit for purposes of § 37-3a; moreover, the trial court did not abuse its discretion in awarding prejudgment interest under the facts of the present case, as the court's findings as to the reservoir project supported a conclusion that the money was due and payable pursuant to the unsigned contract, the amount claimed to be due could be fixed by a mathematical calculation from ascertainable data, and the defendants did not challenge the court's implicit finding that the money was wrongfully detained.

Argued April 15—officially released September 10, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn as to the defendant One Morningside Drive Partners, Limited Partnership; thereafter, the court, *Robaina*, *J.*, granted the plaintiff's amended motion to cite in POKO Management Corp. as a party defendant; subsequently, the matter was tried to the court, *Elgo*, *J.*; judgment in part for the plaintiff, from which the defendants appealed to this court; thereafter, the court, *Elgo*, *J.*, issued a rectification of its decision; subsequently, Pamela Olson, as executrix of the estate of Kenneth M. Olson, was substituted as a defendant. *Affirmed.*

Thomas E. Katon, with whom, on the brief, was *Adam D. Miller*, for the appellants (defendants).

Kirk D. Tavtigian, *Jr.*, with whom was *George M. Purtill*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendants[1] POKO Partners, LLC, POKO Reservoir Yaremich Developers, LLC, POKO Cape Loom Managers, LLC, One Morningside Group,

[1] The original complaint also named One Morningside Drive Partners, Limited Partnership as a defendant. The action was later withdrawn as to that defendant.

LLC, One Morningside Managers, LLC, One Morningside Owners, LLC, Capehart Ventures, LLC, POKO Management Corp., Richard K. Olson, and Pamela Olson, as executrix of the estate of Kenneth M. Olson,[2] appeal from the judgment of the trial court rendered in part in favor of the plaintiff, Crosskey Architects, LLC. On appeal, the defendants claim that the court (1) improperly pierced the corporate veil, (2) improperly found that the plaintiff was entitled to damages on the theory of quantum meruit and (3) abused its discretion in awarding statutory prejudgment interest pursuant to General Statutes § 37-3a[3] on the theory of quantum meruit. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant. The plaintiff is an architectural firm owned by William Crosskey, a licensed architect. From 2006 to 2015, Crosskey had a business relationship with Kenneth Olson and his brother, Richard Olson. The Olsons oversaw between forty to sixty business entities established for the purpose of commercial and residential real estate development. The Olsons managed their business entities by having the businesses owned by one limited liability company while being managed and controlled by another. At the top of this structure are POKO Partners, LLC, in which Kenneth Olson has a 50 percent ownership interest, Richard Olson has a 40 percent ownership interest and Pamela Olson, Kenneth Olson's wife, has a 10 percent interest; and POKO Management Corp., in which Kenneth Olson has a 60 percent ownership interest and

[2] Kenneth M. Olson died during the pendency of this appeal, and Pamela Olson filed a motion to substitute party, which was granted. For ease of reference, we will refer to the individual defendants as Richard Olson or Kenneth Olson or, collectively, as the Olsons.

[3] Although § 37-3a was the subject of technical amendments in 2018; see Public Acts 2018, No. 18-94, § 32; 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.

Richard Olson has a 40 percent ownership interest. Either Kenneth Olson or the Olsons together own a majority interest in nearly all of the defendant entities. The defendant entities owned by the Olsons operate out of one office in Port Chester, New York. All of the personnel working out of this office are paid by either POKO Partners, LLC, or POKO Management Corp. The Olsons' salaries are paid exclusively from POKO Management Corp.

In the thirteen count operative complaint, the plaintiff sought damages for the unpaid work it had performed on four projects of the Olsons: the POKO office project, the Reservoir project, the Morningside Drive project and the Capehart project. The plaintiff alleged breach of contract, quantum meruit and unjust enrichment regarding each of the four projects, and sought to pierce the corporate veil.

The court described the plaintiff's work on the four projects as follows. Kenneth Olson began communications with Crosskey in 2008, regarding the POKO office project, which involved renovating the office in Port Chester. Employees of the plaintiff exchanged e-mails with Richard Olson and an employee of POKO Partners, LLC, regarding the work requested. The work requested was done and accepted at the hourly rates that the plaintiff had charged since the beginning of the plaintiff's business relationship with the Olsons. After completing the work, Crosskey sent Kenneth Olson and POKO Partners, LLC, invoices totaling $4690.24 as of October 15, 2008, but the plaintiff was not paid. Richard Olson explained that the plaintiff was not paid because he and his brother assumed that the plaintiff would write off the costs.

The Reservoir project involved new construction, mixed-use housing and commercial space development in the city of Bridgeport. In September, 2006, Kenneth Olson solicited the plaintiff's architectural services.

Although the project never went forward, the plaintiff performed work on the project and submitted invoices. The plaintiff was never paid.

The Morningside Drive project involved a group of small office buildings owned by Kenneth Olson on One Morningside Drive in Westport. The plaintiff provided architectural services in connection with this project. POKO Management Corp. was the property manager for One Morningside Drive, which was being developed in order to sell to Newman's Own Real Estate, LLC. Following the sale, POKO Management Corp. continued to use the plaintiff's services for ongoing projects at One Morningside Drive. There was an ongoing agreement in which the plaintiff was solicited to provide architectural services and the defendants would pay the plaintiff's hourly rates. Crosskey sent unpaid invoices in the amount of $10,480.10 to POKO Partners, LLC, and POKO Management Corp. One Morningside Managers, LLC, was the managing entity of One Morningside Group, LLC, in which Richard Olson and Kenneth Olson each had a 37.5 percent interest, respectively, and the remaining 25 percent was owned by employees of the defendant entities. One Morningside Managers, LLC, was dissolved in 2014, after the buildings were sold to Newman's Own Real Estate, LLC, for $5.8 million. At that time, One Morningside Group, LLC, of which Kenneth Olson was an investor, netted $1,669,702.51. In reliance on an agreement that he would be paid, Crosskey continued to accept work from Kenneth Olson, but he was not paid.

The Capehart project concerned the development of an old mill building in Norwich into apartment buildings. Kenneth Olson signed a contract in which he was identified as the managing member under the auspices of Capehart Ventures, LLC.[4] The Capehart project never

[4] The record reflects that Crosskey sent Kenneth Olson a signed proposal for the Capehart project and Kenneth Olson signed it.

came to fruition, and the court noted that Kenneth Olson's deposition testimony revealed that "close to a million and a half dollars" was lost on the project. (Internal quotation marks omitted.) POKO Partners, LLC, the project manager on this project, received $450,000 in project management fees. The plaintiff's outstanding bill for the project totaled $31,383.93, with late charges totaling $63,775.71. The court noted that Kenneth Olson "rationalized his refusal to pay the plaintiff for architectural services rendered for the Reservoir and Capehart projects by claiming that the plaintiff was 'on spec.' In other words, the plaintiff was effectively working without compensation for [its] services unless and until the projects were ultimately approved for funding. There is, however, no credible evidence that the plaintiff or Crosskey agreed to this arrangement."

The court found in favor of the plaintiff on the first count of the complaint alleging breach of contract as to the POKO office project as against POKO Partners, LLC, and POKO Management Corp. in the amount of $4690.24 plus interest; on the fifth count of the complaint addressing the Reservoir project and seeking quantum meruit as to POKO Partners, LLC, POKO Management Corp. and POKO Reservoir Yaremich Developers, LLC, in the amount of $23,907.70 plus interest; on the seventh count of the complaint, alleging breach of contract as to the Morningside Drive project as against POKO Partners, LLC, POKO Management Corp., One Morningside Group, LLC, and One Morningside Managers, LLC, in the amount of $10,480.09 plus interest; and on the tenth count of the complaint alleging breach of contract as to the Capehart project as against POKO Partners, LLC, Capehart Ventures, LLC, and POKO Cape Loom Managers, LLC,[5] in the amount of $31,383.93 plus

[5] Although the court found, as to count ten of the operative complaint, that only POKO Partners, LLC, Capeheart Ventures, LLC, and POKO Cape Loom Managers, LLC, breached the contract, the complaint alleged that POKO Management Corp. also breached the contract.

interest. The court also found that the plaintiff prevailed on the thirteenth count of the complaint and pierced the corporate veil, holding the Olsons personally liable for damages awarded on each count found in favor of the plaintiff. The court dismissed all other counts of the complaint as moot. The court awarded prejudgment interest pursuant to § 37-3a on all the damages. This appeal followed. Additional facts will be set forth as necessary.

I

The defendants claim that the court improperly pierced the corporate veil and held the Olsons personally liable under the identity rule.[6] They argue that the court (1) misapplied the identity rule and (2) failed to properly consider whether the defendant entities served a legitimate business purpose. We are not persuaded.

We note the following relevant law. "Whether the circumstances of a particular case justify the piercing of the corporate veil presents a question of fact. . . . Accordingly, we defer to the trial court's decision to pierce the corporate veil, as well as any subsidiary factual findings, unless they are clearly erroneous. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing

[6] The plaintiff argues that it is unnecessary to review the piercing of the corporate veil claim because the court found the Olsons directly liable on the first, fifth, seventh and tenth counts. We do not agree with the plaintiff's interpretation of the trial court's decision. The question of whether the Olsons were directly liable for damages on the first, fifth, seventh and tenth counts was not before the trial court. The allegations in the complaint did not seek to impose direct liability on the Olsons, and only the thirteenth count of the complaint sought to impose liability for business debts on the Olsons by piercing the corporate veil. The court concluded that the plaintiff met its burden of establishing that the corporate veil should be pierced and, as a result, found that the Olsons were personally liable. Accordingly, we will review this claim.

court is left with the definite and firm conviction that a mistake has been made. . . .

"Generally, a corporation is a distinct legal entity and the stockholders are not personally liable for the acts and obligations of the corporation . . . . Courts will, however, disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor." (Citations omitted; internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 138–39, 37 A.3d 724 (2012).

We address the defendants' arguments in turn.

A

The defendants argue that the court misapplied the identity rule. They contend that the court improperly found that the identity test was satisfied based solely on its finding that the Olsons controlled the defendant entities. They argue that control is not relevant to the identity test and concerns, instead, the first prong of the instrumentality test. We are not persuaded.

"It is well established that [t]he . . . determination of the proper legal standard in any given case is a question of law subject to our plenary review." (Internal quotation marks omitted.) *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 183, 74 A.3d 1278 (2013).

"When determining whether piercing the corporate veil is proper, our Supreme Court has endorsed two tests: the instrumentality test and the identity test."[7]

[7] The instrumentality rule and the identity rule also apply to the protection afforded by a limited liability company. *Morris* v. *Cee Dee, LLC*, 90 Conn. App. 403, 414, 877 A.2d 899, cert. granted, 275 Conn. 929, 883 A.2d 1245 (2005) (appeal withdrawn March 13, 2006).

(Internal quotation marks omitted.) *KLM Industries, Inc.* v. *Tylutki*, 75 Conn. App. 27, 32, 815 A.2d 688, cert. denied, 263 Conn. 916, 821 A.2d 770 (2003). The instrumentality rule has three prongs, the first of which requires "[c]ontrol, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own . . . ."[8] (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 232, 990 A.2d 326 (2010). To pierce the corporate veil under the identity rule, the plaintiff must show that "there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) Id. "[T]he identity rule is applicable against individuals, as well as corporations . . . ." (Citation omitted.) Id., 237.

The defendants argue that the court based its determination that the identity rule was satisfied solely on its finding that the Olsons controlled the defendant entities and failed to examine issues of unity of interest and corporate independence. The defendants mischaracterize the trial court's decision and have not shown that

[8] The remaining prongs of the instrumentality rule, which are not implicated in this claim, are as follows: "(2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 232, 990 A.2d 326 (2010).

the court misapplied the identity theory. The trial court examined control in addition to other factors, and such an analysis does not evince a misapplication of the identity rule. The court cited the correct law regarding the identity theory, found facts in support of the theory and concluded that the plaintiff had proven it was entitled to compensation under the identity rule. "Generally, appellate courts presume that the trial court knows and has applied the law correctly in the absence of evidence to the contrary. . . . [I]t is the burden of the appellant to show to the contrary." (Citation omitted; internal quotation marks omitted.) *Havis-Carbone* v. *Carbone*, 155 Conn. App. 848, 867, 112 A.3d 779 (2015).

Nothing prevents a trial court from examining control along with other factors as a method by which to conclude that certain aspects of the identity rule have been met. "[T]he identity rule primarily applies to prevent injustice in the situation where two corporate entities are, in reality, *controlled* as one enterprise . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Falcone* v. *Night Watchman, Inc.*, 11 Conn. App. 218, 221, 526 A.2d 550 (1987). "No hard and fast rule . . . as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case. . . . It is clear that the key factor in any decision to disregard the separate corporate entity is the element of control or influence exercised by the individual sought to be held liable over corporate affairs." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 555–57, 447 A.2d 406 (1982). "In *Zaist* [v. *Olson*, 154 Conn. 563, 578, 227 A.2d 552 (1967)], [our Supreme Court] found the controlling stockholder and a related corporation liable under an alter ego theory, concluding that the corporate structure of the defendant in that case could properly have been disregarded under either

the instrumentality rule or the identity rule." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 232.

Alternatively, the defendants argue essentially that the plaintiff presented no evidence to support the identity rule. They also contend that the court failed to make certain findings, but they did not request an articulation on those grounds.[9] Instead of focusing on findings that the court did not make, we note that "each case in which the issue is raised should be regarded as sui generis, to be decided in accordance with its own underlying facts." (Internal quotation marks omitted.) *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 556 n.7. After a thorough examination, we conclude that the factual findings that the trial court made support a finding that the identity rule was satisfied. The court found that (1) POKO Partners, LLC, and POKO Management Corp. were the locus of power for the overall organization through which the Olsons maintained virtually unchecked power and control; (2) POKO Management Corp., "which receives 'reimbursements' through every company that does business with [the defendant entities] for expense[s], pays salaries to [the Olsons]"; (3) Kenneth Olson viewed the lack of clarity in the overall corporate structure of the defendant entities as a virtue;[10] (4) Kenneth Olson intentionally misled Crosskey on the projects that did not move

[9] The defendants further argue that evidence was presented at trial that POKO Reservoir Yaremich Developers, LLC, Capehart Ventures, LLC, and Cape Loom Managers, LLC, filed and maintained records with the Secretary of State, maintained a separate bank account, and filed tax returns. The court did not state in its memorandum of decision whether it found this evidence credible. If the defendants wanted to have the court specify whether it found this evidence credible, they could have requested an articulation on those grounds. See Practice Book § 66-5.

[10] The court further found that Kenneth Olson's deposition testimony "smacks of elusive game playing semantics" and that the lack of clarity in certain aspects of his testimony indicated that he was attempting to insulate the main defendant entities, as well as himself, from liability.

forward into providing architectural services, and later recast the arrangement as being " 'on spec' "; (5) the defendant entities were located in one office, and shared all office supplies and equipment, including computers; (6) Kenneth Olson signed all of his e-mails as emanating from POKO Partners, LLC, regardless of whether another defendant entity was purporting to handle the matter; (7) the defendant entities were "stack[ed]" to provide the Olsons with layers of protection; and (8) the Olsons would pay themselves first without notice to legitimate creditors, would dissolve or abandon companies when it was not convenient for them to proceed with a project, would ask vendors to supply services to companies that had no reasonable capitalization and would hire vendors through one company while forming another single purpose entity in order to absorb liabilities.[11]

"The essential purposes of the corporate structure, including stockholder immunity, must and will be protected when the corporation functions as an entity in

[11] The defendants argue that the court's finding that single purpose entities were used to absorb liabilities was clearly erroneous. The court determined that the "establishment of 'single purpose entities,' while not nefarious in and of [itself], in this case was used to absorb liabilities, which the entity, specifically, POKO Reservoir Yaremich Developers, LLC, and Capehart Ventures, LLC, did not originally enter into." This finding is supported by the court's additional findings. The court found that Kenneth Olson and POKO Partners, LLC, "do not dispute that they procured architectural services from Crosskey at the outset of [the Reservoir and Capehart] projects, but claim that upon the establishment of a 'single purpose entity' like POKO Reservoir Yaremich Developers, LLC, and Capehart Ventures, LLC, the entities, as opposed to POKO Partners, LLC, under whose auspices [the] court finds solicited Crosskey's services, would begin assuming liability for bills associated with the project. This arrangement was effective, according to [Kenneth] Olson, even though, as Crosskey testified, the plaintiff's services were typically 75 percent complete by the time the single purpose entity was formed." The court also found that after the plaintiff sent invoices regarding the Reservoir project, Kenneth Olson stated that he and his brother " 'would remain open-minded' " on the issue of the payment dispute, and approximately one month later, POKO Reservoir Yaremich Developers, LLC, was dissolved.

the normal manner contemplated and permitted by law. When it functions in this manner, there is nothing insidious in stockholder control, interlocking directorates or identity of officers. When, however, the corporation is so manipulated by an individual or another corporate entity as to become a mere puppet or tool for the manipulator, justice may require the courts to disregard the corporate fiction and impose liability on the real actor." *Zaist* v. *Olson*, supra, 154 Conn. 574–75. "When the statutory privilege of doing business in the corporate form is employed as a cloak for the evasion of obligations, as a mask behind which to do injustice, or invoked to subvert equity, the separate personality of the corporation will be disregarded." (Internal quotation marks omitted.) *Falcone* v. *Night Watchman, Inc.*, supra, 11 Conn. App. 220. The court's findings support the notion that the real actors were the Olsons, who controlled the defendant entities as one enterprise while improperly using the corporate form to their benefit and to the detriment of legitimate creditors. We conclude that the court's finding that the particular circumstances of this case justify piercing the corporate veil under the identity theory was not clearly erroneous.

B

The defendants next argue that the court "failed to properly apply the second prong of the *Naples* [v. *Keystone Building & Development Corp.*, supra, 295 Conn. 214] analysis: that the corporate entity served no legitimate business purpose . . . ." We disagree.

The defendants' argument is unavailing because it is premised on a misstatement of the law. As aptly stated by Justice Borden in his dissent in *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, supra, 187 Conn. 575, "[u]nlike the instrumentality theory, under which there are three specific elements of proof, the identity theory is undifferentiated." The seminal case

of *Zaist* v. *Olson*, supra, 154 Conn. 576, and its progeny express the identity rule as follows: "If [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.)

In *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 233–34, our Supreme Court, after setting forth the identity rule, stated: "The concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule, however, as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case. . . . Ordinarily the corporate veil is pierced only under exceptional circumstances, *for example*, where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice. . . . The improper use of the corporate form is the key to the inquiry, as [i]t is true that courts will disregard legal fictions, including that of a separate corporate entity, when they are used for fraudulent or illegal purposes. Unless something of the kind is proven, however, to do so is to act in opposition to the public policy of the state as expressed in legislation concerning the formation and regulation of corporations." (Citations omitted; emphasis added; internal quotation marks omitted.)

Our Supreme Court in *Naples* stated that the circumstances necessary for piercing the corporate veil vary according to each case. Id., 233. The court cited, as an example of the exceptional circumstances under which

the veil could be pierced, the situation where a corporation served no legitimate purpose. Id. The court did not state that the lack of a legitimate purpose was an element necessary to pierce the corporate veil under the identity theory. See id. Our Supreme Court in *Naples* noted that for reasons of public policy an improper use of the corporate form was key to the inquiry. Id., 233–34. Because the lack of a legitimate business purpose is not a necessary component of the identity test, the defendants' argument is without merit.

II

The defendants claim that the court improperly found that the plaintiff was entitled to damages on the theory of quantum meruit as to the Reservoir project.[12] We disagree.

The court found the following additional relevant facts regarding the Reservoir project. Kenneth Olson solicited the plaintiff to provide architectural services for this project. The plaintiff provided an initial sketch, which Kenneth Olson submitted in response to Bridgeport's request for proposal, and POKO Partners, LLC, was selected. The plaintiff sent Kenneth Olson and POKO Partners, LLC, a contract that outlined the plaintiff's services and included a breakdown of fees according to the five phases of the project. Kenneth Olson reviewed the contract, did not sign it, but by his conduct accepted its terms. The Reservoir project, however, never went forward.

The court did not find that an enforceable contract existed with respect to the Reservoir project because Kenneth Olson failed to sign the contract. The court

[12] The court found that the plaintiff had proven its claim of quantum meruit against POKO Partners, LLC, POKO Management Corp., and POKO Reservoir Yaremich Developers, LLC, and against the Olsons by virtue of piercing the corporate veil.

found that the defendants used the plaintiff's architectural services "in an attempt to secure the development rights for the project. This unequivocally evidences that the defendants received a benefit from the architectural services rendered because without the plaintiff's services, the opportunity to secure the rights to develop the project would not have come to fruition. This court can also find that the defendants' prior dealings with the plaintiff substantiates their knowledge that the plaintiff does not work for free or 'on spec' and [that] withholding payment based on such an unfounded basis is unjust." The court found that the plaintiff had proven its claim of quantum meruit and awarded $23,907.70 in damages plus interest.

A

The defendants argue that the court improperly determined that they received a benefit from the plaintiff's architectural services on the Reservoir project. They contend that the plaintiff's schematic plans only made possible an opportunity to incur a benefit in the future, but because the Reservoir project did not go forward, the defendants did not incur that future benefit and, instead, lost money. The defendants further argue that they did not unjustly fail to pay because both parties were working " 'on spec' " and, therefore, neither party was compensated when the project did not go forward. We are not persuaded.

"Determining whether the equitable [doctrine] of quantum meruit . . . [is] applicable in any case requires a factual examination of the particular circumstances and conduct of the parties. . . . The factual findings of a trial court must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . When a trial court's legal conclusions are challenged, however, our review is plenary and we must decide whether its conclusions are legally and logically

correct and find support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 407, 927 A.2d 832 (2007).

"Quantum meruit is a theory of contract recovery that does not depend upon the existence of a contract, either express or implied in fact. . . . Rather, quantum meruit arises out of the need to avoid unjust enrichment to a party, even in the absence of an actual agreement. . . . Quantum meruit literally means as much as he has deserved . . . . Centered on the prevention of injustice, quantum meruit strikes the appropriate balance by evaluating the equities and guaranteeing that the party who has rendered services receives a reasonable sum for those services." (Citations omitted; internal quotation marks omitted.) *Gagne* v. *Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001).

We are not persuaded by the defendants' argument that they did not unjustly fail to pay. The defendants highlight the deposition testimony of Kenneth Olson in which he stated that it was his understanding that services for the Reservoir project were provided " 'on spec.' " The court had before it the unsigned contract that included a fee proposal. Crosskey testified that he did not agree to work for free and that there was nothing in the unsigned contract concerning free work. The court found credible the evidence that the plaintiff was not working " 'on spec,' " and we will not second-guess this determination. "Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 508, 4 A.3d 288 (2010).

Our review of the record persuades us that there was sufficient evidence for the court properly to determine that the defendants derived a benefit from the plaintiff's

services. Crosskey testified that Bridgeport put out a request for proposal to development teams and that Kenneth Olson solicited his services to draw a sketch to submit in response. He testified that "once [Kenneth Olson] was awarded the project as the selected developer he then asked me to put together a fee proposal to do the architectural and engineering services for the remainder of the project." Crosskey explained that after Kenneth Olson had received the contract, which included a fee proposal, he instructed Crosskey to continue to work. Crosskey also testified that he made plans for the project that included, among other things, schematic plans, a site plan, floor plans of the individual apartments, color renderings for the building exterior and a zoning regulation review. Crosskey further testified that Kenneth Olson used the plans.

Although the defendants did not receive an economic gain from the outcome of Reservoir project itself, it was not improper for the court to determine that the defendants, nonetheless, received a benefit from the services that the plaintiff provided with respect to the Reservoir project. The court found an implied in fact contract and determined that the plaintiff performed architectural services as requested under the first phase of the unsigned contract.

Under the equitable doctrine of quantum meruit, a defendant that obtains the services requested receives a benefit. "Quantum meruit is usually a remedy based on implied contract and usually relates to the benefit of work, labor or services received by the party who was unjustly enriched . . . ." (Citation omitted.) *United Coastal Industries, Inc.* v. *Clearheart Construction Co.*, 71 Conn. App. 506, 512, 802 A.2d 901 (2002). "The defendant is benefitted when he gets what he wants, regardless of market value." 1 D. Dobbs, Law of Remedies (2d Ed. 1993) § 4.5 (2), p. 634. "Requested services are treated as benefits to the person who made

the request." Id., § 4.5 (4), p. 651. "[E]quitable remedies are not bound by formula but are molded to the needs of justice." (Internal quotation marks omitted.) *Stewart* v. *King*, 121 Conn. App. 64, 71, 994 A.2d 308 (2010). We conclude that it was within the province of the court, in examining the circumstances and the conduct of the parties and in balancing the equities, to determine that the plaintiff was entitled to recovery under the doctrine of quantum meruit.

B

The defendants next argue that the court improperly calculated the amount of damages because no factual support existed in the record for the value of the benefit. In support of this argument, the defendants contend that Kenneth Olson stated in his deposition testimony that the plaintiff's services were provided " 'on spec,' " that the defendants did not express any willingness to pay the plaintiff the price on its Reservoir project invoice and that the court found that no contract existed. We are not persuaded.

"The amount of damages available under [quantum meruit], if any, is . . . a question for the trier of fact. . . . The factual findings of a trial court must stand, therefore, unless they are clearly erroneous or involve an abuse of discretion. . . . The measure of damages in restitution is the reasonable value of the benefit to the defendant. . . . [W]herever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract, restitution of the value of what has been given must be allowed. . . .

"The measure of restitution is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of

circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . .

"A court may select from among several methods of determining the amount of recovery in restitution, depending on the circumstances and conduct of the parties in a particular case. . . . Although not directly enforceable under the contract, the contract price is evidence of the reasonable value of the benefit the defendant received from the plaintiff." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 588–90, 57 A.3d 730 (2012).

We note that the court did not find credible Kenneth Olson's testimony that the plaintiff was providing services " 'on spec.' " The court found that Kenneth Olson accepted the terms of the contract by his conduct, and that he was fully aware that he had an obligation to pay for services. The court further found that Kenneth Olson's failure to sign the contract made it ambiguous as to who or which entity was liable under the contract and made "it difficult for [the] court to find that there was a meeting of the minds with respect to the contracting party relative to [the Reservoir project]." The court additionally found that "[u]nder the various applications of quantum meruit under the Restatement [(Third) of Restitution and Unjust Enrichment], and given the equitable character of the doctrine, [the] court finds that the ambiguity as to which entity entered into a contract is not fatal to the plaintiff's ability to demonstrate that it is entitled to the value of services conferred upon the defendants pursuant to the contract, albeit unsigned." The court determined that the parties had an implied in fact contract and awarded damages in

the amount of $23,907.70, plus interest, for services rendered under the doctrine of quantum meruit.

The court's factual findings are supported by evidence from the record and provide a sufficient basis for the court to determine that the contract price, as expressed in the unenforceable contract, for the services rendered constitutes the measure of the value of the benefit to the defendants. The court had for its review the unsigned written contract, the invoices, as well as the testimony of witnesses for the plaintiff and the defendants. Crosskey testified that he sent a written contract to Kenneth Olson regarding the Reservoir project and that, after Bridgeport selected their proposal, Kenneth Olson asked Crosskey to make a fee proposal for the architectural and engineering services for the remainder of the project. The contract included a breakdown of the plaintiff's fees according to the five phases of the project. The court found that because the project did not go forward, the plaintiff provided only one-half of the schematic design services that were contemplated under the first phase of the project. The contract showed a total fee of $45,500 for the schematic design under the first phase of the project. The invoice the plaintiff sent to Kenneth Olson reflected that 50 percent of the schematic design services were provided under the first phase of the project, at a cost of $22,750, and that the professional design services provided by Crosskey, plus postal charges and in-house printing, totaled $1157.70, for a total principal amount of $23,907.70.

The defendants also argue that "[d]ue to the uncertain value of a mere opportunity to compete for a municipal contract, the plaintiff was required to set forth further evidence that its invoice on the Reservoir project reflected a reasonable value of the benefit to the defendants." As we have stated in part II A of this opinion, the court's finding of a benefit was supported by the

record. It was within the province of the court to determine, in balancing the equities, that the proper valuation of the benefit conferred on the defendants was the monetary value of the services performed by the plaintiff as reflected in the unsigned written contract. We conclude that the court's award of damages was not clearly erroneous.

III

The defendants' last claim is that the court improperly awarded statutory prejudgment interest pursuant to § 37-3a on the plaintiff's claim for quantum meruit as to the Reservoir project.[13] We disagree.

The defendants argue that the court lacked the discretion to award prejudgment interest under § 37-3a on the plaintiff's claim for quantum meruit. Because this claim requires us to consider the scope of § 37-3a, our review is plenary. "To the extent that the defendant is challenging the applicability of § 37-3a under the circumstances . . . our review is plenary." *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 100, 952 A.2d 1 (2008).

"[T]here is no right to recover interest in a civil action unless a statute provides for interest." *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 737, 682 A.2d 1026, cert. denied, 239 Conn. 931, 683 A.2d 397 (1996). Section 37-3a (a) provides in relevant part: "[I]nterest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings . . . as damages for the detention of money after it becomes payable. . . ."

"Section 37-3a provides a substantive right that applies only to certain claims. . . . Under § 37-3a, an allowance of prejudgment interest turns on whether the detention of the money is or is not wrongful under the circumstances. . . . There are well established propositions that § 37-3a provides for interest on money

[13] See footnote 12 of this opinion.

detained after it becomes due and payable, that the question under that statute is whether the money was wrongfully withheld . . . . The statute, therefore, applies to claims involving the wrongful detention of money after it becomes due and payable. . . . To award § 37-3a interest, two components must be present. First, the claim to which the prejudgment interest attaches must be a claim for a liquidated sum of money wrongfully withheld and, second, the trier of fact must find, in its discretion, that equitable considerations warrant the payment of interest."[14] (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Reyes* v. *Chetta*, 143 Conn. App. 758, 770, 71 A.3d 1255 (2013). "[P]rejudgment interest for money detained after it becomes due is compensatory because it compensates or reimburses plaintiffs for the interest they could have earned on the money that was rightfully theirs, but that was not paid when it became due." (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 102 n.36. "Detention of money may be wrongful even if a party had a good faith basis for nonpayment." *Nation Electrical Contracting, LLC* v. *St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 820, 74 A.3d 474 (2013).

"When a debtor knows precisely how much he is to pay and to whom he is to pay it, his debt is a liquidated one. . . . An amount claimed to be due is a liquidated sum when it is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in the possession or knowledge of the party to be charged. . . . Unliquidated damages,

[14] In *Travelers Property & Casualty Co.* v. *Christie*, 99 Conn. App. 747, 765 n.13, 916 A.2d 114 (2007), we stated that "[w]e have found one contrary case as to the lack of a need for a liquidated sum in order to obtain . . . § 37-3a interest, penned in the early years of the twentieth century. *Loomis* v. *Gillett*, 75 Conn. 298, 53 A. 581 (1902). Although the case has never been overruled, it has never been cited for the proposition that prejudgment interest is appropriate when damages are unliquidated. We conclude that the reasoning of that case has not been adopted in cases decided after 1902."

on the other hand, are those which are not yet reduced to a certainty in respect to amount, nothing more being established than the plaintiff's right to recover; or such as cannot be fixed by a mere mathematical calculation from ascertainable data in the case." (Citations omitted; internal quotation marks omitted.) *Costello* v. *Hartford Institute of Accounting, Inc.*, 193 Conn. 160, 165–66, 475 A.2d 310 (1984).

"Prejudgment interest pursuant to § 37-3a has been applied to breach of contract claims for liquidated damages, namely, where a party claims that a specified sum under the terms of a contract, or a sum to be determined by the terms of the contract, owed to that party has been detained by another party. . . . It has also been applied to breach of contract claims where the partial performance of one party caused the other party specific damages . . . . [Section] 37-3a [is] inapplicable to claims for punitive damages because those damages do not become payable before judgment. . . . Personal injury claims seek to make persons whole by monetarily compensating them for a loss negligently caused by others. Damages are typically uncertain and the purpose of the damages is to restore the injured, as nearly as money can, to the status they were enjoying and would have continued to enjoy prior to the negligent act. Such claims do not seek to regain money detained by another." (Citations omitted; footnotes omitted.) *Foley* v. *Huntington Co.*, supra, 42 Conn. App. 740–42.

In *Nation Electrical Contracting, LLC* v. *St. Dimitrie Romanian Orthodox Church*, supra, 144 Conn. App. 820, we declined the defendant's invitation to create a rule disallowing interest under § 37-3a in an action seeking damages for unjust enrichment. In that case, the defendant entered into a contract with a general contractor for the construction of a church, and the general contractor retained the plaintiff subcontractor to provide electrical work. Id., 810. The plaintiff had not entered into a contractual agreement with the defendant. Id. The plaintiff submitted invoices to the general

contractor which, in turn, submitted invoices to the defendant, which invoices included the sums sought by the plaintiff. Id. The defendant did not pay the general contractor fully and made no direct payments to the plaintiff. Id., 811. The plaintiff brought an action against the defendant claiming, inter alia, unjust enrichment. Id., 811–12. The trial court concluded that the defendant was liable to the plaintiff for unjust enrichment and awarded damages, prejudgment interest, and costs. Id., 814. On appeal, we concluded that "[the] matter falls squarely within the scope of § 37-3a" and reasoned that the defendant received an invoice for payment from the general contractor that included work performed by the plaintiff and that the amounts were due and owing to the plaintiff. Id., 820–21.

Nation Electrical Contracting, LLC, demonstrates the existence of factual scenarios wherein statutory prejudgment interest is appropriate in claims seeking restitution. The defendants have not provided a compelling argument for disallowing statutory prejudgment interest in an action seeking damages in quantum meruit, and we see no reasonable distinction between claims sounding in unjust enrichment and those sounding in quantum meruit for purposes of § 37-3a. "[B]oth unjust enrichment and quantum meruit are doctrines allowing recovery on the theory of restitution, that is, the restoration to a party of something of which he was deprived because of the unjust enrichment of another at his expense. . . . [U]njust enrichment has been the form of action commonly pursued in this jurisdiction when the benefit that the enriched party receives is either money or property. . . . The other form of action for restitution is quantum meruit, which has been utilized when the benefit received was the work, labor, or services of the party seeking restitution." (Citations omitted; internal quotation marks omitted.) *Schirmer* v. *Souza*, 126 Conn. App. 759, 765–66, 12 A.3d 1048 (2011). "The measure of damages in restitution is the

reasonable value of the benefit to the defendant. . . . Although not directly enforceable under the contract, the contract price is evidence of the reasonable value of the benefit the defendant received from the plaintiff." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, supra, 307 Conn. 589–90.

In concluding that an award for damages under the doctrine of quantum meruit falls within the scope of § 37-3a, we next turn to whether the court abused its discretion in awarding prejudgment interest under the facts of this case. See *Chapman Lumber, Inc.* v. *Tager*, supra, 288 Conn. 99 ("[t]he decision of whether to grant interest under § 37-3a is primarily an equitable determination and a matter lying within the discretion of the trial court" [internal quotation marks omitted]). In the present case, the court did not abuse its discretion in awarding prejudgment interest under § 37-3a. The quantum meruit claim involved a liquidated sum of money that the defendants had withheld from the plaintiff. The unsigned contract, which the court found Kenneth Olson reviewed and accepted its terms by his conduct, included a payment schedule, and the plaintiff sent invoices to the Olsons for $23,907.70 for the services it had provided. In its complaint, the plaintiff sought damages for the nonpayment of $23,907.70 that it was owed for services rendered. The defendants did not pay the plaintiff. The court found that Kenneth Olson intentionally misled Crosskey into providing architectural services and then recast their arrangement as being " 'on spec.' " The court awarded prejudgment interest on the damages for the Reservoir project, beginning on December 31, 2008, thirty days after the final invoice. Under the facts of this case, the amount claimed to be due could be fixed by a mathematical calculation from ascertainable data. See *Costello* v. *Hartford Institute of Accounting, Inc.*, supra, 193 Conn. 165–66. The court's findings as to the Reservoir project support a

conclusion that the money was due and payable, and the defendants do not challenge the court's implicit finding that the money was wrongfully detained. We conclude, therefore, that the court did not abuse its discretion in awarding prejudgment interest on the quantum meruit claim as to the Reservoir project.

The judgment is affirmed.

In this opinion the other judges concurred.

SEMINOLE REALTY, LLC *v.* SERGEY SEKRETAEV (AC 42349)

Lavine, Prescott and Eveleigh, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant. The trial court rendered a judgment of strict foreclosure, from which the defendant appealed to this court, which affirmed the judgment and remanded the case to the trial court for the purpose of setting a new law day. Thereafter, the plaintiff filed a motion to open and a notice of hearing to reset the law day, but before the hearing could be held, the defendant filed a bankruptcy petition, which automatically stayed the foreclosure proceedings. The bankruptcy court then granted the plaintiff's motion for relief from the automatic bankruptcy stay. The defendant appealed to the federal district court, which affirmed the bankruptcy court's order, concluding that the defendant, who had filed four bankruptcy petitions during the course of the foreclosure proceedings, had engaged in the serial filing of bankruptcy petitions to benefit from the automatic bankruptcy stays and to delay, hinder, or defraud his creditors. On the basis of that decision, the plaintiff sought to have the law day reset, but, on May 24, 2018, the defendant filed a fifth bankruptcy petition. The parties subsequently appeared at a hearing before the trial court, at which the court, by agreement of the parties, opened the judgment of strict foreclosure, set a new law day of August 15, 2018, and made updated findings regarding the value of the property for redemption. Thereafter, the defendant moved in the bankruptcy court to extend the automatic bankruptcy stay. On July 10, 2018, the bankruptcy court granted the defendant's motion and suspended for sixty days the relief from the stay it previously had granted to the plaintiff. In September, 2018, the bankruptcy court vacated the suspension of and reimposed the plaintiff's relief from the stay. The plaintiff then filed in the trial court an application and execution for ejectment, in response to which the defendant objected and filed a motion for a

stay of execution of ejectment. The trial court overruled the defendant's objection and denied his motion for a stay, concluding that he had agreed to the law day of August 15, 2018, title had passed to the plaintiff the next day, and there was an insufficient basis to impose a stay. Thereafter, the trial court issued an execution of ejectment, and the defendant appealed to this court. *Held* that the trial court did not abuse its discretion in granting the plaintiff's application and execution for ejectment and denying the defendant's motion for a stay of the execution for ejectment: although this court disagreed with the trial court's conclusion that title passed to the plaintiff on August 16, 2018, this court concluded that the automatic stay provision of the United States Bankruptcy Code (11 U.S.C. § 362 [a]) does not indefinitely stay the period of equitable redemption and that the effect of the bankruptcy court's order suspending the relief from the bankruptcy stay for sixty days was to extend the law day of August 15, 2018, by sixty days, and because the defendant failed to redeem by the time the sixty day extended period had lapsed on October 15, 2018, titled vested in the plaintiff on October 16, 2018, and the defendant no longer had any right or interest in the property; moreover, the trial court's finding that the defendant had agreed to the law day of August 15, 2018, was supported by the transcript of the hearing, and that factual finding, which was predicated on a credibility determination, was within the exclusive province of the trial court to make.

Argued May 28—officially released September 10, 2019

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Windham, where the defendant filed a counterclaim; thereafter, the court, *Boland*, *J.*, rendered judgment of strict foreclosure and judgment in part for the defendant on the counterclaim, and the defendant appealed to this court, which affirmed the judgment of the trial court; subsequently, the court, *Cole-Chu*, *J.*, opened the judgment and rendered a modified judgment of strict foreclosure; thereafter, the court, *Cole-Chu*, *J.*, overruled the defendant's objection to the plaintiff's proposed execution of ejectment, and the defendant appealed to this court; thereafter, the plaintiff filed a motion to dismiss the appeal. *Appeal dismissed in part; affirmed.*

Sergey Sekretaev, self-represented, the appellant (defendant).

Christine S. Synodi, for the appellee (plaintiff).

Opinion

LAVINE, J. The present appeal has its genesis in a foreclosure action commenced by the plaintiff, Seminole Realty, LLC, in 2010. This court affirmed the 2014 judgment of strict foreclosure rendered against the self-represented defendant, Sergey Sekretaev,[1] in *Seminole Realty, LLC* v. *Sekretaev*, 162 Conn. App. 167, 169, 131 A.3d 753 (2015), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). Since that time, the defendant has filed at least five federal bankruptcy petitions and taken one bankruptcy appeal. The defendant's present appeal is from the trial court's judgment overruling his objection to the plaintiff's proposed execution of ejectment and denying his emergency motion for a stay of ejectment. On appeal, the defendant has raised numerous claims,[2] but only two of them have not been raised previously,

[1] Due to a scrivener's error in the summons, the defendant's last name was misspelled, and he is identified in certain of the files of the Judicial Branch pursuant to the spelling error. His surname, Sekretaev, is spelled properly in the complaint, mortgage, note, and bankruptcy court documents.

We granted the defendant's request to waive oral argument. Counsel for the plaintiff appeared and argued before us.

[2] The defendant also claims that the court erred in granting the execution of ejectment because (1) the underlying mortgage was made in violation of 15 U.S.C. §§ 1639 (b) and (c), (2) he rescinded the underlying mortgage pursuant to the Truth in Lending Act, 15 U.S.C. § 1601 et seq., (3) the judgment of strict foreclosure is void, and (4) the court violated Rule 60 (b) (4) of the Federal Rules of Civil Procedure by failing to vacate the judgment of foreclosure. All of those claims are predicated on the validity of the underlying mortgage, which the plaintiff argues was adjudicated in the defendant's appeal from the judgment of strict foreclosure. See *Seminole Realty, LLC* v. *Sekretaev*, supra, 162 Conn. App. 167. Although we agree with the plaintiff that the validity of the mortgage was decided in the defendant's prior appeal, the claims fail because title to the property has vested in the plaintiff. Accordingly, the claims are moot, and we lack jurisdiction to consider them.

"Mootness implicates the subject matter jurisdiction of this court. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . If no practical relief can be afforded to the parties, the appeal must be dismissed." (Internal quotation marks omitted.) *Chase Manhattan Mortgage Corp.* v. *Burton*, 81 Conn. App. 662, 664, 841 A.2d 248, cert. denied, 268 Conn. 919, 847 A.2d 313 (2004).

namely, that the trial court (1) abused its discretion by overruling his objection to the execution of ejectment and denying his emergency motion for a stay of execution of ejectment because title has not yet vested in the plaintiff and (2) erred in finding that his claims of financial and emotional damages were not of the plaintiff's making.[3] We conclude that title vested in the plaintiff when the defendant failed to redeem his interest in the subject property following the sixty day extension of the law day. We, therefore, affirm the judgment of the trial court as to the propriety of the order of ejectment and as to the denial of the defendant's emergency motion for a stay, and dismiss the remainder of the appeal for lack of subject matter jurisdiction. See footnote 2 of this opinion.

The following convoluted procedural history underlies the present appeal. In April, 2009, the defendant purchased a condominium unit located in Sterling (property) and executed a note in the amount of $136,995 that was secured by a mortgage in favor of the plaintiff. Id., 171. The defendant failed to make all of the required monthly interest payments on the debt and to pay the entire principal on April 24, 2010, pursuant to the note. Id., 171–72. The plaintiff filed a lis pendens on the property in the Sterling land records in June, 2010, and commenced an action to foreclose on the property in August, 2010. The defendant challenged the plaintiff's standing to bring the foreclosure action numerous times, denied the allegations of the complaint, and pleaded several special defenses and a three count counterclaim against the plaintiff. Id., 180, 193. The case was tried in September and October, 2014. Id., 170. The court, *Boland*, *J.*, found that the defendant was liable to the plaintiff in the amount of $181,254.45 and rendered a judgment of strict foreclosure. Id., 186. The court set the law day as December 1, 2014. Id. The

[3] The defendant's claim regarding financial and emotional damages also is moot because title has vested in the plaintiff. See footnote 2 of this opinion.

defendant appealed to this court, which affirmed the judgment of strict foreclosure in December, 2015; id., 167; and our Supreme Court denied the defendant's petition for certification to appeal.[4] *Seminole Realty, LLC* v. *Sekretaev*, 320 Conn. 922, 132 A.3d 1095 (2016).

In February, 2014, while the foreclosure case was pending, the defendant filed a petition under chapter 13 of the United Stated Bankruptcy Code; see 11 U.S.C. § 1301 et seq. (2012); but voluntarily withdrew the petition on February 20, 2014. In April, 2014, the defendant filed a second chapter 13 petition, which the bankruptcy court dismissed with prejudice. In addition, the bankruptcy court barred the defendant from filing a further bankruptcy petition for 180 days. In November, 2014, the defendant filed a voluntary petition under chapter 7 of the United States Bankruptcy Code; see 11 U.S.C. § 701 et seq. (2012); and a motion to avoid a lien on the property, which the bankruptcy court denied. The chapter 7 bankruptcy case was closed in March, 2015, without discharging the debt underlying the strict foreclosure judgment.

On May 6, 2016, the plaintiff filed a motion to open the judgment of strict foreclosure for the purpose of resetting the law day. Before a hearing could be held, the defendant filed a motion to open the chapter 7 bankruptcy case. On October 19, 2016, the bankruptcy court denied the defendant's motion to open on numerous grounds, including the absence of good cause, res judicata, and collateral estoppel.

On January 27, 2017, the plaintiff filed a notice of hearing to be held on February 14, 2017, to reset the law day, but, before the hearing could be held, the defendant filed another chapter 13 petition in bankruptcy. On June 5, 2017, the bankruptcy court granted

[4] The defendant filed a motion with this court to stay the proceedings pending a decision by the United States Supreme Court. This court denied the motion for a stay. The defendant never filed a petition for a writ of certiorari with the United States Supreme Court.

the plaintiff's motion for relief from the bankruptcy stay. The plaintiff was granted in rem relief[5] as to the then pending chapter 13 petition and in subsequent petitions the defendant may file within two years. The bankruptcy court found that the plaintiff had a secured "interest in the property" and that the defendant's "petition was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filings affecting the [p]roperty pursuant to 11 U.S.C. § 364 (d) (4) (B) . . . ."[6]

[5] "In 2005, Congress enacted [the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005)], intended as a comprehensive reform measure to curb abuses and improve fairness in the federal bankruptcy system." *Connecticut Bar Assn.* v. *United States*, 620 F.3d 81, 85 (2d Cir. 2010).

Section 362 (a) of title 11 of the United States Code provides in relevant part: "[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay applicable to all entities, of . . . (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title . . . ." The provision for an automatic stay has a limitation, as set forth in 11 U.S.C. § 362 (c) (4) (A), which provides in relevant part: "(i) [I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed . . . the stay under subsection (a) shall *not* go into effect upon the filing of the later case; and (ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect . . . ." (Emphasis added.)

"On request of a party in interest and after notice and [a] hearing, the court has the authority to grant relief from the automatic stay by terminating, annulling, modifying or conditioning the automatic stay. 11 U.S.C. § 362 (d). The 2005 amendments to the [United States] Bankruptcy Code added [§] 362 (d) (4), which provides bankruptcy judges with statutory authority to grant in rem relief. See *In re Montalvo*, 416 B.R. 381, 386 (Bankr. E.D.N.Y. 2009).

"In rem relief can be granted from the automatic stay as to a secured creditor's interest in real property, such that any and all future bankruptcy filings by any person or entity with an interest in the real property will not operate as an automatic stay protecting the owner and its successors and assigns for a period of two years after entry of such order." *In re Wilke*, 429 B.R. 916, 922 (Bankr. N.D. Ill. 2010).

[6] Section 362 (d) (4) (B) of title 11 of the United States Code provides that a bankruptcy court "shall grant relief from the stay . . . with respect to a stay of an act against real property . . . by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved . . . multiple bankruptcy filings affecting such real property."

On June 16, 2017, the defendant appealed the bankruptcy court's in rem order to the federal district court. The district court denied the defendant's motion for a stay pending appeal. On May 8, 2018, the district court affirmed the bankruptcy court's order granting the plaintiff in rem relief from the automatic bankruptcy stay. See *In re Sekretaev*, United States District Court, Docket No. 3:17-CV-00997 (AVC) (D. Conn. May 8, 2018). In addition, the district court stated that the defendant "engaged in the serial filing of bankruptcy proceedings by filing four bankruptcy proceedings, during and after the foreclosure proceeding in state court, to benefit from the automatic stay afforded by the filing of a bankruptcy petition."[7] Moreover, during the period when he was barred from filing further bankruptcy petitions, the district court found that the defendant filed numerous motions in the Superior Court, which further delayed the proceedings.

Despite the plaintiff's in rem relief that was then in effect, on May 24, 2018, the defendant filed yet another chapter 13 petition in bankruptcy. On the basis of the district court's decision affirming the in rem relief ordered by the bankruptcy court, the plaintiff sought to have the law day reset. On June 1, 2018, the parties appeared before the trial court, *Cole-Chu*, *J.*, and *agreed to open* the 2014 strict foreclosure judgment, to a revised judgment of strict foreclosure valuing the property at $55,000 for redemption, and to a law day of August 15, 2018.[8]

[7] The district court also stated, with respect to the defendant's claim that the plaintiff violated 11 U.S.C. § 524 (a) (1) (2), that "a secured creditor's right to foreclose on the mortgage survives or passes through the bankruptcy and remains enforceable under state law." (Internal quotation marks omitted.)

[8] The court's order stated: "By agreement in open court of the defendant . . . and of the plaintiff . . . through its attorney of record . . . [the plaintiff's motion] to open the judgment in this case . . . entered October 24, 2014 . . . is GRANTED as follows.

"JUDGMENT of strict foreclosure of . . . certain real property . . . is hereby granted.

"The fair market value of the subject property is $55,000.

Despite the in rem relief granted to the plaintiff, on June 6, 2018, the defendant filed a motion to extend the automatic bankruptcy stay, which the bankruptcy court denied without prejudice on June 22, 2018. On June 13, 2018, the defendant filed a chapter 13 repayment plan. The defendant filed a second motion to extend the automatic stay on June 26, 2018. On July 10, 2018, the bankruptcy court extended the automatic stay and suspended its in rem order for sixty days to allow the defendant an opportunity to confirm a good faith plan.[9] On July 11, 2018, to protect its interest, the plaintiff filed a proof of claim and objected to the feasibility of the defendant's chapter 13 plan.[10] On July 17, 2018, the bankruptcy trustee filed an objection to the defendant's claim of exemptions and proposed order. The bankruptcy court held a hearing on August 30, 2018. On September 18, 2018, the bankruptcy court reimposed the plaintiff's in rem relief from the automatic bankruptcy stay and ordered that the plaintiff may proceed with the in rem relief it was previously

"The debt for purposes of this judgment, and particularly for redemption—that is, the amount the defendant must pay the plaintiff on or before his law day, August 15, 2018, to redeem the subject property is $55,000. Attorney's fees and costs were denied in the original judgment, and the plaintiff waives any new claim for fees or costs.

"The first (and only) law day is August 15, 2018.

"The parties' agreement as aforesaid is approved and made the JUDGMENT of the court."

[9] The bankruptcy court's order also stated: "During that time the [defendant] is to rectify any deficiencies, promptly provide any missing documents to the trustee, complete the 341 meeting and advance his plan (and any amendments) to a confirmation hearing to be held in late August."

[10] The plaintiff's "Motion to Reimpose a Stay and Vacate the Order Providing [Sixty Days] to Allow [Defendant] to Confirm a Repayment Plan and Correct Deficiencies and [Plaintiff's] Objection to Repayment Plan" requested that the court vacate its order of July 10, 2018, allowing the defendant sixty days to affirm a repayment plan regarding the property, and asked the bankruptcy court to reimpose in rem relief on the ground that the debtor obtained his extension on the basis of bad faith. The motion concluded: "The [plaintiff] further requests that the [i]n [r]em [r]elief from [s]tay be reinstituted such that the law day in the Superior Court may pass and the debtor be allowed to redeem in accordance with the [o]rder of the Superior Court."

accorded.[11] On November 26, 2018, the defendant filed a motion in the bankruptcy court titled "Motion under Federal Rule of Civil Procedure, Rule 60 (b) (6) and 60 [b] (4)," seeking relief from a judgment or order.[12] On November 29, 2018, the bankruptcy court denied the defendant's motion for relief of said order.[13]

The plaintiff filed an application and execution for ejectment, to which the defendant objected and filed an emergency motion for a stay of execution of ejectment. The clerk issued an execution of ejectment on November 29, 2018. The defendant objected to the execution of ejectment, arguing in part that he had never agreed to a law day of August 15, 2018. On November 28, 2018, Judge Cole-Chu overruled the objection and denied the defendant's motion for a temporary stay of the execution of ejectment, stating that there was an insufficient basis for the requested stay. The court stated that the defendant had agreed to the law day of

[11] The bankruptcy court's September 18, 2018 order stated: "The [c]ourt finds that the [defendant's] course of actions in [s]tate [c]ourt and through these bankruptcy proceedings and related appeals has been abusive, lacking in merit and good faith and patently intended to impede, delay and interfere with the course of duly litigated and appealed final judgment of foreclosure. The material facts delineating this course of action can be found in The Amended Motion to Vacate . . . and the supportive [s]upplemental filings . . . . Accordingly, the Amended Motion to Vacate . . . is GRANTED so Seminole Realty LLC may proceed with the [i]n [r]em relief it was previously accorded by this [c]ourt. For cause shown including a [defendant's] lack of good faith and the absence of plan feasibility and as further articulated in [o]bjections to [c]onfirmation . . . confirmation of the [defendant's] [p]lans is denied with prejudice . . . ."

[12] By filing the motion, the defendant again challenged the validity of the mortgage and argued that the judgment of strict foreclosure was void. See footnote 2 of this opinion.

[13] The bankruptcy court denied the defendant's motion for relief, stating that it was "redundant and without appropriate cause for further reconsideration. The [c]ourt concretely and definitively has addressed this request and its [refiling] is abusive, without merit and in bad faith. As the [defendant's] plan has previously been denied confirmation with prejudice, there also is no bona fide reason to maintain this [c]hapter 13 case and it is accordingly dismissed. Any further frivolous or duplicative Bankruptcy Court filings will occasion a hearing on whether the [defendant] shall be sanctioned or held in contempt of [c]ourt."

August 15, 2018,[14] and concluded that title passed to the plaintiff the next day. Moreover, the court stated that the defendant's motion for a stay did not represent that a bankruptcy stay was in effect, and the court "perceive[d] no basis to expect a new bankruptcy stay based on a good faith bankruptcy filing." The defendant filed the present appeal on December 4, 2018.[15]

"In Connecticut, a mortgagee has legal title to the mortgaged property and the mortgagor has equitable title, also called the equity of redemption. . . . The equity of redemption gives the mortgagor the right to redeem the legal title previously conveyed by performing whatever conditions are specified in the mortgage, the most important of which is usually the pay-

[14] The transcript of the June 1, 2018 hearing before Judge Cole-Chu discloses the following colloquy between the court and the defendant, who acknowledged a pending petition in bankruptcy.

"The Court: . . . I'm going to go very slowly because this is . . . important, and I don't want to leave anything out. The idea, sir, is that you and the plaintiff, through its counsel, agree that law days will be set at least two months out. I'll pick a particular day in a . . . moment if the basic structure is acceptable. The value of the property for purposes of the *reinstated judgment* would be $55,000 by agreement. And that . . . amount would be the—very particularly, that amount, not the face amount of the debt with years of interest—would be the redemption amount. That is, from the court's perspective, a very reasonable, simple deal for you, but you're the one who has to make the decision, sir.

"The Defendant: So that . . . would be judgment in the rem?

"The Court: It is a judgment—

"The Defendant: Judgment, yeah—

"The Court: —of strict foreclosure.

"The Defendant: Strict foreclosure, $55,000.

"The Court: With a . . . law day of, say, August 15, two and one-half months for you to pay that or lose title to the property. $55,000. . . .

"The Defendant: Yeah, I agree. But it . . . doesn't stop me from . . . asking [the] bankruptcy court . . . to file the repayment plan. . . . If [the] bankruptcy court confirm[s] my plan, yeah, I agree.

"The Court: Well, sir, you can try, but they're not even making a claim in the bankruptcy. . . . Seminole Realty is not even making a claim. So if you declared in your chapter 13 filing . . . a debt to Seminole Realty . . . that you want to restructure . . . I would imagine that the bankruptcy court would say they didn't file a claim. There's nothing to . . . restructure.

"The Defendant: Yeah. This is—thank you. This is great—great decision. Yeah. I agree."

[15] Judge Cole-Chu granted the defendant's application for a waiver of fees.

ment of money. . . . Under our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day. . . . Accordingly, [if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession. The qualified title which the plaintiff had previously held under his mortgage had become an absolute one." (Citation omitted; internal quotation marks omitted.) *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 97, 172 A.3d 1263 (2017).

The defendant claims that the court improperly overruled his objection to the execution of ejection, arguing that title did not pass to the plaintiff on August 16, 2018. In support of his claim, the defendant argues that (1) he did not voluntarily agree to the August 15, 2018 law day and (2) General Statutes § 49-15 (b) automatically opened the judgment of strict foreclosure. Although we disagree with the defendant's claims that he did not agree to the August 15, 2018 law day and that § 49-15 (b) automatically opened the judgment of strict foreclosure, we agree that title to the property did not vest in the plaintiff on August 16, 2018. The question at the heart of this appeal is the effect of the bankruptcy court's suspension of the plaintiff's in rem relief for sixty days. We conclude that the bankruptcy court's suspension of the plaintiff's in rem relief extended the law day for sixty days and, therefore, title vested in the plaintiff on October 16, 2018, due to the defendant's failure to redeem. See *Provident Bank* v. *Lewitt*, 84 Conn. App. 204, 206–209, 852 A.2d 852, cert. denied, 271 Conn. 924, 859 A.2d 580 (2004); see also 11 U.S.C. § 108 (b). The trial court, therefore, did not abuse its discretion on November 28, 2018, by overruling the

defendant's objection to the execution of ejectment or by denying his emergency motion for a stay.[16]

"The law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature. . . . Because foreclosure is peculiarly an equitable action . . . the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . In exercising its equitable discretion, however, the court must comply with mandatory statutory provisions that limit the remedies available to a foreclosing mortgagee. . . . It is our adjudicatory responsibility to find the appropriate accommodation between applicable judicial and statutory principles. Just as the legislature is presumed to enact legislation that renders the body of the law coherent and consistent, rather than contradictory and inconsistent . . . [so] courts must discharge their responsibility, in case by case adjudication, to assure that the body of the law—both common and statutory—remains coherent and consistent." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 7, 85 A.3d 1 (2014).

Given the convoluted procedural history of this case, the following timeline will aid in our resolution of the defendant's claim:

May 8, 2018, the federal district court affirmed the bankruptcy court's two year in rem relief from stay pursuant to 11 U.S.C. § 364 (d) (4) (B);

May 24, 2018, the defendant filed a chapter 13 petition in bankruptcy;

June 1, 2018, Judge Cole-Chu opened the 2014 judgment of strict foreclosure, reset the redemption amount,

[16] We may affirm a judgment of the trial court albeit on different grounds. See, e.g., *HSBC Bank USA, National Assn.* v. *Lahr*, 165 Conn. App. 144, 151, 138 A.3d 1064 (2016).

set a law day of August 15, 2018, and rendered a revised judgment of strict foreclosure;

June 6, 2018, the defendant filed a motion to lift the in rem relief in bankruptcy;

July 10, 2018, the bankruptcy court suspended the plaintiff's in rem relief for sixty days;

September 18, 2018, the bankruptcy court granted the plaintiff's motion to vacate the suspension of in rem relief;

November 28, 2018, the trial court overruled the defendant's objection to the execution of ejectment and denied his emergency motion for a stay;

November 29, 2018, the execution of ejectment issued;

December 4, 2018, the defendant appealed to this court.

In denying the defendant's emergency motion to stay the execution of ejectment, Judge Cole-Chu found that the defendant agreed to the law day of August 15, 2018. Findings of fact and credibility determinations are beyond the province of this court, but we cannot ignore the record, which supports the court's factual findings that are predicated on credibility determinations. *Malave* v. *Ortiz*, 114 Conn. App. 414, 428, 970 A.2d 743 (2009). Our review of the transcript of the June 1, 2018 hearing supports the court's finding that the defendant agreed to the August 15, 2018 law day. See footnote 14 of this opinion. The defendant's claim therefore fails.

The defendant also claims that title to the property did not vest in the defendant pursuant to § 49-15 (b).[17]

[17] General Statutes § 49-15 (b) provides "Upon the filing of a bankruptcy petition by a mortgagor under Title 11 of the United States Code, any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any

In asserting this claim, the defendant overlooks the fact that, at the time he filed the chapter 13 petition in bankruptcy in May, 2018, the judgment of strict foreclosure at issue was the judgment rendered in 2014, which was opened on June 1, 2018, when the parties appeared before Judge Cole-Chu. At that time, the parties agreed to a new or revised judgment of strict foreclosure with a law day of August 15, 2018. See footnote 14 of this opinion. The defendant did not file a petition in bankruptcy subsequent to the entry of the June 1, 2018 judgment of strict foreclosure. The question for this court to answer, therefore, is the effect of the bankruptcy court's suspension of the in rem relief it had afforded the plaintiff for sixty days on July 10, 2018. The answer is provided by this court's decision in *Provident Bank* v. *Lewitt*, supra, 84 Conn. App. 204.

As in *Provident Bank*, the question here is what effect a sixty day bankruptcy stay or lifting of the in rem relief for sixty days has on the running of a law day. In *Provident Bank*, the plaintiff argued that her filing of a chapter 7 bankruptcy petition prior to the running of her law day indefinitely stayed the period of redemption pursuant to the automatic stay provision of 11 U.S.C. § 362 (a).[18] Id., 206. This court disagreed, concluding that 11 U.S.C. § 108 (b) extended the time for redemp-

encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. The mortgagor shall file a copy of the bankruptcy petition, or an affidavit setting forth the date the bankruptcy petition was filed, with the clerk of the court in which the foreclosure matter is pending. Upon the termination of the automatic stay authorized pursuant to 11 USC 362, the mortgagor shall file with such clerk an affidavit setting forth the date the stay was terminated."

[18] Section 362 (a) of title 11 of the United States Code provides in relevant part: "[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of . . . (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . ."

tion by only sixty days.[19] Id. This court was guided by "the holding of the United States Court of Appeals for the Second Circuit in *In re Canney*, 284 F.3d 362 (2d Cir. 2002)."[20] Id., 207.[21]

"In *In re Canney*, the Second Circuit determined that the sixty day stay period set forth in § 108 (b) applied to the passing of the law day rather than the indefinite stay period prescribed in § 362 (a) when a petitioner filed a bankruptcy petition after judgment had entered but prior to the passing of the law day in a strict foreclosure action. . . . Agreeing with the United States Courts of Appeal in the Sixth, Seventh and Eighth Circuits, the court held that § 108 (b), which provides for only a sixty day delay in the running of the law day, is the applicable provision because the automatic stay provision of § 362 (a) prevents only certain affirmative acts taken by a creditor, and the running of time is not one of those acts." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 207–208.

A strict foreclosure "entails a foreclosure judgment in favor of the mortgagee that results from a proceeding

[19] Section 108 (b) of title 11 of the United States Code provides in relevant part: "[I]f . . . an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor . . . may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure or perform, as the case may be, before the later of—(1) the end of such period . . . or (2) 60 days after the order for relief."

[20] *In re Canney* involved a mortgage foreclosure brought in Vermont under Vermont statutes. Although *In re Canney* concerned foreclosure under Vermont's statutes, the statutory procedure is similar to Connecticut's and therefore the reasoning of the Second Circuit case applies to Connecticut foreclosures with equal force. See *Provident Bank* v. *Lewitt*, supra, 84 Conn. App. 207–208.

[21] *Provident Bank* concerned a chapter 7 bankruptcy petition. *In re Canney* concerned a chapter 13 bankruptcy petition, as does the present appeal. "Section 108 (b) is contained in chapter 1 of the United States Bankruptcy Code and '[e]xcept as provided in section 1161 [railroad reorganization] of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.' 11 U.S.C. § 103 (a)." *Provident Bank* v. *Lewitt*, supra, 84 Conn. App. 207 n.4.

against the debtor and leaves the mortgagor with a right to redeem within a specified time frame, ending with the law day." Id., 208. Connecticut allows redemption within a specified time period after which title automatically passes to the mortgagee. In *Provident Bank*, this court concluded that the plaintiff's period of equitable redemption was not stayed when she filed a chapter 7 petition in bankruptcy, but was extended by sixty days after she filed her petition. Id., 208. "The practical effect of § 108 (b) is that the time in which a trustee (or if the bankruptcy petition is dismissed, the mortgagor) may cure a default or perform any other similar act expires at the end of the period settled for redemption or sixty days after the order for relief. The commencement of a voluntary bankruptcy case through the filing of a petition constitutes an order for relief. 11 U.S.C. § 301." Id., 208–209.

In the present case, the bankruptcy court and the federal district court found that the defendant engaged in the serial filing of bankruptcy proceedings that were part of a scheme to delay, hinder and defraud the plaintiff. Nonetheless, the defendant filed one more chapter 13 petition in bankruptcy in May, 2018, agreed to a revised judgment of strict foreclosure, and then sought to have the plaintiff's in rem relief lifted. On July 10, 2018, the bankruptcy court suspended for sixty days the in rem relief granted to the plaintiff. The consequence of the sixty day suspension was to extend the law day until October 15, 2018. The defendant failed to redeem at any time prior to October 15, 2018. For the foregoing reasons, we conclude that the trial court properly granted the execution of ejectment filed by the plaintiff and properly denied the defendant's emergency motion for a stay.

The appeal is dismissed in part as to the moot claims; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ELIZABETH SPALTER IINO *v.* DIANE ROGERS SPALTER, EXECUTRIX (ESTATE OF HAROLD SPALTER) (AC 40574)

Elgo, Bright and Beach, Js.

Syllabus

The plaintiff sought to recover compensatory and punitive damages from the defendant executrix of the estate of the decedent for, inter alia, intentional sexual assault in connection with the decedent's sexual abuse of the plaintiff. The plaintiff alleged that her father, the decedent, had sexually abused her repeatedly in Connecticut from when she was six years old until she was seventeen, that she suffered extreme trauma, mental anguish and psychological injuries as a result of the decedent's sexual abuse and that her injuries were permanent. The defendant filed a motion to dismiss for lack of personal jurisdiction, which the trial court denied. Thereafter, the defendant filed a motion in limine to preclude evidence of other wrongs or acts of verbal and physical abuse committed by the decedent against the plaintiff, her brothers and the family dog. The court denied the motion in limine but stated that it was reserving judgment on specific objections to such evidence until the evidence was offered at trial. Following the trial, the jury found in favor of the plaintiff and returned a verdict awarding her $15 million in compensatory damages. The jury also found that the plaintiff was entitled to an award of punitive damages, but it was not asked to determine the amount of the punitive damages to be awarded. Thereafter, the trial court denied the defendant's motion to set aside the verdict and rendered judgment in accordance with the verdict, reserving to itself the finding as to the amount of the punitive damages award, which would be determined later. On the defendant's appeal to this court, *held*:

1. The trial court properly denied the defendant's motion to dismiss; contrary to the defendant's claim that that court's assertion of personal jurisdiction over her violated her right to due process because she personally had no minimum contacts with Connecticut, because the court could have exercised jurisdiction over the decedent pursuant to this state's long arm statute (§ 52-59b) for the tortious acts he committed while in this state, it properly exercised jurisdiction over the defendant, who, as executrix of the decedent's estate, had stepped into his shoes for purposes of this action.
2. The defendant could not prevail on her claim that the trial court improperly admitted certain evidence, as any purported error in the admission of the evidence was harmless:

   a. The defendant's claim that the trial court erred in admitting evidence of other wrongs or acts of verbal and physical abuse committed by the decedent against the plaintiff, her brothers and the family dog was unavailing: the record revealed that when the court denied the defendant's motion in limine to preclude the subject evidence, it clearly stated

that it was reserving judgment on specific objections to such evidence until it was offered at trial and that it would not recognize a standing objection to evidence on the issue, and, therefore, to preserve her objections, the defendant needed to object each time evidence was offered on the issue, which she failed to do; moreover, the testimony to which the defendant did object to at trial was merely cumulative of other similar testimony to which she did not object, and, therefore, even if this court assumed that the trial court's rulings were improper, the defendant failed to show that they likely affected the outcome of the trial. b. The defendant's claim that the trial court improperly admitted certain photocopied excerpts from the plaintiff's 1997 journal, which was inadvertently discarded during the course of the litigation, under the state of mind exception to the hearsay rule set forth in the applicable provision (§ 8-3 [4]) of the Connecticut Code of Evidence was unavailing; even if the subject excerpts were admitted improperly, the evidence merely was cumulative of a considerable amount of other evidence, and, therefore, the defendant failed to prove that the claimed improper admission of the excerpts likely affected the outcome of the trial.

3. The jury's determination that the plaintiff was entitled to common-law punitive damages was a final judgment for purposes of appeal because it did not constitute a supplemental postjudgment award, despite the fact that the trial court reserved the determination of the precise amount of those damages to a time postjudgment.

4. The trial court improperly permitted the jury to find the defendant liable for common-law punitive damages without evidence as to the plaintiff's litigation expenses and improperly reserved for its own consideration the specific amount of common-law punitive damages to be awarded; because the defendant properly and timely requested that the question of the amount of punitive damages be decided by the jury, she had the right to have the jury determine that issue, and because the plaintiff admittedly submitted no evidence of her litigation expenses, the matter should not have gone to the jury, as there was no evidence to support the plaintiff's claim for punitive damages.

5. The trial court did not abuse its discretion in denying the defendant's motion to set aside the verdict, in which she alleged that there was insufficient evidence that the plaintiff suffers from post-traumatic stress disorder and other psychological trauma and injuries; there was ample evidence that the plaintiff suffers from psychological trauma caused by the childhood sexual abuse of the decedent, as the plaintiff submitted factual evidence as to what the decedent did to her and the impact his actions have had on her emotional and psychological well-being, and she submitted expert testimony regarding the symptoms typically displayed by victims of sexual abuse, and it was within the province of the jury to conclude, on the basis of all of the evidence it heard, that the plaintiff's evidence regarding the emotional and psychological injuries inflicted on her by the decedent was credible and that her injuries were worthy of compensation.

Argued April 16—officially released September 10, 2019

Procedural History

Action to recover damages for, inter alia, intentional sexual assault, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, denied the defendant's motion to dismiss; thereafter, the court denied the defendant's motion to preclude certain evidence; subsequently, the matter was tried to the jury; verdict for the plaintiff; thereafter, the court denied the defendant's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Reversed in part*; *judgment directed in part*.

Alexander Copp, with whom were *David B. Zabel* and, on the brief, *Barbara M. Schellenberg*, for the appellant (defendant).

Hugh D. Hughes, for the appellee (plaintiff).

Opinion

BRIGHT, J. The defendant, Dianne Rogers Spalter, executrix of the estate of Harold Spalter, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the plaintiff, Elizabeth Spalter Iino, the biological daughter of Harold Spalter, the decedent (decedent). On appeal, the defendant claims that the trial court improperly (1) denied her motion to dismiss for lack of personal jurisdiction, (2) admitted certain evidence, (3) permitted the jury to find her liable for punitive damages without evidence as to the plaintiff's litigation expenses and reserved to itself the issue of the amount of punitive damages to be awarded, and (4) denied her motion to set aside the verdict, which alleged that there was insufficient evidence that the plaintiff suffers from psychological trauma caused by childhood sexual abuse. We agree with the defendant's

third claim. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following procedural history provides a sufficient foundation for our analysis. Following the death of the decedent, the plaintiff brought a two count complaint against the defendant executrix of the decedent's New York estate, alleging that the decedent repeatedly had sexually abused her in Connecticut from the time she was six years old until she reached the age of seventeen. She claimed extreme trauma, mental anguish and psychological injuries, and that such injuries were permanent. The first count of her complaint alleged intentional sexual abuse, and the second count alleged reckless sexual abuse. The plaintiff requested compensatory damages and punitive damages. Following a trial, the jury found in favor of the plaintiff on the first count of her complaint, and it returned a verdict awarding her $15 million in compensatory damages.[1] The jury also found that the plaintiff was entitled to an award of punitive damages, but it was not asked to determine the amount of the punitive damages to be awarded. The court rendered judgment in accordance with the jury's verdict, reserving to itself a finding as to the amount of punitive damages, to be determined later. The relevant facts and additional procedural history will be set forth as necessary throughout this opinion.

I

The defendant claims that the trial court improperly denied her motion to dismiss for lack of personal jurisdiction. She argues that the court's denial of her motion to dismiss was improper because "asserting jurisdiction over a New York executrix with absolutely no ties to Connecticut . . . violate[s] due process." She contends that, despite its agreement that the defendant

[1] The jury was instructed not to return a verdict on the second count of the plaintiff's complaint if it returned a verdict in her favor on the first count.

"had no appreciable contacts in Connecticut . . . the trial court denied the motion to dismiss on the ground that [the decedent's] contacts with Connecticut were sufficient to support jurisdiction. . . . The trial court erred by failing to base its decision on [the] defendant's complete lack of contacts with this state." We disagree.

The standard of review for a court's decision on a motion to dismiss 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 [is] de novo." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007).

Although, "[a]s a general matter, the burden is placed on the defendant to disprove personal jurisdiction . . . [i]f the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction." (Citations omitted; internal quotation marks omitted.) Id., 515. "When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state's long-arm statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) Id., 514–15. Thus, on the basis of the facts in the record, this court must determine whether our long arm statute, General Statutes § 52-59b,[2] properly applies to

[2] General Statutes § 52-59b (a) provides: "As to a cause of action arising from any of the acts enumerated in this section, *a court may exercise personal jurisdiction over any nonresident individual*, foreign partnership or foreign voluntary association, *or over the executor or administrator*

the defendant and, if that statutory threshold is met, whether the defendant, acting as executrix of the estate of the decedent, has the requisite minimum contacts with this state sufficient to satisfy constitutional due process concerns. See id.

In the present case, the defendant does not contest that the statutory threshold has been met. Indeed, she never cites § 52-59b in her primary appellate brief or in her reply brief. Rather, the defendant argues that her right to due process of law has been violated by the court's assertion of jurisdiction over her because she, personally, has no minimum contacts with our state. Specifically, she argues that "[a]lthough a long arm statute may change [the common-law rule regarding jurisdiction over a nonresident defendant] as a matter of state law, it does not alter the minimum contacts requirement under the United States constitution, which require[s] analysis into [the] [*d*]*efendant's* contacts with the forum state." (Emphasis in original.) Accordingly, we consider whether the exercise of personal jurisdiction over the defendant is proper under the due process clause of the fourteenth amendment to the federal constitution; see U.S. Const., amend. XIV,

of such nonresident individual, foreign partnership or foreign voluntary association, *who in person or through an agent*: (1) Transacts any business within the state; (2) *commits a tortious act within the state*, except as to a cause of action for defamation of character arising from the act; (3) commits a tortious act outside the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if such person or agent (A) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; (4) owns, uses or possesses any real property situated within the state; or (5) uses a computer, as defined in subdivision (1) of subsection (a) of section 53-451, or a computer network, as defined in subdivision (3) of subsection (a) of said section, located within the state." (Emphasis added.)

§ 1; which limits the jurisdiction of state courts called on to render judgments against nonresident defendants. See *Samelko* v. *Kingstone Ins. Co.*, 329 Conn. 249, 265, 184 A.3d 741 (2018), citing *Kulko* v. *Superior Court*, 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978). We agree with the multitude of cases and § 358 of the Restatement (Second) of Conflict of Laws, which have considered this issue and have concluded that, if the relevant long arm statute would have permitted the court to exercise jurisdiction over *the decedent* had he been living, the due process clause of the federal constitution is not offended by that statute also permitting the exercise of jurisdiction over the decedent's executrix, who stands in the shoes of the decedent for purposes of the action. See 2 Restatement (Second), Conflict of Laws § 358, p. 421 (1971) ("[a]n action may be maintained against a foreign executor or administrator upon a claim against the decedent when the local law of the forum authorizes suit in the state against the executor or administrator and (a) suit could have been maintained within the state against the decedent during his lifetime because of the existence of a basis of jurisdiction other than mere physical presence").

"In the past, common law directed that an executor could only be sued in the state in which he was appointed. See *Martel* [v. *Stafford*, 992 F.2d 1244, 1246 (1st Cir. 1993)] (discussing Massachusetts common law rule); *Gandolfo* v. *Alford*, 31 Conn. Supp. 417, 333 A.2d 65, 66 (Ct. 1975) (stating 'that the general common-law rule is an executor or administrator of an estate can sue and be sued only in a jurisdiction in which he has been so appointed'). However, within the last several decades, many state legislatures have abrogated that common law notion by enacting long arm statutes which expressly provide for jurisdiction over the executor if jurisdiction could have been maintained over the decedent. See *Eubank Heights Apartments, Ltd.* v.

LeBow, 615 F.2d 571, 574 (1st Cir. 1980) (concluding that jurisdiction over the decedent's estate was appropriate if the Texas long arm statute would have provided jurisdiction over the decedent had he not died); *Nile* v. *Nile*, 432 Mass. 390, 734 N.E. 2d 1153, 1159 (2000) (holding that the Massachusetts long-arm statute provides for jurisdiction over a non-resident personal representative when the decedent had sufficient contacts with the forum such that the decedent would have been subject to personal jurisdiction had he lived); *V.H.* v. *Estate of Birnbaum*, 543 N.W. 2d 649, 655 (Minn. 1996) (concluding that 'the decedent's foreign personal representative is subject to in personam jurisdiction under the long-arm statute if the decedent would be subject to jurisdiction if alive'); *Hayden* v. *Wheeler*, 33 Ill. 2d 110, 210 N.E. 2d 495, 497 (1965) (holding that the foreign administrator of a deceased non-resident was subject to jurisdiction under the Illinois state long-arm statute because decedent would have been subject to jurisdiction had he lived); *Gandolfo* [v. *Alford*], supra, [425] (holding that Connecticut's long-arm statute modified the common law rule and granted Connecticut's courts jurisdiction over suits brought against an executor of a foreign estate when the non-resident decedent could have been sued in Connecticut if he had lived)." K. Hesse & C. Fields, "Representing Estate & Trust Beneficiaries & Fiduciaries: Get Me to the Court on Time: Jurisdiction and Choice," ALI-ABA Course of Study, SR003 ALI-ABA 67, 81–82 (July 2009).

"In deciding whether an executor is subject to suit in a particular jurisdiction, a [federal] district court looks to the law of the forum state. Many state long-arm [statutes] include the executor, administrator, or other personal representative of a person within the long-arm jurisdiction of a state as also being within the long-arm jurisdiction. It has generally been held that such [statutes] are constitutional even though only the

decedent, and not his or her representative, had any contact with the forum jurisdiction . . . .'' (Footnotes omitted.) 28 Fed. Proc., L. Ed. § 65:23 (June 2019 Update); see *Rosenfeld* v. *Hotel Corp. of America*, 20 N.Y.2d 25, 228 N.E.2d 374, 281 N.Y.S.2d 308 (1967) (thoroughly discussing constitutionality of state court obtaining in personam jurisdiction over nonresident executors, although such nonresident executors had committed no acts and transacted no business in state, but decedent had transacted such business); see also *SongByrd, Inc.* v. *Estate of Grossman*, 206 F.3d 172, 180–81 (2d Cir.), cert. denied, 531 U.S. 824, 121 S. Ct. 68, 148 L. Ed. 2d 33 (2000) (''[w]hether the [e]state is subject to long-arm jurisdiction in Louisiana with respect to SongByrd's cause of action depends on whether [the decedent] would have been subject to such jurisdiction during his lifetime''); *Crosson* v. *Conlee*, 745 F.2d 896, 900–901 (4th Cir. 1984), cert. denied, 470 U.S. 1054, 105 S. Ct. 1759, 84 L. Ed. 2d 822 (1985) (''There can be no doubt that personal jurisdiction could have been obtained over [the decedent] during his lifetime, as he had operated a business in Virginia . . . . Accordingly, we hold that personal jurisdiction was properly obtained over defendant, a Florida executor, under the Virginia long-arm statute, notwithstanding the absence of any assets of the decedent's estate in Virginia''); *Steego Corp.* v. *Ravenal*, 830 F. Supp. 42, 48 (D. Mass. 1993) (''Massachusetts courts will permit personal jurisdiction over an executor where there would have been personal jurisdiction over the testator while he was still living'').

The defendant relies on three cases to support her contention that she, personally, must have sufficient minimum contacts with this state to support the court's exercise of jurisdiction over her. Specifically, she cites *Walden* v. *Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), *Rush* v. *Savchuk*, 444 U.S. 320, 100 S.

Ct. 571, 62 L. Ed. 2d 516 (1980), and *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), for the proposition that sufficient minimum contacts must arise out of the contacts that the defendant executrix, *personally*, had with the forum state. We conclude that each of those cases is inapposite from the present case. None of them involves or speaks to an action that could have been brought in the forum state *against a decedent* had he still been alive, but, instead, by necessity, due to the death of the decedent, was brought against the executrix of the decedent's estate, who stood in the shoes of the decedent for purposes of the action.

In the present case, the action brought by the plaintiff could have been brought against the decedent for the tortious acts *he committed while in this state*. The action names the defendant, not because of any act or failure to act on her part, but because she is standing in the shoes of the decedent. See 2 Restatement (Second), supra, § 358; id., comment (d), pp. 422–23; id., reporter's note to comment (d), pp. 425–26, and cases cited therein. Given the well established precedent on the constitutionality of a court's exercise of long arm jurisdiction in accordance with its statutory authority, we conclude that the court in the present case did not violate the defendant's right to due process of law by exercising jurisdiction over her because she had stepped into the shoes of the decedent when she became the executrix of his estate. Accordingly, the court properly denied the defendant's motion to dismiss.

II

The defendant claims that the trial court improperly admitted certain evidence, which she claims was highly prejudicial and likely affected the outcome of the trial. Specifically, she argues that the court erred in (1) admitting "evidence of verbal and physical abuse allegedly

perpetrated by [the decedent] on [the] plaintiff and [on] third parties," and (2) admitting "hearsay evidence[3] purporting to be from a 1997 journal, the original of which was discarded by [the] plaintiff's attorney during the course of [the] litigation." (Footnote added.) After setting forth our standard of review, we will consider each of these in turn.

"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. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . Additionally, [b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 627–28, 161 A.3d 562 (2017).

A

The defendant claims that the court erred in admitting evidence of verbal and physical abuse committed by the decedent and that such evidence was highly prejudicial, likely affecting the outcome of the trial. She argues that she "filed a motion in limine seeking to preclude evidence of claimed verbal and physical abuse of [the]

[3] "Hearsay [refers to] a statement, other than the one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted. Conn. Code Evid. § 8-1 (3). Hearsay is inadmissible, except as provided in the Code, the General Statutes or the Practice Book. Conn. Code Evid. § 8-2." (Internal quotation marks omitted.) *Miron* v. *University of New Haven Police Dept.*, 284 Conn. 35, 50–51, 931 A.2d 847 (2007).

plaintiff's brothers (Jonathan [Spalter], Alan [Spalter], and Michael Spalter) on the ground that such evidence was not relevant and constituted improper character and/or propensity evidence, particularly because it effectively allowed statutorily time-barred claims of third parties to be brought before the jury. . . . The trial court denied the motion in limine . . . . The trial court erred by admitting this evidence." (Citation omitted.)

The plaintiff argues that the evidence was relevant to explain the plaintiff's fear of the decedent and why she delayed reporting his sexual abuse, and that the defendant failed to object to much of the testimony that she now claims was admitted improperly. The plaintiff contends that the defendant's motion in limine did not serve to preserve her objections to each and every bit of testimony related to the decedent's verbal and physical abuse of the plaintiff and her brothers because the court stated that it was delaying its ruling on the admissibility of this evidence until it was offered at trial, thereby necessitating that the defendant object to the specific evidence as it was being offered. The plaintiff also argues that any improper admission by the trial court was harmless.

The following additional facts inform our review. The defendant filed a motion in limine to "preclude evidence of alleged other crimes, wrongs, or bad acts" committed by the decedent, including alleged physical or emotional abuse by the decedent against the family dog, the plaintiff, and the plaintiff's brothers, on the ground that it was "improper character and/or propensity evidence." She also argued that the evidence was not relevant and that its prejudicial effect significantly would outweigh its probative value. The court held a hearing on the defendant's motion, and other items, on February 7, 2017, at which the court explained, "Connecticut Code

of Evidence [§ 4-5][4] appl[ies] to both civil and criminal cases. . . . So, what this means, to the extent evidence of [the decedent's] abuse of other people and the dog . . . are offered, I will need to do a two part test before I can admit it. I have to make a determination as to relevance, and I also have to weigh the probative value of the evidence against the prejudicial effect of the evidence, and that needs to be done . . . out of the hearing of the jury." (Footnote added.) Consistent with this explanation, the court, also on February 7, 2017, issued a short written ruling denying the motion in limine because "[e]vidence of other wrongs and acts is admissible for certain purposes pursuant to [§] 4-5 (c) of the Connecticut Code of Evidence, provided it is relevant and that its probative value outweighs any prejudicial effect."

The record reflects that the defendant clearly was told that the court, although denying the motion in limine, was reserving judgment on specific objections to evidence of other wrongs or acts until the evidence was offered at trial. Later in the February 7, 2017 hearing, the parties were discussing the admissibility of portions of depositions regarding allegations of physical

[4] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "(a) General Rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

"(b) When Evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish . . . .

"(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

"(d) Specific instances of conduct when character in issue. In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct."

and emotional abuse committed by the decedent to which the defendant objected. The plaintiff's attorney told the court that he would be telling the jury during opening argument that the plaintiff was terrified of the decedent because of his sexual abuse and his violent acts toward her, her brothers, and her dog. He also stated that he would explain to the jury that this is why she waited until he died to disclose this abuse publicly and file this action; it helped to explain her fearful state of mind during his lifetime. The defendant's attorney responded: "The fact that opposing counsel wants to make some statements in opening argument about evidence that may or may not come in is his choice. The court doesn't have before it the information at this point in time sufficient to rule [on] whether . . . the evidence that will be offered comes in under [§ 4-5 (c) of the Connecticut Code of Evidence]. There are significant issues about that evidence. We would be severely prejudiced by the introduction of evidence. . . . And so, if counsel wants to make statements in opening argument, he can state whatever he wants to, but, as [with] any opening argument, Your Honor, you take the chance if you want to make statements about evidence that may or may not come in; that's their choice. The court should not make rulings on evidence at this point in time based upon what [the] plaintiff's counsel says he wants to say in opening argument." The court responded: "All right then. What I understand you [to] say is you would object to my ruling, but not to him raising these, these concepts."

The following day, February 8, 2017, when the plaintiff was on the witness stand, she brought up an incident involving the decedent and her brothers, and the following colloquy occurred:

"[The Defendant's Attorney]: Your Honor, may I state my objection for the record?

"The Court: Sure. . . . Yes, go ahead.

"[The Defendant's Attorney]: Okay. And so I would object and move to strike that response to the extent that, again, Your Honor, it seems to have been nonresponsive to the question that I understood [the plaintiff's attorney to be] asking, which was directed at an incident of alleged sexual abuse. And we claim that objection based on the fact that we have a pending objection to incidents of physical abuse.

"The Court: Well, let's be clear about that. I don't acknowledge a pending objection.[5] There is—you [filed] a motion in limine, and I said we would take it in turn, as necessary. But I do not—pending objections are not favored in Connecticut practice, and I don't [favor them] either. So, and it hasn't stopped you from raising objections when you felt it appropriate. And, so that's the status of that. In terms of this one, I'll reserve [ruling] pending connection to the witness.

"[The Defendant's Attorney]: Thank you, Your Honor. And I understand that, thank you."

The defendant now argues that her motion in limine preserved her objections to every instance of evidence regarding allegations that the decedent committed acts of physical, verbal, or emotional abuse.[6] We disagree.

[5] We understand the court's reference to pending objections to be to what are more commonly referred to as "standing objections" or "continuing objections," meaning "[a] single objection to all the questions in a given line of questioning"; Black's Law Dictionary (7th Ed. 1999), p. 1011; rather than objections interposed on a question by question basis. See id.

[6] The defendant also argues that insofar as the court refused "to acknowledge a 'pending objection,' " this was error, in violation of Practice Book § 60-5, which provides in relevant part: "In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, and counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or exception, and the ruling thereon as previously articulated, remain the same. . . ."

We disagree with the defendant's contention. The portion of Practice Book § 60-5 on which the defendant relies specifically states that an objection is preserved if "counsel has fully complied with the requirements for preserv-

The court explained to the parties during the hearing on the defendant's motion in limine that its denial of the defendant's motion was only a preliminary ruling, because it thought that some of the evidence likely would be admissible at trial. Additionally, the court clearly reiterated, the following day, that the defendant was required to object to specific evidence at the time it was offered, and it told the defendant that it would not recognize a standing objection to evidence on this issue; the defendant's attorney then told the court that he understood.

We conclude, therefore, that in order to preserve her objections, the defendant needed to object each time evidence was offered on the issue so that the court could consider the evidence in the context for which it was being offered. See *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 468, 115 A.3d 1 (objections not preserved by motion in limine when court clearly stated it would not rule in vacuum by issuing blanket prohibition because some evidence might be admissible; court left issue "open for objection during trial as specific testimony was offered"), cert. denied, 317 Conn. 913, 116 A.3d 812 (2015). Accordingly, after setting forth additional relevant facts, we will examine the specific evidence that the defendant in her appellate brief now claims was admitted improperly.

In response to the plaintiff's revised complaint, the defendant filed five special defenses, including a defense that "[t]he plaintiff's claims are barred or diminished to the extent she failed to take proper and reasonable steps to avoid or mitigate damages." The plaintiff

ing any objection . . . to the judge's adverse ruling . . . ." In this case, the court's denial of the defendant's motion in limine was not a definitive adverse ruling. Instead, the court specifically required counsel to voice an objection at the appropriate times during trial because the court believed that some of the evidence on the issue of the decedent's physical, verbal, and emotional abuse could be admissible. Accordingly, in order to preserve an objection, the defendant was required to object and give the court the opportunity to rule on the objection.

denied each of the special defenses. As explained previously in this opinion, the plaintiff's attorney told the court that he would be telling the jury during his opening statement that the plaintiff was terrified of the decedent because of his sexual abuse and his violent acts toward her, her brothers, and her dog, and that this was why she waited until he died to disclose this abuse and file this action. He said this information would be used to explain her fearful state of mind during the decedent's lifetime and her inability to bring an action before his death. The defendant's attorney responded by saying that counsel could argue whatever he wanted during his opening statement but that it did not mean the evidence of which he spoke would be admissible.

During opening argument, the plaintiff's attorney argued, in part, that he believed that the evidence would show that the decedent "serially and repeatedly abused [the plaintiff] sexually for his own gratification from the time she was six years old to the time she was seventeen, [and] that he kept her in abject fear of him for his entire life by his acts and his violence that she witnessed as a child . . . ." The defendant's attorney argued: "[W]e expect that [the plaintiff] will come into court and take the [witness] stand and testify that she was afraid to bring this suit or to bring a suit during [the decedent's] lifetime. In fact, we expect [the plaintiff] to come in and testify that she thought about suing [the decedent] . . . for years and that she even thought about it as far back as the 1990s, but that she couldn't bring herself to do it. She only found the courage after [the decedent] died. But, we think that once you've heard everything, once you've listened to the testimony, once you've seen the record, the evidence that comes in, that [the] evidence will tell a very different story. And that story . . . is that [the decedent's] death is actually the reason for this lawsuit, because when [the decedent died] . . . he left a will. And [the decedent's]

will favors his wife . . . .'' The defendant's attorney also argued that the evidence would show that the plaintiff maintained a close affectionate relationship with the decedent up until the time of his death but that, when the decedent died, and his will was disclosed, ''that's when things change[d]. And we think the evidence in this case will show that that is the reason for this lawsuit . . . .''

The defendant now claims that all of the testimony from the plaintiff and her brothers regarding the decedent's violent and physically abusive behavior should have been excluded by the court. The plaintiff argues that this evidence was necessary because the defense sought to attack the plaintiff's motivation for filing the action after the decedent's death, and the evidence, therefore, was necessary to explain why she delayed her action. The plaintiff also contends that the defendant raised objections to approximately one half of the testimony concerning the violence of the decedent and that some of the objections were on grounds other than improper character evidence. Accordingly, the plaintiff argues that any impropriety by the court in overruling the defendant's limited objections was harmless in light of the overwhelming additional evidence to which there was no objection. We agree with the plaintiff.

In her appellate brief, the defendant cites several instances of testimony given by the plaintiff and her brothers. We will look at each of these instances, as well as other cumulative testimony by these witnesses to which the defendant did not object or that was brought out during the defendant's cross-examination.

At the start of the plaintiff's testimony, her attorney asked what her earliest recollection was of the decedent. The plaintiff stated that she remembered a very violent man. The defendant objected and asked that the response be stricken, but the court allowed the

testimony to continue. The plaintiff then explained to the jury that the decedent would "hit, scream, punch, kick, [and] spit . . . ." The defendant again objected, and the court overruled the objection stating that the testimony went to explain the state of mind of the plaintiff. The plaintiff continued: "I saw [the decedent] punching, screaming, hitting my brothers on a regular basis. He would slap me and punch—punch me and pull my—pull me and throw me, and he also punched and kicked my dog. And he would scream, and he looked like a monster, you know, spitting and beady eyes, and that's what I observed."

The defendant also points to additional testimony by the plaintiff regarding the decedent having an ulcer and his anger. Specifically, the plaintiff testified: "[T]here was an incident where [the decedent]—I was about nine. . . . [He] had an ulcer and the violence was—[he] would get so angry." The defendant objected, and the court overruled the objection.

During cross-examination, however, the defendant's attorney asked the plaintiff if she thought the decedent was a "monster" because she "saw him do things regularly such as punch and kick and scream and spit," to which the plaintiff responded in the affirmative. When questioning the plaintiff about her decision to associate with the decedent in 2004, the defendant's attorney also asked: "And in fact, you were in fear of [the decedent] throughout your childhood because of his anger and volatility?" The plaintiff answered, "Yes." Counsel then asked: "Okay. And you were in fear of him because of the physical violence that he displayed in front of you . . . and you were in fear of him because of his physical abuse of your brothers that you witnessed . . . ?" The plaintiff, again, responded in the affirmative. Counsel then asked, "But still you chose to associate with him in 2004?" The plaintiff answered, "I did."

The defendant also argues that the court improperly admitted the following testimony by Alan Spalter: "Our house in Connecticut was a house filled [with] basically fear and terror. It was a house that we had a daily, almost daily verbal abuse and physical abuse. Verbal abuse in terms of being yelled at, screamed at. . . . Physical abuse by [the decedent] included kicking, punching, and hitting. These are all based on the fact that [the decedent] was really a powder keg waiting to go off at any moment for any type of indiscretion, any kind of—if we displeased him in any way, there were consequences. He ruled the house as a dictator. And, if we did anything to displease him, there were consequences. . . . Back in the day when there were no sprinkler systems, underground sprinkler systems, we had to move the hose from one end of the lawn to the other, and I was doing that, and I sprayed [the plaintiff] playfully with the sprinkler, and I . . . got [the decedent] wet . . . . He enraged, got out of his chair, ran after me, tackled me to the ground, put his knee on my back, arm on my head, buried it into the ground, and yelled at me, apologize." This testimony, however, was presented at trial *without objection* by the defendant.

The defendant also argues that certain testimony of Jonathan Spalter improperly was admitted. Specifically, she argues: "Jonathan Spalter testified that on one occasion, [the decedent] punched him in the stomach, grabbed him by the hair, and threw him down on the ground. . . . He then testified as to several more supposed incidences of violence, including [the decedent's] purportedly hitting him and [the] plaintiff while in the car, a separate claimed road rage incident, and an additional incident involving alleged physical abuse of his brother, Michael Spalter."[7] The defendant, how-

[7] The defendant cites only a small portion of this testimony; the complete testimony was as follows: "There was . . . one instance where [the decedent]—I must have been fourteen or fifteen—came in naked into [the plaintiff's] room. She and I—in Connecticut. We were talking and playing on her bed. She immediately rolled off the bed and tried to hide underneath the

ever, raised no objection to that testimony when it was offered at trial.

The defendant also argues: "Over objection of defense counsel, Jonathan Spalter testified: '[The plaintiff], my brother Alan, my brother Michael, and myself were in a horror house' . . . . He later testified, also over objection, that he 'wanted [the decedent] to know

bed. And I was really concerned about [her], but also really worried about what was going on, and I stood up to [the decedent] in front of him. I said, why are you—why are you in [the plaintiff's] room without any clothes on? She's obviously scared. And as he's done many times, he hit me and—in the stomach. And I remember doubling over. He grabbed my hair and threw me on the floor and he said, never question me.

"That is a memory that I have but it's not the only one. We were—when we would come back from Connecticut, where we lived significant amounts of our time in our house there, when we were talking too loud in the car coming back home on the highway, it didn't even matter who was doing the loud talking. Even when he was driving in the car, he'd turn around and start to hit us. [The plaintiff] was in the car. She was just a little girl.

"Another road rage incident, my parents both smoked cigarettes, and it was really difficult for me, even as a teenager, to sit in the car with cigarette smoke. And I remember telling [the decedent] to please put their cigarettes out because the smoke was really bothering me, and his response was to roll up the windows and say, you're just going to have to live with it.

"I started yelling, stop; I don't want to sit in a car with all of this smoke, it's hard to breathe. And I remember him veering over on the highway from the left lane because he always drove really quickly, veering over on the highway, screeching this car to a stop, getting out of the car and insisting that I get out. And I knew what was coming, but I didn't want to. And he started screaming, get out of the car, get out of the car now, and I didn't want to. And the kids, my brothers and sister were crying. And he kept on screaming get out of the car. And I knew that if I didn't get out of the car that we all would probably suffer, so I got out of the car, and he just wacked me with the back of his hand. I was thirteen or fourteen.

"The night before I went to college, we were in Connecticut. I was proud because I was about to become a young man leaving home. [The decedent] started drinking. There was yelling going on. There was constantly yelling in the house. He saw that Michael also—my younger brother—took a drink because he was upset, and I observed [the decedent] grab my brother, and [the plaintiff] was right there in the room right next door. He pulled him up the stairs literally by his shirt, almost trying to drag him up the stairs, shoved him into our second floor bathtub in Connecticut, literally just—and I was watching because I was trying to stop him put his head into the bathtub, turn on cold water, and then started hitting him like this. [The plaintiff] was screaming. She came in. He pushed me away. This was my moment before I was going to college. They drove me and dropped me at the train station with all of my bags, and I went up to college alone the next day."

how gravely hurt I've remained by all of the abuse, myself, and my brother, and [the plaintiff], particularly [the plaintiff], endured at his hands . . . .' "

A review of the transcripts also reveals that during cross-examination by the defendant's attorney, Jonathan Spalter was asked about his anger toward the decedent, and he replied in relevant part: "I was angry at [the decedent] for many things. The most important thing that I've been angry at [him] at that time was about the fact that he had admitted to me that he sexually abused [the plaintiff] and the years of abuse, verbal and physical, that I, and my brother Alan, and my brother Michael suffered." Jonathan Spalter also testified during cross-examination, when asked about an e-mail sent to him by the decedent, alleging that he had engaged in personal attacks against the decedent: "No, I never made attacks at [the decedent]. I told him the plain truth as I knew the truth to be, that I was hurt and my family was hurt because of the years of abuse that he perpetrated physically, emotionally, and sexually against [the plaintiff]. These were not attacks. These were shining a mirror at [the decedent] and letting him know how sad and how much he's impacted me, and particularly [the plaintiff] through his life, and also registering my deep disappointment and my protected instinct for my children, my sweet children, that this is a man who didn't have the basic human decency to be even remotely close to treating grandchildren as they should be treated, which is having some level of communication with them."

On the basis of the record and the objections voiced by the defendant's attorney to some of the testimony, as specifically set forth in this opinion, we conclude that even if we were to agree that the court improperly overruled each of those objections, the defendant has not established that the error was harmful. There simply

was a mound of similar testimony to which the defendant did not object, much of which was much more in-depth than that to which she did object during trial.

"When a court commits an evidentiary impropriety, we will reverse the trial court's judgment only if we conclude that the trial court's improper ruling harmed [a party]. . . . In a civil case, a party proves harm by showing that the improper evidentiary ruling likely affected the outcome of the proceeding. . . . It is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error. . . . In determining whether evidence is merely cumulative, we consider the nature of the evidence and whether any other evidence was admitted that was probative of the same issue as the evidence in controversy." (Citations omitted; internal quotation marks omitted.) *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 204, 128 A.3d 901 (2016).

As previously discussed in this opinion, the defendant objected to some of the plaintiff's testimony wherein she described the decedent's violence against his children and the plaintiff's dog. She also objected to some of the testimony of Jonathan Spalter wherein he testified that they had lived in a "horror house" and that he wanted the decedent to know that he and his siblings were hurt by the decedent's abuse.

The defendant then cross-examined the plaintiff on those issues. Additionally, during the defendant's cross-examination of Jonathon Spalter, he was asked about his anger toward the decedent, which elicited a response about the physical and verbal abuse perpetrated by the decedent. He also was questioned about an e-mail sent to him by the decedent, which elicited further testimony about the years of abuse. Alan Spalter also testified on direct examination, without objection,

about the daily physical and verbal abuse perpetrated by the decedent, and he referenced a specific violent event that had been witnesses by the plaintiff; he also testified, without objection, that their Connecticut home was filled with "fear and terror." The record reveals that the testimony to which the defendant objected merely was cumulative of other similar testimony to which she did not object. Accordingly, she has failed to show that the trial court's rulings, even if we assume that they were improper, likely affected the outcome of the trial.[8]

B

The defendant also claims that the "trial court committed reversible error by admitting hearsay evidence purporting to be from a 1997 journal, the original of which was discarded by plaintiff's attorney during the course of litigation." She argues that the court improperly admitted the entries under the state of mind exception to the hearsay rule; see § 8-3 (4) of the Connecticut Code of Evidence;[9] and that the court should have excluded the journal entries because the original journal was discarded by the plaintiff's "attorney." We are not persuaded.

The following additional facts inform our review. After the discovery deadline had passed, the plaintiff

[8] The defendant also makes a passing claim that the court's limiting instruction was insufficient. She argues: "The highly inflammatory nature of the evidence and repetition by several witnesses could not logically be separated from the claims of sexual abuse as the trial judge instructed. Additionally the trial court instructed the jury that it could properly consider 'what effect, if any, such conduct had on the plaintiff,' thereby ultimately undercutting its own limiting instruction." We are not persuaded by the defendant's argument, especially in light of the fact that her own supplemental and amended proposed jury instructions contained the exact phrase that she now contends was improper.

[9] Section 8-3 (4) of the Connecticut Code of Evidence, setting forth the state of mind exception to the hearsay rule, provides: "A statement of the declarant's then existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed."

disclosed the existence of a 1997 journal, which her attorney represented recently had been discovered among the plaintiff's possessions kept in a storage facility, and a copy was provided to the defendant and the court. After some time had passed and the plaintiff had failed to produce the original journal, the defendant filed a motion for sanctions, and the court ordered the plaintiff to produce the original journal. At a subsequent status conference, the plaintiff's attorney explained to the court that after the plaintiff found the journal in a storage facility, she made a photocopy of its pages so that she could e-mail them to him, as she had done with previous documents. Her attorney further explained that there had been a mix-up concerning whether the original journal had been included in the items placed in a shipping crate to be returned to Austria, where the plaintiff was living. Eventually, however, the plaintiff came to believe that the original journal inadvertently had been thrown away by the plaintiff's cousin, Laura Phillips, with whom the plaintiff was staying when she discovered the journal. The court requested an affidavit from Phillips, which she provided the following day.

In her affidavit, Phillips averred, among other things, that she is an attorney licensed to practice law in New York; she had not worked with the plaintiff's attorneys of record on this case; she and the plaintiff are cousins, and they have a close relationship; the plaintiff had stayed with her for approximately one month in July and August, 2016, while visiting here from Austria; during the plaintiff's visit, they had retrieved approximately fifty boxes of belongings from the plaintiff's storage unit; she and the plaintiff sorted through the boxes and reduced them to approximately eighteen boxes that they shipped to the plaintiff's home in Austria; many of the items set aside to be discarded included papers,

notebooks, books, etc., which were strewn about Phillips' apartment; the plaintiff also had set aside a stack of papers to be kept at Phillips' apartment; Phillips told the plaintiff that she would discard the items left over from the storage unit; and although Phillips remembered seeing the journal, which had Spanish writing on the cover, she thought she may have inadvertently thrown it away believing it was her daughter's old notes from Spanish class.

The defendant then renewed her motion for sanctions, alleging discovery misconduct and destruction of evidence. The court denied the motion, finding no evidence of wilful misconduct, but it did permit further deposition questioning.

During the trial, the plaintiff's attorney sought to introduce into evidence the photocopy pages from the 1997 journal. The defendant objected on the grounds of spoliation and lack of authentication. The court overruled the objection, opining that the "absence of the original was adequately explained." The defendant then objected to the introduction of all of the excerpts of the journal that the plaintiff sought to introduce on the grounds of hearsay and undue prejudice. Outside the presence of the jury, the court went through each excerpt, listened to the argument of counsel, and determined that the excerpts were admissible.

The defendant now claims that the court misconstrued the state of mind exception to the hearsay rule; see § 8-3 (4) of the Connecticut Code of Evidence; leading to its improper admittance of certain excerpts of the plaintiff's journal. She argues, "[t]he admission of the self-serving hearsay statements is especially troubling in a case with no living first-hand witnesses who could confirm or deny the alleged abuse, no contemporaneous written records corroborating [the] plaintiff's account of events, and very little written corroboration of events at *any time* prior to the [the] plaintiff's filing of the instant lawsuit." (Emphasis in original.)

The defendant in her appellate brief specifically addresses two excerpts from the journal, which she argues improperly were admitted into evidence by the court. The first excerpt cited by the defendant is as follows: "All day I have been thinking about the sickening stuff that [the decedent] does. It is so disturbing."[10] The second excerpt from the journal contains a letter that the plaintiff wrote to [the decedent], which she never sent. Specifically, the defendant objects to the following portions: "You fondled my genitalia. . . . I always pretended to be asleep. . . . You recall only one incident. So one of us is inaccurate. I swear on my mother's grave and on my nephews' lives I know the incest you did actions to be true. . . . I see you screaming and beating up your children as using poor judgment."[11] (Internal quotation marks omitted.) Immediately after the introduction of these excerpts, the

[10] The defendant cites only a portion of this excerpt, the entirety of which is as follows: "I am really looking forward to seeing the [Fifth] Element this afternoon at 5 p.m. All day I have been thinking about the sickening stuff that [the decedent] does. It is so disturbing. It is so hard for me to stay present. I'm in this great city for God's sake."

[11] On appeal, the defendant cites to only a portion of this excerpt. The entirety of the excerpt to which she objected during trial is as follows: "Dear Dad, after much thought, in fact [seven] years of thought, I have concluded that no emotions, act or word is in reality a black or white entity. For as there are as many angles at looking at a thing, there are also as many perceptions of what is being studied. You are a scientist, and have shown to me that you have the ability to think like a scientist—logically, I'm sure you would agree. Only by looking at *all* angles intensely, thoroughly, can one eventually understand the organism as a whole.

"For many years now I have committed to myself a pursuit to better understand myself, from all angles. After much thought, empirical experience, and thousands upon thousands of pages of research to support my point of view, I believe that the interfamilial relationships play a huge role in the development and perception of the self in all its manifestations. Call them what you will—ego, id, super ego, self efficacy, self esteem. This development is especially touched by the parent-child relationship.

"And so, I have examined our relationship. And I know of times you helped bolster my sense of worth, where you acted as often fathers do with love, selflessness, support and guidance.

"I also have examined times when you acted with immaturity, insolence, greed and violence. You fondled my genitalia! I always pretended to be asleep. I told my friends about these things then, I told my brother about these things when I was [sixteen]. I saw a therapist about it in college, and wrote about it in my journal from ages [eleven] to today. You recall only

court gave a limiting instruction: "So now, ladies and gentlemen, once again, this is admitted to show [the plaintiff's] state of mind at the time she wrote this and is not for proof of any of the events that she discusses there. It's to show you what was going on in her mind at the time." The defendant also asserts in passing that the court's limiting instruction to the jury was insufficient to limit "the impact of the self-serving accusatory statements . . . ."

The plaintiff responds that the journal excerpts were necessary to provide proof of her claim for emotional damages. She also argues that the defendant "cherry picks objectionable sentences [from the excerpts] when [she] made only a general objection in the trial court to the entire thing." Furthermore, she argues, the prejudicial impact of the journal excerpts caused by any statements concerning abuse contained therein was minimal and cumulative in light of all the other evidence at trial. We conclude that even if these excerpts improperly were admitted, the evidence merely was cumulative of considerable other evidence, and the defendant has failed to prove that the improper admission of the

one incident. So one of us is inaccurate. I swear on my mother's grave and on my nephews lives I know the incest you did actions to be true.

"So, in my pursuit to better understand myself, I wrote in a journal, wrote letters not meant to be sent, which explored all angles of my feelings to better understand myself. I also attended at least [five] incest support groups, did workbooks, etc.

"It is unfortunate that mom read my papers. I had kept much of my pain from her, did not seek her help to protect her. I felt telling her would cause her too much pain. How much it would hurt her to know that your actions were the source of incredible pain for me.

"I invested much energy and gave up a lot of soothing and endured humiliation and pain for years by not telling mom. This was a choice I made to protect her. Not me, but mom.

"You say mean, hurtful things to me. You say I killed mom. I cannot forget that. I perceive you saying that as perverse and bizarre. Many agree with me. I see you bring up your marriage at Jon's wedding as using really poor judgement. I think you use poor judgement about a lot of things. It is clear to me you have a distorted understanding of reality. I see you screaming and beating up your children as using poor judgement.

"You told me you dislike me. I don't believe you know me well enough to make such conclusions." (Emphasis in original.)

excerpts likely affected the outcome of the trial. See *Fink* v. *Golenbock*, 238 Conn. 183, 211, 680 A.2d 1243 (1996) ("[i]t is well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely cumulative" [internal quotation marks omitted]).

At trial, the plaintiff testified extensively about the decedent's sexual abuse. Jonathan Spalter testified about seeing the decedent naked in the plaintiff's bedroom. He also testified, in response to questioning from the defendant's attorney, that the decedent admitted to sexually assaulting the plaintiff once. Additionally, as fully explained in part II A of this opinion, there was other evidence of physical and emotional abuse, as well. Alan Spalter testified, *without objection*, that the family home was filled with "fear and terror . . . [and] almost daily verbal abuse and physical abuse . . . [that] included kicking, punching, and hitting." Jonathan Spalter also testified, *without objection*, about specific instances of physical violence committed by the decedent. Finally, the defendant did not object during trial to the admission of other journal excerpts written by the plaintiff in 1995 and 1996. Those excerpts included several references to incest, including a statement by the plaintiff that "[she] was incested at [eleven] years old by [the decedent]." Because the jury was privy to this evidence, it is not reasonable to conclude that the excerpts from the 1997 journal likely affected the verdict. We cannot conclude, therefore, that any purported error in their admission was harmful.

III

The defendant claims that the trial court improperly permitted the jury to find her liable for punitive damages without evidence of the plaintiff's litigation expenses and that the court improperly reserved to itself the

issue of the amount of punitive damages to be awarded. Specifically, she argues: "During the charging conference . . . defense counsel objected to the trial court charging the jury on the issue of punitive damages on the grounds that the amount of common-law punitive damages is an issue for the jury, and because there was no evidence upon which the jury could base such an award. . . . The trial court disagreed based on its past practices, instructing the jury to determine whether punitive damages should be awarded, and that the court would later determine the amount of such damages. . . . This was error." (Citations omitted; footnote omitted.)

The plaintiff argues that there is no final judgment on the issue of punitive damages, and, therefore, we are unable to review this claim. In the alternative, she argues that the court properly ruled that it would reserve the amount of punitive damages for its own consideration, after the jury determined whether the defendant was liable for such damages. Furthermore, the plaintiff argues, even if it were improper for the court not to let the jury decide the amount of punitive damages, we should remand the matter for a hearing limited to that issue. We begin with the complicated issue of whether there is a final judgment as to punitive damages.

A

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [and, therefore] our review is plenary. . . .

"Neither the parties nor the trial court . . . can confer jurisdiction upon [an appellate] court. . . . The right of appeal is accorded only if the conditions fixed

by statute and the rules of court for taking and prosecuting the appeal are met. . . . It is equally axiomatic that, except insofar as the legislature has specifically provided for an interlocutory appeal or other form of interlocutory appellate review . . . appellate jurisdiction is limited to final judgments of the trial court. . . .

"It is well settled that a judgment rendered only upon the issue of liability without an award of damages is interlocutory in character and not a final judgment from which an appeal lies. . . . Nevertheless, [under the bright line rule announced in *Paranteau* v. *DeVita*, 208 Conn. 515, 544 A.2d 634 (1988)] a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." (Citations omitted; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 84, 191 A.3d 983 (2018).

In *Ledyard*, the defendant had appealed from the summary judgment rendered in favor of the plaintiff, as to liability only, with respect to certain attorney's fees that had been incurred by the plaintiff. See *Ledyard* v. *WMS Gaming, Inc.*, 171 Conn. App. 624, 625, 157 A.3d 1215 (2017), rev'd, 330 Conn. 75, 191 A.3d 983 (2018). This court concluded that the trial court's decision rendering summary judgment, as to liability only, with regard to the attorney's fees at issue was not an appealable final judgment because the amount of damages had not been determined at the time the appeal was filed. Id., 625. Following the granting of certification to appeal, our Supreme Court reversed this court's decision, concluding that there was a final judgment, despite the fact that the trial court had not yet determined the amount of attorney's fees that would be awarded. *Ledyard* v. *WMS Gaming, Inc.*, supra, 330 Conn. 90.

In *Ledyard*, our Supreme Court began its final judgment analysis by discussing *Paranteau*. Id., 84–87. The

court explained that, in *Paranteau*, "[b]y opting for a bright line rule, [it had] implicitly recognized that there would be some cases . . . in which the application of the bright line [rule] would mean that an attorney's fees award that would otherwise be considered integral to the judgment on the merits would nevertheless be severable from that judgment for purposes of finality." (Internal quotation marks omitted.) Id., 87. It is noteworthy to mention that the court in *Paranteau*, however, also issued a caveat to the bright line rule by explaining, in footnote 11 that "[a] supplemental postjudgment award of attorney's fees becomes final and appealable, however, not when there is a finding of liability for such fees, but when the amount of fees are conclusively determined. A finding as to liability only, prior to a determination on the issue of damages, is not a final judgment from which an appeal lies. . . . Furthermore, a timely appeal from a supplemental postjudgment award of attorney's fees may challenge not only the amount awarded, but the underlying recoverability of such fees as well." (Citation omitted.) *Paranteau* v. *DeVita*, supra, 208 Conn. 524 n.11.

The court in *Ledyard* then went on to discuss *Hylton* v. *Gunter*, 313 Conn. 472, 487, 97 A.3d 970 (2014). See *Ledyard* v. *WMS Gaming, Inc.*, supra, 330 Conn. 87–90. In *Hylton*, our Supreme Court, relying on *Paranteau*, had explained that it could not conceive of a reason "why the benefits of the bright line rule articulated in *Paranteau* do not apply equally in the context of common-law punitive damages, which are limited under Connecticut law to litigation expenses, such as attorney's fees less taxable costs. . . . The assessment a court is required to make in order to award punitive damages is identical to the assessment required in any other matter involving a common-law, contractual, or statutory basis for departure from the American rule . . . . Indeed, common-law punitive damages are akin

to statutorily authorized attorney's fees in practicality and purpose, insofar as both provide the same relief and serve the same function . . . namely, fully compensating injured parties. . . . Thus, our practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as merits or nonmerits, but rather preservation of operational consistency and predictability in the overall application of [the final judgment rule]. . . . Accordingly, we conclude that an appealable final judgment existed when all that remained for the trial court to do was determine the amount of the attorney's fees comprising the common-law punitive damages that it previously had awarded." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Hylton* v. *Gunter*, supra, 484–87.

In *Hylton*, our Supreme Court also overruled this court's decision in *Lord* v. *Mansfield*, 50 Conn. App. 21, 717 A.2d 267, cert. denied, 247 Conn. 943, 723 A.2d 321 (1998). *Hylton* v. *Gunter*, supra, 313 Conn. 487–88. In *Lord*, this court held that the judgment that had been rendered on the defendant's counterclaim for intentional infliction of emotional distress had not been final for purposes of appeal because the plaintiff's claim on appeal concerned the amount of the damages awarded on that counterclaim and the trial court had not determined the amount of common-law punitive damages that were due as part of the compensation to the defendant on that counterclaim. *Lord* v. *Mansfield*, supra, 24, 25 n.3, 28. In *Hylton*, our Supreme Court determined that "*Lord* was wrongly decided because, among other reasons, it [was] inconsistent with . . . *Paranteau* . . . which adopted the bright line rule that a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." (Citation omitted;

internal quotation marks omitted.) *Hylton* v. *Gunter*, supra, 474–75.[12]

After discussing *Hylton*, our Supreme Court, in *Ledyard*, returned to *Paranteau* and further limited the application of footnote 11 of that decision: "Footnote 11 of *Paranteau* can be explained as part of an effort to save jurisdiction over that appeal given the facts of that particular case, which predated our clarification in *Ambroise* v. *William Raveis Real Estate, Inc.*, 226 Conn. 757, 762–63, 628 A.2d 1303 (1993), that the twenty day time limitation for filing an appeal set forth in Practice Book § 63-1 (a) is not subject matter jurisdictional. See *Benvenuto* v. *Mahajan*, [245 Conn. 495, 503–505 and n.4, 715 A.2d 743 (1998)]. Nevertheless, footnote 11 is in tension with *Paranteau's* bright line rule as it has been extended in *Benvenuto* and *Hylton*. Although the Appellate Court has dismissed several appeals following the rationale of *Paranteau's* footnote 11 . . . we observe that the footnote must be considered in the context of this court's subsequent decisions in *Benvenuto* and *Hylton*, which emphasize the importance of the bright line rule with respect to attorney's fees awards that are not rendered postjudgment." (Citation omitted.) *Ledyard* v. *WMS Gaming, Inc.*, supra, 330 Conn. 91 n.5.

In conducting our final judgment rule analysis, we next review a recent case in which our Supreme Court denied a motion to dismiss that had been filed by the defendant in error in that case, who had sought dismissal on final judgment grounds of a writ of error. See

[12] Justice McDonald, joined by Justice Zarella, authored a strong dissent in *Hylton*, opining that *Lord* had been decided correctly by this court. *Hylton* v. *Gunter*, supra, 313 Conn. 489 (*McDonald, J.*, dissenting). Specifically, Justice McDonald stated that *Lord* was correct because "punitive damages, unlike attorney's fees, *are always integral* to the judgment on the merits. Moreover, no . . . case-by-case inquiry would be necessary . . . if this court were to adopt *Lord*, because it effectively adopted a bright line final judgment rule for punitive damages." (Emphasis added.) Id., 489–90.

Maurice v. *Chester Housing Associates Ltd. Partnership*, 188 Conn. App. 21, 24 n.5, 204 A.3d 71, cert. denied, 331 Conn. 923, 206 A.3d 765 (2019). In *Maurice*, the plaintiff in error, Douglas Williams, who was the general and managing partner of one of the defendants in the underlying case, but not a party himself, had been sanctioned and ordered to pay the attorney's fees of the plaintiff. Id., 22. Williams filed a writ of error in our Supreme Court before the trial court had determined the amount of the fees for which Williams would be liable. Id., 24 n.5. The plaintiff, who was the defendant in error on appeal, filed a motion to dismiss on the ground that the writ was not taken from a final judgment because the trial court had yet to determine the amount of fees for which Williams would be responsible. Id. Our Supreme Court denied the motion to dismiss and transferred the writ to this court to be considered on the merits. Id.

This court explained the issue regarding whether the appeal was taken from a final judgment as follows: "On September 4, 2018, prior to oral argument of this case before this court, our Supreme Court released its decision in *Ledyard* v. *WMS Gaming*, Inc., [supra, 330 Conn. 75]. In *Ledyard*, the Supreme Court ruled that the Appellate Court wrongly dismissed, for lack of a final judgment, an appeal taken from a judgment that determined only that the defendant was liable for attorney's fees. The Supreme Court ruled that the trial court's determination that the defendant was liable for attorney's fees was an appealable final judgment, despite the fact that the amount of those fees had not yet been determined. The Supreme Court found that, in dismissing the appeal, the Appellate Court had wrongly relied on a footnote in *Paranteau* v. *DeVita*, [supra, 208 Conn. 524 n.11], for the proposition that a trial court does not render a final judgment as to attorney's fees until it conclusively determines the amount of those fees. The Supreme

Court held that the language in *Paranteau* applies only to 'supplemental postjudgment awards of attorney's fees.' *Ledyard* v. *WMS Gaming, Inc.*, supra, 90.

"Here, the order that Williams be sanctioned and that he pay attorney's fees is a final judgment under *Ledyard*—notwithstanding the fact that the trial court has yet to determine the amount of those fees—because it does not constitute a supplemental postjudgment award of attorney's fees." *Maurice* v. *Chester Housing Associates Ltd. Partnership*, supra, 188 Conn. App. 25 n.5.

Presumably then, Williams could file *an appeal* after the trial court orders the specific amount of fees for which he will be liable, contesting the reasonableness of the amount. See id. As explained by Attorneys Wesley W. Horton and Kenneth J. Bartschi, "*Paranteau* has been extended to a strict foreclosure case in *Benvenuto* v. *Mahajan*, [supra, 245 Conn. 495], which rejects the contrary result in *Connecticut Nat*[*ional*]. *Bank* v. *L & R Realty*, 40 Conn. App. 492, 671 A.2d 1315 (1996); to a case in which the right to punitive damages has been determined but the amount has not; *Hylton* v. *Gunter*, [supra, 313 Conn. 472], overruling *Lord* v. *Mansfield*, [supra, 50 Conn. App. 21]; and even to a case when the attorneys' fee award is integral rather than collateral to the underlying award. *Ledyard* v. *WMS Gaming, Inc.*, [supra, 330 Conn. 75]." W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2018-2019 Ed.) § 61-1, authors' comments, p. 68.

As we attempt to reconcile all of these cases and arrive at a workable final judgment rule, we conclude as follows: a judgment that includes an award of attorney's fees, even when those fees are integral to the judgment, as with an award of common-law punitive damages, is an appealable final judgment despite the fact that the

amount of those fees has not yet been determined; implicit in this rule is that once the amount of those fees has been determined postjudgment, that postjudgment determination will be a separately appealable final judgment as to the reasonableness of the fees awarded.

On the basis of the foregoing, we conclude that the jury's determination that the plaintiff is entitled to common-law punitive damages is a final judgment for purposes of appeal because it does not constitute a supplemental postjudgment award, despite the fact that the trial court reserved a determination of the precise amount of those damages to a time postjudgment.

B

We next consider the merits of the defendant's claim that the trial court improperly permitted the jury to find her liable for punitive damages without evidence as to the plaintiff's litigation expenses, and that the court improperly reserved to itself the issue of the amount of punitive damages to be awarded.

The following facts assist with our review. Before the plaintiff began her presentation of evidence, the defendant submitted to the court a request to charge and her proposed jury interrogatories. She requested, in part, that, if the court were to permit a consideration of punitive damages in this case, it submit the question of punitive damages and the amount of those damages to the jury. Then, during the charging conference, which was held after the close of evidence, the defendant asked the court not to charge the jury on punitive damages because the plaintiff had failed to put forth any evidence of her litigation expenses, and she, again, told the court that, if the issue of punitive damages went to the jury, the court must have the jury determine the amount of those damages. The plaintiff argued that, although the liability for punitive damages is a jury question, the amount of the award is a question for the

court, to be determined after the jury issued its verdict. She expressed to the court that there would be no way to "know the cost of litigation until we are done with the trial." The court agreed with the plaintiff, stating that this was its past practice when common-law punitive damages were involved, and it stated that it would determine the amount of damages if the jury found that the defendant was liable for punitive damages. The defendant, following the court's charge to the jury, also took an exception to the court instructing the jury on punitive damages. On appeal, the defendant claims that the court improperly permitted the jury to find her liable for common-law punitive damages without evidence as to the plaintiff's litigation expenses, and that the court improperly reserved for its own consideration the specific amount of common-law punitive damages to be awarded. We agree with the defendant.

The defendant asks that we apply a plenary standard of review to her claim. We agree that this is the appropriate standard of review. "A challenge to the validity of jury instructions presents a question of law. Our review of this claim, therefore, is plenary. . . . We must decide whether the instructions, read as a whole, properly adapt the law to the case in question and provide the jury with sufficient guidance in reaching a correct verdict. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Citation omitted; internal quotation marks omitted.) *Green* v. *H.N.S Management Co.*, 91 Conn. App. 751, 757–58, 881 A.2d 1072 (2005), cert. denied, 277 Conn. 909, 894 A.2d 990 (2006). "It is established law that it is error for a court to submit to the jury an issue which is wholly unsupported by the evidence." *Novak* v. *Anderson*, 178 Conn. 506, 508, 423 A.2d 147 (1979).

The precise issue presented by this claim does not appear to have been addressed squarely by an appellate court in Connecticut, at least in quite some time. We are aware, however, of at least one Connecticut case in which this issue squarely was raised on appeal on constitutional grounds, but our Supreme Court did not decide the issue because it was unpreserved before the trial court. See *Berry* v. *Loiseau*, 223 Conn. 786, 822, 614 A.2d 414 (1992) (plaintiff failed to preserve claim that he had constitutional right to have jury determine amount of punitive damage award, not just plaintiff's entitlement thereto).

We also are aware that this issue has surfaced in at least two cases from the United States Court of Appeals for the Second Circuit. In *Gagne* v. *Enfield*, 734 F.2d 902 (2d Cir. 1984), the plaintiff brought a 42 U.S.C. § 1983 claim and a state law negligence claim in the United States District Court for the District of Connecticut. The District Court instructed the jury that if it found the defendants liable for punitive damages, "the judge . . . will award the plaintiff an amount equal to his reasonable costs in bringing this lawsuit." Id., 904. During the trial, however, the plaintiff had "offered no evidence of the cost of litigating his claims." Id., 903. The defendants objected to the court's submission of the issue of punitive damages to the jury. Id. In its verdict, the jury found that punitive damages should be awarded but, in accordance with the judge's instruction, did not specify an amount. Id., 904. The District Court, thereafter, held a posttrial hearing, and it awarded the plaintiff $21,336.40 in punitive damages on his state law negligence claim. Id. On appeal to the Second Circuit, that court reversed the judgment as to the award of punitive damages, and it remanded the case with direction to vacate the punitive damages award. Id., 905. Specifically, the Second Circuit held that, because the plaintiff failed to offer any evidence of his litigation costs *at trial* before the jury, he was not entitled to

punitive damages under Connecticut law, and there was "an insufficient evidentiary basis to submit the question of punitive damages to the jury." Id., 905. The Second Circuit also held that "[u]nder the Seventh Amendment, the determination of the amount of such damages is a legal claim and for the jury . . . ." Id.

Then, in *Wolf* v. *Yamin*, 295 F.3d 303, 312 (2d Cir. 2002), the Second Circuit was faced with a similar question regarding whether the amount of common-law punitive damages is a jury question when the defendant so demands, and it certified the following question to our Supreme Court: "[U]nder Connecticut law on punitive damages, is a plaintiff who does not offer any evidence of litigation costs *at trial* before a jury barred from recovering any punitive damages? (This question assumes there has been no agreement by the parties to a bifurcation of the punitive damages determination between the jury/trier of fact as to liability and the judge as to amount)." (Emphasis in original.) As in the present case, the plaintiff in *Wolf* also argued that if the District Court had acted improperly in reserving the question of the amount of damages for a later hearing before the court, then the Second Circuit should remand the matter "for the sole purpose of a [p]unitive damages hearing before a jury." (Internal quotation marks omitted.) Id., 307.

In *Wolf*, the Second Circuit discussed *Gagne* at length, calling into question its continued viability in light of more recent Connecticut case law. Id., 308–311.[13] The

[13] The court, however, made no mention of a federal constitutional question, but it considered the issue solely as a matter of Connecticut law. See *Wolf* v. *Yamin*, 295 F.3d 308–11. We are unable to determine from the court's decision whether the defendant had raised a constitutional claim or whether the court, unlike the court in *Gagne*, had concluded that this was not a constitutional issue. See id. In any event, in the present case, the defendant has not argued a violation of a constitutional right, either under the federal constitution or the state constitution, and we, therefore, consider any constitutional claim waived. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162 n.33, 84 A.3d 840 (2014) (appellate courts not required to review issues of possible constitutional error if not raised by appellant).

Second Circuit, in *Wolf*, opined that the rule in Connecticut had been clear that, unless agreed otherwise by the parties, evidence as to the amount of punitive damages must be offered *during trial* to warrant such a claim going to the jury. Id., 309. The court relied, in part, on *Venturi* v. *Savitt, Inc.*, 191 Conn. 588, 593, 468 A.2d 933 (1983) (plaintiff failed to prove claim for punitive damages, due in part to failure to offer any evidence of expenses of litigation at trial), and *Chykirda* v. *Yanush*, 131 Conn. 565, 567–69, 41 A.2d 449 (1945) (plaintiff cannot recover punitive damages without evidence of those amounts being presented at trial, "except for those items of taxable costs of which the trial court can take judicial notice"), to support that opinion. *Wolf* v. *Yamin*, supra, 295 F.3d 308–309.

In its determination that our law no longer was clear, the Second Circuit relied on two more recent cases, namely, *Kenny* v. *Civil Service Commission*, 197 Conn. 270, 496 A.2d 956 (1985), and *Berry* v. *Loiseau*, supra, 223 Conn. 786. The Second Circuit explained those cases as follows: "*Kenny* was an action for wrongful termination of employment in which [the] plaintiff sought compensatory and exemplary damages. After a bench trial, the trial court found [the] defendant liable for, among other things, exemplary damages in the amount of [the] plaintiff's litigation expenses. . . . At trial, the court did not take any evidence as to the actual costs of the litigation, and no post-trial damages hearing was held. . . . On appeal, defendant argued in part that since the plaintiff offered no evidence of the cost of litigation at trial, exemplary damages were not recoverable. . . . The Connecticut Supreme Court held: While it concededly is true that [n]o award for an attorney's fee may be made when the evidence is insufficient . . . it is equally clear that liability for attorney's fees can be placed in the absence of any evidence of the cost of the work performed. In this case the trial court found

the defendants liable for exemplary damages based on sufficient evidence of discrimination. It merely failed to set the amount of the award. The proper remedy under these circumstances, and the one which we order, is that the case be remanded to the trial court for a hearing to determine the amount of exemplary damages awarded. . . .

"Seven years later, the Connecticut Supreme Court decided *Berry*. In that case, the plaintiff sued his former employer and others, alleging wrongful termination of his employment and other causes of action, and defendants counterclaimed on various theories. The trial court submitted interrogatories to the jury, asking whether punitive damages were warranted on either the plaintiff's claim or the defendants' counterclaim. . . . The court made clear to the jury that if [it] found that punitive damages were warranted, the court would determine the amount thereof. No exception was taken to the charge. The jury responded in the affirmative on both claims for punitive damages. . . . After a hearing before the judge, at which the parties submitted evidence of their litigation expenses, the trial court awarded punitive damages awards to both the plaintiff ($16,667) and the defendants ($50,000). . . .

"Both parties appealed. [The] [p]laintiff challenged the restrictive Connecticut rule limiting punitive damages to the costs of litigation. [The] [p]laintiff also argued [in part] that the trial court . . . improperly denied him his right under the Connecticut constitution to have the jury determine the amount of his punitive damages, [and] . . . improperly applied a Connecticut contingency fee limitation statute to limit his punitive damages . . . . Defendants, on their appeal, claimed, among other things, the trial judge improperly awarded the plaintiff punitive damages when there was no evidence at trial to support such an award. . . .

"On the plaintiff's appeal, the Connecticut Supreme Court rejected the general attack on Connecticut's restrictive punitive damages rule. . . . Next, the Court held that it would not consider the claim that [the] plaintiff had been denied his constitutional right to have a jury determine the amount of his punitive damages award, due to his failure to take a timely exception when the jury instructions on punitive damages were given. . . . Regarding [the] plaintiff's argument that the trial court improperly limited the plaintiff's punitive damages based on the Connecticut contingency fee limitation statute, the Court concluded that the trial court had improperly applied the statute, and reversed and remanded for a new hearing before the judge on punitive damages. . . .

"On the defendants' appeal, the Connecticut Supreme Court rejected the argument that there was no evidence to support [the] plaintiff's punitive damages award. The Court stated evidence of wanton behavior on the part of [the] defendants justified an allowance of punitive damages . . . and that [i]n the present case, the jury could reasonably have found from the evidence presented at the trial that [the defendant] subjected the plaintiff to physical abuse, in reckless disregard of the consequences of his actions. Accordingly, we are persuaded that the trial court properly allowed the jury to decide whether the plaintiff was entitled to punitive damages. . . .

"In this discussion, the Court did not mention whether [the] plaintiff had presented evidence of litigation costs during the jury trial.

"In *Berry*, two judges concurred in an opinion of the court, two judges concurred in the result only and one judge concurred in a separate opinion, stating that he would not address the issue . . . in the majority opinion concerning the rule limiting punitive damages to the party's litigation costs. . . .

"It is unclear whether the holdings in *Kenny* and *Berry* conflict with earlier Connecticut cases on punitive damages. It is true that *Kenny* was a bench trial with no jury, so that the post-trial hearing allowed the same trier of fact to determine punitive damages, while the case now before us was before a jury, so that the judge was not the trier of fact. Still, the Connecticut Supreme Court in *Kenny* suggested that a post-trial procedure be used by the trial court to determine the amount of punitive damages, rather than holding that the failure to present evidence of litigation costs at trial barred punitive damages.

"The Connecticut Supreme Court's decision in *Berry* provides further evidence of ambiguity in Connecticut law on punitive damages, especially in light of the various concurrences in that case. In *Berry*, the Court again ordered a post-trial hearing (apparently by the court) to determine punitive damages, this time after a jury trial. *Berry* therefore also suggests that Connecticut law does not require a plaintiff to offer evidence of litigation costs at trial. We believe that these two cases, *Kenny* and *Berry*, appear to make Connecticut law on punitive damages ambiguous." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted). *Wolf* v. *Yamin*, supra, 295 F.3d 309–11. Two months after the Second Circuit certified its question to our Supreme Court, the request for certification was withdrawn, leaving the question unanswered, and the matter was voluntarily dismissed at the Second Circuit.

We next consider the Second Circuit's statement that *Kenny* and *Berry* "appear to make Connecticut law on punitive damages ambiguous." Id., 311. As noted by the Second Circuit, *Kenny* was a trial to the court, and the remand from our Supreme Court was to the trial court for a hearing in damages. See *Kenny* v. *Civil Service Commission*, supra, 197 Conn. 278–79. That, in and of

itself, distinguishes *Kenny* from the cases in which the matter is tried to a jury, and the jury is released from its service after issuing its verdict. We also are unable to discern from the decision, which stated in part, "the court took no evidence as to the actual costs of the ligation, and no posttrial hearing in damages was ever held," whether the trial court made the decision before or during trial that it did not want to take evidence as to the costs of litigation until after it rendered judgment. See id., 278.

In *Berry*, our Supreme Court was called upon to determine, inter alia, whether there was evidence to support an award of punitive damages. *Berry* v. *Loiseau*, supra, 223 Conn. 811. The court held that "the jury could reasonably have found from the evidence presented at the trial that [the defendant] subjected the plaintiff to physical abuse, in reckless disregard of the consequences of his actions. Accordingly, [it was] persuaded that the trial court properly allowed the jury to decide whether the plaintiff was entitled to punitive damages on the sixth count of the complaint." Id., 811–12.

In the plaintiff's separate appeal in *Berry*, he claimed that the trial court, in relevant part, improperly had "(1) denied him his constitutional right to have the jury determine the amount of his punitive damages award; [and] (2) applied General Statutes § 52–251c to limit the amount of punitive damages awarded him to one third of his recovery on the intentional infliction of emotional distress count . . . ." Id., 822–23. Our Supreme Court concluded that the plaintiff had waived his constitutional claim by failing to preserve it; id., 827–28; but it agreed with the plaintiff's second claim, reversed the judgment as to the amount of punitive damages, and remanded the case for a new hearing on punitive damages. Id., 829. The fact that our Supreme Court remanded the case for a hearing on punitive damages, presumably before the trial court, does not indicate to us anything more than that the plaintiff had

waived any purported right to have that issue decided by a jury. In the present case, the defendant clearly did not waive any rights she may have had to have the jury decide the amount of punitive damages. Accordingly, we conclude that both *Kenny* and *Berry* are distinguishable from the present case and do not address the resolution of claims for common-law punitive damages submitted to a jury.

In Connecticut, common-law punitive damages, also called exemplary damages, primarily are compensatory in nature. See *Bodner* v. *United Services Auto. Assn.*, 222 Conn. 480, 492, 610 A.2d 1212 (1992) (in Connecticut, common-law punitive damages "are limited to the plaintiff's attorney's fees and nontaxable costs, and thus serve a function that is both compensatory and punitive"); see also *Hylton* v. *Gunter*, supra, 313 Conn. 493 (*McDonald*, *J.*, dissenting) (common-law punitive damages are compensatory in nature, but also serve "a punitive and deterrent function"). "To furnish a basis for recovery of punitive damages, the pleadings must allege and the evidence must show wanton or wilful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought. . . . *If awarded*, [*common-law*] *punitive damages are limited to the costs of litigation less taxable costs*, *but*, *within that limitation*, *the extent to which they are awarded is in the sole discretion of the trier*. . . . Limiting punitive damages to litigation expenses, including attorney's fees, fulfills the salutary purpose of fully compensating a victim for the harm inflicted . . . while avoiding the potential for injustice which may result from the exercise of unfettered discretion by a jury. . . . We have long held that in a claim for damages, proof of the expenses paid or incurred affords some evidence of the value of the services . . . . *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 335–36, 852 A.2d 703 (2004); but cf. *Berry* v. *Loiseau*,

supra, 223 Conn. 827 (common-law punitive damages, when viewed in the light of the increasing costs of litigation, also [serve] to punish and deter wrongful conduct)." (Emphasis added; internal quotation marks omitted.) *Hylton* v. *Gunter*, supra, 313 Conn. 486 n.14.

Juries in Connecticut have been awarding punitive damages for "wanton or malicious injuries" for more than two hundred years. See, e.g., *Linsley* v. *Bushnell*, 15 Conn. 225, 235 (1842), and cases cited therein. More recently, in *Bifolck* v. *Philip Morris, Inc.*, 324 Conn. 402, 451, 152 A.3d 1183 (2016), our Supreme Court confirmed that, in a jury trial, the question of the amount of punitive damages is for the jury, not the court, when the parties do not agree to have the court decide that issue. As our Supreme Court explained: "Indeed, it was precisely because juries assessed the amount of punitive damages that this court was motivated to adopt the common-law rule, limiting the exercise of the jury's discretion by tying such damages to litigation expenses."[14] Id. In reaching this conclusion, the court

[14] Connecticut Civil Jury Instructions 3.4-4 offers the following jury instruction for cases involving punitive damages: "In addition to seeking compensatory damages, the plaintiff seeks an award of punitive damages. Punitive damages are damages awarded not to compensate the plaintiff for any injury or losses but to punish the defendant for outrageous conduct and to deter (him/her) and others like (him/her) from similar conduct in the future. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's reckless indifference to the rights of others or an intentional and wanton violation of those rights. You may award punitive damages only if you unanimously find, from facts established by a preponderance of the evidence, that the conduct of the defendant was, in fact, outrageous.

"The law does not require you to award punitive damages. It is, instead, a matter for your sound discretion. An award of punitive damages must not reflect bias, prejudice or sympathy with respect to any party. It must instead be fairly based on the evidence in the case.

"There is no exact standard for fixing the amount of punitive damages. The amount awarded, if any, should be the amount you unanimously find necessary for achieving the objectives of punitive damages that I have described. You should consider the degree of reprehensibility of the defendant's misconduct and the actual or potential harm suffered by the plaintiff." Connecticut Civil Jury Instructions 3.4-4, available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited September 5, 2019).

In the notes that follow the model instruction, the following is offered: "With respect to common-law causes of action, the final paragraph of the

distinguished common-law punitive damages from the award of punitive damages or attorney's fees under certain statutory causes of action that specifically provide that the court, not the jury, is to determine the amount to be awarded. Id., 449–51.[15]

That juries are to determine the amount of common-law punitive damages is confirmed also by our state statutes. General Statutes § 52-215 provides in relevant part: "The following-named classes of cases shall be entered in the docket as jury cases upon the written request of either party made to the clerk within thirty

suggested charge should be replaced by the following language: 'Punitive damages are limited to the costs of litigation, including attorney's fees, less taxable costs. Within that limitation, the extent to which they are awarded is within your sole discretion.' . . . '[T]here is an undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an appropriate evidentiary showing.' . . .

"With respect to common-law causes of action, it may be prudent to have the jury find whether an award of punitive damages is appropriate and to have the court subsequently determine the amount of such award." (Citations omitted.) Id., notes. The final suggestion, however, does not address what the court should do if the defendant objects to that procedure.

[15] In a footnote, the Supreme Court stated: "We note that, despite repeated statements in the past that 'the extent to which exemplary damages are to be awarded ordinarily rests in the discretion of the trier of the facts'; *Gionfriddo* v. *Avis Rent A Car System, Inc.*, 192 Conn. 280, 295, 472 A.2d 306 (1984); several more recent decisions reflect a trend toward having the trial court determine the amount of common-law punitive damages following a jury trial, thus implicitly limiting this statement to a determination of the entitlement to such damages. See *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 313, 50 A.3d 841 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013); *Nelson* v. *Tradewind Aviation, LLC*, 155 Conn. App. 519, 530, 111 A.3d 887, cert. denied, 316 Conn. 918, 113 A.3d 1016 (2015); *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 873–74, 89 A.3d 993, cert. denied, 312 Conn. 920, 94 A.3d 1200 (2014); *Metcoff* v. *NCT Group, Inc.*, 137 Conn. App. 578, 582, 49 A.3d 282 (2012); *Bridgeport Harbour Place I, LLC* v. *Ganim*, 131 Conn. App. 99, 165–66, 30 A.3d 703, cert. granted, 303 Conn. 904, 31 A.3d 1179 (2011) (appeal withdrawn January 27, 2012), cert. granted, 303 Conn. 905, 31 A.3d 1180 (2011) (appeal withdrawn January 26, 2012)." *Bifolck* v. *Philip Morris, Inc.*, supra, 324 Conn. 450 n.24. None of the cases cited by the court in *Bifolck*, however, involved matters in which there had been a jury trial and the defendant had objected to the trial court reserving the issue of *the amount* of the punitive damages to itself; they all appear to be cases in which the parties either agreed that the court, rather than the jury, would determine the amount to be awarded after the jury found the plaintiff liable, or they involved trials to the court.

days after the return day . . . civil actions involving such an issue of fact as, prior to January 1, 1880, would not present a question properly cognizable in equity . . . . All issues of fact in any such case shall be tried by the jury, provided the issues agreed by the parties to be tried by the court may be so tried. . . .'' See also Practice Book § 14-10.

Additionally, pursuant to General Statutes § 52-216: ''The court shall decide all issues of law and all questions of law arising in the trial of any issue of fact; and, in committing the action to the jury, shall direct them to find accordingly. The court shall submit all questions of fact to the jury, with such observations on the evidence, for their information, as it thinks proper, without any direction as to how they shall find the facts. After the action has been committed to the jury, no pleas, arguments or evidence may be received before the verdict is returned into court and recorded.'' See also Practice Book § 16-9.

As noted, claims for common-law punitive damages were recognized and submitted to juries for the determination as to the amount of such damages long before 1880. In the present case, the defendant repeatedly told the court and the plaintiff that she wanted the jury to determine the amount of punitive damages. The plaintiff was on notice of this before she put on any evidence in the case, when, on February 6, 2017, the defendant filed her preliminary request to charge the jury and her proposed jury interrogatories. The plaintiff called the first witness on February 8, 2017. There is no indication that the plaintiff filed a motion requesting the court to opine on whether she needed to produce evidence in her case-in-chief as to the amount of her punitive damages. When the defendant again raised this issue during the March 9, 2017 charging conference, which occurred after the close of evidence, the plaintiff did not request to open the evidence to allow her to submit evidence on the amount of punitive damages. The defendant again

objected, in the form of an exception, after the court charged the jury on the issue of punitive damages when there had been no evidence as to the amount of those damages. The issue certainly was well preserved.

Because the defendant properly and timely requested that the question of the amount of punitive damages be decided by the jury, it was incumbent on the plaintiff to submit evidence supporting her claim to such damages in her case. It is undisputed that she did not do so. We conclude, on the basis of the foregoing, that the court improperly charged the jury on punitive damages when there was no evidence of damages to support that charge. See *Venturi* v. *Savitt, Inc.*, supra, 191 Conn. 592–93 ("it is essential for the plaintiff to offer evidence of what those [punitive] damages are"; "punitive damages are not properly recoverable in the absence of evidence as to the elements entering into their determination"); *Chykirda* v. *Yanush*, supra, 131 Conn. 568–69 ("[p]unitive damages are limited to the costs of litigation less taxable costs, but within that limitation the extent to which they are awarded is in the discretion of the trier"; "punitive damages are not properly recoverable in the absence of evidence as to the elements entering into a determination of them"); see also *Green* v. *H.N.S. Management Co.*, supra, 91 Conn. App. 758 ("[t]he trial court has a duty not to submit any issue to the jury upon which the evidence would not support a finding" [internal quotation marks omitted]). Accordingly, the judgment as to the defendant's liability for punitive damages must be reversed. The defendant had the right to have the issue of the amount of punitive damages determined by the jury. In light of the fact that the plaintiff admittedly submitted no evidence of her litigation expenses, the matter should not have gone to the jury.[16]

[16] We also are unpersuaded by the plaintiff's argument that, because the case was not completely over when she rested, it was not possible for her to submit evidence of her litigation expenses to the jury. There are numerous

IV

The defendant's final claim is that the trial court improperly denied her motion to set aside the verdict, which alleged that there was insufficient evidence that the plaintiff suffers from post-traumatic stress disorder and other psychological trauma and injuries. She argues that the "plaintiff offered no competent and sufficient evidence to establish that she actually suffered from the medical and/or psychological conditions she claimed, or that those conditions were caused by childhood sexual abuse."

The following additional facts and procedural history assist with our review. In her complaint, the plaintiff claimed in count one that the decedent had committed intentional sexual assault against her. She claimed, inter alia, that "[a]s a result of said sexual abuse, sexual assault and sexual exploitation, the plaintiff has suffered extreme trauma, mental anguish and psychological injury, which is permanent in nature." Following the plaintiff's case-in-chief, the defendant filed a motion for a directed verdict on the ground that "the plaintiff ha[d] failed to present any competent and sufficient evidence to establish that she in fact suffers from any of the various medical/psychological conditions that she claims in the harm that was inflicted on her as a result of childhood sexual abuse by [the decedent], or that any such harm was caused by the alleged childhood sexual abuse." The court reserved judgment on that motion.

At the conclusion of the trial, the jury found in favor of the plaintiff on the first count of her complaint, and it returned a damages award of $15 million, as follows:

examples of this court and our Supreme Court reviewing common-law punitive damages awards made by juries on the basis of the plaintiff's evidence of litigation expenses. See, e.g., *Matthiessen* v. *Vanech*, 266 Conn. 822, 826, 836 A.2d 394 (2003) (jury awarded $118,000 in common-law punitive damages).

Mental anguish and emotional distress $5 million; psychological trauma and injuries $5 million; permanency of injuries $3 million; and inability to pursue life's enjoyment $2 million. The defendant thereafter filed a motion to set aside the verdict and for a judgment notwithstanding the verdict. In a corrected memorandum of decision, the trial court denied that motion. The defendant claims that this was error. Additional facts will be set forth as necessary.

"Our standard of review of the court's refusal to grant [motions for directed verdicts and to set aside verdicts] requires us to consider the evidence in the light most favorable to the prevailing party, according particular weight to the congruence of the judgment of the trial judge and the jury, who saw the witnesses and heard their testimony. . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached [its] conclusion. . . . While it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . If the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Our standard of review, where the trial court's action on a motion to set aside a verdict is challenged, is whether the trial court clearly abused its discretion. . . . The decision to set aside a verdict is a matter within the broad legal discretion of the trial court and it will not be disturbed unless there has been a clear abuse of that discretion." (Internal quotation marks omitted.) *Kosiorek* v. *Smigelski*, 138 Conn. App. 695, 707–708, 54 A.3d 564 (2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013).

The defendant contends that the plaintiff offered no competent medical or psychological evidence to support her claims that she suffers from psychological injuries or that those injuries will continue in the future.

She argues that the plaintiff's expert witness, Dawn Hughes, a clinical and forensic psychologist, opined that childhood sexual abuse can result in harmful effects, but she did not draw any conclusions with respect to the plaintiff or her alleged injuries. Furthermore, the defendant argues, no medical professionals with whom the plaintiff previously may have treated testified that she ever suffered from emotional or psychological trauma, or that she will continue in the future to suffer from such trauma. Accordingly, the defendant argues that the court erred in denying her motion to set aside the verdict. The plaintiff argues that the court properly denied the defendant's motion because there was ample evidence of the plaintiff's injuries. We agree with the plaintiff.

The plaintiff testified during trial about her emotional and psychological trauma. She testified that the decedent began abusing her sexually when she was approximately six years old but that she did not understand that this was sexual abuse, and, in fact, she "thought he was maybe cuddling [her] but it also hurts." She testified about the hair on his arms, his breath, his saliva on her neck, and his smell. She testified that this abuse happened on a regular basis until she was seventeen years old and that she tried to distract herself while it was occurring, attempting to focus on other things.

The plaintiff also testified that at age nine, she was "very popular," that she "felt like [she] was the teacher's pet . . . [and that] all the girls wanted to be [her] friend. [She] was doing . . . really well, amazingly well academically . . . [that she] was put into the highest math class . . . [and that she] felt . . . very confident and okay." The plaintiff said, however, that this all changed as she began to reach puberty, around the age of ten, and that the abuse became more intense after that. She stated that at that time she came to realize that what the decedent was doing was sexual. She testified that she "became absolutely consumed with shame

and . . . felt so dirty. [She] felt really guilty because [she] felt like [she] was doing something bad to [her] mom. [She] couldn't sleep because [she] was afraid [the decedent] would come in, and [she] started withdrawing." She also testified that she stopped doing well in school, stopped socializing with friends, and experienced binge eating, and that she wanted to die. She also stated that she wanted to gain weight so that she would be unattractive to the decedent.

The plaintiff testified that by the time she was in high school, she "considered [her]self to be fat and [she] felt ugly and unattractive . . . ." She also stated that she had low self-esteem and that, in her junior year of high school, she received several grades of "D."

The plaintiff told the jury about her prior drug abuse, her alcohol abuse, and her sexual promiscuity, and she stated that she did things because she "was trying to just not be here, just go someplace away from reality because [she] had felt so much shame about [her]self." She testified about her experiences with psychotherapy, cognitive behavioral therapy, and an incest group that was made up of women who had been victims of childhood sexual abuse. She testified about dealing with "the trauma and the flashbacks, the intrusive memories, the panic, the anxiety, [and] the sadness . . . ." She detailed how those issues still continue and discussed her depression, insomnia, sadness, and belief that nearly every decision she makes in her life is shaped by the abuse she suffered. She testified about her difficulty being around aggressive, strong, or professional men, who remind her of the decedent, and how she can't function in their presence. The plaintiff also testified about her husband and some of the marital issues they have experienced related to sexual intimacy. She explained that although she has been in therapy for years, she still feels dirty and ashamed, but that she tries to take one day at a time by concentrating on being healthy that day. Some of the plaintiff's other

witnesses also substantiated portions of the plaintiff's testimony.[17]

The plaintiff also called Dr. Hughes to testify as an expert. Hughes testified that she specializes in "interpersonal violence and traumatic stress . . . [which] covers childhood abuse, childhood sexual abuse, rape, sexual assault, domestic violence . . . and single assaults." She explained that children who experience sexual abuse often do not report the abuse and that they may be afraid. She also stated that the children may be unaware of what is happening to them and that they may feel dirty and a tremendous amount of shame and embarrassment.

Hughes testified that "when we look at the effects of childhood sexual abuse, we see that there's a higher degree of likelihood of a number of disorders and difficulties. So, we see post-traumatic stress disorder. We see depressive disorders; we see anxiety disorders. We see suicidality. We see sleep difficulties. We also see a host of . . . problems in living, interpersonal difficulties, difficulties trusting others, still struggling immensely with guilt, and shame, and embarrassment, even years later."

Hughes also stated: "So, when an individual who has been sexually abused as a child . . . they learn the

[17] For example, Jonathan Spalter testified that he "observed [the plaintiff] being transformed and when she was a little girl . . . she was . . . the light of our life . . . she had so many friends. She . . . really was this joyful little girl, so smart, so curious. She would come and help me with my own homework. I would bring her in and she just was exuberant. And by the time she turned . . . maybe eight years old . . . I noticed things like she just started becoming a little more withdrawn. . . . I remember . . . coming in late at night into the kitchen and seeing [her] . . . on the floor eating . . . ice cream, the whole half gallon thing of ice cream. She was a little girl. And she started to gain weight. . . . And in the next couple of years . . . this once happy-go-lucky girl, who was so curious about things, had so many friends, just the lights went off. . . . She became withdrawn, and morose, and sad . . . . [W]hen she . . . [was] a junior or senior in high school, this really became a more of her permanent state." Alan Spalter testified to similar changes in the plaintiff's behavior and personality.

wrong things. Basically, they learn that someone who loves you and is supposed to take care of you, also can harm you and abuse you. . . . So, when [these children] go out into the world, they often have trust difficulties . . . . They don't really know if they can trust people. They often have difficulties with people in authority because people who were above them . . . abused that power and sexually abused them. They often have difficulty with their . . . own sense of value. Having been abused makes one feel . . . dirty and damaged . . . and ashamed. . . . [A] lot of abuse victims . . . find themselves closed in and not offering much of themselves. As a result, then they tend to feel very disconnected in this world . . . ."

Hughes discussed that victims of childhood sexual abuse often have problems having healthy sexual relationships because of the nature of their trauma. She explained that post-traumatic stress disorder (PTSD) "is a disorder that arises when somebody has been exposed to a traumatic stressor. . . . [T]he brain remembers. So, the memories continue. Sometimes, we say, the trauma ends and the nightmare begins. . . . [W]hen the memories of the abuse come into their mind, they're psychologically distressed. So then they have accompanying symptoms of sadness, of guilt, of anger, of rage, of embarrassment, that continue to linger. Sometimes they have dreams about abusive episodes or themes of abuses as well. The next thing they try to do . . . is avoid. That's a second symptom . . . of PTSD, the intrusion, then the avoidance. They try to push . . . it away. They try not to think about it. We try not to feel it. Those are the avoidance clusters."

Hughes then talked about the "hyperarousal" response that PTSD sufferers also may experience. She stated that they often are "quite jumpy." They experience a "sense of hypervigilance . . . scanning the environment to make sure you're safe." She stated that this "disrupts concentration and attention, our ability to

. . . sleep . . . .” Hughes then explained: “And then the . . . fourth cluster of symptoms is . . . changes in your thoughts and feelings. It changes the way you view the world. . . . [T]he world is not safe . . . . Also, I am not worthy. You know, I am disgusting. These sort of . . . fundamental changes in the way someone views the world.”

Hughes also opined that “depressive disorders have been associated with individuals who have been abused as children. It actually is one of the most robust findings, the depressive disorders, even sometimes above and beyond PTSD . . . . People can have depression that doesn’t rise to a level of a disorder, but once it gets to a disorder, the definition includes impairment and functioning. . . . So depression certainly . . . is related—has been shown to be related to childhood sexual abuse and can also interfere with people’s everyday functioning.”

The defendant contends that this evidence was insufficient to support the plaintiff’s claim for psychological damages. She argues that the plaintiff needed competent medical or psychological evidence to support her claims that she suffers from psychological injuries or that those injuries will continue in the future. We conclude that the evidence was sufficient.

In *Braun* v. *Edelstein*, 17 Conn. App. 658, 661–62, 554 A.2d 1102, cert. denied, 211 Conn. 803, 599 A.2d 1136 (1989), this court considered and rejected a claim that is similar to the one raised by the defendant. In that case, the defendant, Edelstein, had argued that the plaintiff needed to call her treating psychiatrist to testify that the assault by the defendant had caused the plaintiff’s emotional injury. Id. Specifically, this court explained: “[E]xpert testimony is not required in order to prevail on a claim for mental suffering. A plaintiff may recover damages in a personal injury action for pain and suffering even when such pain and suffering

is evidenced exclusively by the plaintiff's subjective complaints. . . . A plaintiff need only establish a claim for mental or emotional distress by a fair preponderance of the evidence. . . . The defendant does not demonstrate that the plaintiff failed to meet this burden. Our function is to decide whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record . . . . Weighing the evidence and judging the credibility of the witnesses is the function of the trier of fact and this court will not usurp that role." (Citations omitted; internal quotation marks omitted.) Id., 662; see *Giordano* v. *Giordano*, 39 Conn. App. 183, 184–85, 207–208, 664 A.2d 1136 (1995) (in action alleging six counts of sexual abuse and emotional distress against grandfather, court found testimony of grandchildren sufficient to support award of prejudgment remedy, holding "[p]laintiffs claiming damages as a result of emotional distress are not required to present expert medical testimony . . . to substantiate their claims of noneconomic damages such as pain and suffering" [emphasis omitted]).

In the present case, the plaintiff submitted factual evidence as to what the decedent did to her and the impact his actions have had on her emotional and psychological well-being. She also submitted expert testimony, through Hughes, regarding the symptoms typically displayed by victims of sexual abuse and sexual assault. It was in the province of the jury to conclude, on the basis of all of the evidence it heard, that the plaintiff's evidence regarding the emotional and psychological injuries inflicted on her at the hands of the decedent was credible and that her injuries were worthy of compensation. We conclude, therefore, on the basis of the evidence presented, that there was ample proof to support the jury's verdict and, therefore, that the court did not abuse its discretion when it denied the defendant's motion to set aside that verdict.

In conclusion, the court properly denied the plaintiff's motion to dismiss, concluding that it had personal juris-

diction over the estate; the defendant failed to prove that she was harmed by any purported impropriety in the court's admission of certain evidence; the court improperly sent to the jury the question of the plaintiff's entitlement to punitive damages when the plaintiff had failed to submit evidence at trial of her litigation expenses; and the court did not abuse its discretion in denying the defendant's motion to set aside the verdict because there was ample evidence that the plaintiff suffers from psychological trauma caused by the childhood sexual abuse of the decedent.

The judgment is reversed only as to the defendant's liability for punitive damages and the case is remanded with direction to vacate the jury's finding in that regard; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

PASCO COMMON CONDOMINIUM ASSOCIATION, INC., ET AL. *v.* PAUL D. BENSON ET AL.
(AC 39898)

Prescott, Bright and Cobb, Js.

Syllabus

The plaintiffs, an association of unit owners in a common interest community that had been created pursuant to the Common Interest Ownership Act (§ 47-200 et seq.) and eighteen individual members of that association, brought this action alleging that the defendant B Co., the declarant, and the defendant B, the president and chief operating officer of B Co., violated the provisions of a condominium declaration recorded by B Co. by, inter alia, assessing common charges against unit owners on the basis of a formula that deviated from the terms of the declaration. The condominium complex was comprised of residential and commercial units, one of which was occupied by a restaurant. Since the inception of the condominium complex, B was in complete control of B Co. as its president and chief operating officer, and he owned almost all of its stock. Because B owned a majority of the units in the complex, he was also in complete control of the association. B, however, did not act in

conformity with the declaration in several instances, including when he did not follow the formula defined in the declaration for assessing common charges to the unit owners, he made an agreement with the restaurant exempting it from paying common charges, and he expended association funds to finance repairs to units, for management fees, and for vehicle and paving expenses. In 2009, pursuant to the terms of the declaration, control of the association transitioned from an executive board consisting of B and two members of his family to three directors: B and two unit owners. B, however, continued to direct that common charges be assessed pursuant to his methodology, and B Co. continued to amend the declaration and exercise development rights through 2013, when the plaintiffs filed the present action. In their answer and special defenses, B and B Co. alleged that all of the plaintiffs' claims were barred by the three year statute of limitations applicable to tort actions (§ 52-577) and the six year statute of limitations applicable to contract actions (§ 52-576), as B Co.'s executive control of the declaration's board ended in 2008, pursuant to the declaration. The trial court determined that the plaintiffs' action was not time barred until 2013, when the plaintiffs' commenced their action, on the ground that the misconduct of B and B Co. continued to that time and because the period of declarant control defined by statute (§ 47-245 [d]), as well as under provisions of the declaration, had not terminated. On the defendants' appeal to this court, *held:*

1. The trial court incorrectly determined that the statute of limitations governing the plaintiffs' claims was tolled until the commencement of the present action, as the statute of limitations applicable to the plaintiffs' action against B Co. was tolled only until the period of declarant control ended on August 12, 2008, ten years after the declaration was recorded in 1998: that court improperly interpreted the declaration and applicable statutes to conclude that the period of declarant control could continue beyond the ten year limit established in § 8.10 of the declaration so long as one of the terminating events in § 47-245 (d) and § 8.9 of the declaration had not occurred, as that conclusion ignored the fact that, regardless of the occurrence of those events, B Co.'s right to appoint and remove executive board members expired no later than ten years after the recording of the declaration, and, thus, although B Co. may have engaged in conduct through 2013 consistent with control, its period of control legally ended on August 12, 2008, ten years after the declaration was recorded; moreover, that conclusion was supported by the language of § 47-245 (d), which permits a declaration to set a specific period of time of declarant control that can be shortened only by the occurrence of any of four terminating events set forth in the declaration, and it would contravene the legislature's intent to permit the declaration to set a specific period of declarant control if that period could continue beyond its set expiration as a result of the declarant's own conduct.
2. The defendants could not prevail on their claim that all of the plaintiffs' claims in counts one through eight were time barred: in light of this

court's conclusion that the statute of limitations was tolled until August 12, 2008, and the fact that the present action was commenced almost five years later in July, 2013, the timeliness of the plaintiffs' action was necessarily contingent on whether the three year tort statute of limitations in § 52-577 or the six year contract statute of limitations in § 52-576 applied, and, therefore, the plaintiffs' claims that sounded in both tort and contract were not barred by § 52-576, which included its claims that B Co. had a duty to record correct unit square footage in the amendments to the declaration, that the defendants made a secret arrangement with the owner of the restaurant to exempt the restaurant from paying common charges, that the defendants improperly assessed common charges related to the improper wiring of certain common area lighting, and that the defendants improperly expended the funds of the association to finance repairs and maintenance for units and for paving expenses; nevertheless, the plaintiffs' claim that the defendants engaged in self-dealing and that B breached his fiduciary duty by remitting association funds to the defendants as a management fee, and by charging the association for B's personal vehicle expenses sounded in tort only and, thus, was barred by the statute of limitations in § 52-577.

3. The trial court improperly awarded damages to the association for common charges that should have been assessed to the restaurant, as that award was inconsistent with the court's finding that the association, which had collected 100 percent of the common charges to which it was entitled, had not been harmed or damaged by the failure of the restaurant to pay its share of common expenses, which damaged only the individual unit owners who had paid an increased amount of common charges as a result thereof, and because the individual unit owners did not seek damages, the award of damages to the association for common charges that should have been assessed to the restaurant was improper.

4. The trial court's decision to pierce the corporate veil and hold B individually liable for the misconduct of B Co. was clearly erroneous: although that court set forth findings with respect to the first element of the instrumentality rule, namely, that B exercised sufficient control over B Co., the court's decision was devoid of any findings as to the second and third elements of the instrumentality rule, as the court, with respect to the second element, set forth an exhaustive list of B's misconduct but made no findings that B used his control over B Co.'s corporate form to accomplish that misconduct, and the breaches of duty that the court attributed to B arose out of his direct relationship with the association through his position on the executive board, not through his role as owner of B Co., and because the plaintiffs sought only to hold B derivatively liable for the conduct of B Co. and B's alleged misconduct did not arise out of his control of B Co., the plaintiffs failed to satisfy the second element of the instrumentality rule; moreover, as to the third element, the court's decision did not find that B's control over B Co. proximately caused the association's injuries and B's control over the association through this position on the executive board was insufficient.

Argued March 7—officially released September 10, 2019

Procedural History

Action to recover damages for, inter alia, alleged violations of a condominium declaration, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Scholl*, *J.*; judgment rendered in part for the plaintiffs, from which the defendants appealed to this court. *Reversed in part*; *judgment directed in part.*

Edward S. Hill, with whom were *John F. Harvey*, *Jr.*, and *P. Jo Anne Burgh*, for the appellants (defendants).

Walter A. Twachtman, *Jr.*, for the appellees (plaintiffs).

Opinion

BRIGHT, J. The defendants, Benson Enterprises, Inc. (declarant), and Paul D. Benson, appeal from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiffs, Pasco Common Condominium Association, Inc. (association), and eighteen individual members of the association.[1] On appeal, the defendants claim that (1) the court incorrectly concluded that the statute of limitations governing the plaintiffs' claims was tolled until the commencement of the present action because the period of declarant control had not terminated, (2) the plaintiffs' action was time barred pursuant to General Statutes § 52-577, the three year statute of limitations applicable to tort actions,[2] (3) the court improperly awarded the association damages on the plaintiffs' claim that the defendants improperly assessed common charges, and (4) the court improperly

[1] The eighteen individual members of the association are Steven Fowler, Rene Dupuis, Thomas DeForge, Brian U. Mozzer, Michael S. O'Neill, Sheryl Marinone, Hari Grunupudi, Brian C. Cassidy, Robert Torneo, John Bartolucci, Michael Barrett, Deb Romero, Karen Bona, Michael R. O'Connell, David Santiago, Catherine Peirolo, Robert D. Rybick, and Shaun O'Conner.

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

determined that Benson individually was liable.[3] We agree with the defendants' first, third, and fourth claims, but we disagree in part with the defendants' second claim. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The record reveals the following relevant facts, found by the trial court or otherwise undisputed, and procedural history. On August 11, 1993, the declarant created Pasco Common, a common interest community, pursuant to the Common Interest Ownership Act (act), General Statutes § 47-200 et seq., by recording the Declaration of Pasco Common on the land records. Pasco Common is a condominium complex located in East Windsor and is comprised of dozens of residential and commercial units, one of which is occupied by a restaurant.

On August 12, 1998, the declarant recorded the operative, Amended and Restated Declaration of Pasco Common (declaration). The declaration provides for the creation of the association as a Connecticut nonstock corporation. The members of the association are the unit owners at Pasco Common, and the association is governed by an executive board. The executive board has the powers and duties to act on behalf, and manage

[3] The defendants also claim that the court improperly altered its memorandum of decision in response to an order of articulation from this court to determine that Benson individually was liable to the plaintiffs pursuant to count ten of the complaint. In light of our conclusion in part IV of this opinion that the court improperly determined that Benson individually was liable, we need not reach this claim.

Furthermore, the defendants amended their appeal to include a challenge to the court's judgment, issued after it rendered judgment for the plaintiffs on their complaint, in which it awarded attorney's fees and costs to the plaintiffs. Although the defendants offer no analysis in their briefs on appeal, this claim appears to be premised on the fact that the plaintiffs are entitled to attorney's fees and costs, pursuant to General Statutes § 47-253 (d), only if "the declarant is liable to the association . . . ." We reject this claim on the basis of our conclusion that certain claims against the declarant are not time barred by the statute of limitations and, thus, that the declarant is liable to the association.

the affairs, of the association. These powers and duties include, among other things, to adopt and amend bylaws and budgets, to collect common charges from unit owners, and to expend the funds of the association. The declaration also provides the declarant with developmental rights,[4] special declarant rights,[5] and the right to control the association.[6] The declaration provides specific time periods during which the declarant had the authority to exercise these rights. In particular, the special declarant rights expired no later than ten years after the declaration was recorded. Despite these limitations, between October 5, 1998, and March 19, 2013, the declarant recorded twenty-one amendments to the declaration, primarily to add units to Pasco Common.

[4] General Statutes § 47-202 (16) defines "Development rights" as "any right or combination of rights reserved by a declarant in the declaration to (A) add real property to a common interest community; (B) create units, common elements, or limited common elements within a common interest community; (C) subdivide units or convert units into common elements; or (D) withdraw real property from a common interest community."

[5] General Statutes § 47-202 (33) defines "Special declarant rights" as "rights reserved for the benefit of a declarant to (A) complete improvements indicated on surveys and plans filed with the declaration or, in a cooperative, to complete improvements described in the public offering statement pursuant to subdivision (2) of subsection (a) of section 47-264; (B) exercise any development right; (C) maintain sales offices, management offices, signs advertising the common interest community, and models; (D) use easements through the common elements for the purpose of making improvements within the common interest community or within real property which may be added to the common interest community; (E) make the common interest community subject to a master association; (F) merge or consolidate a common interest community with another common interest community of the same form of ownership; (G) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control; (H) control any construction, design review or aesthetic standards committee or process; (I) attend meetings of the unit owners and, except during an executive session, the executive board; or (J) have access to the records of the association to the same extent as a unit owner."

[6] General Statutes § 47-245 (d) provides in relevant part: "[T]he declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. . . ."

Since the inception of Pasco Common, Benson was in complete control of the declarant because he was its president and chief operating officer, and he owned almost all of its stock. Between 1993 and 2009, Benson owned a majority of the units at Pasco Common,[7] and, thus, he was in complete control of the association. Prior to 2009, Benson, on behalf of the declarant, appointed the executive board members, who were his wife, Ann M. Benson, his son, Paul D. Benson, Jr., and himself. Until at least 2009, Benson, on behalf of the executive board, created the annual budgets for the association, determined the monthly common charges, decided what expenses the association would pay, decided who was responsible for repairs to the units, and conducted the business of the association without regard to whether his actions were in conformance with the terms of the declaration or the act.

For instance, Benson, on behalf of the executive board, assessed common charges to the unit owners on the basis of the square footage of each unit; these assessments, however, were improper because, inter alia, many of the square footage figures conflicted with the East Windsor land records. Further, unbeknownst to the residential unit owners, Benson and the unit owner of the restaurant, located at Pasco Common, made a special arrangement in which they agreed that the restaurant was exempt from paying common charges. Benson also improperly expended the association's funds to finance repairs he made to units, for management fees, for vehicle expenses, and for paving expenses.

In 2009, shortly after the period of declarant control provided for in the declaration ended, control of the association transitioned from the executive board that

[7] Although the declaration provided the declarant the ability to create a maximum of 213 units, there never was enough land to do so. As of June, 2009, Benson owned forty-eight of the seventy-six units that had been created. As of December, 2015, Benson, and the entities he controlled, owned thirty-seven of the eighty-one units that had been created.

included Benson, his wife, and his son to an executive board that consisted of three directors: Benson, Steven Fowler, and Rene Dupuis. Fowler and Dupuis are unit owners and plaintiffs. At the same time, management of the association transitioned from the declarant to Advance Property Management and then, in 2011, to Elite Property Management. Nevertheless, Benson directed the new management of the association to continue to assess common charges pursuant to his own methodology, as opposed to the method prescribed by the declaration. Furthermore, the declarant continued to amend the declaration and exercise development rights through 2013.

In July, 2013, the plaintiffs commenced the present action against the defendants. The plaintiffs' operative, amended complaint contains ten counts. In counts one through eight, the plaintiffs allege that the declarant violated the declaration as well as certain provisions of the act[8] by assessing common charges against unit owners on the basis of a formula that deviated from the terms of the declaration; issuing an inadequate, incorrect, and misleading public offering statement; failing to keep adequate records of the association's finances; modifying and creating units without the approval or notice to the executive board; failing to pay its correct proportion of the common charges; misrepresenting the true nature and composition of Pasco Common by failing to disclose that the restaurant was a unit and that the declarant would maintain total control over the association; amending the declaration without notice or approval by the executive board; and creating a garage unit. In count nine, the plaintiffs allege that the declarant violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. In count ten, the plaintiffs allege a piercing of the

[8] In particular, the complaint contains allegations that the declarant violated the declaration in counts one, three, and eight.

corporate veil count against Benson. In response, the defendants filed their operative answer and special defenses in which they allege, inter alia, that all of the plaintiffs' claims were time barred pursuant to § 52-577, the three year statute of limitations applicable to tort actions, and/or General Statutes § 52-576, the six year statute of limitations applicable to contract actions.[9]

On October 25, 2016, after a ten day bench trial, the court issued a memorandum of decision in which it rendered judgment for the plaintiffs against the declarant on counts one through eight, for the declarant on count nine, and for the plaintiffs against Benson individually on count ten.[10]

With respect to the defendants' statute of limitations special defense, the court held that the statute of limitations had been tolled, pursuant to General Statutes § 47-253 (d),[11] until 2013, because the period of declarant

[9] General Statutes § 52-576 (a) provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

[10] The court's memorandum of decision actually stated that the court "finds the issues for the defendants on the . . . tenth count . . . ." After the defendants filed their principal appellate brief, the plaintiffs filed a "motion for permission to file a late motion for rectification and articulation," and a corresponding motion for articulation, in which they requested that this court order the trial court to correct its conclusion that it rendered judgment in favor of Benson on count ten because the entirety of its decision found otherwise. This court denied the plaintiffs' motion for permission to file a late motion for rectification and articulation, but, nevertheless, we ordered, sua sponte, the trial court to articulate whether it disposed of count ten against Benson and its factual and legal basis therefor. In response, the trial court issued an articulation in which it stated that it had found count ten against Benson, rectified two sentences of its conclusion, and detailed the corresponding factual and legal basis therefor. The defendants challenge the propriety of the court's articulation in this appeal, but we need not reach this claim. See footnote 3 of this opinion.

[11] General Statutes § 47-253 (d) provides in relevant part: "Any statute of limitation affecting the association's right of action against a declarant under this chapter is tolled until the period of declarant control terminates. . . ."

control, as defined by General Statutes § 47-245 (d),[12] had not terminated as result of the defendants' continued misconduct. As a result, the court held that the plaintiffs' action was not time barred, except for count nine, the CUTPA claim, which the court determined was time barred by the three year statute of limitations because the plaintiffs had not raised their tolling claim as to that count until after trial.[13] As to the plaintiffs' other claims, the court, in light of its conclusion that any statute of limitations was tolled, did not make a determination as to whether the tort, contract, or some other statute of limitations was applicable. Consequently, the court awarded the association compensatory damages and ordered the defendants to take certain remedial actions. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendants claim that (1) the court incorrectly concluded that the statute of limitations governing the plaintiffs' claims was tolled until the commencement of the present action because the period of

[12] General Statutes § 47-245 (d) provides in relevant part: "[T]he declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require, during the remainder of the period, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (1) Sixty days after conveyance of sixty per cent of the units that may be created to unit owners other than a declarant . . . or, if no such number is specified, after conveyance to unit owners other than the declarant of three hundred units; (2) two years after all declarants have ceased to offer units for sale in the ordinary course of business; (3) two years after any right to add new units was last exercised; or (4) the date the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association."

[13] The plaintiffs do not challenge the court's judgment in favor of the declarant on count nine of their complaint.

declarant control had not terminated, (2) the plaintiffs' action was time barred pursuant to § 52-577, (3) the court improperly awarded the association damages on the plaintiffs' claim that the defendants improperly assessed common charges, and (4) the court improperly determined that Benson individually was liable.

I

The defendants first claim that the court incorrectly concluded that the statute of limitations governing the plaintiffs' claims was tolled until the commencement of the present action because the period of declarant control had not terminated. The defendants argue that the declaration set a ten year limit on the period of declarant control, and, thus, the statute of limitations was tolled only until 2008. They also argue that the tolling provision, § 47-253 (d), applies only to toll claims against the declarant, not Benson individually. The plaintiffs counter that the court properly determined that, notwithstanding the period provided by the declaration, the period of declarant control, in fact, continued until 2013 because the declarant continued to exercise special declarant rights through 2013. We agree with the defendants.

We begin by setting forth the applicable standard of review and relevant legal principles governing our resolution of the defendants' first claim. The interpretation of the relevant provisions of the act and the definitive language of the declaration are pure questions of law over which we exercise plenary review. See *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 380, 194 A.3d 759 (2018) (interpretation of statute is question of law); *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, 300 Conn. 254, 259, 14 A.3d 284 (2011) (interpretation of definitive language

in condominium declaration, which operates as contract, is question of law).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Hynes* v. *Jones*, 331 Conn. 385, 392–93, 204 A.3d 1128 (2019).

"It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [the statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Citations omitted; internal quotation marks

omitted.) *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 203, 937 A.2d 1184 (2008). "We are not in the business of writing statutes; that is the province of the legislature. Our role is to interpret statutes as they are written. . . . [We] cannot, by [judicial] construction, read into statutes provisions [that] are not clearly stated." (Internal quotation marks omitted.) *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 412, 999 A.2d 682 (2010).

"When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 341, 152 A.3d 1230 (2016). "[Additionally], in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *Awdziewicz* v. *Meriden*, 317 Conn. 122, 130, 115 A.3d 1084 (2015).

We next turn to the relevant provisions of the act. "The act is a comprehensive legislative scheme regulating all forms of common interest ownership that is largely modeled on the Uniform Common Interest Ownership Act. . . . The act addresses the creation, organization and management of common interest communities and contemplates the voluntary participation of the owners. It entails the drafting and filing of a

declaration describing the location and configuration of the real property, development rights, and restrictions on its use, occupancy and alienation . . . the enactment of bylaws . . . the establishment of a unit owners' association . . . and an executive board to act on . . . behalf [of the association]. . . . It anticipates group decision-making relating to the development of a budget, the maintenance and repair of the common elements, the placement of insurance, and the provision for common expenses and common liabilities." (Internal quotation marks omitted.) *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 22–23 n.2, 165 A.3d 193 (2017); see also *Fruin* v. *Colonnade One at Old Greenwich Ltd. Partnership*, 237 Conn. 123, 130–31, 676 A.2d 369 (1996) (outlining five major parts of the act).

The act specifies who may bring an action to enforce its provisions. General Statutes § 47-278 (a) provides in relevant part: "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 act makes the declarant liable to the association. Section 47-253 (c) provides: "The declarant is liable to the association for all funds of the association collected during the period of declarant control which were not properly expended." The act also provides that the statute of limitations applicable to such action brought against a declarant is tolled while the declarant is in control of the association. Section 47-253 (d) provides in relevant part: "Any statute of limitation affecting the association's right of action against a declarant under this chapter is tolled until the period of declarant control terminates."

The period of declarant control is defined by § 47-245 (d), which provides in relevant part: "[T]he declaration may provide for a period of declarant control of the

association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require, during the remainder of the period, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (1) Sixty days after conveyance of sixty per cent of the units that may be created to unit owners other than a declarant . . . or, if no such number is specified, after conveyance to unit owners other than the declarant of three hundred units; (2) two years after all declarants have ceased to offer units for sale in the ordinary course of business; (3) two years after any right to add new units was last exercised; or (4) the date the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association."

The plain and unambiguous language of § 47-245 (d) demonstrates that the legislature intended that the period of declarant control terminate on the occurrence of one of the terminating events or, at the latest, at the end of the period set by the declaration. The first sentence of the subsection permits a declaration to set a period of time for declarant control. The second and third sentences permit a declarant to voluntarily surrender his control over the association before the period ends, and to reserve its right of approval. The fourth sentence then provides that the first occurrence of any four terminating events would end the period of declarant control regardless of the time period set by the

declaration. To give effect to both the first and fourth sentences of § 47-245 (d), the period of declarant control set by a declaration must serve as the maximum time period, which can be shortened only by the first occurrence of any of the four terminating events. The first sentence permitting a declaration to set a period of declarant control has meaning only if it serves as the outer limit of declarant control because, otherwise, the statute would permit a declaration to set a period of time that necessarily would have no effect if the period of declarant control ended only on the earliest of the four terminating events. Thus, § 47-245 (d) permits a declaration to set a specific period of declarant control, which can be shortened only by the declarant voluntarily surrendering control or by the occurrence of any of the four terminating events outlined in subdivisions (1) through (4).

Because, pursuant to § 47-245 (d), the declaration can set forth the period of declarant control, we turn to the language of the declaration at issue in the present case. Article VIII of the declaration, titled "Development Rights and Other Special Declarant Rights," specifically provides a ten year period of declarant control. Section 8.10 of the declaration, titled "Limitations on Special Declarant Rights," provides: "Unless sooner terminated by a recorded instrument executed by the [d]eclarant, any [s]pecial [d]eclarant [r]ight may be exercised by the [d]eclarant during such period of time as the [d]eclarant is obligated under any warranty or obligation, holds a [d]evelopment [r]ight to create additional [u]nits or [c]ommon [e]lements, owns any [u]nit, or holds any [s]ecurity [i]nterest in any [u]nit, or for 10 years after recording this [d]eclaration, whichever is earliest. Earlier termination of certain rights may occur by statute." Section 8.4 of the declaration, titled "Special Declarant Rights," defines the special declarant rights subject to the limitations in § 8.10. Section 8.4 provides

in relevant part: "The [d]eclarant reserves the following [s]pecial [d]eclarant [r]ights, to the maximum extent permitted by law, which may be exercised, where applicable, anywhere within [Pasco Common] . . . . (e) To appoint or remove any officer of the [a]ssociation or any [e]xecutvie [b]oard member during any period of [d]eclarant control subject to the provisions of [§] 8.9 of this [d]eclaration."

Section 8.9 of the declaration, titled "Declarant Control of Association," provides in relevant part: "There shall be a period of [d]eclarant control of the [a]ssociation, during which the [d]eclarant, or persons designated by it, may appoint and remove the officers and members of the [e]xecutive [b]oard. The period of [d]eclarant control shall terminate no later than the earlier of:

"(i) sixty (60) days after conveyance of sixty percent . . . of the [u]nits [that] may be created to [u]nit [o]wners other than a [d]eclarant, a shareholder thereof, or his or her spouse, or other member of the immediate family;

"(ii) two (2) years after all [d]eclarants have ceased to offer [u]nits for sale in the ordinary course of business; or

"(iii) [e]ight (8) years after any right to add new [u]nits was last exercised.

"A [d]eclarant may voluntarily surrender the right to appoint and remove officers and members of the [e]xecutive [b]oard before termination of that period, but in that event the [d]eclarant may require, for the duration of the period of [d]eclarant control, that specified actions of the [a]ssociation or [e]xecutive [b]oard as described in a recorded instrument executed by the [d]eclarant be approved by the [d]eclarant before they become effective."

The court determined that § 47-253 (d) tolled any statute of limitations until 2013 because none of the events listed in § 8.9 and § 47-245 (d) (1) through (4) had occurred earlier to terminate the period of declarant control.[14] The court concluded that the ten year limit on the exercise of the special declarant rights set forth in § 8.10 of the declaration was not applicable to its analysis because "[t]he plain meaning of the declaration, which defines what special declarant rights may be exercised during the period of declarant control, is that the term of declarant control may be longer than the time in which the declarant may exercise special declarant rights." We disagree.

When §§ 8.4, 8.9, and 8.10 are read together, it is clear that the declaration set a ten year limit on the period of declarant control. Section 8.9, in relevant part, defines the period of declarant control as the time "during which the [d]eclarant . . . may appoint and remove the officers or members of the [e]xecutive [b]oard." Section 8.4 defines one of the declarant's special declarant rights as the right "[t]o appoint or remove any officer of the [a]ssociation or any [e]xecutive [b]oard member during any period of [d]eclarant control subject to the provisions of [§] 8.9 of this [d]eclaration." Finally, § 8.10 provides that the special declarant rights terminate no later than ten years after the recording of the declaration. Thus, the declarant's right to appoint and remove board members terminated no later than ten years after the recording of the declaration. Because the right to appoint and remove executive board members is the definition of declarant control under § 8.9, the loss of

[14] The court incorrectly concluded that § 8.9 adopted the language of § 47-245 (d). Although similar, the language of the two provisions is different. To the extent that the terminating events in § 8.9 of the declaration are in conflict with those prescribed by § 47-245 (d), the provisions of the statute prevail. See General Statutes § 47-203 ("Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived").

that right necessarily meant the end of declarant control. See *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, 273 Conn. 724, 734, 873 A.2d 898 (2005) (interpreting declaration to determine that limitation on authority to exercise special declarant rights effectively operated as limitation on developmental rights, where declaration provides that developmental right is special declarant right). Consequently, declarant control under the declaration necessarily ended no later than ten years after the recording of the declaration, regardless of whether any of the events in § 8.9 of the declaration or § 47-245 (d) had occurred.

The court's construction of the declaration does not take into account the interplay of §§ 8.4, 8.9, and 8.10. The court, therefore, improperly interpreted the declaration and the applicable statutes to conclude that the period of declarant control could continue beyond the ten year limit in § 8.10 as long as one of the events in § 47-245 (d) and § 8.9 had not occurred. Such a conclusion ignores the fact that, regardless of the occurrence of those events, the declarant's right to appoint and remove executive board members, which is what gave the declarant control, expired no later than ten years after the recording of the declaration. Although the declarant may have engaged in conduct through 2013 consistent with control, its period of control legally ended on August 12, 2008, ten years after the declaration was recorded. Thus, we agree with the defendants that any statute of limitations for claims by the association against the declarant was tolled, pursuant to §§ 47-245 (d) and 47-253 (d), only until August 12, 2008.[15]

This conclusion is not only required by the clear language of the declaration, it is also consistent with the language of § 47-245 (d). The first sentence of § 47-

[15] Neither party contends, and the court did not find, that any of the four terminating events prescribed by § 47-245 (d) occurred so as to end the period of declarant control prior to its expiration on August 12, 2008.

245 (d) explicitly sets forth the option to include a specific period of declarant control in the declaration. It would contravene the legislature's intent to permit the declarant to set a specific period of declarant control if that period could continue beyond its set expiration as a result of the declarant's own conduct. If the legislature intended to terminate the period of declarant control only on the occurrence of one of the four terminating events in the fourth sentence of § 47-245 (d), it would not have included the option for the declarant to select a different date for the termination of declarant control. Instead, this subsection expressly permits a declarant to set a specific period of declarant control that serves as the maximum time, which can be shortened only by the occurrence of any of the four terminating events.

Finally, our conclusion is consistent with the purpose of the tolling provision of § 47-253 (d). Tolling the statute of limitations applicable to claims against the declarant while it is in control of the association allows the association and its unit members sufficient time after the termination of the period of declarant control to know whether the declarant has engaged in any wrongful conduct. When the period of declarant control ends, that control is transitioned to the individual members of the association. See § 47-245 (f) and (h). In the present case, an executive board took over legal control of the association in 2009, shortly after the period of declarant control ended. That board, which included two unit owners in addition to Benson, had the legal right to control the affairs of the association, as well as the right to access all of the association's books and records. Consequently, it is logical that the tolling of any statute of limitations would end as soon as the declarant loses the legal ability to control the affairs of the association.

In the present case, because the declaration was recorded on August 12, 1998, the declarant's right to

exercise its special declarant rights, and, thus, the period of declarant control, expired a maximum of ten years later, on August 12, 2008.[16] Accordingly, we conclude, contrary to the trial court's determination, that the statute of limitations applicable to the association's action against the declarant was tolled only until the period of declarant control ended on August 12, 2008.[17]

II

Having concluded that any applicable statute of limitations was tolled only until August 12, 2008, we turn to the defendants' claim that all of the plaintiffs' claims in counts one through eight are time barred.[18] In light

[16] We note that the plaintiffs did not argue, and the court did not conclude, that the statute of limitations was tolled by the continuing course of conduct doctrine, fraudulent concealment, or some other equitable tolling theory. See *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 44, 148 A.3d 1123 (2016) (determining whether continuing course of conduct doctrine applied to toll statute of limitations applicable to condominium action), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017).

[17] The defendants also argue that § 47-253 (d) applies only to toll the statute of limitations applicable to claims brought by the association against the declarant. We agree. The definitive language of § 47-253 (c) and (d) unambiguously provides that the declarant is liable to the association and that a statute of limitations applicable to such an action is tolled. These provisions cannot be understood to also toll claims brought against an individual, like Benson, who controls and operates the declarant. Such a reading would require us to import words into the statute, which we are prohibited from doing. Accordingly, pursuant to § 47-253 (d), the statute of limitations applicable to an association's right of action is tolled only as to actions against a declarant until the period of declarant control terminates. The parties have not addressed, though, how this conclusion impacts the only count against Benson individually, count ten, which seeks to hold Benson derivately liable for the declarant's actions under a piercing the corporate veil theory. Because we conclude in part IV of this opinion that the court erroneously found that the plaintiffs proved this claim, we need not address Benson's statute of limitation special defense.

[18] Our review of which statute of limitations applies to the plaintiffs' claims against the declarant is limited to the first eight counts of their complaint. We need not analyze count nine, the CUTPA count against the declarant, because the court found for the declarant on that count and the plaintiffs do not challenge that ruling on appeal. See footnote 13 of this opinion. We also need not analyze count ten, the piercing the corporate veil count against Benson, because we conclude in part IV of this opinion that the court erroneously found in favor of the plaintiffs on that count.

Furthermore, the first eight counts all are against the declarant, and not Benson. The defendants filed a request to revise the plaintiffs' original

of our conclusion in part I of this opinion that the statute of limitations was tolled until August 12, 2008, and the present action was commenced almost five years later in July, 2013, the timeliness of the plaintiffs' action is necessarily contingent on whether the three year tort statute of limitations, or the six year contract statute of limitations, applies to the plaintiffs' action. As a result, although the trial court did not make such a determination because it determined that the statute of limitations was tolled until 2013, it is necessary for us to determine which statute of limitations applies to the plaintiffs' claims. See *Designs for Health, Inc.* v. *Miller*, 187 Conn. App. 1, 14 n.9, 201 A.3d 1125 (2019) ("remand unnecessary where record on appeal sufficient to make determination as matter of law").

The defendants argue that the plaintiffs' claims are governed by § 52-577, the three year statute of limitations applicable to tort actions, because the legal duties alleged to have been breached stemmed from the provisions of the act, not the declaration. The plaintiffs take the position, without any analysis,[19] that § 52-576, the six year contract statute of limitations, applies because

complaint in which they requested that the plaintiffs identify which defendant each count applied to. In response, the plaintiffs filed their operative complaint in which they specifically identified that the first eight counts are against the declarant. Accordingly, to the extent that the actions of Benson are alleged in the first eight counts, those allegations do not seek to impose individual liability on Benson.

[19] Despite the fact that the defendants brief this issue in their principal and supplemental briefs on appeal, the plaintiffs do not present a counter argument in their briefs. Nevertheless, at oral argument before this court, the plaintiffs' counsel maintained that the contract statute of limitations should apply because the declaration operates as a contract among the parties. The lack of analysis by the plaintiffs, although unfortunate, does not preclude our plenary review of this claim because it is the burden of the defendants, as the parties claiming error, to raise and brief their claims. See *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018); *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016). Further, the defendants were aware that the contract statute of limitations may be applicable because they raised that issue as a special defense to the plaintiffs' claims.

the declaration operates as a contract among the parties. We conclude that some of the plaintiffs' claims are tort claims that are time barred pursuant to § 52-577, but that the remainder of the claims sound in both contract and tort and, thus, are not time barred by § 52-576.

We begin by setting forth the applicable standard of review and relevant legal principles governing our resolution of this issue. The determination of which statute of limitations applies to an action is a question of law over which our review is plenary. See *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 29, 148 A.3d 1123 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017). Furthermore, to the extent that we are required to interpret the plaintiffs' pleadings, our review also is plenary. See *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014).

"Public policy generally supports the limitation of a cause of action in order to grant some degree of certainty to litigants. . . . The purpose of [a] statute of limitation . . . is . . . to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the search for truth that may be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. . . . Therefore, when a statute includes no express statute of limitations,[20] we should not simply assume that there

[20] We note that the act contains a three year statute of limitations applicable to actions alleging a breach of an implied or express warranty of quality. General Statutes § 47-277 provides in relevant part: "(a) Unless a period of limitation is tolled under section 47-253, a judicial proceeding for breach of any obligation arising under section 47-274 or 47-275 shall be commenced within three years after the cause of action accrues. . . ." See *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245

is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon." (Citations omitted; footnote added; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 199, 931 A.2d 916 (2007).

Generally, "[w]hether [a] plaintiff's cause of action is one for [tort or contract] depends upon the definition of [those terms] and the allegations of the complaint." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291, 87 A.3d 534 (2014). "[T]he fundamental difference between tort and contract lies in the nature of the interests protected. . . . The duties of conduct which give rise to [a tort action] are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Furthermore, other courts have held that, when a plaintiff seeks to recover damages for the breach of a statutory duty, such an action sounds in tort. See, e.g., *Curtis* v. *Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974) (damages action pursuant to statute sounds in tort because it defines new legal duty and authorizes courts to compensate plaintiff for injury caused by defendant's wrongful breach of duty); *Federal Deposit Ins. Corp.* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 368–69 (7th Cir.) (liability for breach of duty imposed by statute sounds in tort), cert. denied, 444 U.S. 829, 100 S. Ct. 56, 62 L. Ed. 2d 37 (1979).

"On the other hand, [c]ontract actions are created to protect the interest in having promises performed.

Conn. 1, 28-30, 717 A.2d 77 (1998) (analyzing provisions of § 47-277). General Statutes § 47-274 governs express warranties made by a seller to a purchaser of a unit, and General Statutes § 47-275 governs implied warranties made by a declarant to the purchaser of a unit as to the condition of the unit. None of the plaintiffs' claims sounds in breach of warranty and neither party has argued that § 47-277 applies, thus, we need not discuss it further.

Contract obligations are imposed because of [the] conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract. . . . In short, [a]n action in contract is for the breach of a duty arising out of a contract; an action in tort is for a breach of duty imposed by law." (Citations omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 200.

"[I]t is well established that . . . [s]ome complaints state a cause of action in both contract and tort. . . . [O]ne cannot bring an action [under both theories, however,] merely by couching a claim that one has breached a standard of care in the language of contract. . . . [T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims. To ensure that plaintiffs do not attempt to convert [tort] claims into breach of contract claims by talismanically invoking contract language in [the] complaint . . . reviewing courts may pierce the pleading veil by looking beyond the language used in the complaint to determine the true basis of the claim." (Citations omitted; internal quotation marks omitted.) *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, supra, 311 Conn. 290–92.

Furthermore, although the issue of whether a claim sounds in tort or contract sometimes is a binary determination, that is not always the case. See *Stowe* v. *Smith*, 184 Conn. 194, 199, 441 A.2d 81 (1981) (some complaints allege both contract and tort); *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 342, 147 A.3d 104 (2016) (two different statute of limitations can apply to claims arising from same set of alleged facts); see also 51 Am. Jur. 2d 547, Limitation of Actions § 76 (2016) ("If two or more statutes of limitation within a jurisdiction may apply to a cause of action, generally the statute providing the longest limitation period is preferred and will be applied. Any doubt as to the application of two

or more statutes of limitation to a claim should be resolved in favor of the longest limitation period. Thus, when two statutes of limitation conflict, or when a claim may be pursued on two theories having different limitation periods, the longer limitation period applies." [Footnotes omitted.]).

With respect to the interpretation of pleadings, our Supreme Court has "long . . . eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 462.

Moreover, "it is true that ordinarily a court may not grant relief on the basis of an unpleaded claim. . . . That does not necessarily mean, however, that the absence of a particular claim from the pleadings automatically precludes a trial court from addressing the claim, because a court may, despite pleading deficiencies, decide a case on the basis on which it was actually litigated and may, in such an instance, permit the

amendment of a complaint, even after the trial, to conform to that actuality. Indeed, [our Supreme Court has] recognized that, even in the absence of such an amendment, where the trial court had in fact addressed a technically unpleaded claim that was actually litigated by the parties, it was improper for the Appellate Court to reverse the trial court's judgment for lack of such an amendment." (Citations omitted; internal quotation marks omitted.) *Stafford Higgins Industries, Inc.* v. *Norwalk*, 245 Conn. 551, 575, 715 A.2d 46 (1998); see also *Tedesco* v. *Stamford*, 215 Conn. 450, 457–60, 576 A.2d 1273 (1990) (affirming judgment of trial court in favor of plaintiff even though claim insufficiently pleaded because defendant had sufficient notice of claim that actually was litigated). Despite pleading deficiencies, a court is permitted to "decide a case on the basis on which it was actually litigated . . . ." (Internal quotation marks omitted.) *Stamford Landing Condominium Assn., Inc.* v. *Lerman*, 109 Conn. App. 261, 273, 951 A.2d 642 (trial court properly determined that plaintiff was entitled to damage award of common charges because such claim, although not explicitly alleged, was litigated), cert. denied, 289 Conn. 938, 958 A.2d 1246 (2008).

Our Supreme Court repeatedly has held that "[a] declaration is an instrument recorded and executed in the same manner as a deed for the purpose of creating a common interest community. . . . [T]he declaration operates in the nature of a contract, in that it establishes the parties' rights and obligations . . . ." (Citations omitted; internal quotation marks omitted.) *Southwick at Milford Condominium Assn., Inc.* v. *523 Wheelers Farm Road, Milford, LLC*, 294 Conn. 311, 313 n.3, 984 A.2d 676 (2009); see *Harbour Pointe, LLC* v. *Harbour Landing Condominium Assn., Inc.*, supra, 300 Conn. 259; *Cantonbury Heights Condominium Assn., Inc.* v. *Local Land Development, LLC*, supra, 273 Conn. 734;

see also *Grovenburg* v. *Rustle Meadow Associates, LLC*, supra, 174 Conn. App. 46. Furthermore, we have recognized that an action for a breach of the declaration is an action for a breach of contract. See *Elm Street Builders, Inc.* v. *Enterprise Park Condominium Assn., Inc.*, 63 Conn. App. 657, 664–69, 778 A.2d 237 (2001). Accordingly, we must determine whether the plaintiffs' claims, as litigated, allege a breach of duty stemming from the declaration, which would be a contract claim, and/or a breach of duty stemming from the act, which would be a tort claim.

At the outset of our analysis, we note that our review of whether the plaintiffs' claims sound in contract or tort is complicated by the fact that the complaint alleges overlapping claims and subclaims, and the fact that the court analyzed the claims as framed by the parties in their posttrial briefs, which substantially differ from the claims alleged in the plaintiffs' complaint. In particular, the plaintiffs' posttrial brief contained seventeen one sentence headings that asserted a myriad of different claims against the defendants on the basis of the evidence presented at trial, and the defendants' posttrial brief mirrored those seventeen headings. The court, in its posttrial memorandum of decision, utilized the same claim framework used by the parties in their posttrial briefs to determine whether the plaintiffs prevailed and, consequently, to award the association relief on those claims.

In contrast, the complaint alleges a blunderbuss of claims, which are not entirely represented in the headings used by the court and the parties. In addition, there were a number of narrow claims discussed in the posttrial briefs and ruled on by the court that are not *specifically* alleged in the complaint.[21] Instead, the complaint contains broad claims against the defendants,

[21] The defendants do not challenge on appeal the propriety of the approach taken by the court. They do specifically argue, however, as part of their claim that the court erroneously awarded the association damages; see part

and those broad claims were then narrowed by the plaintiffs' posttrial brief. This problem is compounded by the fact that the defendants advance a general argument that all of the claims are time barred, without analyzing any of the individual claims and the lack of any analysis by the plaintiffs with respect to this issue.

Consequently, in an effort to read the complaint "in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties" we analyze the broad claims alleged in the plaintiffs' complaint that were further articulated by their posttrial brief. *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 462. We take this approach because the court ruled, and the parties' briefed, the claims as articulated in the posttrial brief, not the complaint. Further, this approach takes into account the general theory on which the plaintiffs' claims were pursued, and does not prejudice the defendants because they defended the claims as outlined in the plaintiffs' posttrial brief. See footnote 19 of this opinion. The defendants did not file a request to revise in order

III of this opinion; that the complaint does not allege that the declarant prevented the association from collecting 100 percent of the common charges, yet, the court awarded damages for fees that should have been charged to the restaurant but were not. This argument is belied by their posttrial brief in which they explicitly recognized that the plaintiffs had made such a claim and argued that the plaintiffs had failed to prove it. Thus, to the extent that this argument is advanced by the defendants in support of their statute of limitations claim on appeal, we decline to consider it because it is contrary to their position at trial. See *Buxenbaum* v. *Jones*, 189 Conn. App. 790, 811, A.3d (2019) (party cannot adopt one position at trial and then adopt different position on appeal because doing so would ambush trial judge and opposing party); see also *Stamford Landing Condominium Assn., Inc.* v. *Charlene Lerman*, supra, 109 Conn. App. 271–72 ("[o]ur Supreme Court has recognized . . . that where the trial court ha[s] in fact addressed a technically unpleaded claim that was actually litigated by the parties, it [i]s improper for the Appellate Court to reverse the trial court's judgment for lack of such an amendment [to the complaint]" [internal quotation marks omitted]).

to clarify the substance of the plaintiffs' claims and, indeed, opposed the plaintiffs' posttrial request to amend the complaint to conform to the proof at trial, which objection was sustained by the court. See *Stafford Higgins Industries, Inc.* v. *Norwalk*, supra, 245 Conn. 575; *Tedesco* v. *Stamford*, supra, 215 Conn. 457–60; *Stamford Landing Condominium Assn., Inc.* v. *Lerman*, supra, 109 Conn. App. 273.

In light of the foregoing, we turn to consider whether the tort or contract statute of limitations applies to each of the following four claims that were broadly alleged in the plaintiff's complaint, further articulated by their posttrial brief, and on which the court awarded relief.[22]

A

First, the plaintiffs claim that common expenses assessed to each unit were to be determined, pursuant to the declaration, on the basis of each units' relative floor area compared to the floor area of all the units. They allege that the declarant recorded inaccurate floor areas of the units on the Schedule A-2 attached to each amendment to the declaration. The plaintiffs allege that the declarant's conduct violated the declaration and General Statutes §§ 47-224 and 47-226. The court awarded the plaintiffs equitable relief in the form of an order mandating that the declarant correct the most recent Schedule A-2.

We conclude that the duty of the declarant to record correct unit square footage in the amendments to the declaration is both a tort and contract claim. The act

[22] It would serve no purpose for us to determine which statute of limitations applied to the plaintiffs' claims on which the court determined that they failed to prove damages and/or awarded them no relief. Such discussion would be purely academic because it would have no effect on the final outcome of this case. See *Gladstein* v. *Goldfield*, 325 Conn. 418, 425, 159 A.3d 661 (2017) (appellate courts must refuse to entertain purely academic questions).

mandates that the declaration, and any amendments thereto, provide each unit's boundaries and its percentage interest in the community as a whole. General Statutes § 47-202 (15) provides: " 'Declaration' means any instruments, however denominated, that create a common interest community, including any amendments to those instruments." Section 47-224 provides in relevant part: "(a) The declaration shall contain . . . (5) In a condominium or planned community, a description of the boundaries of each unit created by the declaration, including the unit's identifying number . . . ." Section 47-226 provides in relevant part: "(a) The declaration shall allocate to each unit: (1) In a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association . . . ." Further, the plaintiffs specifically allege in their complaint that the declarant violated §§ 47-224 and 47-226. Thus, because the act mandates that the declaration contain these denominations, the duty to correctly record them flows from the act.

Nevertheless, this claim also sounds in contract. The allocation of interests on the basis of each unit's square footage also is mandated by the declaration. Section 9.1 of the declaration provides in relevant part: "The table showing [u]nit numbers and their allocated interests is attached as Schedule A-2. These interests have been allocated in accordance with the formulas set out in this [a]rticle . . . . These formulas are to be used in reallocating interests if [u]nits are added to [Pasco Common]. Section 15.8 of the declaration provides that when new units are added, "the [d]eclarant shall prepare, execute and record an amendment to the [d]eclaration. If necessary, the [d]eclarant shall aslo record either new [s]urveys and [p]lans . . . or new certifications of Schedules A-3 and A-4 . . . .

"The amendment to the [d]eclaration shall assign an identifying number to each new [u]nit created and reallocate the [a]llocated [i]nterests among all [u]nits. The amendment shall describe any [c]ommon [e]lements and [l]imited [c]ommon [e]lements created thereby and designate the [u]nit to which each [l]imited [c]ommon [e]lement is allocated . . . ." In accordance with the foregoing provisions, the duty to correctly file amendments to the Schedule A-2 also derives from the declaration. In addition, the plaintiffs explicitly allege in their complaint that the declarant's conduct violated the declaration. Therefore, we conclude that this claim sounds in both tort and contract.

B

Second, the plaintiffs claim that the defendants wired certain common area lights to individual units so that those unit owners inappropriately were being assessed, and paying, common expenses, and that the defendants made a special arrangement with the owner of the restaurant unit in which they agreed that the restaurant was exempt from paying common charges. They allege that the unit owners were not made aware of the wiring or the special arrangement. The court awarded the association $126,766.11 for common charges that should have been assessed against the restaurant, and the court awarded equitable relief in the form of an order mandating that the defendants produce a new wiring plan for approval by the executive board.

We conclude that the claim arising out of the secret arrangement made with the owner of the restaurant and the assessing of common charges related to the improper wiring of certain common area lighting is both a tort claim and a contract claim. Section 47-245 (a) provides in relevant part: "Except as provided in the declaration, the bylaws, subsection (b) of this section, or other provisions of this chapter, the executive board

may act in all instances on behalf of the association. In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty to the association required of a trustee and officers . . . .'' General Statutes § 47-211 provides in relevant part: ''Every . . . duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.'' See *Chioffi* v. *Martin*, 181 Conn. App. 111, 138–39, 186 A.3d 15 (2018) (outlining common-law tort elements of breach of fiduciary duty). As there is no provision of the declaration that provides otherwise, the duty imposed on Benson, as a member of the executive board, and the declarant, as the founder of Pasco Common, to refrain from acting as a fiduciary to the detriment of the plaintiffs is a legal one imposed by the act. Indeed, in articulating their claim in their posttrial brief, the plaintiffs specifically assert that the defendants ''failed to perform [their] fiduciary dut[ies] . . . .''

Moreover, this claim also is one for breach of contract because the declaration mandates that each unit owner, including the restaurant, is responsible for common charges. Section 9.2 (b) provides in relevant part: ''The percentage of liability for [c]ommon [e]xpenses allocated to each [u]nit is based on the relative floor area of each [u]nit as compared to the floor area of all of the [u]nits in the [c]ommon [i]nterest [c]ommunity. . . . Nothing contained in this [s]ubsection shall prohibit certain [c]ommon [e]xpenses from being apportioned to particular [u]nits under Article XIX of this Declaration.'' Section 19.1 of the declaration, which is contained in Article XIX of the declaration, provides that ''[c]ommon [e]xpenses shall include,'' among other things, ''[e]xpenses of administration, maintenance, and repair or replacement of the [c]ommon [e]lements,'' and ''[e]xpenses declared to be [c]ommon [e]xpenses by the [d]ocuments or by the [a]ct . . . .'' According to these

provisions, the declaration mandates that each unit owner is liable for common expenses. Thus, the allegation that the restaurant was made exempt from common charges is a claim for a breach of the declaration. Moreover, in framing their claim in their posttrial brief, the plaintiffs assert "[t]here is no exception set forth in the [d]eclaration, which would eliminate a unit owner from the obligation to pay normal common charges." Similarly, a claim that the declarant charged individual unit owners for lighting expenses that should have been common expenses alleges a breach of the declaration.

C

The plaintiffs claim that the defendants improperly expended the funds of the association to finance repairs and maintenance for units and for paving expenses. In particular, the plaintiffs claim that, during the development of Pasco Common, the defendants repaired and maintained some of the older units, most of which were owned by the defendants, and repaved a parking lot. They allege that the defendants improperly charged the association for such repairs. In connection with this claim, the court awarded the association $106,173 for repairs and maintenance and $45,298 for paving expenses.

We conclude that the defendants' alleged improper expenditure of the association's funds for maintenance and repair of their units and for paving is both a tort claim and a contract claim. The duty of the declarant to expend properly the funds of the association stems from § 47-253 (c), which provides: "The declarant is liable to the association for all funds of the association collected during the period of declarant control which were not properly expended." Our legislature, in enacting this provision, codified a social policy that the declarant must properly expend the funds of the association. The claim that the declarant improperly

expended funds is tortious because the duty alleged to have been breached flows from § 47-253 (c). Indeed, count five of the plaintiffs' complaint incorporates the prior four counts and merely alleges that the declarant's conduct violated § 47-253 (c).

Furthermore, the mandate as to which party is responsible for repair and maintenance is outlined by General Statutes § 47-249 (a), which provides in relevant part: "Except to the extent provided by the declaration . . . the association is responsible for maintenance, repair and replacement of the common elements, and each unit owner is responsible for maintenance, repair and replacement of his unit. . . ." To the extent that the plaintiffs' claim alleges that the defendants improperly charged the association for repairs and maintenance, such a claim alleges a violation of the mandate of § 47-249 (a). Moreover, in describing this claim in their posttrial brief, the plaintiffs specifically assert that the defendants had "a fiduciary duty to manage the financial affairs of the association in a lawful and proper fashion," and that "[s]ince the declarant/Benson charged maintenance and repair for many of the units, especially the older ones owned by the declarant, to the association and since the declarant/Benson is in a fiduciary capacity to the association, the plaintiffs claim that the entire repair and maintenance category should be paid back to the association by the declarant/Benson." Accordingly, this claim is a tort claim.

Nonetheless, this claim also is a contract claim because Article VI of the declaration prescribes which party is responsible for repairs and maintenance. Section 6.1 of the declaration provides that the association is responsible for the maintenance, repair, and replacement of the common elements of Pasco Common, except that a party that has "legal or equitable ownership of all units within one structure" is responsible

for all interior and exterior maintenance, repair, and replacement of that structure. Section 6.2 of the declaration provides that the unit owners are responsible for the maintenance, repair, and replacement of "all portions of his or her [u]nit . . . ." Section 6.3 provides that, notwithstanding §§ 6.1 and 6.2, each unit owner is responsible for "maintenance, repair and replacement" of "the exterior building, including but not limited to the siding, roof and paint" and of the limited common elements, which are the "space heating, water heating and air conditioning apparatus and all electrical switches, television, telephone, and electrical receptacles . . . serving [that] one [u]nit exclusively . . . ." In addition, the plaintiffs assert in their posttrial brief that the defendants' improper expenditure of common expenses was in violation of the declaration. Therein, they also cite a number of provisions of the declaration that they maintain are in conflict with each other. In addition, the defendants recognized the contractual nature of this claim because their counterargument made in their posttrial brief substantially relied on the provisions of the declaration, and the court decided the issue on the basis of the provisions of the declaration cited by the plaintiffs. Thus, this claim also is a contract claim.

D

The plaintiffs also claim that the defendants engaged in self-dealing and that Benson breached his fiduciary duty by remitting association funds to the defendants as a "management fee," and by charging the association for Benson's personal vehicle expenses. In connection with this claim, the court awarded the association $64,834 for management fees and $14,592 for vehicle expenses.

We conclude that both the self-dealing and the breach of fiduciary duty allegations relating to the management fee and the personal vehicle expenses sound in tort,

not in contract. As we previously outlined in part II B of this opinion, the duty not to engage in self-dealing as a fiduciary is imposed by § 47-245 (a) and common-law tort principles. To clarify their claims, the plaintiffs specifically used the talismanic phrases "self-dealing," and "a breach of fiduciary duty." Thus, on the basis of this language and the fact that the plaintiffs do not cite a particular provision of the declaration that was violated, we conclude that both of these claims are tort claims.

In sum, we conclude that the plaintiffs' claim regarding the vehicle expenses and management fee sounds in tort and, thus, is time barred pursuant to § 52-577. We further conclude that the remainder of the plaintiffs' claims sound in both tort and contract. As to those claims, the plaintiffs are entitled to the benefit of the longer breach of contract statute of limitations. Consequently, those claims are not time barred pursuant to § 52-576.[23]

III

The defendants next claim that the court improperly awarded the association damages on the plaintiffs'

[23] Finally, we reject the defendants' argument that *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 193, compels the conclusion that all of the plaintiffs' claims are tort claims. In that case, our Supreme Court considered whether the tort or contract statute of limitations applied to a count that alleged that "the defendant had violated [General Statutes] § 49-8 by failing to provide a release of mortgage within sixty days of the satisfaction of the underlying debt." Id., 198. Our Supreme Court held that the tort statute of limitations applied to such a claim because, among other reasons, "the duty to release the mortgage that the plaintiff complained of in . . . her complaint did not arise from the mortgage contract but, rather, from § 49-8, which also prescribes damages for a breach of that statutory duty"; id., 201; that "[a]pplying multiple statutes of limitation to a singular duty created by statute is an odd result, one that we generally attempt to avoid"; id., 202; and that "the cause of action created by § 49-8 is akin to an action for slander of title," which is a tort. Id.

Bellemare is inapplicable because, in the present case, the parties actually litigated and the court decided whether the defendants breached the declaration in addition to committing statutory violations. In addition, although some of the plaintiffs' claims rely on common-law tort language, that phrasing does not apply to the concurrent breach of contract claims.

claim that the defendants improperly assessed common charges because it made a special arrangement with the owner of the restaurant unit in which the defendants agreed that the restaurant was exempt from paying common charges. The defendants argue, inter alia, that the court's damage award is inconsistent with its prior finding that the association had not been damaged because "the association collected 100 percent of the common expenses of the condominium from the unit owners . . . ." We agree.

We begin by setting forth the applicable standard of review and relevant legal principles governing our resolution of the defendants' third claim. "The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 355, 133 A.3d 402 (2016).

"Where a court's opinion contains fundamental logical inconsistencies, it may warrant reversal." *In re Jacob W.*, 178 Conn. App. 195, 217, 172 A.3d 1274 (2017), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019); see *Sun Val, LLC* v. *Commissioner of Transportation*, 330 Conn. 316, 325, 193 A.3d 1192 (2018) ("[w]hen . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct" [internal quotation marks omitted]); *Kaplan & Jellinghaus, P.C.* v. *Newfield Yacht Sales, Inc.*, 179 Conn. 290, 292, 426 A.2d 278 (1979) ("[a] trial court's conclusions are not erroneous unless they

violate law, logic, or reason or are inconsistent with the subordinate facts in the finding"). "[A] judgment rendered [on] facts found will not be reversed or set aside unless . . . a conclusion has been reached, or an inference drawn, from a fact, many facts, or the facts found, which affects the judgment rendered in material degree and is legally or logically inconsistent with that or those facts . . . ." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 576 n.12, 31 A.3d 1 (2011).

In the present case, the court first addressed the plaintiffs' claim that the defendants utilized an improper formula to determine the amount of common charges. The court concluded that: "The defendants do not dispute that the formula used by the declarant for the calculation of common charges based on use categories and square footage groups is not consistent with the provisions of the declaration. . . . The plaintiffs argue that the failure to follow the amended declaration in assessing common charges to the unit owners caused great damage to the unit owners and the association, but present no manner in which the court can calculate such damages. The defendants argue that since the association collected 100 percent of the common expenses of the condominium from the unit owners, and since the association is only claiming relief here, there is no basis for this court to find that the association has been damaged by the use of the improper formula. The court agrees. The damages, if any, would have been sustained by individual unit owners."

The court later addressed the plaintiffs' claim that the defendants improperly assessed common charges because it made a special arrangement with the owner of the restaurant unit in which they agreed that the restaurant would be exempt from paying common charges. The court concluded that: "[I]t was improper for Benson to make an arrangement with the restaurant

that was not consistent with the provisions of the declaration," and that "the restaurant did not pay its proper share of the common expenses." As for damages, the court recognized that "[t]he defendants claim that even if any funds are due from the restaurant it should be the restaurant that pays and not the defendants." Nevertheless, the court held that "the defendants are the ones who established this system of special treatment of the restaurant and therefore should be responsible to the association for any resulting losses to the association. Based on the calculations by the plaintiffs,[24] which the court accepts, that amount is $126,766.11." (Footnote added.)

We conclude that these two determinations are logically inconsistent. The court first determined that the association was not harmed on the basis of its finding that the association had collected 100 percent of the common charges to which it was entitled. The court next determined that the association suffered damages because the restaurant unit had not been assessed its percentage of the common charges. The award of damages for common charges to the association is inconsistent with the court's factual finding that the association, itself, was not damaged because the association collected 100 percent of the common charges. Put another way, because the association collected 100 percent of the common charges due, the fact that the restaurant did not pay its share of common charges had no effect on the total amount of common charges collected by the association. Instead, the failure of the restaurant to pay its share of common expenses damaged only the

[24] The plaintiffs' calculation, which is set forth in a one page spreadsheet, was submitted as an exhibit to their posttrial brief. Therein, the plaintiffs calculate the amount of annual common expenses that should have been assessed to the restaurant unit by multiplying the restaurant's percentage share of the total square footage at Pasco Common by the total income of the association. The plaintiffs applied this calculation for each fiscal year from 1998 through 2014.

individual unit owners because they, consequently, had to pay an increased amount of common charges each year. The individual unit owners, however, did not seek damages. Therefore, we reverse the court's award of damages to the association for common charges that should have been assessed to the restaurant because that award is logically inconsistent with the court's finding that the association had collected 100 percent of the common charges due.

IV

The defendants' final claim is that the court improperly determined that Benson individually was liable.[25] The defendants argue that the court erroneously found that the facts of the present case justified piercing the corporate veil to hold Benson individually liable for the misconduct of the declarant, pursuant to the "instrumentality" rule. We agree.

We begin by setting forth the applicable standard of review and relevant legal principles governing our resolution of the defendants' fourth claim. "Whether the circumstances of a particular case justify the piercing of the corporate veil presents a question of fact." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 234, 990 A.2d 326 (2010). "Accordingly, we defer to the trial court's decision to pierce the corporate veil, as well as any subsidiary factual findings, unless they are clearly erroneous. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite

[25] The defendants preliminarily argue that the court's articulation as to whether it held Benson individually liable was improper. See footnote 3 of this opinion. We need not decide that claim because assuming, without deciding, that the court's articulation was proper, we conclude that the court erroneously found that Benson individually was liable.

and firm conviction that a mistake has been made." (Citation omitted; internal quotation marks omitted.) *Commissioner of Environmental Protection* v. *State Five Industrial Park, Inc.*, 304 Conn. 128, 138, 37 A.3d 724 (2012).

"Courts will . . . disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor. . . . We have affirmed judgments disregarding the corporate entity and imposing individual stockholder liability when a corporation is a mere instrumentality or agent of another corporation or individual owning all or most of its stock. . . .

"The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. . . .

* * *

"The concept of piercing the corporate veil is equitable in nature. . . . No hard and fast rule, however, as to the conditions under which the entity may be disregarded can be stated as they vary according to the circumstances of each case. . . . Ordinarily the corporate veil is pierced only under exceptional circumstances, for example, where the corporation is a mere

shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice. . . . The improper use of the corporate form is the key to the inquiry, as [i]t is true that courts will disregard legal fictions, including that of a separate corporate entity, when they are used for fraudulent or illegal purposes. Unless something of the kind is proven, however, to do so is to act in opposition to the public policy of the state as expressed in legislation concerning the formation and regulation of corporations." (Citations omitted; internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 231-34.

The trial court set forth the following subsidiary factual findings in support of its determination to pierce the declarant's corporate veil. "Benson is in complete control of the . . . declarant in that at all times relevant he was president of the declarant and its chief operating officer; he owns all or almost all of the stock of the corporate declarant; and he exercised complete domination of the finances and policy and business practices of the corporate declarant."[26] "From 1998 to 2009, Benson was in complete control of the association. During that time Benson appointed the members of the [executive] board . . . of the association who were himself, his wife, Ann M. Benson, and his son, Paul D. Benson, Jr." "From 1998 to 2009 Benson created the budgets for the association and determined the monthly common charges. On the advice of counsel, Benson did not use the formula set forth in the declaration for allocation of expenses and the determination

[26] This allegation in the plaintiffs' complaint was admitted by the defendants in their answer. See *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 708, 145 A.3d 292 ("Factual allegations contained in pleadings upon which the cause is tried are considered judicial admissions and hence irrefutable as long as they remain in the case. . . . The admission of the truth of an allegation in a pleading is a judicial admission conclusive on the pleader." [Internal quotation marks omitted.]), cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

of common charges for each unit." "From 1998 to 2009 Benson also made all the decisions as to what expenses the association should pay. He made the decisions as to who was responsible for a repair to a unit. If a roof needed repair he charged the association. He interpreted the declaration as providing that the Association was responsible for the decks, roofs, and siding. The declaration, however, provides otherwise.

"During the time Benson managed the association, he expended the funds of the association and conducted its business as he saw fit, without concern as to whether his actions were consistent with the declaration or the [act]." "Benson directed Elite [Property Management] not to follow the terms of the declaration as to how common charges should be assessed but to continue to use the methodology he had developed." "The record is replete with invoices for work Benson charged to the association both for his own units as well as those owned by others which should not have been. Benson also offset his charges to the association against the condominium fees he owed the association. Since Benson or others were responsible for expenses he charged to the association, it was improper for him to do so." "The court agrees that, based on the above findings and conclusions, the . . . association is entitled to damages from the defendants." On the basis of these findings the court held that Benson individually was liable to the association pursuant to the instrumentality rule.[27]

[27] The court, in its articulation, also cited as legal support for its conclusion the "identity" rule for piercing the corporate veil. See *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 232. The defendants argue on appeal, and we agree, that the plaintiffs did not allege, or rely on, the identity rule before the trial court and, thus, they cannot prevail on such a theory on appeal. See *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 13 n.4, 151 A.3d 358 (2016) (declining to review on appeal claim not alleged in complaint and raised for first time on appeal). We likewise decline to review the plaintiffs' claim that Benson individually was liable for actions taken in his personal capacity because this claim was neither alleged nor ruled on by the court. See footnote 21 of this opinion.

We conclude that the court's decision to pierce the corporate veil on the basis of these facts was clearly erroneous. Although the court set forth findings with respect to the first element of the instrumentality rule, namely, that Benson exercised sufficient control over the declarant; see General Statutes § 47-202 (1) (defining control over declarant); the court's decision is devoid of any findings as to the second and third elements of the instrumentality rule.

With respect to the second element, the court set forth an exhaustive list of the misconduct of Benson, however, the court's decision does not contain any findings as to "the key to the inquiry;" *Naples* v. *Keystone Building Development Corp.*, supra 295 Conn. 233; namely, that Benson improperly used his control over the declarant's corporate form to accomplish this misconduct. The court found that Benson improperly assessed common charges, determined which party was responsible for repairs, expended funds of the association, and directed subsequent management to continue to assess common charges. The court did not find, however, that Benson utilized his control over the declarant to accomplish these actions. Instead, the court found that these actions by Benson were taken in his capacity as a member of the executive board, which controlled the association, or in his individual capacity. Put another way, the breaches of duty that the court attributed to Benson arose out of his direct relationship with

Furthermore, we note that on June 25, 2019—three months after oral argument before this court and six years after the plaintiffs commenced this action—our legislature passed No. 19-181 of the 2019 Public Acts (P.A. 19-181), which codifies the instrumentality test for veil piercing. P.A. 19-181 implicitly abandons the identity rule by virtue of the language in § 2 that "a court shall make such [a veil piercing] determination exclusively in accordance with the provisions of this section . . . of this act." P.A. 19-181 does not impact our resolution of the present appeal because the plaintiffs did not rely on the identity rule before the trial court, and because "the legislature explicitly stated that it intended . . . P.A. 19-181 to apply prospectively, that is, on or after July 9, 2019, the date the governor signed the legislation." *McKay* v. *Longman*, 332 Conn. 394, 432 n.27, A.3d (2019).

the association through his position on the executive board, not through his role as owner of the declarant. Although the declarant appointed Benson, his wife, and his son to the executive board during the period of declarant control, the declarant itself was not on the board and did not make the decisions that are the subject of the plaintiffs' complaint. Consequently, although Benson might be individually responsible for certain wrongful conduct, he was not sued directly for such conduct. Instead, the plaintiffs sought only to hold him derivatively liable for the conduct of the declarant. Because Benson's conduct did not arise out of his control of the declarant, the plaintiffs failed to satisfy the second element of the instrumentality rule. Furthermore, even if Benson was acting on the behalf of the declarant, the court's decision does not find that the declarant was a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice. To the contrary, the undisputed evidence established that the declarant was primarily and legally involved in the development of Pasco Common.

With respect to the third element, the court's decision does not find that Benson's control over the declarant proximately caused the association's injuries. The court did find that the association was "entitled to damages from the defendants," but its decision does not find that Benson's control over the declarant proximately caused those injuries. As stated previously, Benson's wrongful conduct, alone, does not satisfy the requirements of the instrumentality rule; rather, Benson can be held individually liable only if he proximately caused losses by the use of his control over the declarant as a shell corporation. Control over the association through his position on the executive board is not sufficient. In the absence of these required findings, the facts of this case do not present the exceptional circumstances in which to contravene the public policy of this state.

Therefore, we conclude that the court erroneously held Benson individually liable on the basis of the theory pursued by the plaintiffs.

The judgment is reversed in part as to count ten and in part as to the award of damages, and the case is remanded with direction to render judgment in favor of Benson as to count ten, and to vacate the damages award of $64,834 for management fees, $14,592 for vehicle expenses, and $126,766.11 for fees that should have been charged to the restaurant; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DAVID BLINN *v.* DESH SINDWANI
(AC 40985)

Alvord, Keller and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for negligence in connection with personal injuries sustained by the plaintiff in an automobile accident that occurred in 2012. The plaintiff alleged, inter alia, that the accident caused him to suffer mental anguish and exacerbated preexisting conditions of anxiety and depression, for which he sought treatment in 2014 and 2015. During trial, the parties had agreed to enter into evidence certain treatment records of a mental health treatment provider from whom the plaintiff sought counseling in 2104 and again in 2015 and 2016. The treatment records contained references to various incidents of the plaintiff's prior misconduct, including a prior conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and a citation he had received for his alleged involvement in a 2014 motor vehicle accident. The trial court sustained the defendant's objections to the plaintiff's motions in limine, which sought to exclude all references to his prior convictions and misconduct, as well as the citation. After the jury returned a verdict in favor of the plaintiff, the trial court rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff's claim that the evidence of his prior misconduct should have been precluded was unavailing; the prior misconduct evidence was relevant to the issue of whether the 2012 accident caused emotional distress for which the plaintiff claimed damages and sought treatment in 2014 and 2015, as it tended to show that the plaintiff's treatment at

the mental health service provider did not result from the 2012 accident but, rather, resulted from other events and stressors in his life, including the prior misconduct, and the trial court properly determined that the probative value of the evidence outweighed its prejudicial effect and did not abuse its discretion in sustaining the defendant's objection to the plaintiff's motion in limine with respect to the plaintiff's prior convictions and other misconduct.

2. The trial court did not abuse its discretion by admitting evidence of the 2014 motor vehicle citation; the citation was relevant to the damages element of the plaintiff's claim because it tended to make it less probable that the plaintiff's treatment with the mental health provider resulted, in whole or in part, from the 2012 accident, and the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effect, as the plaintiff testified that the citation was particularly stressful because of its bearing on his probation status and the custody of his child.

Argued March 19—officially released September 10, 2019

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley, J.*, sustained the defendant's objection to the plaintiff's motions in limine to preclude certain evidence; thereafter, the matter was tried to a jury; judgment for the plaintiff, from which the plaintiff appealed to this court. *Affirmed.*

Blake A. Driscolli, with whom was *Peter J. Brown*, for the appellant (plaintiff).

Julie Harris, with whom, on the brief, was *Yelena Akim*, for the appellee (defendant).

Opinion

BEACH, J. In this personal injury action arising out of an automobile accident, the plaintiff, David Blinn, appeals from the judgment of the trial court rendered following a jury verdict against the defendant, Desh Sindwani. The plaintiff claims that the court erred by sustaining the defendant's objection to his motions in limine that sought to preclude evidence of the plaintiff's (1) prior misconduct and (2) citation arising from a motor vehicle accident that occurred on June 6, 2014,

which resulted in a violation of the plaintiff's probation stemming from a 2013 conviction for operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a. We affirm the judgment of the trial court.

The following facts which the jury reasonably could have found and procedural history are relevant on appeal. On June 15, 2012, the plaintiff was operating his motorcycle on Route 83 in Rockville, Connecticut. As he traveled northbound, he approached Pease Farm Road in Ellington on his right. The defendant was stopped at a stop sign on Pease Farm Road waiting to proceed onto Route 83. As the plaintiff approached the intersection, the defendant pulled out from the stop sign. The plaintiff struck the defendant's driver's side rear door and was ejected from his motorcycle. The plaintiff commenced this action alleging that the accident was caused by the defendant's negligence in the operation of his motor vehicle. The plaintiff sought, in pertinent part, damages for mental injuries suffered as a result of the accident. Specifically, the plaintiff alleged that the accident caused him mental anguish and exacerbated preexisting conditions of anxiety and depression. The defendant filed a special defense alleging that the plaintiff's negligence contributed to the accident and damages.

The parties agreed to enter into evidence certain treatment records from Community Health Resources (CHR), a mental health services provider, from whom the plaintiff sought counseling from January 7, 2014 through December 10, 2014, and again from July 9, 2015 through October 12, 2016. These treatment records contained references to various incidents of the plaintiff's prior misconduct, including a ten month term of incarceration for felony larceny, harassment charges, and operating a motor vehicle while under the influence, as well as a citation for driving an unregistered vehicle.

Claiming lack of relevance, remoteness, and high potential for prejudice, the plaintiff filed a motion in limine to exclude all references to his prior nonfelony convictions, arrests, and misconduct. The plaintiff filed a second motion in limine to exclude all references to a citation that he received for his alleged involvement in a motor vehicle accident that took place on June 6, 2014, which the plaintiff said could be used to suggest that he was involved in a subsequent motor vehicle accident and that his alleged injuries were the result of that accident, or to suggest bad character. The plaintiff also argued that evidence concerning the June 6, 2014 citation was a collateral matter that would distract the jury and unduly prejudice him.

The defendant objected to the plaintiff's motions in limine, asserting that both the evidence of prior misconduct and the evidence of the 2014 citation would not be offered for any impermissible use, such as showing bad character but, rather, to dispute the claim that the earlier accident that was the subject of the trial was a cause of the plaintiff's emotional distress and a reason he sought psychotherapy at CHR. The defendant argued in opposition to the motion in limine that "[t]o permit the plaintiff to proceed with a claim that the therapy he had at CHR was due to the 2012 accident, and that his ongoing anxiety and distress was due solely to injuries he suffered in that accident, without permitting the defendant to introduce alternative explanations for the plaintiff's treatment and distress, which explanations *appear in the treatment record itself*, would be a miscarriage, as it is highly probative of the plaintiff's damage claim and is admissible for that reason." (Emphasis in original.)

The court sustained the defendant's objection for the reasons stated in the objection but limited the defendant's use of the misconduct evidence to that which was related to anxiety and depression and was contained in the treatment records. Further, the court ordered

that the defendant was not to introduce into evidence facts of the incidents themselves, but rather only the proceedings that were triggered by those underlying incidents and any effects that they may have had on the plaintiff's mental health.

At trial, the plaintiff offered into evidence treatment records regarding his sessions at CHR between January 7, 2014, and October 12, 2016. The treatment records indicated that the plaintiff was ordered by the court, in connection with dissolution proceedings, to attend treatment at CHR.[1] The plaintiff also submitted bills for mental health treatment that he had received at CHR and Manchester Memorial Hospital totaling $20,708.61.

When asked on direct examination about his mental health and treatment history, the plaintiff said that he had been in counseling for anxiety and mood disorders for most of his life. He also was asked specifically about what had brought him to CHR. He cited issues relating to his divorce but also testified that the accident that was the subject of this case was an additional reason why he continued to seek treatment.

On cross-examination, the plaintiff testified about various incidents of prior misconduct and their effects on his mental health leading up to and throughout his treatment at CHR.[2] He also testified about the motor

[1] The medical record included the following: "[The plaintiff] came in today per the orders of the court. He . . . currently reports that he is only here to do what he needs to for the courts. . . . He does report that he has been 'on edge and stressed' with all of the court proceedings but other than that he reported no mental illness."

[2] The following colloquy occurred between the defendant's counsel and the plaintiff:

"Q. Did you say—which is what the record says, which is in evidence, David [the plaintiff] reported that 2013 was a hard year for him as he was going through ugly divorce, dealing with family court, juvenile court, and criminal court.

"A. Okay. That's accurate.

"Q. You were referred to CHR for services in 2015 by your probation officer. Correct?

"A. Yes, that was—yes.

"Q. You had been on probation for charges which included harassment. That was the dispute with Audra.

"A. Yes.

vehicle citation issued on June 6, 2014.[3] The plaintiff's counsel did not object to the introduction of such evidence at any point during the cross-examination, nor did he ask for curative instructions regarding limited use of this evidence by the jury. During closing argu-

"Q. Which was first pressed in 2012, and a DUI [operating a motor vehicle while under the influence], which occurred in September, 2013. Correct?

"A. I—yes, I was charged with a DUI.

"Q. Okay. That was September 8, 2013?

"A. Sounds correct.

"Q. And as a result of both of those charges, that is the DUI and the harassment charge, you pled guilty to a sentence which resulted in you being placed on probation.

"A. Yes, I pled guilty because given my circumstances and dispute over custody, I was kind of forced to make a pleading in that manner.

"Q. Was that a stressful event in your life?

"A. It was.

* * *

"Q: Okay. And in fact, the reason that you went to Community Health Resources in 2014 was because it was ordered as part of a custody evaluation. Correct?

"A. That's correct.

"Q. And in fact, separately, the court encouraged you to attend therapy for relapse present—prevention due to the DUI.

"A. It's possible, yes.

"Q. Okay. So you, you didn't go to therapy with Community Health Resources because of problems you were having from this 2012 motorcycle accident. You were ordered there by the court.

"A. I did not seek the treatment for that, no."

[3] The following colloquy occurred between the defendant's counsel and the plaintiff:

"Q. Stay with me. June, 2014, early morning, the police arrest you and charge you with being responsible for a car leaving the road and hitting the tree and charge you with driving an unregistered motor vehicle. Correct?

"A. They gave me a ticket, but yes.

"Q. Okay. And this was very stressful to you. Wasn't it?

"A. It was stressful considering—

"Q. Yeah.

"A. —it had nothing to do with me.

"Q. Well—

"A. Well, not nothing, but I wasn't driving the vehicle.

"Q. Not only that, but you were on probation at the time.

"A. Yes.

"Q. And you knew that you potentially faced some jeopardy of going to jail—

"A. That would be correct.

"Q. —for violating the terms of your probation. Correct?

"A. Yes.

"Q. In fact, you told your health care provider at the Community Health Resources, your therapist, that you were concerned with this latest charge, that you'd have to go to jail and lose custody of your son and you had been told in fact a warrant was going to be issued for your arrest on those charges.

"A. Yes."

ment, the defendant's counsel told the jury that she did not intend to disparage the plaintiff for his past. Instead, she highlighted the roles that the prior misconduct and the June, 2014 citation played in the plaintiff's seeking and receiving treatment at CHR.[4]

The jury found that the defendant was liable and that the plaintiff was entitled to damages of $58,500. The jury also found that the plaintiff's negligence was 50 percent responsible for the accident, and it reduced the total damages award to $29,250. The court accepted the verdict and rendered judgment accordingly. This appeal followed.

"Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State* v. *Russo*, 62 Conn. App. 129, 133, 773 A.2d 965 (2001). In reviewing for abuse of discretion, "the ultimate issue is whether the court could reasonably conclude as it did." *DiPalma* v. *Wiesen*, 163 Conn. 293, 299, 303 A.2d 709 (1972).

[4] The defendant's counsel, in closing argument, stated: "What he's not entitled to do is blame personal turmoil, which happened after 2012, on [the defendant]. What you have here is a claim that court-ordered psychotherapy to the tune of $4000 in 2014. The record, which is in evidence, Exhibit 17, indicates right there, it's in evidence, ladies and gentlemen, that [the plaintiff] was there ordered by the court. He had a DUI. He was charged with a restraining order violation, and he was in the midst of a custody dispute. And the court said we want you to get therapy. That's all well and good and I wouldn't be talking to you about it, except he's monetizing this event and claiming it's all due to this intersection collision in 201[2]. That's why we're talking about it. You can read the records, because they're in evidence. David reported that 2012 was a hard year for him as he was going through ugly divorce, dealing with family court, juvenile court, and criminal court. I bet. I bet it was. But it's not the fault of this intersection collision, and that's what I mean by a tell."

I

We first address the plaintiff's claim that evidence of his prior misconduct should have been precluded. Specifically relying on § 4-5 of the Connecticut Code of Evidence, the plaintiff argues that the evidence did not fit any of the exceptions to the general rule of inadmissibility. The defendant responds that such evidence was relevant to the plaintiff's claim that his treatment for anxiety and depression in 2014 and 2015 resulted from the 2012 accident. We agree with the defendant.

The Connecticut Code of Evidence provides, in relevant part, that "[a]ll relevant evidence is admissible, except as otherwise provided by the constitution of the United States, the constitution of the state of Connecticut, the Code, the General Statutes or the common law." Conn. Code Evid. § 4-2. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1.

"Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person . . . ." Conn. Code Evid. § 4-5 (a). However, subsection (c) of § 4-5 provides that such evidence is admissible "for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." Conn. Code Evid. § 4-5 (c). This court has recognized that this code section is applicable to both criminal and civil cases. See *Senk* v. *Senk*, 115 Conn. App. 510, 518, 973 A.2d 131 (2009).

To determine the admissibility of prior misconduct evidence, we use a two part test. "Under the first prong

of the test, the evidence must be relevant for a purpose other than showing the defendant's bad character or criminal tendencies." (Footnote omitted.) *State* v. *Martin V.*, 102 Conn. App. 381, 386, 926 A.2d 49, cert. denied, 284 Conn. 911, 931 A.2d 933 (2007). Recognized purposes include those enumerated in § 4-5 (c) but are not limited to such. See id. Second, "[f]or prior misconduct evidence to be admissible, it must not only be relevant and material, but also more probative than prejudicial." *State* v. *Campbell*, 328 Conn. 444, 522, 180 A.3d 882 (2018). "Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the [fact finder]. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Solomon*, 150 Conn. App. 458, 463, 91 A.3d 523, cert denied, 314 Conn. 908, 100 A.3d 401 (2014).

In *Campbell*, our Supreme Court held that the listed exceptions in section 4-5 (b)[5] of the Connecticut Code of Evidence are intended to be illustrative rather than exhaustive. *State* v. *Campbell*, supra, 328 Conn. 519. "A court is not precluded 'from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal

[5] The Connecticut Code of Evidence was amended in 2011, and subsection (b) of § 4-5 was redesignated as subsection (c).

tendencies . . . .' " Id., quoting Conn. Code Evid. § 4-5 (b), commentary;[6] see *State* v. *Campbell*, supra, 519 (holding that establishing means for committing crime is appropriate alternative purpose for which prior misconduct evidence may be admissible); see also *State* v. *Cooper*, 227 Conn. 417, 424–25, 630 A.2d 1043 (1993) (holding that prior misconduct is admissible to complete story of crime on trial by placing it in context of nearby and nearly contemporaneous events).

The prior misconduct was relevant to the issue of whether the accident caused emotional distress, for which the plaintiff claimed damages. The trial court properly admitted the misconduct evidence for the limited purpose of providing reasons for and the context of the plaintiff's treatment for anxiety and depression in 2014 and 2015. During his therapy sessions, the plaintiff discussed various stressors in his life, including court involvement, financial difficulties, his son's needs, and his divorce.[7] The plaintiff did not mention the 2012 accident until his session on February 18, 2014. At his session following the June 6, 2014 citation, the plaintiff described how the incident affected him.[8] He further elaborated on the incident's impact, particularly as it related to his probation status, in the sessions that followed.[9] The references to the misconduct are relevant

[6] See footnote 5 of this opinion.

[7] The records provide: "[The plaintiff] reported that 2013 was a hard year for him as he was going through [an] ugly divorce, dealing with family court, [j]uvenile court and criminal court."

[8] The records provide: "[The plaintiff] reported not doing well due to a motor vehicle incident that occurred on 6/6/14 which he is being charged with driving an unregistered car. . . . [The plaintiff] claims he is afraid to lose custody of son if he goes to jail."

[9] For example, "[the plaintiff] reported has not been doing well due to violating probation and possibly having to get a lawyer. [The plaintiff] claims there is a chance he can go to jail but he is hopeful he doesn't. . . . [The plaintiff] reported he is feeling very sad about situation and is fearful that son will be taken away."

because they tended to show that the plaintiff's treatment at CHR did not result from the accident, but rather from other events, including the prior misconduct. Although issues of causation and damages in civil cases are not among the exceptions expressly listed in § 4-5 (c), we hold that the misconduct evidence in this case was material to the plaintiff's claim for emotional damages and was admitted for an appropriate purpose.[10]

We next consider whether the trial court properly determined that the probative value of the evidence outweighed its prejudicial effects. The plaintiff claims that the introduction of the evidence inappropriately biased the jury and caused it to reduce the damages award by 50 percent due to comparative negligence. The defendant argues that the plaintiff put his emotional injuries and treatment records at issue by seeking monetary compensation for his treatment at CHR. We agree with the defendant.

Our Supreme Court has noted that "[t]he party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. . . . The purpose of allowing the introduction of such evidence is not to give the opposing party a license to introduce unreliable or irrelevant evidence but to allow the opposing party to put the initial offer of evidence into its proper context." (Citation omitted; internal quotation marks omitted.) *Somers* v. *LeVasseur*, 230 Conn. 560, 565, 645 A.2d 993 (1994). Here, the evidence that the plaintiff sought to preclude provided necessary context for his claim that he required treatment for anxiety and depression in 2014 and 2015 as a result of the 2012 accident by highlighting the extent to which there were other stressors in his life that likely contributed to his

[10] We note that on its face, § 4-5 (a) prohibits the introduction of misconduct evidence "to prove . . . bad character, propensity, or criminal tendencies . . . ." Conn. Code Evid. § 4-5 (a). The evidence in this case was not admitted for any of the proscribed purposes.

need for treatment at CHR. As reported in the treatment records, the plaintiff's general discussion of his court involvement as an ongoing stressor was not specific; it was unclear what court proceedings he was referring to. The evidence elicited in cross-examination regarding the plaintiff's prior misconduct was highly probative because it developed the specific nature of the court involvement to which the plaintiff was referring. Because the plaintiff introduced the contents of the treatment records and claimed that his mental health treatment was a result of the accident, he "opened the door" to admitting the evidence. He was not unfairly prejudiced by the contents of the medical records that were related to his treatment at CHR.

In support of his claim that the evidence was more prejudicial than probative, the plaintiff contends that the defendant had other evidence available to dispute that the treatment resulted from the accident. Specifically, he claims that the therapy records as a whole sufficiently demonstrated that he "discussed stressors in his life beyond his injuries from the accident, including his background, family and financial issues, without exposing the highly prejudicial facts concerning his convictions for harassment of his ex-wife, [operating a motor vehicle while under the influence], [v]iolation of [p]robation, and a thirty-day incarceration, as well as arrests that did not even lead to a conviction." He further argued that the prejudicial effect of a criminal record far outweighed any disadvantage that the defendant may have endured "if the jury was not made aware that [the plaintiff] had been ordered to attend therapy in connection with court proceedings and that during part of those therapy sessions he discussed stressors he was experiencing from those criminal charges." We disagree. Although the plaintiff did testify about other noncriminal stressors in his life, it would have been reasonable for the jury to find that the arrests and

convictions were significantly disruptive in his life and thus were responsible, at least in part, for his treatment at CHR.

Ultimately, the jury found partly in favor of the plaintiff on liability and awarded monetary damages to compensate him for the injuries he suffered. The plaintiff's claim that he was compensated unfairly because of the introduction of evidence of misconduct is misplaced. The jury reduced its award because it found the plaintiff's negligence was a cause of his damages. "Upon issues regarding which, on the evidence, there is room for reasonable difference of opinion among fairminded men, the conclusion of a jury, if one at which honest men acting fairly and intelligently might arrive reasonably, must stand, even though the opinion of the trial court and this court be that a different result should have been reached." (Internal quotation marks omitted.) *Trzcinski* v. *Richey*, 190 Conn. 285, 298–99, 460 A.2d 1269 (1983). The issue of liability was contested; there was conflicting evidence, and the jury reasonably could have concluded on the evidence that the plaintiff's negligence was partly responsible for the damages.[11]

[11] Particularly contested was the speed at which the plaintiff was traveling just before the accident occurred. The defendant contended that the plaintiff was speeding above the forty miles per hour speed limit, which had contributed to the accident. The following colloquy occurred between the defendant's counsel and his reconstruction expert:

"Q: So if you had a motorcycle traveling at the speed of forty miles an hour that was confronted by a vehicle pulling out of the Pease Farm Road intersection just as it crested that hill, fair to say with all reasonable accident reconstruction certainty, the bike should've been able to stop.

"A: Correct.

"Q: No collision?

"A: No collision.

"Q: All right. Same, same situation. Assume hypothetically, the bike crests the hill at a speed of fifty-five miles per hour, how much distance will the bike need to cover to come to a stop?

"A: 252 feet .03.

"Q: So if the bike is traveling at fifty-five miles per hour, is there going to be a collision?

"A: Yes."

We conclude that the court did not abuse its discretion in concluding that the introduction of the plaintiff's prior arrests and convictions was not so unduly prejudicial as to outweigh their probative value or in sustaining the defendant's objection to the plaintiff's motion in limine with respect to the plaintiff's prior convictions and other misconduct.[12]

II

The plaintiff also claims that the court erred in failing to preclude evidence of a motor vehicle citation dated June 6, 2014, which resulted in a violation of the plaintiff's probation stemming from a 2013 conviction for operating a motor vehicle while under the influence. Alternatively, the plaintiff argues that even if evidence of the June 6, 2014 citation were properly admissible, the defendant's inquiry into the matter exceeded the scope prescribed by the trial court. For the purpose of our analysis of admissibility, we see no material differences between evidence of the citation and evidence of the prior arrests and convictions discussed in Part I of this opinion. Both categories of evidence were used to show other stressors in the plaintiff's life. The June 6, 2014 citation was relevant to the damages element of the plaintiff's claim, because it tended to make it less probable that the plaintiff's treatment at CHR resulted, in whole or in part, from the 2012 accident. The plaintiff himself testified that the citation was particularly stressful because of its bearing on his probation status and the custody of his child. Accordingly, we conclude that the court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effects.

The plaintiff argues that the inquiry by the defendant's counsel into specific details associated with the June 6, 2014 accident exceeded the scope prescribed by the

[12] In light of our conclusion that the evidence was properly admitted, we need not consider the defendant's argument that the rulings were harmless.

trial court. We disagree. The plaintiff's counsel failed to make any objections during the line of questioning. "Appellate review of evidentiary rulings is ordinarily limited to the specific legal issue raised by the objection of trial counsel. . . . By failing to object . . . the defendant failed to preserve this claim." (Internal quotation marks omitted.) *State* v. *Patterson*, 170 Conn. App. 768, 786, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017). The issue was raised for the first time in the plaintiff's appellate brief, and we are not bound to consider it. Practice Book § 50-5; *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014). The plaintiff's counsel additionally did not request curative instructions. The plaintiff contended that "no curative instruction would have prevented the jury from having yet another reason to possess a negative bias towards the Plaintiff." Yet, in supporting his argument that the trial court's error was harmful, the plaintiff highlighted the fact that "the court took no corrective measures, such as curative instructions, to mitigate the effect of the evidentiary impropriety." The plaintiff cannot simultaneously argue that the curative instructions would have been ineffective, yet contend that the trial court's failure to provide such instructions contributed to harmful error. We are unconvinced by the plaintiff's inconsistent argument. See *Modaffari* v. *Greenwich Hospital*, 157 Conn. App. 777, 787–88, 117 A.3d 508 (holding that plaintiff's repeated requests for additional curative instructions and later contention that she would have suffered further prejudice had court given jury additional curative instructions was inconsistent), cert. denied, 319 Conn. 904, 122 A.3d 1279 (2015). We hold that the trial court did not abuse its discretion by admitting evidence of the June 6, 2014 citation.

The judgment is affirmed.

In this opinion the other judges concurred.

BARBARA A. FLEISCHER *v.* WILLIAM B. FLEISCHER (AC 40987)

Prescott, Bright and Eveleigh, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court dismissing his motions to modify alimony and for contempt. Although the motions were scheduled to be argued in June, 2015, no activity on the motions occurred until December, 2016, when the court scheduled a status conference, after which a full hearing was scheduled for the motions in April, 2017, when the plaintiff argued that the motions should be dismissed due to the defendant's failure to prosecute the motions with reasonable diligence. Subsequently, the plaintiff filed a motion to dismiss, which the trial court granted for the defendant's failure to prosecute the motions with reasonable diligence. *Held* that the trial court improperly dismissed the defendant's motions for modification of alimony and for contempt: even though a trial court has wide discretion in determining whether to dismiss an action for failure to prosecute it with due diligence, there are limits to that discretion, and the sanction imposed must be proportional to the violation or misconduct, which did not occur here, as the sanction of dismissal was imposed for a onetime, one and one-half year delay that occurred after the defendant's counsel had been diagnosed with a serious illness, there was no evidence showing that during that period of delay, the defendant was ever ordered to prosecute the motions more expeditiously, the first time that the defendant was confronted with potential dismissal was at the hearing on the merits of the motion to dismiss, the court made no findings in its memorandum of decision that it considered and found inadequate lesser sanctions before dismissing the motions for failure to prosecute them with due diligence, and the delay in prosecuting the motions was due to the illness of the defendant's attorney, which tended not to justify the severe sanction of dismissal; moreover, the defendant provided a compelling reason for the delay, both parties were fully prepared to move forward with a trial on the merits of the defendant's motions, and the defendant never received, let alone ignored, orders from the court regarding the motions, and the court's decision to dismiss the defendant's motions created an appearance that it was a punishment for the defendant's refusal to waive a claim that any reduction in alimony should be retroactive to the date that the motion for modification of alimony was filed.

Argued April 8—officially released September 10, 2019

Procedural History

Action for the dissolution of a marriage and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Ford. J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Axelrod, J.*, dismissed the defendant's motions for modification of alimony and for contempt, and the defendant appealed to this court. *Reversed; further proceedings.*

Logan A. Carducci, with whom was *Daniel J. Krisch*, for the appellant (defendant).

Christopher P. Norris, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant, William B. Fleischer, appeals from the judgment of the trial court dismissing, pursuant to Practice Book § 14-3, his motions for modification of alimony and for contempt on the ground that he had failed to prosecute the motions with reasonable diligence.[1] On appeal, the defendant claims that the trial court improperly dismissed his motions because there was no clear pattern of delay and the evidence showed his intent to prosecute the motions. We agree that the motions should not have been dismissed and, accordingly, reverse the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. The plaintiff and the defendant married on June 28, 1958. The parties' marriage was dissolved in a judgment dated May 31, 1984. The judgment incorporated the parties' separation agreement

[1] Practice Book § 14-3 is made applicable to family matters by Practice Book § 25-48 and provides in relevant part: "(a) If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. . . ."

and provided, inter alia, that the defendant pay alimony to the plaintiff until her remarriage or death.[2]

On December 10, 2012, the defendant filed a motion for modification of alimony and a motion for contempt. In his motion for modification of alimony, the defendant argued that the plaintiff was earning substantially more income than she had been at the time of the dissolution judgment twenty-eight years prior, and, by contrast, the defendant was now earning substantially less. In his motion for contempt, the defendant argued that the plaintiff had not provided him with her W-2 forms, as required by section 3.2 of the separation agreement.[3] See footnote 2 of this opinion.

[2] The parties' separation agreement provided in relevant part:

"ARTICLE II – ALIMONY AND SUPPORT

"2.1. The [h]usband shall pay, during his lifetime, to the wife until her remarriage or death, whichever first occurs, the following allowances as alimony and support for the [w]ife and children:

"A. On the first day of the first month following the date of this agreement, and on the first day of each succeeding month until the house located at 121 Cedar Lane, Ridgefield, Connecticut is sold the sum of $4,600.00, and, after the house is sold, the sum of $2,850.00. The obligations of the [h]usband under this sub-paragraph A. shall be suspended during any period of more than 60 consecutive days in which the [w]ife cohabits with a person of the opposite sex.

"B. The monthly payments to be made by the [h]usband to the [w]ife pursuant to subparagraph A. above shall be reduced by the sum of ($650.00) [d]ollars when the minor child (a) marries, (b) dies, (c) attains the age of eighteen (18) years, or (d) becomes emancipated or lives with the [h]usband.

* * *

"ARTICLE III – WAIVER OF ALIMONY

* * *

"3.2 In the event the [w]ife becomes gainfully employed, by any employer other than Upneumat International, Inc., the [h]usband shall be entitled to a credit of 25 [percent] of the [w]ife's salary over and above the first $250.00 per month averaged over a full year's period, as against the amount of alimony due by [h]usband to [w]ife. The [w]ife shall annually provide the [h]usband with copies of any W-2 forms issued to her and her federal income tax return. The term "salary" used herein shall be deemed to include income received by the [w]ife from [s]ocial [s]ecurity, [p]ension and [p]rofit [s]haring [p]lan whether or not she is gainfully employed at the time of such receipt."

[3] On March 15, 2013, the plaintiff filed a motion for contempt regarding nonpayment of alimony. No action was taken on the plaintiff's motion.

On November 4, 2014, the defendant moved in limine to preclude the plaintiff from having admitted certain evidence pertaining to his motions.[4] On December 3, 2014, the defendant served the plaintiff with a request for admissions. On December 19, 2014, a status conference was held on the parties' outstanding motions.

On February 25, 2015, the defendant's counsel, Attorney Allen G. Palmer, was diagnosed with Parkinson's disease. Attorney Palmer's diagnosis was disclosed in an affidavit attached to the defendant's opposition to the plaintiff's motion to dismiss; see footnote 12 of this opinion; and the plaintiff "does not challenge the medical diagnosis of [Attorney Palmer]" on appeal.

The parties subsequently entered into a stipulation, dated June 1, 2015, regarding the defendant's motion in limine and amended appendix to the motion in limine. The stipulation stated that the plaintiff was to file any objection by June 8, 2015, and counsel were to return to court on June 22, 2015, to argue the motions and objections. The plaintiff does not appear ever to have filed an objection to the motion in limine. In any event, no activity on the defendant's motion for modification of alimony and motion for contempt occurred between June, 2015, and December, 2016.

In December, 2016, the court scheduled a status conference on the motions for January 19, 2017. At the

[4] The plaintiff instituted a separate action in the Superior Court of California seeking to enforce the Connecticut spousal support order and to collect outstanding spousal support from the defendant. On October 23, 2001, the parties stipulated, and the California court ordered, that "[b]eginning on August 1, 2001, [the defendant] shall pay $1,741.76 per month to [the plaintiff] as ongoing current spousal support on the [first] day of the month for which it is due."

In his motion in limine, the defendant moved to preclude the plaintiff from offering into evidence any testimony or documents to vary or contradict the terms of paragraph 3.2 of the parties' separation agreement; see footnote 2 of this opinion; or to vary or contradict the terms of the parties' October 23, 2001 stipulation and order of the Superior Court of California.

January 19 status conference, the court scheduled the matter for a full hearing on April 20, 2017.

At the April 20, 2017 hearing, both parties informed the court that they were prepared to move forward with a trial on the defendant's motions. The plaintiff, however, argued that both of the defendant's motions should be dismissed pursuant to Practice Book §§ 25-34 (f)[5] and 14-3 because they were not heard within three months of their filing date and the defendant had failed to prosecute the motions with reasonable diligence. The plaintiff also requested that, if a hearing on the motions were to proceed, the defendant waive his request to have the modification of alimony apply retroactively back to December 10, 2012, the date on which the motion was filed. The defendant's counsel responded that the defendant had been dutifully prosecuting the case, but there were several delays due to issues regarding scheduling and discovery. Additionally, he stated that his medical condition accounted for a portion of the delay.

After the defendant's argument, the court asked if the defendant was willing to waive any claim that modification of alimony be retroactive. The defendant responded no. After the defendant declined to waive retroactivity, the court summarily dismissed both of the defendant's motions pursuant to Practice Book § 25-34 (f). The plaintiff's counsel asked the court to delay the dismissal for a five minute recess to allow the defendant's counsel to discuss with the defendant waiving

[5] Practice Book § 25-34 (f) provides: "Failure to appear and present argument on the date set by the judicial authority shall constitute a waiver of the right to argue unless the judicial authority orders otherwise. Unless for good cause shown, no motion may be reclaimed after a period of three months from the date of filing. This subsection shall not apply to those motions where counsel appeared on the date set by the judicial authority and entered into a scheduling order for discovery, depositions and a date certain for hearing."

retroactivity so that the motions could go forward that day. Despite the assertion of the defendant's counsel that he did not need to discuss waiving retroactivity with his client, the court took a recess, again stating that if retroactivity were not waived, it would dismiss the motions.

Following a short recess, the defendant stated again that he would not waive retroactivity. The defendant also asserted that dismissal was improper because the plaintiff had not filed a written motion to dismiss, arguing that the plaintiff's oral motion denied him the opportunity to prepare a proper response. The court then vacated its dismissal of the motions and provided the parties with an opportunity to brief the issues and request additional oral argument.

On May 12, 2017, the plaintiff filed a motion, along with a supporting memorandum of law, seeking dismissal of the defendant's motion for modification of alimony and motion for contempt. In response, the defendant filed an objection to the motion to dismiss and an affidavit from Attorney Palmer.

On August 1, 2017, the parties appeared before the court for a hearing on the plaintiff's motion to dismiss. At the hearing, the defendant was represented by Attorney Timothy McGuire and Attorney Palmer. After argument by both parties, the court informed the parties that it was reserving its decision on the motion to dismiss. On September 15, 2017, the court issued a written memorandum of decision,[6] in which it granted the plaintiff's motion to dismiss under Practice Book § 14-3 and denied the plaintiff's motion to dismiss under Practice Book § 25-34.[7] This appeal followed.

[6] The trial court's memorandum of decision contains minimal analysis of the parties' claims. Further, the memorandum mostly is comprised of quoted material from the parties' memoranda of law, as well as the borrowing of headings from various pleadings.

[7] Specifically, the court held that Practice Book § 25-34 (f) did not apply because counsel appeared on the date set for hearing and the plaintiff failed

We begin our analysis of the defendant's claim that his motions should not have been dismissed with the relevant law and our standard of review. "Practice Book § 14-3 (a) permits a trial court to dismiss an action[8] with costs if a party fails to prosecute the action with reasonable diligence. The ultimate determination regarding a motion to dismiss for lack of diligence is within the sound discretion of the court. . . . Under [§ 14-3], the trial court is confronted with endless gradations of diligence, and in its sound discretion, the court must determine whether the party's diligence falls within the 'reasonable' section of the diligence spectrum. . . .

"We review the trial court's decision for abuse of discretion. . . . In determining whether a trial court abused its discretion, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . .

"A trial court properly exercises its discretion to dismiss for failure to prosecute [with reasonable diligence] if the case has been on the docket for an unduly protracted period or the court is satisfied from the record or otherwise that there is no real intent to prosecute . . . ." (Citations omitted; footnote added; internal quotation marks omitted.) *Bobbin* v. *Sail the Sounds, LLC*,

to file her motion to dismiss under § 25-34 (f) prior to the hearing date. Section 25-34 (f) expressly states that it is inapplicable to those motions in which counsel appeared on the date set by the judicial authority and entered into a scheduling order for discovery, depositions and a date certain for hearing. See footnote 5 of this opinion.

[8] "[T]he word action means the lawful demand of one's right in a court of justice . . . . It includes not only the usual civil action instituted by process but also proceedings initiated by . . . motion." (Internal quotation marks omitted.) *Ill* v. *Manzo-Ill*, 166 Conn. App. 809, 824, 142 A.3d 1176 (2016).

153 Conn. App. 716, 726–27, 107 A.3d 414 (2014), cert. denied, 315 Conn. 918, 107 A.3d 961 (2015).

"The court's discretion, however, is not unfettered; it is a legal discretion subject to review. . . . [D]iscretion imports something more than leeway in decision-making. . . . It 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." (Internal quotation marks omitted.) *Speer* v. *Dept. of Agriculture*, 183 Conn. App. 298, 303, 192 A.3d 489 (2018).

The purpose of Practice Book § 14-3 is to "ensure the proper movement of cases and to prevent a backlog of the docket" so as to avoid permitting cases to "drift aimlessly through the system." (Internal quotation marks omitted.) *Fuller* v. *Commissioner of Correction*, 75 Conn. App. 814, 818–19, 817 A.2d 1274, cert. denied, 263 Conn. 926, 823 A.2d 1217 (2003). The court has, consistent with these principles, established that "lengthy periods of inactivity by the plaintiff constitute sufficient grounds for a trial court to determine that the plaintiff has failed to prosecute an action with reasonable diligence." (Internal quotation marks omitted.) *Brochu* v. *Aesys Technologies*, 159 Conn. App. 584, 593, 123 A.3d 1236 (2015).

"The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case [in which] it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Rules are a means to justice, and not an end in themselves." (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16, 776 A.2d 1115 (2001).

Importantly, "[c]ourts must remain mindful . . . that [i]t is the policy of the law to bring about a trial on the merits of a dispute whenever possible . . . and

that [o]ur practice does not favor the termination of proceedings without a determination of the merits of the controversy [if] that can be brought about with due regard to necessary rules of procedure. . . . *Disciplinary dismissals pursuant to Practice Book § 14-3, thus, are not favored* . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 429, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018).

Accordingly, "although dismissal of an action is not an abuse of discretion [if] a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort . . . and [if] it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17.

Finally, even though a trial court has wide discretion in determining whether to dismiss an action for failure to prosecute it with due diligence, there are limits to this discretion. Importantly, sanctions imposed by the court must be *proportional* to the violation or misconduct. See id., 18; see also *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 176 A.3d 1167 (2018) (holding that *Millbrook* proportionality test, which applied to sanctions involving violations of discovery order, applies to all sanctions). In *Ridgaway*, our Supreme Court reasoned, "[i]ndeed, we cannot imagine a circumstance under which it would *not* be an abuse of discretion to impose a sanction that is disproportionate to the misconduct." (Emphasis added.) *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 72.

Our Supreme Court has identified the following factors as relevant to determining the proportionality of

a sanction: the nature and frequency of the misconduct, notice of the possibility of a sanction,[9] the availability of lesser sanctions, and the client's participation in or knowledge of the misconduct. Id., 73. Our Supreme Court also noted that these principles reflect that, in assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself. Id., 76. We recognize that the *Millbrook* factors were established in the context of noncompliance with discovery orders, whereas the present case pertains to a failure to prosecute with due diligence pursuant to Practice Book § 14-3. Accordingly, we have adapted the factors to fit the circumstances of the present case.

With respect to the first factor, the nature and frequency of the misconduct, it is logical that particularly egregious or frequent misconduct, such as repeated refusals to comply with a court order, warrants more severe sanctions. See id., 73. The court in *Ridgaway*, however, also acknowledged that although our courts have not considered whether a single act of misconduct could warrant imposing a judgment of nonsuit or similar sanction, courts in other jurisdictions have concluded that a single act could warrant nonsuit or dismissal if the act is *sufficiently egregious*, particularly if the improper conduct involves the perpetration of a deception on the court. Id., 73–74.

The conduct for which the court imposed the sanction of dismissal in the present case was a onetime, one and one-half year delay that occurred after the

[9] Although our Supreme Court in *Ridgaway* addressed whether a judgment of nonsuit was a proportionate sanction, whereas in the present case we consider whether dismissal of the defendant's motions was an appropriate sanction, for our purposes, we find that these sanctions are equivalent in that both fully dispose of the action at issue, and, therefore, we analyze the same factors in the present case. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 60.

defendant's counsel had been diagnosed with a serious illness. The defendant's counsel eventually transferred the case to another attorney, who appeared in court ready to prosecute the motions. There is no evidence in the record, nor does the plaintiff claim, that during the period of delay the defendant ever was ordered specifically by the court to prosecute more expeditiously the motions, let alone that the defendant disregarded such an order. Further, there is no suggestion by the plaintiff or the court that the delay in this matter involved the perpetration of a deception on the court.

With respect to the next factor—notice of the possibility of a sanction—our Supreme Court noted that in instances in which our appellate courts have upheld the sanction of a nonsuit, a significant factor has been that the trial court *put the plaintiff on notice* that noncompliance would result in a nonsuit. Id., 74. We acknowledge that Practice Book § 14-3 generally puts a party on notice of the possibility of dismissal for failure to prosecute an action with due diligence. Nevertheless, we find it relevant that, unlike in the cases described in *Ridgaway*, in which the court made various orders in which the party was explicitly informed that failure to follow would result in nonsuit, here, the first time that the defendant was confronted with potential dismissal was at the hearing on the merits of the motion. Notably, this was a hearing in which *both parties were prepared to move forward.* There was nothing further the defendant needed to do to comply with § 14-3, as he was already willing and able to prosecute the motions that day.

Next, in evaluating the third factor, i.e., the availability of lesser sanctions, the court in *Ridgaway* noted that, "[our Supreme Court] has refused to uphold a sanction of nonsuit when there were available alternatives to dismissal that would have allowed a case to be heard on the merits while ensuring future compliance

with court orders." Id., 75. As to this factor, in addition to citing Connecticut case law, the court in *Ridgaway* took note of other jurisdictions that similarly have reversed a sanction of nonsuit or dismissal when it had not been established that a lesser sanction would be inadequate to vindicate the interests of the other party and the trial court. Notably, the *Ridgaway* court cited to *McKoy* v. *McKoy*, 214 N.C. App. 551, 554, 714 S.E.2d 832 (2011), in which the court vacated the trial court's order dismissing a counterclaim for failure to prosecute because the trial court made no findings that lesser sanctions were considered and found inadequate. *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 75. The court in *McKoy* noted that "involuntary dismissal of a claim is one of the harshest sanctions at a trial court's disposal, effectively extinguish[ing] the [party]'s cause of action and deny[ing] [the party] his [or her] day in court." (Internal quotation marks omitted.) *McKoy* v. *McKoy*, supra, 553. Similarly, here, the court made no findings in its memorandum of decision that it considered and found inadequate lesser sanctions before dismissing the motions for failure to prosecute.

As to the last factor, i.e., the client's participation in or knowledge of the misconduct, the court in *Ridgaway* stated that, "[w]hether the misconduct was solely attributable to counsel and not to the party also has been a factor in assessing whether a less severe sanction than a nonsuit or dismissal should have been ordered." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 75. In evaluating this factor, our Supreme Court cited to cases in which the degree of personal involvement of the client in the misconduct, was evaluated in determining proportionality. Id., 75–76; see *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 49–50, 53, 134 A.3d 643 (2016) (trial court abused its discretion in rendering judgment of nonsuit when attorney failed to timely pay attorney's fees of opposing parties); *EMM*

Enterprises Two, LLC v. *Fromberg, Perlow and Kornik, P.A.*, 202 So. 3d 932, 934 (Fla. App. 2016) (before dismissal for fraud on court, factors to be considered include personal involvement of plaintiff); *Eaton Corp.* v. *Frisby*, 133 So. 3d 735, 759 (Miss. 2013) (dismissal was proper exercise of court's discretion when plaintiff *knew*, through its corporate officers, that counsel had engaged in improper ex parte communication with judge). Here, the delay in prosecuting the motions was due to the illness of the defendant's attorney, which fell well outside the control and personal involvement of the client, and thus tends not to justify the severe sanction of dismissal.

Finally, because a trial court must consider the totality of the circumstances, we evaluate the *Ridgaway* factors in light of the prejudice to the plaintiff in the present case. *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 76. The plaintiff argued that the defendant's delay prejudiced her by the potential retroactivity of the motion for modification of alimony.[10] Specifically, she argued that if the modification of alimony were to apply retroactively, she would have exposure to pay back the difference in alimony for the four and a half years that had passed since the motion was originally filed. Therefore, she would be at risk to pay back a large sum of money.

Dismissal, however, was not the only remedy available to ameliorate the plaintiff's retroactivity concern.

[10] At the hearing on the defendant's motions on April 20, 2017, the plaintiff's counsel stated, "I am glad to go forward today if the sanction for the nonprosecution of the motion or the order is that; that there will be no retroactivity and we're going forward. I am prepared, Your Honor."

Further, at the August 1, 2017 hearing on the plaintiff's motion to dismiss the defendant's motions, the plaintiff's counsel again argued that he could not have his client subjected to the retroactivity risk on the motion for modification of alimony. The plaintiff's counsel stated, "if retroactiv[ity] is gone, which was my initial plan, then *my client's not prejudiced*." (Emphasis added.)

Rather, the court could have addressed the issue as part of its adjudication of the merits of the motion for modification. For example, the trial court could have granted the defendant's motion to modify alimony prospectively, but denied the retroactive application of the order. See *Hane* v. *Hane*, 158 Conn. App. 167, 176, 118 A.3d 685 (2015) (there is no "bright line test for determining retroactivity" of modification to alimony or child support; instead, trial court is to consider factors applicable given facts and circumstances of case, and may consider length of time period to adjudicate motion for modification). Moreover, if the court concluded that retroactive modification of alimony was appropriate, it could have crafted a repayment plan that could have allowed the plaintiff to pay back the defendant over time. Therefore, for the reasons stated previously, it was improper for the trial court to dismiss the defendant's motions without a hearing on the merits.

In addition to dismissal being a disproportionate sanction, the present case is distinguishable from cases in which dismissal under Practice Book § 14-3 was found to be proper. A brief discussion of some of these cases illustrates this point. For example, in *Ill* v. *Manzo-Ill*, 166 Conn. App. 809, 142 A.3d 1176 (2016), the defendant appealed from the judgment of the trial court dismissing, pursuant to Practice Book §§ 25-34 (e) and 14-3, her postdissolution motion to modify her alimony award. Id., 817–19. The defendant filed her motion for modification of alimony on April 6, 2010. Id., 813. On February 22, 2012, almost two years after the defendant had filed her motion for modification, the plaintiff moved to dismiss the defendant's motion on the grounds that (1) the defendant had not prosecuted her motion with reasonable diligence pursuant to § 14-3 and (2) had failed to reclaim it within three months from its filing date pursuant to § 25-34 (e).[11] Id., 815. The

[11] When Practice Book § 25-34 was amended in 2016, effective January 1, 2017, subsection (e) was redesignated as subsection (f).

defendant filed an objection to the plaintiff's motion to dismiss, which the court sustained. Id., 815–16. After the court's ruling, the defendant took some steps to pursue discovery. Id., 816. Despite initiating efforts to take numerous depositions throughout the pendency of her motion, however, the defendant admitted that she never took a single deposition. Id., 817.

After the passage of another year and ten months, on December 26, 2013, the plaintiff in *Ill* filed a second motion to dismiss the defendant's motion for modification pursuant to Practice Book §§ 14-3, 25-34 (e), and 25-48. Id., 817. On February 19, 2014, the defendant filed an objection to the plaintiff's motion to dismiss. Id., 818. The court subsequently heard oral argument on the motion to dismiss, which it granted on May 14, 2014. Id.

In affirming the judgment of dismissal pursuant to Practice Book § 14-3, this court concluded that the defendant's inactivity for extended time periods and her repeated failure to complete noticed depositions supported the dismissal. Id., 827–30. This court emphasized that, even after the trial court denied the plaintiff's first motion to dismiss and informed the defendant of her duty to ensure the progress of her motion to modify, she "did not accelerate or streamline her scattered and imprecise discovery efforts . . . ignored the court's direction to obtain a hearing date and never sought a scheduling order . . . ." Id. 830. Further, although the defendant argued that her delay was justified due to the plaintiff's appeal of the original alimony order and failure to provide discovery in good faith, this court disagreed stating that it was not evident how the plaintiff's appeal, which was withdrawn in 2010, "would have affected her ability to proceed efficiently for the next three and one-half years" and rejected the defendant's claim that the plaintiff had engaged in bad faith delay tactics regarding discovery. Id., 827.

In *Brochu* v. *Aesys Technologies*, supra, 159 Conn. App. 586–87, this court found that an unjustified delay of more than four years in substituting a representative of the decedent's estate as the party plaintiff supported the trial court's dismissal of the action for failure to prosecute with due diligence pursuant to Practice Book § 14-3. In affirming the dismissal, this court emphasized that the plaintiff *never* provided the court with a compelling reason for her failure to substitute herself in, despite having years in which to have done so, and failed to provide a reason on appeal. Id., 592. This court in *Fuller* v. *Commissioner of Correction*, supra, 75 Conn. App. 815, affirmed the dismissal, pursuant to § 14-3, of the petitioner's petitions for a writ of habeas corpus and a new trial because the petitioner had engaged in various delay tactics, requested an indefinite postponement of her trial, was unable to proceed with trial when asked by the court to call her first witness, and, after the court postponed the trial to the following day, was again unable to proceed. Id., 815–19. Finally, in *Bobbin* v. *Sail the Sounds LLC*, supra, 153 Conn. App. 728–29, this court affirmed the trial court's dismissal, pursuant to § 14-3, of the plaintiff's application to compel arbitration where the plaintiff engaged in minimal activity on the case for almost four years.

The present case is readily distinguishable from *Ill*, *Brochu*, *Fuller*, and *Bobbin*. Here, the case had not "drift[ed] aimlessly through the system." See *Brochu* v. *Aesys Technologies*, supra, 159 Conn. App. 593. The defendant provided a compelling reason for the delay, both parties were fully prepared to move forward with a trial on the merits of the motions, and the defendant never received, let alone ignored, orders from the court regarding the motions. Here, a single, one and one-half year period of inactivity from June, 2015, to December, 2016, occurred. Directly before this period of inactivity,

the defendant's counsel had been diagnosed with Parkinson's disease, and was attempting to organize his practice accordingly. The plaintiff never seriously disputed that the defendant's counsel suffered from significant health issues, or that he had taken efforts to inform the courts in which he was practicing that there could be delays in prosecuting his cases.[12]

Finally, we are concerned that the court's decision to dismiss the defendant's motions creates an appearance that it was punishment for the defendant's refusal to waive a claim that any reduction in alimony should be retroactive to the date that the motion for modification of alimony was filed.

This court has recognized, in the context of settlement discussions, that "[w]hen . . . a judge engages in [discussions] looking to the settlement of a case . . . in which he will be called upon to decide the issues of

[12] The plaintiff objected to affidavit of the defendant's counsel, in which counsel described his illness and the steps he took after his diagnosis in order to inform the courts of how his illness would delay the progress of his cases. Although the plaintiff's counsel objected as to the effect that the illness of the defendant's counsel had on his ability to work, he did not seriously object to the fact that the defendant's counsel was in fact diagnosed with Parkinson's disease, or argue that counsel was not truthful in his representation to the court that he had spoken with the various courts in which he was working regarding his illness.

The trial court ultimately indicated that it was not persuaded that the affidavit properly was before the court under Practice Book § 25-13 because, unlike in the present case, that section applies only if the grounds for the motion to dismiss concern defects in jurisdiction, venue and process. Despite that conclusion, the trial court in its memorandum of decision recognized the illness of the defendant's counsel and made reference to information from his affidavit. Namely, the court referenced that the defendant's counsel met with judges whom he had cases before in order to apprise them of his illness.

We also note that, even when not under oath, "[a]ttorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath." (Internal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 420, 680 A.2d 147 (1996); Rules of Professional Conduct 3.3.

liability and damages . . . [i]t is . . . impossible to avoid questions as to whether the judge can disregard . . . matters disclosed in the conference . . . and whether a preliminary judgment, formed at the conference and predicated on unsubstantiated claims of proof, may have some subtle influence on a final judgment after a full hearing. . . . It is inevitable that the basis is laid for suspicion, no matter how unfounded or unjustified it may be, and that failure to concur in what the judge may consider an adequate settlement may result in the imposition, upon a litigant or his counsel, of some retributive sanction or the incurrence of judicial displeasure." (Internal quotation marks omitted.) *Carvalhos Masonry, LLC* v. *S & L Variety Contractors, LLC*, 180 Conn. App. 237, 240–41, 183 A.3d 697 (2018).

We find the same concerns to exist in the present case. At the initial hearing on the defendant's motions, the court asked if the defendant would waive retroactivity with respect to the motion for modification and when he refused, it immediately granted the plaintiff's motion to dismiss his motions. The following colloquy occurred:

"The Court: The position of counsel for the plaintiff is that he's willing to waive the provision of [Practice Book §] 25-34 subsection F if there's no retroactivity. Are you asking for retroactivity in the event I enter a modified order?

"[The Defendant's Counsel]: We are, Your Honor, however I don't think that . . . is something that could be waived or granted at the outset of a trial. I think that's something for the finder of fact to determine, and certainly that is a factor for the finder of fact to consider when determining whether or not to award retroactivity.

"The Court: Parties can always waive retroactivity if they want to waive it. My question is are you waiving retroactivity in the event I grant your motion to modify?

"[The Defendant's Counsel]: No, Your Honor.

"The Court: Pardon me?

"[The Defendant's Counsel]: No, Your Honor.

"The Court: All motions are off for failure to comply with [§] 25-34 subsection F. They'll have to all be refiled."

After the court dismissed the defendant's motions, the plaintiff requested a recess for the defendant's counsel to discuss with the defendant waiving retroactivity. The court stated in response to the request of the plaintiff's counsel, "I'll give them that opportunity. Otherwise, my order of dismissal will remain in effect and if anyone wants to be heard on any motions, they'll have to refile them. . . . I already told you what the order's going to be *if there's no waiver*; I'm going to enforce the Practice Book Rule." (Emphasis added.)

In this context, the court's decision to dismiss the defendant's motions gives rise to an appearance that dismissal was in retaliation for the defendant's decision to decline the plaintiff's request that he waive retroactivity. The fact that the court ultimately withdrew its ruling dismissing the motions pursuant to Practice Book § 25-34 (f) and allowed the parties the opportunity to brief and argue the motion to dismiss does not negate fully the appearance that the dismissal was punitive in nature. A trial court cannot attempt to force a party to engage in horse trading and then punish them when they decline to do so.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

NAILIA VODOVSKAIA-SCANDURA *v.* HARTFORD HEADACHE CENTER, LLC, ET AL.
(AC 41049)

Alvord, Elgo and Moll, Js.

Syllabus

The plaintiff physician sought to recover damages from the defendant medical practice and its sole member for negligence and intentional infliction of emotional distress in connection with the termination of her employment. The trial court granted the defendants' motion for summary judgment, concluding that the plaintiff had not provided an evidentiary foundation to demonstrate the existence of a genuine issue of material fact as to the extreme and outrageous conduct element of the intentional infliction of emotional distress claim, or as to the duty and causation elements of the negligence claim. From the summary judgment in favor of the defendants, the plaintiff appealed to this court, challenging the propriety of the court's determination. *Held* that the trial court properly granted the defendants' motion for summary judgment and rendered judgment for the defendants as to the plaintiff's claims of negligence and intentional infliction of emotional distress; that court having properly resolved the issues, this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the relevant facts, issues and applicable law.

Argued May 28—officially released September 10, 2019

Procedural History

Action to recover damages for, inter alia, intentional infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Bright*, *J.*, granted the defendants' motion for summary judgment on the complaint and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Peter White, with whom, on the brief, was *A. Paul Spinella*, for the appellant (plaintiff).

Steven C. Rickman, with whom was *Cristina Salamone*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Nailia Vodovskaia-Scandura, appeals from the summary judgment rendered by the trial court in favor of the defendants,

the Hartford Headache Center, LLC, and Tanya Bilchik, M.D.[1] On appeal, the plaintiff claims that the court improperly concluded that no genuine issue of material fact existed as to (1) the extreme and outrageous conduct element of her intentional infliction of emotional distress claim, and (2) the duty and causation elements of her negligence claim. We disagree and, accordingly, affirm the judgment of the trial court.

Following the termination of her employment, the plaintiff commenced this civil action against the defendants in 2013. Her second amended complaint contained twelve counts.[2] In response, the defendants filed an answer and several special defenses. Hartford Headache Center, LLC, also filed a counterclaim against the plaintiff sounding in conversion, statutory theft, and replevin.

The defendants thereafter filed a motion for summary judgment on all twelve counts of that complaint. In opposing the motion, the plaintiff conceded that she could not prevail on ten of her twelve counts and, thus, requested leave to amend her complaint accordingly.[3] In granting that request, the court indicated that it would consider the defendants' motion for summary judgment in light of the allegations set forth in her revised pleading. Days later, the plaintiff filed her amended complaint, which contained two counts alleging intentional

[1] At all relevant times, Bilchik was the sole member of Hartford Headache Center, LLC. It is undisputed that Bilchik extended an offer of employment to the plaintiff as a staff physician following the completion of her medical residency.

[2] In her second amended complaint, the plaintiff alleged breach of contract, breach of the covenant of good faith and fair dealing, fraud, libel, three counts of slander, two counts of what the plaintiff termed "defamation/slander," intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

[3] At the July 10, 2017 hearing on the defendants' motion for summary judgment, the plaintiff's counsel informed the court that the plaintiff was "withdrawing" all but the intentional infliction of emotional distress and negligence counts.

infliction of emotional distress and negligence. By memorandum of decision dated October 31, 2017, the court concluded, as a matter of law, that judgment should enter in favor of the defendants on both counts because the plaintiff had not provided an evidentiary foundation to demonstrate the existence of a genuine issue of material fact as to the extreme and outrageous conduct element of her intentional infliction of emotional distress claim or the duty and causation elements of her negligence claim.[4] On appeal, the plaintiff challenges the propriety of that determination.

Our examination of the pleadings, affidavits, and other proof submitted, as well as the briefs and arguments of the parties, persuades us that the judgment should be affirmed. The issues properly were resolved in the court's thorough and well reasoned memorandum of decision. See *Vodovskaia-Scandura* v. *Hartford Headache Center, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-13-6044074-S (October 31, 2017) (reprinted at 192 Conn. App. 562, A.3d). We therefore adopt it as a proper statement of the

[4] Hartford Headache Center, LLC, also sought summary judgment on its counterclaim, which the court denied. Because the court's October 31, 2017 judgment disposed of the entirety of the plaintiff's complaint, it is a final judgment for purposes of appeal. See Practice Book § 61-2 (judgment rendered on entire complaint is final judgment); *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, 153 Conn. App. 387, 396 n.11, 102 A.3d 87 ("the defendant has . . . appealed from a final judgment insofar as at the time the appeal was taken the court had adjudicated the entirety of the plaintiffs' complaint"), cert. denied, 315 Conn. 901, 104 A.3d 106 (2014). Although the plaintiff was entitled under our rules of practice to defer the present appeal until judgment is rendered on the pending counterclaim, she was not obligated to do so. Practice Book § 61-2 provides in relevant part that "[i]f at the time a judgment referred to in this section is rendered, an undisposed complaint, counterclaim or cross complaint remains in the case, appeal from such a judgment *may* be deferred (unless the appellee objects as set forth in Section 61-5) until the entire case is concluded by the rendering of judgment on the last such outstanding complaint, counterclaim or cross complaint. . . ." (Emphasis added.) For that reason, the defendants understandably have not raised any final judgment issue in this appeal.

relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

APPENDIX

NAILIA VODOVSKAIA-SCANDURA *v.* HARTFORD HEADACHE CENTER, LLC, ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-13-6044074-S

Memorandum filed October 31, 2017

Proceedings

Memorandum of decision on defendants' motion for summary judgment. *Motion granted in part.*

A. Paul Spinella, for the plaintiff.

Steven C. Rickman, *Hugh W. Cuthbertson* and *Cristina Salamone*, for the defendants.

Opinion

BRIGHT, J.

I

INTRODUCTION

This action arises out of the plaintiff's employment with the defendant Hartford Headache Center, LLC (LLC). The defendant Tanya Bilchik is the sole member of the LLC. The plaintiff's second amended complaint dated April 29, 2015, alleged twelve causes of action

* Affirmed. *Vodovskaia-Scandura* v. *Hartford Headache Center, LLC*, 192 Conn. App. 559, A.3d (2019).

related to how the plaintiff was treated while employed by the LLC. The defendants have moved for summary judgment as to all twelve counts. The LLC also seeks summary judgment on its six count counterclaim, which alleges that the plaintiff converted and stole records belonging to the LLC, including certain confidential patient records. In response, the plaintiff concedes that judgment should enter for the defendants on ten of the twelve counts of her complaint. She argues, however, that there are genuine issues of material fact as to her intentional infliction of emotional distress claim (ninth count) and her negligence claim (eleventh count). As to the counterclaim, the plaintiff does not deny taking the records in question, but argues that the LLC's claims are time barred. Consequently, the plaintiff asks that summary judgment enter in her favor on all six counts of the counterclaim.

The bases for the intentional infliction of emotional distress claim, as pled in the second amended complaint, are that the defendants misrepresented to others that the plaintiff had engaged in improper conduct and a lack of integrity in the performance of her professional duties; the defendants solicited false complaints about the plaintiff from patients and included those falsities in patient medical records and charts; and the defendants, in an effort to distort the plaintiff's professional achievements, omitted materials from her personal file that reflected favorably on her performance as a physician. In their motion for summary judgment, the defendants argue that none of these allegations, even if true, are sufficiently extreme or outrageous to support a claim of intentional infliction of emotional distress.

The basis for the plaintiff's negligence claim is her allegation that the defendants refused to allow the plaintiff to leave work to see a doctor for abdominal pain she was experiencing. She claims that as a result of the defendants' conduct, her treatment was delayed, and

as a result of the delay she suffered complications, including infertility. The defendants argue that they owed the plaintiff no duty; they, in fact, did tell the plaintiff to leave work and see a doctor when she complained of the pain; and that there is no competent evidence that any delay in treatment caused the harm she is claiming.

Following argument on the defendants' motion for summary judgment, the plaintiff filed a request to amend her complaint. Attached to her request was her proposed fourth amended revised complaint.[1] The proposed amended revised complaint is limited to just the intentional infliction of emotional distress (first count) and negligence (second count) claims. It, thus, removes the other claims as to which the plaintiff agreed that summary judgment could enter. The proposed amended revised complaint also adds allegations of mistreatment, primarily in support of the plaintiff's claim of intentional infliction of emotional distress. In particular, the proposed revisions allege that the defendants' office manager, Denise McGrath, created a hostile work environment by intimidation, humiliation, constant criticism and bullying of the plaintiff. Specifically, the plaintiff alleges that she was bullied to maximize billable hours, including forcing patients to come in when not medically required. The plaintiff also alleges that she was constantly criticized for not bringing in new patients and for how she conducted herself professionally. As to the negligence claim, the proposed amended revised complaint specifies that the abdominal pain the plaintiff suffered from was appendicitis and specifies the date she reported the pain to the defendant as October 3, 2011.

The defendants opposed the filing of the proposed amended revised complaint because it would unduly

[1] It does not appear that the plaintiff ever filed a third amended complaint. Nevertheless, because the plaintiff has labeled it as such, the court will refer to the proposed amended revised complaint as the fourth.

prejudice them and was an attempt to "end run" the defendants' motion for summary judgment. By an order issued today, the court overruled the defendants' objection because the allegations set forth in the proposed amendment were known to the defendants in that the plaintiff testified to them at her deposition in October, 2016, and because the amendments do not affect the nature of the defendants' arguments or the court's analysis. Specifically, the court must still determine whether the new allegations are sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress. Consequently, the court will consider the defendants' motion for summary judgment in light of the allegations in the fourth amended revised complaint.

II

DISCUSSION

The summary judgment standard is well established. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820, 116 A.3d 1195 (2015). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

"[T]he burden of showing the nonexistence of any material fact is on the party seeking summary judgment." (Internal quotation marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 114 Conn. App. 123, 126, 968 A.2d 956 (2009). "To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

The evidence, viewed in light most favorable to the plaintiff, establishes the following material facts. In January, 2011, following the plaintiff's residency in the neurology department at the University of Connecticut Health Center and Hartford Hospital, Bilchik offered the plaintiff a staff position in the LLC, which the plaintiff accepted. The plaintiff worked as a physician for the LLC until June 30, 2012, when her employment was terminated. During her employment with the LLC a number of disputes arose between the plaintiff and the defendants. Over the course of the plaintiff's employment, the defendants demanded that the plaintiff require patients to come into the office for visits, even though the plaintiff believed that the visits were neither medically indicated nor appropriate. On a nearly daily basis she was disrespected and demeaned by Bilchik and the LLC's office manager, McGrath, who questioned

the plaintiff's competence and complained that the plaintiff was not generating enough revenue for the LLC. Bilchik and McGrath also criticized and harassed the plaintiff for her refusal to write a letter attesting to the poor performance of an employee of the LLC. While the plaintiff also claims that the defendants solicited untrue complaints about her from patients, the undisputed facts prove otherwise. In each of the three instances identified by the plaintiff, the undisputed evidence shows that the patient first expressed his or her dissatisfaction with the plaintiff, and that Dr. Bilchik made a note in the patient's file to reflect that feeling and/or asked the patient to put it in writing. The evidence, viewed in a light most favorable to the plaintiff, does establish, however, that McGrath tried to get at least one former employee of the LLC to write a complaint against the plaintiff, but the employee refused to do so. Knowing that her relationship with the defendants had soured, the plaintiff reviewed her personnel file in anticipation of leaving the LLC. When she did so, she noticed that certain materials that reflected positively on her performance and background were missing.

On October 3, 2011, the plaintiff returned to work following her three week honeymoon trip. When she returned to work she had no paid vacation or personal leave time remaining. Upon returning to work she reported to McGrath that she did not feel well. McGrath told the plaintiff that she had no additional leave time to take, had a full schedule of patients to see, and that if she felt she needed to see a doctor she would have to do so on her own time. The plaintiff made no attempt to seek medical treatment at any time on October 3. On October 4, she reported to work and again told McGrath that she did not feel well. In particular, she reported having abdominal pain. McGrath, also a nurse, has averred in her affidavit that she offered to conduct

an examination of the plaintiff and did so. The plaintiff does not deny that such an examination occurred. She simply cannot recall whether it occurred. McGrath has also averred that she told the plaintiff to leave around mid-day on October 4 so that she could seek medical treatment. She has also averred that the plaintiff did in fact leave work mid-day on October 4. Again, the plaintiff does not dispute McGrath's claims. Instead, she has testified that she cannot recall what time she left work on October 4. The plaintiff did not seek medical treatment until approximately 7 p.m. on October 4. At that time, the doctor who saw her ordered an abdominal CT scan for October 6. The plaintiff was given time off from work to go for the CT scan. The test revealed that the plaintiff had acute appendicitis and needed emergency surgery, which was performed.

Following the surgery, the plaintiff had difficulty becoming pregnant. She attributes those difficulties to the fact that her treatment for appendicitis was delayed from when she first felt symptoms on October 3 until her operation on October 6. The only opinion testimony she offers in support of her conclusion is her own. The plaintiff is board certified in internal medicine, but is not board certified in fertility medicine or as an OB/GYN.

As to the LLC's counterclaims, it is undisputed that while still employed by the LLC the plaintiff removed records from the files of patients and other employees that she believed related to her and supported her claims of mistreatment by the defendants. The defendants first learned that the plaintiff removed these records when she testified to taking the records at her deposition on October 10, 2016. Thereafter, the LLC sought leave to assert its counterclaim on December 5, 2016.

A

Intentional Infliction of Emotional Distress

In the first count of her fourth amended revised complaint the plaintiff claims that the defendants' treatment of her constitutes intentional infliction of emotional distress. "In order for the plaintiff to prevail in a case for liability under . . . [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. . . . Only where reasonable minds disagree does it become an issue for the jury." (Citations omitted; internal quotation marks omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000).

"Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional

infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) Id., 210–11.

Our appellate courts have applied the above test a number of times to claims by employees against their employers. For example, in *Appleton*, the Supreme Court held that the trial court properly granted summary judgment for the defendant where the evidence, viewed in a light most favorable to the plaintiff, established that the defendant "made condescending comments to [the plaintiff] in front of [her] fellow colleagues questioning [her] vision and ability to read; telephoned the plaintiff's daughter, representing that the plaintiff had been acting differently and should take a few days off from work; and telephoned the police, who came to the school and escorted the plaintiff out of the building to her car. The plaintiff also asserted in her affidavit that she was subjected to two psychiatric examinations at the request of the board, and that she was forced to take a suspension and a leave of absence and, ultimately, forced to resign." (Internal quotation marks omitted.) Id., 211. The court held that "[t]hese occurrences may very well have been distressing and hurtful to the plaintiff. They do not, however, constitute extreme and outrageous conduct . . . . As the defendants' actions in the present case were not so atrocious as to exceed all bounds usually tolerated by decent society, their conduct is insufficient to form the basis of an action for intentional infliction of emotional distress." (Citations omitted.) Id., 211–12.

In *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 43 A.3d 69 (2012), the plaintiff's intentional infliction of emotional distress claim was based on allegations and evidence that the defendants told the plaintiff that her job was in jeopardy and subsequently subjected her to adverse actions, including transfer, based on unsubstantiated and false accusations. Again viewing the evidence in a light most favorable to the plaintiff, the Supreme

Court held that no reasonable jury could conclude that the conduct was so extreme or outrageous as to support a claim for intentional infliction of emotional distress. Id., 527. The court, thus, reversed the trial court's denial of the defendants' motion for a directed verdict. Id., 530–31.

In *Tracy* v. *New Milford Public Schools*, 101 Conn. App. 560, 567–68, 922 A.2d 280, cert. denied, 284 Conn. 910, 931 A.2d 935 (2007), the plaintiff alleged that "[the defendants] harassed, intimidated and defamed him in the workplace and disciplined him without conducting a proper investigation." The trial court, assuming these allegations to be true, granted the defendants' motion to strike the plaintiff's claim of intentional infliction of emotional distress because the allegations were not sufficiently extreme or outrageous. Id., 568. The Appellate Court affirmed the trial court's decision. Id., 570.

Similarly, the Appellate Court affirmed the granting of a motion to strike in *Dollard* v. *Board of Education*, 63 Conn. App. 550, 777 A.2d 714 (2001). There, the plaintiff alleged that "[i]n 1998 and early 1999, the defendants jointly engaged in a concerted plan and effort to force the plaintiff to resign from her position or to become so distraught that they would have a colorable basis for terminating her employment. The defendants carried out their plan by hypercritically examining every small detail of her professional and personal conduct. Specifically, the defendants transferred the plaintiff to a school where she did not want to be assigned and then secretly hired someone to replace her at the school from which she had been transferred. The defendants also publicly admonished the plaintiff for chewing gum, being habitually late, being disorganized and not using her time well. Finally, the defendants unnecessarily placed the plaintiff under the intensive supervision of a friend of [one of the defendants]. The defendants ultimately forced the plaintiff to resign." Id., 552–53.

The court held that such conduct did not constitute extreme and outrageous behavior. Id., 554–55. The Appellate Court reached a similar conclusion when it affirmed the trial court's grant of summary judgment in *Gillians* v. *Vivanco-Small*, 128 Conn. App. 207, 213, 15 A.3d 1200 ("The most troubling allegation is that the defendants vindictively conspired to terminate the plaintiff's employment. A concerted effort to remove an employee, however, does not necessarily constitute outrageous conduct . . . ." [Citation omitted.]), cert. denied, 301 Conn. 933, 23 A.3d 726 (2011).

Finally the Appellate Court's decision in *Bator* v. *Yale-New Haven Hospital*, 73 Conn. App. 576, 808 A.2d 1149 (2002), cert. denied, 279 Conn. 903, 901 A.2d 1225 (2006), is particularly relevant to the court's analysis of the plaintiff's claim here. In *Bator*, the "complaint alleged that the plaintiff was employed by the defendant as a respiratory therapist in February, 1989. During the course of his employment, the defendant's agents, servants and employees subjected him to abusive and disparate treatment. Specifically, the plaintiff alleged, among other things, that his supervisor once scheduled him to report for duty when he was under a physician's care. When the plaintiff failed to report as scheduled, the supervisor recommended that he be disciplined. The plaintiff alleged further that he received less compensation than other, less experienced employees in his position. When a nurse accused the plaintiff of being rude to her, a supervisor falsely accused the plaintiff of endangering a patient's life. One of his supervisors suggested that the plaintiff seek psychiatric help when he complained about his schedule and assignments. Another of his supervisors recommended that the plaintiff attend anger management classes after he had a confrontation with a nurse. When the plaintiff complained about a change in his monthly rotation assignment, he was given a written warning. Following

another verbal altercation with a nurse about a patient's care, the plaintiff's supervisor gave him a final written warning for violence. The plaintiff further alleged that as a result of the alleged disparate treatment he received in the defendant's employ, he suffered severe emotional distress that he could no longer endure and resigned on March 28, 2001." Id., 577–78. The Appellate Court affirmed the decision of the trial court striking the plaintiff's claim for intentional infliction of emotional distress. In doing so, it concluded that "[o]n the basis of our plenary review of the plaintiff's complaint, taking the facts together or in isolation, we cannot say that this case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, [Outrageous! . . . Conduct] on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citation omitted; internal quotation marks omitted.) Id., 579.

In this case, the evidence, viewed in a light most favorable to the plaintiff, establishes that the defendants were openly critical of the plaintiff as to the number of patients she saw and the amount of billings she generated. Bilchik and McGrath not only repeatedly expressed their displeasure directly to the plaintiff, but also discussed with the staff their dissatisfaction with the plaintiff, and they sought negative comments about the plaintiff from staff. They also included negative comments they received from patients in various files and records. They also removed positive material about the plaintiff from her personnel file. They also criticized and harassed the plaintiff for her refusal to write a negative letter about another employee of the LLC. Furthermore, the plaintiff has submitted evidence that McGrath told the plaintiff that she could not leave work

on October 3, 2011, to see a doctor. Instead, the plaintiff was told that she would have to do so on her own time. Finally, Bilchik and McGrath threatened the plaintiff with firing if she did not see more patients. These allegations are remarkably similar to the allegations and facts set forth in the cases above, which our Supreme and Appellate Courts have deemed insufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress.

The plaintiff has not cited a single appellate court case involving an employment relationship that has come to a different conclusion. Instead, the plaintiff relies on three Superior Court cases in which the court denied a motion to strike an intentional infliction of emotional distress claim based on an ongoing pattern of harassment and/or defamation in the workplace. The court finds that each of those cases is either distinguishable from the evidence presented here or not persuasive in light of the appellate authority discussed above.

In *Stanley Black & Decker, Inc.* v. *Krug*, Superior Court, judicial district of New Britain, Docket No. CV-14-6027247 (May 7, 2015) (*Abrams, J.*) (60 Conn. L. Rptr. 311), the defendant alleged, inter alia, in her counterclaim a claim for intentional infliction of emotional distress. Id., 312. The basis for the claim was the defendant's claim that "shortly after the defendant's first month of employment the working conditions became intolerable because the defendant's immediate supervisor 'would continuously bully, berate, ridicule and belittle' the defendant, 'created a feeling of paranoia amongst employees,' 'led a personal smear campaign' against the defendant, baselessly disparaged the defendant to her coworkers and management, and repeatedly harassed the defendant." Id. Based on these allegations, Judge Abrams concluded that he "[could not] say as a matter of law that this conduct was not sufficiently outrageous to state a cause of action for intentional infliction of emotional distress." Id., 313. The allegations

in *Krug* were much broader and less specific than what the evidence, viewed in a light most favorable to the plaintiff, establishes here. The evidence presented is that the defendants harassed the plaintiff and threatened to terminate her because they were unhappy with the plaintiff's job performance, particularly as it related to seeing and billing clients. Furthermore, the unrebutted evidence presented by the defendants shows that any patient complaints originated with the patients and were then documented by the defendants. In addition, the defendants' attempts to get other workers to write negative comments about the plaintiff resulted in no such complaints. Finally, McGrath's comments to the plaintiff on October 3, 2011, that she could not leave work to see a doctor was based on the fact that the plaintiff had used all of her vacation and personal time. This last fact is very similar to one of the allegations in *Bator*, which the Appellate Court did not find extreme and outrageous. In addition, the court believes that the analysis in *Krug* is inconsistent with the holdings in *Tracy*, *Dollard*, *Gillians* and *Bator*. For these reasons, the court is not persuaded that *Krug* is persuasive authority for denying the defendants' motion for summary judgment as to the intentional infliction of emotional distress claim.

The plaintiff's reliance on *Savage* v. *Andoh*, Superior Court, judicial district of New Haven, Docket No. CV-07-5015657-S (April 11, 2008) (*Bellis*, *J.*) (45 Conn. L. Rptr. 493), and *Leone* v. *New England Communications*, Superior Court, judicial district of New Britain, Docket No. CV-01-0509752-S (April 10, 2002) (*Quinn*, *J.*) (32 Conn. L. Rptr. 72), is even less persuasive. In those cases Judges Bellis and Quinn gave great weight to the fact that the alleged harassing behavior involved racial and/or ethnic slurs.

Judge Bellis made specific note of this in *Savage*. "In *Leone* v. *New England Communications*, [supra,

32 Conn. L. Rptr. 73] Judge Quinn denied the defendant employer's motion to strike where the complaint alleged that the owners of the company referred to the plaintiff employee as 'dago, wop, Father Sarducci or Gimabroni,' made offensive comments to the plaintiff about homosexuality and his sexual performance, and placed sexually offensive comments and pictures on his computer. [Id.] The court noted that 'there is a strong public policy expressed by statute in our state prohibiting discrimination on the basis of race, sex or national origin.' Id. Based on this public policy and the factual allegations, the court found 'these comments so outrageous in character, and so extreme in degree so as to go beyond all bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.' . . ." *Savage* v. *Andoh*, supra, 45 Conn. L. Rptr. 495. Based on *Leone* and other cases that found similar slurs to be sufficient, Judge Bellis concluded that the plaintiff's allegations of anti-Semitic comments by her supervisor, combined with the other allegations of her complaint sufficient to survive a motion to strike. Id., 496.

The plaintiff here has not alleged any racial, ethnic or similar type slurs or animus. Her allegations, and the evidence related to them, are more of the garden variety employee related claims that our appellate courts have found insufficient to support a claim for intentional infliction of emotional distress. Furthermore, both *Savage* and *Leone* were decided at the pleading stage and not based on a factual record, as is the case here. In fact, ultimately in *Savage* summary judgment was granted for the defendants when the plaintiff could not prove the conduct alleged in the complaint. *Savage* v. *Andoh*, Docket No. CV-07-5015657-S, 2013 WL 951173, *20–21 (Conn. Super. February 6, 2013) (*B. Fischer, J.*).

Overall, the evidence submitted, viewed in a light most favorable to the plaintiff, does not establish conduct that a reasonable jury could conclude constituted

extreme and outrageous behavior. Consequently, the defendants are entitled to summary judgment on the first count of the fourth amended revised complaint.

B

Negligence

As noted above, the plaintiff's negligence count alleges that the defendants were negligent in not allowing the plaintiff to leave work on October 3, 2011, to see a doctor. The plaintiff alleges that as a result of this negligence the plaintiff's treatment for her appendicitis was delayed and she suffered complications, including infertility.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 29, 930 A.2d 682 (2007). Generally, "[i]ssues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner." (Internal quotation marks omitted.) *Fogarty* v. *Rashaw*, 193 Conn. 442, 446, 476 A.2d 582 (1984). However, the "issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Internal quotation marks omitted.) *Mozeleski* v. *Thomas*, 76 Conn. App. 287, 290, 818 A.2d 893, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003). "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand." (Internal quotation marks omitted.) *Sic* v. *Nunan*, 307 Conn. 399, 407, 54 A.3d 553 (2012). In addition, "[a]lthough the issue of causation generally is a question reserved for the trier of fact . . . the issue becomes one of law when the mind of a fair and reasonable person could reach only one conclusion, and summary judgment may be granted based on a fail-

ure to establish causation." (Internal quotation marks omitted.) *Abrahams* v. *Young & Rubicam, Inc.*, 240 Conn. 300, 307, 692 A.2d 709 (1997).

The defendants first claim that they owed no duty to the plaintiff to tell her she was free to leave work to go to a doctor and that their failure to do so cannot expose them to a claim that the plaintiff suffered some adverse medical consequence because she was delayed in getting to the doctor. In making this argument, the defendants note that this is not a medical malpractice case. The plaintiff does not claim that she was in the medical care of the defendants. Instead, the plaintiff's claim is that an employer owes a duty to accommodate a request of an employee to leave work to see a doctor and if the employer fails to do so, it can be sued for any adverse effects suffered by the employee because treatment was delayed.

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable . . . . [T]he test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis

of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 649–50, 126 A.3d 569 (2015). That an injury is foreseeable does not "mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results. . . . [I]n considering whether public policy suggests the imposition of a duty, we . . . consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. . . . [This] totality of the circumstances rule . . . is most consistent with the public policy goals of our legal system, as well as the general tenor of our [tort] jurisprudence." (Internal quotation marks omitted.) Id., 650–51.

As to foreseeability, the facts, viewed in a light most favorable to the plaintiff, are as follows. Although her testimony as to when she reported to McGrath that she felt ill is less than clear, it is possible to read her deposition such that she reported not feeling well upon her return from her honeymoon on October 3, 2011. In response to being so notified by the plaintiff, McGrath told the plaintiff that she would need to go to the doctor on her own time because she had a full schedule of patients to see. The question then is whether the defendant could reasonably have foreseen from the plaintiff's

statement that she did not feel well that waiting to see a doctor until a time when the plaintiff was not occupied with work duties, whether during a lunch break or after the workday, would lead to a significant medical complication, including the alleged infertility.

The court concludes that an ordinary person in the situation of the defendants would not reasonably foresee the consequences claimed by the plaintiff. It is not unusual for employees to report to work and tell their employer that they are not feeling well or suffering from some aliment. An ordinary employer would not be expected to reasonably foresee from such a complaint that serious complications might develop if not treated immediately or within hours. In fact, the ordinary employer would expect that the employee, who knows better than anyone how they are feeling, would take responsibility for their own medical care if they truly felt in distress. This conclusion is particularly apt here when the only evidence of what the plaintiff reported on October 3, 2011, was that she was not feeling well.

There is evidence that when the plaintiff came to work on October 4, 2011, she reported abdominal pain, vomiting, nausea and diarrhea that all started that morning. This evidence might have put the defendants on greater notice as to the foreseeable consequences of a delay in treatment. However, the plaintiff does not and cannot rely on the complaints on October 4 because the unrebutted evidence submitted by the defendants is that McGrath conducted an examination of the plaintiff on October 4 and told her to leave mid-day so that the plaintiff could see a doctor. McGrath's unrebutted testimony is that the plaintiff in fact left work mid-day on October 4. The plaintiff does not deny that she was examined by McGrath or that she left work mid-day on October 4. She testified that she simply does not recall. Consequently, even if the court were to determine that the defendants owed the plaintiff a duty on October 4,

2011, not to delay her treatment, the undisputed evidence is that they did not delay her treatment that day. Recognizing this problem, the plaintiff has amended her complaint to specifically allege that she first reported feeling ill on October 3. Consequently, the question is whether the general nature of the harm alleged by the plaintiff was foreseeable on October 3. For the reasons set forth above, it was not.

Furthermore, even if the court determined that the plaintiff's alleged injuries were foreseeable on October 3 or that the plaintiff might be able to prove a breach of a duty, assuming, one existed, on October 4, the court would still need to conduct the second part of the duty analysis and determine whether as a matter of public policy, an employer owes a duty to an employee to make sure she has access to prompt medical care if she complains of an ailment. Although the parties did not address the four public policy factors, the court will.

First, the normal expectations of employers and employees is not that employers take responsibility for an employee's health and welfare other than the employee's actual working conditions. Our legislature has by statute spelled out an employer's obligation to its employees. General Statutes § 31-49 provides: "It shall be the duty of the master to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work and fit and competent persons as his colaborers and to exercise reasonable care in the appointment or designation of a vice-principal and to appoint as such vice-principal a fit and competent person. The default of a vice-principal in the performance of any duty imposed by law on the master shall be the default of the master." Nothing in the statute imposes any duty on the employer to insure that its employees are permitted to leave work as necessary to seek medical treatment. In fact, in October, 2011,

Connecticut law did not require that every employer provide its employees with paid medical leave. Thus, many employees could have been in the position of waiting until nonwork hours to seek medical treatment or risk loss of pay or other discipline by their employer.

Second, the public policy regarding the interplay of employers and employees is spelled out in great detail by our legislature in several statutes. The fact that the legislature has heavily regulated this relationship weighs against the court judicially creating duties and rights between the parties.

Third, imposition of a duty on an employer to insure prompt medical treatment of a sick employee will no doubt lead to increased litigation. Furthermore, the creation of such a duty would have the perverse effect of discouraging employees from taking primary responsibility for their own health. For this reason, creating a cause of action is an inefficient and costly way of insuring that employees seek treatment for medical ailments.

Finally, the plaintiff has not cited a single case from another jurisdiction that has recognized such a duty, and the court is not aware of any. The closest this court could find to a claim such as that alleged here by the plaintiff is *Coste* v. *Riverside Motors, Inc.*, 24 Conn. App. 109, 585 A.2d 1263 (1991). In that case, the employee sued his employer for not allowing him to leave work during the early stages of a snowstorm. The employee claimed that by the time he was permitted to go home the conditions had worsened and he ended up in a motor vehicle accident as a result. The Appellate Court affirmed the trial court's ruling striking the complaint because the plaintiff could not allege that the employer's decision was the proximate cause of the accident. While the court was not required to address whether the defendant owed the plaintiff any duty regarding the decision of when to allow its employees to leave work, the court did note: "The implication of

the delict is that an employer has a duty to ensure an employee a safe trip home or a duty to prevent an employee from driving in hazardous weather. Although we know of no case, statute or principle of common law that places such a duty on an employer, we need not reach the issue because we conclude that legal causation has not been sufficiently alleged." (Footnote omitted.) Id., 112. Similarly, this court knows of no case, statute or principle of common law that would impose on the defendants the duty alleged by the plaintiff.

Overall, none of the four public policy factors support creation of the duty suggested by the plaintiff. Consequently, the court concludes that the defendants did not owe the plaintiff a duty to insure that she was given time off from work to seek medical treatment when she complained of not feeling well, and the defendants are entitled to summary judgment on the second count of the fourth amended revised complaint.

The defendants further argue that even if the court does find that they owed the plaintiff the duty alleged, the plaintiff has failed to present competent evidence that any breach of that duty by the defendants caused the plaintiff's claimed harm. "Causation is an essential element of a cause of action in negligence. . . . [A] plaintiff must establish that the defendant's conduct legally caused the injuries. . . . The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. . . . The second component of legal cause is proximate cause . . . . [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the

injury to the negligent act complained of for the necessary causal connection. . . . This causal connection must be based upon more than conjecture and surmise." (Citation omitted; internal quotation marks omitted.) *Kumah* v. *Brown*, 130 Conn. App. 343, 347, 23 A.3d 758 (2011). While the issue of causation is typically for the jury, where evidence of the connection between the defendant's conduct and the plaintiff's injuries is attenuated or would call for conjecture on the part of the fact finder, the issue can be resolved on summary judgment. Id., 350–51.

As noted above, the only evidence the plaintiff has regarding causation is her opinion testimony that the delay in treatment of her appendicitis led to complications, including her infertility. The plaintiff's opinion, though, makes no attempt to relate any particular period of delay to the alleged complications. For example, the plaintiff now claims in the fourth amended revised complaint that she first complained of not feeling well upon her return to work on October 3, 2011. However, it is undisputed that the plaintiff made no attempts to seek medical treatment after her workday ended on October 3. The plaintiff has presented no evidence, expert or otherwise, tying the delay in treatment, from her first complaint on October 3 to her first opportunity to seek treatment later that day, to her alleged injuries. This is crucial because the only evidence as to October 4 is that when the plaintiff complained of injuries that day she was examined by McGrath and permitted to leave work mid-day. For whatever reason though, the plaintiff did not seek medical treatment until approximately 7 that evening. Again, the plaintiff has presented no evidence as to the effect of the delay caused by her own decision not to seek treatment until later that evening. Finally, although the plaintiff sought treatment on October 4, her CT scan and surgery did not occur until October 6. The plaintiff does not claim that the delay from October 4 to October

6 was in any way the fault of the defendants. In fact, she admits that she was given time off from work on October 6 to have the CT scan performed. The plaintiff has presented no expert opinion differentiating any harm from this delay from the harm associated with the only delay, based on the evidence, that can be attributed to the defendants—the hours on October 3 between when she first complained of discomfort and when she could have sought treatment that evening. In the end, the plaintiff's evidence of proximate cause is full of gaps that would require the fact finder to engage in conjecture and speculation as to whether the alleged negligence of the defendants was a substantial factor in bringing about her alleged injury. See, e.g., *Coste* v. *Riverside Motors, Inc.*, supra, 24 Conn. App. 115 ("[t]he defendant's conduct is too inconsequential to the ultimate harm to the plaintiff, considering the many other variables, to rise to the level of proximate cause"). Because, based on the evidence presented, no reasonable jury could find that the defendants' alleged conduct proximately caused the plaintiff's claimed injuries, the defendants are entitled to summary judgment on the second count of the fourth amended revised complaint.

C

LLC's Counterclaim

Whether the LLC is entitled to summary judgment on the six counts of its counterclaim turns on application of the statute of limitations. The plaintiff claims that all six counts are barred by General Statutes § 52-577, which requires that any claim in tort be brought within three years from the date of the act or omission complained of. She argues that the LLC's counterclaim was not brought until January, 2017, yet alleges wrongful conduct that took place while the plaintiff was employed by the LLC. She argues that because her employment with the LLC ended in June, 2012, it is clear that the counterclaim is untimely and that she is entitled to summary judgment on all six counts.

The LLC's only response to the plaintiff's argument is that it did not learn of the plaintiff's conduct until her deposition in October, 2016. Thereafter, the LLC immediately sought to plead its counterclaim in December, 2016. The LLC argues, relying on General Statutes § 52-595, that the three year limitation period in § 52-577, was tolled due to the plaintiff's concealment of her conduct. Section 52-595 provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence." "[T]o prove fraudulent concealment, the plaintiffs [must] show: (1) [the] defendant's actual awareness, rather than imputed knowledge, of the facts necessary to establish the plaintiffs' cause of action; (2) [the] defendant's intentional concealment of these facts from the plaintiffs; and (3) [the] defendant's concealment of the facts for the purpose of obtaining delay on the plaintiffs' part in filing a complaint on their cause of action. . . . To do so, it [is] not sufficient for the plaintiffs to prove merely that it was more likely than not that the defendants had concealed the cause of action. Instead, the plaintiffs [must] prove fraudulent concealment by the more exacting standard of clear, precise, and unequivocal evidence." (Citation omitted; internal quotation marks omitted.) *Weiner* v. *Clinton*, 106 Conn. App. 379, 387, 942 A.2d 469 (2008).

Neither party has submitted any evidence regarding the elements that the LLC must prove to establish fraudulent concealment. As the party moving for summary judgment, the LLC has failed to meet its burden. Consequently, its motion for summary judgment on the six counts of its counterclaim is denied. The plaintiff, having never actually moved for summary judgment on the counterclaim, is not entitled to have it enter based solely on her opposition to the defendant's motion for summary judgment.

III

CONCLUSION

For all of the foregoing reasons, the defendants' motion for summary judgment as to the first and second counts of the plaintiff's fourth amended revised complaint is GRANTED. The LLC's motion for summary judgment as to each of the six counts of its counterclaim is DENIED.

ROBERT P. IVES *v.* COMMISSIONER OF MOTOR VEHICLES (AC 41282)

Sheldon, Elgo and Lavery, Js.*

Syllabus

The plaintiff appealed to the trial court from a decision by the defendant commissioner of motor vehicles suspending the plaintiff's operator's license, pursuant to statute ([Rev. to 2015] § 14-227b), for a period of forty-five days and requiring the installation of an ignition interlock device in his motor vehicle for six months. The plaintiff claimed, inter alia, that the trial court erred in concluding that blood test results need not satisfy the conditions for admissibility and competence set forth by statute (§ 14-227a [k]) to be admissible in an administrative license suspension hearing. The plaintiff claimed that the trial court improperly interpreted a 2009 amendment to § 14-227b (j) as changing the requirements for the admissibility of chemical evidence at an administrative hearing, and that because he did not suffer and was not alleged to have suffered a physical injury in an accident as required by § 14-227a (k), his blood sample was improperly obtained. *Held*:

1. The trial court properly determined that the blood test derived from the plaintiff's blood sample satisfied the conditions for admissibility in the underlying administrative hearing before the defendant; although § 14-227b (j), which applies to administrative proceedings, and § 14-227a (k), which applies to criminal proceedings, plainly and unambiguously set forth certain factual preconditions that must be satisfied in order for those sections to be applicable to their respective proceedings, § 14-227b (j) sets forth an additional precondition not contained in the criminal statute, which was added by the 2009 amendment, that applies when

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

a police officer otherwise determines that an operator of a motor vehicle requires treatment or observation at a hospital and which appears to create a conflict between the administrative statute and the criminal statute as to whether the blood test results derived from a blood sample taken from an operator may be admitted in a subsequent license suspension hearing when the operator has neither suffered, nor is alleged to have suffered a physical injury, and, thus, because the plain and unambiguous language of both statutes, when construed together, yields an unworkable result, it was necessary to look to the legislative history of the 2009 amendment for guidance, which demonstrated that its purpose was to extend the factual circumstances in which blood test results derived from blood samples are admissible in administrative proceedings under § 14-227b (j) to include accident situations where an operator of a motor vehicle, regardless of a physical injury or alleged physical injury, is determined by a police officer to require treatment or observation at a hospital; accordingly, the plaintiff's proposed reading of § 14-227b (j) to require either that an operator suffer or be alleged to have suffered a physical injury before his blood can be taken at a hospital would be inconsistent with the purpose underlying the 2009 amendment to § 14-227b (j) and render that section, as amended, inoperative, and construing § 14-227b (j) and § 14-227a (k) as being applicable to distinct factual circumstances was consistent with our case law discussing the legislative scheme underlying both statutes, and under the circumstances here, where the plaintiff was involved in an accident as a result of operating a motor vehicle while intoxicated and the police officer at the scene determined that the plaintiff, in light of his behavior following the accident, required either treatment or observation at a hospital, where a blood sample was taken for the purpose of diagnosing or treating him, the conditions for the admissibility of the blood test were satisfied.

2. The plaintiff's claim that permitting the introduction of the blood test results absent satisfaction of the admissibility conditions set forth in § 14-227a (k) was unconstitutional was not reviewable, the plaintiff having failed to raise that claim in the administrative hearing; moreover, the claim was not reviewable under *State* v. *Golding* (213 Conn. 233), the plaintiff having failed to raise a specific claim of constitutional deficiency.

Argued February 13—officially released September 10, 2019

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's license to operate a motor vehicle and requiring the installation of an ignition interlock device on the plaintiff's vehicle, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Gleeson*, *J.*; judgment dismissing the appeal;

thereafter, the court denied the plaintiff's motion to reargue or for reconsideration, and the plaintiff appealed to this court. *Affirmed.*

Christopher Thompson, with whom was *Gregory Thompson*, for the appellant (plaintiff).

Christine Jean-Louis, assistant attorney general, with whom, on the brief, was *George Jepson*, former attorney general, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, Robert P. Ives, appeals from the judgment of the trial court rendered in favor of the defendant, the Commissioner of Motor Vehicles (commissioner), dismissing his appeal from the decision of the commissioner to suspend his motor vehicle operator's license, pursuant to General Statutes (Rev. to 2015) § 14-227b,[1] for forty-five days and to require that he install and maintain an ignition interlock device in his motor vehicle for six months.[2] On appeal, the plaintiff claims that (1) the court erred in concluding that, in light of a 2009 amendment to § 14-227b (j), blood test

[1] In this opinion, our references to § 14-227b are to the 2015 revision of the statute, unless otherwise noted.

[2] Pursuant to Practice Book § 61-12, the plaintiff filed a motion requesting that the trial court impose a discretionary stay of the commissioner's decision during the pendency of this appeal. The trial court denied the motion, and the plaintiff sought review of that order. This court granted the plaintiff's subsequent motion for review of the stay order, but denied the relief requested therein. The plaintiff also filed a motion, pursuant to Practice Book § 61-14, requesting that this court order that the commissioner's decision be stayed, which this court subsequently denied. In the absence of an appellate stay, the plaintiff's forty-five day license suspension and six month ignition device installation requirement have expired. This appeal is not moot, however, because this court could afford the plaintiff practical relief from the adverse collateral consequences that are attendant to his license suspension. See *Stash* v. *Commissioner of Motor Vehicles*, 297 Conn. 204, 208 n.7, 999 A.2d 696 (2010) (noting that § 14-227b license suspensions have collateral consequences due to the increasing penalties imposed upon successive violations of that statute).

results need not satisfy the conditions for admissibility and competence set forth in General Statutes § 14-227a (k) to be admissible in an administrative license suspension hearing, and (2) the introduction of blood test results derived from his blood sample without satisfying the admissibility conditions set forth in § 14-227a (k) is unconstitutional. We affirm the judgment of the trial court.

The following facts, as set forth in the trial court's order rendering a judgment of dismissal, and procedural history are relevant to our resolution of this appeal. "On April 4, 2016, at about 8:30 p.m., the Southington Police Department responded to a complaint about a motor vehicle in a ditch. The complainant had reported that the operator of the vehicle smelled of alcohol. Officer [Ryan] Lair found the plaintiff's vehicle off of the roadway in a ditch near a damaged guardrail. He observed the plaintiff to be unsteady on his feet and saw him fall to the ground, losing a sneaker in the process. The plaintiff did not replace his sneaker upon standing and gave Officer Lair a blank stare. As the plaintiff was having trouble standing up on his own, Officer Lair assisted the plaintiff so that he would not fall again. During their conversation, the plaintiff's speech was slurred and mumbling. Officer Lair observed that the plaintiff's eyes were glassy and bloodshot and he smelled the odor of alcohol on [the] plaintiff's breath. In plain view in [the] plaintiff's vehicle was an almost empty 375 [milliliter] Jägermeister bottle as well as several unopened [twelve ounce] beers. [The] [p]laintiff stated that 'he drank way too much tonight' and admitted to driving.

"[The] [p]laintiff's belligerence with the paramedics who arrived to examine him was witnessed by fire department personnel. The paramedics and fire personnel informed Officer Lair that the plaintiff 'appeared and smelled as if he was intoxicated.' [The] [p]laintiff

was taken to a parking lot so that standard field sobriety tests could be administered by Lair and Officer [Jonathan] Lopa, but while there [the] plaintiff appeared to be dazed and continued to slur his speech and mumble. [The] [p]laintiff denied that he was a diabetic, but a blood sugar test administered by a paramedic resulted in a 'borderline' number. [The] [p]laintiff at some point returned himself to the police cruiser and closed the door. When asked by Officer Lopa whether he had taken anything that night, [the] plaintiff became upset and agitated, exited the police cruiser, and physically assaulted Lopa. The officers then took the plaintiff down to the ground, which resulted in a small cut to [the] plaintiff's chin, as well as damage to the cruiser. As [the] plaintiff appeared to be incapacitated and blank faced, he was placed in the ambulance, whereupon he licked the female paramedic. [The] [p]laintiff was transported to Bradley Memorial Hospital for evaluation. Upon arrival, [the] plaintiff struck a male paramedic in the chest with his fist, after which both of his arms were handcuffed to his hospital bed. [The] [o]fficers learned that [the] plaintiff had struck both paramedics during the transport, one of whom had to sit on the plaintiff to control him. Hospital records indicate that [the] plaintiff was admitted because of [an] 'altered mental status,' and [the] plaintiff's violent and bizarre behavior continued while hospitalized. [The] [p]laintiff tried to bite a nurse technician, and repeatedly tried to bite his handcuffs off and to bite his IV line. [The] [p]laintiff intermittently displayed a confused affect, repeatedly swore at police and hospital staff, and made obscene suggestions and lascivious displays. Officer Lair was informed by Dr. Richard Steinmark that [the] plaintiff's blood would be drawn by medical staff in the course of their normal medical duties. [The] [p]laintiff's blood was so drawn and he was given medical treatment by hospital staff before being discharged.

"On April 28, 2016, Officer Lair sought and obtained a search and seizure warrant for [the] plaintiff's medical records, including toxicology results. Said toxicology results revealed a blood alcohol level that converted to 0.31, more than three times the legal limit. [The] [p]laintiff was arrested by warrant on May 27, 2016, for operating under the influence." Subsequently, the commissioner issued a notice advising the plaintiff of the proposed suspension of his license. On July 7, 2016, an administrative hearing was held at the Department of Motor Vehicles (department) to determine whether the plaintiff's license should be suspended pursuant to § 14-227b. At the hearing, Officer Lair testified to the contents of his police report detailing the events of the night of April 4, 2016. On the basis of the evidence presented at the hearing, the commissioner found that (1) Officer Lair had probable cause to arrest the plaintiff for operating a motor vehicle while under the influence of intoxicating liquor or drug or both, (2) the plaintiff was placed under arrest, (3) the plaintiff submitted to the test or analysis and the results indicated an elevated blood alcohol content, and (4) the plaintiff was operating the motor vehicle. Accordingly, the commissioner ordered the suspension of the plaintiff's license and required that an ignition interlock device be installed and maintained in the plaintiff's vehicle.

On July 14, 2016, the plaintiff commenced an appeal of the commissioner's decision to the Superior Court. In his appeal, the plaintiff challenged the commissioner's findings that there was probable cause for his arrest for operating while under the influence and that he was operating a motor vehicle at that time. The plaintiff subsequently filed an amended complaint challenging the admissibility of the blood test results derived from the blood sample taken from him at the hospital under § 14-227b (j). On November 7, 2016, the defendant filed a request for remand and stay of appeal, in which he

requested that the case be remanded to the department for further proceedings to determine whether the plaintiff's blood sample was obtained in accordance with the conditions for admissibility set forth in § 14-227a (k), pursuant to § 14-227b (j) (5). The court subsequently remanded the case to the department and retained jurisdiction pending the disposition of the case on remand. Among the facts supported by the evidence at the remand hearing and found by the commissioner to have been proven were that, in the opinion of Officer Lair, the plaintiff's postaccident behavior warranted further evaluation and treatment, and, thus, required that he be transported to the hospital for that purpose. After hearing arguments from the parties as to the admissibility of the blood test results derived from the plaintiff's blood sample, the commissioner again ordered the suspension of the plaintiff's license, concluding that Officer Lair's "actions in requiring [the plaintiff] to be in need of treatment or observation at the hospital [were] consistent" with the requirements set forth in § 14-227b (j), and that "the results of the blood sample were obtained by proper application for and issuance of a search and seizure warrant" pursuant to § 14-227a (k).

The plaintiff again appealed the commissioner's decision to the Superior Court, arguing that the blood test was inadmissible because the blood sample was not taken in accordance with § 14-227a (k), as required by § 14-227b (j) (5). Specifically, the plaintiff argued that "he had not suffered or allegedly suffered a physical injury in the accident, nor was the sample taken for the purpose of diagnosis or treatment of such an injury." The court rejected the plaintiff's argument, concluding that § 14-227a (k) governs the admissibility of chemical analyses of blood samples in criminal proceedings, "but is not applicable in the same way to administrative hearings" such as the one in the present case. The court then looked to the language of § 14-227b (j), which

governs administrative proceedings, and concluded that "the language of § 14-227b (j) in question is plain and unambiguous," and that "there was substantial evidence in the record to support the [commissioner's] finding that [Officer Lair's] determination that the plaintiff's postaccident behavior necessitated further evaluation at a hospital was warranted." Accordingly, the court affirmed the commissioner's decision and dismissed the plaintiff's appeal. This appeal followed.

I

The focus of the plaintiff's first claim on appeal is the trial court's purportedly erroneous interpretation of § 14-227b (j), the administrative statute, and its relation to § 14-227a (k), the criminal statute. The plaintiff claims that the court erred in interpreting the 2009 amendment to § 14-227b (j) as changing the requirements for the admissibility of chemical evidence at an administrative hearing. Notwithstanding that amendment, the plaintiff argues that because he did not suffer and was not alleged to have suffered a physical injury in an accident as required by § 14-227a (k), his blood sample was improperly obtained and, thus, any resulting blood test was inadmissible in the hearing before the department. In response, the commissioner argues that the references to suffering or allegedly suffering a physical injury in § 14-227a (k) are factual preconditions applicable to criminal proceedings and the admissibility of blood test results in those proceedings. As such, the commissioner contends that these preconditions do not apply to § 14-227b (j), which sets forth its own distinct preconditions for the admissibility of blood test results in administrative proceedings.

We begin by setting forth the appropriate standard of review. "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through

4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"A reviewing court, however, is not required to defer to an improper application of the law. . . . It is the function of the courts to expound and apply governing principles of law. . . . We previously have recognized that the construction and interpretation of a statute is a question of law for the courts, where the administrative decision is not entitled to special deference . . . . Questions of law [invoke] a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Because this case forces us to examine a question of law, namely, [statutory] construction and interpretation . . . our review is de novo. . . . We are also compelled to conduct a de novo review because the issue of statutory construction before this court has not yet been subjected to judicial scrutiny." (Citation omitted; internal quotation marks omitted.) *Jim's Auto Body* v. *Commissioner of Motor Vehicles*, 285 Conn. 794, 803–804, 942 A.2d 305 (2008).

"[W]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the

statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Footnote omitted; internal quotation marks omitted.) *Winsor* v. *Commissioner of Motor Vehicles*, 101 Conn. App. 674, 680–81, 922 A.2d 330 (2007).

''It also is well established that, [i]n cases in which more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law . . . and we construe the [provisions], if possible, to avoid conflict between them.'' (Internal quotation marks omitted.) *State* v. *Victor O.*, 320 Conn. 239, 248–49, 128 A.3d 940 (2016); see also *Winsor* v. *Commissioner of Motor Vehicles*, supra, 101 Conn. App. 681 (''[T]he 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.]).

We begin our analysis by examining the relevant subsections of §§ 14-227b and 14-227a. Section 14-227b (a) provides in relevant part that "[a]ny person who operates a motor vehicle in this state shall be deemed to have given such person's consent to a chemical analysis of such person's blood, breath or urine . . . ." Section 14-227b (j) further provides in relevant part that "[n]otwithstanding the provisions of subsections (b) to (i), inclusive, of this section, any police officer who obtains the results of a chemical analysis of a blood sample taken from or a urine sample provided by an operator of a motor vehicle who was involved in an accident and suffered or allegedly suffered physical injury in such accident, *or who was otherwise deemed by a police officer to require treatment or observation at a hospital*, shall notify the Commissioner of Motor Vehicles and submit to the commissioner a written report if such results indicate that such person had an elevated blood alcohol content, and if such person was arrested for violation of section 14-227a . . . . The commissioner may, after notice and an opportunity for hearing . . . suspend the motor vehicle operator's license . . . of such person for the appropriate period of time . . . and require such person to install and maintain an ignition interlock device for the appropriate period of time . . . . Each hearing conducted under this subsection shall be limited to a determination of the following issues: (1) [w]hether the police officer had probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or drug or both; (2) whether such person was placed under arrest; (3) whether such person was operating the motor vehicle; (4) whether the results of the analysis of the blood or urine of such person indicate that such person had an elevated blood alcohol content; and (5) *in the event that a blood sample was taken*, whether the blood sample was obtained in accordance with conditions for admissibility and competence as evidence

as set forth in subsection (k) of section 14-227a." (Emphases added.)

Section §14-227a (k) provides in relevant part that "[n]otwithstanding the provisions of subsection (b) of this section, evidence respecting the amount of alcohol or drug in the blood or urine of an operator of a motor vehicle *involved in an accident who has suffered or allegedly suffered physical injury in such accident*, which evidence is derived from a chemical analysis of a blood sample taken from or a urine sample provided by such person after such accident at the scene of the accident, while en route to a hospital or at a hospital, shall be competent evidence to establish probable cause for the arrest by warrant of such person for a violation of subsection (a) of this section and *shall be admissible and competent in any subsequent prosecution thereof* if: (1) [t]he blood sample was taken or the urine sample was provided *for the diagnosis and treatment of such injury*; (2) if a blood sample was taken, the blood sample was taken in accordance with the regulations adopted under subsection (d) of this section; (3) a police officer has demonstrated to the satisfaction of a judge of the Superior Court that such officer has reason to believe that such person was operating a motor vehicle while under the influence of intoxicating liquor or drug or both and that the chemical analysis of such blood or urine sample constitutes evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both in violation of subsection (a) of this section; and (4) such judge has issued a search warrant in accordance with section 54-33a authorizing the seizure of the chemical analysis of such blood or urine sample. . . ." (Emphases added.)

There is no ambiguity in the application of § 14-227b to administrative proceedings and § 14-227a to criminal proceedings. Moreover, both §§ 14-227b (j) and 14-227a

(k) plainly and unambiguously set forth certain factual preconditions that must be satisfied in order for those sections to be applicable to their respective proceedings. Section 14-227b (j), however, sets forth an additional precondition not contained in the criminal statute that applies when a police officer otherwise determines that an operator of a motor vehicle requires treatment or observation at a hospital. This precondition, which was added by the 2009 amendment to § 14-227b, appears to create a conflict between the administrative statute and the criminal statute as to whether the blood test results derived from a blood sample taken from an operator may be admitted in a subsequent license suspension hearing when that operator has neither suffered, nor is alleged to have suffered, a physical injury. In light of this apparent conflict, the plaintiff argues that the commissioner's admission of the blood test results absent a determination of whether the operator suffered or allegedly suffered a physical injury "contravenes an essential premise of chemical testing under § 14-227a (k)." In other words, the plaintiff argues that because one of the conditions that must be met under § 14-227a (k) references diagnosis or treatment *of an injury*, and because the plaintiff did not suffer nor was alleged to have suffered a physical injury, the conditions for the admissibility of the blood test derived from his blood sample were not satisfied in accordance with the criminal statute, as required by § 14-227b (j) (5).

The plaintiff's interpretation of the relationship between the two statutes would lead to an unworkable result. See *Canton* v. *Cadle Properties of Connecticut, Inc.*, 188 Conn. App. 36, 47, 204 A.3d 62 (2019) (literal adherence to plain and unambiguous text of statute unworkable where such an interpretation of statute relieving tenants of obligation to pay utility expenses and placing burden on receiver appointed under General Statutes § 12-163a would "likely lead to considerably less money to satisfy the amount owed in unpaid

property taxes and, where necessary, the fees and costs of the receiver, thereby defeating the primary purpose of the receivership"). An interpretation of the administrative statute as requiring that an operator suffer or allegedly suffer a physical injury on the basis of its reference to the criminal statute, when its language plainly and unambiguously dictates its application otherwise, would eliminate any operative distinction in the application of either statute. In addition, such an interpretation would be inconsistent with this court's recognition that the legislative scheme of §§ 14-227a and 14-227b establishes distinct types of proceedings. *State* v. *Gracia*, 51 Conn. App. 4, 10, 719 A.2d 1196 (1998) ("We have previously recognized . . . that [t]he legislative scheme [of §§ 14-227a and 14-227b] establishes *two separate and distinct proceedings*. The administrative suspension of an operator's license is under the jurisdiction of the department of motor vehicles and the prosecution of the underlying offense of driving while intoxicated falls within the jurisdiction of the criminal justice system." [Emphasis added; internal quotation marks omitted.]).

Because we have determined that the plain and unambiguous language of §§ 14-227b (j) and 14-227a (k), when construed together, "yields an unworkable result, we may look for interpretive guidance to extratextual evidence, such as the legislative history . . . ." *Canton* v. *Cadle Properties of Connecticut, Inc.*, supra, 188 Conn. App. 47. In order to provide clarity on the relationship between the two statutes, we examine the legislative history behind the 2009 amendment to § 14-227b (j). See *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 174, 927 A.2d 793 (2007) ("[t]o determine whether the legislature enacted a statutory amendment with the intent to clarify existing legislation, we look to various factors, including, but not limited to (1) the amendatory language . . . (2) the

declaration of intent, if any, contained in the public act . . . (3) the legislative history . . . and (4) the circumstances surrounding the enactment of the amendment, such as, whether it was enacted in direct response to a judicial decision that the legislature deemed incorrect . . . or passed to resolve a controversy engendered by statutory ambiguity . . . .'' [citations omitted; internal quotation marks omitted]).

Number 09-187, § 63 of the 2009 Public Acts (P.A. 09-187) made several revisions to General Statutes (Rev. to 2009) § 14-227b, which included adding to then subsection (k) the additional precondition in which a police officer has otherwise determined that an operator of a motor vehicle requires treatment or observation at a hospital. In regard to this revision, the summary for P.A. 09-187 provides that the act ''*expands the circumstances* under which blood test results from someone taken to a hospital can be used *under the administrative . . . process*.'' (Emphases added.) That summary further describes the act as expanding ''the circumstances under which blood test results *can be used to include situations where the police officer determines that the person requires treatment or observation at a hospital, even if an injury is not apparent*.'' (Emphasis added.) This description confirms that the purpose of the 2009 amendment was to extend the factual circumstances in which blood test results derived from blood samples are admissible in administrative proceedings under § 14-227b (j) to include accident situations where an operator of a motor vehicle, regardless of a physical injury or alleged physical injury, is determined by a police officer to require treatment or observation at a hospital.

On the basis of the foregoing, we disagree with the plaintiff's proposed reading of § 14-227b (j) to require either that an operator suffer or be alleged to have suffered a physical injury before his blood can be taken

at a hospital. Our adoption of that reading would be inconsistent with the purpose underlying the 2009 amendment to § 14-227b (j) and render that subsection, as amended, inoperative. See *Middlebury* v. *Dept. of Environmental Protection*, supra, 283 Conn. 173–74 ("An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act. . . . Because of the legislature's plenary authority to define the scope of administrative appeals . . . we have been especially deferential to statutory changes when the new statute may be characterized as clarifying the administrative law." [Citation omitted; internal quotation marks omitted.]). The 2009 amendment reinforces the notion that distinct factual preconditions were necessary for the application of §§ 14-227b (j) and 14-227a (k), respectively. Reading the amended subsection as simply reiterating the physical injury or alleged physical injury requirement would effectively make the new language added by the amendment meaningless and imparts no real distinction between the administrative statute and the criminal statute. "It is a cardinal maxim of statutory interpretation that statutes shall not be construed to render any sentence, clause, or phrase superfluous or meaningless." (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 309, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

Moreover, as previously discussed, construing § 14-227b (j) and 14-227a (k) as being applicable to distinct factual circumstances is consistent with our case law discussing the legislative scheme underlying both of those statutes. See *State* v. *Gracia*, supra, 51 Conn. App. 10. Although both subsections of those statutes relate to the same subject matter, they govern separate proceedings that have distinct purposes and burdens of proof. See *O'Rourke* v. *Commissioner of Motor Vehicles*, 33 Conn. App. 501, 508, 636 A.2d 409, cert. denied,

229 Conn. 909, 642 A.2d 1205 (1994); *State* v. *Barlow*, 30 Conn. App. 36, 41, 618 A.2d 579 (1993). Accordingly, we conclude that, in the context of an administrative proceeding, a physical injury or alleged physical injury is not necessary for the admission of blood test results derived from a blood sample taken when an operator of a motor vehicle, who was involved in an accident, has otherwise been determined by a police officer to require treatment or observation at a hospital.[3]

In the present case, there is no dispute that the plaintiff was involved in an accident as a result of operating his motor vehicle while intoxicated. The record further reveals that the plaintiff began acting in an increasingly belligerent manner after the police officers and paramedics arrived to provide assistance. This included physically assaulting an officer and two paramedics, and causing damage to a police cruiser. Moreover, Officer Lair indicated in his police report that he was going to transport the plaintiff to the Southington Police Department for booking, but, because the plaintiff "appeared to be incapacitated with a blank look on his face," he was released from his handcuffs and put into the rear of the ambulance that transported him to the hospital. The plaintiff's unseemly conduct continued at the hospital, where he struck a male paramedic, attempted to bite a nurse technician, and repeatedly tried to bite off his handcuffs and bite into his IV line. Hospital records also indicate that the plaintiff was

[3] This conclusion does not affect the application of the admissibility conditions set forth in § 14-227a (k) in determining whether to impose a license suspension in an administrative hearing. In this regard, we disagree with the trial court to the extent that its decision could be read as suggesting that § 14-227a (k) is not applicable to administrative proceedings. Rather, we recognize that § 14-227b (j) (5) necessitates that blood samples must be obtained in accordance with the admissibility conditions set forth in § 14-227a (k), and that blood test results may be admissible in administrative proceedings if they are derived from a blood sample taken from an operator of a motor vehicle who suffered or allegedly suffered a physical injury, *or in the absence of such an injury* was deemed by a police officer to require treatment or observation at a hospital.

admitted due to "an altered mental status," that hospital staff continued to observe the plaintiff and update his medical status, and that a vaccine was administered to the plaintiff after his blood was drawn. In addition, "Officer Lair was informed by Dr. Richard Steinmark that [the] plaintiff's blood would be drawn by medical staff in the course of their normal medical duties." As such, the record demonstrates that, following an accident, the plaintiff was determined by Officer Lair to require either treatment or observation at the hospital in lieu of suffering or allegedly suffering a physical injury, pursuant to § 14-227b (j), and that the hospital staff, recognizing the plaintiff's erratic behavior, took the plaintiff's blood sample in order to diagnose or treat him in connection with that behavior pursuant to § 14-227a (k) (1).

Accordingly, we conclude that the trial court properly determined that the blood test derived from the plaintiff's blood sample satisfied the conditions for admissibility in the underlying administrative hearing before the department.[4]

II

The plaintiff next claims that permitting the introduction of blood test results absent satisfaction of the

[4] In this appeal, the plaintiff's only claim in regard to the interpretation of §§ 14-227b (j) and 14-227a (k) is that the blood test was inadmissible in the license suspension hearing because his blood sample was not obtained for the diagnosis or treatment of an injury. Because the plaintiff does not challenge the commissioner's determination as to the remaining issues that are considered in a hearing under § 14-227b (j) or the remaining conditions for admissibility under § 14-227a (k), we need not address them. See, e.g., *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 527, 142 A.3d 363 (claims not briefed or mentioned in any way on appeal deemed to be abandoned), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); *Deutsche Bank National Trust Co.* v. *Shivers*, 136 Conn. App. 291, 292 n.2, 44 A.3d 879 (court may decline to review claims not briefed on appeal and deemed abandoned) cert. denied, 307 Conn. 938, 56 A.3d 950 (2012).

admissibility conditions set forth in § 14-227a (k) is unconstitutional. Specifically, the plaintiff urges this court to consider what he characterizes as the "serious constitutional implications" that may arise in cases involving uninjured drivers sent by police officers to hospitals for treatment or observation.

We need not address this claim because it was not raised by the plaintiff in the administrative hearing below. See *Adams* v. *Commissioner of Motor Vehicles*, 182 Conn. App. 165, 176, 189 A.3d 629 ("[a] plaintiff cannot raise issues on appeal that he failed to present to the hearing officer below"), cert. denied, 330 Conn. 940, 195 A.3d 1134 (2018). Moreover, this unpreserved claim does not warrant review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), because the alleged constitutional implications are purely speculative.[5] The plaintiff does not identify any particular constitutional violations that have arisen in this case. In the absence of a specific claim of constitutional deficiency, this claim is not reviewable under *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

[5] Under *Golding*, a party "can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived [the respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate the harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in the original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781. "Because a [party] cannot prevail under *Golding* unless he meets each of those four conditions, an appellate court is free to reject a defendant's unpreserved claim upon determining that any one of those conditions has not been satisfied." *State* v. *Brunetti*, 279 Conn. 39, 54, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

ULYSES ALVAREZ *v.* CITY OF MIDDLETOWN
(AC 41478)

Lavine, Elgo and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant city for employment discrimination pursuant to the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) following his resignation from his employment after he was notified by the defendant that he was going to be discharged. The plaintiff, a Hispanic American citizen of Puerto Rican descent, who was employed as a probationary police officer by the defendant and was seeking a position as a police officer with the defendant's police department, filed a two count complaint, alleging that the defendant, in discharging him, had discriminated against him on the basis of national origin and race. The defendant filed a motion for summary judgment and submitted uncontroverted documentary proof to substantiate its proffered legitimate, nondiscriminatory justification for deciding to discharge the plaintiff, namely, the plaintiff's deficient performance throughout his field training and probationary period. The trial court granted the defendant's motion for summary judgment and rendered judgment in favor of the defendant, from which the plaintiff appeal to this court. *Held* that the trial court properly rendered summary judgment in favor of the defendant, as the plaintiff failed to demonstrate the existence of a genuine issue of material fact as to whether the defendant's nondiscriminatory justification for his discharge was a pretext for unlawful discrimination on the basis of national origin and race: although the plaintiff asserted that the defendant did not discipline other officers who had performed deficiently in the same manner that he had been disciplined, he did not produce any evidence to substantiate that assertion, and the defendant presented contrary evidence that it had discharged a Caucasian officer during his probationary period due to that officer's failure to meet the police department's expectations and to properly document reports in accordance with department requirements; moreover, the plaintiff's reliance on a certain question allegedly asked by M, the defendant's chief of police, during the plaintiff's preemployment interview as indicative of a discriminatory bias was unavailing, as M's query contained no reference to the plaintiff's race or national origin and could be asked of any potential employee, and because M, following the interview, made the final recommendation to hire the plaintiff and recommended that the defendant discharge the plaintiff less than sixteen months later, the same actor inference was implicated, which is based on the premise that if the person who discharges an employee is the same person that hired him, one cannot logically impute to that person an invidious intent to discriminate against the employee

and strongly suggests that invidious discrimination is unlikely when the discharge occurred only a short time after the hiring; furthermore, the plaintiff's assertion that an internal affairs report by G, a detective with the defendant's police department, reflected a discriminatory bias that influenced M's recommendation to discharge the plaintiff was also unavailing, as the plaintiff furnished no evidence that M had received G's internal affairs report prior to making his recommendation to the defendant.

Argued April 11—officially released September 10, 2019

Procedural History

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

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

Cindy M. Cieslak, with whom were *Sarah L. Wilber* and, on the brief, *Michael J. Rose*, for the appellee (defendant).

Opinion

ELGO, J. In this employment discrimination action, the plaintiff, Ulyses Alvarez, appeals from the summary judgment rendered in favor of the defendant, the city of Middletown. The dispositive issue is whether the court properly determined that no genuine issue of material fact existed as to whether the defendant's nondiscriminatory justification for the plaintiff's discharge was merely a pretext for unlawful discrimination. We affirm the judgment of the trial court.

In its memorandum of decision, the court set forth the following undisputed facts, as gleaned from the pleadings, affidavits and other proof submitted. "The plaintiff is a Hispanic American citizen of Puerto Rican descent residing in Waterbury, and was employed as a

probationary police officer by the defendant. In October of 2013, the plaintiff applied to the defendant for a position as a police officer and went through the hiring process, which included a background check and an interview with the chief of police. The plaintiff alleges that [when] Detective Thomas Ganley was performing [his] background check, [Ganley] remarked that the plaintiff was 'too clean,' in reference to the plaintiff being a Puerto Rican from Waterbury. Nevertheless, the plaintiff's background check cleared and Ganley recommended the plaintiff move forward in the hiring process. . . . [T]he plaintiff [subsequently] was interviewed by Police Chief William McKenna. During the interview, the plaintiff claims that McKenna asked him if the plaintiff had any 'side bitches' or 'baby mama drama' he should know about. Even so, shortly thereafter the plaintiff received a conditional offer of employment on November 13, 2013, provided he undergo training at the Police Officer Standards and Training Council (POST).

"The plaintiff began attending POST on January 6, 2014. While there, the plaintiff was the only Hispanic cadet out of six recruits, and he alleges that he was subjected to racial slurs and derogatory language by some of his fellow trainees. . . . [T]he plaintiff graduated from POST on June 14, 2014, and he subsequently entered into the [defendant's] field training program. His supervising officer during this period made note of several performance deficiencies, including a lack of situational awareness, organizational issues, difficulty writing reports and [responding to] various calls, and the plaintiff initially failed his firearms training. His schedule was adjusted in response. On November 12, 2014, the plaintiff was cleared to conduct patrol work on his own.

"On February 4, 2015, a female resident, Jane Doe, came into the police headquarters and reported that

the plaintiff groped her and made her feel his genitals through his pants while he was responding to a reported domestic incident at her home. The plaintiff denied these allegations, but was placed on administrative leave on February 18, 2015, pending an internal affairs investigation. Detective Ganley was assigned to complete the investigation. During the course of his investigation, Officer [Elliot] Arroyo, a colleague of the plaintiff, made a statement to Ganley that, on the day on which the incident between the plaintiff and Jane Doe was alleged to have taken place, the plaintiff had met Arroyo for lunch and bragged to him that he had received oral sex from one of the individuals involved in the call he was on. The plaintiff denied making this statement but does not dispute that Arroyo reported such to Ganley.

"While the investigation was ongoing, McKenna ordered a performance evaluation on the plaintiff, which showed he still demonstrated notable performance deficiencies, including a failure to file written reports. In light of these deficiencies on March 4, 2015, McKenna sent a letter to the plaintiff informing him that he would be facing probationary discharge on March 6, 2015. The plaintiff subsequently resigned on that same date."[1] (Footnote omitted.)

[1] In his letter to the plaintiff, McKenna stated in relevant part: "This letter is notice that you will be facing probationary discharge from your position as Police Officer from [the defendant] due to various observations during the course of your [field training] and probationary period. There are reported violations of policies, procedures and the Middletown Police Department's Rules and Regulations."

On March 6, 2016, the plaintiff submitted his written resignation to the defendant, in which he stated: "I, Officer Ulyses R. Avarez, resign my position at the Middletown Police Department due to personal reasons." In his subsequent deposition testimony, which the plaintiff appended as an exhibit to his objection to the defendant's motion for summary judgment, the plaintiff stated: "I chose to write a letter of resignation because I was informed by Detective Puorro that he had confirmed with the chief that it was okay, that I could resign and retain my certification so I [could] find police work in other departments."

The plaintiff filed a timely complaint with the Connecticut Commission on Human Rights and Opportunities, which issued a release of jurisdiction on October 30, 2015. The plaintiff then commenced the present action in the Superior Court. His complaint contained two counts, which alleged discrimination on the basis of national origin and race, respectively, in contravention of the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq. In its answer, the defendant admitted that the plaintiff was employed as a probationary police officer but denied the material allegations of the complaint, including the plaintiff's allegations that he "performed [his] job at or above a satisfactory level" and that "[a]ny and all excuses offered . . . to explain [his] termination would be a pretext to mask unlawful race [and] national origin discrimination" on the part of the defendant.

On August 18, 2017, the defendant filed a motion for summary judgment, which was accompanied by numerous exhibits. In response, the plaintiff filed an objection, to which he attached several exhibits. The court heard argument from the parties on January 8, 2018. In its subsequent memorandum of decision, the court articulated two distinct grounds for its decision to render summary judgment in favor of the defendant. First, the court concluded that no genuine issue of material fact existed as to whether the allegedly adverse employment action in question—the plaintiff's discharge—occurred under circumstances that give rise to an inference of discrimination. Second, the court concluded that no genuine issue of material fact existed as to whether the legitimate, nondiscriminatory justification articulated by the defendant for the plaintiff's discharge was merely a pretext for unlawful discrimination.

On appeal, the plaintiff challenges the propriety of both determinations. We agree with the trial court that the plaintiff has not demonstrated the existence of a

genuine issue of material fact as to whether the defendant's nondiscriminatory justification for his discharge was a pretext for unlawful discrimination. We therefore do not consider the propriety of the alternative ground for summary judgment articulated by the court.[2]

As a preliminary matter, we note the well established standard that governs our review of the trial court's decision to grant a motion for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[2] Because "[s]ummary judgment is appropriate where no genuine issue of material fact exists, and the defendant is entitled to judgment as a matter of law, with respect to any one element that the plaintiff is required to prove in order to prevail at trial"; *Tyler* v. *Tyler*, 151 Conn. App. 98, 105, 93 A.3d 1179 (2014); accord *Perille* v. *Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 543, 494 A.2d 555 (1985) ("[a] defendant's motion for summary judgment is properly granted if it raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact"); an appellate court need not address every basis articulated by a trial court in rendering summary judgment. See, e.g., *James* v. *Valley-Shore Y.M.C.A, Inc.*, 125 Conn. App. 174, 176 n.1, 6 A.3d 1199 (2010) ("[i]n light of our conclusion that summary judgment was appropriate on that ground, we do not address the court's alternate basis for rendering summary judgment or the plaintiff's challenge thereto"), cert. denied, 300 Conn. 916, 13 A.3d 1103 (2011), citing *Valentine* v. *LaBow*, 95 Conn. App. 436, 448 n.11, 897 A.2d 624 ("[b]ecause we conclude that the court correctly determined that the defendant's fraudulent conveyance claim was barred by the three year statute of limitations contained in General Statutes § 52-577, we need not address the defendant's claims with respect to the court's alternate grounds for granting the motion for summary judgment"), cert. denied, 280 Conn. 933, 909 A.2d 963 (2006).

On our review of the record before us, we agree with the trial court that the plaintiff has not demonstrated the existence of a genuine issue of material fact as to whether the defendant's nondiscriminatory justification for his discharge was merely a pretext for unlawful discrimination. For that reason, we need not pass on the question of whether the plaintiff's discharge occurred under circumstances that give rise to an inference of discrimination. Even if we assume that such an inference is warranted in the present case, the plaintiff cannot prevail in light of our conclusion with respect to the nondiscriminatory justification proffered by the defendant.

In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018). "The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 294, 977 A.2d 189 (2009).

The present action involves an alleged violation of the act, which proscribes discriminatory employment practices on, inter alia, the basis of national origin and race. See General Statutes § 46a-60 (b). In his complaint, the plaintiff does not allege that he was discharged from his employment for both legitimate and illegitimate reasons. Rather, he claims that "[a]ny and all excuses offered by the defendant to explain the termination [are] a pretext to mask unlawful race [and] national origin discrimination . . . ." Accordingly, the analytical framework known as the "pretext/*McDonnell Douglas-Burdine* model"; *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 105, 671 A.2d 349 (1996); applies in the present case. See *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, 438, 197 A.3d 919 (2018).

As our Supreme Court has explained, under the pretext/*McDonnell Douglas-Burdine* model, "the employee must first make a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." *Craine* v. *Trinity College*, 259 Conn. 625, 637, 791 A.2d 518 (2002).

"Upon the defendant's articulation of . . . a non-discriminatory reason for the employment action, the presumption of discrimination arising with the establishment of the prima facie case drops from the picture." (Internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 515, 43 A.3d 69 (2012). "[T]o defeat summary judgment . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination . . . ." (Internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019), citing *Govori* v. *Goat Fifty, L.L.C.*, 519 Fed. Appx. 732, 734 (2d Cir. 2013); cf. *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) ("a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason" [emphasis in original]).

The legitimate, nondiscriminatory justification proffered by the defendant was the plaintiff's deficient performance throughout his field training and probationary period. In moving for summary judgment, the defendant submitted uncontroverted documentary proof to substantiate that justification.

Specifically, McKenna stated in his August 18, 2017 affidavit that the plaintiff exhibited "[s]everal performance deficiencies" during his field training. In an August 21, 2014 memorandum from Sergeant Michael Lukanik, the plaintiff's field training coordinator, to Captain Patrick Howard, Lukanik stated in relevant part: "I have been reviewing [the plaintiff's] daily observation reports along with frequently checking in with his field training officers since he has begun his field training with the Middletown Police Department [(department)]. [The plaintiff] has already begun to have some difficulties with basic situational awareness in non-stress conditions. It seems at this point that he is not progressing at the field training program pace." In a similar memorandum dated September 7, 2014, Lukanik noted that the plaintiff "still needs to work on some organizational issues." In his subsequent October 3, 2014 memorandum, Lukanik stated that although the plaintiff was "due to start" the next phase of his field training, he "is not quite ready to [do so] at this time." Lukanik further indicated that he had met with the plaintiff and informed him "that at this point we needed to see a little more consistency. We spoke in detail that he needs to work on his organizational skills, and remembering the small details in terms of questioning persons on all types of calls and obtaining even the simple information such as telephone numbers. [The plaintiff] agreed and assured me that he would work hard to get better in those areas." As a result, the current phase of the plaintiff's field training was extended for an additional two weeks.

The plaintiff's performance issues during his field training also were documented in Lukanik's October 21, 2014 memorandum, in which he stated that although the plaintiff was "due to begin Phase IV (Shadow) in one week," the plaintiff "is still not ready at this point." Lukanik, along with Captain Howard and the plaintiff's

field training officer, met with the plaintiff and informed him that "he has not shown that he is ready for Phase IV consistently. In speaking with his field training officers and reviewing his daily observation reports it is clear that there are some calls he handles on his own at [the] level of ability consistent with where he should be. There are other calls that he appears to almost revert back to early on in the training process, forgetting simple details and tasks that are crucial to our daily function as police officers. We discussed the inconsistencies at great length with [the plaintiff] in this meeting." At that meeting, Lukanik informed the plaintiff "that he would be extended for another block of time." Lukanik concluded his memorandum as follows: "At this point in [the plaintiff's] field training he has been exposed to several different field training officers on all three shifts. He has now been extended on field training a total of five weeks. I explained to him that we need him to really focus and buckle down at this point in his training. I explained to him that he needs to consistently be at a level capable of performing the duties of a police officer."

In an affidavit submitted in connection with the defendant's motion for summary judgment, McKenna averred that although the plaintiff completed his field training in November, 2014, his "deficiencies continued" following the commencement of his probationary period.[3] Those deficiencies are detailed in Lukanik's February 23, 2015 memorandum regarding the plaintiff's "ability to do the job functions of a police officer." In that memorandum, Lukanik noted that the plaintiff "initially failed his firearms qualification so the schedule

[3] In his deposition testimony, McKenna explained that, after finishing POST training, new officers participate in the department's field training program, which consists of four phases. When an officer completes the field training program, the officer becomes a probationary police officer. The officer's probationary period lasts for one year from the date that field training was completed.

needed to be adjusted several times throughout [his] training." Lukanik also noted that the field training program administered by the department normally entails "480-500 hours" of training. Nevertheless, the plaintiff ultimately required "a total of 624 hours of field training" due to multiple extensions deemed necessary by his supervisors.

In his memorandum, Lukanik also explained that "[t]he one year probation upon completion of field training is to monitor [officers to ensure that they are] capable of performing all of the requirements of the job." Lukanik stated that he had reviewed "all of the calls for service that [the plaintiff] has been sent to as a primary responding officer" since his completion of field training and "found [fourteen] calls that [the plaintiff] did not write reports on that clearly should have been written on as per our department policy." Lukanik also detailed two cases "that easily could have been handled with very little investigative work" on the plaintiff's part, as well as an automobile accident in which the plaintiff submitted an unsatisfactory report to his supervisors.[4] Those three cases, Lukanik stated, were

[4] As Lukanik stated, after the plaintiff submitted his written report on the automobile accident, "Sergeant D. Smith sent the report back several times to [the plaintiff] asking for him to do more work. [The plaintiff] sent it back with minor corrections that did not conclude the report to a satisfactory level. I requested [that Smith] send me the report so I could look at the issue. [The plaintiff] cleared the report stating that there were conflicting reports from both operators and he was unable to determine who caused the accident. He did not include anything in writing about where the vehicles were or any other investigative tools to help determine who caused the accident. He was told by [Smith] to add more information to support his findings and [the plaintiff] failed to be able to do so. Upon taking over the case, I received photographs that were taken of the accident by one of the persons involved. The photo is at the time of the accident and shows the position of both vehicles. It is clear in the picture that one vehicle cut a left turn too sharply into the oncoming traffic lane. It is also clear that the other vehicle clearly had both driver side tires over the double yellow line. [The plaintiff] should have clearly observed both violations and issued each operator the appropriate ticket, written warning, etc."

"simple cases that officers in this department are sent on routinely and should have easily been handled." Lukanik continued: "Given the [number] of hours [the plaintiff] received on field training and the amount of exposure to different types of calls while on training, he should easily be able to handle the calls that I have detailed above. The same deficiencies are still continuing that [the plaintiff] had while on field training. . . . [H]e does not consistently [handle calls in the proper manner] and he should be able to at this point. Forgetting basic information and choosing to not write reports that he clearly should creates a substantial risk of liability to the [department] and the [defendant]. Based on my training and experience as a field training officer, field training coordinator, and first line supervisor I do not believe that [the plaintiff] will progress past his current abilities. . . . [The plaintiff] has been exposed to many different types of calls and is still having issues with basic functions that police officers do every day."

McKenna articulated similar concerns in his March 3, 2015 letter to Mayor Dan Drew, which the plaintiff attached to his objection to the motion for summary judgment. In that correspondence, McKenna noted that "performance issues" were reported "on several occasions with regard to [the plaintiff's] performance, or lack of performance. During the course of a recent civilian complaint . . . it was revealed that he was unable, and/or unwilling, to handle basic functions of a police officer which shall be performed on a daily basis. We feel that [the plaintiff's] productivity has not met the department's expectations of a probationary employee and feel that he will not progress. The deficiencies have been documented and attempts were made to have him correct the issues, yet issues remained present." McKenna thus recommended that the plaintiff be discharged from his employment with the defendant.

As the trial court noted in its memorandum of decision, the plaintiff does not dispute that the aforementioned performance deficiencies existed. In his appellate brief, the plaintiff alleges that he was "not alone in his performance issues" and that the defendant "did not discipline other officers for the *same issues*." (Emphasis added.) He nonetheless has produced no evidence to substantiate that assertion. To the contrary, the defendant presented evidence that the defendant, on the recommendation of McKenna, had discharged a Caucasian officer during his probationary period due to that officer's failure to meet department expectations and failure to properly document reports in accordance with department requirements.

The plaintiff also points to a statement allegedly uttered by McKenna during his preemployment interview as indicative of a discriminatory bias. In his deposition testimony, the plaintiff alleged that McKenna "asked me if I had any side bitches or side girls or baby mama drama in Waterbury that he had to concern himself with because he didn't want that type of issues in the police department."[5] As the trial court noted, although tasteless, that query contains no reference to the plaintiff's race or national origin, and could be asked of any potential employee. In addition, the defendant presented uncontroverted evidence that, following that interview, McKenna "made the final recommendation" to hire the plaintiff. McKenna nonetheless recommended that the defendant discharge the plaintiff less than sixteen months later. In such circumstances, the same actor inference is implicated. "The premise underlying this inference is that if the person who fires an employee is the same person that hired him, one cannot logically impute to that person an invidious intent to discriminate against the employee." *Carlton* v. *Mystic*

[5] The plaintiff does not allege that McKenna made any additional statements implicating either his national origin or his race subsequent to that preemployment interview.

Transportation, Inc., 202 F.3d 129, 132 (2d Cir. 2000). As the United States Court of Appeals for the Second Circuit has observed, the same actor inference "strongly suggest[s] that invidious discrimination was unlikely," particularly when "the firing has occurred only a short time after the hiring." *Grady* v. *Affiliated Central, Inc.*, 130 F.3d 553, 560 (2d Cir. 1997); see also *Lowe* v. *J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992) ("[i]t is simply incredible" that officials who hired plaintiff "suddenly developed an aversion" to his protected class "less than two years later"). In the present case, McKenna's recommendation came less than three months after the commencement of the plaintiff's probationary period, less than nine months after the commencement of his field training with the department, and less than sixteen months after the defendant first extended an offer of employment to him.

Also unavailing is the plaintiff's assertion that Ganley's internal affairs report reflected a discriminatory bias that influenced McKenna's recommendation to discharge the plaintiff.[6] The record before us is bereft of any evidence so indicating. Nothing in the affidavits, deposition transcripts, and other documents submitted suggest that Ganley discussed his internal affairs investigation with McKenna prior to McKenna's March 3, 2015 recommendation. Furthermore, in his March 3, 2015 letter to Mayor Drew, McKenna detailed the performance issues that led him to recommend the plaintiff's discharge. Most significantly, McKenna at that time stated: "The *pending* internal affairs investigation may add additional reasons to support my reasons to recommend discharge." (Emphasis added.) For that reason, the trial court properly concluded that Ganley's internal affairs investigation "is ultimately irrelevant" because the plaintiff furnished no evidence that McKenna had

[6] It is undisputed that, in 2013, Ganley recommended that the plaintiff move forward in the hiring process following the completion of a background check.

received Ganley's report prior to making his recommendation to the defendant.

We have reviewed the pleadings, the defendant's motion for summary judgment, the plaintiff's objection thereto, and the exhibits submitted by the parties. On the record before us, no reasonable trier of fact could conclude that the defendant's nondiscriminatory justification for the plaintiff's discharge was merely a pretext for unlawful discrimination on the basis of race or national origin. As this court has observed, "to defeat summary judgment . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination . . . ." (Internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, supra, 189 Conn. App. 28. Because the plaintiff has not presented such evidence, we conclude that the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

AMICA MUTUAL INSURANCE COMPANY *v.* MICHELLE LEVINE (AC 40999)

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

Syllabus

The plaintiff insurance company sought a declaratory judgment to determine the rights of the parties related to a provision in an automobile insurance policy it had issued to the defendant, which required the defendant to undergo an independent medical examination at the plaintiff's request. The plaintiff brought this action after the defendant refused to undergo an independent medical examination following an automobile crash in which she had been involved. The trial court granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant appealed to this court. She claimed, inter alia, that

the trial court improperly concluded that the provision in the insurance policy that required her to undergo an independent medical examination was not void as against public policy, that the provision was reasonable and that her refusal to attend the examination was unreasonable. *Held* that the trial court properly granted the plaintiff's motion for summary judgment and rendered judgment for the plaintiff; because the issues that were raised by the defendant were resolved properly in the trial court's careful and thorough memorandum of decision, this court adopted the trial court's well reasoned memorandum of decision as a statement of the facts and the applicable law on those issues.

Argued May 16—officially released September 10, 2019

Procedural History

Action for a declaratory judgment to determine the rights of the parties under a provision in a certain insurance policy issued by the plaintiff requiring the defendant to undergo an independent medical examination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro, J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant appealed to this court. *Affirmed.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (defendant).

Philip T. Newbury, Jr., with whom, on the brief, was *Ondi A. Smith*, for the appellee (plaintiff).

Opinion

PER CURIAM. This declaratory judgment action arises from an automobile crash that occurred in 2010 involving the defendant, Michelle Levine. The defendant appeals from the trial court's rendering of summary judgment in favor of the plaintiff, the Amica Mutual Insurance Company. On appeal, the defendant claims that the trial court erred when it concluded that (1) the provision in the plaintiff's automobile insurance policy requiring the defendant to undergo an independent medical examination (IME) at the plaintiff's request was not void as against public policy, (2) the provision

requiring the defendant to undergo an IME was reasonable and the defendant's refusal to attend was unreasonable, (3) the defendant had breached the policy's cooperation clause for failing to attend the IME because that determination was predicated on an improper allocation of the burden of proof, and (4) there was no issue of material fact as to whether the plaintiff properly had reserved its rights to bring the present action. We disagree and, therefore, affirm the judgment of the trial court.

We have examined the record on appeal, including the briefs and arguments of the parties, and conclude that the judgment of the trial court should be affirmed. The issues raised by the plaintiff were resolved properly in a careful and thorough memorandum of decision written by the trial court. Because the trial court's memorandum of decision fully addresses the arguments raised in the present appeal,[1] we adopt the trial court's well reasoned decision as a statement of the facts and the applicable law on those issues. See *Amica Mutual Ins. Co.* v. *Levine*, judicial district of Hartford, Docket No. CV-16-6064569-S (July 31, 2017) (reprinted at 192

[1] In addition to the claims she raised before the trial court in her opposition to the plaintiff's motion for summary judgment, the defendant, on appeal, also argues that the trial court failed to consider as a necessary factor whether the plaintiff acted with "reasonable diligence" in securing her cooperation when it determined that she breached her insurance policy's cooperation clause. We decline to address this claim, given that it was not properly or distinctly raised in the defendant's answer, special defenses or opposition to the motion for summary judgment. See *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229–30, 131 A.3d 771 (2016) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one." [Internal quotation marks omitted.]). Moreover, to the extent that the claim was raised for the first time in the defendant's motion to reargue and reconsider, for which the court wrote a supplemental memorandum of decision, the defendant has not taken an appeal from that ruling. "[A]ppellate courts are not required to review issues that have been improperly presented . . . ." (Internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555 n.14, 979 A.2d 469 (2009).

Conn. App. 623, A.3d). It would serve no useful purpose for us to repeat those facts or the discussion here. See, e.g., *Tzovolos* v. *Wiseman*, 300 Conn. 247, 253–54, 12 A.3d 563 (2011).

The judgment is affirmed.

APPENDIX

AMICA MUTUAL INSURANCE COMPANY *v.* MICHELLE LEVINE*

Superior Court, Judicial District of Hartford
File No. CV-16-6064569-S

Memorandum filed July 31, 2017

Proceedings

Memorandum of decision on plaintiff's motion for summary judgment. *Motion granted.*

Ondi A. Smith, for the plaintiff.

Jennifer B. Levine, for the defendant.

Opinion

SHAPIRO, J. This matter is before the court concerning the plaintiff Amica Mutual Insurance Company's motion for summary judgment (#104) (motion). The court heard oral argument concerning the motion on May 30, 2017. For the reasons stated below, the motion is granted.

I

BACKGROUND

The defendant, Michelle Levine, was a covered person under an automobile liability insurance policy issued by the plaintiff, Amica Mutual Insurance Company, for the period December 1, 2010 to December 1,

* Affirmed. *Amica Mutual Ins. Co.* v. *Levine*, 192 Conn. App. 620, A.3d (2019).

2011 (policy). The defendant sought medical payments for treatment she claimed resulted from a December 6, 2010 motor vehicle accident (accident).

In the plaintiff's complaint, it seeks a declaratory judgment, finding that it has no duty to provide medical payment benefits to the defendant because she refused to undergo requested independent medical examinations (IMEs) with a physician selected by the plaintiff, which prejudiced the plaintiff's ability to properly evaluate the defendant's claim for such benefits.

The correspondence submitted concerning the motion shows that, in 2012 and 2013, the plaintiff made several requests for the defendant to submit to a medical examination, but the defendant never did so. See plaintiff's exhibit C; defendant's exhibits A, B, C, 23, 25 and 27. Additional references to the factual background are set forth below.

II

STANDARD OF REVIEW

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit

documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013). "A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) Id., 312–13.

III

DISCUSSION[1]

"[C]onstruction of a contract of insurance presents a question of law for the court . . . . It is the function of the court to construe the provisions of the contract of insurance. . . . The [i]nterpretation of an insurance policy . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . [including] what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . [A] contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . [giving the] words . . . [of the policy] their natural and ordinary meaning . . . [and construing] any ambiguity in the terms . . . in favor of the insured . . . ." (Internal quotation marks

[1] In considering the parties' arguments, this court has considered the parties' oral and written arguments, including those presented in the plaintiff's reply memorandum (#124). By order dated June 15, 2017, the court (*Wahla*, *J.*) granted the defendant's motion to strike the reply. See #125.86. This court is not bound by that ruling. See *Breen* v. *Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982) (The law of the case doctrine "expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power. . . . Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case *may* treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided . . . ." [Citations omitted; emphasis added; internal quotation marks omitted.]).

omitted.) *Chicago Title Ins. Co.* v. *Bristol Heights Associates, LLC*, 142 Conn. App. 390, 405–406, 70 A.3d 74, cert. denied, 309 Conn. 909, 68 A.3d 662 (2013).

As discussed below, the policy contains provisions which require persons seeking coverage to cooperate with the insurer in its investigation of the claim and to submit to physical examinations by physicians it selected. "The purpose of the cooperation provision is to protect the interests of the insurer. . . . If insurers could not contract for fair treatment and helpful cooperation from the insured, they would at the very least, be severely handicapped in determining how and whether to contest the claim . . . ." (Citation omitted; internal quotation marks omitted.) *Arton* v. *Liberty Mutual Ins. Co.*, 163 Conn. 127, 134, 302 A.2d 284 (1972).

"A cooperation clause in a liability insurance policy requires that there shall be a fair, frank, and substantially full disclosure of information reasonably demanded by the insurer to enable it to prepare for, or to determine whether there is, a genuine defense. . . . [I]t has been held that an insured's failure to disclose information breached a cooperation clause [when] . . . [t]he insured . . . [failed] to provide information requested by the insurer." (Internal quotation marks omitted.) *Double G.G. Leasing, LLC* v. *Underwriters at Lloyd's, London*, 116 Conn. App. 417, 433, 978 A.2d 83, cert. denied, 294 Conn. 908, 982 A.2d 1082 (2009); see *Chicago Title Ins. Co.* v. *Bristol Heights Associates*, supra, 142 Conn. App. 409 (insured's failure to disclose information breached cooperation clause when insured failed to provide information requested by insurer).

"Generally, in the absence of a reasonable excuse, when an insured fails to comply with the insurance policy provisions . . . the breach generally results in the forfeiture of coverage, thereby relieving the insurer

of its liability to pay, and provides the insurer an absolute defense to an action on the policy." (Internal quotation marks omitted.) *Double G.G. Leasing, LLC* v. *Underwriters at Lloyd's, London*, supra, 116 Conn. App. 432.

"The lack of cooperation, however, must be substantial or material. . . . [T]he condition of cooperation with an insurer is not broken by a failure of the insured in an immaterial or unsubstantial matter. . . . [L]ack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature." (Internal quotation marks omitted.) *Chicago Title Ins. Co.* v. *Bristol Heights Associates, LLC*, supra, 142 Conn. App. 408.

Here, the policy, page 11 of 14, provides, in relevant part: "Part E—Duties After an Accident or Loss: We have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us . . . B. A person seeking any coverage must: 1. Cooperate with us in the investigation, settlement or defense of any claim or suit. . . . 3. Submit, as often as we reasonably require: a. To physical exams by physicians we select. We will pay for these exams." See plaintiff's exhibit A.

The plaintiff asserts that it reasonably requested that the defendant submit to an IME after review of the medical bills and reports forwarded by the defendant in late June, 2011, in connection with her claim made it was clear that the defendant had been treating for her medical condition prior to the accident. In September, 2011, the plaintiff requested a records review of the defendant's treatment by Dr. Mark Silk, a urologist, who concluded that, other than a temporal basis, it was difficult, if not impossible, to establish a relationship between the accident and defendant's subsequent medical course. See defendant's exhibit 24.

When the defendant was still treating a year and a half after the accident, and was still seeking medical payment benefits, the plaintiff requested that the defendant attend an IME by Dr. Silk, to ascertain whether the defendant's treatment was related to the accident. As an integral part of its investigation into the claim, the plaintiff made several requests that the defendant submit to such an IME.

In July, 2012, the defendant's attorney objected to the plaintiff's selected medical examiner/urologist on the basis that he had not been shown to be an expert who matched the defendant's out-of-state physician's expertise in interstitial cystitis, noting that "there appears to be no urologist in Connecticut who match[es] Dr. [Robert] Moldwin's knowledge and expertise regarding this particular disease." See defendant's exhibit A, page 2 (letter dated July 18, 2012).

The plaintiff contends that the defendant did not have a reasonable excuse for failing to attend the IME and outlined a number of conditions which she demanded be satisfied before she would submit to the IME, none of which are afforded to her in the policy, such as (1) furnishing a copy of the doctor's resume; (2) that she either not fill out written questionnaires or be provided with the forms ten days in advance so that counsel may object to certain questions; (3) that she not be required to fill out any authorizations unless provided prior to the exam with an explanation of the reasons for the request; and (4) that counsel be permitted to attend and tape record the IME.

The defendant advances several arguments in opposition to the motion, which the court addresses below: (1) the policy provision the plaintiff seeks to enforce is void as against public policy; (2) the provision is void as against the informed consent doctrine; (3) the provision is void because Dr. Silk is not a "physician"

as defined by the policy; (4) the IME request was not reasonable; (5) the preconditions proposed by the defendant were not unreasonable; (6) a fact issue exists as to whether the plaintiff engaged in bad faith/unclean hands; and (7) a factual dispute exists as to whether the plaintiff waived its right to claim a breach of the cooperation clause by arbitrarily paying out Med-Pay benefits.

First, the defendant presents two arguments to support her assertion that the policy provision requiring an insured to submit to a medical examination is void as against public policy. She has presented no evidence to show that, prior to this litigation, she ever advised the plaintiff that she declined to submit to an IME because the provision was void as against public policy.

The defendant argues that the provision violates General Statutes § 52-178a[2] and Practice Book § 13-11.[3] By their terms, these provisions pertain to requests for physical examinations in civil actions to recover damages for personal injuries, not to insurance policies. They are plainly inapplicable to the parties' contractual

[2] General Statutes § 52-178a provides: "In any action to recover damages for personal injuries, the court or judge may order the plaintiff to submit to a physical examination by one or more physicians or surgeons. No party may be compelled to undergo a physical examination by any physician to whom he objects in writing submitted to the court or judge."

[3] Practice Book § 13-11 (b) provides in pertinent part: "In the case of an action to recover damages for personal injuries, any party adverse to the plaintiff may file and serve . . . a request that the plaintiff submit to a physical or mental examination at the expense of the requesting party. That request shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. Any such request shall be complied with by the plaintiff unless, within ten days from the filing of the request, the plaintiff files in writing an objection thereto specifying to which portions of said request objection is made and the reasons for said objection. The objection shall be placed on the short calendar list upon the filing thereof. The judicial authority may make such order as is just in connection with the request. No plaintiff shall be compelled to undergo a physical or mental examination by any physician to whom he or she objects in writing."

agreement as set forth in the policy. The decisional law concerning § 52-178a and Practice Book § 13-11 is inapplicable as well.

Second, the defendant also contends that the policy provision violates the public policy behind the informed consent doctrine. In Connecticut, lack of informed consent is a cause of action based on medical negligence, as distinguished from medical malpractice. "In order to prevail on a cause of action for lack of informed consent, a plaintiff must prove both that there was a failure to disclose a known material risk of a proposed procedure and that such failure was a proximate cause of his injury." *Shortell* v. *Cavanagh*, 300 Conn. 383, 388, 15 A.3d 1042 (2011).

The defendant's citation to decisions from other states which reference statutory authority in those states is inapt in the absence of a similar statute in Connecticut.

Having failed to attend the requested examination, the defendant has no evidence of what information would have been provided to her at that time. She has not shown that the doctrine of informed consent is applicable to the policy provision.

Third, the defendant argues that the plaintiff has failed to prove that it requested an examination by a physician. In support of this assertion, the defendant argues that the plaintiff produced copies of Dr. Silk's medical licenses which had expired. See defendant's exhibit C (letter dated October 19, 2012, enclosing Dr. Silk's curriculum vitae).

The policy provision did not require the plaintiff to provide to the defendant proof of Dr. Silk's qualifications. It provided the information in the October 19, 2012 letter as a courtesy.

The defendant never objected to the IME on this ground prior to the commencement of suit. In addition, the policy provision does not afford an insured the right to belatedly object to a physician's examination on this ground. As noted above, the defendant's only previously stated concern about Dr. Silk's credentials was that he did not have the knowledge and expertise concerning interstitial cystitis that her own physician possessed.

"A 'physician' is defined as 'a person skilled in the art of healing: one duly authorized to treat disease: a doctor of medicine . . . .' Webster's Third New International Dictionary; see also Black's Law Dictionary (5th Ed.)." *Kilduff* v. *Adams, Inc.*, 219 Conn. 314, 337, 593 A.2d 478 (1991).

According to his curriculum vitae, Dr. Silk received his medical degree from New York Medical School, and was then an assistant professor of urology at the University of Connecticut and an attending physician at Saint Francis Hospital and Medical Center in Hartford. The provision of an expired license to practice medicine in Connecticut appears to have been inadvertent. The record establishes that he was a physician.

Fourth, the defendant argues that the plaintiff failed to show that she refused to submit to a reasonable IME. By its terms, the policy provision required the defendant to submit to the requested IME. The record reflects that the defendant's objection to the selected medical examiner and the proposed examination also was unreasonable in light of the policy language. See *Van-Haaren* v. *State Farm Mutual Automobile Ins. Co.*, 989 F.2d 1, 6–7 (1st Cir. 1993).

Fifth, the defendant contends that the preconditions she proposed were not unreasonable. The defendant's list of conditions regarding the IME constituted an improper insistence on preconditions to performance not stated in the contract. See id. The defendant's

refusal to submit to an IME based upon the identity and qualifications of the physician performing the examination, and her insistence on certain conditions to performance not stated in the contract constituted an unreasonable refusal to submit to the policy conditions and breach of the IME clause.

Sixth, the defendant asserts that there is a genuine issue of material fact as to her defense of unclean hands and that the plaintiff engaged in bad faith. "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Internal quotation marks omitted.) *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 433, 849 A.2d 382 (2004).

In support, the defendant again relies on § 52-178a and Practice Book § 13-11, which, as discussed above, are inapplicable to the contract at issue. She also reiterates her informed consent argument, which, as discussed above, is inapplicable. She also repeats her arguments concerning Dr. Silk, which the court discussed above.

In addition, she asserts that the plaintiff acted in bad faith by arbitrarily refusing to pay for the majority of Dr. Moldwin's bills. No evidentiary support was cited for this conclusory argument, which the court is not required to consider. The defendant has not shown that the plaintiff has unclean hands or engaged in bad faith.

Seventh, the defendant argues that a genuine issue of fact exists as to whether the plaintiff waived its right to assert a violation of the policy provision. She

contends that the plaintiff made selective medical payments benefits to her after its request for an August, 2012 examination by Dr. Silk and never again requested that she submit to a physical examination.

This contention is plainly wrong and unsupported by the record. In defendant's exhibit 27, a letter to the defendant's counsel dated May 10, 2013, the plaintiff's counsel again requested that the defendant submit to such an examination, citing the policy provision's requirement and explicitly reserving the plaintiff's rights, including stating: "please be advised that any action taken by Amica to date should not be construed as a waiver of any of its rights." Further, the letter stated that "Amica reserves the right to file a declaratory judgment action to seek a judicial determination of coverage for this claim." Thus, the defendant was explicitly put on notice more than four years ago that the plaintiff did not intend to waive its rights under the policy.

Next, the court must determine whether the plaintiff was prejudiced. An insured's "failure to comply with the cooperation clause is presumed to have been detrimental to the [insurance company's interests] . . . ." *Taricani* v. *Nationwide Mutual Ins. Co.*, 77 Conn. App. 139, 151, 822 A.2d 341 (2003). The Appellate Court has determined that an insured's refusal to produce various records and documentation, which reasonably pertained to the insured's loss or damage, materially prejudices the insurer by hindering its "ability to determine whether the coverage applied and to prevent loss or damage . . . [and] to investigate and defend the defendant's claim . . . ." *Chicago Title Ins. Co.* v. *Bristol Heights Associates, LLC*, supra, 142 Conn. App. 409–10.

Here, the IME was necessary for the plaintiff to properly evaluate the plaintiff's claims for benefits. Without the IME, the plaintiff could not do so. The plaintiff has

shown that it was prejudiced by the defendant's failure to submit to an IME, in that it prevented the plaintiff from being able to properly evaluate the claim and to determine whether, and to what extent, the defendant's treatment and the expenses incurred for medical care were causally related to the accident.

Summary judgment is warranted because there is no genuine issue of material fact as to whether the defendant breached the policy's provision and that the plaintiff was prejudiced as a result.

CONCLUSION

For the reasons stated above, the plaintiff has shown that it is entitled to judgment as a matter of law. Accordingly, the motion for summary judgment is granted. The plaintiff is not required to provide Med-Pay benefits to the defendant under the policy. It is so ordered.