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Alpha Beta Capital Partners, L.P. v. Pursuit Investment Management, LLC

ALPHA BETA CAPITAL PARTNERS,
L.P. v. PURSUIT INVESTMENT
MANAGEMENT, LLC, ET AL.
(AC 39388)

Lavine, Bright and Bishop, Js.

Syllabus

The plaintiff company sought to recover damages from the defendants for, inter alia, breach of contract for their failure to remit to the plaintiff its proportionate share of certain proceeds secured by a settlement agreement. The defendants S and C are individuals who, together, formed, operated, and controlled the defendant companies, O Co., F Co., C Co., M Co., P Co., I Co. and N Co. In approximately 2007, the plaintiff invested in both O Co. and C Co. and, as a result, acquired limited partnership interests in those companies. In 2007, F Co. and M Co. had purchased certain securities known as collateralized debt obligations from U Co. and, in 2008, after the value of the collateralized debt obligations precipitously dropped, P Co. and I Co. commenced a civil action alleging fraud against U Co. In April, 2009, the plaintiff executed a limited partnership agreement for C Co., which contained certain provisions for withdrawals by and distributions to limited partners. In September, 2009, the plaintiff redeemed its investment in O Co., which extinguished its interest in that company except for certain holdbacks to indemnify potential future expenses of O Co. In 2010, the plaintiff commenced a civil action in the Supreme Court of the state of New York against I Co., S, and C, and filed a separate arbitration proceeding against O Co. and C Co. In April, 2011, the plaintiff, I Co., S, C, O Co., C Co., and A Co., the former general partner of C Co., executed a confidential settlement agreement to resolve the 2010 New York action and the arbitration proceeding. As consideration for the plaintiff's withdrawal and release, § 3 of the settlement agreement required I Co. to pay the plaintiff a settlement payment, as well as a redemption payment, which represented the plaintiff's pro rata share, approximately 32.083612 percent, of the net asset value in C Co. as of February 28, 2011, minus a holdback of \$250,000 for the purpose of funding costs associated with the ongoing 2008 action against U Co., and minus an additional holdback of \$200,000 to pay legal fees and expenses. In addition, § 4 of the settlement agreement secured the plaintiff's interest in two of C Co.'s contingent assets by providing that nothing in the settlement agreement shall affect the plaintiff's pro rata share in C Co.'s proportionate interest in the U Co. litigation proceeds or in C Co.'s interest in a claim against L Co. Shortly after the settlement agreement was signed, the L Co. claim was sold for \$9,334,141.55, but no portion of the L Co. claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received \$1,022,022.36. In 2013, the plaintiff commenced a civil action

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in the Supreme Court of the state of New York against I Co., C Co., O Co., and A Co., alleging that those defendants had breached the settlement agreement by, inter alia, failing to pay the plaintiff its pro rata portion of the L Co. claim proceeds. Soon after the commencement of the 2013 New York action, certain of the defendants transferred to the plaintiff approximately \$700,000 in additional proceeds from the L Co. claim, for a total distribution of \$1,722,022.36. In 2015, P Co. settled the U Co. litigation for a total of \$36 million, but the defendants have not provided the plaintiff with any portion of the settlement proceeds. The plaintiff then brought the present action against the defendants seeking damages for their failure to remit to the plaintiff its proportionate share of the U Co. litigation proceeds as secured by § 4 of the settlement agreement. The plaintiff filed an application for a prejudgment remedy, and the plaintiff's operative amended substitute complaint alleged, inter alia, breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, statutory theft (§ 52-564), and violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). Subsequently, the defendants filed a motion to strike the plaintiff's complaint, which the court granted only as to the claims of statutory theft and a CUTPA violation. The court also granted the plaintiff's application for a prejudgment remedy, and the plaintiff thereafter secured the full attachment amount. In October, 2016, the court rendered judgment partially in favor of the plaintiff as to certain defendants on its complaint and in favor of the plaintiff on a counterclaim filed by the defendants. In particular, the court concluded that the defendants that were parties to the settlement agreement, namely, C Co., O Co., I Co., S, and C, as well as N Co., the general partner of C Co. at the time the U Co. litigation proceeds were realized, were liable for breach of contract and breach of the implied covenant of good faith and fair dealing for their intentional failure to remit to the plaintiff its proportionate share of the U Co. litigation proceeds as secured by the settlement agreement. The defendants appealed and the plaintiff cross appealed to this court. During the pendency of this appeal, the plaintiff, pursuant to statute (§ 52-278k), filed a motion with the trial court seeking modification of the previously secured prejudgment remedy attachment amount to secure from C Co., O Co., I Co., S, C, and N Co., an additional \$947,731 that it anticipated would accrue during the pendency of this appeal. The plaintiff also filed a motion with the court seeking supplemental asset disclosure from those defendants to assist with the securing of the additional attachment pursued by the motion to modify. Subsequently, the trial court granted those two motions, and the defendants filed an amended appeal with this court. *Held:*

1. The defendants could not prevail on their claim that the trial court improperly interpreted the agreements between the parties when it concluded that the plaintiff prevailed on its breach of contract claim, which alleged that the defendants had failed to pay the plaintiff its proportionate share of the proceeds from the U Co. litigation, as the court properly held

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that the plaintiff proved a breach of contract because the defendants settled the U Co. litigation for \$36 million, and the plaintiff has not received its portion of those proceeds in contravention of the settlement agreement and the limited partnership agreement: the defendants' claim that they could not be held liable for breach of the settlement agreement because, pursuant to § 4 of that agreement, the distribution of the proceeds from the contingent assets was governed by all of provisions of the limited partnership agreement, which afforded the general partner discretion to withhold or reduce payment of the contingent interests, was unavailing, as the trial court correctly determined that the execution of the settlement agreement constituted a withdrawal of the plaintiff as a limited partner from C Co. and properly concluded, in light of that withdrawal, that the payment of the contingent assets was to be governed by the specific withdrawal provision of the limited partnership agreement, and the court's interpretation of both the settlement agreement and the limited partnership agreement together was further bolstered by the relevant portion of the withdrawal provision of the limited partnership agreement, which provides that a withdrawal was subject to certain restrictions and reserves for contingent or undetermined liabilities of C Co., as the parties specifically identified those restrictions and reserves in the settlement agreement's holdback provisions, and it was logical for the court to conclude that, following C Co.'s receipt of proceeds from the realization of a contingent asset, the plaintiff, pursuant to § 4 of the settlement agreement and § 5.01 of the limited partnership agreement, was entitled to its pro rata share of those proceeds in cash as soon as practicable following the effective date of the withdrawal; accordingly, the trial court properly considered the language of § 4 of the settlement agreement in conjunction with the other provisions of the settlement agreement, the limited partnership agreement, the relation of the parties, and the circumstances under which it was executed.

2. The defendants' claim that the trial court improperly rejected their breach of contract counterclaim, which alleged that they were relieved of their obligation to remit the U Co. litigation proceeds because the plaintiff had breached the settlement agreement, was unavailing:
 - a. The defendants could not prevail on their claim that the trial court erroneously found that the plaintiff had not materially breached the settlement agreement by violating § 7 when it requested that R Co., the plaintiff's law firm, contact the United States Securities and Exchange Commission regarding an ongoing investigation, by commencing the 2013 New York action seeking an injunction to prevent C Co. from utilizing the U Co. litigation holdback, and by colluding with S Co.; that court's finding that the plaintiff's actions did not constitute a material breach of the settlement agreement, the essential purpose of which was to resolve the then existing disputes among the parties, was not clearly erroneous and was supported by the evidence that § 7 was not central to the settlement agreement, that the plaintiff sought information from the United States Securities and Exchange Commission regarding an

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- ongoing investigation in which the plaintiff's interests were potentially involved, that the plaintiff filed an action in New York alleging that the defendants had breached the settlement agreement, and that the plaintiff had communicated with S Co. after it already had been advised of the settlement agreement, as those actions were taken by the plaintiff to enforce its rights that were at the core of the settlement agreement.
- b. The defendants could not prevail on their claim that the trial court erroneously found that their prior partial delayed payment of the L Co. claim to the plaintiff relieved the plaintiff from its obligations under the confidentiality provision, as the court's finding that any claimed breach by the plaintiff was excused by the defendant's prior breach of the settlement agreement was not clearly erroneous; the evidence demonstrated that the settlement agreement, read in conjunction with the limited partnership agreement, obligated the payment of the contingent assets, including the pro rata share of the proceeds of the L Co. claim, approximately \$2,994,729.76, to the plaintiff in cash as soon as practicable following the effective date of the withdrawal on June 1, 2011, and that no portion of the L Co. claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received \$1,022,022.36, and, even if the defendants' calculation as to the plaintiff's proportionate share of the L Co. claim was correct, the evidence that, prior to any of the contested communications, the plaintiff received less than one half of what the defendants had calculated was the plaintiff's entitlement, more than four months after the funds had been received by C Co. without sufficient justification, supported the court's finding that the defendants had materially breached the settlement agreement.
3. The trial court properly concluded that the plaintiff prevailed on its breach of the implied covenant of good faith and fair dealing claim; that court found that the signatory defendants, I Co., O Co., C Co., S, and C, deprived the plaintiff of its right to receive the benefits under the settlement agreement, under which they had a clear obligation to remit the U Co. litigation proceeds to the plaintiff, and the trial court's conclusion that at least some of the defendants breached the implied covenant of good faith and fair dealing was supported by its findings that the defendants failed to remit the U Co. litigation proceeds to the plaintiff, wilfully attempted to thwart the plaintiff's ability to receive those proceeds, raised unsupported claims and counterclaims that alleged misconduct by the plaintiff, maintained control over the proceeds so as to retain them for as long as possible for their own benefit, continued to prolong the litigation and cause excessive expenses, and failed, until ordered by the court, to provide information to the plaintiff that could have resolved some of the issues in advance of this litigation.
4. The plaintiff's claim on cross appeal that the trial court improperly concluded that the plaintiff could not prevail on its conversion claim was unavailing, as the court properly concluded that the plaintiff could not prevail on its conversion claim because it merely was a recasting of its breach of contract claim; the plaintiff's conversion claim sought the

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- same damages as its breach of contract claim, namely, its proportionate share of the U Co. litigation proceeds, the plaintiff's conversion claim alleged the same breach of duty, namely, the defendants' obligation pursuant to the settlement agreement and the limited partnership agreement to remit the U Co. litigation proceeds to the plaintiff, and the plaintiff's conversion claim was based on the exact same allegations as its breach of contract claim because the plaintiff's complaint entirely incorporated the breach of contract allegations into its count alleging conversion.
5. The plaintiff could not prevail on its claim that the trial court improperly granted the defendants' motion to strike its Connecticut statutory causes of action for statutory theft and a violation of CUTPA on the ground that those claims were barred by § 12 of the settlement agreement, which provides in relevant part that any disputes or litigation arising out of that agreement "shall be governed by New York law"; the relevant language in § 12 of the settlement agreement is broad and does not apply only to breach of contract causes of action, and the plaintiff's statutory causes of action arose out of the settlement agreement because the basis for both claims stemmed from the settlement agreement, as the statutory theft claim alleged that the defendants withheld and utilized for themselves the U Co. litigation proceeds, and the CUTPA claim alleged that the defendants breached the settlement agreement and failed to provide the plaintiff its share of the U Co. litigation proceeds.
 6. The plaintiff could not prevail on its claim that all of the defendants should be held liable for the plaintiff's claims of breach of contract and breach of the implied covenant of good faith and fair dealing pursuant to a piercing the corporate veil or alter ego theory, and that the trial court improperly declined to consider those theories despite the fact that they had been pleaded and briefed; when construing the trial court's judgment as a whole, it was apparent that although the court recognized that the plaintiff had not separately pleaded its piercing the corporate veil and alter ego theories, and although the court did not engage in a discussion of each and every element of the plaintiff's theories, it considered and rejected those theories.
 7. The trial court improperly interpreted the settlement agreement to conclude that all of the defendants who were signatories to the settlement agreement, I Co., O Co., C Co., S, and C, as well as N Co. as successor general partner of C Co., were liable for nonpayment of the U Co. litigation proceeds, as only I Co., C Co., and N Co. were liable: although that court correctly concluded that there was no express limitation in § 4 of the settlement agreement as to which defendants had the obligation to remit the U Co. litigation proceeds, the court erred in literally interpreting certain language in the settlement agreement to hold all of the signatory defendants liable for each and every obligation in the settlement agreement, and it improperly failed to consider the limited partnership agreement or the circumstances under which the settlement agreement was executed, as O Co. could not be held liable pursuant to § 4 of the

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- settlement agreement because it was unable to remit the U Co. litigation proceeds to the plaintiff, and S and C could not be held individually liable in the absence of an express agreement by them to undertake an individual obligation in either the settlement agreement or the limited partnership agreement to remit the U Co. litigation proceeds as soon as practicable; moreover, the defendants could not prevail on their claim that the proper interpretation of the limited partnership agreement and the settlement agreement required that only N Co. be held liable for nonpayment of the U Co. litigation proceeds, as the defendants that are liable for nonpayment are those that both undertook an obligation and had the ability to pay the U Co. litigation proceeds, namely, C Co., as owner of the interest in the U Co. litigation proceeds at issue, N Co., as general partner of C Co., and I Co., which had remitted both the settlement payment and redemption payment on behalf of the defendants, including C Co., pursuant to the settlement agreement.
8. The defendants could not prevail on their claim that the trial court erroneously awarded damages because it failed to reduce C Co.'s share of the U Co. litigation proceeds by 10 percent to account for M Co.'s other investor, H Co., which is another entity controlled by S and C: the trial court's finding that C Co. was the sole investor in M Co. and, thus, that C Co. was entitled to all of M Co.'s share of the proceeds from the settlement of the U Co. litigation, was supported by the court's findings regarding the lack of credibility of the defendants' position regarding \$1.1 million that S and C had deposited into an account of M Co., the defendants' failure to comply fully with discovery, and the lack of credibility of the testimony of S, and that the investment was withdrawn prior to the execution of the settlement agreement, as well as evidence that S and C, through H Co., made their investment in M Co. after the collateralized debt obligations had been purchased, after the collateralized debt obligations had lost value, and after the U Co. litigation had been commenced; moreover, the defendants could not prevail on their claim that the trial court erroneously awarded damages because it failed to account for a performance fee reduction from the U Co. litigation proceeds, which was based on their claim that the limited partnership agreement provides that the general partner of C Co., N Co. at the time, was entitled to a 20 percent performance fee for net economic profit, as the limited partnership agreement definitively provides that losses incurred by a limited partner prior to the execution of the limited partnership agreement are to be taken into account when determining cumulative fiscal period net economic profit and, thus, the trial court correctly concluded that the U Co. litigation proceeds did not constitute a net profit because those proceeds only partially recouped prior substantial losses incurred in connection with the collateralized debt obligations.
9. The plaintiff could not prevail on its claim that the trial court erroneously awarded damages because it improperly permitted the defendants to retain the remainder of the U Co. litigation holdback, which was based on the plaintiff's claim that the court, having found that the \$250,000

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holdback designated by the settlement agreement to cover expenses incurred in connection with the U Co. litigation had not been exhausted, erroneously failed to award damages for the remainder of the unused U Co. litigation holdback: that court definitively concluded that there was insufficient evidence to conclude that the U Co. litigation holdback had been exhausted, and did not conclude, as claimed by the plaintiff, that the evidence demonstrated that the holdback had not been exhausted, and the plaintiff's claim that the trial court erroneously found the division of the U Co. litigation proceeds to be 52.8 percent to M Co. and 47.2 percent to F Co., and that the court should have drawn an adverse inference against the defendants for their failure to comply fully with discovery was unavailing, as the trial court specifically rejected the plaintiff's credibility challenge to the position taken by the defendants, this court could not second-guess that credibility assessment, and the testimony and evidence cited by the court were sufficient to support its conclusion; accordingly, the court's finding as to the division of the net proceeds of the U Co. litigation was not clearly erroneous, and the court properly determined the amount of damages.

10. The defendants could not prevail on their claim that the trial court improperly granted the plaintiff's motion to increase the amount of the prejudgment remedy, which was based on their claim that the filing of an appeal, without more, did not constitute a sufficient basis for the court to modify, pursuant to § 52-278k, the existing prejudgment remedy; it was not clear error for the trial court to have increased the amount of the prejudgment remedy, as the court made its probable cause determination on the basis of the amount of the judgment rendered against the defendants, the court's award of postjudgment interest, the fact that the defendants took an amended appeal, and the average pendency of similar civil cases before this court.

This court declined to review the defendants' unpreserved claim that the trial court improperly granted the plaintiff's motion for postjudgment discovery in connection with the court's upward modification of the prejudgment remedy amount, the defendants having failed to preserve properly their claim that the trial court lacked authority to grant the plaintiff's supplemental motion for disclosure of assets.

Argued November 27, 2018—officially released October 8, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket, where the defendants filed a counterclaim; thereafter, the court, *Genuario, J.*, granted the plaintiff's application for a prejudgment remedy; subsequently, the court

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granted in part the defendants' motion to strike; thereafter, the court denied the defendants' motion to reargue and for reconsideration, and the named defendant et al. appealed to this court; subsequently, the matter was tried to the court, *Genuario, J.*; thereafter, the court, *Genuario, J.*, denied the motion to modify the prejudgment remedy filed by the defendant Pursuit Partners, LLC, et al.; judgment in part for the plaintiff on the complaint and for the plaintiff on the counterclaim, from which the named defendant et al. appealed and the plaintiff cross appealed to this court; subsequently, the court, *Genuario, J.*, granted the plaintiff's motion to modify the prejudgment remedy attachment and the plaintiff's motion for disclosure of assets, and the named defendant et al. filed an amended appeal with this court; thereafter, the court, *Genuario, J.*, denied the motion to open the judgment and to modify the interest rate filed by the named defendant et al., and the named defendant et al. filed a second amended appeal with this court. *Reversed in part; judgment directed.*

Michael S. Taylor, with whom were *Brendon P. Levesque* and, on the brief, *James P. Sexton* and *Megan L. Wade*, for the appellants-cross appellees (named defendant et al.).

Edward P. Dolido, pro hac vice, with whom were *James C. Graham* and, on the brief, *Anthony C. Famiglietti*, *Bijan Amini*, and *Kelly McCullough*, for the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, J. This appeal arises out of a dispute between the plaintiff, Alpha Beta Capital Partners, L.P., and the defendants Pursuit Opportunity Fund I, L.P. (POF), Pursuit Opportunity Fund I Master Ltd. (POF Master), Pursuit Capital Management Fund I, L.P. (PCM), Pursuit Capital Master (Cayman) Ltd. (PCM Mas-

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ter), Pursuit Partners, LLC (Pursuit Partners),¹ Pursuit Investment Management, LLC (PIM), Northeast Capital Management, LLC (Northeast), Anthony Schepis, and Frank Canelas, Jr. The central issue of this appeal is the defendants' claim that the court improperly interpreted the agreements between the parties to hold that certain defendants were liable for their failure to distribute to the plaintiff its share of a substantial contingent asset in which it had an interest.

The defendants appeal, and the plaintiff cross appeals, from the judgment of the trial court, rendered after a bench trial, partially in favor of the plaintiff as to certain defendants on its complaint and in favor of the plaintiff on the defendants' counterclaim.² The defendants also appeal from the orders of the trial court granting the plaintiff's postjudgment motion to increase the amount of a previously secured prejudgment remedy, and granting the plaintiff's motion for discovery to secure the additional prejudgment remedy attachment.

Addressing the parties' various contentions, we conclude that (1) the court properly interpreted the agreements between the parties in concluding that the plaintiff prevailed on its breach of contract claim, (2) the court properly rejected the defendants' breach of contract counterclaim, (3) the court properly concluded that the plaintiff prevailed on its breach of the implied covenant of good faith and fair dealing claim, (4) the court properly concluded that the plaintiff could not prevail on its conversion claim, (5) the court properly struck the plaintiff's Connecticut statutory causes of

¹ Pursuit Partners did not appeal from the judgment of the trial court and is not involved in this appeal. Our references to the defendants do not include Pursuit Partners.

² As set forth subsequently in this opinion, the court rendered judgment in favor of the plaintiff against PCM, POF, PIM, Schepis, Canelas, and Northeast on two of the seven counts of the complaint, in favor of all of the defendants on the remaining counts of the complaint, and in favor of the plaintiff on the defendants' counterclaim.

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action, (6) the court improperly concluded that all of the defendants who had signed the settlement agreement were liable for breach of contract and for breach of the implied covenant of good faith and fair dealing, (7) the court properly determined the amount of damages awarded to the plaintiff, (8) the court properly granted the plaintiff's motion to increase the amount of the prejudgment remedy, and (9) the defendants' claim that the court improperly granted the plaintiff's motion for postjudgment discovery was not properly preserved, and, thus, we decline to review it. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The plaintiff is a limited partnership organized under the laws of the state of Delaware. POF and PCM are both hedge funds³ that were formed as Delaware limited partnerships. POF Master and PCM Master are both hedge funds that were formed as Cayman Islands limited liability companies. The vast majority of investments in POF Master were made by POF, and, likewise, the vast majority of investments in PCM Master were made by PCM. Pursuit Partners⁴ and PIM are Delaware limited liability companies, each with a principal place of business in Greenwich, Connecticut. PIM provided advisory and investment management services to POF, PCM, POF Master, and PCM Master. Northeast is a limited liability company that became the general partner of PCM on February 17, 2014, which was after the prior general partner, Pursuit Capital Management, LLC (Pursuit Management), had filed for bankruptcy. Schepis and Canelas are individuals who reside in

³ A "hedge fund" is "[a] specialized investment group—[usually] organized as a limited partnership or offshore investment company—that offers the possibility of high returns through risky techniques such as selling short or buying derivatives." Black's Law Dictionary (9th Ed. 2009).

⁴ The court did not make any factual findings as to the role of Pursuit Partners in the hedge fund structure.

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Greenwich, Connecticut, and who, together, formed, operated, and controlled all of the other defendants. At one point in time, the defendants cumulatively managed assets in excess of \$600 million. During all relevant times, the plaintiff was represented by the law firm Reed Smith, and the defendants were represented by the law firm DLA Piper.

In approximately 2007, the plaintiff invested in both POF and PCM.⁵ In return, the plaintiff acquired limited partnership interests in POF and PCM, and became a signatory to both the POF and PCM limited partnership agreements. Also invested in POF and PCM at that time was the Schneider Group, which was comprised of various persons and entities, including Leslie Schneider, Lillian Schneider, Claridge Associates, LLC, and Jamus Scott, LLC. In 2007 and 2008, all of the defendants were experiencing significant financial difficulties as a result of the volatility of the global securities market. More specifically, in 2007, POF Master and PCM Master had purchased certain securities known as collateralized debt obligations (CDOs)⁶ from UBS AG, or its affiliate, for substantial sums of money. Shortly thereafter, the value of the CDOs precipitously dropped and, in 2008, Pursuit Partners and PIM commenced a civil action in the Connecticut Superior Court against UBS AG and Moody's Corporation (UBS litigation), alleging "a fraud

⁵ The plaintiff did not invest directly in POF Master or PCM Master.

⁶ According to Wikipedia, a popular encyclopedia website, which is accessible to the public free of charge and updated collaboratively by the site's visitors, a CDO is "a type of structured asset-backed security Originally developed as instruments for the corporate debt markets, after 2002 CDOs became vehicles for refinancing mortgage-backed securities Like other private label securities backed by assets, a CDO can be thought of as a promise to pay investors in a prescribed sequence, based on the cash flow the CDO collects from the pool of bonds or other assets it owns." (Footnotes omitted.) Wikipedia, the free encyclopedia, "Collateralized debt obligation," (last modified September 16, 2019), available at https://en.wikipedia.org/wiki/Collateralized_debt_obligation (last visited September 26, 2019).

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. . . committed by [UBS AG and UBS Securities, LLC], upon [POF Master and PCM Master] in connection with [those entities'] purchase of CDOs from [UBS AG and UBS Securities, LLC]." *Pursuit Partners, LLC v. UBS AG*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. CV-08-4013452-S (September 8, 2009) (48 Conn. L. Rptr. 557, 558). POF Master and PCM Master were not parties to that action even though they were the actual purchasers of the CDOs from UBS AG and UBS Securities, LLC.

In 2009, the investors in POF and PCM were provided an opportunity to redeem their investments and to withdraw their partnership interests from POF and PCM. A majority of the investors chose to redeem. In September, 2009, the plaintiff redeemed its investment in POF, which extinguished its interest in POF except for certain holdbacks⁷ to indemnify potential future expenses of POF. Nevertheless, the plaintiff, as well as the Schneider Group, chose to remain invested in PCM and, as a result, between them, they cumulatively held approximately two thirds of the equitable interest in PCM.

On or about April 1, 2009, the plaintiff executed the "Amended and Restated Limited Partnership Agreement" (LPA) for PCM, which was drafted by one or more of the defendants under the supervision of Schepis and Canelas. The LPA did not require or contemplate any new investment; rather, the plaintiff retained its interest in PCM consistent with the terms of the LPA on the basis of its previous investment in PCM. The LPA contained certain provisions for withdrawals by and distributions to limited partners.

In 2010, the plaintiff commenced a civil action in the Supreme Court of the state of New York (2010 New York

⁷ A "holdback" is "[a]n amount withheld from the full payment of a contract pending the other party's completion of some obligation" Black's Law Dictionary, *supra*.

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action) against PIM, Schepis, and Canelas. Therein, the plaintiff alleged that PIM, Schepis, and Canelas were liable for substantial damages caused by their “tortious conduct involving the management of its investments in the hedge funds.” Contemporaneously, the plaintiff filed a separate arbitration proceeding against POF and PCM, claiming similar losses for similar tortious conduct. In that proceeding, the plaintiff alleged, among other things, that one or more of the defendants had paid themselves compensation on the basis of a highly inflated value of the CDOs, notwithstanding their knowledge that the CDOs had little or no value.⁸

On or about April 8, 2011, the plaintiff, PIM, Schepis, Canelas, Pursuit Management, POF, and PCM executed the “Confidential Settlement Agreement and Mutual Release” (CSA) to resolve the 2010 New York action and the arbitration proceeding. The CSA was comprised of fifteen sections and provided at the outset that “the [p]arties hereby agree as follows” In §§ 1, 2, 5, and 6, the CSA provided that the plaintiff was to execute a dismissal with prejudice as to both the 2010 New York action and the parallel arbitration proceeding, and that the plaintiff agreed to a mutual release with PIM, Schepis, Canelas, Pursuit Management, POF, and PCM of all claims that were, or could have been, raised therein.

As consideration for the plaintiff’s withdrawal and release, § 3 of the CSA required PIM to pay the plaintiff a settlement payment of \$2.2 million and a redemption payment of \$1,418,033. Pursuant to § 3 (b) (i) and (iii)

⁸ Approximately during the same time, the United States Securities and Exchange Commission (SEC) began an investigation of the defendants. After receiving a letter from DLA Piper indicating that the SEC proceeding could cost as much as \$10 million, the defendants notified the investors, including the plaintiff, of the SEC investigation, but not the estimate of costs. On receipt of this letter, and pursuant to the plaintiff’s request, Reed Smith contacted the SEC in 2010, 2011, and 2012, to learn more about the investigation. Ultimately, the SEC investigation was resolved without penalty or sanction.

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of the CSA, the amount of the redemption payment represented the plaintiff's pro rata share, approximately 32.083612 percent, of the net asset value (NAV) in PCM as of February 28, 2011,⁹ minus a holdback of "\$250,000 for the purpose of funding necessary costs . . . associated with the ongoing [UBS litigation]" and minus "an additional holdback in the amount [of] \$200,000 to pay legal fees and expenses with respect to which PCM has an obligation to indemnify." Section 3 (b) (ii) of the CSA provided detailed mandates regarding these holdbacks, including that PIM shall not use any prior holdbacks in connection with the UBS litigation, that the plaintiff shall "be entitled to periodic updates on the status of the holdbacks," and that the plaintiff "will be provided with the opportunity to pay additional expenses necessary for the UBS [l]itigation" if the UBS litigation holdback was insufficient.

In addition, § 4 of the CSA secured the plaintiff's interest in two of PCM's contingent assets. Section 4 of the CSA provided in relevant part that "PCM owns certain contingent assets that were valued at zero . . . for purposes of calculating PCM's NAV. These contingent assets include (a) PCM's proportionate interest in the UBS [l]itigation; and (b) PCM's interest in a claim against Lehman Brothers International (Europe) . . . in the amount of approximately \$14,000,000 [(LBIE claim)]. Nothing herein . . . shall affect in any way [the plaintiff's] pro rata share . . . of the contingent assets as of February 28, 2011. It is further understood that [the plaintiff's] continued interest in the contingent assets shall be governed by the [LPA]"

⁹ Specifically, § 3 (b) (iii) of the CSA defined the total NAV in PCM as of February 28, 2011, to be \$5,822,390, and the plaintiff's pro rata share of the NAV in PCM as of February 28, 2011, to be \$1,868,033. Consequently, the court found that the CSA defined the plaintiff's percentage of the pro rata share of the NAV in PCM as of February 28, 2011, to be approximately 32.083612 percent (\$1,868,033 divided by \$5,822,390).

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Section 7 of the CSA was a confidentiality provision in which the parties agreed, among other things, “to maintain in the strictest confidence and not disclose . . . the contents and terms of [the CSA] . . . [and] not to use or provide any information relating to any claim arising out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM.” Section 12 of the CSA was a choice of law provision that provided: “This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York. Any disputes or litigation arising out of this [a]greement shall be governed by New York law.”

On or about April 28, 2011, PIM sent a letter to the remaining investors in PCM, notifying them that the plaintiff’s claims against PCM had been settled, that PIM was effecting a “‘mandatory withdrawal’” of the plaintiff’s limited partnership interest, and that the plaintiff would maintain its proportionate interest in the two contingent assets. On or about April 30, 2011, Schepis, in his capacity as the managing member of the general partner of PCM, acting on behalf of the limited partners, executed “Amendment No. 1” to the LPA. That amendment set forth certain terms governing the withdrawn investors’ continued interest in the contingent assets, the right of the general partner to be paid an incentive fee, and the right of the general partner to withhold reserves, costs, and expenses from any distribution of the proceeds of the contingent assets.

Shortly after the CSA was signed, the LBIE claim was sold for \$9,334,141.55, and, on June 1, 2011, those funds were received in PCM Master’s account. Nevertheless, no portion of the LBIE claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received \$1,022,022.36. Thereafter, a series of communications occurred between Reed Smith and DLA Piper

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regarding the distribution of the LBIE claim proceeds to the plaintiff.

On November 9, 2011, DLA Piper sent an explanation to Reed Smith, stating that the plaintiff's contingent interest in the LBIE claim was worth \$2,691,641, which amount represented 32.08 percent of PCM's 90 percent interest in the LBIE claim owned by PCM Master, and that a performance fee also would be subtracted from that amount. On November 16, 2011, Reed Smith sent a letter in response, asserting that the defendants had provided no documentation to support their valuation of the plaintiff's proportionate interest in the LBIE claim, that Reed Smith had been in contact with the Schneider Group and their related entities, and that the Schneider Group was supporting the plaintiff's demands. On November 26, 2011, DLA Piper sent another explanation to Reed Smith, stating that the plaintiff's interest in the LBIE claim was reduced to \$2,132,559 to account for the performance fee due to the defendants, and that the plaintiff's "reserve balance in May, 2011, was adjusted upward in that amount." Neither of DLA Piper's communications provided an explanation as to the basis for the performance fee or the balance reserve, nor the reason for which the defendants had remitted less than 48 percent of the total amount that they finally had calculated the plaintiff's interest in the LBIE claim to be worth. The defendants did not remit any further amount of the LBIE claim at that time.

On November 6, 2012, the court dismissed the UBS litigation for lack of subject matter jurisdiction on the ground that Pursuit Partners and PIM lacked standing to proceed against UBS AG and Moody's Corporation. On December 4, 2012, lead counsel for Pursuit Partners in the UBS litigation sent a letter to the investors, including the plaintiff, explaining that the case had been dismissed, that he disagreed with the decision, that he had filed a motion to reargue, that the investors should not

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take any action that would interfere with the process, and that he was confident that they ultimately would prevail.

In March, 2013, after having received no further communication regarding the LBIE claim and concerned about the status of its holdbacks, the plaintiff commenced a civil action in the Supreme Court of the state of New York against PIM, PCM, POF, and Pursuit Management (2013 New York action).¹⁰ In that action, the plaintiff alleged that those defendants had breached the CSA by failing to pay the plaintiff its pro rata portion of the LBIE claim proceeds, and by failing to provide the plaintiff with periodic updates on the status of its holdbacks and contingent assets. Accordingly, the 2013 New York action did not seek the UBS litigation proceeds, as the UBS litigation had not yet been resolved; rather, the plaintiff sought an accounting and an injunction to prevent those defendants from accessing or utilizing the plaintiff's holdbacks.

Soon after the commencement of the 2013 New York action, the defendants, or some of them, transferred to the plaintiff approximately \$700,000 in additional proceeds from the LBIE claim, for a total distribution of \$1,722,022.36, which was approximately 81 percent of the total amount that the defendants finally had calculated the plaintiff's interest in the LBIE claim to be worth. The transmittal of the \$700,000 was not accompanied by any explanation or accounting as to how the amount was calculated, the balance of the LBIE claim proceeds, or the status of the holdbacks. Even though it mandatorily had withdrawn the plaintiff as a member of PCM in April, 2011, when the CSA was executed, on April 22, 2013, Pursuit Management sent the plaintiff a letter executing its purported right, pursuant to the LPA,

¹⁰ As of the date of oral argument before this court, the 2013 New York action was still pending before the New York Supreme Court. See *Alpha Beta Capital Partners, L.P. v. Pursuit Investment Management, LLC*, New York Supreme Court, County of New York, Index No. 152104/2013.

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to “ ‘mandatorily withdraw’ ” the plaintiff from PCM,¹¹ which allegedly terminated any interest the plaintiff had in the contingent assets. The purported basis for this second mandatory withdrawal was the initiation of the 2013 New York action.

On July 3, 2014, the court in the UBS litigation, after reconsideration, vacated the judgment dismissing the UBS litigation and held that Pursuit Partners and PIM had standing on the basis of the unique and unitary relationship between the various entities that make up and control the hedge fund structure. In August and September, 2015, Pursuit Partners settled the UBS litigation for a total of \$36 million; however, the defendants have not provided the plaintiff with any portion of the settlement proceeds.

The plaintiff then brought the present action against the defendants seeking damages for their failure to remit to the plaintiff its proportionate share of the UBS litigation proceeds as secured under § 4 of the CSA.¹² On September 11, 2015, the plaintiff filed an application for a prejudgment remedy and a proposed summons and complaint against the defendants. The plaintiff’s operative amended substitute complaint, dated May 6, 2016, is comprised of seven counts: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment, (4) conversion, (5) statutory theft under General Statutes § 52-564, (6) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (7) civil conspiracy.

On February 17, 2016, the defendants, in response, filed an application for a prejudgment remedy and a counterclaim against the plaintiff alleging, among

¹¹ The court inconsistently found that this letter was sent on April 22, 2013, and April 22, 2014. This discrepancy is immaterial to our decision.

¹² The plaintiff does not seek the remaining portion of the LBIE claim, as that claim is the subject of the 2013 New York action.

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other things, that the plaintiff is liable to the defendants for breach of contract and is not entitled to any portion of the UBS litigation proceeds. In particular, the defendants alleged that the November, 2011 letter from Reed Smith to DLA Piper referencing the plaintiff's communication with the Schneider Group, as well as the commencement of the 2013 New York action, had breached certain provisions of both the CSA and the LPA. The defendants' operative amended counterclaim, dated June 7, 2016, contained two counts that respectively alleged breach of the CSA and fraud.

On May 17, 2016, the defendants filed a motion to strike all seven counts of the plaintiff's complaint. The defendants argued in their memorandum of law in support, in relevant part, that counts five and six of the complaint, which alleged Connecticut statutory causes of action sounding in statutory theft and CUTPA, are barred by the choice of law provision in § 12 of the CSA, which provided that "[a]ny disputes or litigation arising out of this [a]greement shall be governed by New York law." On June 8, 2016, the plaintiff filed a memorandum of law in opposition to the defendants' motion to strike in which it argued, among other things, that the choice of law provision was not broad enough to preclude the Connecticut statutory causes of action.

On June 16, 2016, after an eight day hearing,¹³ the court issued a thorough memorandum of decision in which it concurrently granted the plaintiff's application for a prejudgment remedy and denied the defendants' application for a prejudgment remedy. The court found that there was "probable cause that the plaintiff will obtain a judgment in the amount of \$4,929,582 plus interest in the amount of \$492,000, for a total prejudgment remedy in the amount of \$5,421,582." The defendants then filed a motion for reconsideration,

¹³ The parties stipulated that the evidence introduced at the prejudgment remedy proceeding would constitute evidence in the subsequent full trial on the merits.

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and certain defendants also filed a motion to modify the prejudgment remedy, which were both summarily denied by the court. The plaintiff thereafter secured the full attachment amount.

On June 20, 2016, the court issued an oral ruling granting the defendants' motion to strike as to counts five and six, and denying the motion as to the remainder of the counts. The court held that although the choice of law provision in § 12 of the CSA "is not quite as broad" as compared to other similar cases, "it is still quite broad. It is difficult to see how the specific claims alleged in counts five and six being litigated in this case do not arise out of the [CSA]. Those counts have as the center of the alleged wrongful conduct of the defendants various wrongful [conduct] and schemes that would further their efforts to withhold from the [plaintiff] the amount the [plaintiff] claim[s] [is] due under the CSA. As such, while those counts do not rest on the validity, construction, and enforcement of the agreement, they do arise out of the obligations of the defendants that emanate from that agreement."

On October 14, 2016, after seven additional days of evidence, the court issued an extensive memorandum of decision in which it rendered judgment partially in favor of the plaintiff as to certain defendants on its complaint and in favor of the plaintiff on the defendants' counterclaim.¹⁴ In particular, the court concluded that the defendants that were parties to the CSA—PCM, POF, PIM, Schepis, and Canelas—as well as the general partner of PCM at the time the UBS litigation proceeds were realized, Northeast, were liable for breach of contract and breach of the covenant of good faith and fair dealing for their intentional failure to remit to the plaintiff its proportionate share of the UBS litigation proceeds as secured by the CSA. The court also

¹⁴ On appeal, the defendants only challenge the court's judgment in favor of the plaintiff on the breach of contract count in the counterclaim, and do not challenge the court's judgment in favor of the plaintiff on its fraud count in the counterclaim.

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concluded that the remaining claims in the plaintiff's complaint, the defendants' special defenses, and the defendants' counterclaim had not been proven. Consequently, the court rendered judgment in favor of the plaintiff against PCM, POF, PIM, Schepis, Canelas, and Northeast in the total amount of "\$4,929,582 plus pre-judgment interest at the rate of 10 percent per year from October 16, 2015, the date that the plaintiff's interest in the UBS [litigation] proceeds should have been remitted to the plaintiff, until October 16, 2016, in the amount of \$492,958, for a total of \$5,422,540." The court also rendered judgment in favor of Pursuit Partners, PCM Master, and POF Master on counts one and two of the complaint, in favor of all the defendants on counts three through seven of the complaint, and in favor of the plaintiff on the counterclaim. This appeal and cross appeal followed.

On November 8, 2016, during the pendency of this appeal, the plaintiff, pursuant to General Statutes § 52-278k, filed a motion with the trial court seeking modification of the previously secured prejudgment remedy attachment amount to secure from PCM, POF, PIM, Schepis, Canelas, and Northeast an additional \$947,731 that it anticipated would accrue during the pendency of this appeal. On the same date, the plaintiff, pursuant to Practice Book § 13-13, filed a motion with the trial court seeking supplemental asset disclosure from those defendants to assist with the securing of the additional attachment pursued by the motion to modify. On December 16, 2016, the defendants filed an opposition to the plaintiff's motion to increase the prejudgment remedy in which they argued, among other things, that § 52-278k does not permit the upward modification of a prejudgment remedy in the present circumstances.

On January 4, 2017, after a hearing, the court granted the plaintiff's motion to increase the prejudgment remedy amount by \$947,731 to a total of \$6,369,313, holding that § 52-278k permits the modification of a prejudgment remedy "at any time," and that the "evidence

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at trial and the circumstances of the pending appeal” constituted probable cause warranting an increased modification. On the same date, the court granted the plaintiff’s motion for disclosure of assets to assist with the securing of the additional amount. The defendants thereafter filed an amended appeal to challenge these rulings. Additional facts will be set forth as necessary.

On appeal, the defendants present a myriad of claims, which principally challenge the court’s interpretation of the CSA and the LPA. In particular, the defendants argue that the court improperly determined that certain defendants breached the CSA and the covenant of good faith and fair dealing, improperly rejected their breach of contract counterclaim, improperly held all of the defendants that had signed the CSA liable for the breach found by the court of a single provision thereof, and improperly determined the amount of damages. The defendants also claim that the court improperly granted the plaintiff’s motion to increase the amount of the prejudgment remedy and the plaintiff’s motion for discovery to assist it with securing the additional prejudgment remedy attachment. In its cross appeal, the plaintiff claims that the court improperly determined that the defendants that had not signed the CSA were not liable, improperly granted the defendants’ motion to strike its Connecticut statutory causes of action, improperly determined that the plaintiff could not prevail on its conversion claim, and improperly determined the amount of damages. We now turn to each of the parties’ claims.

I

The defendants first claim that the court improperly interpreted the agreements between the parties when it concluded that the plaintiff prevailed on its breach of contract claim, which alleged that the defendants had failed to pay the plaintiff its proportionate share of the proceeds from the UBS litigation. The defendants first argue that none of them could be held liable for

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breach of the CSA because the distribution of the proceeds from the contingent assets was governed by the LPA, which they contend afforded the general partner discretion to withhold or reduce payment of the contingent interests. They argue that the court misinterpreted the agreements to obligate them to remit the proceeds of the contingent assets to the plaintiff as soon as practicable. We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. “The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties’ intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary].” (Internal quotation marks omitted.) *Joseph General Contracting, Inc. v. Couto*, 317 Conn. 565, 575, 119 A.3d 570 (2015). In light of the fact that the defendants’ claim is directed at the court’s interpretation of the agreements, as opposed to the court’s factual findings, “our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.” (Internal quotation marks omitted.) *Sun Val, LLC v. Commissioner of Transportation*, 330 Conn. 316, 325–26, 193 A.3d 1192 (2018).

In interpreting contracts pursuant to New York law,¹⁵ “the intention of the parties should control. To discern the parties’ intentions, the court should construe the agreements so as to give full meaning and effect to the material provisions” (Citations omitted.) *Excess*

¹⁵ The parties on appeal are in agreement that New York substantive law governs this claim because of the choice of law provision in § 12 of the CSA, which provides in relevant part: “This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York.”

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Ins. Co. Ltd. v. Factory Mutual Ins. Co., 3 N.Y.3d 577, 582, 822 N.E.2d 768, 789 N.Y.S.2d 461 (2004). “Where . . . a literal construction defeats and contravenes the purpose of the agreement, it should not be so construed” (Citation omitted; internal quotation marks omitted.) *Currier, McCabe & Associates, Inc. v. Maher*, 75 App. Div. 3d 889, 892, 906 N.Y.S.2d 129 (2010). “In making these determinations, [t]he court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought” (Citations omitted; internal quotation marks omitted.) *Id.*, 890–91.¹⁶

We begin our analysis with the plain language of the provision at issue. Section 4 of the CSA provided in relevant part: “PCM owns certain contingent assets that were valued at zero . . . for purposes of calculating PCM’s NAV. These contingent assets include (a) PCM’s proportionate interest in the UBS [l]itigation; and (b) PCM’s interest in [the LBIE claim]. Nothing herein . . . shall affect in any way [the plaintiff’s] pro rata share . . . of the contingent assets as of February 28, 2011. It is further understood that [the plaintiff’s] continued interest in the contingent assets shall be governed by the [LPA]”

The definitive language of this section demonstrates that the parties intended to preserve the plaintiff’s then existing right to receive its share of proceeds that might

¹⁶ Ordinarily, under New York law, the first determination to be made is whether the contract, under the circumstances, is ambiguous or unambiguous. See *In re Estate of Wilson*, 138 App. Div. 3d 1441, 1442, 31 N.Y.S.3d 331 (2016); see also *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244, 21 N.E.3d 1000, 997 N.Y.S.2d 339 (2014). Nevertheless, because neither the trial court nor the parties frame the issue in that manner, we likewise decline to take that approach.

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be realized from certain contingent assets. Prior to the execution of the CSA, these contingent assets were the property of PCM, and, thus, at the time the CSA was executed, the parties carved out these contingent assets from the redemption payment and agreed that the plaintiff would be entitled to its share of these assets if they were realized.

There is no dispute among the parties regarding the foregoing interpretation; rather, the parties' views diverge as to the intended meaning of the final relevant sentence of § 4 of the CSA, which directs that the LPA governs the continued interest in the contingent assets. The defendants argue that the parties intended that *all* of the provisions of the LPA continued to govern the contingent interests. They maintain that the contingent interests were subject to the distribution and withdrawal provisions of the LPA, which they argue granted the general partner of PCM broad discretion to reduce, reinvest, or retain a portion of the contingent assets once realized. The plaintiff argues that, because the execution of the CSA constituted a withdrawal of the plaintiff from PCM, the court properly determined that the parties intended that the payment of the contingent assets was to be governed by a specific portion of the LPA withdrawal provision. We agree with the plaintiff.

In the present case, the court properly considered the language of § 4 of the CSA in conjunction with the other provisions of the CSA, the LPA, the relation of the parties, and the circumstances under which it was executed. The court first determined that the execution of the CSA had the effect of withdrawing the plaintiff as a limited partner from PCM. The court then determined that, because the plaintiff had been withdrawn from PCM, the parties intended that the payment of the contingent assets secured by the CSA was to be governed by § 5.01 (c) of the LPA, which mandated that “[a] withdrawal shall be effective on the applicable [w]ithdrawal [d]ate. In the case of any [l]imited [p]artner who

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withdraws all or any portion of its [l]imited [p]artner-ship [i]nterest, such withdrawing [l]imited [p]artner shall be paid the amount of its withdrawal in cash as soon as practicable following the effective date of the withdrawal, subject to certain restrictions and reserves for contingent or undetermined liabilities of [PCM].” We conclude that the court’s interpretation is legally and logically correct and supported by the facts in the record.

The purpose of the CSA, as a whole, was to resolve the then existing disputes between the parties, and the execution of the CSA had the effect of vitiating any remaining investment the plaintiff had in PCM. The CSA provided that, in exchange for the releases of claims, PIM was to pay the plaintiff a settlement payment, as well as a redemption payment, which represented the plaintiff’s pro rata share of the NAV remaining in PCM at that time. Thus, the only financial connections between the plaintiff and PCM that existed after the execution of the CSA were the certain holdbacks and the contingent interests. The limited nature of the ongoing relationship was confirmed by PIM’s letter to the other investors in PCM, sent twenty days after the CSA was executed, informing the investors that the plaintiff’s claims had been settled and that the plaintiff had been mandatorily withdrawn as a limited partner in PCM. Consequently, although the CSA did not expressly state that the plaintiff had been withdrawn from PCM, these facts support the court’s determination that the execution of the CSA constituted a withdrawal of the plaintiff from PCM. Thus, in light of this withdrawal, it was logical for the court to conclude that the contingent assets were to be governed by the specific withdrawal provision of § 5.01 (c) of the LPA.¹⁷

¹⁷ This conclusion also disposes of the defendants’ alternative argument that the plaintiff is not entitled to any of the proceeds from the UBS litigation because Pursuit Management exercised its right under the LPA on April 22, 2013 to “mandatorily withdraw” the plaintiff as a limited partner of PCM and, at that time, the UBS litigation had no value because it had been

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The court's interpretation of both the CSA and the LPA together¹⁸ is further bolstered by the relevant portion of § 5.01 (c) of the LPA that provides that a withdrawal was "subject to certain restrictions and reserves for contingent or undetermined liabilities of [PCM]." The parties specifically identified these restrictions and reserves in the CSA holdback provisions, pursuant to which \$250,000 was subtracted from the plaintiff's redemption payment "for the purpose of funding necessary costs . . . associated with the ongoing [UBS litigation] . . ." As a result, it is apparent that the parties anticipated that further expenditure was required to pursue the contingent assets, and, thus, they specifically assented to the potential reduction of that amount in the CSA. This reduction is in conformance with the foregoing language of the LPA.

The fatal problem with the defendants' proffered interpretation is that it fails to consider the pertinent language of the CSA in conjunction with the LPA and the circumstances in which the CSA was executed. The court properly determined that the defendants' position is untenable because, in view of the fact that the plaintiff no longer was a limited partner in PCM, it would contravene the purpose of the CSA to permit the defendants to retain or reinvest the contingent assets once they were realized. We agree that it would be illogical to conclude that, after the withdrawal of the entire NAV

dismissed. Because the plaintiff was withdrawn as a limited partner when the CSA was executed, it could not be withdrawn a second time. Furthermore, the defendants' argument that the UBS litigation had no value when it was dismissed in 2012 is disingenuous in light of their counsel's December 4, 2012 letter to the limited partners, including the plaintiff, telling them that despite the dismissal, counsel expected ultimately to prevail in the litigation.

¹⁸ We disagree with the defendants' interpretation of the court's decision as concluding only that they had breached the CSA; rather, the court concluded that certain defendants had breached both the CSA and the LPA when they failed to remit the contingent assets as soon as practicable. See *In re James O.*, 322 Conn. 636, 649, 142 A.3d 1147 (2016) (interpretation of court's decision presents question of law).

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of the plaintiff's investment, the realization of the contingent assets would constitute a reinvestment of the plaintiff back into PCM, and the defendants could then utilize those funds however they wished. This myopic interpretation contravenes the purposes of the CSA. Instead, it was logical for the court to conclude that, following PCM's receipt of proceeds from the realization of a contingent asset, the plaintiff, pursuant to § 4 of the CSA and § 5.01 (c) of the LPA, was entitled to its pro rata share of those proceeds "in cash as soon as practicable following the effective date of the withdrawal" Accordingly, we conclude that the court's interpretation was logically and legally correct and was supported by the facts in the record.

Consequently, we conclude that the court properly held that the plaintiff proved a breach of contract because it is uncontroverted that the defendants settled the UBS litigation for \$36 million, and the plaintiff has not received its portion of those proceeds in contravention of the CSA and the LPA.

II

The defendants next claim that the court improperly rejected their breach of contract counterclaim, which alleged that they were relieved of their obligation to remit the UBS litigation proceeds because the plaintiff had breached the CSA. The defendants argue that the court erroneously found that (1) the plaintiff had not materially breached the CSA, and (2) the defendants' prior partial delayed payment of the LBIE claim to the plaintiff relieved the plaintiff from its obligations under the confidentiality provision. We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. "The determination of whether a contract has been materially breached is a question of fact that is subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to

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support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” (Citations omitted; internal quotation marks omitted.) *Efthimiou v. Smith*, 268 Conn. 487, 493–94, 846 A.2d 216 (2004).

Under New York law, “[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant’s failure to perform; and (4) resulting damage” (Citation omitted; internal quotation marks omitted.) *Clearmont Property, LLC v. Eisner*, 58 App. Div. 3d 1052, 1055, 872 N.Y.S.2d 725 (2009). A party’s prior material breach relieves the nonbreaching party from performing its remaining obligations under the contract. *U.W. Marx, Inc. v. Koko Contracting, Inc.*, 124 App. Div. 3d 1121, 1122, 2 N.Y.S.3d 276, appeal denied, 25 N.Y.3d 904, 30 N.E.3d 167, 7 N.Y.S.3d 276 (2015); *N450JE, LLC v. Priority 1 Aviation, Inc.*, 102 App. Div. 3d 631, 632, 959 N.Y.S.2d 156 (2013).

“[A] ‘material breach’ is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must ‘go to the root’ or ‘essence’ of the agreement between the parties, or be one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract, or affect the purpose of the contract in an important or vital way. A breach is ‘material’ if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, the breach substantially defeats the contract’s purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract.

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Other courts have defined a breach of contract as ‘material’ if the promisee receives something substantially less or different from that for which the promisee bargained. In many cases, a material breach of contract is proved by the established amount of the monetary damages flowing from the breach; however, proof of a specific amount of monetary damages is not required when the evidence establishes that the breach was so central to the parties’ agreement that it defeated the essential purpose of the contract. Conversely, where a breach causes no damages or prejudice to the other party, it may be deemed not to be ‘material.’ ” (Footnotes omitted.) 23 R. Lord, *Williston on Contracts* (4th Ed. 2018) § 63:3, pp. 482–84; see *Robert Cohn Associates, Inc. v. Kosich*, 63 App. Div. 3d 1388, 1389, 881 N.Y.S.2d 235 (2009) (“a party’s obligation to perform under a contract is only excused where the other party’s breach of the contract is so substantial that it defeats the object of the parties in making the contract” [internal quotation marks omitted]); *Metropolitan National Bank v. Adelphi Academy*, Docket No. 7389/08, 2009 N.Y. Misc. LEXIS 1261, *10 (N.Y. Sup. May 27, 2009) (decision without published opinion, 886 N.Y.S.2d 68 [N.Y. Sup. 2009]) (“for a breach to be material it must be so substantial that it defeats the object of the parties in making the contract; the breach must go to the root of the agreement between the parties”).

Section 7 of the CSA was a confidentiality provision in which the parties agreed, among other things, “to maintain in the strictest confidence and not disclose . . . the contents and terms of [the CSA] . . . [and] not to use or provide any information relating to any claim arising out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM.” There is no dispute among the parties with respect to the interpretation of this provision.

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A

The defendants first argue that the court erroneously found that the plaintiff had not materially breached the CSA¹⁹ by violating § 7 when it requested that Reed Smith contact the SEC regarding the investigation, commenced the 2013 New York action seeking an injunction to prevent PCM from utilizing the UBS litigation holdback, and colluded with the Schneider Group. We conclude that the court's finding was not clearly erroneous.

In the present case, as indicated previously in this opinion, the purpose of the CSA was to settle and resolve the disputes among the parties. At the outset of the CSA, it is acknowledged that the parties "wish[ed] to resolve any and all disputes . . . between them," and that the "sole purposes" of the CSA were to end "the [2010] New York [a]ction and the [a]rbitration" The objective of the CSA, therefore, was the resolution of the pending claims, which entailed the plaintiff's withdrawal and release of claims and the defendants' distribution of certain payments to the plaintiff. Thus, the court's finding that the plaintiff's actions did not constitute a material breach of the CSA is supported by the evidence that § 7 was not central to the CSA.

Moreover, the court's finding is supported by the evidence regarding the circumstances in which these communications were made. Philip Chapman, the managing member of the general partner of the plaintiff, testified that the then ongoing SEC investigation was viewed as an impediment to the return of the plaintiff's holdbacks, and that the communications were intended to stop the legal fees from draining those holdbacks. Thus, the plaintiff's communications to the SEC were made regarding an ongoing investigation in which the

¹⁹ The court, without extensive elaboration, specifically concluded that the plaintiff's actions constituted a partial breach that caused the defendants to suffer no damages.

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plaintiff's interests were potentially involved. Further, there was evidence presented that the 2013 New York action was filed by the plaintiff to obtain an accounting and an injunction that would enjoin the defendants from accessing or utilizing the plaintiff's holdbacks, which were secured by the CSA, because the defendants had failed to provide the plaintiff with periodic updates as required by the CSA. Essentially, the plaintiff commenced the 2013 New York action in response to the defendants' purported breaches of the CSA. In addition, there was evidence that PIM, prior to the November 16, 2011 letter from Reed Smith, already had disclosed to PCM's investors, including the Schneider Group, that the claims brought by the plaintiff against PCM had been resolved by the CSA.

This evidence supports the court's findings that the plaintiff, by engaging in these communications, did not materially breach the essential purpose of the CSA, which was to resolve the then existing disputes among the parties. The evidence that the plaintiff sought information from the SEC regarding an investigation that may affect the plaintiff's interest, filed an action that alleged that the defendants had breached the CSA, and communicated with the Schneider Group after it already had been advised of the CSA supports the court's finding. In fact, each of these actions were taken to enforce the plaintiff's rights that were at the core of the CSA. The defendants' argument would lead to the absurd result that the defendants could act contrary to the CSA and the plaintiff could do nothing about it because disclosing the defendants' actions would violate the CSA's confidentiality provision. The court was not required to conclude that the parties intended such an outcome. See *Davis v. Nyack Hospital*, 130 App. Div. 3d 455, 455–56, 13 N.Y.S.3d 371 (2015) (party permitted to disclose terms of confidential settlement agreement in order to enforce agreement); *Osowski v.*

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AMEC Construction Management, Inc., 69 App. Div. 3d 99, 106, 887 N.Y.S.2d 11 (2009) (“disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are ‘material and necessary’ to the nonsettling party’s case”). Consequently, we conclude that the court’s finding that the plaintiff had not materially breached the CSA was not clearly erroneous.

B

We now turn to the defendants’ second claim that the court erroneously found that the defendants’ prior partial delayed payment of the LBIE claim to the plaintiff relieved the plaintiff from its obligations under the confidentiality provision.²⁰ The defendants reassert their argument, which we rejected in part I of this opinion, that the payment of the LBIE claim proceeds, as a contingent asset, was subject to reduction and reinvestment pursuant to the LPA.²¹ Although we need not reach this issue given our conclusion in part II A of this opinion that the plaintiff’s disclosures did not constitute a material breach of the CSA, we, nonetheless, conclude that the court’s finding that any claimed breach by the plaintiff was excused by the defendants’ prior breach of the CSA was not clearly erroneous.

²⁰ We emphasize that the payment of the LBIE claim proceeds is the subject of the pending 2013 New York action; see footnote 10 of this opinion; and those proceeds are only indirectly implicated here as part of the defendants’ counterclaim in which they alleged that they were excused from remitting the proceeds from the UBS litigation.

²¹ The gravamen of the defendants’ argument on this point is founded in anticipatory repudiation, which requires “proof of a definite and final communication by [the] plaintiff of its intention not to perform” (Citation omitted.) *1625 Market Corp. v. 49 Farm Market, Inc.*, 165 App. Div. 3d 426, 426, 84 N.Y.S.3d 142 (2018). This argument is inapposite because there is no allegation that the plaintiff communicated to the defendants that it intended to avoid its obligations under the agreement prior to engaging in the contested communications, or at any time.

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In the present case, there was an abundance of evidence to support the court's finding. First, the language of the agreements, as outlined previously in part I of this opinion, supports the court's conclusion that the CSA, read in conjunction with the LPA, obligated the payment of the contingent assets, including the pro rata share of the proceeds of the LBIE claim, to the plaintiff "in cash as soon as practicable following the effective date of the withdrawal" As the contingent assets could not have been remitted on the date of the execution of the CSA because they had not yet been realized, "as soon as practicable following the effective date of the withdrawal," effectively was the date on which the proceeds from the LBIE claim were received by PCM. Here, shortly after the CSA was signed, the LBIE claim was sold for \$9,334,141.55, and, on June 1, 2011, those funds were received in PCM Master's account. Accordingly, the plaintiff was entitled to receive its pro rata share of those proceeds; see footnote 9 of this opinion; approximately \$2,994,729.76, as soon as practicable after June 1, 2011.

Nevertheless, the evidence demonstrated that no portion of the LBIE claim proceeds were remitted to the plaintiff until October, 2011, when the plaintiff received \$1,022,022.36. In response to requests from Reed Smith as to the valuation of this amount, DLA Piper stated that it had calculated that the plaintiff's share of the LBIE claim was worth \$2,132,559, which amount represented 32.08 percent of PCM's 90 percent interest in the LBIE claim owned by PCM Master, minus a performance fee. Neither of DLA Piper's communications, however, provided an explanation as to the basis for the reduction for the performance fee or the balance reserve, nor the reason for which the defendants had remitted less than 48 percent of the total amount that they had calculated the plaintiff's interest in the LBIE claim to be worth. Two years later, shortly after the commencement of the 2013 New York action, the plain-

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tiff received the second and final partial distribution of approximately \$700,000 in additional proceeds from the LBIE claim, for a total distribution of \$1,722,022.36, which was approximately 81 percent of the total amount that the defendants had calculated the plaintiff's interest in the LBIE claim to be worth.

The foregoing evidence supports the court's finding that the defendants were in material breach of their obligations under the CSA in October and November, 2011, which was prior to any of the plaintiff's aforementioned communications. Even if we assume that the defendants' calculation as to the plaintiff's proportionate share of the LBIE claim was correct, the evidence that, prior to any of the contested communications, the plaintiff received less than one half of what the defendants had calculated was the plaintiff's entitlement, more than four months after the funds had been received by PCM without sufficient justification, supports the court's finding that the defendants had materially breached the CSA. On the basis of the foregoing, we conclude that the court's finding that the defendants materially had breached the CSA prior to the plaintiff's purported breach was not clearly erroneous. Therefore, we conclude that the court properly rejected the defendants' breach of contract counterclaim.

III

The defendants also claim that the court improperly concluded that the plaintiff prevailed on its breach of the implied covenant of good faith and fair dealing claim. In support, the defendants reassert their argument, which we rejected in parts I and II of this opinion, that neither the LPA nor the CSA mandate that they remit the entirety of the plaintiff's proportionate share of the UBS litigation proceeds. They argue that, in the absence of such a mandate, the court erroneously found

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them liable for breach of the implied covenant of good faith and fair dealing.²² We disagree.

We begin by setting forth the standard of review and legal principles relevant to this claim. The question of whether certain conduct breached the duty of good faith and fair dealing is a question of fact subject to the clearly erroneous standard of review. See *Renaissance Management Co. v. Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007); see also *Landry v. Spitz*, 102 Conn. App. 34, 47, 925 A.2d 334 (2007).

Under New York law, “[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. . . . This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . . Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement

²² The defendants also argue that the plaintiff cannot prevail on its breach of the implied covenant of good faith and fair dealing claim because it is merely a recast breach of contract claim. This argument, unlike the defendants’ similar claim asserted in part IV of this opinion, was not raised before the trial court and, therefore, it is not properly preserved. See *Eubanks v. Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (claim is properly preserved if “articulated below with sufficient clarity” [internal quotation marks omitted]); *Chief Disciplinary Counsel v. Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) (claim is not reviewable if raised for first time on appeal), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 (“[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial”).

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. . . . The implied covenant of good faith encompasses any promises which a reasonable person in the position of the promisee would be justified in understanding were included in the agreement, and prohibits either party from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (Citations omitted; internal quotation marks omitted.) *Atlas Elevator Corp. v. United Elevator Group, Inc.*, 77 App. Div. 3d 859, 861, 910 N.Y.S.2d 476 (2010).

In the present case, the court found that the signatory defendants, PIM, POF, PCM, Schepis, and Canelas, deprived the plaintiff of its right to receive the benefits under the CSA. In particular, the court found: “The signatory defendants had a clear obligation under the CSA to provide the plaintiff with 32.08 percent of PCM’s interest in the UBS [Litigation] proceeds as soon as practicable after receipt. The defendants have done everything but that. The defendants have conducted themselves in a manner in which they have wilfully attempted to thwart the plaintiff’s ability to receive the benefits of the CSA. Rather than provide the plaintiff with 32.08 percent of PCM’s interest in the UBS [Litigation] proceeds, they have raised claims and counterclaims that arise out of alleged conduct of the plaintiff, which conduct was justified based upon their prior breaches of the CSA with regard . . . to the LBIE [claim] proceeds. At every step of the process, the defendants have conducted themselves not in a way to provide the plaintiff with [its] contractual benefit, but rather to maintain control, use, and possession of as much of the mon[ey] that the plaintiff had a contractual right to for as long as possible in order to maintain the benefit of those mon[ey] for themselves. Accordingly, the court finds that the signatory defendants are all liable for the breach of the covenant of good faith and fair dealing contained in the CSA. Indeed, it is remarkable that [al]though the plaintiff executed the CSA with

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the intent of resolving its issues and ending litigation and disputes with the defendants, the defendants' wilful conduct in failing to comply with the CSA has been the primary reason for the continued litigation and excessive expenses incurred by the parties since 2011. The defendants' failure to provide information to the plaintiff until ordered by the court, which might have resolved some of the issues in advance of the litigation, is indicative of their breach of this covenant. The nonsignatory defendants, not having a contractual obligation to the plaintiff, can have no liability under the covenant implied by that contractual relationship."

We conclude that these subsidiary factual findings support the court's finding that at least some of the defendants breached the implied covenant of good faith and fair dealing. At the outset, we reject, for the reasons outlined in parts I and II of this opinion, the defendants' contention that they had no obligation under the CSA to remit the UBS litigation proceeds to the plaintiff. Consequently, the court's findings that the defendants failed to remit those proceeds, wilfully attempted to thwart the plaintiff's ability to receive those proceeds, raised unsupported claims and counterclaims that alleged misconduct by the plaintiff, maintained control over the proceeds so as to retain them as long as possible for their own benefit, continued to prolong the litigation and cause excessive expenses, and failed, until ordered by the trial court, to provide information to the plaintiff that could have resolved some of the issues in advance of this litigation, all support the court's finding. Therefore, we conclude that the court properly concluded that the plaintiff prevailed on its implied covenant of good faith and fair dealing claim.

IV

Because it relates to the extent of the defendants' liability, we next address the plaintiff's claim in its cross appeal that the court improperly concluded that the

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plaintiff could not prevail on its conversion claim. The defendants argue that the court properly concluded that a breach of contract claim, alone, cannot support a claim for conversion. The plaintiff argues that the UBS litigation proceeds were a specifically identifiable thing controlled by the plaintiff. We conclude that the court properly concluded that the plaintiff could not prevail on its conversion claim because it merely was a recasting of its breach of contract claim.

We begin by setting forth the standard of review and legal principles relevant to this claim. This claim requires us to interpret the plaintiff's pleadings, which is a question of law subject to plenary review. See *Byrne v. Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014). Under New York law,²³ “[i]n order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right” (Citations omitted.) *Giardini v. Settanni*, 159 App. Div. 3d 874, 875, 70 N.Y.S.3d 57 (2018). “The mere right to payment cannot be the basis for a cause of action alleging conversion” (Citations omitted; internal quotation marks omitted.) *Zendler Construction Co. v. First Adjustment Group, Inc.*, 59 App. Div. 3d 439, 440, 873 N.Y.S.2d 134 (2009).

²³ The plaintiff argues in one sentence, incorporating its contentions advanced in part V of this opinion, that the court improperly determined that New York law, as opposed to Connecticut law, applies to the plaintiff's conversion claim. We decline to review this claim because the plaintiff offers no independent analysis with respect to the applicability of § 12 of the CSA to its conversion claim. See *Estate of Rock v. University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) (“Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record” [Internal quotation marks omitted.]); see also *Commission on Human Rights & Opportunities ex rel. Arnold v. Forvil*, 302 Conn. 263, 268 n.6, 25 A.3d 632 (2011) (disavowing multiplicity of claims approach).

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“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated Put another way, where the damages alleged were clearly within the contemplation of the written agreement . . . [m]erely charging a breach of a duty of due care, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim” (Citations omitted; internal quotation marks omitted.) *Dormitory Authority v. Samson Construction Co.*, 30 N.Y.3d 704, 711, 94 N.E.3d 456, 70 N.Y.S.3d 893 (2018).

“To determine whether a tort claim lies, we have also evaluated the nature of the injury, how the injury occurred and the harm it caused However, we have made clear that where [the] plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory” (Citations omitted; internal quotation marks omitted.) *Id.* “Generally, a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action . . . particularly where . . . both seek identical damages” (Citations omitted.) *Duane Reade v. SL Green Operating Partnership, L.P.*, 30 App. Div. 3d 189, 190, 817 N.Y.S.2d 230 (2006).

“While a cause of action alleging conversion cannot be predicated upon a mere breach of contract, the contracting party may also be held liable in tort where the conduct which constitutes a breach of contract also constitutes a breach of a duty distinct from, or independent of, the breach of contract” (Citations omitted.) *Connecticut New York Lighting Co. v. Manos Business Management Co.*, 171 App. Div. 3d 698, 699, 98 N.Y.S.3d 101 (2019); see *New York v. Shellbank Restaurant Corp.*, 169 App. Div. 3d 581, 582, 95 N.Y.S.3d 60 (conversion claim duplicative of breach of contract claim because “there were no facts pleaded beyond

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those that support the contract claim or that would support the existence of a duty separate from the parties' agreement"), appeal dismissed, 33 N.Y.3d 1061, 127 N.E.3d 312, 103 N.Y.S.3d 354 (2019); *Greater Bright Light Home Care Services, Inc. v. Jeffries-El*, 151 App. Div. 3d 818, 824, 58 N.Y.S.3d 68 (2017) ("cause of action alleging conversion cannot be predicated on a mere breach of contract" [internal quotation marks omitted]).

In count four of its complaint, the plaintiff incorporated the prior three counts, including the breach of contract count, and alleged, in one paragraph, that the defendants engaged in conversion because "[the plaintiff], being the owner and entitled to the possession and payment of its share of the settlement funds from the UBS litigation and the sums advanced by [the plaintiff] in connection with the UBS litigation, made demand for payment of the sums to which it is entitled, and the defendants . . . including . . . Schepis and Canelas, have refused and neglected to return and pay over to [the plaintiff] the sums to which it is entitled and, without authority from [the plaintiff], converted the same to their own use." The court rejected the plaintiff's conversion claim and rendered judgment on that count in favor of the defendants because, in relevant part: "The plaintiff had a contractual right to be paid certain sums of money pursuant to the CSA. It had neither ownership nor possession of the money itself. . . . Here, the property was neither specific nor did the plaintiff have possession or control of the settlement of proceeds prior to the defendants' conduct. The plaintiff has ple[aded] and proven a breach of contract claim; without more, that claim does not establish conversion." (Citations omitted.)

We need not decide whether the court properly determined that the plaintiff failed to prove conversion on the basis that the UBS litigation proceeds were a specifically identifiable interest because we agree with the court that the plaintiff's conversion claim is merely a

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recasting of its breach of contract claim. The plaintiff's conversion claim seeks the same damages as the breach of contract claim, namely, its proportionate share of the UBS litigation proceeds. The plaintiff's conversion claim also alleges the same breach of duty, essentially, the defendants' obligation pursuant to the CSA and the LPA to remit the UBS litigation proceeds to the plaintiff. Accordingly, the plaintiff seeks to enforce the mandates of the CSA and the LPA that the defendants remit its share of the UBS litigation proceeds. In addition, the plaintiff's conversion claim is based on the exact allegations as its breach of contract claim because the plaintiff's complaint entirely incorporates the breach of contract allegations into its count alleging conversion. Indeed, on appeal, the plaintiff does not dispute the court's holding that its conversion claim was simply a breach of contract claim. Therefore, we conclude that the court properly determined that the plaintiff could not prevail on its conversion claim.

V

The plaintiff also claims that the court improperly granted the defendants' motion to strike its Connecticut statutory causes of action on the ground that those claims are barred by § 12 of the CSA, which provides in relevant part that "[a]ny disputes or litigation arising out of this [a]greement shall be governed by New York law." The plaintiff argues that the court improperly interpreted the plain language of § 12 of the CSA to conclude that New York law applies so as to bar its Connecticut statutory causes of action.²⁴ We disagree.

²⁴ On appeal, the plaintiff also argues that § 12 of the CSA did not bar its Connecticut statutory causes of action because public policy mandates that Connecticut law apply. We decline to review this claim because it is raised for the first time on appeal and, therefore, is not properly preserved. See *Eubanks v. Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (claim is properly preserved if "articulated below with sufficient clarity" [internal quotation marks omitted]); *Chief Disciplinary Counsel v. Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) (claim is not reviewable if raised for first time on appeal), cert. denied, U.S. , 138 S. Ct. 2583,

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The following additional facts and procedural history are relevant to our resolution of this claim. On May 17, 2016, the defendants filed a motion to strike all seven counts of the plaintiff's complaint. The defendants argued in their memorandum of law in support, in relevant part, that counts five and six of the complaint, which alleged Connecticut statutory causes of action sounding in statutory theft and CUTPA, are barred by the choice of law provision in § 12 of the CSA, which provides in relevant part: "Any disputes or litigation arising out of this [a]greement shall be governed by New York law." On June 8, 2016, the plaintiff filed a memorandum of law in opposition to the defendants' motion to strike in which it argued that the choice of law provision was not broad enough to preclude the Connecticut statutory causes of action.

On June 20, 2016, a hearing was held on the defendants' motion to strike, at which the parties advanced arguments consistent with their written memoranda. At the conclusion of the hearing, the court issued an oral ruling granting the defendants' motion to strike as to counts five and six, and denying the motion as to the remainder of the counts. The court compared and contrasted several decisions cited by the parties and concluded that although § 12 of the CSA, the choice of law provision "is not quite as broad" as compared to

201 L. Ed. 2d 295 (2018). In its written opposition to the defendants' motion to strike, the plaintiff did not argue that § 12 of the CSA was violative of the public policy of Connecticut. At oral argument on the defendants' motion to strike, although the plaintiff's counsel argued in one sentence that Connecticut has an interest in the resolution of this dispute, the plaintiff's counsel did not advance an oral argument that § 12 of the CSA violated the public policy of Connecticut, that New York had no substantial relationship to the parties or transaction, or that New York law is contrary to the fundamental policy of Connecticut. See *Elgar v. Elgar*, 238 Conn. 839, 850, 679 A.2d 937 (1996) (concluding that Connecticut law favors choice of law provisions unless application of foreign state law violated Connecticut public policy). To entertain this argument for the first time on appeal would constitute an ambush of the trial judge and the defendants. See *Forgione v. Forgione*, 186 Conn. App. 525, 530, 200 A.3d 190 (2018).

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other similar cases, “it is still quite broad. It is difficult to see how the specific claims alleged in counts five and six being litigated in this case do not arise out of the [CSA]. Those counts have as the center of the alleged wrongful conduct of the defendants various wrongful [conduct] and schemes that would further their efforts to withhold from the [plaintiff] the amount the [plaintiff] claim[s] [is] due under the CSA. As such, while those counts do not rest on the validity, construction, and enforcement of the agreement, they do arise out of the obligations of the defendants that emanate from that agreement. Sophisticated parties advised by sophisticated counsel chose to have all such disputes governed by New York law.” The court, thus, determined that the plaintiff could not bring Connecticut statutory actions against the defendants because, pursuant to § 12 of the CSA, New York law applied to the dispute among the parties.

We next set forth the standard of review and legal principles relevant to this claim. We afford plenary review to this claim because it stems from the court’s decision granting a motion to strike; *Levin v. State*, 329 Conn. 701, 706, 189 A.3d 572 (2018); and requires us to interpret definitive contract language; see *Joseph General Contracting, Inc. v. Couto*, supra, 317 Conn. 575. We incorporate the New York principles of contract interpretation as outlined in part I of this opinion.²⁵

Pursuant to New York law, the applicability of a choice of law clause to a particular claim is entirely dependent on the exact language of the clause and

²⁵ On appeal, the plaintiff acknowledges that New York contractual interpretation principles apply to determine whether the language of § 12 of the CSA bars its Connecticut statutory causes of action, yet, it also argues that Connecticut law leads to the same result. Likewise, the defendants inconsistently argue that the contractual interpretation principles of both states apply. We apply the contract interpretation principles of New York, not Connecticut, because that is the law the parties, in the sentence prior to the one at issue, specifically agreed applied to the interpretation of the CSA: “This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York.”

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the nature of the claim. For instance, “[u]nder New York law . . . tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract” (Citation omitted; internal quotation marks omitted.) *Coco Investments, LLC v. Zamir Manager River Terrace, LLC*, Docket No. 600137-2008, 2010 WL 761237, *5 n.1 (N.Y. Sup. March 3, 2010) (decision without published opinion, 907 N.Y.S.2d 99 [N.Y. Sup. 2010]); see, e.g., *Twinlab Corp. v. Paulson*, 283 App. Div. 2d 570, 571, 724 N.Y.S.2d 496 (2001) (choice of law clause applicable to “validity, interpretation, construction and performance” of consulting agreement did not apply to “tort cause of action [that] was based on the appellant’s alleged criminal activities, which were unrelated to his duties as a consultant” [internal quotation marks omitted]).

On the other hand, “the use of ‘arising out of’ language in a contract is considered unambiguous and viewed as reasonably supporting only a broad reading. For example, in the arbitration context, the language ‘arising out of’ a specified contract is considered ‘broadly worded, and hence, encompasses [a plaintiff’s] claims of fraudulent inducement directed at the agreement itself.’ ” *Nycal Corp. v. Inoco PLC*, Docket No. 98-7058, 1998 WL 870192, *2 (2d Cir. December 9, 1998) (decision without published opinion, 166 F.3d 1201 [2d Cir. 1998]). “The same analysis of the phrase ‘arising out of’ is found in insurance law cases.” *Id.*, *3; see, e.g., *Turtur v. Rothschild Registry International, Inc.*, 26 F.3d 304, 309–10 (2d Cir. 1994) (choice of law clause applicable to “any controversy or claim arising out of or relating to this contract or breach thereof” was “sufficiently broad to cover tort claims as well as contract claims” [emphasis omitted]); *Capital Z Financial Services Fund II, L.P. v. Health Net, Inc.*, 43 App. Div. 3d 100, 105, 109, 840 N.Y.S.2d 16 (2007) (choice of law clause

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applicable to “ ‘all issues’ concerning ‘enforcement of the rights and duties of the parties’ ” was broad enough to cover tort claims).

In count five of its complaint, the plaintiff alleged, among other things, that the CSA secured its legal ownership in the proceeds of the UBS litigation and that the defendants, without any valid basis, permanently deprived the plaintiff of those proceeds. The plaintiff further alleged that the defendants used the UBS litigation proceeds for themselves and, thus, the defendants’ conduct constituted theft under Connecticut’s statutory theft statute, § 52-564. In count six of its complaint, the plaintiff alleged that the defendants repeatedly breached the CSA, misappropriated the plaintiff’s share of the UBS litigation proceeds, and commenced vexatious and frivolous litigation and arbitration against the plaintiff. The plaintiff alleged that the defendants’ conduct constituted unfair and deceptive trade practices in violation of Connecticut’s CUTPA statute, General Statutes § 42-110b (a).

We conclude that the relevant language of § 12 of the CSA that “[a]ny disputes or litigation arising out of this [a]greement shall be governed by New York law,” barred the plaintiff’s statutory theft and CUTPA causes of action. The language “[a]ny disputes or litigation arising out of this [a]greement” is broad. (Emphasis added.) The language of this section does not apply only to breach of contract causes of action, and we decline to read it to give it that effect. If the parties intended § 12 to apply only to a claim of breach of the CSA, they could have included such language. Instead, the parties agreed that New York law would apply to *any* disputes or litigation *arising* out of the CSA.

In the present case, the plaintiff’s extracontractual statutory causes of action arise out of the CSA because the basis for both claims stems from the CSA. In count

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five, the plaintiff alleged that the defendants withheld and utilized for themselves the UBS litigation proceeds. In count six, the plaintiff alleged that the defendants breached the CSA and failed to provide the plaintiff its share of the UBS litigation proceeds. The foundation for both of these claims is the CSA and the defendants' failure to remit the plaintiff's share of the proceeds of the UBS litigation secured thereby. Accordingly, both of these counts constitute a dispute or litigation that arises from the CSA and, thus, are barred by the parties' agreement in § 12 of the CSA that New York law would apply to such claims. Therefore, we conclude that the court properly granted the defendants' motion to strike counts five and six of the plaintiff's complaint.

VI

Having addressed the court's conclusions as to the viability of each of the plaintiff's claims in its complaint that are challenged on appeal, we now turn to the question of which of the defendants are liable to the plaintiff for its claims of breach of contract and the implied covenant of good faith and fair dealing. The defendants claim that the court improperly interpreted the CSA to conclude that all of the defendants that were signatories to the CSA—PIM, POF, PCM, Schepis, and Canelas—were jointly and severally liable for nonpayment of the UBS litigation. The defendants argue that, because payment of the UBS litigation was governed by the LPA, not the CSA, only Northeast, as the general partner of PCM at the time the UBS litigation was resolved, had the obligation to remit the UBS litigation. The plaintiff argues that the court's conclusion was proper, yet, in its cross appeal, it claims that all of the defendants should be held liable pursuant to a piercing the corporate veil or alter ego theory, and that the court improperly declined to consider these theories despite the fact that they had been pleaded and briefed. We reject the plaintiff's piercing and alter ego claims, and we agree with the defendants that the court improperly con-

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cluded that all of the defendant signatories to the CSA are liable. We, however, conclude that PIM, PCM, and Northeast are liable for the nonpayment of the UBS litigation proceeds.

A

The plaintiff claims that the court improperly declined to consider its piercing the corporate veil and alter ego theories. It argues that, if the court had considered these theories, it would have determined that all of the defendants were liable for nonpayment of the UBS litigation proceeds. We disagree with the plaintiff's interpretation of the trial court's judgment.

“The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . 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. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole.” (Internal quotation marks omitted.) *Olson v. Mohammad*, 310 Conn. 665, 682, 81 A.3d 215 (2013). “[A] trial court opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding.” (Internal quotation marks omitted.) *In re Jacob W.*, 330 Conn. 744, 782, 200 A.3d 1091 (2019) (*D'Auria, J.*, dissenting).

The following additional procedural history is relevant to this issue. In its complaint, the plaintiff alleged, in describing the relevant parties, that “[t]he defendant entities are all owned or controlled by the defendants Schepis and Canelas”; that “[a]ll of the defendant entities, and nonparty Pursuit Management, are part of the Pursuit Hedge Fund Group, a self-described ‘unitary enterprise’ under the exclusive control of two individu-

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als . . . Schepis and Canelas”; that “[t]he Pursuit Hedge Fund Group includes Pursuit Partners and PIM—both of which are wholly owned and controlled by Schepis and Canelas”; that “[a]t all relevant times . . . Schepis and Canelas controlled and continue to control each of the corporate defendants, and Schepis and Canelas are alter egos of each of the entities they control”; that “Schepis and Canelas have stated in court filings, including in the UBS litigation, that the Pursuit entities operate as a ‘unitary enterprise’ and are operated as a single entity”; and that “[t]he structure of the Pursuit entities is completely integrated.”

In its memorandum of decision in which it rendered judgment partially in favor of the plaintiff, the court held that “[t]he nonsignatory defendants, other than Northeast, cannot be held liable to the plaintiff for breach of a contract or an implied covenant in that contract to which they are not a party. Notably, the plaintiff did not plead a count against any of these defendants sounding in a piercing of the corporate veil or alter ego [theory]. The plaintiff seems to rely upon the finding by the court in the UBS litigation; [*Pursuit Partners, LLC v. UBS AG*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. CV-08-4013452-S (July 3, 2014) (58 Conn. L. Rptr. 501)]; concerning the interrelationship and unitary nature of the various Pursuit hedge fund entities, but the determination of the court in its decision to reconsider its prior ruling dismissing the action was a determination that related to the standing of the plaintiff[s] [in that action]. Nothing in that decision implies or suggests that the same concepts are applicable or control the decision of whether or not nonsignatory defendants are liable for the conduct of the signatory defendants. Indeed, the standards discussed by the court in its memorandum of decision are quite foreign to the traditional standards applied in New York and Connecticut with regard to

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piercing a corporate veil.” Nevertheless, the court utilized the plaintiff’s unitary enterprise theory to conclude that all of the defendants that had signed the CSA were liable. The court held that “[t]he evidence is clear that all of the Pursuit entities were controlled by Schepis and Canelas in a variety of capacities. Indeed, in the UBS litigation, [the plaintiffs] took the position that the Pursuit entities were, and the UBS court found that, the various Pursuit entities constituted a ‘unitary set of tightly related entities all working for a common purpose’ [*Pursuit Partners, LLC v. UBS AG*, supra, 502]. The evidence before this court is consistent with that finding.”

In the present case, construing the court’s judgment as a whole, it is apparent that the court, although recognizing that the plaintiff had not separately pleaded these theories, had considered and rejected the plaintiff’s piercing the corporate veil and alter ego theories. The court rejected the plaintiff’s theories on the ground that the plaintiff’s reliance on the holding of *Pursuit Partners, LLC v. UBS AG*, supra, 58 Conn. L. Rptr. 501, was inapposite. In that decision, the Superior Court, after reconsideration, vacated its prior dismissal of the UBS litigation and held that Pursuit Partners and PIM had standing to pursue a claim against the defendants in that action because the “unitary interest as described by [the testimony presented] concerning fees and percentages based upon the funds would support a colorable claim of direct injury to the plaintiff[s] in an individual or representative capacity.” *Id.*, 506. In the present case, the court determined that the issue of whether Pursuit Partners and PIM had standing to pursue an action against the defendants in the UBS litigation is distinct and does not provide a basis for an alter ego or piercing the corporate veil claim against the defendants who had not signed the CSA.

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Although the court did not engage in a discussion of each and every element of the plaintiff's theories, as the plaintiff maintains it should have done, there is no question that it considered and rejected them. We recognize that "[t]rial court judges operate under tremendous time pressure and without the resources available to [our Supreme Court] and the Appellate Court." *In re Jacob W.*, supra, 330 Conn. 782 (*D'Auria, J.*, dissenting). This is especially true in cases, as in the present, which involve complicated factual scenarios and a multitude of legal theories asserted by both sides. Therefore, we conclude that the court had considered and rejected the plaintiff's piercing the corporate veil and alter ego theories.

B

The defendants claim that the court improperly interpreted the CSA to conclude that the defendants who were signatories to the CSA—PIM, POF, PCM, Schepis, and Canelas—as well as Northeast, as the successor general partner of PCM, were liable for nonpayment of the UBS litigation. They argue that, because payment of the UBS litigation was governed by the LPA, not the CSA, only Northeast had the obligation to remit the UBS litigation. We agree that the court's conclusion was incorrect, but disagree with the defendants that the proper interpretation of the LPA and CSA requires that only Northeast be held liable for nonpayment of the UBS litigation. For the following reasons, we conclude that PIM, PCM, and Northeast are liable for nonpayment of the UBS litigation.

We afford plenary review to this claim because it requires us to interpret definitive contract language; see *Joseph General Contracting, Inc. v. Couto*, supra, 317 Conn. 575; and we incorporate the New York principles of contract interpretation as outlined in part I of this opinion.

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The trial court first observed that § 4 of the CSA,²⁶ which secured the contingent assets, “does not identify which of the parties to the agreement is obligated to make the payments required thereunder or in [any] way suggest the rights and obligations set forth in [§] 4 are rights and obligations that are in any way limited to less than all of the parties to the CSA.” The court then relied on the language of an opening paragraph to the CSA, which provided: “NOW, THEREFORE, without admission of fault or liability and for the sole purposes of ending the New York [a]ction and the [a]rbitration and resolving the claims that have been, or could have been, asserted between and among the [p]arties, and any other claims between them, in consideration of the mutual promises made herein, the sufficiency of which is hereby acknowledged, *the [p]arties hereby agree as follows . . .*” (Emphasis added.)

The court then reasoned that “[a]ll of the parties understood the close working relationship between the entities and that Schepis and Canelas controlled all the entities. The CSA was executed as a way to settle claims brought in a lawsuit and arbitration proceedings against the individual parties to the CSA, which claims included claims brought against Schepis and Canelas personally. The court must conclude that all of the signatories were undertaking the obligation to protect and ultimately pay the plaintiff [its] interest in the contingent assets. Given the lack of a specific obligor in [§] 4, the interrelationship between the funds and the prior litigation/arbitra-

²⁶ As outlined previously in this opinion, § 4 of the CSA provided in relevant part that “PCM owns certain contingent assets that were valued at zero . . . for purposes of calculating PCM’s NAV. These contingent assets include (a) PCM’s proportionate interest in the UBS [l]itigation; and (b) PCM’s interest in [the LBIE claim]. Nothing herein . . . shall affect in any way [the plaintiff’s] pro rata share . . . of the contingent assets as of February 28, 2011. It is further understood that [the plaintiff’s] continued interest in the contingent assets shall be governed by the [LPA]”

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tion, the court concludes that the parties intended that all of the defendants be obliged to perform the various obligations contained therein. More importantly, that is what the express language of the CSA says. . . .

“All the parties made the mutual promises to each other, and the plaintiff was releasing all of the defendants for prior acts. It is simply an incorrect reading of the language ‘the parties hereby agree’ as suggesting that only some of the parties agree to the benefits and obligations contained therein, particularly when there is no specific language [in § 4]²⁷ . . . that identifies a particular party who is to perform a particular obligation.

“While [§] 4 of the CSA identifies PCM, as it must, as the owner of the certain contingent assets, it does not limit the obligation to comply with the terms of the agreement to PCM. The parties were aware that PCM and the other Pursuit entities could only act with the consent of its general partner and, therefore, with the consent of Schepis and Canelas, who controlled and managed the general partner. In the absence of such an express limitation, there is no reason to conclude that the parties intended to limit the particular persons or entities that were obliged to perform in a manner that is contradictory to the broad and inclusive language contained in the introductory paragraph. To suggest otherwise is an unwarranted and tortured reading of the CSA.” (Footnote added.)

We agree with the court that there was no express limitation in § 4 of the CSA as to which of the defendants had the obligation to remit the UBS litigation proceeds. We disagree, however, with the court’s literal interpretation of “the [p]arties hereby agree as follows” language, to hold all of the signatory defendants liable for each

²⁷ As set forth previously in this opinion, § 3 of the CSA mandated that PIM pay the plaintiff the settlement payment and the redemption payment.

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and every obligation in the CSA. In accordance with part I of this opinion, the proper interpretation of § 4 of the CSA is in consideration of the other provisions of the CSA, the LPA, and the circumstances under which the CSA was executed. Conversely, the court, in interpreting the same provision of the CSA to determine which of the defendants were liable for the same nonpayment, failed to consider the LPA or the circumstances under which the CSA was executed. Although not expressly provided for in the CSA, considering the obligations set forth therein in the context of the LPA and the relevant circumstances, the CSA imposes an implied limitation as to which of the defendants were liable for nonpayment of the UBS litigation.

First, under the circumstances, POF cannot be held liable pursuant to § 4 of the CSA because POF was unable to remit the UBS litigation proceeds to the plaintiff. In September, 2009, the plaintiff redeemed its investment in POF, which extinguished its interest in POF except for certain holdbacks to indemnify potential future expenses of POF. When the CSA was executed, on or about April 8, 2011, the plaintiff had no contingent interest in POF and, thus, the CSA did not secure any interest. Rather, § 4 of the CSA secured the plaintiff's contingent interests in two assets that were owned by PCM, not POF. POF, as a distinct hedge fund from PCM, could not have paid the plaintiff the proceeds of the UBS litigation because it had no interest in PCM's portion of the claim. Further, POF was not a signatory to the LPA, which specifically mandated payment as soon as practicable. Therefore, we disagree with the court that POF is liable.

Likewise, we disagree with the court that Schepis and Canelas are individually liable for nonpayment of the UBS litigation proceeds. Although the court found that Schepis and Canelas controlled all of the defendant

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entities, it previously had rejected the plaintiff's piercing the corporate veil and alter ego theories. See part VI A of this opinion. Thus, pursuant to New York law, Schepis and Canelas would be liable for nonpayment of the UBS litigation proceeds only if they expressly agreed to be individually liable. See *J.N.K. Machine Corp. v. TBW, Ltd.*, 155 App. Div. 3d 1611, 1612, 65 N.Y.S.3d 382 (2017) (“[a]ccording to the well settled general rule, individual officers or directors are not personally liable on contracts entered into on behalf of a corporation if they do not purport to bind themselves individually” [internal quotation marks omitted]); *New York Assn. for Retarded Children, Inc., Montgomery County Chapter v. Keator*, 199 App. Div. 2d 921, 923, 606 N.Y.S.2d 784 (1993) (“[i]t is well established that an agent of a disclosed principal does not, absent express agreement, become liable individually on a contract relating to the agency”); *American Media Concepts, Inc. v. Atkins Pictures, Inc.*, 179 App. Div. 2d 446, 448, 578 N.Y.S.2d 193 (1992) (“[i]n modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation’s engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice—once as an officer and again as an individual” [internal quotation marks omitted]).

Here, Schepis and Canelas signed the CSA in their personal capacities and on behalf of the corporate signatory defendants. Schepis and Canelas signed the CSA individually because that agreement was executed to resolve the 2010 New York action filed against them. As the court recognized, there is no express provision that obligated Schepis and Canelas to be responsible to remit the UBS litigation proceeds, and, thus, they cannot be held individually liable under that agreement. Furthermore, the fact that Schepis and Canelas signed

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the CSA in their individual capacities, alone, does not support the imposition of individual liability because the CSA does not mandate payment. Instead, it is the CSA read in conjunction with the LPA that obligated payment. Schepis and Canelas had not entered into the LPA in their individual capacities; instead, they executed the agreement as managing members of Pursuit Management,²⁸ which was the general partner of PCM at the time the LPA was executed. There is no express provision in the LPA that mandates that Schepis and Canelas make payments as soon as practicable in their individual capacities; rather, the withdrawal provision at issue obligates the general partner of PCM to remit withdrawals. In the absence of an express agreement by Schepis and Canelas to undertake an individual obligation in either the CSA or the LPA to remit the UBS litigation proceeds as soon as practicable, they cannot be held individually liable.

Consistent with the foregoing, the language of both agreements, viewed under the circumstances, demonstrates that the defendants that are liable for nonpayment are those that both undertook an obligation, and had the ability, to pay the UBS litigation proceeds. Those defendants are PCM, PIM, and Northeast. Under both the CSA and the LPA, PCM, as the owner of the interest in the UBS litigation at issue, and Northeast, as the general partner of PCM, undertook an obligation to remit the proceeds as soon as practicable after they were realized. On receipt of these proceeds, both PCM and Northeast had the ability to remit to the plaintiff its share as soon as practicable. Furthermore, PIM had an ability to pay the UBS litigation proceeds because it had remitted both the settlement payment

²⁸ The version of the LPA entered into evidence and included in the defendants' appendix on appeal is unsigned. Nevertheless, typed names below the signature lines contained in the LPA support this interpretation.

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and the redemption payment on behalf of the defendants, including PCM, pursuant to the CSA. Indeed, this ability is evinced by the April 28, 2011 letter in which PIM informed the remaining investors in PCM that it was effectuating a mandatory withdrawal of the plaintiff pursuant to the recent execution of the CSA. There is no finding suggesting that PIM no longer had the ability or authority to remit payments to the plaintiff on behalf of PCM. Therefore, we conclude that PCM, PIM, and Northeast are liable for their failure to remit to the plaintiff its proportionate share of the UBS litigation proceeds.

VII

The seventh issue presented is whether the court properly determined the amount of damages. The plaintiff and the defendants respectively advance a two-prong challenge to the court's damages award. The defendants claim that the court erroneously awarded damages because it (1) failed to reduce PCM's share of the UBS litigation proceeds by 10 percent to account for PCM Master's other investor, which the parties and the court referred to as PCM offshore, and (2) failed to account for a performance fee reduction from the UBS litigation proceeds. The plaintiff claims that the court erroneously awarded damages because it improperly permitted the defendants to retain the remainder of the UBS litigation holdback, and erroneously found that the division of the UBS litigation proceeds to be 52.8 percent to PCM Master and 47.2 percent to POF Master. We reject all of the parties' claims and conclude that the court properly determined the amount of damages.

Before reaching the parties' claims, we first set forth the court's calculation of damages. As set forth previously, the gross UBS litigation settlement amount was \$36 million. After deducting \$6.9 million for attorney's fees incurred in pursuing the UBS litigation, the net

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proceeds from the UBS litigation were \$29.1 million. The \$29.1 million was then divided between PCM Master and POF Master because both hedge funds had purchased the CDOs from UBS. The court determined that PCM Master was entitled to 52.8 percent and POF Master was entitled to 47.2 percent of those net proceeds.

The court determined, however, that the plaintiff was entitled to only a portion of PCM Master's percentage because the plaintiff was invested in PCM, which was invested in PCM Master, and § 4 of the CSA explicitly applied to PCM's share of the UBS litigation proceeds. The court calculated PCM Master's portion of the net proceeds, 52.8 percent of the \$29.1 million net proceeds, to equal \$15,364,800. The court further determined that PCM was the sole investor and owned 100 percent of PCM Master and, thus, PCM owned the entirety of the \$15,364,800 owned by PCM Master. Accordingly, because the plaintiff's pro rata share of PCM was 32.083612 percent, the court calculated the plaintiff's interest in the UBS litigation proceeds to be \$4,929,582.

We next set forth the standard of review applicable to all four of the parties' damages related claims. "The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it

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was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . .

“[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses.” (Citations omitted; internal quotation marks omitted.) *FirstLight Hydro Generating Co. v. Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018). Finally, to the extent that we are required to interpret the court’s judgment, our review is plenary. See *Joseph General Contracting, Inc. v. Couto*, supra, 317 Conn. 575.

A

The defendants first claim that the court failed to reduce PCM’s share of the UBS litigation proceeds by 10 percent to account for PCM Master’s other investor, PCM offshore. The defendants argue that the court erroneously found that PCM owned 100 percent of PCM Master, when the evidence demonstrated that PCM offshore, which is another entity controlled by Schepis and Canelas, owned 10 percent of PCM Master. The defendants contend that the damages award should be reduced because PCM owned only 90 percent of the net UBS litigation proceeds owned by PCM Master. We disagree.

In the present case, the trial court rejected the defendants’ 10 percent claim, reasoning that: “By April, 2010, all of the investors of PCM Master other than PCM had redeemed. On May 6, 2009, Schepis and Canelas deposited \$1,100,000 into the PCM Master account. This arguably became the only other investment in PCM

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Master other than PCM. It is this deposit which forms the basis for the defendants' claim that PCM is entitled only to 90 percent interest in the proceeds to which PCM Master is entitled. There are several problems with the claim of the defendants. First, the deposit was made after all other investors in PCM Master other than PCM had redeemed; second, the deposit was made after the CDOs had been purchased and after [the UBS litigation] had been instituted; and third, the deposit amounted to little more than parking cash, which Schepis and Canelas retained complete control over in order to assert a claim for a percentage of the UBS [litigation] proceeds. This is verified by the fact that in excess of \$1,100,000 was withdrawn from the PCM Master account by August, 2010 (eight months before the CSA had been signed). Essentially, the defendants claim that Schepis and Canelas could gain an interest in a valuable claim (which other investors were pledging substantial assets to prosecute) by parking cash in an account after the fact, which cash could be withdrawn or moved without any risk, or at least without risk comparable to that involved in the CDO transactions which gave rise to the UBS litigation. The claim strains credibility. It was an investment after the initial risk had been taken and was withdrawn before the CSA had been executed. It was managed independent of any risk participated in by the PCM investors. To the extent that PCM Master chose to make investments utilizing the cash, any such returns were not shared by the PCM investors. The second problem with the defendants' position is that the defendants had not been forthcoming in their compliance with the court's discovery orders, both in terms of the timeliness of that compliance and in terms of the completeness of that compliance, which hampers their credibility as to this issue. The records and the testimony are simply not supportive of the defendants' position.

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“Finally, Schepis’ testimony as to this issue is not particularly credible either. His explanations were not complete. They were inconsistent and varied from his earlier testimony during the [prejudgment remedy] proceedings.”

In short, the court rejected the defendants’ argument on the basis of its findings regarding the lack of credibility of the defendants’ position regarding the \$1.1 million deposit, their failure to comply fully with discovery, and the lack of credibility of Schepis’ testimony. The court specifically cited evidence that Schepis and Canelas, through PCM offshore, made their investment in PCM Master after the CDOs had been purchased, after the CDOs had lost value, and after the UBS litigation had been commenced. Most significantly, the court found, on the basis of the evidence, that the investment was withdrawn prior to the execution of the CSA. All of this evidence supports the court’s finding that PCM was the sole investor in PCM Master and, thus, PCM was entitled to all of PCM Master’s share of the proceeds from the settlement of the UBS litigation. Further, to the extent that the court’s decision is founded on its credibility determinations, we cannot second-guess those determinations on appeal. See *FirstLight Hydro Generating Co. v. Stewart*, supra, 328 Conn. 679–80. Therefore, we conclude that the court’s finding that the defendants’ 10 percent claim failed was not clearly erroneous.

B

The defendants next claim that the court failed to account for a performance fee reduction from the UBS litigation proceeds. The defendants’ argument on appeal is the same one that they made before the trial court: the LPA provides that the general partner of PCM, Northeast at the time, was entitled to a 20 percent performance fee for net economic profit. They argue

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that, because the LPA governed the UBS litigation and the UBS litigation proceeds were net economic profit, Northeast was entitled to 20 percent of those proceeds. The plaintiff's argument before us is also the same one as it made before the trial court: the UBS litigation proceeds did not constitute net economic profit because those proceeds only partially recouped prior substantial losses incurred in connection with the CDOs.

The court agreed with the plaintiff. It concluded that the UBS litigation proceeds did not represent a net economic profit but merely were a return of part of PCM's investment. Consequently, the court determined that Northeast was not entitled to a performance fee. We agree with the court.

Because the defendants do not challenge the court's factual finding that the UBS litigation proceeds constituted a net loss, we exercise plenary review over the defendants' claim because it requires us to interpret the definitive language of the LPA, which is a pure question of law. See *Joseph General Contracting, Inc. v. Couto*, supra, 317 Conn. 575.

Section 4.02 of the LPA, titled "Allocation of Net Income," governs the allocation of net profits and losses. Section 4.02 (a) provides in relevant part: "[T]here shall be a provisional allocation of net profits . . . or net losses . . . for each calendar year (or other accounting period), to all [p]artners in proportion to the [c]apital [a]ccounts as of the beginning of such period: then, at the end of the calendar year or upon a withdrawal of a limited partner, 20 [percent] of the [l]imited [p]artner's [s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit . . . provisionally allocated to each [l]imited [p]artner for the calendar year . . . allocated to such [l]imited [p]artner's [c]apital [a]ccount since the last reallocation of net profits . . . shall be reallocated to the [g]eneral [p]artner."

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Section 1.01 (ab) of the LPA defines “[s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit” to mean, in relevant part, “with respect to each [l]imited [p]artner, an amount determined as of the end of any [a]ccounting [p]eriod including the end of the [f]iscal [y]ear . . . equal to the sum of the amounts (positive or negative) of [n]et [i]ncome or [n]et [l]oss allocable to such [l]imited [p]artner . . . subject to the following modifications. If a [l]imited [p]artner’s [s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit for any [a]ccounting [p]eriod shall be a loss—(i.e., negative amount), then such loss shall carry forward into the next [a]ccounting [p]eriod (and, if necessary, into succeeding [a]ccounting [p]eriods) and will reduce such [l]imited [p]artner’s [s]hare of [c]umulative [f]iscal [p]eriod [n]et [e]conomic [p]rofit i[f] any, in such next (or succeeding) [a]ccounting [p]eriod.” (Internal quotation marks omitted.)

The court interpreted the foregoing language to mean that “the limited partner’s share of cumulative fiscal period net economic profits pursuant to the express terms of the LPA must include prior losses that are carried forward into the next accounting period.” The court then reasoned that the profits and losses incurred by the plaintiff as a limited partner in PCM prior to the execution of the LPA on April 1, 2009, including the profits and losses associated with the CDOs purchased from UBS, carried forward. The court relied on § 2.01 of the LPA, which provides that the parties agreed “to form *and continue* the [p]artnership as a limited partnership” (Emphasis added.) The court also relied on § 3.09 of the LPA, which provides in relevant part: “Each [p]artner’s [c]apital [a]ccount shall consist initially of the amount of cash and agreed net fair market value of any other property *which it has contributed* to the [p]artnership as a [c]apital [c]ontribution upon its admission to the partnership” (Emphasis added.)

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The court then held that, “[i]n effect, the [plaintiff] experienced a substantial loss in [its] PCM investment as a result of the defendants’ decision to purchase the UBS CDOs (through PCM Master). The settlement of the UBS litigation did not result in a net economic profit; rather it represented a recoupment of part of the loss that PCM had earlier experienced. [Northeast] is not entitled to a performance fee based upon profit because it managed to recoup some of the value that it had previously lost. The language of the LPA does not so provide and actually states the opposite.” (Footnote omitted.)

We conclude that the court’s interpretation is legally and logically correct. Sections 4.02 (a) and 1.01 (ab) of the LPA, when read together, provide that a limited partner’s share of cumulative fiscal period net economic profit of PCM includes past losses that were incurred by PCM. Sections 2.01 and 3.09 of the LPA contemplate that these past losses were carried forward from prior to the execution of the LPA. Thus, the LPA definitively provides that losses incurred by a limited partner prior to the execution of the LPA are to be taken into account when determining cumulative fiscal period net economic profit.

In accordance with the foregoing, the court held that the UBS litigation proceeds represented a recoupment of part of the loss that PCM previously had experienced. In essence, the court determined that the UBS litigation proceeds did not constitute a net profit because those proceeds failed to exceed the losses incurred as a result of the purchase and subsequent devaluation of the CDOs. Consequently, because the UBS litigation proceeds constituted a partial recoupment of prior losses, not a net profit, Northeast was not entitled to deduct a performance fee therefrom. Therefore, we conclude that the court properly rejected the defendants’ performance fee claim.

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C

The plaintiff claims that the court improperly permitted the defendants to retain the remainder of the UBS litigation holdback. The plaintiff maintains that the court found that the \$250,000 holdback designated by the CSA to cover expenses incurred in connection with the UBS litigation had not been exhausted. Consequently, the plaintiff argues that the court erroneously failed to award damages for the remainder of the unused UBS litigation holdback. We disagree.

It is undisputed that, pursuant to § 3 of the CSA, the plaintiff was entitled to any unused portion of the UBS litigation holdback. Section 3 (b) (i) of the CSA provides that the redemption payment owed to the plaintiff was “less a holdback in the amount of \$250,000 for the purpose of funding necessary costs (other than plaintiff counsel’s attorneys fees through trial) associated with the ongoing [UBS litigation]” Section 3 (b) (ii) provides that “PIM represents and warrants that the holdbacks referenced in [§] 3 (b) (i) reflect [the plaintiff’s] pro rata share of the holdbacks that will be assessed with respect to current investors in PCM as of February 28, 2011, and further represents and warrants that use of the holdbacks will be limited to the purposes set forth in [§] 3 (b) (i) and that no part of any prior holdback presently maintained by either of the [f]unds . . . shall be used in connection with the UBS [l]itigation.” Section 3 (b) (ii) further provides that “[the plaintiff] shall . . . be entitled to periodic updates on the status of the holdbacks,” that the plaintiff will be provided with the opportunity to pay for additional expenses if the holdback is insufficient, and that the plaintiff’s interest in the UBS litigation would be extinguished if it failed to pay for such additional expenses.

The court did not address separately whether the plaintiff was entitled to a portion, if any, of the

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remaining UBS litigation holdback. The court's damages award also did not include any additional funds that could be attributed to a portion of the UBS litigation holdback. As set forth previously, the entirety of the court's damages award equaled the sum of the plaintiff's pro rata share of PCM's interest in the net proceeds of the UBS litigation, plus interest.

Nevertheless, the court, in a different part of its decision, rejected the defendants' argument that they were permitted to deduct post-CSA expenses from the UBS litigation proceeds. It held, in relevant part: "The plaintiff's obligation to pay post-CSA expenses for the UBS litigation was limited to \$250,000, as [its] proportionate share of those expenses. The plaintiff was not obligated to contribute anymore for expenses unless [it], along with other investors, [was] given the voluntary opportunity under the express language of the CSA. The plaintiff was never asked to contribute more to those additional expenses. Moreover, there is insufficient evidence for the court to conclude that the \$250,000 holdback specifically earmarked for UBS [litigation] expenses was insufficient to satisfy the plaintiff's obligation for those expenses. The post-CSA expenses incurred as a result of the UBS litigation would have to have exceeded approximately \$1,500,000 in order for the plaintiff's \$250,000 holdback to be insufficient to cover its proportionate share of expenses. The evidence does not indicate that the post-CSA expenses exceeded that amount." (Footnote omitted.)

The plaintiff argues that the court concluded that the UBS litigation holdback had not been exhausted and, thus, it erroneously failed to award it damages equal to the remainder. We disagree with the plaintiff's interpretation of the court's judgment.

The court definitively concluded that there was *insufficient* evidence to conclude that the UBS litigation holdback had been exhausted. This is critically

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different from the inverse conclusion that the plaintiff draws, namely, that there was *sufficient* evidence to establish that the UBS litigation had not been exhausted. In short, the court concluded that it was unable to determine whether the holdback had been exhausted, not that the evidence demonstrated that the holdback had not been exhausted. Indeed, the plaintiff recognized this point in its principal appellate brief: “If the trial court intentionally omitted the holdback from the judgment, it could have only been for one reason: it was impossible to quantify how much [the plaintiff] was entitled to receive back because [the court] found that ‘there is insufficient evidence’ before it to conclude how much of the holdback had been legitimately used.”²⁹

In light of the court’s conclusion that there was insufficient evidence to establish whether the holdback had been exhausted, and in the absence of any discussion by the court as to whether the plaintiff was entitled to a portion of the UBS litigation holdback, we reject the plaintiff’s claim.

D

The plaintiff also claims that the court erroneously found the division of the net UBS litigation proceeds to be 52.8 percent to PCM Master and 47.2 percent to POF Master. The plaintiff argues that the court’s finding

²⁹ The plaintiff additionally argues on appeal that it “satisfied its burden to prove that [the] defendants held \$250,000 of its money as a UBS litigation holdback that was now due to be returned; only [the] defendants could prove how much of that legitimately remained and, having failed to do so or to produce the relevant records, the court should have awarded the full \$250,000 to [the plaintiff].” Nevertheless, the plaintiff did not make this argument before the trial court and, thus, it is not properly preserved. See *Eubanks v. Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018) (claim is properly preserved if “articulated below with sufficient clarity” [internal quotation marks omitted]); *Chief Disciplinary Counsel v. Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) (claim is not reviewable if raised for first time on appeal), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018).

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as to the division of those proceeds between PCM Master and POF Master was erroneous because the court relied on the defendants' calculation, which allegedly was incomplete as a result of the defendants' purported failure to comply fully with discovery regarding this issue. The plaintiff contends that the trial court should have drawn an adverse inference against the defendants for their discovery misconduct, and held that the proper division of the net UBS litigation proceeds should have been 56.23 percent to PCM Master and 43.77 percent to POF Master. We disagree.

The court made its division of the UBS litigation between PCM Master and POF Master on the basis of the following findings. "The defendants . . . claim that the net proceeds need to be divided 52.8 percent to PCM Master and 47.2 percent to POF Master. The court agrees with the defendants in this regard. The CSA clearly indicated that the plaintiff was only entitled to PCM's interest. (PCM, of course, had no interest in POF Master). The plaintiff had earlier withdrawn and redeemed its interest in POF and the CSA contains a broad release concerning any claims arising out of the redemption of the plaintiff's interest in POF. At the time the plaintiff executed the CSA, the UBS litigation had already begun and the amended complaints in that case expressly claimed that both PCM Master and POF Master had purchased the troubled CDOs from UBS. The evidence presented to this court established that the ratio of those purchases between PCM Master and POF Master are consistent with the defendants' claims. That evidence consisted [of] testimony from Berg Simpson, [which was a Colorado law firm that pursued the UBS litigation on behalf of Pursuit Partners and PIM], concerning the nature of the claims made in the UBS litigation, the actual trade tickets evidencing the transactions, the amended complaints in the UBS [litigation], which set forth the transactions by which both PCM

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Master and POF Master acquired the CDOs. The evidence also demonstrated that the expenses that were incurred in pursuing the UBS litigation were borne in relatively equal amounts by both PCM Master and POF Master. While the [plaintiff] assert[s] that the defendants lack credibility in this regard because Schepis and Canelas have an interest in moving as large a percentage to POF Master as possible because they have a significantly greater interest in POF Master than PCM Master, the court finds the evidence presented sufficient to sustain its finding. Accordingly, the court finds that PCM Master's interest in the net settlement proceeds was 52.8 percent, or \$15,364,800."

On appeal, the plaintiff asks this court to override the court's credibility assessments and its weighing of the evidence, which we cannot do. See *FirstLight Hydro Generating Co. v. Stewart*, supra, 328 Conn. 679–80. The court specifically rejected the plaintiff's credibility challenge to the position taken by the defendants; on appeal, we cannot second-guess such an assessment. Likewise, to the extent that the plaintiff challenges the court's reliance on the evidence specifically credited in support of its findings, we cannot discredit that evidence on appeal. Further, after review of the evidence cited by the court in support of its conclusion, we conclude that such testimony and exhibits were sufficient to support the court's conclusion.

Moreover, the plaintiff requests that this court reverse the trial court's decision with respect to the division of the UBS litigation proceeds because it failed to impose a negative inference against the defendants for their failure to comply fully with discovery on this issue. See *Glinski v. Glinski*, 26 Conn. App. 617, 623, 602 A.2d 1070 (1992) ("[w]hile the trial court may certainly draw adverse inferences from the failure of a party to submit the required financial information, *it is under no obligation to do so*" [emphasis added]); see also

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Szegda v. Szegda, 97 Conn. App. 426, 430, 904 A.2d 1266, cert. denied, 280 Conn. 932, 909 A.2d 959 (2006). The plaintiff made the exact same argument to the trial court and it necessarily was rejected because the court did not draw such an inference. While the trial court was permitted to draw such an inference, we decline to reverse that discretionary judgment on appeal. The trial court was in the best position to assess the extent to which the defendants produced credible evidence on this issue, and it clearly concluded that the evidence produced by the defendants was sufficient to support its conclusion. Therefore, we conclude that the court's finding as to the division of the net proceeds of the UBS litigation was not clearly erroneous.

In sum, we conclude that the court properly determined the amount of damages.

VIII

The defendants next claim that the court improperly granted the plaintiff's motion to increase the amount of the prejudgment remedy. The defendants argue that the filing of an appeal, without more, did not constitute a sufficient basis for the court to modify, pursuant to § 52-278k, the existing prejudgment remedy. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On June 16, 2016, the court granted the plaintiff's application for a prejudgment remedy in the total amount of \$5,421,582. On October 14, 2016, the court rendered judgment partially in favor of the plaintiff against certain defendants in the total amount of \$5,422,540, plus 10 percent postjudgment interest per annum. The defendants appealed from that judgment.

On November 8, 2016, during the pendency of this appeal, the plaintiff, pursuant to § 52-278k, filed a motion with the trial court seeking modification of

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the previously secured prejudgment remedy attachment amount, seeking to secure from PCM, POF, PIM, Schepis, Canelas, and Northeast an additional \$947,731 that it anticipated would accrue during the pendency of this appeal. The plaintiff calculated the \$947,731 accrual of interest by multiplying the per diem interest on the judgment, which the plaintiff determined on the basis of the court's award of 10 percent interest per annum on its award of \$5,422,540 in damages, by 564.3, the plaintiff's estimation of the average duration of the pendency of similar civil cases before this court, and then adding the probable additional costs associated with levy and execution. In support of its calculation, the plaintiff's attorney submitted an affidavit and attachments that detailed the duration of several recent Appellate Court cases. On December 16, 2016, the defendants filed an opposition to the plaintiff's motion to increase the prejudgment remedy in which they argued, among other things, that § 52-278k does not permit the upward modification of a prejudgment remedy in the present circumstances.

On January 4, 2017, after a hearing, the court granted the plaintiff's motion to increase the prejudgment remedy amount by \$947,731, to a total of \$6,369,313. The court held that "§ 52-278k provides that the court may modify a prejudgment remedy 'at any time' 'as may be warranted by the circumstances.' It is well established that the prejudgment remedy statutes apply and are applicable subsequent to the rendering of a judgment in the trial court, which trial court judgment is pending appeal. *Gagne v. Vaccaro*, 80 Conn. App. 436, 451-54, [835 A.2d 491 (2003), cert. denied, 268 Conn. 920, 846 A.2d 881 (2004)]. Based upon the evidence at trial and the circumstances of the pending appeal, the court finds probable cause that the plaintiff will ultimately obtain a final judgment against those parties against whom the court has rendered judgment in the amount of \$6,369,313, which amount includes interest at the rate

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of 10 percent per annum for the likely period of appeal and probable execution fees. Of course, this is without prejudice to the defendants' right to request a downward modification should they prevail on their pending motion . . . which seeks adjustment of the previously ordered interest rate, and the right of either party to seek further modification 'as may be warranted by the circumstances.'" The defendants thereafter filed an amended appeal to challenge this ruling.

We next set forth the standard of review and legal principles relevant to this claim. "A prejudgment remedy means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment General Statutes § 52-278a (d)." (Internal quotation marks omitted.) *ASPIC, LLC v. Poitier*, 179 Conn. App. 631, 639, 181 A.3d 593 (2018). "A prejudgment remedy is available upon a finding by the court that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff General Statutes § 52-278d (a) (1). . . . Proof of probable cause as a condition of obtaining a prejudgment remedy is not as demanding as proof by a fair preponderance of the evidence. . . . When reviewing a trial court's order on a motion for a prejudgment remedy, our role is fairly limited. . . . We will not upset a prejudgment remedy order in the absence of clear error . . . viewing the evidence in the light most favorable to the plaintiff." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co. v. Signature Properties, LLC*, 309 Conn. 307, 338–39, 71 A.3d 492 (2013).

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The authority for a court to modify an existing pre-judgment remedy is afforded by § 52-278k, which provides: “The court may, upon any application for pre-judgment remedy under section 52-278c, 52-278e, 52-278h or 52-278i, modify the pre-judgment remedy requested as may be warranted by the circumstances. The court may, upon motion and after hearing, at any time modify or vacate any pre-judgment remedy granted or issued under this chapter upon the presentation of evidence which would have justified such court in modifying or denying such pre-judgment remedy under the standards applicable at an initial hearing.”

The defendants recognize that a pre-judgment remedy may be granted while the case is on appeal. See *Gagne v. Vaccaro*, supra, 80 Conn. App. 454 (“a pre-judgment remedy is available to a party who has prevailed at the trial level and whose case is on appeal”); *Tadros v. Tripodi*, 87 Conn. App. 321, 335 n.9, 866 A.2d 610 (2005) (“[d]espite the apparent contradiction in terms, a pre-judgment remedy may be granted after the entry of judgment but before appellate disposition in order to protect assets to satisfy the judgment”). Instead, the defendants argue, without citing any legal authority in support, that the fact that they took “an appeal, without more, [does not] constitute a sufficient basis to amend an existing [pre-judgment remedy].”

Viewing the evidence before the court in the light most favorable to the plaintiff, we conclude that it was not clear error for the court to have increased the amount of the pre-judgment remedy. The court made its probable cause determination “[b]ased upon the evidence at trial and the circumstances of the pending appeal” The evidence at trial established that certain defendants were liable to the plaintiff for a total of \$5,422,540, and the court awarded the plaintiff 10 percent postjudgment interest per annum. The court also considered the fact that the defendants took an

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amended appeal from the October 14, 2016 judgment. Further, the court credited the plaintiff's calculation as to the amount of interest that it estimated would accrue on appeal. The plaintiff's calculation, as supported by an affidavit, was made in part on the basis of the average duration of the pendency of similar cases before this court. Accordingly, the court made its decision on the basis of the amount of the judgment rendered against the defendants, the court's award of postjudgment interest, the fact that the defendants took an amended appeal, and the average pendency of similar civil cases before this court. Viewing these facts in the light most favorable to the plaintiff, it was not clear error for the court to have increased the amount of the prejudgment remedy.³⁰

IX

The defendants' final claim is that the court improperly granted the plaintiff's motion for postjudgment discovery in connection with the court's upward modification of the prejudgment remedy amount. We conclude that this claim was not preserved properly, and, thus, we decline to review it.

We begin by setting forth the legal principles relevant to whether a claim properly was preserved for appellate review. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a

³⁰ We recognize that the effect of our conclusion that the court properly increased the prejudgment remedy, which was entered against PCM, POF, PIM, Schepis, Canelas, and Northeast, is limited by our determination that only PCM, PIM, and Northeast are liable to the plaintiff on its complaint. See part VI of this opinion. The defendants, however, do not argue that the court improperly increased the amount of the prejudgment remedy against only certain parties. Therefore, we do not reach that issue.

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party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambush, which is unfair to both the trial court and the opposing party.” (Internal quotation marks omitted.) *Chief Disciplinary Counsel v. Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 (“court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial”). “[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim.” (Internal quotation marks omitted.) *Eubanks v. Commissioner of Correction*, 329 Conn. 584, 598, 188 A.3d 702 (2018).

The following additional procedural history is relevant to this claim. On November 8, 2016, during the pendency of this appeal, the plaintiff, pursuant to Practice Book § 13-13, filed a motion with the trial court seeking supplemental asset disclosure from the defendants against which judgment had been rendered, seeking to secure the additional attachment pursued by its motion to modify the amount of the prejudgment remedy. On December 16, 2016, the defendants filed an opposition to the plaintiff’s motion to increase the prejudgment remedy, but they did not file a written objection to the plaintiff’s motion seeking supplemental asset disclosure. Furthermore, in their objection to the motion to modify, the defendants did not advance any counterargument to the plaintiff’s motion for supplemental asset disclosure.

At the hearing held on December 22, 2016, regarding the plaintiff’s motions, the defendants’ counsel conceded that there was no written objection filed to the

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plaintiff's motion for supplemental asset disclosure. Indeed, the defendants' counsel, when asked whether he had a comment on the motion for disclosure of assets, provided the following response: "Well . . . the reason I didn't object [was] because I have to imagine, without prejudice again, that if the [c]ourt increased the [prejudgment remedy] . . . the [c]ourt was going to grant . . . I haven't seen—you know, and I call it pretty fair—I haven't seen a [prejudgment remedy] where the [c]ourt said, well, now I've granted a [prejudgment remedy], but I'm not going to let you . . . disclose the assets. I don't think though that given that the disclosure was who's claiming what, I happen to agree that as long as the gross amount has been attached, that's what counts. I don't think you get each . . . defendant doesn't have to put up that . . . the entire amount."

On the basis of the foregoing, we conclude that the defendants failed to preserve properly their claim that the court lacked authority to grant the plaintiff's supplemental motion for disclosure of assets. The defendants did not file a written objection and they did not make a written counterargument. When asked whether they had any comment on the motion, the defendants' counsel acknowledged that he was not aware of any court that denied a motion for disclosure after it had granted a prejudgment remedy. The defendants' counsel took the position that it was a rare occurrence that a court actually would deny such a motion under the circumstances. Therefore, we decline to review this claim because it was not properly preserved.

The judgment is reversed in part as to counts one and two of the plaintiff's complaint and the case is remanded with direction to render judgment in favor of POF, Schepis, and Canelas on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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STATE OF CONNECTICUT v.
JEFFREY TODD PALUMBO
(AC 41509)

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

Syllabus

Convicted of the crimes of sexual assault in the fourth degree, sexual assault in the first degree, and risk of injury to a child in connection with his alleged sexual abuse of the minor victim, the defendant appealed. Although the defendant's conviction related to two incidents involving the minor victim, during his trial there was testimony relating to two other alleged incidents of sexual abuse, one of which occurred while the defendant and the victim were hiking alone at a state park. After the defendant testified at trial that, during the hike, there were other people around, the prosecutor asked him a series of questions that focused on whether he previously had told the police during an interview that there were other people around during the hike, and remarked that this was the first time that they were hearing about that information. On appeal, the defendant claimed, for the first time, that the questions referring to the trial as being the first time that the defendant mentioned that other people were in the same area during the hike violated his constitutional right to remain silent pursuant to *Doyle v. Ohio* (426 U.S. 610) by introducing evidence of his post-*Miranda* silence. Specifically, he claimed that the questions focused on his silence after he was arrested and received his *Miranda* warnings and, therefore, that his post-*Miranda* silence was used as evidence of guilt. *Held:*

1. The defendant's unpreserved claim that his constitutional right to remain silent pursuant to *Doyle* was violated was unavailing; it was clear from the record that the questions referring to the trial as the first time that the other hikers were mentioned pertained to the defendant's pre-*Miranda* interview that occurred on March 31, 2014, and, therefore, the defendant having failed to demonstrate that an alleged constitutional violation existed, his unpreserved claim failed under the third prong of the test set forth in *State v. Golding* (213 Conn 233).
2. The defendant could not prevail on his claim that because the prosecutor's questions sought to elicit evidence of his post-*Miranda* silence, they amounted to prosecutorial impropriety that violated his due process rights: this court has determined that certain of the questions did not violate *Doyle* and the defendant did not argue how those questions would otherwise amount to prosecutorial impropriety, and with respect to the prosecutor's question of whether the defendant told anyone about the presence of the other hikers in the time period between a pre-*Miranda* interview and his arrests in September and November, 2014, even if that question was improper, it did not deprive the defendant of his due process right to a fair trial, as the claimed impropriety was not

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pervasive throughout the trial and was confined to a single question that related to uncharged misconduct, it was not central to a critical issue in the case or the defendant's theory of defense, defense counsel objected to the question before it was answered and the objection was sustained, the court's general instructions were sufficiently curative, and the state's case was not particularly strong.

Argued March 4—officially released October 8, 2019

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of New London, and substitute information, in the second case, charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the court, *Seeley, J.*, granted the state's motion for joinder; thereafter, the matter was tried to the jury; verdicts and judgments of guilty, from which the defendant appealed. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Marissa Goldberg*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Jeffrey Todd Palumbo, appeals from the judgments of conviction, rendered following a jury trial, of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims, pursuant to *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), that the state (1) violated his

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constitutional right to remain silent by introducing evidence of his post-*Miranda*¹ silence and (2) engaged in prosecutorial impropriety by attempting to elicit evidence of his post-*Miranda* silence.² We affirm the judgments of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. The defendant started dating the victim's mother, K, on August 8, 2008, when the victim was three.³ The defendant moved into an apartment in Montville with K and the victim in March, 2009, when K became pregnant with the defendant's child. The defendant continued living there with K and the victim after their son, T, was born, and his older son from a previous relationship, D, moved in with K and the victim as well. The defendant moved out of K's apartment in May, 2012. However, the defendant still had contact with the victim because he and K shared custody of T, and the defendant and D would occasionally go to K's apartment to watch movies and play video games with K, T, and the victim.

K, T, and the victim also would visit the defendant and D at the defendant's apartment in Danielson. Sometimes K would leave the victim alone with the defendant

¹ See *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² The defendant has raised three additional issues on appeal, claiming that (1) the trial court improperly denied his motions for judgments of acquittal because of insufficient evidence of penetration to support the conviction for sexual assault in the first degree or, alternatively, because the conviction was against the weight of the evidence, (2) he was deprived of his due process rights as a result of prosecutorial impropriety because the state improperly elicited constancy of accusation evidence, which led to an erroneous jury instruction, and the state made comments in rebuttal that misstated evidence, related to the constancy of accusation evidence, and highlighted the defendant's interest in the case, and (3) that the trial court improperly joined his separate cases for trial. We carefully have considered the defendant's claims and conclude that they have no merit.

³ In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

while she ran errands. On one occasion at the defendant's apartment, the victim was in the defendant's bedroom lying down at the edge of his bed. The defendant told her to take her pants off and she did. She saw that the defendant's "front private went through a hole in his underwear." He told her to touch it. She testified that she did, that it felt "squishy," and that the defendant then touched his penis to her vagina, making "skin to skin" contact. The victim said that it hurt the middle of her vagina.

In December, 2013, the defendant and D went to K's apartment in Montville to watch movies and play video games. While K was outside smoking a cigarette, the victim was standing on the couch. The defendant put his hand inside the victim's pants and rubbed her vagina over her underwear. She told him to stop, but he did not. She told him that she was going to tell her mother, and he responded that her mother would not believe her. When K returned, the victim told K that the defendant made her feel uncomfortable, and K told her to stay in K's bedroom and play on the computer.

When K learned from the victim's grandmother that the victim had told her cousin that she had been abused, K informed Nora Selinger, a school guidance counselor who the victim saw for counseling. After speaking with the victim, Selinger filed a report with the Department of Children and Families (department). The department then forwarded the report to the police.

On March 31, 2014, police officers went to the defendant's house and asked to talk to him about a case they were investigating. The defendant agreed to meet with the police at the police barracks where the police interviewed the defendant. The defendant did not receive *Miranda* warnings, and the interview was taped. On September 12, 2014, the defendant was given *Miranda* warnings and arrested on charges of sexual assault in the fourth degree and risk of injury to a child stemming

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from the December, 2013 incident at K's apartment in Montville. On November 12, 2014, he was given *Miranda* warnings and arrested on charges of sexual assault in the first degree and risk of injury to a child arising from his conduct in the bedroom of his apartment in Danielson. The two cases were consolidated for trial.

During the defendant's trial, there was testimony relating to two other alleged incidents when the defendant rubbed the victim's vagina over her underwear. The defendant was not charged for those incidents. One occurred at the defendant's apartment when K was not there, and the other occurred when the defendant and the victim were hiking alone at a state park.

The defendant elected to testify. On cross-examination, the state played portions of his March 31, 2014 police interview and questioned him about the interview and the hiking incident. The defendant testified that, during the hike, there were other people around. The state then asked the defendant a series of questions that focused on whether the defendant previously had told the police that there were other people "around" during the hike. Specifically, the state asked: (1) "That's the first time that we're hearing this. Isn't that correct?"; (2) "And this is the first time that we're hearing that information?"; and (3) "[B]etween March 31st of 2014 and your arrest in September in Montville and in November in—in Danielson, you never told anybody about that?"⁴ Defense counsel objected to the last of these three questions, and the objection was sustained.

⁴ The questions that the defendant claims constituted *Doyle* violations occurred during the following exchange:

"[The Prosecutor]: Okay. So only the two of you would know what happened out in—in the woods?

"[The Defendant]: Correct. There was a lot of other people there at the time, too, walking around hiking, too, so—

"[The Prosecutor]: You didn't tell the police that when you talked to them.

"[The Defendant]: They didn't ask.

"[The Prosecutor]: *That's the first time that we're hearing this. Isn't that correct?*

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The jury found the defendant guilty of sexual assault in the first degree, sexual assault in the fourth degree, and two counts of risk of injury to a child. The court accepted the verdicts and sentenced the defendant to

“[The Defendant]: I do believe I—I don’t—actually I don’t know if I told them at the time or not. The fact is, is when we were walking around, there were other people there. The place was busy. It was in the middle of summer and it was Green Falls.

“[The Prosecutor]: *And this is the first time that we’re hearing that information?*

“[The Defendant]: Nobody inquired previous to it.

“[The Prosecutor]: Well, you’re in a two-hour interview with police officers and you have time to talk about other things, you talk about your vaporizer, you talk about your brewing at the beginning of the video?

“[The Defendant]: Yes, when inquired.

“[The Prosecutor]: And you never thought to mention to them that there were a bunch of other people around on this hike?

“[The Defendant]: Well, there’s people walking. It’s a hiking path at Green Falls. There was people camping there. As we were walking, we passed people, we had conversations with people. So, yes, there’s other people, but nothing—again, nothing that I thought of, nothing out of the ordinary, nothing more than a hike, a normal hike.

“[The Prosecutor]: So when you’re in an interview room with two police officers being accused of touching a child on a hike—

“[The Defendant]: Yeah.

“[The Prosecutor]: —alone, you didn’t think it was helpful information that maybe there were other people around?

“[The Defendant]: I had stated that there were other people around in the beginning. I stated that I had asked a bunch of other people if they wanted to go for a hike, too.

“[The Prosecutor]: So they were back at the campsite?

“[The Defendant]: Those people were, yes.

“[The Prosecutor]: Right. So we’re talking about when you were on the hike alone with [the victim].

“[The Defendant]: It just didn’t cross my mind. There was people. You hike, you see people.

“[The Prosecutor]: Okay. And so you—so you—

“[The Defendant]: And there was nothing spe—yeah, I mean yeah, there was—

“[The Prosecutor]: So you didn’t tell the officers about that?

“[The Defendant]: No. No.

“[The Prosecutor]: *And between March 31 of 2014 and your arrest in September in Montville and in November in—in Danielson, you never told anybody about that?*

“[Defense Counsel]: Objection, Your Honor.

“The Court: Send the jury out.” (Emphasis added.)

When the jury returned, the court stated: “All right. I think when we broke there was an objection. That objection is sustained.”

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a total effective term of ten years mandatory incarceration followed by eight years of special parole. This appeal followed.

I

The defendant claims that the two questions, referring to the trial as being the *first time* that the defendant mentioned that other people were in the same area during the hike with the victim, violated his constitutional right to remain silent pursuant to *Doyle v. Ohio*, supra, 426 U.S. 610, by introducing evidence of the defendant's post-*Miranda* silence. Specifically, the defendant argues that the two questions focused on the defendant's silence after he was arrested and received his *Miranda* warnings, and therefore his post-*Miranda* silence was used as evidence of guilt. We disagree.

“In *Doyle* [v. *Ohio*, supra, 426 U.S. 610] . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. . . . Likewise, our Supreme Court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt *Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him. . . . Because it is the *Miranda* warning itself that carries with it the promise of protection . . . the prosecution's use of [a defendant's] silence *prior* to the receipt of *Miranda* warnings does not violate due process. . . . Therefore, as a factual predicate to an alleged *Doyle* violation, the record must demonstrate that the defendant received a *Miranda* warning prior to the period of silence that was disclosed to the jury. . . . The defendant's claim raises a question of law over which our review is plenary.” (Emphasis in original;

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internal quotation marks omitted.) *State v. Reddick*, 174 Conn. App. 536, 553, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018).

The defendant acknowledges that he did not preserve his *Doyle* claim but asserts that it is reviewable 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). Under *Golding*, “a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant’s claim will fail.” (Emphasis in original; footnote omitted.) *State v. Golding*, *supra*, 239–40.

Upon our review of the record, it is clear that the two questions, in which the state referred to the trial as the “first time” that the other hikers were mentioned, pertained to the defendant’s March 31, 2014 pre-*Miranda* interview. “[E]vidence of prearrest, and specifically pre-*Miranda*, silence is admissible to impeach the testimony of a defendant who testifies at trial, since the rule of *Doyle* . . . is predicated on the defendant’s reliance on the implicit promise of the *Miranda* warnings.” *State v. Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009); see also *State v. Esposito*, 223 Conn. 299, 319, 613 A.2d 242 (1992) (“prosecution’s use of silence prior to the receipt of *Miranda* warnings does not violate due process”). Because the state’s questions clearly focused on the pre-*Miranda* interview, the present situation is distinguishable from the cases the defendant cites in support of his argument that the state’s

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use of the term the “first time” amounts to a *Doyle* violation. See, e.g., *State v. Brunetti*, 279 Conn. 39, 45-46, 83, 86, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). In *Brunetti*, the defendant was given *Miranda* warnings during a police interview after becoming upset when he was questioned about reddish brown stains on certain clothing, and he provided a confession after receiving a *Miranda* warning. *Id.*, 46. During the trial, the prosecutor asked: “[O]ther than your lawyer, could you please tell . . . the jury when is the first time that you told someone in authority, like a judge, a prosecutor or a police officer, this story about your sweatpants being dipped in blood?” *Id.*, 83. Our Supreme Court concluded that the *Doyle* violation was harmless. *Id.*, 86; see also *State v. Apostle*, 8 Conn. App. 216, 220, 512 A.2d 947 (1986) (defendant gave written statement to police after receiving *Miranda* warnings; during final argument, prosecutor focused on defendant not returning to police to correct his statement), superseded by statute on other grounds as stated in *State v. Kulmac*, 230 Conn. 43, 58 n.12, 644 A.2d 887 (1994). We, therefore, conclude that the defendant failed to demonstrate that an alleged constitutional violation existed, and thus his unreserved *Doyle* claim fails the third prong of *Golding*.

II

The defendant additionally claims that the state’s three questions sought to elicit evidence of the defendant’s post-*Miranda* silence and, therefore, amounted to prosecutorial impropriety⁵ that violated his due process rights. We disagree.

⁵ The defendant raises other instances of prosecutorial impropriety, but as we stated in footnote 2 of this opinion, we conclude that the remainder of the defendant’s prosecutorial impropriety claim is without merit. We, therefore, address only the claimed *Doyle* violations that the defendant argues are instances of prosecutorial impropriety.

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“In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether prosecutorial impropriety occurred.

. . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . [T]he defendant has the burden to show both that the prosecutor’s conduct was improper and that it caused prejudice to his defense.

. . .

“In determining whether the defendant was deprived of his due process right to a fair trial, we are guided by the factors enumerated by this court in *State v. Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include [1] the extent to which the [impropriety] was invited by defense conduct or argument, [2] the severity of the [impropriety], [3] the frequency of the [impropriety], [4] the centrality of the [impropriety] to the critical issues in the case, [5] the strength of the curative measures adopted, and [6] the strength of the state’s case. . . . [A] reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury’s verdict would have been different absent the sum total of the improprieties.” (Citations omitted; internal quotation marks omitted.) *State v. Sinclair*, 332 Conn. 204, 236-37, 210 A.3d 509 (2019).

The defendant argues that the state’s three questions—“That’s the first time that we’re hearing this. Isn’t that correct?”; “And this is the first time that we’re hearing that information?”; and “[B]etween March 31st of 2014 and your arrest in September in Montville and in November in—in Danielson, you never told anybody

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about that?”—amounted to prosecutorial impropriety because the state attempted to elicit evidence of the defendant’s post-*Miranda* silence.

As we discussed in part I of this opinion, the first two questions did not violate *Doyle* and the defendant does not argue how the questions would otherwise amount to prosecutorial impropriety. Therefore, we address only the defendant’s arguments as to the state’s question of whether the defendant told anybody about the presence of other hikers in the time period between the pre-*Miranda* interview and the defendant’s arrests in September and November, 2014. The defendant argues that this last question was improper because it includes a post-*Miranda* time period of two months between the defendant’s September and November arrests.

Even if we assume without deciding that the last question was improper, we determine that it did not deprive the defendant of his due process right to a fair trial.⁶ See *State v. Baltas*, 311 Conn. 786, 827, 91 A.3d 384 (2014) (reaching second step of prosecutorial impropriety analysis by assuming, arguendo, that prosecutor’s remarks were improper); see also *State v. Ross*, 151 Conn. App. 687, 699, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014).

Under our review of the *Williams* factors, we first note that the claimed impropriety was not invited by the defense. Additionally, we conclude that the factors

⁶ Our opinion should not be understood to suggest that the prosecutor committed impropriety at any time during her questioning. In *State v. Papantoniou*, 185 Conn. App. 93, 111, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018), this court explained: “The two steps of [our] analysis are separate and distinct, and we may reject the claim if we conclude that the defendant has failed to establish either prong.” (Internal quotation marks omitted.) Accordingly, like in *Papantoniou*, we simply assume, solely for the sake of argument, that the prosecutor’s question was improper. See *id.*, 112 n.19.

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of severity, frequency, centrality of the claimed impropriety, and strength of the curative measures also weigh in favor of the state. In the present case, the claimed impropriety was not pervasive throughout the trial but was confined to a single question that related to uncharged misconduct, and was not central to a critical issue in the defendant's case or his theory of defense. Defense counsel objected to the question before it was answered, the objection was sustained, and the court had previously instructed the jury regarding sustained objections.⁷ Although defense counsel failed to request a specific curative instruction, the court's general instruction directed the jury's approach to sustained objections, curing any impropriety. See *State v. A. M.*, 324 Conn. 190, 207, 152 A.3d 49 (2016) ("in nearly all cases where defense counsel fails to object to and request a specific curative instruction in response to a prosecutorial impropriety, especially an impropriety that we do not consider to be particularly egregious, and the court's general jury instruction addresses that impropriety, we have held that the court's general instruction cures the impropriety").

Finally, we consider the sixth factor, namely the strength of the state's case. Because there was no physical evidence and the state's case relied on the victim's testimony, which the defendant, in part, corroborated, we cannot conclude that the state's case was particularly strong. Nevertheless, our Supreme Court has "never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial." (Internal quotation marks omitted.)

⁷ On the first day of trial, the court gave the jury the following instruction: "If I sustain [an] objection, you will not hear an answer to the question and you should not wonder why the objection was made and you should not speculate as to what an answer might have been." The court also instructed the jury at the close of evidence that "any question or objection by a lawyer is not evidence . . . testimony that has been excluded or stricken is not evidence and must be disregarded"

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State v. Stevenson, 269 Conn. 563, 596, 849 A.2d 626 (2004).

Under the present circumstances, in which the claimed impropriety—one question—was objected to and the objection was sustained before the question was answered, and the court’s general instructions were sufficiently curative, we conclude that the defendant was not denied his due process rights and that his prosecutorial impropriety claim fails.

The judgments are affirmed.

In this opinion the other judges concurred.

DANIEL KLEIN v. QUINNIPIAC UNIVERSITY
(AC 41964)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant private university for negligence in connection with personal injuries he sustained when, while riding his bicycle on the defendant’s campus, he hit a speed bump and was thrown over the bicycle’s handlebars. The plaintiff alleged that the speed bump was a dangerous, defective and unsafe condition on the defendant’s property and that his injuries resulted from the defendant’s negligence. The defendant denied any negligence and raised as a special defense that the plaintiff was contributorily negligent. Following a trial, the jury returned a general verdict in favor of the defendant, but no interrogatories were submitted to it. The trial court rendered judgment in accordance with the verdict, and the plaintiff appealed to this court. *Held:*

1. The plaintiff could not prevail on his claim that the trial court erred by declining to instruct the jury on the definition of, and the duty owed to, a licensee: the evidence in the record did not reasonably support a conclusion that the plaintiff was a licensee, as there was no evidence that the defendant explicitly or implicitly expressed a desire that the plaintiff enter its campus or a willingness that he do so, and, contrary to the plaintiff’s contention that the defendant impliedly gave him consent to ride his bicycle on the campus because there was a lack of “no trespassing” signs and no gate or the like at each entrance to the campus, the lack of such signs or a gate at each entrance, without some additional evidence demonstrating implied consent, was insufficient to send the

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- question of whether the plaintiff was a licensee to the jury, and if this court were to adopt the plaintiff's reasoning and permit liability to be imposed in situations such as these, it essentially would require many private properties in the state that are now used for recreational purposes, to be fenced, gated and covered with "no trespassing" signs to bar access by the public, which would have significant societal impact and concomitant cost; moreover, even if this court were to assume that the plaintiff was a licensee, the evidence did not support a finding that the defendant breached any duty to the plaintiff as a licensee because, under the circumstances in this case, the defendant was not required to warn the plaintiff of the obvious dangers of his actions, namely, riding his bicycle over a speed bump as he proceeded down a hill with no intention of obeying the stop sign that lay just beyond the speed bump.
2. The general verdict rule precluded review of the plaintiff's claim that the trial court improperly permitted a certain witness to testify concerning the estimated speed of the plaintiff's bicycle at the time of the accident; because the general verdict rule applied, this court was required to presume that the jury found every issue in favor of the defendant, including that the defendant was not negligent, and, therefore, that rule precluded review of the plaintiff's remaining evidentiary claim, which related only to the defendant's special defense of contributory negligence.

(One judge dissenting)

Argued May 16—officially released October 8, 2019

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the jury before, *Wahla, J.*; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Steven D. Jacobs, with whom, on the brief, was *Richard L. Jacobs*, for the appellant (plaintiff).

James E. Wildes, for the appellee (defendant).

Opinion

LAVINE, J. In this premises liability action, the plaintiff, Daniel Klein, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, Quinnipiac University. On appeal, the plaintiff claims that the trial court erred by (1) permitting

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a witness to testify about the estimated speed of the plaintiff's bicycle at the time of his collision, and (2) refusing to give a jury instruction on the definition of, and the duty owed to, a licensee. For the reasons discussed herein, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The weather was clear and sunny on July 30, 2014, and the plaintiff, who was then seventy-one years old, and his friend, Richard Lebov, decided to take a bike ride through the defendant's campus because the "hill" offered a "difficult climb" that was "fun" and "a challenge." The two had ridden their bicycles there the year before. They were not students at the defendant, employed at the defendant, invited onto the campus, or planning to meet anyone on the campus.¹ The campus was not gated, and there were no "no trespassing" signs. Upon entering the campus, there were alternative routes available, one of which would pass by a guardhouse where a public safety officer was sta-

¹ The plaintiff gave the following testimony:

"Q. And on the day of the accident, no one invited you to go onto the campus, is that fair to say?"

"A. Correct."

"Q. And no one gave you permission to enter the campus?"

"A. Correct."

"Q. You just decided to go up the hill and go onto the campus?"

"A. Correct."

"Q. And you never worked there?"

"A. Correct."

"Q. You weren't a student there?"

"A. Correct."

"Q. You were never a student there?"

"A. Never."

"Q. You didn't know anybody who worked there?"

"A. Correct."

"Q. So, your sole purpose of going onto the campus that day was just to go for a bike ride?"

"A. Correct."

"Q. And [the defendant] is a private university, is that so?"

"A. Yes."

"Q. All right. So, you went onto private property to go for your bike ride?"

"A. Correct."

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tioned at all times.² There was a sign posted on the guardhouse directing vehicles to check in.³

² In our view, the dissent places too much weight on Officer Juan Melendez' following testimony in support of its argument that "visitors without any affiliation with the defendant were generally permitted [on campus] unless they appeared suspicious":

"Q. . . . [I]t's within the—and that person is not affiliated with the university, it's within the discretion of the officer then on duty to let that person up; is it not?

"A. Yes, it is.

"Q. And is it fair to say that unless that person appears to be suspicious in some way that you, as the guard at the guardhouse, would be inclined to exercise your discretion to let that person up.

"A. Yes."

Notably, Officer Melendez additionally testified to the following:

"Q. When you were assigned to the [defendant's] York Hill campus in the guardhouse, what were your—what were your responsibilities?

"A. My responsibilities when I was assigned there was to man that gate, stop traffic, make sure—ask for [identification cards], determine who was coming on campus and what are their nature; what are they there for. One of the reasons they have us ask for student [identification cards] is because we would have people that may want to come on campus that are not students or affiliated with the [defendant], and we do not want to have people that do not belong there there. Because if something happens there could—hurt somebody or do something that they're not, you know, of criminal intent. So, that's why they have us there.

"Q. Is [the defendant] a private university?

"A. It's private.

"Q. And the property of York Hill campus that's private property?

"A. That's a private property. . . .

"Q. Back on July 30, 2014, what was the practice and procedure of guards, such as yourself, public safety officers, if someone had stopped at the guardhouse going up the York Hill campus?

"A. You would ask in—you would ask them for their information, their [identification card], and their business there. If they were a student, faculty, staff, and—you would let them go because they would have a decal on their vehicle."

³ The dissent's supposition that "the only apparent purpose of the guardhouse was to limit vehicular access" is not supported by the record. The testimony on the issue from Officer Melendez was that "[t]he reason there's a guardhouse is for security reasons. [The defendant has] a student population that [it is] responsible for." Likewise, Barbara Barbuito, the assistant director of facilities for the defendant's York Hill campus, testified as follows:

"Q. Why is there a guardhouse in that location?

"A. There's a guardhouse there so no one enters, other than faculty, students, and student parents, and our staff. . . .

"Q. I mean security, are—are you concerned about the security of the students, their safety at campus?

"A. Yes.

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The plaintiff and Lebov took the road to the right that avoided the guardhouse and rode to the top of the

“Q. Is that—could you tell us whether or not that’s a reason why there’s a guardhouse there?”

“A. That is the reason why there’s a guardhouse, so, there’s only specific people that are allowed past that guardhouse. . . .”

“Q. Is the guardhouse occupied?”

“A. Yes.

“Q. And who occupies the guardhouse?”

“A. Public safety.

“Q. And how often does public safety occupy the guardhouse?”

“A. 24/7.

“Q. Does that include the summer time?”

“A. Yes.

“Q. And on July 30, 2014, was the guardhouse—did the guardhouse have somebody in it?”

“A. Yes.

“Q. Why was there somebody in the guardhouse?”

“A. For safety.

“Q. What are the responsibilities of a public safety officer of [the defendant] who’s assigned to that guardhouse?”

“A. So, he is not to allow anyone, other than a student, staff member, faculty, or a parent up in the area where the dorms are located. . . .”

“Q. Could you tell us whether or not it’s the responsibility of who’s ever assigned to the guardhouse to stop people from entering that area of campus? . . .”

“A. Yes.

“Q. Is [the defendant] a private or public university?”

“A. Private.

“Q. And is the York Hill campus part of the [defendant]?”

“A. Yes.

“Q. Is that private or public?”

“A. Private.

“Q. Does [the defendant] have a policy regarding individuals who come onto the campus who are not students, faculty, staff?”

“A. I believe it’s a verbal policy that no one is allowed in the areas where the student dorms are.

“Q. And was that policy in place on July 30, 2014?”

“A. Yes.

“Q. If someone rode up on a bicycle to the open campus where the guardhouse [was] back on July 30, 2014, what was the procedure that was in place at the time for public safety?”

“A. They would stop them, and ask for [identification], and ask them what they were doing on campus.

“Q. And, again, why would they do that?”

“A. For the safety of the students.”

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hill.⁴ They rode down the hill on a road that passes near the guardhouse. At the end of the road, there were two bright yellow speed bumps and a stop sign. There was nothing that obstructed the plaintiff's, or Lebov's, view of the speed bumps and the stop sign—especially as it was a clear and sunny day. Both of them saw the bright yellow speed bumps clearly.⁵

At trial, the plaintiff and Lebov each testified that they had no intention of stopping at the stop sign.⁶ They

⁴ The plaintiff testified to the following on cross-examination:

“Q. Exactly. So, rather than go up to the guardhouse to check in at the guardhouse, you took a right?”

“A. Correct.

“Q. You didn't see what the sign said?”

“A. Correct.

“Q. Because you avoided the guardhouse by going to the right?”

“A. Correct.

“Q. So, obviously, you didn't stop at the guardhouse and check in?”

“A. Correct.”

On redirect examination the plaintiff testified to the following:

“Q. Did you purposely avoid the guardhouse?”

“A. No, I came down by the guardhouse.”

⁵ The plaintiff gave the following testimony:

“Q. And you saw these speed bumps as you were going down the hill?”

“A. Correct.

“Q. And the speed bumps were yellow?”

“A. Correct.

“Q. And they were bright yellow?”

“A. Yes.

“Q. Yes? And you had no difficulty seeing them?”

“A. No.”

⁶ The plaintiff gave the following testimony:

“Q. My question is, you were not planning on stopping at the stop sign at the bottom of the hill, is that correct?”

“A. To make a full stop, no, that—we don't—we never stop, make full stops unless there was traffic or something. That's just what bicyclists do. When we get to a stop sign, we look both ways, if there's nothing coming, we—I mean, we slow until maybe one or two miles an hour. But to stop means we have to get out of our pedals and put our feet down. . . .

“Q. I think you just said that you were going to slow, but, you were—you were not going to stop. Were you planning on stopping that day?”

“A. Was I planning on coming to a full stop, probably not. . . .

“Q. Right. So, you didn't plan on stopping?”

“A. Not to a full stop, no. . . .

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both rode over the first speed bump without incident. When the plaintiff's bicycle made contact with the second speed bump, he flew over the top of his handlebars, hit the ground, and sustained serious injuries. The officer stationed at the guardhouse, Juan Melendez, called dispatch, and the plaintiff received medical assistance.

Officer Melendez had seen the plaintiff and Lebov ride up the hill and had left the guardhouse to survey the area because he thought that they were still in the general area.⁷ He turned when he heard a noise and

"Q. My question is this, you didn't plan on stopping at the guardhouse, is that correct?

"A. That's correct.

"Q. Okay. And you didn't plan on stopping at the stop sign, is that correct?

"A. That is correct."

⁷ Officer Melendez gave the following testimony:

"Q. Had you seen [the plaintiff] before the moment when you observed him being thrown off the bike?

"A. Yes.

"Q. Where did you observe him?

"A. I saw him come up the hill, and they went out through the backend of the—of the campus where the armed gate is situated.

"Q. So—so you saw him enter the campus?

"A. I saw him en—enter—I saw him go up the campus, but they didn't go by me or by the guardhouse.

"Q. They went up by the wind—by the wind farm.

"A. By the wind farm.

"Q. Okay. Did you call to any—withdrawn. Were there any other officers on campus at that time?

"A. There was another patrol officer.

"Q. Did you call to the other patrol officer to alert him to the presence of—of the bicyclists?

"A. At the time I did not do that. That's one of the reasons why I was out of the guardhouse. I was looking in the general area, seeing traffic, observing my—observing my surroundings. And—I—and usually I was expecting them to come back.

"Q. Okay. So, about how much time passed from the moment when while standing outside of the guardhouse you observed them, the two—there were two riders?

"A. There were two riders.

"Q. When you observed them right up the road past the wind farm to the time when they came back?

"A. Well, when they were coming up the hill, I was still in the guardhouse when they went back through the wind farms. There was a time I couldn't

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saw the tire of the plaintiff's bicycle hit the second speed bump and the plaintiff thrown over the handlebars. Officer Melendez was permitted, over objection, to testify that the plaintiff's speed was "conservatively ten miles an hour" or faster because of the hill's incline.

The plaintiff brought the present action, seeking monetary damages, claiming that the speed bump was dangerous, defective, and unsafe and that his injuries resulted from the defendant's negligence. The defendant denied any negligence and raised the special defense that the plaintiff was contributorily negligent. The case was tried to a jury, but no interrogatories were submitted to it. Following the trial, the jury returned a general verdict in favor of the defendant, and the court rendered judgment accordingly. This appeal followed.

The plaintiff first challenges the court's evidentiary ruling permitting Officer Melendez to estimate the speed of the plaintiff's bicycle. Second, he claims that the court improperly refused to instruct the jury that his status could have been that of a licensee and erred by charging the jury only on his status as a trespasser.⁸

tell you how long. And that's when I exited the guardhouse and decided to look around the area; observe my area."

Officer Melendez further testified:

"Q. And can you just explain for the ladies and gentlemen of the jury again, why you were not in the guardhouse and where you were?

"A. I was in front of the guardhouse, towards the left side of it. I was surveying my area, my post. I had [seen] bicycles—bicyclists come up, and I thought they were still in the general area, but they didn't come by my gate. So, I was just surveying my area."

⁸The court instructed the jury on the duty owed to a trespasser as well as to a constant trespasser. Although used infrequently, our Supreme Court has recognized the status of constant trespasser where a heightened duty is owed when the possessor of land has knowledge that trespassers constantly intrude upon a limited area of the land. See *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 333, 612 A.2d 1197 (1992). The court charged the jury as follows: "If a possessor of the land has knowledge that the trespassers constantly intrude upon a limited area of the land, the possessor of the land is liable for an artificial condition that caused injury to the trespasser on that part of the land if all of the following are met. The condition is one that the possessor has created or maintains and the condition is

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The defendant, however, argues that the general verdict rule applies to this case and precludes a review of the plaintiff's contentions on appeal. The plaintiff argues that although the general verdict rule might insulate the verdict from attack in other circumstances, it does not do so in the present case because the improper jury charge affected both the negligence claim and the contributory negligence special defense. We view the plaintiff's second claim of error with respect to the jury charge to be without merit, and we conclude that the general verdict rule applies to defeat the plaintiff's first claim. We address the plaintiff's second claim first.

The essential issue in this case is whether the plaintiff, an experienced bicyclist, who was injured while riding his bicycle on the York Hill campus of the defendant, a private university, was entitled to have the jury instructed on the definition of, and the duty owed to, a licensee. The trial court decided that the issue was one of law, that the evidence did not support the claim that the plaintiff was a licensee, and that he was not entitled to such a jury charge. On appeal, the plaintiff claims that it was reversible error for the court to take the issue away from the jury, which returned a verdict in favor of the defendant, because, in his view, there was evidence that the defendant implicitly consented to his presence.

Connecticut's premises liability law has long provided that "[t]he status of an entrant on another's land, be it trespasser, licensee or invitee, determines the duty that is owed to the entrant while he or she is on a landowner's property." (Internal quotation marks omitted.) *Cuozzo v. Orange*, 178 Conn. App. 647, 655, 176

one that to the possessor's knowledge is likely to cause death or serious bodily harm to such trespasser. And the condition is of such nature—of such a nature that the possessor has reason to believe that such trespasser will not discover it. And the possessor has failed to use reasonable care to warn such trespassers of [the] artificial condition and the risk involved."

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A.3d 586 (2017), cert. denied, 328 Conn. 906, 177 A.3d 1159 (2018). “Ordinarily, the status of one who sustains injury while upon the property of another is a question of fact.” (Internal quotation marks omitted.) *Moonan v. Clark Wellpoint Corp.*, 159 Conn. 178, 185, 268 A.2d 384 (1970); see also *Roberts v. Rosenblatt*, 146 Conn. 110, 112, 148 A.2d 142 (1959). “Where, however, the facts essential to the determination of the plaintiff’s status are not in dispute, a legal question is presented.” (Internal quotation marks omitted.) *Gargano v. Azpiri*, 110 Conn. App. 502, 506, 955 A.2d 593 (2008); see also *Brown v. Robishaw*, 282 Conn. 628, 633, 922 A.2d 1086 (2007) (“[i]f . . . 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” [internal quotation marks omitted]).

The plaintiff argues that he asked the court to charge the jury on the definition of and the duty owed to a licensee. He cites in his appellate brief to a proposed jury instruction that states: “A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor’s consent, that is, with the possessor’s permission or with the possessor’s express or *implied consent*.” (Emphasis in original.) See Connecticut Civil Jury Instructions 3.9-3, available at <http://www.jud.ct.gov/JI/Civil/Civil.pdf> (last visited October 3, 2019).⁹ He argues that the “evidence reasonably supported a finding that [he], while on the defendant’s property on July 30, 2014, was there, if not with the possessor’s express consent, then with its implied consent”

⁹ The Connecticut Civil Jury Instructions state on page one of the collection: “This collection of jury instructions was compiled by the Civil Jury Instruction Committee and is intended as a guide for judges and attorneys in constructing charges and requests to charge. The use of these instructions is entirely discretionary and their publication by the Judicial Branch is not a guarantee of their legal sufficiency.” Connecticut Civil Jury Instructions, available at <https://jud.ct.gov/JI/Civil/Civil.pdf> (last visited October 3, 2019).

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While the civil jury instruction cited to by the plaintiff contains the phrases “express consent” and “implied consent,” those precise phrases do not appear in our case law discussing the classification of someone entering onto someone else’s land. Rather, our Supreme Court, guided by § 330 of the Restatement (First) of Torts, has defined a licensee as “a person who is privileged to enter or remain upon land by virtue of the possessor’s consent, whether given by *invitation* or *permission*.” (Emphasis added; internal quotation marks omitted.) *Laube v. Stevenson*, 137 Conn. 469, 473, 78 A.2d 693 (1951); see also *Salaman v. Waterbury*, 246 Conn. 298, 305, 717 A.2d 161 (1998) (same).

Although our Supreme Court has made clear that licensee status can be established by demonstrating that the possessor of the land gave someone permission or an invitation to enter the property, only a few cases following our Supreme Court’s adoption of the licensee definition discuss such status, and they shed little light on precisely what a plaintiff entrant is required to show in order to establish that it received the requisite consent.

For example, in *Salaman v. Waterbury*, *supra*, 246 Conn. 301, an administrator of a swimmer’s estate brought an action against the defendant city for premises liability negligence, after the swimmer drowned while swimming across a reservoir owned by the city. The jury returned a verdict in favor of the plaintiff, but the court ultimately granted the city’s motion to set aside the verdict and for judgment notwithstanding the verdict, concluding that there was insufficient evidence to impose either trespasser or licensee liability. *Id.*, 303. This court disagreed and reversed the trial court’s judgment. *Id.* Our Supreme Court then granted certification to appeal. *Id.*, 304. After defining “licensee,” the court went on to note that “[i]n order to prove that the decedent was a licensee, the plaintiff was required to prove that the decedent was on the city’s land with its

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permission or by its express or implied invitation.”¹⁰
Id., 306.

In construing this statement by our Supreme Court, it is unclear whether licensee status can also be established by implied permission. One could argue that the absence of the phrase “express or implied” before the word “permission” suggests that the court intended to preclude proof of licensee status by implied permission. One could also argue that our Supreme Court’s use of the phrase “implied invitation” was intended to be interchangeable with “implied permission.” The court in *Salaman*, however, did not reach the issue of whether the swimmer was in fact a licensee or provide any further analysis on his status. The court concluded that it need not examine the record to determine if there was some evidence from which the jury reasonably might have concluded that the decedent was a licensee because, even if it assumed that the decedent was a licensee, the evidence did not support a finding that the city breached any duty to the decedent as a licensee. Id, 306.

Older case law, however, suggests that implied permission may be sufficient to establish licensee status. For example, in *Katsonas v. Sutherland Building & Contracting Co.*, 104 Conn. 54, 132 A. 553 (1926), which was decided prior to our Supreme Court’s adoption of its current licensee definition, stated that “when a

¹⁰ Our Supreme Court has explained that a person “might be found to have been impliedly invited if he came to the premises under either of two sets of facts: First, because he was led to believe that [the premises] were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used; or, secondly, he was using them with the acquiescence, actual or implied, of the defendant in pursuance of a matter of mutual interest.” (Citation omitted; internal quotation marks omitted.) *Dym v. Merit Oil Corp.*, 130 Conn. 585, 588–89, 36 A.2d 276 (1944).

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landowner tacitly permits certain acts upon his property, a license to do these acts may be inferred from his failure to object”

In an attempt to clarify this ambiguity and determine what proof is permissible to establish licensee status, we turn our attention to the comments of § 330 of the Restatement (First) of Torts, the section from which our Supreme Court adopted the licensee definition. Comment (a) to that section states: “ ‘Invitation’ and ‘permission.’ An invitation differs from a permission only in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter; a permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so. It is immaterial whether the consent which creates the license is an invitation originating with the possessor of the land or by a permission given upon request made by the licensee. The important fact is that the entry is by the consent of the possessor and it is immaterial that the suggestion of the visit originates with him or with his licensee.” 2 Restatement (First), Torts § 330, comment (a), p. 893 (1934).

Furthermore, comment (b) to § 330 of the Restatement (First) of Torts states: “ ‘Toleration’ and ‘permission.’ The word ‘permission’ indicates that the possessor’s conduct is such as to give others reason to believe that he consents to their entering the land if they desire to do so. A mere failure to object to another’s entry may be a sufficient manifestation of consent thereto if the possessor knows of the other’s intention to enter and has reason to believe that his objection is likely to be effective in preventing the other from entering. On the other hand, the fact that the possessor knows of the other’s intention to enter and does not prevent it may not be of itself a sufficient manifestation of consent and, therefore, is not necessarily permission. A failure

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to take burdensome and expensive precautions against intrusion manifests an unwillingness to go to the trouble and expense of preventing others from trespassing upon the land and expresses toleration of the practically unavoidable rather than consent to their entry as licensees. *Even a failure to post a notice warning the public not to trespass cannot reasonably be construed as an expression of consent to the intrusions of persons who habitually and notoriously disregard such notices.*” (Emphasis added.) *Id.*, comment (b), p. 893–94.

Additionally, comment (d) to § 330 of the Restatement (First) of Torts states in relevant part: “License created otherwise than by words. The consent which is necessary to confer a license to enter land, may be expressed by acts other than words. Here again the decisive factor is the interpretation which a reasonable man would put upon the possessor’s acts.” *Id.*, comment (d), p. 894.

In light of the guidance provided in the comments to § 330 of the Restatement (First) of Torts, and in light of the myriad cases from other jurisdictions recognizing that both express and implied permission is sufficient to render an entrant a licensee; see, e.g., *Fitzsimmons v. State*, 42 App. Div. 2d 636, 637, 345 N.Y.S.2d 171 (1973) (“[a] licensee is one who enters the premises for his own benefit without invitation, but with permission, express or implied, of the owner or person in possession”), *aff’d*, 34 N.Y.2d 739, 313 N.E.2d 790, 357 N.Y.S.2d 498 (1974); we are assuming, *arguendo*, that express or implied permission, in addition to an express or implied invitation, if established, can render an entrant a licensee.

In the present case, we must determine if the court properly concluded, as a matter of law, that the evidence did not reasonably support a finding that the plaintiff was a licensee. See *Gargano v. Azpiri*, *supra*, 110 Conn. App. 506 (“[w]here . . . the facts essential

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to the determination of the plaintiff's status are not in dispute, a legal question is presented" [internal quotation marks omitted]).

We conclude that the essential facts in the present case are not in dispute, and, thus, the determination of the plaintiff's status is a question of law. The essential facts are as follows: The plaintiff is an avid bicyclist; he entered the private campus of the defendant on his bicycle; he did not stop at the clearly visible guardhouse located near the two main roads accessing the buildings on campus, but took the road that avoided it by riding to the right of it; there were no "no trespassing" signs present; there were not gates at every entrance to the campus; the plaintiff was not employed by the defendant at the time of the accident; he was not a student or a parent of a student attending the university; he had no other purpose for being on campus other than his desire to continue his bike ride through the campus, which he had done one previous time a year earlier; and there was no evidence that the defendant knew of the plaintiff's prior bike ride on the campus a year earlier.

On the basis of the record before us, we have little difficulty concluding that the court properly declined to give the jury a licensee instruction. The evidence in the present case did not reasonably support a conclusion that the plaintiff was a licensee—that is, that he received an express or implied invitation or express or implied permission to enter the campus. Indeed, there was no evidence of the defendant's having explicitly or implicitly expressed a desire that the plaintiff enter its campus, nor was there any evidence of the defendant's having expressed a willingness that he do so. See 2 Restatement (First), *supra*, § 330, comment (a), p. 893.

The plaintiff primarily argues that the defendant impliedly gave him consent to ride his bicycle on the campus because there was a lack of "no trespassing"

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signs and no gate or the like at each and every entrance to the campus. The lack of “no trespassing” signs or a gate at each entrance, however, without some additional evidence demonstrating implied consent, is insufficient to send the question of whether the plaintiff was a licensee to the jury. See 2 Restatement (First), supra, § 330, comment (b), p. 894 (“[e]ven a failure to post a notice warning the public not to trespass cannot reasonably be construed as an expression of consent”). Put another way, there is insufficient evidence in the record before us demonstrating that the defendant’s conduct, either expressly or implicitly, made others believe that the defendant was willing to let them enter the campus if they desired to do so. If we were to adopt the plaintiff’s reasoning and permit liability to be imposed in situations such as these, “no trespassing” signs will go up, along with fences and gates, barring access to many private properties now used for recreational purposes, creating closed enclaves throughout our state. The societal impact, and concomitant cost, of such a ruling would be significant. See, e.g., *Salaman v. Waterbury*, supra, 246 Conn. 307 (“A rule requiring a property owner to post warning signs about the dangers inherent in swimming is unreasonable. In Connecticut, a small state, hundreds of miles of shoreline would be exposed to this unreasonable requirement. Property owners who have water on their land are entitled to assume that a reasonable adult would be aware of the risk of drowning in a body of water.”) We, therefore, conclude that the court did not err in declining to instruct the jury on licensee status and its corresponding duty of care.¹¹

¹¹ We note that even if it was error for the court not to send the question of whether the plaintiff was a licensee to the jury, the plaintiff’s one sentence harmfulness argument contained in his appellate brief was insufficient to address the harm of the court’s alleged error. See *MacDermid, Inc. v. Leonetti*, 328 Conn. 726, 749, 183 A.3d 611 (2018) (“Specifically, with respect to jury instructions, we have explained that [i]t is axiomatic . . . that not every error is harmful. . . . [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful.” [Internal quotation marks omitted.]).

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Moreover, even if we were to assume that the plaintiff in this case was a licensee, we would be unable to conclude that the evidence supports a finding that the defendant breached any duty to the plaintiff as a licensee. See *Salaman v. Waterbury*, supra, 246 Conn. 306. “The duty that a . . . [landowner] owes to a licensee . . . does not ordinarily encompass the responsibility to keep the property in a reasonably safe condition, because the licensee must take the premises as he [or she] finds them. . . . If the licensor actually or constructively knows of the licensee’s presence on the premises, however, the licensor must use reasonable care both to refrain from actively subjecting him [or her] to danger and to warn him [or her] of dangerous conditions which the possessor knows of but which he [or she] cannot reasonably assume that the licensee knows of or by reasonable use of his [or her] faculties would observe.” (Citations omitted; internal quotation marks omitted.) *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 327, 612 A.2d 1197 (1992).

The plaintiff would have been required to establish that the defendant breached the duty owed to a licensee. On the basis of our review of the evidence, no jury reasonably could have concluded that the defendant breached that duty even if one assumes the plaintiff was a licensee. In particular, there was no claim or evidence to support a finding that the defendant actively subjected the plaintiff to danger. Thus, the defendant’s duty to the plaintiff, had he in fact been a licensee, would be to “warn him [or her] of dangerous conditions which the possessor knows of but which he [or she]

In light of the court’s constant trespasser jury instruction; see footnote 8 of this opinion; which is substantially similar to the licensee instruction the plaintiff seeks, it would have been incumbent upon the plaintiff to address sufficiently the harm with respect to the court’s alleged error. See *MacDermid, Inc. v. Leonetti*, supra, 328 Conn. 748 (“without adequate briefing on the harmfulness of an alleged error, the defendant is not entitled to review of [the] claim on the merits” [internal quotation marks omitted]).

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cannot reasonably assume that the licensee knows of or by reasonable use of his [or her] faculties would observe.” (Internal quotation marks omitted.) *Id.*, 329.

We are simply unwilling to conclude that on a sunny and clear day, a plainly visible bright yellow speed bump located on a paved road, even if on a hill, can be considered a hidden, dangerous condition. In fact, there was testimony that speed bumps “are a known hazard to bicyclists.” Moreover, there was no evidence before the jury demonstrating that the defendant was aware of this alleged defect. In particular, there was no evidence that the defendant was aware that the way that the speed bump was constructed rendered the premises unsafe. Here, under the circumstances of this case, the plaintiff should have been aware of the dangers of riding his bicycle over a speed bump as he proceeded down the hill with no intention of obeying the stop sign that lay just beyond the speed bumps. See, e.g., *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn. 314, 336 n.12, 885 A.2d 734 (2005) (“[t]he risks inherent in each type of recreational activity will necessarily vary, and it is common knowledge that some recreational activities are inherently more dangerous than others”); see also *Rivera v. Glen Oaks Village Owners, Inc.*, 41 App. Div. 3d 817, 820, 839 N.Y.S.2d 183 (2007) (“[b]y engaging in a sport or recreational activity, a participant consents to those commonly-appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation”) Even if we had assumed the plaintiff was a licensee, we would conclude on the facts of the present case that the defendant was not required to warn the plaintiff of the obvious dangers of his actions.

Lastly, we conclude that the general verdict rule applies to defeat the plaintiff’s remaining claim that the court improperly permitted Officer Melendez to estimate the speed of the plaintiff’s bicycle. “[The general

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verdict] rule operates . . . to insulate a verdict that may have been reached under a cloud of error, but which also could have been reached by an untainted route.” *Dowling v. Finley Associates, Inc.*, supra, 248 Conn. 376. “[It] applies whenever a verdict for one party could reasonably have been rendered on one or more distinct causes of action or distinct defenses. . . . [A] defendant[’s] denial of negligence and . . . allegations of contributory negligence constitute two discrete defenses, either of which could [support a] jury’s general verdict. . . . The verdict [could be] predicated on the defendant[’s] freedom from negligence or on the plaintiff’s comparatively greater negligence. . . . In light of [a] plaintiff’s failure to request interrogatories to ascertain the basis of the jury’s verdict, [the verdict] must [be] uph[eld] . . . under the general verdict rule, if either defense is legally supportable. . . . Further, if the trial court’s instructions to the jury are shown to be proper and adequate as to any of the defenses raised, the general verdict must stand, regardless of error, if any, in the charge as to any other defense.”¹² (Citations omitted.) *Staudinger v. Barrett*, 208 Conn. 94, 99–100, 544 A.2d 164 (1988).

Because the general verdict rule applies, we must presume that the jury found every issue in favor of the defendant. We, therefore, conclude that the jury found that the defendant was not negligent. The plaintiff’s

¹² This court’s recent decision in *Farmer-Lanctot v. Shand*, 184 Conn. App. 249, 194 A.3d 839 (2018), illustrates this principle. In *Farmer-Lanctot*, two defenses, a denial of negligence and a special defense of contributory negligence, could have supported the general verdict, and there was a claim of instructional error as to each ground. *Id.*, 254. This court, therefore, considered the first claim of instructional error, which pertained to the negligence claim, as part of its analysis into whether there was a properly and adequately instructed defense that supported the verdict. *Id.*, 254–59. This court concluded that the general verdict rule applied because there was no error in the instructions on the negligence claim, and, therefore, it did not need to consider the claimed errors relating to contributory negligence. *Id.*, 258–59.

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remaining evidentiary claim, that the court improperly permitted Officer Melendez to estimate the speed of the plaintiff's bicycle, relates only to the contributory negligence special defense. As such, it is precluded by the general verdict rule; see *Segale v. O'Connor*, 91 Conn. App. 674, 680, 881 A2d 1048 (2005); and does not require further discussion.

The judgment is affirmed.

In this opinion KELLER, J., concurred.

BISHOP, J., dissenting. In this premises liability action involving serious physical injuries, the plaintiff, Daniel Klein, asserts two claims on appeal: first, that the trial court abused its discretion by permitting a witness to give opinion testimony without adequate foundation, and second, that the court improperly refused to instruct the jury on the definition of and duties owed to a licensee upon a possessor's land. The majority concludes that the court properly refused to give such instruction. Alternatively, the majority concludes that, even if the court's instruction was incorrect, the error did not harm the plaintiff. The majority therefore finds no reversible error in the court's instruction to the jury and, consequently, concludes that the plaintiff's evidentiary claim is barred by application of the general verdict rule. I respectfully disagree.

A pivotal issue at trial was the legal status of the plaintiff on the property of the defendant, Quinnipiac University. The plaintiff asserted that he was there with the permission of the defendant; the defendant claimed, in response, that the plaintiff was a mere trespasser. The trial court determined, as a matter of law, that the plaintiff was a trespasser and, therefore, declined to instruct the jury with respect to the duties owed to licensees. I conclude that this was reversible error. In my view, there was adequate evidence adduced at trial

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for the jury to conclude that the plaintiff had entered the defendant's property with the defendant's implied permission, and, accordingly, the trial court erred in refusing to give the requested licensee instruction.¹ In doing so, the court, in essence, directed a verdict against the plaintiff, thereby denying him the opportunity to have his claims fairly decided by a jury of his peers. In my view, this instructional error necessarily prejudiced the plaintiff and, therefore, requires reversal and an order remanding the matter for a new trial. Because the issue of the admissibility of the opinion testimony regarding the plaintiff's speed may arise on retrial, I would also reach the plaintiff's evidentiary claim and conclude that this lay opinion testimony was improperly admitted because the witness rendering the opinion lacked an adequate factual foundation.

The underlying facts, which the jury reasonably could have found, are, in the main, undisputed, with one exception regarding the purpose of a guardhouse on the defendant's premises. On July 30, 2014, the plaintiff

¹ In his request to charge, the plaintiff requested that the court instruct the jury that it was its responsibility to decide, on the basis of the evidence presented, whether the plaintiff was a licensee or a trespasser. Included in the plaintiff's requested charge was a proper statement of the legal definition of one who is a licensee and one who is a trespasser, and also a proper statement of the law regarding the duties owed by a possessor of land to a licensee and to a trespasser. On appeal, the plaintiff asserts that the court incorrectly charged the jury by instructing it solely with regard to the duties owed to a trespasser. From my perspective, this was a fatal error for either of two reasons. First, as is evident from the majority and dissenting opinions in this case, there was a sufficient factual dispute regarding the role of the guardhouse vis-à-vis visitors to the campus to render the question of the plaintiff's status a factual one for the jury's determination. Alternatively, if the court determined that the facts essential to the determination of the plaintiff's status were not in dispute, it should have charged only on the duties owed to a licensee. See *Millette v. Connecticut Post Ltd. Partnership*, 143 Conn. App. 62, 69 n.5, 70 A.3d 126 (2013) ("Ordinarily, the status of one who sustains injury while upon the property of another is a question of fact. . . . Where, however, the facts essential to the determination of the plaintiff's status are not in dispute, a legal question is presented." [Internal quotation marks omitted.]).

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and a friend, Richard Lebov, both experienced bicyclists, went for an extended bicycle ride that ended on the defendant's York Hill campus in Hamden (campus), which, being situated on a hill, provides a nice view of New Haven and Long Island Sound.² The plaintiff and Lebov entered the campus via an access road from Sherman Avenue and proceeded onto the campus. At the time in question, this entrance was not gated, and there were no "no trespassing" signs posted anywhere around the campus or any other signs indicating that access to the campus was restricted in any way. In short, the circumstances were such as to lead a reasonable person approaching the entrance to the defendant's campus from Sherman Avenue to believe that the premises were open to the public without restriction.

The access road from Sherman Avenue terminates well into the interior of the campus, where it intersects with another campus road. At this point, lane use arrows in the right travel lane of the access road indicate that traffic may either proceed straight or turn right. Both routes lead to the top of the campus, where several dormitories and a student center are located. The plaintiff and Lebov turned right at this intersection to continue their ride to the top of the campus.

Across from the intersection at which the plaintiff and Lebov turned right is a road that leads directly to the dormitory area of the campus. Situated at the entrance to this road, in the median, is a guardhouse staffed at all times by a public safety officer. The guardhouse is flanked on both sides by two yellow painted speed bumps. A sign posted on the front of the guardhouse states that "all vehicles must stop and be registered." It is noteworthy that the sign at the guardhouse was directed only to vehicles and that, at the time in question, there were no signs posted requiring that

² The plaintiff and Lebov had been bicycle riding together on a regular basis over the course of twenty-five years, logging well over 20,000 miles.

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users of the roadway coming from the Sherman Avenue entrance proceed across the intersection to the guardhouse instead of turning right as did the plaintiff and Lebov.

The route to the right of the intersection, taken by the plaintiff and Lebov, leads past a wind farm before connecting with the other end of the guardhouse road at the top of the hill. As with the Sherman Avenue entrance and the access road, there were no signs restricting traffic from taking the road leading past the wind farm. Nor were there any signs posted indicating that this road was one-way or that bicyclists or pedestrians using the road were going against the flow of traffic. Although there was a vertical swing arm gate located at some point along this road, the arm was in the upright position at the time in question. The open position of the gate's arm certainly does not suggest that travelers, be they students, staff, or visitors on that road, were unwelcome.

When the plaintiff and Lebov reached the intersection and turned right along the road up the hill toward the wind farm,³ the safety officer on duty, Juan Melendez, observed them but remained inside the guardhouse. Also, he did not attempt to alert the other officer on duty to their presence. This inaction by Melendez supports the plaintiff's view that it was not part of Melendez' duty to screen, generally, visitors to the campus who did not seek access via the guarded roadway to the dormitories. Indeed, when the plaintiff and Lebov

³ There was no evidence adduced at trial to suggest that the plaintiff and Lebov had decided to take the road to the right at the intersection in order to avoid the guardhouse at the entrance to the guarded road. Indeed, they both explicitly testified that they had not purposely avoided the guardhouse; rather, they chose to follow the route they had previously taken in order to pass by the wind farm. Moreover, the guardhouse straddling the road leading directly to the student dormitories did not appear to relate, in any way, to pedestrians, bicyclists, or those driving motor vehicles on campus who did not seek to travel on the guarded road.

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had taken a bicycle ride along a similar route on the campus the previous year, no one had attempted to stop them, and there had been nothing to suggest in any manner that their presence had been unwelcome.⁴

After a minute or two, Melendez exited the guardhouse to survey the area, as he was expecting to see the plaintiff and Lebov come back. While standing in front of the guardhouse surveying the area, Melendez “heard a noise” and “instinctively” turned to his right, whereupon he observed the front wheel of the plaintiff’s bicycle hit the second speed bump, causing the plaintiff to be thrown into the air over his handlebars and to hit the ground. The plaintiff sustained serious physical injuries as a result.⁵

The plaintiff commenced the present action by service of process on the defendant on March 11, 2015. In the operative second amended complaint filed on October 24, 2017, the plaintiff alleged that the bottom most speed bump in the egress lane of the guardhouse road was in a dangerous, defective, and unsafe condition and that he had been injured as a result of the defendant’s negligence in allowing this dangerous condition to exist, failing to inspect the speed bump to ensure that it was in a reasonably safe condition, failing to remedy the condition, and failing to warn of the condition.⁶ The defendant denied the plaintiff’s allegation of negligence and raised the special defense of

⁴ On the previous occasion, they had cycled into the campus and taken the same road past the wind farm. On that occasion, they had circled around counterclockwise past the dormitories before leaving the campus via a rear access road. There had been no “no trespassing” signs, and the only gate along their route had been up.

⁵ The plaintiff sustained a brain bleed and broke one of his femurs, a hip, and four ribs. He required surgery to repair his femur.

⁶ The plaintiff also specifically alleged that he had been a business invitee of the defendant. After the parties presented their evidence at trial, however, the plaintiff’s counsel conceded that a business invitee instruction was not warranted and, instead, requested an instruction on the duties owed by a land possessor to a licensee. Although the plaintiff had not alleged in the operative complaint that he had been a licensee, the defendant did not object

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contributory negligence. The matter was tried to a jury beginning on April 16, 2018, but no interrogatories were submitted to it.

At trial, Melendez testified that he had not seen the plaintiff coming down the hill prior to the plaintiff's collision with the speed bump. Nevertheless, he was permitted to testify, over the objection of the plaintiff's counsel, as to his opinion that the plaintiff's speed going down the hill was ten miles per hour, conservatively. This estimate was in line with that provided by the defendant's expert witness, Christopher Juliano, who opined that the plaintiff had been traveling at approximately 9.8 miles per hour at the time the accident occurred.

Following the conclusion of the defendant's case-in-chief on April 19, 2018, the defendant moved for a directed verdict. During argument on the defendant's motion, the defendant's counsel argued that the only conclusion that could be reached on the basis of the evidence presented was that the plaintiff had been a trespasser and that, consequently, the only duty that the defendant owed was to refrain from intentionally or recklessly injuring the plaintiff. The defendant's counsel, therefore, contended that, because the plaintiff did not allege or prove that the defendant had intentionally or recklessly injured him, he could not prove negligence.

The plaintiff's counsel countered that there was ample evidence to support a conclusion that the plaintiff had been a licensee, which he defined as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent, that is with the possessor's permission or with the possessor's expressed or implied

to the plaintiff's requested instruction on that ground and the arguments presented by counsel to the court concerned only whether the evidence entitled the plaintiff to a charge related to the duties of care owed to a licensee.

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consent.” More specifically, the plaintiff’s counsel argued that the evidence demonstrated that the plaintiff had had the implied consent of the defendant to be on the campus. In support of this argument, the plaintiff’s counsel pointed to the following evidence: the lack of any “no trespassing” signs, the lack of any signs restricting access to the campus to any particular categories of people, the lack of any signs directing visitors to stop at the guardhouse to sign in, the arrows on the street pointing in directions away from the guardhouse, the upright position of the arm of the gate along the road leading past the wind farm, Melendez’ testimony that visitors without any affiliation with the defendant were generally permitted unless they appeared suspicious, and the lack of any gate at the entrance to the campus.⁷

Although the plaintiff had been proceeding under a theory of implied consent, the court, without explanation, proceeded to summarize the law concerning implied *invitations*. Citing the second edition of American Jurisprudence, the court stated: “An invitation may be implied from dedication, customary use, or enticement, allurement, or inducement to enter [or] manifested by an arrangement of the premises or the conduct of the owner or occupant” See 62 Am. Jur. 2d 464, Premises Liability § 92 (2018). The court went on to note that this was consistent with Connecticut case law indicating that, for the plaintiff to constitute an *invitee*, “it must appear that [the plaintiff] was expressly

⁷ In addition to these specific claims made by the plaintiff, the court heard or saw documentary evidence that should have made it apparent that the guardhouse, about which there was a great deal of testimony, was not situated in a manner to guard the campus against trespassers but served, only, to limit and scrutinize vehicular traffic seeking access up the guarded road to the dormitory area. In my view of the record, testimony related to the guardhouse was minimally relevant to the issue of the plaintiff’s status because the guardhouse was a substantial distance from the Sherman Avenue entrance to the campus, and its only apparent purpose was to screen vehicular traffic to the dormitory portion of the campus.

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or impliedly invited to use the defendant's premises," which, according to the court, "[was] not the case here." Nevertheless, the court deferred ruling on the defendant's motion for a directed verdict and immediately moved on to a charge conference.

During the charge conference, and in spite of the plaintiff's unequivocal statement that he was claiming to have been a licensee and his explicit disavowal of any claim of invitee status, the court framed the issue regarding the appropriate jury charge in terms of "whether there was an implied *invitation*," citing the principles it had previously noted in the context of the defendant's motion for a directed verdict. (Emphasis added.) The court concluded that, "considering [those principles], the charge . . . [that] is going to be giv[en] is [the] trespasser charge only"

Following trial, the jury returned a general verdict in favor of the defendant, and the court rendered judgment accordingly. This appeal followed.

I first address the plaintiff's claim that the trial court erred in refusing to instruct the jury regarding the definition of a licensee and the duties owed to a licensee by a possessor of land. The plaintiff argues that the trial court improperly conflated the concepts of implied invitation and implied consent and that there was sufficient evidence to support a finding that he had entered the campus with the defendant's implied consent. The plaintiff, therefore, contends that it was an abuse of discretion for the trial court to refuse to instruct the jury on the definition of and the duties owed to a licensee. The plaintiff further argues that the court's error was harmful because it was tantamount to directing a verdict in favor of the defendant. More specifically, the plaintiff contends that, without a licensee instruction, the jury was left with no choice but to find that he was a trespasser to whom the defendant owed a duty only to refrain from intentionally or recklessly injuring the plaintiff. I agree with the plaintiff.

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“A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor’s consent” (Internal quotation marks omitted.) *Laube v. Stevenson*, 137 Conn. 469, 473, 78 A.2d 693 (1951), quoting 2 Restatement (First), Torts § 330 (1934). Although such consent may be given by invitation—i.e., “conduct [that] justifies others in believing that the possessor *desires* them to enter the land”; (emphasis added) 2 Restatement (Second), Torts § 332, comment (b) (1965); mere “permission”—i.e., “conduct justifying others in believing that the possessor is *willing* that they shall enter if they desire to do so”; (emphasis added) *id.*; will suffice. See *Corcoran v. Jacovino*, 161 Conn. 462, 466, 290 A.2d 225 (1971) (“[m]ere permission, as distinguished from invitation, is sufficient to make [a] visitor a licensee”). As the majority correctly acknowledges, the great weight of authority indicates that such invitation or permission may be given either expressly or implicitly.

In the present case, there was no evidence adduced at trial of the defendant’s having explicitly or implicitly expressed a desire that the plaintiff enter its campus, nor was there any evidence of the defendant’s having explicitly expressed a willingness that the plaintiff enter. Accordingly, I agree with the majority that the jury reasonably could not have found the plaintiff to be a licensee by virtue of any express or implied invitation or by an express grant of permission. I disagree, however, that there was insufficient evidence to support a finding that the defendant had tacitly permitted the plaintiff to enter the campus.

As the majority notes, our appellate case law provides little insight as to the proof necessary to establish licensee status by implied permission. I therefore agree that, in such circumstances, it is appropriate to look to the Restatement for guidance. The commentary to § 330 of the Restatement (First) of Torts provides that, “[a]s

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in all cases in which one person's consent is important as affecting the legal relations between him and another, it is the *manifestation* of consent which is decisive and not the state of mind which the possessor intended to express." (Emphasis added.) 2 Restatement (First), supra, comment (c), p. 894. In other words, "the decisive factor is the interpretation which a *reasonable man* would put upon the possessor's acts"; (emphasis added) id., comment (d), p. 894; not the possessor's unexpressed intentions or policies.

"In determining whether a particular course of action is sufficient to manifest a consent to enter the land, regard must be had to all the surrounding circumstances." Id. For example, "[i]f a railway company prepares a paved or boarded path between the two platforms of its station, it may or may not give passengers reason to believe that the pathway is prepared for their use. If there is no other means of communication provided between the two platforms, a passenger may reasonably believe that the path is meant for his use. On the other hand, if there is an overhead bridge or a subway plainly visible, even though the pathway is not blocked by a fence or railing, the passenger might not be justified in regarding the path as prepared for him." Id., pp. 894–95.

"In determining this regard is to be had to customs prevailing in the community. The well-established usages of a civilized . . . community entitle everyone to assume that a possessor of land is willing to permit them to enter for certain purposes until a particular possessor expresses unwillingness to admit them. . . . [For instance] if there be a local custom for possessors of land to permit others to enter it for particular purposes, residents in that locality and others knowing of the custom are justified in regarding a particular possessor as conversant with it and, therefore, in construing his neglect to express his desire not to receive them as a sufficient manifestation of a willingness to

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admit them.”⁸ (Internal quotation marks omitted.) *Id.*, p. 895.

Applying these principles in the context of the case at hand, it is plain that there was sufficient evidence adduced at trial to reasonably support a finding that the plaintiff had been a licensee by virtue of the defendant’s implied permission. As noted, at the time in question, the Sherman Avenue entrance to the campus was not gated, and there were no “no trespassing” signs posted at the campus entrance or any signs signifying that presence on the campus was restricted in any manner or to any category of individuals. Although one of the roads leading to the dormitories at the top of the campus was guarded by a guardhouse, the other route to the top of the campus taken by the plaintiff was not guarded, and the lane use arrows on the access road from Sherman Avenue suggested that entrants could utilize this other route rather than the guarded road. Additionally, there was no evidence of any signs along the route taken by the plaintiff restricting access to the top of the campus to certain categories of people. Moreover, Melendez’ testimony that he took no action to limit or even question the plaintiff upon seeing him turn right at the intersection, or to seek assistance from the other safety officer on duty elsewhere on the campus, supports the conclusion that the plaintiff’s presence on the campus was permitted. Finally, given the plaintiff’s testimony that he had taken the same route to the top of the campus the previous year without any interference from the defendant’s agents, the jury reasonably could have concluded that the prevailing custom on the campus was to permit individuals not

⁸ “[W]here it is local custom for possessors of land to permit others to enter their land for particular purposes, it is immaterial that the particular person entering is not a member of the local community, or, if a member of the local community, is ignorant of the custom.” 2 Restatement (First), *supra*, § 330, comment (e), p. 896.

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associated with the defendant to enter the campus and to ride, without restriction or interference, to the top of the campus to enjoy the vista it affords.⁹ Given this evidence, I have little difficulty in concluding that a properly instructed jury could have determined that a reasonable person in the plaintiff's position justifiably would have inferred from the surrounding circumstances that the defendant was willing to allow the plaintiff to enter the campus and to proceed along the route he took leading past the wind farm to the top of the campus.

The majority's conclusion to the contrary is, in my view, flawed. Preliminarily, I note that the majority appears to accept that, *in some circumstances*, the lack of gates and "no trespassing" signs, without more, may be sufficient to establish implied permission. See 2 Restatement (First), *supra*, § 330, comment (b), p. 893 ("[a] mere failure to object to another's entry may be a sufficient manifestation of consent thereto if the possessor knows of the other's intention to enter and has reason to believe that his objection is likely to be effective in preventing the other from entering").¹⁰ Thus,

⁹ The majority asserts that there is no evidence in the record to indicate that the defendant had been aware of the plaintiff's presence when he rode through the campus the previous year. The majority is mistaken. Although there was no direct evidence of the defendant's awareness, Melendez, the public safety officer on duty at the time the plaintiff was injured, testified at trial that he had been able to see the plaintiff riding up the road toward the wind farm, and Barbara Barbuito, the assistant director of facilities for the campus, testified that the guardhouse is staffed at all times by public safety officers. Given this claim of constant surveillance, the jury reasonably could have inferred from this evidence that, in general, any bicyclist traveling up the road toward the wind farm would have been observed by whoever was then on duty at the guardhouse on this date or at any earlier time.

¹⁰ This is not inconsistent with the observation in comment (b) to § 330 of the Restatement (First) of Torts that "[e]ven a failure to post a notice warning the public not to trespass cannot reasonably be construed as an expression of consent to the intrusions of persons *who habitually and notoriously disregard such notices*." (Emphasis added.) 2 Restatement (First), *supra*, § 330, comment (b), p. 894. The clear implication of this statement is that, in cases involving an entrant who does not habitually and

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the majority's position appears to be that there are additional circumstances in the present case that render the lack of such signs and gates insufficient to establish the plaintiff's status as a licensee. Although the majority does not state explicitly what these additional circumstances are, it appears to rely heavily, if not exclusively, on the fact that the plaintiff did not stop at the guardhouse that straddled the road leading directly to the dormitories at the top of the campus and, instead, took the route to the top of the campus that leads past the wind farm. Ostensibly, the majority interprets the presence of the guardhouse as a manifestation of the defendant's unwillingness to permit persons who are not affiliated with the defendant and have not checked in at the guardhouse to enter into the top of the campus. I respectfully disagree with this interpretation.

Although there was a sign posted on the front of the guardhouse stating that "all vehicles must stop and be registered," there were no signs stating that people coming into the campus by other means—for example, by foot or on bicycle—must also check in at the guardhouse before going to the top of the campus. Nor were there any signs requiring that entrants to the top of the campus utilize the guardhouse road rather than the road that leads past the wind farm. Given these circumstances, a reasonable person in the plaintiff's position may well have concluded that the only apparent purpose of the guardhouse was to limit vehicular access to the road that it guarded and that the presence of the guardhouse therefore had no bearing on the defendant's willingness to allow individuals without vehicles to proceed along the route traveled by the plaintiff to the top of the campus.¹¹

notoriously disregard "no trespassing" signs, the absence of such signs may be a sufficient manifestation of consent to the entry.

¹¹ The majority contends that there is nothing in the record to support the conclusion that the "only apparent purpose of the guardhouse was to limit vehicular access" to the dormitory portion of the campus. For this contention, the majority relies on testimony from Melendez and Barbara

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I also respectfully disagree with the majority's speculative assertion that, if this court were to conclude that the plaintiff in this case was a licensee, it essentially would require much, if not all, private property to be fenced, gated, and covered with "no trespassing" signs in order to avoid conferring licensee status on mere trespassers.¹² As previously noted, whether an entrant constitutes a licensee is a *fact specific* inquiry that requires due consideration of *all of the surrounding circumstances*. See 2 Restatement (First), *supra*, § 330, comment (c). Thus, my conclusion that the lack of "no trespassing" signs and gates was sufficient to warrant a licensee instruction under the particular factual circumstances of the present case cannot reasonably be construed as an indication that, in all premises liability cases, the lack of such signs and gates renders an entrant a licensee as a matter of law.

In sum, I conclude that the trial court erred in refusing to instruct the jury on the definition of and the

Barbuito regarding their respective understandings of the purpose of the guardhouse, as well as testimony about a "verbal policy" regarding the entry of individuals onto the campus who are not affiliated with the defendant. See footnote 3 of the majority opinion. This reliance is misplaced. As previously noted, the decisive factor in determining the issue of a possessor's consent is the interpretation that a reasonable person would put upon the possessor's acts, not the possessor's unexpressed intentions or policies. In the present case, there is no evidence in the record to suggest that the views and policies expressed in Melendez' and Barbuito's testimony were made manifest. Consequently, this testimony is not relevant to the question of how a reasonable person in the plaintiff's position would have interpreted the surrounding circumstances.

¹² In making this assertion, I believe that the majority conflates the notion of notice with prevention. The turning point on whether an entrant is welcomed or is a trespasser is whether the entrant has fair notice. That can be provided, simply, with signs placed at the campus entrances. For example, in the case at hand, a sign stating the following would make clear that the campus is not generally open to the public: "The campus grounds are for the use of the Quinnipiac University community and invited guests. The public is welcomed to the campus only for events open to the public." If there had been such a sign at the Sherman Avenue entrance to the campus, it is likely that this case and the underlying injuries that befell the plaintiff would not have occurred.

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duties owed to licensees. As the majority correctly notes, however, “before a party is entitled to a new trial [due to an error in the trial court’s jury instructions] . . . he or she has the burden of demonstrating that the error was harmful.” (Internal quotation marks omitted.) *MacDermid, Inc. v. Leonetti*, 328 Conn. 726, 749, 183 A.3d 611 (2018). In the present case, the plaintiff argues, in essence, that the court’s refusal to provide the requested licensee instruction was harmful because “[i]t was tantamount to directing a verdict for the defendant” I agree.

The record reveals that there was no evidence presented at trial to indicate that the defendant had intentionally injured the plaintiff or that it had engaged in wilful, wanton, or reckless conduct so as to make it liable for injuries to a trespasser. See *Maffucci v. Royal Park Ltd. Partnership*, 243 Conn. 552, 558, 707 A.2d 15 (1998) (“a possessor of land is under no duty to keep his or her land reasonably safe for an adult trespasser, but has the duty only to refrain from causing injury to a trespasser intentionally, or by willful, wanton or reckless conduct” [footnote omitted; internal quotation marks omitted]). Consequently, the trial court, by improperly instructing the jury only with respect to the duties owed to trespassers, effectively directed a verdict in the defendant’s favor.¹³ In my view, this necessarily harmed the plaintiff because it deprived him of

¹³ In my view, at the close of evidence, the court had two choices. If the court perceived that the evidence as to the plaintiff’s status was controverted because of any ambiguity in the testimony of Melendez as to the scope of his duties, it could have instructed the jury that it was its task, as the fact finder, to determine whether the plaintiff was a trespasser or a licensee. If the court had made this choice, it would then have been appropriate for the court to provide the jury with detailed instructions on the definitions of “licensee” and “trespasser” with corresponding instructions on the duties owed by a possessor of land to a licensee and to a trespasser as requested by the plaintiff.

If, on the other hand, the court determined that the facts were not in dispute, it could have made a determination of the plaintiff’s status as a matter of law. The court in the present case chose the latter course and

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a fair opportunity to have the jury carry out its constitutional fact-finding function and determine his claims on the basis of correct legal principles.¹⁴ See *Tryon v. North Branford*, 58 Conn. App. 702, 716, 755 A.2d 317 (2000) (whether there was breach of duty of care is question of fact to be decided by jury after considering credibility and weight to be accorded evidence). I respectfully disagree with the majority's conclusion to the contrary.

The majority also asserts that there was insufficient evidence presented at trial to support a finding that the defendant breached any duty owed to the plaintiff as a licensee and that, therefore, any error in failing to provide the requested licensee instruction was harmless. As the majority correctly notes, a land possessor who actually or constructively knows of a licensee's presence on the premises must use reasonable care to warn the licensee of dangerous conditions on the land that the possessor knows of but that the possessor cannot reasonably assume the licensee knows of or by reasonable use of his or her faculties would observe. See *Morin v. Bell Court Condominium Assn., Inc.*, 223

concluded as a matter of law that the plaintiff had been a trespasser. For the reasons already noted, however, I believe that this determination was both erroneous and fatal to the plaintiff's opportunity to have his claim fairly adjudicated by the jury.

¹⁴ Contrary to the majority's suggestion, the harmfulness of the trial court's error is not ameliorated by the fact that the court also instructed the jury regarding the duty owed to a constant trespasser. See footnote 11 of the majority opinion. The duty owed to a constant trespasser only arises when "[a] possessor of land . . . knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof . . ." (Internal quotation marks omitted.) *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 333, 612 A.2d 1197 (1992). The majority does not dispute that there was no evidence adduced at trial that trespassers constantly intrude into the top of the campus. Therefore, to the extent that the majority implies that the court's constant trespasser instruction in some way negates the harm caused by the court's failure to instruct the jury with regard to the definition of and duties owed to a licensee, I respectfully disagree.

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Conn. 323, 327, 612 A.2d 1197 (1992). The majority notes that speed bumps in general are a known hazard to bicyclists and that the particular speed bump at issue in the present case was plainly visible to the plaintiff. Accordingly, it concludes that the plaintiff knew or had reason to know of the speed bump and the risk involved in riding his bicycle over it.

Respectfully, I believe this conclusion to be premised on a fundamental misunderstanding of the nature of the plaintiff's claim.¹⁵ The majority construes the plaintiff's claim to be that the defendant's premises were in a dangerous condition by virtue of the mere existence of the speed bump. The plaintiff made no such claim. Rather, the plaintiff alleged in his complaint, and offered evidence at trial to prove, that the *improper manner* in which the speed bump was *constructed* rendered the premises dangerous. Specifically, he claimed that the speed bump was defective in that "the height of the downhill side of the . . . speed bump was [five] inches above grade, whereas the uphill height of the speed bump was [one and five-eighths] inches above grade; the speed bump profile was not uniform; the transition from [the] speed bump to [the] roadway surface was not smooth; [and] the speed bump, with its downhill height of [five] inches, was unreasonably high for a road with a 10 [percent] downhill grade." Given the

¹⁵ Moreover, in asserting that the court's instruction, even if erroneous, caused the plaintiff no harm, the majority takes up an issue not raised or briefed by the appellee. As has been well established by our Supreme Court, it is improper for this court, on review, to decide a case on a basis not raised or briefed by a party on appeal. See *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 156 n.24, 84 A.3d 840 (2014) ("[W]e have long held that, in the absence of a question relating to subject matter jurisdiction, the [reviewing] [c]ourt may not reach out and decide a case before it on a basis that the parties never have raised or briefed. . . . To do otherwise would [unfairly] deprive the parties of an opportunity to present arguments regarding those issues." [Internal quotation marks omitted.]).

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technical nature of these alleged defects, the jury reasonably could have concluded that they would not have been obvious to the plaintiff, even if the speed bump itself was plainly visible to him as he was riding down the hill. Moreover, although there was no evidence presented that the defendant had actual knowledge of the defective condition of the speed bump, the around-the-clock presence of a safety officer at the guardhouse, which is adjacent to the speedbump, is sufficient, in my view, to charge the defendant with such knowledge.

In sum, I conclude that the trial court's refusal to give the plaintiff's requested licensee instruction and its decision to instruct only on the duties owed by a possessor of land to a trespasser constitutes reversible error. Because this error left the jury with no "untainted" route to the verdict, I do not find the general verdict rule applicable in the present case. See *Cavaliere v. Olmsted*, 98 Conn. App. 343, 347–48, 909 A.2d 52 (2006) (holding that general verdict rule did not apply because, even if this court assumed that jury rejected plaintiff's allegations of negligence *and* found him contributorily negligent, *both* of those determinations were undermined by trial court's failure to instruct jury regarding proper standard of care, and, therefore, there was no "untainted route" to verdict); *Monterose v. Cross*, 60 Conn. App. 655, 661, 760 A.2d 1013 (2000) (same).

Because I would reverse the judgment of the trial court on the basis of the instructional error, the plaintiff's claim of evidentiary error—that the trial court improperly admitted Melendez' testimony regarding his estimation of the plaintiff's speed—need not be addressed. Nevertheless, because the issue could arise on retrial, I briefly address it.

The following standard of review and legal principles are relevant to the resolution of this claim. "Our standard of review regarding challenges to a trial court's

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evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the [plaintiff] of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [plaintiff] must also establish that the ruling was harmful and likely to affect the result of the trial.” (Internal quotation marks omitted.) *Bank of New York v. Savvidis*, 174 Conn. App. 843, 849, 165 A.3d 1266 (2017).

Pursuant to § 7-1 of the Connecticut Code of Evidence, “[i]f a witness is not testifying as an expert, the witness may not testify in the form of an opinion, *unless the opinion is rationally based on the perception of the witness* and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.” (Emphasis added.) Thus, although our Supreme Court has stated that “lay witnesses are competent to offer opinions on such matters as the speed of an automobile . . . *they may only testify on the basis of observed facts.*” (Citation omitted; emphasis added.) *Acampora v. Asselin*, 179 Conn. 425, 427, 426 A.2d 797 (1980).

Here, it is undisputed that Melendez had not seen the plaintiff riding down the hill toward the guardhouse; he had only observed the plaintiff at the moment his bicycle hit the second speed bump. Consequently, Melendez’ opinion that the plaintiff had been traveling at approximately ten miles per hour had no basis in “observed facts.” Indeed, his subsequent testimony makes clear that Melendez’ opinion was not based on his actual perception of *the plaintiff* but on his estimation of how fast a *hypothetical person* traveling down the hill would have been going: “[I]f you were asking me if I knew how fast [the plaintiff] was going down that hill, I can’t tell you that I saw him go down the hill. But because I work there, I know the incline of that hill, how steep it is. I could tell you approximately

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how fast *somebody* would be able to go down that hill on a bicycle.” (Emphasis added.) Thus, the trial court erred in admitting Melendez’ opinion testimony. Although it is unlikely that this error affected the result of the trial in light of Juliano’s expert opinion testimony that the plaintiff had been traveling at approximately 9.8 miles per hour, this error should not be repeated in the event of a retrial.

In sum, I would reverse the judgment of the trial court and remand the case for a new trial. Accordingly, I respectfully dissent.
