PROFESSIONAL ELECTRICAL CONTRACTORS OF CONNECTICUT, INC. *v.* THE STAMFORD HOSPITAL ET AL.
(AC 41931)

Bright, Moll and Bear, Js.

Syllabus

The plaintiff, a second tier subcontractor, sought to recover damages from the defendants H Co., a hospital, S Co., a general contractor, and E Co., a subcontractor, for, inter alia, quantum meruit or unjust enrichment, and to collect on a bond issued by the defendant F Co. posted pursuant to statute (§ 49-37), in connection with a dispute arising from a project relating to the expansion and renovation of H Co. Following the trial court's granting of motions for summary judgment filed by F Co. and S Co., the plaintiff appealed to this court. *Held*:

1. The trial court erred in granting S Co.'s motion for summary judgment on the count of the complaint in which the plaintiff alleged that H Co., S Co. and E Co. were liable in quantum meruit or unjust enrichment; the plaintiff alleged that it performed services at the request of H Co., S Co. and E Co., and that H Co., S Co. and E Co. accepted and benefited from the plaintiff's work, and S Co. presented no evidence establishing that it paid E Co. or someone else for the plaintiff's specific services, and, thus, there existed a genuine issue of material fact with respect to the plaintiff's claim for quantum meruit or unjust enrichment.
2. The trial court erred in granting the motion for summary judgment filed by S Co. and F Co. on the count of the complaint in which the plaintiff sought to collect on the surety bond issued by F Co.: under Connecticut's mechanic's lien statutes (§§ 49-33 and 49-36), recovery was not barred to the second tier subcontractor plaintiff solely because the first tier subcontractor had been paid in full by S Co.; moreover, S Co. and F Co. could not prevail on their alternative ground for affirmance that the lienable fund had been exhausted by the costs of the project and that the plaintiff did not have a contract with H Co., S Co. or F Co.; there was a lienable fund still available in the amount still owed by H Co. to S Co. at the time the plaintiff gave statutory notice (§§ 49-34 and 49-35) of its lien to H Co., regardless of whether H Co. continued to make payments to the nondefaulted S Co., a construction of the applicable statutes that was supported by the legislative history.

Argued November 18, 2019—officially released March 17, 2020

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, where the

plaintiff withdrew the action as to the named defendant; thereafter, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, granted the motions for summary judgment filed by the defendant Skanska USA Building, Inc., et al., and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

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

Michael J. Donnelly, with whom was *Kevin W. Munn*, for the appellee (defendant Skanska USA Building, Inc.).

Charles I. Miller filed a brief for the appellee (defendant Fidelity and Deposit Company of Maryland).

Opinion

BRIGHT, J. The plaintiff, Professional Electrical Contractors of Connecticut, Inc., appeals from the summary judgment rendered by the trial court in favor of the defendants Fidelity and Deposit Company of Maryland (Fidelity)[1] and Skanska USA Building, Inc. (Skanska).[2] On appeal, the plaintiff claims that the court erred in rendering summary judgment on counts two and three of its complaint because there were genuine issues of material facts and neither defendant was entitled to judgment as a matter of law. Specifically, the plaintiff claims that (1) Skanska failed to prove that there existed no issues of material fact on the plaintiff's equitable claim of quantum meruit or unjust enrichment, and (2)

[1] The plaintiff withdrew the matter as to the named defendant, The Stamford Hospital. Fidelity is the surety that issued a bond in substitution for the mechanic's lien that the plaintiff had filed against the hospital. See General Statutes §§ 49-33 and 49-37.

[2] Semac Electrical Company, Inc. (Semac), also is a defendant in this matter. Although Semac initially had appeared by counsel in the trial court, the court, on December 12, 2017, granted counsel's motion for permission to withdraw its appearance. No further action appears to have been taken against Semac, who now is a nonappearing defendant, and the matter remains pending as to Semac in the trial court. For purposes of this appeal, we refer to Skanska and Fidelity as the defendants unless further clarification is necessary.

neither defendant established that it was entitled to judgment as a matter of law on the plaintiff's bond claim because the claim is viable pursuant to General Statutes §§ 49-33 and 49-36. We agree with the plaintiff on both claims. Accordingly, we reverse in part and affirm in part the judgment of the trial court.[3]

The following facts, which were uncontested for summary judgment purposes, and procedural history are relevant to our consideration of the issues on appeal. The plaintiff commenced this action by service of process on January 4, 2017. In its complaint, the plaintiff alleged, in count one, that Semac Electrical Company, Inc. (Semac), Skanska, and The Stamford Hospital (hospital) were in breach of contract on the basis of the following alleged facts: the hospital had entered into a contract with Skanska to provide construction services to the hospital (project); Skanska entered into a subcontract agreement with Semac for electrical work on the project; Semac entered into a second tier subcontract agreement with the plaintiff to perform electrical work on the project; on October 3, 2015, the plaintiff began to furnish materials and services for the project; the plaintiff furnished materials and services in accordance with the terms of its contract; the plaintiff has demanded payments in the amount of $38,509.07; and Semac, Skanska, and the hospital all have refused to pay the plaintiff for its materials and services in breach of contract.

In count two of its complaint, the plaintiff alleged that Semac, Skanska, and the hospital were liable under the theories of quantum meruit or unjust enrichment. In addition to the facts alleged in count one, which the plaintiff incorporated into count two, the plaintiff also alleged that it performed services and incurred

[3] The court also rendered summary judgment in favor of Skanska as to count one of the plaintiff's complaint, which alleged that Skanska had breached a contract with the plaintiff. The plaintiff does not challenge that judgment in this appeal. Thus, we affirm the judgment in favor of Skanska as to count one.

costs at the request of Semac, Skanska, and the hospital; its services were worth at least $38,509.07; Semac, Skanska, and the hospital accepted and benefited from the plaintiff's work; the plaintiff requested payment for the reasonable value of the services it rendered; Semac, Skanska, and the hospital have refused to pay the plaintiff; and Semac, Skanska, and the hospital have been unjustly enriched.

In the third count of its complaint, the plaintiff sought to collect on the bond pursuant to General Statutes § 49-37. Specifically, it alleged in count three that Skanska submitted a bond in the amount of $38,509.07 in substitution for the mechanic's lien that had been filed against the hospital in the original amount of $42,359.97; on January 27, 2016, Fidelity issued the surety bond in the amount of $42,359.97; Skanska has failed to pay the plaintiff, despite repeated demands for the sum of $38,509.07; and Fidelity has refused to pay the plaintiff on the bond.

Fidelity filed an answer and set forth a special defense in which it alleged that the lienable fund had been exhausted by the costs of the project, and that the plaintiff did not have a contract with the hospital, Skanska, or Fidelity. Skanska also filed an answer in which it, inter alia, denied having any type of contract with the plaintiff, and it left the plaintiff to its proof on other allegations set forth in the complaint. Skanska did not file a special defense.

On March 29, 2018, Skanska filed a motion for summary judgment on the plaintiff's complaint. In its motion, Skanska argued that it was entitled to judgment as a matter of law because (1) there was no lienable fund available because all funds had been exhausted in completing the project, (2) there existed no contract between it and the plaintiff, and (3) its payment to Semac, the party with whom the plaintiff had contracted, barred the plaintiff's claims for quantum meruit

or unjust enrichment. In support of its motion for summary judgment, Skanska submitted the affidavit of Michael J. Smerglio, the executive director of facilities management for the hospital. Smerglio averred that the hospital and Skanska had entered into a contract for the construction and renovation of the hospital, which required Skanska to act as the construction manager for the project. He also averred that Skanska would send the hospital periodic requests for payment on the basis of the work that had been completed, and that the hospital would produce the payments after making any necessary adjustments. Further, he averred that the hospital and Skanska had entered into a series of change orders that expanded and refined the work to be done on the project, which then adjusted the final contract price to a maximum price of $284,091,867. Smerglio acknowledged that the plaintiff served the hospital with a notice of mechanic's lien on January 13, 2016, and that, as of that date, the hospital had paid to Skanska the sum of $216,637,556.56 on the project, and that it had not paid any other entity for work done on the project. Smerglio additionally averred that, after January 13, 2016, the hospital paid Skanska an additional $67,354,375.44 for work on the project, for a total of $283,991,932, with the remaining $99,935 held as retainage, pending completion of some punch list items. Smerglio also declared that Skanska had not been in default on its contract with the hospital. Appended to Smerglio's affidavit were several exhibits, the first of which provided that the original amount of the contract between the hospital and Skanska, before the series change orders, was $267,706,729.

Skanska also submitted the affidavit of Mark Miller, its senior vice president and the director for the project. Miller averred in relevant part that in October, 2015, Semac breached its subcontract with Skanska and abandoned the project, requiring Skanska to hire replacement subcontractors to complete the work at

an increased cost, which was borne by Skanska and not by the hospital. Miller further attested that there never was a contract between Skanska and the plaintiff, the hospital and the plaintiff, or Fidelity and the plaintiff in relation to the project, and that the plaintiff was a second tier subcontractor on the project.

On April 2, 2018, Fidelity filed a motion for summary judgment, specifically joining Skanska's motion and memorandum as to count three of the plaintiff's complaint, which is the bond claim.

The plaintiff filed an opposition to the motions for summary judgment, arguing that there were genuine issues of material fact that prohibited the granting of the motions for summary judgment and that there was no merit to the motions as to the bond claim because it is uncontested that the lienable fund was not exhausted at the time the plaintiff filed its mechanic's lien. No affidavits or other evidence were attached to the plaintiff's memorandum in opposition.

On July 11, 2018, the court rendered summary judgment in favor of the defendants, concluding that there were no genuine issues of material fact and that the defendants were entitled to judgment as a matter of law. As to the plaintiff's claim for breach of contract, the court stated that the plaintiff had conceded that it did not have a contract with Skanska and, therefore, that count one of the complaint was not viable as to Skanska. As to the plaintiff's claim for quantum meruit or unjust enrichment, set forth in count two of the complaint, the court, referencing and taking judicial notice of the related case of *Semac Electric Co.* v. *Skanska USA Building, Inc.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-15-6076107-S (August 23, 2017), aff'd, 195 Conn. App. 695, A.3d (2020) (*Semac*), pointed out that "[t]he record in *Semac* [was] silent on whether Skanska dealt with the plaintiff prior to Semac's breach, directed

the plaintiff's performance and knowingly accepted its services, or represented that Skanska [would] compensate the plaintiff for work done." Nonetheless, the court concluded that judgment was appropriate on this count of the plaintiff's complaint because it concluded that there was no evidence of an implied contract between Skanska and the plaintiff.

As to the bond claim, the court concluded that the defendants' argument that the lienable fund had been exhausted was not compelling, but, relying on *Brian's Floor Covering Supplies, LLC* v. *Spring Meadow Elderly Apartments*, Superior Court, judicial district of Fairfield, Docket No. CV-00-0375810-S (March 22, 2006), concluded that Skanska already had paid Semac for the plaintiff's work, and, therefore, the plaintiff could not recover under the bond. The court, thereafter, rendered judgment in favor of the defendants. This appeal followed.

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met

its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 405–406, 848 A.2d 1165 (2004).

I

The plaintiff claims that the court erred in rendering summary judgment on count two of its complaint because Skanska failed to prove that there exists no issue of material fact on the equitable claim of quantum meruit or unjust enrichment. The plaintiff argues that it sufficiently alleged in its complaint that Skanska knew of and accepted the plaintiff's work, and that this allegation, which has not been rebutted sufficiently by the defendants' evidence, alone demonstrates the existence of an issue of material fact as to whether there was an implied contract between the plaintiff and Skanska, which would support count two of its complaint sounding in the theories of quantum meruit and unjust enrichment. The plaintiff also argues that the issue of whether Skanska paid Semac in full for the work done by the plaintiff has no bearing on its claims for quantum meruit or unjust enrichment because Semac did not pay the plaintiff, and Skanska accepted the benefit of the plaintiff's work. Skanska argues that the plaintiff's claim sounds only in unjust enrichment, not in quantum meruit, which the plaintiff disputes vigorously in its reply brief. On the merits of the plaintiff's claim, Skanska argues that, because it paid Semac for the work

done by the plaintiff, the plaintiff cannot recover from Skanska but must seek its recovery from Semac. We agree with the plaintiff.

"Quantum meruit and unjust enrichment are noncontractual means of recovery in restitution. Quantum meruit is a theory of recovery permitting restitution in the context of an otherwise unenforceable contract. In contrast, recovery under a theory of unjust enrichment applies in the absence of a quasi-contractual relationship. . . . Because both doctrines are restitutionary, the same equitable considerations apply to cases under either theory. The terms of an unenforceable contract will often be the best evidence for restitution of the reasonable value of services rendered in quantum meruit, although sometimes the equities may call for a more restrictive measure. . . . [Our Supreme Court] has used quantum meruit and unjust enrichment interchangeably, or as equivalent terms for recovery in restitution." (Citations omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 587 n.9, 57 A.3d 730 (2012).

"Quantum meruit is a theory of contract recovery that does not depend upon the existence of a contract, either express or implied in fact. . . . Rather, quantum meruit arises out of the need to avoid unjust enrichment to a party, even in the absence of an actual agreement. . . . Quantum meruit literally means as much as he has deserved . . . . Centered on the prevention of injustice, quantum meruit strikes the appropriate balance by evaluating the equities and guaranteeing that the party who has rendered services receives a reasonable sum for those services. Unjust enrichment applies whenever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract . . . . Indeed, lack of a remedy under the contract is a precondition for recovery based upon unjust enrichment. Not unlike quantum meruit, it is a doctrine based on the postulate that it is contrary to equity and fairness for

a defendant to retain a benefit at the expense of the plaintiff." (Citations omitted; internal quotation marks omitted.) *Gagne* v. *Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001).

"[A] right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . .

"Unjust enrichment is a very broad and flexible equitable doctrine that has as its basis the principle that it is contrary to equity and good conscience for a defendant to retain a benefit that has come to him at the expense of the plaintiff. . . . The doctrine's three basic requirements are that (1) the defendant was benefited, (2) the defendant unjustly failed to pay the plaintiff for the benefits, and (3) the failure of payment was to the plaintiff's detriment. . . . All the facts of each case must be examined to determine whether the circumstances render it just or unjust, equitable or inequitable, conscionable or unconscionable, to apply the doctrine." (Citations omitted; internal quotation marks omitted.) Id., 408–409.

In the present case, in count two of its complaint, the plaintiff alleges that Skanska is liable to it under the theories of quantum meruit or unjust enrichment. Specifically, the plaintiff alleges in count two that Skanska entered into a contract with the hospital to provide construction services on the project; Skanska entered into a subcontract agreement with Semac to perform electrical work on the project; Semac entered into a

second tier subcontract agreement with the plaintiff to perform electrical work on the project; the plaintiff, on October 3, 2015, began to furnish materials and services for the project; *the plaintiff performed services and incurred costs at the request of Skanska*; *Skanska accepted and benefited from the plaintiff's work; the plaintiff demanded payment in the amount of $38,509.07 for its services from Skanska*; *and Skanska refused to pay the plaintiff.*

In its motion for summary judgment as to count two of the plaintiff's complaint, Skanska argued that, because it had paid Semac, the party with whom the plaintiff had a written contract, the plaintiff's claims against Skanska were barred. In support of its motion for summary judgment, Skanska relied on the affidavit of Miller and the court's decision in the *Semac* case.

Miller averred in relevant part that in October, 2015, Semac breached its subcontract with Skanska and abandoned the project, requiring Skanska to hire replacement subcontractors to complete the electrical work at an increased cost, which was borne by Skanska and not by the hospital. Miller further attested that the plaintiff was a second tier subcontractor on the project, and that there existed no contract between Skanska and the plaintiff. In the *Semac* case, the court held that Semac had overbilled Skanska, and it rendered judgment in favor of Skanska and against Semac in the amount of $4,262,390.56. *Semac Electrical Co.* v. *Skanska USA Building, Inc.*, supra, Superior Court Docket No. X07-CV-15-6076107-S. Skanska argues that because it is undisputed that it paid Semac and replacement contractors more than the amount it contractually was required to pay Semac, as a matter of law, it cannot have been unjustly enriched by not paying the plaintiff for any work it performed. We are not persuaded.

The Miller affidavit and the court's decision in the *Semac* case do not speak to the plaintiff's allegations in count two that it began working on the project on

October 3, 2015, that it obtained materials and provided services in the amount of $38,509.07 for the project, that it completed its work, that *Skanska accepted and benefited from the plaintiff's work*, that the plaintiff performed services and incurred costs *at the request of Skanska and that Skanska has never paid for the plaintiff's work*.[4] The trial court, in its decision in the *Semac* case, calculated damages due to Skanska based on the court's analysis of the percentage of work completed by Semac compared to how much Semac was paid. Id. The trial court in that case made no finding that Semac had been paid for the work performed by the plaintiff. The lack of such a finding is particularly significant because the court specifically found that Semac had been compensated for the work performed by two other subcontractors. Additionally, as the trial court in the present case stated, it also is unknown whether Skanska "dealt with the plaintiff prior to Semac's breach, directed the plaintiff's performance and knowingly accepted its services, or represented that [it would] compensate the plaintiff for work done."

The fact that Skanska paid replacement electrical contractors more than it was contractually obligated to pay Semac, as averred to by Miller, or overpaid Semac, as found by the trial court in the *Semac* case, says nothing about whether Skanska ever paid Semac or anyone else for the work performed by the plaintiff. Without evidence to the contrary, it is entirely possible that the additional costs incurred by Skanska for electrical work were unrelated to the work performed by the plaintiff. If that is the case, then Skanska was unjustly enriched because it received the benefit of the plaintiff's

[4] Although Skanska had alleged in its answer that it fully had paid Semac for the plaintiff's work, Miller made no such attestation in his affidavit. In fact, he averred that "[t]he total amount paid to the replacement electrical contractors exceeded *the remaining amount* of the original subcontract with Semac." (Emphasis added.)

work without ever paying anyone for it. The court was not in a position to resolve this issue on summary judgment because Skanska failed to present evidence establishing that there was no genuine issue of material fact that it had paid Semac or someone else for the plaintiff's specific services.

The cases relied on by Skanska are consistent with our analysis. In *Providence Electric Co.* v. *Sutton Place, Inc.*, 161 Conn. 242, 245–47, 287 A.2d 379 (1971), our Supreme Court held that the plaintiff subcontractor who had supplied appliances to the general contractor to be installed in apartments in the defendant owner's building could not prevail on a claim of unjust enrichment against the owner because the plaintiff failed to prove that the owner had not paid the general contractor for the appliances. Id. According to the court, "[i]n this case, the plaintiff has clearly demonstrated that [the owner] has derived a benefit: Electrical appliances were installed in its apartments. If, however, [the owner] paid [the general contractor] *for those appliances*, then the enrichment, in the absence of fraud, has not been unjust." (Emphasis added.) Id., 246. The question then is whether the owner, or in this case, Skanska, paid for the precise goods and/or services supplied by the subcontractor. In *Nation Electrical Contracting, LLC* v. *St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 74 A.3d 474 (2013), this court upheld the trial court's unjust enrichment award to the plaintiff subcontractor because there was sufficient evidence that the defendant owner had not paid the general contractor for the plaintiff's work even though the owner had "paid far in excess of the contract price to complete the project." Id., 818–19. Consequently, Skanska was entitled to summary judgment only if it submitted evidence sufficient to establish that there was no genuine issue of material fact that it paid for the specific work performed by the plaintiff. It failed to do so.

It is the movant's burden at the summary judgment stage to prove that there exists no disputed issue of material fact and that it is entitled to judgment as a matter of law. See, e.g., *Allstate Ins. Co.* v. *Barron*, supra, 269 Conn. 405. The absence of any evidence to refute the plaintiff's allegations that it performed services at the request of Skanska, and that Skanska accepted and benefited from the plaintiff's work because it never paid for that work, creates genuine issues of material fact with respect to the plaintiff's claim for quantum meruit or unjust enrichment.[5] Neither Miller's affidavit nor the court's decision in the *Semac* case, submitted by Skanska in support of its motion for summary judgment on count two of the plaintiff's complaint, addresses these material allegations. Accordingly, the court erred in granting Skanska's motion for summary judgment on count two of the plaintiff's complaint.

II

The plaintiff next claims that the court erred as a matter of law in rendering summary judgment on count three of its complaint. Specifically, the plaintiff argues that its bond claim is viable under a proper reading of our mechanic's lien statutes, including §§ 49-33, 49-36, and 49-37.[6] The defendants argue that the court properly granted the motion for summary judgment on

[5] Because we conclude that there is a genuine issue of material fact as to whether Skanska ever paid for the plaintiff's services, we need not address whether the plaintiff could prevail on its claim in the event that Skanska fully had paid Semac for the plaintiff's work, if the plaintiff proves that Skanska, despite such payment, had requested that the plaintiff continue performing work on the project. We also need not determine whether there are additional issues of material fact that rendered summary judgment inappropriate.

[6] General Statutes § 49-33 provides in relevant part: "(a) If any person has a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenances or in the improvement of any lot or in the site development or subdivision of any plot of land, and the claim is by virtue of an agreement with or by consent of the owner of the land upon which the building is being erected or has been erected or has been moved, or by consent of the owner of the lot

the third count of the plaintiff's complaint, but for the wrong reason. Specifically, they argue that they were entitled to judgment as a matter of law on count three of the plaintiff's complaint because the lienable fund was exhausted in completing the project, and there

being improved or by consent of the owner of the plot of land being improved or subdivided, or of some person having authority from or rightfully acting for the owner in procuring the labor or materials, the building, with the land on which it stands or the lot or in the event that the materials were furnished or services were rendered in the site development or subdivision of any plot of land, then the plot of land, is subject to the payment of the claim. . . .

"(e) A mechanic's lien shall not attach to any such building or its appurtenances or to the land on which the same stands or to any lot or to any plot of land, in favor of any subcontractor to a greater extent in the whole than the amount which the owner has agreed to pay to any person through whom the subcontractor claims subject to the provisions of section 49-36.

"(f) Any such subcontractor shall be subrogated to the rights of the person through whom the subcontractor claims, except that the subcontractor shall have a mechanic's lien or right to claim a mechanic's lien in the event of any default by that person subject to the provisions of sections 49-34, 49-35 and 49-36, provided the total of such lien or liens shall not attach to any building or its appurtenances, or to the land on which the same stands or to any lot or to any plot of land, to a greater amount in the whole than the amount by which the contract price between the owner and the person through whom the subcontractor claims exceeds the reasonable cost, either estimated or actual, as the case may be, of satisfactory completion of the contract plus any damages resulting from such default for which that person might be held liable to the owner and all bona fide payments, as defined in section 49-36, made by the owner before receiving notice of such lien or liens. . . ."

General Statutes § 49-36 provides in relevant part: "(a) No mechanic's lien may attach to any building or its appurtenances, or to the land on which the same stands, or any lot, or any plot of land, in favor of any person, to a greater amount in the whole than the price which the owner agreed to pay for the building and its appurtenances or the development of any such lot, or the development of any such plot of land. . . .

"(c) In determining the amount to which any lien or liens may attach upon any land or building, or lot or plot of land, the owner of the land or building or lot or plot of land shall be allowed whatever payments he has made, in good faith, to the original contractor or contractors, before receiving notice of the lien or liens. No payments made in advance of the time stipulated in the original contract may be considered as made in good faith, unless notice of intention to make the payment has been given in writing to each person known to have furnished materials or rendered services at least five days before the payment is made."

General Statutes § 49-37 provides in relevant part: "(a) Whenever any mechanic's lien has been placed upon any real estate pursuant to sections 49-33, 49-34 and 49-35, the owner of that real estate, or any person interested in it, may make an application to any judge of the Superior Court that the lien be dissolved upon the substitution of a bond with surety, and the judge shall order reasonable notice to be given to the lienor of the application. . . ."

were no funds remaining to give to the plaintiff.[7] We agree with the plaintiff that its claim remains viable.

"Those who provide services or materials in connection with the construction of a building are entitled to claim a lien on the land that they have improved if they fall into one of two categories. Lienors are protected if they have a claim either (1) by virtue of an agreement with or the consent of the owner of the land, or (2) by the consent of some person having authority from or rightfully acting for such owner in procuring labor or materials. General Statutes § 49-33. Lienors in the second category must give timely notice of their intent to claim a lien in order to perfect their lien, while those in the first category need not give such notice. General Statutes § 49-35. Lienors in the second category include subcontractors and persons who furnish materials or services by virtue of a contract with the original contractor or with any subcontractor, that is to say at least first and second tier subcontractors. General Statutes § 49-35. No mechanic's lien may exceed the price which the owner has agreed to pay for the building being erected or improved, and the owner is entitled, furthermore, to credit for payments made in good faith to the original contractor *before receipt of notice of such a lien or liens*. General Statutes §§ 49-33 and 49-36. If the contract price which the owner agreed to pay the original contractor is insufficient to cover all the liens, *claimants other than the original contractor are to be paid first*, and, if necessary, on a pro rata basis. General Statutes § 49-36." (Emphasis added; footnote omitted.) *Seaman* v. *Climate Control Corp.*, 181 Conn. 592, 595–96, 436 A.2d 271 (1980)[8]; see also *ProBuild East, LLC*

[7] Pursuant to Practice Book § 63-4, Skanska and Fidelity submitted this argument as an alternative ground for affirmance.

[8] We note that the lien statutes referenced in *Seaman* v. *Climate Control Corp.*, supra, 181 Conn. 592, are from the 1979 revision of the General Statutes. Although several of those statutes have been amended by the legislature since our Supreme Court's decision in *Seaman*, those amendments have no bearing on the merits of this appeal.

v. *Poffenberger*, 136 Conn. App. 184, 191–92, 45 A.3d 654 (2012).

"General Statutes § 49-33 establishes a lien in favor of subcontractors by virtue of an agreement with or by consent of the owner of the land upon which the building is being erected . . . . It is well established that [i]t is not necessary to their lien status that [a subcontractor] have any direct contractual relationship either with the owner or with the general contractor . . . . All that is necessary is that the defendant consented to have a building erected on its property and that the lien was for materials or services provided in the erection of said building." (Citations omitted; internal quotation marks omitted.) *Connecticut Carpenters Benefit Funds* v. *Burkhard Hotel Partners II, LLC*, 83 Conn. App. 352, 362, 849 A.2d 922 (2004).

We first address the reasoning set forth by the trial court in rendering summary judgment on the bond claim. The court held that "because Skanska already paid Semac . . . it was not obligated to pay the plaintiff . . . ." But see footnote 4 of this opinion. We disagree with the premise of this holding. Our Supreme Court in *Seaman* v. *Climate Control Corp.*, supra, 181 Conn. 596–97, addressed this precise question and clearly held that, under our mechanic's lien statutes, recovery would not be barred to a second tier subcontractor solely because "the first tier subcontractor with whom they contracted has been paid in full by the general contractor." The trial court, therefore, erred in rendering summary judgment on this ground. We next consider the alternative ground for affirmance raised by the defendants on appeal.

We have examined all of the cases raised by the parties, as well as conducted our own examination of our appellate case law, and we have found nothing factually analogous with the present case. Accordingly, we must determine, as a matter of first impression, whether

a lienable fund is exhausted when, *after proper notice* that a subcontractor has filed a mechanic's lien on the property, the property owner continues to pay the general contractor for work on the project until the general contractor has been paid the full contract price. Guided by our General Statutes, relevant legislative history, and our relevant case law, we conclude that when the general contractor *is not in default*, unless there were payments made in bad faith, the lienable fund is the amount still owed by the property owner to the general contractor at the time the property owner receives notice of the lien pursuant to General Statutes § 49-34,[9] regardless of whether it continues to make payments to the nondefaulted general contractor. See General Statutes § 49-36 (c) (in determining amount of lienable fund, property owner allowed credit for whatever good faith payments it has made to general contractor *before it received notice of lien*); see generally General Statutes § 49-35 (regarding subcontractor's notice of intent);[10] *H & S Torrington Associates* v. *Lutz Engineering Co.*, 185 Conn. 549, 555, 441 A.2d 171

[9] General Statutes § 49-34 provides: "A mechanic's lien is not valid unless the person performing the services or furnishing the materials (1) within ninety days after he has ceased to do so, lodges with the town clerk of the town in which the building, lot or plot of land is situated a certificate in writing, which shall be recorded by the town clerk with deeds of land, (A) describing the premises, the amount claimed as a lien thereon, the name or names of the person against whom the lien is being filed and the date of the commencement of the performance of services or furnishing of materials, (B) stating that the amount claimed is justly due, as nearly as the same can be ascertained, and (C) subscribed and sworn to by the claimant, and (2) not later than thirty days after lodging the certificate, serves a true and attested copy of the certificate upon the owner of the building, lot or plot of land in the same manner as is provided for the service of the notice in section 49-35."

[10] General Statutes § 49-35 provides in relevant part: "(a) No person other than the original contractor . . . or a subcontractor whose contract with the original contractor is in writing and has been assented to in writing by the other party to the original contract, is entitled to claim any such mechanic's lien, unless, after commencing, and not later than ninety days after ceasing, to furnish materials or render services for such construction . . . such person gives written notice to the owner of the building, lot or plot

(1981) (subcontractor or materialman may give property owner § 49-35 notice of intent prior to recording mechanic's lien certificate or may give notice under §§ 49-34 and 49-35 with service of lien certificate; two separate notices not required).[11]

Although, as noted previously in this opinion, neither this court nor our Supreme Court has addressed the precise issue before us, certain decisions by our Supreme Court interpreting the relevant statutes at issue in this case inform our analysis. We start with our Supreme Court's decision in *Seaman*, a case quite similar in many respects to the present case, and one relied on by all parties on appeal. In *Seaman*, the plaintiff, who was the property owner, contracted with a general contractor to construct apartment style hous-

of land and to the original contractor that he or she has furnished or commenced to furnish materials, or rendered or commenced to render services, and intends to claim a lien therefor on the building, lot or plot of land; provided an original contractor shall not be entitled to such notice, unless, not later than fifteen days after commencing the construction . . . such original contractor lodges with the town clerk of the town in which the building, lot or plot of land is situated an affidavit in writing, which shall be recorded by the town clerk with deeds of land, (1) stating the name under which such original contractor conducts business, (2) stating the original contractor's business address, and (3) describing the building, lot or plot of land. . . .

"(b) No subcontractor, without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor, may be required to obtain an agreement with, or the consent of, the owner of the land, as provided in section 49-33, to enable him to claim a lien under this section."

[11] Our Supreme Court explained in *H & S Torrington Associates* that the enactment of the notice requirement set forth in § 49-34 "was intended to protect the due process rights of property owners who would not otherwise have actual notice of the recorded lien." *H & S Torrington Associates* v. *Lutz Engineering Co.*, supra, 185 Conn. 554. It also explained that the enactment of the notice requirement set forth in § 49-35 "was concerned with the protection of the owner of the property, who might not otherwise know what, if any, subcontractors the principal contractor had employed . . . *so that payments to the main contractor may be withheld* . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) Id. A subcontractor may satisfy simultaneously in one document the notice requirements of both §§ 49-34 and 49-35. Id., 555. "Two separate notices are not necessary to accomplish the purpose of the statutes." Id.

ing. *Seaman* v. *Climate Control Corp.*, supra, 181 Conn. 593. The general contractor then entered into a subcontract agreement for the installation of plumbing equipment on the project, and the subcontractor, thereafter, entered into two second tier subcontract agreements, one with a supplier and one with a servicer. Id., 593–94. The second tier subcontractors, who were the defendants in the case, had no contractual relationship with the plaintiff or the general contractor, and their work was not directed or controlled by either of them. Id., 594. The general contractor had paid the subcontractor nearly the full amount of its subcontract price when the subcontractor defaulted and walked off the job. Id., 594 and n.3. Although having been paid by the general contractor, the subcontractor had not paid the defendants. Id., 594–95. The defendants notified the property owner of their intention to file a mechanic's lien; at that time, the property owner still owed the general contractor $89,157, with an additional cost of $8005.91 to complete the work left unfinished by the defaulting subcontractor. Id., 594. The defendants each filed a mechanic's lien, one in the amount of $40,697.66 and the other in the amount of $7702, the total of which was "substantially less than the amount remaining due . . . to the general contractor . . . ." Id., 595. The parties thereafter stipulated that the $7702 amount should be $6526. Id. Unlike the hospital in the present case, the property owner in *Seaman* did not pay the general contractor the outstanding balance he owed, but, rather, he retained that money after receiving notice of the liens. Id., 596.

Our Supreme Court explained in *Seaman*: "The subcontractors, even though they are second tier rather than first tier subcontractors, are prima facie within the ambit of the mechanic's lien law. It is not necessary to their lien status that they have any direct contractual relationship either with the owner or with the general

contractor (denominated the original contractor in the statutes). They have concededly given timely notice to the owner, in proper form, of their liens. There is an identifiable fund which appropriate claims for mechanic's liens may reach, since the owner has retained an unpaid balance due under his contract with the general contractor that exceeds in amount the totality of the mechanic's lien claims." Id. Our Supreme Court then explained that the defendants, which were second tier subcontractors, were not barred from recovery on their liens simply because the first tier subcontractor, with whom they had contracted, had been paid in full by the general contractor. Id., 596–97.

Our Supreme Court then set forth its analysis of § 49-33: "In interpreting this section, the complexity of which should not be underestimated . . . we are guided by [well settled] principles of construction. Although the mechanic's lien law creates a statutory lien in derogation of the common law, its remedial purpose to furnish security for a contractor's labor and materials requires a generous construction. . . . Even bearing in mind the statute's beneficent purpose, we are, however, constrained by the language of the statute as we find it, and cannot rewrite the statute or adopt the reasoning of precedents in other jurisdictions with different statutes. . . .

"Two sentences in § 49-33 are central to the arguments of the parties. '[A] mechanic's lien shall [not] attach to any . . . building . . . in favor of any subcontractor to a greater extent in the whole than the amount which the owner has agreed to pay to any person through whom [the] subcontractor claims . . . . [General Statutes § 49-33 (e).] Any such subcontractor shall be subrogated to the rights of the person through whom such subcontractor claims . . . .' [General Statutes § 49-33 (f).] The plaintiff urges that the second sentence subrogates the second tier subcontractor to the rights of the first tier subcontractor while the defendants claim to be subrogated to the rights of

the general contractor. These disparate interpretations are crucial to this appeal, since the first tier subcontractor, having been fully paid, has no right to which anyone could be subrogated, while the general contractor, as yet partially unpaid, remains a suitable candidate for subrogation. The parties are at odds both about the significance of the exact wording of § 49-33 and about its relationship to our existing case law." (Citations omitted; footnote omitted.) Id., 597–99. The court explained that a second tier subcontractor is subrogated to the rights of the general contractor when the first tier subcontractor defaults after having been paid, leaving unpaid the second tier subcontractor. Id., 603–604. Our Supreme Court explained that it is significant that under our legislative scheme "all subcontractors are preferred to the general contractor if the lienable fund is inadequate to cover [all] outstanding claims."[12] Id., 605; see General Statutes § 49-36. When considering the plaintiff's argument in *Seaman* that the court's construction of § 49-33 would result in the "unjust enrichment of second tier subcontractors," our Supreme Court stated the following: "How the risk of defaulting first tier subcontractors should be allocated between

[12] The legislature's desire to protect the rights of subcontractors, further is demonstrated by the enactment of NO. 99-153 of the 1999 Public Acts (P.A. 99-153), codified at General Statutes § 42-158*l*. In § 4 of P.A. 99-153, the legislature "placed substantial restrictions on a party's right to include lien waivers in construction contracts." D. Rosengren, 13 Connecticut Practice Series: Construction Law (2005) § 6:8, p. 140. Furthermore, "it is well settled that the general contractor cannot bargain away the lien rights of subcontractors and materialmen who: (1) are not themselves privy to the general contractor's agreement containing the waiver; (2) do not agree with the general contractor to waive their lien right; or (3) do not adopt the lien waiver provision as incorporated in the contract between the general contractor and the owner." Id., pp. 141–42.

Subsection (a) of § 42-158*l* provides: "Any provision in a construction contract or any periodic lien waiver issued pursuant to a construction contract that purports to waive or release the right of a contractor, subcontractor or supplier engaged to perform services, perform labor or furnish materials under the construction contract to (1) claim a mechanic's lien, or (2) make a claim against a payment bond, for services, labor or materials which have not yet been performed and paid for shall be void and of no effect."

the owner and the general contractor is not an issue presently before us, although we observe that contractors generally are deemed to make a number of implied warranties, including the warranty that there are no outstanding liens. Cf. Uniform Commercial Code §§ 2-312 and 3-417, General Statutes §§ 42a-2-312 and 42a-3-417."[13] Id., 606.

[13] General Statutes § 42a-2-312 provides: "(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that (a) the title conveyed shall be good, and its transfer rightful; and (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

"(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

"(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications."

General Statutes § 42a-3-417, as amended by No. 91-304 of the 1991 Public Acts, provides: "(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that: (1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft; (2) the draft has not been altered; and (3) the warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

"(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

"(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized endorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the endorsement is

The significant difference between the facts in *Seaman* and the facts in the present case is that the property owner in *Seaman*, after he received notice of the second tier subcontractors' liens, retained the balance due to the nondefaulted general contractor, whereas, in the present case, the hospital, after it received notice of the plaintiff's lien, continued to make payments to the nondefaulted general contractor, Skanska. The defendants argue that, pursuant to the language in §§ 49-33 (e) and (f) and 49-36, this fact makes all the difference because the lienable fund became exhausted when the hospital paid the full contract price to Skanska.

In support of this argument, the defendants principally rely on our Supreme Court's decision in *Rene Dry Wall Co.* v. *Strawberry Hill Associates*, 182 Conn. 568, 438 A.2d 774 (1980). In that case, the plaintiff subcontractor sought to foreclose a mechanic's lien held against the defendant owner whose property was improved by the plaintiff's work. Id., 569. The defendant argued that it was excused from the obligation to pay

effective under section 42a-3-404 or 42a-3-405 or the drawer is precluded under section 42a-3-406 or 42a-4-406 from asserting against the drawee the unauthorized endorsement or alteration.

"(d) If (i) a dishonored draft is presented for payment to the drawer or an endorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply: (1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument. (2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

"(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

"(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach."

the plaintiff because of good faith payments made to the general contractor before notice of the plaintiff's lien and "because of expenditures reasonably incurred to complete the construction project after the general contractor's default." Id. The court concluded that the issues in the case were framed by the relevant statutory provisions regarding mechanic's liens. In particular, the court held that "General Statutes §§ 49-33 and 49-36 . . . define and delimit the fund to which a properly noticed mechanic's lien may attach. Both of these sections start with the proposition that no mechanic's lien may attach to any building or land in an amount greater than the price which the owner has agreed to pay to the general contractor for the building being erected or improved. This amount may be diminished to the extent that it exceeds 'the reasonable cost . . . of satisfactory completion of the contract plus any damages resulting from . . . default for which [the general contractor] might be held liable to the owner.' General Statutes § 49-33. The amount may be diminished further by 'bona fide payments, as defined in section 49-36, made by the owner [to the general contractor] before receiving notice of [the mechanic's] lien or liens.' " (Footnotes omitted.) Id., 571–72.[14]

The defendants argue that, applying the reasoning of *Rene Dry Wall Co.*, the plaintiff cannot collect on the bond because the combination of the amounts paid by the hospital in good faith prior to notice of the plaintiff's lien and the amounts paid to Skanska to complete the construction project equal the amount the hospital agreed to pay for the project. Thus, they argue, there is no lienable fund available to the plaintiff. The plaintiff argues in response that *Rene Dry Wall Co.* is distin-

[14] We note that § 49-33, referenced in *Rene Dry Wall Co.* v. *Strawberry Hill Associates*, supra, 182 Conn. 568, is from the 1979 revision of the General Statutes. Although § 49-33 has been amended by the legislature since our Supreme Court's decision in *Rene Dry Wall Co.*, those amendments have no bearing on the merits of this appeal.

guishable and inapplicable to this case because Skanska was never in default of its contract with the hospital. According to the plaintiff, pursuant to § 49-33, an owner is entitled to credits against the lienable fund only for payments made after notice of a subcontractor's lien when it is required to make such payments because of the general contractor's default. We agree with the plaintiff.

Section 49-33 provides in relevant part: "(e) A mechanic's lien shall not attach . . . in favor of any subcontractor to a greater extent in the whole than the amount which the owner has agreed to pay to any person through whom the subcontractor claims subject to the provisions of section 49-36.

"(f) Any such subcontractor shall be subrogated to the rights of the person through whom the subcontractor claims, except that the subcontractor shall have a mechanic's lien or right to claim a mechanic's lien in the event of any default by that person subject to the provisions of sections 49-34, 49-35 and 49-36, provided the total of such lien or liens shall not attach . . . to a greater amount in the whole than the amount by which the contract price between the owner and the person through whom the subcontractor claims exceeds the reasonable cost, either estimated or actual, as the case may be, of satisfactory completion of the contract plus any damages resulting from such default for which that person might be held liable to the owner and all bona fide payments, as defined in section 49-36, made by the owner before receiving notice of such lien or liens."

Section 49-36 provides in relevant part: "(a) No mechanic's lien may attach . . . to a greater amount in the whole than the price which the owner agreed to pay for the building and its appurtenances or the development of any such lot, or the development of any such plot of land. . . .

"(c) In determining the amount to which any lien or liens may attach . . . the owner of the [property] . . . shall be allowed whatever payments he has made, in good faith, to the original contractor or contractors, *before receiving notice of the lien or liens*. No payments made in advance of the time stipulated in the original contract may be considered as made in good faith, unless notice of intention to make the payment has been given in writing to each person known to have furnished materials or rendered services at least five days before the payment is made." (Emphasis added.)

The plaintiff argues that, under a proper reading of these statutes, when the general contractor *is not in default*, the lienable fund must be determined at the time the lien is filed and notice given to the property owner. The defendants argue that the plaintiff's interpretation of the statutes "would create a perverse incentive by encouraging property owners to terminate the general contractor when a subcontractor gives notice of a lien in order to take advantage of the reduction for the cost to complete the work. In other words, because [the plaintiff's] interpretation of the statute[s] would permit the lienable fund to be reduced when the general contractor defaults or is terminated, a property owner who otherwise had no intention to terminate the general contractor may do so after receiving notice of a lien in order to reduce the amount available to the lienor." The defendants contend that the plain language of § 49-33 (f) "provides that the lienable fund is reduced by the cost to complete the contract, and that reduction applies whether or not the general contractor defaults."

During oral argument before this court, the plaintiff explained that it believed that the defendants' construction of our statutory scheme regarding mechanic's liens would lead to absurd results because a lien or a bond, specifically meant to protect the subcontractors, including second tier subcontractors, would be useless

because a nondefaulted general contractor, after a properly noticed lien had been filed by a subcontractor, could get paid fully, including profit, thereby exhausting the fund, and the subcontractors would be left with no secured claim, despite their preference in the statute. During questioning by the appellate panel, this court asked Skanska's counsel whether a nondefaulted general contractor essentially could just ask for full payment from the property owner in exchange for bonding off every subcontractor lien, including second tier subcontractors, thereby reducing the lienable fund to zero and avoiding the preference in the statutes in favor of the subcontractors. Skanska's counsel responded that the second tier subcontractors still could bring a claim against the party with whom they had a written contract, and, he argued, if the situation were similar to the present case, where "there's a bad actor sub[contractor, then] somebody gets the short end of the stick . . . ." We conclude that the defendants' construction of our statutes is not only inconsistent with the language of the statutes, but it would lead to absurd results, inconsistent with the legislative purpose of those statutes.

Although in derogation of the common law, the remedial purpose of § 49-33 is to "furnish security for a contractor's labor and materials . . . ." *Seaman* v. *Climate Control Corp.*, supra, 181 Conn. 597. Pursuant to §§ 49-33 and 49-36, the amount of a mechanic's lien may not exceed the price that the property owner has agreed to pay for the building being erected or improved, and the property owner is entitled to credit for payments it made in good faith to the general contractor *before receipt of notice of such a lien*. See id., 596. If the contract price that was agreed on by the general contractor and the property owner is insufficient to cover all the liens, "claimants *other than the original contractor* are to be paid first, and, if necessary, on a pro rata basis." (Emphasis added.) Id.; see General Statutes § 49-36 (b). "[A]ll subcontractors are preferred to the general

contractor if the lienable fund is inadequate to cover outstanding claims." Id., 605. "[I]f the owner still owes money to the general contractor *when a second-tier subcontractor files a mechanic's lien*, the second-tier subcontractor can seek recovery from the owner even where the general contractor has made full payment to the first-tier subcontractor who hired the second-tier subcontractor." (Emphasis added.) D. Rosengren, 13 Connecticut Practice Series: Construction Law (2005) § 6:2, p. 125.

"In [General Statutes (1918 Rev.) §] 5220 [(now § 49-36)], the opening provision clearly applies to all mechanics' liens by whomsoever held, and provides that they shall not exceed the total which the owner was to pay under his contract. It then explicitly provides that *the contractor's own lien shall be subordinated to those of subcontractors, entitling them to payment before him*, and if the available fund does not pay the subcontractor liens in full, the fund must be apportioned between them. The subcontractor's right to a lien, though inchoate comes into existence when he begins furnishing materials . . . *and becomes perfected when he files his lien* having complied with all statutory requirements. These rights which are given the subcontractor cannot be taken from him or abridged by act of the contractor or the owner." (Citation omitted; emphasis added; internal quotation marks omitted.) *Purcell, Inc.* v. *Libbey*, 111 Conn. 132, 137, 149 A. 225 (1930).

The defendants contend that older case law is not controlling because there was an important change in our statutes that occurred in 1953; see Public Acts 1953, No. 502, § 1; that modified what is now § 49-33. They contend that No. 502 of the 1953 Public Acts "add[ed] the language in what is now . . . § 49-33 (f) providing that the amount available to subcontractors is reduced by the 'reasonable cost . . . of satisfactory completion of the contract . . .' " and that this language applies

"whether or not the general contractor defaults." The legislative history of No. 502 of the 1953 Public Acts does not support the defendants' position.

In 1953, the House of Representatives introduced House Bill No. 1733, 1953 Sess., which ultimately became No. 502 of the 1953 Public Acts, modifying General Statutes (Cum. Supp. 1951) § 1273b (formerly General Statutes (1949 Rev.) § 7217), now § 49-33. In 1953, the legislature added the language, "except that such subcontractor shall have such a lien or right to claim such a lien in the event of any default by such person . . . provided the total of such lien or liens shall not attach . . . to a greater amount in the whole than the amount by which the contract price between the owner and such person exceeds the reasonable cost . . . of satisfactory completion of the contract plus any damages resulting from such default for which such person might be held liable to the owner and all bona fide payments . . . made by the owner before receiving notice of such liens or liens"; see No. 502 of the 1953 Public Acts; which remains a part of § 49-33 today, specifically, § 49-33 (f). The defendants contend that the legislature meant this language to apply even when the general contractor is not in default. The plaintiff contends that this language applies *only* when the general contractor is in default. In light of the legislative history of No. 502 of the 1953 Public Acts and the purpose for which it was enacted, we agree with the plaintiff.

House Bill No. 1733 was introduced to correct a statutory problem that was uncovered by our Supreme Court in *Rowley* v. *Salladin*, 139 Conn. 642, 96 A.2d 219 (1953). In *Rowley*, the general contractor had abandoned the project without paying the subcontractor, who then filed a mechanic's lien. Id., 644. The property owner argued that the subcontractor had no right to the lien because, pursuant to General Statutes (Cum. Supp.

1951) § 1273b (now § 49-33), the subcontractor was subrogated only to the rights of the general contractor, who had no right to a lien because he had defaulted. Id. After construing the plain language of the statute, our Supreme Court agreed. Id., 644–45.

In response to *Rowley*, members of the legislature introduced House Bill No. 1733. Representative Kenyon W. Greene, in moving for acceptance of the bill, explained that it was introduced to "provid[e] [that] the subcontractor's right of [a] mechanic's lien shall not be lost by default of the general contractor . . . ." 5 H.R. Proc., Pt. 8, 1953 Sess., pp. 3313–14; see also Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1953 Sess., pp. 760–63. Thus, what is now § 49-33 was amended to ensure that an owner could not use a general contractor's default as an excuse not to pay a subcontractor for work that benefitted the owner. At the same time, the amendment protected the owner who was forced to incur additional costs due to the general contractor's default. There simply is nothing in the language or legislative history of the 1953 amendment that suggests that an owner is entitled to take credit for payments made to a general contractor not in default after having received notice of the subcontractor's lien. In fact, such an interpretation would run contrary to the 1953 amendment's intent to provide greater protection to subcontractors.

Prior to the 1953 amendment to what is now § 49-33, the only amounts the owner was entitled to credit against the lienable fund were "whatever payments he shall have made, in good faith, to the [general] contractor or contractors before receiving notice of such lien or liens." General Statutes (1949 Rev.) § 7220. The 1953 amendment gave the owner an additional credit for any funds it had to pay after notice of the subcontractor's lien, *due to the general contractor's default*. Such protection for the owner makes sense because, once the general contractor defaults, the owner would be forced

to find someone else to complete the project and would be required to pay that third party for their work. Under that specific circumstance, the legislature chose to place the risk of the defaulting general contractor on the subcontractor and not the owner, to the extent the owner's costs of completing the construction project equaled or exceeded the amount he had contracted to pay the general contractor. However, where the general contractor is not in default, there is no need to protect the owner by permitting it to continue to pay the general contractor at the expense of subcontractors who have filed valid mechanic's liens on the owner's property. The owner need only withhold payments from the general contractor until the subcontractor's mechanic's liens are resolved. There is no third party who was previously a stranger to the construction project that must be compensated for its work. In such a circumstance, the risk of not getting paid properly is placed on the general contractor, consistent with the preference in favor of subcontractors expressly set forth in § 49-36 (b). Put another way, expanding the language of § 49-33 to payments made when the general contractor is not in default, as suggested by the defendants, would eviscerate the protections provided to subcontractors in § 49-36 (b) and (c).

Furthermore, the defendants' interpretation of the relevant statutes would lead to absurd results in that it would permit an owner and a general contractor to render a subcontractor's lien essentially meaningless. The facts of this case show exactly how such a result can be accomplished. It is undisputed that at the time the plaintiff filed its mechanic's lien there were more than sufficient funds still unpaid by the hospital to Skanska to cover the plaintiff's claim. Rather than withholding money from Skanska to pay any amounts duly owed to the plaintiff pursuant to its lien, the hospital paid the full contract amount to Skanska. Under the defendants' interpretation of § 49-33, doing so wiped out the lienable fund, and, with it, the plaintiff's lien, and *created*

a preference in favor of the general contractor at the expense of a subcontractor. Not only is there nothing in the language or legislative history of § 49-33 that remotely suggests such a result; the result is flatly contrary to the preference in favor of subcontractors set forth in § 49-36 (b). We cannot conclude that the legislature intended a result that is so completely at odds with the remedial purpose of the mechanic's lien statutes.

Finally, the defendants' claim that the plaintiff's reading of §§ 49-33 and 49-36 would lead to the perverse result that owners would be incentivized to find a reason to hold general contractors in default makes little sense. According to the defendants, an owner who has received notice of a mechanic's lien from a subcontractor would be motivated to manufacture a default by the general contractor in order to terminate the general contractor in order to reduce the size of the lienable fund available to the subcontractor. There are several problems with this hypothesis. First, it ignores what could be significant transaction costs the owner would incur by replacing a performing contractor with a new contractor unfamiliar with the project. Second, it ignores the fact that, by engaging in such conduct, the owner would expose itself to liability to the general contractor for breach of contract. Third, to the extent the owner concluded that it would be profitable to breach its contract with the general contractor, whether a subcontractor filed a mechanic's lien likely would not change that conclusion. Finally, the defendants have not described a precise scenario that would lead an owner to manufacture a default by the general contractor, and we cannot think of a scenario in which the owner would not be acting against its economic interest by terminating the general contractor simply to reduce the amount available to a subcontractor lienor. The amount available to the subcontractor lienor would only be reduced to the extent that the owner paid an amount equal to or greater than its contract price with

the defaulted general contractor. It would defy logic for an owner to terminate a general contractor just so it can incur more costs to avoid paying the subcontractor lienor.

On the basis of the foregoing analysis, we conclude that the lienable fund was the amount owed by the hospital to Skanska at the time the plaintiff gave notice of its mechanic's lien to the hospital in accordance with §§ 49-34 and 49-35. Accordingly, the defendants' alternative ground for affirmance fails.

The judgment is reversed with respect to counts two and three of the plaintiff's complaint, and the case is remanded to the trial court for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BOARD OF EDUCATION OF THE CITY OF WATERBURY *v.* WATERBURY TEACHERS ASSOCIATION, CEA-NEA
(AC 41981)

Lavine, Prescott and Sheldon, Js.

Syllabus

The plaintiff board sought to vacate an arbitration award issued in connection with a grievance filed by the defendant union on behalf of a class of teachers, some of whom were assigned to the T school, alleging that the board had violated the parties' collective bargaining agreement by depriving certain teachers of their bargained for weekly preparation periods. Following arbitration proceedings, the arbitrator found that twenty-two teachers at the T school had been routinely deprived of preparation periods as a result of being required to substitute for absent teachers. In his award, the arbitrator ordered that the affected teachers be awarded compensatory damages and that the board cease and desist from depriving the teachers at the T school of their preparation periods. The trial court granted the board's application to vacate the award, denied the union's application to confirm the award and rendered judgment thereon, from which the union appealed to this court. *Held*:

1. The trial court improperly vacated the arbitration award, pursuant to the applicable statute (§ 52-418 (a) (4)), on the ground that the arbitrator

exceeded or so imperfectly executed his powers that a mutual, final and definite award on the subject matter submitted was not made, as the award conformed to the arbitration submission: the unrestricted submission required a determination of whether teachers at the T school were deprived of their preparation periods and, if so, the nature and extent of their remedy, and the award determined that only twenty-two teachers at the T school had been deprived of their preparation periods, awarded the affected teachers compensatory damages and ordered the board to cease and desist from depriving the teachers at the T school of their preparation periods, and, therefore, the award plainly conformed to the submission because it was directly responsive to, and did not exceed the scope of, the submission; moreover, there was no merit to the board's argument that the award was not mutual, final and definite because the award did not offer any guidance that could be used in similar situations arising in the future, and the board's argument that the award failed to provide a basis for why the application of the cease and desist order applied only to the teachers at the T school and not to others misapprehended the award.

2. The trial court improperly determined that the arbitration award violated the public policy set forth in the Teacher Negotiation Act (§ 10-153a et seq.): the relevant public policy of the act, that parties must negotiate salaries and other conditions of employment through the collective bargaining process, was not contravened by the execution of the award because the act applies to arbitrations of collective bargaining agreements and does not apply to grievance arbitrations, the parties in fact abided by the act and negotiated various terms of employment in their agreement, including salary and compensation, the award did not constitute compensation, salary or remuneration because compensatory damages are not synonymous with compensation, the award did not add to or modify the provisions of the agreement, and, most important, the arbitrator awarded compensatory damages, which was within his authority as provided in the terms of the agreement; moreover, the award was not inconsistently limited to a group within a collective bargaining unit, as it was properly limited to the aggrieved teachers at the T school who had presented evidence of their deprivation at the arbitration proceedings.

Argued November 12, 2019—officially released March 17, 2020

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed an application to confirm the award; thereafter, the matter was tried to the court, *M. Taylor*, *J.*; judgment granting the application to vacate and denying the application to confirm, from which the

defendant appealed to this court. *Reversed*; *judgment directed.*

Adrienne R. DeLucca, with whom, on the brief, was *Martin A. Gould*, for the appellant (defendant).

Tara L. Shaw, with whom, on the brief, were *Connor P. McNamara* and *Anne Murdica*, for the appellee (plaintiff).

Opinion

LAVINE, J. The defendant, the Waterbury Teachers Association, CEA-NEA (union), appeals from the judgment of the trial court vacating an arbitration award in favor of the plaintiff, the Board of Education of the City of Waterbury (board). On appeal, the union claims that the trial court erred in concluding that (1) the arbitrator so imperfectly executed his powers that a mutual, final, and definite award on the subject matter submitted was not made, and (2) the arbitration award violates public policy. We agree with both of the union's claims and, accordingly, reverse the judgment of the trial court.

The following facts, as found by the arbitrator, are germane to this appeal. In January, 2017, the union filed a grievance on behalf of a class of teachers, some of whom were assigned to Tinker Elementary School (Tinker school), alleging that the board had violated the collective bargaining agreement between the union and the board (agreement) by depriving certain teachers of their bargained for weekly preparation periods. Specifically, the grievance stated: "Preparation [p]eriods. The [union] alleges that the [board] is in violation of the 2016–2019 [agreement] at Tinker [school] and other elementary schools as a result of multiple teachers failing to receive the [bargained for] preparation period." The union requested that the board cease and desist from such violations and that it pay all affected teachers who could quantify the loss at their per diem hourly rate. The board unanimously upheld the grievance and

stated that the administration would make "every effort to provide [teachers with] the required five preparation periods per week." The board, however, denied the monetary award sought by the union.

The union then filed for arbitration, which was held before Attorney Emanuel N. Psarakis (arbitrator) in September, 2017. The parties were unable to agree on an arbitration submission and, therefore, allowed the arbitrator to fashion it. The board did not object to the submission as framed by the arbitrator. The submission stated: "Has the [board] violated the requirement that Waterbury [kindergarten through fifth grade] teachers at the Tinker school receive five weekly preparation periods, and that each preparation period must be no less than [thirty] minutes in duration with no less than three hours of preparation time per week? If so, what shall the remedy be?"[1]

Following the arbitration proceedings, the arbitrator found that twenty-two teachers at the Tinker school during the 2016–2017 school year were routinely deprived of one or more of their bargained for weekly preparation periods as a result of being required to substitute for other, absent teachers.[2] The arbitrator found, and the parties agreed, that the agreement had been violated by the board. The remaining issue for the arbitrator to decide was "whether or not monetary damages [were] appropriate for the admitted deprivation of preparation time authorized for teachers under the [agreement]."

The board took the position that its initial offer, to make "every effort" thereafter to comply with the contract, was reasonable. The board further argued that the

[1] We note that there was evidence before the arbitrator that there were approximately twenty-two [kindergarten through fifth grade] teachers at the Tinker school.

[2] The evidence presented by the union at the arbitration proceedings specifically related to those twenty-two teachers at the Tinker school.

agreement does not authorize damages for such violations and that the agreement does not provide compensation for missed preparation periods.[3] Accordingly, the board argued that an award of compensatory damages would exceed the authority of the arbitrator because it would modify and add to the agreement. The arbitrator rejected the board's arguments and concluded that a compensatory award to the aggrieved teachers was appropriate because the agreement expressly authorized the awarding of compensatory damages by an arbitrator, the agreement did not expressly limit compensatory damages for the deprivation of preparation periods, and a monetary award would place the affected parties essentially in the same position in which they would be had there been no violation. The arbitrator further reasoned that "the remedy announced by the board to make 'every effort' to provide the required preparation periods is not a viable or reasonable one. It provides no consequences for ongoing violations, and allowed the board to continue violations with impunity." The arbitrator also noted that the board negotiated the provisions of the agreement, and, therefore, it was "not impossible to foresee that absences on account of authorized leave would impact upon the number of teachers available to teach on any day."

The arbitrator issued the following arbitration award (award): "Compensatory damages to each affected teacher as set forth [herein]; [a]n [o]rder that the [b]oard [c]ease and [d]esist from refusing to provide contract[ual] preparation periods to teachers at the Tinker

[3] In support of this argument, the board asserted that the agreement language that "teachers may be required to perform substitute services . . . without remuneration or other remedy" in the event of teacher absences precluded compensating teachers for missed preparation periods. The arbitrator explicitly rejected this argument on the basis that the "provision relating to the performing of substitute services without compensation does not implicate the [agreement] requirement to provide five nonteaching preparation periods per week."

[s]chool; [and] [f]ailing compliance with such [c]ease and [d]esist [o]rder, the [b]oard will become liable for and obligated to pay appropriate compensatory damages to affected teachers consistent with the formula discussed [herein]. It thereby will become responsible for compensatory damages to teachers for any preparation periods that continue to be denied [them] after the date of this decision."

After the award was issued, the union wrote to the arbitrator and requested the following clarification: "Does the [c]ease and [d]esist [o]rder requiring prospective compensatory liability for the denial of preparation periods during the remainder of the current [agreement] apply only to Tinker [school] teachers, all elementary school teachers in the bargaining unit or all teachers within the bargaining unit?" Over the board's objection, the arbitrator responded to the union's request for clarification. He stated in part: "Consequently, to the extent that clarification may be necessary, any further monetary liability under this [award] for subsequent denial of preparation periods during the remainder of the current [agreement] *applies only to the affected teachers at the Tinker school for which compensatory damages were awarded*." (Emphasis added.)

The union filed in the trial court an application to confirm the award pursuant to General Statutes § 52-417, and the board filed an application to vacate the award pursuant to General Statutes § 52-418. In support of its application, the board argued that, pursuant to § 52-418 (a) (4), the award must be vacated because the arbitrator exceeded his powers under the agreement and the award was not final and definite and was, therefore, unenforceable.[4] The board also argued that the

[4] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds any of the following defects . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

award was contrary to law in that it disregarded the doctrines of impossibility and/or impracticality,[5] and that the award violated public policy.

The court granted the board's application to vacate the award and issued a memorandum of decision, in which it stated that the award "created an inconsistency in the application of the [agreement] to members of the union," despite an agreement provision to the contrary, because it "limit[ed] remuneration to Tinker's teachers" and that "parties are statutorily required to collectively bargain over the terms and conditions of employment, which includes salaries." The court decided that the "award was imperfectly executed, in that a mutual, final and definite award upon the subject matter submitted was not made, as it may be inconsistently applied to teachers in the district and, moreover, without following the mandatory provisions of the [Teacher Negotiation Act, General Statutes § 10-153a et seq.], applicable to the entire bargaining unit." The court concluded that the award violates public policy. Accordingly, the court

[5] With respect to the impossibility and/or impracticality argument, the arbitrator stated: "I conclude and find that the [b]oard has not proven it was legally impossible to comply with the contract[ual] requirements of preparation periods. The [agreement] is replete with teacher rights to sick leave, personal leave, religious leave, compensatory leave, family sick leaves, bereavement leave, child rearing and childbearing leave among others, and the [agreement] has provisions clearly providing authorized leave benefits to teachers with and without pay.

"However, I conclude the existence of the contractual requirements to provide various leave benefits cannot support a claim that it is impossible to provide them or provide authorized preparation time. The use of authorized leave under this [agreement] was reasonably foreseeable by the [b]oard, since it is party to and had negotiated the [agreement] provisions providing these benefits to teachers. It was not impossible to foresee that absences on account of authorized leave would impact upon the number of teachers available to teach on any day.

"I conclude that as the [agreement] provides for certain leave benefits which are then used as authorized, this circumstance does not rise to the level of creating an impossibility of complying with contract[ual] requirements providing teachers the requisite preparation time or their use of authorized leave benefits."

granted the board's application to vacate the award and denied the union's application to confirm it. This appeal followed.

I

The union claims that the trial court improperly concluded that the arbitrator so imperfectly executed his powers that a mutual, final, and definite award on the subject matter submitted was not made. We agree with the union.

The standard that governs our review of arbitration awards that are challenged pursuant to § 52-418 (a) (4) is as follows. "The scope of judicial review of arbitration awards is very narrow. Our courts favor arbitration as a means of settling differences and uphold the finality of arbitration awards except where an award clearly falls within the proscriptions of § 52-418 . . . . Subsection (a) (4) of . . . § 52-418 . . . provides in part that an award is invalid if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. Generally, any challenge to an award pursuant to . . . § 52-418 (a) (4) on the ground that the arbitrators exceeded or imperfectly performed their powers is properly limited to a comparison of the award with the submission. . . . If the award conforms to the submission, the arbitrators have not exceeded their powers." (Internal quotation marks omitted.) *Exley* v. *Connecticut Yankee Greyhound Racing, Inc.*, 59 Conn. App. 224, 228, 755 A.2d 990, cert. denied, 254 Conn. 939, 761 A.2d 760 (2000). "In deciding whether the arbitrators have exceeded their powers, this court, as a general rule, examines only the award to determine whether it is in conformity with the submission. The memorandum of the arbitrator is irrelevant." *Board of Education* v. *AFSCME*, 195 Conn. 266, 271, 487 A.2d 553 (1985).

"Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the construction placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . . The party challenging the award bears the burden of producing evidence sufficient to demonstrate a violation of § 52-418." (Citations omitted; internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 115, 779 A.2d 737 (2001). The trial court's determination of whether the award conforms to the submission is a legal conclusion and is, therefore, subject to our plenary review. See, e.g., *Tuxis-Ohr's, Inc.* v. *Gherlone*, 76 Conn. App. 34, 39, 818 A.2d 799, cert. denied, 264 Conn. 907, 826 A.2d 179 (2003).

The trial court concluded that a final and definite award was not made because it "may be inconsistently applied to the teachers in the district . . . ." The union argues on appeal that there is no support for the trial court's conclusion that a grievance award to an affected grievant is not mutual, final, and definite because it applies only to the particular employee who is affected. The board argues in response that the award will result in an inconsistent application to teachers in the district because the underlying grievance was expressly filed on behalf of a broader set of teachers than those assigned to the Tinker school;[6] the union requested clarification as to whether the award applied to other district schools, despite not having presented evidence

[6] The grievance stated: "The [union] alleges that the [board] is in violation of the 2016–2019 [agreement] at Tinker [school] *and other elementary schools* as a result of multiple teachers failing to receive the [bargained for] preparation period." (Emphasis added.)

of those schools; the award did not offer any guidance that could be used in similar situations arising in the future; and the award failed to provide a basis for why the application of the cease and desist order applied only to the Tinker school and not to others. We are not persuaded by the board's arguments.

Our review of whether the arbitrator imperfectly executed his powers is limited to a determination of whether the award conforms to the submission.[7] As stated previously, the submission stated: "Has the [board] violated the requirement that Waterbury [kindergarten through fifth grade] *teachers at the Tinker school* receive five weekly preparation periods, and that each preparation period must be no less than [thirty] minutes in duration with no less than three hours of preparation time per week? If so, what shall the remedy be?" (Emphasis added.) The award stated: "Compensatory damages to each affected teacher as set forth [herein]; [a]n [o]rder that the [b]oard [c]ease and [d]esist from refusing to provide contract[ual] preparation periods to teachers at the Tinker [s]chool; [and] [f]ailing compliance with such [c]ease and [d]esist [o]rder, the [b]oard will become liable for and obligated to pay appropriate compensatory damages to affected teachers consistent with the formula discussed [herein]. It thereby will become responsible for compensatory damages to teachers for any preparation periods that continue to be denied after the date of this decision." The arbitrator clarified the award insofar as he stated that "any further monetary liability under this [award] for subsequent denial of preparation periods during the remainder of the current [agreement] *applies only to the affected teachers at the Tinker school for which compensatory damages were awarded*." (Emphasis added.)

[7] Because our inquiry is limited to the submission and the award, we do not consider the board's arguments with respect to the underlying grievance and the fact that the union requested clarification of the award.

The parties agree that the submission was unrestricted.[8] The submission was whether *teachers at the Tinker school* were deprived of their preparation periods and, if so, the nature and extent of their remedy. The award determined that only twenty-two teachers at the Tinker school had proven that they had been deprived of their preparation periods and, as such, awarded compensatory damages to those teachers. Moreover, the award ordered the board to cease and desist from refusing to provide preparation periods to the affected teachers at the Tinker school who had been awarded the compensatory damages. The award plainly conforms to the submission because the award is directly responsive to, and does not exceed the scope of, the submission.

We reject the board's argument that the award was not mutual, final, and definite because the award did not offer any guidance that could be used in similar situations arising in the future. If the award had been so broad, it arguably would have exceeded the scope of the submission and would not have been mutual, final, and definite. Additionally, "an arbitration award is not considered conclusive or binding in subsequent cases involving the same contract language but different incidents or grievances." (Internal quotation marks omitted.) *Stratford* v. *International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 118, 728 A.2d 1063 (1999). It is, therefore, of little consequence that the award did not offer guidance to be used in similar cases arising in the future.

The board cited *Bridgeport City Supervisors' Assn.* v. *Bridgeport*, 109 Conn. App. 717, 952 A.2d 1248, cert.

[8] "A submission is unrestricted when . . . the parties' arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Bridgeport City Supervisors' Assn.* v. *Bridgeport*, 109 Conn. App. 717, 724 n.2, 952 A.2d 1248, cert. denied, 289 Conn. 937, 958 A.2d 1244 (2008).

denied, 289 Conn. 937, 958 A.2d 1244 (2008), to illustrate a case in which an award was not definite and, therefore, properly vacated by the trial court. In that case, the court held that an arbitrator's award was not definite because it awarded the grievant alternative relief, insofar as she was to be reinstated *either* to one position *or* to another position, and, therefore, the award did not definitively fix the rights and obligations of the parties. Id., 728–29. The court decided that the award "le[ft] open the possibility of disagreement and litigation as to [the grievant's] ultimate placement." Id., 729. In the present case, the arbitrator did not grant alternative relief to the aggrieved teachers and, therefore, *Bridgeport City Supervisors' Assn.* does not change our conclusion.

Furthermore, we reject the board's argument that the award failed to provide a basis for why the application of the cease and desist order applied only to the teachers at the Tinker school and not to others. This argument misapprehends the award. The award applied only to the twenty-two affected teachers at the Tinker school, not all teachers at the Tinker school. Because the award applied only to those teachers who had proven that they had been deprived of their preparation periods, the basis was clear as to why the application of the cease and desist order applied only to those affected teachers.

On the basis of the foregoing, we conclude that the trial court improperly vacated the arbitration award on the basis that the arbitrator exceeded or imperfectly executed his powers pursuant to § 52-418 (a) (4).[9]

[9] We also are unpersuaded by the trial court's reasoning that a final and definite award was not made because it did not follow the mandatory provisions of the Teacher Negotiation Act. Those considerations go beyond our limited scope of review of this claim. The scope of review for arbitration awards is exceedingly narrow because "[a]rbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of disputes." (Internal quotation marks omitted.) *Benistar Employer Services Trust Co.* v. *Benincasa*, 189 Conn. App. 304, 309, 207 A.3d 67, cert. denied, 331 Conn. 932, 208 A.3d 280 (2019).

II

The union also claims that the trial court erred in finding that the award violates the public policy of the Teacher Negotiation Act (act); see General Statutes § 10-153a et seq.; because the parties' agreement was modified without consideration of the statutory factors set forth in the act.[10] We agree with the union.

"A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. . . . This rule is an exception to the general rule restricting judicial review of arbitral awards. . . . The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy. . . . A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot

[10] "The [act] is essentially patterned on the National Labor Relations Act [29 U.S.C. § 151 et seq.]. . . ." *Hartford Principals' & Supervisors' Assn.* v. *Shedd*, 202 Conn. 492, 503, 522 A.2d 264 (1987); see generally *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 317, 85 S. Ct. 955, 13 L. Ed. 2d 855 (1965) ("[t]he central purpose of [the National Labor Relations Act] was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers").

"By enacting the [act] the legislature gave teachers the right to bargain collectively and imposed upon school boards the duty to negotiate with the representatives of the teachers. In so doing the legislature expressed the view that by requiring that disputes between the parties be submitted 'to the mediating influence of negotiation it was eliminating any need for resort to illegal and disruptive tactics, and that disputes between school boards and teachers were 'more likely' of resolution and agreement by negotiation than by strike or otherwise." *Connecticut State Board of Labor Relations* v. *Board of Education*, 177 Conn. 68, 71–72, 411 A.2d 28 (1979).

The act provides in relevant part: "Members of the teaching profession shall have and shall be protected in the exercise of the right to form, join or assist, any organization for professional or economic improvement and *to negotiate in good faith through representatives of their own choosing with respect to salaries, hours and other conditions of employment* . . . ." (Emphasis added.) General Statutes § 10-153a (a).

expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, *the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award.* . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's [award] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . .

"The party challenging the award bears the burden of proving that illegality or conflict with public policy is *clearly demonstrated*. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [a party] can prevail . . . only if it demonstrates that the [arbitrator's] award clearly violates an established public policy mandate. . . . [W]hen a challenge to a voluntary arbitration award rendered pursuant to an unrestricted submission raises a legitimate and colorable claim of violation of public policy, the question of whether the award violates public policy requires de novo judicial review." (Citations omitted; emphasis in original; internal quotation marks omitted.) *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 803–804, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

In its memorandum of decision, the court first stated that provisions of the act represent a clear and dominant public policy of Connecticut and, further, that pursuant to *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 586–87, 295 A.2d 526 (1972), questions

of conditions of employment, including compensation, are mandatory subjects of negotiation. The court determined that, in the present case, "arguably noncompensable terms and conditions of employment became compensable through grievance arbitration, brought by a subgroup of a bargaining unit, and were thereby inconsistently limited to one of many elementary schools in the district."

On appeal, the parties agree that the act sets forth public policy with respect to the negotiation of a collective bargaining agreement. The union argues, however, that the award does not violate the public policy set forth in the act because the act applies to arbitrations of collective bargaining agreements, not to grievance arbitrations. Furthermore, it argues that the parties bargained for the following terms within the agreement: that every teacher would be given five preparation periods per week and that an arbitrator of a grievance would have the authority to fashion a compensatory award.

In response, the board asserts that enforcing the award would violate the public policy set forth in the act insofar as salaries and working conditions must be negotiated pursuant to the procedures set forth in the act.[11] The board further argues that the award "purports to compensate a group of elementary school teachers for missing preparation periods where the [agreement] included specific language prohibiting such compensation, and the board had never compensated for missed

[11] More specifically, the board argues that missed preparation periods are "a part of 'teacher [work]load' and compensation for such constitute 'salary' and, as such, must be negotiated under the [act]." Accordingly, the board argues that the award fails to analyze the board's ability to pay, consistent with the act, "which must be considered and applied when evaluating proposed contract changes in the context of a binding interest arbitration." The board, however, failed to argue that its ability to pay must be considered and applied when evaluating awards in grievance arbitrations.

preparation periods in the past." Finally, the board contends that the award lacks clarity and direction with respect to elementary teachers at other district schools who similarly miss preparation periods and, therefore, provide substitute services during those periods.

We conclude that the public policy of the act at issue in this appeal—that parties must negotiate salaries and other conditions of employment through the collective bargaining process—is not contravened by the execution of the award for the following reasons: (1) the act applies to arbitrations of collective bargaining agreements and does not apply to grievance arbitrations; see *Glastonbury Education Assn.* v. *Freedom of Information Commission*, 234 Conn. 704, 714, 663 A.2d 349 (1995) (Arbitrations under the act arise out of "failure to reach agreement in ordinary collective bargaining . . . . The [act] establishes a sequence of increasingly formal collective bargaining procedures to ensure the existence of a teacher contract by the beginning of the town's fiscal year."); (2) the parties, in fact, abided by the act and negotiated various terms of employment in their agreement, including salary and compensation; (3) the award did not constitute compensation, salary, or remuneration because compensatory damages are not synonymous with compensation;[12] (4) the award did not add to or modify the provisions of the agreement; and, most importantly, (5) the arbitrator

[12] Compensation is defined as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages," and compensatory damages are defined as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." Black's Law Dictionary (9th Ed. 2009) p. 354.

We also reject the board's assertion that the damages were intended as remuneration for substitute services rendered because the substitute services rendered were merely the cause of the teacher's deprivation of their preparation periods. The arbitrator also explicitly rejected this assertion on the basis of its factual findings. See footnote 3 of this opinion. "A court does not sit to review the factual findings of an arbitrator." *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 257, 117 A.3d 470 (2015).

awarded compensatory damages, which was within his authority per the terms of the agreement.[13] That is, the award provided compensatory damages to those teachers who had been deprived of the benefit of preparation periods, which they had negotiated for through the collective bargaining process. On the basis of the foregoing, we also reject the claim that the award was inconsistently limited to a group within a collective bargaining unit; the award was properly limited to the aggrieved teachers at the Tinker school who presented evidence of their deprivation at the arbitration proceedings. In fact, it was the board that inconsistently provided teachers with their contractual right to preparation periods, which had been negotiated for through the collective bargaining process.

If we were to agree with the board and to conclude that the award violates the public policy of the act, teachers would be unable to enforce their contractual right to preparation periods. Moreover, the authority for arbitrators to award compensatory damages pursuant to the agreement, in the face of empty gestures like the board's promise to "make every effort" to provide the bargained for preparation periods, would be rendered meaningless. Accordingly, we conclude that the board's challenge to the award does not raise a legitimate and colorable claim of a violation of public policy. The trial court, therefore, improperly vacated the award.

The judgment is reversed and the case is remanded with direction to render judgment denying the application to vacate the award and granting the application to confirm the award.

In this opinion the other judges concurred.

[13] The agreement does not specify a remedy for a violation of this preparation periods provision. The agreement, instead, explicitly provides that an arbitrator "shall have the power to make an award, including appropriate compensatory awards."

STATE OF CONNECTICUT *v.* TYRONE ROSA
(AC 42267)

Keller, Elgo and Bright, Js.

Syllabus

Convicted of the crimes of murder, assault in the first degree and criminal possession of a firearm, the defendant appealed, claiming that the state violated his right to due process when it suppressed DNA evidence that was material to his defense, in violation of *Brady* v. *Maryland* (373 U.S. 83), and did not disclose it until after the jury returned its verdict. The defendant allegedly shot the victims, J and M, in the automobile in which the three were riding after they had left an after-hours club. M subsequently died from his injuries but J was able to flee after he was shot. After the three men left the after-hours club, the defendant told J to park the automobile on the street so the defendant could exit the automobile to urinate. The defendant testified that, while he was urinating by a nearby fence, an unknown person put a gun to his head and told him not to move, yell or turn around. The defendant further testified that he then heard two loud pop sounds. When he turned around one minute later and saw no one, he went back to the automobile and saw that the driver's side door was open. The defendant testified that he did not see anyone inside the automobile or on the street and then ran away. A discarded sweatshirt that the police found in the vicinity of the shootings was sent to the state's scientific laboratory for DNA testing. At the time of trial, DNA from the sweatshirt had not been matched to anyone, including the defendant. Two weeks after the verdict, the prosecutor notified defense counsel that a DNA profile from the sweatshirt had matched a DNA sample that had been collected from a convicted felon, O, whom defense counsel later learned was not incarcerated at the time of the shootings. The defendant claimed that the state had acquired the DNA evidence at least two months before his trial began or while his trial was proceeding, and that it would have discredited the testimony of J, the state's key witness, and bolstered the defense theory that the unknown individual was the shooter. At the defendant's sentencing proceeding, the trial court denied the defendant's motion for a judgment of acquittal. *Held* that the defendant failed to prove that the DNA match between the sweatshirt and O constituted material evidence within the meaning of *Brady*, there having been no reasonable basis to conclude that the lack of the DNA evidence of the match at trial undermined its fairness and resulted in a verdict that was not worthy of confidence: it was reasonable to conclude that the sweatshirt could have been left as a result of innocuous activity, rather than by someone involved in the commission of the shootings, as the defendant did not testify that the alleged unknown gunman was wearing

a sweatshirt, which was found more than half a block away from the crime scene in an area that was reasonably likely to be traversed by the public, there was no evidence that indicated how long the sweatshirt had been there, that it was present when the police first responded to the crime scene or that it contained gunpowder residue or blood, and, as there was no indication that O was in the vicinity of the crime scene at the time of the shootings or had any connection to the victims, the defendant would not have been able to successfully raise a third party culpability defense; moreover, even though the defendant was aware of the existence of the sweatshirt at the time of trial and that it did not contain his DNA, it was not necessary for defense counsel to know about the DNA match in order to suggest to the jury that the sweatshirt belonged to someone other than the defendant, bolstering his claim that some unknown person committed the shootings; furthermore, the state's case against the defendant was strong, as it included J's identification of the defendant as the shooter, evidence that the defendant had a motive to kill M when he learned at the after-hours club that M had admitted to the killing the brother of a close friend of the defendant, the defendant's testimony about the events was very weak and lacked credibility, and significant consciousness of guilt evidence implicated the defendant, as he had lied to the police when they interviewed him and had sought to have friends dispose of his cell phone and visit an area near the crime scene to see if surveillance cameras were present.

Argued October 11, 2019—officially released March 17, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder, assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Baldini*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motion for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed; subsequently, the court, *Baldini*, *J.*, granted the defendant's motion for rectification. *Affirmed.*

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robin D. Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Tyrone Rosa, appeals from the judgment of conviction, rendered following a jury trial, of one count of murder in violation of General Statutes § 53a-54a, one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (5) and one count of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant claims that the state suppressed evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, the defendant asserts that, either before his trial began or while the trial was ongoing, the state, via its agent, the Department of Emergency Services and Public Protection's division of scientific services (division), acquired evidence that the Combined DNA Index System (CODIS)[1] reported that a DNA profile that was developed from the swabbing of a discarded sweatshirt found in the vicinity of the crime scene matched (CODIS match) a DNA sample collected from a convicted felon, Javier Otero. He asserts that this evidence, which was favorable to him and material for purposes of *Brady*, was not disclosed to the defense until after the jury had returned a guilty verdict. He asserts that this evidence would have bolstered his sole theory of defense that an unknown gunman committed the crimes and also would have discredited the state's key witness. We affirm the judgment of the trial court because we conclude that the defendant has failed to prove that the CODIS match was material to his defense.

On the basis of the evidence presented at trial and the reasonable inferences drawn therefrom, the jury reasonably could have found the following facts. The victims, Dederick "DJ" Jiminez and Hiram "Sito" Martinez, had been close friends since childhood. In 2009,

[1] See, e.g., *State* v. *Webb*, 128 Conn. App. 846, 852–83 n.3, 19 A.3d 678 (generally describing national CODIS database), cert. denied, 303 Conn. 907, 32 A.3d 961 (2011).

Jiminez became friends with the defendant while the two were incarcerated in the same prison. Jiminez knew the defendant by his nicknames of "Flex" and "Pipone." Jiminez introduced the defendant to Martinez, who began selling drugs with the defendant.

The defendant was friends with Joel "Tuti" Gonzalez, who had a brother named Mariano "Papa" Gonzalez. The defendant claimed to have never met Mariano Gonzalez, but when the police showed the defendant his photograph, the defendant identified him. On December 14, 2014, Mariano Gonzalez was murdered on Bond Street in Hartford, and the police suspected that Martinez was the perpetrator.

On December 20, 2014, Jiminez and Martinez drove in Martinez' tan-colored Honda to an after-hours club on Francis Avenue in Hartford.[2] They arrived between 3 and 4 a.m. and encountered the defendant inside the club. The defendant was there with a close friend, Carlos "Cuz Los" Mangual. At the club, the defendant began talking to Martinez. Jimenez walked away while Martinez and the defendant continued to talk. After Martinez and the defendant stopped talking, the defendant approached Jiminez and asked him what had happened on Bond Street. Jiminez believed that Martinez had just told the defendant that he was the one who had killed Mariano Gonzalez on Bond Street. Jiminez replied that Mariano Gonzalez "got what he deserved" because he had tried to rob Martinez and had tried to "run up in [Martinez'] house with his family." After hearing this information from Jiminez, the defendant's mood changed. He became quiet and no longer wanted to talk. Jiminez, at that time, was unaware that Joel Gonzalez and Mariano Gonzalez were brothers, although he knew that they were related. He also was unaware of the defendant's friendship with Joel Gonzalez.

[2] Jiminez described the after-hours club as a "place where people go after the clubs are closed down."

At about 5 a.m., as Jiminez and Martinez were leaving the after-hours club, the defendant approached them and asked if they had any cigarettes. When they responded that they did not, he asked them to give him a ride to get some. Jiminez refused because there was no room in the automobile's backseat, which was crowded with his possessions. Upon Martinez' insistence, however, Martinez and Jiminez made room for the defendant in the backseat of the automobile, behind the driver. The defendant got inside of the automobile in the space made for him. Jiminez got into the driver's seat and Martinez got into the front passenger seat.

The defendant directed Jiminez to drive to the residence of the defendant's sister, which was located at the corner of Park Street and Hazel Street. After learning that no one inside of the house had any cigarettes, the defendant directed Jiminez to drive to a twenty-four hour convenience store at Park Street and Broad Street. When the three men arrived at the store, however, the defendant refused to go inside, insisting that Martinez go inside instead. Martinez refused, and he and the defendant argued until Jiminez got out of the car, went inside the store, and purchased cigarettes. After Jiminez purchased the cigarettes, the defendant directed him to drive to Hendricxsen Avenue. When they arrived at Hendricxsen Avenue, adjacent to a vacant lot, the defendant told Jiminez to park the automobile because he needed to urinate. Jiminez complied and parked the automobile close to the street corner at which Hendricxsen Avenue and Masseek Street meet, and the defendant exited the automobile.

Initially, Jiminez could not see where the defendant went because the defendant had left the automobile door open, which caused the interior dome light to remain on and obscure his view of the defendant. Once Jiminez had closed the door, however, he saw the defendant standing behind the automobile, by a fence. Jiminez heard the defendant talking on his cell phone as

he returned to the automobile. Once he was back inside the automobile, the defendant asked Jiminez and Martinez if they wanted to go to the home of one of his friends and have a few drinks. Both of them agreed.

As he waited for directions from the defendant to the friend's house, Jiminez checked his cell phone. He suddenly heard a loud bang from the backseat of the automobile. Stunned by the loudness of the bang, he brought his hands up to his ears and ducked down. He then felt his right arm fall to his side and realized that his arm did not feel right. He opened the driver's side door, got out of the automobile and ran. While running, he looked back and saw only the defendant standing outside of the automobile. He did not see Martinez exit the automobile and did not see anyone else on the street.

Jiminez ran through a vacant lot, toward a building located at 62 Hendricxsen Avenue. A woman inside the building yelled to him that she was coming downstairs to open the door. Jiminez went inside and lay down on the steps. The woman called 911.

At approximately 5:40 a.m., Hartford Police Officer Christopher White was dispatched to 62 Hendricxsen Avenue, where he found Jiminez in the stairwell, bleeding and holding his shoulder. At approximately 5:41 a.m., Hartford Police Officer Matthew Steinmetz was dispatched to the area of Hendricxsen Avenue and Masseek Street on a report of a shooting and a victim inside a tan Honda. Steinmetz found the engine of the tan Honda running and Martinez slumped over the center console with a gunshot wound to the back left side of his head. He did not see any other people in the area.

Martinez later was pronounced dead as a result of the gunshot wound that he had sustained to his head. Jiminez, who had been shot twice, underwent surgery to repair gunshot wounds to his shoulder and elbow. Physicians were unable to remove the bullet that was

lodged in his shoulder without risking greater damage and had to place permanent plates and rods in his elbow, which had shattered. After surgery, Jiminez told the police that the defendant, whom he called "Pipone," had shot him. He gave a description of "Pipone" that matched the defendant's appearance at the time of the shooting. Later, he gave a written statement to the police and selected the defendant's photograph from a sequential photographic array. Hartford police lifted the defendant's fingerprint from the interior handle of the rear door on the driver's side of the automobile, next to the seat where Jiminez had said the defendant was sitting when he fired the gun.

After leaving the after-hours club, Mangual could not find the defendant and repeatedly tried to call him. It was not until 5:36 a.m. that the defendant answered his phone. The defendant told Mangual to pick him up. Thereafter, Mangual picked up the defendant on Stonington Street in Hartford, which is near Hendricxsen Avenue, where the shootings occurred, and is separated from the scene of the crimes only by a vacant lot with a path running through it. Portions of the path are horseshoe shaped. When Mangual arrived to pick up the defendant, the defendant told him that he "almost got shot."

After their initial investigation, the Hartford police suspected that the defendant had some involvement in the shooting of Jiminez and Martinez. At the request of the police, on December 31, 2014, the defendant was taken into custody by his parole officer and transported to the Hartford Police Department, where he consented to be interviewed. He provided the police with a fake cell phone number and falsely denied that one of his nicknames was "Flex." The police found a public Facebook profile for the defendant that reflected his use of that nickname. Although the defendant admitted that he knew Joel Gonzalez, he falsely denied associating with him. The defendant's cell phone records,

which later were seized by the police, revealed that the defendant called Joel Gonzalez' phone fifty-one times between December 16 and December 20, 2014. The police also found an online video in which the defendant stated to Joel Gonzalez that he loved him and would die for him. The defendant admitted to the police that he was at the same after-hours club as Jiminez and Martinez on the morning of the shooting. He indicated, however, that although he had gotten into a gold automobile with them and had sat behind the driver's seat, he had not been driven anywhere in the automobile with them that morning. He told the police that after he left the after-hours club, he walked to the area of Capitol Avenue and Rowe Avenue in Hartford to visit a woman, but he could not provide the police with her name.[3]

During the interview, Hartford Police Detective Daniel R. Richter told the defendant that cell towers help the police track people's movements via their cell phones. After Richter made this statement to the defendant, Officer Luis Colon of the Department of Correction listened to and recorded a phone call the defendant made the very next day from prison to Joel Gonzalez, in which he instructed Joel to make sure that Mangual destroyed his cell phone "because of [cell] towers." Colon also listened to and recorded another call from the defendant to Joel Gonzalez on February 18, 2015, the day on which the defendant was arrested on the charges in this case. During that phone conversation, the defendant directed Joel Gonzalez to "take a trip down memory lane," go around the "horseshoe," and "go make sure that within that trail there's nothing

[3] During his trial testimony, the defendant admitted that he had fabricated much of the information he gave the police during their interview of him, including his statements about his association with Joel Gonzalez and about not driving anywhere with Jiminez and Martinez in Martinez' car after he left the after-hours club on December 20, 2014.

[there] . . . . But if you seen that trail and cheese, I see you," make sure that there are no "cheese, I see you." The defendant's statement was significant evidence of his involvement in the crimes because there was a horseshoe shaped area close to the shooting scene and "cheese, I see you" is code for a surveillance camera. Thereafter, Richter returned to the area near the crime scene and checked several horseshoe shaped areas but did not find any additional evidence.

The defendant testified at trial. His testimony concerning the events that occurred on the morning of December 20, 2014, was markedly different from the information that he previously had relayed to law enforcement personnel. He testified that, while he was standing at the fence at Hendricxsen Avenue and urinating, an unknown person put a gun to his head and told him not to move, yell or turn around. He stated that he then heard two loud "pops," a car door open and close, and a whistle. One minute later, he turned around, and, seeing no one, went back to the automobile. He saw that the driver's door was open but did not see anyone inside or on the street and so he ran away. The defendant admitted that he never told anyone about the presence of this unknown gunman prior to his trial testimony. He claimed that he did not do so and that he lied to the police during his interview because he did not want his parole violated. He also admitted that he did not testify to this version of events during his parole revocation hearing.[4]

After approximately two and one-half days of deliberation, the jury found the defendant guilty of murder, assault in the first degree and criminal possession of a firearm. The trial court denied the defendant's postverdict motion for a judgment of acquittal, rendered judgment of conviction, and sentenced him to seventy years

[4] In fact, when the defendant began referring to his encounter with an unknown gunman on Hendricxsen Avenue, the prosecutor declared she was surprised and had not been given any notification that the defendant was going to assert a third-party culpability defense.

of incarceration. Additional facts and procedural history will be set forth as necessary.

The defendant's sole claim on appeal is that the state, through its agent, the division,[5] suppressed evidence favorable to him and material to his guilt or innocence, namely, evidence of the CODIS match indicating that the DNA of another convicted felon was found on a discarded sweatshirt in the vicinity of the scene of the shootings. He alleges that the division acquired this key evidence either at least two months before his trial began or while his trial was proceeding, and did not disclose it until after his trial had concluded. He asserts that evidence belonging to a convicted felon, found near the crime scene, would have bolstered his sole theory of defense—that an unknown individual was the shooter—and discredited the state's key witness, Jiminez. He maintains that because the outcome of the trial hinged on whether the jury believed him or Jiminez with respect to the identity of the shooter, the failure to disclose the CODIS match for nearly two weeks after the verdict violated his right to due process under the United States constitution[6] and cast doubt on the fairness of his trial.

[5] The state concedes that it sent the sweatshirt that was seized to the division for DNA testing and is not contesting agency for purposes of this appeal. See *State* v. *Guerrera*, 331 Conn. 628, 631, 206 A.3d 160 (2019) (when Department of Correction acts as investigative arm of state in conducting review of inmate phone calls at behest of prosecutor as part of state's investigation into criminal case, such calls are subject to disclosure requirements of *Brady*); *Stevenson* v. *Commissioner of Correction*, 165 Conn. App. 355, 367–68, 139 A.3d 718 (whether individual or agency is "arm of the prosecution," does not turn on status of person or agency but on what they did—i.e., whether they worked in conjunction with police or prosecutor and whether they actively assisted in investigation of crime), cert. denied, 322 Conn. 903, 138 A.3d 933 (2016).

[6] Although the defendant also claims a due process violation under our state constitution; see Conn. Const., art. I, § 8; he does not provide a separate analysis thereunder or argue that the Connecticut constitution provides greater protection than the federal constitution. Accordingly, review of his claim is limited to the federal constitution. See *State* v. *Ortiz*, 280 Conn. 686, 689 n.2, 911 A.2d 1055 (2006).

The state counters that the defendant's *Brady* claim was waived when his trial counsel chose to pursue a postjudgment motion for a judgment of acquittal rather than properly raise his *Brady* claim by filing a motion for a new trial, although he had a fair opportunity to do so. Alternatively, the state, mainly focusing on the issue of whether the evidence of the CODIS match had been suppressed, argues that the record is inadequate for this court to review the defendant's unpreserved *Brady* claim under the rule in *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). Finally, the state contends that if the defendant's *Brady* claim is reviewable, it fails on its merits because the defendant failed to prove that (1) the division suppressed favorable evidence regarding the CODIS match and (2) the CODIS match constitutes material evidence. We agree with the state that the defendant has failed to prove that the newly disclosed evidence of the CODIS match was material and, therefore, affirm the judgment of the trial court.

The following additional facts and procedural history are relevant to the defendant's claim. At trial, Detective Jason Lee testified that, on December 23, 2014, he was working for the Hartford Police Department's crime scene division, which processes crime scenes. His main function was to process the crime scene by taking photographs and collecting and preserving evidence. At approximately 11:43 a.m. on December 20, 2014, he was called to process a murder scene in the area of Hendricxsen Avenue and Masseek Street. While there, the lead detective in the case, Richter, who had arrived on the scene at approximately 7:47 a.m., alerted him to "potential evidence" on a street "kind of . . . nearby" the crime scene and south of it. Lee "tried" to photograph his "way down there to . . . show perspective" and then photographed two items, a sweatshirt and a pair of sweatpants in that area. Lee testified that

the sweatshirt was on the "southeast corner of the intersection of Hendricxsen Avenue and Curcombe Street," by a sidewalk and a fence near "an apartment complex." He saw the sweatpants behind a telephone pole as "you headed east on Curcombe . . . ." After photographing the items, he seized them. The sweatshirt and sweatpants were processed and sent to the division for testing.

The defendant's trial ended on February 14, 2017. On April 4, 2017, the date of the defendant's sentencing, the court began the proceeding by stating on the record that a meeting had just taken place with counsel in chambers to go over what "we were going to do today. During that conversation, there was some information provided to the court." The court did not indicate the nature of this information. Defense counsel then indicated that he wanted to address one issue before sentencing. He stated on the record that, on February 27, 2017, almost two weeks after the jury returned its verdict, the prosecutor had e-mailed him, stating that she had been notified by the division of a "CODIS hit" between Otero and the sweatshirt recovered from the corner of Hendricxsen Avenue and Curcombe Street. Defense counsel explained that "there was some DNA taken from a sweatshirt" for testing, and that, "[a]t the time of [the defendant's] trial," the DNA had not been matched to anyone, including the defendant. Defense counsel indicated that, after he received the e-mail from the prosecutor, he did some research and learned that Otero had not been incarcerated at the time of the crimes and, thus, "potentially," could have been a suspect in this case. He further stated that the "information was not available to anyone" and was "not insinuating" that the state had engaged in any "subterfuge" with regard to it. Defense counsel then noted that, after the prosecutor had alerted him to the CODIS match and its potential value, he did research and consulted with

several attorneys about how to proceed. Referring to Practice Book § 42-51, which governs motions for a judgment of acquittal,[7] and Practice Book § 42-53, which governs motions for a new trial,[8] defense counsel orally made "a motion for [a] judgment of acquittal . . . based on new evidence."

Defense counsel then stated that he knew that the court was "aware of the fact that there is some information that may [have] changed the balance of the case, and I would ask for the court to allow me to advance the argument and to grant that motion. And there's—there's certain remedies; I think, you could overturn or set aside the verdict, or you could grant a new trial . . . it's within your discretion." Defense counsel then advised the court that it would be his plan to go through with the sentencing if the court denied his motion and that the next stage would be to file a petition for a new trial, which was the "proper mechanism" for raising his concerns under Practice Book § 42-55[9] and General

[7] Practice Book § 42-51 provides in relevant part: "If the jury returns a verdict of guilty, the judicial authority, upon motion of the defendant . . . shall order the entry of a judgment of acquittal as to any offense specified in the verdict, or any lesser included offense, for which the evidence does not reasonably permit a finding of guilty beyond a reasonable doubt. If the judicial authority directs an acquittal for the offense specified in the verdict, but not for a lesser included offense, it may either:

"(1) Modify the verdict accordingly; or

"(2) Grant the defendant a new trial as to the lesser included offense."

Practice Book § 42-52 provides in relevant part: "Unless the judicial authority, in the interests of justice, permits otherwise, a motion for a judgment of acquittal shall be made within five days after a . . . verdict . . . ."

[8] Practice Book § 42-53 provides in relevant part: "(a) Upon motion of the defendant, the judicial authority may grant a new trial if it is required in the interests of justice. Unless the defendant's noncompliance with these rules or with other requirements of law bars his or her asserting the error, the judicial authority shall grant the motion:

"(1) For an error by reason of which the defendant is constitutionally entitled to a new trial; or

"(2) For any other error which the defendant can establish was materially injurious to him or her. . . ."

[9] Practice Book § 42-55 provides: "A request for a new trial on the ground of newly discovered evidence shall be called a petition for a new trial and shall be brought in accordance with General Statutes § 52-270. The judicial authority may grant the petition even though an appeal is pending."

Statutes § 52-270 (a).[10] He concluded by asserting that he had just made, "fairly, a complete record," and asked the court to rule on the motion.

The prosecutor responded that the standard for granting a motion for a judgment of acquittal, as set forth in Practice Book § 42-51, had not been met because the admitted evidence, which included Jiminez' eyewitness testimony that the defendant shot both him and Martinez, fully and reasonably supported the jury's verdict. The prosecutor did not address the defendant's request for a new trial.

The court then stated that, "in the interest of justice," it would entertain the defendant's late motion for a judgment of acquittal "under Practice Book §§ 42-51 and 42-52" because it had had some advance notice from defense counsel that he would be making an oral motion, and it had reviewed its notes, some of the testimony, "the information that was presented," and the law pertaining to postverdict motions for a judgment of acquittal. The court did not indicate that it was considering a motion for a new trial pursuant to Practice Book § 42-53. The court then denied the motion for a judgment of acquittal, specifically stating that it had considered the "information that was conveyed to the state's attorney's office, which was subsequently provided to defense counsel with regard to some evidence that was discussed at this trial" in light of the evidence

[10] General Statutes § 52-270 (a) provides: "The Superior Court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence or want of actual notice of the action to any defendant or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed, or the want of actual notice to any plaintiff of the entry of a nonsuit for failure to appear at trial or dismissal for failure to prosecute with reasonable diligence, or for other reasonable cause, according to the usual rules in such cases. The judges of the Superior Court may in addition provide by rule for the granting of new trials upon prompt request in cases where the parties or their counsel have not adequately protected their rights during the original trial of an action."

In his brief, the defendant indicates that no petition for a new trial has been filed.

presented in this case. It then proceeded to sentence the defendant.

Our review of the proceedings before the trial court on the defendant's oral motion for a judgment of acquittal or a new trial leads us to conclude that no claim of a *Brady* violation ever was advanced to the trial court by the defendant's trial counsel. Rather, defense counsel explicitly stated that he had been made aware of newly discovered evidence, and that neither the prosecution nor the defense were at fault for the postverdict timing of this disclosure. Without introducing any documentation or other evidence, he made an argument that an acquittal or a new trial was justified on the basis of newly revealed information concerning the CODIS match, which apparently had been discussed earlier with the court in chambers, but made no legal argument that would have alerted the court that he was making a *Brady* claim.

The state, in opposing the defendant's motion, apparently did not perceive that defense counsel was making a claim of untimely disclosure under *Brady*. Rather, the state argued that the defendant had not met the standard for the granting of a motion for a judgment of acquittal. Defense counsel made no rebuttal argument indicating that his claim was of a different nature. In denying the motion for a judgment of acquittal, the court did not set forth any factual findings or legal conclusions that, in any way, addressed the essential components of a *Brady* claim. As we will discuss in greater detail, "[i]n order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material." (Internal quotation marks omitted.) *State* v. *Dixon*, 72 Conn. App. 852, 858, 806 A.2d 1153, cert. denied, 262 Conn. 926, 814 A.2d 380 (2002).[11]

[11] In its brief, the state argues that the defendant waived his *Brady* claim when defense counsel had a fair opportunity to raise a *Brady* claim and

After filing the present appeal, appellate counsel for the defendant filed a motion for rectification of the record and requested that three documents that were referenced as "information" during the hearing on his motion for a judgment of acquittal or a new trial be marked as court exhibits, as they were the basis for his unpreserved *Brady* claim and necessary to his appeal. He indicated in the motion for rectification that there had been a conversation in chambers on April 4, 2017, and that some information had been provided to the court. That information, he claimed, was disclosed by the state in its February 27, 2017 e-mail to defense counsel. He alleged that the three documents contained "critical facts," which were not otherwise in the record, in support of his *Brady* claim. These facts included the dates on which (1) Otero was incarcerated, (2) Otero's DNA sample was taken and (3) the division, the state's investigative agent, matched the DNA from the sweatshirt to Otero's DNA and provided notice of this result to the Hartford police and the Hartford state's attorney's office. Those three documents, which were appended to the defendant's motion for rectification, were: (1) a printout of the February 27, 2017 e-mail from the state to defense counsel, in which it disclosed the CODIS hit; (2) the offender hit notification form, dated February 23, 2017, that the division sent to the Hartford and New Britain police departments and the Hartford state's attorney's office, informing them of the CODIS hit; and (3) an inmate information sheet from the Department of Correction regarding the incarceration of Otero. On September 12, 2018, the trial court granted the motion for rectification and marked the three documents as

made a strategic decision not to pursue one. We decline to construe the argument of defense counsel, in seeking a judgment of acquittal or a new trial on the basis of what he characterized as "newly discovered evidence," rather than suppressed evidence, as a knowing and intelligent waiver of a possible *Brady* claim. On the basis of our review of the record, we are not convinced that defense counsel realized that he may have had the factual requisites to raise a *Brady* claim.

court exhibits.[12] The court stated that the page number designations at the bottom of the documents were not there at the time of its initial discussion and review of the documents, but that they were otherwise "what [the] court recollect[ed] [were] discussed in this matter previously."[13] The defendant sought no further augmentation of the record.

As previously discussed, in this case, the record reveals that defense trial counsel never argued, and the trial court never considered, a *Brady* claim. Therefore, the defendant's *Brady* claim is unpreserved, a fact the defendant concedes in his reply brief, wherein he first asserts that his claim is subject to review under *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781, yet falls short of affirmatively requesting such review. 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

[12] The court marked the February 27, 2017 e-mail to defense counsel from the prosecutor, the February 23, 2017 offender hit notification form from the division, and the Department of Correction information sheet concerning Otero as court exhibits one through three, respectively. To avoid confusion with court exhibits one through three, which had been marked as court exhibits during the defendant's trial, we will refer to the three documents added to the record through rectification as the state's e-mail, the offender hit notification form and the Department of Correction information sheet.

[13] Because there was no specific reference, on the record, to any of these documents during the hearing on the defendant's postverdict motion on April 4, 2014, we conclude that the court, in indicating that it had previously been made aware of the documentation sought to be introduced in the defendant's motion for rectification, was referring to the same "information" to which it alluded as having been provided to it in chambers prior to the commencement of the April 4 hearing.

constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Jerrell R.*, 187 Conn. App. 537, 543, 202 A.3d 1044, cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019).

An affirmative request for review under *Golding* is not a prerequisite for review. See *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014) (to obtain *Golding* review of unpreserved claim, defendant need only raise claim in main brief, present adequate record for review and affirmatively demonstrate that claim seeks to vindicate fundamental constitutional right). The defendant's claim is reviewable under *Golding* because the record is adequate for review and, in his main brief, he has alleged a violation of his constitutional right to due process and provided analysis of his claim. Therefore, pursuant to *Golding*, we will proceed to examine the defendant's unpreserved claim that the state committed a *Brady* violation by failing to disclose the CODIS match.

"Our analysis of the defendant's claim begins with the pertinent standard, set forth in *Brady* and its progeny, by which we determine whether the state's failure to disclose evidence has violated a defendant's right to a fair trial. In *Brady*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . In *Strickler* v. *Greene*, 527 U.S. 263, [281–82] 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the United States Supreme Court identified the three essential components of a *Brady*

claim, all of which must be established to warrant a new trial: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [s]tate, either [wilfully] or inadvertently; and prejudice must have ensued. . . . Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 699–700, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006), discussing *Kyles* v. *Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). "If . . . [the defendant] . . . fail[s] to meet his burden as to [any] one of the three prongs of the *Brady* test, then [the court] must conclude that a *Brady* violation has not occurred." *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 296, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009).

In setting forth his claim on appeal, the defendant does not claim that an error was committed by the trial court. As we have discussed previously, the defendant moved for rectification to have certain documents made part of the record so that he could raise this *Brady* claim for the first time on appeal, and he maintains that the record, as rectified, renders his claim adequate for review.[14] Stated otherwise, the defendant relies solely

[14] In moving for rectification and seeking to have only the three documents made part of the record so that he could raise a *Brady* claim on appeal, the defendant should have been aware of other options available to him to further perfect the record and to preserve the claim at trial, including requesting an evidentiary hearing pursuant to *State* v. *Floyd*, 253 Conn. 700, 730–32, 756 A.2d 799 (2000) (defendant may request hearing to create factual record and obtain factual findings necessary to properly present *Brady* claim on appeal when he was precluded from doing so previously because new information was obtained postjudgment). After the defendant's motion for rectification was granted, he chose not to ask the trial court to conduct

on the facts in the record to demonstrate that a *Brady* violation occurred and, thus, he was deprived of a fair trial.

With respect to the record, we observe that "[o]ur Supreme Court has clarified that [a] record is not inadequate for *Golding* purposes because the trial court has not reached a conclusion of law if the record contains the factual predicates for making such a determination. . . . Nevertheless, [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." (Citation omitted; internal quotation marks omitted.) *State* v. *Morales*, 164 Conn. App. 143, 167, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016). Although the parties dispute whether the late disclosed CODIS match is favorable to the defense and whether it was suppressed by the division, they do not dispute the nature of the late disclosed evidence or where it was located. A sweatshirt was found approximately one-half to three-quarters of a block away from the car in which the shootings occurred. After the sweatshirt was tested for DNA, a CODIS match to Otero, who was not incarcerated at the time of the shootings, was generated. In the present case, we are being asked by the defendant to reach a legal conclusion that the trial court had not been asked to address, on

an evidentiary hearing to consider the merits of his *Brady* claim based on this new documentation.

The defendant is not now entitled to have the matter remanded by this court to the trial court for a *Floyd* hearing to further perfect the record, especially because he has indicated, adamantly, that he does not need, and therefore, does not request, this alternative relief. See *State* v. *Ouellette*, 295 Conn. 173, 183–84, 989 A.2d 1048 (2010) (although defendant claimed in his intermediate appeal that Appellate Court should order *Floyd* hearing to determine whether state withheld impeachment evidence, he did not renew claim in his certified appeal to Supreme Court or ask for such relief in alternative; consequently, he abandoned any such claim for relief).

the basis of an undisputed factual record that we deem adequate for review of the *Brady* claim as framed by the defendant in this appeal. See *State* v. *Torres*, 230 Conn. 372, 379, 645 A.2d 529 (1994). On the basis of the record demonstrating these facts and, assuming, without deciding, that this evidence is favorable to the defense and was suppressed, we are able to dispose of the defendant's *Brady* claim by addressing only the materiality prong.[15]

Next, we turn to the standard by which we review materiality in the context of a *Brady* analysis. We rely on the standard set forth in *State* v. *Ortiz*, 280 Conn. 686, 718–22, 911 A.2d 1055 (2006), in which our Supreme Court "clarified" the standard for review of materiality in a *Brady* claim because it determined that prior cases had not squarely articulated one.[16]

The court in *Ortiz* joined sister state and federal jurisdictions that have concluded that a trial court's determination as to materiality under *Brady* presents

[15] Because the defendant bears the burden of proving each of the three prongs of the *Brady* test, we need not address the favorability or the suppression prongs. See, e.g., *Morant* v. *Commissioner of Correction*, supra, 117 Conn. App. 296 (if petitioner fails to satisfy burden of proof as to one of *Brady*'s three prongs, court must conclude that *Brady* violation has not occurred).

[16] In *Ortiz*, the court discussed the lack of clarity in its prior opinions, as follows: "Compare, e.g., [*State* v. *Wilcox*, 254 Conn. 441, 452–55, 758 A.2d 824 (2000)] (reciting governing legal principles without stating standard of appellate review) with *State* v. *Pollitt*, 205 Conn. 132, 147–49, 531 A.2d 125 (1987) (noting that 'the determination of materiality has been said to be "inevitably fact-bound" and like other factual issues is committed to the trial court in the first instance,' but characterizing trial court's determinations about whether there was " 'reasonable probability' " that the result of the trial would have been different,' as 'conclusions of law,' but also recognizing 'the difficulty inherent in measuring the effect of nondisclosure in the course of a lengthy trial with many witnesses and exhibits such as this; this lack of certitude suggests deference by a reviewing court especially in the weighing of evidence') and *State* v. *Shannon*, 212 Conn. 387, 400, 563 A.2d 646 (citing *Pollitt*, but reviewing trial court's materiality determination for abuse of discretion), cert. denied, 493 U.S. 980, 110 S. Ct. 510, 107 L. Ed. 2d 512 (1989)." *State* v. *Ortiz*, supra, 280 Conn. 718–19.

a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error. Id., 720. Our Supreme Court, however, also expressed a preference for providing the trial judge with the opportunity to first consider a *Brady* claim, as the trial judge has observed firsthand the proceedings at trial, and it indicated that its "independent review nevertheless is informed by [the trial judge's] assessment of the impact of the *Brady* violation . . . ." Id., 721–22. The court explained: "[W]e find persuasive the Second Circuit Court of [Appeals'] approach of engaging in independent review, yet giving 'great weight' to the 'trial judge's conclusion as to the effect of nondisclosure on the outcome of the trial . . . .' " Id., quoting *United States* v. *Zagari*, 111 F.3d 307, 320 (2d Cir.), cert. denied sub nom. *Herzog* v. *United States*, 522 U.S. 983, 118 S. Ct. 445, 139 L. Ed. 2d 381 (1997), and cert. denied sub nom. *Shay* v. *United States*, 522 U.S. 988, 118 S. Ct. 455, 139 L. Ed. 2d 390 (1997).

Despite our Supreme Court's preference to first have the trial court assess the impact of a *Brady* violation, we do not interpret this stated preference as an inviolable rule that any *Brady* claim must first be fully presented and preserved in the trial court or be deemed waived. That would be a derogation of defendants' rights under *Golding*. This court has reviewed unpreserved *Brady* claims under *Golding* when there was no dispute as to the nature of the allegedly suppressed evidence. For example, in *State* v. *Bryan*, 193 Conn. App. 285, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019), despite the fact that the trial court did not adjudicate the specific issue of whether the state committed a *Brady* violation by failing to disclose certain internal affairs records of a police department, this court determined that no additional proceedings under *State* v. *Floyd*, 253 Conn. 700, 730–32, 756 A.2d 799 (2000), were necessary. *State* v. *Bryan*, supra, 313; see footnote 14 of this opinion. It proceeded to examine

the defendant's unpreserved *Brady* claim, noted that the state conceded that certain records had not been disclosed, and then assumed, without deciding, that the internal affairs records were favorable to the defendant as impeachment evidence against one of the testifying police officers.[17] Id., 316. Addressing only the materiality prong, the court in *Bryan* concluded that there was no *Brady* violation because the records were not material to the outcome of the defendant's trial and, thus, the state's late disclosure did not run afoul of *Brady*. Id.; see also *State* v. *Bethea*, 187 Conn. App. 263, 280–82, 202 A.3d 429 (conducting *Golding* review of unpreserved *Brady* claim by assuming evidence was favorable to defense, reviewing transcript of pretrial hearing, and finding, based on transcript, that defendant had equal access to witness to obtain statement and, thus, there was no evidence of suppression), cert. denied, 332 Conn. 904, 208 A.3d 1239 (2019).[18]

[17] There were two sets of internal affairs records in *State* v. *Bryan*, supra, 193 Conn. App. 310–11, that were the subject of the defendant's *Brady* claim: a set from 2008 and a set from 2005. During a 2017 hearing on a motion for augmentation and rectification before the trial court, the state conceded that it had not disclosed the 2008 records prior to trial, and, during a second hearing on a motion for augmentation and rectification of the record in 2018, the parties entered into a stipulation that the 2005 records also had not been disclosed prior to trial. Id., 309–11. The trial court, however, never ruled on whether the state's failure to disclose the records constituted a *Brady* violation. Id., 312–13.

[18] Our Supreme Court in *State* v. *Ortiz*, supra, 280 Conn. 686, noted that its decision in *State* v. *Floyd*, 253 Conn. 700, 732–33, 756 A.2d 799 (2000), had established a procedure by which evidence could be developed to explore claims of potential *Brady* violations in "the unusual situation in which a defendant was precluded from perfecting the record due to new information obtained after judgment." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 713 n.17. This would include seeking a full evidentiary hearing, a *Floyd* hearing, to augment the record. The purpose of a *Floyd* hearing is to permit the "rapid resolution of these fact sensitive constitutional issues and mitigate the effects of the passage of time that would accompany requiring defendants to wait to address these matters until after the conclusion of direct appellate review. Indeed, the potential memory fade attendant to this delay conceivably might even reward the state for violating *Brady*." Id., 714 n.17. In determining that we can address unpreserved *Brady* claims under *Golding* in a direct appeal, we are furthering the policy favored by our Supreme Court of promoting "rapid resolution" of *Brady* issues. Id.

Having resolved the issues of reviewability that pertain to the claim before us, we turn to the merits of the claim under *Golding*. "Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material." (Internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 529–30, 193 A.3d 625 (2018). Under the last *Brady* prong, the evidence must have been material to the case, such that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, supra, 514 U.S. 435. The mere possibility that the undisclosed information might have helped the defense or might have affected the outcome of the trial does not meet the materiality standard. See *State* v. *Pollitt*, supra, 205 Conn. 149. For the reasons that follow, we conclude that, even assuming that the state suppressed favorable evidence, the defendant has failed to show that the evidence the state allegedly suppressed was material.

In deciding whether the defendant has met his burden on the materiality prong, this court views the undisclosed favorable evidence, "not . . . in a vacuum . . . [but] in the context of all the evidence introduced at trial." (Internal quotation marks omitted.) Id., 143. "[E]vidence that may first appear to be quite compelling when considered alone can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory. Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 141 Conn. App. 626, 639, 62 A.2d 554, cert. denied, 308 Conn. 947, 67 A.3d 290 (2013). The favorable evidence must cast the whole case in a different light. It is not enough for

the defendant to show that the undisclosed evidence would have allowed the defense to weaken or destroy a particular prosecution witness or item of evidence to which the undisclosed evidence relates. See *Kyles* v. *Whitley*, supra, 514 U.S. 460 (Scalia, J., dissenting). When the evidence admitted at trial strongly supports the defendant's guilt, it is less likely that the undisclosed evidence would undermine confidence in the verdict. See, e.g., *State* v. *Dupigney*, 295 Conn. 50, 73, 988 A.2d 851 (2010).

In this case, the defendant failed to prove that the CODIS match constituted material evidence. The defendant did not testify that the alleged unknown gunman was wearing a sweatshirt, and the sweatshirt was not found at the actual crime scene but more than half a block away[19] at the corner of Hendricxsen Avenue and Curcombe Street. There is no evidence to indicate how long the sweatshirt had been there or that it was even present when the police first responded to the crime scene. There is no indication that the sweatshirt contained any signs of gunpowder residue or blood. Richter, who did not arrive at the crime scene until 7:43 a.m. on the morning of December 20, 2014, testified at trial that he alerted Lee to the sweatshirt. As depicted in photographs taken by Lee near the crime scene, the sweatshirt was found next to a sidewalk and in front of a fence surrounding an apartment complex, an area that is reasonably likely to be traversed by the public.

We are guided in our analysis by our Supreme Court's analysis in *State* v. *Dupigney*, supra, 295 Conn. 50, in which the petitioner, who had been convicted of murder, sought postconviction forensic DNA testing of a hat that was found on a driveway near the crime scene and had been introduced into evidence at his criminal trial. In *Dupigney*, the state had presented evidence at

[19] The defendant does not dispute that the sweatshirt was 600 feet away from where Martinez' vehicle was stopped on Hendricxsen Avenue at the time of the shootings.

trial that the shooter had been wearing a hat. Id., 70. In order to be entitled to postconviction DNA testing of evidence, the petitioner, pursuant to General Statutes § 54-102kk (b) (1), had to demonstrate a reasonable probability that he "would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing . . . ." The trial court denied the petition. *State* v. *Dupigney*, supra, 53. On appeal, our Supreme Court, applying the reasonable probability standard under § 54-102kk, found that the possibility that DNA testing of the hat could show that biological material from the hat belonged to neither the victim nor the petitioner would not create a reasonable probability that the jury could have formed a reasonable doubt that the petitioner was the shooter. Id., 73. In making its decision, the court noted that the term "reasonable probability" has a well established meaning—"a probability sufficient to undermine confidence in the outcome"—in the context of postconviction challenges, generally, including the *Brady* line of cases governing postconviction challenges on the basis of prosecutorial failure to disclose evidence to an accused. (Internal quotation marks omitted.) Id., 60–61. Accordingly, it applied the *Brady* materiality standard to its determination of whether the petitioner had shown sufficient cause to obtain postconviction DNA testing of the hat. Id., 64. In other words, the question that was addressed by the court in *Dupigney* was whether confidence in the outcome of the petitioner's trial would be undermined if the results of testing on the hat were to reveal the presence of DNA that matched neither the petitioner nor the victim. After noting the generic nature of the black knit hat found approximately twenty-two feet from the scene of the crime and the fact that the state never argued that the shooter had worn that particular hat, the court ruled that the link between the hat recovered in the driveway and the hat worn by the shooter was inconclusive. Id., 71–72. In light of the strong evi-

dence, entirely unrelated to the hat, identifying the petitioner as the shooter, the court determined that even if biological material could be found on the hat that did not belong to the petitioner or the victim, it would not undermine confidence in the fairness of the guilty verdict. Id., 72–73.

In the present case, the connection between the sweatshirt and the crimes is even more tenuous than the connection between the black knit hat and the crime in *Dupigney*. Specifically, the sweatshirt was found farther away from the crime scene, and the defendant did not testify that the alleged unknown shooter was wearing a dark colored sweatshirt.

Furthermore, in the present case, although defense counsel provided documentation to the trial court that Otero was not in prison at the time of the crimes, there is no indication that he was in the vicinity of the crime scene on or about December 20, 2014, or that he had any connection to the victims, let alone a motive to harm them. Without a clear link between Otero and the crimes, the defendant would not have been able to successfully raise a third-party culpability defense, assigning blame to Otero. In the absence of other evidence that connected Otero to the crime, it is reasonable to conclude that the sweatshirt at issue, which was located more than half a block from the crime scene, could have been left as a result of innocuous activity, rather than by someone involved in the commission of the shootings. See *State* v. *Gray-Brown*, 188 Conn. App. 446, 474, 204 A.3d 1161 (evidence of partial fingerprint of third person on vehicle victim was driving at time of robbery raised only bare suspicion that third party committed crime and was not relevant to jury's consideration; defendant needs to demonstrate direct connection between third party and crimes to warrant giving third-party culpability instruction to jury), cert. denied, 331 Conn. 922, 205 A.3d 568 (2019).

Even though, at the time of the trial, defense counsel did not know of the CODIS match, which linked Otero to the sweatshirt, he nonetheless was aware of the existence of the sweatshirt and the fact that it did not contain the defendant's DNA. In fact, in closing argument, defense counsel argued to the jury that it should question why it had heard nothing from the state about evidence found at or near the crime scene, but which testing revealed not to belong to the defendant. Defense counsel referred to the sweatshirt, fingerprints, and a cigarette butt. Obviously, it was not necessary for defense counsel to know about the CODIS match to suggest to the jury that the sweatshirt found up the street near the scene of the crimes belonged to someone other than the defendant in order to bolster his claim that some unknown person committed the shootings. He could have cross-examined Richter, who testified that the sweatshirt revealed no useful evidence, in more depth and asked him to explain in detail what forensic analysis, if any, the state had performed and, specifically, whether the division had created a DNA profile from a swabbing of the sweatshirt, whether that profile was compared to the defendant's DNA profile, and what the results were. See *United States* v. *Alston*, 899 F.3d 135, 147 (2d Cir. 2018) (to extent that defendant argues exculpatory testimony was material because it bolstered his reasonable perception that third party was legitimate businessman, defendant had opportunity to make that argument to jury through evidence already admitted, specifically, third party's trial testimony), cert. denied, U.S. , 139 S. Ct. 1282, 203 L. Ed. 2d 292 (2019).

Although the defendant places great weight on the fact that Otero was a convicted felon, Otero's felony conviction was for larceny in the second degree, not for a violent crime. If Otero's felony history presumes a propensity to commit the crimes in this case, the same could be said of the defendant's criminal history, for

he admitted in his testimony that he had several prior felony convictions, several for larceny.

Viewing the evidence as a whole, the state's case against the defendant was strong. It included Jiminez' eyewitness identification of the defendant, a person with whom he was familiar, as the shooter. Jiminez also testified that he exited the car immediately after being shot and ran in the direction of the apartment building in front of which the sweatshirt was discarded but that he saw no one else except the defendant in the area.

There also was evidence of a motive. The jury reasonably could have found that the defendant's mood at the after-hours club suddenly changed when he became aware that Martinez had admitted to killing Mariano Gonzalez, and the defendant was very close with Mariano Gonzalez' brother, Joel Gonzalez. The defendant himself testified that he had vouched for Martinez with the Los Solidos gang after Martinez had said the gang suspected him of killing someone.[20]

There also was significant consciousness of guilt evidence implicating the defendant. There was evidence that he repeatedly lied to the police during his interview with them, by giving an incorrect number for his cell phone and by denying that one of his nicknames was Flex, that he associated with Joel Gonzalez, and that he drove anywhere with Jiminez and Martinez on the night of the shootings. There was evidence that he called Joel Gonzalez to ask him to tell Mangual to get rid of the defendant's cell phone after the police told him they could track phone locations via cell towers. He also called Joel Gonzalez a second time to ask him to go to an area close to the crime scene, the "horseshoe," to see if there were any surveillance cameras present.

Particularly damaging to the defendant's testimony that an unknown gunman was the perpetrator was his

[20] The defendant testified that he had once been a member of the Los Solidos street gang.

admission on cross-examination that he previously did not describe that version of events when he was interviewed by the police or when it would have behooved him to do so at his parole revocation hearing, which resulted from his having violated his parole by committing the crimes in this case. His testimonial version of the events that transpired also lacks credibility in certain areas. As a matter of logic, certain unanswered questions undermine the defendant's version of events. For example, how could he look into the car when the driver's side door was open and not see the dying, or already deceased, Martinez slumped over the front console? And, why would he have told his friend, Mangual, who picked him up near the crime scene early that morning, only that he "almost got shot," and why wouldn't the defense have asked Mangual, on cross-examination, to corroborate that conversation?

There was strong evidence inculpating the defendant, including the eyewitness testimony of Jimenez, the evidence that he had a motive to commit the crimes, and evidence that he was conscious of his guilt. Although the defendant presented his own testimony concerning an unknown shooter, a version of events that he did not previously relate to the police or to parole officials, such evidence was very weak. Additionally, the jury was made aware of the fact that a sweatshirt and a pair of sweatpants had been discovered near the crime scene but that these items were not connected to the defendant. Also, the defendant is unable to demonstrate any actual connection between Otero and the victims in this case. On the basis of the foregoing, there is no reasonable basis to conclude that the lack of the evidence of the CODIS match during the defendant's trial undermined its fairness and resulted in a verdict not worthy of confidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WAYNE S. BRADBURY (AC 41544)

Alvord, Prescott and Bright, Js.

Syllabus

Convicted, after a jury trial, of the crimes of criminal possession of a firearm and carrying a pistol without a permit in connection with the shooting of the victim, the defendant appealed to this court. The jury found the defendant not guilty of the crimes of assault in the first degree and criminal attempt to commit robbery in the first degree, and the defendant claimed that, in light of the jury's not guilty finding on those charges, there was insufficient evidence to support his conviction as demonstrated by the inconsistency of the jury's verdict. *Held* that the defendant could not prevail on his claim that there was insufficient evidence to support his conviction, as his attempt to obtain review of the legal inconsistency between a conviction and an acquittal by recasting it as a claim of evidentiary insufficiency did not change the nature of his claim, and this court considered only whether the state presented sufficient evidence to support the defendant's conviction: the victim testified that he saw the defendant with a gun in his hand and that, immediately thereafter, he heard a gunshot and realized he had been shot, the defendant stipulated to the fact that he did not have a gun permit and that he was a convicted felon, and the defendant conceded that, if the jury believed the victim's testimony, there was sufficient evidence to convict him of the charges he challenged on appeal; moreover, the defendant's argument that the jury's not guilty verdict on the assault and robbery charges meant that the jury necessarily rejected the victim's testimony in its entirety was unavailing under long-standing case law.

Argued January 16—officially released March 17, 2020

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, criminal attempt to commit robbery in the first degree, criminal possession of a firearm and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, and tried to the jury before *Blue, J.*; verdict and judgment of guilty of criminal possession of a firearm and carrying a pistol without a permit, from which the defendant appealed to this court. *Affirmed.*

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

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

Opinion

BRIGHT, J. The defendant, Wayne S. Bradbury, appeals from the judgment of conviction, rendered following the jury's guilty verdict, of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a).[1] The defendant claims that, in light of the jury's not guilty finding on the remaining charges, there was insufficient evidence to support his conviction. We affirm the judgment of the trial court.

The state presented the following relevant evidence to the jury. On May 5, 2016, Zachary Ourfalian contacted the defendant to arrange to purchase $1500 worth of marijuana from him. Ourfalian previously had purchased marijuana from the defendant. They arranged to meet at the Home Depot in Wallingford. Ourfalian knew that the defendant would be driving a white BMW automobile. Prior to the meeting, Ourfalian picked up his friend, Leo Spencer, to take the ride with him, as he drove his mother's white Infinity FX 35. Ourfalian did not have a weapon with him, and he had never possessed a firearm. As Ourfalian was driving to meet the defendant, the defendant contacted him and changed the location of the meeting to Connecticut Beverage Mart

[1] The jury found the defendant not guilty of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), and the court rendered a judgment of acquittal on those charges.

(Mart), located across the street from the Home Depot in Wallingford. When Ourfalian and Spencer arrived at the Mart, Ourfalian saw the defendant waiting in a white BMW, which was parked on the side of the building, in the shadows. At approximately 8:45 p.m., Ourfalian parked in front of the Mart and walked around to the side of the building where the defendant had backed his BMW into a parking space. Ourfalian had $1500 tucked into his waistband of his pants.

The defendant was standing outside of the vehicle, which may have been running, with the passenger side door open. Another man was seated in the driver's seat. The defendant told Ourfalian that the marijuana was in a shoe box in the front of the car. Ourfalian felt uncomfortable about this because it would require him to reach into the car with his back to the defendant, so he looked around to investigate. The defendant then told him to hand over his money. Ourfalian saw a gun in the defendant's hand, and, as he started to turn and run, he heard a gunshot. When he returned to his vehicle, the $1500 was no longer in his waistband, and he realized that he had been shot. Ourfalian told Spencer that he needed to drive and Ourfalian got into the passenger's seat, and Spencer drove away from the Mart.

Ourfalian started looking on his cell phone for the addresses of local hospitals, but he was getting information on other types of medical facilities and could not narrow his search. He had Spencer drive to one of the locations, but it was not a hospital, so they asked a security guard in the area for directions to a hospital. After attempting to follow those directions, they pulled into the entrance of an elementary school, Cook Hill School, and Ourfalian called his girlfriend and 911. Before emergency responders arrived, Ourfalian deleted from his cell phone some of the messages between him and the defendant regarding the marijuana purchase.

At approximately 9 p.m., Anthony Baur, an officer with the Wallingford Police Department, received a report via his police radio about a shooting in the Cook Hill School area. When he arrived, other officers already were on scene at the school, speaking with two individuals, who had exited a white Infinity automobile.[2] Baur went to assist the other officers, and he asked Ourfalian to raise his arms so that he could be frisked for weapons. Baur then saw that Ourfalian had been shot in the abdomen, and he relayed their exact location to paramedics. Ourfalian appeared pale and in shock. Spencer, who was not being cooperative, was placed in handcuffs and put in the backseat of a police cruiser.

Baur rode with Ourfalian in the ambulance to Yale New Haven Hospital (hospital), where Ourfalian was taken into surgery. Meanwhile, other officers went to the Mart, where they found a .45 caliber shell casing, Ourfalian's hat, and Ourfalian's earbuds, but no weapons or money. The next day, Baur and Detective Shawn Fairbrother went to the hospital to interview Ourfalian and to present to him a photographic array. Ourfalian identified the photograph of the defendant, and stated that he was the person who had shot him.

On May 9, 2016, the police arrested the defendant, and he was charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1),[3] criminal attempt to commit robbery in the first degree in violation of § 53a-134 (a) (2),[4] criminal possession of a firearm, and carrying a pistol without a permit. During trial,

[2] The vehicle and the surrounding area were searched by the police, who discovered no firearms, ammunition, or drugs.

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

[4] General Statutes § 53a-134 provides in relevant part: "(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery . . . he or another participant in the crime . . . (2) is armed with a deadly weapon . . . ."

the defendant, who admitted to being a convicted felon, testified that it was Ourfalian who pulled a gun on him, and that when he pushed Ourfalian's gun away, he heard it go off.[5] Following the trial, the jury found the defendant guilty of criminal possession of a firearm and carrying a pistol without a permit; it found him not guilty of the remaining charges. The court accepted the jury's verdict and rendered a judgment of conviction, sentencing the defendant to a total effective sentence of ten years imprisonment, execution suspended after six years, with three years probation. This appeal followed.

On appeal, the defendant claims that there was insufficient evidence to support his conviction as demonstrated by the inconsistency of the jury's verdict, wherein the jury "credited nonexisting evidence in finding the defendant guilty of [the] firearms charges . . . ."[6] He argues: "Based on the evidence introduced at trial, there was only one way the defendant could have been guilty of assault or attempted robbery: If the jury believed that the defendant held the firearm, pointed it at Ourfalian, demanded his money, and then fired. The jury simply did not believe that version of events because they acquitted the defendant of the assault and attempted robbery charges. Put simply, they did not credit the evidence that the defendant was holding the weapon to complete the assault and attempt the robbery." We conclude that the evidence was sufficient.

[5] The defendant stipulated to being a convicted felon and to not having a permit.

[6] Although the defendant did not preserve this claim, "we have held that an unpreserved claim of evidentiary insufficiency is reviewable because it is of constitutional magnitude. [A]ny defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*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)]. There being no practical significance, therefore, for engaging in a *Golding* analysis of an insufficiency of the evidence claim, we will review the defendant's challenge to his conviction . . . as we do any properly preserved claim." (Internal quotation marks omitted.) *State* v. *Nova*, 161 Conn. App. 708, 717 n.6, 129 A.3d 146 (2015).

"In reviewing a sufficiency of the evidence claim, we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Daniel B.*, 331 Conn. 1, 12, 201 A.3d 989 (2019).

This "inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Jackson* v. *Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard . . . does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the [fact finder]—if known." Id., 319–20 n.13; see also *State* v. *Arroyo*, 292 Conn. 558, 586, 973 A.2d 1254 (2009) ("claims of legal inconsistency between a conviction and an acquittal are not reviewable"), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010).

In the present case, the defendant does not actually challenge whether the state introduced sufficient evidence to support each element of the crimes of which

the jury found him guilty but, rather, his challenge is to the consistency of the verdict because, in his view, it was obvious that the jury did not credit certain evidence, having found him not guilty of assault and robbery.[7] The defendant's attempt to obtain review of the legal inconsistency between a conviction and an acquittal by recasting it as a claim of evidentiary insufficiency, although artful, does not change the nature of his claim. See *State* v. *Arroyo*, supra, 292 Conn. 583–86 (discussing whether claims of legal inconsistency between conviction and acquittal are reviewable). Accordingly, we will consider only whether the state presented sufficient evidence to support the defendant's conviction. See *State* v. *Blaine*, 168 Conn. App. 505, 512, 147 A.3d 1044 (2016) (explaining that prior case law has "resolved any prior uncertainty in the law by holding that courts reviewing claims of inconsistent verdicts should examine only whether the evidence provided sufficient support for the conviction, and not whether the conviction could be squared with verdicts on other counts"), aff'd, 334 Conn. 298, 221 A.3d 798 (2019).

Section 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit . . . ." "[T]o obtain a conviction for carrying a pistol without a permit, the state was required to prove beyond a reasonable doubt that the defendant (1) carried a pistol, (2) for which he lacked a permit, (3) while outside his dwelling house or place of business." (Internal quotation marks omitted.) *State* v. *Covington*,

[7] We also disagree with the premise of the defendant's argument that the jury's split verdict necessarily means that the verdict is inconsistent. The jury logically could have concluded that, although the state proved beyond a reasonable doubt that the defendant was in possession of the gun, it failed to prove that the defendant possessed the requisite intents to commit the crimes of assault in the first degree and attempt to commit robbery in the first degree. It is because of such possibilities that challenges to the consistencies of verdicts are not permitted.

184 Conn. App. 332, 339, 194 A.3d 1224, cert. granted, 330 Conn. 933, 195 A.3d 383 (2018). "[T]o establish that a defendant carried a pistol or revolver, the state must prove beyond a reasonable doubt that he bore a pistol or revolver upon his person . . . while exercising control or dominion of it." (Internal quotation marks omitted.) Id.

Section 53a-217 provides in relevant part: "(a) A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and (1) has been convicted of a felony . . . ." In the present case, for the state to obtain a conviction for criminal possession of a firearm, the state was required to prove that the defendant possessed a firearm and that he was a convicted felon at the time of possession. See General Statutes § 53a-217 (a) (1). A "[f]irearm" is defined as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged . . . ." General Statutes § 53a-3 (19).

Ourfalian testified that he saw the defendant with a gun in his hand and that, immediately thereafter, he heard a gunshot, and realized, as he ran back to his vehicle, that he had been shot in the abdomen. The defendant stipulated to the fact that he did not have a gun permit and that he was a convicted felon, and, additionally, in his trial testimony, he also admitted that he was a convicted felon. The defendant concedes that if the jury believed Ourfalian's testimony, there was sufficient evidence to convict him of the gun charges he challenges on appeal. His argument that the jury's not guilty verdict on the assault and robbery charges means that we must conclude that the jury necessarily rejected Ourfalian's testimony in its entirety simply is unavailing under our long-standing case law. See, e.g., *State* v. *Kaplan*, 72 Conn. 635, 637–38, 45 A. 1018 (1900) ("The counsel for the [defendant] has apparently been misled by the erroneous belief that the jury could not

lawfully accept as true the testimony of the state's witness . . . so far as it tended to prove [one or more facts], and reject other portions of his testimony as untrue or unreliable. Such discrimination is within the power of the jury in respect to every witness . . . ."); *Santos* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-14-4005961-S (April 5, 2017) (reprinted at 186 Conn. App. 107, 115–16, 198 A.3d 698) ("[N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded [to] the testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Citation omitted; internal quotation marks omitted.)), aff'd, 186 Conn. App. 107, 198 A.3d 698, cert. denied, 330 Conn. 955, 197 A.3d 893 (2018).

The judgment is affirmed.

In this opinion the other judges concurred.

RCN CAPITAL, LLC *v.* CHICAGO TITLE INSURANCE COMPANY
(AC 42082)

Elgo, Bright and Devlin, Js.

Syllabus

The plaintiff, R Co., sought to recover damages from the defendant, C Co., a mortgage title insurance company, for, inter alia, breach of contract in connection with its failure to pay a claim on a policy that it had issued. The policy insured R Co.'s interests, as a mortgagee, in certain real property that secured a note executed by S Co. in exchange for a commercial loan. S Co. defaulted on the note and R Co. commenced foreclosure proceedings, during which R Co. discovered that its rights in the property were subordinate to the interests of a superior mortgage held by M. The property also became subject to a tax foreclosure action, and R Co.'s and M's mortgages were found to be subordinate to the interests of the municipality that brought the tax foreclosure action. R Co. purchased the property for $150,000, pursuant to the tax foreclosure by sale. As a result of that sale, M received approximately $108,000, which represented the total purchase price of $150,000 less committee

expenses and the satisfaction of the tax lien. Thereafter, R Co. commenced the present action after C Co. failed to pay money damages to R Co. due to M's superior encumbrance on the property. The trial court rendered judgment in favor of R Co. and awarded it $108,000, which represented R Co.'s loss in equity had its mortgage been superior to that of M. On appeal, R Co. claimed that the trial court improperly calculated the damages award by using the tax foreclosure sale price of the property instead of the estimated fair market value of the property at the time it commenced its foreclosure action. *Held* that the trial court did not err in calculating R Co.'s damages to be $108,000, which was the actual amount R Co. did not receive as a result of having to satisfy M's superior mortgage; R Co.'s claim that the damages should have been calculated as approximately $270,000, measured as the fair market value of the property as determined in the foreclosure action less the satisfaction of the tax lien, on the basis that due to the small amount of bidders, the purchase price from a foreclosure by sale was an unreliable valuation, was unavailing, as the law of contract damages limits an injured party to its actual loss caused by the breach, and an award in excess of that amount, based on an estimated fair market value, would have provided R Co. with an impermissible windfall.

Argued October 25, 2019—officially released March 17, 2020

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Moukawsher*, *J.*; judgment for the plaintiff, from which the plaintiff appealed to this court. *Affirmed.*

Jon C. Leary, for the appellant (plaintiff).

Frank B. Velardi, *Jr.*, for the appellee (defendant).

Opinion

ELGO, J. In this breach of contract action, the plaintiff, RCN Capital, LLC, appeals from the judgment of the trial court awarding it $108,000 in damages. On appeal, the plaintiff claims that the court improperly determined the amount of damages. We affirm the judgment of the trial court.

The following relevant facts are not in dispute. On June 28, 2012, Sunford Properties & Development, LLC

(Sunford), executed a note in favor of the plaintiff in exchange for a commercial loan in the amount of $600,000. To secure the note, Kwok L. Sang executed and delivered a limited guarantee agreement to the plaintiff, which was secured by a commercial guarantee mortgage deed (mortgage) on certain real property located in Norwich (property).[1] On June 29, 2012, the mortgage was recorded on the Norwich land records.

Under the terms of the loan agreement, Sunford and Sang directed their attorney—an agent of the defendant, Chicago Title Insurance Company—to have the defendant issue a mortgage title insurance policy (policy), insuring the interests of the plaintiff with respect to the property. The policy was executed on June 29, 2012, and provided for up to $600,000 in coverage. The policy insured various types of losses that could be suffered by the plaintiff, including "[t]he lack of priority of the lien of the [i]nsured [m]ortgage upon the [t]itle over any other lien or encumbrance."[2] On November 5, 2013, the policy was modified by way of an endorsement that included, in part, an increase of coverage to $800,000 and reflected the plaintiff's name change. That same day, the note, the limited guarantee, and the commercial guarantee mortgage were also modified to increase the loan amount to $800,000.

On April 1, 2014, Sunford defaulted on the loan. On January 6, 2015, the plaintiff commenced a foreclosure action seeking a judgment of foreclosure on the property.[3] During the foreclosure litigation, the plaintiff

[1] The note was also secured by a different property located in Norwich. That property is not relevant to this appeal.

[2] The policy originally named the insured as Entertainment Financial, LLC, which was the former name of the plaintiff. The November 5, 2013 modification of the policy, evidenced by an endorsement, reflected the plaintiff's name change to RCN Capital, LLC.

[3] In a three count complaint, the plaintiff asserted claims against Sunford, Sang, and another individual—Janny Lam. Those claims included (1) foreclosure of a separate property, (2) foreclosure of the property at issue in the present case, and (3) a personal guarantee collection as to Lam.

learned that its rights in the property as a mortgagee were subordinate to the interest of a mortgage held by the Mashantucket Pequot Tribal Nation (Tribal Nation). The Tribal Nation mortgage was in the principal amount of $1,400,000 and was recorded on the Norwich land records in July, 2007. The plaintiff's original complaint did not identify the Tribal Nation mortgage as an encumbrance on the property.[4]

On April 27, 2015, the property became the subject of a tax foreclosure action commenced by the city of Norwich (tax foreclosure action). Both the plaintiff's mortgage and the Tribal Nation mortgage were found to be subordinate in right to the interests of Norwich.[5] On May 12, 2016, the court in the tax foreclosure action rendered a judgment of foreclosure by sale of the property.

On May 16, 2016, the court in the plaintiff's foreclosure action rendered a judgment of strict foreclosure and found the property to have a fair market value of $304,000.[6] On August 19, 2016, the plaintiff purchased the property for $150,000 pursuant to the tax foreclosure by sale. As a result of the sale to the plaintiff, the Tribal Nation received $108,478.32, which represented the total purchase price of $150,000 less committee expenses and satisfaction of Norwich's tax lien. Having now acquired the property through the tax foreclosure action, the plaintiff filed a motion to open the judgment in its own foreclosure action. After the court granted

[4] The plaintiff filed a second revised complaint on December 24, 2015, that identified the Tribal Nation mortgage as superior to its mortgage.

[5] The policy excluded from coverage "[a]ny lien on the [t]itle for real estate taxes or assessments imposed by a governmental authority and created or attaching between [the date] of [the policy] and the date of recording of the [i]nsured [m]ortgage in the Public Records." Neither party argues that the Norwich tax lien was covered by the policy.

[6] The court also rendered judgment in favor of the plaintiff with respect to its claims seeking strict foreclosure of a different property and collection on the personal guarantee.

that motion, the plaintiff withdrew its count seeking foreclosure of the property.[7]

On April 26, 2016, the plaintiff notified the defendant of its claim for monetary damages under the policy. After the defendant failed to pay on the claim, the plaintiff instituted this action against the defendant. In its revised complaint dated May 23, 2017, the plaintiff alleged a single count of breach of contract and sought monetary damages for the defendant's failure to pay the claim submitted under the policy. On February 20, 2018, the court, *Noble*, *J.*, denied the defendant's motion for summary judgment as to liability. In its memorandum of decision, the court found that, although "the plaintiff acquired title [to the property] free and clear of the Tribal Nation's mortgage . . . it was required to satisfy the Tribal Nation's superior encumbrance to the extent of the equity remaining in the property. The partial satisfaction of the Tribal Nation's mortgage deprived the plaintiff of access to equity otherwise available to it to satisfy the debt owed it, thereby causing it to suffer actual loss."

After the defendant conceded liability at trial, the court, *Moukawsher*, *J.*, rendered judgment in favor of the plaintiff on August 27, 2018, awarding the plaintiff $108,000 in damages. In its memorandum of decision, the court rejected the plaintiff's damages valuation of $269,337.08, which represented the fair market value of the property at the time of the plaintiff's foreclosure action less the $34,662.92 in taxes paid to Norwich. Relying on *Cohen* v. *Security Title & Guarantee Co.*, 212 Conn. 436, 562 A.2d 510 (1989), the court found that, because $108,000 was the actual loss suffered by the plaintiff, "[a]ny other amount is not a reflection of

[7] In its motion to open the judgment, the plaintiff argued that, because the property was sold pursuant to the tax foreclosure action, its claim seeking strict foreclosure of the property was moot.

the security impairment actually suffered by the [plaintiff] . . . .'' This appeal followed.[8]

On appeal, the plaintiff challenges the court's measurement of damages. Specifically, it argues that the court improperly valued its damages at $108,000, representing the actual loss of equity it would have received if its mortgage had priority over the Tribal Nation's mortgage. The plaintiff asserts that the proper valuation of damages should have been the fair market value of the property as determined in its foreclosure action less the satisfaction of the Norwich tax lien. We disagree.

''Our standard of review applicable to challenges to damages awards is well settled. . . . [T]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . [If], however, a damages award is challenged on the basis of a question of law, our review [of that question] is plenary.'' (Internal quotation marks omitted.) *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 735, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020).

We begin by noting that ''[a] title insurance policy is a contract of indemnity under which the insurer agrees to indemnify the insured in a specified amount against loss through defect of title to real estate. . . . Accordingly, the relationship between an insurance company

[8] After this appeal was filed, and in response to the plaintiff's motion for articulation, the court issued an order in which it clarified that it took judicial notice of the pleadings, orders, and judgments in both the plaintiff's foreclosure action and the tax foreclosure action. The court further clarified that ''[i]ts decision [on the plaintiff's damages] was made with an understanding of them.''

and the insured is essentially contractual." (Citation omitted.) *Lee* v. *Duncan*, 88 Conn. App. 319, 325, 870 A.2d 1, cert. denied, 274 Conn. 902, 876 A.2d 12 (2005). Because the resolution of this claim necessarily involves the interpretation of an unambiguous contract, our review is plenary. See, e.g., *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 575, 119 A.3d 570 (2015).

The title insurance contract at issue in the present case provides for coverage against loss caused, in part, by "[t]he lack of priority of the lien of the [i]nsured [m]ortgage upon the [t]itle over any other lien or encumbrance." Expressly excluded from coverage are "[d]efects, liens, encumbrances, adverse claims, or other matters . . . resulting in no loss or damage to the [plaintiff]." As our Supreme Court has held, "[t]his exclusion reflects the fact that [t]itle insurance is . . . an indemnity contract and as such it is to provide reimbursement for *actual* loss only."[9] (Emphasis in original; internal quotation marks omitted.) *Cohen* v. *Security Title & Guarantee Co.*, supra, 212 Conn. 439. Thus, the proper measurement of damages is limited to the actual loss suffered by the plaintiff.

As the trial court found in denying the defendant's motion for summary judgment, the plaintiff could acquire title to the property free and clear of encumbrances only by partially satisfying the Tribal Nation's superior mortgage. The record unequivocally indicates that the plaintiff would have received approximately $108,000 had its mortgage been superior to that of the Tribal Nation's mortgage. Because its mortgage was not superior, the court found that the plaintiff sustained an actual loss of approximately $108,000 upon its purchase of the property pursuant to the tax foreclosure action.

[9] We further note that paragraph 8 of the policy explicitly states that "[t]his policy is a contract of indemnity against *actual* monetary loss or damage sustained or incurred by the [insured] who has suffered loss or damage by reason of matters insured against by this policy." (Emphasis added.)

In challenging this valuation, the plaintiff submits that the correct methodology for calculating damages is the fair market value of the property determined during the plaintiff's foreclosure action ($304,000) less the amount required to satisfy Norwich's tax lien ($33,780), for a total of $270,220. It asserts that, due to the small number of bidders, the purchase price from a foreclosure by sale is an unreliable valuation for purposes of damages.[10]

In support of its claim that the sales price from a foreclosure sale is not reliable for the valuation of damages, the plaintiff cites to *New England Savings Bank* v. *Lopez*, 227 Conn. 270, 630 A.2d 1010 (1993). In that case, the defendants claimed that the trial court's use of the foreclosure sale price of the property—instead of the property's fair market value—to calculate a deficiency judgment violated their right to due process. Id., 274–75. In rejecting this claim, our Supreme Court stated in dicta that, unlike a foreclosure by sale, "[f]air market value is generally said to be the value that would be fixed in fair negotiations between a desirous buyer and a willing seller, neither under any undue compulsion to make a deal. . . . An auction sale, such as a foreclosure sale, is not designed to reach that result because there is no opportunity for negotiations, and the seller, namely, the committee appointed by the trial court to conduct the sale, *is* under compulsion to make a deal, in the sense that it is required to take the highest bid . . . ."[11] (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 280.

[10] The plaintiff also asserts that it likely would have paid the Norwich tax lien to avoid the tax foreclosure action from going to judgment. At oral argument before this court, however, the plaintiff conceded that no evidence existed to support that assertion. Such speculation for the purposes of calculating damages is impermissible. See *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 191–92, 90 A.3d 219 (2014).

[11] Although not directly relevant to our resolution of this claim, it is not lost on this court that the plaintiff availed itself of the "unreliable" valuation process in order to secure the property at a price well below the fair market valuation of its own expert witness.

Our appellate courts have not had the occasion to address the issue of the measurement of an actual loss sustained by an insured lender under a title insurance policy for purposes of calculating damages. Courts in other states, however, have used the foreclosure sale price to determine the actual loss suffered by an insured mortgagee under an insurance policy when that loss resulted from a superior encumbrance.[12] See *Grunberger* v. *Iseson*, 75 App. Div. 2d 329, 331–32, 429 N.Y.S.2d 209 (1980) (market price is irrelevant to determining actual loss under title insurance policy where actual sale price establishes amount available to lienholders); *Chicago Title Ins. Co.* v. *Huntington National Bank*, 87 Ohio St. 3d 270, 274–75, 719 N.E.2d 955 (1999) (appropriate measure of damages under title insurance policy is what buyer actually paid at foreclosure sale and what lender actually received, "not a hypothetical valuation based on speculation had the property been sold on the open market").

Under the present circumstances, we believe that the analysis in *Chicago Title Ins. Co.* v. *Huntington National Bank*, supra, 87 Ohio St. 3d 273, is highly persuasive regarding how to calculate the actual loss suffered by an insured under a title insurance policy. In that case, the Supreme Court of Ohio was presented with a similar question of whether the actual loss suffered by an insured whose policy covered the insured having first priority with respect to other encum-

[12] We acknowledge that "[t]here is a fundamental distinction between the indemnifiable loss of an insured lender and the indemnifiable loss of an insured owner of property by virtue of title defects or undisclosed liens." *Cale* v. *Transamerica Title Insurance*, 225 Cal. App. 3d 422, 426, 275 Cal. Rptr. 107 (1990). This difference is significant "because [t]he fee interest of an owner is immediately diminished by [the] presence of [a] lien since resale value will always reflect the cost of removing the lien." (Internal quotation marks omitted.) *Twin Cities Metro-Certified Development Co.* v. *Stewart*, 868 N.W.2d 713, 717 (Minn. App. 2015). However, because measuring damages incurred by an insured owner is not before us, we do not address that issue.

brances,[13] was the proceeds it would have received from a foreclosure by sale had a superior lien not existed. Id., 273–74. In answering that question in the affirmative, the court emphasized that, when an insured's coverage includes losses incurred as a result of a superior lienholder foreclosing on the property, "[t]he appropriate measure of damages is based upon what the buyer actually paid at the foreclosure sale and what the [superior] lender actually received . . . ." Id., 274. Because the foreclosure sale resulted in the superior lienholder receiving approximately $40,000 in proceeds, and because the insured's indebtedness remained above $60,000, the court held that the $40,000 received by the superior lienholder was the actual loss sustained by the insured. Id. In so doing, the court reasoned that "the use of the actual sale price of the secured property to measure loss instead of an estimated fair market value provides the parties with a conclusive method of valuation that is not based on opinion or speculation." Id., 275. We concur with that assessment.

In the present case, the sale of the property, pursuant to the tax foreclosure action, resulted in a purchase price of $150,000. Of that amount, the Tribal Nation received approximately $108,000 after satisfaction of the Norwich tax lien and foreclosure expenses. But for the Tribal Nation's superior mortgage, the plaintiff, therefore, would have received $108,000. Thus, under the circumstances before us, the plaintiff sustained an actual loss of $108,000. An award in excess of that

[13] The relevant language of the title insurance policy in *Huntington National Bank* is similar to the policy at issue in the present matter. For instance, the policy in that case covered any loss or damage incurred by the insured by reason of "[t]he priority of any lien or encumbrance over the lien of the insured mortgage." *Chicago Title Ins. Co.* v. *Huntington National Bank*, supra, 87 Ohio St. 3d 273. It further excluded from coverage any damages arising from "[d]efects, liens, encumbrances, adverse claims or other matters either created . . . by the insured or resulting in no loss or damage to the insured claimant." (Internal quotation marks omitted.) Id. Moreover, neither the policy in *Huntington National Bank* nor the policy at issue here defined the term "loss." See id.

amount would provide the plaintiff with an impermissible windfall. See *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 804, 17 A.3d 40 (2011) ("[g]uarding against excessive compensation, the law of contract damages limits the injured party to damages based on his actual loss caused by the breach" [internal quotation marks omitted]). We therefore conclude that the court properly calculated the plaintiff's damages.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN S. KAMINSKI *v.* SCOTT SEMPLE ET AL.
(AC 42288)

Alvord, Moll and Norcott, Js.

Syllabus

The plaintiff inmate sought, inter alia, a declaratory judgment and injunctive relief in connection with the alleged failure of the defendant state employees to conduct a criminal investigation into abuse that he alleged had been inflicted on him by a correction officer. The defendants moved to dismiss the plaintiff's complaint on the ground that the trial court lacked subject matter jurisdiction because the plaintiff lacked standing to assert a claim that was based on the alleged failure to conduct a criminal investigation. The defendants also claimed that the plaintiff's claims were barred by sovereign immunity and statutory (§ 4-165) immunity. The trial court granted the defendants' motion to dismiss, concluding that the defendants were entitled to sovereign immunity and immunity pursuant to § 4-165, and that the plaintiff lacked standing as to his claim that the defendants failed to investigate the alleged abuse. The trial rendered judgment for the defendants, and the plaintiff appealed to this court, claiming, inter alia, that because he had sued all of the defendants in their individual capacities, the trial court improperly concluded that they were entitled to sovereign and statutory immunity. *Held* that the judgment of the trial court was affirmed in part and the appeal was dismissed in part as moot, the plaintiff on appeal having failed to challenge the trial court's determination that he lacked standing to raise certain of his claims as to certain defendants, and because the trial court's memorandum of decision fully addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned decision as a proper statement of the relevant facts and the applicable law on the issues.

Argued December 5, 2019—officially released March 17, 2020

Procedural History

Action for a judgment declaring that the defendants hindered the plaintiff's ability to file a criminal complaint against them in violation of his civil rights and his right to due process, and for the establishment of reporting procedures for crimes against inmates, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Morgan, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed in part; affirmed in part.*

John S. Kaminski, self-represented, the appellant (plaintiff).

Steven M. Barry, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented plaintiff, John S. Kaminski, appeals from the judgment of the trial court granting the defendants'[1] motion to dismiss on the grounds that the defendants, who are state employees, are entitled to sovereign immunity or statutory immunity pursuant to General Statutes § 4-165,[2] and that the plaintiff lacked standing to assert a claim that was based on the defendants' alleged failure to conduct a crimi-

[1] The defendants are Scott Semple, Commissioner of Correction; Deputy Warden Gary Wright; Captain Jeanette Maldonado; Jay Gershowitz, a deputy sergeant with the state police; Tolland State's Attorney Matthew C. Gedansky; Warden Edward Maldonado; and Captain Scott VanOundenhove.

[2] General Statutes § 4-165 provides in relevant part: "(a) No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter. . . ."

nal investigation into the abuse he claimed had been inflicted on him by a correction officer. The plaintiff contends that, because all of the defendants were sued in their individual capacities, the court improperly concluded that the defendants were entitled to sovereign immunity and statutory immunity. We affirm the judgment of the trial court in part and dismiss the appeal in part as moot.

The following facts, as alleged in the plaintiff's complaint and viewed in the light most favorable to the plaintiff, are relevant to this appeal. On November 18, 2014, the plaintiff underwent spinal surgery. On November 20, 2014, the plaintiff was being transferred from John Dempsey Hospital at the University of Connecticut Health Center in Farmington, where the surgery took place, back to Osborn Correctional Institution in Somers, where he was incarcerated at the time. Prior to transport, "he was the victim of reckless endangerment [in the second degree in] violation of General Statutes [§] 53a-64, and [abuse in the first degree and abuse in the second degree] of the elderly in violation of General Statutes [§§] 53a-321 [and 53a-322, respectively]." Thereafter, the plaintiff was admitted to the Osborn Correctional Institution infirmary, where he spent six days before returning to the general inmate population.

On December 3, 2014, the plaintiff requested that the defendant Captain Jeanette Maldonado file a criminal complaint against the named correction officer, a Department of Correction (department) incident report, and a request to secure video footage concerning the alleged physical abuse. On December 12, 2014, unsatisfied with the response from Maldonado, the plaintiff contacted the state police. The state police subsequently interviewed the plaintiff on January 7, 2015. According to the plaintiff, no additional investigation was conducted as a result of this interview.

The plaintiff commenced this action by way of a writ of summons and complaint on February 1, 2017.[3] On January 26, 2018, the defendants moved to dismiss the plaintiff's complaint on the ground that the trial court lacked subject matter jurisdiction because (1) the plaintiff lacked standing to assert a claim that was based on the defendants' failure to conduct a criminal investigation and (2) his claims were barred by sovereign immunity and statutory immunity. The court, *Morgan*, *J.*, heard argument concerning the motion on July 30, 2018.

On October 31, 2018, the court issued its memorandum of decision granting the defendants' motion to dismiss. To determine whether the action was brought against the defendants in their individual or official capacities, the court applied the four factor test set forth in *Spring* v. *Constantino*, 168 Conn. 563, 568, 362

[3] In his complaint, the plaintiff alleged the following: As to the defendant Commissioner of Correction Scott Semple, the plaintiff claims that Semple failed to report a felony after being made aware that the plaintiff was a victim of physical abuse and obstructed justice by failing (1) to establish a directive concerning reporting procedures and (2) to secure video evidence of the physical abuse.

As to the defendant Deputy Warden Gary Wright, the plaintiff claims that Wright obstructed justice by failing to initiate and to investigate an incident report concerning the physical abuse.

As to the defendant Captain Jeanette Maldonado, the plaintiff claims that Maldonado obstructed justice by failing (1) to take action concerning a complaint initiated by the plaintiff, (2) to secure video evidence of the physical abuse, and (3) to report a felony or initiate a departmental incident report.

As to the defendant Detective Sergeant Jay Gershowitz, the plaintiff claims that Gershowitz obstructed justice by failing to investigate the physical abuse against the plaintiff.

As to the defendant Tolland State's Attorney Matthew C. Gedansky, the plaintiff claims that Gedansky obstructed justice by failing to investigate and report a felony.

As to the defendant Warden Edward Maldonado, the plaintiff claims that Maldonado obstructed justice by failing (1) to protect the plaintiff from the physical abuse of correction officers by taking no action once he was fully informed of the physical abuse and (2) to secure video evidence of the physical abuse.

As to the defendant Captain Scott VanOundenhove, the plaintiff claims that VanOundenhove obstructed justice by failing to report a felony and to investigate the matter after he became aware that the plaintiff was a victim of physical abuse.

A.2d 871 (1975), and concluded that the defendants had satisfied all criteria and, therefore, were sued in their official capacities. Accordingly, sovereign immunity applied, and the plaintiff's complaint was barred. The court further concluded that, to the extent that the defendants were each sued in their individual capacities, they were entitled to statutory immunity pursuant to § 4-165. Last, the court held that the plaintiff lacked standing to assert any claim of failure to conduct a criminal investigation because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." (Internal quotation marks omitted.) This appeal followed.

The trial court cited three independent grounds for granting the defendants' motion to dismiss: (1) sovereign immunity; (2) statutory immunity; and (3) lack of standing as to all defendants other than the defendant Commissioner of Correction Scott Semple. As to the issue of standing, the court stated that "[t]he plaintiff is not entitled to a criminal investigation of his complaint by the state's attorney or [the] police or to a prosecution if an investigation had taken place. Accordingly, the court lacks subject matter jurisdiction to adjudicate the plaintiff's claim against any of the defendants for failure to conduct a criminal investigation . . . ." The plaintiff does not address the issue of standing in his appellate brief or in his preliminary statement of issues. "[W]here alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant." (Internal quotation marks omitted.) *Anghel* v. *Saint Francis Hospital & Medical Center*, 131 Conn. App. 823, 828, 29 A.3d 179 (2011), cert. denied, 303 Conn. 929, 36 A.3d 240 (2012). Accordingly, because the plaintiff has failed to challenge the trial court's

determination that he lacks standing, we cannot grant the plaintiff any practical relief with respect to his claims and, therefore, dismiss the appeal as moot as to the plaintiff's claims concerning the defendants Deputy Warden Gary Wright, Maldonado, Detective Sergeant Jay Gershowitz, Tolland State's Attorney Matthew C. Gedansky, Warden Edward Maldonado, and Captain Scott VanOundenhove. See *In re Jorden R.*, 293 Conn. 539, 556, 979 A.2d 469 (2009) ("[i]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow" (emphasis omitted; internal quotation marks omitted)).

As to Commissioner Semple, our examination of the record on appeal and the briefs and arguments of the parties persuades us that the judgment of the trial court should be affirmed. The trial court's memorandum of decision fully addresses the arguments raised in the present appeal, and we adopt its concise and well reasoned decision as a proper statement of the relevant facts and applicable law on the issues presented here.[4] See *Kaminski* v. *Semple*, Superior Court, judicial district of New Britain, Docket No. CV-17-5018219-S (October 31, 2018) (reprinted at 196 Conn. App. 534, A.3d). It serves no useful purpose for us to repeat the discussion contained therein. See *Furka* v. *Commissioner of Correction*, 21 Conn. App. 298, 299, 573 A.2d 358, cert. denied, 215 Conn. 810, 576 A.2d 539 (1990).

[4] We note that two of the cases cited in the court's memorandum of decision were overruled on other grounds. These cases are *Antinerella* v. *Rioux*, 229 Conn. 479, 642 A.2d 699 (1994), and *Shay* v. *Rossi*, 253 Conn. 134, 749 A.2d 1147 (2000). Both cases were overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003), "to the extent that each of those cases holds that sovereign immunity does not bar monetary damages actions against state officials acting in excess of their statutory authority." Our Supreme Court's decision in *Miller* does not have an effect on the issues that were before the trial court because the trial court did not rely on *Antinerella* or *Shay* for the proposition that the plaintiff's claim for monetary damages in the present case was not barred. Instead, the court relied on the facts from those cases to determine whether the defendants acted outside the scope of their employment. We, therefore, conclude that our decision in the present case is unaffected by *Miller*.

The appeal is dismissed as moot as to the plaintiff's claims concerning the failure to conduct a criminal investigation; the judgment is affirmed in all other respects.

APPENDIX

JOHN S. KAMINSKI *v.* SCOTT SEMPLE ET AL.*

Superior Court, Judicial District of New Britain
File No. CV-17-5018219-S

Memorandum filed October 31, 2018

Proceedings

Memorandum of decision on defendants' motion to dismiss. *Motion granted.*

John S. Kaminski, self-represented, the plaintiff.

Steven M. Barry, assistant attorney general, for the defendants.

Opinion

MORGAN, J. Before the court is the defendants' motion to dismiss the plaintiff's complaint. In his complaint, the plaintiff, John S. Kaminski, asserts claims against the defendants, Department of Correction Commissioner Scott Semple (Semple), Deputy Warden [Gary] Wright (Wright), Captain [Jeanette] Maldonado (Maldonado), State Police Detective Sergeant [Jay] Gershowitz (Gershowitz), Tolland State's Attorney Matthew C. Gedansky (Gedansky), Warden Edward Maldonado (E. Maldonado), and Captain VanOundenhove (VanOundenhove). All of the defendants worked for the state and, with the exception of Gershowitz and

* Appeal dismissed in part; affirmed in part. *Kaminski* v. *Semple*, 196 Conn. App. 528, A.3d (2020).

Gedansky, all worked for the Department of Correction (department).

The defendants move to dismiss the complaint on the ground that the court lacks subject matter jurisdiction to adjudicate the plaintiff's claims because the plaintiff lacks standing and because the claims are barred by sovereign immunity and/or statutory immunity under General Statutes § 4-165. The plaintiff opposes the motion and argues that apart from Semple, he has sued all of the defendants in their individual capacities and, therefore, sovereign immunity does not bar his claims. The plaintiff does not clearly address the immunity arguments regarding Semple. The parties were heard on the motion on July 30, 2018.

A

Motion to Dismiss Standard of Review

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346, 977 A.2d 636 (2009). A motion to dismiss may be brought to assert, inter alia, "lack of jurisdiction over the subject matter . . . ." Practice Book § 10-30 (a) (1). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). "Claims involving the doctrines of common-law sovereign immunity and statutory immunity, pursuant to § 4-165, implicate the court's subject matter jurisdiction." *Manifold* v. *Ragaglia*, 94 Conn. App. 103, 113–14, 891 A.2d 106 (2006). "[W]henever a court discovers that it has no jurisdiction, it is bound to dismiss the case . . . ." (Internal quotation marks omitted.) *Pet* v.

Dept. of Health Services, 207 Conn. 346, 351, 542 A.2d 672 (1988).

B

Sovereign Immunity

"The doctrine of sovereign immunity protects state officials and employees from lawsuits resulting from the performance of their duty." *Hultman* v. *Blumenthal*, 67 Conn. App. 613, 620, 787 A.2d 666, cert. denied, 259 Conn. 929, 793 A.2d 253 (2002). "[B]ecause the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state." (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn 56, 65, 23 A.3d 668 (2011).

In his complaint, the plaintiff alleges that the defendants failed to report and investigate an incident involving the plaintiff and a correction officer and seeks a "declaratory acknowledgement," after a trial, that the defendants obstructed justice and thereby violated his civil rights. His prayer for relief additionally noted that he was not seeking financial compensation. Subsequently, the plaintiff filed a Motion for Permission to Amend (No. 111.00) on May 8, 2017, seeking permission to amend his prayer for relief to add claims for damages. In doing so, the plaintiff specified that his claims against the defendants were in their individual capacities only and for money damages, with the exception of Semple, who was sued in his official capacity.[1] The plaintiff's motion was granted on May 22, 2017 (No. 111.01). The defendants argue that although the plaintiff purports to be suing the defendants (excluding Semple) in their individual capacities, he seeks to hold them liable for

[1] The plaintiff also confirmed at oral argument that he was seeking declaratory relief as to Semple only and money damages as to all other defendants.

their actions in discharging their duties as employees of the state. Thus, the defendants maintain, the plaintiff is actually suing Wright, Maldonado, Gershowitz, Gedansky, E. Maldonado, and VanOundenhove in their official capacities.

Whether an action against a state official is, in effect, one against the state or one against the official in his personal capacity turns not on the plaintiff's conclusory allegations, but rather upon four criteria established by our Supreme Court. *Spring* v. *Constantino*, 168 Conn. 563, 568, 362 A.2d 871 (1975). The four criteria are: "(1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment; though nominally against the official, will operate to control the activities of the state or subject it to liability." Id. All four criteria must be met for the action to be deemed against the state and barred. *Kenney* v. *Weaving*, 123 Conn. App. 211, 216, 1 A.3d 1083 (2010).

In the present case, the first two criteria are met: all of the defendants were state employees performing their duties when the alleged misconduct occurred. The third criterion is satisfied because the damages sought by the plaintiff are premised entirely on injuries alleged to have been caused by the defendants in performing or failing to perform acts that were part of their official duties such that the state is the real party in interest against whom relief is sought. See *Macellaio* v. *Newington Police Dept.*, 142 Conn. App. 177, 181, 64 A.3d 348 (2013) ("third criterion [of *Spring* test] is met because damages are sought for injuries allegedly caused by the defendant for performing acts that are a part of his official duties such that the state is the real party against whom relief is sought"). The fourth criterion is also satisfied. Any judgment against the defendants would control the activities of the state because it would

impact the way in which the Office of the State's Attorney, the state police, and the department operate, conduct investigations, and perform other related duties, and subject the state to liability, as payment of any judgment would be made by the state. See *Cimmino* v. *Marcoccia*, 149 Conn. App. 350, 360, 89 A.3d 384 (2014) (fourth prong satisfied because any judgment against defendants would impact manner in which state officials conduct investigations). In sum, because the criteria in *Spring* are satisfied, the court finds that the plaintiff's complaint alleges claims against Wright, Maldonado, Gershowitz, Gedansky, E. Maldonado, and VanOundenhove in their official capacities and is thus, in effect, an action against the state.

The court recognizes that "[t]he sovereign immunity enjoyed by the state is not absolute"; (internal quotation marks omitted) *Macellaio* v. *Newington Police Dept.*, supra, 142 Conn. App. 183 n.6; and that our Supreme Court has recognized three narrow exceptions to the sovereign immunity doctrine.[2] See *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349. Nevertheless, none of the exceptions applies in the present case, and no evidence has been presented that the plaintiff sought or obtained permission from the Office of the Claims Commissioner to bring an action against the state for monetary damages. See id., 351 (plaintiff who seeks to bring action for money damages against state must first obtain authorization from Claims Commissioner). Consequently, the plaintiff's

[2] The recognized exceptions are: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349.

claims against Wright, Maldonado, Gershowitz, Gedansky, E. Maldonado, and VanOundenhove are barred by the doctrine of sovereign immunity.

The plaintiff's claim for relief against Semple in his official capacity as commissioner of the department is also barred by sovereign immunity. Here, the plaintiff is seeking declaratory relief to essentially require Semple to establish procedures for reporting felonies to law enforcement and securing evidence upon notification of a complaint by an inmate. However, neither of the two exceptions [pertaining to declaratory or injunctive relief that were] recognized in *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349, is applicable to the plaintiff's claim.[3] The second exception is inapplicable because the plaintiff's claim that Semple did not report or adequately investigate his claim against a correction officer or secure evidence does not allege a substantial claim that Semple violated the plaintiff's constitutional rights. There are no allegations by the plaintiff that clearly demonstrate an incursion upon a constitutionally protected interest, and the plaintiff does not indicate what protected interest he has in a department official's administrative responsibilities. Likewise, the third exception does not apply because the plaintiff does not allege that Semple acted in excess of his statutory authority. The plaintiff further fails to allege that Semple was engaged in any wrongful conduct to promote an illegal purpose. In sum, the plaintiff's claim against Semple lacks a proper factual basis to support the applicability of either the second or third exception identified in *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 349. Therefore, the plaintiff's claim against Semple is barred by sovereign immunity.

[3] See footnote 2 of this opinion for exceptions (2) and (3).

C

Statutory Immunity

To the extent the claims against the defendants may be construed as against them in their individual capacities, the defendants argue the plaintiff's claims are barred by statutory immunity. Section 4-165 (a) provides in relevant part that "[n]o state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. . . ." To establish that a state actor's conduct is "wanton, reckless or malicious" and thus falls outside the scope of § 4-165, the plaintiff must allege conduct that "is more than negligence, more than gross negligence . . . something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them." (Internal quotation marks omitted.) *Martin* v. *Brady*, 261 Conn. 372, 379, 802 A.2d 814 (2002). He must allege conduct that "indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Internal quotation marks omitted.) Id. "[T]o overcome the immunity provided under § 4-165, a plaintiff must produce *facts* from which a reasonable person could infer that the defendant acted with the requisite mental state of recklessness and malice." (Emphasis in original.) *Manifold* v. *Ragaglia*, 102 Conn. App. 315, 325, 926 A.2d 38 (2007). In the present case, the plaintiff's complaint fails to allege facts, even when viewed in a light most favorable to the plaintiff, to demonstrate that Wright, Maldonado, Gershowitz, Gedansky, E. Maldonado, or VanOundenhove acted in a wanton, reckless or malicious manner.

In order to determine if a state actor has acted beyond the scope of his or her employment, "it is necessary to examine the nature of the alleged conduct and its

relationship to the duties incidental to the employment." *Martin* v. *Brady*, supra, 261 Conn. 377. Here, none of the actions alleged to have been taken by the defendants is arguably outside the scope of their respective employment. There are no allegations of misuse of governmental authority for personal gain as the court found to be actions outside the scope of a state actor's employment in *Antinerella* v. *Rioux*, 229 Conn. 479, 499, 642 A.2d 699 (1994) (defendant's alleged actions were motivated by purely personal considerations entirely extraneous to his employer's interest), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003), nor are there any allegations of the extraneous manipulation of government authority in order to justify erroneous conduct such as was found to be outside the scope of a state actor's employment in *Shay* v. *Rossi*, 253 Conn. 134, 174, 749 A.2d 1147 (2000) (defendants' alleged actions were solely to justify their own prior unjustified conduct and not to carry out government policy with which they were entrusted), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003). Once again, even when viewing the allegations of the plaintiff's complaint in the light most favorable to the plaintiff, the court finds that there are no allegations of misuse of governmental authority for personal gain, extraneous manipulation of government authority in order to justify erroneous conduct, or other actions that exceed the scope of the defendants' respective employment.

In sum, the plaintiff has not alleged any facts that support a conclusion that any of the defendants' conduct was wanton, reckless or malicious or that such conduct was outside the scope of their respective employment. Consequently, to the extent the plaintiff has sued Wright, Maldonado, Gershowitz, Gedansky, E. Maldonado, and VanOundenhove in their individual

capacities, those claims are barred by the immunity provided by § 4-165.[4]

D

Standing

The plaintiff's claim against Gedansky, in particular, and against the other defendants to the extent such claim is made, further fails because the plaintiff lacks standing to assert a claim based on a failure to conduct a criminal investigation. It is a well established principle that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973); see *Kelly* v. *Dearington*, 23 Conn. App. 657, 660–61 and n.4, 583 A.2d 937 (1990); see also *Leeke* v. *Timmerman*, 454 U.S. 83, 87, 102 S. Ct. 69, 70 L. Ed. 2d 65 (1981) (inmates alleging beating by prison guards lack standing to challenge prison officials' request to magistrate not to issue arrest warrants). The plaintiff is not entitled to a criminal investigation of his complaint by the state's attorney or [the] police or to a prosecution if an investigation had taken place. Accordingly, the court lacks subject matter jurisdiction to adjudicate the plaintiff's claim against any of the defendants for failure to conduct a criminal investigation because the plaintiff lacks standing to assert such a claim against them. See *Lewis* v. *Slack*, 110 Conn.

[4] In their memorandum of law, the defendants also argue that to the extent the plaintiff purports to assert any federal claims for money damages against the defendants in their individual capacities, those claims are also barred by qualified immunity. The court recognizes that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." (Internal quotation marks omitted.) *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). However, the court does not address this ground because the plaintiff has not alleged any federal claims.

App. 641, 643, 955 A.2d 620, cert. denied, 289 Conn. 953, 961 A.2d 417 (2008).

E

Conclusion

For the foregoing reasons, the defendants' motion to dismiss is GRANTED. This action is dismissed in its entirety as to all defendants.