IN RE OMAR I. ET AL.*
(AC 43251)

Lavine, Keller and Bishop, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court terminating his parental rights as to the petitioners, his three minor biological children, and denying his motion to revoke their commitment to the custody and care of the Commissioner of Children and Families. The father claimed, inter alia, that the trial court erred in concluding that the children had proved, by clear and convincing evidence, that he failed to achieve a sufficient degree of personal rehabilitation, as required by statute (§ 17a-112 (j) (3) (B) (i)), that would encourage the belief that, within a reasonable time, he could assume a responsible position in their lives. Court-appointed attorneys for the children had filed petitions to terminate the parental rights of the father and the children's biological mother after the children had been adjudicated neglected in a prior proceeding and committed to the custody of the commissioner. The trial court, which also terminated the mother's parental rights, found that the children had proved, by clear and convincing evidence, that the Department of Children and Families had made reasonable efforts to reunify them with the father but that he had attempted to manipulate and control some of the service providers offered to him by the department, and engaged in coercive and controlling behavior that led to the failure of the parenting services that had been provided to the parents. The court also found that the parents could not adequately meet the children's developmental, emotional and medical needs, that the parents had not acquired the ability to care for the children, had failed to meet some of their basic needs and failed to ensure their school attendance. The court further found that there was a pattern of intimate personal violence between the parents in the presence of the children and that, in the four years since the children had been removed from the family home and later placed in foster care, the father consistently maintained that he had done nothing wrong and failed to gain insight into his controlling behavior and how it impacted the children. *Held*:

1. The respondent father could not prevail on his unpreserved claim that judicial bias deprived him of a fair trial, as he failed to demonstrate the existence of plain error: the father's disagreements as to several of the

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the full names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

court's adverse rulings and factual findings were not a proper basis for a claim of judicial bias and did not constitute evidence of judicial bias, as those rulings and findings were plainly based on facts in evidence and were relevant to the issues before the court, the father's complaint that the court relitigated the prior finding of neglect erroneously conflated that finding with the court's assessment of evidence in the neglect proceeding, the court having been unable to relitigate the finding of neglect, and the father did not cite any authority that supported his belief that the court in a subsequent termination of parental rights trial may not independently assess evidence from the prior neglect proceeding in evaluating whether rehabilitation, which is factually and legally distinct from neglect, had occurred, and, even if the court had confined its analysis to his conduct beginning at the time of the children's commitment to the commissioner, the father could not demonstrate that there would have been a different outcome in the termination of parental rights proceeding; moreover, there was no basis in the record to support the father's argument that the court precluded him from calling several witnesses to testify, as he did not cite to any instance in which the persons he identified in his brief were precluded from testifying, those persons either testified or their opinion was before the court, which considered their testimony in its evaluation of the evidence, and the father failed to show that the court's weighing of the evidence in the manner that it did reflected judicial bias, as the court's written decision explained its factual findings and why it discounted the weight of certain evidence and afforded greater weight to other testimony and evidence.

2. The respondent father could not prevail on his claim that the trial court improperly found that there was clear and convincing evidence that he failed to rehabilitate himself, which was based on his assertion that the court misconstrued the proper legal standard and the principle of "coercive control": the court's finding that he failed to achieve sufficient rehabilitation was supported by the evidence and the reasonable inferences that could be drawn therefrom, which included the court's observation that he had not recognized his role in the children's removal from the home, he continued his pattern of exerting control concerning the mother and undermining efforts to reunify her and the children while failing to recognize how those failures impacted the children, and he had not gained the ability to set aside his personal interests and demonstrate an ability to provide a safe, nurturing and stable home environment for the children; moreover, contrary to the father's assertion that the court failed to limit its inquiry to whether he satisfied the specific steps that he was issued, pursuant to § 17a-112 (j) (3) (B), to facilitate his reunification with the children, a determination with respect to rehabilitation is not solely dependent on compliance with the specific steps but with whether the facts that led to the initial commitment of the children to the commissioner have been corrected, his claim that the court improperly considered his conduct from the time the children

were removed from the family home instead of from the time they were committed to the commissioner's custody two years later was not logically sound and lacked legal support, as he was on notice of the issues that led to the children's removal and could have taken steps to address the issues, and he could not demonstrate that the court misconstrued the meaning of coercive control, which he based on his claim that, after he was issued the specific steps, there was no evidence that he intimidated, threatened or induced fear in the mother, as coercive control is a factual description of conduct and not a term of art for which a legal definition exists.

3. This court found unpersuasive the respondent father's claim that the trial court improperly determined that the termination of his parental rights was in the children's best interests, which was based on his assertion that the court disregarded the children's Muslim religious affiliation: the father's assertion that the court deemed the children's religious affiliation insignificant was belied by the court's written decision, in which the court observed that, although the father identified as a Muslim, the length of his visits with the children had been extended to permit him to engage in religious instruction with them and the department had transported the children, at his request, to a mosque for religious instruction, he had not made any significant efforts to foster religious beliefs in the children or engaged in prayer with them, and the children, who had expressed anxiety about their religious identities, had not attended religious services prior to their removal from the family home; moreover, the court properly considered the religious beliefs of the children, if any, and those of the mother, who, although she had been a practicing Muslim, had expressed her desire to introduce the children to other religious practices, and the father's assertion that the trial court's best interests finding should be overturned, which was based on his claim that the children had been placed with foster parents who did not foster the Muslim faith and had introduced them to religious beliefs that differed from his Muslim beliefs, reflected a misunderstanding of the court's inquiry in the dispositional phase of a termination of parental rights proceeding, and, even if there were a legal requirement that the children be placed in a setting that would nurture their religious faith or that of the father, he failed to demonstrate how the failure to comply with such a requirement was a basis on which to challenge the court's determination that the children's best interests were served by terminating his parental rights.

4. The respondent father's claim that the trial court improperly found that the department made reasonable efforts to reunify him with the children was unavailing: contrary to the father's assertions that the department unreasonably prolonged the children's stay in foster care for more than four years and failed to achieve permanency for them, the department took steps to ensure that they achieved a sense of permanency in that, since the time of their removal from the family home, they resided with one another and were cared for by their foster parents, with whom they

bonded and who provided a living environment that met their physical and emotional needs, and, in light of the difficulties the father posed in participating in the services the department offered him and his failure to provide adequate supervision during visitation with the children, it was disingenuous for him to blame the department for the fact that the children were in foster care for a lengthy period of time; moreover, the department's placement of the children with a foster family that was not of the Muslim faith did not undermine the court's reasonable efforts finding, as the father was afforded ample opportunity to engage the children in matters of faith, which he failed to do, and a rational interpretation of the applicable statute (§ 17a-96) did not require the department to place the children with foster parents who would foster the Muslim faith in them.

5. This court declined to review the respondent father's unpreserved claim that the department was estopped from supporting the children's petitions to terminate his parental rights; although the department initially recommended that reunification efforts continue but thereafter changed its position by the time of trial and adopted the children's petitions for termination of the father's parental rights, there was no trial court ruling on this issue to review, the father did not provide this court with any legal basis on which to review his claim and, as a result of his failure to raise the issue at trial, there was no evidence to review with respect to why the department changed its position or whether the father changed his conduct in reliance on the department's change of position.

6. The respondent father's claim that the trial court improperly denied his motion to revoke the commitment of the children to the care and custody of the commissioner was unavailing; the father's assertion that the cause underlying the children's commitment, parental conflict, no longer existed was contrary to the court's findings, which were supported by the evidence and the rational inferences to be drawn from them.

Argued January 16—officially released May 27, 2020**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' three minor children neglected, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Lobo*, *J.*; judgments adjudicating the minor children neglected and committing them to the custody of the Commissioner of Children and Families; thereafter, petitions by the three minor children to terminate the respondent parents' parental rights, brought to the Superior Court

** May 27, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

in the judicial district of Middlesex, Child Protection Session, and tried to the court, *Burgdorff*, *J.*; subsequently, the court, *Burgdorff*, *J.*, denied the respondents' motions to revoke the court's order committing the minor children to the custody of the Commissioner of Children and Families and rendered judgments terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Ammar A. I., self-represented, the appellant (respondent father).

Brian T. Walsh, assigned counsel, with whom, on the brief, were *Robert W. Lewonka*, assigned counsel, and *Katarzyna Maluszewski*, assigned counsel, for the appellees (petitioners).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon* and *Jane Rosenberg*, assistant attorneys general, for the appellee (Commissioner of Children and Families).

Opinion

KELLER, J. The self-represented respondent father, Ammar A. I.[1] appeals from the judgments of the trial court terminating his parental rights pursuant to General Statutes § 17a-112 (j) (3) (B) (i) as to three of his biological minor children, the petitioners, Omar, Safiyah, and Muneer (children), and denying his motion to revoke the court's order committing the children to the care, custody, and guardianship of the Commissioner of Children and Families (commissioner). The respondent claims that (1) judicial bias deprived him of a fair

[1] The children's mother, whose parental rights also were terminated, filed a separate appeal from the judgments of the trial court; see footnote 7 of this opinion; and did not participate in this appeal. We therefore refer in this opinion to the respondent father as the respondent. During the termination of parental rights proceeding, the respondent was represented by counsel. The respondent is appearing in a self-represented capacity in the present appeal.

trial, (2) the court improperly found that he failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time, considering the ages and needs of the children, he could assume a responsible position in the children's lives, (3) the court improperly found that the termination of his parental rights was in the children's best interests, (4) the court improperly found that the Department of Children and Families (department) made reasonable efforts to reunify him with his children, (5) the department was estopped from supporting the petitions brought by the children to terminate his parental rights, and (6) the court improperly denied his motion to revoke the court's order that committed the children to the care and custody of the commissioner.[2] We affirm the judgments of the trial court.

The following facts and procedural history are not in dispute. The respondent is the biological father of the three children at issue in this appeal. The respondent and the children's biological mother married in May, 2005, and separated in 2015. The respondent is also the biological father of three sons who were born prior to the respondent's relationship with and marriage to the mother. On December 18, 2017, Omar, Safiyah, and Muneer were adjudicated neglected by the court, *Lobo*, *J.*, and committed to the care and custody of the commissioner. The court, *Lobo*, *J.*, ordered specific steps, pursuant to § 17a-112 (j) (3) (B), for the respondent and the mother to take to facilitate the return of the children to them.[3] Thereafter, the department made efforts to reunify the children with the respondent and the mother.

[2] The respondent listed sixteen separate claims of error in the statement of the issues portion of his appellate brief. In the analysis portion of his brief, however, the respondent did not address these sixteen claims separately, but he analyzed these claims, to varying degrees, in the context of the six claims of error that we will address in this opinion.

[3] In the present action, the court, *Burgdorff*, *J.*, observed: "[The respondent's] final specific steps included the following: Cooperate and keep appointments with [the department] and keep the department informed of

In November, 2018, attorneys representing the children[4] filed petitions to terminate the parental rights of the respondent and the mother pursuant to § 17a-112 (j) (3) (B) (i)[5] on the grounds that the children had

his address; undergo individual and parenting counseling and make progress toward identified treatment goals to provide a safe and stable home environment for the children, understand intimate partner violence, coercive control dynamics and how interpersonal conflict impacts children, recognize and work through coparenting conflicts, develop effective communication and healthy dispute resolution with [the] mother, and understand the children's therapeutic needs, respect [the] mother's choice of religious spirituality; accept in-home support services referred by [the department] and cooperate with them; cooperate with service providers recommended for counseling; cooperate with recommendations regarding assessment and treatment; cooperate with court-ordered evaluations and testing; sign releases to enable [the department] to communicate with service providers; sign releases for the children; get and maintain adequate housing and legal income; immediately let [the department] know about any changes in the household; cooperate with restraining/protective order and/or other appropriate safety plan approved by [the department]; keep [the] children in [the] state of Connecticut; visit [the children] as often as [the department] permits; do not get involved with [the] criminal justice system and cooperate with [the] Office of Adult Probation or parole officer and follow conditions of probation or parole; take care of the children's physical, educational, medical or emotional needs, including keeping the [children's] appointments with medical or educational providers; make all necessary child care arrangements to make sure [the children are] properly supervised and cared for by appropriate caretakers; utilize, cooperate with, and follow [the] recommendations of [the] coparenting coordinator. [The department] is to perform autism reassessment for Omar, explore/address [an] orthodontic surgery issue for Safiyah, ensure [that the] children's fears and misunderstandings surrounding [the respondent] and Islam are addressed in therapy, [and] ensure [that the] foster parents support the children's Muslim faith."

[4] On June 7, 2017, prior to the trial on the neglect petitions, the court, *Frazzini, J.*, appointed attorneys to represent each of the children. Each of the children, through his or her attorney, subsequently filed the petitions to terminate the respondent's parental rights.

General Statutes § 17a-112 (a) provides in relevant part: "In respect to any child in the custody of the Commissioner of Children and Families in accordance with section 46b-129, either the commissioner, or the attorney who represented such child in a pending or prior proceeding, or an attorney appointed by the Superior Court on its own motion, or an attorney retained by such child after attaining the age of fourteen, may petition the court for the termination of parental rights with reference to such child. . . ."

[5] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided

been adjudicated neglected in a prior proceeding and that the respondent and the mother, who had been provided specific steps to facilitate reunification, had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of the children, they could assume a responsible position in the lives of the children. The court, *Burgdorff*, *J.*, conducted a trial on the petitions over the course of fifteen days between January and April, 2019. Although the commissioner did not initially support the position of the children, she did so by the time of trial. On July 26, 2019, the court issued a thorough memorandum of decision in which it terminated the parental rights of the respondent and the mother and denied the parents' motions to revoke the order committing the children to the care and custody of the commissioner.[6] This appeal by the respondent followed.[7]

I

TRIAL COURT'S MEMORANDUM OF DECISION[8]

A

Relevant Procedural History

In its well reasoned and thorough memorandum of decision, the court set forth the following procedural history: "This family first became involved with

specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[6] The court denied the respondent's subsequent motion for articulation, noting that the court's "unambiguous findings are detailed and set forth in its decision." Later, this court granted the respondent's motion for review of the trial court's ruling but denied the relief requested therein.

[7] The mother filed a separate appeal from the trial court's judgments, which this court dismissed in October, 2019.

[8] In this appeal, the respondent has raised several claims, and they touch on not only the trial court's conduct throughout the trial but on nearly every aspect of its decision. The court had a great deal of evidence before it, and its decision sets forth a multitude of relevant findings. This is not surprising in light of the fact that, as of the time of the trial, the children had been in

[the department] in 2011 due to issues of physical and emotional neglect. A report was made to [the department] concerning [the] mother's concerns that Safiyah had a rash in her vaginal area, which [the] mother felt was related to [the respondent's] older son, Oais, having [had] inappropriate sexual contact with her, as observed by [the] mother. No trauma was noted by Safiyah's physician, and the allegation was unsubstantiated. On February 11, 2012, [the department] received an anonymous report from [the respondent's] oldest child, Adnan, that [the] mother was suffering from schizophrenia and that she had accused him of making sexual advances against her. . . . The allegations were unsubstantiated. On April 12, 2012, [the department] received a referral from St. Vincent's Behavioral Health reporting that Adnan had been admitted to the hospital on March 30, 2012. Adnan was diagnosed with mood disorder, anxiety, post-traumatic stress disorder and polysubstance abuse. Adnan admitted to a suicide attempt when jumping out of a car [the respondent] was operating en route to the police station to report Adnan's stealing. . . . [The respondent] and [the] mother refused to take him home from the hospital. The allegations of physical neglect were substantiated, and Adnan was adjudicated neglected and removed from [the respondent's] care on April 20, 2012. He was committed to [the department] until his eighteenth birthday. On April 9, 2015, [the] mother contacted the Plymouth Police Department to report her concern that [the respondent] had allowed Oais in the family home and reported that he had a history of sexually inappropriate behavior with Safiyah, and that [the respondent] had directed [the] mother to lie to [the department] about what she had witnessed. On May 16, 2015, [the respondent] reported to [the department] that [the]

the custody of the commissioner for nearly four years. In light of the nature of the claims, as well as the fact that it is necessary for this court to refer to the trial court's detailed findings of fact in our analysis, we believe that it is necessary to set forth verbatim many of the court's findings.

mother was diagnosed with mental health issues, including manic depression and anxiety, and was prescribed with many medications that she left around the house, which [the] mother denied. The allegations by [the respondent] were unsubstantiated.

"After [the] mother and [the respondent] separated in May, 2015, [the respondent] moved out the family home. On July 29, 2015, [the respondent] filed [a motion for] an emergency ex parte order of temporary custody along with a sworn affidavit with the Superior Court for family matters in New Britain . . . . [The respondent] reported [that] he filed the motion for [an] ex parte order of custody with the expectation that he would be awarded immediate custody of the children. The court, *Abery-Wetstone*, *J.*, issued a bench order of temporary custody removing the children from [their] parents' care, and vested their care and custody with [the commissioner] based on the allegations contained in [the respondent's] affidavit. The [order of temporary custody] was sustained on August 7, 2015, [by the court, *Frazzini*, *J.*].

"Thereafter, on the evening of July 29, 2015, and after the issuance of the [order of temporary custody], the Plymouth Police Department contacted the [department's] Careline to report that [the] mother [had] reported that [the respondent had] texted her, stating that he was outside of the home and demanded to be let in; that [the respondent] had previously texted [the] mother threatening messages stating that he had hidden in the garage on a prior occasion to watch for [the] mother's boyfriend, and that, if he found an intruder in his home, he had the right under the law to kill any home invader who enters the home. [The] [m]other reported that she texted [the respondent] to tell him [that] he did not have permission to enter the home and to leave. [The respondent] then entered the home against her wishes. [The] [m]other reported that, upon

hearing [the respondent] in the home, she locked the children in the bathroom and she locked herself in a bedroom; that [the respondent] forced himself into the bedroom; that [the] mother was struck by [the respondent] on the arm and was struck in the head with a glass bottle resulting in a cut to her head. When the police arrived at the home, they observed [the] mother bleeding, with a cut approximately one inch [in length] over her right eye. [The respondent] admitted to going in the locked family home and entering the home with the garage door opener against [the] mother's wishes and that he refused to leave when [the] mother requested him to do so. [The] mother reported that the children did not witness the violence. However, the children reported to the police [that] they heard [the] mother and [the respondent] arguing, witnessed [the] mother bleeding after the assault, and saw her being transported from the home by ambulance. [The] [m]other reported to the police that 'she has been subjected to physical and mental abuse from [the respondent] throughout the course of the marriage.' [The respondent] denied assaulting [the] mother and stated that she self-inflicted her injuries. [The respondent] was arrested on July 30, 2015, and charged with [assault in the second degree, reckless endangerment in the second degree, disorderly conduct, burglary in the third degree, and three counts of risk of injury to a child]. The investigating detective testified during the neglect trial that [the] mother's financial situation would be potentially compromised if [the respondent] was charged. [The] [m]other chose not to cooperate with the police. The charges against [the respondent] were subsequently dismissed.

"[The respondent] later contacted the Plymouth Police Department on at least three occasions requesting that [the] mother be charged [with] filing a false report and three counts of risk of injury [to a child] regarding the July 29, 2015 domestic violence incident.

The investigating detective found no probable cause for either charge after reviewing forty thousand texts from [the] mother's and [the respondent's] cell phones, which were given to the detective by [the respondent].

"[The] [m]other also had a protective order on behalf of herself and the children against [the respondent] as the result of the domestic violence incident. The protective order was subsequently modified to allow [the respondent] supervised visitation and ended in October, 2015. The three children were removed from the home on July 29, 2015, and have been in their current foster home since July 31, 2015. . . . [N]eglect petitions were subsequently filed on August 7, 2015, by [the commissioner], alleging that the children were being permitted to live under condition[s], circumstances or associations injurious to their well-being, due to their exposure to domestic violence between the parents, and educational neglect. [The department] reported that during the 2014–2015 school year, Omar was absent twenty-one days and tardy eighteen times, Safiyah was absent eighteen times and tardy twenty-three times, and Muneer was absent forty times and tardy nine times. Further, all three children had bed-wetting issues when placed in their current foster home. All three were wearing diapers and did not know basic hygiene. All three children required a high level of supervision and had special needs. All three children also exhibited inappropriate sexual behavior in the foster home. After a mistrial, the children were adjudicated neglected by the court (*Lobo*, *J.*) in a bench decision of December 18, 2017, and committed to the care and custody of the [commissioner]. [The commissioner] filed permanency plans seeking reunification of the children with placement with [the] mother under a period of protective supervision. In November, 2018, the minor children . . . filed petitions for termination of [the] mother's and [the respondent's] parental rights. [The] petitions

were subsequently adopted and supported by [the commissioner] at the time of trial."

B

Mother

The court made findings with respect to the mother, which we set forth in large part because they are integral to an understanding of the court's findings with respect to the respondent and the living conditions to which the children were exposed while in the care of their biological parents.

"[The] [m]other reported that she was eighteen years old when she met [the respondent] on a computer website when researching Islamic culture due to her interest in converting to Islam. They commenced an online relationship. Within two weeks of commencing that relationship, [the respondent] flew [the] mother to Connecticut. They married shortly thereafter on May 6, 2005, because Islamic law prohibited cohabitating before marriage. . . .

"[The] [m]other was completely dependent on [the respondent] financially throughout the marriage. At [the] time the children were removed, [the] mother reported that she had less than $100. Her work history has consisted [of] helping out [the respondent] in his dental practice . . . .

"[The] [m]other engaged in an extramarital affair with 'George' prior to the removal of the children from the home and prior to her separation from [the respondent]. [The] [m]other exchanged explicitly graphic sexual photos with George. [The respondent] saw the photographs when he took [the] mother's cell phone from her without permission. As noted [herein], [the] mother and [the respondent] had three children, Omar, Safiyah, and Muneer. At the time of their marriage, [the respondent] had three older sons: Adnan . . . Muhammed . . . and Oais . . . . [The] [m]other reported that [the

respondent] informed her that Oais' and Muhammed's mother severely abused Adnan, a child from his first marriage, and that [the respondent] divorced her but allowed Oais and Muhammed to remain in her custody. [The] [m]other reported that Adnan returned to his mother's care in Syria. Adnan returned to reside in the family home when he was approximately thirteen years old. For a period of time, all three of [the respondent's] older children lived in the home, along with the three younger children, Omar, Safiyah, and Muneer. Due to [the] mother's becoming overwhelmed with raising six children, a series of nannies and babysitters was hired to assist her. [The] [m]other left most of the child-rearing to the nannies.

"After separating from [the respondent] and after the children's removal, [the] mother eventually moved out of the leased family home and relocated to Norwich in November, 2015, where she rents a three bedroom apartment. . . . She testified during [the] trial that she found employment but had not yet commenced working. . . .

"[The] [m]other . . . reported that she had a trust fund containing approximately $130,000 to $180,000 at the time of her marriage. She gave those funds to [the respondent] to open up his own dental practice. [The respondent] agreed to pay her back but [she] said [the] agreement was never formalized, and it has not been paid back. Since [the] mother's and [the respondent's] divorce, [the] mother has received additional financial assistance from [the respondent], in addition to . . . alimony payments, including the purchase of a motor vehicle. [The] [m]other testified that if the court terminated [the respondent's] parental rights, she would continue to seek financial assistance from [the respondent] to assist her in caring for the children if they were returned to her care.

"[The] [m]other reported observing inappropriate sexual touching of Safiyah and Muneer by Oais in 2012. [The] [m]other expressed her concerns to [the respondent] as to the sexual contact. [The respondent] repeatedly expressed denial of any sexual misconduct by Oais and threatened [the] mother not to report it. . . .

"[The] [m]other reported that Omar, Safiyah, and Muneer were exposed to a video recording of [the] mother and [the respondent] engaging in sexual acts that was filmed by [the respondent]. [The] [m]other reported that she consented to being in the videos with [the respondent] but that [the respondent] allowed the video to be streamed to other devices in the home, which the children inadvertently saw. [The respondent] admitted to filming the sexual activity but blamed [the] mother for [its] being seen by the children.

"[The] [m]other and [the respondent] divorced on August 15, 2016 (*Carbonneau*, *J.*). The court ordered that all issues regarding the children were referred to the juvenile court in light of the issuance of the [order of temporary custody] and pending neglect petitions.

"[The] [m]other reported that [the respondent] exhibited controlling, abusive and possessive behavior toward her throughout the marriage. She also reported ongoing domestic violence and coercive control by [the respondent]. [The] [m]other reported that [the respondent] would control her financially by refusing to let her work outside of the home, limit[ing] the use of her motor vehicle, and [taking] her cell phone. He also threatened to take the children out of the country and threatened that she would never see them again. [The] [m]other also reported that [the respondent] took the family out for a 'last supper' on July 27, 2015, at which time he confronted [the] mother about her affair, all in the presence of her children. He also began swearing at her and degrading her in front of the children while

driving the car, and . . . drove in an erratic manner and sped through red lights.

"[The] [m]other denied the allegations made by [the respondent] in his [previously] referenced affidavit to the family court on July 29, 2015. She also reported that, on the evening of July 29, 2015, as also discussed [previously], [the respondent] texted [the] mother regarding breaking into the family home, that he would be waiting in the garage with a gun to shoot her lover, that he had a knife and would kill her lover, that she told [the respondent] to leave the home, and [that] they engaged in a physical struggle at which time [the respondent] struck her in the face with a glass oil diffuser. . . . [The] [m]other stated that she did not want to pursue the criminal charges against [the respondent] because she would be without any financial support if he were incarcerated. . . .

"[The] [m]other was also referred to a Women and Healing Group at [the] Wheeler Clinic to address her domestic violence issues in her relationship with [the respondent]. [The] [m]other has engaged in group therapy since August 10, 2015. [The] [m]other's therapist noted that [the] mother's presentation was consistent with a victim of domestic violence. . . .

"Prior to [the department's] involvement, [the] mother was engaged in individual treatment and therapy at Bristol Psychiatric Services commencing in October, 2011, until November, 2014. She reengaged in services . . . on March 11, 2015, and then reengaged in services with her prior therapist in December, 2015. [The] [m]other's therapist diagnosed her with post-traumatic stress disorder, attention deficit hyperactivity disorder, and panic disorder. . . . Her therapist also reported that [the] mother was experiencing ongoing stress regarding her divorce from [the respondent] and the accusations he made against her. [The] [m]other's goals

were to focus on her relationship and coparenting with [the respondent], and how the relationship impacted the children. . . . The therapist also noted that [the] mother worked on the conflict issues with [the respondent] but also acknowledged her deep fear of [the respondent] and his continued controlling behaviors. [The] [m]other also acknowledged [that] her fear of [the respondent] could impact their ability to coparent the children. . . . [The] [m]other continued therapy until June, 2018, when her therapist moved out of state. Currently, [the] mother is not engaged in individual therapy, nor has she sought out a new therapist since that time.

"[The] [m]other participated in family therapy with the children and their therapists, Michael DeRosa and Kristin Baker, commencing in July, 2018. [The respondent] did not participate along with [the] mother, as the therapists felt that [the respondent] was not 'grounded enough to make progress in family therapy' with the children. . . .

"[The] [m]other underwent a court-ordered psychological evaluation with Dr. Stephen Humphrey, a licensed clinical psychologist, commencing in October, 2015. Dr. Humphrey completed psychological evaluations of [the] mother, [the respondent], and interactionals with the three children. He also completed updated psychological evaluations and interactionals in 2018.

"After the initial evaluation, Dr. Humphrey reported that [the respondent] stated that [the] mother was suicidal; however, Dr. Humphrey found no indication of that from her interview with him or from her demeanor, nor did she present with any obvious mental disorder. He also found no support of a substance abuse disorder, also contrary to [the respondent's] claims. He recommended that [the] mother continue with her therapy and support groups.

"Dr. Humphrey opined in his initial report that [the children] . . . had been 'living in a conflict-laden home environment that has included allegations of intimate partner violence, educational neglect, and counterclaims of parental inadequacy and neglect . . . and . . . the parents' relationship is likely to remain contentious.' Dr. Humphrey noted that he could not 'emphasize enough how psychologically toxic this conflict between parents is for young children.' He also opined that the children should be engaged in 'individual supportive psychotherapy to address the likely effects of past exposure to interfamilial strife and conflict, and moderate the effects of any future conflict.' . . .

"In his updated evaluation in March and April, 2018, Dr. Humphrey reiterated that [the] mother needed continued services to help her 'to understand the nature and history (including any contributions of trauma and psychosexual variables) of her engagement with men who (by her report) place her at risk for victimization and coercive control . . . . He further noted that he 'was concerned about the degree of dependence [the mother] showed [the respondent] . . . given his proclivity toward behaviors that are intrusive and controlling' and that she could continue therapy that will 'ideally help [the mother] to avoid emotional or other forms of dependence on [the respondent], and to develop positive, healthy and supportive relationships with others.' . . . [With regard to the children's developmental delays, the mother's recognition of these delays] 'falls far short of recognizing how delayed [the children] were, and does not incorporate an acknowledgement of how much school the children were missing in her care.'

"Notably, [the] mother has never engaged in the psychosexual therapy recommended by Dr. Humphrey. Further, Dr. Humphrey recommended coparenting sessions for [the] mother and [the respondent]. As discussed below, they did not begin those services until . . . approximately three years after the recommenda-

tion by Dr. Humphrey, and the initial services were unsuccessful.

"Pursuant to the court-ordered specific steps and Dr. Humphrey's recommendation, [the] mother and [the respondent] participated in coparenting services with Attorney Emily Moskowitz commencing in January, 2018. Notably, [the respondent] unilaterally provided Attorney Moskowitz with the police reports regarding the July 29, 2015 domestic violence incident at his first session with her, although Attorney Moskowitz testified that she did not review them. Initially, [the] mother was reported by Attorney Moskowitz to be making progress. [The] [m]other reported that she and [the respondent] were making progress, as did [the respondent]; however, [the] mother did not feel respected by Attorney Moskowitz in the sessions and felt [that] Attorney Moskowitz 'had the understanding that [the respondent] was good to me and I fabricated everything. . . .' [The] [m]other also reported that during the first coparenting session with [the respondent], [the respondent] stated that the foster parents were 'poisoning the kids with Christianity.' It was also reported that [the respondent] complained about the foster parents . . . alienating the children from [him]. [The respondent] also falsely reported to Attorney Moskowitz that [the] mother was not seeking custody of the children and that she was unfit to parent the children. [The] [m]other discontinued the services with Attorney Moskowitz due to her impression that her concerns were not being adequately heard. [The] [m]other also reported that the reports being made to [the department] by Attorney Moskowitz did not accurately reflect what occurred during the sessions. When [the] mother requested permission to tape the sessions, she was refused, at which time the sessions ceased. [The] [m]other credibly testified that Attorney Moskowitz took [the respondent's] side and accepted [the respondent's] misrepresentation that the

children were being returned to his care. The court finds [the] mother's concerns well-founded based on the credible evidence presented. The court found Attorney Moskowitz to be clearly biased against [the] mother in her reports to [the department] and during her testimony, primarily due to [the respondent's] attempts to control and influence the sessions. [The] [m]other and [the respondent] engaged with another parenting coordinator, Rabbi [Andrew P. Hechtman], during the pendency of the [termination of parental rights] trial, as discussed in further detail . . . .

"The children have consistently reported enjoying their visits with [the] mother; however, they have also consistently maintained that they wish to remain in their foster home. It was observed that [the] mother was having difficulty, at times, in handling the children and keeping track of their appointments and required assistance from [the department]. [The] [m]other has also developed a good relationship with the foster parents."

C

Respondent

The court made the following findings concerning the respondent: "[The respondent] . . . was born on September 16, [1966], in Saudi Arabia. He received his early education in Saudi Arabia and emigrated to the United States in 1989 to further his education. He attended the University of Connecticut, where he received his dental degree, and Tufts University, where he received a certificate in special pediatric dentistry. [The respondent] has owned his own dental practice since 2007. He also works as a pediatric dental surgeon at Connecticut Children's Medical Center. [The respondent] was issued a $10,000 fine and three years of probation in September, 2018, following concerns of unnecessary dental practices. [The respondent] denies any wrongdoing. [The respondent] is reportedly in good health.

"[The respondent's] criminal history involves an arrest on July 29, 2015, stemming from the domestic violence incident involving [the] mother at the family home as discussed in detail [previously]. [The respondent] admitted he went to the home and that he entered with the garage door opener because the doors were locked; that [the] mother asked him not to enter the home but he did so anyway, and he admitted to sending [the] mother text messages of a threatening nature, including that he would enter the home with a knife. [The respondent] admitted to engaging in an argument with [the] mother upon entering the home but denied that it was confrontational or that there was a physical altercation. He reported that [the] mother self-inflicted the injuries she sustained during the altercation. He reported that he was arrested the next day, and a protective order was issued against him on behalf of [the] mother and the children. He was charged with [assault in the second degree, reckless endangerment in the second degree, disorderly conduct, burglary in the third degree, and three counts of risk of injury to a child]. [The respondent] was placed on [the department's] central registry but his name was subsequently removed. He also expressed that his placement on [the department's] central registry has threatened his ability to maintain his [dental] license. The criminal charges were dismissed on September 28, 2016. . . . [The respondent] contacted the police department the day after the incident at the family home and requested that [the] mother be charged with three counts of risk of injury [to a child]. [The] charges were not filed, as no probable cause was found. [The respondent] has filed numerous motions against [the] mother in the family court, including a motion for contempt/sanctions for perjury on March 6, 2016; [a] motion to open [the dissolution] judgment based on fraud on October 29, 2018, wherein he alleged [fraud on the part of the] mother and her attorney with regard to the divorce decree; [and an]

objection to [the] plaintiff's objection to [the] father's motion to open based on fraud on October 29, 2018, which is currently pending.[9] In addition, [the respondent] filed a $9,000,000 civil action for damages against [the] mother related to the July 29, 2015 domestic violence incident. In the juvenile court, [the respondent] has filed at least nine motions directed at [the department] and the foster parents.

"[The respondent] has been married three times. He was married to his first wife in 1993. The marriage ended after the birth of his first child, Adnan, in 1995. [The respondent] reported that Adnan's mother abandoned Adnan. In 1997, he married his second wife. That marriage produced two sons, Muhammed and Oais. That marriage lasted seven years. [The respondent] reported to his psychologist that he threatened to expose Oais' and Muhammed's mother's violence toward the children if she did not give him custody of Muhammed and Oais. [The respondent] also reported that his second wife abused Adnan physically. 'She forced him to eat, poured hot water on him, strangled [him], and kicked him.' [The respondent] reported that he felt guilty for being 'oblivious to what was going on with Adnan.'

"As discussed [previously in the recitation of facts concerning [the] mother, the respondent] married [the] mother in 2005, when [the] mother was eighteen years old and [the respondent] was thirty-eight years old. They married three weeks after they first encountered one another on the Internet. At the time of the marriage, [the respondent's] two older sons, Muhammed and Oais, were living in his home, and [the] mother reported that she helped raise them. The [children] . . . were born of that marriage. . . .

[9] The court found that many of the filings of the respondent "contained clear misrepresentations, falsehoods, and inconsistencies, including extremely disturbing aspersions as to [the] mother, all of which have damaged [the respondent's] credibility in [the] eyes of this court."

"[The] [m]other and [the respondent] separated in May, 2015. On May 15, 2015, [the respondent] was served with the divorce paperwork. On May 16, 2015, [the respondent] called [the department's] hotline to report alleged neglect of the children by [the] mother. The marriage dissolved by way of divorce in August, 2016. [The respondent] subsequently reported to [the department] that he was engaged to a woman who resided in Arizona and . . . would be residing with him in his home. [The respondent] refused to disclose her name and address to [the department]. He later reported that he is no longer engaged to her.

"[The respondent] currently resides in a home with his adult sons, Oais and Muhammed. Of note, contrary to his court-ordered specific steps, [the respondent] failed to inform [the department] of Oais' and Muhammed's presence in the home when supervised visits in the home with [the children] . . . commenced.

"[The respondent] has consistently and repeatedly denied any physical violence against [the] mother and [has maintained] that the injuries sustained by [the] mother were self-inflicted. However, [the respondent] testified at trial that he shoved or pushed [the] mother away on at least one occasion. He also admitted to taking [the] mother's car and cell phone without her permission after she commenced the divorce proceedings. He attributed the allegations of domestic violence made by [the] mother due to [the] mother's affair with her boyfriend. [The respondent] hired a private detective to [perform] an extensive background check on [the] mother's boyfriend and . . . the investigator followed [the] mother. As discussed [previously], the court finds that the credible evidence presented in this matter confirms [the] mother's account of what transpired at the family home on July 29, 2015.

"Pursuant to his court-ordered specific steps, [the respondent] was ordered by the court to engage in men-

tal health services and focus on the patterns of intimate partner violence, coparenting and dispute resolution.

"[The respondent] underwent a court-ordered psychological evaluation with [Dr. Humphrey] in October, 2015, including interactionals with the children. Dr. Humphrey also performed supplemental evaluations in 2018. Dr. Humphrey conducted the personality assessment inventory with [the respondent] and found it to be of questionable validity in that [the respondent] 'responded in a manner to portray himself to be relatively free of common shortcomings to which most individuals admit.' He did not find any evidence of mental illness but noted that [the respondent] exhibited some grandiosity and the desire to maintain strict control in relationships. He reported that [the respondent] did not believe he would benefit from any therapeutic interventions. He opined that the marriage between [the] mother and [the respondent] 'was marked by indicators of coercive control on the part of [the respondent]' and was a highly conflictual relationship. He also noted that [the respondent] denied any problems of a psychological nature, including depression. Notably, during his credible testimony, Dr. Humphrey reported that there were issues of intimate partner violence and power control in the relationship, and that the texts between [the] mother and [the respondent] reinforced [the] mother's position that [the respondent] was trying to control her behaviors via threats of violence and coming into the home. He also opined that the fact that the charges against [the respondent] were dismissed did not change his opinion that there was a larger pattern of control. He noted that [the respondent's] entering the family home against [the] mother's wishes was concerning and that the coparenting with [the] mother would be an ongoing issue.

"Dr. Humphrey noted that [the respondent] reported a limited role in the direct day-to-day care of the children when they were in his care, that [the mother] was

tasked with taking care of the children with the aid of nannies and babysitters, that [the respondent] was unaware of the children's absences from school and tardiness, and that [the respondent] stated that making sure the children got to school was [the] mother's 'job.' After the initial evaluation, Dr. Humphrey opined that the children should remain in their current foster home until [the] mother and [the respondent] engage in services with a one year period of protective supervision; thereafter, and if [the] mother and [the respondent] followed his recommendations, he would support reunification of the children, with each parent to follow a shared parenting agreement. He recommended [that the respondent's] visitation with the children increase to two hours a week, and if [the respondent] established and engaged in the recommended services, he should have three hours of unsupervised visits one day each weekend. Dr. Humphrey also recommended that the children have no contact with their older [half siblings] unless it occurred during their therapy. He also recommended that [the] mother and [the respondent] engage a parenting coordinator to facilitate effective communication between [the] mother and [the respondent], resolve parenting disputes, and help the parents to understand assessments of the children. He further recommended that the majority of the communication should occur in the presence of the parenting coordinator or through monitored e-mails. Notably, Dr. Humphrey opined that 'the parental psychopathology is not the heart of the problem but, rather, the intense parental conflict that is of concern.' He also noted that a thorough psychological (custody) evaluation was 'essential' if the family court litigation proceeded.

"Dr. Humphrey recommended individual therapy for [the respondent] with specific goals and objectives with the primary goal of focusing on and addressing his coercive and controlling behaviors, in addition to improving his coparenting skills. He also noted that the

children appeared comfortable with [the respondent] during the interactionals in 2015 and that he had a positive relationship with them.

"During Dr. Humphrey's testimony [at] the neglect trial on October 19, 2017, Dr. Humphrey discussed a tape recording made by [the respondent] of his conversation with Omar during a supervised visit, wherein [the respondent] was asking Omar which parent was nicer. Dr. Humphrey testified that he found this was concerning because: '[T]here's a great pressure on Omar to decide how to answer the question in a way that would please a parent . . . and then in several ways in the recordings, he urges Omar to answer the question in a way that he wants to hear it answered. The answers tend to be favorable to [the respondent] and unfavorable to [the mother].' In addition, with regard to the other recordings made by [the respondent] during the visits with the children wherein the visitation supervisor instructed [the respondent] not to ask the children questions about attending church with their foster family, Dr. Humphrey opined that 'the impact of exposing the children to this kind of discord, intention, the tenseness in the voices, and the persistence of asking the same questions in a somewhat insistent way, I am concerned it shows at least some lack of regard for the effect of those things on the children . . . . [T]he concerns for the recordings to me aren't about necessarily control and coercion, although there's an element there. There's an element of persistence to pressure a situation to get the result you want regardless of . . . the consequences . . . [and] the appreciation for the ways in which these things affect the children psychologically, exposure to this level of conflict, exposure to a comparison of [the] mother and [the respondent], casting one as good and the other [as] bad, and exposure to conflict with adults, bringing the children into the conflict . . . .'

"Dr. Humphrey also noted at that time that he was 'less optimistic that there can be a prompt resolution to the matter if the parents . . . have not engaged to this point in the efforts I recommended at working on coparenting issues. . . .' He further noted that 'it was less likely that [the] mother and [the respondent] would be able to overcome [the] conflict that marked their relationship. . . . I don't know whether any efforts [at] psychotherapeutic intervention are going to yield any increased degree of insight or awareness of child protection concerns . . . .'

"With regard to the domestic violence incident of July 29, 2015, Dr. Humphrey noted in his report that his primary concern . . . was [the respondent's] disregard of [the] mother's request that he not enter the home, 'which came after he had made threats of violence in [a] series of text messages.' During his testimony at the neglect trial on October 19, 2017, Dr. Humphrey noted that the [text messages] sent by [the respondent] 'support the notion that [the respondent] would engage in verbalizations that would cause fear or intimidate [the mother], make her feel that he might do something dangerous or he might engage in threatening behaviors which would potentially cause her fear for herself [and] fear for the children.' He also testified that he was disheartened by the delay in commencing coparenting services, which had not yet commenced, and that [such delay] increased his doubts that the parents could get past their conflicts.

"Dr. Humphrey conducted updated psychological evaluations and interactionals in March and April, 2018. Of note, Dr. Humphrey reported that during this session with [the respondent], [the respondent] sought information and opinions from Dr. Humphrey regarding specific areas [the respondent] wanted to address, and frequently discussed information already covered in the first evaluation, even after Dr. Humphrey made it clear

to [the respondent] that [these areas were] not the focus of the current evaluation. Dr. Humphrey opined after the second evaluation that the issues of intimate partner violence and coercive control continued to exist in the family dynamic and that [the respondent] continued with his controlling behavior since the prior evaluation. Upon being informed that [the respondent] had contacted [the] mother's attorney requesting permission to communicate with [the] mother's therapist to ensure that the therapist was aware of [the] mother's 'behaviors,' Dr. Humphrey noted that '[r]emarkably . . . [the respondent] said he has not exhibited any controlling behavior in two years . . . he continues to minimize his past behaviors' and that [the respondent] reported that in the past [that] 'there was an aspect of control' but 'not the kind that could cause damage.' Dr. Humphrey recommended that [the respondent] continue his therapy with Dr. [Jason] Gockel, who appeared to have [a] good understanding of [the respondent's] control issues and had made progress with him. Dr. Humphrey also noted that he found it 'compelling that [the respondent's] older children were developmentally behind and that Adnan's significant problems . . . led to child protection involvement. Ultimately, the children, [whom the respondent] and [the] mother raised together, were also developmentally delayed in various ways. . . . The more likely explanation for [the] children's delays (which have been remedied) and poor socialization is not innate dysfunction but, rather, poor socialization and lack of . . . support and stimulation.' He noted that [the respondent] suggested [that] his responsibility for meeting the children's day-to-day needs was diminished because he felt this was [the] mother's role, and he had trouble understanding that he also shared responsibility.

"[The respondent] engaged in individual therapy with Bill Powers. He reported that [the respondent's] 'narcissism runs deep' and that he has 'a need to be a bet-

ter parent.' He noted that he believes that [the respondent] is more controlling than he sees himself. [Powers] opined that he did not believe that [the respondent] could make progress with addressing this in individual therapy. He confirmed that [the respondent] addressed Dr. Humphrey's recommended goals 'to the degree he can' but [the respondent] is 'perceived as being controlling.' He further noted that [the respondent] was engaged in therapy only to meet the requirements of the court. Notably, [Powers] reported that [the respondent] conveyed that the allegations of domestic violence were not accurately portrayed and that it was the domestic violence incident (rather than the allegations in [the respondent's] affidavit filing in family court) that resulted in the children's removal from the family home. . . .

"[The respondent] also engaged in the [previously] mentioned coparenting services with Attorney Moskowitz. . . . As noted [previously], the court finds [the] mother's concerns regarding the coparenting [sessions] with Attorney Moskowitz well-founded due to [the respondent's] attempt to control the narrative of the sessions. . . . Attorney Moskowitz testified that [the respondent] informed her that there was an agreement that the children would be reunited with [him], that [he] would be in charge, that he would work out a parenting schedule with [the] mother and that the children would be raised in the Muslim faith. Attorney Moskowitz did not independently verify the veracity of this information. This further gives credence to [the] mother's representation that she was not being listened to by Attorney Moskowitz. The court found Attorney Moskowitz' testimony unpersuasive, as she was clearly aligned with [the respondent] and biased against [the] mother. As a result, the coparenting sessions ended unsuccessfully. . . .

"[Next, the respondent] retained Rabbi Hechtman, a licensed family therapist, and engaged in coparenting

services with [the] mother shortly after the commencement of the [termination of parental rights] trial. Dr. Hechtman testified that [the] mother and [the respondent] were participating in the services but continued to require additional work on their coparenting issues. Notably, he reported that they realized the seriousness of this matter only after the [termination of parental rights] petitions were filed.

"[The department] engaged in a search for doctoral level therapists to provide [the respondent] with [an] individual therapy [provider who] would accept his insurance and be [in] close vicinity to his home. Several therapists were recommended; however, [the respondent] was not in agreement with the referrals. [The respondent] retained Dr. Leslie Lothstein, Ph.D., a clinical psychologist. Dr. Lothstein testified that he relied on [the respondent's] statements and his 'word' in formulating his report. . . . [The respondent] met with Dr. Lothstein in June and August, 2016. Dr. Lothstein interviewed [the children] . . . on June 13, 2016, and November 28, 2016, and Oais and Muhammed on November 28, 2016. According to Dr. Lothstein's report, dated December 16, 2016, he also conducted a live video camera interview with Safiyah and reviewed Facebook postings of [the] mother, including writings and pictures. He also spoke with [the respondent's] spiritual advisor. He did not interview [the] mother. . . . He did not speak to any [department] social workers. He did not speak to the foster parents. Dr. [Lothstein] testified [that the respondent] handed him a packet of information after the completion of his report and prior to his testimony in court in November, 2017. [This information] included Dr. Humphrey's report in addition to Detective [Damien] Bilotto's report regarding his investigation of the domestic violence incident of July 29, 2015. Notably, Dr. Lothstein did not independently verify the veracity of any of [the respondent's] statements

to him and solely relied on the information provided to him by [the respondent] in formulating his opinions and answers. . . .

"The court finds Dr. Lothstein's report and subsequent testimony unremarkable due to the clear misrepresentations of information given to him by [the respondent] and pursuant to the court's review of all of the credible evidence submitted in this case. The court further notes the lack of the veracity by [the respondent] of the clearly self-serving 'facts' given to Dr. Lothstein, especially with regard to the circumstances surrounding the allegations made against [the] mother in [the respondent's] affidavit filed with his application for the order of temporary custody and the domestic violence incident of July 29, 2015. Most troubling is [the respondent's] representation to Dr. Lothstein that [the] mother did not want custody of the children and was abandoning them. With the exception of Dr. Lothstein's opinion that [the respondent] 'is overly controlling and obsessive,' and that [the respondent] had little insight [into] the reasons for the failure of his marriages, and that there were still factors of intimate personal violence present in [the] mother's and [the respondent's] relationship, the court gives no credence to any of Dr. Lothstein's opinions and conclusions, as they are based on inaccurate, flawed and biased information given to him by [the respondent]. Further, Dr. Lothstein did not independently verify any of the information given to him by [the respondent]. Therefore, Dr. Lothstein's report was ultimately of no assistance to the court, with the exception of his findings as to [the respondent's] overtly controlling behavior.

"In January, 2018, [the respondent] reported to [the department] that he [had] cancelled an appointment with a therapist due to receiving negative feedback about him. This resulted in a further delay in treatment for [the respondent]. [The respondent] then informed

[the department] that he scheduled an appointment with [Dr. Gockel] on January 22, 2018, who was directly retained by [the respondent].

"According to Dr. Gockel, [the respondent] reported to him that he was seeking services to satisfy a court order 'demanding that he complete six sessions on issues of control and the impact this may have on his children.' As noted by Dr. Gockel in his intake note, [the respondent] 'appeared to need to make [Dr. Gockel] understand his innocence regarding the charges of domestic violence and to reassure [him] that he is not a violent individual.' He further noted that [the respondent] reported a history of depression 'but appears to be suffering from ongoing adjustment disorder related to the removal of his children and ongoing frustrations with the legal system . . . [and] there appears to be an underlying layer of anxiety with possible mild paranoia as he discusses the system being against him.' During the course of the sessions, Dr. Gockel reported that [the respondent] appeared to have difficulty in acknowledging his role in the removal of his children and externalized blame. He also continued to express anger and frustration with regard to [the] mother. While [the respondent] did appear to make progress toward accepting his role in the collapse of his marriage and the removal of his children, Dr. Gockel also noted that [the respondent] appeared 'to struggle with obsessive thinking that results in compulsive behaviors.'

"[The respondent] is currently engaging in weekly therapy with Dr. Gockel. Dr. Gockel reported that [the respondent] is making progress with his goals and continues to demonstrate insight into his role in his marriage without placing blame on [the] mother. He also reported that [the respondent] responds well to discussing his identified goals and is open to the concerns regarding his ongoing controlling behavior. [The respondent] did admit that his role in the children's removal was due to his controlling behaviors and that

he should have acted sooner with regard to the 'red flags' he saw concerning [the] mother. Dr. Gockel testified that [the respondent] 'has made significant progress' and has acknowledged engaging in behavior not in his best interest or [that of] others. Dr. Gockel opined that he did not find much evidence of coercive control or intimate partner violence on [the respondent's] part. Dr. Gockel also opined that [the respondent's] text [message] regarding [his] using a knife in the family home was evidence of [the respondent's] impulsive behavior, but [that it] was not an effort to control [the mother].[10] Further, Dr. Gockel testified that while [the respondent] had acquired insight into the children's removal from the home, [the respondent] reported that the removal was due to his complaint that [the] mother put the children in danger due to her boyfriend and that the removal was due to the entrance into the home. Dr. Gockel noted that [the respondent] did accept responsibility for failing to care for the children. . . .

"[The respondent's] initial visits with the children were supervised and were separate from [the] mother's [visits] in light of a protective order in place at that time. Visits were scheduled on Sunday due [to the respondent's] insistence that [that] was the only time [at which] he was available. This created a barrier, as many agencies and workers were not available to conduct supervision of weekend visits; however, [the department] accommodated his request. [The respondent] takes the children on outings during many of the visits and engages in age appropriate play with them. However, he, at times, has arrived late, left early or took breaks during the visits. At times, he left the visitations for periods of time, leaving the worker to supervise the children. He would often stand or sit and watch

[10] At this point in its decision, the court set forth the following finding in a footnote: "The court does not find these conclusions persuasive based on the credible evidence presented to the court and based on Dr. Gockel's lack of independent verification of the information given to him by [the respondent]."

the children, and was minimally engaged with them during the visits. He was also observed giving the children money or toys in response to behavioral issues. He often brought excessive gifts to the visits. He often gave Safiyah more gifts than her brothers.

"[The respondent] commenced unsupervised visits on July 11, 2018, at [his] home. [The respondent] had rooms fully prepared for the children and purchased stuffed animals, toys and computers for each of them. [The respondent] also showed the children a 'snack' room in the home filled with many boxes of snacks. The children spent much of the time during the visits on their computers. On July 15, 2018, [the respondent] reported that he began 'segmented' visits with the children wherein he outlined a program of thirty minute increments of activities to promote 'fun, happiness and love' and 'respect and discipline.' [The respondent] would often leave the children unsupervised while he was upstairs in the home. During periods of time when the social workers stopped by [the respondent's] home during the visits, [the respondent] was observed engaging in little interaction and conversation with the children. During a visit on September 16, 2018, on at least two occasions, [the respondent] was upstairs and not present with the children for an extended period of time. Notably, [the respondent] was observed to leave the children unsupervised with Oais and Muhammed, who were living in the home. This was also confirmed by the children, who also reported that Oais and Muhammed 'roughhoused' with them, and [that] they did not like it. During a visit at [the respondent's] home [on] October 7, 2018, [the respondent] left the children in the company of Oais and Muhammed to go to [a] mall. Supervised visitation with [the respondent was] stopped by order of the court (*Burgdorff*, *J.*) on January 29, 2019, during the pendency of the termination of parental rights trial, due to the credible testimony by the social worker that [the respondent] left the children

alone with Oais in light of the credible concerns of inappropriate sexual contact by Oais with Safiyah, and [the respondent's] ongoing and repeated denial of such contact.

"During the supervised visits with the children, [the respondent] would, at times, discuss inappropriate topics with the children, including seeing [the] mother covered in blood, that there were 'real memories' and 'false memories,' and that they had been told incorrect information by the foster parents.

"[The respondent] made telephone calls to the foster home to speak with the children. However, in early 2018, the foster parents refused to engage in the telephone calls with [the respondent] after receiving a threatening e-mail, which stated that emotional abuse was a crime punishable by law and if the foster parents thought they were immune, they were 'dead wrong.' He currently does not have a good relationship with the foster parents and has alleged [that] they have alienated the children from him and from their religion, and are the cause of the children's issues. He also alleged that they have abused the children.

"At [the respondent's] request, an additional one-half hour was added to the visits for the purposes of religious instruction by [the respondent] for the children. In addition, [the department] transported the children to a mosque with [the respondent] in January, 2018, for an hour of religious instruction at [the respondent's] request. Of note, [the respondent] has been observed to use the extra half-hour for religious instruction on only two or three occasions. Prior to 2017, [the respondent] did not engage in prayer with the children during the visits.

"[The respondent] was ordered to engage in family therapy with the children. As noted [herein], the children's therapists did not support [the respondent's] engaging in family therapy at the same time as [the]

mother because [the respondent] was not 'grounded enough to make progress in family therapy' with the children. It was noted that Safiyah was 'on the fence about engaging in therapy with [the respondent] and that Omar was resistant. At the first session involving [the respondent], Omar expressed that he was not happy that [the respondent] was present. Notably, [the respondent] falsely stated to DeRosa that the children were not going back to [the] mother because she was not seeking custody. Mr. DeRosa reported that [the respondent] 'appeared to be trying to gather information from the therapy and that [the respondent] continued to place blame on the foster parents and [the department] for the children's current issues. [The respondent] also stated to Mr. DeRosa that the children have been abused in their foster home, and [the respondent] insisted on their removal from the foster home. Mr. DeRosa also noted that [the respondent] continues to have a 'one dimensional view.'

"After a provider meeting in June, 2018, [the department], as noted [previously], recommended reunification of the children with [the] mother. While recognizing that [the respondent] had made progress in his services, including improved parenting skills and a clear love and affection for the children, [the department] had ongoing concerns about [the respondent's] continued lack of ability to take full responsibility for his history of controlling behaviors and his continued ongoing efforts to try to control [the] mother. [The department] also expressed concerns about [the respondent's] decision-making and the best interests of the children in light of ongoing control issues. [The department] also expressed concerns about the children's consistent resistance to reunifying with [the respondent].

"The record is replete with many instances of [the respondent's] repeated attempts to use coercion and control in his dealings with [the] mother, [the department], the foster parents, and the service providers. As

noted [herein], one concerning example is a May 5, 2017 e-mail sent by [the respondent] to [the] mother's attorney requesting to speak directly to her therapist to make sure that the therapist is aware of her 'real symptoms and what really prompted her to injure herself to frame me with a crime, she will never get better and she will not receive the therapy she really needs . . . . I would . . . sign whatever affidavit is [necessary] to grant [the mother] immunity from criminal prosecution and to promise her in writing that I will not press any charges against her . . . . I will drop the civil lawsuit against her in return for her reporting what happened truthfully to her therapist.' Another example is an e-mail sent approximately one week prior to the commencement of the [termination of parental rights] trial to the social worker, along with an attached draft 'agreement' entered into with [the] mother regarding his proposal for the custody of the children. [Although] the e-mail states that it should not be sent to anyone else, [the respondent] forwarded it to the social worker. The e-mail compliments [the] mother as 'smart, mature, intelligent, workable and flexible,' and then goes on to critically discuss [the] mother's 'disturbing' relationship with her boyfriend and her 'psychosexual issues,' which 'may continue to undermine her ability to care for the children or to put them at risk. [The mother's] inability to care for the children was directly related to her secret affair with [her boyfriend].' He then goes on to state that '[m]y position is that the children are better off with their mother as primary caretaker, ideally.' Further, as previously discussed, [the respondent] attempted to exert control over [the] mother by filing numerous motions in the family court and in the juvenile court. The credible evidence clearly and convincingly demonstrates [the respondent's] extensive history of attempts to coercively control [the] mother financially and emotionally. He has made numerous false allegations against her regarding her mental health and drug

use, and with regard to the care of the children, all of which has adversely affected the children.

"[The respondent] did eventually admit in his testimony at the [termination of parental rights] trial that he has started to gain insight as to why the children were removed and that the children were removed directly as a result of the affidavit he filed with the family court on July 29, 2015. He also admitted that he completely blamed [the] mother for everything and had since come to realize through therapy that his treatment of [the] mother triggered the intimate personal violence and coercive control which affected [the] mother and the children in a negative way.

"[The respondent] also testified that he never left the children alone during their unsupervised visits with him at his home and that Oais was never 'a single second alone' with Safiyah, which is clearly at odds with the credible evidence presented during the trial of this matter. The court finds that [the respondent] did leave the children alone for periods of time both inside and outside of the home. [The respondent] also testified that he never asked the children to have overnight visits with him. This testimony is also not credible, as the children reported this information to [the department] and their therapists; in addition, it was heard by a social worker most recently at a visit with the children in January, 2019. The court, as discussed [previously], does not give credence to [the respondent's] testimony that he committed no physical violence or altercations with [the] mother during their marriage. It is abundantly clear that domestic violence occurred when [the respondent] entered the home against [the] mother's wishes on July 29, 2015, and forced himself through the locked bedroom door and that [the] mother sustained injuries all within the hearing of the children. Further, [the respondent appeared] to minimize 'a couple of isolated incidents,' including pushing [the] mother away when he was going to a meeting and [that] Safiyah may have

seen him 'pushing her,' all of which constitutes domestic violence. The children have also reported other domestic violence incidents in the house.

"The court is also dismayed at [the respondent's] testimony that he believed [the] mother's concerns regarding inappropriate sexual contact between Safiyah and Oais, when he has repeatedly and consistently denied that it occurred, including verbally expressing [such belief] to this court when the court ordered [that] supervised visitation recommence on January 29, 2019. The court finds deeply concerning [the respondent's] failure to acknowledge and appreciate the significance of the alleged sexual misconduct by Oais with regard to his young daughter, Safiyah. The court further finds that, contrary to [the respondent's] testimony, he has attempted to alienate [the] mother from the children and has attempted to cast her in a disparaging light by making outrageous and disturbing false claims about her. He has repeatedly objected to the prior permanency plans of reunification with [the] mother. His actions clearly belie his words that he respects and supports [the] mother's relationship with the children." (Footnotes in original; footnotes omitted.)

D

Omar

The court's findings with respect to Omar are as follows: "Omar . . . was born on January 17, 2008. He is the [eldest] child of [the] mother and the fourth . . . child of [the respondent]. . . . Omar was referred to [the] Birth to Three [program for] services until the age of three. He was reportedly diagnosed with autism at the age of three and was evaluated at the Connecticut Children's Medical Center . . . . He transitioned to a special education preschool program and requires a higher level of care, including a higher level of parenting with additional supports from his therapists, pediatrician and support groups.

"Omar, in addition to Safiyah and Muneer, [was] reported by their foster mothers as infantile and developmentally behind when they arrived at the foster home. Of special concern to the foster parents was the children's lack of toilet training, [their use of] diapers, and [their] lack of basic hygiene. . . . As noted [previously], the children were ages five, four and three at the time they were placed in their current foster home. . . .

"[Omar] was seen at the Center for Allergy, Asthma and Immunology in September, 2018 . . . . He is considered medically complex due to his asthma. . . .

"He is currently enrolled in the fifth grade. In February, 2017, it was determined that Omar no longer needed special education services and [an education plan that was created pursuant to § 504 of the Rehabilitation Act of 1973; see 29 U.S.C. § 701 et seq.] was initiated. As of February, 2018, Omar's teacher reported that he had become more vocal and had formed a small group of friends, with whom he was able to interact appropriately. . . . He continues to require additional assistance with sensory tools and strategies, and extended time on assessments and on class assignments.

"Omar was referred for an autism reevaluation at Western Connecticut Behavioral Health in February and March, 2018. His history of significant trauma related to domestic violence witnessed at home was noted. He was diagnosed with unspecified trauma and stressor related disorder, which was attributed to early complex childhood trauma with an ongoing diagnosis of spectrum disorder requiring support. . . . Omar described his visits with [the] mother positively but was consistently negative in his description of his visits with [the respondent] and has repeatedly expressed that he did not want to see [the respondent] at all. He also consistently expressed his desire to stay with his foster family.

The evaluator also opined that Omar's current assessment was consistent with his prior diagnosis of autism spectrum disorder requiring support, although his symptoms have improved substantially: 'Omar's trauma exposure and his lack of interventions early on in his life likely increased the intensity of his symptoms for some time, although with increased stability in his life, he has done well and continued to improve in terms of his language, social and behavioral functioning . . . . [He] is doing better now that he is in a safe and structured environment where he is learning necessary skills . . . [and] it is likely that Omar will continue to make gains in adaptive functioning if he remains in a safe, structured and stable environment. . . . Omar must be in a home that will be free of his witnessing and/or experiencing any physical, sexual, emotional, or verbal abuse.'

"Omar started therapy at the Child & Family Agency in early 2016. He was diagnosed with post-traumatic stress disorder . . . . He participated in play therapy to lower his level of avoidance by means of gradual exposure. He initially presented as guarded in therapy and transitioned to therapy with Muneer. He was successfully discharged in the fall of 2017. He reengaged in individual therapy there in March, 2018, pursuant to [Judge Lobo's] order. He is addressing his fears and misunderstandings surrounding [the respondent] and Islam.

"Omar also participated in family therapy sessions. His therapist, [DeRosa], noted that Omar's diagnoses in 2017 include autism, persistent depressive disorder, and other reactions to severe stress, and that these were due to his high level of anxiety. . . . Omar reported during therapy to observing domestic violence in the home, and he continued to have challenges in discussing the dysfunction in the family home. [DeRosa] also reported that Omar, as well as Muneer, were not experiencing psychological suffering due to being in

foster care. [DeRosa] also noted that Omar had made progress in the therapy and that extended therapy would not be beneficial. As discussed [previously], the children's therapists did not support [the respondent's] engaging in therapy at the same time with [the] mother, as they did not believe that [the respondent] was 'grounded enough to make progress in family therapy.' . . . Eventually, [the respondent] engaged in the family therapy. Notably, both Safiyah and Omar were resistant to [the respondent's] engaging in the family therapy. Omar was able to express that he was not happy that [the respondent] was present at family therapy [visits], but [he] eventually adjusted to [the respondent's] presence. However, Omar was observed to continue to experience anxiety when [the respondent] was in the room. Omar continues with individual therapy, which is going well. . . . Of note, Omar's therapist reported that Omar is 'highly ambivalent' about reunification with his parents.

"Omar engaged in a child abuse consultation at the Greater Hartford Children's Advocacy Center at Saint Francis Hospital and Medical Center on October 8, 2015, for an evaluation due to concerns of witnessing domestic violence between [his] mother and [the respondent]. [Omar] disclosed that [his] mother sustained cuts to the front of her body after tripping over a cell phone and falling onto broken glass. He further stated that the glass broke because [the respondent] had a bat and hit the glass, causing it to shatter on the floor, and that [the respondent] 'did this on accident.' He noted that if [the respondent] did not have the bat, 'I would not even be here.' He also reported witnessing other incidents of [the respondent] yelling at [the] mother. . . . Omar also reported that he had seen [the respondent] hit [the] mother and then [lie] about it. He also reported that [the respondent] would not let [the] mother eat.

"Omar completed a psychosexual evaluation and risk assessment with Eliza Borecka at the Sterling Center on June 22, 2018, due to allegations made by [the] mother that there could have been a sexual abuse history of all three children by older [half siblings] or a premature exposure to adult sexuality by [the respondent]. Omar reported that he wanted to stay with his foster parents . . . because '[my parents] can't teach me anything good. All I need to learn is with [my foster mother]. I didn't even know how to use the toilet when I lived with my mom and dad. . . . They didn't teach us anything. We were wearing diapers when we came to live with [our foster mothers]. I would wear a pull-up to school. Mom was somewhere. Mostly, our nanny was at home. Dad was at work.' Omar also stated that he did not want to move back home because 'they will just do the same to us. They will just teach us wrong. They would treat us like babies, and [we] will end up behaving like babies. Because they don't know how to grow a baby into someone with no sick mind. They will raise us into a person with a sick mind. . . . We would just become adults with special needs.' Omar described his father as a 'dork and cruel' and that [his] mother 'eventually will not teach us wrong from right . . . .' The evaluator opined that Omar's responses did not indicate clinically significant symptoms of trauma, nor did he exhibit any behaviors indicating potential sexual exposure. . . .

"Omar continues to receive support and case management through The Connection and his therapeutic foster home where he has been placed . . . along with his siblings, Safiyah and Muneer.

"Omar, as well as Safiyah and Muneer, underwent a psychological evaluation with Dr. Eric Frazer, Psy.D., a clinical and forensic child psychologist, on September 19, 2018. Dr. Frazer credibly opined that all three children presented with significant psychological issues.

He reported that Omar had a long-standing preference for staying with his foster parents. Omar stated that he 'loved them and want[ed] to stay with them. . . . I've improved a lot as a child since they took care of me.' He also stated that any future communication with [his] mother and [the respondent] should be decided by his foster parents and that, if that occurred, 'he would like them to be spaced out every three months.' Significantly, when asked what it would be like if he lived with [his] mother, Omar stated, 'I would be really sad. I wouldn't progress anymore and still have visits with my dad. I don't want overnight visits to happen . . . [because] I won't be with [my foster parents]. I wouldn't be safe and wouldn't feel too safe.' When asked what it would be like to live with [the respondent], Omar stated, '[b]asically, the same thing with my mom, and I would also have to be Muslim and I want to be Christian. He would spoil us, like the bad type of spoil; we would just ask for everything and get it, like, not earning anything.' He further stated that he did not want any more visits with his parents. 'No more visits with either parents.' Dr. Frazer noted that Omar did discuss experiences [that] he enjoyed with [his] mother and [the respondent], but 'those positive experiences did not translate into the desire to sustain a parent-child relationship with either parent in the context of living with them.' He further opined as to all three children that, '[w]hat is developmentally consistent in the children's responses is their desire to have predictability, consistency, and permanency in a home with foster parents they perceived as being safe and [reliable] caregivers. This is what all children seek and thrive on, so their preferences do not show abnormal thinking. Given the amount of time [they have spent] in their foster home, it is understandable that they have developed trust and a strong parent-child relationship with their foster parents and wish to maintain it.' Dr. Frazer also credibly

testified that the children were doing better qualitatively in their developmental needs, including education and learning needs, their socialization needs, and their emotional needs. . . .

"With regard to [the] mother's and [the respondent's] need for coparenting, Dr. Frazer credibly opined that the referral to a parenting coordinator was due to 'a significant presence of conflict. . . . Parents who are able to coparent successfully in a productive manner don't have the need for coparenting therapy and definitely not a parenting coordinator . . . . [That] tells me that there was a significant level of conflict, a significant amount of coparenting difficulties . . . and that . . . has introduced conflict to the children, which makes it more difficult for each of the parties to parent the children. And, then, in consideration of the special needs of the children, it adds another additional stress.' . . .

"Dr. Frazer also credibly opined that the concern to him in the case 'is, really, instability by innumerable risk factors, risk factors that were identified with education, social development with emotional development, coparenting conflict, things like that.' Most persuasive to the court was Dr. Frazer's opinion that if the children were returned to their home where the behavior of the caregivers was not predictable and consistent, 'their overall history show[s] that they're at significant risk of regression . . . . They could start lagging academically. They could have difficulty with peer relationships. They could start showing resumption of symptoms associated with anxiety that they . . . had been treated for.' . . .

"Dr. Frazer also compellingly testified that, with regard to the three children's clear preference to remain with their foster parents, '[i]t's more about what they have come to experience as young children in terms of consistency, predictability, expectations, routines, and

connection to their caregivers . . . . They've improved academically and socially and emotionally, as well . . . . Those are really the significant factors that I see influencing the articulation of their preferences. . . . [T]he way the children conveyed it to me was the way they described their routines at the foster home. They knew what to expect, what was happening after school. They were able to talk about their day. They had activities that they described that were happening on the weekends. So, it was really about their communication, about their routines and their sense of expectation and familiarity with that which was the way they described their perception versus when they were living with . . . their parents [at which time they] didn't have those things.'

"As noted [previously], Omar also participated in a court-ordered psychological evaluation with Dr. Humphrey in October, 2015, and an additional court-ordered evaluation in late 2018. Dr. Humphrey opined that Omar, along with Safiyah and Muneer, had been 'living in a conflict-laden home environment that has included allegations of intimate partner violence, educational neglect, and counterclaims of parental inadequacy and neglect.' In his 2018 interview with Omar, Dr. Humphrey noted that Omar had thrived at school and in his socializations. He also noted that his posture toward [the respondent] had changed dramatically since his removal in 2015. He expressed that he no longer wanted to go to visits and did not want to go to the mosque, nor did he want to continue to engage in therapy. He also expressed that [his] mother and [the respondent] did not 'teach him and his siblings well . . . .' Dr. Humphrey credibly opined that 'Omar presents as [a] child who received inadequate care with his parents that contributed to social, academic, and developmental delays, and contributed to problems with behaviors, including enuresis and problems with interpersonal communication. He has shown improvement in all these areas since entering foster care . . . .'

"As noted [previously], Omar was placed with his siblings, Safiyah and Muneer, in a therapeutic foster home through The Connection in July, 2015. The foster home consists of two foster mothers and their adopted daughter. There have been no concerns with the foster home. Muneer and Omar share a bedroom in the home. Omar has been thriving in his foster home where he is well cared for and has been given much needed structure and parenting. Omar continues to receive weekly support and case management from The Connection. Omar has significantly progressed emotionally, physically and educationally since being placed in the foster home. Omar has a strong bond with his foster family, in addition to his brother and sister, and clearly wishes to remain in their care. . . .

"[The respondent's] visits [with Omar] were initially supervised by [the department] and then became unsupervised in July, 2018. As discussed [previously], [Judge Burgdorff ordered that supervised] visits with [the respondent] be reinstated due to credible reports that [the respondent] does not consistently supervise the [children during] visits . . . when they are in Muhammed's and Oais' presence in [the respondent's] home. [The respondent's] visits take place primarily at his home on Sundays due to his work schedule. Omar has expressed, for a significant amount of time, that he does not wish to reunify with either [the] mother or [the respondent] but appears, at times, to enjoy his visits with [the] mother and [the respondent], as well as his older [half siblings], Muhammed and Oais. At times, he has been distant and guarded with [the respondent] but also, at times, has some positive interactions with him. Omar has consistently expressed his opposition to overnight visits with [the] mother or [the respondent], stating that he is 'not comfortable.' At times, he has been resistant in attending visits with [the respondent] but had no issues when attending the visits. He

has, at times, refused to speak with [the respondent] on the telephone at the foster home. Notably, after a visit with [the respondent] on July 8, 2018, Omar wet his bed on July 9, [2018], and July 14, 2018, for the first time in approximately four months. Notably, these [incidents] occurred after discussions regarding overnight visits with [the respondent].

"Omar has been consistently adamant in his desire to stay in with his foster family, even going so far as to trying to bribe the social worker in an attempt to ensure [that] he stays there. Omar continues to address these issues in therapy. Recently, he appears to have tired of the visits with his parents and with his service providers. Omar is well bonded with his foster parents, in whose home he has resided with Safiyah and Muneer for almost four years, along with his foster parents' adopted daughter. He has a strong, stable and loving bond with his foster family. He has consistently expressed his wish not to reunify with either [the] mother or [the respondent], and has expressed that he would like to be adopted by his foster parents and that he wants to 'stay with them forever.' Omar's foster parents have expressed their willingness to adopt [the children] . . . if they become legally available to do so."

E

Safiyah

With respect to Safiyah, the court found the following facts: "Safiyah . . . was born to [the] mother and [the respondent] on February 8, 2009. She is [the respondent's fifth] . . . child and [the] mother's second . . . child. [The] [m]other reported that Safiyah met developmental milestones but [that she] was somewhat delayed. She was evaluated by [the] Birth to Three [program for services] but was deemed not eligible. She is in good overall physical health and is fairly active. Her pediatrician noted no ongoing developmental concerns.

. . . She has been diagnosed with asthma and is treated at the Center for [Allergy] Asthma and Immunology. . . .

"Safiyah is currently enrolled in the fourth grade and is identified as a regular education student. Due to concerns by [the department] that she required special education services, her school implemented a leveled literary instruction group as an intervention. Safiyah has improved academically and she is currently on grade level with her reading. She is approaching and meeting expectation[s] in several classes. She has several classes where she is not meeting expectations. Safiyah has had several meetings with the school worker due to some behavioral issues.

"Upon entering [the department's] care, Safiyah was placed in a therapeutic foster home through The Connection. She continues to receive weekly support and case management from The Connection. At the time she entered care, Safiyah presented with sexualized behaviors, bed-wetting, was emotionally dysregulated, and hyperactive. . . .

"Safiyah's therapist credibly testified that Safiyah's exposure to domestic violence in the home played a significant factor in her [post-traumatic stress disorder] diagnosis and that she has made significant progress since being placed in her foster home. She has matured, improved her self-esteem and personal advocacy [skills], as well as her overall coping skills. She has developed appropriate boundaries with her brothers and become more vocal in expressing her concerns to adults. Her incontinence issues have resolved, as well. She commenced therapy in early 2016 and was successfully discharged in March, 2018. She continues to work on addressing her fears and misunderstandings with regard to [the respondent] and Islam.

"Safiyah is currently engaging in family therapy sessions with each parent. Her therapist, [Baker], noted

that Safiyah adapted and transitioned into therapy, which included the trauma treatment model, and made progress. She improved in her self-regulation and self-esteem, and worked through her past trauma. She did not disclose any new trauma while in foster care. Overall, Safiyah has improved her behaviors and has demonstrated the ability to advocate for herself and maintain healthy boundaries with her siblings and her peers. She was discharged from therapy successfully.

"Safiyah engaged in a child abuse consultation at the Greater Hartford Children's Advocacy Center at Saint Francis Hospital and Medical Center on October 8, 2015, for an evaluation for sexual abuse due to concerns of witnessing domestic violence between [her] mother and [the respondent] as well as allegations of inappropriate contact by an older [half brother], and possible exposure to pornography. During the forensic interview, Safiyah reported observing multiple incidents of domestic violence between [her] mother and [the respondent], including [the respondent] throwing a glass at [her] mother, that [her] mother was bleeding, and that [the respondent] was mad at [her] mother and pushed her. She also reported other past incidents [in which the respondent] pushed [her] mother. She reported that [her] mother 'doesn't ever do anything bad to my dad. It's only my dad.' She reported an incident while in the family car when [the respondent] told [her] mother he was 'going to explode' her. She also reported witnessing [her] mother being pushed and hit by [the respondent]. She also reported that Muneer and Omar touched her 'private space . . . with their hands under their clothing . . . lots of times.' She also stated that Muneer made her touch his 'private spot.' Therapy and a medical evaluation was recommended.

"Safiyah was referred for a psychosexual evaluation in July, 2017. She reported a history of domestic violence between [her] mother and [the respondent].

Safiyah was reported to have a number of behavioral issues when she came into [the department's] care, including inappropriate boundaries and touching with her siblings, and being inappropriately touched by an older [half sibling]. There were concerns [that] she was exposed to inappropriate sexual content prior to her removal. She also struggled with daily routines. Concerns were raised regarding [the respondent's] affectionate behavior with her, as well as Omar and Muneer, especially in light of the [respondent's] awareness of the children's sexual behaviors.

"Safiyah underwent a psychosexual evaluation and risk assessment at the Sterling Center on June 22, 2018. Safiyah reported that she was living in [a] foster home 'to be safe' and because 'we were not treated well.' She reported that [her] mother and [the respondent] 'did not teach us anything.' She reported Muneer touching her on her private body parts, but the evaluator noted that [such contact] did not exceed 'normative physical exploration between the siblings.' She also reported that [her] mother had all three children take showers together and that the cats were allowed to urinate on the children's beds. The evaluator opined that 'the evident hygiene issues and inadequate boundaries perhaps illustrate deficient understanding of responsible parenting by the adult who was providing direct care to Safiyah and her siblings at home.' She further opined that Safiyah's responses to questions did not indicate clinically significant symptoms of trauma but that she needed further mental health support focusing on her anger, boundaries and coping skills. She further noted that '[i]t is likely that she is suppressing her true feelings in order to please the people around her.'

"As noted [previously], Safiyah underwent an evaluation with [Dr. Frazer] on September 19, 2018. Safiyah reported that she felt closest to her foster family, and

Omar and Muneer. She stated [that] she wanted to continue living with her foster parents and that she liked it there: 'Because it's fun there. We go places a lot . . . . It makes more sense . . . . Like, let's say we got in trouble and asked for our tablets, [her foster mother would] say no. At home with mom or dad, [they] would say, yeah, sure.' Safiyah expressed ambivalence and uncertainty in continuing communication with [her] mother and [the respondent], and indicated [that] she would like to do it by telephone. She also stated [that] she would like to continue seeing them at their homes but with no overnight visits. Notably, she expressed [that] she did not want to live with either [her] mother or [the respondent]. . . .

"Safiyah initially had supervised visits with [her] mother and [the respondent]. She was initially resistant to the visits with [her] mother and [the respondent]. . . . [The respondent's] visits were initially supervised by [the department] and then became unsupervised. As discussed [previously], [Judge Burgdorff] . . . ordered [that the respondent's] visits be supervised in [light] of reports that [the respondent] does not consistently supervise the visits between Omar, Safiyah and Muneer when [the children are] in Muhammed's and Oais' presence. [The respondent's] visits take place primarily at his home on Sundays due to his work schedule. . . . Safiyah appears to enjoy her visits with [her] mother and [the respondent], as well as her older [half siblings] . . . . She appears to have developed a positive bond and has not reported any concerns. However, Safiyah has consistently stated that she does not wish to have overnight visits with either [her] mother or [the respondent], and that she does not want to reside with either [her] mother or [the respondent]. She also stated that she does not like to go to the mosque and that she does not understand why she has to go when she had not gone before.

"As noted, Safiyah was placed, along with her siblings, Omar and Muneer, with her foster parents and their adopted daughter after entering [the department's] care in 2015. She is well bonded with her foster family, in addition to Omar and Muneer, and is emotionally attached to them."

F

Muneer

With respect to Muneer, the court found the following facts: "Muneer . . . was born to [the] mother and [the respondent] on March 4, 2010. He is [the respondent's] sixth . . . child and [the] mother's third . . . child. [The] [m]other reported that Muneer met all developmental milestones. However, his pediatrician reported that he had a history of delayed milestones but [that he] has no current concerns. He is in overall good health. . . . He is deemed medically complex due to his diagnosis of asthma, for which he is seen at the Center for Allergy, Asthma and Immunology. . . .

"At the time Muneer entered [the department's] care in 2015, he was placed in a therapeutic foster home through The Connection. He continues to receive weekly support and case management from The Connection. At the time of his removal, Muneer was experiencing issues with bed-wetting and hygiene. . . . Since being placed in his foster home on July 31, 2015, those issues have resolved.

"Muneer is currently enrolled in the third grade, where he is identified as a regular education student with no educational or developmental concerns noted . . . .

"Muneer is currently reported to be an overall happy child and is fairly well-behaved. Muneer was initially engaged in individual therapy at the Child and Family Agency in 2016, and consistently attended until fall, 2017, when he was successfully discharged. He then

reengaged in therapy in March, 2018. He is also engaged in a school-based program to avoid missing time at school. Muneer's therapy focuses on his fears and misunderstandings surrounding [the respondent] and Islam. Muneer appears to enjoy talking about his feelings. He occasionally displays oppositional behaviors, including talking back to his foster parents. Muneer has also been engaging in family therapy with [his] mother and [the respondent], and his siblings. Muneer has made improvements in that he is better able to articulate his feelings and implement the coping skills [that] he has learned in therapy.

"Muneer underwent a forensic interview at Saint Francis Hospital and Medical Center's Children's Advocacy Center on October 8, 2015. Muneer did not engage and did not want to discuss the domestic violence incident at the family home on July 29, 2015. No assessment was made due to his refusal to engage.

"Muneer underwent a psychosexual evaluation and risk assessment at the Sterling Center on June 22, 2018. Muneer had been diagnosed with dysthymic disorder and other reactions to severe stress. He also reported a history of domestic violence between [his] mother and [the respondent]. At the time he was placed in [the department's] care, Muneer had a number of behavioral issues, including inappropriate touching and boundaries with his siblings. He reported a history of nightmares and intrusive thoughts. . . . The foster parents received a call from Muneer's school reporting that Muneer was humping another boy and [had] locked himself and the little boy in a bathroom stall. His foster parents described him as [engaging in] sexual/fantasizing behaviors. Muneer reported that he had touched Safiyah in her private area but did not do it anymore. Muneer reported seeing [his] mother and [the respondent] without clothes on the television at his parents' home. He reported that Omar and Safiyah saw it, as

well. The foster parents reported that, as of the time of the evaluation, he had not engaged in that type of behavior for approximately a year and a half. He also had issues with being controlling and demanding, and [he] engaged in long temper tantrums in the foster home and in public. Those behaviors were reported to have improved since [he was] placed in his foster home. The evaluator opined that Muneer's responses indicate clinically significant symptoms of trauma with elevated responses in the areas of anxiety, depression, post-traumatic stress, sexual concerns and sexual preoccupation. He exhibited significant distress when discussing the topic of sexuality and physical boundaries. . . . It was noted that . . . Muneer's exposure to sexual content in the years prior to his removal continued to generate a very strong response in Muneer. As the evaluator noted, Muneer's exposure to the sexual content would likely cause him to react to it through unusual behavior, and his reactivity will be displayed as sexualized behavior, as demonstrated in his sexualized behavior with Safiyah and the child at his school. His evaluator opined that Muneer presented as a child who exhibits significant symptoms of significant stress and emotional burden due to his life circumstances, '[and] he reports symptoms of anxiety, depression and confusion about where his life is going and he desperately needs stability and resolution to the turmoil he has been experiencing in the past three years.' . . .

"Muneer underwent an evaluation with [Dr. Frazer] on September 19, 2018. Muneer expressed feeling closest to [his] mother but that he did not want to stay overnight at either [his] mother's or [the respondent's] homes. Muneer expressed that he wanted to continue living with his foster parents '[b]ecause they taught me everything I need to know . . . they taught me right from wrong. I don't think my biological parents are ready for kids yet . . . [t]hey don't teach me things I

need to know. They taught me things that are not right. I love them but if they are going to treat me that way, I just don't want to stay with them.' He further stated that, '[o]ne day, my dad threw a glass at my mom, and I had to go stay with someone else.' Muneer also noted that he would miss [his] mother and [the respondent] if he stayed with the foster parents because he loved them. He was uncertain and ambivalent regarding ongoing communication with [his] mother but did not want to stay in communication with [the respondent]. He also noted that he might consider seeing his parents once a month, as well as [on] special days. . . .

"Muneer initially had supervised visits with [his] mother and [the respondent]. . . . [The respondent's] visits were initially supervised by [the department] and then became unsupervised. Most recently, [Judge Burgdorff] ordered [that the respondent's] visits be supervised in [light] of reports that [the respondent] does not consistently supervise the visits between Omar, Safiyah and Muneer when in Muhammed's and Oais' presence. . . . Notably, Muneer has consistently expressed his opposition to overnight visits with [his] mother or [the respondent], stating that he is 'not comfortable.' He has expressed that his visits with [the respondent] 'are not so good' and that he does not like attending the mosque.

"Muneer is well bonded with his foster parents in whose home he has resided with Safiyah and Omar for almost four years, along with his foster parents' adopted daughter. He has a strong, stable and loving bond with his foster family. He initially expressed that he wanted to live with [his] mother and expressed fear of [the respondent] due to his exposure to domestic violence between his parents. However, most recently, he has consistently expressed his wish not to reunify with either [his] mother or [the respondent] and would like to be adopted by his foster parents."

G

Religion

The court made additional findings concerning the subject of the children's religion, as follows: "As [discussed previously, the respondent] . . . is a practicing Muslim. [The] [m]other was also a practicing Muslim when the children were in her care. She has since expressed the desire to have the children [introduced] . . . to other religions and supports their celebration of other holidays, such as Christmas. [The] [m]other has celebrated these holidays with the children. [The respondent] has consistently not been in agreement. The court finds no credible evidence supporting [the respondent's] claim that the foster parents have attempted to alienate the children from [their] Muslim father. The foster parents are practicing Christians who have not forced the children to engage in religious practices. However, notably, the children reported [that] they did not attend a mosque before their removal. They have also expressed some anxiety regarding their current religious identities. As noted [previously], [the respondent's] visitation time with the children was increased by thirty minutes for the purpose of religious education, but he has made little effort to engage with the children to discuss religion. He has given the children gifts on Muslim holidays but does not engage in prayer with the children before eating during the visits."

H

Adjudicative Findings

In the adjudicative phase of the proceeding, the court, relying on its prior detailed findings concerning the services that were provided to the mother and the respondent to facilitate reunification, determined that the children had proven by clear and convincing evidence that the department made reasonable efforts to

reunify the mother and the respondent with the children. The court found that, on December 18, 2017, the children were found to have been neglected.

The court then found by clear and convincing evidence that the mother and the respondent had failed to rehabilitate. The court stated: "[T]he evidence . . . clearly and convincingly demonstrates that [the] mother and [the respondent] have failed to rehabilitate to the extent that the children can be returned to their care or custody. They clearly have not rehabilitated in a timely manner. They clearly cannot adequately meet the children's developmental, emotional and medical needs at the present time, nor in the foreseeable future. Neither parent has gained the necessary insight and ability to care for their children, given their ages and needs, including their special needs, within a reasonable period of time. . . . They have not sufficiently and successfully engaged in rehabilitation in a timely manner nor have they made adequate progress to the extent that it is safe for the children to return to their care, given their ages and need for permanency. Further, giving them additional time to [rehabilitate] is neither in the children's best interests nor in their need for permanency in light of their clear failure to do so over the past four years.

"The evidence clearly and convincingly reveals that [the] mother and [the respondent] continue to have a significant lack of parenting skills, including coparenting skills. Prior to the children's removal from the home, both parents relied on a series of nannies and babysitters to care for the children. [The] [m]other was often out of the home or sleeping late. [The respondent] was working. They both failed to teach the children basic tasks, such as toilet training and personal hygiene. The court finds it both disturbing and remarkable that these children were not toilet trained and were using diapers at the time [that] they were placed in their current

foster home. They both failed to ensure that the children attended school and arrived [at] school on time. Neither were involved in the children's day-to-day lives, and both failed to meet some of their basic needs. [The respondent] denied responsibility for their day-to-day needs and consistently blamed [the] mother.

"Further, these parents engaged in intimate personal violence in the home and in the family car, in the presence of the children, on at least several occasions. The clear and convincing evidence shows a clear pattern of intimate personal violence, including coercive control, by [the respondent] toward [the] mother during their marriage and since the children's removal. He has repeatedly attempted to control [the] mother emotionally and financially. He has continuously made many false aspersions regarding [the] mother to [the department] and the providers. [The respondent's] failure to sufficiently rehabilitate is clearly exemplified by [his] conduct and words over the four years since the children's removal. [The respondent] has consistently maintained that he has not done anything wrong and [has] failed to fully accept responsibility for the role he played in the removal of his children. He clearly misrepresented, if not outright lied, regarding the circumstances surrounding the children's removal, and blamed [the] mother for filing what he characterized as false charges against him with regard to the July 29, 2015 domestic violence incident in the home. He also clearly failed to sufficiently gain the necessary insight into his coercive and controlling nature in his relationship with [the] mother and how this impacted the care of his children both before and after their removal. [Although the respondent] eventually admitted that he had committed some controlling behaviors toward [the] mother, that realization was much too little and much too late. His actions and words belie that belief, as his coercive control continued up to the commencement of the . . .

trial. Further, it is abundantly clear that [the respondent] has always put his interests first and the children's second. His actions have clearly been damaging to the children and to their relationship with [the] mother. It is abundantly clear that the [respondent] has utterly failed to gain sufficient insight into his ongoing need to exert control.

"[Although the respondent] has consistently reported a positive relationship with [the] mother and the importance of her role as the mother of the three children, his actions and words also clearly belie those statements. He has vehemently opposed [the department's] plans of reunification with [the] mother and continually presented evidence that [the] mother was unfit to parent the children, made numerous false allegations against her and has made extensive efforts to prevent [the] mother from reunifying with the children. As discussed [previously], [the respondent], in his affidavit filed with the family court, made many outrageous and false statements vilifying [the] mother and her care of the children. Further, [the respondent's] actions and statements have detrimentally impacted the children. There is clearly an overwhelming need to control on the part of the [respondent], and he has not been able to sufficiently overcome that need through his services. He has clearly been unable to gain the necessary insight into his ongoing issues in a timely manner to make it even remotely possible to return the children to his care in a reasonable period of time.

"[The department] offered timely and reasonable services to [the respondent]. Any delay in receiving those services is directly attributable to [the respondent]. As discussed [previously], [the respondent] was not in agreement with several of the recommended treatment providers and retained his own. Further . . . the record is replete with numerous instances of [the respondent's] coercive control in all aspects of this case, from

[the department], [the] mother, the service providers and, most importantly, the children. [The respondent] attempted to manipulate and control some, if not all, of the providers, especially Dr. Lothstein and Attorney Moskowitz, by giving incorrect and misleading information. It was that coercive and controlling influence with Attorney Moskowitz that led to [the] failure of the coparenting services and required another coparenting provider, which commenced only recently.

"[The respondent] consistently presented himself in the best possible light and often blamed [the] mother, in addition to [the department] and the foster parents. He has made disparaging remarks about the foster parents on at least several occasions and has blamed them for their ongoing issues. He also testified that he had a 'very friendly and benign relationship' with the foster parents. The credible evidence clearly demonstrates that [this characterization] is not true. [The respondent's] actions and words have clearly demonstrated his inability to put his children's needs ahead of his own. Further, the court is concerned regarding [the respondent's] testimony that he would continue to assist [the] mother financially and allow the children [to have] access to her if the court terminated her parental rights, which is clearly indicative of his ongoing desire to control [the] mother.

"[Although the respondent] did eventually make some limited progress in his therapy [by] admitting to his control issues . . . these limited admissions are woefully insufficient to support a finding of a sufficient degree of rehabilitation. He certainly did not come to those realizations within a reasonable period of time. . . .

"As also discussed [previously], [the department] also facilitated supervised and unsupervised visits with [the respondent]. It accommodated [the respondent's] insistence that the visits be held on Sundays to accommodate his work schedule. As discussed, [the respondent]

failed to ensure that the children were not left unsupervised after the unsupervised visits commenced, and [he] allowed his older sons to be alone with the children. [The respondent] was well aware of the concerns of inappropriate sexual contact with Safiyah but failed to consider her safety and well-being during the visits. This not only clearly demonstrates [the respondent's] lack of insight but also a clear lack of judgment. Rather than putting the safety of his children as a priority, he continued to deny [that] any inappropriate sexual contact occurred through the trial of this matter. He has also failed to engage on a consistent basis with the children during the visits, thus failing to provide the routine and structure they clearly need.

"In light of the above, the court finds that [the respondent] failed to sufficiently rehabilitate in that he has failed to attain a level of stability to permit his children to be safely placed in his care. He has made limited progress with his ongoing significant control issues, which has been an impediment to his gaining any lasting benefit from his services. He has failed to gain the necessary insight into his ongoing issues, which prevents him from successfully reuniting with his children. . . . [Although the respondent] did eventually comply with his court-ordered specific steps, that is not enough to show rehabilitation. . . . Further, in determining whether a parent has achieved sufficient personal rehabilitation, the court may consider whether the parent has corrected the factors that led to the initial complaint, regardless of whether those factors were included in the specific expectations ordered by the court or imposed by [the department]."

The court concluded that the mother had not rehabilitated. The court then stated: "The court notes that [the] mother and [the respondent] appear to love their children, and the children, at times over the past four years, have indicated their love and affection for [their] mother

and [the respondent], but that is simply not enough to support reunification. . . .

"Of paramount consideration to the court is the issue of stability for [the children]. . . . Our laws recognize that a child is legally entitled to some minimal standard of safety, which should include a parent's desire to protect and keep their children safe in all ways, including physically and emotionally. [The] [m]other and [the respondent] have failed in their ability to sufficiently demonstrate their ability to parent and meet these critical needs of their three children. [The children's] need for permanence far outweighs any remote chance that [the] mother or [the respondent] may rehabilitate in the far distant future, which they clearly have not done since the children's removal. Either due to lack of ability or desire, [the] mother and [the respondent] have failed to successfully accomplish in the past four years what was needed to consider reunification as an appropriate conclusion. They cannot provide their children with a nurturing, safe and structured environment. They have clearly repeatedly failed to put the needs of their children ahead of their own, both prior to and subsequent to [the children's] removal from the home. They have each failed to sufficiently understand the detrimental impact of their actions, or lack thereof, on the children. These children cannot afford to wait for their parents to rehabilitate. The [children] . . . have presented compelling evidence that they need permanency and stability now.

"Accordingly, the court finds that, based upon the credible testimony and documentary evidence presented, [the children] . . . have met their burden of proof by the rigorous standard of clear and convincing evidence, that [the] mother and [the respondent] have failed to achieve the degree of rehabilitation that would reasonably encourage the belief that, within a reasonable period of time, considering the ages and needs of

these three children, either [the] mother or [the respondent] could assume a responsible position in the children's lives. They have each clearly failed to sufficiently address their ongoing issues and parental deficiencies that gave rise to [the department's] involvement. Further, the court also finds by clear and convincing evidence that to allow [the] mother or [the respondent] additional time to rehabilitate would adversely affect the children's emotional stability and well-being, especially in light of the children's ongoing special needs and their desperate need for permanency, four years after their removal. Either through lack of ability or lack of desire, neither parent has made sufficient progress toward addressing the child protection issues or their rehabilitative status as it relates to the children's ongoing needs. [The] [m]other's and [the respondent's] ongoing limitations and deficits have clearly proven to be an insurmountable barrier to reunification." (Citations omitted.)

II

DISPOSITIONAL FINDINGS

In the dispositional phase of the proceeding, the court made findings concerning each of the criteria set forth in § 17a-112 (k). Thereafter, the court made findings concerning the best interests of the children, in relevant part, as follows: "It is clear that [the children] cannot be returned to their mother or [to the respondent]. The court has balanced each child's intrinsic need for stability, sustained growth, development, well-being and permanency against the potential benefits of maintaining a connection with their biological parents. . . . In consideration of all these factors and after weighing all of the evidence, the court finds that the clear and convincing evidence has established that it is in the best interests of [the children] to terminate the parental rights of the . . . mother and the respondent . . . to ensure that they each have a secure and safe placement

so [that] they can continue to grow, thrive and mature to become productive children and adults. They need the permanency and stability that their foster parents will continue to provide for [them], as they have successfully done over the past four years. As our courts have long observed, the deleterious effects of prolonged temporary care is well known. . . .

"[The children] need this closure of the uncertainty in their lives and the removal of the possibility of returning home to their mother or [the respondent], the thought of which has caused them undue stress, anxiety and emotional discomfort. As noted by Dr. Frazer, the children have a fear of removal from their foster parents, which causes them anxiety, and to remove them from their foster parents after four years would be traumatic. Neither [the] mother nor [the respondent] offer any reasonable prospect of providing any form of the stability, safety and permanency that these three children need in the foreseeable future. The evidence, as discussed in detail . . . clearly and convincingly establishes that neither [the] mother nor [the respondent] is a stable and competent caretaker for [the children]. . . . The court is aware of the affection that the children have, at times, felt for their parents. However, the court, based on the evidence presented, does not find a strong bond between any of the children with either [the] mother or [the respondent]. This, in conjunction with each parent's inability to substantially and sufficiently benefit from their treatment and services, clearly indicates that reunification cannot occur in the near future. . . . Any further delay would be clearly detrimental to the children. The clear and convincing evidence has demonstrated that their strongest and most compelling bond is with their foster parents. It is abundantly clear to the court that these three children have thrived in their foster home . . . . They receive

the attention, care and love that they were clearly lacking in the care of [the] mother or [the respondent]. Since placement in the foster home, the children significantly improved physically, educationally and emotionally. They are much more emotionally stable, better at communication and their basic hygiene has improved. The inappropriate sexual touching between them has stopped. The bed-wetting has greatly diminished. The foster parents are providing excellent parenting to these three children and they have flourished in that care. These three children have a strong and loving bond with their foster family. They consider their foster parents their parents. They look to them for care, love and support. They love their foster sister. They love each other. . . . The children's need for stability, predictability, and permanency, which they currently have in their foster home, far outweighs any need to maintain a connection with [the] mother or [the respondent]. The court concludes that it is clearly not in the children's best interest[s] [to maintain such connection].

"The court must reiterate and emphasize in its best interest[s] findings that [the children] have consistently, repeatedly, and adamantly stated that they do not want to return to either [the] mother's or [the respondent's] care. The court finds their statements and desires quite compelling and quite understandable in light of the totality of the circumstances of this case. They have all expressed the desire to be adopted by their foster parents. Further, the court must also credit these children for their deep insight into the flawed parenting and care received from their parents while in their care. These statements emphasize the court's finding that the care of these children was never a priority for these parents.

"Accordingly, after considering the children's ages and the totality of the circumstances, the court finds that termination of [the] mother's and [the respondent's] parental rights is in the best interests of . . .

[the children]. The convincing and clear evidence has established that [the] mother and [the respondent] are in no better position today to provide for their children than they were at the time of their removal. The problems that led to the children's removal have not been rectified, and the prospects of improvement are bleak at best, especially in light of the fact that these children have been out of the parents' care for four years. Despite all of the services offered and provided to [the] mother and [the respondent], they have clearly not sufficiently benefited from those services in which they did engage. . . . These children need the security and safety of a stable and permanent home, which is clearly found in their current home. Further, the court finds that it would be clearly detrimental to the well-being of these children to delay permanency any longer in order to allow [the] mother and [the respondent] additional time to rehabilitate especially when they have not successfully done so over the past four years. This conclusion is clearly and convincingly supported by the testimony of the witnesses as well as the information contained in the exhibits presented at the time of trial." (Citations omitted.)

The court ordered that the parental rights of the mother and the respondent be terminated, denied the motions to revoke the commitment of the children to the care and custody of the commissioner that had been filed by the mother and the respondent, and appointed the commissioner to be the statutory parent of the children.

III

JUDICIAL BIAS

The first claim raised by the respondent is that judicial bias deprived him of a fair trial. We disagree.

In analyzing his claim of judicial bias, the respondent draws our attention to a myriad of specific statements

and rulings made by the court, both prior to and during the lengthy trial.[11] Additionally, the respondent draws our attention to isolated portions of the court's lengthy memorandum of decision. The respondent views these rulings, comments, and findings as evidence of bias. He argues that the court "made numerous flagrantly prejudicial comments before the commencement of the trial and during the trial, and conducted [itself] in a prejudicial manner throughout the trial. [The court's] bias clearly manifested when [it] arrived at a conclusion wholly antithetical to individual and cumulative witness testimony." (Footnote omitted.)

In attempting to demonstrate bias on the part of the trial court, the respondent states in general terms that the court had "a prejudicial agenda." The respondent argues that the court improperly relitigated "the findings of prior neglect,"[12] predetermined several of the factual issues in the case,[13] drew inferences adverse to him solely on the basis of motions that he [had] filed

[11] It would serve no useful purpose to analyze each and every instance of alleged judicial bias that is discussed by the respondent in his appellate brief. Although we will discuss many of the specific points raised in the claim, in the interest of judicial economy, we may dispose of the claim by addressing some of the more prominent arguments in his brief as well as the general principles that defeat his claim. We note, however, that we have considered all of the arguments raised in his claim, and that our analysis applies to and encompasses all of the arguments raised.

[12] The respondent argues that, during the neglect proceeding, Judge Lobo did not determine "which parent was responsible for the adjudication of neglect," but that the court in the present proceeding "blamed [him] entirely." The respondent argues that the doctrine of collateral estoppel precluded the court from relitigating "the findings of prior neglect."

[13] In support of this view, the respondent observes that, at a pretrial motions hearing on January 8, 2019, during which the respondent's counsel argued that an updated evaluation of the children and an updated report from Lothstein were necessary, the court expressed its concern that the respondent was "trying to control" the situation with regard to Lothstein. The court also observed that Lothstein's prior report was based primarily on information that had been provided to him by the respondent and, thus, was "very one-sided." The record reflects that the court's observation was based on its review of matters that the parties had agreed to be marked as trial exhibits, and the court made clear that its view was based on information reflected in those exhibits.

against [the] mother,[14] deprived him of his right to consult with counsel during trial,[15] and made many evidentiary rulings that were adverse to him.[16] The respondent argues that the court erroneously "preclude[d]" the testimony of several witnesses, including Moskowitz, Gockel, Lothstein, Humphrey, Hechtman, department social worker Michael Jones, the mother, and himself. He also argues that the court's decision was unfair in that the court engaged in "strong condemnation of [him] throughout [its memorandum of decision] at every possible opportunity." The respondent argues

[14] The respondent states that, before the trial started, the court indicated that it had reviewed numerous motions that he had filed and disparaged him as follows: "I saw [that the respondent] filed numerous filings with the court, numerous filings . . . . There's a lot of them in there . . . and I know a lot of them were denied. . . . I learned a lot about the case by what he filed. . . . I'm personally taking judicial notice of all the contents of the file since day [one], so counsel may . . . [refer to matters in the court file]." Thereafter, in a response to a request by Omar's counsel for the court to take judicial notice of the neglect and dissolution files, the court advised counsel to direct it to specific portions of the files. The court stated: "There's a lot of information and history . . . in these various motions that was very enlightening to the court to read and . . . I got a general idea of what the issues are in the file."

The respondent argues that, in its memorandum of decision, the court made clear that it was penalizing him for his history of bringing motions against the mother. We observe that the court's observation and its findings were based on matters properly before it, as the parties agreed that the court could review the evidence before Judge Lobo during the neglect proceeding. Moreover, the issue of the respondent's litigation history with the mother was relevant to the issue of whether the respondent had gained the ability to coparent with the mother and, thus, was one of the central issues before the court in ruling on the termination of parental rights petitions.

[15] The respondent does not provide any details of the instance during which he claims that the court "denied his request to consult with his counsel during trial . . . ." Although, in his brief, he provided a transcript citation to this alleged occurrence, the transcript does not reflect that any such request to consult with counsel was made.

[16] Part of the respondent's claim is that the court was not evenhanded in its rulings and "prevent[ed] [the respondent's] counsel from asking questions regarding the history of the case while allowing opposing parties to do the same." The respondent has not provided relevant citations to the record to demonstrate such a pervasive pattern of rulings. It is not the role of this court to scrutinize the record of the lengthy trial in an attempt to justify this aspect of the claim.

that the court's decision was unsupported by the evidence and that the court "relied on substantial ambiguity in [its] decision to mask unlawful discrimination" against him. The respondent repeatedly characterizes the court as being partial, but he does not articulate a reason *why* the court was biased against him, let alone suggest that the court had any type of personal or pecuniary interest in the outcome of the trial.

The respondent does not dispute that he did not raise a claim of judicial bias before the trial court, ask the court to recuse itself, or move for disqualification. He has chosen, instead, to wait to raise a claim of this nature only after the court rendered its judgments terminating his parental rights. The respondent summarily states that he seeks review under the doctrine of plain error or under the doctrine set forth 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).

"It is well settled that courts [generally] will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court through a motion for disqualification or a motion for a mistrial. . . . Because an accusation of judicial bias or prejudice strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary . . . we . . . have reviewed unpreserved claims of judicial bias under the plain error doctrine [when raised on appeal]." (Citation omitted; internal quotation marks omitted.) *Michael G.* v. *Commissioner of Correction*, 153 Conn. App. 556, 561–62, 102 A.3d 132 (2014), cert. denied, 315 Conn. 916, 107 A.3d 412 (2015).

In his brief, the respondent has invoked the plain error doctrine, and we construe his arguments to constitute an analysis under the plain error doctrine. We will review the claim of judicial bias under the plain error doctrine because, as the respondent argues, it implicates the concept of a fair trial. "The plain error doctrine

is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . .

"When an appellate court addresses a claim of plain error, the court first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in the light of the record. . . . In addition, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *Tala E. H.* v. *Syed I.*, 183 Conn. App. 224, 233–34, 192 A.3d 494 (2018), cert. denied, 330 Conn. 959, 199 A.3d 19 (2019).

"[A] claim of judicial bias strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary. . . . No more elementary statement concerning the judiciary can be made than that the conduct of the trial judge must be

characterized by the highest degree of impartiality. If [the judge] departs from this standard, he [or she] casts serious reflection upon the system of which [the judge] is a part. . . .

"In reviewing a claim of judicial bias, this court employs a plain error standard of review. . . . The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." (Internal quotation marks omitted.) *State* v. *Cane*, 193 Conn. App. 95, 133–34, 218 A.3d 1073, cert. denied, 334 Conn. 901, 219 A.3d 798 (2019).

After reviewing the arguments set forth in the respondent's appellate brief, the transcript of the proceedings before the trial court, and the court's memorandum of decision, we conclude that the respondent's claims of judicial bias do not, in actuality, relate to what is commonly viewed as judicial bias at all. The respondent's claim, as it relates to several adverse rulings and findings, does not constitute evidence of bias. The respondent may disagree with the court's factual findings, yet we conclude that they were plainly based on the evidence, relevant to the issues before the court, and thoughtfully set out in the court's memorandum of decision.[17] The respondent's disagreements with the court's rulings throughout the trial generally are not a proper

[17] The respondent observes that, during the mother's testimony, an objection was raised with respect to questions concerning the domestic violence incident. The court stated in relevant part: "I think this question is a valid question in light of what I have to decide because I have to decide if I'm going to let these children go back to either or both parents. I need to have a good understanding of the past history with the violence. I've read some of the reports. I read the police report about what transpired in the house that day, which is very, very concerning to the court, very concerning. And, quite frankly, I think it was horrific, but I certainly think that's a valid question."

basis for a claim of judicial bias. "[A]dverse rulings do not themselves constitute evidence of bias. . . . Obviously, if a ruling against a party could be used as an indicia of bias, at least half of the time, every court would be guilty of being biased against one of two parties. Moreover, the fact that a trial court rules adversely to a litigant, even if some of these rulings were determined on appeal to have been erroneous, [still] does not demonstrate personal bias. . . . The fact that [a party] strongly disagrees with the substance of the court's rulings does not make those rulings evidence of bias." (Citation omitted; internal quotation marks omitted.) *Burns* v. *Quinnipiac University*, 120 Conn. App. 311, 317, 991 A.2d 666, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010).

The flaw in the respondent's numerous references to comments and findings that were adverse to him is that, in each instance, the court based its opinion on facts in evidence and, rather than merely reflecting hostility to him, they were relevant to the issues before the court. As this court has observed: "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or

The respondent argues that this comment, as well as the court's subsequent findings in the memorandum of decision concerning his role in the domestic violence incident reflects that Judge Burgdorff deemed him guilty of having committed "a horrific crime" and, thus, she "should have recused herself." The respondent argues that such findings are "starkly inconsistent" with Judge Lobo's findings in the neglect proceeding. It suffices to observe that the court heard ample evidence that the respondent engaged in domestic violence by having entered the family home against the mother's wishes on July 29, 2015, and having forced himself into the mother's locked bedroom. Thus, the court's comment in ruling on the objection and its later findings were properly based on evidence before the court and the reasonable inferences to be drawn therefrom.

even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (Emphasis in original; internal quotation marks omitted.) *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 395, 186 A.3d 739 (2018).

The respondent complains at length that the court "relitigated" the "findings of prior neglect" made by Judge Lobo in the neglect proceeding. In terminating the respondent's parental rights, the court relied on the fact that, during a prior proceeding, the children were found to be neglected. The respondent erroneously conflates the finding of neglect, which the court in the present proceeding was unable to relitigate; see, e.g., *In re Stephen M.*, 109 Conn. App. 644, 647, 953 A.2d 668 (2008) ("a party is barred by the doctrine of collateral estoppel from relitigating a previous finding of neglect during a subsequent termination trial"); with the court's assessment of some or all of the same evidence that may have been presented to the court that heard the prior neglect proceeding. With respect to the evidence presented during the neglect proceeding, the respondent does not cite to any authority that supports his belief that the court at the subsequent termination of parental rights trial may not independently assess such evidence in evaluating whether rehabilitation, which is factually and legally distinct from neglect, had occurred.

In this vein, the respondent states that it was evidence of judicial bias for the court in the present case to have "placed the blame" for the children's neglect on him, despite the fact that Judge Lobo had not done so during the neglect proceeding. He also faults the court for holding him responsible for the domestic violence incident, characterizing such finding as being contrary to the findings of Judge Lobo in the neglect proceeding.

An adjudication of neglect relates to the status of the child and not necessarily parental fault, yet a court in a neglect proceeding nonetheless may clearly identify who is responsible for that status. See, e.g., *Matthew C.* v. *Commissioner of Children & Families*, 188 Conn. App. 687, 711, 205 A.3d 688 (2019). It was not improper for the court, in resolving the factual issues before it, to have made subordinate factual findings that, while not made by Judge Lobo during the neglect proceeding, were not in any way contrary to the finding of neglect. Moreover, Judge Lobo plainly stated that it was unnecessary in light of the issues before him in the neglect proceeding to determine whether the respondent had engaged in domestic violence.[18] It was not improper, in evaluating the critical issue of rehabilitation, for the court in the termination proceeding to have made findings concerning the domestic violence incident that had not been made by Judge Lobo previously.

Additionally, there is no basis in the record in support of the respondent's arguments that the court "preclude[d]" several witnesses from testifying. The respondent does not cite to any instance in which any of the several persons identified in his brief were precluded from testifying. All of the persons identified in the respondent's brief, in fact, either testified at trial or, with respect to Lothstein in particular, their opinion was otherwise before the court.[19] The court considered

[18] In his decision adjudicating the children neglected, Judge Lobo stated in relevant part: "One of two things happened [during the alleged domestic violence incident]. Either [the respondent] forcibly assaulted [the mother] or the assault didn't happen, and [the mother] cut herself and exposed the children to her state afterward, in which she's described as being covered in blood by the children. . . . That they were arguing and yelling . . . the court finds that . . . most likely credible. Either one of those two things occurred. And the court really doesn't need to determine which one it is because [the resolution of the neglect petitions] comes down to the condition of the children at the time of the filing of the petitions."

[19] We observe that, at trial, the court explicitly afforded the respondent's counsel an opportunity to present live testimony from Lothstein. The respondent's counsel, however, indicated his preference to introduce a transcript of Lothstein's testimony at a prior proceeding as well as a report Lothstein authored.

their testimony in its evaluation of the evidence. In essence, the respondent disagrees with the fact that the court did not credit as true some or all of the testimony of Moskowitz, Gockel, Lothstein, Humphrey, Hechtman, Jones, the mother, and himself. The court carefully explained its factual findings in its memorandum of decision and, specifically, why it discounted the weight of certain testimony and afforded greater weight to other testimony and evidence. "[A]s a reviewing court [w]e must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . The weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 450, 172 A.3d 802 (2017). The respondent has not persuaded us that the fact that the court weighed the evidence in the manner that it did reflects judicial bias.

For the foregoing reasons, we conclude that the respondent has not demonstrated that plain error exists.

IV

FAILURE TO REHABILITATE

Next, the respondent claims that the court improperly found that he failed to rehabilitate. We disagree.

First, we address the respondent's argument that the court misconstrued the proper legal standard for evaluating whether he failed to rehabilitate. The respondent argues that the court improperly failed to limit its

inquiry to whether he satisfied the specific steps that were issued and failed to limit its evaluation to the evidence of his rehabilitation that occurred after the specific steps were issued. The respondent also argues that the court misconstrued the legal principle of "coercive control." With respect to the arguments that the court misinterpreted or misapplied current legal principles, we apply a plenary standard of review. See, e.g., *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008).

The respondent places great emphasis on the following isolated finding in the court's memorandum of decision: "[Although the respondent] did eventually comply with his court-ordered specific steps, that is not enough to show rehabilitation." Contrary to the respondent's arguments, the court properly recognized that a determination with respect to rehabilitation is not solely dependent on a parent's technical compliance with specific steps but the broader issue of whether the factors that led to the initial commitment have been corrected. This court has explained: "The specific steps facilitate, but do not guarantee, the return of the child to the parent. . . . Although a parent may have participated in the programs recommended pursuant to the specific steps ordered, a court may properly find that the parent has failed to achieve rehabilitation. . . . In other words, a finding of rehabilitation is not based on a mechanistic tabulation of whether a parent has undertaken specific steps ordered. The ultimate issue the court must evaluate is whether the parent has gained the insight and ability to care for his or her child given the age and needs of the child within a reasonable time." (Citations omitted; emphasis omitted.) *In re Destiny R.*, 134 Conn. App. 625, 627, 39 A.3d 727, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012).

We also reject the respondent's argument that it was improper for the court to have considered his conduct as of the time of the children's removal from the family

home pursuant to an order of temporary custody in July, 2015, rather than following the children's commitment to the care and custody of the commissioner in December, 2017.[20] Thus, the respondent relies on a belief that the date of commitment constitutes a type of starting point in the rehabilitative process. It is evident that, prior to the date of commitment, the respondent was on notice of the issues that led to the children's removal from the family home.[21] In the interest of reunifying with the children and ensuring that they achieved permanency as soon as possible, the respondent could have taken immediate steps to address the issues. He did not, and his argument that the court improperly considered this fact and, instead, should have viewed the date of commitment as an artificial starting line in the rehabilitative process is not logically sound. Moreover, there is no legal support for the respondent's

[20] As is reflected in the court's memorandum of decision, the court noted that it had considered the respondent's failure to rehabilitate during the four years since the children's removal from the family home.

[21] The record reflects that, on August 7, 2015, following the ten day hearing on the order of temporary custody, the respondent was provided with and signed a document containing the preliminary specific steps he needed to take to promote his rehabilitation and reunification with the children. One of the steps required the respondent to "[c]ooperate with service providers recommended" by the department. Although, prior to the trial on the neglect petitions, the respondent engaged in some recommended services, Judge Lobo found it noteworthy, in light of the unique coparenting failings that contributed significantly to the children's removal from the family home, that the respondent had not engaged in the services of a parenting coordinator. A department social study filed prior to the neglect trial referred to the fact that, when he was "re-referred" to meet with a parenting coordinator, he deemed such services to be unnecessary. Additionally, Judge Lobo, in ruling on the neglect petitions, observed in relevant part: "[The respondent] feels that his one day family course was enough to not need a parenting coordinator. The court will note that a one day parenting course in family court does not equal working with a parenting coordinator over a period of time. [The respondent] opined that the system itself is at fault regarding the children's prolonged presence in foster care and . . . testified that any controlling and coercive behavior in the past can be interpreted in different ways. During the course of the testimony and the course of the questioning, and [as is reflected in the documentary evidence presented, the respondent]

contention.[22] We also observe that, even if the respondent's argument were correct, he is unable to demonstrate that, if the court had confined its analysis to his conduct beginning in December, 2017, it would have led to a different outcome in the termination of parental rights proceeding. The dispositive issue that was addressed by the court was whether, by the time of the termination trial, the respondent had rehabilitated.[23]

To the extent that the respondent argues that the court misconstrued the meaning of "coercive control," the argument is not persuasive. The respondent, citing to a trial court opinion, urges us to conclude that "coercive control" necessarily encompasses intimidation, threats, and inducing fear in another. He argues that the evidence did not reflect that he engaged in such activities with the mother after the date when the court issued the specific steps. It suffices to observe that "coercive control" is a factual description of conduct; it is not a term of art for which an objective legal definition exists. The respondent is unable to demonstrate legal error in the court's use of this descriptive term.

We next turn to the aspect of the claim in which the respondent argues that the court erred in concluding

feels that he in no way, shape or form owns anything as to the reason for the children's removal."

[22] As the commissioner states in her brief, § 17a-112 (j) (3) (B) (ii) provides that, in certain circumstances, a petition that is based on a failure to rehabilitate may be adjudicated even in the *absence* of a finding of neglect and, pursuant to General Statutes § 46b-129 (b), upon the issuance of an ex parte order, the court must provide "specific steps" to each parent to address the ex parte order and to regain custody of his or her child.

[23] The respondent also argues that the court committed legal error by considering "[w]hat happened between [him] and the mother during their marriage" because "those issues ceased to exist after the date [that the court issued specific steps]." The respondent's argument completely ignores the fact that, to determine whether he had rehabilitated, it was necessary for the court to understand the scope of the problems, particularly the issues involving coparenting, that led to the children's removal from the family home and their ultimate adjudication as neglected children.

that there was clear and convincing evidence that he failed to rehabilitate. "Pursuant to § 17a-112, [t]he trial court is required . . . to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [he] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . .

"When a child is taken into the commissioner's custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights. . . . Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of [parental] rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termi-

nation of his or her rights based on a failure to rehabilitate. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue." (Citations omitted; internal quotation marks omitted.) *In re Yolanda V.*, 195 Conn. App. 334, 343–44, 224 A.3d 182 (2020).

Our Supreme Court has clarified the standard of review that must be employed by an appellate court in a review of a trial court's finding that a parent has failed to rehabilitate. "We have historically reviewed for clear error *both* the trial court's subordinate factual findings and its determination that a parent has failed to rehabilitate. . . . While we remain convinced that clear error review is appropriate for the trial court's subordinate factual findings, we now recognize that the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly, we now believe that the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Citation omitted; emphasis in original; footnote omitted.) *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015).

"A [subordinate factual] finding is clearly erroneous when either there is no evidence in the record to support

it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [G]reat weight is given to the judgment of the trial court because of [the trial court's] opportunity to observe the parties and the evidence. . . . [An appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Keyashia C.*, 120 Conn. App. 452, 455, 991 A.2d 1113, cert. denied, 297 Conn. 909, 995 A.2d 637 (2010).

We have set forth the court's extensive findings concerning the adjudicative phase of the termination of parental rights proceeding. The court not only set forth ample findings but also set forth the evidentiary basis of most, if not all, of its subordinate findings of fact. The court's subordinate findings of fact are supported by the evidence and the reasonable inferences to be drawn therefrom. Moreover, the court's ultimate conclusion, that rehabilitation had not occurred, was reasonably based on the subordinate facts established and the reasonable inferences to be drawn therefrom. On the basis of ample subordinate findings made by the court, it was reasonable to conclude that the respondent had not gained the ability to parent sufficiently. As the court observed, by the time of the trial, the respondent had not recognized his role in the circumstances that led to the children's removal from the home, continued to undermine efforts to reunify the mother with the children, and continued his underlying pattern of exerting control in all matters concerning the mother, to the detriment of his children.[24] The court properly

[24] We take judicial notice of the fact that, in October, 2018, shortly before the termination of parental rights trial commenced, the respondent filed a motion to open the judgment dissolving his marriage to the mother. In an appeal from the denial of that motion, the respondent, referring to the domestic violence incident at the marital home, argued that the mother had perpetrated "a criminal fabrication of a bloody assault . . . ."

found that the respondent failed to recognize how these failures impacted the children. Moreover, the respondent's issues with several of the service providers undermined a finding that he had learned to control the coercive behaviors that were the focal point of the very services at issue. In short, the findings amply reflected that, by the time of the trial, the respondent had not fully appreciated his parental shortcomings, his inability to coparent with the mother, and his controlling tendencies, even when such tendencies directly affected the children. The weight of the evidence amply supported the conclusion that, despite the fact that the respondent had made some progress, he had not gained the ability to set aside his personal interests and demonstrate an ability to provide a safe, nurturing, and stable home environment for his children.[25]

Having carefully reviewed the arguments in the respondent's brief, they generally may be summarized as an attempt to relitigate the issue of rehabilitation. The respondent has summoned evidence that he believes supports a finding of reunification, and he invites this court to draw inferences that are consistent with a conclusion that rehabilitation had occurred. Much of the evidence on which the respondent relies was explicitly found by the trial court either not to be credible or not to be persuasive. This includes the respondent's own testimony, which the court was free to reject in whole or in part. We observe that, to the extent that the respondent claims error on the ground that the

[25] The court had before it proposed orders that were filed by the respondent in the dissolution action in May, 2016. One of the orders he proposed was that the respondent "shall reserve the right to file a postjudgment motion in family court for a final ruling on custody of the three children." Thus, despite the fact that the family court had deferred a decision on the issue of custody and visitation to the juvenile court, the respondent remained intent on continuing the custody battle if the decision of the juvenile court was not to his satisfaction. This action reflects his lack of insight into the children's need for stability and his self-absorbed determination to get his own way.

court failed to afford sufficient weight to the opinions of Gockel and Lothstein, such arguments are equally unpersuasive. "The testimony of professionals is given great weight in parental termination proceedings. . . . It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Citations omitted; internal quotation marks omitted.) *In re Carissa K.*, 55 Conn. App. 768, 781–82, 740 A.2d 896 (1999).

For the foregoing reasons, we reject the respondent's claim concerning the court's finding that he failed to rehabilitate.

V

BEST INTERESTS OF CHILDREN

Next, we address the claim that the court improperly determined that termination of the respondent's parental rights was in the children's best interests. We disagree.

The scope of the respondent's arguments in the present claim is somewhat narrow. He argues that, "the trial court determined that the children's religious affiliation is insignificant in this [termination of parental rights] proceeding" and that, in the dispositional phase of the proceeding, the court "disregarded the children's religious affiliation." The respondent focuses on the undisputed evidence that the children's foster parents were not Muslim and that they had introduced the children

to religious beliefs that differed from his Muslim beliefs. The respondent argues that the court disregarded General Statutes § 45a-707 (8)[26] and that, "[i]f the [termination of parental rights judgment] were to be affirmed, the children would have to be adopted by a Muslim family of like religious faith that has the ability to sustain the children's religious affiliation . . . ." The respondent also argues that "[p]lacing the children with yet a different family for adoption is not in the children's interest in sustained growth, development, well-being, and in the continuity and stability of [their] environment." Finally, he asserts that "the foster parents have failed to fulfill their statutory obligation to furnish social and religious guidance for the children, and have intentionally exposed the children to different religious beliefs."

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make

[26] General Statutes § 45a-707 (8), defines "[t]ermination of parental rights" as "the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent or parents so that the child is free for adoption except it shall not affect the right of inheritance of the child or the religious affiliation of the child."

written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote omitted; internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015).

"On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . .

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [as to whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Citations omitted; internal quotation marks omitted.) *In re Malachi E.*, 188 Conn. App. 426, 443–44, 204 A.3d 810 (2019).

The respondent's claim is not persuasive for several reasons. First, his insistence that the court deemed the children's religious affiliation to be insignificant is

belied by the court's memorandum of decision, which reflected the court's consideration of the children's faith. The court observed that the respondent identified as a member of the Muslim faith and that the length of his visits with his children had been extended for the expressed purpose of permitting him to engage in religious instruction with them. Also, at the respondent's request, the department transported the children to a mosque for the purpose of permitting the children to obtain religious instruction at the respondent's request. As the court found, however, the respondent did not follow through on providing religious instruction to the children on a consistent basis. Also, the court found that, despite the respondent's complaints concerning the religious practices of the foster parents, which were different from those of the respondent, the foster parents had not forced the children to engage in any type of religious practices. The court found that the respondent had not made any significant efforts with respect to fostering religious beliefs in the children, he had not engaged in prayer with the children, and the children, who had expressed anxiety concerning their religious identities, had not attended religious services prior to their removal from the family home.

Second, the respondent appears to view as a foregone conclusion that the children's religious identities are rooted in the Muslim faith. On the basis of the evidence, the court found that the children's *other* biological parent, the mother, who was a practicing Muslim when the children were in her care, had, during the events leading up to the termination of her parental rights, expressed her desire to introduce the children to other religious practices and had celebrated other religious holidays, such as Christmas, with them. Certainly, in terms of gauging the children's religious identity, to the extent that it was relevant in the dispositional phase of the termination proceeding, the court properly considered the children's religious beliefs, if any, of *both*

of their biological parents, not simply those of the respondent.

Third, and most importantly, the respondent's arguments reflect a fundamental misunderstanding of the nature of the court's inquiry and the court's finding in the dispositional phase of the proceeding. As we have stated previously, the court's inquiry in the dispositional phase of the proceeding was properly focused on whether termination of the respondent's parental rights was in the children's best interest. The respondent, however, invites this court to overturn the court's finding on the basis of the unrelated issue of whether the children's foster parents shared his religious beliefs or whether they would fulfill an obligation to raise the children in the Muslim faith. Even if a legal *requirement* exists that the children be placed in a care setting that would nurture the religious faith of the children or the respondent,[27] the respondent has failed to demonstrate how the department's or the court's failure to comply with such requirement is a basis on which to challenge the court's determination that the children's best interests were served by terminating his parental rights.

[27] The respondent erroneously suggests that § 45a-707 (8) sets forth such a requirement. We observe that General Statutes § 46b-129 expresses a legislative *preference*, rather than an *obligation*, that, during a commitment following a finding of neglect, the commissioner place children entrusted to his or her care in an environment that is consistent with the religious faith of the child or parent.

General Statutes § 46b-129 (j) (4) provides in relevant part: "In placing such child or youth, the commissioner shall, *if possible*, select a home, agency, institution or person of like religious faith to that of a parent of such child or youth, if such faith is known or may be ascertained by reasonable inquiry, provided such home conforms to the standards of the commissioner and the commissioner shall, when placing siblings, if possible, place such children together. . . ." (Emphasis added.)

We note that, in the present case, the department complied with the preference codified in § 46b-129, in that it accomplished the very difficult task of placing three siblings with highly specialized needs together in the same foster home of a nonrelative and that, at the time of the trial, the placement had remained stable for almost four years.

Stated otherwise, the respondent, relying on what he deems to be a weakness in the foster parents, is unable to demonstrate that his parental rights were terminated erroneously. As this court has observed, "[a]fter the statutory grounds for termination are proved by clear and convincing evidence in an adjudicatory phase, the question then to be decided in a dispositional phase is whether it is in the best interests of the child to sever the parent-child relationship. That is different from the question of who should have custody of the child if termination of parental rights is determined to be in the best interests of the child." (Internal quotation marks omitted.) *In re Carissa K.*, supra, 55 Conn. App. 776. Accordingly, we reject the respondent's claim.[28]

VI

DEPARTMENT'S REUNIFICATION EFFORTS

Next, the respondent claims that the court improperly found that the department made reasonable efforts to reunify him with his children. We disagree.

The respondent does not distinctly challenge any of the court's detailed factual findings concerning the many services that were offered to him by the department or the degree to which he engaged in those services. We already have set forth the court's detailed findings in this regard in part I of this opinion and rely

[28] In the context of his analysis of this claim, the respondent focused on the issue of religion. At the conclusion of his analysis, however, the respondent stated in general terms that "[n]o . . . proof was presented during trial to support a finding that placement with the [respondent] is not in the children's best interests." This cursory statement, unsupported by legal analysis or reference to the record, may be an attempt to challenge the court's detailed findings in the dispositional phase of the proceeding, yet it is legally insufficient. "[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259 (2004). Accordingly, we do not address in further detail this aspect of the claim.

on them in the present claim. Instead, the respondent challenges the court's determination that reasonable efforts were made, arguing in broad terms that the department "unreasonably prolonged the stay of the children in foster care for over four years" and, thus, failed to achieve permanency for the children. He also argues in broad terms that the department did not "[address] the children's misunderstandings of their father in therapy . . . ." In specific terms, the respondent argues that the department acted unreasonably in that it suspended his overnight visits with the children. He refers to the fact that, at the time of the neglect proceeding, it was made clear to the court that Omar had expressed his preference not to visit with the respondent. Judge Lobo stated that the matter should be addressed with Omar in a therapeutic setting. In arguing that the subsequent efforts made by the department were unreasonable, the respondent focuses on the fact that the department did not force Omar to have overnight visits with him. He argues: "[The department] took unilateral action by suspending the overnight visits altogether. By doing so, [the department] validated whatever underlying fears that might have been implemented in the children's minds, which prompted them to start to reject overnight visits after their initial acceptance, and thus created an 'untrue barrier' violating the statutory mandate of reasonable efforts." The respondent argues that the department created a barrier between him and his children, thereby undermining what he believes to be the strong bond that existed between him and his children at the time of their removal. Moreover, the respondent argues that the department violated General Statutes § 17a-96[29] by plac-

[29] General Statutes § 17a-96 provides in relevant part: "In placing any child in a foster home, the commissioner shall, *if practicable*, select a home of like religious faith to that of the parent or parents of such child, if such faith is known or ascertainable by the exercise of reasonable care." (Emphasis added.)

ing the children in a household that did not foster the Muslim faith.

Before addressing these arguments, we set forth some relevant principles. Pursuant to § 17a-112 (j), the court may grant a petition to terminate parental rights "if it finds by clear and convincing evidence that . . . (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b." In the present case, the petitions for termination of parental rights alleged that such efforts were made and, as our recitation of the court's findings reflects, the court found that such efforts were made. "The reasonableness of the department's efforts must be assessed in the context of each case. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . .

"This court has applied the general meaning of reasonable and stated that [i]t is axiomatic that the law does not require a useless and futile act." (Citation omitted; internal quotation marks omitted.) *In re Kyara H.*, 147 Conn. App. 855, 872–73, 83 A.3d 1264, cert. denied, 311 Conn. 923, 86 A.3d 468 (2014).

"[T]he court's determination as to whether the department made reasonable efforts toward reunification is a legal conclusion drawn from the court's subordinate factual findings. Therefore, we apply a clearly

erroneous standard of review as to the court's underlying factual findings, and we review the court's legal determinations of reasonable efforts and of failure to rehabilitate for sufficient evidence." (Internal quotation marks omitted.) *In re Quamaine K.*, 164 Conn. App. 775, 783, 137 A.3d 951, cert. denied, 321 Conn. 919, 136 A.3d 1276 (2016).

None of the respondent's arguments is persuasive. First, we observe that the department did, in fact, take steps to ensure that the children achieved a sense of permanency during the events leading up to the termination of the respondent's parental rights. It is undisputed that since the time of their removal, the children have been residing with one another and that they have been cared for by their foster parents. As the court found, since the time of their removal, the children have bonded with their foster parents and have been provided with a living environment that adequately met their physical and emotional needs. In light of the court's findings concerning the difficulties posed by the respondent in participating in the services offered to him by the department, as well as the impediments that he raised to the department's efforts to reunite the children with *both* of their biological parents, it is disingenuous for the respondent to complain that the department is to blame for the fact that the children were in foster care for a lengthy period of time.

Second, the respondent is unable to demonstrate that the department's decision to suspend overnight visits undermines the court's determination that reasonable efforts at reunification were made by the department. The court made ample findings concerning overnight visits, none of which is distinctly challenged by the respondent. The court found that, in therapeutic settings and otherwise, each of the children had expressed their opposition to the visits. The court also found that,

after discussions were had with Omar concerning overnight visits, he had bed-wetting issues for the first time in several months.[30] We are mindful, as well, that the children's opposition to overnight visits must be viewed in light of the respondent's shortcomings during unsupervised visits, which led the court to discontinue unsupervised visits. These shortcomings were thoroughly addressed by the court in its memorandum of decision. It suffices to reiterate that, at times, the respondent failed to adequately supervise and engage with the children during these visits. Moreover, the court noted the respondent's disturbing indifference to the dangers posed to Safiyah by her half brothers. In light of the facts in their totality, the respondent has failed to demonstrate that the failure to compel the children to engage in overnight visits was unreasonable or that it detracted from the court's finding that reasonable efforts had been made by the department to reunify him with his children.

Third, to the extent that the respondent attempts to undermine the court's reasonable efforts determination on the ground that the department did not place the children with a foster family of the Muslim faith, the argument is not legally sound. The court properly found that the respondent was afforded an ample opportunity to engage his children in matters of faith during his visits with them, something that he failed to do. Even

[30] The record reflects that, at the time of the neglect proceeding, Omar began expressing his desire not to have visits with the respondent. The respondent states in his brief to this court that, at the time of the court's judgments in the neglect proceeding, Judge Lobo required the department to address the issue in therapy. In addition to stating that Omar's opposition to visits was an issue to be addressed "in therapy to work that out," Judge Lobo also stated: "If [Omar] doesn't want to visit, I'm not going to force him to visit." Contrary to the respondent's suggestion that the department failed to comply with Judge Lobo's directive that the children be enrolled in therapy, the evidence reflected that all three children were in therapy soon after the neglect proceeding took place.

if we were to assume, contrary to the evidence, that the respondent's faith, and not that of the mother, was the children's faith, a rational interpretation of § 17a-96 did not require the department to place the children with foster parents who would foster the Muslim faith in them.

For the foregoing reasons, the respondent has failed to demonstrate that the court improperly determined that reasonable efforts were made to reunify him with his children.

VII

DEPARTMENT'S SUPPORT OF CHILDREN'S PETITIONS

Next, the respondent argues that the department was estopped from supporting the petitions brought by the children to terminate his parental rights. We decline to review this unpreserved claim.

The following relevant procedural history is reflected in the record. On November 8, 2018, the children filed petitions to terminate the respondent's parental rights. Initially, the department did not support the petitions. In a trial management conference memorandum that was submitted to the court on November 19, 2018, the department, among other things, recommended that reunification efforts, with the mother's home as the primary physical residence of the children, continue.[31] The memorandum stated, in relevant part: "[The department] is not in support of legally severing the parents' right to reunify with their children at this time, as they have cooperated with rehabilitative efforts, have made

[31] In the memorandum, the department also disagreed with the respondent's motion for revocation of commitment, observing that reunification must "be based upon a slow transition, whereby the children become more confident in their parents' ability to safely coparent them, and display a significant reduction or elimination of regressive behaviors and emotional distress in relation to the specter of reunification."

significant progress in addressing the issues that [led] to the children's commitment, are appropriate during visitation with the children, and the children are making progress in family therapy." By the time that the trial on the petitions for termination of parental rights commenced, the department had changed its position and had adopted the children's petitions.[32]

[32] By the time of the termination of parental rights trial, the children had been in the custody of the commissioner for nearly four years.

Relevant statutes prohibit, except in limited circumstances, the type of lengthy stays in foster care that the children in the present case were forced to endure.

General Statutes § 17a-111a provides in relevant part: "(a) The Commissioner of Children and Families shall file a petition to terminate parental rights pursuant to section 17a-112 if (1) the child has been in the custody of the commissioner *for at least fifteen consecutive months*, or at least fifteen months during the twenty-two months, immediately preceding the filing of such petition . . . .

"(b) Notwithstanding the provisions of subsection (a) of this section, the commissioner is not required to file a petition to terminate parental rights in such cases if the commissioner determines that: (1) The child has been placed under the care of a relative of such child; (2) there is a compelling reason to believe that filing such petition is not in the best interests of the child; or (3) the parent has not been offered the services contained in the permanency plan to reunify the parent with the child or such services were not available, unless a court has determined that efforts to reunify the parent with the child are not required." (Emphasis added.) See also 45 C.F.R. § 1356.21, which sets forth, inter alia, federal guidelines for concurrent planning and family reunification with regard to children placed in foster care.

The record reflects that, until nearly the eve of trial, the commissioner proposed permanency plans that sought to further *reunification* efforts while the children continued to languish in foster care. For example, in April, 2017, the commissioner filed motions to review permanency plans in which she proposed that reunification of the children with their biological parents was in their best interests. In support of these plans, the commissioner filed a social study that was completed by the department and recommended reunification with a period of protective supervision. Safiyah objected to her permanency plan on the grounds that she had bonded with her foster family, she preferred to live with her foster family, she was "adamant about not living" with either of her biological parents, and it was in her best interests to remain with her foster family. Omar also objected to his permanency plan. The respondent objected to this plan on, inter alia, the ground that the mother was not seeking custody of the children and was not a fit parent. In September, 2017, the court, *Frazzini*, *J.*, approved these plans and ordered the commissioner to file subsequently required motions to review the permanency plans on or before June 7, 2018.

In June, 2018, despite the passage of nine more months during which the goal of reunification with either parent still had not been achieved, the commissioner filed motions to review the permanency plans in which she

continued to propose that reunification of the children with their biological parents was in their best interests. In support of these plans, the commissioner submitted a social study that was completed by the department and recommended reunification with the mother, with a period of protective supervision, prior to the start of the 2018–2019 school year. The children and the respondent objected to these plans. Safiyah and Muneer based their objection, in part, on their desire not to live with either biological parent and their desire to continue to live with their foster parents. Omar objected to his plan, as well. It is not clear from the record whether the court approved the permanency plans that were filed in June, 2018, despite the fact that the law requires approval of a permanency plan every twelve months when children remain in the custody and care of the commissioner. See General Statutes § 46b-129 (k) (1) (A).

In light of the undisputed facts concerning the length of time that the children were in the custody of the commissioner and living uninterrupted in foster care, in the permanency plans we have discussed, which were pursued in 2017 and 2018, the commissioner was required by law to set forth a compelling reason to believe that filing petitions to terminate the parental rights of the respondent and the mother was not in the best interests of the children because the children had been in care for more than fifteen months. The commissioner did not do so.

There is no dispute that the children were never placed in the care of a relative or that the respondent and the mother had been offered the services referred to in the plan to reunify. In fact, every time that the court approved a permanency plan in this case, it found that the department had made reasonable efforts at reunification. When the commissioner filed the motions to review the permanency plans at issue, she did not, by means of either her motions or the social studies that were filed in support of the motions, advance a compelling reason to support the belief that petitions to terminate the parental rights of the respondent and the mother were not in the best interests of the children. Moreover, with respect to the permanency plan that the commissioner filed in 2017, the court approved the plan over the objections of the children, who, as they did at the time of trial, adamantly believed that it was in their best interests to terminate the parental rights of the respondent and the mother.

General Statutes § 46b-129 (k) (4) provides: "At a permanency hearing held in accordance with the provisions of subdivision (1) of this subsection, the court shall (A) (i) ask the child or youth about his or her desired permanency outcome, or (ii) if the child or youth is unavailable to appear at such hearing, require the attorney for the child or youth to consult with the child or youth regarding the child's or youth's desired permanency outcome and report the same to the court, (B) review the status of the child or youth, (C) review the progress being made to implement the permanency plan, (D) determine a timetable for attaining the permanency plan, (E) determine the services to be provided to the parent if the court approves a permanency plan of reunification and the timetable for such services, and (F) determine whether the commissioner has made reasonable efforts to achieve the permanency plan. The court may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth."

It does not appear that the court, when it approved the permanency plans in September, 2017, despite the fact that the children had by then been in foster care for more than two years, established a time table or modified

For the first time on appeal, the respondent raises the doctrine of equitable estoppel. He argues that the department's pretrial memorandum, which he erroneously refers to as a "certificate of estoppel," was calculated to induce him to believe that he had rehabilitated. Moreover, he argues that, to his detriment, he relied on and acted on the belief that he had rehabilitated. The respondent does not provide this court with any details of how he changed his conduct or how this change in conduct was to his detriment. He states that, at the time of closing argument during the termination of parental rights trial, his trial counsel made "[a] diligent effort to find the truth on this matter . . . ."[33] The respondent states: "It is highly inequitable *and* oppressive not to estop [the department] from changing a clear position attesting that the [respondent] had rehabilitated and had made significant progress resolving all issues that [led to the] commitment, into the exact opposite [position] of adopting the [termination of parental rights] petitions." (Emphasis in original.)

"The doctrine of equitable estoppel is well established. [W]here one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous

the specific steps to ensure permanency would be achieved before the approval of another permanency plan would be required. The result was another lengthy delay during which permanency in the lives of the children was not achieved while the divorced parents remained in a holding pattern of participating in services but not benefiting sufficiently such that one of them could be reunified with the children.

Thus, setting aside the concerns raised by the respondent in the present claim, it appears that, after the children had been in foster care beyond fifteen months, the commissioner, by continuing to recommend plans for reunification without setting forth a compelling reason to do so, did not comply with her obligations under General Statutes § 17-111a to file petitions to terminate the respondent's parental rights with respect to these children. Filing for termination of parental rights thus became an option the children had to undertake for themselves. Child-initiated petitions are an extremely rare occurrence in the law of child protection.

[33] The respondent draws our attention to the fact that, during closing argument, his counsel referred to the department's decision, at the time of trial, to support the petitions as a "mystery."

position, he is [precluded] from averring a different state of things as existing at the time. . . . In its general application, we have recognized that [t]here are two essential elements to an estoppel—the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and that the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done. . . . [T]here must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. . . . In the absence of prejudice, estoppel does not exist." (Citations omitted; internal quotation marks omitted.) *Gaddy* v. *Mount Vernon Fire Ins. Co.*, 192 Conn. App. 337, 351–52, 217 A.3d 1082 (2019). "The party claiming estoppel . . . has the burden of proof. . . . Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 614, 830 A.2d 164 (2003).

For several reasons, we are unable to reach the merits of the respondent's estoppel claim. First and foremost, because the issue is being raised for the first time on appeal, there is no ruling by the trial court for this court to review. Moreover, the respondent has not provided this court with any legal basis on which to review this unpreserved claim. As the authority cited previously reflects, the issue of whether the doctrine of estoppel applies is inherently fact bound. Even if we were to attempt to consider the merits of the claim, one of the consequences of the respondent's failure to raise the issue at trial is that there is no evidence to review with respect to the issues of *why* the department changed its position or *whether* the respondent changed his conduct in reliance on the department's change in its position. The respondent's one-sided assertions with

respect to these issues are not a substitute for an adequate evidentiary record.

VIII

MOTION TO REVOKE COMMITMENT

Finally, the respondent claims that the court improperly denied his motion for revocation of commitment. In his summary analysis of this claim, the respondent argues that, for the reasons already set forth in the context of his other claims raised on appeal, he has demonstrated that the cause underlying the children's commitment no longer exists. Specifically, he argues that he has demonstrated in this appeal that "[p]arental conflict no longer exists." The respondent's claim fails because we have rejected the other claims he has raised in this appeal. The argument that the cause underlying the commitment no longer exists is contrary to the court's findings, which, for the reasons previously discussed, we conclude are supported by the evidence and the rational inferences to be drawn therefrom. Accordingly, we reject this claim.

The judgments are affirmed.

In this opinion the other judges concurred.

JERMAINE WOODS *v.* COMMISSIONER OF CORRECTION (AC 41987)

Lavine, Alvord and Keller, Js.

Syllabus

The petitioner, who had previously been convicted of murder, sought a writ of habeas corpus, claiming that his sentence was illegal because evidence of his diminished capacity and mitigating circumstances were not considered at trial and that his equal protection rights were violated by the state's decision to try him for murder for a third time after his first petition for a writ of habeas corpus was granted. The habeas court granted the motion to dismiss filed by the respondent, the Commissioner

of Correction, and rendered judgment thereon, and, thereafter, denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion by granting the respondent's motion to dismiss the third petition for a writ of habeas corpus without holding a hearing; a hearing on the petition was not required, as the court did not dismiss the petition sua sponte but, instead, pursuant to a motion filed by the respondent and to which the petitioner had filed an objection.

2. The habeas court properly dismissed the petitioner's claim that evidence of his diminished capacity and of mitigating circumstances were not properly presented to the triers of fact.

   a. The allegations of the petition could not be construed to allege a claim of ineffective assistance by the petitioner's second habeas counsel, and there was no allegation that reasonably could be construed as a direct or indirect reference to the petitioner's second habeas counsel; moreover, the petitioner's claim that trial counsel was ineffective was litigated at the second habeas trial and, thus, was barred by the doctrine of res judicata.

   b. The court properly dismissed the petitioner's claim that mitigating circumstances should have been considered at his sentencing for failing to state a claim for which relief could be granted: the petitioner, who was nineteen years old and, therefore, not a child at the time he committed the murder, was not entitled to individualized sentencing; moreover, the petitioner could not prevail on his claim that his fifty year sentence, which was ten years less than the maximum legislatively prescribed sentence, was disproportionate to the crime; furthermore, the court properly dismissed the petitioner's mitigating circumstances claim as procedurally defaulted, as the petitioner failed to raise the claim of mitigating circumstances at sentencing, on direct appeal or at his second habeas hearing, the petitioner could not prevail on his claim that procedural default did not apply to eighth amendment claims predicated on evolving standards of decency when the mitigating circumstances of recent research and understandings in brain development were known and accepted at the time of his third trial and second habeas petition, and the petitioner failed to plead prejudice adequately in his reply in that he failed to allege specific facts demonstrating that if he had offered brain development studies there was a substantial likelihood or reasonable probability that he would have received a lighter sentence.

3. The habeas court properly dismissed the petitioner's equal protection claim on the ground of procedural default.

   a. The petitioner failed to meet his burden to establish good cause for failure to raise his equal protection claim in a prior proceeding; although the petitioner asserted in his objection to the respondent's motion to dismiss that he could not raise the claim of vindictive prosecution prior to raising it in his third petition for a writ of habeas corpus, he failed

to assert any facts that prevented him from raising his equal protection claim in his second petition for a writ of habeas corpus.

b. The petitioner's equal protection claim also failed on the alternative ground that he failed to state a claim on which habeas relief could be granted; the petitioner failed to allege any facts to meet his burden to demonstrate the prosecutor's alleged substantial animus toward him, and, thus, he failed to demonstrate good cause for failing to raise his claim in an earlier proceeding.

Argued December 2, 2019—officially released June 2, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak*, *J.*, granted the respondent's motion to dismiss and rendered judgment dismissing the petition; thereafter, the court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Vishal K. Garg, for the appellant (petitioner).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Jermaine Woods, appeals from the judgment of the habeas court dismissing his third petition for a writ of habeas corpus.[1] The habeas court denied the petitioner's petition for certification to appeal. On appeal, the petitioner claims that the habeas court (1) abused its discretion by denying his petition for certification to appeal, (2) abused its discretion by dismissing his petition without fair notice to him and without holding a hearing on his petition, (3) erred by dismissing count one of his petition alleging that his conviction was illegal because (a) evidence of his diminished capacity was not properly presented

[1] The petitioner filed his third petition for a writ of habeas corpus as a self-represented party. He was represented by counsel on appeal.

at his criminal trial and sentencing and (b) mitigating circumstances warrant reduction of his sentence, and (4) erred by dismissing count two of his petition alleging violation of his constitutional right to equal protection. We dismiss the appeal.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. Given the lengthy history of court proceedings and judicial rulings, a detailed discussion is required. In the underlying criminal matter, the petitioner was charged with murder for fatally shooting Jamal Hall on November 5, 1994. The charge against the petitioner was tried to a jury in December, 1996, but the jury was unable to reach a verdict and a mistrial was declared. The petitioner was retried in January, 1997, and a jury convicted him of murder in violation of General Statutes § 53a-54a (a).[2] The petitioner was sentenced to fifty years imprisonment. His conviction was affirmed in *State* v. *Woods*, 250 Conn. 807, 740 A.2d 371 (1999).[3]

[2] In the petitioner's first direct appeal, our Supreme Court stated that the jury "reasonably could have found the following facts. In the early morning hours of November 5, 1994, the [petitioner] and [Hall] began arguing in the vicinity of North Main and East Farm Streets in Waterbury. Domingo Alves, a close family friend of Hall, placed himself between Hall and the [petitioner]. Alves put his hands out, one toward Hall and one toward the [petitioner], in an effort to separate them. Hall stood calmly, but the [petitioner] kept pushing against Alves, trying to reach Hall. Alves then lightly put both his hands on the [petitioner's] chest to stop him from advancing. The [petitioner] removed a gun from his pocket. When Alves saw the gun, he took a step back from the [petitioner]. Hall stood still and appeared to be frightened. The [petitioner] shot Hall once in the torso, then ran to his car. While driving away, the [petitioner] told his cousin, James Bryan, who was waiting in the car, 'I told him stop messing with me.' " (Footnote omitted.) *State* v. *Woods*, 250 Conn. 807, 809, 740 A.2d 371 (1999).

[3] In his first direct appeal, the petitioner claimed that the trial court improperly permitted the prosecutor to comment during closing argument on the petitioner's failure to call his prior counsel to testify, and that the court's jury instructions on "self-defense inadequately advised the jury that the [petitioner's] subjective belief that he was in imminent danger, even if mistaken, could justify his conduct." *State* v. *Woods*, supra, 250 Conn. 808–809.

The petitioner thereafter filed a petition for a writ of habeas corpus in which he alleged that his trial counsel was ineffective for failing to prepare an adequate diminished mental capacity defense and that he was actually innocent. See *Woods* v. *Commissioner of Correction*, 85 Conn. App. 544, 545 n.1, 857 A.2d 986, cert. denied, 272 Conn. 903, 863 A.2d 696 (2004). The first habeas court, *Hon. Richard M. Rittenband*, judge trial referee, denied the petition as to the petitioner's actual innocence claim, but granted it with respect to his claim that his trial counsel was ineffective in presenting evidence of the petitioner's diminished capacity. The first habeas court, therefore, granted in part the petition for a writ of habeas corpus and ordered a new trial.[4] Id. The judgment granting the habeas petition was upheld on appeal; id., 545; and the petitioner elected to be tried by a panel of three judges. *State* v. *Woods*, 297 Conn. 569, 572, 4 A.3d 236 (2010). At the petitioner's third criminal trial, the three judge panel convicted him of murder and sentenced him to fifty years imprisonment.[5] Id. The petitioner's conviction again was upheld on direct appeal.[6] Id.

[4] Judge Rittenband ordered the petitioner "conditionally released from confinement. He shall be absolutely discharged unless within thirty days from the date of this memorandum of decision, the state's attorney for the judicial district of Waterbury files with the clerk's office a written notice of intention to proceed with the retrial of the petitioner." *Woods* v. *Warden*, Superior Court, judicial district of Hartford, Docket No. CV-00-0598785 (April 3, 2003).

[5] At trial before the three judge panel, the petitioner argued that, "because of his diminished mental capacity, he believed that he was acting in self-defense." *State* v. *Woods*, Superior Court, judicial district of Waterbury, Docket No. CR-94-235234 (June 30, 2006). The court found, however, that the petitioner did not "[produce] any credible evidence that would support a claim of self-defense." Id. The record discloses that John H. Felber, a psychiatrist, and attorneys Gregory St. John and Louis Avitabile testified to the petitioner's diminished capacity.

[6] In his second direct appeal, the petitioner claimed that the trial court abused its discretion by admitting his testimony from a prior trial because that testimony was not voluntary and that his waiver of his right to a jury trial was not valid. *State* v. *Woods*, supra, 297 Conn. 571. Our Supreme Court rejected his claims and affirmed his conviction. Id., 589.

The petitioner filed a second petition for a writ of habeas corpus on November 4, 2008, alleging various claims of ineffective assistance of trial counsel during the third criminal trial, including a claim that the trial counsel failed to timely notify and to adequately prepare the petitioner's expert witness, John H. Felber, a psychiatrist, to testify.[7] The second habeas court, *T. Santos*, *J.*, denied the second habeas petition. This court upheld the judgment denying the second petition for a writ of habeas corpus in a memorandum decision. *Woods* v. *Commissioner of Correction*, 142 Conn. App. 907, 64 A.3d 1290, cert. denied, 309 Conn. 915, 70 A.3d 39 (2013).[8]

The petitioner filed the present petition for a writ of habeas corpus on July 16, 2013, alleging in count one that his sentence is illegal because evidence of his diminished capacity and mitigating circumstances were not considered at trial and, in count two, that his equal protection rights were violated. In his January 5, 2018 return, the respondent, the Commissioner of Correction, alleged multiple special defenses to the petitioner's claims.

On March 9, 2018, the respondent filed a motion to dismiss the petition pursuant to Practice Book § 23-29[9]

[7] The petitioner alleged in his second petition for a writ of habeas corpus that his third criminal trial counsel rendered ineffective assistance by (1) failing to adequately prepare him to testify at the third criminal trial, (2) advising him to waive a trial by jury and to be tried by a three judge panel, (3) failing to object to testimony regarding a firearm that was unrelated to the subject crime, (4) failing to impeach state's witnesses who were seen speaking with one another during the trial, (5) failing to adequately prepare his expert witness, John H. Felber, a psychiatrist, to testify, and (6) failing to follow through on a plea bargain. The second habeas court, *T. Santos*, *J.*, found that the petitioner failed to meet his burden of proof on any of the claims. See *Woods* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-08-4002720 (June 30, 2011).

[8] The record discloses that the petitioner was represented by the same attorney at his first and second habeas trials.

[9] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . .

on the grounds that the petitioner's claims are precluded by the doctrines of res judicata and collateral estoppel, are procedurally defaulted in that they were not raised at trial or on direct appeal, and failed to state claims for which habeas relief can be granted. The petitioner filed an objection to the motion to dismiss on March 21, 2018.

The third habeas court, *Kwak*, *J.*, granted the respondent's motion to dismiss in a memorandum of decision on July 16, 2018. With respect to the petitioner's claim that evidence of his diminished capacity was not properly presented during trial, the court determined that evidence of the petitioner's diminished capacity was presented at the petitioner's third criminal and second habeas trials. Moreover, the court found that the petitioner was seeking the same relief in both his second and third petitions for a writ of habeas corpus. The court concluded that the claim concerning the petitioner's diminished capacity was barred by the doctrines of res judicata and collateral estoppel.

The habeas court also found that the petitioner alleged that his sentence was illegal because the sentencing court did not consider evidence of mitigating circumstances prior to imposing sentence. The habeas court found that the petitioner, who was nineteen at the time of the murder, was seeking an individualized sentencing hearing, but determined that the petitioner was not entitled to such a hearing. The court, therefore, concluded that the petitioner's sentence could not be determined to be illegal on the ground alleged and that there was no habeas corpus relief the court could grant. The habeas court also found that the respondent sought to have the mitigating circumstances claim dismissed

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ."

on the ground of procedural default because the petitioner did not raise it at trial or on direct appeal. The court found that the petitioner failed to allege any new facts or allege any legally cognizable cause and prejudice to rebut his procedural default, citing *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 788, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009). See id. (Practice Book § 23-31 (c) requires petitioner to allege facts and cause and prejudice permitting review). The court thus dismissed the allegations of mitigating circumstances as a basis to reduce the petitioner's sentence.

In count two of the third petition, the habeas court found that the petitioner alleged that his rights under the equal protection clause were violated by the state's decision to try him after his first petition for a writ of habeas corpus was granted. More particularly, the petitioner alleged that "Waterbury Chief State's Attorney John Connelly resigned on January 14, 2011, after a federal investigation was launched against him and his longtime friend defense attorney Martin Minella for corruption." He also alleged that Connelly provided favorable treatment to Minella's clients. The petitioner further alleged that he was unable to afford to retain Minella but, if he had retained him, Connelly would have disposed of the petitioner's case and not tried him for a third time. The respondent sought to have the claim dismissed on the ground of procedural default because the petitioner failed to raise this improbable claim in the trial court or on direct appeal. The court found that the petitioner had failed to meet the cause and prejudice standard to overcome the bar of procedural default. The court, therefore, dismissed count two of the petitioner's third petition for a writ of habeas corpus. The petitioner filed a petition for certification to appeal, which the court denied. The petitioner appealed.

I

CERTIFICATION TO APPEAL

The petitioner's first claim is that the court abused its discretion by denying his petition for certification to appeal from the court's judgment dismissing his third petition for a writ of habeas corpus because his appeal is not frivolous. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 448, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). On the basis of our review of the petitioner's substantive claims as discussed herein, we conclude that the habeas court did

not abuse its discretion by denying the petition for certification to appeal.

II

CLAIMS ON APPEAL

On appeal, the petitioner claims that the habeas court abused its discretion by granting the respondent's motion to dismiss his third petition for a writ of habeas corpus challenging the legality of his conviction, which he filed as a self-represented party.[10] At the heart of the petitioner's appellate claims is his contention that the habeas court misconstrued the allegations of his petition. The resolution of the petitioner's appeal, therefore, turns on our construction of the allegations in his third petition for a writ of habeas corpus. At oral argument, the petitioner's appellate counsel conceded that the petition was not artfully pleaded but argued that, under the deferential standard ordinarily afforded self-represented parties, the habeas court's dismissal of the petition should be reversed and the case remanded for a hearing on its merits. We disagree.

"The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 193,

[10] At the petitioner's request, counsel was appointed to represent the petitioner in the habeas court. Appointed counsel, however, filed a motion for leave to withdraw his appearance pursuant to Practice Book § 23-41 (a), which provides in relevant part: "[w]hen counsel has been appointed . . . and counsel, after conscientious investigation and examination of the case, concludes that the case is wholly frivolous, counsel shall so advise the judicial authority by filing a motion for leave to withdraw from the case. . . ." The judicial authority, *Bright*, *J.*, granted appointed counsel's motion to withdraw. The petitioner proceeded as a self-represented party until appellate counsel was appointed for him.

932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008). "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *McMillion* v. *Commissioner of Correction*, 151 Conn. App. 861, 869–70, 97 A.3d 32 (2014).

"The purpose of the [petition] is to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . The petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint. . . . A complaint includes all exhibits attached to it. . . .

"[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and *realistically*, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient to allow recovery." (Citations omitted; emphasis in original; internal quota-

tion marks omitted.) *Lorthe* v. *Commissioner of Correction*, 103 Conn. App. 662, 668–69, 931 A.2d 348, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007).

"While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 262, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012).

As counsel for the petitioner correctly has pointed out on appeal, "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of the other parties to construe the rules of practice liberally in favor of the [self-represented] party." (Internal quotation marks omitted.) *Vitale* v. *Commissioner of Correction*, 178 Conn. App. 844, 850, 178 A.3d 418 (2017), cert. denied, 328 Conn. 923, 181 A.3d 566 (2018). "The modern trend . . . is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . . This rule of construction has limits, however. Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A habeas court does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to

strain the bounds of rational comprehension." (Citations omitted; internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569–70, 877 A.2d 761 (2005). There, however, comes a point at which granting *too much* latitude to self-represented parties can simply be unfair to their adversaries.

III

The petitioner claims that it was improper for the third habeas court to grant the respondent's motion to dismiss without providing him fair notice and without holding a hearing on his third petition for a writ of habeas corpus. In support of his argument, the petitioner relies on our Supreme Court's decision in *Mercer* v. *Commissioner of Correction*, 230 Conn. 88, 644 A.2d 340 (1994), which stands for the general proposition that a petitioner is entitled to present evidence in support of his claims. Id., 93. The court, however, noted a narrow exception to the presumption that a hearing is required. "[I]f a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, unless it states new facts or proffers new evidence not reasonably available at the previous hearing." (Internal quotation marks omitted.) Id. We disagree that a hearing was required in the present case.

"Whether the habeas court was required to hold a hearing prior to dismissing a habeas petition presents a question of law subject to plenary review. . . . Pursuant to Practice Book § 23-29, the habeas court may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof . . . ." (Citation omitted; internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 339, 199 A.3d 1127 (2018), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020). "Although,

under Practice Book § 23-40, [h]abeas petitioners generally have the right to be present at any evidentiary hearing and at any hearing or oral argument on a question of law which may be dispositive of the case . . . Practice Book § 23-40 speaks only to the petitioner's right to be present at an evidentiary hearing when such a hearing is held. Such hearings are not always required, as Practice Book § 23-29 authorizes the court to dismiss a habeas petition on its own motion." (Internal quotation marks omitted.) Id., 340.

In support of his argument, the petitioner relies on *Boyd* v. *Commissioner of Correction*, 157 Conn. App. 122, 115 A.3d 1123 (2015). "This court previously has held that it is an abuse of discretion by the habeas court to dismiss a habeas petition sua sponte under Practice Book § 23-29 without fair notice to the petitioner and a hearing on the court's own motion to dismiss." Id., 125. The facts of the present case are distinguishable from those in *Boyd*. The habeas court in the present case did not dismiss the petition sua sponte. The respondent filed a motion to dismiss and the petitioner filed an objection to the motion to dismiss. We therefore conclude that it was not improper for the habeas court to grant the respondent's motion to dismiss without holding a hearing.

IV

The petitioner claims that the third habeas court improperly dismissed count one of his third petition for a writ of habeas corpus (1) "because evidence of his diminished capacity was not properly presented during the criminal trial [and sentencing]," and (2) "his sentence should be reduced because mitigating circumstances existed." We disagree that the habeas court improperly dismissed count one of the third petition for a writ of habeas corpus.

A

The petitioner claims that the habeas court improperly dismissed his claim that evidence of his diminished

capacity was not properly presented during his criminal trial and sentencing because it failed to construe the allegations of count one broadly. We disagree.

After the pleadings were closed, the respondent filed a motion to dismiss the third petition for a writ of habeas corpus to which the petitioner objected. When ruling on the motion to dismiss, Judge Kwak reviewed the record and found that evidence related to the petitioner's diminished capacity defense was presented at his third criminal and second habeas trials. In her oral decision, Judge Santos acknowledged that Felber's testimony regarding the petitioner's diminished capacity differed at the third criminal trial from his testimony at the second habeas trial, but ultimately denied the petitioner's claims.[11] In addition, Judge Kwak found that

[11] In her opinion, Judge Santos stated in relevant part: "Now as to [the allegation that] trial counsel failed to timely notice and adequately prepare petitioner's expert witness . . . Felber, and this is what the petitioner's counsel has felt is the most important of these issues.

"I know that, and it's clear and you're right [habeas counsel], there is a difference in terms of what has transpired here in the testimony, and I think anybody reading that would see that there was a difference in how . . . Felber testified, but just as . . . and there was no evidence as to . . . although there were comments, but there was no evidence as to whether or not . . . Felber had any decline in his mental capacity or whatever over the years from between 2002 and 2006, as . . . was argu[ed] . . . so that wasn't based on any evidence. . . .

"[The court agreed that trial counsel testified that he did not notice a decline in Felber's mental faculties, but perhaps there was a physical decline. The court stated] I don't think that as far as his ability to recollect or anything of that sort, it doesn't seem like there's any evidence that he could not testify, if he wished, to exactly what he had testified earlier. . . . The fact that he didn't do that that day none of us know why. . . . He couldn't tell us today . . . but [trial counsel] spoke with him on the telephone twice. The first time he told him what he was going to send him. He told him that . . . he was going to send him the . . . prior habeas testimony, and he was going to send him the transcript of the trial, and so he would know, he would have some ability to be able to go back and see what he had said before."

Trial counsel looked at Felber's "opinion as he would something that was an empirical test." Prior to the third criminal trial, trial counsel had the petitioner examined by Kenneth Selig, a psychiatrist. Trial counsel, however, did not like what he heard when he received Selig's report.

Trial counsel felt that Felber's "examination of whatever records he had, his initial conversations with [the petitioner], on the eve of trial was perhaps

the other witnesses identified by the petitioner, i.e., Rosita Saucier, Gregory St. John, and Louis Avitabile, all previously testified on the petitioner's behalf. [12] Moreover, he found that the relief the petitioner was seeking in the second and third habeas proceedings was the same. The third habeas court concluded that the petitioner's claim alleging that evidence of his diminished capacity had been adjudicated previously and, therefore, was barred by the doctrines of res judicata and collateral estoppel. For those reasons, it dismissed the claim.

We begin with a review of the applicable law. "The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings. . . . However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the

all he had and the best he had and he was going with it, and whatever problems he was going to encounter, he was going to have to deal with at the trial. And it wasn't until he had the results of . . . Selig's report that he made that decision, and, again, it was a strategic decision." See *Woods* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-08-4002720 (June 30, 2011).

[12] The petitioner made the following allegations regarding the witness' testimony. Saucier, a guidance counselor with Waterbury Adult Education, "testified that [the petitioner's] scores on a standardized test were abysmal. . . ." Gregory St. John, an attorney who represented the petitioner when he was a juvenile, "testified that [the petitioner] had been difficult to explain matters to . . . in a way that he could understand." St. John believed the petitioner was "sufficiently impaired to make it difficult for him to form the requisite specific intent for intentional murder." Avitabile, an experienced criminal defense lawyer, "testified that after speaking with [the petitioner, Avitabile] said that [the petitioner's] intellectual abilities [were] subpar and that he is of diminished capacity."

application of the doctrine of res judicata . . . [is limited] to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 63–64, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011).

"Thus, a habeas petition may be vulnerable to dismissal by reason of claim preclusion only if it is premised on the same ground litigated in a previously dismissed habeas petition. We recognize, therefore, that the application of the doctrine of claim preclusion to a habeas petition is narrower than in a general civil context because of the nature of the Great Writ.

"A narrowing of the application of the doctrine of res judicata to habeas proceedings is encapsulated in Practice Book § 23-29, which states: The judicial authority, may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition . . . ." (Internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 233–34, 965 A.2d 608 (2009).

On appeal, the petitioner claims that the habeas court improperly dismissed his claim that evidence of his diminished capacity defense was not properly presented to the triers of fact because the habeas court "failed to recognize that a broad [construction] of the pleading reveals that the petitioner alleged ineffective assistance of prior habeas counsel." The petitioner also noted that in his reply to the respondent's return, he alleged that "the evidence of diminished capacity in the petitioner's case has never been litigated or reviewed in its entirety." In other words, the petitioner is claiming

that his third petition for a writ of habeas corpus alleges the ineffective assistance of both his third criminal trial counsel and his second habeas counsel. We are not persuaded.

The petitioner's claim requires us to examine the relevant allegations of count one of his third petition. The construction of pleadings presents a question of law over which our review is plenary. See, e.g., *Miller* v. *Egan*, 265 Conn. 301, 308, 828 A.2d 549 (2003).

Count one begins with the allegation that the "petitioner's conviction is illegal because [t]here is a significant amount of evidence of diminished capacity in the petitioner's case, that could of changed the outcome of this case, if presented properly to the triers of fact. . . . The petitioner's habeas corpus was granted in 2002–2003 because of the testimony of a psychiatrist named Dr. Felber, but the triers of fact never got to hear that testimony."[13] Even the most generous reading of the allegations in paragraphs 1 and 2 of count one cannot be construed to allege a claim of ineffective assistance by the petitioner's second habeas counsel. First, the petitioner states that his conviction is illegal because significant evidence of his diminished capacity could have changed the outcome of his case if it had been presented to the triers of fact.[14]

[13] Interestingly, the petitioner alleged in paragraph 5 of count one: "Evidence in this case shows that [the petitioner] was under the influence of a large amount of alcohol the night this incident occurred."

[14] The petitioner essentially is alleging that he would not have been convicted if evidence of his diminished capacity had been presented to the triers of fact. The triers of fact who convicted the petitioner and, ultimately, sentenced him, were the members of the three judge panel. If there is any claim of ineffective assistance of counsel, it logically relates to his third trial counsel. Moreover, in the next paragraph, the petitioner sets out Felber's testimony that was presented at his first habeas trial and alleges that it was not presented to the triers of fact. The words triers of fact, therefore, must refer to the three judge panel which convicted and sentenced him. Such allegations cannot refer to his second habeas counsel.

In addition, the petitioner alleged that three individuals also testified as to his diminished capacity, which testimony was not heard by the triers of fact. The three individuals testified at the petitioner's second habeas trial. *The triers of fact referred to in the third petition for a writ of habeas corpus, therefore, must refer to the three judge panel.* On the basis of our construction of count one, there is no allegation that reasonably can be construed as a reference, either directly or indirectly, to the petitioner's second habeas counsel.

As to any claim that his third trial counsel was ineffective, Judge Santos found, following the second habeas trial, in which the petitioner had alleged the ineffective assistance of his third trial counsel, that the evidence regarding trial counsel's performance did not support a finding of ineffective assistance. See footnote 11 of this opinion. The petitioner's claim that trial counsel was ineffective was litigated at the second habeas trial and, therefore, the claim is barred by the doctrine of res judicata. Thus, we conclude that Judge Kwak properly dismissed the petitioner's claim that evidence of his diminished capacity special defense was not properly presented to the triers of fact.

B

The petitioner also claims that the third habeas court improperly dismissed that portion of count one of his third petition alleging that there were mitigating circumstances that should have been considered at sentencing. We do not agree.

In his memorandum of decision, Judge Kwak found that the petitioner had alleged that his conviction was illegal because the sentencing court did not consider that the petitioner was nineteen years old when the murder occurred, he had no history of violence prior to or subsequent to the murder, the weapon used was discharged only once, there were more than 100 people

in the area when the murder occurred, and there was no evidence that the petitioner and the victim knew one another. In his return, the respondent alleged that the claim should be dismissed because it failed to state a claim for which habeas corpus relief can be granted and on the ground of procedural default. In his reply to the respondent's return, the petitioner alleged that he was a teenager in 1994 and that his age is relevant because newly discovered brain research demonstrates that the brain's frontal lobe is not fully developed until the age of twenty-five.

The habeas court construed the allegations as a claim that the petitioner was entitled to an individualized sentencing hearing pursuant to *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *State* v. *Riley*, 315 Conn. 637, 110 A.3d 1205 (2015), cert. denied, 57 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016) (*Miller/Riley*). The habeas court concluded, however, on the basis of *Haughey* v. *Commissioner of Correction*, 173 Conn. App. 559, 164 A.3d 849, cert. denied, 327 Conn. 906, 170 A.3d 1 (2017), that *Miller/Riley* considerations do not apply to the petitioner, who was older than eighteen at the time of the crime.[15] In *Haughey*, this court concluded that "[e]xpanding the application of [*Miller/Riley*] to offenders eighteen years of age or older simply does not comport with existing eighth amendment jurisprudence pertaining to juvenile sentencing." Id., 568. The habeas court, therefore, concluded that the petitioner, who was nineteen at the time

[15] The habeas court stated that General Statutes § 54-91g (a) (1), which requires a sentencing court to take into account "the defendant's age at the time of the offense, the hallmark features of adolescence, and any scientific and psychological evidence showing the differences between a child's brain development and an adult's brain development," only applies to cases involving children, as defined by General Statutes § 46b-120. (Internal quotation marks omitted.) Section 46b-120 (1) defines child as "any person under eighteen years of age who has not been legally emancipated . . . ." We note that at the time of the petitioner's sentencing, General Statutes (Rev. to 1997) § 46b-120 (1) defined child as "any person under sixteen years of age . . . ."

of the crime, was not a child entitled to individualized sentencing pursuant to General Statutes §§ 46b-120 (1) and 54-91g (a) (1), and dismissed the claim as one that failed to state a claim for which habeas relief could be granted.

The habeas court also concluded that the petitioner's claim was barred by the doctrine of procedural default. After examining the petitioner's reply to the respondent's return, the court found that the reply failed to allege any facts or to assert any cause and resulting prejudice to permit review of the petitioner's mitigating circumstances claim. The court stated that the petitioner's reply merely reasserted facts alleged in his petition, which is not permissible or sufficient to overcome the respondent's affirmative defense of procedural default. The court concluded that the petitioner failed to allege a legally cognizable cause and prejudice to rebut procedural default and, therefore, dismissed the claim alleging mitigating circumstances.

1

On appeal, the petitioner claims that the habeas court misconstrued the allegations of his mitigating circumstances claim. He denies that he was seeking to expand the age at which individualized sentencing is required and contends that he made that clear in his objection to the respondent's motion to dismiss.[16] He claims that the habeas court misconstrued the allegations as an attempt to raise the age for individualized sentencing and contends that a more "natural" interpretation of the allegations is that his sentence was disproportionate

[16] The record does not support the petitioner's representation. In his brief on appeal, the petitioner represented that in his objection to the respondent's motion to dismiss, he explicitly disclaimed that he intended to plead that *Miller* v. *Alabama*, supra, 567 U.S. 460, and *State* v. *Riley*, supra, 315 Conn. 637, should be extended to nonjuveniles. Our review of the petitioner's objection to the motion to dismiss makes no mention of *Miller* and *Riley*, let alone an argument that the petitioner did not seek to expand the age of individuals for whom individualized sentencing applies.

under the eighth and fourteenth amendments to the United States constitution, citing *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015). The petitioner argues that the habeas court should have construed his petition as a claim that his fifty year sentence was grossly disproportionate in light of evolving standards of decency and that it no longer served any legitimate penological purpose. He contends that the allegations were sufficient to state a claim that his right to be free from cruel and unusual punishment under the eighth and fourteenth amendments was violated because his sentence is disproportionate.

We disagree that the allegations of the first count of the petition alleged a constitutional challenge to his sentence in that it constituted cruel and unusual punishment because it was disproportionate. The petitioner alleged that he "was a teenager (nineteen) when this incident occurred." In his reply to the respondent's return, the petitioner alleged factors and evidence of his diminished capacity. He did not allege that the sentence was disproportionate nor did he allege cruel and unusual punishment or mention the eighth amendment.

In the past fifteen years, the United States Supreme Court has issued three cases addressing the sentencing of *juvenile* offenders to assure that their sentences are not excessive or disproportionate. "The court first barred capital punishment for all juvenile offenders; *Roper* v. *Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); and then barred life imprisonment without the possibility of parole for juvenile nonhomicide offenders. *Graham* v. *Florida*, 560 U.S. 48, 79–80, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Most recently, in *Miller* v. *Alabama*, [supra, 567 U.S. 467], the court held that mandatory sentencing schemes that impose a term of life imprisonment without parole on juvenile homicide offenders, thus precluding consideration of the offender's youth as mitigating against such a severe punishment, violate the principle of proportionate pun-

ishment under the eighth amendment." *State* v. *Riley*, supra, 315 Conn. 640.

In *Riley*, the defendant was seventeen at the time he committed the crimes of which he was convicted. Id., 641. Our Supreme Court agreed with the defendant's claim on direct appeal that, pursuant to *Miller* v. *Alabama*, supra, 567 U.S. 460, he was "entitled to a new sentencing proceeding at which the court must consider as mitigation the defendant's age at the time he committed the offenses and the hallmarks of adolescence that *Miller* deemed constitutionally significant when a juvenile offender is subject to a potential life sentence."[17] *State* v. *Riley*, supra, 315 Conn. 641. Our Supreme Court made clear, however, that it used the "term juvenile offenders to refer to persons who committed a crime when they were *younger than eighteen years of age*." (Emphasis added.) Id., 640 n.1.

[17] "By statute and the rule of practice, our trial courts must consider the information in the presentence report before imposing sentence. See General Statutes § 54-91a (a); Practice Book §§ 43-3 and 43-10." *State* v. *Riley*, supra, 315 Conn. 659.

In the present case, the three judge panel ordered a presentence investigation of the petitioner. The petitioner referred to it in his reply to the respondent's return and attached a copy of the mental health evaluation performed by Catholic Charities as part of the presentence investigation. The evaluation states that, on "August 11, 2006, the [petitioner] was evaluated by the director of the clinical staff at Catholic Charities. The clinical impressions of the evaluation were that the [petitioner] has a long history of learning disability, alcoholism, some sleep disturbance, and depression. It was determined that the [petitioner] would benefit from therapy for mental health and substance abuse issues, including medication management. It was also noted that extensive educational and psychological testing would be useful in determining the full extent of [the petitioner's] learning and cognitive impairments and would have implications for possible treatment modalities. During the evaluation the [petitioner] expressed some paranoia particularly that he believes that some people act suspiciously around him and may be out to get him, however, it was unclear how much reality there is to that perception. The [petitioner] was diagnosed with [d]epression, [not otherwise specified] and [l]earning [d]isability [not otherwise specified]." (Internal quotation marks omitted.) The petitioner does not claim that the three judge panel failed to consider the Catholic Charities mental health evaluation prior to sentencing.

Subsequent opinions of this court have stated that *Miller*'s holding is limited to cases in which the defendant is younger than eighteen at the time of the crime. "Our law . . . categorically limits review pursuant to *Miller* and its progeny to cases in which the defendant was under the age of eighteen at the time of the crime. In *State* v. *Delgado*, 323 Conn. 801, 810–11, 151 A.3d 234 (2016), our Supreme Court held that the Superior Court had no jurisdiction to entertain a motion to correct that did not state a colorable claim for relief."[18] *State* v. *Mukhtaar*, 179 Conn. App. 1, 9, 177 A.3d 1185 (2017). "[A]n offender who has reached the age of eighteen is not considered a juvenile for sentencing procedures and eighth amendment protections articulated in *Miller*." *Haughey* v. *Commissioner of Correction*, supra, 173 Conn. App. 571.

The petitioner alleged that he was nineteen years old at the time of the crime. We conclude, therefore, that the habeas court properly dismissed the petitioner's claim that he was denied an individualized sentencing hearing on the ground that it failed to state a claim for which habeas relief can be granted under *Miller/Riley*.

Even if the habeas court misconstrued the allegations of the petition as an effort to expand the application of *Miller/Riley*, the petitioner cannot prevail on his claim that his sentence is disproportionate to the crime

[18] Melvin Delgado was convicted of a murder he committed when he was sixteen years old and sentenced to sixty-five years imprisonment without the possibility of parole. *State* v. *Delgado*, supra, 323 Conn. 802. At the time of his sentence, the court did not consider "mitigating factors associated with the juvenile's young age at the time of the crime." Id. Following the passage of No. 15-84 of the 2015 Public Acts (P.A. 15-84), Delgado filed a motion "to correct his allegedly illegal sentence, claiming that he [was] entitled to be resentenced." Id., 803–804. Our Supreme Court affirmed the judgment dismissing of the motion to correct. Id., 816. Delgado failed to allege a colorable claim; he conceded that the enactment of P.A. 15-84, which ensures that he is eligible for parole, resolved his eighth amendment claim. Id., 809.

and therefore a violation of the eighth amendment. Numerous decisions of the United States Supreme Court and the appellate courts of this state hold to the contrary. "The eighth amendment to the federal constitution establishes the minimum standards for what constitutes impermissibly cruel and unusual punishment. . . . Specifically, the United States Supreme Court has indicated that at least three types of punishment may be deemed unconstitutionally cruel: (1) inherently barbaric punishments; (2) excessive and disproportionate punishments; and (3) arbitrary or discriminatory punishments." (Citation omitted; footnote omitted.) *State* v. *Santiago*, supra, 318 Conn. 18–19. In *State* v. *Ross*, 230 Conn. 183, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), our Supreme Court "broadly adopted, as a matter of state constitutional law, this federal framework for evaluating challenges to allegedly cruel and unusual punishments." *State* v. *Santiago*, supra, 19. "[T]he eighth amendment mandates that punishment be proportioned and graduated to the offense of conviction." Id., 20.

As to the petitioner's eighth amendment claim, the respondent correctly points out that a claim that a fifty year sentence of imprisonment for murder is excessive and disproportionate fails as a matter of law. The eighth amendment "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." (Internal quotation marks omitted.) *Ewing* v. *California*, 538 U.S. 11, 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003). The petitioner's fifty year sentence is ten years less than the maximum life term that our legislature has prescribed for murder. "The potential maximum sentence for murder in violation of . . . § 53a-54a is life imprisonment. General Statutes § 53a-35a (2). A life sentence is a definite sentence of sixty years. General Statutes § 53a-35b." *Braham* v. *Commissioner of Correction*, 72 Conn. App. 1, 9 n.6, 804 A.2d

951, cert. denied, 262 Conn. 906, 810 A.2d 271 (2002). "[I]t is rare that a sentence falling within a legislatively prescribed term of years will be deemed grossly disproportionate." *United States* v. *Reingold*, 731 F.3d 204, 212 (2d Cir. 2013); see also *Ewing* v. *California*, supra, 22 ("federal courts should be reluctant to review legislatively-mandated terms of imprisonment" (internal quotation marks omitted)). For these reasons, the habeas court properly dismissed the plaintiff's mitigating circumstances claim for failing to state a claim for which relief can be granted.

2

The petitioner also claims that the habeas court improperly dismissed his mitigating circumstances claim as procedurally defaulted for two reasons: (1) it is questionable whether procedural default can be applied meaningfully to evolving standards of decency, and (2) his claim is predicated upon newly discovered evidence regarding brain development. We disagree.

"Practice Book § 23-29 (5) permits a habeas court to dismiss a petition for any . . . sufficient ground . . . which may include procedural default. . . . The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *Saunders* v. *Commissioner of Correction*, 194 Conn. App. 473, 481–82, 221 A.3d 810 (2019), cert. granted, 334 Conn. 917, 222 A.3d 103 (2020).

The law regarding procedural default is clear. "Under the procedural default doctrine, a claimant may not raise, in a collateral proceeding, claims that he [or she] could have made at trial or on direct appeal in the orig-

inal proceeding, unless he [or she] can prove that his [or her] default by failure to do so should be excused. . . . When a respondent seeks to raise an affirmative defense of procedural default, the rules of practice require that he or she must file a return to the habeas petition alleg[ing] any facts in support of any claim of procedural default . . . or any other claim that the petitioner is not entitled to relief. . . . If the return alleges any defense or claim that the petitioner is not entitled to relief, and such allegations are not put in dispute by the petition, the petitioner shall file a reply. . . . The reply shall allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. . . .

"The cause and prejudice standard [of reviewability] is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . . In order to satisfy this standard, the [habeas] petitioner must demonstrate *both* good cause for failing to raise a claim at trial or on direct appeal *and* actual prejudice from the underlying impropriety. . . . [T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule. . . .

"With respect to the actual prejudice prong, [t]he habeas petitioner must show not merely that the errors at . . . trial created the *possibility* of prejudice, but that they worked to the *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. . . . Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied fundamental fairness at trial." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442,

461–62, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017).

Our review of the record discloses that the petitioner failed to raise the claim of mitigating circumstances at sentencing, on direct appeal, or at his second habeas hearing. But see footnote 15 of this opinion. The respondent alleged in its return that the petitioner's mitigating circumstances claim was procedurally defaulted; the third habeas court agreed, stating that the petitioner's reply failed to allege any facts or assert any cause and resulting prejudice to permit review of his claim. On appeal, the respondent argues that we should affirm the judgment of dismissal because the petitioner's appellate argument that his sentence is disproportionate is unsupported by legal authority that procedural default does not apply to eighth amendment claims predicated on evolving standards of decency. The respondent cites several federal cases in support of his argument, e.g., *Dugger* v. *Adams*, 489 U.S. 401, 405–407, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989) (claim not so novel that failure to raise it in state court proceedings procedurally defaulted in federal habeas proceeding); *Franklin* v. *Bradshaw*, 695 F.3d 439, 454–55 (6th Cir. 2012) (procedural default applies to evolving standards argument where petitioner failed to raise equal protection claim in state court, seeking better outcome in federal habeas petition), cert. denied sub nom. *Franklin* v. *Robinson*, 569 U.S. 906, 133 S. Ct. 1724, 185 L. Ed. 2d 789 (2013); *Prieto* v. *Zook*, 791 F.3d 465, 467–69 (4th Cir.) (eighth amendment claim regarding prohibition on execution of intellectually disabled person procedurally barred when not raised at sentence review), cert. denied, U.S. , 136 S. Ct. 28, 192 L. Ed. 2d 999 (2015).

The respondent also argues that the petitioner failed to allege any facts regarding cause and prejudice. Although the petitioner alleged that newly discovered brain research shows that the brain's frontal lobe is not

fully developed until the age of twenty-five, he did not allege that the research was not reasonably available to him at the time of the trial before the three judge panel in 2006, his direct appeal in 2010, or his second habeas trial in 2011. The respondent points out, however, that, in 2005, when the Supreme Court decided *Roper*, scientific evidence confirmed that "regions of the adolescent brain," in particular "those associated with impulse control, regulation of emotions, risk assessment, and moral reasoning" are not fully mature until after the age of eighteen. See *Roper* v. *Simmons*, U.S. Supreme Court Briefs, October Term, 2004, Amicus Brief of the American Medical Association et al. p. 2, reprinted in 2004 WL 1633599 *2.[19] The Supreme Court recognized that "qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen." *Roper* v. *Simmons*, supra, 543 U.S. 574. In *Graham* v. *Florida*, supra, 560 U.S. 68, decided in 2010, the Supreme Court explicitly relied on amici briefs explaining the results of brain development research conducted in the late 1990s through 2009. The petitioner, therefore, can hardly prevail on his argument that societal standards are evolving when the mitigating circumstances for which he argues were known and accepted at the time of his third trial and his second habeas petition.

The respondent further argues that the petitioner failed to plead prejudice adequately in his reply. We agree. To allege a legally sufficient prejudice in the context of the present case, the petitioner was required to allege specific facts demonstrating that, if he had offered brain development studies, there was a substantial likelihood or a reasonable probability sufficient to undermine the confidence in the outcome that the three judge panel would have imposed a lighter sentence. We, therefore, conclude that the habeas court prop-

[19] The brief was submitted by the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, Ameri-

erly dismissed the petitioner's mitigating circumstances claim pursuant to procedural default.

For the foregoing reasons, the habeas court properly dismissed count one of the third petition for a writ of habeas corpus.

V

The petitioner's third claim is that the habeas court improperly dismissed count two of his third petition on the ground of procedural default. In count two, the petitioner alleged that he was denied the constitutional right to equal protection because the prosecutor vindictively tried him for murder a third time after his first petition for a writ of habeas corpus was granted. We do not agree.

The petitioner alleged in count two of his third petition that a federal investigation revealed that Connelly, the former Waterbury state's attorney, allegedly was providing Minella's clients with favorable treatment in exchange for trips provided to him by Minella. The petitioner further alleged that he was subject to a third criminal trial because Connelly vindictively prosecuted him for a third time. He alleged that he could not afford to retain Minella but, if Minella had been his counsel, Connelly would not have subjected him to a third criminal trial and the petitioner would not be in "this situation" because Minella would have disposed of the petitioner's case.[20] He also alleged that without Connelly's misconduct, he would have been tried on a lesser charge, released on time served, or offered a favorable plea deal.

In his return, the respondent alleged that count two was barred by procedural default and failed to state a

can Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association.

[20] Shorn of its legalese, this part of the petitioner's singular claim appears to decry his inability to benefit from an *allegedly* corrupt practice.

claim upon which habeas relief may be granted.[21] In his reply, the petitioner realleged the substance of the allegations in count two of the petition and attached copies of a November 30, 2005 newspaper article regarding Connelly's decision to retry him for murder. In the article, the petitioner's counsel is quoted as stating that the petitioner is not willing to plead to a charge higher than manslaughter.

A

In its memorandum of decision with regard to the petitioner's equal protection claim, the habeas court stated that the petitioner had not raised the claim in the trial court or on appeal. The court found that the petitioner's reply "merely recites the facts alleged in his petition, with the addition of a copy of a newspaper article in which . . . Connelly indicates that he is unwilling to let the petitioner plead guilty to manslaughter. The petitioner has failed to allege legally cognizable cause and prejudice to rebut his procedural default."

As we previously stated in part III B of this opinion, when a habeas court dismisses a claim on the ground of procedural default, we review the court's conclusions to determine whether, as a matter of law, they are legally and logically correct. To overcome procedural default, the petitioner must demonstrate both good cause for failing to raise the claim in a prior proceeding and prejudice. The existence of good cause turns on whether there was some objective factor external to the defense that impeded counsel's efforts to comply

[21] The respondent alleged that the petitioner failed to state a cognizable equal protection claim under either the state or federal constitutions which demonstrates that his conviction was the product of purposeful discrimination, citing *Abdullah* v. *Commissioner of Correction*, 123 Conn. App. 197, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010). The respondent also alleged that the petitioner failed to state a claim upon which the habeas court could grant relief because the relief the petitioner sought would have resulted from his own illegal acts, citing *Greenwald* v. *Van Handel*, 311 Conn. 370, 88 A.3d 467 (2014).

with the procedural rule. See *Arroyo* v. *Commissioner of Correction*, supra, 172 Conn. App. 461–62. We agree with the habeas court that the petitioner failed to meet his burden.

In his reply, the petitioner failed to state facts as to why he did not raise the claim of vindictive prosecution prior to alleging it in his third petition for a writ of habeas corpus. In his opposition to the respondent's motion to dismiss, however, he asserted that he could not have raised the claim because the federal investigation into Connelly's alleged corruption did not occur until years after the 2006 trial before the three judge panel. Even if that assertion could be read into the petitioner's reply, it does not assert objective facts that prevented him from raising the equal protection claim in his second petition for a writ of habeas corpus. In his petition, the petitioner alleged that Connelly resigned in January, 2011. The petitioner's second habeas trial did not commence until June, 2011. The petitioner, therefore, failed to meet his burden to establish good cause for failing to raise the claim in a prior proceeding.

B

Although the habeas court did not dismiss the second count of the third petition on the ground of failing to state a claim on which habeas relief can be granted, on appeal, the respondent raises failure to state a claim as an alternative ground on which to affirm the judgment of dismissal[22] should we conclude that the court improperly dismissed the petitioner's third petition for a writ of habeas corpus.[23] Although we conclude that

[22] The petitioner responded to the respondent's alternative ground for affirmance by arguing that the respondent failed to raise the affirmative defense in his return. The record is to the contrary. The respondent pleaded procedural default and two grounds for failure to state a claim in his return.

[23] An appellate court may affirm the judgment of the trial court although it may be founded on an improper reason. See *Mercer* v. *Rodriquez*, 83 Conn. App. 251, 268, 849 A.2d 886 (2004).

the court properly dismissed the second count of the petition on the ground of procedural default,[24] we agree with the respondent that the judgment also can be affirmed on the ground of failure to state a viable claim for habeas relief.[25]

The petitioner alleged that "Connelly ordered his assistant to selectively and vindictively prosecute the petitioner for the third time on the same case that happened back in 1994." "A presumption of vindictiveness generally does not arise in a pretrial setting. . . . Therefore, the defendant must show actual vindictiveness on the part of the prosecutor." (Citation omitted; internal quotation marks omitted.) *State* v. *Lee*, 86 Conn. App. 323, 327–28, 860 A.2d 1268 (2004), cert. denied, 272 Conn. 921, 867 A.2d 839 (2005). To establish an actual vindictive motive on Connelly's part, the petitioner had to "prove objectively that the prosecutor's charging decision was a direct and unjustifiable penalty . . . that resulted solely from the defendant's exercise of a protected legal right . . . . Put another way, the defendant must show that (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a stalking horse, and (2) [the defendant] would not have been

[24] We address the respondent's alternative ground to affirm the judgment of dismissal to resolve all claims should the petitioner seek certification to appeal to our Supreme Court.

[25] Our Supreme Court has acknowledged that "circumstances exist where although the trial court did not reach a dispositive issue"; *Bouchard* v. *Deep River*, 155 Conn. App. 490, 496, 110 A.3d 484 (2015); an appellate court may nonetheless "affirm the judgment of the trial court [on an alternative ground] so long as the plaintiff is not prejudiced or unfairly surprised by the consideration of the issue." Id. An appellate court may affirm on an alternative ground if it concerns a question of law, the essential facts are undisputed, and the court's standard of review is plenary. See id. In the present case, the respondent raised the alternative ground in his brief and the petitioner responded to it in his reply brief. Moreover, the respondent pleaded failure to state a claim in his return to the allegations of count two of the petition.

prosecuted except for the animus." (Internal quotation marks omitted.) Id., 328.

The petitioner failed to allege any facts to meet his substantial burden to demonstrate Connelly's animus toward him. It is undisputed that the petitioner was tried twice on the charge of murder. Thus, Connelly's decision to try the petitioner for a third time could not have been a direct and unjustifiable penalty for the petitioner's having exercised a protected legal right; see id.; as it flowed from Judge Rittenband's order granting, in part, the first petition for a writ of habeas corpus. Judge Rittenband ordered that the petitioner be unconditionally discharged if the state's attorney for the judicial district of Waterbury did not file a notice of intention to retry the petitioner. See footnote 4 of this opinion. Moreover, in his first petition for a writ of habeas corpus, the petitioner, who had been tried for murder, sought a new trial. When Judge Rittenband granted the petition and ordered that the petitioner be retried, the petitioner got the remedy he sought. The petitioner, therefore, failed to demonstrate good cause for failing to raise his claim in an earlier proceeding.

In order to overcome procedural default, a petitioner must demonstrate *both* good cause and actual prejudice for failing to raise the claim in a prior proceeding. See *Arroyo* v. *Commissioner of Correction*, supra, 172 Conn. App. 462. Because the petitioner has failed to meet his burden to demonstrate good cause, we need not determine whether he demonstrated actual prejudice. For the foregoing reasons, we conclude that the habeas court properly dismissed count two of the third petition for a writ of habeas corpus.

The appeal is dismissed.

In this opinion the other judges concurred.

DILA HASSIEM *v.* O & G INDUSTRIES, INC.
(AC 41794)

Lavine, Bright and Devlin, Js.

Syllabus

The plaintiff employee sought to recover damages from the defendant employer for personal injuries he sustained at work while cleaning equipment that allegedly resulted from the defendant's having intentionally created a dangerous condition that it knew with substantial certainty would result in injury to the plaintiff. The trial court granted the defendant's motion for summary judgment and rendered judgment for the defendant. The court concluded that the plaintiff's claim was barred by the exclusivity provision (§ 31-284 (a)) of the Workers' Compensation Act because the plaintiff failed to present a genuine issue of material fact to show that the defendant engaged in intentional conduct that it knew with substantial certainty would result in injury to him. The court determined, inter alia, that there was no information that the defendant's failure, prior to the plaintiff's injury, to install a lockout device it had previously required that would have activated and controlled the equipment was intentional or would cause injury. The court also determined that, in the months prior to the plaintiff's injury, the defendant had discussed with the plaintiff and other employees changes it was making for safety and other operational procedures, and that there was no evidence of a failure to follow safety regulations before the plaintiff's injury or that the defendant had disabled or changed any of its devices for any improper reason. On appeal to this court, the plaintiff claimed that the trial court improperly granted the defendant's motion for summary judgment because questions as to intent are to be decided by the trier of fact, and the defendant coerced him into cleaning the equipment and was deliberately deceptive in having failed to install the lockout device when it knew that the device was required to be used. *Held* that the trial court properly granted the defendant's motion for summary judgment, the plaintiff having failed to show that there was a genuine issue of material fact as to whether the defendant had the subjective intent to create a dangerous situation knowing that there was a substantial certainty he would be injured: there was no genuine issue of material fact that the defendant was not deliberately deceptive in failing to install the lockout device and did not subjectively believe the plaintiff's injury was certain to follow, as the defendant was aware, and informed its employees that it was aware, of the dangers posed by powerful machines that could accidentally be turned on, it informed its employees of its intention to install the lockout devices it had acquired and, although the defendant failed to install the lockout devices expeditiously, deception or a subjective intent to injure employees could not be inferred

from that failure and was not sufficient to demonstrate the necessary intent to injure; moreover, there were no genuine issues of material fact as to the plaintiff's claim that he was coerced into cleaning the equipment, as the plaintiff presented no evidence that he previously had safety concerns about cleaning the equipment or that he could not complain about the dangerous procedure used to clean it in light of a complaint he had raised in the past with respect to another task he was asked to perform.

Argued January 9—officially released June 2, 2020

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's allegedly intentional creation of a dangerous workplace condition, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion to strike; thereafter, the court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John T. Bochanis, for the appellant (plaintiff).

Michael S. Lynch, with whom was *Nicole A. Carnemolla*, for the appellee (defendant).

Opinion

LAVINE, J. Our Workers' Compensation Act (act); General Statutes § 31-275 et seq.; provides the exclusive remedy for an employee who sustains an injury that arises out of and in the course of employment, unless the employee can establish "an employer's subjective intent to create a dangerous situation with a substantial certainty of injury to the employee [thereby] avoiding application of General Statutes § 31-284 (a), the exclusive remedy provision of the [act] . . . ." (Internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 766, 176 A.3d 1 (2018). Decisions issued by this court and our Supreme Court repeatedly have stressed the need for this stringent rule to uphold the legislative intent underlying our workers' compensation scheme.

In the present matter, the plaintiff, Dila Hassiem, appeals from the summary judgment rendered by the trial court in favor of the defendant, O & G Industries, Inc., after concluding that the plaintiff's claim was barred by the exclusivity provision of the act. On appeal, the plaintiff claims that the court improperly determined that there were no genuine issues of material fact that the defendant did not engage in an intentional act knowing that there was a substantial certainty that the plaintiff would be injured. We affirm the judgment of the trial court.

There are no material factual disputes concerning the manner and nature of the injury the plaintiff sustained. The plaintiff was employed by the defendant at its asphalt production facility in Stamford. Once a year, the defendant performed routine maintenance of its equipment, including a horizontal auger in a trough that is used to transfer stone and sand in the making of asphalt. The defendant's employees turn power to the auger on and off in a control room. On December 27, 2011, Robert Buchetto, the defendant's maintenance supervisor, ordered the plaintiff to clean the auger and the trough.[1] The plaintiff was not aware that power to the auger was on when he prepared to clean it with a high pressure hose. He climbed a ladder to a platform above the auger, which had no protective barrier, and was pulling up the hose when he slipped and fell into the trough. The plaintiff's left leg was caught in the auger and severed above his knee. As a result of his

[1] In its memorandum of law in support of its motion for summary judgment, the defendant stated that the plaintiff, a nine year employee, was performing annual maintenance, which included cleaning "the industrial screw auger machine . . . to remove debris and other accumulated particles contained in the trough encasing the auger. [The annual cleaning] involved spraying pressurized water into the screw trough while a small section of the screw cover was uncovered and the screw was turning, so that the accumulated debris and particles along the trough could be pushed down and eventually out of the trough." The plaintiff does not dispute this description of the auger cleaning process.

injuries, the plaintiff applied for and received workers' compensation benefits.

The plaintiff commenced the present litigation in which he alleged that the injuries he sustained were a direct result of the defendant's intentionally having created a dangerous condition, knowing that the dangerous condition made his injuries substantially certain to occur. In response to the plaintiff's revised complaint,[2] the defendant filed a motion for summary judgment, claiming that there were no genuine issues of material fact as to whether it "had a substantially certain belief that cleaning the auger would cause the plaintiff to sustain injuries." The plaintiff opposed the motion for summary judgment. Following the parties' submission of exhibits, numerous memoranda of law, and after oral argument, the trial court issued a comprehensive memorandum of decision on June 12, 2018. The court granted the defendant's motion for summary judgment, stating, in part, that the plaintiff had failed to present a genuine issue of fact to show that the defendant had engaged in intentional conduct knowing that there was a substantial certainty that the plaintiff would be injured while cleaning the auger. The court concluded that,

[2] The defendant filed a motion to strike the plaintiff's original complaint on the ground that it failed to allege facts in support of an intentional act. The court granted the motion to strike, and the plaintiff pleaded over. The plaintiff's revised complaint is the operative pleading.

In paragraph 7 of the revised complaint, the plaintiff alleged: "The defendant established a policy and procedure whereby the auger machine would be cleaned without turning the power off whereby the defendant knew with substantial certainty that requiring employees to clean the auger machine with the power on would cause the plaintiff to be seriously injured. The defendant, through its established policy and procedure and by and through the defendant's assistant vice president, Raymond Bradford Oneglia, who oversaw the operation of the defendant's Stamford asphalt plant and the supervisors at the Stamford asphalt plant, including Robert Buchetto, ordered the plaintiff to clean out the operating, rotating auger machine with full knowledge that the exposed rotating auger would cause serious personal injury to the plaintiff if the plaintiff was caused to come into contact with the rotating auger."

"[b]ecause there is no intentional act that was substantially certain to cause serious injury, the exception to the [act] does not apply." The plaintiff, thereafter, appealed to this court. The central issue presented to us is whether the trial court properly determined that there were no issues of material fact as to the defendant's subjective intent to create a dangerous situation with a substantial certainty of injury to the plaintiff. We conclude that it did.

Before addressing the plaintiff's claim, we set forth the applicable standard of review and the principles that guide our analysis of an appeal from the granting of a motion for summary judgment. "Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Gold* v. *Greenwich Hospital Assn.*, 262 Conn. 248, 253, 811 A.2d 1266 (2002).

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under the applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"A material fact is a fact that will make a difference in the result of the case. . . . It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward . . . evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute. . . . The party opposing summary judgment must present a factual predicate for his argument to raise a genuine issue of fact. . . . Once raised, if it is not conclusively refuted by the moving party, a genuine issue of fact exists, and summary judgment is inappropriate. . . . [A] party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . Demonstrating a genuine issue requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred." (Citations omitted; internal quotation marks omitted.) *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, 434–35, 197 A.3d 919 (2018).

"The fundamental purpose of summary judgment is preventing unnecessary trials. . . . If a plaintiff is unable to present sufficient evidence in support of an essential element of his cause of action at trial, he cannot prevail as a matter of law. . . . To avert these types of ill-fated cases from advancing to trial, following adequate time for discovery, a plaintiff may properly be called upon at the summary judgment stage to demonstrate that he possesses sufficient counterevidence to raise a genuine issue of material fact as to any, or even all, of the essential elements of his cause of action." (Citations omitted; internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 822–23, 116 A.3d 1195 (2015). Summary judgment is mandated "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (Internal quotation marks omitted.) *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The test is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Scheirer* v. *Frenish, Inc.*, 56 Conn. App. 228, 232, 742 A.2d 808 (1999), cert. denied, 252 Conn. 938, 747 A.2d 3 (2000).

I

The plaintiff's appeal concerns the exception to the exclusive remedy provision of our workers' compensation scheme, § 31-284 (a), which provides in relevant part: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . . ." Our Supreme Court consistently has "interpreted the exclusivity provision of the act . . . as a total bar to [common-law] actions brought by employees against employers for job related injuries with one narrow exception that exists when the employer has committed an intentional tort or where the employer has engaged in wilful or serious misconduct." *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 106, 639 A.2d 507 (1994) (*Suarez I*).

The exclusivity provision "represents a balancing of interest, insofar as the purpose of the act is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . The act is to be broadly construed to effectuate the

purpose of providing compensation for an injury arising out of and in the course of the employment regardless of fault. . . . Under typical workers' compensation statutes, employers are barred from presenting certain defenses to the claim for compensation, the employee's burden of proof is relatively light, and recovery should be expeditious. In a word, these statutes compromise an employee's right to a [common-law] tort action for [work-related] injuries in return for relatively quick and certain compensation." (Internal quotation marks omitted.) *Lucenti* v. *Laviero*, supra, 327 Conn. 774; *Mingachos* v. *CBS*, *Inc.*, 196 Conn. 91, 106, 491 A.2d 368 (1985) (same). "[A] damage suit as an alternative or additional source of compensation, becomes permissible only by carving a judicial exception in an uncarved statute. . . . Neither moral aversion to the employer's act nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the [l]egislature." (Internal quotation marks omitted.) *Mingachos* v. *CBS*, *Inc.*, supra, 106. The "principle of exclusivity is not eroded, [however] . . . when the plaintiff alleges an intentional tort, in which case an employee is permitted to pursue remedies beyond those contemplated by the act." *Suarez I*, supra, 229 Conn. 115.

Our Supreme Court first recognized the narrow intentional tort exception to the act's exclusivity in *Jett* v. *Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979). In *Jett*, the court exempted from the exclusivity provision of the act an employer's tortious act of intentionally directing or authorizing another employee to assault the injured party. Id., 218–19. In *Mingachos* v. *CBS*, *Inc.*, supra, 196 Conn. 100–101, the court "declined to extend [the] intentional tort exception to [the] act's exclusivity provision to situations in which an injury resulted from the employer's intentional, wilful, or reckless violations of safety standards as established pursuant to federal

or state laws." *Lucenti* v. *Laviero*, supra, 327 Conn. 775. "To bypass the exclusivity of the act, the intentional or deliberate . . . conduct alleged must have been designed to cause the injury that resulted." *Mingachos* v. *CBS, Inc.*, supra, 102. "[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent." (Internal quotation marks omitted.) Id., 103. Reckless misconduct differs from intentional misconduct, and an employee must establish that the employer *knew* that injury was substantially certain to follow its deliberate course of action. Id.

Our Supreme Court "elaborated on the contours of this substantial certainty standard as an alternative method of proving intent in *Suarez I* and [*Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (1997) (*Suarez II*)], which arose from amputation injuries suffered by an employee who claimed that his foreman had forced him to clean out plastic molding machines while those machines were still running, and forbade him and other employees from using safer cleaning methods under threat of termination of their employment, despite the risk of injury to their hands." *Lucenti* v. *Laviero*, supra, 327 Conn. 775.

In *Suarez I*, the trial court granted the employer's motion for summary judgment "on the ground that the exclusivity provision of the act barred his claim, because he had introduced no evidence that the employer intended to injure him." Id., 776. The employee appealed and our Supreme Court further defined the substantial certainty exception, concluding that "intent refers to the consequences of an act . . . [and] denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to flow from it. . . . A result is intended if the act is done for the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue. . . . An intended or wilful injury does not necessarily involve the ill will or malevolence shown in express

malice, but it is insufficient to constitute such an [intended] injury that the act . . . was the voluntary action of the person involved. . . . Both the action producing the injury and the resulting injury must be intentional. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . The intentional injury aspect may be satisfied if the resultant bodily harm was the direct and natural consequence of the intended act. . . . The known danger involved must go from being a foreseeable risk which a reasonable man would avoid and become a substantial certainty." (Internal quotation marks omitted.) Id. The court reversed the summary judgment and remanded the case for further proceedings, concluding that it was a question for the jury to determine whether the employer's intentional conduct permitted an inference that the employer knew that there was a substantial certainty an injury would occur. Id., 777; *Suarez I*, supra, 229 Conn. 119.

On remand, the jury returned a verdict in favor of the employee under the actual intent standard, rather than under the substantial certainty exception; the employer appealed. *Lucenti* v. *Laviero*, supra, 327 Conn. 777. In *Suarez II*, our Supreme Court "restated the substantial certainty test to emphasize that the employer must be shown *actually to believe that the injury would occur* . . . ." (Emphasis in original; internal quotation marks omitted.) Id. The court "described its decision in *Suarez I* as establishing an exception to workers' compensation exclusivity if the employee can prove either that the employer actually intended to injure the [employee] or that the employer intentionally created a dangerous condition that made the [employee's] injuries substantially certain to occur . . . ." (Internal quotation marks omitted.) Id., 777–78. The court stated that "[p]ermitting an employee to sue an employer for injuries intentionally caused to him constitutes a narrow exception to the exclusivity of the act.

. . . Since the legal justification for the common-law action is the nonaccidental character of the injury from the . . . employer's standpoint, the common-law liability of the employer cannot . . . be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer *short of a conscious and deliberate intent directed to the purpose of inflicting an injury. . . . What is being tested is not the degree of gravity of the employer's conduct, but, rather, the narrow issue of intentional versus accidental conduct.*" (Emphasis in original; internal quotation marks omitted.) Id., 778–79.

In *Lucenti*, the Supreme Court noted that "it is now well established under Connecticut law that proof of the employer's intent with respect to the substantial certainty exception demands a purely subjective inquiry. . . . Put differently, satisfaction of the substantial certainty exception requires a showing of the employer's subjective intent to engage in activity that it knows bears a substantial certainty of injury to its employees." (Citations omitted.) Id., 779. The court, however, noted that intent is a question of fact "ordinarily inferred from one's conduct or acts under the circumstances of the particular case." (Internal quotation marks omitted.) Id., 780. Historically, there was a substantial body of Connecticut law rejecting an employee's claim of entitlement to the substantial certainty exception, but no decision described "the kind of evidence that would allow for an inference that an employer subjectively believed that employee injury was substantially certain to follow its actions." Id. The court, therefore, looked to other jurisdictions in which the substantial certainty exception was a common feature of workers' compensation law and found New Jersey law instructive. Id.; see *Millison* v. *E.I. du Pont de*

Neumours & Co., 101 N.J. 161, 178–79, 501 A.2d 505 (1985) (New Jersey's "leading decision articulating substantial certainty test").

"New Jersey courts engage in a [two step] analysis. First, a court considers the conduct prong, examining the employer's conduct in the setting of the particular case. . . . Second, a court analyzes the context prong, considering whether the resulting injury or disease, and the circumstances in which it is inflicted on the worker, [may] fairly be viewed as a fact of life of industrial employment, or whether it is plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the [New Jersey Workers' Compensation Act]." (Internal quotation marks omitted.) *Lucenti* v. *Laviero*, supra, 327 Conn. 780–81.[3]

The New Jersey conduct prong of the substantial certainty test is closely akin to the factual inquiry Connecticut courts "undertake in determining whether the employer knew of a substantial certainty of employee harm . . . ." (Footnote omitted.) Id., 781–82. An employer's mere knowledge "that a workplace is dangerous does not equate to an intentional wrong. . . . [T]he dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework . . . is not circumvented simply because a known risk later blossoms into reality. [Courts] must demand virtual certainty." (Internal quotation marks omitted.) Id., 782. "In considering whether the totality of the circumstances indicates that the conduct prong is satisfied, New Jersey courts consider factors such as: (1) prior similar accidents related to the conduct at

[3] For a discussion of the context prong of the two step New Jersey analysis, see *Lucenti* v. *Laviero*, supra, 327 Conn. 781 n.7. Our Supreme Court declined to adopt the context prong as a matter of Connecticut law at that time, as it was not pertinent to the issue of intent to injure in *Lucenti*, which also is the case in the present matter. See id., 781–82 n.7.

issue that have resulted in employee injury, death, or a near-miss, (2) deliberate deceit on the part of the employer with respect to the existence of the dangerous condition, (3) intentional and persistent violations of safety regulations over a lengthy period of time, and (4) affirmative disabling of safety devices."[4] (Footnote omitted; internal quotation marks omitted.) Id.

Our Supreme Court found that the body of New Jersey case law "applying the factors that guide the conduct prong of the substantial certainty exception demonstrates that proof of negligent or even reckless conduct will not suffice, and only the most egregious examples of employer conduct will defeat workers' compensation exclusivity." Id., 783. In addition, cases from other states "applying the substantial certainty doctrine are consistent with the factors applied in New Jersey." Id., 785. Importantly, the court found that Connecticut appellate decisions also are consistent with the New Jersey multifactor standard, "including our decisions that stand for the proposition that, although warnings to the employer regarding the safety of workplace conditions are relevant evidence, they do not, without more, raise a genuine issue of material fact to defeat summary judgment with respect to whether an employer subjectively believes that its employee's injuries are substantially certain to result from its action." (Footnote omitted.) Id., 786.

The court in *Lucenti* noted that in *Stebbins* v. *Doncasters, Inc.*, 263 Conn. 231, 235, 819 A.2d 287 (2003) (adopting trial court's decision in *Stebbins* v. *Doncasters, Inc.*, 47 Conn. Supp. 638, 820 A.2d 1137 (2002)), the employees had presented evidence that the employer

[4] "With respect to decisions made to cut corners as to safety in order to save time or money, the New Jersey Supreme Court considers a profit motive of only limited relevance, applicable only to critique an employer's long-term choice specifically to sacrifice employee safety for product-production efficiency." (Internal quotation marks omitted.) *Lucenti* v. *Laviero*, supra, 327 Conn. 782–83.

failed to follow warnings and recommendations from the University of Connecticut Health Center concerning air quality. *Lucenti* v. *Laviero*, supra, 327 Conn. 786–87. "Despite evidence that the [employer] received these warnings and did not follow them, the [trial] court ultimately held that the evidence submitted by the employees provided nothing more than a mere failure to provide appropriate safety or protective measures. . . . The [trial] court concluded that [t]he [employees'] submissions may show that the [employer] exhibits a lackadaisical or even cavalier attitude toward worker safety, but are bereft of evidence from which one might reasonably and logically infer that the [employer] believed its conduct was substantially certain to cause hypersensitivity pneumonitis in these [employees]. . . . Thus, the evidence did not establish that the employer believed that its conduct was substantially certain to cause injury to the employees, and the act's exclusivity provision barred the employees' claim." (Citations omitted; internal quotation marks omitted.) Id., 787.

The court in *Lucenti* also noted that in *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 446, 830 A.2d 372 (overruled in part by *Lucenti* v. *Laviero*, 327 Conn. 764, 176 A.3d 1 (2018)), cert. denied, 266 Conn. 925, 835 A.2d 473 (2003), "an employee warned his supervisor that a lathe was not working properly. In response, the supervisor told the employee to be careful." *Lucenti* v. *Laviero*, supra, 787. The lathe malfunctioned and threw a piece of material that broke through a safety shield and struck the employee's arm, causing a severe laceration. Id. The employee presented evidence that the employer was aware that its employees operated the machine without the proper safety shield and had been warned of the dangerous condition. Id., 787–88. Nonetheless, the trial court concluded that, "[a]lthough the [employer's] failure (1) to repair the lathe, (2) to provide adequate butt blocks and shield

guards, and (3) to alert employees to a policy regarding the use of the rotating table [from which the material that struck the employee was thrown] may constitute negligence, gross negligence or even recklessness, those allegations fail to meet the high threshold of substantial certainty . . . . The combination of factors demonstrated a failure to act; however, such a failure is not the equivalent of an intention to cause injury." (Internal quotation marks omitted.) Id., 788; *Sorban* v. *Sterling Engineering Corp.*, supra, 446.[5]

Our review of the trial court's thorough memorandum of decision in the present case discloses that the court was well aware of the stringent standard applicable to the substantial certainty doctrine when adjudicating the defendant's motion for summary judgment. The court discussed the evolution of the substantial certainty doctrine in *Suarez I*; *Suarez II*; *Stebbins* v. *Doncasters, Inc.*, supra, 47 Conn. Supp. 638; *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 444; *Mingachos* v. *CBS, Inc.*, supra, 196 Conn. 91; and noted the factual distinctions and similarities between those cases and the facts of the present case. Most significantly, the court was knowledgeable with respect to the New Jersey hallmarks that define intentional acts and substantial certainty to injure that are at the heart of the exception to the exclusivity provision of the act.

In adjudicating the question posed by the defendant's motion for summary judgment, i.e., whether the plaintiff had provided evidence that there is a genuine issue of

[5] See also *Martinez* v. *Southington Metal Fabricating Co.*, 101 Conn. App. 796, 798, 806–807, 924 A.2d 150 (testimony that employee's arm was crushed while positioning steel plate in metal bending machine was not sufficient to defeat summary judgment), cert. denied, 284 Conn. 930, 934 A.2d 246 (2007); *DaGraca* v. *Kowalsky Bros., Inc.*, 100 Conn. App. 781, 791–93, 919 A.2d 525 (expert testimony that employer, given its experience, had to know of dangers of untested manholes was insufficient to defeat summary judgment), cert. denied, 283 Conn. 904, 927 A.2d 917 (2007).

material fact that the actions of the defendant in giving the plaintiff the task of cleaning the auger intentionally created a dangerous condition and that there was a substantial certainty that the plaintiff would be injured, the court stated that, "[u]nder Connecticut law, proof of the employer's intent with respect to the substantial certainty exception demands a purely subjective inquiry. *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 118–20, 889 A.2d 810 (2006); *Stebbins* v. *Doncasters, Inc.*, supra, [263 Conn. 234]. Thus, in order to satisfy the substantial certainty exception, the plaintiff must show that the [defendant's] subjective intent was to engage in an activity that it knows bears a substantial certainty of injury to its employees. [*Suarez I* and *Suarez II*] established a heavy burden to demonstrate intentional acts."

The court noted the New Jersey multifactor framework that our Supreme Court found "particularly instructive": "(1) prior similar accidents related to the conduct at issue that have resulted in employee injury, death, or a near-miss, (2) deliberate deceit on the part of the employer with respect to the existence of the dangerous condition, (3) intentional and persistent violations of safety regulations over a lengthy period of time, and (4) affirmative disabling of safety devices. *Lucenti* v. *Laviero*, supra, 327 Conn. 782." (Internal quotation marks omitted.) Applying those factors to the facts of the case at hand, the court concluded that those facts did "not yield a showing that the [defendant] intentionally created a dangerous condition and that the condition was substantially certain to cause injury to the [plaintiff]."

More to the point, the court found that "there is no evidence of any prior similar accidents or any accident that occurred during the past years performing this same process to clean [the auger]. The plaintiff has not provided any evidence that the defendant did anything

to deceive or place the employees in a dangerous position. The plaintiff argue[d] that the defendant was to put in new lockout devices to activate and control the equipment, but there is no information provided that the failure to have them installed in the six months prior to the accident had been purposeful to either save time or money or that the lack of or initiation of these procedures was intentional or would cause injury. The failure to have the new device in place on this date, while possibly a sign of poor management, is not tantamount to the intentional conduct which is described by our courts. Interestingly enough, according to the plaintiff's deposition testimony, the defendant took the time with its employees to discuss various changes it was making for safety and other operational procedures just six months before this accident. The change which was to be made for the starting controls of the auger . . . was known to the plaintiff because he had been present in meetings which were obviously scheduled to discuss the operations of the plant and new procedures. Unlike many of the cases discussed [in this memorandum of decision], the defendant in this case was taking positive action for oversight of the operations. Even prior to the discussion of the lockout device, the defendant had in place a procedure for the person cleaning the auger to determine that it was ready to turn on. There was no testimony that this had changed. The plaintiff offered this testimony and then could not remember specifically what he did or if the process was followed.

"The process at issue in this action did not, unlike other actions, involve direct contact with the auger . . . . Unlike [the *Suarez* cases], where the plaintiff was . . . cleaning the machine out with his hands while it was still running, or *Sorban*, where the machine was working and [something broke off] hitting the plaintiff, the operation here called for the machine to be off

until the person cleaning it gave the approval to start it. If anything, the evidence presented by both parties as to training and oversight creates the image of negligence in the operation or a lackadaisical approach to the placement of the new process to the factory.

"It should also be noted that up until this accident there [were no violations of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 et seq.], no accidents, no verbal complaint by [the plaintiff] or any others, no evidence that the defendant chose to not install the lockout [devices] for purposes of saving money or time in the operation and, therefore, there was no deceitful or even improper purpose demonstrated by the plaintiff. . . .

"[T]here is no testimony or evidence that the placement of a checks and balance process would have created a different scenario. The plaintiff testified in his deposition that there was a process that was followed, to his knowledge, which is [that] the [auger] would not go on until he or whoever was performing the cleaning would give a sign to begin it. The plaintiff testified at his deposition that his understanding was, if he saw the auger . . . on when he was preparing to clean [it], he would communicate to turn it off. He was not as clear in the affidavit he submitted to support the objection to the motion for summary judgment. The plaintiff was not clear as to whether the machine was on or off when he first climbed the ladder and, although he stated he does not recall, he cannot say that he failed to follow his own training and/or understanding to have it turned off at his signal.

"Lastly, there was no evidence or testimony of either a failure to follow safety regulations before this incident, a citing by any agency of particular safety violations, or even any knowledge of the existence of any safety concerns before this incident. As to the final step,

there was absolutely no testimony that the defendant did anything to disable or change any device, including the starting of the auger, for any improper reason. These findings, which follow [our Supreme Court's decision in] *Lucenti*, lead to the conclusion that there was no intentional action by the [defendant] that was substantially certain to injure." (Internal quotation marks omitted.)

II

In his appellate claim that the court improperly granted the defendant's motion for summary judgment, the plaintiff raises three issues: summary judgment was inappropriate because (1) questions regarding intent are questions of fact to be resolved by the trier of fact, (2) the defendant was deliberately deceptive by failing to install the lockout devices when it knew that they were required, and (3) the defendant coerced the plaintiff into cleaning the auger.[6] The claims are not persuasive.

A

The plaintiff first claims that the court improperly rendered summary judgment because a party's intent

[6] The court further found that there was no evidence that the defendant failed to follow safety regulations or even had knowledge of the existence of any safety concerns before the present incident. The court found "absolutely no testimony that the defendant did anything to disable or change any device, including the starting of the auger, for any improper reasons." The court concluded that these findings followed our Supreme Court's decision in *Lucenti* v. *Laviero*, supra, 327 Conn. 764, and led to the conclusion that there were no intentional actions by the defendant that were substantially certain to injure an employee.

The plaintiff does not claim that the court improperly determined that there was no evidence of a prior similar incident at the facility or that there were intentional and persistent violations of safety regulations over a lengthy period of time. We reject the plaintiff's claim that an intent to injure should be inferred from OSHA violations found at the facility after he was injured. *Lucenti* requires evidence of intentional and persistent violations of safety regulations over a prior lengthy period of time. See id., 782.

is a question of fact for the jury to determine. The plaintiff is correct that, as a general proposition, intent is a question of fact for the trier of fact. E.g., *State* v. *Johnson*, 26 Conn. App. 779, 784, 603 A.2d 440, cert. denied, 221 Conn. 925, 608 A.2d 690 (1992). In the present case, however, there are no facts to substantiate the plaintiff's claim that the defendant intended to create a dangerous condition with substantial certainty to cause injury.

"To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents." (Internal quotation marks omitted.) *Reynolds* v. *Chrysler First Commercial Corp.*, 40 Conn. App. 725, 729, 673 A.2d 573, cert. denied, 237 Conn. 913, 675 A.2d 885 (1996). To successfully oppose a motion for summary judgment when intent is at issue, a plaintiff must raise a necessary factual predicate to demonstrate a genuine issue of material fact regarding intent. E.g., *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 782–83, 196 A.3d 328 (2018).

"Although it is less demanding than the actual intent standard, the substantial certainty standard is, nonetheless, an intentional tort claim requiring an appropriate showing of intent to injure on the part of the defendant. . . . Specifically, the substantial certainty standard requires that the plaintiff establish that the employer intentionally acted in such a way that the resulting injury to the employee was substantially certain to result from the employer's conduct. . . . To satisfy the substantial certainty standard, a plaintiff must show more than that [a] defendant exhibited a lackadaisical or even cavalier attitude toward worker safety . . . . Rather, a plaintiff must demonstrate that [the] employer believed that its conduct was substantially certain to cause the employee harm. . . . Substantial certainty exists when the employer cannot be believed if it denies that it knew the consequences were certain to follow."

(Citation omitted; internal quotation marks omitted.) *Binkowski* v. *Board of Education*, 180 Conn. App. 580, 589–90, 184 A.3d 279 (2018).

Our Supreme Court has held that "even with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact. See, e.g., *Connell* v. *Colwell*, [214 Conn. 242, 251, 571 A.2d 116 (1990)] (summary judgment granted in issue of fraudulent concealment); *Dubay* v. *Irish*, 207 Conn. 518, 534, 542 A.2d 711 (1988) (summary judgment granted in issue of wilful, wanton or reckless conduct); *Multi-Service Contractors, Inc.* v. *Vernon*, 193 Conn. 446, 452, 477 A.2d 653 (1984) (summary judgment granted on questions of good faith and wilful misconduct)." *Wadia Enterprises, Inc.* v. *Hirschfeld*, 224 Conn. 240, 250, 618 A.2d 506 (1992); see also *Scheirer* v. *Frenish, Inc.*, supra, 56 Conn. App. 233–35 (summary judgment properly granted on question of employer's intent).

In support of his claim, the plaintiff argues that there are questions of fact regarding two of the factors the court was to consider in determining whether there was sufficient evidence as to the defendant's intent, namely, whether the defendant was deliberately deceptive with respect to installing the lockout devices and whether the defendant placed him under significant duress to clean the auger. For the reasons stated in part II B and C of this opinion, we disagree, as a matter of law, as to whether there were any genuine issues of fact regarding the defendant's intent.

B

The plaintiff claims that there were genuine issues of material fact as to whether the defendant was deliberatively deceptive in failing to install the power lockout device for the auger. We disagree.

The following additional undisputed facts are relevant to this claim. Approximately six months prior to

the plaintiff's accident, the defendant met with its employees at the facility and informed them that it would be installing power lockout devices on machinery. The lockout devices require the use of multiple keys to turn on the power to a machine. The plaintiff argues that the purpose of the lockout devices was to prevent a machine from being turned on without a number of employees with keys taking steps to initiate power. Although the defendant acquired the lockout devices, the devices were stored in the control room at the time of the plaintiff's injury. The plaintiff claims that the defendant's failure to install the devices, even though they were in its possession, was deliberate deception akin to disabling a lockout device.[7]

In its memorandum of decision, the court noted that the defendant had presented an affidavit from Anthony Damiano, a recently retired vice president of the defendant, who averred that there had not been any injuries at the Stamford facility and that cleaning the auger was performed two or three times per year for the past twenty years by many different employees. In addition, the court correctly noted: "[W]hat the plaintiff does emphasize as the basis for a finding of an intentional act is the failure to install a lockout system that would require multiple individuals to use a key to start the auger machine and the OSHA finding after the accident. [See footnote 6 of this opinion.] The [court in] *Lucenti* . . . stated that our appellate courts, consistent with the New Jersey multifactor standard, have found that, although warnings to the employer regarding the safety

[7] In making this claim, the plaintiff compares the facts of the present case with the facts of *Lucenti* v. *Laviero*, supra, 327 Conn. 789. The *Lucenti* facts are wholly distinguishable. In *Lucenti*, the employer "rigged" the throttle of a malfunctioning excavator, rather than repair the piece of equipment. Id. But even under those facts, our Supreme Court concluded that the rigging of the excavator's throttle did not establish a genuine issue of material fact with respect to whether the "defendants believed there was a substantial certainty that the rigged excavator would injure the plaintiff or any other employee." Id., 790–91.

of workplace conditions are relevant evidence, they do not, without more, raise a genuine issue of material fact to defeat summary judgment with respect to whether an employer subjectively believes that an employee's injuries are substantially certain to result from its actions. The [court in] *Lucenti* . . . analyzed *Stebbins* v. *Doncasters, Inc.*, supra, 47 Conn. Supp. 640, where the employer failed to follow warnings and recommendations but the court determined this was nothing more than mere failure to provide safety or protective measures. . . . [T]he [court in] *Lucenti* . . . opined that such submission may have exhibited a lackadaisical attitude toward worker safety but that such a finding does not logically infer that the employer believed its conduct was substantially certain to cause injury to the employees. So, too, in the [present] action, the defendant did not install the lockout devices, but it is not logical with the evidence in this action to find that the failure to do so was intentional conduct to injure the [plaintiff] with substantial certainty." (Internal quotation marks omitted.)

On the basis of our review of the record, we conclude that the court's analysis of the undisputed facts and the cases it relied on was proper. We, therefore, agree with the court's conclusion that there is no genuine issue of material fact that the defendant was not deliberately deceptive in failing to install the lockout devices and did not subjectively believe that the plaintiff's injury was certain to follow. There is no question that the defendant was aware of the dangers posed by powerful machines that could accidentally be turned on, causing injury to its employees. The defendant not only informed its employees that it was aware of potential danger and of its intention to install the lockout devices; it also had acquired the devices. Although the defendant may not have made a wise managerial decision by failing to install the lockout devices expeditiously—which is unclear from the record—one cannot infer deception or

a subjective intent to injure employees from that decision. See *Sorban* v. *Sterling Engineering Corp.*, supra, 79 Conn. App. 457 (failure to act does not meet high threshold of intent to cause injury). Finally, failure to install safety devices promptly is markedly different from affirmatively disconnecting the safety devices, and the failure in this case is not sufficient to demonstrate the necessary intent to injure.

C

The plaintiff's third claim is that the court improperly granted the defendant's motion for summary judgment because there are genuine issues as to whether he cleaned the auger under duress. We do not agree.

On the basis of the plaintiff's testimony, the court noted that he had not been specifically trained to clean the auger. He, however, had performed the task the year before, and he had seen the cleaning performed by various employees at other times. He did not ask for direction or assistance because he was unclear as to how to perform the task. He did not complain that it was unsafe, and he provided no evidence that before the incident he believed he was performing a task that could even possibly lead to injury. The court stated: "This is unlike the plaintiffs who believed they would be fired if they did not do the job [as occurred in *Suarez I*. The plaintiff's] testimony about an unrelated job [he performed while working for the defendant] and the [related] innuendo for some actions does not rise to the level of being forced to perform the task. The plaintiff was not specific as to the details involving the prior verbal warning [he received], and without more there is no evidence that there is any similarity between the incidents. Interestingly, this belief by the plaintiff was never verbalized until [he was deposed], and even then, he indicated that no supervisor gave him such a warning for this task. He also testified that he never complained,

unlike the plaintiff in *Ducharme*,[8] and never asked to perform the task in a different manner." The plaintiff raised no genuine issue of material fact because he provided no evidence of any prior difficulties or injury that occurred in the years before the event at issue in this case.

On appeal, the plaintiff claims that there are genuine issues of material fact that he was coerced to clean the auger and that he could not complain about the dangerous procedure used to clean it. In his brief on appeal, the plaintiff points to a complaint he raised in the past with respect to another task he was asked to perform. On the basis of that experience, he claims that he believed that he could not raise his concerns about cleaning the auger. The plaintiff, however, presented no evidence that he previously had safety concerns about cleaning the auger. The trial court, therefore, found that the plaintiff's deposition testimony was insufficient to create an issue of fact that he was coerced to clean the auger. On appeal, the plaintiff has not pointed to any facts that cause us to disagree with the trial court's determination. The plaintiff, therefore, cannot prevail—despite his catastrophic injury—and we conclude that the court properly granted the defendant's motion for summary judgment.

[8] In *Ducharme* v. *Thames Printing Co.*, Superior Court, judicial district of New London, Docket No. CV-09-6001312-S (May 5, 2015) (*Cole-Chu*, *J.*) (60 Conn. L. Rptr. 736), the plaintiff was a printing press operator, a position that required him to remove paper that jammed the press. Id., 737. On the day he was injured, he activated the safety features before attempting to remove paper, which should have prevented the press from turning back on. Id. As he reached into the press, he accidentally started the press, which resulted in injuries to his hand. Id. In denying the defendant's motion for summary judgment, the court found evidence that the press' multiple safety devices were not functioning and the manufacturer's safety guards had been removed. Id. Prior to being injured, the plaintiff had complained to his supervisor about the safety defects. Id., 739. His supervisor threatened him with the loss of employment if he did not perform and told the plaintiff that the defendant was not going to invest money in a machine it intended to replace. Id. The court concluded that a jury could infer from the evidence that the defendant knew of the safety issues, taking the case out of the exclusivity provision of the act. Id., 739–40.

The judgment is affirmed.

In this opinion the other judges concurred.

SRINIVAS KAMMILI *v.* SAISUDHA KAMMILI
(AC 41576)

Alvord, Prescott and Lavery, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving his marriage to the defendant, claiming that the trial court inequitably distributed the parties' marital property, improperly declined to admit many of his exhibits into evidence, and failed to address several of his pretrial motions in a timely manner. *Held*:

1. The trial court did not abuse its discretion in distributing the marital property, this court having concluded that, based on a consideration of the plaintiff's arguments and an independent review of the overall distribution and the record, that the court's distribution of the property was not improper; the trial court could have concluded from the defendant's testimony and other evidence that the defendant did not withdraw funds from the parties' joint bank accounts in violation of the automatic court orders, and, based on that conclusion and the relevant statutory criteria, decided that it was appropriate to allow each party to retain his or her respective bank accounts as part of the overall distribution of marital property; moreover, because the plaintiff agreed with the trial court that it did not have jurisdiction to distribute property not owned by either party, he waived that part of his claim concerning the distribution of real property owned by the defendant's father, and, taking into account the financial standing of the parties at the time of trial, the trial court's order to sell one of the parties' homes was not improper; furthermore, in light of this court's decision in *Picton* v. *Picton* (111 Conn. App. 143), and having reviewed the trial court's overall distribution of marital property and the record, the trial court did not improperly order that the plaintiff either return the defendant's jewelry to her or forfeit $50,000 of his share of the proceeds from the sale of one of their homes.
2. This court declined to review the plaintiff's claim that the trial court abused its discretion when it declined to admit his exhibits into evidence due to an inadequate record; the plaintiff never requested that any of the excluded exhibits be marked for identification, and he did not point to an adequate substitute in the record that would allow this court to analyze the contents of his excluded evidence.
3. The trial court did not abuse its discretion by not adjudicating the plaintiff's outstanding pretrial motions until after the trial concluded, the plaintiff having failed to demonstrate that he was harmed by either the timing

or substance of the trial court's decisions; at a pretrial status conference the plaintiff indicated, after the trial court had addressed various discovery issues, that he had everything he needed to try the case, thereby conceding that he was not harmed by the timing of the court's adjudication of his discovery related pretrial motions; moreover, the plaintiff did not assert that the court incorrectly denied any of his pretrial motions and could not demonstrate that he was harmed by the substance of the court's decisions.

Argued December 9, 2019—officially released June 2, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Prestley, J.*, rendered judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

David V. DeRosa, for the appellant (plaintiff).

Steven R. Dembo, with whom were *Caitlin E. Kozloski*, and, on the brief, *P. Jo Anne Burgh*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Srinivas Kammili, appeals from the judgment of the trial court dissolving his marriage to the defendant, Saisudha Kammili. The plaintiff makes numerous claims[1] on appeal, including

[1] Within each of these claims, the plaintiff asks this court to consider several issues. In his claim concerning his pretrial motions, for example, the plaintiff argues that the court abused its discretion by failing to address *eleven* of his pretrial motions in a timely manner.

Although the number of claims that a party may bring on appeal is not limited by rule, we are mindful of what our Supreme Court has stated regarding the merits of an appeal that sets forth a multiplicity of issues. "[A] torrent of claimed error . . . serves neither the ends of justice nor the [plaintiff's] own purposes as possibly meritorious issues are obscured by the sheer number of claims that are put before [the court].

"Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one [issue]. . . . [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one. . . .

"Most cases present only one, two, or three significant questions. . . . Usually . . . if you cannot win on a few major points, the others are not

that the trial court (1) improperly declined to admit many of his exhibits into evidence, (2) failed to address several of his pretrial motions in a timely manner, and (3) inequitably distributed the marital property, specifically, the parties' bank accounts, real property, and certain gold jewelry.[2] We disagree with the plaintiff and, accordingly, affirm the judgment of the court.

The record reveals the following facts and procedural history. The plaintiff commenced this marital dissolution action on March 30, 2017. The parties tried the case to the court on January 25 and 26, 2018. Although the plaintiff was represented by an attorney when he commenced this action, he ultimately represented himself at trial.

The trial court issued a memorandum of decision on April 3, 2018, in which it dissolved the parties' marriage and, among other things, distributed the parties' assets.[3] The court, in its decision, also entered additional orders concerning, inter alia, eleven outstanding pretrial motions.

On April 19, 2018, the plaintiff filed a motion to reargue, in which he raised, inter alia, many of the claims he brings in this appeal. The court denied the plaintiff's motion to reargue. This appeal followed. Additional facts will be set forth as necessary.

likely to help. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Pelletier*, 209 Conn. 564, 566–67, 552 A.2d 805 (1989).

[2] Within each of his first two claims, the plaintiff alleges that "[t]he [c]ourt violated [his] constitutional right to due process . . . ." Although the plaintiff states that his constitutional right to due process was violated, he placed this claim under the same headings in which he claimed that the court abused its discretion, and almost all of his analysis under these two headings focuses on whether the court abused its discretion. Indeed, the plaintiff provided nothing more than bare assertions and minimal analysis concerning his constitutional claims. Because he has not adequately briefed his constitutional claims, we decline to review them. See *State* v. *Buhl*, 321 Conn. 688, 722–29, 138 A.3d 868 (2016).

[3] The trial court issued a corrected memorandum of decision on April 17, 2018. All references throughout this opinion are to the court's corrected memorandum.

I

The plaintiff first argues that the trial court improperly declined to admit "at least [twenty]" of his exhibits into evidence because he failed to comply with the trial management order.[4] Moreover, the plaintiff asserts that the trial court's refusal to admit his exhibits harmed him because it prevented the court from comprehending his assertion that certain real property in India, which was owned in whole or in part by individuals other than the parties to the action, should nonetheless be distributed as marital property.[5] Ultimately, the plaintiff claims that the court's refusal to admit many of his exhibits constituted an abuse of discretion. We decline to review this claim.

[4] The trial management order for all trials of family matters states, in relevant part, the following: "Counsel and self-represented parties are ordered to exchange with each other, and give to the Family Caseflow Office, the following documents that comply with the Trial and Hearing Management Order so that they are received not less than 10 (ten) calendar days before the assigned trial or hearing date. . . .

* * *

"2. A list of all pending motions, including motions to be decided before the start of the trial or hearing such as motions in limine and motions for protective order . . .

* * *

"6. A list of exhibits each party reasonably expects to introduce in evidence . . .

* * *

"If a party does not follow this order, the party may have sanctions imposed by the court, which may include a monetary sanction, exclusion of evidence, or the entry of a nonsuit, default or dismissal." (Emphasis omitted.)

In response to the plaintiff's failure to comply with the trial management order, the defendant filed a motion in limine in which she "move[d] that the plaintiff be precluded from offering any testimonial or documentary evidence in the . . . trial . . . . The court "grant[ed] [the defendant's] motion in limine in part." The court explained its decision by stating the following: "With respect to the exhibits, if [the plaintiff] attempts to offer exhibits, I'm going to take it on a *case-by-case* [*basis*]. . . . With respect to witnesses, he has none." (Emphasis added.) At trial, the court admitted four of the plaintiff's exhibits into evidence.

[5] The plaintiff claims that "at least [twenty]" of his exhibits were excluded from evidence at trial because the court granted, in part, the defendant's motion in limine for the plaintiff's failure to comply with the trial management order. Our independent review of the transcript, however, did not uncover any examples of the court explicitly stating that it was excluding an exhibit that the plaintiff offered because he violated the trial management order. Moreover, the trial transcript is riddled with instances in which the

We begin by stating the well settled principles concerning this court's ability to review a party's evidentiary claims. "It is the responsibility of the appellant to provide an adequate record for review." Practice Book § 61-10 (a); see also Practice Book § 60-5. Importantly, if a party challenging an evidentiary ruling on appeal "failed to have [an excluded exhibit] marked for identification, it is not part of the record and [this court is] unable to review the ruling which excluded it from admission into evidence." *Carpenter* v. *Carpenter*, 188 Conn. 736, 745, 453 A.2d 1151 (1982).[6] Moreover, "[a]lthough we allow [self-represented] litigants some latitude, *the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law*." (Emphasis added; internal quotation marks omitted.) *Traylor* v. *State*, 332 Conn. 789, 806, 213 A.3d 467 (2019).

In the present case, the court admitted four of the exhibits that the plaintiff offered at trial. As for exhibits that the trial court excluded, the plaintiff never requested that any of these exhibits be marked for identification. Indeed, in his reply brief, the plaintiff admits as much. Because the plaintiff failed to request that his excluded evidence be marked for identification, and he has not pointed us to, nor are we aware of, an adequate substitute in the record that would allow us to analyze the contents of his excluded evidence, we conclude that the record is inadequate to review his evidentiary claim.[7]

plaintiff drew the court's attention to a document but never offered it as an exhibit for admission into evidence.

[6] This court may, however, review a claim regarding the exclusion of an exhibit that was not marked for identification "if the record reveals an adequate substitute for that exhibit." *Finan* v. *Finan*, 287 Conn. 491, 495, 949 A.2d 468 (2008). Examples of what might constitute an adequate substitute in the record include a formal offer of proof, an excluded exhibit being attached to a motion that was before the court, and other evidence in the record that would allow this court to decipher the contents of the excluded exhibit. See id., 495–96.

[7] In the alternative, the plaintiff asserts that, because he was a self-represented litigant, the court was required, but failed, to mark, sua sponte, his

II

The plaintiff next claims that the trial court abused its discretion by not considering eleven of his pretrial motions in a timely manner. The plaintiff asserts that the court improperly delayed consideration of his pretrial motions because he failed to comply with the trial management order. He does not assert, however, that the court ultimately decided the motions incorrectly. In essence, the plaintiff argues that, by not hearing his motions in a timely manner, he was precluded from obtaining certain information from the defendant through discovery and that this prevented him from providing the court with the information that it needed to distribute marital assets equitably. We disagree.

We review a party's challenge to a court's decision regarding docket management for an abuse of discretion. See, e.g., *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, 176 Conn. App. 461, 476, 170 A.3d 682 (2017). Although a trial court has broad discretion in managing its docket; see *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 182, 73 A.3d 742 (2013); "a trial court must consider and decide on a reasonably prompt basis all motions properly placed before it . . . ." *Ahneman* v. *Ahneman*, 243 Conn. 471, 484, 706 A.2d 960 (1998).

The following additional facts are relevant to our resolution of this claim. On October 10, 2017, the court ordered that all pending pretrial motions were to be considered at trial.[8] In its memorandum of decision,

excluded exhibits for identification, even though he did not request that these exhibits be marked. This assertion, however, contradicts our well settled case law stating that, "[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Traylor* v. *State*, supra, 332 Conn. 806. Thus, the fact that the plaintiff represented himself at trial bears no weight on our ultimate conclusion that the plaintiff failed to provide an adequate record for this court to review his evidentiary claim.

[8] Moreover, the court, on November 14, 2017, and January 23, 2018, repeated its order that it would take up pending motions at the time of trial.

the court decided ten of the plaintiff's pretrial motions and one of the defendant's pretrial motions.[9] The court denied all pending pretrial motions, except for one of the plaintiff's motions, which the court granted in part.[10] Of the plaintiff's pretrial motions that the court denied, only two can be read as pertaining to discovery issues that may have required resolution prior to trial. The remaining motions that the court denied in its memorandum were either moot[11] or were of a nature that they did not need to be resolved before trial.[12]

The plaintiff's claim that he was harmed by the timing of the court's adjudication of his pending pretrial motions fails for two reasons. First, to the extent that the plaintiff argues that he was harmed by the court's deciding his pretrial motions pertaining to his discovery requests in its memorandum of decision that it issued after the trial had concluded, his argument is unper-

[9] The trial court did not address the plaintiff's motion for order filed on October 19, 2017, in which the plaintiff requested that the court award him damages from the attorney who had represented him for a period of time in the present case. This motion was neither on the calendar nor marked ready. Thus, this motion was not properly before the court and, accordingly, we do not address it in this opinion.

[10] The plaintiff's motion for order pendente lite filed on October 6, 2017, was "granted, in part, as to return of the plaintiff's personal property such as trophies or other memorabilia that the defendant has in her possession."

[11] The court denied as moot the following nondiscovery related pretrial motions of the plaintiff: a motion for modification of child support and visitation; a motion to consolidate and refinance all loans belonging to the parties; and a motion to order the defendant to make minimum payments on all credit card bills and loans in the names of both him and the defendant. The court, however, addressed the issues raised in these motions—child support, visitation rights, and the distribution of debts—in its memorandum of decision.

[12] Of the plaintiff's remaining pretrial motions, the court denied the following: two motions alleging breach of fiduciary duty, breach of contractual obligation to a third-party beneficiary, and breach of implied contract; a motion to vacate the court's August 29, 2017 order to liquidate a brokerage account belonging to the parties and to order that the defendant return $72,000 to a joint bank account; and a motion to order that the defendant cease making statements that were false and misleading and to sanction the defendant and her attorney for engaging in such conduct.

suasive. Indeed, at a status conference held on December 1, 2017, the plaintiff indicated, after the court had addressed various discovery issues, that he had everything that he needed to try the case. Moreover, the plaintiff concedes in his appellate brief that "[t]here was extensive discovery, including interrogatories and depositions . . . [and that] [t]here was very little that each side did not know about the other sides' position, given the extent of discovery." In light of these statements, the plaintiff has conceded that he was not harmed by the timing of the court's adjudication of his discovery related pretrial motions.

Second, the plaintiff does not assert that the court incorrectly denied any of his ten pretrial motions. Because he does not argue that the court incorrectly denied any of these motions, the plaintiff cannot demonstrate that he was harmed by the substance of the court's decisions. Therefore, because the plaintiff has failed to demonstrate that he was harmed by either the timing or substance of the trial court's decisions on his pretrial motions, we reject his claim that the trial court abused its discretion by not adjudicating his outstanding pretrial motions until after the trial concluded.

III

The plaintiff next claims that the trial court's orders pertaining to the distribution of marital property were improper for various reasons. Specifically, the plaintiff argues that the trial court's distribution of the parties' bank accounts,[13] real property, and certain gold jewelry constituted an abuse of discretion. We disagree.

Before addressing the plaintiff's claim and each of its parts, we set forth our well settled standard of review of a trial court's orders pertaining to the distribution

[13] The term "bank accounts" used throughout this opinion refers to the checking and savings accounts attested to in both parties' financial affidavits. The term "brokerage account" used throughout this opinion refers to an account containing stocks that the court ordered the parties to liquidate in its August 29, 2017 pendente lite order.

of marital property. Our Supreme Court has stated: "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017). Furthermore, "[i]n reviewing the trial court's [orders distributing marital property] under [the abuse of discretion] standard, we are cognizant that [t]he issues involving [these] orders are entirely interwoven. The rendering of judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." (Internal quotation marks omitted.) *Kunajukr* v. *Kunajukr*, 83 Conn. App. 478, 481, 850 A.2d 227, cert. denied, 271 Conn. 903, 859 A.2d 562 (2004).

In fashioning orders that distribute marital property, "General Statutes § 46b-81 (c) directs the court to consider numerous separately listed criteria. . . . [Section] 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to assign to either the husband or wife all or any part of the estate of the other. On the basis of the plain language of § 46b-81, *there is no presumption in Connecticut that marital property should be divided equally* prior to applying the statutory criteria." (Emphasis added; internal quotation marks omitted.) *Desai* v. *Desai*, 119 Conn. App. 224, 238, 987 A.2d 362 (2010).

The following facts are relevant to our resolution of this claim. On August 29, 2017, the trial court issued a pendente lite order regarding funds contained in a brokerage account owned by both parties. At the defendant's request, and with the plaintiff's agreement, the court ordered that the brokerage account be liquidated. The court also ordered the parties to use the proceeds from the sale of stocks held in the brokerage account to cover expenses such as tuition for one of the parties' children, health insurance for both parties and their children, and the mortgage payments on the marital home. In addition, the court ordered that, after these expenses were paid, any remaining proceeds from the stock sales were to be divided evenly between the parties.

After a trial in which various issues concerning property distribution were addressed, the court distributed the marital property in its memorandum of decision. The court ordered that the parties retain control over their own bank accounts. In the most recently filed financial affidavits that were before the trial court at the time of trial, the plaintiff averred that he had a total net value of -$168.50 in his bank accounts, and the defendant averred that she had a total net value of $1013 in her bank accounts.[14]

In addition, the court distributed the parties' real property in the United States and India. First, with respect to the properties in the United States, the court awarded three properties to the defendant, two properties to the plaintiff, and ordered that one property be sold. Specifically, the court awarded the defendant the marital home in Windsor (Windsor home), which the court found had a fair market value of $365,000. The court also ordered the plaintiff to immediately vacate

[14] The most recent financial affidavits before the court at the time of trial were the plaintiff's May 22, 2017 affidavit and the defendant's January 15, 2018 affidavit.

the home in Illinois (Illinois home) so that this property could be sold. In its memorandum, the court found that this property had a fair market value of $630,000 and noted that it already had been marketed by a real estate agent but had not yet sold at the time of trial. Per the court's order, the proceeds of this property's sale were to be used to cover "all outstanding real estate and closing costs, outstanding tax liabilities on any of the United States properties . . . 100 [percent] of the appraisal fees for any appraisals done in this case . . . [and] [a]ttorney's fees of up to $10,000 per party . . . ."[15] After covering these liabilities and expenses, any remaining proceeds from the sale of the Illinois home were to be split evenly between the parties. The court ordered, however, that "[i]f the plaintiff has not paid his share of the child's college expenses, as ordered and agreed upon previously, or made any other payments ordered during the pendente lite period, that amount shall be deducted from his share of the proceeds [from the sale of the Illinois home] and paid to the defendant."[16]

Aside from the Windsor and Illinois homes, there were four other properties in the United States that the parties owned. The court ordered that the plaintiff and the defendant each receive two of these four remaining properties. Of the four properties, the plaintiff received two properties with a total fair market value of $142,400, and the defendant received two properties with a total fair market value of $170,000.

With respect to the real property in India, the court ordered that "each party shall retain any properties held

[15] The court noted that the $10,000 allocated to cover the defendant's attorney's fees did "not include the $7500 that was previously awarded to the defendant during the pendente lite period."

[16] As discussed later in this opinion, the court also ordered the plaintiff to forfeit the first $50,000 of his share of the proceeds from the sale of the Illinois home to the defendant if he failed to return certain gold jewelry to her within thirty days.

jointly with family members or gifted specifically to that party." There were six properties in India that either the parties did not co-own with a family member or that were not specifically gifted to a party. Of the six properties, the court awarded two to the defendant, one to the plaintiff, and ordered that three be sold and that the proceeds of those sales be divided equally between the plaintiff and the defendant. In effect, the court awarded properties with a total fair market value of $525,229.50 to the plaintiff and properties with a total fair market value of $911,034.50 to the defendant.

As for personal property, the court found that the plaintiff had the defendant's jewelry. The court awarded the defendant "[a]ny gold jewelry or jewelry belonging to [her] or the children . . . ." Moreover, the court ordered the plaintiff to "return to the defendant any other gold or jewelry that he . . . removed from Connecticut or that is in his possession." The defendant testified that this jewelry was valued at $200,000 and requested that the court order the plaintiff to pay her $200,000 if he failed to return the jewelry to her. The court ordered, in its memorandum of decision, that, "[i]f [the plaintiff] claims that he does not have the gold jewelry or fails to return it within [thirty] days, the defendant shall receive the first $50,000 of the proceeds to which the plaintiff is entitled from the sale of the Illinois [home]."

In support of his claim that the court's distribution of marital property constituted an abuse of discretion, the plaintiff sets forth multiple arguments. He first argues that the trial court improperly ordered the parties to retain their own bank accounts[17] because, in

[17] The plaintiff also argues, in a somewhat contradictory fashion, that the court made no orders distributing cash held in the parties' bank accounts. In its memorandum of decision, the trial court stated: "Retirement and *Bank Accounts*: The parties shall each retain their own pension/retirement accounts." (Emphasis added.) Importantly, the plaintiff did not file a motion for articulation in which he asked the court to clarify whether the court's orders distributed the parties' bank accounts in addition to the retirement

doing so, the court failed to account for the approximately $80,000 which, he asserts, the defendant withdrew from bank accounts held in joint name in violation of the automatic orders filed on April 6, 2017.[18] Moreover, the plaintiff asserts that, even though the defendant testified that she withdrew this money from the parties' joint bank accounts to cover expenses, she had, in fact, already been awarded funds to cover these expenses in the court's August 29, 2017 order liquidating the brokerage account. Thus, the plaintiff contends that, because the defendant removed money from the joint bank accounts in violation of the automatic orders to cover expenses for which she was already provided funds, the trial court should have awarded him some compensation for the funds that the defendant withdrew. We are not persuaded by the plaintiff's argument.

At trial, the defendant testified that she removed funds from the joint bank accounts between early 2016 and May, 2017, to cover certain expenses. She also testified, however, that she had done so with the plaintiff's consent.

We are mindful that, in fashioning orders concerning the distribution of marital property, the trial court is in the best position to assess the evidence and testimony before it. See *Leo* v. *Leo*, 197 Conn. 1, 4, 495 A.2d 704 (1985); *Desai* v. *Desai*, supra, 119 Conn. App. 237–38. Thus, the trial court in the present case could have concluded from the defendant's testimony and other evidence before it that the defendant did not withdraw funds from the joint bank accounts in violation of the

accounts. Because the plaintiff failed to file a motion for articulation in which he requested that the court clarify whether it distributed the parties' bank accounts, we construe the order to include both retirement and bank accounts in light of the heading used by the court.

[18] The automatic orders state in relevant part that "[n]either party shall cause any asset, or portion thereof, co-owned or held in joint name, to become held in his or her name solely without the consent of the other party, in writing, or an order of the judicial authority."

automatic orders and, based on this conclusion and the relevant statutory criteria, decided that it was appropriate to allow each party to retain his or her respective bank accounts as part of the overall distribution of marital property. Moreover, having considered the court's overall distribution of marital property, and based on our independent review of the record, we conclude that the court's order distributing to each party his or her respective bank accounts was not improper.

The plaintiff next argues that the trial court's distribution of real property between him and the defendant was improper because the court failed to include certain real property as part of its distribution of marital property, declined to award him one of the homes in the United States that the parties owned, and did not adequately weigh his financial contribution in obtaining assets prior to the marriage. We are not persuaded for the reasons that follow.

In support of this argument, the plaintiff first asserts that the trial court incorrectly failed to award certain real property in India that was owned by the defendant's father. At trial, the plaintiff requested that the trial court consider evidence purporting to establish that certain real property owned by the defendant's father was, in fact, marital property. The court stated, however, that it did not have the authority to distribute property owned by someone other than the plaintiff or the defendant.[19] Importantly, the plaintiff *agreed* with the court that it did not have jurisdiction to award property owned by neither party.[20] Because the plaintiff agreed with the trial court that it did not have jurisdiction to distribute property owned by neither party, the plaintiff

[19] Moreover, the plaintiff, at trial, conceded that this property was owned by the defendant's father.

[20] "The Court: You cannot pursue any order on those properties [in this court]. . . .

"[The Plaintiff]: I know that, Your Honor."

has waived the part of his claim concerning the distribution of real property owned by the defendant's father, and, accordingly, we decline to review it. See *O'Hara* v. *Mackie*, 151 Conn. App. 515, 522, 97 A.3d 507 (2014) ("[w]hen a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal" (internal quotation marks omitted)).[21]

The plaintiff next asserts that the court improperly required him to transfer all interest he had in the Windsor home to the defendant while requiring him to vacate the Illinois home so that it could be sold. In essence, the plaintiff contends that, in distributing the marital property, it was improper for the court to not award him one of the homes.

In addressing this assertion, we are mindful that the trial court has broad discretion in awarding marital property, even if its orders result in an unequal property distribution. *Desai* v. *Desai*, supra, 119 Conn. App. 238 ("§ 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to assign to either the husband or wife all or any part of the estate of the other" (internal quotation marks omitted)); see also *Elliott* v. *Elliott*, 14 Conn. App. 541, 543, 548, 541 A.2d 905 (1988) (trial court did not abuse discretion in awarding 65 percent of proceeds of sale of marital

[21] The plaintiff argues that the court failed to distribute properties that were gifted to the defendant or that she co-owned with a family member. With respect to this property, the court ordered that "each party shall retain any properties held jointly with family members or gifted specifically to that party." Thus, the trial court did, indeed, distribute these properties and awarded them to the defendant *because* they were either gifted to her or she co-owned them with a family member.

Moreover, the *plaintiff* also received property as a result of the court's order concerning property that was gifted or co-owned with a family member. Indeed, the court found that the plaintiff "owned" two properties that he gifted to his parents but which would "return to him in a will." The court awarded these properties to the plaintiff. For these reasons, the plaintiff's argument is meritless.

residence to defendant and 35 percent to plaintiff). Thus, the fact that the defendant was awarded one of the homes and the plaintiff was not awarded one does not necessarily mean that the court's distribution of marital property was improper, as the plaintiff implies.

In the present case, the court ordered that the proceeds from the sale of the Illinois home be used to cover the parties' tax liabilities and other expenses. After these liabilities and expenses were covered, each party would then receive an equal share of the remaining proceeds. Indeed, based on the financial affidavits of both parties, which demonstrated that the parties had substantial liabilities, the court reasonably could have concluded that the Illinois home needed to be sold to provide the parties with cash to satisfy their liabilities. Taking into account the financial standing of the parties at the time of trial, and based on our independent review of the court's overall distribution of marital property and the record, we conclude that the court's order to sell the Illinois home was not improper.

The plaintiff also asserts that the overall award of property was improper because the trial court did not consider the plaintiff's financial contribution in obtaining assets prior to the marriage. In essence, the plaintiff argues that the court's distribution was improper because the court was required to, but ultimately did not, "consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates," as required by § 46b-81 (c).

Section 46b-81 (c) enumerates several factors that a trial court must consider when fashioning an order distributing marital property. The contribution of each party to the purchase of property is but one factor. See General Statutes § 46b-81 (c). "There is no . . . requirement that the court specifically state how it weighed these factors or explain in detail the importance it assigned to these factors." *Desai* v. *Desai*,

supra, 119 Conn. App. 238. Moreover, when a trial court states in its memorandum of decision that it has considered the factors listed in § 46b-81 (c) in fashioning an order distributing marital property, the "judge is presumed to have performed [his or her] duty unless the contrary appears [from the record]." (Internal quotation marks omitted.) *Picton* v. *Picton*, 111 Conn. App. 143, 152, 958 A.2d 763 (2008), cert. denied, 290 Conn. 905, 962 A.2d 794 (2009).

In its memorandum of decision, the trial court stated that it "fully considered the criteria of . . . § 46b-81 . . . as well as the evidence, applicable case law, the demeanor and credibility of the parties and witnesses and arguments of counsel in finding the facts and in reaching the conclusions reflected in [its] orders . . . ." The plaintiff has neither pointed us to, nor are we aware of, anything in the record that would dispute the accuracy of this statement. Thus, we reject the plaintiff's assertion that the trial court improperly failed to consider the factors set forth in § 46b-81 (c) when fashioning its orders to distribute the marital property.

The plaintiff's final argument is that the trial court improperly awarded all of the jewelry in his possession to the defendant and ordered that he forfeit $50,000 of his share of the proceeds of the sale of the Illinois home if he failed to return the jewelry to the defendant. We are not persuaded by this argument.

In reviewing this part of the plaintiff's claim, we are mindful that "the [trial] court, as the trier of fact and thus the sole arbiter of credibility, [is] free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 357, 999 A.2d 713 (2010). In the present case, the trial court chose to credit the defendant's evidence and testimony demonstrating that the plaintiff took the jewelry belonging to her and the children from a safe deposit box and would

not return it until she was obedient to him. The court also discredited the plaintiff's evidence and testimony, which, according to the plaintiff, tended to show that the defendant had the jewelry and that he did not. The court, as the sole arbiter of credibility, was free to credit the defendant's testimony and discredit the plaintiff's testimony in arriving at its factual finding that the plaintiff had the jewelry. See id.

Having concluded that the plaintiff had the jewelry, the court ordered that he return it to the defendant as part of the court's overall distribution of marital property. On appeal, the plaintiff has failed to articulate a reason to support a conclusion that, in light of the court's overall distribution of marital property, the court's decision to award all of the jewelry to the defendant was improper. Moreover, having considered the court's overall distribution of marital property, and based on our independent review of the record, we conclude that the court's decision to award the defendant all of the jewelry belonging to her and their children was not improper.

As for the trial court's decision to require that the plaintiff either return the jewelry to the defendant or forfeit $50,000 of his share of the proceeds from the sale of the Illinois home, this court previously has held that a trial court, in a marital dissolution case, may, within its discretion, include an order of this nature as part of its overall distribution of marital property. See *Picton* v. *Picton*, supra, 111 Conn. App. 150–51, 153–54. In *Picton*, we concluded that the trial court properly exercised its discretion by ordering that the plaintiff could retain possession of a vacation home he owned, provided that he pay the defendant $700,000 within ninety days of judgment being entered. See id., 148, 154. If, however, the plaintiff failed to make this payment within ninety days, then the plaintiff was required to "immediately list the property for sale . . . [and] [f]rom the net proceeds of that sale . . . pay to the

defendant the sum of $700,000 plus interest from the date of judgment at the statutory rate for judgments." (Internal quotation marks omitted.) Id., 148.

In the present case, the defendant submitted into evidence a list and photographs of the jewelry at issue. The court also had before it the defendant's testimony, in which she stated that the jewelry was worth $200,000.[22] In light of this court's decision in *Picton*, and having reviewed the trial court's overall distribution of marital property and the record, we conclude that the trial court did not improperly order that the plaintiff either return the defendant's jewelry to her or forfeit $50,000 of his share of the proceeds from the sale of the Illinois home.

Having considered all of the plaintiff's arguments, and based on our independent review of the trial court's overall distribution of marital property and the record, we conclude that the court's distribution of marital property was not improper. Thus, we conclude that the court did not abuse its discretion in distributing the marital property as it did.

The judgment is affirmed.

In this opinion the other judges concurred.

[22] The plaintiff asserts that the court improperly valued the jewelry at $50,000 without expert testimony. We disagree.

The defendant, who owned the jewelry, testified that it was worth $200,000. She also requested that the court order the plaintiff to pay her $200,000 if he failed to return the jewelry to her.

The trial court partially credited her testimony as to the value of the jewelry and valued it at $50,000, which is less than the amount that the defendant stated in her testimony. See *Porter* v. *Porter*, 61 Conn. App. 791, 799–800, 769 A.2d 725 (2001) (court's valuation of marital property was not clearly erroneous finding, even though court's valuation of property was less than valuation of property offered in testimony from both parties). A court, in valuing personal property, may rely on the testimony of its owner as to its value. See *Wolk* v. *Wolk*, 191 Conn. 328, 333, 464 A.2d 780 (1983) (concluding that court "improperly admitted [party's testimony] since [he] was neither *the owner of the jewelry* nor an expert" (emphasis added)); *Saporiti* v. *Austin A. Chambers Co.*, 134 Conn. 476, 479–80, 58 A.2d 387 (1948) (stating that "[t]estimony of the [party] as to the value of the furniture was proper, although no qualification other than his ownership of it was shown"). Thus, the plaintiff's argument is unavailing.

STATE OF CONNECTICUT *v.* LORI T.*
(AC 40384)

Prescott, Bright and Devlin, Js.

Syllabus

Pursuant to statute (§ 53a-98 (a) (3)), a person is guilty of custodial interference in the second degree when, knowing that she has no right to do so, she "holds, keeps or otherwise refuses to return a child . . . to such child's lawful custodian after a request by such custodian for the return of such child."

Convicted, after a jury trial, of three counts of the crime of custodial interference in the second degree, the defendant appealed to this court. The defendant's children were at her home in Glastonbury for purposes of visitation over a holiday weekend. The defendant's former husband, F, who is the children's father, had sole physical and legal custody of the children, but they wanted to live with the defendant and not with F. When F arrived to pick up the children in accordance with the visitation schedule, the defendant told F that she was not sending the children out to him because they did not want to come out and that she was going to do what the children wanted to do. F contacted N, a Norwalk police officer and the children's school resource officer, and told him about the children's refusal to return to his home in Norwalk. A few days later, N contacted the defendant by telephone and asked her why the children were not returned to F, and she told N that they did not want to come out to F and that she would not make them go with him. N then warned the defendant that she could be in trouble if she did not return the children to school. When the children were still not in school approximately one week later, N followed up with the defendant, who said that she would not return the children to school. Thereafter, N sought an arrest warrant for the defendant. On appeal, the defendant claimed that § 53a-98 (a) (3) was unconstitutionally vague as applied to her and that there was insufficient evidence to support her conviction. *Held*:

1. The defendant could not prevail on her unpreserved claim that § 53a-98 (a) (3) was unconstitutionally vague as applied to her, the defendant having failed to demonstrate the existence of a constitutional violation, and, therefore, her claim failed under the third prong of the test set forth in *State* v. *Golding* (213 Conn. 233):

   a. The defendant's claim that § 53a-98 (a) (3) was unconstitutionally vague as applied to her because the phrase "refuses to return" was not defined in the statute and its meaning was not otherwise sufficiently

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

clear or definite to provide notice that her inaction of not forcing the children to go with F could expose her to criminal liability was unavailing; the language of the statute provided clear notice to the defendant that the core meaning of the phrase "refuses to return," which could be ascertained from common dictionary definitions, encompassed the behavior of a person who either affirmatively declines to return a child to his lawful custodian or declines to take any affirmative steps to do so upon the lawful custodian's request, and a person of ordinary intelligence in the defendant's circumstances would have understood that her abdication of any parental responsibility to return the children to F violated the core meaning of the statute.

b. The defendant failed to demonstrate that she fell victim to arbitrary and discriminatory enforcement of § 53a-98 (a) (3); although the defendant claimed that the statute is subject to arbitrary enforcement due to its vagueness and that it, therefore, impermissibly delegates the resolution of the definition of the phrase "refuses to return" to police officers, judges and juries on an ad hoc basis, it was unnecessary to address the particular enforcement of the statute in this case, this court having concluded that § 53a-98 (a) (3) provided sufficient guidance as to what conduct is prohibited and that it has a clear core meaning within which the defendant's conduct fell.

2. The evidence was sufficient to sustain the defendant's conviction of three counts of custodial interference in the second degree; the jury reasonably could have inferred from the evidence presented at trial that the defendant had the ability to take some action to return the children to F but that she refused to do so, F and N having testified that the defendant stated that she would not make the children go with F and that she was going to do what the children wanted, and the defendant having testified that she was going to support the children's decision not to go with F and that she was not going to make the decision for them, even though, as their mother, she had a certain amount of power do so.

Argued September 13, 2019—officially released June 2, 2020

Procedural History

Substitute information charging the defendant with three counts of the crime of custodial interference in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Megan L. Wade, assigned counsel, with whom were *James P. Sexton*, assigned counsel, and, on the brief, *Emily G. Sexton*, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Justina Moore*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Lori T., appeals from the judgment of conviction, rendered following a jury trial, of three counts of custodial interference in the second degree in violation of General Statutes § 53a-98 (a) (3). On appeal, the defendant claims that § 53a-98 (a) (3) is unconstitutionally vague in its application to her and that there was insufficient evidence to support her conviction. We disagree with both claims, and, thus, we affirm the judgment of the trial court.

The following facts, on which the jury reasonably could have based its verdict, and procedural history are relevant to the issues on appeal. The defendant's four children, R, L, T, S,[1] were at her Glastonbury home for purposes of visitation over the Memorial Day weekend in 2015. The defendant's ex-husband, the children's father (CF), had sole physical and legal custody of the children, and the defendant had rights of visitation. The children, however, wanted to live with the defendant and not with CF.

In fact, R had been staying with the defendant for several months; after a physical incident involving CF in January, 2015, R, with the involvement of the Norwalk Police Department and the Department of Children and Families, went to stay with the defendant. Over the Memorial Day weekend, the children all decided that they were not going to go home with CF on May 25, 2015.

During the course of the weekend, CF received a couple of e-mails from one of the children telling him that she did not want to return to his home and that

[1] On May 25, 2015, R was thirteen years old, L and T were eleven years old, and S was nine years old.

she wanted to stay at the defendant's home. CF "went to pick . . . up [the children] on Memorial Day . . . according to [the] visitation schedule, which was 7:30 [p.m.], and [the defendant] came out of her house and told [him] that she wasn't sending the children out. The children didn't want to come out, and she was going to do what the children wanted to do." CF did not make any attempt to telephone the children regarding their decision to remain at the defendant's home, and he did not attempt to go inside the defendant's home to speak with the children in an effort to persuade them to return to his home. Instead, he went directly to the Glastonbury Police Department.

Officer Brian Barao of the Glastonbury Police Department went to the defendant's Glastonbury home to conduct a welfare check of the children at CF's request. He spoke with each child and determined that they all were okay. He did not arrest the defendant, but, rather, he encouraged her to seek legal counsel and to pursue these matters with the family court, which, the defendant told him, she was in the process of doing.

CF then returned to Norwalk and contacted Norwalk Police Officer Jermaine Nash, the school resource officer in Norwalk, whom he told about the children's refusal to return to his home. Nash and CF knew each other through sporting programs at the schools, and Nash had been a visitor to CF's home several times. A few days after speaking with CF, Nash contacted the defendant by telephone and asked her why the children were not returned to CF. The defendant told Nash that "the kids didn't want to come out to [CF]." Nash made a comment about the defendant being "the adult," and he asked her why she just did not send them out to CF. According to Nash, the defendant told him that "[s]he won't make the children come out to him."

Wanting to ensure that the children returned to school, Nash told the defendant that she could be in trouble if she did not get the children back into school.

The defendant agreed that she would return the children to school, and Nash agreed that he would not seek a warrant for her arrest. When the children still were not in school approximately one week later, Nash followed up with the defendant, who said she would not return the children to school. Nash then sought an arrest warrant on one charge of custodial interference in the second degree, and he contacted the Department of Children and Families.

On June 2, 2015, Nash contacted the Glastonbury Police Department for assistance in executing the arrest warrant; Officer David Hoover of the Glastonbury Police Department was at the defendant's Glastonbury home when Nash arrived. The defendant's aunt also was present at the home. At some point, CF also arrived at the scene. L testified that Nash threatened the children "by telling [them that] if [they] didn't go back to [CF], he would . . . pick [them] up and forcibly take [them] outside." T described Nash as "yelling" and "kind of harsh." Both Hoover and Nash tried to persuade the children to go with CF, but the children continued to refuse. Hoover telephoned the Department of Children and Families, and he arranged a meeting at its Manchester office, where he brought the children. The children continued to refuse to go with CF, and the defendant's aunt then was granted temporary custody of the children, who later were placed with their maternal grandmother, with whom they resided for several months after this incident.

The defendant later was charged with four counts of custodial interference in the second degree, one count for each child. Immediately before jury selection, the state dropped the charges as to R, the child who had been staying with the defendant for several months, and proceeded to trial on the three remaining counts. In a long form information dated January 9, 2017, the state charged the defendant in count one as follows:

"The [s]tate of Connecticut accuses [the defendant] of [c]ustodial [i]nterference in the [s]econd [d]egree and charges that at the city of Glastonbury on or about May 25, 2015 at approximately 7:30 [p.m.] . . . the . . . [defendant] did hold and keep for a protracted period and otherwise refused to return a child, to wit: [L], who was less than sixteen years old, to such child's lawful custodian, to wit: [CF] of Norwalk, after a request by such custodian for the return of such child, knowing that she had no legal right to do so, in violation of . . . § 53a-98 (a) (3)." The remaining two counts contained similar accusations for T and S. At trial, the state's theory of the case focused on the defendant's alleged refusal to return the children to CF. Following a trial to a jury, the defendant was convicted of all three counts.[2] This appeal followed. Additional facts will be set forth where necessary.

I

On appeal, the defendant claims that § 53a-98 (a) (3) is unconstitutionally vague in its application to her.[3] Specifically, she argues that the statute fails to define what it means when someone "otherwise refuses to return a child" to his or her lawful custodian, and, taking this lack of definition into consideration, it was impossible, under the facts of this case, for the defendant to know that her failure to force the children to go with their father could amount to a refusal to return under the statute. She argues that she did not refuse to return the children, as that phrase reasonably is understood but, rather, that the children voluntarily

[2] The defendant filed at least one motion to dismiss, a motion for a judgment of acquittal, and a motion for judgment notwithstanding the verdict.

[3] The defendant requests review of this claim pursuant to *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). "To enable us to review a claim that a statute is vague as applied, the record must . . . reflect the conduct that formed the basis of the defendant's conviction." *State* v. *Indrisano*, 228 Conn. 795, 800, 640 A.2d 986 (1994). We conclude that the record in this case is adequate to enable our review.

elected not to return to their father. She contends that the statute is void for vagueness as applied to her because it did not give her any notice that inaction on her part exposed her to criminal liability. Additionally, she argues that the vagueness of the statute impermissibly delegates the resolution of the definition of the phrase "refuses to return" to police officers, judges and juries on an ad hoc and subjective basis, and, therefore, the statute is subject to arbitrary enforcement, which clearly is demonstrated by the facts of this case. We are not persuaded.

"The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review. . . . In undertaking such review, we are mindful that [a] statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to [her], the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [she] had inadequate notice of what was prohibited or that [she was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . Moreover, an ambiguous statute will be saved from unconstitutional vagueness if the core meaning of the terms at issue may be elucidated from other sources, including other statutes, published or unpublished court opinions in this state or from other jurisdictions, newspaper reports, television programs or other public information . . . .

"Finally, even though a statutory term that is susceptible to a number of differing interpretations may be impermissibly vague as applied to some situations, the term is not necessarily vague as applied in all cases; rather, whether the statute suffers from unconstitutional vagueness is a case-specific question, the resolution of which depends on the particular facts involved. . . . Similarly, a term is not void for vagueness merely because it is not expressly defined in the relevant statutory scheme." (Citations omitted; internal quotation marks omitted.) *State* v. *DeCiccio*, 315 Conn. 79, 87–88, 105 A.3d 165 (2014).

A

Failure To Provide Notice

The defendant claims that § 53a-98 (a) (3) is unconstitutionally vague as applied to her because it gave her no notice that her inaction would meet the "refuses to return" element of that statute. She contends that the meaning of "refuses to return" is not statutorily defined and its meaning is not otherwise sufficiently clear or definite to satisfy the requirement of fair notice. The state argues that the defendant's "conviction was based on her affirmative, repeated statements that she would not send her children out to their father . . . ." It argues that the "refuses to return" element of § 53a-98 (a) (3) clearly encompasses the defendant's affirmative act of refusing to send out the children to CF when he requested their return. Accordingly, the state argues, the statute is not vague as applied.

To resolve the defendant's claim, we must determine whether the process of statutory interpretation reveals a core meaning for the phrase "refuses to return" such that a person of ordinary intelligence would be able to understand what action the statute prohibits. We first consider the language of § 53a-98 (a), which provides in relevant part: "A person is guilty of custodial interference in the second degree when . . . (3) knowing that

he has no legal right to do so, he holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child." In this case, we are concerned only with the "refuses to return" element of the statute. The statute contains no definition of this phrase, and, therefore, it provides no guidance on the constitutional question raised by the defendant's claim. Accordingly, we must use other available tools of statutory construction. We start with the common meaning of the words used in the statute. See, e.g., *State* v. *Moulton*, 310 Conn. 337, 358 n.19, 78 A.3d 55 (2013) ("Under General Statutes § 1-1 (a), '[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . .' We look to the dictionary definition of a term to ascertain its commonly approved usage.").

The American Heritage Dictionary of the English Language (5th Ed. 2011) defines "refuse" as "[t]o decline to do, accept, give or allow . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines "refuse" as "to express oneself as unwilling to accept" and "to show or express unwillingness to do or comply with . . . ." Black's Law Dictionary (9th Ed. 2009) defines "refusal" as "[t]he denial or rejection of something offered or demanded . . . ." The term "refuse" also has been discussed in our case law. In *State* v. *Corbeil*, 41 Conn. App. 7, 18–19, 674 A.2d 454, cert. granted, 237 Conn. 919, 676 A.2d 1374 (1996) (appeal dismissed September 18, 1996), we considered the defendant's claim that General Statutes § 14-227a (f) was unconstitutionally vague as applied to him because the statute did not define adequately the term "refused." We rejected the defendant's claim and stated: "It is not necessary to define a word that carries an ordinary, commonly understood meaning, is commonly used and

is defined in standard dictionaries. . . . The word refuse is defined as to show or express unwillingness to do or comply with . . . . Consequently, the dictionary definition makes it clear that refusing to take a breath test may be accomplished by a failure to cooperate as well as by express refusal." (Citations omitted; internal quotation marks omitted.) Id.; see *O'Rourke* v. *Commissioner of Motor Vehicles*, 156 Conn. App. 516, 525, 113 A.3d 88 (2015), quoting *State* v. *Corbeil*, supra, 18–19; *Bialowas* v. *Commissioner of Motor Vehicles*, 44 Conn. App. 702, 717 n.14, 692 A.2d 834 (1997), quoting *State* v. *Corbeil*, supra, 18–19; see also *Sansevero* v. *Commissioner of Motor Vehicles*, 79 Conn. App. 856, 859, 832 A.2d 80 (2003) ("[r]efusal to take a breath test can occur through conduct as well as an expressed refusal" [internal quotation marks omitted]).

"Return" is defined as "to pass back to an earlier possessor," "to restore to a former or to a normal state," and "to give back to the owner." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1065. The American Heritage Dictionary, supra, defines "return" as "[t]o revert to a former owner," and "[t]o send, put, or carry back."

These common definitions provide us with the assurance that the legislature intended "refuses to return" to include, at its core, a person who has declined a demand to send back a child to his or her lawful custodian. Given this clear meaning, we need not resort to any other aids in the interpretation of the meaning of "refuses to return" in § 53a-98 (a) (3). See General Statutes § 1-2z.

Despite the plain and ordinary meaning of "refuses to return," the defendant argues that the statute gave her no notice that her inaction of not forcing her children to return to their father could expose her to criminal liability. We reject the defendant's argument for

two reasons. First, we disagree with the premise of the defendant's argument that she was charged with violating § 53a-98 (a) (3) due to inaction. To the contrary, the state's theory was that the defendant affirmatively refused to order her children to return to CF. It should be clear to a person of ordinary intelligence in the defendant's circumstances that affirmatively refusing to direct a child in her care to return to the custodial parent upon a request for the return of the child would constitute a refusal to return the child.

Second, even assuming that the defendant was prosecuted for inaction, we conclude that the plain meaning of the statute provides notice that some affirmative step to comply with the requested return of the children to their lawful custodian is required. Otherwise, a person could avoid the requirements of § 53a-98 (a) (3) simply by not answering the door or not responding to a request from the custodial parent that the child be returned. Any person of ordinary intelligence would understand that ignoring a request to return is the equivalent of an affirmative refusal to return and, therefore, prohibited by the plain language of the statute. Consistent with this analysis, this court, in a case involving civil theft and conversion, specifically rejected a claim that inaction cannot constitute a refusal to return. In *Rana* v. *Terdjanian*, 136 Conn. App. 99, 103, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012), $5133.95 that should have been deposited into the plaintiff's bank account was mistakenly deposited into the defendant's bank account. Despite being provided with proof beyond doubt that the funds at issue belonged to the plaintiff, the defendant failed to return the funds to the plaintiff. Id., 115. The plaintiff sued the defendant claiming that his failure to return to the plaintiff the wrongfully held funds constituted both common-law conversion and a violation of Connecticut's civil theft statute, General Statutes § 52-564. Id., 103–104. The trial court agreed

and rendered judgment for the plaintiff, and the defendant appealed to this court. Id., 106–107. With respect to the judgment on the conversion count, the defendant argued that he could not be liable absent an " 'absolute and unqualified refusal' to return the plaintiff's funds." Id., 120. This court disagreed and concluded that the failure to return the funds after demand by the plaintiff "evinced his unqualified refusal to comply." Id., 121. Similarly, in the present case, it would be clear to any person in the defendant's situation that ignoring a demand to return the children to their lawful custodian would constitute a refusal to return.

The evidence in this case, including from the defendant, was that the defendant refused to send out the children to their custodial parent. In particular, the evidence demonstrated that CF "went to pick . . . up [the children] on Memorial Day . . . according to [the] visitation schedule . . . and [the defendant] came out of her house and told [him] that *she wasn't sending the children out*. The children didn't want to come out, and *she was going to do what the children wanted to do*." (Emphasis added.) The defendant also later told Nash that she had not made the children go outside to CF because they did not want to go with CF. Consistent with this testimony, the defendant testified that she "wasn't making decisions for [her] children" and that she was "supporting whatever they needed." She further testified that the children "were convincing [her] of the reasons why they didn't want to go." Consequently, rather than exercising her parental authority over the children, the defendant chose not to make the decision whether the children had to go with CF, as required by the court order placing custody in CF, but, instead, decided to support whatever decision the children made. In her words, she let her children convince her why they should not have to go with their father. The statements of the defendant clearly indicate that she

abdicated her parental role and made a conscious decision not to return the children to their custodial parent and then informed others of that decision by communicating that she would not make the children return to CF.

We conclude that the defendant's conduct falls within the core meaning of § 53a-98 (a) (3) and that the language of the statute provided clear notice to the defendant that "refuses to return" encompassed the behavior of a person who either affirmatively declines to return a child to his or her lawful custodian or declines to take any affirmative steps to return a child to the lawful custodian upon that custodian's request.

As noted previously in this opinion, the question of whether a statute is unconstitutionally vague as applied is a fact specific inquiry. Consequently, our conclusion is limited to the defendant's conduct at issue in this case, namely, refusing to take any steps whatsoever to require the children to return to CF. We do not address, for example, a situation in which the noncustodial parent instructs the child to return to the custodial parent and the child refuses or what other steps a noncustodial parent must take in similar circumstances to avoid criminal liability. Whether the statute is unconstitutionally vague as applied to such a situation will depend on the particular facts of that situation. In this case, the defendant does not claim that she ever instructed the children to return to CF or that they refused to comply with such an instruction. She simply refused to make them go with CF because they told her that they did not want to go. Because a person of ordinary intelligence in the defendant's circumstances would understand that her abdication of any parental responsibility to return the children to the custodial parent violated the core meaning of the statute, her claim that § 53a-98 (a) (3) is unconstitutionally vague as applied to her fails.

B

Arbitrary and Discriminatory Enforcement

The defendant also claims that § 53a-98 (a) (3) is subject to arbitrary enforcement due to its vagueness and that it, therefore, impermissibly delegates the resolution of the definition of the phrase "refuses to return" to police officers, judges and juries on an ad hoc and subjective basis. She contends that her claim is demonstrated by the particular facts of this case, namely, that the Glastonbury police declined to charge her under the statute, that Nash initially declined to charge her under the statute, that the prosecutor dropped the charges as to R while proceeding with charges as to the remaining children, and that the state and the judge also appeared confused as to what conduct met the elements of § 53a-98 (a) (3). The state argues that there could not have been arbitrary and discriminatory enforcement in this case because the plain terms of § 53a-98 (a), illuminated by their dictionary definitions, provided sufficient guidance as to the behavior that is prohibited, and the statute has a core meaning within which the defendant's conduct clearly fell. We agree with the state.

The United States Supreme Court has emphasized that "the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." (Internal quotation marks omitted.) *Kolender* v. *Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

"Our Supreme Court has instructed that [a]s a practical matter, a court analyzing an as-applied vagueness challenge may determine that the statute generally provides sufficient guidance to eliminate the threat of arbitrary enforcement without analyzing more specifically whether the particular enforcement was guided by adequate standards. In fact, it is the better (and perhaps more logical) practice to determine first whether the statute provides such general guidance, given that the [United States] Supreme Court has indicated that the more important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . If a court determines that a statute provides sufficient guidelines to eliminate generally the risk of arbitrary enforcement, that finding concludes the inquiry.

"[When] a statute provides insufficient general guidance, an as-applied vagueness challenge may nonetheless fail if the statute's meaning has a clear core. . . . In that case the inquiry will involve determining whether the conduct at issue falls so squarely in the core of what is prohibited by the law that there is no substantial concern about arbitrary enforcement because no reasonable enforcing officer could doubt the law's application in the circumstances." (Internal quotation marks omitted.) *State* v. *Daniel G.*, 147 Conn. App. 523, 543–44, 84 A.3d 9, cert. denied, 311 Conn. 931, 87 A.3d 579 (2014). Having concluded in part I B of this opinion that § 53a-98 (a) (3) provided sufficient guidance as to what is prohibited and that it has a clear core meaning within which the defendant's conduct fell, we need not address the particular enforcement of the statute in this case. See id.

The defendant has not demonstrated that § 53a-98 (a) (3) is impermissibly vague such that it deprived her of adequate notice or that she fell victim to arbitrary and discriminatory enforcement. Accordingly, we conclude that the defendant's claim that § 53a-98 (a) (3) is void

for vagueness as applied to her fails under the third prong of *Golding*[4] because she failed to demonstrate the existence of a constitutional violation.

II

The defendant next claims that there is insufficient evidence to support her conviction of three counts of custodial interference in the second degree. She contends that she did nothing to stop or prevent the children from going with their father, and that she, in fact, encouraged the police and others to speak with the children and made the children readily available to them. Specifically, she argues that "there is no evidence whatsoever of any conduct by the defendant that equated to holding, keeping, or refusing to return the children to their father."

The state argues that "[w]hat the defendant fails to understand is that her repeated refusal to send the children out to their father was 'specific action on [her] part' . . . that satisfied the 'otherwise refuse to return' element of . . . [custodial interference in the second degree]. The evidence introduced at trial . . . showed that the defendant three times refused to return her minor children to their father. First, she told [CF] that she wasn't sending [the] children out because they didn't want to go with him. . . . She then told Nash on two different occasions that she would not ask the children to go with their father, even after Nash advised her that she could face criminal charges. . . . On the basis of these affirmative actions, the jury could have found beyond a reasonable doubt that the defendant refused to return her children to [CF]."[5] Although the

[4] See footnote 3 of this opinion.

[5] The state points specifically to two pages of the transcripts in support of its argument. The first page is Nash's testimony that the first time he contacted the defendant by telephone after the children had refused to return home with CF, the defendant told him that "the kids didn't want to come out to [CF] . . . [and that] she won't make the children come out to him." The second page is Nash's testimony that he contacted the defendant one week after she had promised to return the children to school, and she told him she would not return them.

evidence in this case is far from overwhelming, we conclude that it is sufficient to sustain the defendant's conviction.

We begin by setting forth the applicable standard of review. "In [a defendant's] challenge to the sufficiency of the evidence . . . [w]hether we review the findings of a trial court or the verdict of a jury, our underlying task is the same. . . . We first review the evidence presented at trial, construing it in the light most favorable to sustaining the facts expressly found by the trial court or impliedly found by the jury. We then decide whether, upon the facts thus established and the inferences reasonably drawn therefrom, the trial court or the jury could reasonably have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. . . .

"In evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . As we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier [of fact], would have resulted in an acquittal. . . . 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 [trier of fact's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 157–58, 49 A.3d 962 (2012). "[A] defendant is entitled to a judgment of acquittal and retrial is barred if an appellate court determines that the evidence is insufficient to support the

conviction." *State* v. *Padua*, 273 Conn. 138, 178, 869 A.2d 192 (2005).

We begin our analysis of this claim with an overview of the language of § 53a-98 (a), which provides in relevant part: "A person is guilty of custodial interference in the second degree when . . . (3) knowing that he has no legal right to do so, he holds, keeps or otherwise *refuses to return* a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child." (Emphasis added.)

Determining the required elements of a particular statute presents a question of statutory construction over which we exercise plenary review. See, e.g., *State* v. *Drupals*, supra, 306 Conn. 159. "[W]hen the statute being construed is a criminal statute, it must be construed strictly against the state and in favor of the accused. . . . [C]riminal statutes [thus] are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant. . . . Rather, penal statutes are to be construed strictly and not extended by implication to create liability which no language of the act purports to create. . . . Further, if, after interpreting a penal provision, there remains any ambiguity regarding the legislature's intent, the rule of lenity applies. It is a fundamental tenet of our law to resolve doubts in the enforcement of a [P]enal [C]ode against the imposition of a harsher punishment." (Citations omitted; internal quotation marks omitted.) Id., 160.

To establish that the defendant was guilty of three counts of custodial interference in the second degree pursuant to § 53a-98 (a) (3), the state, in this instance, needed to prove beyond a reasonable doubt that, on May 25, 2015, the defendant (1) held, kept, or otherwise *refused to return* the children, L, T, and S, to their lawful custodian, CF, (2) that L, T, and S each were

under the age of sixteen, (3) that CF had requested the return of each child, and (4) that the defendant knew she had no legal right to refuse to return L, T, and S to CF.[6] The parties agree that the only element at issue in this case is the otherwise *refuses to return* element.

The defendant contends that the state failed to prove beyond a reasonable doubt that she "otherwise refuse[d] to return" the children to CF because the state provided no evidence that she had anything to do with the children's refusal to go with him. She also argues that "there is not a scintilla of evidence to suggest that [she] in any way restricted her children's access to their father, prevented their return to him, or actively refused to allow [him] to assert his custody over their children." In support of her argument, she points to the fact that it is uncontested that neither Nash, members of the Glastonbury Police Department, nor the Department of Children and Families could get the children to go with CF because the children refused to go. The state does not contest any of these facts but, instead, argues that it satisfied the "otherwise refuses to return" element of § 53a-98 (a) (3) through the testimony of CF and Nash, both of whom stated that the defendant told them that she "was not sending the children out" to CF. The specific question we must answer in this case is whether the defendant's statements that she "was not sending the children out" are enough to satisfy the element of "otherwise refuses to return." We conclude that they are sufficient.

At trial, CF testified that he "went to pick . . . up [the children] on Memorial Day . . . according to [the] visitation schedule . . . and [the defendant] came out

[6] The state specifically alleged in its amended long form information that the defendant "did hold and keep for a protracted period and otherwise refused to return" L, T, and S to CF. Although the state charged the defendant in the conjunctive, it concedes that she did not hold or keep the children from CF, but only that she otherwise refused to return them.

of her house and told [him] that *she wasn't sending the children out*. The children didn't want to come out, and *she was going to do what the children wanted to do*." (Emphasis added.) The defendant also later told Nash that she had not made the children go outside to CF because they did not want to go with him. Consistent with this testimony, the defendant testified that she "wasn't making decisions for [her] children" and that she was "supporting whatever they needed." She further testified that the children "were convincing [her] of the reasons why they didn't want to go." From these statements the jury reasonably could have inferred that, although the defendant had the ability to compel her children to go with their father, she refused to take any steps to comply with the court's custody and visitation orders by returning the children to him upon his request.

Having thoroughly reviewed the entirety of the transcripts in this case, we are aware that the defendant testified in relevant part that when CF arrived to pick up the children on May 25, 2015, the children refused to go with him and that she in no way prevented them from going. She stated that she made the children readily accessible to the police and to others, but the children continued to refuse to go with CF. She also testified that she believed that forcing the children to go with their father "was not an option" because she did not want to hurt them physically, by attempting force.[7] She stated that, "as a mom, you have a certain amount of power to convince your children to do things," and so she essentially urged them to go, but "they just kept giving [her] reasons why they didn't want to go. And it just became to the point where [she] felt that [she] had an obligation to let their voices be heard, to let them talk to some people. [She] didn't refuse to let them go. They refused to go." She also stated that she did not believe that any amount of coer-

[7] The state concedes that physical force is not required to comply with the statute.

cion would work. She opined that the children had planned this together, and she recognized that they were not "kids that [she] could pick up and buckle into their car seat[s] and make them go." She also explained that she was hesitant about the use of physical force because of a previous physical altercation that CF had with R and because of the involvement of the police and the Department of Children and Families. The defendant further stated that CF could have spoken with the children to try to resolve the matter, but he chose not to.

Other evidence before the jury showed that R had been living with the defendant since January, 2015, that all of the children had agreed together that they were going to refuse to go with CF, that one of the children e-mailed CF a couple of times telling him she did not want to return to his home, and that the children all refused to go with him when he arrived to pick them up on May 25, 2015. When the state asked L what prompted the children to make this decision, she responded that they had "been wanting to not go for a while, so eventually [they] just decided not to go with him." Other witnesses, including Nash, members of the Glastonbury Police Department, and the Department of Children and Families also admittedly could not persuade the children to go with CF because the children absolutely refused. CF also did not persuade the children to return home with him.

Nevertheless, our law is quite clear: "[E]vidence is not insufficient . . . because it is conflicting or inconsistent . . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses . . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Young*, 174 Conn. App. 760, 766, 166 A.3d 704, cert. denied, 327 Conn. 976, 174 A.3d 195 (2017).

In this case, both CF and Nash testified that the defendant stated to them that she *would not make* the children go with CF and that she was going to do what the children wanted. The defendant similarly testified that she was going to support the children's decision and was not going to make the decision for them. Clearly, such statements indicate that the defendant had the ability to take some action to return the children to CF but that she refused to do so. The defendant, herself, testified that, as a mom, she had a certain amount of power to convince her children to do things but that she decided to "let their voices be heard . . . ." We conclude that this evidence is sufficient to support her conviction of three counts of custodial interference in the second degree.

The judgment is affirmed.

In this opinion the other judges concurred.

PROCUREMENT, LLC *v.* GURPREET AHUJA ET AL. (AC 41680)

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

Syllabus

The plaintiff, P Co., a real estate development company, sought damages from the defendant A, a property owner, and the defendant H Co., a real estate holding company, for vexatious litigation in connection with P Co.'s plans to construct a mixed use development project in Stamford. P Co. alleged that the defendants sought to impede its development project through A's opposition to three of P Co.'s zoning applications. The trial court granted the defendants' motion for summary judgment, determining that A's zoning appeals were protected activity pursuant to the *Noerr-Pennington* doctrine, which shields individuals from liability for petitioning a government entity for redress in order to advocate their causes regarding business and economic interests. On appeal, P Co. claimed, inter alia, that the trial court erred in concluding that A's appeals were not objectively baseless and, therefore, that the sham exception to the *Noerr-Pennington* doctrine, which does not protect activity brought with no reasonable expectation of obtaining a favorable ruling, was not applicable. *Held*:

1. The trial court properly determined that there was no genuine issue of material fact and that A's legal actions in contesting various changes to P Co.'s zoning applications did not qualify for the sham exception to the *Noerr-Pennington* doctrine; contrary to the plaintiff's claim, A's appeals were not objectively baseless and did not become baseless merely because they failed; a reasonable litigant in A's position could have concluded that P. Co.'s failure to comply with the Stamford zoning regulations resulted in an incomplete application, and that the zoning board's failure to post notice of a hearing continuation could have been grounds for an appeal, and, once the trial court determined that at least one claim in an action had objective merit, it was not required to determine whether additional claims in the same action were not objectively baseless.
2. P Co. could not prevail on its claim that the trial court misinterpreted the sham exception to the *Noerr-Pennington* doctrine in applying the two part analysis in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.* (508 U.S. 49), in which a trial court may examine a litigant's subjective motivations only if the challenged litigation was objectively meritless; although P Co. claimed that A's petitioning activity consisted of several legal proceedings rather than a single proceeding, and that the trial court should have applied the holistic analysis in *California Motor Transport Co.* v. *Trucking Unlimited* (404 U.S. 508), in which a court may analyze a litigant's subjective motivations in determining whether A's appeals were not baseless, the two part analysis was appropriate in the present case because there were only three actions alleged to have been baseless, and the holistic analysis argued by P Co. has only been applied in cases concerning proceedings that far outnumbered those in the present case.

Argued November 14, 2019—officially released June 2, 2020

Procedural History

Action to recover damages for, inter alia, vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Arnold, J.*, granted the plaintiff's motion to substitute Nicholas Ahuja, executor of the estate of Gurpreet Ahuja, for the named defendant; subsequently, the trial court, *Ecker, J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the plaintiff withdrew the remaining count of the complaint and appealed to this court. *Affirmed.*

Richard C. Robinson, with whom was *Jonathan A. Kaplan*, for the appellant (plaintiff).

Peter Milano, for the appellees (substitute defendant et al.).

Opinion

KELLER, J. The plaintiff, Procurement, LLC, brings this action sounding in vexatious litigation, abuse of process, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42a-110g et seq., aiding and abetting, and tortious interference with contractual and business relations, and seeking damages from the defendants Gurpreet Ahuja[1] and Ahuja Holdings, LLC (Holdings), on the ground that they generally sought to impede the plaintiff's development of a mixed use development project. The plaintiff appeals from the judgment of the trial court rendered after the granting of the defendants' motion for summary judgment. On appeal, the plaintiff claims that (1) the trial court erred in concluding as a matter of law that Ahuja's zoning appeals with regard to the plaintiff's proposed development plan were not objectively baseless and, therefore, the sham exception to the *Noerr-Pennington* doctrine was not applicable, and (2) the court misinterpreted the sham exception under the *Noerr-Pennington* doctrine.[2] We affirm the judgment of the trial court.

The following procedural history, as set forth by the trial court in its thorough, well reasoned memorandum of decision, is relevant to this appeal. This appeal and the underlying litigation arose "out of a series of interrelated administrative and judicial proceedings . . . involving [the plaintiff's development project]." The plaintiff's development plan involved "the construction

[1] Gurpreet Ahuja died on December 28, 2016, several months after the commencement of this action, and the executor of her estate has been substituted as a defendant.

[2] See *Zeller* v. *Consolini*, 59 Conn. App. 545, 758 A.2d 376 (2000), for a discussion of this doctrine.

of a large childcare center and approximately twenty residential units on High Ridge Road in Stamford." "For ease of reference, the court . . . describe[d] the allegedly wrongful activity at issue . . . [in] three distinct, though related, administrative and judicial proceedings, each involving [the] defendants' opposition to a particular zoning application made by [the] plaintiff in connection with its High Ridge Road project. . . .

"The initial round of administrative and judicial proceedings arose out of a set of applications submitted by [the plaintiff] to the Stamford Zoning Board (board) in April, 2010. These included an application for special exception approval, and an application for approval of site and architectural plans, each of which related to [the plaintiff's] intention to develop a two-story building consisting of a day care center and nine residential units on the subject property ([collectively referred to as the first application]). The board held hearings on the first application in December, 2010, and voted on January 10, 2011, to deny the application for a special exception. [The plaintiff] timely appealed the denial to the Superior Court.

"Ahuja's formal involvement in the first application did not come until over a year later, on February 22, 2012, when she filed a motion to intervene in the appeal pending in the Superior Court. The motion described her status as a statutorily aggrieved landowner pursuant to General Statutes § 8-8, based on the fact that she owned property within 100 feet of the subject property. Ahuja alleged that her participation as an intervenor had become necessary because there was no longer true adversity between [the] plaintiff . . . and [the board] due to the board's recent action on a second, modified zoning application [for a special permit] made by [the plaintiff], which the board had approved while the appeal of the decision in the first application was pending. . . . Ahuja argued that [the plaintiff] and

the board were now essentially on the same side, and would settle the appeal unless the court permitted her to intervene in support of the board's denial of the special exception sought in the first application.

"Ahuja's motion to intervene was denied by the court (*Adams*, *J.*), on May 30, 2012. . . . The [court, denying intervention], weighed the various factors relevant to permissive intervention and determined that a majority of those considerations counseled denial of Ahuja's motion to intervene. The existence of Ahuja's then pending appeal from the board's approval of the second application . . . gave [the court] pause, because it was possible that intervention might not lead to more efficient proceedings in light of that appeal . . . but [the court] ultimately chose to exercise [its] discretion to deny intervention. To ensure that Ahuja's interests would be protected, [the court] ordered the parties to provide three weeks' notice to Ahuja in the event of a settlement [of the plaintiff's appeal], which would allow her to participate in any hearing for judicial approval of the settlement under . . . § 8-8 (n). There is no suggestion anywhere in the [court's decision denying intervention], express or implied, that Ahuja's motion to intervene was frivolous, vexatious or otherwise objectively unreasonable.

"Ahuja sought appellate review of [the court's] intervention order by filing a timely petition for certification pursuant to . . . § 8-8 (o) and Practice Book § 81-1. Certification was granted by the Appellate Court on October 24, 2012. A game of litigation chess followed. [The plaintiff] (which had opposed Ahuja's motion to intervene) filed a motion in the Superior Court case to implead Ahuja as a party defendant on May 25, 2013. Ahuja (who had sought to intervene) initially objected to [the plaintiff's] motion to implead. The board also objected. [The court, *Berger*, *J.*] granted the motion to implead on August 23, 2013. Ahuja withdrew [her]

appeal in the Appellate Court on October 4, 2013, and the Superior Court case proceeded on the merits. Ahuja's trial brief, filed on October 15, 2013, adopted the board's trial brief in its entirety and added less than two pages of additional argument. [The court] held a merits hearing on December 6, 2013, and issued a decision on February 14, 2014. . . . [The court] found that the board's decision denying a special exception was not supported by substantial evidence, and therefore sustained [the plaintiff's] appeal in connection with the first application.

"In late July, 2011, after the board's denial of the first application and while the appeal of that denial was pending in the Superior Court, [the plaintiff] filed a second application for a special permit with the board. The second application sought to develop a day care center and twenty-two residential units at the subject property, an increase from the nine units proposed in the first application. A series of five public hearings on the second application were held by the board in the latter part of 2011. . . . The board voted to approve the second application on December 12, 2011.

"Ahuja appealed the board's decision. . . . The matter was fully briefed and argued in the Superior Court. On January 4, 2013, [the court, *Berger*, *J.*] issued a memorandum of decision denying the appeal . . . . Ahuja filed a petition for certification from that decision, which was denied by the Appellate Court on July 24, 2013 . . . .

"On September 17, 2014, [the plaintiff] filed [a third] zoning application, which requested modification of certain conditions imposed by the board in its approval of the second application. More particularly, [the plaintiff] sought to increase the number of residential units from seventeen to nineteen units; increase the amount of available parking by three additional spaces; open

an entrance exit on Bradley Place without the obligation to install a traffic signal; and change the form of residential ownership from condominiums to apartments. After public hearings, the board approved the third application on November 17, 2014. Ahuja appealed the board's decision to the Superior Court on . . . December 2, 2014. [The plaintiff] moved to dismiss the appeal on the ground that it was not returned to court within the time required by General Statutes § 52-46a. The motion to dismiss was granted on July 6, 2015. No appeal was taken. . . .

"[The plaintiff] also alleges that [the] defendants engaged in wrongful conduct outside of the immediate context of the [aforementioned] legal proceedings . . . . These allegations relate to false or otherwise tortious communications that [the plaintiff] claims were made by [the] defendants to various nongovernmental individuals or entities with some role in the overall fate of the project. . . . According to [the plaintiff], [the] defendants (1) spread false information about the development plans to neighbors, in an effort to mobilize opposition to the project . . . (2) [contacted] [the plaintiff's] 'lending institutions with the goal of controlling the debt that secured [the plaintiff's] property' . . . and (3) contact[ed] or interfere[d] with [the plaintiff's] current or prospective tenant relationships. . . .

"[The underlying] lawsuit was commenced by [the plaintiff] in 2016. The operative complaint contains seven counts, all of which relate in some way to [the] defendants' alleged campaign to impede [the plaintiff's] project by wrongful means. . . . Four counts of the complaint are brought solely against Ahuja personally—the first count, for common-law vexatious litigation; the second count, for vexatious litigation under General Statutes § 52-568, the third count, for abuse of process, and the fourth count, which alleges that the conduct underlying the first three counts violates [CUTPA]. Two

other counts are directed solely at . . . Holdings (the fifth count, for aiding and abetting Ahuja's wrongful conduct as alleged in the first four counts; and the sixth count, for a violation of CUTPA). The seventh count alleges tortious interference with contractual and business relations against both defendants.

"[The defendants] . . . moved for summary judgment on all counts. The sole basis for their motion [was] the *Noerr-Pennington* doctrine, which, as explained [subsequently], confers immunity from civil liability for 'petitioning activity' protected by the first amendment. Broadly speaking, *Noerr-Pennington* immunizes activity undertaken by persons who use the official channels of governmental agencies and courts to advocate their cause, even if that cause consists of nothing more than seeking an outcome adverse to a business competitor and/or favorable to the petitioner's own economic interests. [The plaintiff] . . . filed an objection to the motion for summary judgment, and each party . . . submitted extensive written memoranda and supporting materials. Oral argument [on the motion for summary judgment] was heard [before the trial court] on November 27, 2017. In mid-March, 2018, at [the] plaintiff's initiative and over [the] defendants' objection, the court allowed the parties to submit supplemental briefs. Argument on the supplemental submission was heard [before the trial court] on March 29, 2018." (Footnotes omitted.)

In its May 3, 2018 memorandum of decision, the court granted the motion for summary judgment in favor of the defendants on counts one through six, and denied the motion with respect to the seventh count.[3] Applying

[3] The seventh count, alleging tortious interference with business expectations, was subsequently withdrawn and is not at issue in this appeal. Likewise, the court found that "[t]here are limited allegations incorporated in the first six counts regarding what [the] plaintiff labels 'nonpetitioning activity' . . . but the court is under the impression that those allegations are intended to establish [the] defendants' motive and intentions underlying the petitioning activity. Only the seventh count seeks damages allegedly caused

the *Noerr-Pennington* doctrine, the court concluded that Ahuja's zoning appeals were immunized from suit and, further, that Ahuja's petitioning activity did not qualify for the sham exception to the doctrine because the relevant zoning appeals were not objectively baseless. The plaintiff has appealed to this court from the judgment rendered on counts one through six. Additional procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred in concluding, as a matter of law, that Ahuja's zoning appeals with regard to the plaintiff's proposed development plan were not objectively baseless and, therefore, the sham exception to the *Noerr-Pennington* doctrine was not applicable. We disagree.

by the nonpetitioning activity." On appeal, the plaintiff does not raise a claim of error with respect to this aspect of the court's decision. The plaintiff's only reference to the nonpetitioning activity as it relates to counts one through six is in a footnote in its brief. Therein, the plaintiff states, in a conclusory fashion, that its counts of abuse of process and violation of CUTPA were pleaded on the basis of the defendants' nonpetitioning activity, and that both counts were "perfectly viable without any requirement that the underlying claim be objectively baseless." The plaintiff does not separately brief these issues within the body of its brief nor offer sufficient authority in support of its proposition. Therefore, we conclude that this portion of the plaintiff's argument is not sufficiently briefed in accordance with our briefing requirements and we consider these claims abandoned. See *Clelford* v. *Bristol*, 150 Conn. App. 229, 233, 90 A.3d 998 (2014) ("It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.)).

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

We begin our analysis by setting forth the background of the *Noerr-Pennington* doctrine generally and, specifically, how it has been applied in Connecticut jurisprudence. In *Zeller* v. *Consolini*, 59 Conn. App. 545, 758 A.2d 376 (2000), this court adopted "the reasoning of a trio of federal antitrust cases, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) [(*California Motor*)], *United*

Mine Workers v. *Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and their progeny, collectively referred to as the *Noerr-Pennington* doctrine.

"In short, the *Noerr-Pennington* doctrine shields from the Sherman [Antitrust] Act [15 U.S.C. § 1 et seq.] a concerted effort to influence public officials regardless of intent or purpose. . . . The United States Supreme Court has reasoned that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors. *California Motor Transport Co.* v. *Trucking Unlimited*, supra, [404 U.S. 510–11].

"The *Noerr-Pennington* doctrine has evolved from its antitrust origins to apply to a myriad of situations in which it shields individuals from liability for petitioning a governmental entity for redress. [A]lthough the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which [seek] to assign liability on the basis of the defendant's exercise of its first amendment rights. . . . For example, *Noerr-Pennington* has been recognized as a defense to actions brought under the National Labor Relations Act, 29 U.S.C. § 151 et seq.; *Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); state law claims of tortious interference with business relations; *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913–15, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982); federal securities laws; *Havoco of America Ltd.* v. *Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983); and wrongful discharge claims. . . .

"Although the *Noerr-Pennington* doctrine provides broad coverage to petitioning individuals or groups, its protection is not limitless. . . . [P]etitioning activity is not protected if such activity is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling." (Citations omitted; internal quotation marks omitted.) *Zeller* v. *Consolini*, supra, 59 Conn. App. 550–52.

Preliminarily, it is undisputed that the *Noerr-Pennington* doctrine applies to the present case. The plaintiff argues on appeal, however, that the zoning litigation initiated by Ahuja and supported by Holdings was baseless and thus meets the doctrine's sham exception. In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), the United States Supreme Court outlined a two part definition of "sham" litigation. "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor . . . ." (Emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 60–61.

"The existence of probable cause to institute legal proceedings precludes a finding that [a] . . . defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable

cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. . . . Probable cause to institute civil proceedings requires no more than a reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication. . . . Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. . . . Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the [fact finder] to infer the absence of probable cause. . . . When a court has found that [a] . . . defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. . . . [T]herefore, a proper probable cause determination irrefutably demonstrates that [a] . . . plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 62–63.

"Application of the *Noerr-Pennington* doctrine to . . . petitioning activity directed at local governments . . . already is well established. E.g., *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379–84, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (city council); *Juster Associates* v. *Rutland*, 901 F.2d 266, 270–72 (2d Cir. 1990) (city); *Racetrac Petroleum, Inc.* v. *Prince George's County*, 786 F.2d 202, 203 (4th Cir. 1986) (county zoning board); *Bob Layne Contractor, Inc.* v. *Bartel*, 504 F.2d 1293, 1296 (7th Cir. 1974) (city zoning board and council). Indeed, many of our own trial courts have applied the *Noerr-Pennington* doctrine in their decisions. E.g., *Roncari Development Co.* v. *GMG Enterprises, Inc.*, 45 Conn. Supp. 408, 414, 718 A.2d

1025 (1997), citing *Connecticut National Bank* v. *Mase*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 269180 (January 31, 1991); *Abrams* v. *Knowles*, Superior Court, judicial district of New London at Norwich, Docket No. 95287 (December 4, 1990) (3 Conn. L. Rptr. 9); *Yale University School of Medicine* v. *Wurtzel*, Superior Court, judicial district of New Haven, Docket No. 275314 (November 9, 1990) (2 Conn. L. Rptr. 813)." *Zeller* v. *Consolini*, supra, 59 Conn. App. 552–53.

In granting the defendants' motion for summary judgment, the court applied the *Noerr-Pennington* doctrine to the defendants' petitioning activity and determined that the activity was immunized from suit. Further, the court determined that the sham exception to the doctrine was inapplicable because Ahuja's zoning appeals were not objectively baseless.[4] Whether the court properly granted summary judgment as to counts one through six essentially comes down to whether the court properly applied the *Noerr-Pennington* doctrine. Accordingly, we will examine the appeals brought by Ahuja with respect to the plaintiff's second and third zoning applications, which were the subject of the causes of action in counts one through six of the plaintiff's complaint.

A

Ahuja's Appeal of the Second Application

Having set forth the *Noerr-Pennington* doctrine and its applicability to Ahuja's petitioning activity in the present case, we now turn to the plaintiff's claims with regard to Ahuja's appeal of the second application. First,

[4] The trial court determined that Ahuja's appeal of the plaintiff's first application was immunized under the *Noerr-Pennington* doctrine, and was not objectively baseless and, therefore, not subject to the doctrine's sham exception. In its appellate brief, the plaintiff has not set forth a claim of error with respect to the court's ruling regarding Ahuja's appeal of the first application and, therefore, we decline to review it on appeal.

the plaintiff claims that the court erred in concluding as a matter of law that Ahuja's appeal of the board's approval of the second application was objectively baseless. Specifically, the plaintiff claims that Ahuja's appeal was objectively baseless in that she alleged that the board acted "illegally, unlawfully, [and] arbitrarily" in granting the plaintiff's second application because the notice for several of the public hearings was inadequate and that the application was materially changed after one of the public hearings.

The following additional procedural history is relevant to this portion of the plaintiff's appeal. In July, 2011, while the plaintiff's appeal from the denial of its first application was pending, the plaintiff filed a second application for a special permit and architectural/site plan approval. In preparation for a public hearing for the second application held on September 26, 2011, the board published notice in the Stamford Advocate on September 14 and 21, 2011. The public hearing was continued to October 6, 2011, and then to October 24, 2011, due to the large number of citizens who wished to speak on the application. The board did not publish additional notice for the continued hearings. The board also published notice in the Stamford Advocate on October 28 and November 4, 2011, for a public hearing on November 10, 2011. Following the board's approval of the plaintiff's second application, Ahuja appealed the board's decision, alleging that the board acted "illegally, unlawfully, [and] arbitrarily." Specifically, Ahuja alleged that "(a) [t]he board lacked jurisdiction to hear and decide the [second] application where notice of the public hearings held on October 6, 2011, and October 24, 2011, was not published in a newspaper having general circulation in the city of Stamford; [and] (b) the board lacked jurisdiction to approve the application since it was materially changed by [the plaintiff] at the last public hearing held on November 10, 2011. The changes

made to the application on November 10, 2011, were material and therefore constituted a new application. The board lacked jurisdiction to approve the new application since it did not comport with the notice requirements of General Statutes § 8-3 et seq. and the Stamford Zoning Regs., art. VI, § 20." The court rejected Ahuja's claims and denied the appeal.

1

No Notice Claim

First, we address the portion of the plaintiff's claim relating to Ahuja's appeal of the second application on the basis that adequate notice was not provided for several of the public hearings associated with the second application.

The court, in granting the motion for summary judgment in favor of the defendants, found "that Ahuja's legal claims regarding notice were supported by probable cause." Ahuja's appeal of the second zoning application was based in part on the assertion that with respect to several of the public hearings associated with the second application, notice was not provided in compliance with the relevant provision of the Stamford Charter (charter). Specifically, Ahuja argued that notice was not provided for the public hearings on October 6 and 24, 2011. The public hearings in question were continued from an initial public hearing held on September 26, 2011, for which adequate notice was provided. In determining that Ahuja's appeal with regard to the notice claim was not objectively baseless, the court most heavily relied on the plain text of the relevant charter provisions which "provided Ahuja with a solid foundation to contend that a new notice was required for every public hearing, 'continuation' or otherwise." In particular, the court looked to the language of §§ C6-40-11 and C6-40-12 of the charter. Section C6-40-11, titled "Notice of Public Hearings," provides in relevant

part: "Notice of each public hearing held with respect to amendments of the Zoning Regulations and Map or applications for approval of site and architectural plans and/or requested uses shall be given by publishing in an official newspaper the time, place and purpose of such hearing. . . . Said notice shall be published at least twice, the first not more than fifteen nor less than ten days before such hearing, and the last not less than two days before such hearing . . . ." Section C6-40-12, titled "Hearings," provides that "[i]f more than one public hearing is considered by the Zoning Board to be necessary or advisable, additional hearings may be held upon due notice, as herein above set forth, provided no more than ninety days shall elapse between the first and last hearing on any one petition, unless the petitioner agrees in writing to an extension of such period." The court determined that "Ahuja's argument—that the literal text of § C6-40-12 requires notice of any and all 'additional hearing[s]' held in connection with an application—posits a very plausible construction of the charter provision. The text of § C6-40-12 does not limit its application to 'new' or 'separate' hearings, or otherwise create a category of 'continuation' hearings exempt from the notice requirement. The provision's literal terms would seem to include *any* 'additional' hearing, and its context would appear to contemplate precisely the situation confronted in connection with the second application, when the first public hearing was insufficient to complete the board's full consideration of the zoning matter at issue." (Emphasis in original.)

In challenging the court's determination that Ahuja's second zoning appeal, which was based in part on a claim that notice was deficient, was not objectively baseless, the plaintiff points both to the plain text of the charter, and to Connecticut case law. First, in looking to the language of the relevant charter provisions, the

plaintiff asserts that the drafters contemplated that the continuation of public hearings would be a common phenomenon, and that if they intended for notice to be provided for each continuation, they would have included language to that effect. The omission of such language, according to the plaintiff, is indicative of the drafters' intentions not to require notice for continuations, and that Ahuja, in looking at the plain language of the charter, should have considered that her appeal would not likely succeed.

Second, in support of its argument, the plaintiff relies primarily on two cases; *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, 281 Conn. 66, 912 A.2d 1008 (2007) (*Roncari Industries*), and *Carberry* v. *Zoning Board of Appeals*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-00-0176766 (October 16, 2001) (30 Conn. L. Rptr. 537). In *Roncari Industries*, a neighbor who owned property that abutted the property at issue, appealed the decision of the town planning and zoning commission, which granted the landowner's application for a special permit. The basis of the plaintiff's appeal was that "the commission failed to satisfy the notice requirements of General Statutes (Rev. to 2001) § 8-3 regarding the public hearing because the notice given for the originally scheduled public hearing was insufficient to apprise the public that the matter was scheduled to be heard on a later date . . . ." (Footnote omitted.) *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, supra, 70–71. The court held that "[§] 8-3 does not require the publication of additional notices when the public hearing is continued or rescheduled; the statute is silent with regard to notice when the hearing is postponed. Similarly, nothing in the town's zoning regulations requires the publication of additional notices when a public hearing is rescheduled or continued." Id., 73.

Similarly, in *Carberry*, the plaintiff claimed that the notice given of a continued hearing was defective because there was no newspaper publication of the fact that the relevant application would be considered on that date. *Carberry* v. *Zoning Board of Appeals*, supra, 30 Conn. L. Rptr. 537. The relevant notice provision in *Carberry* was that set forth in General Statutes § 8-7d.[5] Id., 541. The court found that the notice for the continued hearing did not need to comply with the requirements in § 8-7d (a). Id. Specifically, the court stated that "[r]equiring new newspaper publication of notice for a hearing that is continued beyond the original date would place an undue burden on local boards and commissions which as a general practice meet during the evening hours of the work week. There are many conceivable and appropriate reasons for a zoning board of appeals not to complete a hearing on a matter in a single weekday evening. If each continuation of a hearing imposed the necessity of a new newspaper publication schedule, it would severely constrain the scheduling of new dates and slow down the process." Id.

The plaintiff purports in its brief that "[t]here are no material differences" between the present case and *Roncari Industries* and, therefore, that "[t]here is no way a reasonable litigant reading *Roncari Industries* and assessing whether the defendants' 'no notice' argument had a reasonable chance of succeeding could rationally conclude that the argument had any such prospect." The plaintiff further contends that the notice provisions in *Roncari Industries* and the present case

[5] The portion of § 8-7d that was relevant in *Carberry* provides: "Notice of the hearing shall be published in a newspaper having a general circulation in such municipality where the land that is the subject of the hearing is located at least twice, at intervals of not less than two days, the first not more than fifteen days or less than ten days and the last not less than two days before the date set for the hearing." General Statutes § 8-7d (a). The court did not address the specific language of the statute in coming to its conclusion.

are "virtually identical." The plaintiff also asserts that the defendants' reading of *Carberry* "could only have enforced the view that the argument was hopeless." Although we agree with the plaintiff that the aforementioned case law did not necessarily support Ahuja's appeal, that fact does not automatically make Ahuja's appeal objectively baseless. The cases relied on by the plaintiff, even if brought to Ahuja's attention, would not make her appeal of the second application objectively baseless because in those cases the courts analyzed notice provisions that were entirely different from the provision in the present case. Specifically, the court in *Roncari Industries* conducted a notice analysis entirely under the purview of General Statutes (Rev. to 2001) § 8-3 (a)[6] and the court in *Carberry* focused its analysis on § 8-7d (a), whereas in the present case the relevant notice provisions are §§ C6-40-11 and C6-40-12 of the charter.[7]

In its memorandum of decision granting summary judgment in favor of the defendants, the court noted that "the text of the relevant charter provisions provided Ahuja with a solid foundation to contend that a new notice was required for *every* public hearing, 'continuation' or otherwise. Section C6-40-11 of the charter contains the basic requirement that the board give notice of a public hearing to be held on certain types of zoning applications. Section C6-40-12 of the charter provides specifically for the situation where a

[6] At the time of the public hearing in *Roncari Industries*, § 8-3 (a) required that "[n]otice of the time and place of such [public] hearing shall be published in the form of a legal advertisement appearing in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, the first not more than fifteen days nor less than ten days and the last not less than two days, before such hearing . . . ." General Statutes (Rev. to 2001) § 8-3 (a).

[7] As noted in Judge Berger's January 4, 2013 memorandum of decision, "[u]nlike most zoning commissions . . . planning and zoning in Stamford [is] governed by 26 Spec. Laws 1228, No. 619, hereinafter referred to as the Stamford Charter (1953), rather than by the General Statutes."

matter before the board requires more than one hearing: "If more than one public hearing is considered by the Zoning Board to be necessary or advisable, *additional hearings may be held upon due notice, as herein above set forth* . . . . Ahuja's argument—that the literal text of § C6-40-12 requires notice of any and all 'additional hearing[s]' held in connection with an application—posits a very plausible construction of the charter provision. The text of § C6-40-12 does not limit its application to 'new' or 'separate' hearings, or otherwise create a category of 'continuation' hearings exempt from the notice requirement. The provision's literal terms would seem to include *any* 'additional' hearing, and its context would appear to contemplate precisely the situation confronted in connection with the second application, when the first public hearing was insufficient to complete the board's full consideration of the zoning matter at issue." (Emphasis in original.)

We conclude that the court's determination, which was grounded in the language of the relevant charter provisions, is legally and logically correct. We agree that a reasonable litigant, reading the notice provisions of §§ C6-40-11 and C6-40-12, could deduce that notice is required for every public hearing, including a continuation. In particular, the charter's use of the word "additional," without specific omission of continuations, could lead a reasonable litigant to believe that any additional hearing, including a continuation, requires notice pursuant to the relevant charter provisions. We disagree with the plaintiff's contention that the notice provisions at issue in *Roncari Industries*[8] and the charter are virtually identical. *Roncari Industries* concerned a provision of the General Statutes, and the present case con-

[8] The plaintiff asserts, and we agree, that the court did not refer to *Roncari Industries* in its memorandum of decision. The court did, however, refer to Judge Berger's decision, which contained analyses of both *Roncari Industries* and *Carberry*.

cerns a notice provision from the charter. Further, General Statutes (Rev. to 2001) § 8-3 (a) in *Roncari Industries* does not include the word "additional," which is included in the notice provision of the charter. The similarity between *Roncari Industries* and the present case begins and ends with the fact that both notice provisions are silent with regard to the term "continuation." We conclude, however, that the differences between the two provisions are such that a reasonable litigant relying on the notice provisions in the charter could bring an appeal on the ground of lack of notice for a continued hearing, despite the outcome in *Roncari Industries*.

Further, we conclude that the trial court's determination regarding the notice aspect of the second application is consistent with this court's prior analysis of the *Noerr-Pennington* doctrine. Specifically, in *Zeller* v. *Consolini*, supra, 59 Conn. App. 553–54, this court stated that "failure to apply the *Noerr-Pennington* doctrine aggressively may create a chilling effect on the first amendment right to petition in zoning and other matters. . . . Indeed, such a chilling effect can be a virtual deep freeze when individual citizens not versed in the legal system and without financial resources do not exercise potentially meritorious legal challenges for fear of costly and protracted, retributive litigation from opponents." (Citations omitted; internal quotation marks omitted.) We decline to accept the plaintiff's reasoning that, on the basis of the holdings in *Roncari Industries* and *Carberry*, Ahuja should have known that her notice argument was meritless and, therefore, objectively baseless. As aforementioned, *Roncari Industries* and *Carberry* did not analyze the specific notice provisions at issue in the present case. The type and language of the notice provisions in the cases relied on by the plaintiff and that are at issue in the present case were not identical. To hold Ahuja, and future parties, to the standard suggested by the plaintiff

would contradict our holding in *Zeller*. Although we agree with the court that Ahuja's appeal of the second application on the notice issue ultimately was not successful, that is not determinative of whether the appeal was objectively baseless. To the contrary, we agree with the court that a reasonable litigant could have expected to prevail on the basis of Ahuja's notice argument.

Finally, the court concluded that, despite the fact that Ahuja's argument was not successful before the board, "and perhaps it should have lost . . . it was by no means groundless." We conclude that the court's finding in this respect is legally and logically correct. Specifically, the trial court's rationale closely adheres to the reasoning in *Zeller* v. *Consolini*, supra, 59 Conn. App. 545. In particular, in *Zeller*, this court stated: "The defendants' opposition to the plaintiffs' zoning requests and the defendants' subsequent appeals were legally available to the defendants and followed applicable judicial procedure. Merely because those attempts failed does not in itself make them baseless acts. A failure of the challenged action is only one factor in determining whether an action is a sham. . . . [W]hen the . . . defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation." (Citation omitted; internal quotation marks omitted.) Id., 560. Similarly, here, we conclude that the outcome of the defendants' appeal of the second application is not determinative of whether that appeal was objectively baseless under the *Noerr-Pennington* doctrine.

We conclude that, with regard to Ahuja's appeal of the second application, the court properly determined that Ahuja's actions were not objectively baseless and were not a sham that would strip away the protection of the *Noerr-Pennington* doctrine and properly found no genuine issue of material fact.

Mid-hearing Changes Claim

The second ground raised in Ahuja's appeal of the approval of the plaintiff's second application was that the board lacked jurisdiction to approve the application because it was materially changed by the plaintiff at the last public hearing held on November 10, 2011.

With regard to the mid-hearing changes claim, the plaintiff purports that "the trial court never addressed [Ahuja's] mid-hearing change claim and thus, expressed no view on whether it was objectively baseless or not." The defendants, in their brief, agree that the court did not address the mid-hearing change claim, but stated that the trial court was not required to address that portion of the claim because it had already made a determination that the notice portion of the appeal of the second application was not objectively baseless.

We agree with the defendants for two reasons. First, we look to the language of *Professional Real Estate Investors*, *Inc.*, the seminal case concerning the sham exception to the *Noerr-Pennington* doctrine. Specifically, the court stated that in order to be a sham, a "*lawsuit* must be objectively baseless . . . ." (Emphasis added.) *Professional Real Estate Investors*, *Inc.* v. *Columbia Pictures Industries*, *Inc.*, supra, 508 U.S. 60. Further, the court stated that "[i]f an objective litigant could conclude that the *suit* is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and . . . [a claim] premised on the sham exception must fail." (Emphasis added.) Id. The court's use of the broad terms "lawsuit" and "suit" reflects that it is unnecessary for each claim within an action to survive scrutiny under the sham exception to the *Noerr-Pennington* doctrine provided that the action contains at least one claim that is not a sham.

Second, multiple federal courts have held that an action cannot be classified as a sham so long as at least one claim in the action has objective merit. For instance, in *Trustees of University of Pennsylvania* v. *St. Jude Children's Research Hospital*, 940 F. Supp. 2d 233, 247 (E.D. Pa. 2013), the court stated that "[c]ourts have routinely held that as long as some of the claims in a complaint have a proper basis, the lawsuit is not a sham for *Noerr-Pennington* purposes." (Internal quotation marks omitted). Further, in *Dentsply International, Inc.* v. *New Technology Co.*, United States District Court, Docket No. 96-272 (MMS) (D. Del. December 19, 1996), the court held that "litigation will not be considered a sham so long as at least one claim in the lawsuit has objective merit." (Internal quotation marks omitted). Similar language was used by the court in *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.*, 914 F.2d 556, 565 (4th Cir. 1990), in which the court held that an action containing one claim with objective merit was "hardly a sham." Finally, *In re Flonase Antitrust Litigation*, 795 F. Supp. 2d 300, 311–12 (E.D. Pa. 2011), stated that "[p]laintiffs do not need to show a realistic expectation of success on *all* of [the] arguments in each petition and its lawsuit." (Emphasis in original.)

Connecticut courts have yet to address whether, in the context of the *Noerr-Pennington* doctrine, a court may conclude that a party's action was not objectively baseless on the basis of one claim in the action having merit. We agree with the federal courts that have concluded that a party's action cannot be objectively baseless when at least one claim in the action has merit. We are in accordance with the court's reasoning in *Trustees of University of Pennsylvania* v. *St. Jude Children's Research Hospital*, supra, 940 F. Supp. 2d 247, that such a holding is consistent with the "very narrow scope" of the *Noerr-Pennington* doctrine's sham exception.

As discussed in part I of this opinion, we conclude that, on the basis of the defendants' notice claim, Ahuja's appeal of the second application was not objectively baseless. For this reason, the court properly rendered summary judgment in favor of the defendants with respect to the plaintiff's claim that Ahuja's appeal of the second zoning application met the sham exception to the *Noerr-Pennington* doctrine. Accordingly, we need not reach the second ground on which Ahuja premised her appeal of the second application—that the board lacked jurisdiction to approve the application because the application had been materially changed.

B

Ahuja's Appeal of the Third Application

The plaintiff also claims that the court erred in granting summary judgment in favor of the defendants because Ahuja's appeal of the plaintiff's third zoning application was objectively baseless.

The following procedural history, as set forth by the court in its memorandum of decision, is relevant to this portion of the appeal. "The third application was submitted by [the plaintiff] to modify certain conditions that the board had placed on the development project in its previous decisions. These modifications, among other things, sought to increase the number of units approved to nineteen units; increase the amount of available parking by three additional spaces; open an entrance exit on Bradley Place without the obligation to install a traffic signal; and change the form of ownership from condominiums to apartments. . . . [T]here was some amount of neighborhood opposition to the third application. The thrust of this opposition was that the conditions attached by the board to its prior approval of the project in December, 2011 (as part of the second application) was based on a compromise reached by

[the plaintiff] with opponents of the project; the neighbors claimed that [the plaintiff's] third application reneged on important components of that prior agreement by seeking modifications that would, among other things, increase the number of residential units from seventeen to nineteen and change the residential ownership from condominium to rental units. . . .

"In a four to one split decision, the board voted to approve the third application on November 17, 2014, effective November 21, 2014. It appears . . . that the majority failed to provide any reasons for its approval. . . . [D]uring the board's brief deliberations, Stamford's associate planner read aloud to the board from the text of condition [No.] 2 to the board's prior approval of the special exception. . . . Condition [No.] 2 stated that the project's 'residential development shall be limited to a total of seventeen units to be in condominium form of ownership.' The meeting minutes reflected that the board members were polled, and the majority indicated that they were 'okay with adding the two additional units.' The board did not explain why the modification was 'okay.'

"Ahuja appealed the board's decision to the Superior Court by complaint dated December 2, 2014, with a return date January 6, 2015. The appeal claimed, among other things, that there was not 'substantial evidence' in the record to support the board's approval of the special exception under § 19-3.2 of the Stamford Zoning Regulations." Specifically, in her appeal, Ahuja claimed that "[i]n approving the [third] application, the board acted illegally, unlawfully, arbitrarily, upon unlawful procedures, in excess of its authority, and in abuse of its discretion, in one or more of the following respects: (a) The board lacked jurisdiction to hear and decide the [third] application where notice of the public hearing held on November 10, 2014 was not provided to abutters within the meaning of [General Statutes] § 8-8 (a) (1), [and] (b) the board lacked jurisdiction to

approve the [third] application, as there was no traffic impact study submitted with the [third] application that is a prerequisite for the . . . board to act upon an application pursuant to the Stamford zoning regulations." "[The plaintiff] moved to dismiss the appeal on the ground that it was not returned to court within the time required by General Statutes § 52-46a. The motion to dismiss was granted on July 6, 2015. No appeal was taken from that disposition."

Preliminarily, the court noted that, because the appeal was dismissed on procedural grounds, it did not have insight into how a reviewing court would have ruled on Ahuja's appeal of the third application. Regardless, the court stated that its "review of the underlying record leads to the firm conviction that a court considering the merits reasonably might have concluded that substantial evidence did not support the board's decision to grant the special exception sought in the third application. It is unlikely, but a reversal might have been obtained based on a court's view of the evidence in light of the five relevant categories to be taken into account under § 19-3.2 of the Stamford zoning regulations. More likely is the possibility that a Superior Court would have been particularly concerned that the board originally saw fit, in December, 2011, to place express conditions on its approval of the special exception by allowing a maximum of seventeen residential units but, then, in 2014, changed that limitation to permit the developer to increase the number of units to nineteen without justifying the modification, and without explaining what circumstances leading to the original limitation had changed."

As the court alluded to in its discussion of the third application, a court reviewing the decision of a zoning board does so under the "substantial evidence" analysis. "The evidence supporting the decision of a zoning board must be substantial. . . . This so-called substantial evidence rule is similar to the sufficiency of the

evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Citations omitted; internal quotation marks omitted.) *Martland* v. *Zoning Commission*, 114 Conn. App. 655, 663, 971 A.2d 53 (2009).

In its brief, the plaintiff argues that its third application did not seek a special exception and, therefore, the trial court's determination is "based on a flawed analysis." Rather, the plaintiff states that, prior to the third application, it had received two special exceptions; one via the decision on the first application and a second via the decision on the second application. The plaintiff claims that, as a result of these two special exceptions, it had already satisfied the zoning regulations special exception requirements and it was therefore entitled to approval in each instance.

The defendants argue that the court was correct in its determination that Ahuja's appeal of the third application was not objectively baseless because "[a]ny reasonable litigant in [Ahuja's] position would conclude the modifications sought were conditions that contradicted what was previously agreed upon in prior applications

and approvals." As aforementioned, the third application specifically attempted to increase the number of residential units in the second floor of one of the buildings, to increase the number of available parking spots by three spaces, to change the residential use of the units from condominiums to apartments, and to open an entrance exit on Bradley Place without the obligation of a traffic signal. In support of its argument, the defendants also point to the fact that seventeen members of the public voiced their opposition to the third application at a public hearing. Finally, the defendants argue that the appeal of the third application was not objectively baseless because "the plaintiff failed to provide a traffic impact study in support of the third application, despite the study being requested by the city traffic engineer. . . . Stamford Zoning Regulations § 7.2C requires the applicant to submit a traffic impact study when requested by the city traffic engineer." Therefore, the defendants purport that "[a]ny reasonable litigant in [Ahuja's] position would conclude the plaintiff's failure to submit a required traffic study made the third application defective and incomplete."

The plaintiff correctly asserts that the court did not address each of the modifications individually in determining that Ahuja had probable cause to appeal the third application. Under our plenary review, we turn first to the defendants' argument that the appeal was not objectively baseless because the plaintiff did not provide a traffic impact study, as required by Stamford zoning regulations. Preliminarily, the Connecticut Practice Series states that "[f]or a special permit to be granted, it must appear from the record before the agency that the application met all conditions imposed by the regulations." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 33:4, p. 278. Alternatively, "[a] special permit can only be denied for failure to meet specific standards in the regulation . . . ." Id. The relevant regulation in this

case was § 7.2C15 of the Stamford Zoning Regulations, which provides in relevant part that "[a] traffic impact and access study shall be submitted, prepared by a State of Connecticut Registered Professional Engineer qualified to prepare such studies, where . . . considered necessary in the judgment of the City Traffic Engineer." Here, before the trial court on the motion for summary judgment as Exhibit CC was a letter from a city traffic engineer, requesting a traffic impact study from the plaintiff for the intersection where a traffic light was proposed to be installed. The plaintiff counters that the third application was not incomplete by means of the missing traffic impact study because one of the relevant roads in the intersection was a state road and, therefore, only the Department of Transportation (department) had the power to authorize the installation of traffic lights.

On the basis of the parties' arguments, we conclude that the court correctly determined that Ahuja's appeal of the third application was not objectively baseless. The plaintiff's failure to submit a traffic impact study resulted in its noncompliance with the Stamford zoning regulations. We agree with the defendants' argument that a reasonable litigant in Ahuja's position would conclude that the plaintiff's noncompliance resulted in an incomplete application and, thus, provided a proper basis for an appeal to the board. See *Two Yale & Towne, LLC* v. *Zoning Board of Appeals*, Superior Court, judicial district of Hartford, Docket No. CV-13-6046438-S (July 24, 2014) (court dismissed appeal on basis of incomplete application that was noncompliant with zoning regulations); *Cohen* v. *Zoning Board of Appeals*, Superior Court, judicial district of Fairfield, Docket No. CV-12-6026111-S (October 31, 2012) (court sustained appeal on basis of incomplete application that was noncompliant with town zoning regulations).

The plaintiff counters by referring to its submissions in its objection to the motion for summary judgment, arguing that shortly before the board's approval of the third application, the plaintiff testified at a public hearing regarding the traffic light. Specifically, the plaintiff testified before the board that one of the roads in question was a state road and, therefore, that only the department had the power to authorize the installation of a traffic light. The plaintiff also testified that it sought the department's authorization for a traffic light, but that the department rejected the request on the basis of a study of traffic counts in the area. During this testimony, a chairman of the board asked the plaintiff whether it had documentation confirming the department's denial of the request. The plaintiff did not definitively provide an answer as to whether documentation existed, but the record does not contain any written notice confirming the fact to which the plaintiff testified. Further, the record does not suggest that the city traffic engineer rescinded the requirement that the plaintiff provide a traffic impact study. Therefore, our review of the record leads to the conclusion that, on the basis of the plaintiff's failure to submit a traffic impact study, a reasonable litigant could have determined that the plaintiff's third application was noncompliant with the Stamford zoning regulations and, therefore, there was not substantial evidence supporting the approval of the application. Accordingly, we conclude that the trial court properly granted summary judgment in favor of the defendants because the appeal of the third application was not objectively baseless.

Finally, we conclude that we need not reach the issue of whether Ahuja's appeal was objectively baseless on the basis of the ground alleged therein related to modifications of the application, in addition to the omission of the traffic impact study. In coming to this conclusion, we refer to the aforementioned principle in part I A 2

of this opinion that an action cannot be a sham under the *Noerr-Pennington* doctrine so long as at least one claim within the action has merit. See *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.*, supra, 914 F.2d 556; *Trustees of University of Pennsylvania* v. *St. Jude Children's Research Hospital*, supra, 940 F. Supp. 2d 233;; *In re Flonase Antitrust Litigation*, supra, 795 F. Supp. 2d 311–12; *Dentsply International, Inc.* v. *New Technology Co.*, supra, United States District Court, Docket No. 96-272 (MMS). Because we conclude that a reasonable litigant could appeal the approval of the third application solely on the basis of the missing traffic impact study, we conclude that Ahuja's appeal of the approval of the third application was not objectively baseless. Therefore, the defendants met their burden to show that no genuine issue of material fact existed.

II

The plaintiff next claims that the court misinterpreted the sham exception under the *Noerr-Pennington* doctrine. Specifically, the plaintiff asserts that "objectively baseless" is not the proper standard for sham exception applicability. The plaintiff argues that because the challenged petitioning activity consists of several legal proceedings rather than a single proceeding, and that the defendants also engaged in significant, allegedly ill motivated and false communications to nongovernmental individuals and entities, the court also should have taken into account the defendants' subjective motivations and intentions. We disagree.

The plaintiff proposes that this court should develop a new sham exception analysis under the *Noerr-Pennington* doctrine that takes into account both the objective reasonableness of petitioning activity as well as the subjective intent of the party engaging in the petitioning activity. The plaintiff did not ask the trial court to fashion a new sham exception analysis or to apply such an analysis to the facts at hand. Rather, the plaintiff

unequivocally asserted to the trial court in its "Response to Defendants' Motion for Summary Judgment" that "the correct test to apply to this matter is the pattern test from *California Motor Transport* [*Co.*] v. *Trucking Unlimited*, [supra, 404 U.S. 508]."[9]

Regardless of the plaintiff's request to this court to fashion a new sham exception analysis, we conclude that the trial court applied the correct analysis from *Professional Real Estate Investors*, *Inc.* As aforementioned, in *Professional Real Estate Investors*, *Inc.*, the United States Supreme Court outlined a two part analysis under which to analyze whether petitioning activity under the *Noerr-Pennington* doctrine should be classified as a sham and, therefore, unprotected. In setting forth the sham exception analysis, the court emphasized that "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Professional Real Estate Investors*, *Inc.* v. *Columbia Pictures Industries*, *Inc.*, supra, 508 U.S. 60. About twenty years before the court's holding in *Professional Real Estate Investors*, *Inc.*, the court had analyzed the sham exception in *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 404 U.S. 508. In *California Motor*, the court explained that sham litigation occurs where "a pattern of baseless, repetitive claims . . . emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused." Id., 513.

Following *California Motor*, a line of circuit court cases held that, although the *Professional Real Estate Investors*, *Inc.* test is well suited for a sham exception analysis involving one underlying proceeding, it is not conducive to an analysis involving a series of legal proceedings and, therefore, the *California Motor* sham

[9] The sham exception analysis set forth by *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 404 U.S. 508, is discussed subsequently in this opinion.

exception analysis should apply in scenarios involving the latter. For example, in *Hanover 3201 Realty, LLC* v. *Village Supermarkets, Inc.*, 806 F.3d 162, 180–81 (3d Cir. 2015), the United States Court of Appeals for the Third Circuit held that "when a party alleges a series of legal proceedings, we conclude that the sham exception analysis from *California Motor* should govern. This inquiry asks whether a series of petitions were filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm a market rival and restrain trade. In deciding whether there was such a policy of filing petitions with or without regard to merit, a court should perform a holistic review that may include looking at the defendant's filing success . . . as circumstantial evidence of the defendant's subjective motivations. . . . Courts should also consider other evidence of bad-faith as well as the magnitude and nature of the collateral harm imposed on plaintiffs by defendants' petitioning activity . . . ." (Citations omitted; internal quotation marks omitted.) Similarly, the United States Court of Appeals for the Second Circuit noted that, when applying the sham exception analysis from *California Motor*, the relevant issue is "whether the legal challenges are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." (Internal quotation marks omitted.) *Primetime 24 Joint Venture* v. *National Broadcasting Co.*, 219 F.3d 92, 101 (2d Cir. 2000); see also *Waugh Chapel South, LLC* v. *United Food & Commercial Workers Union Local 27*, 728 F.3d 354 (4th Cir. 2013); *USS-POSCO Industries* v. *Contra Costa County Building & Construction Trades Council, AFL-CIO*, 31 F.3d 800 (9th Cir. 1994).

Here, the court concluded that the test set forth in *Professional Real Estate Investors, Inc.*, was the correct standard to apply to the sham exception to the *Noerr-Pennington* doctrine. The court stated that the plaintiff's request that the court apply the *California*

Motor analysis "is based largely on a line of cases interpreting the United States Supreme Court precedent to limit the scope of *Professional Real Estate Investors, Inc.*, to circumstances not present [in the present case]. [The plaintiff] relies on the Supreme Court decision in *California Motor* . . . a case decided more than twenty years before *Professional Real Estate Investors* [*Inc.*], but understood by some federal courts to provide an alternative 'sham' analysis in cases involving 'multiple' acts of petitioning activity—which includes the present case, according to [the plaintiff].[10] [The plaintiff] insists that because the sham exception described analysis in *California Motor* requires inquiry into [the] defendants' subjective motivations and intentions, this case cannot be resolved by summary judgment. . . . The *California Motor* analysis advanced by [the] plaintiff applies a more 'holisitic' inquiry than the two part test applicable under *Professional Real Estate Investors* [*Inc.*] to petitioning activity involving single underlying proceedings." (Footnote added.) The court rejected the plaintiff's argument and instead applied the two part analysis articulated in *Professional Real Estate Investors, Inc.*

On the basis of our plenary review of the record, we conclude that the court applied the correct analysis for the sham exception. The cases relied on by the plaintiff suggest that in order for a court to apply the more holistic *California Motor* analysis, the petitioning activity must consist of a "pattern" or "series" of legal proceedings. Particularly, many of the courts that have applied the *California Motor* analysis rather than the

[10] The plaintiff also urges that in holistically assessing the defendants' subjective motivations, we should also consider their allegedly false, nonpetitioning activities directed to nongovernmental agencies to foster opposition to the plaintiff's proposed development. The plaintiff does not offer any authority in support of this argument. As previously noted, the court, in finding that none of the defendants' litigation was baseless, did not need to consider the defendants' subjective motivations, which is the second part of the test set forth in *Professional Real Estate Investors, Inc.*

two part test set forth in *Professional Real Estate Investors, Inc.*, have done so in cases that have concerned quantities of proceedings that far outnumber those in the present case. See, e.g., *Waugh Chapel South, LLC* v. *United Food & Commercial Workers Union Local 27*, supra, 728 F.3d 354 (court applied *California Motor* sham exception analysis in case involving fourteen underlying proceedings); *USS-POSCO Industries* v. *Contra Costa County Building & Construction Trades Council, AFL-CIO*, supra, 31 F.3d 800 (court relied on *California Motor* analysis when petitioning activity included twenty-nine lawsuits).

Further, in its memorandum of decision, the court aptly pointed to a number of cases in which courts have applied the *Professional Real Estate Investor, Inc.* analysis to cases involving more than one underlying proceeding. In particular, the court referred to *ERBE Elektromedizin GmbH* v. *Canady Technology, LLC*, 629 F.3d 1278, 1291–92 (Fed. Cir. 2010) (court declined to apply holistic analysis to three underlying lawsuits); *Amarel* v. *Connell*, 102 F.3d 1494, 1519–20 (9th Cir. 1997) (court held that two underlying lawsuits did not trigger *California Motor* analysis); *Polaris Industries, Inc.* v. *Arctic Cat, Inc.*, United States District Court, Docket No. 15-4475 (JRT/FLN) (D. Minn. March 29, 2017) (court held that three cases did not amount to series of legal proceedings requiring application of *California Motor* sham analysis); and *In re Flonase Antitrust Litigation*, supra, 795 F. Supp. 2d 300 (court declined to apply *California Motor* test to five underlying petitions). Similarly, in *Zeller* v. *Consolini*, supra, 59 Conn. App. 545, this court applied the two part analysis from *Professional Real Estate Investors, Inc.*, to a case with three underlying proceedings.

The present case involved only three zoning appeals. The plaintiff has not demonstrated, therefore, that the approach set forth in *California Motor* should have been applied. We agree with the trial court that a court

has never applied the *California Motor* sham exception analysis in a case involving so few proceedings.[11] We, therefore, agree that the trial court properly applied the two part analysis from *Professional Real Estate Investors, Inc.*, in rendering summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

MELISSA CHANG *v.* DAVID CHANG
(AC 42175)

Alvord, Prescott and Bright, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from certain postjudgment orders of the trial court granting in part the plaintiff's motions for contempt. The plaintiff cross appealed to this court from certain postjudgment orders of the trial court denying in part her motions for contempt and granting the defendant's motion for contempt. The motions for contempt were all predicated on a postjudgment order of the court incorporating a stipulation by the parties. In her motions for contempt, the plaintiff alleged, inter alia, that the defendant had wilfully violated the parties' stipulation when he was late in returning the parties' minor son to her house after school on four occasions and by refusing to work with the guardian ad litem in mediation to resolve a parenting access schedule issue. In his motion for contempt, the defendant alleged, inter alia, that the plaintiff had wilfully violated an order of the court when she removed the parties' minor daughter from private physical therapy sessions, which had been prescribed by the daughter's physician. *Held*:

[11] To our knowledge, the *California Motor* sham exception analysis was applied once in the context of an action involving four proceedings. See *Hanover 3201 Realty, LLC* v. *Village Supermarkets, Inc.*, supra, 806 F.3d 162. The court, however, provided little reasoning for such application. The court noted, "we do not set a minimum number requirement for the applicability of *California Motor* or find that four sham petitions will always support the use of *California Motor*." Id., 181. The plaintiff's reliance on this case does not persuade this court to abandon the two part analysis set forth in *Professional Real Estate Investors, Inc.*

1. The trial court improperly granted the plaintiff's motion for contempt regarding the parties' parenting access schedule: the language in the stipulation underlying the motion, that the parties "shall work with the guardian ad litem" to adjust the schedule, was not clear and unambiguous, and the testimony of the guardian ad litem as to her interpretation of the relevant language was extrinsic evidence, which could only be considered when the order was found not to be clear and unambiguous and, thus, could not support a finding of contempt, and the defendant's conduct in engaging in a forty-five minute telephone conversation with the guardian ad litem constituted a reasonable interpretation of the relevant language; moreover, the additional qualifying phrase "if necessary" in the stipulation provision in question was ambiguous as it was susceptible to more than one reasonable interpretation; furthermore, the relevant section of the stipulation contained no clear and unambiguous language that instructed the parties how to proceed when they disagreed as to the necessity of adjusting the parenting access schedule.
2. The trial court properly denied the plaintiff's motion for contempt regarding the defendant's actions in returning the parties' minor son to her at the end of the school day; the stipulation language in question, that "the defendant shall be responsible for coordinating [their son's] timely return to the plaintiff's care" after school was not clear and unambiguous, as the parties did not specify an exact time the son must be returned to the plaintiff, and, on each of the four days at issue in the motion for contempt, the parties' son stayed after school to meet with his teachers and tutors or to practice the drums, which was a reasonable interpretation of the relevant stipulation language.
3. The trial court erred in granting the defendant's motion for contempt regarding physical therapy for the parties' minor daughter, as its judgment finding that the plaintiff wilfully failed to comply with a court order that she engage in a good faith consultation with the defendant prior to making a decision about the children's health did not conform to the defendant's pleadings; in his motion, the defendant alleged that the plaintiff had wilfully failed to comply with a court order when she unreasonably withheld her consent for timely medical treatment for their daughter, failed to insure their daughter's medical needs were timely and appropriately met and failed to place their daughter's needs and interests above the plaintiff's personal preferences, and, thus, the basis on which the court found the plaintiff in contempt was not one of the bases pleaded by the defendant in his motion for contempt, and the defendant's contention that the court's order requiring good faith consultation and prohibiting the unreasonable withholding of consent must be read together was unavailing, as those obligations are two separate components of the court's order.

Argued January 16—officially released June 2, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a cross complaint; thereafter, the case was tried to the court, *Pinkus*, *J.*; judgment dissolving the marriage and granting certain other relief; subsequently, the court, *Hon. Stanley Novack*, judge trial referee, issued an order in accordance with the parties' stipulation; thereafter, the court, *Sommer*, *J.*, granted in part the plaintiff's motions for contempt and granted the defendant's motion for contempt, and the defendant appealed and the plaintiff cross appealed to this court. *Reversed in part; further proceedings*.

Reuben S. Midler, for the appellant-cross appellee (defendant).

Yakov Pyetranker, for the appellee-cross appellant (plaintiff).

Opinion

ALVORD, J. In this postdissolution matter, the defendant, David Chang, appeals and the plaintiff, Melissa Chang, cross appeals from the judgment of the trial court resolving their postjudgment motions for contempt. On appeal, the defendant claims that the court improperly granted the plaintiff's October 25, 2017 motion for contempt regarding her proposed adjustment to the parties' parenting access schedule. On cross appeal, the plaintiff claims that the court improperly (1) denied her November 15, 2017 motion for contempt regarding the timely return of the parties' minor son to her by the defendant after school and (2) granted the defendant's November 19, 2017 motion for contempt regarding withheld consent by the plaintiff to procure private physical therapy for the parties' minor daugh-

ter.[1] We agree with the defendant. We also agree with the plaintiff as to her second claim, but disagree with her first claim. Accordingly, we affirm in part and reverse in part the judgment of the court.

The following undisputed facts and procedural history are relevant to this appeal and cross appeal. On June 15, 2015, the court, *Pinkus*, *J.*, dissolved the parties' eleven year marriage and imposed orders, some of which concerned their two minor children, a son and a daughter. See *Chang* v. *Chang*, 170 Conn. App. 822, 823, 155 A.3d 1272, cert. denied, 325 Conn. 910, 158 A.3d 321 (2017). Following the dissolution of their marriage, the parties each filed several postjudgment motions. In order to resolve the issues underlying some of their several postjudgment motions, the parties entered into a multiparagraph stipulation on August 31, 2017 (August 31, 2017 stipulation), which the court, *Hon. Stanley Novack*, judge trial referee, approved and entered as an order of the court on the same day. The August 31, 2017 stipulation and one of the orders from Judge Pinkus' June 15, 2015 memorandum of decision underlie the parties' postjudgment motions for contempt, which were ruled on by the court, *Sommer*, *J.*, in a September 13, 2018 memorandum of decision. The defendant appeals and the plaintiff cross appeals from the September 13, 2018 ruling. Additional facts will be set forth as necessary.

We set forth the standard of review and relevant legal principles at the outset because they guide our analysis of the claims made in the appeal and cross appeal. "[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . .

[1] Collectively, over a five week period, the parties had filed five postjudgment motions for contempt, three of which are at issue in this appeal.

This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . .

"Civil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . Whether an order is sufficiently clear and unambiguous is a necessary prerequisite for a finding of contempt because [t]he contempt remedy is particularly harsh . . . and may be founded solely upon some clear and express direction of the court. . . . One cannot be placed in contempt for failure to read the court's mind. . . . It is also logically sound that a person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." (Citation omitted; internal quotation marks omitted.) *Bolat* v. *Bolat*, 191 Conn. App. 293, 297–98, 215 A.3d 736, cert. denied, 333 Conn. 918, 217 A.3d 634 (2019).

"To impose contempt penalties, whether criminal or civil, the trial court must make a contempt finding, and this requires the court to find that the offending party wilfully violated the court's order; failure to comply with an order, alone, will not support a finding of contempt. . . . Rather, to constitute contempt, a party's conduct must be wilful. . . . A good faith dispute or legitimate misunderstanding about the mandates of an order may well preclude a finding of wilfulness. . . .

Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties. . . . The clear and convincing evidence standard of proof applies to civil contempt proceedings . . . ." (Citation omitted; internal quotation marks omitted.) *Hall* v. *Hall*, 182 Conn. App. 736, 747, 191 A.3d 182 (2018), aff'd, 335 Conn. 377, 238 A.3d 687 (2020).

"It is . . . necessary, in reviewing the propriety of the court's decision to [grant or] deny the motion for contempt, that we review the factual findings of the court that led to its determination. The clearly erroneous standard is the well settled standard for reviewing a trial court's factual findings. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 326–27, 966 A.2d 292, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009).

"In domestic relations cases, [a] judgment rendered in accordance with . . . a stipulation of the parties is to be regarded and construed as a contract. . . . It is well established that [a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according

to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . In contrast, an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation. . . . Nevertheless, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Bolat* v. *Bolat*, supra, 191 Conn. App. 298.

I

On appeal, the defendant claims that the court improperly granted the plaintiff's parenting access schedule adjustment motion for contempt because the relevant language of the August 31, 2017 stipulation underlying that motion is not sufficiently clear and unambiguous. We agree.[2]

The following additional facts, found by the court, and procedural history are relevant to this claim. In paragraph 3 of the August 31, 2017 stipulation (paragraph 3), the parties agreed that they "shall work with the guardian ad litem to adjust the parenting access schedule, if necessary, to accommodate the academic

[2] In light of our conclusion that the relevant language of the August 31, 2017 stipulation underlying the plaintiff's parenting access schedule adjustment motion for contempt is not clear and unambiguous, we do not consider whether the defendant's conduct was wilful. See *Puff* v. *Puff*, 334 Conn. 341, 365, 222 A.3d 493 (2020) ("[i]t is the burden of the party seeking an order of contempt to prove . . . *both* a clear and unambiguous directive to the alleged contemnor *and* the alleged contemnor's wilful noncompliance with that directive" (emphasis added)).

calendars of the children, the holiday and vacation schedules and to establish synchronicity between the parties' minor children and the members of the plaintiff's household." Immediately following Judge Novack's adoption of the August 31, 2017 stipulation as an order, during September and October, 2017, the plaintiff sought to adjust the parenting access schedule. Specifically, the plaintiff sought to have the defendant exchange with her the weekends that he was scheduled to spend parenting time with their children. The plaintiff sought this adjustment of the parenting access schedule so that she would have parenting time at the same time that her boyfriend had his parenting time with his son from a prior marriage. The parties agreed to mediate the issue with the assistance of the guardian ad litem, Attorney Bonnie Amendola, who scheduled a meeting between the parties for October 26, 2017 (October meeting). Prior to the October meeting, Amendola contacted the defendant by telephone. During their telephone conversation, the defendant expressed to Amendola that he did not believe it was necessary to adjust the parenting access schedule because the son of the plaintiff's boyfriend was not a member of the plaintiff's household. He further told Amendola that such a change was not necessary to the best interests of his children. Finally, he expressed his concern that the plaintiff's new boyfriend presented a safety risk for the parties' daughter. For these reasons, the defendant did not want to participate in the October meeting and would not agree to swap weekends with the plaintiff. On October 19, 2017, Amendola notified the plaintiff that the defendant "was unwilling to meet to resolve the 'swap' issue" and that she was cancelling the mediation.

On October 25, 2017, the plaintiff filed her motion for contempt alleging that the "defendant was unwilling to engage in mediation to resolve the 'swap' issue and [that Amendola] therefore cancelled the [October]

meeting." The plaintiff further alleged that "[t]he defendant's conduct [was] wilful." In its September 13, 2018 memorandum of decision, the court found that the "language of paragraph 3 [of the August 31, 2017 stipulation], clearly and unambiguously states [that] the parties shall work with the guardian ad litem." The court was dismissive of the defendant's suggestion that the language in paragraph 3 was susceptible to multiple reasonable interpretations, stating that "merely positing questions does not create ambiguity where the fundamental language of the [August 31, 2017] stipulation is clear." The court further found that "[t]he defendant's own testimony as confirmed by the testimony of [Amendola] . . . supports the finding that the reason the meeting did not proceed was that he refused to comply with a clear and unambiguous court order and that his refusal was wilful." Thus, the court "conclude[d] that the plaintiff . . . satisfied her burden of proof on [the parenting access schedule adjustment motion for contempt]."

Applying the previously set forth legal principles to paragraph 3 of the August 31, 2017 stipulation, we conclude that the language contained therein is not clear and unambiguous. See *Bolat* v. *Bolat*, supra, 191 Conn. App. 297 (analysis of court order is "legal inquiry subject to de novo review" (internal quotation marks omitted)). In analyzing whether paragraph 3 is clear and unambiguous, the court failed to discuss the language "work with the guardian ad litem" and, thus, overlooked its potential ambiguity. Although the court did not assess the clarity of the language "work with the guardian ad litem," it seemingly agreed with Amendola's interpretation of that language because it found that the defendant did not "work with" her on the basis of his refusal to participate in the October meeting.[3] Amendola testified

[3] In a portion of its analysis discussing the meaning of the term "synchronicity," as it is used in paragraph 3, the court stated that it "accepts and adopts the definition and interpretation of paragraph 3 of the [August 31, 2017] stipulation according to the testimony of [Amendola]." A clear and

that her interpretation of "work with the guardian ad litem" required the parties to meet or to mediate with her. The plaintiff, by contacting Amendola to initiate the October meeting and by filing her motion for contempt after the defendant refused to participate in the October meeting, appears to have endorsed Amendola's interpretation of the language "work with the guardian ad litem."

The defendant's conduct, however, evinced an interpretation of the phrase "work with the guardian ad litem" that did not require him either to meet or to mediate in order to satisfy his obligation under paragraph 3 but, rather, permitted him to conduct a lengthy telephone conversation with Amendola in which he expressed his position on the plaintiff's proposed adjustment to the parenting access schedule. That the defendant conducted such a substantive telephone conversation is supported by the uncontroverted testimony of Amendola and the defendant. Their testimony was that the defendant, in the course of a forty-five minute conversation with Amendola, explained the reasons

unambiguous order is a necessary predicate to holding a party in contempt. See *Bolat* v. *Bolat*, supra, 191 Conn. App. 297. Witness testimony as to his or her interpretation of language in an order is extrinsic evidence, which should only be considered when the order is found not to be clear and unambiguous and, thus, cannot support a finding of contempt. See *Parisi* v. *Parisi*, 315 Conn. 370, 384–86, 107 A.3d 920 (2015) (remanding case "to resolve the ambiguity in the parties' separation agreement through a determination of their intent after consideration of all available extrinsic evidence and the circumstances surrounding the entering of the agreement" after concluding "that the alimony buyout provision of the parties' separation agreement is ambiguous, thereby precluding a finding of contempt").

The court's statement "accepting and adopting" Amendola's interpretation indicates that it may have improperly applied the well established principles of contract interpretation to assess whether paragraph 3 was clear and unambiguous. The plaintiff argues that "[j]ust because the court referred to an interpretation that accorded with its own, it does not necessarily follow that the court failed to reach independently the legal conclusion as to whether paragraph 3 was clear and unambiguous." Because we conclude that the court erroneously determined that paragraph 3 was clear and unambiguous, we need not decide whether it improperly relied upon extrinsic evidence to reach its determination.

why he did not want to change the parenting access schedule or even discuss it further at the October meeting, namely, the son of the plaintiff's boyfriend was not a member of the plaintiff's household, a change to the parenting access schedule was not in his children's best interests, and he was concerned that the plaintiff's boyfriend presented a safety risk to the parties' daughter.

Paragraph 3 does not provide the parties with any discernible guidance as to what constitutes "work[ing] with the guardian ad litem." Nevertheless, we conclude that a reasonable interpretation of paragraph 3 is that the defendant's telephone conversation with Amendola constituted "work[ing] with the guardian ad litem." Stated differently, the defendant's lengthy telephone conversation with Amendola, in which he stated his reasons for not wanting to adjust the parenting access schedule, could reasonably be interpreted as "work[ing] with the guardian ad litem" because of the imprecision in the language used in paragraph 3. Because the language "work with the guardian ad litem" is susceptible to multiple reasonable interpretations, we conclude that paragraph 3 is ambiguous. See *Bolat* v. *Bolat*, supra, 191 Conn. App. 298 ("an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation" (internal quotation marks omitted)).[4]

[4] In the section of her brief that discusses the defendant's wilfulness, the plaintiff argues that "[i]f the defendant truly harbored a different interpretation of his obligation to engage with the guardian [ad litem] at the proposed meeting . . . then the basis for his refusal to engage further was nothing but a form of self-help. If anything, given that the defendant at no time obtained, much less sought, a clarification or modification of paragraph 3, it would have been error for the court *not* to find him in contempt." (Emphasis in original; footnote omitted.) To the extent that the plaintiff argues on appeal that the court's finding of the defendant in contempt should be upheld despite an unclear and ambiguous order; see *Sablosky* v. *Sablosky*, 258 Conn. 713, 720, 784 A.2d 890 (2001) ("we conclude that where there is an ambiguous term in a judgment, a party must seek a clarification upon motion rather than resort to self-help"); we disagree.

This case in no way presents facts warranting a finding of contempt against the defendant because he exercised self-help when faced with an

Additional ambiguity is present in paragraph 3 with the use of the phrase "if necessary," which conditions the parties' obligation to take action under paragraph 3. First, the term "necessary" is susceptible to more than one reasonable interpretation. See *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 293 Conn. 218, 232–33, 975 A.2d 1266 (2009) (Our Supreme Court concluded that the phrase "amount necessary" is ambiguous because "Webster's Third New International Dictionary defines the term 'necessary' as '[something] that cannot be done without: that must be done or had: absolutely required: essential, indispensable. . . .' Black's Law Dictionary (6th Ed. 1990), however, notes that the term '[n]ecessary' also 'may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.' "). Because the term "necessary" reasonably can be interpreted in more than one way, paragraph 3 is not clear and unambiguous.

Moreover, paragraph 3 fails to instruct the parties how to proceed when they disagree as to whether it is necessary to adjust the parenting access schedule, and cannot be construed to require a party to accept an adjustment proposed by the other party. Said another way, there is no clear and unambiguous language in paragraph 3 that obligated the defendant to accept the plaintiff's proposed adjustment to the parenting access schedule even if he were to "work with the guardian ad litem" in the way that the plaintiff interprets that language.[5]

unclear and ambiguous order. We emphasize that the defendant did not exercise self-help but, rather, attempted to comply with the requirement in paragraph 3 that he "work with the guardian ad litem" by speaking with Amendola on the telephone and stating his reasons for his opposition to the plaintiff's proposed adjustment to the parenting access schedule. See *In re Leah S.*, 284 Conn. 685, 700, 935 A.2d 1021 (2007) (concluding that because trial court order was "ambiguous at the outset, and therefore conferred broad discretion" on party, party, "far from employing self-help tactics . . . instead employed the broad discretion conferred upon it by the court").

[5] We acknowledge that the plaintiff alleged that the defendant acted contemptuously by failing to "work with the guardian ad litem," and she did not allege that he contemptuously disagreed with her proposed adjustment

In light of the foregoing, we conclude that the court improperly granted the plaintiff's parenting access schedule adjustment motion for contempt.

II

In her cross appeal, the plaintiff claims that the court improperly denied her child return motion for contempt. We disagree.

The following additional facts, found by the court, and procedural history are relevant to the plaintiff's claim. In paragraph 4 of the August 31, 2017 stipulation (paragraph 4), the parties agreed to the following relevant language: "The plaintiff shall be responsible for

to the parenting access schedule. Nevertheless, the relief she sought was an implementation of the adjustment she desired. In the parenting access schedule adjustment motion for contempt the plaintiff requested, inter alia, that the court "order the defendant to immediately engage in mediation regarding the . . . 'swaps' with [her] and the guardian ad litem, and if the parties are unsuccessful in resolving [the] issue after two . . . mediation sessions, the guardian ad litem shall make a binding recommendation until further agreement by the parties or order by the court . . . ." The plaintiff further sought an "order that until further agreement by the parties or recommendation by the guardian ad litem, the weekend 'swaps' be instituted immediately in accordance with the schedules of the members of [her] household . . . ." If the plaintiff believed that an adjustment to the recently established parenting access schedule was necessary, a motion for modification of visitation under Practice Book § 25-26 would have been a more direct and effective approach to receiving impartial consideration of the adjustment she sought.

As an initial matter, the plaintiff has not provided us with any legal support for her position that the guardian ad litem, under the facts of this case, was authorized to make a binding recommendation on a child custody and visitation matter. Furthermore, had the plaintiff moved to modify the parenting access schedule, instead of filing a motion for contempt against the defendant, she might have received appropriate consideration and relief more expeditiously. The fact that the plaintiff filed the parenting access schedule adjustment motion for contempt *less than two months* after the parties entered into the global August 31, 2017 stipulation further informs our conclusion that filing a motion for contempt was imprudent. When the parties cannot agree on a decision impacting the parenting of their children, they should turn to the court to resolve their impasse in a manner that does not seek to punish the other party, unless it truly is warranted. See *Sablosky* v. *Sablosky*, supra, 258 Conn. 722 ("[t]he doors of the courthouse are always open; it is incumbent upon the parties to seek judicial resolution of any ambiguity in the language of judgments").

coordinating [their son's] transportation from her residence to [private school] at the defendant's reasonable cost and the defendant shall be responsible for coordinating [their son's] timely return to the plaintiff's care at his sole expense." On November 15, 2017, the plaintiff filed a motion for contempt alleging that, on four days, the defendant failed to timely return their son to her home after his dismissal from his private school. Specifically, the plaintiff alleged that on September 20 and 29, and October 13, 2017, their son was dismissed from his private school at 2:40 p.m., picked up by the defendant between 4:15 and 4:28 p.m., and dropped off at the plaintiff's home at, around, or after 5 p.m. The plaintiff further alleged that on October 19, 2017, their son was dismissed from his private school at 4 p.m. and dropped off by the defendant at the plaintiff's home at 5:30 p.m. The plaintiff alleged that the defendant's conduct was in violation of the August 31, 2017 stipulation and was wilful.

In its September 13, 2018 memorandum of decision, the court found that on each of the four days at issue in the child return motion for contempt, the parties' son stayed after school to meet with his teachers and tutors or to practice the drums, and neither he nor the defendant informed the plaintiff. The court further found that the parties' son stayed after school because "[s]tudents benefit from tutoring or other general academic enrichment as a result of after school access to teachers." The court determined that "[t]he scheduling matters of which the plaintiff complains are not examples of wilful violation[s] of clear and unambiguous court orders by the defendant, but lapses in communication between [the parties]." The court determined that "[t]he plain language of [paragraph 4] does not require the defendant to return [their son] by a specific time as [the] plaintiff argue[d]." Accordingly, the court concluded that "there is no basis for a finding of contempt under the facts presented."

We conclude that paragraph 4 is not clear and unambiguous. See *Bolat* v. *Bolat*, supra, 191 Conn. App. 297 (analysis of court order is "legal inquiry subject to de novo review" (internal quotation marks omitted)). Paragraph 4 states that "the defendant shall be responsible for coordinating [their son's] timely return to the plaintiff's care at his sole expense." Paragraph 4 does not specify that the defendant must return their son to the plaintiff immediately after students are dismissed from their classes at the private school. As a result, paragraph 4 is reasonably susceptible to an interpretation that the parties' son must be timely picked up by the defendant and driven to the plaintiff after he completes the academic and enrichment extracurricular activities that he is engaged in at his private school.[6] See *Bolat* v. *Bolat*, supra, 298 ("an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation" (internal quotation marks omitted)). Had the parties wanted more precision as to what time their son must be returned by the defendant to the plaintiff, they could have specified an exact time in paragraph 4.[7] The parties did not. In light of that failure, we conclude that paragraph 4 is not clear and unambiguous

[6] The plaintiff argues that there was no evidence to support the court's findings that "[s]tudents benefit from tutoring or other general academic enrichment as a result of after school access to teachers" and that "[their son] chose to stay after school for reasons that are important to a child's education." We conclude that there was evidence to support both of these findings.

With respect to the second finding, the defendant's uncontested testimony was that on three of the four days at issue in the child return motion for contempt their son stayed after school to meet with his teachers, to complete his homework, and to practice on a percussion set available at his private school because there was not a set at his home. On one of the four days, the defendant was late due to a "client meeting." On that one day, the court reasonably could have concluded that the defendant did not act wilfully. See *Hall* v. *Hall*, supra, 182 Conn. App. 747 ("[F]ailure to comply with an order, alone, will not support a finding of contempt. . . . Rather, to constitute contempt, a party's conduct must be wilful." (Internal quotation marks omitted.)).

[7] The court stated that specifying an exact time by which the parties' son must be returned to the plaintiff "would be [an] impractical, if not impossible" obligation for the defendant to satisfy. The plaintiff homes in on this

as to when their son must be returned by the defendant to the plaintiff after getting picked up at his private school.[8] Accordingly, the court properly denied the plaintiff's child return motion for contempt.

III

The plaintiff next claims that the court improperly granted the defendant's physical therapy motion for contempt because the basis on which the court found the plaintiff in contempt differed from those pleaded by the defendant. We agree.

The following additional facts, found by the court, and procedural history are relevant to this claim. In his June 15, 2015 memorandum of decision, Judge Pinkus ordered, in relevant part, the following: "The parties shall have joint legal custody of the minor children. The plaintiff shall have final decision-making authority regarding the minor children after good faith consultation with the defendant. Such custody designation confers upon both parents the obligation to consult and discuss with each other regarding major decisions affecting the minor children's best interests, including, but not limited to matters of academic education, religious training, health and general welfare of the children. Neither parent will unreasonably withhold consent to matters affecting the children but shall endeavor to make decisions in such a way as the children's needs

language, arguing that "[t]he court effectively determined that no order, be it crystal clear or utterly amorphous, can provide a sufficient basis for a violation in this particular case—none but one: whatever [the parties' son] may decide enriches his education." It is not our function to offer an opinion as to the parties' capabilities to abide by paragraph 4 in parenting their son were it to specify an exact time by which he is to be dropped off at the plaintiff's home by the defendant. Paragraph 4, in its current form, however, is not clear and unambiguous and, thus, cannot support a finding of contempt against the defendant.

[8] Because we conclude that paragraph 4 is not clear and unambiguous, we do not consider whether the defendant acted wilfully. See *Puff* v. *Puff*, supra, 334 Conn. 365; footnote 2 of this opinion.

are timely and appropriately met, despite a parent's particular personal preference in relation to the other parent, and both the parents shall place the children's needs and interests above such individual and personal preferences." The parties' daughter has been diagnosed with "arthrogryposis, a neuromuscular condition which inhibits her ability to use her upper limbs. This condition is marked by contracture of her elbow, wrist and finger joints." The parties' daughter received private physical therapy with Ginette Courtney from ages two to six. Since the summer of 2017, when the plaintiff terminated their daughter's engagement in private physical therapy, the parties have disagreed over whether their daughter should continue to receive private physical therapy. Their daughter receives physical therapy at her elementary school, which is more limited than the private physical therapy she had received previously. The plaintiff believes that their daughter does not require private physical therapy because she engages in sports activities. On October 16, 2017, the daughter's treating physician wrote her the following prescription: "Physical therapy: eval & treat w/ attention to hamstring stretches & quad strengthening, ankle dorsiflexion strength b/l achilles stretching on right."

On November 19, 2017, the defendant filed the physical therapy motion for contempt. Therein, the defendant alleged that he had proposed that their daughter have her prescription filled by "work[ing] on a weekly basis with . . . Courtney." The defendant further alleged that the plaintiff "[had] refused to allow [their daughter] to treat with . . . Courtney and [had] failed to discuss with [him] or identify any other private physical therapist to fulfill the requirements of [their daughter's] prescription." Instead, the defendant alleged, the "plaintiff [had] opted to have [their daughter] continue to visit the physical therapist at the . . . public school which she now attends," which the defendant asserted was

"inadequate to satisfy [their daughter's] prescription." As a result, the defendant alleged, their daughter has not been treated "[d]espite more than one month having elapsed since the parties received the prescription." Accordingly, the defendant alleged that the plaintiff had "unreasonably withheld her consent for timely medical treatment for [their daughter]," "failed to insure that [their daughter's] medical needs are timely and appropriately met," and "failed to place [their daughter's] needs and interests above her personal preferences," all in violation of Judge Pinkus' order. The defendant further alleged that "[t]he plaintiff's conduct [was] wilful."

In its September 13, 2018 memorandum of decision, the court construed the physical therapy motion for contempt as alleging "that the plaintiff [was] in wilful violation of court orders as a result of her refusal to continue private physical and occupational therapy for the parties' . . . daughter . . . ." The court "[found] by clear and convincing evidence [that] the plaintiff [had] wilfully failed to comply with the clear and unambiguous court order that she engage in a good faith consultation with the defendant prior to making a decision about the children's health." The court thus "conclude[d] that the defendant [had] satisfied his burden of proof based on the clear and convincing evidence of the plaintiff's failure to engage in good faith consultation with the defendant about proper medical care for their child." Accordingly, the court granted the defendant's physical therapy motion for contempt.

The following legal principles are relevant to the plaintiff's claim. "Any determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary. . . . Generally, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . When reviewing the

court's decisions regarding the interpretation of pleadings, [t]he [motion] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . .

"Pleadings have an essential purpose in the judicial process. . . . For, instance, [t]he purpose of the [motion] is to put the defendants on notice of the claims made, to limit the issues to be decided, and to prevent surprise. . . . [T]he concept of notice concerns notions of fundamental fairness, affording parties the opportunity to be apprised when their interests are implicated in a given matter. . . . Whether a [motion] gives sufficient notice is determined in each case with reference to the character of the wrong complained of and the underlying purpose of the rule which is to prevent surprise upon the defendant. . . .

"[I]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings. . . . [A]ny judgment should conform to the pleadings, the issues and the prayers for relief. . . . [A] plaintiff may not allege one cause of action and recover upon another. . . . The requirement that claims be raised timely and distinctly . . . recognizes that counsel should not have the opportunity to surprise an opponent by interjecting a claim when opposing counsel is no longer in a position to present evidence against such a claim." (Citations omitted; internal quotation marks omitted.) *Lynn* v. *Bosco*, 182 Conn. App. 200, 213–15, 189 A.3d 601 (2018).

With respect to the physical therapy motion for contempt, the court found the plaintiff in contempt for her "failure to engage in good faith consultation with the defendant about proper medical care for their child." The basis on which the court found the plaintiff in contempt was not one of the bases pleaded by the defendant in the physical therapy motion for contempt. The defendant alleged that the plaintiff "unreasonably withheld her consent for timely medical treatment for [their daughter]," "failed to insure that [their daughter's] medical needs are timely and appropriately met," and "failed to place [their daughter's] needs and interests above her personal preferences." The defendant's allegations are that the plaintiff violated specific obligations within Judge Pinkus' order. These obligations are separate and distinct from the obligation that the court cited as its basis for finding the plaintiff in contempt.

The defendant argues that "any unbiased reading of the language set forth in paragraph [2 of his physical therapy motion for contempt] would reveal that the order which the plaintiff was alleged to have violated contains reference to the requirements of a 'good faith consultation prior to the plaintiff exercising final decision-making authority'; and, the requirement that 'neither parent will unreasonabl[y] withhold consent to matters affecting the children . . . .' Any reasonable construction of the original order of Judge Pinkus requires that those provisions be read together in a consistent whole as they are limitations on the exercise of 'final decision-making authority.' "

The defendant is correct that quoted within paragraph 2 of his physical therapy motion for contempt is the part of Judge Pinkus' order that pertains to "good faith consultation." The defendant did not allege, however, that the plaintiff violated the "good faith consultation" requirement of Judge Pinkus' order, thereby impermissibly depriving the plaintiff of fair notice that the issue of "good faith consultation" would be before

the court in the defendant's physical therapy motion for contempt. See *Lynn* v. *Bosco*, supra, 182 Conn. App. 214.

Moreover, we do not agree with the defendant's contention that the requirement of "good faith consultation" and the prohibition against unreasonably withholding consent must be read together. Although both obligations are related to decision making for the parties' children, they are unique obligations within the decision-making process. Thus, the obligation to consult in good faith could be violated without triggering a violation of the obligation to not unreasonably withhold consent, and vice versa.

Because the requirement of good faith consultation and the prohibition against unreasonably withholding consent are two separate components of Judge Pinkus' order, in order for the plaintiff to have been found in contempt for her failure to consult in good faith regarding their daughter's physical therapy needs, the defendant was required to have pleaded such. There was no allegation in the defendant's physical therapy motion for contempt that the plaintiff refused to consult in good faith with the defendant concerning their daughter's physical therapy. As such, the court's judgment does not conform to the pleadings. See *Lynn* v. *Bosco*, supra, 182 Conn. App. 214 ("[a]ny judgment should conform to the pleadings, the issues and the prayers for relief" (internal quotation marks omitted)). Therefore, it must be reversed.[9]

The judgment is affirmed only as to the denial of the plaintiff's child return motion for contempt; the judgment is reversed as to the granting of the plaintiff's parenting access schedule adjustment motion for contempt and the defendant's physical therapy motion for contempt.

In this opinion the other judges concurred.

[9] In addition, we note that we harbor the same concerns with regard to the defendant's motion for contempt that were articulated in footnote 5 of this opinion.

STATE OF CONNECTICUT *v.* MARCOS A. VELAZQUEZ (AC 40224)

Alvord, Bright and Bear, Js.

Syllabus

Convicted, following a bench trial, of operating a motor vehicle while under the influence of intoxicating liquor or drugs, the defendant appealed to this court, claiming that there was insufficient evidence to sustain his conviction and that the trial court improperly admitted certain testimony of a police officer. The defendant had been involved in an accident in which the investigating police officers determined that he had been the operator of the motor vehicle that collided with two other vehicles. At trial, during the state's direct examination of D, a police officer who responded to the scene of the accident, D testified that he smelled the odor of marijuana in the defendant's car but did not smell the odor of marijuana on the defendant's person. Following D's testimony, defense counsel, claiming that the state committed a discovery violation because it had not disclosed that D would testify about the odor of marijuana, moved for a mistrial and a dismissal of the charge. The trial court denied defense counsel's motions and found the defendant guilty. *Held*:

1. This court concluded, on the basis of the evidence presented at trial and the reasonable inferences drawn therefrom, that there was sufficient evidence for the trial court to have found the defendant guilty beyond a reasonable doubt of operating a motor vehicle while under the influence of intoxicating liquor or drugs, specifically, marijuana or Gabapentin, or both: the defendant did not dispute that he was operating a motor vehicle on a public road at the time of the accident, and the state elicited testimony from the investigating police officers that the defendant failed three field sobriety tests, that he was stumbling around and slow to respond to questions and directions, appeared dazed and confused, appeared unaware that he had been in a car accident, refused to provide a urine sample following his arrest, and admitted to the officers that he had smoked marijuana approximately one hour before the accident and that he also had consumed regular prescription medication, Gabapentin, which he had admitted to a medical professional one month earlier caused him to feel drowsy and unable to function, and a forensic toxicologist testified that Gabapentin should not be taken prior to operating heavy machinery, such as a motor vehicle, and that the side effects of that drug included negative cognitive effects, dizziness and lack of coordination.
2. The trial court did not abuse its discretion in failing to strike D's testimony with respect to the marijuana odor coming from the defendant's vehicle: in its oral decision, the court identified the evidence that it relied on to conclude that the defendant was guilty beyond a reasonable doubt,

and nowhere in that recitation did it rely on any reference to D's testimony about the odor of marijuana, and, even if the court did abuse its discretion in allowing that testimony, given the remaining evidence before the court with respect to the defendant's guilt beyond a reasonable doubt, any error was harmless.

Submitted on briefs February 3—officially released June 2, 2020

Procedural History

Substitute information charging the defendant with the crime of illegal operation of a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, where the case was tried to the court, *Lobo*, *J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Marcos A. Velazquez, self-represented, the appellant, filed a brief (defendant).

Melissa Patterson, assistant state's attorney, *Gail P. Hardy*, state's attorney, and *Sara Greene*, assistant state's attorney, filed a brief for the appellee (state).

Opinion

BEAR, J. The self-represented defendant, Marcos A. Velazquez,[1] appeals from the judgment of conviction, rendered following a bench trial, of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both in violation of General Statutes § 14-227a (a) (1).[2] On appeal, the defendant claims that (1) there was insufficient evidence to sustain his conviction and (2) the court improperly admitted the testimony of a police officer with regard to the presence of a marijuana odor in the defendant's vehicle at the time

[1] The defendant was represented by counsel during his criminal trial.

[2] Although the state appeared for oral argument, the defendant did not appear. Because of the absence of the defendant, the state waived its right to oral argument. Therefore, this court considers this appeal on the briefs submitted by the parties. See, e.g., *State* v. *Cotto*, 111 Conn. App. 818, 819 n.1, 960 A.2d 1113 (2008).

he was involved in an accident. We affirm the judgment of the trial court.

The trial court's oral decision sets forth, and the record reveals, the following relevant facts and procedural history. On March 24, 2015, while the defendant was operating a motor vehicle near 914 Silver Lane in East Hartford, he sideswiped one motor vehicle, reversed direction, and then rear-ended a second motor vehicle. Following the second collision, the police arrived on the scene and interviewed the defendant and the operators of the other vehicles. The police determined that the defendant was the operator of the vehicle that collided with the two other vehicles.

Shortly after the collisions, the investigating officers found the defendant to be "dazed and confused, stumbling around, [and] unaware of where he came from and even knowing that [he had] been in an accident." Additionally, "[h]e overwhelmingly failed the horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand test." When speaking with the police, the defendant admitted to using marijuana approximately one hour prior to the collisions. The defendant further admitted taking Gabapentin, a medication that was prescribed to treat the effects of some of his preexisting injuries. He also admitted that Gabapentin made him drowsy and unable to "function."[3]

During trial, Sergeant John Dupont of the East Hartford Police Department testified about his interactions with the defendant at the scene of the accident. Dupont testified, among other things, that he smelled an odor of marijuana inside the defendant's car, but he did not

[3] The state's expert witness testified at trial that side effects associated with Gabapentin include fatigue, dizziness, lack of coordination, and cognitive effects similar to that caused by other central nervous system depressants.

smell any odor of marijuana coming from the defendant's person. Following Dupont's testimony, defense counsel claimed that the state committed a *Brady*[4] violation and a discovery violation because it failed to disclose that Dupont had smelled marijuana in the defendant's car and that Dupont would testify about it. As a result, defense counsel moved for a mistrial and a dismissal of the charge of operating a motor vehicle while under the influence. After the court conducted a *Brady* hearing, defense counsel admitted that there was no *Brady* violation with respect to Dupont's testimony about the odor of marijuana. Defense counsel, however, asserted that, pursuant to his discovery requests, the state should have disclosed prior to trial that Dupont would testify about the odor of marijuana in the defendant's vehicle. The court denied defense counsel's requests because it concluded that Dupont's testimony about the odor of marijuana in the defendant's vehicle constituted neither a *Brady* violation nor a discovery violation.

On January 6, 2017, the trial court found the defendant guilty of operating a vehicle under the influence of intoxicating liquor or any drug or both in violation of § 14-227a (a) (1). Specifically, the court concluded that, "[w]hen considering the defendant's admission to marijuana use approximately an hour before the accident, his admission [to a health care professional] one month prior as to the side effects . . . [and] impacts that Gabapentin was having on his functioning, the nature of the accident, the defendant's behaviors exhibited following the accident in conjunction with his failures on the standard field sobriety test, this court finds

[4] *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ("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").

. . . beyond a reasonable doubt that the defendant's physical and mental capabilities were impaired to a degree . . . [t]hat he no longer had the ability to drive a motor vehicle with the caution and characteristic[s] of a sober person of ordinary prudence."

After the court found the defendant guilty, the defendant moved for a continuance, which was granted by the court, to file a sentencing memorandum and postverdict motions. Subsequently, the defendant filed a motion for a judgment of acquittal, arguing that there was insufficient evidence to meet the requisite standard of guilt beyond a reasonable doubt. He also filed a motion for a new trial in which he argued, among other things, that relief should have been granted pursuant to Practice Book § 40-5[5] with regard to Dupont's testimony concerning the odor of marijuana in the defendant's vehicle. On January 13, 2017, the court denied the defendant's motions and sentenced him to six months incarceration, execution suspended after four months, followed by two years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to sustain his conviction. He argues that both he and the state produced expert testimony, but that the toxicologist produced by the state and the toxicologist that he had produced reached opposite conclusions as to whether he was under the influence of alcohol or drugs. The defendant asserts that the state's toxicologist testified that he may have been under the influence only of drugs. He also asserts that the urine test he took

[5] Practice Book § 40-5 provides in relevant part: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate . . . ."

at Hartford Hospital, within three days of the accident, "indicated that he wasn't under the influence at the time of the accident." Finally, he asserts that a blood test taken by his primary doctor also "indicated that he wasn't under the influence at the time of the accident."

"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 [fact finder] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the [fact finder] if there is sufficient evidence to support the [fact finder's] verdict . . . ." (Internal quotation marks omitted.) *State* v. *Watson*, 195 Conn. App. 441, 445, 225 A.3d 686, cert. denied, 335 Conn. 912, 229 A.3d 472 (2020).

Additionally, as our Supreme Court often has noted, "proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . 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 [trier's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 152, 976 A.2d 678 (2009).

The court found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both in violation of § 14-227a (a) (1). In order for the court to have found beyond a reasonable doubt that the defendant was guilty, the state needed to prove that the defendant (1) operated

a motor vehicle (2) on a public road (3) while under the influence of intoxicating liquor or any drug or both.[6] See *State* v. *Gordon*, 84 Conn. App. 519, 527, 854 A.2d 74, cert. denied, 271 Conn. 941, 861 A.2d 516 (2004).

During trial, the state elicited the following testimony from the police officers who investigated the incident: (1) immediately after the incident, the defendant "appeared dazed and confused and did not appear like he knew where he was . . . he was stumbling around . . . [and] [n]ot steady on his feet"; (2) the defendant was slow to respond to questioning and directions; (3) the defendant, while at the scene of the incident, appeared to be unaware that he had been in a car accident; (4) the defendant admitted to the police that he smoked marijuana approximately one hour prior to the accident and that he also consumed regular prescription medication, which he had admitted to a medical professional one month earlier, caused him to feel drowsy and unable to function; (5) the defendant failed three separate field sobriety tests;[7] and (6) after he was arrested, the police attempted to obtain a urine sample from the defendant, but the defendant refused to provide one.

The state also elicited the testimony of Robert Powers, a forensic toxicologist. Powers testified that Gabapentin, the defendant's prescribed medication, should not be taken prior to operating heavy machinery, such as a motor vehicle, and that the side effects of taking Gabapentin include negative cognitive effects, dizziness, and lack of coordination.

[6] The defendant does not dispute the fact that he was driving his vehicle on a public road at the time of the accident. He denies, however, that he was under the influence of intoxicating liquor or any drug.

[7] During trial, the police officers testified about the results of three field sobriety tests that they administered to the defendant. Specifically, they testified that during the horizontal gaze nystagmus test, the defendant's eyes moved involuntarily, a typical sign of impairment; during the walk and turn test, the defendant swayed back and forth and could not remain on the straight line; and, for the one leg test, he could not keep his balance or stand on one leg.

On the basis of this evidence, and the reasonable inferences drawn therefrom, we conclude that there was sufficient evidence for the court to have found the defendant guilty beyond a reasonable doubt of operating a motor vehicle while under the influence of marijuana or Gabapentin, or both.[8]

II

Next, the defendant claims that the court erred when it failed to strike Dupont's testimony with respect to the marijuana odor coming from his vehicle. Specifically, the defendant asserts that Dupont did not file a written report, that he was "completely surprised" because he did not have prior notice that Dupont's testimony that there was an odor of marijuana in his vehicle would be presented during trial, and that the state's failure to disclose that testimony prior to trial constituted a discovery violation.[9] The defendant further posits that he was prejudiced by Dupont's testimony because had he known of that testimony in advance, he would have accepted a plea bargain offer prior to trial in order to obtain a more favorable result. The state contends that the court did not abuse its discretion in denying the defendant's motion to strike

[8] Although the defendant argues that he presented evidence at trial that proved he was not under the influence of either marijuana or Gabapentin, insofar as the defendant challenges the trial court's determinations of his or other witnesses' credibility, we note that "[i]t is well established . . . that the evaluation of a witness' testimony and credibility are wholly within the province of the trier of fact. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . [*Emerick* v. *Emerick*, 170 Conn. App. 368, 378–79, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017)]." (Internal quotation marks omitted.) *Al-Fikey* v. *Obaiah*, 196 Conn. App. 13, 18, 228 A.3d 668 (2020).

[9] As previously set forth, the defendant originally claimed a *Brady* violation but subsequently withdrew that claim.

Dupont's testimony about the marijuana odor. In the alternative, the state argues that any error in allowing that testimony was harmless. Because the trial court specifically stated that it did not consider Dupont's testimony about the marijuana odor, we agree that its admission did not harm the defendant.[10]

"[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the . . . verdict was substantially swayed by the error. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *Jackson*, 183 Conn. App. 623, 648, 193 A.3d 585, rev'd on other grounds, 334 Conn. 793, 224 A.3d 886 (2020).

In its oral decision, the court identified the evidence that it relied on to conclude that the defendant was guilty beyond a reasonable doubt. Nowhere in the court's recitation of the evidence did it rely on any reference to Dupont's testimony about the odor of marijuana in the defendant's vehicle. Moreover, during the trial, the court stated that it did not "[find] the testimony that the car smelled of marijuana . . . to be that material [to] the case." The court further stated that it was not drawing the conclusion that the defendant had been

[10] Although we do not rely on it in this opinion, we note that the defendant has not set forth either the legal basis for his claim or any authority supporting it.

smoking marijuana less than one hour before the collision. Accordingly, even if the court did abuse its discretion in denying the defendant's motion for relief, given the remaining evidence before the court with respect to the defendant's guilt beyond a reasonable doubt, we conclude that any error was harmless.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHIFFON MILNER (AC 40322)

DiPentima, C. J., and Sheldon and Moll, Js.*

Syllabus

Convicted, after a bench trial, of the crime of criminal possession of a firearm in connection with the shooting death of C, the defendant appealed to this court. An individual, R, who lived in a residence adjacent to the area where the shooting occurred, witnessed an individual shoot at C. Another witness, S, testified that the shooter, who was wearing a white tank top, pointed and fired a gun. The defendant was charged in connection with the incident with murder and criminal possession of a firearm. He elected a jury trial on the charge of murder, and the jury returned a verdict of not guilty. Thereafter, the court conducted a separate trial on the charge of criminal possession of a firearm, and the court found the defendant guilty. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to sustain his conviction because the trustworthiness of his alleged inculpatory statements to a former friend, B, on which the trial court principally relied in finding him guilty, were not corroborated by substantial independent evidence, in violation of the corpus delicti rule; the defendant did not dispute that independent evidence tended to establish that a shooting occurred, that he was at the scene of the shooting, and that he was drinking with the victim at that location before the two engaged in a physical altercation, and the state adduced substantial independent evidence of the trustworthiness of the defendant's statements to B, including DNA and forensic evidence linking the defendant to the scene at the time of the shooting and S's testimony linking the defendant to a white tank top worn by the shooter, providing ample corroboration of the defendant's statements to B that he then possessed a firearm.

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

2. The defendant could not prevail on his claim that, even if the state had satisfied the requirements of the corpus delicti rule with respect to his statements to B, B's testimony and that of the state's other witnesses was too unreliable to support his conviction: the state and the defendant stipulated that he had been convicted of a felony, and evidence was presented that the defendant possessed a firearm capable of discharging a shot because two witnesses saw the shooter holding the weapon and heard the shooter discharge it five times in rapid succession, with one such discharge firing a bullet that caused C's death; moreover, the defendant told B that he and C had a physical altercation because C wanted the defendant's gun, and that he shot C with that gun when C, who had previously knocked the defendant unconscious in the altercation, began to reapproach the defendant after he had regained consciousness; this admission, combined with other independent evidence, furnished a sufficient evidentiary basis for the court to find beyond a reasonable doubt that the defendant committed the crime of criminal possession of a firearm.

Argued January 23, 2019—officially released June 2, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, where the charge of murder was tried to the jury before *Crawford, J.*; verdict of not guilty; subsequently, the charge of criminal possession of a firearm was tried to the court; finding of guilty; judgment of guilty in accordance with the court's finding, from which the defendant appealed to this court. *Affirmed.*

Richard E. Condon, senior assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, 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

SHELDON, J. The defendant, Chiffon Milner, appeals from the judgment of conviction, following a trial to the court, of criminal possession of a firearm in violation

of General Statutes § 53a-217 (a) (1). On appeal, the defendant claims that the evidence was insufficient to sustain his conviction because (1) the court improperly relied on his inculpatory statements to a former friend, Kevin Barco, in the absence of substantial independent evidence corroborating the trustworthiness of those statements, in violation of the corpus delicti rule, and (2) even if the state satisfied the requirements of the corpus delicti rule with respect to the defendant's statements to Barco, Barco's testimony and that of the state's other witnesses was too unreliable to support the defendant's conviction. We affirm the judgment of the trial court.

The state presented the following evidence. In the early morning hours of July 12, 2014, a group of people were drinking alcohol, playing music, and gambling in the parking lot/courtyard of a U-shaped apartment complex located at 30 Auburn Street in Hartford. A three-family residence located at 18 Auburn Street was adjacent to the parking lot/courtyard and driveway of 30 Auburn Street. Rhonda Burney, who lived on the second floor of 18 Auburn Street, was awakened at approximately 4:30 a.m. on July 12, 2014, by the sound of "[a]rguing." When Burney went to the front porch of her apartment to investigate, she saw two individuals arguing. She then saw one of the two individuals (the shooter), whom she could not later identify or describe, shoot at the other individual (the victim) with a gun, four or five times in rapid succession, from where he was standing by a mailbox in front of 30 Auburn Street. Immediately thereafter, she heard the victim, who was later identified as Tyshawn Crawford, yell out that he had been shot, then saw him fall to the ground where he had been standing, directly across the street from the shooter, in front of 17 Auburn Street. Burney promptly dialed 911 on her cell phone, then went outside to assist the fallen victim. She never saw a weapon on or near

the victim at any time. Burney later told the police that she had seen someone running away from the scene of the shooting but she "didn't give any description because there was a bunch of people that ran."

Melanie Solis, who lived on the third floor of the three-family residence at 18 Auburn Street, also was awakened in the early morning hours of July 12, 2014, by the sound of arguing outside the building. When she looked out of a window in the front of the building, she saw a man with braided hair, who was wearing a white tank top, standing by the mailbox in front of 18 Auburn Street and pointing a gun in the air. She then heard the man ask: "What [are] you going to do? What [are] you going to do?" After running away from the front window toward the back of the residence, Solis heard five gunshots ring out in rapid succession. She then looked out of her kitchen window in the front of the building and saw the shooter, who was still wearing a white tank top, run to and enter a black car, in which he drove away in the direction of Winchester Street. At that time, as the victim lay on the ground across the street, Solis saw several people "fleeing into their houses." She then directed her mother to call 911. While her mother was on the phone with the 911 dispatcher, Solis informed her mother that the shooter had been shirtless when he fled the scene.[1] She did not talk to the detectives herself because she "was scared."

Officer Michael Dizaar of the Hartford Police Department responded to the scene. He first examined the victim, who was still lying on the ground in front of 17 Auburn Street and could not speak. Dizaar noticed a small hole in the victim's neck and a hole in the lower back of his shirt. The victim was transported to the hospital, where he was pronounced dead.

[1] The court instructed the jury to consider this inconsistent statement only as it related to Solis' credibility.

Dizaar then canvassed the neighborhood for information about the shooting, but encountered "some resistance" to his investigative efforts. He spoke with Burney, however, who reported that she had seen a shirtless man running away from the scene toward Westland Street. Officers found blood near a dumpster on the pavement of the driveway of 30 Auburn Street and on the front yard of 17 Auburn Street. They also found five .40 caliber shell casings on the driveway of 30 Auburn Street and a white shirt with bloodstains on it, size XXL, in the northwest corner of the courtyard/parking lot of 30 Auburn Street.

An autopsy later revealed that the cause of the victim's death was a single gunshot wound to the chest by a bullet that penetrated his right lung before exiting his body through the middle of his back. No bullet was recovered from the victim's body during the autopsy.

Forensic testing of blood samples recovered from the driveway of 30 Auburn Street and from the large bloodstain on the front of the white shirt recovered from the courtyard at that address revealed that both samples had been left by a person whose DNA profile was consistent with the defendant's profile but inconsistent with that of the victim. The expected frequency of such a DNA profile in the general population was less than one in seven billion. By contrast, forensic testing of a different blood sample taken from a separate bloodstain on the interior collar and right shoulder area of the same white shirt revealed that it contained a complex mixture of DNA profiles, potentially including the victim's profile, but definitely not including the defendant's, thereby eliminating the defendant as a possible contributor to that sample. Furthermore, separate forensic testing of a mixed sample of DNA removed postmortem from the fingernails of the victim's left hand revealed multiple DNA profiles consistent with the profiles of both the defendant and the victim, thus making

each of them a possible contributor to that sample. Finally, forensic testing of a particle removed from the bloodstained white shirt found in the courtyard of 30 Auburn Street revealed the presence of antimony and barium, two of the three essential elements necessary to establish the presence of gunshot residue. Testing of that particle did not reveal the presence of lead, the third essential element of gunshot residue.

The investigation caused the lead investigator, Michael Rykowski, a detective with the Hartford Police Department, to suspect that the defendant was the person who had shot and killed the victim. He subsequently interviewed the defendant, who denied any involvement in the shooting but admitted that in the overnight hours of July 11 and July 12, 2014, he had been smoking marijuana and drinking alcohol at 30 Auburn Street when he and the victim had a physical altercation, during which the defendant's white V-neck T-shirt had been removed. Although the defendant initially told Rykowski that he had left 30 Auburn Street on foot in the early morning hours of July 12, 2014, he stated later in the interview that he had left 30 Auburn Street that night in his uncle's black Mercedes sport utility vehicle. Rykowski noticed signs of a recent physical altercation on the defendant's person, including stitches on his lip, scratches on his throat, bandages on his knees, cuts on the back of his head, and a bandage on his right hand.

Kevin Barco, who was once a friend of the defendant, testified at trial that while he was incarcerated on unrelated charges, he contacted the police to give them information about the July 12, 2014 shooting. Barco and his family had received threats after the incident due to his friendship with the defendant. Barco testified that he had learned on Facebook that the victim had been shot. Thereafter, having received several phone calls reporting that the defendant was responsible for the shooting, he called the defendant to ask him what

had occurred. When they later met, the defendant admitted to Barco that he had "fucked up," explaining that, "[w]hen [the defendant and the victim were] on Auburn Street, drinking, [the defendant] had a gun. He said [the victim] wanted his gun. [The defendant] wasn't trying to give it up. So, they started arguing . . . because they was both drunk. [The victim] started to fight him. They fought. [The defendant] got knocked out. [The victim] walked off. [The defendant] got up, I guess, tried to go in his aunt's house. When he turned around [the victim] was coming back. [The defendant] said that he wasn't going to fight [the victim] again and [the defendant] shot [the victim]."

The defendant was arrested in connection with the incident and charged with murder in violation of General Statutes § 53a-54a and criminal possession of a firearm in violation of § 53a-217 (a) (1). He pleaded not guilty to both charges, elected a jury trial on the charge of murder, but waived his right to a jury trial on the charge of criminal possession of a firearm and elected a trial to the court. Following a jury trial on the charge of murder, the jury found the defendant not guilty. Thereafter, the court conducted a separate trial on the charge of criminal possession of a firearm based on the same evidence that the parties had presented to the jury on the murder charge,[2] and found the defendant guilty. The court reported its findings as follows: "Court exhibit number six, which was the stipulation that the defendant is a convicted felon, in that he was convicted of burglary in the second degree on August 2, 2011, which is a felony. As to the other element, possession of a firearm, the question is whether or not this defendant possessed a firearm, the court credited the following

[2] The state requested that the court rely on the same evidence when considering the charge of criminal possession of a firearm as it had presented to the jury on the charge of murder. The defendant had no objection to the state's request.

testimony, that . . . Burney heard an argument and she also heard and saw the flash of four to five shots fired in rapid succession. She also went outside to the victim and the evidence shows that the [victim] had died from a gunshot wound. . . . Solis [testified that] she also heard the shots and had her mother call 911. She saw someone fleeing from the scene, fleeing in a black car, and . . . at that time the mother was giving the information, and she told the mother the description of the person fleeing, and that person had no shirt on and fled in a black car. Although at trial, she did say that he was wearing a shirt, the court, however, finds the statement made closer in time to be relayed to the police officer, police department as to the description that included that the defendant was not wearing a shirt. Additionally . . . she identified the person fleeing as having braids. . . .

"The testing of the evidence on the shirt that the officer seized indicates that the defendant's DNA was on that shirt. Additionally . . . Rykowski indicated that he had located five shell casings and that the defendant admitted to him that he was there, and that he had an altercation with the deceased. . . . Barco, from the information that he saw on Facebook and phone calls he received, contacted the defendant and met with him, and the defendant admitted that he shot the deceased. And so, based on that evidence the court on the assessment of the credibility of the witnesses, the court finds . . . the defendant guilty of [the charge of criminal possession of a firearm]." The defendant was sentenced on the charge of criminal possession of a firearm to a term of ten years of incarceration. This appeal followed.

We first set forth the applicable legal principles governing our review of the defendant's claim. "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 [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a [trier's] factual inferences that support a guilty verdict need only be reasonable." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 151–52, 976 A.2d 678 (2009).

A person is guilty of criminal possession of a firearm pursuant to § 53a-217 (a) (1) when that person possesses a firearm and has been convicted of a felony. 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).

I

The defendant first claims that the evidence was insufficient to sustain his conviction because the trustworthiness of his alleged inculpatory statement to Barco, on which the court principally relied as the basis for finding him guilty of the charged offense, was not corroborated by any evidence, much less by substantial independent evidence, as required by our state's corpus delicti rule. The state responds that the corpus delicti rule was not violated in this case because it introduced

substantial independent evidence tending to establish the trustworthiness of the defendant's inculpatory statement to Barco. We agree with the state.

As a preliminary matter, we address the issue of preservation. The defendant has argued that his corpus delicti claim was preserved because he filed a motion for a judgment of acquittal. The state initially countered that the defendant's corpus delicti claim was unpreserved and, therefore, unreviewable because the defendant had failed to raise that claim distinctly before the trial court. Following oral argument before this court, we stayed this appeal pending our Supreme Court's decisions in *State* v. *Leniart*, 333 Conn. 88, 215 A.3d 1104 (2019), and *State* v. *Robert H.*, 333 Conn. 172, 214 A.3d 343 (2019). In *Leniart*, our Supreme Court concluded that unpreserved corpus delicti claims are reviewable on appeal because the common-law corpus delicti rule is not merely evidentiary but, rather, is a hybrid rule that has both an evidentiary component and a substantive component that implicates the defendant's due process right not to be convicted in the absence of sufficient evidence of his guilt. See *State* v. *Leniart*, supra, 98–110. In the companion case of *Robert H.*, supra, 175, our Supreme Court relied on *Leniart* in concluding that "even unpreserved corpus delicti claims are reviewable on appeal." Following those decisions, this court lifted the appellate stay in the present case and ordered the parties to submit supplemental briefs "addressing the impact, if any, of *State* v. *Leniart*, [supra, 88], and *State* v. *Robert H.*, [supra, 172], on this appeal." The state and the defendant agreed in their supplemental briefs that, as decided in *Leniart* and *Robert H.*, the defendant's corpus delicti claim is reviewable. We, of course, are bound by the Supreme Court's decisions in *Leniart* and *Robert H.*, and, thus, we agree with the parties that the defendant's corpus delicti claim is properly before us, even though it had not been

briefed or argued before the trial court. We thus turn to the merits of that claim.

Recent case law has clarified the corpus delicti rule, also known as the corroboration rule, as follows. "It is a [well settled] general rule that a naked extrajudicial confession of guilt by one accused of crime is not sufficient to sustain a conviction when unsupported by any corroborative evidence. . . . This corroborating evidence, however, may be circumstantial in nature. . . . [The state is] require[d] . . . to introduce substantial independent evidence which would tend to establish the trustworthiness of the [defendant's] statement." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Harris*, 215 Conn. 189, 192–94, 575 A.2d 223 (1990). This "trustworthiness rule set forth in *Harris*, also known as the corroboration rule . . . applies to all types of crimes . . . . [A] confession is . . . sufficient to establish the corpus delicti of any crime, without independent extrinsic evidence that a crime was committed, as long as there is sufficient reason to conclude that the confession is reliable." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 333 Conn. 113, quoting *State* v. *Hafford*, 252 Conn. 274, 317, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

In other words, "[t]he present version of the corpus delicti rule, which applies to the admission of inculpatory statements involving all types of crimes, requires that the state present corroborative evidence to establish the trustworthiness of the statement, but that such evidence need not be sufficient, independent of the statements, to establish the corpus delicti." (Internal quotation marks omitted.) *State* v. *Andino*, 173 Conn. App. 851, 877, 162 A.3d 736 (quoting *State* v. *Hafford*, supra, 252 Conn. 316), cert. denied, 327 Conn. 906, 170 A.3d 3 (2017).

The defendant does not dispute that independent evidence tends to establish that a shooting occurred on July 12, 2014, near 30 Auburn Street, which was adjacent to the residences of Burney and Solis. Burney testified that she saw a person standing near the mailbox at the entrance to the driveway of 30 Auburn Street shoot at the victim four or five times, after which the victim, who was standing across the street from the shooter, yelled that he had been shot and fell to the ground. Solis testified that the shooter, who was standing in front of a mailbox, pointed a gun in the air, then fired it five times in rapid succession. When Dizaar examined the victim, he saw a hole in the victim's neck and a hole in the back of his shirt. An autopsy later revealed that the cause of the victim's death was a gunshot wound to the chest by a single bullet that penetrated his right lung and exited his body through the middle of his back. The police recovered five .40 caliber shell casings from the scene.

The defendant also does not dispute that independent evidence tends to establish that he was at the scene of the shooting on the night in question and was drinking with the victim at that location before the two engaged in a physical altercation, which resulted in the defendant sustaining numerous injuries, including a temporary loss of consciousness. Forensic evidence also supports an inference that the victim and the defendant engaged in a physical altercation near 30 Auburn Street on the night in question. The defendant's DNA profile was found in blood recovered from the pavement of the driveway of 30 Auburn Street near a dumpster, in blood from a bloodstain on the front of a white shirt found in the courtyard of 30 Auburn Street, and in material removed postmortem from the fingernails of the victim's left hand. When Rykowski interviewed the defendant, moreover, he noticed what appeared to be recent physical injuries to the defendant's lip, throat, knees, head, and right hand.

The defendant disputes only the existence of substantial independent evidence tending to corroborate his identity as the person who possessed the firearm from which shots were fired at the victim on the night of July 12, 2014.[3] He contends that the independent evidence shows only that an unknown person possessed a firearm from which shots were fired at that location, and that such evidence was insufficient to demonstrate the trustworthiness of his inculpatory statement to Barco.

The independent evidence, viewed together with the previously recounted evidence that the defendant had engaged in a physical altercation with the victim on Auburn Street in the early morning hours of July 12, 2014, when the victim was shot, amply corroborates the defendant's statements to Barco that he possessed a firearm at that time, as the state alleged and the trial court found beyond a reasonable doubt. DNA evidence linked the white shirt found at the scene to both the defendant and to the victim. Solis testified that the man she saw standing by the mailbox, holding a gun, was wearing a white tank top, and forensic analysis revealed that the white shirt found at the scene contained particles consistent with, although not definitively establishing, the presence of gunshot residue. Rykowski testified

[3] Generally, identity is not part of the corpus delicti of a crime. See, e.g., *State* v. *Berkowitz*, 24 Conn. Supp. 112, 118–19, 186 A.2d 816 (App. Div.), cert. denied, 150 Conn. 712, 204 A.2d 933 (1962). The defendant argues that identity is part of the corpus delicti of the status offense of criminal possession of a firearm because that offense requires proof that the person who possessed the firearm is a convicted felon. The state agrees with the defendant that corroborative evidence must implicate the defendant in order to show that a crime has been committed. We agree with both parties that the corpus delicti of § 53a-217 (a) (1) cannot be established without identifying the person who committed the offense as a convicted felon. See, e.g., *Smith* v. *United States*, 348 U.S. 147, 153–54, 75 S. Ct. 194, 99 L. Ed. 192 (1954) (with crime such as tax evasion that lacks tangible injury, "it cannot be shown that the crime has been committed without identifying the accused"); *United States* v. *Brown*, 617 F.3d 857, 862 (6th Cir. 2010) ("when an accused confesses to a crime for which there is no tangible injury and it cannot be shown that [a] crime has been committed without identifying the accused

that the defendant had informed him that his white V-neck T-shirt had been removed during his altercation with the victim. Burney testified that, after the shooting, she saw a shirtless man running away from the scene. The victim, moreover, was wearing a shirt when Dizaar responded to the scene, thereby suggesting that the bloodstained white shirt did not belong to him. Furthermore, the injuries sustained by the defendant during his altercation with the victim support the inference that he had a motive to shoot the victim. See *State* v. *Farnum*, 275 Conn. 26, 34, 878 A.2d 1095 (2005) (evidence of motive can be used to identify defendant as perpetrator).

The defendant, however, contends that the court's reliance on certain portions of the state's evidence was misplaced because such evidence did not support an inference that he possessed a firearm on the night the victim was shot. We are not persuaded by these arguments, which merely offer differing interpretations of the evidence than those advanced by the state and credited by the court. In addressing these arguments, we are mindful that, although the corpus delicti rule requires the state to present evidence tending to corroborate the trustworthiness of the defendant's inculpatory statements, that evidence "need not be sufficient, independent of the statements, to establish the corpus delicti." (Internal quotation marks omitted.) *State* v. *Hafford*, supra, 252 Conn. 316; see also *State* v. *Andino*, supra, 173 Conn. App. 877. "The purpose of the corpus delicti rule is not to erase any doubt as to the accuracy of the accused's inculpatory statement, but to assure that such a statement is trustworthy because of the evidence that the criminal activity described therein actually has occurred. . . . [I]t is sufficient if the corroboration merely fortifies the truth of the confession without independently establishing the crime charged

. . . the corroborative evidence must implicate the accused" (citation omitted; internal quotation marks omitted)).

. . . .'' *Wright* v. *Commissioner of Correction*, 143 Conn. App. 274, 301–302, 68 A.3d 1184, cert. denied, 310 Conn. 903, 75 A.3d 30 (2013).

The defendant first contends that the court improperly relied on Solis' prior inconsistent statement that the person she saw running to and entering a black car was shirtless. He notes that Solis, the only witness to provide a description of the shooter, described him as wearing a white tank top and testified that he was still wearing the white tank top when he entered the black car and fled from the scene. The defendant argues that this testimony from Solis necessarily excluded him as the shooter, because he admitted to Rykowski that his white V-neck T-shirt was removed during his earlier altercation with the victim and there was no evidence that the defendant was wearing a white tank top while at 30 Auburn Street in the early morning hours of July 12, 2014. The court's decision, however, does not support the defendant's argument that it improperly relied on Solis' prior inconsistent statement for substantive purposes. Although the court mentioned Solis' prior inconsistent statement, it did not state that it relied on that statement for substantive purposes. ''In the absence of any evidence to the contrary, [j]udges are presumed to know the law . . . and to apply it correctly.'' (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 29 n.21, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 1245 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Additionally, we determine that the trier of fact reasonably could have determined that Solis' testimony that the shooter fled following the shooting while wearing a white shirt was impeached by her prior inconsistent statement that the shooter fled while shirtless.

The defendant also argues that the evidence concerning the white shirt found at the scene shows that it more likely had been worn by the victim than by the defendant because the victim's DNA was found on

the interior collar of the shirt. He also contends that because the white shirt in question was a size XXL, it was more likely worn by the victim, who was six feet, one inch tall and weighed 216 pounds, than by the defendant, who weighed only 165 pounds. The defendant further claims that the bloodstains on the front of the white shirt are consistent with the defendant having bled on the victim's shirt during the altercation.

The white shirt recovered from the scene contained both the defendant's and the victim's DNA, which was consistent with there having been a physical altercation between them. The fact that the white shirt was a size XXL, or that the blood swabbed from the interior collar of the shirt contained a complex DNA mixture that included the victim but not the defendant as a possible contributor, does not render the defendant's statements to Barco untrustworthy. When Heather Degnan, a forensic scientist, was asked by the state on direct examination whether the presence of the victim's DNA on the inside collar of the white shirt meant that the victim had touched or had been wearing the shirt, Degnan responded as follows: "I can't say. When we receive a sample we don't know how someone's DNA could've gotten onto an item. And in this case it was a mixture. . . . I can't tell you how it got on that item." When asked if the defendant could have been eliminated as a contributor to the blood swabbed from the inside collar of the shirt because there was not enough DNA to detect it, Degnan responded in the affirmative.

Although the defendant points to an alternative interpretation of the independent evidence, we do not examine such evidence to see if it can be viewed in a light supporting innocence but, rather, to determine if it fortifies the truth of the defendant's statements sufficiently to establish their trustworthiness. See, e.g., *Wright* v. *Commissioner of Correction*, supra, 143 Conn. App. 301–302. When viewed in such a light, the independent evidence indicates that the shooter, not the victim, was

wearing the white shirt that was found at the scene, and that the defendant was the shooter. Prior to the shooting, the shooter had been seen wearing a white shirt and waving a gun in the air. The white shirt found at the scene contained both the defendant's and the victim's DNA, as well as elements consistent with gunshot residue. It is not reasonable to infer that the white shirt must have been worn by the victim because the responding officer found the injured victim to be wearing a shirt. Furthermore, the defendant admitted to Rykowski that he had been wearing a white shirt on the night in question but stated that the shirt had been removed during his altercation with the victim. The independent evidence thus corroborates the defendant's statement to Barco that he was the shooter. With regard to this argument, as with the defendant's other arguments concerning interpretations of the independent evidence that might have been made in his favor, we note that "[t]he corpus delicti does not have to be established beyond a reasonable doubt, or even by a preponderance of the evidence." *State* v. *Kari*, 26 Conn. App. 286, 290, 600 A.2d 1374 (1991), appeal dismissed, 222 Conn. 539, 608 A.2d 92 (1992).

The defendant further argues that Burney's testimony demonstrated *only* that an *unknown* individual fired four to five gunshots. He contends that Solis' testimony specifying that the shooter fled the scene in "a black car" excludes him as the shooter because he described the vehicle he used on the night in question as a black Mercedes sport utility vehicle. The defendant also notes that the court relied on Solis' testimony that the person fleeing had braids, although the state had introduced no evidence regarding the defendant's hairstyle during the early morning hours of July 12, 2014. We are not persuaded that Solis' more general description of the vehicle used by the shooter to flee the scene as a "black car" is inconsistent with the defendant's more specific

description of the getaway vehicle as a black Mercedes sport utility vehicle. Rather, the evidence that the shooter fled the scene in a black vehicle and the evidence that the defendant was driving a black vehicle on the night in question tend to support, circumstantially, an inference that the defendant was the shooter. Furthermore, the state was not required to offer evidence as to the defendant's hairstyle on the night in question in order to prove the trustworthiness of his statements to Barco, as there was other independent evidence that substantially corroborated the defendant's inculpatory statements.

The defendant also argues that, when viewed in light of *State* v. *Andino*, supra, 173 Conn. App. 851, the evidence adduced at trial was not corroborative of his alleged inculpatory statements to Barco that he had shot the victim. In *Andino*, the defendant, who was recognized and identified by two bystanders, and the victim were arguing in the parking lot of an apartment complex. Id., 854. The argument, which was overheard by residents, was related to the victim's sale of illegal drugs in the neighborhood. Id. The defendant threatened to shoot the victim and, ultimately, did shoot him before fleeing the scene. Id. Multiple witnesses overheard gunshots. Id. The victim, who sustained injuries that were not life threatening, was not cooperative with the investigating police officers and did not testify at trial. Id., 854 n.2. The defendant waived his *Miranda*[4] rights and told a police detective that he had shot the victim because the victim had been selling drugs in an area that he and others controlled. Id., 855. We concluded that the trial court, in denying the defendant's motion for acquittal, properly determined that the state had sufficiently corroborated the defendant's inculpatory statement to the police, and properly concluded that the state had met its burden of proof as to the

[4] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 88 S. Ct 1602, 16 L. Ed. 2d 694 (1966).

charge of criminal possession of a firearm in violation of § 53a-217 (a) (1). Id., 876–77. We determined that "the state proved that the defendant's statement was trustworthy by means of evidence that demonstrated that the defendant was at the scene of the crime, that he was involved in an altercation with the victim, that he threatened to shoot the victim, that a shooting occurred, and that the victim sustained a gunshot injury." Id., 877.

The defendant argues that in the present case, unlike in *Andino*, there was no independent evidence identifying him as the shooter, that he was at the scene *at the time* of the shooting, or that he threatened to shoot the victim. Although the evidence in *Andino* directly identified the defendant as the shooter; id., 854; corroborative evidence that is circumstantial is not necessarily of lesser significance or probative value under the corpus delicti rule than direct evidence. See, e.g., *State* v. *Harris*, supra, 215 Conn. 194–95. In the present case, circumstantial evidence, in the form of DNA and forensic evidence, linked the defendant to the scene at the time of the shooting. Solis' testimony linked the defendant to the white tank top that was worn by the shooter. A reasonable inference can be drawn that the white shirt found at the scene was worn by the shooter, given that it contained particles consistent with gunshot residue, and that Solis testified that the man she saw holding a gun by the mailbox was wearing a white tank top.

We conclude that the state adduced substantial independent evidence of the trustworthiness of the defendant's statements to Barco that he possessed a firearm. It thus was reasonable for the trier of fact to consider and rely on the defendant's statements in determining if the state had proved beyond a reasonable doubt that the defendant was guilty of criminal possession of a firearm. Accordingly, we reject the first aspect of the defendant's claim of evidentiary insufficiency.

II

The defendant further claims that, even if the trustworthiness of his statement to Barco was sufficiently corroborated to satisfy the corpus delicti rule, the state's evidence against him, including Barco's statement, was too unreliable to sustain his conviction for criminal possession of a firearm. We disagree.

To convict the defendant of criminal possession of a firearm, the state was required to prove beyond a reasonable doubt that the defendant was a convicted felon and that he possessed an operable firearm that was then capable of discharging a shot. See General Statutes § 53a-217 (a) (1). The state and the defendant stipulated that the defendant had been convicted of a felony. Evidence was presented, moreover, that the defendant possessed a firearm capable of discharging a shot, because two witnesses saw the shooter holding the weapon and heard the shooter discharge it five times in rapid succession, with one such discharge firing a bullet that caused the victim's death. Furthermore, the defendant told Barco that he and the victim had argued and physically fought with one another because the victim wanted the defendant's gun, and that he had shot the victim with that very gun when the victim, who had knocked the defendant unconscious in the fight, began to approach him again after he had regained consciousness. This admission, when combined with the independent evidence described in detail in part I of this opinion and the stipulation that the defendant was a convicted felon, furnished a sufficient evidentiary basis for the court to find beyond a reasonable doubt that the defendant committed the crime of criminal possession of a firearm.

The defendant further argues that the evidence was insufficient to support his conviction because Barco, who obtained both his freedom and monetary gain in

exchange for his testimony, "was a profoundly unreliable witness." The court, however, credited the defendant's confession to Barco, and it is not our role on appeal to question determinations of credibility. "Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Osoria*, 86 Conn. App. 507, 514–15, 861 A.2d 1207 (2004), cert. denied, 273 Conn. 910, 870 A.2d 1082 (2005).

The defendant also argues that Solis was the only witness to describe the shooter but that her description excluded the defendant as the shooter. Although Solis described the shooter as having fled the scene wearing a shirt, her prior inconsistent statement was admitted as impeachment evidence. The defendant admitted to Rykowski that he was wearing a white V-neck T-shirt that was removed during his physical altercation with the victim. Although Solis' description of the shooter and the defendant's statement to Rykowski conflict, "[i]t is well settled . . . that [e]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . Rather, the [finder of fact] [weighs] the conflicting evidence and . . . can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Ocasio*, 140 Conn. App. 113, 119 n.7, 58 A.3d 339, cert. denied, 308 Conn. 909, 61 A.3d 531 (2013). Accordingly, the defendant cannot prevail on this aspect of his insufficiency claim.

The judgment is affirmed.

In this opinion the other judges concurred.