THERESA MASELLI *v.* REGIONAL SCHOOL DISTRICT NUMBER 10 ET AL.
(AC 41809)

Alvord, Elgo and Norcott, Js.

Syllabus

The plaintiff, as next friend of her minor daughter, M, sought to recover damages from, inter alia, the defendant soccer coach and physical education teacher, S, for injuries that M suffered when S kicked a soccer ball that struck M in the face during a soccer scrimmage at the school M attended. The plaintiff's complaint alleged claims against S of assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress and negligence, as well as claims of negligence and recklessness against the other defendants, the regional school district, the superintendent of schools and the school's principal. The trial court granted the defendants' motion for summary judgment, concluding that the plaintiff's negligence claims against all of the defendants were barred by governmental immunity pursuant to statute (§ 52-557n (a) (2) (B)) because the plaintiff failed to establish any of the three prongs of the identifiable person-imminent harm exception to governmental immunity. The court further concluded that the plaintiff's claims of assault and battery and recklessness failed as a matter of law. The court rendered judgment for the defendants, and the plaintiff appealed to this court. *Held* that the trial court properly granted the defendants' motion for summary judgment and rendered judgment for the defendants, and, because the court's memorandum of decision fully addressed the arguments raised in this appeal, this court adopted the trial court's memorandum of decision as a proper statement of the facts and applicable law on the issues.

Argued March 10—officially released July 7, 2020

Procedural History

Action to recover damages for, inter alia, assault and battery, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

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

Ashley A. Noel, with whom, on the brief, was *Kevin R. Kratzer*, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, Theresa Maselli, as next friend of her minor daughter, Angelina Maselli,[1] appeals from the summary judgment rendered by the trial court in favor of the defendants, Regional School District Number 10, which serves the towns of Burlington and Harwinton; its superintendent, Alan Beitman; the principal of Har-Bur Middle School (middle school), Kenneth Smith; and Robert Samudosky, a physical education teacher at the middle school and the coach of the girls soccer team. The plaintiff claims that the court improperly granted the defendants' motion for summary judgment because (1) a jury reasonably could have concluded that Samudosky intended to batter Angelina when he kicked a ball during soccer practice that struck her, (2) a jury reasonably could have concluded that Samudosky is liable for battery for acting wantonly or recklessly when he kicked the ball, (3) the court improperly concluded that the defendants were entitled to governmental immunity pursuant to General Statutes § 52-557n (a) (2) (B)[2] because the defendants had a duty to act and Angelina was an identifiable person to which the

[1] We refer in this opinion to Theresa Maselli as the plaintiff and to her minor child as Angelina.

[2] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be

imminent harm exception to governmental immunity applied, and (4) the court improperly applied the governmental immunity analysis by considering whether Angelina was a member of an identifiable class of potential victims.[3] We disagree and, accordingly, affirm the judgment of the trial court.

The court's memorandum of decision and the record reveal the following relevant facts and procedural history. On October 28, 2013, Angelina, who was twelve years of age and in the seventh grade, was participating in a girls soccer practice that was coached by Samudosky at the middle school. During the practice, the team, which consisted of twenty-four middle school-aged girls, was split into four smaller teams, each consisting of six players. Samudosky participated as a member of one of the teams. Thereafter, the teams engaged in scrimmages inside the gymnasium of the middle school.

At some point during the practice, Angelina and Samudosky were on opposing teams. Angelina was an offensive player, and Samudosky was playing defense. During the scrimmage, Samudosky had the ball in his defensive end while Angelina and her teammates approached to challenge him from about six feet away. In an effort to clear the ball from his defensive end, Samudosky looked down and kicked the dodge ball that the team was using to play. The ball hit Angelina in the face, causing her to become "tingly . . . dizzy . . . and [fall] to the ground." Angelina also suffered from a nosebleed as a result of being hit with the ball. At this time, the scrimmage stopped. Thereafter, Samudosky instructed Angelina to go to the girls locker room

liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

[3] At oral argument before this court, the plaintiff abandoned her claim that a reasonable juror could conclude that Samudosky's conduct rose to the level of being extreme and outrageous, which is necessary to establish the plaintiff's claim of intentional infliction of emotional distress.

to clean her bloody nose. Angelina returned and participated in the remainder of practice. Samudosky did not inform the plaintiff of the incident.

At the conclusion of practice, Angelina was taken home by a friend. Before Angelina could tell the plaintiff what happened, the plaintiff "took one look at her and asked her . . . '[w]hat the hell happened to you?' " Thereafter, Angelina informed the plaintiff of the events that had occurred at practice that day. Two days later, the plaintiff took Angelina to Unionville Pediatrics, which referred Angelina to Elite Sports Medicine, where she saw a physician. Subsequently, Angelina was diagnosed with a concussion. Due to the severity of her symptoms related to the concussion, she did not attend school full-time until January, 2014.

On November 8, 2013, the plaintiff called the middle school, spoke to the principal, Smith, and requested that Smith investigate the cause of Angelina's injury. On November 15, 2013, when no investigation had been conducted, the plaintiff called Beitman, the superintendent of schools. Beitman, along with Smith, interviewed each member of the girls soccer team and confirmed the events of the incident. As a result of this incident, Angelina transferred to Kingswood Oxford School in West Hartford at the start of the next school year, where she repeated the seventh grade. Angelina continues to have nosebleeds and headaches on a regular basis, which the plaintiff described as "humiliating."

The plaintiff commenced this action by way of a writ of summons and complaint on September 8, 2015. On July 13, 2016, the plaintiff filed an amended complaint, asserting six claims against the defendants. Counts one through four, alleging assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence, are against only Samudosky. Counts five and six, which allege negligence and recklessness, respectively, are against all of

the defendants. The plaintiff sought monetary damages, punitive damages, attorney's fees and costs, and such other legal and equitable relief as the court deemed just and proper.

On August 25, 2017, the defendants moved for summary judgment as to all counts of the plaintiff's complaint. The memorandum of law in support of the defendants' motion sets forth that (1) the plaintiff's claims of negligent assault and battery, negligent infliction of emotional distress, and negligence are barred by the doctrine of governmental qualified immunity, (2) to the extent that the doctrine of governmental qualified immunity did not apply to Samudosky, the claims of negligent assault and battery, negligent infliction of emotional distress, and negligence fail as a matter of law, (3) Samudosky's conduct was not extreme and outrageous, (4) the claim as to assault and battery fails as a matter of law, and (5) the plaintiff's claim of recklessness fails as a matter of law, and the defendants' allegedly reckless conduct was not the cause of Angelina's injuries.

On January 29, 2018, the court, *Robaina, J.*, heard oral argument concerning the defendants' motion. On June 11, 2018, the court issued a memorandum of decision granting the defendants' motion for summary judgment. The court held that the plaintiff's negligence claims against all the defendants are barred by governmental immunity because the plaintiff failed to establish any of the three prongs of the identifiable person-imminent harm exception set forth in *St. Pierre* v. *Plainfield*, 326 Conn. 420, 435, 165 A.3d 148 (2017). The court also held that the plaintiff's claims of negligent assault and battery and recklessness fail as a matter of law. This appeal followed.

Our examination of the record on appeal, and the briefs and arguments of the parties, persuades us that the judgment of the trial court should be affirmed.

Because the court's memorandum of decision fully addresses the arguments raised in the present appeal, we adopt its thorough and well reasoned decision as a proper statement of the facts and applicable law on these issues. See *Maselli* v. *Regional School District No. 10*, Superior Court, judicial district of Hartford, Docket No. CV-15-6062402-S (June 11, 2018) (reprinted at 198 Conn. App. 648, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Royal Indemnity Co.* v. *Terra Firma, Inc.*, 287 Conn. 183, 189, 947 A.2d 913 (2008); *Lachowicz* v. *Rugens*, 119 Conn. App. 866, 870, 989 A.2d 651, cert. denied, 297 Conn. 901, 994 A.2d 1287 (2010).

The judgment is affirmed.

APPENDIX

THERESA MASELLI *v.* REGIONAL SCHOOL DISTRICT NUMBER 10 ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-15-6062402-S

Memorandum filed June 11, 2018

Proceedings

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

A. Paul Spinella, for the plaintiff.

Kevin R. Kratzer and *Ashley A. Noel*, for the defendants.

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* Affirmed. *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, A.3d (2020).

Opinion

ROBAINA, J.

FACTS

This action was brought on behalf of Angelina Maselli, a minor, through her mother and next friend, Theresa Maselli, seeking damages for injuries Angelina sustained when she was hit in the face with a ball during soccer practice.[1] The incident took place at Har-Bur Middle School (middle school) in Burlington, where Angelina was a member of the school's soccer team. During the practice, the team engaged in a scrimmage inside the gymnasium, and its coach, Robert Samudosky, participated as a member of one of the teams. At some point during the scrimmage, Samudosky kicked the ball, which then hit Angelina in the face.

On July 13, 2016, the plaintiff filed an amended complaint asserting six claims against the defendants: Regional School District Number 10, which serves the towns of Burlington and Harwinton; its superintendent, Alan Beitman; the middle school's principal, Kenneth Smith; and Samudosky, a gym teacher for the middle school as well as the girls' team soccer coach. Counts one through four are against Samudosky only, and counts five and six are against all defendants. In her amended complaint, the plaintiff alleges the following facts. On October 28, 2013, Angelina was participating in a mandatory soccer practice supervised by Samudosky, and, during the practice, Samudosky violently kicked a soccer ball into Angelina's face. Samudosky did not notify a school nurse, paramedics, or Angelina's parents and, despite the fact that he is not a doctor, conducted an assessment of Angelina and determined that she had not suffered a concussion and allowed her to continue

[1] Theresa Maselli will be referred to as the plaintiff and Angelina Maselli as Angelina throughout this memorandum of decision.

to play. Angelina, however, had suffered a concussion. The defendants failed to inform the plaintiff of Angelina's injury, which delayed her medical diagnosis and treatment.

On August 25, 2017, the defendants moved for summary judgment as to all counts of the plaintiff's complaint on the grounds that (1) the plaintiff's negligence claims are barred by governmental immunity, (2) to the extent governmental immunity does not apply, the plaintiff's negligence claims fail as a matter of law, (3) Samudosky's conduct was not extreme and outrageous, (4) the claim of assault and battery fails as a matter of law, and (5) the recklessness claim fails as a matter of law, and the defendants' conduct did not cause Angelina's injuries. Along with each party's memorandum of law, the court has also received a number of exhibits, including deposition transcripts and affidavits.

DISCUSSION

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." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 820–21, 116 A.3d 1195 (2015). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under 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 which will make a difference in the result of the case." (Internal quotation marks omitted.) Id., 821.

"To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015).

"[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way. . . . [A] summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party. . . . [A] directed verdict may be rendered only where, on the evidence *viewed in the light most favorable to the nonmovant*, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003). "While [a party's] deposition testimony is not conclusive as a judicial admission; General Statutes § 52-200; it is sufficient to support entry of summary judgment in the absence of contradictory competent affidavits that establish a genuine issue as to a material fact." *Collum* v. *Chapin*, 40 Conn. App. 449, 450 n.2, 671 A.2d 1329 (1996).

I

GOVERNMENTAL IMMUNITY

Under the common law, a municipality was generally immune from liability for its tortious acts. *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 47, 881 A.2d 194 (2005). Our Supreme Court has "recognized, however, that governmental immunity may be abrogated by statute." (Internal quotation marks omitted.) Id. General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ." "[Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Haynes* v. *Middletown*, 314 Conn. 303, 312, 101 A.3d 249 (2014).

There are three exceptions to discretionary act immunity: "(1) the alleged conduct involves malice, wantonness or intent to injure; (2) a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; or (3) the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 434 n.13, 165 A.3d 148 (2017). The identifiable person-imminent harm exception has three elements: "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm

. . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. . . . If the [plaintiff fails] to establish any one of the three prongs, this failure will be fatal to [the] claim that [the plaintiff comes] within the imminent harm exception." (Internal quotation marks omitted.) Id., 435.

Our Supreme Court has "held that a party is an identifiable person when he or she is compelled to be somewhere. . . . Accordingly, [t]he only identifiable class of foreseeable victims that [the court has] recognized . . . is that of schoolchildren attending public schools during school hours because: they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions." (Citation omitted; internal quotation marks omitted.) Id., 436; see also *Strycharz* v. *Cady*, 323 Conn. 548, 575–76, 148 A.3d 1011 (2016) ("[o]ur decisions underscore . . . that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims" (internal quotation marks omitted)).

This rule has been narrowly applied outside of the schoolchildren context, and, in fact, our Supreme Court has recognized an identifiable person under this exception only once, in *Sestito* v. *Groton*, 178 Conn. 520, 423 A.2d 165 (1979), and this case has since been limited to its facts because it was decided before the three-pronged imminent harm test was adopted. See *Edgerton* v. *Clinton*, 311 Conn. 217, 240, 86 A.3d 437 (2014). Since

then, although our appellate courts have addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims, neither the Supreme Court nor the Appellate Court has broadened the definition. See, e.g., *Grady* v. *Somers*, 294 Conn. 324, 356, 984 A.2d 684 (2009) (permit holder injured at refuse transfer station owned by town was not member of class of identifiable persons despite being paid permit holder and resident of town); *Cotto* v. *Board of Education*, 294 Conn. 265, 279, 984 A.2d 58 (2009) (youth director injured in school bathroom was not identifiable person subject to imminent harm because, if he "was identifiable as a potential victim of a specific imminent harm, then so was every participant and supervisor in the [summer youth] program who used the bathroom"); *Thivierge* v. *Witham*, 150 Conn. App. 769, 780, 93 A.3d 608 (2014) (visitor to dog owner's property who was bitten by dog after municipal officer's alleged failure to enforce restraint order was not identifiable victim because "any number of potential victims could have come into contact with the dog following [the municipal officer's] issuance of the restraint order"); cf. *St. Pierre* v. *Plainfield*, supra, 326 Conn. 437–38.

A

Negligence Claims Against Samudosky

In counts three and four, the plaintiff asserts claims of negligent infliction of emotional distress and negligence, respectively, against Samudosky. The defendants move for summary judgment as to these negligence claims on the ground that they are barred by governmental immunity and that no exception applies. The plaintiff argues that Angelina was an identifiable individual because she was attending a soccer practice supervised by Samudosky and was standing six feet away from him when he forcefully kicked the ball. A review of the evidence submitted in support of and

in opposition to the motion for summary judgment, viewed in a light most favorable to the plaintiff, along with established case law, demonstrates the absence of any genuine issue of material fact that Angelina was not an identified individual.

In a signed and sworn affidavit, Beitman attests that the girls' soccer team is a voluntary extracurricular activity and that practices are held after the mandatory school hours have concluded. Samudosky testified at his deposition that practices run between 3 and 5 p.m. and that school academic courses never go past 3 p.m. Angelina testified at her deposition that you have to try out to be on the girls' soccer team, that you are not required to be on the team and that she chose to be on the soccer team. She further testified that soccer practice began once your last academic class finished, between 2:45 p.m. and 3 p.m. The plaintiff attempts to frame Angelina's participation as involuntary by describing the practices as mandatory. The plaintiff attests in a signed and sworn affidavit that practices were a mandatory event and that players were told: "If you don't come to practice, you don't play." This argument fails to comprehend the key reason why schoolchildren were found to be a foreseeable class—because they are statutorily required to attend school—and has previously been rejected.

In *Jahn* v. *Board of Education*, 152 Conn. App. 652, 99 A.3d 1230 (2014), the plaintiff high school student argued that there was an issue of fact as to whether his participation in the swim team was voluntary because he attested in his affidavit that the warm-up drill was mandatory. Id., 667. The court rejected this argument, stating: "[W]hile it may be true that the plaintiff was 'required' to participate in the warm-up drill if he also desired to participate in the swim meet, the fact remains that nothing required the plaintiff to participate in the swim meet or, for that matter, the swim team, in the first place. The plaintiff chose to participate in

the swim team when he joined it. He has not argued that any statute or other source of law compelled him to join the team or to participate in the warm-up drill." Id. The Appellate Court thus found that the plaintiff did not qualify as a member of an identifiable class of schoolchildren. Id., 667–68.

Similarly, a student playing in a pickup basketball game during a senior class picnic did not qualify as an identifiable person. See *Costa* v. *Board of Education*, 175 Conn. App. 402, 408–409, 167 A.3d 1152, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017). In *Costa*, the court stated: "Here, it is undisputed that [the plaintiff] was not required to attend the senior picnic, but did so voluntarily. He also voluntarily participated in the pickup basketball game in which he was injured. We agree with the trial court that [the plaintiff's] voluntary participation did not grant him the status of an identifiable person entitled to protection by school authorities." Id., 409. In a case outside the school context, our Supreme Court has also recently reaffirmed the principle that one whose presence and/or participation is voluntary and not compelled by statute or other law, is not an identifiable person. See *St. Pierre* v. *Plainfield*, supra, 326 Conn. 424, 432, 438. "In the present case, the plaintiff was in no way compelled to attend the aqua therapy sessions provided by (the rehabilitation center). Instead, he voluntarily decided to use (the center's) services. Under established case law, this choice precludes us from holding that the plaintiff was an identifiable person or a member of an identifiable class of persons." Id.

Just like the plaintiffs in the previously discussed cases, Angelina voluntarily chose to participate in the soccer team. She was not required to be on the team and, in fact, students had to try out in order to make the team. As in *Jahn*, the mere fact that participation in practices may have been mandatory does not negate

that, overall, participation in the soccer team was voluntary. See *Jahn* v. *Board of Education*, supra, 152 Conn. App. 667. Angelina chose to participate in the soccer team, just like the plaintiff in *Jahn* chose to participate in the swim team and [the plaintiff in *Costa*] chose to attend the senior picnic and participate in the pickup basketball game. Accordingly, Angelina is not an identified person for purposes of the exception. Further, even if Angelina was considered identifiable in the sense that Samudosky knew her identity and of her presence at practice, she would still not be an identifiable person for purposes of the exception. The evidence establishes that Samudosky was looking down at the ball when he kicked it, and, therefore, any girl on the opposing team could have been hit by the ball. See, e.g., *Cotto* v. *Board of Education*, supra, 294 Conn. 279 (determining that director of youth program was not identifiable victim when he slipped in wet bathroom because "any person using the bathroom could have slipped at any time" (emphasis omitted)). Because the failure to establish any one of the prongs for the exception is fatal to a plaintiff's claim that they fall within it, the negligence claims against Samudosky are barred by governmental immunity.

B

Negligence Against All Defendants

In count five, the plaintiff alleges negligence against all of the defendants, based on the response to the incident, such as their failure to immediately inform her of Angelina's injury and their failure to adequately address Angelina's educational needs. The plaintiff again does not contest the discretionary nature of the defendants' duties but argues that Angelina falls within the identifiable victim-imminent harm exception. The defendants argue that Angelina was not subject to imminent harm because, at the time of the alleged action

and/or inaction, harm to Angelina had already occurred. Additionally, as the injury occurred during a routine soccer practice and was one that is an inherent consequence, it was not apparent to the defendants that a failure to immediately ascertain what had occurred would subject Angelina to imminent harm. The plaintiff frames the dangerous condition as an undiagnosed head injury and that Angelina faced the imminent harm of a failure to diagnose, treat, and mitigate the effects of her concussion.

"[T]he proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." (Internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 9, 176 A.3d 531 (2018). The focus is on "the *magnitude of the risk* that the condition created"; (emphasis in original) *Haynes* v. *Middletown*, supra, 314 Conn. 322; rather than "the *duration* of the alleged dangerous condition . . . ." (Emphasis in original.) Id. As for the apparentness prong, "to meet the apparentness requirement, the plaintiff must show that the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm. . . . This is an objective test pursuant to which [courts] consider the information available to the government agent at the time of her discretionary act or omission." (Citation omitted.) *Edgerton* v. *Clinton*, supra, 311 Conn. 231.

On the basis of the summary judgment record, Angelina cannot be said to have been subject to an imminent harm that was apparent to the defendants. Soccer is a contact sport; see *Jaworski* v. *Kiernan*, 241 Conn. 399, 406–407, 696 A.2d 332 (1997); and a player getting hit by a ball, even in the face, whether during a practice

scrimmage or an actual game, is a not so uncommon of a risk. In the present case, Angelina briefly had a bloody nose and felt dizzy. She had a headache, about which she told Samudosky; however, she did not ask to sit out the rest of practice and was able to walk from the indoor gym to the field outside. Under these circumstances, it could not have been apparent to the defendants that Angelina had suffered a concussion or that a failure to immediately contact the plaintiff would subject Angelina to the imminent harm of exacerbated postconcussion symptoms.

As to the plaintiff's allegations regarding Angelina's exacerbated postconcussion symptoms and diminished academic performance, Angelina's having to repeat the seventh grade was far too attenuated from the incident and the defendants' alleged conduct to be considered imminent. See *Brooks* v. *Powers*, 328 Conn. 256, 274, 178 A.3d 366 (2018) ("[decedent's] drowning was too attenuated from the risk of harm created by the defendants' conduct for a jury reasonably to conclude that it was imminent"). A jury could not reasonably conclude that the defendants, in failing to inform the plaintiff of Angelina's being hit with a ball or to investigate the incident, ignored a risk that Angelina would have to repeat an entire year of schooling. As neither the imminent nor apparentness prong can be met, Angelina does not fall within the identifiable victim-imminent harm exception and, therefore, the negligence claim in count five is barred by governmental immunity.

II

INTENTIONAL TORTS

A

Assault and Battery

"A civil assault is the intentional causing of imminent apprehension of harmful or offensive contact in another.

1 Restatement (Second), Torts [§ 21 [1965]." *DeWitt* v. *John Hancock Mutual Life Ins. Co.*, 5 Conn. App. 590, 594, 501 A.2d 768 (1985). "[A]ctual, physical contact (technically defined as 'battery') is not necessary to prove civil assault"; *McInerney* v. *Polymer Resources, LTD*, Superior Court, judicial district of New Britain, Docket No. CV-11-6012308-S (October 22, 2012) (*Swienton, J.*) (54 Conn. L. Rptr. 873, 874); and, thus, "[i]t is more technically correct in Connecticut civil tort law to refer to what is commonly called an 'assault' as a 'battery.' However, the cases rarely make that distinction." *Carragher* v. *DiPace*, Docket No. CV-10-6014357-S, 2012 WL 6743563, *4 (Conn. Super. November 30, 2012) (*Wahla, J.*).

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." (Internal quotation marks omitted.) *Alteiri* v. *Colasso*, 168 Conn. 329, 334 n.3, 362 A.2d 798 (1975), quoting 1 Restatement (Second), supra, § 13. "[A]n actionable assault and battery may be one committed wilfully or voluntarily, and therefore intentionally; one done under circumstances showing a reckless disregard of consequences; or one committed negligently." (Internal quotation marks omitted.) *Markey* v. *Santangelo*, 195 Conn. 76, 78, 485 A.2d 1305 (1985). Intentional conduct is, therefore, not always required for assault and battery; see *Clinch* v. *Generali-U.S. Branch*, 110 Conn. App. 29, 40, 954 A.2d 223 (2008), aff'd, 293 Conn. 774, 980 A.2d 313 (2009); nevertheless, on the basis of the allegations in the plaintiff's amended complaint, count one is properly construed as a claim of intentional and/or reckless and wanton assault and battery. Thus, the defendants' motion for summary judgment will be evaluated against these two theories.

1

Intentional

"A wilful or malicious injury is one caused by design. Wilfulness and malice alike import intent. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances." (Internal quotation marks omitted.) *Markey* v. *Santangelo*, supra, 195 Conn. 78. "[T]hat the act resulting in the injury was intentional in the sense that it was the voluntary action of the person involved" is insufficient to constitute a wilful or malicious injury; instead, "[n]ot only the action producing the injury but the resulting injury must be intentional." (Internal quotation marks omitted.) *Alteiri* v. *Colasso*, supra, 168 Conn. 333. "It is not necessary that the precise injury that occurred be the one intended, so long as the injury was the direct and natural consequences of the intended act." *American National Fire Ins. Co.* v. *Schuss*, 221 Conn. 768, 779, 607 A.2d 418 (1992).[2]

The defendants argue that there is no genuine issue of material fact that Samudosky did not intend to injure Angelina and, therefore, the plaintiff's claim of intentional assault and battery fails as a matter of law.

It is undisputed that Angelina's injury took place during a scrimmage, or a simulated game; see Merriam-Webster's Collegiate Dictionary (11th Ed. 2003); where she and Samudosky were on opposing teams. Angelina Deposition, p. 35, ll. 5–13. Prior to Angelina's being hit with the ball, Samudosky had the ball and was defending his end, while Angelina and her team moved up to

[2] "The only rational conclusion is that the defendant intended . . . to bring about a result, namely, some burning of that building or its contents, that invaded the interests of the synagogue in a way that the law forbids. . . . It is of no moment that he may not have specifically intended the Torah scrolls to burn, or that he may not have specifically intended that the building be substantially damaged by fire." (Citations omitted.) *American National Fire Ins. Co.* v. *Schuss*, supra, 221 Conn. 778–79.

challenge, with her in the lead. She and her teammates were about six feet away and, although she was facing him, he was looking down when he kicked the ball, which then hit her in the face. The plaintiff asserts that there is an issue of fact as to intent because Samudosky and Angelina were facing each other when he kicked the ball as hard as he could. Angelina, however, repeatedly testified that Samudosky was looking down at the ball when he kicked it and that he kicked it with a lot of force because he was trying to clear it. She stated that, because he was in a defensive position, he would have wanted to get the ball away from his goal, upon which Angelina and the other girls on her team were advancing. Finally, she testified that she did not believe he kicked the ball at her on purpose or intended to hit her with the ball.

On the basis of the foregoing, no fair and reasonable jury could find that in kicking the ball, Samudosky intended to hit Angelina with the ball or injure her. The plaintiff asserts that there is a factual dispute because Samudosky testified at his deposition that he does not recall who kicked the ball that hit Angelina. This does not raise a genuine issue of material fact because not only the act producing the injury but the injury itself must be intentional. See *Markey* v. *Santangelo*, supra, 195 Conn. 77; *Alteiri* v. *Colasso*, supra, 168 Conn. 333. Thus, even viewing the evidence in a light most favorable to the plaintiff and taking as true that Samudosky did in fact intentionally kick the ball, the record does not support a conclusion that his purpose in kicking the ball was to hit and injure Angelina. In the midst of a scrimmage, Samudosky kicked the ball hard, away from his team's goal, as players on the opposing team, including Angelina, were moving up to challenge. He looked down at the ball to kick it, while those players, including Angelina, were advancing, with Angela in the lead, kicked the ball, and she was hit in the face. The only rational inference a fact finder could make is that

which Angelina herself made: that he was trying to clear the ball, i.e., get the ball away from the goal and from the members of the opposing team, including Angelina. The injury suffered by Angelina was not by intentional design; the only reasonable and logical conclusion that a jury could reach is that this was a simple accident, an inherent part of a contact sport. See *Jaworski* v. *Kiernan*, supra, 241 Conn. 406–407. Accordingly, there is no genuine issue of material fact that Samudosky did not commit an intentional assault and battery as a matter of law.

2

Reckless and Wanton

"Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Citation omitted; internal quotation marks omitted.) *Markey* v. *Santangelo*, supra, 195 Conn. 78. Thus, "[a] wanton assault and battery is one that under circumstances, evinces a reckless disregard of the consequence of the assaultive act." *Carragher* v. *DiPace*, supra, 2012 WL 6743563, *5. "[Reckless] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Northrup* v. *Witkowski*, 175 Conn. App. 223, 248, 167 A.3d 443, cert. granted on other grounds, 327 Conn. 971, 173 A.3d 392 (2017).

In the present case, a fair and reasonable jury could not conclude that a middle school soccer coach participating in a scrimmage with his players involved a situation of such a high degree of danger, such that the decision to participate would constitute highly unreasonable conduct. See id., 250. The possibility of being hit in the face with a ball exists as a part of soccer, regardless of who is participating, and, thus, Samudosky's participation could not be found to have created

an unreasonable risk of bodily harm. See *Carragher* v. *DiPace*, supra, 2012 WL 6743563, *8. Finally, the fact that Samudosky kicked the ball with a lot of power, possibly too hard, cannot reasonably be characterized as anything more than mere thoughtlessness or inadvertence, which, as a matter of law, is not reckless conduct. See *Northrup* v. *Witkowski*, supra, 175 Conn. App. 248. Accordingly, there is no genuine issue of material fact that Samudosky did not commit a wanton and reckless assault and battery.

Samudosky is therefore entitled to judgment as a matter of law as to the assault and battery claim in count one.

B

Intentional Infliction of Emotional Distress

"In order for the plaintiff to prevail in a case for liability under . . . [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe. . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. . . . Only where reasonable minds disagree does it become an issue for the jury." (Citations omitted; internal quotation marks omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000). "Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds

of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . .'' (Internal quotation marks omitted.) *Geiger* v. *Carey*, Superior Court, judicial district of Litchfield, Docket No. CV-11-5007327-S (February 25, 2015) (reprinted at 170 Conn. App. 462, 497, 154 A.3d 1119), aff'd, 170 Conn. 459, 154 A.3d 1093 (2017).

''[I]n assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeping function. In this capacity, the role of the court is to determine whether the allegations of a complaint, counterclaim or cross complaint set forth behaviors that a reasonable fact finder could find to be extreme or outrageous. In exercising this responsibility, the court is not [fact-finding], but rather it is making an assessment whether, as a matter of law, the alleged behavior fits the criteria required to establish a claim premised on intentional infliction of emotional distress.'' (Internal quotation marks omitted.) *Gagnon* v. *Housatonic Valley Tourism District Commission*, 92 Conn. App. 835, 847, 888 A.2d 104 (2006).

The defendants move for summary judgment as to the third count of the complaint alleging intentional infliction of emotional distress on the grounds that (1) Samudosky's conduct was not extreme and outrageous, and (2) Angelina did not suffer severe emotional distress. The plaintiff contends that there is a genuine issue of material fact as to whether his conduct was extreme and outrageous.

In the present case, the plaintiff's allegations do not, as a matter of law, rise to the level of outrageousness required to sustain a claim of intentional infliction of emotional distress. A coach participating in a scrimmage with his players is not patently unreasonable, let

alone so atrocious as to go beyond all bounds usually tolerated by a society. See *Appleton* v. *Board of Education*, supra, 254 Conn. 211. Samudosky's act of kicking the ball, even if too hard given the size discrepancy between him and his players, cannot be deemed so extreme in degree as to render it intolerable. "The standard for extreme and outrageous behavior has historically been construed very strictly"; *Marquez* v. *Housing Authority*, Docket No. CV-12-5014008-S, 2013 WL 6916760, *5 (Conn. Super. December 3, 2013) (*Hon. Alfred J. Jennings, Jr.*, judge trial referee); and it has been said that "[t]his tort must be strictly policed to avoid turning ordinary life and its insults and ignorant behavior into an endless and uncontrollable pool for litigation." (Internal quotation marks omitted.) *Bremmer-McLain* v. *New London*, Docket No. CV-11-5014142-S, 2012 WL 2477921, *12 (Conn. Super. June 1, 2012) (*Devine, J.*), aff'd, 143 Conn. App. 904, 69 A.3d 351 (2013). To deem the conduct alleged to be extreme and outrageous, the standard would have to be construed much more broadly than our courts, including appellate courts, have done.

Similarly, the allegation regarding Samudosky evaluating Angelina despite not being a medical professional and allowing her to continue to play cannot be said to be extreme and outrageous. This was not an exceptional incident; as soccer is a contact sport, being hit with the ball is a risk every time soccer is played. See *Jaworski* v. *Kiernan*, supra, 241 Conn. 406–407. Additionally, it was not unreasonable of Samudosky to determine that Angelina was fine and okay to keep playing; although she had a bloody nose, it lasted only about five to ten minutes; when asked how she felt and if she thought she could play, she told Samudosky that she had a headache but thought she could play; she was able to walk from the indoor gym to the field where practice was finished; and she did not ask not to play. Finally, mere errors in judgment do not, as a matter of law, rise

to the level of extreme and outrageous conduct. See *Appleton* v. *Board of Education*, supra, 254 Conn. 210. Samudosky is thus entitled to summary judgment on this count on the ground that his conduct was not extreme and outrageous.

Furthermore, the claim of intentional infliction of emotional distress also fails because there is no genuine issue of material fact that Angelina did not suffer severe emotional distress. The distress necessary to sustain a claim of intentional infliction of emotional distress has been defined simply, but clearly, as "mental distress of a very serious kind." (Internal quotation marks omitted.) *Gillians* v. *Vivanco-Small*, 128 Conn. App. 207, 212, 15 A.3d 1200, cert. denied, 301 Conn. 933, 23 A.3d 726 (2011). Our appellate courts, however, have never adopted a bright-line test for determining what kinds of mental distress are sufficiently serious to sustain a claim of intentional infliction of emotional distress, but our trial courts have consistently used the standard set forth in the Restatement. See *Civitella* v. *Pop Warner Football*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-09-5010392-S (September 5, 2012) (*Matasavage, J.*) (54 Conn. L. Rptr. 641, 643); *Stapleton* v. *Monro Muffler, Inc.*, Docket No. CV-98-0580365-S, 2003 WL 462566, *5 (Conn. Super. February 3, 2003) (*Sheldon, J.*).

Comment (j) to the Restatement (Second) of Torts, § 46, provides in relevant part: "The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity." 1 Restatement (Second), supra, § 46, comment (j), pp. 77–78. Emotional distress is unlikely to be considered severe in the absence of treatment, medical, psychological, or otherwise. See, e.g., *Civitella* v. *Pop Warner Football*, supra, 54 Conn. L. Rptr. 643–44; *Stapleton* v. *Monro Muffler, Inc.*, supra, 2003 WL 462566, *4; cf. *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 529, 43 A.3d 69 (2012)

("[T]he only evidence of severe emotional distress that the plaintiff presented with respect to this conduct is that she became frightened and choked up upon being told that her career might be in jeopardy. There was no evidence that the plaintiff was in distress for an extended period or that she sought medical treatment."). Mere embarrassment, humiliation and hurt feelings do not constitute severe emotional distress. See *Barry* v. *Posi-Seal International, Inc.*, 36 Conn. App. 1, 20 n.17, 647 A.2d 1031 (1994), remanded for further consideration, 235 Conn. 901, 664 A.2d 1124 (1995); *Stapleton* v. *Monro Muffler, Inc.*, supra, *6 ("common feelings and emotions, such as hurt feelings, embarrassment and humiliation, are things we all experience in our daily lives, and thus things we must learn to live with").

In the present case, the evidence submitted demonstrates that Angelina did not suffer severe emotional distress. Initially, it is noted that the consequences described—missing school, having to repeat a grade, not being able to participate with friends and family because of headaches, or not being able to finish the soccer season or try out for basketball the year the incident took place—are a result of her concussion rather than emotional distress. Nevertheless, Angelina testified that she suffered emotional distress from having to repeat the seventh grade, suffering embarrassment from being one year behind her friends and older than the other students in her grade. She testified that she does not like talking about her situation and is uncomfortable with it. The plaintiff similarly attested in her affidavit that Angelina has suffered embarrassment and humiliation at having to repeat the seventh grade. Notably, Angelina testified that she has not sought any treatment for her emotional distress and does not plan to. Although this distress is arguably long-term in the sense that she will continue to be older than her classmates throughout the remainder of high school, it

cannot be said to be of the type that is so intolerable or unbearable that no reasonable person could be expected to endure. To the contrary, Angelina's embarrassment is nothing more than a "degree of transient and trivial emotional distress, which is a part of the price of living among people." (Internal quotation marks omitted.) *Civitella* v. *Pop Warner Football*, supra, 54 Conn. L. Rptr. 644. Samudosky is thus entitled to summary judgment on this count on the ground that Angelina did not suffer severe emotional distress.

C

Recklessness

"Recklessness requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent. . . . More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Internal quotation marks omitted.) *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 330, 147 A.3d 104 (2016). "Reckless conduct must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention . . . or even an intentional omission to perform a statutory

duty . . . . [In sum, reckless] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Citation omitted; internal quotation marks omitted.) *Northrup* v. *Witkowski*, supra, 175 Conn. App. 248.

In count six, the plaintiff asserts a claim of recklessness against all of the defendants for their alleged conduct relating to the incident and Angelina's injury. The defendants argue that the recklessness claim fails as a matter of law and that their allegedly reckless conduct did not cause Angelina's injuries.

In the present case, the plaintiff has simply incorporated her allegations of negligence in count five into the recklessness counts and then adds the legal conclusion that the defendants wantonly, wilfully, or recklessly failed to inform the plaintiff of Angelina's injuries in disregard for her safety, health and well-being. It has been said that "[m]erely using the term 'recklessness' to describe conduct previously alleged as negligence is insufficient as a matter of law." *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 705, 927 A.2d 312, cert. denied, 284 Conn. 927, 934 A.2d 243 (2007); see id. (affirming summary judgment where plaintiffs' "simply incorporated their allegations of negligence and labeled the conduct recklessness"). Furthermore, the plaintiff's allegations, when viewed in light of the evidence on the record, even when taken in a light most favorable to her, cannot be characterized as rising above mere negligence. The evidence does not demonstrate that the incident of Angelina's being hit with the ball involved a situation of such a high degree of danger that allowing Angelina to continue practice or failing to immediately contact her parents constituted the sort of highly unreasonable conduct or "wanton disregard that is the hallmark of reckless behavior." *Northrup* v. *Witkowski*, supra, 175 Conn. App. 250. On the basis of the evidence submitted, the defendants' conduct cannot reasonably

be characterized as anything more than mere thoughtlessness or inadvertence, which, as a matter of law, is not reckless conduct. See id., 248. Accordingly, the defendants are entitled to summary judgment as to the plaintiff's recklessness claim.[3]

CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for summary judgment as to all counts of the plaintiff's complaint.

ALPHA BETA CAPITAL PARTNERS, L.P. *v.* PURSUIT INVESTMENT MANAGEMENT, LLC, ET AL. (AC 41986)

Prescott, Devlin and D'Addabbo, Js.

Syllabus

The plaintiff, following the defendants' appeal from the trial court's judgment in the plaintiff's favor, sought sanctions from the defendants for their failure to comply with postjudgment discovery orders. The court had previously granted the plaintiff's application for a prejudgment remedy, and, thereafter, granted the plaintiff's postjudgment motions to increase the judgment amount and for disclosure of assets to assist it with securing the additional amount of the judgment. The court ordered the defendants to provide the plaintiff with additional documents, stating that if the defendants failed to substantially comply with its order, S and C, the individual defendants who operated the defendant companies, would each be required to appear for an examination of judgment debtor. Thereafter, after failing to produce many of the documents they were required to disclose, S and C were ordered by the court to appear for an examination of judgment debtor and, subsequently, the defendants were ordered to provide the plaintiff with supplemental disclosures. The court thereafter issued an order of sanctions against the defendants for their failure to comply with the court's discovery orders, ordering monetary sanctions comprised of attorney's fees and litigation costs,

[3] Because the court finds that the negligence claims are barred by governmental immunity, and that the plaintiff's assault and battery, intentional infliction of emotional distress and recklessness claims fail as a matter of law, the court does not address alternative arguments in favor of summary judgment.

and the defendants amended their appeal and this court severed this claim from the appeal. *Held* that the court's order of sanctions met the requirements that a trial court must deem satisfied before imposing sanctions, and, therefore, the court's order did not constitute an abuse of discretion: the court's order was reasonably clear, notwithstanding the defendants' claim that there was neither a clear order nor a violation of any such order, S and C were under oath when testifying during the examination of judgment debtor, and, having sworn to provide truthful testimony, understood that they were required to provide such testimony during the proceeding; moreover, the trial court properly found that the defendants violated the court's discovery order, as there was ample evidence in the record, which purportedly contradicted the testimony that S and C had provided at the examination of judgment debtor, from which the trial court reasonably could have inferred that S and C conducted themselves with obvious dishonesty; furthermore, the court's order of sanctions was proportionate to the defendants' violation of the court's discovery orders that occurred after the examination of judgment debtor, because the court found that the defendants engaged in a continuous practice of disobeying the court's discovery orders, the plaintiff suffered harm, including attorney's fees and litigation costs, as a result of the defendants' failure to provide documents that the court had ordered them to disclose that were pertinent to the plaintiff's ability to identify assets that could be used to satisfy the judgment, and the defendants' failure to disclose the documents deprived the plaintiff of information that it needed to collect on the judgment, part of which was not secured by a prejudgment remedy, and the court's order of sanctions was appropriate because it reimbursed the plaintiff for the attorney's fees and other litigation costs that it incurred in order to compel the defendants to provide it with certain documents that the court had ordered they disclose, and that the plaintiff needed, to obtain a remedy to which it was entitled, and, in the absence of the court's order of sanctions, the plaintiff unfairly would have borne this cost.

Argued January 13—officially released July 7, 2020

Procedural History

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

to this court; thereafter, the court, *Genuario, J.*, granted the plaintiff's motion for sanctions, and the defendants amended their appeal. *Affirmed.*

Michael S. Taylor, with whom was *Brendon P. Levesque*, for the appellants (defendants).

James C. Graham, with whom was *Dennis M. Carnelli*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. This appeal involves a challenge to sanctions imposed by the trial court to remedy extensive discovery abuses by the defendants that frustrated the plaintiff's attempt to collect on a significant monetary judgment. The defendants, Pursuit Opportunity Fund I, L.P. (POF), Pursuit Opportunity Fund I Master Ltd. (POF Master), Pursuit Capital Management Fund I, L.P. (PCM), Pursuit Capital Master (Cayman) Ltd. (PCM Master), Pursuit Investment Management, LLC (PIM), Northeast Capital Management, LLC (Northeast), Anthony Schepis, and Frank Canelas, Jr.,[1] appeal from the trial court's order of sanctions, in which the court awarded the plaintiff, Alpha Beta Capital Partners, L.P., attorney's fees and litigation costs for the defendants' discovery abuses. On appeal, the defendants claim that the court's order of sanctions constituted an abuse of discretion because the order failed to meet the three requirements that a trial court must deem satisfied before imposing sanctions and that this court must analyze to determine whether the trial court's order constituted an abuse of discretion. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 328 Conn. 60, 70–71, 176 A.3d 1167 (2018) (citing *Millbrook Owners Assn.*,

[1] "Schepis and Canelas are individuals who reside in Greenwich . . . and who, together, formed, operated, and controlled all of the other defendants. At one point in time, the defendants cumulatively managed assets in excess of $600 million." *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 390–91, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020) (*Alpha Beta I*).

Inc. v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001)).[2] We disagree with the defendants' claim and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendants' claims on appeal. In September, 2015, the plaintiff "filed an application for a prejudgment remedy and a proposed summons and complaint against the defendants."[3] *Alpha Beta Capital Partners,*

[2] In its appellate brief, the plaintiff claims that the defendants' appeal should be dismissed for lack of subject matter jurisdiction. In making this argument, the plaintiff asserted that the trial court's order of sanctions was an interlocutory order that did not constitute a final judgment. We disagree.

Generally, discovery orders, which include orders of sanctions based on a party's failure to comply with discovery, are not appealable final judgments. See, e.g., *Incardona* v. *Roer*, 309 Conn. 754, 760, 73 A.3d 686 (2013) ("prior to final judgment, we have jurisdiction to hear a challenge to an interlocutory order sanctioning a party for failure to comply with a discovery order only upon a finding of contempt for failure to comply with the order"). This appeal, however, was filed as an amendment to an existing appeal in accordance with Practice Book § 61-9. Subsequently, this court severed the claim in the present amended appeal from those brought and decided by this court in *Alpha Beta I*.

If an appeal from a final judgment already exists over which this court properly has jurisdiction, any subsequent rulings by the trial court in the underlying matter typically are reviewable by way of an amended appeal; see Practice Book § 61-9; and need not be final judgments themselves. See *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 687, 899 A.2d 586 (2006) ("[a]s a general rule, jurisdiction once acquired is not lost or divested by subsequent events" (internal quotation marks omitted)); see also *Friedlander* v. *Friedlander*, 191 Conn. 81, 84, 463 A.2d 587 (1983); *Young* v. *Polish Loan & Industrial Corp.*, 126 Conn. 714, 715, 11 A.2d 395 (1940). Therefore, because this court had subject matter jurisdiction over the defendants' claims concerning the merits of the underlying judgment of the trial court, it follows that this court maintains jurisdiction over the defendants' claim in the present amended appeal, even after severing this claim from those brought and decided by this court in *Alpha Beta I*. The plaintiff acknowledged the soundness of this reasoning at oral argument, indicating that it no longer sought to pursue its jurisdictional argument on appeal. In sum, we conclude that this court has subject matter jurisdiction to address the defendants' claims.

[3] In the underlying dispute with the plaintiff, Pursuit Partners, LLC (Pursuit Partners) was also a named defendant. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 389, 219 A.3d 801 (2019) (*Alpha Beta I*), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). As stated by this court, however, "Pursuit Partners did not appeal from the judgment of the trial court and [was] not involved in [*Alpha Beta I*]." Id., 381 n.1. Like in *Alpha Beta I*, Pursuit Partners did not participate in this appeal, and our references to the defendants do not include it.

L.P. v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 398, 219 A.3d 801 (2019) (*Alpha Beta I*), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020). The plaintiff then filed a seven count amended substitute complaint against the defendants, alleging "(1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) unjust enrichment, (4) conversion, (5) statutory theft under General Statutes § 52-564, (6) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (7) civil conspiracy." Id.

In June, 2016, the trial court granted the plaintiff's application for a prejudgment remedy in the amount of $5,421,582. Id., 399. After a bench trial held later that year, "the court rendered judgment [partially] in favor of the plaintiff against PCM, POF, PIM, Schepis, Canelas, and Northeast in the total amount of . . . $5,422,540." (Internal quotation marks omitted.) Id., 401. Then, "[o]n January 4, 2017 . . . the court granted the plaintiff's motion to increase the [judgment] amount by $947,731 to a total of $6,369,313 . . . . On the same date, the court granted the plaintiff's motion for disclosure of assets to assist with . . . securing . . . the additional [$947,731]." Id., 401–402.

Ultimately, "[t]he defendants appeal[ed], and the plaintiff cross appeal[ed], from the judgment of the trial court . . . [In this appeal], the defendants also [challenged] the [order] of the trial court granting the plaintiff's postjudgment motion to increase the amount of [the judgment] and [the order] granting the plaintiff's motion" to discover assets that could be used to satisfy the judgment, $947,731 of which had not been secured by a prejudgment remedy. *Alpha Beta I*, supra, 193 Conn. App. 389. This court disposed of that appeal in *Alpha Beta I*. See id., 389–90.

At a hearing before the trial court on January 12, 2017, the defendants stated that they would disclose assets sufficient to satisfy the increase in the judgment

amount within thirty days. Accordingly, the court ordered the defendants to make these disclosures by February 14, 2017.

On March 31, 2017, the plaintiff moved the court for an order requiring the defendants to comply with its January 12, 2017 order and to impose sanctions against the defendants because they had failed to make the disclosures that the court had ordered them to make by February 14, 2017. In light of the defendants' failure to comply with its previous order, the court, on April 12, 2017, ordered the defendants to provide the plaintiff with documents spanning sixty-six categories. The court required them to provide these documents by May 3, 2017. The defendants agreed that they would provide these documents to the plaintiff by this date. Moreover, the court stated that, if the defendants failed substantially to comply with its order by May 3, 2017, then Schepis and Canelas would be required to appear for an examination. Instead of complying with this order, however, the defendants, on May 3, 2017, moved for a protective order in which they challenged, inter alia, the court's authority to order postjudgment asset discovery. The court denied this motion.

On that same date, the plaintiff served postjudgment interrogatories on the defendants, in accordance with General Statutes § 52-351b (a). The defendants' responses were due to the plaintiff on June 2, 2017. After the defendants failed to respond by this date, the plaintiff moved the court to order supplemental discovery and to compel Schepis and Canelas to appear in person before the court for an examination of judgment debtor (EJD), in accordance with § 52-351b (c) and General Statutes § 52-397.[4]

[4] General Statutes § 52-397 provides in relevant part: "Any judgment debtor, an execution against whom has been returned unsatisfied in whole or in part or who has failed to respond within thirty days to any postjudgment interrogatories served pursuant to section 52-351b, may be examined on oath . . . concerning his property and means of paying such judgment . . . ."

On August 21, 2017, the court granted this motion. The court also reiterated that the defendants were obligated to provide the plaintiff with the disclosures that the court previously had ordered them to make in its January 12 and April 12, 2017 orders. The court ordered compliance by October 6, 2017. The court also advised the defendants that they should begin gathering these documents and responding "*immediately*" and that they should not return to court on October 6, 2017, claiming that they had insufficient time to comply with the court's orders.[5] (Emphasis added.) The defendants again failed to comply.

On October 20, 2017, the plaintiff moved for the court to order the defendants to produce the required documents and to appear for an EJD, and requested that the court impose sanctions against the defendants for failing to comply with the court's discovery orders. On November 6, 2017, the court ordered the defendants to provide the plaintiff with the disclosures that the court had ordered them to make in its January 12, April 12, and August 21, 2017 orders. The court ordered the defendants to comply with this order by November 16, 2017, or risk being held in contempt of court. The court also agreed to sanction the defendants and ordered them to reimburse the plaintiff for the cost of preparing the plaintiff's October 20, 2017 motion.[6] As for further

[5] Specifically, the court stated in relevant part: "[I]t is the court's intent that the defendant[s] work on [the] responses *immediately*. And the court states that, so that there is no claim that come September [29, 2017], they only had a week to respond. So [the defendants] are to begin preparing their responses now, but they don't have to actually disclose the information to the [plaintiff] . . . until October [6, 2017]. *But* [*the defendants*] *should not come into the court on October* [6, 2017], *and say* [*that*] *they need more time, because they only had a week to prepare the responses*. They have over a month to prepare the responses, about seven or eight weeks." (Emphasis added.)

[6] In a March 8, 2018 order, the court stated that, "[w]ithout objection, the court will grant the request for attorney's fees, as directed by [the court's November 6, 2017] order . . . in the amount of [$5120], to be paid by April 4, 2018."

sanctions, the court stated that it would "reserve decision on the need for [them] depending on the defendants' compliance with this order." The court also ordered "Schepis and . . . Canelas . . . to appear on November 22, 2017 . . . to be examined as [j]udgment debtors." The court later granted a motion by the defendants asking the court to move the deadline for document disclosures to December 8, 2017, and the date of the EJD to December 13, 2017.

By the time that the EJDs commenced on December 13, 2017, the defendants had provided the plaintiff with only a small fraction of the sixty-six categories of documents that they had agreed to make available pursuant to the April 12, 2017 agreement and that the court most recently ordered them to produce in its November 6, 2017 order.[7] The defendants told the court that they had not produced many of the documents that they were required to disclose because they did not have them in their possession.

Both Schepis and Canelas testified under oath during the EJD. Despite being sophisticated investors with significant assets, however, Schepis and Canelas claimed that they were able to recall little information about their finances. For example, when asked which accountant prepared his personal tax returns, Schepis represented that he could not remember who prepared them. Canelas provided similar answers concerning the tax returns about which he was asked. For example, he asserted that he did not know who had prepared the 2016 tax return for one of the entities that he controlled and operated with Schepis.

[7] The court noted the lack of production on the record at the EJD, indicating as follows:

"The Court: What I understand [the plaintiff's counsel] is saying is that all that has been produced are the redacted income tax returns. Is that right?

"[The Defendants' Counsel]: *That is, Your Honor.*

"[The Plaintiff's Counsel]: There are K-1s, so we do have some K-1s. I don't want to mislead you." (Emphasis added.)

Schepis and Canelas were also asked about their sources of income and where they deposit their earnings. During his testimony, Schepis was presented with a document purporting to show that he received a disbursement of $931,383 from his former attorney in September, 2015. Schepis claimed, however, that he could not recall receiving this large sum of money, even though he received it only two years prior. Schepis also represented that he could not remember receiving cash distributions in the past three or four years from the entities that he controlled and operated and claimed that he had not received a distribution from Pursuit Partners, LLC, "in quite a while." Moreover, he asserted that he did not know where he deposited earnings from these distributions when he was receiving them. Indeed, Schepis claimed that he did not have a checking account and could not remember the last time he had one.[8] Moreover, Schepis represented that he paid for everything in cash.

Canelas provided similarly evasive answers to questions about his personal finances. He claimed that he could not recall receiving a $776,000 disbursement from his former attorney and could not recall whether he received disbursements from entities that he controlled and operated. Asked whether he had an account into which he could deposit money, Canelas asserted that he could not recall. He also represented that he did not

[8] The following exchange between the plaintiff's counsel and Schepis that occurred during the EJD exemplifies the absurdity of Schepis' claim that he did not know where he would deposit large sums of money that he received:

"[The Plaintiff's Counsel]: Well, I mean . . . is it fair to say that you wouldn't be walking around with hundreds of thousands of dollars of cash in your pocket, right?

"[Schepis]: Possibly not.

"[The Plaintiff's Counsel]: Well, if you weren't going to walk around with the cash in your pocket, where did it go?

"[Schepis]: I don't remember.

"[The Plaintiff's Counsel]: Do you have any records anywhere that would refresh your recollection as to where moneys went?

"[Schepis]: No."

have a checking account and could not recall the last time that he had a bank account. In light of this representation, the plaintiff's counsel asked him how he retrieves cash when he needs it, to which he responded that he asks his wife for it, whom he described as being a stay-at-home mother who does charity work and is his "sole source of money." He also asserted that his wife pays his bills and that he does not.

On the same date as the EJD, the court, in light of the defendants' evasive and incredible responses during the EJD and their failure to provide the plaintiff with the documents that the court, in previous discovery orders, had required them to disclose, entered new orders to address these issues.[9] First, the court continued the EJD until February 6, 2018.[10] The court also ordered that, by December 22, 2017, Schepis and

[9] After the plaintiff's counsel examined Schepis, the court reprimanded him for his evasive responses during the EJD in the following exchange:

"The Court: I think that would help us focus the inquiry a little bit here. So let's—so, Mr. Schepis, I assume your lawyer has explained to you what's going on here and what the rules are and why you're sitting here under oath and people are asking these questions that are uncomfortable questions and they are.

"But it's a situation where, you know, there are these judgments and these orders and the laws of Connecticut allow for this. I mean, they're not doing anything they're not permitted to do. And it is—and you are required to answer questions.

"[Schepis]: I understand.

"The Court: And if it appears that you're not answering truthfully, you know, just saying I don't recall doesn't end it because that may not seem credible.

"And you know you don't want to [be] found in contempt. I mean, I just want to say—and I'm not saying that's what's going to happen today. But General Statutes § 52-399 is called commitment of debtor. Commitment means you're going into a cell until you purge yourself of the contempt. Now, please, life's too short for that kind of thing.

"So it is somehow important to get through this and you know—let me put it this way, if you can't remember, you better find out, okay. That's what I'm saying. It really—you're under a big obligation here and there is an obligation to find out. Okay."

[10] On January 31, 2018, the plaintiff moved to continue the EJD until sometime after February 6, 2018, to which the defendants consented. It is unclear from the record if the EJD ever recommenced before the court entered its order of sanctions on July 23, 2018.

Canelas were to produce the following: "1. [f]ederal and state income tax returns for each of tax years 2015 and 2016 identifying the preparer(s)' name(s); 2. [a]n unredacted copy of [a document containing financial information from the defendants' prior counsel]; 3. [f]ederal and state income tax returns for the tax years 2015 and 2016, identifying the preparer's name, for (a) [POF], (b) [PCM], (c) [PIM], (d) Pursuit Partners, LLC, and (e) [Northeast]." Indeed, the court had, in three prior orders, commanded that the defendants produce the tax returns listed in its December 13, 2017 order. Additionally, the court ordered the defendants' counsel to "submit a responsive pleading" to the court's November 6, 2017 order requiring the defendants to provide the plaintiff with the documents that, on April 12, 2017, they agreed to make available to the plaintiff and had been ordered to disclose several times. The defendants agreed to comply with this order by the December 22, 2017 deadline that the court imposed.

On January 2, 2018, the plaintiff moved for the court to order the defendants to comply with the court's December 13, 2017 order. In this motion, the plaintiff stated that the defendants had provided some, but not all, of the documents that the court's December 13, 2017 order required them to produce and that they had failed to submit a responsive pleading to the court's November 6, 2017 order, despite being required to produce all of these items by December 22, 2017.

The plaintiff then filed a second motion on February 13, 2018, in which it requested that the court order Schepis and Canelas to provide the information that they claimed that they could not recall during the EJD and impose sanctions for Schepis' and Canelas' conduct during the EJD. In addition, the plaintiff requested that, in light of the testimony that Schepis and Canelas did provide during the EJD and the defendants' failure to provide the plaintiff with documents that the court had previously ordered them to produce, the court compel

the defendants to provide the plaintiff with supplemental disclosures covering ten categories of information. Some of the categories of documents requested in this motion pertained to documents that the court already had ordered the defendants to produce in prior orders, such as statements for securities accounts that either Schepis or Canelas owned, but the motion also contained requests for the defendants to produce documents covering new categories of information.

On March 8, 2018, the court ordered the defendants to "to identify . . . the preparer's name of the state income tax returns for the tax years 2015 and 2016, for (a) [POF], (b) [PCM], (c) [PIM], (d) Pursuit Partners, LLC, and (e) [Northeast], an[d] the preparer for the federal tax returns of Pursuit Partners, LLC." With respect to the ten categories of documents that the plaintiff asked the court to order the defendants to provide, the court ordered the parties to conference to attempt to resolve any issues with respect to the defendants' providing these documents. If, however, the parties were unable to resolve the issues, the court instructed the plaintiff's counsel to submit an affidavit describing the categories of documents that remained in dispute by March 22, 2018. The court also reserved its decision on the other orders requested by the plaintiff.

On March 22, 2018, the plaintiff's counsel submitted an affidavit to the court in which he averred that the defendants agreed to produce some, but not all, of the ten categories of documents that the plaintiff had requested in its February 12, 2018 motion. On April 4, 2018, the court, having reviewed the affidavit, ordered the defendants to provide the plaintiff with supplemental disclosures within the categories of documents that the defendants' counsel agreed to produce during the conference with plaintiff's counsel by April 20, 2018.[11]

[11] Indeed, the order, in relevant part, provided: "The court has reviewed the affidavit of [the] plaintiff's counsel . . . regarding a discovery conference on March 20, 2018, with [the] [defendants'] counsel . . . as directed by

On April 24, 2018, the plaintiff's counsel filed an affidavit with the court in which he averred that the defendants had provided nothing in the way of compliance with the court's April 4, 2018 order. The court, on June 6, 2018, then ordered the "[p]laintiff . . . to submit a supplemental filing identifying the outstanding discovery by June 14, 2018, [and that the defendants] respon[d] to th[is] [supplemental] filing . . . by July 2, 2018. The court also ordered that "[a] hearing [be held] to consider an order for fees and [p]enalties . . . ." On June 14, 2018, the plaintiff submitted two affidavits in response to the court's June 6, 2018 order. In the first affidavit, the plaintiff's counsel averred that the defendants had only partially complied with the court's April 4, 2018 order, in which it ordered them to make supplemental disclosures to the plaintiff. In the second affidavit, the plaintiff's counsel sought an award of attorney's fees, averring that the plaintiff had incurred $31,610 in attorney's fees and $1258.05 in other litigation expenses preparing for and taking the December 13, 2017 EJD and attempting to obtain the defendants' compliance with the court's discovery orders.

In support of the requested attorney's fees, the plaintiff's counsel averred that he bills at an hourly rate of $400. He stated that he spent fourteen hours preparing for the December 13, 2017 EJD; 3.7 hours taking the December 13, 2017 EJD; 2.8 hours preparing the plaintiff's January 2, 2018 motion; 35.2 hours preparing the plaintiff's February 13, 2018 motion; and 1.5 hours arguing motions related to the defendants' noncompliance at a June 6, 2018 status conference.

the court. The affidavit describes several undertakings by [the defendants' counsel] on behalf of his clients to comply with some, but not all, of [the] plaintiff's discovery requests. The court directs [the defendants' counsel] to fulfill these undertakings on or before April 20, 2018, and requests [the plaintiff's counsel] to file an affidavit within seven days thereafter advising the court of any remaining discovery disputes requiring court intervention."

In addition, the plaintiff's counsel requested that the plaintiff be awarded $8730 for the services of an attorney from Reed Smith LLP (Reed Smith), who served as the plaintiff's cocounsel. The plaintiff's counsel further stated that cocounsel from Reed Smith bills at an hourly rate ranging from $450 to $800 and engaged in 14.4 hours of work on the plaintiff's behalf.

Thereafter, the defendants filed their response to the plaintiff's affidavits. Notably, the defendants filed this response on July 19, 2018, even though the court ordered them to file it by July 2, 2018.[12] The defendants essentially made three arguments in their response. First, they argued that the award of attorney's fees that the plaintiff requested for preparing, attending, and taking the December 13, 2017 EJD was excessive. The defendants did, however, concede that the plaintiff should receive an award for some of the fees incurred for the EJD, stating that "*a reasonable award of attorney's fees related to the December 13, 2017 EJDs should be in an amount significantly less*." (Emphasis added.) Second, the defendants argued that the plaintiff should not be awarded attorney's fees for work performed after January 5, 2018, because the defendants filed several motions opposing the plaintiff's discovery requests. Third, the defendants argued that the plaintiff should not receive the award of fees requested for the work of cocounsel from Reed Smith because this request of fees was "unreasonably excessive and duplicative." Importantly, in their response, the defendants *did not contest* that they had failed to comply fully with the court's discovery orders, as the plaintiff's counsel had averred in his June 14, 2018 affidavit.

On July 23, 2018, the court issued the order of sanctions that is the subject of the present appeal. The court's decision to sanction the defendants was predicated on two factual findings. First, "[t]he court [found]

[12] On June 19, 2018, the defendants requested an extension until July 9, 2018 to respond to the June 14, 2018 affidavits of the plaintiff's counsel.

that an award of [attorney's] fees and costs [was] appropriate because [Schepis and Canelas] conducted themselves at the [EJD] on December 13, 2017, before the court with obvious dishonesty . . . ." Second, the court found that, after conducting themselves with "obvious dishonesty" at the EJD on December 13, 2017, the defendants "then . . . engaged in a continuous practice of disobeying the court's discovery orders."

Having made these findings and determined that an order of sanctions was appropriate, the court awarded the plaintiff $17,962.05, which amounted to $16,704 in attorney's fees and $1258.05 in litigation costs. The court calculated the attorney's fee portion of the award using an hourly rate of $360 for the hours that both the plaintiff's counsel and cocounsel from Reed Smith billed. Specifically, the court awarded: 3.7 hours, as requested, for attending and taking the December 13, 2017 EJD, stating that "[t]he court awards the fees requested because of the egregious duplicity displayed by the individual defendants at the EJD before the court"; 2.8 hours, as requested, for preparing its January 2, 2018 motion because "it represent[ed] an effort to assure compliance with a court order"; 30.2 hours of fees for the plaintiff's February 12, 2018 motion, deducting five hours from the 35.2 hours of fees that the plaintiff requested because these five hours were "spent on matters not caused by [the] defendants' inappropriate conduct"; and 1.5 hours, as requested, for the plaintiff's counsel's appearance at the June 6, 2018 status conference because "[t]he motions argued [at that conference] related to discovery and were necessitated by [the] defendants' [noncompliance] with court orders . . . ." Moreover, the court awarded the plaintiff attorney's fees for 8.2 hours of work by cocounsel from Reed Smith, an amount less than the plaintiff had requested. The court also did not award the plaintiff for

There is no indication in the record, however, that the court ever addressed this motion.

the fourteen hours of work that the plaintiff's counsel claimed to have spent preparing for the December 13, 2017 EJD "because preparation for the [EJD] was required regardless of [the] defendants' subsequent conduct." This appeal followed.

The defendants thereafter filed a motion for articulation. Specifically, the defendants asked the court to articulate which discovery orders formed the bases of the court's finding in its July 23, 2018 order that the defendants had "engaged in a continuous practice of disobeying the court's discovery orders" and whether any of these orders were the bases for the court's March 8, 2018 order of sanctions.[13] (Internal quotation marks omitted.)

In its articulation, the court reiterated that it based its award of attorney's fees and costs in its July 23, 2018 order of sanctions on the number of hours and hourly rate that it deemed reasonable for the time that the plaintiff's counsel and cocounsel from Reed Smith had spent taking the testimony of Schepis and Canelas at the December 13, 2017 EJD, preparing the plaintiff's January 2 and February 12, 2018 motions, and participating in the June 6, 2018 status conference.

With respect to the March 8, 2018 order of sanctions, the court stated that the amount that it awarded the plaintiff in that order reflected the cost of preparing its October 20, 2017 motion, as stated in its November 6, 2017 order. The court also noted that its November 6, 2017 order "was directed to the defendants' failure to comply with [the discovery] orders previously entered in 2017 and restated what was outstanding, so that the

[13] As stated previously, the court, in its November 6, 2017 order, stated that it would sanction the defendants and would award the plaintiff the amount that it cost the plaintiff to prepare its October 20, 2017 motion. The court ultimately imposed this sanction by awarding the plaintiff attorney's fees in a March 8, 2018 order. In this order, the court stated that it was awarding these attorney's fees "[w]ithout objection . . . ." Moreover, the defendants do not challenge this order of sanctions in this appeal.

[EJD] . . . would be productive." Additional facts will be set forth as necessary.

The defendants claim that the trial court's July 23, 2018 order of sanctions was improper because it constituted an abuse of discretion. In support of this claim, the defendants argue that the order of sanctions failed to meet the three requirements that a trial court must deem satisfied before imposing sanctions and that this court must analyze to determine whether the trial court's order constituted an abuse of discretion. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 71 (citing *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18). We disagree with the defendants.

We begin our analysis of the defendant's claim by setting forth our standard review of a court's order of sanctions for a party's failure to comply with that court's discovery order. Our Supreme Court has stated that, "a court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of [Practice Book] § 13-14, impose sanctions . . . . The decision to enter sanctions . . . and, if so, what sanction or sanctions to impose, is a matter within the sound discretion of the trial court. . . . In reviewing a claim that this discretion has been abused the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Evans* v. *General Motors Corp.*, 277 Conn. 496, 522–23, 893 A.2d 371 (2006).[14] Our Supreme Court

[14] Practice Book § 13-14 provides in relevant part: "(a) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production or for disclosure of the existence and contents of an insurance policy or the limits thereof, or has failed to submit to a physical or mental examination, or has failed to comply with a discovery

has described three criteria for evaluating whether a court's order of sanctions constitutes an abuse of discretion. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 71, citing *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18. Specifically, the court has stated that "a trial court properly exercises its discretion in imposing a sanction for a violation of a [court's discovery] order when (1) the order to be complied with is reasonably clear, (2) the record establishes that the order was in fact violated, and (3) the sanction imposed is proportionate to the violation." *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 71. To be upheld on appeal, the order of sanctions must satisfy each of these three requirements. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 17–18. Having reviewed the court's order of sanctions, and on the basis of our review of the record, we conclude that the order satisfies each of these three requirements.

I

CLARITY OF THE DISCOVERY ORDER

The defendants first argue that the court's order of sanctions constituted an abuse of discretion because "there [was] neither a clear order nor [did the defendants violate] any such order." Specifically, the defendants assert that the court's order, which stated, in relevant part, that "Schepis and . . . Canelas . . . are

order made pursuant to Section 13-13, or has failed to comply with the provisions of Section 13-15, or has failed to appear and testify at a deposition duly noticed pursuant to this chapter, or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order as the ends of justice require.

"(b) Such orders may include the following . . .

"(2) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee . . . .

* * *

"(c) The failure to comply as described in this section may not be excused on the ground that the discovery is objectionable unless written objection as authorized by Sections 13-6 through 13-11 has been filed. . . ."

to appear . . . to be examined as [j]udgment debtors" did not expressly "requir[e] [Schepis and Canelas] to answer any of the EJD questions differently than they had answered them." In essence, the defendants contend that the court's ultimate finding that Schepis and Canelas "conducted themselves . . . with obvious dishonesty" during the EJD could not serve as the basis for imposing sanctions, because the court's order compelling Schepis and Canelas to be examined as judgment debtors was unclear as to whether they were required to provide truthful testimony during the EJD. We are not persuaded.[15]

In order for a court to impose sanctions based on a party's failure to comply with the court's discovery order, "the [discovery] order to be complied with must be reasonably clear." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17. Moreover, "even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we . . . review de novo." Id.

A requirement that a person give truthful testimony is so patently implicit in any order compelling a person to testify that the defendants' argument does not warrant much discussion. Indeed, witnesses providing truthful testimony in judicial proceedings is critically important to the court's ability to uncover the truth and ensure that justice is properly administered. See *State* v. *Simmons*, 188 Conn. App. 813, 831–32, 205 A.3d 569 (2019).

[15] On appeal, the defendants argue only that the court's order compelling Schepis and Canelas to testify at the EJD was not reasonably clear. In doing so, the defendants do not claim that any of the court's orders compelling them to provide the plaintiff with certain documents were unclear. Thus, we do not address whether these orders were reasonably clear in this opinion.

Here, Schepis and Canelas were under oath when testifying during the EJD, as required by § 52-397.[16] Thus, before testifying, Schepis and Canelas, swore to provide truthful testimony under the penalty of perjury. See General Statutes § 1-25.[17] Therefore, there is no doubt that Schepis and Canelas, having sworn to provide truthful testimony, understood that they were required to provide such testimony during their EJD.

II

FINDING THAT THE DEFENDANTS VIOLATED THE DISCOVERY ORDER

The defendants next argue that, even if the court's order compelling Schepis and Canelas to be examined as judgment debtors required them to provide truthful testimony during the EJD, the order of sanctions nevertheless constituted an abuse of discretion because the trial court improperly found that Schepis and Canelas had violated this order. In support of their argument that this finding was improper, the defendants assert that the court's underlying factual finding—that Schepis and Canelas "conducted themselves . . . with obvious dishonesty" during the EJD—was clearly erroneous. The defendants assert that "while the trial court certainly was within its discretion to discredit and disbelieve the defendants' EJD testimony, it could not use that disbelief to conclude that the opposite of their testimony had been established."

[16] General Statutes § 52-397 provides in relevant part: "Any judgment debtor, an execution against whom has been returned unsatisfied in whole or in part or who has failed to respond within thirty days to any postjudgment interrogatories served pursuant to section 52-351b, *may be examined on oath*, in the court location where the judgment was rendered, concerning his property and means of paying such judgment, before any judge of the Superior Court or before a committee appointed by such judge. . . ." (Emphasis added.)

[17] Indeed, the oath administered to witnesses is as follows: "You solemnly swear or solemnly and sincerely affirm, as the case may be, that *the evidence you shall give concerning this case shall be the truth, the whole truth and nothing but the truth*; so help you God or upon penalty of perjury." (Emphasis added.) General Statutes § 1-25.

In so asserting, the defendants cite to cases in which our courts have stated that a finder of fact may not make a finding that is the opposite of what is stated in one's testimony if that finding is based *solely* on the fact finder's disbelief of that testimony. See, e.g., *Essex Ins. Co.* v. *William Kramer & Associates, LLC*, 331 Conn. 493, 519–20, 205 A.3d 534 (2019) ("the jury was not free to conclude from [the] rejection [of the testimony] that the opposite of the testimony [was] true" in absence of evidentiary basis in record for arriving at such conclusion); *State* v. *Alfonso*, 195 Conn. 624, 634–35, 490 A.2d 75 (1985) (jury could not conclude that defendant possessed marijuana from his denial of possessing it "without . . . evidence supporting . . . a conclusion" that he possessed it); *State* v. *Coleman*, 14 Conn. App. 657, 671, 544 A.2d 194 ("the jury is barred from directly inferring that a defendant was present at the scene of a crime from its finding that he was lying when he denied his presence there"), cert. denied, 208 Conn. 815, 546 A.2d 283 (1988). In light of these cases, the defendants assert that the court's underlying factual finding was clearly erroneous because there was no basis in the record to support the court's conclusion that Schepis and Canelas provided dishonest testimony during the EJD other than the court's disbelief of their testimony. We are not persuaded.[18]

In order for a court to impose sanctions based on a party's failure to comply with the court's discovery order, "the record must establish that the [discovery] order was in fact violated." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17. Our

[18] On appeal, the defendants do not contest the court's other underlying factual finding—that, after the December 13, 2017 EJD, the defendants "then . . . engaged in a continuous practice of disobeying the court's discovery orders." Moreover, the defendants concede that, in June, 2018, when the court ordered that a hearing on sanctions be held, the defendants had not provided all the documents to the plaintiff that the court previously had ordered that they make available. Because the defendants do not contest the court's finding that they continually failed to obey its orders to provide the plaintiff with certain documents, we do not address it.

determination of whether an order for sanctions satisfies "[t]his requirement poses a question of fact . . . ." Id., 17–18. Thus, to determine whether an order for sanctions satisfies this requirement, we review the court's finding to determine whether it is clearly erroneous. Id., 18.

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017). In applying the clearly erroneous standard of review, we also are mindful that, "[b]ecause factual findings . . . are squarely within the trial court's purview, [they are] afford[ed] . . . great deference. . . . In short, the court, as fact finder, may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *Keeley* v. *Ayala*, 328 Conn. 393, 419–20, 179 A.3d 1249 (2018).

First, we note that the defendants failed to preserve this portion of their claim for appellate review. See Practice Book § 60-5.[19] Indeed, the defendants failed to assert in their objection to the plaintiff's application for attorney's fees that the defendants' conduct at the EJD could not form the basis of the court's award of attorney's fees and litigation costs to the plaintiff because such conduct did not violate the court's order.

Nevertheless, even if we assume that the defendants properly preserved this portion of their claim for appellate review, we conclude that it is meritless. Indeed, contrary to the defendants' assertion, there was ample

[19] Practice Book § 60-5 provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ."

evidence in the record from which the trial court could reasonably have inferred that Schepis and Canelas "conducted themselves . . . with obvious dishonesty" during the EJD.

The following additional facts are relevant to this portion of the defendants' claim. During the EJD, Schepis and Canelas made representations, the veracity of which were undermined by exhibits that the plaintiff attached to its February 12, 2018 motion and that its counsel attached to his June 14, 2018 affidavits. For example, during their EJD testimony, both Schepis and Canelas claimed that they did not have an IRA account. Postjudgment interrogatory responses from Fidelity Management Trust Company purported to show, however, that both Schepis and Canelas maintained IRA accounts. Moreover, both Schepis and Canelas asserted that they each had one motor vehicle in their households and that the vehicles were owned by their wives. Municipal tax records updated as of June 14, 2018, purported to show, however, that Schepis and Canelas were the sole taxpayers listed for several vehicles.

In addition, the plaintiff's counsel attached exhibits to his June 14, 2018 affidavit that undermined the veracity of Schepis' representation that he did not know which accountant he used to prepare his tax returns. First, the plaintiff's counsel submitted the deposition of Richard Bangs, who stated that the accounting firm with which he was employed had performed Schepis' accounting and tax preparation work for at least fifteen or sixteen years. Second, the plaintiff's counsel attached an e-mail exchange between Bangs and Schepis that occurred two months before the EJD and contained "Pursuit Partners" as the subject heading. In one e-mail, Schepis sent Bangs the K-1 form for Pursuit Partners, LLC. Then, in a subsequent e-mail, Schepis asked Bangs, "we will not owe anything for 2016, correct?" Finally, the plaintiff submitted to the court a letter from Bangs' accounting firm addressed to Schepis and his wife. The

letter stated that their 2016 Connecticut income tax return was attached to the letter and that the firm "*prepared the return* from the information [Schepis and his wife] furnished [to the accounting firm] . . . ." (Emphasis added.)

In light of these exhibits, the contents of which purportedly contradict the testimony that Schepis and Canelas provided during the EJD, we conclude that the principle in our case law relied on by the defendants that a finding of fact cannot be based solely on the disbelief of testimony is inapplicable to the present case. Indeed, there was ample evidence in the record from which the court could reasonably have inferred that Schepis and Canelas "conducted themselves . . . with obvious dishonesty" during the EJD. Accordingly, we conclude that the court's finding that they violated its order was not clearly erroneous.

III

PROPORTIONALITY OF THE SANCTIONS TO THE VIOLATIONS

The defendants' final argument in support of their claim is that the trial court's order of sanctions was disproportionate to the defendants' violations of the court's discovery orders that occurred after the December 13, 2017 EJD. In support of this argument, the defendants assert that the three factors used by our Supreme Court in *Yeager* v. *Alvarez*, 302 Conn. 772, 787, 31 A.3d 794 (2011), to determine whether an order of sanctions is proportionate to a party's violation of a court's discovery order weigh against concluding that the court's July 23, 2018 order of sanctions was proportionate to the defendants' failure to comply with the court's December 13, 2017 discovery order. We are not persuaded.[20]

[20] On appeal, the defendants do not address the award of attorney's fees for the 3.7 hours the plaintiff's counsel spent attending and taking the December 13, 2017 EJD in their analysis concerning the proportionality of the court's order of sanctions to their violations of the court's discovery orders. In assessing the proportionality of the sanctions imposed by the court

Our Supreme Court has stated that "the sanction imposed [for violation of a court's discovery order] must be proportional to the violation." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 18. We review the proportionality of a sanction to the sanctioned party's violation for an abuse of discretion. Id.

"In reviewing the proportionality of the trial court's sanction, we focus our analysis on the [sanctioned party's] violation . . . . Our analysis of the [sanctioned party's] violation is guided in turn by the factors we previously have employed when reviewing the reasonableness of a trial court's imposition of sanctions: (1) the cause of the [sanctioned party's] failure to [comply with the court's discovery order], that is, whether it [was] due to inability rather than the [wilfulness], bad faith or fault of the [sanctioned party] . . . (2) the degree of prejudice suffered by the [nonsanctioned] party, which in turn may depend on the importance of the information requested to that party's case; and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct." (Citations omitted; internal quotation marks omitted.) *Yeager* v. *Alvarez*, supra, 302 Conn. 787; see also *Krahel* v. *Czoch*, 186 Conn. App. 22, 33–34, 198 A.3d 103, cert. denied, 330 Conn. 958, 198 A.3d 584 (2018). Importantly, when weighing these factors to determine whether the sanction is proportionate to the violation, "the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Krahel* v. *Czoch*, supra, 34.

to the defendants' violations, we note, however, that *all* of the violations that the court found had occurred are relevant. Thus, we reject the defendants' attempt to compartmentalize the court's order of sanctions into individual parts.

Before assessing the trial court's order of sanctions using the factors set forth by our Supreme Court in *Yeager*, we first address the defendants' contention that this court, in assessing whether the July 23, 2018 order of sanctions was proportional to the defendants' practice of habitually failing to comply with the court's discovery orders, must ignore any improper conduct that they engaged in prior to December 13, 2017. In asserting that this court must cabin its proportionality analysis to conduct in which the defendants engaged between December 13, 2017, and July 23, 2018, the defendants incorrectly characterize the conduct on which the court based its July 23, 2018 order of sanctions.

Indeed, in its order of sanctions, the trial court found that, after the December 13, 2017 EJD, the defendants "then . . . engaged in a continuous practice of disobeying the court's discovery orders." In its articulation, the court stated that its July 23, 2018 order "awarded a fee . . . for the effort of [the] plaintiff's . . . counsel to compel compliance with the *November 6*, [*2017*] *and December 13*, [*2017*] *orders* as discussed at the EJDs . . . ." (Emphasis added.) Importantly, the court also stated in its articulation that "[f]urther compliance with the document production ordered by the *November 6, 2017 and December 13, 2017 orders* required extensive effort on the part of the plaintiff and the court, with mandated meet and confer sessions and status conferences." Thus, the court acknowledged in its findings that the defendants' failure to comply with the court's orders *before* December 13, 2017, required the plaintiff to expend resources *after* December 13, 2017, to attempt to compel the defendants' compliance with these orders. Accordingly, the defendants' failure to comply with the court's discovery order before December 13, 2017, is relevant in assessing whether the court's July 23, 2018 order of sanctions was proportional to the defendants' practice of habitually failing to comply with the court's discovery orders.

Having resolved this underlying issue in the defendants' argument, we now assess whether the court's sanctions were proportionate to the defendants' failure to comply with the court's discovery orders in light of the three *Yeager* factors. Mindful of the significant discretion that the trial court is afforded in crafting an order of sanctions for a party's violation of its discovery order, we conclude, for the reasons that follow, that the three *Yeager* factors weigh in favor of concluding that the court's July 23, 2018 order of sanctions was proportionate to the defendants' violations of the court's discovery orders.

A

With respect to the first factor, the defendants assert that their "discovery efforts constituted a good faith effort to respond to and confront [the] [p]laintiff's overbroad discovery efforts, rather than a wilful disregard of the court's orders . . . ." In support of this assertion, the defendants point to their March 5, 2018 motion for a protective order and contend that they were attempting to prevent certain information from being revealed that was contained in the documents that the court ordered the defendants to disclose in its December 13, 2017 order. This assertion is unpersuasive for two reasons.[21]

[21] In addition to the defendants' March 5, 2018 motion for a protective order, there are several other motions that the defendants reference in their appellate brief and in their objection to the plaintiff's application for attorney's fees that they assert support a conclusion that they were "litigating bona fide discovery disputes" in response to the court's December 13, 2017 order. (Emphasis omitted.) These motions, all of which the court denied, include: two motions to quash a subpoena; a May 16, 2018 motion for a protective order; an April 24, 2018 motion to reconsider the court's April 4, 2018 order, in which it granted the plaintiff's motion to permit the plaintiff to "share and disclose all postjudgment discovery" with Reed Smith; and an April 24, 2018 motion to reargue, in which the defendants asked the court to reconsider its decision to deny in part their March 5, 2018 motion for a protective order.

These motions, however, offer no support to the defendants' assertion that they were engaged in "litigating bona fide discovery disputes" in response

First, at the December 13, 2017 hearing, the court ordered the defendants to file, no later than January 15, 2018, any motion for a protective order seeking to redact information from the documents that they were ordered to produce. The defendants, however, did not move for a protective order requesting redactions until March 5, 2018. Thus, the fact that the defendants moved for a protective order nearly two months after the court's deadline for filing such a motion contradicts their assertion that they made a good faith effort to comply with the court's December 13, 2017 order.

Second, although the court, on April 4, 2018, denied in part the defendants' March 5, 2018 motion for a protective order, it did permit some redactions to the documents that the defendants were ordered to provide.[22] Despite the court's *in camera* review of the documents, and its allowance for some redactions to protect certain information, the defendants *still* failed to provide all of the required documents, resulting in the court's decision to schedule a hearing on sanctions on June 6, 2018. The defendants' failure to provide the plaintiff with the documents that they were required to disclose, even after the court, per their request, reviewed these documents and permitted some redactions, undercuts their assertion that they made a good faith effort to comply with the court's December 13, 2017 order.

to the court's December 13, 2017 order. (Emphasis omitted.) Indeed, the motions to quash a subpoena, the April 24, 2018 motion to reconsider concerning postjudgment discovery being shared with Reed Smith, and the May 16, 2018 motion for a protective order, unlike the March 5, 2018 motion for a protective order, do not challenge the *obligation of Schepis and Canelas* to produce the three categories of documents that the court described in its December 13, 2017 order. Moreover, the April 24, 2018 motion to reargue merely asked the court to reconsider its untimely March 5, 2018 motion for a protective order. Thus, we are not persuaded by the defendants' contention that these motions demonstrate that they were, in good faith, challenging the court's December 13, 2017 order.

[22] On April 24, 2018, the defendants moved for the court to reconsider its decision on the defendants' motion for a protective order. The court denied this motion on May 17, 2018.

Contrary to the defendants' characterization of their effort to comply with the court's discovery orders, the defendants, in fact, habitually failed to comply with these orders. In its order of sanctions, the trial court found that the defendants' practice of disobeying its discovery orders was "continuous . . . ." Indeed, the defendants admit that, despite being ordered to produce certain tax returns in the court's December 13, 2017 order *and in three prior orders* dating back to April 12, 2017, the defendants, as of June 14, 2018, *still* had not disclosed all of the tax returns that the court had required them to make available.

Moreover, despite the court's April 4, 2018 order compelling the defendants to provide the plaintiff with certain supplemental disclosures by April 20, 2018, the plaintiff's counsel averred on June 14, 2018, that the defendants had failed to provide any documents to satisfy this order. The defendants do not contest this averment on appeal, nor did they dispute it in their objection to the plaintiff's application for attorney's fees. Having considered the defendants' continuous practice of failing to comply with the court's discovery orders, we conclude that the first factor weighs in favor of concluding that the court's July 23, 2018 order of sanctions was proportionate to the defendants' violations of the court's discovery orders.

B

Regarding the second factor, the defendants assert that the plaintiff suffered minimal harm—if any—from their failure to comply with the court's discovery orders. In support of this assertion, the defendants point out that, by June, 2018, they "had complied in large part" with the court's December 13, 2017 order requiring them to provide the plaintiff with certain documents and to respond to the court's November 6, 2017 order. We are not persuaded.

Before addressing the harm that the plaintiff suffered as a result of the defendants' conduct, we first address the defendants' assertion that they substantially complied with the court's discovery orders. Indeed, in stating that they "complied in large part with the [court's discovery] orders," the defendants grossly misstate the extent to which they, in fact, complied with these orders. Although the defendants may have provided the plaintiff with most of the documents that the court's December 13, 2017 order required them to disclose, the defendants completely ignore—and, indeed, do not contest—that they failed to comply fully with the court's April 4, 2018 order, which required the defendants to provide the plaintiff with certain supplemental disclosures by April 20, 2018. Thus, contrary to their assertion, the defendants did not substantially comply with the court's discovery orders.

Having addressed the extent to which the defendants complied with the court's discovery orders, we now assess the harm that the plaintiff suffered as a result of the defendants' conduct. Relevant to this assessment is the harm that the plaintiff suffered as a result of the defendants' failure to comply with the court's discovery orders and, in the face of these violations, the cost that the plaintiff incurred in order to attempt to obtain the defendants' compliance with these orders. With respect to the harm that the plaintiff suffered as a result of the defendants' failure to provide it with certain documents that the court had ordered them to disclose, the plaintiff's counsel averred in his June 14, 2018 affidavit that these documents were pertinent to the plaintiff's ability to identify assets that could be used to satisfy the judgment, \$947,731 of which had not been secured by a prejudgment remedy. The defendants do not contest this averment in their appellate brief. Thus, the defendants' failure to produce certain documents that the court had ordered them to disclose deprived the plaintiff of information that it needed to collect on the judgment.

The defendants' failure to comply with the court's discovery orders made it necessary for the plaintiff to move for the court to compel the defendants to comply with these orders so that the plaintiff could obtain the documents that it needed to identify assets that could be used to satisfy the judgment, $947,731 of which had not been secured by a prejudgment remedy. Indeed, in its order of sanctions, the court found that the defendants' noncompliance with the court's discovery orders made it necessary for the plaintiff's counsel to prepare the plaintiff's January 2 and February 12, 2018 motions, in which the plaintiff asked the court to order that the defendants comply with the court's discovery orders. In addition, the court found that plaintiff's counsel's attendance at a June 6, 2018 status conference was "necessitated by [the] defendants' noncompliance with [the court's discovery] orders . . . ."

To attempt to compel the defendants' compliance, the plaintiff accumulated attorney's fees and other litigation costs. Thus, as a result of the defendants' failure to comply with the court's discovery orders, the plaintiff expended financial resources so that it could obtain the documents to which it was entitled and that it needed to identify assets that could be used to satisfy the judgment, $947,731 of which had not been secured by a prejudgment remedy. Having weighed the harm that the plaintiff suffered due to the defendants' failure to produce certain documents that they were ordered to disclose and the financial burden that the plaintiff shouldered in order to compel the defendants' compliance, we conclude that the second *Yeager* factor weighs in favor of concluding that the court's July 23, 2018 order of sanctions was proportionate to the defendants' failure to comply with the court's discovery orders.

C

Finally, with respect to the third factor—whether the sanction imposed is appropriate in the context of the

case—"we bear in mind that [t]he primary purpose of a sanction for violation of a discovery order is to ensure that the [nonsanctioned party's] rights are protected, not to exact punishment on the [sanctioned party] for its allegedly improper conduct." (Internal quotation marks omitted.) *Yeager* v. *Alvarez*, supra, 302 Conn. 790. In light of this principle and the financial burden that the plaintiff suffered in order to attempt to compel the defendants' compliance with the court's discovery orders, we conclude that the court's order of sanctions was appropriate.

Indeed, the court's order of sanctions reimbursed the plaintiff for the attorney's fees and other litigation costs that it incurred in order to compel the defendants to provide it with certain documents that the court had ordered they disclose and that the plaintiff needed to obtain a remedy to which it was entitled. In the absence of the court's order of sanctions, the plaintiff unfairly would have borne this cost. Thus, the third *Yeager* factor weighs in favor of concluding that the court's July 23, 2018 order of sanctions was proportional to the defendants' violations of the court's discovery orders.

IV

CONCLUSION

Having reviewed the court's order of sanctions and the record, we conclude that the court's July 23, 2018 order meets the three requirements for such orders described by our Supreme Court. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 328 Conn. 71, citing *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18. Thus, we conclude that the court's order of sanctions did not constitute an abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN C. MCCULLOUGH *v.* TOWN OF ROCKY HILL (AC 41834)

Lavine, Elgo and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendant town for, inter alia, abuse of process and various other intentional torts. The town, after discussion with the plaintiff and without his objection, began mowing overgrown grass, removing shrubbery and cutting and removing certain branches and trees on an area of land located between the plaintiff's property line and the curb of the adjacent street. One month later, however, the plaintiff, after consulting a tree expert, informed town officials that he intended to bring an action against the town because he believed that some of the cut branches and trees had been on his property and that the town had unlawfully cut them. The plaintiff sent a $400,000 invoice to the town manager for "tree and related damages." Thereafter, the town brought an action against the plaintiff to foreclose municipal tax liens on his property. While the foreclosure action was pending, the town notified the plaintiff of an increase in the 2013 assessment of his property. The trial court rendered judgment in favor of the plaintiff in the foreclosure action, and, the plaintiff commenced the present action. In a twelve count complaint, the plaintiff alleged, in counts one and four, abuse of process in connection with the foreclosure action and the 2013 assessment, respectively, and, in count eight, abuse of process for the town's alleged misuse of the statute (§ 8-12) that sets forth the procedure to be followed when ordinances are violated. In the other counts of the complaint, the plaintiff alleged, inter alia, that the town committed multiple intentional torts. In response, the town filed an answer and special defenses, including governmental immunity pursuant to statute (§ 52-557n (a) (2) (A)) with respect to ten counts. The trial court rendered summary judgment in favor of the town on all counts, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly rendered summary judgment in favor of the town on the plaintiff's intentional tort claims, as that court correctly determined that the doctrine of governmental immunity barred those claims; it was undisputed that the town is a political subdivision of the state, and, therefore, the protection from liability under § 52-557n (a) (2) (A) applied to the intentional tort claims, as the plaintiff failed to identify any statute that abrogated the town's governmental immunity with respect to the relevant intentional torts.
2. The trial court properly rendered summary judgment in favor of the town on the abuse of process claims in counts four and eight of the plaintiff's complaint; those claims contained no allegations that the town utilized

a judicial process or instituted a legal proceeding against the plaintiff, but, rather, they pertained to the municipal property revaluation process and the authority of a zoning enforcement officer to issue orders, in accordance with municipal enactments, regarding the removal of inoperable vehicles from private property, and, therefore, the conduct alleged, as a matter of law, did not support an abuse of process claim.

3. The trial court properly rendered summary judgment in favor of the town on the abuse of process claim in count one of the plaintiff's complaint: no genuine issue of material fact existed as to whether the town commenced the tax lien foreclosure action for the primary purpose of escaping liability for $400,000 in damages that allegedly resulted from the overgrowth remediation activities on the plaintiff's property, as the record was bereft of properly authenticated affidavits, exhibits or other documentation to substantiate the plaintiff's bald assertion that the town had done so; moreover, although a genuine issue of material fact existed as to whether the primary purpose of the tax lien foreclosure action was the collection of delinquent taxes or the remediation of blight on the plaintiff's property, this court concluded that the protections of § 52-557n (a) (2) (A), nevertheless, afforded the town governmental immunity against the plaintiff's abuse of process claim, as abuse of process is an intentional tort and, therefore, § 52-557n (a) (2) (A) applied, and the plaintiff failed to identify any statute that abrogated the town's immunity from liability to permit his claim.

Argued January 22—officially released July 7, 2020

Procedural History

Action to recover damages for, inter alia, abuse of process, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Wiese, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Stephen C. McCullough, self-represented, the appellant (plaintiff).

Melinda A. Powell, for the appellee (defendant).

Opinion

ELGO, J. The self-represented plaintiff, Stephen C. McCullough, appeals from the summary judgment rendered by the trial court in favor of the defendant, the town of Rocky Hill, on all twelve counts of his operative

complaint. On appeal, the plaintiff raises several claims that do not merit substantive discussion.[1] The plaintiff further claims that the court improperly rendered summary judgment in favor of the defendant on (1) the intentional tort claims pleaded in his operative complaint and (2) his abuse of process claims. We affirm the judgment of the trial court.

The record, which we view in the light most favorable to the plaintiff for purposes of reviewing the trial court's rendering of summary judgment, reveals the following facts and procedural history. At all relevant times, the plaintiff owned a parcel of real property known as 140 Hayes Road (property) in the defendant municipality. In early 2012, the defendant enacted a municipal blight ordinance.[2] In the months that followed, various officials visited the property and discussed overgrowth with the plaintiff.

On August 27, 2012, town officials began mowing overgrown grass and removing shrubbery on land located between the plaintiff's property line and the

[1] Specifically, the plaintiff claims that the court (1) abused its discretion in overruling his objection to the defendant's request to revise with respect to a particular statement made by the defendant's attorney, (2) abused its discretion in denying his motion to replead, (3) abused its discretion in deferring consideration of his request to file an amended substitute complaint until after the defendant's motion for summary judgment had been decided, (4) improperly rendered summary judgment on his challenge to the legality of a municipal ordinance concerning the removal of ice and snow from public sidewalks, and (5) improperly rendered summary judgment in favor of the defendant on his illegal search, equal protection, and state constitutional law claims. We carefully have considered those claims in light of the record before us, including the court's thorough memorandum of decision, and conclude that they are without merit.

[2] The plaintiff has not identified that blight ordinance or its contents with any specificity and did not provide the trial court with a copy of that ordinance in either his pleadings or the materials submitted in connection with the motion for summary judgment. In his operative complaint, the plaintiff merely alleged that the defendant "enacted a new blight ordinance"; he likewise testified under oath on April 29, 2015, that the defendant "enacted a blight ordinance in April of 2012."

curb of the adjacent street.[3] Those efforts continued on August 28, 2012, when certain branches and trees were cut and removed from that area at the direction of Lisa Zerio, the defendant's tree warden. It is undisputed that the plaintiff did not voice any objection at that time. In his deposition testimony, the plaintiff stated that he initially assumed that the trees and branches were not on his property and that he had simply asked town officials not to "cut down any more than you have to . . . ."[4]

Weeks later, however, the plaintiff contacted Robert Ricard, a tree expert at the University of Connecticut. As a result of his communications with Ricard, the plaintiff came to believe that some of the cut branches and trees had been located on his property and that the defendant, by cutting them, had "disobeyed the tree laws." The plaintiff met with town officials in September, 2012, to express his displeasure, at which time he informed them of his intent to sue the defendant. The plaintiff contemporaneously sent a $400,000 invoice to the defendant's town manager for "tree and related damages."

At that time, the plaintiff had multiple years of outstanding property tax assessments from the defendant that he had not paid. In November, 2012, the defendant brought an action to foreclose municipal tax liens

[3] In his deposition testimony, which the defendant submitted in support of its motion for summary judgment, the plaintiff indicated that he "didn't mind" the grass mowing and the shrubbery removal.

[4] In her sworn affidavit dated June 20, 2017, which was submitted in support of the defendant's motion for summary judgment, Zerio stated in relevant part: "In late August, 2012, I was made aware of a complaint concerning trees, vines and overgrowth at [the property]. I made a decision that three trees at the property were a safety hazard and needed to be cut. There was a dead cherry tree, a maple tree and a dogwood tree. . . . I showed [the plaintiff] the trees that needed to be cut. At no time did [the plaintiff] voice a strong objection to removing the trees . . . ."

against the plaintiff (foreclosure action).[5] Following a trial, the court found that the plaintiff had "paid no portion" of the property taxes duly assessed for the 2008 through 2013 tax years. *Rocky Hill* v. *McCullough*, Superior Court, judicial district of New Britain, Docket No. CV-12-6018310-S (June 30, 2015). The court nevertheless found that, although the defendant had presented the sworn testimony of its tax collector, it "did not produce the original certificates [of liens] nor certified copies." Id. Its failure to do so, the court concluded, was "fatal to the [defendant's] case, as sufficient evidence to support a prima facie case was not offered . . . ." Id. The court thus rendered judgment in favor of the plaintiff in the foreclosure action on June 30, 2015. No appeal was taken from that judgment.

The plaintiff commenced the present action approximately two months later by service of process on September 4, 2015. On September 17, 2015, Kimberley A. Ricci, the defendant's zoning enforcement officer, sent the plaintiff a letter regarding an "unregistered/inoperable Mercedes-Benz" located on the property in violation of chapter 234 of the defendant's code of ordinances (code). Ricci's letter asked the plaintiff to "rectify this violation by either registering the vehicle or [storing] the vehicle under a covered structure . . . ." In his deposition testimony, the plaintiff admitted that he stored unregistered vehicles on the property and that the Mercedes-Benz in question was not registered at the time that Ricci sent the violation notice.[6] There is

[5] While the foreclosure action was pending, the defendant completed its revaluation of all real property in the town for the October 1, 2013 grand list. The defendant's tax assessor notified the plaintiff of an increase in the assessment of the property by letter dated November 19, 2013, and apprised him of his ability to contest that assessment before the defendant's Board of Assessment Appeals. In his complaint, the plaintiff confirms that he brought such an appeal and that the Board of Assessment Appeals thereafter "made the decision to significantly lower [his] assessment . . . ."

[6] The plaintiff previously had been ordered to remove "all inoperable motor vehicles" from the property pursuant to § 234-4 of the code by the

no evidence in the record before us as to whether the plaintiff complied with that violation notice.

Over the next ten months, the plaintiff filed multiple amended complaints in response to the defendant's requests to revise. On August 17, 2016, the defendant moved to strike all twelve counts of the plaintiff's July 18, 2016 amended complaint. Following a hearing, the court issued a detailed memorandum of decision on January 24, 2017, in which it granted the motion to strike as to all but the first count of the complaint, alleging abuse of process.[7]

After obtaining multiple extensions of time to replead, the plaintiff filed the operative complaint, his twelve count substitute complaint, on April 24, 2017. Counts one and four of that complaint both alleged abuse of process in connection with the foreclosure action and the 2013 reassessment of the property, respectively. See footnote 5 of this opinion. Counts two and nine alleged intentional infliction of emotional distress. Count three alleged invasion of privacy on the basis of an illegal search of the property allegedly conducted by a member of the Rocky Hill Police Department in 2013. Count five alleged inverse condemnation and due process violations under the state and federal constitutions. Count six alleged trespass, and count seven alleged trespass to chattels, as well as an illegal

defendant's prior zoning enforcement officer, Frank J. Kelley, in August, 2012.

[7] In its memorandum of decision on the motion to strike, the court specifically noted that the plaintiff's July 18, 2016 amended complaint did not include a vexatious litigation count. The operative complaint likewise does not contain a vexatious litigation count, and neither the term "vexatious" nor General Statutes § 52-568, Connecticut's vexatious litigation statute, appears anywhere therein. The plaintiff also has not alleged in the operative complaint that the defendant lacked probable cause to commence the foreclosure action, an essential element of a vexatious litigation action. See *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 330, 994 A.2d 153 (2010). For that reason, the plaintiff's reliance on § 52-568 in his principal appellate brief is misplaced.

search that the defendant's zoning enforcement officer allegedly conducted during the defendant's overgrowth remediation activities on the property on August 27, 2012. Count eight set forth another abuse of process claim predicated on the defendant's alleged "misuse of . . . General Statutes § 8-12," and count ten alleged fraudulent misrepresentation. Count eleven concerned a municipal ordinance that required property owners to remove ice and snow from their sidewalks[8] and alleged that the ordinance in question was an illegal enactment. Lastly, count twelve alleged an illegal search related to the September 17, 2015 violation notice regarding the unregistered Mercedes-Benz on the property.

In response, the defendant filed its answer and three special defenses. The first special defense alleged governmental immunity with respect to counts one through ten. In its second special defense, the defendant alleged that all twelve counts were barred by applicable statutes of limitations set forth in General Statutes §§ 52-577 and 52-584. The third special defense alleged that the plaintiff lacked standing to challenge the constitutionality of the municipal ordinance at issue in count eleven of the complaint.

On June 2, 2017, the court entered a scheduling order that, inter alia, obligated the defendant to file its motion for summary judgment by June 21, 2017. In accordance with that order, the defendant filed a motion for summary judgment on June 21, 2017, which was accompanied by a memorandum of law and eight exhibits.[9] On

[8] In March, 2015, the plaintiff received two citations for failing to remove ice and snow from the public sidewalk abutting his property in violation of § 212-21 of the code. Each citation included a fine of $25.

[9] The eight exhibits submitted in support of the defendant's motion for summary judgment were (1) the ninety-three page transcript of the April 29, 2015 trial proceeding in the foreclosure action, (2) the sixty-four page transcript of the plaintiff's deposition dated November 7, 2016, (3) a certified copy of a document titled "Event History Details" that is dated June 10, 2013, and concerns a complaint that the Rocky Hill Police Department

that same date, the plaintiff filed a request for leave to amend his complaint, to which the defendant objected. By order dated July 31, 2017, the court denied the plaintiff's request "pending the outcome of the motion for summary judgment." The plaintiff then filed memoranda of law in opposition to summary judgment on September 25 and October 11, 2017,[10] together with two documents purporting to be his own affidavits.[11]

The court heard argument on the defendant's motion for summary judgment on October 16, 2017. It thereafter rendered summary judgment in favor of the defendant on all twelve counts of the operative complaint,

received about the property, (4) the sworn affidavit of Dana McGee, the defendant's director of human resources and legal compliance, (5) the sworn affidavit of Ricci, (6) the sworn affidavit of Zerio, (7) an invoice from TimberJack Tree Co., LLC, regarding work performed on the property, and (8) a copy of the court's June 30, 2015 memorandum of decision in the foreclosure action.

[10] The plaintiff appended three exhibits to those memoranda: (1) a one page portion of the minutes of the October 15, 2012 meeting of the defendant's public safety committee, (2) an electronic confirmation from the Connecticut Judicial Branch's e-filing service dated April 29, 2015, indicating that the defendant had filed a reply to the plaintiff's special defense in the foreclosure action, and (3) a copy of a release of a tax lien dated October 15, 2012, that the defendant had filed on the land records with respect to the property.

[11] Although both documents are titled "Affidavit of Plaintiff," neither contains any indication that its contents were sworn to by the plaintiff before a clerk, notary public, or commissioner of the Superior Court. See General Statutes § 1-24a (requiring affiant to "swear to the truth of the document or writing before any proper officer"); see also *Burton* v. *Mottolese*, 267 Conn. 1, 46 n.47, 835 A.2d 998 (2003) (noting that "the document filed by the plaintiff was not, in actuality, an affidavit because the contents were not sworn to and did not satisfy the requirements of a proper affidavit"), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d. 983 (2004); *Scinto* v. *Stamm*, 224 Conn. 524, 533, 620 A.2d 99 ("[u]nsworn assertions of fact . . . in an affidavit do not entitle a party to a summary judgment"), cert. denied, 510 U.S. 861, 114 S. Ct. 176, 126 L. Ed. 2d. 136 (1993); *Viola* v. *O'Dell*, 108 Conn. App. 760, 768, 950 A.2d 539 (2008) (holding that unsworn affidavits are "of no evidentiary value" for summary judgment purposes); *Krassner* v. *Ansonia*, 100 Conn. App. 203, 209–10, 917 A.2d 70 (2007) ("[b]ecause the witness statements were not sworn to before an officer authorized to administer oaths, they did not meet the requirements of an affidavit").

as detailed in a memorandum of decision dated January 31, 2018. The plaintiff filed a motion seeking reargument and reconsideration, which the court denied, and this appeal followed.

As a preliminary matter, we note the well established standard that governs our review of the trial court's decision to grant a motion for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

I

We begin with the plaintiff's claims regarding certain intentional torts allegedly committed by the defendant.[12] On appeal, the plaintiff claims that the court improperly rendered summary judgment on those

[12] In his operative complaint, the plaintiff alleges that the defendant committed multiple intentional torts—namely, intentional infliction of emotional distress, trespass, trespass to chattels, fraudulent misrepresentation, and invasion of privacy.

claims. The defendant, by contrast, submits that the court properly determined that the doctrine of governmental immunity barred those claims. We agree with the defendant.

The defendant's motion for summary judgment was predicated on General Statutes § 52-557n (a) (2), which provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct . . . ." In *Pane* v. *Danbury*, 267 Conn. 669, 685–86, 841 A.2d 684 (2004), overruled on other grounds by *Grady* v. *Somers*, 294 Conn. 324, 349, 984 A.2d 684 (2009), our Supreme Court held that the defendant municipality could not be liable for intentional torts committed by its employees under § 52-557n (a) (2) (A). This court consistently has adhered to that precedent. See, e.g., *Avoletta* v. *Torrington*, 133 Conn. App. 215, 224, 34 A.3d 445 (2012) ("under our case law, a municipality cannot be held liable for the intentional torts of its employees"); *Martin* v. *Westport*, 108 Conn. App. 710, 729, 950 A.2d 19 (2008) (noting general rule that municipality and its agents are immune from liability for acts conducted in performance of official duties); *McCoy* v. *New Haven*, 92 Conn. App. 558, 562, 886 A.2d 489 (2005) (protection afforded to municipality under § 52-557n (a) (2) (A) bars intentional torts unless otherwise provided by law); *O'Connor* v. *Board of Education*, 90 Conn. App. 59, 65, 877 A.2d 860 (explaining that intentional torts fall within purview of § 52-557n (a) (2) (A) because "there is no distinction between 'intentional' and 'wilful' conduct"), cert. denied, 275 Conn. 912, 882 A.2d 675 (2005).[13]

[13] In his reply brief, the plaintiff argues that "*Avoletta* . . . should be overruled" and that "*Pane* . . . should . . . be partially overruled in matters where the intentional act is performed on the part of the municipality, versus on the part of the employee." That contention is problematic for two reasons. First, this court is not at liberty to overrule the precedent of our

In the present case, it is undisputed that the defendant is a political subdivision of the state. It also is undisputed that the plaintiff has alleged intentional torts against the defendant. As a result, the protection of § 52-557n (a) (2) (A) applies unless that immunity from liability has been abrogated by statute. See *Avoletta* v. *Torrington*, supra, 133 Conn. App. 221; *Martin* v. *Westport*, supra, 108 Conn. App. 730. The plaintiff has not identified any statute that abrogates the defendant's governmental immunity with respect to the intentional torts in question. For that reason, the trial court properly determined that no genuine issue of material fact existed and that the defendant was entitled to judgment as a matter of law on those claims.

II

The plaintiff also claims that the court improperly rendered summary judgment on his abuse of process claims. We do not agree.

Under Connecticut law, "[a]n action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed." (Internal quotation marks omitted.) *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, 260 Conn. 766, 772, 802 A.2d 44 (2002); see also *MacDermid, Inc.* v. *Leonetti*, 158 Conn. App. 176, 184, 118 A.3d 158 (2015) ("the tort of abuse of process also provides a cause of action against the improper use of the judicial system"). As our Supreme Court has explained, "although the definition of process may be broad enough to cover a wide range of judicial procedures,

Supreme Court; see, e.g., *State* v. *Corver*, 182 Conn. App. 622, 638 n.9, 190 A.3d 941, cert. denied, 330 Conn. 916, 193 A.3d 1211 (2018); and we "cannot overrule a decision made by another panel of this court absent en banc consideration." *State* v. *Joseph B.*, 187 Conn. App. 106, 124 n.13, 201 A.3d 1108, cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019). Second, even if we were not so constrained, the plaintiff has provided no good reason to depart from that sound precedent.

to prevail on an abuse of process claim, the plaintiff must establish that the defendant *used a judicial process* for an improper purpose." (Emphasis altered.) *Larobina* v. *McDonald*, 274 Conn. 394, 406–407, 876 A.2d 522 (2005). Accordingly, an essential element of an abuse of process claim is the use of a judicial process by the defendant.

A

The abuse of process claims set forth in counts four and eight are patently deficient in this regard. They contain no allegations that the defendant utilized a judicial process or instituted a legal proceeding against the plaintiff. Rather, they pertain to the municipal property revaluation process and the authority of a zoning enforcement officer to issue orders, in accordance with municipal enactments, regarding the removal of inoperable vehicles from private property. In *Larobina* v. *McDonald*, supra, 274 Conn. 407, our Supreme Court held that certain "acts alleged by the plaintiff in support of his abuse of process claim did not involve a judicial procedure and, therefore, as a matter of law, do not support an abuse of process claim." That logic applies with equal force to the abuse of process claims contained in counts four and eight of the operative complaint. We therefore conclude that the court properly rendered summary judgment in favor of the defendant on those claims.

B

Unlike counts four and eight, count one of the operative complaint contains an allegation that the defendant improperly utilized a judicial process. In that count, the plaintiff alleged that the defendant commenced the foreclosure action with "extreme malice, wantonness, and intent to injure the plaintiff . . . ." More specifically, he alleged that the defendant impermissibly utilized the statutory tax lien foreclosure process (1) to

escape liability "for $400,000 in tree and related damages" allegedly incurred as a result of the defendant's overgrowth remediation activities on the property in August, 2012, and (2) to circumvent "blight statutes and instead . . . go after blight through foreclosure . . . ." On appeal, the plaintiff claims that the court improperly rendered summary judgment on those abuse of process claims. We disagree.

Taxes are the lifeblood of a municipality. Their "prompt and certain availability [is] an imperious need." *Bull* v. *United States*, 295 U.S. 247, 259, 55 S. Ct. 695, 79 L. Ed. 1421 (1935). For that reason, municipalities in this state are afforded a host of options under our General Statutes to collect delinquent taxes.[14] Among those is the authority to foreclose on outstanding municipal tax liens. See General Statutes § 12-181; see also Practice Book § 10-70 (setting forth elements municipality must allege and prove in tax lien foreclosure action). The defendant's authority to commence the foreclosure action is unquestionable.

The sole question, then, is whether a genuine issue of material fact exists as to whether the defendant commenced that action "*primarily* to obtain a wrongful purpose for which the proceedings were not designed." (Emphasis added; internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 191, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015). A plaintiff cannot prevail if the municipality utilized the judicial process "for the purpose for which it is

[14] See, e.g., General Statutes § 12-146b (authorizing municipality to withhold payments it otherwise would make to delinquent taxpayer); General Statutes § 12-157 (authorizing municipality to sell property in question by deed sale); General Statutes § 12-162 (authorizing municipality to issue alias tax warrant to seize goods, chattels, and real estate to satisfy delinquent tax obligation).

intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." (Internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987). Accordingly, to prevail on his abuse of process claim, the plaintiff must prove that the defendant utilized the tax lien foreclosure process primarily for a "wrongful and malicious purpose to attain an unjustifiable end . . . ." (Internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 95 n.10, 912 A.2d 1019 (2007).

1

We first address the plaintiff's claim that the defendant commenced the tax lien foreclosure action for the primary purpose of evading liability for $400,000 in damages stemming from the August, 2012 remediation activities on the property. The record before us is bereft of properly authenticated affidavits, exhibits, or other documentation to substantiate that bald assertion.

"It is frequently stated in Connecticut's case law that . . . a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact." (Internal quotation marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 111 Conn. App. 588, 594, 960 A.2d 1071 (2008); see also

Buell Industries, Inc. v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 558, 791 A.2d 489 (2002) (party may not rely on mere speculation or conjecture as to true nature of facts to overcome motion for summary judgment). There is no evidence in the record to substantiate the purported $400,000 in "tree and related damages" that the plaintiff alleged in the operative complaint.[15]

There also is no evidence that the plaintiff ever paid the delinquent taxes in question, nor does he so claim. In its memorandum of decision in the foreclosure action, which was submitted in support of the defendant's motion for summary judgment, the trial court specifically found that the plaintiff had "paid no portion" of the property taxes duly assessed for the 2008 through 2013 tax years. *Rocky Hill* v. *McCullough*, supra, Superior Court, Docket No. CV-12-6018310-S. Accordingly, we conclude that no genuine issue of material fact exists as to whether the defendant commenced the foreclosure action for the primary purpose of escaping liability for $400,000 in damages that allegedly resulted from the August, 2012 remediation activities on the property.

2

In count one of his complaint, the plaintiff alternatively claimed that the defendant abused the tax lien foreclosure process to bypass established blight enforcement protocols. He alleged that the defendant commenced the foreclosure action to circumvent the "blight statutes" and, instead, chose to "go after blight through foreclosure, because it is easier . . . ." On appeal, the plaintiff contends that the court improperly rendered summary judgment on that claim. We do not agree.

[15] Indeed, the plaintiff has offered little in the way of documentary evidence to substantiate his opposition to the motion for summary judgment; see footnote 10 of this opinion; and his self-styled "affidavits" do not meet the requirements for such documents under Connecticut law. See footnote 11 of this opinion.

Under Connecticut law, municipalities are authorized to impose blight liens on real property and, when necessary, to commence legal actions to foreclose on those liens. General Statutes § 7-148 (c) (7) (H) (xv) provides in relevant part that municipalities are empowered to "[m]ake and enforce regulations for the prevention and remediation of housing blight" and to "prescribe civil penalties for the violation of such regulations . . . ." General Statutes § 7-148aa likewise provides in relevant part: "Any unpaid penalty imposed by a municipality pursuant to the provisions of an ordinance regulating blight, adopted pursuant to subparagraph (H) (xv) of subdivision (7) of subsection (c) of section 7-148, shall constitute a lien upon the real estate against which the penalty was imposed from the date of such penalty. . . ."

In its memorandum of decision, the court stated that, "even if the defendant had pursued the plaintiff's property pursuant to the blight ordinances, it could have sought the same outcome; acquisition of the property, through the same process: foreclosure." That observation confuses the availability of a statutory mechanism with its actual utilization. Significantly, there is no indication in the record before us that the defendant *ever* issued any blight citations to the plaintiff or recorded any blight liens on the property.

In the operative complaint, the plaintiff alleged that the defendant commenced the foreclosure action because the blight foreclosure process is a more cumbersome and time-consuming endeavor than a tax lien foreclosure proceeding. To substantiate that allegation, the plaintiff provided the court with a copy of the October 15, 2012 minutes of the defendant's public safety committee, in which the defendant's town manager, Barbara Gilbert, discussed the problem of blight on the plaintiff's property.[16] The minutes of that meet-

[16] A copy of those minutes was included with the plaintiff's September 25, 2017 opposition to the motion for summary judgment as "Exhibit A." The trial court did not address that exhibit in its memorandum of decision.

ing state in relevant part: "Chairman Joe Kochanek asked how the [b]light [o]rdinance is coming along. Town Manager Barbara Gilbert said the [b]light [o]rdinance is hers. They have been working with the [t]own [a]ttorney methodically on this by doing one property at a time. Some properties have been identified and the easiest way is to go after these through foreclosure due to the nonpayment of taxes instead of going after them through blight. She explained more."[17] Weeks later, the defendant commenced the tax lien foreclosure action against the plaintiff to collect approximately $4600 he then owed in delinquent property taxes.[18]

On the record before us, and mindful of our obligation to draw all reasonable inferences in favor of the party opposing summary judgment; see *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 558; *Walker* v. *Housing Authority*, 148 Conn. App. 591, 601, 85 A.3d 1230 (2014); we conclude that a genuine issue of material fact exists as to whether the collection of delinquent taxes was the primary purpose of the tax lien foreclosure action. If it credited the substance of the October 15, 2012 minutes of the public safety committee and drew reasonable inferences therefrom, the trier of fact could conclude that the primary purpose of the foreclosure action was not the collection of municipal taxes but, rather, the remediation of blight on the property. Although permitted under other provisions of our General Statutes; see General Statutes § 7-148aa; such is not a proper purpose of the tax lien foreclosure procedure established by § 12-181, particularly when no blight citations had been issued to the plaintiff. A genuine issue of material fact thus exists in

[17] Although the defendant submitted affidavits from several of its municipal officials in support of the motion for summary judgment, it did not furnish an affidavit from Gilbert.

[18] In his operative complaint and throughout this litigation, the plaintiff has maintained that his tax delinquency was $4642.24 at the time the foreclosure action commenced. The defendant has not disputed that figure.

the present record, which only a trier of fact can resolve.[19]

That determination does not end our inquiry. As this court has noted, abuse of process is an intentional tort. *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, supra, 157 Conn. App. 190. In count one of his operative complaint, the plaintiff alleged that the defendant, "through its [t]own [m]anager and [a]ttorney," commenced the foreclosure action with "extreme malice, wantonness, and intent to injure the plaintiff . . . ." In responding to that complaint, the defendant raised, among other things, a governmental immunity defense predicated on § 52-557n (a) (2) (A). In moving for summary judgment, the defendant renewed its claim that count one was barred by governmental immunity.[20]

Section 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct . . . ." As discussed in part I of this opinion, our

[19] We recognize, of course, that the trier of fact also could conclude that the remediation of blight was but an "incidental motive of spite or an ulterior purpose of benefit to the defendant." (Internal quotation marks omitted.) *Mozzochi* v. *Beck*, supra, 204 Conn. 494. On the evidence submitted by the parties in connection with the motion for summary judgment, that factual dispute nonetheless remains the province of the trier of fact to resolve.

[20] Although the court did not address the defendant's governmental immunity defense with respect to the abuse of process claim contained in count one of the operative complaint, we are free to do so on appeal. See *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 702, 694 A.2d 788 (1997) (appellate court "may affirm the court's judgment on a dispositive alternat[ive] ground for which there is support in the trial court record"); *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 219, 928 A.2d 586 (2007) ("[a]lthough the trial court did not rule on those alternat[ive] grounds for summary judgment, it is within our discretion to do so on appeal"), aff'd, 289 Conn. 57, 956 A.2d 579 (2008); *Vaillancourt* v. *Latifi*, 81 Conn. App. 541, 544 n.4, 840 A.2d 1209 (2004) ("[w]e may affirm the [summary] judgment of the court on different grounds").

appellate courts consistently have held that a defendant municipality cannot be held liable for intentional torts committed by its employees in the absence of a statutory abrogation of governmental immunity. See *Pane* v. *Danbury*, supra, 267 Conn. 685–86; *Avoletta* v. *Torrington*, supra, 133 Conn. App. 224; *Martin* v. *Westport*, supra, 108 Conn. App. 729. The plaintiff has not identified any statutory abrogation of the immunity from liability contained in § 52-557n (a) (2) (A) to permit his abuse of process claim against the defendant. See *Avoletta* v. *Torrington*, supra, 133 Conn. App. 221; *Martin* v. *Westport*, supra, 108 Conn. App. 730. Indeed, § 52-557n (b) (5) expressly provides that political subdivisions of the state such as the defendant shall not be liable for an action pertaining to "the initiation of a judicial proceeding," with the exception of vexatious litigation actions commenced pursuant to General Statutes § 52-568.[21] In light of the foregoing, we conclude that the protections of § 52-557n (a) (2) (A) afford the defendant governmental immunity against the plaintiff's abuse of process claim. For that reason, the trial court properly rendered summary judgment in favor of the defendant on the abuse of process claim contained in count one of the operative complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

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[21] General Statutes § 52-557n (b) provides in relevant part: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (5) the initiation of a judicial or administrative proceeding, provided that such action is not determined to have been commenced or prosecuted without probable cause or with a malicious intent to vex or trouble, as provided in section 52-568 . . . ." The plaintiff's operative complaint does not contain a vexatious litigation count. See footnote 7 of this opinion.

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* SEBASTIAN MANGIAFICO ET AL.
(AC 42560)

Lavine, Moll and Devlin, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant M, following M's failure to make any payment on the note for a period of more than eight years. The trial court granted the plaintiff's motion for summary judgment as to liability only and rendered a judgment of strict foreclosure, from which M appealed. On appeal, M claimed that the trial court erred in granting the plaintiff's motion for summary judgment because the action was time barred by statute (§ 42a-3-188) and the court failed to consider his special defense that the plaintiff engaged in inequitable conduct. *Held*:

1. M's claim that the limitation period in § 42a-3-118 barred the foreclosure action was unavailing; the statute, which required that any action to enforce the underlying debt represented by a note must be initiated within six years after the accelerated due date in the note, applies only to the enforcement of a note and did not bar a mortgage foreclosure action on the same debt, and this court declined to overrule precedential case law defining the note and the mortgage as separate instruments and actions for foreclosure of the mortgage and upon the note as distinct causes of action.
2. The trial court properly rejected the viability of M's special defense that the plaintiff engaged in inequitable conduct: M failed to sufficiently allege a valid defense or otherwise meet his burden of proving the facts alleged in his special defense, as his support of his defense consisted only of an affidavit providing merely conclusory statements that did not go to the making, validity or enforcement of the mortgage, and the court properly refused to consider M's testimony at the summary judgment hearing; moreover, M's attempted reliance on appeal on findings in the foreclosure mediator's final report was unavailing, as neither party had submitted the report to the trial court for its consideration in the summary judgment context and, thus, this court did not consider that evidence.

Submitted on briefs March 2—officially released July 7, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of

Hartford, where the defendant Stuart Hecht et al. were defaulted for failure to appear; thereafter, the court, *Dubay, J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, the court granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

Paul G. Ryan, filed a brief for the appellant (named defendant).

Adam D. Lewis, filed a brief for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant Sebastian Mangiafico[1] appeals from the judgment of strict foreclosure rendered in favor of the plaintiff, The Bank of New York Mellon, formerly known as The Bank of New York, as Trustee (CWALT 2007-14T2).[2] On appeal, the defendant claims that the trial court erred in granting the plaintiff's motion for summary judgment as to liability only because (1) the action is time barred by the statute of limitations set forth in General Statutes § 42a-3-118, and (2) the court failed to consider the defendant's fifth special defense, namely, that the plaintiff engaged in inequitable conduct.[3] We affirm the judgment of the trial court.

[1] The complaint also named several other parties as defendants: Stuart Hecht; Janice Hecht; Synchrony Bank, Successor in Interest to GE Capital Retail Bank, formerly known as GE Money Bank; Saint Francis Hospital and Medical Center; Mohawk Factoring, Inc.; and Masland Carpets & Rugs. These parties were defaulted for failing to appear and are not participating in this appeal. Accordingly, we refer to Sebastian Mangiafico as the defendant.

[2] Neither the defendant nor his counsel appeared for oral argument and, therefore, this court considered the appeal on the briefs submitted by the parties. See *State* v. *Cotto*, 111 Conn. App. 818, 819 n.1, 960 A.2d 1113 (2008).

[3] The defendant also claims that the trial court erred in granting the plaintiff's motion for summary judgment as to liability only when issues of fact exist as to the date the debt was initially accelerated. Because that claim is inadequately briefed, we decline to review it. See *State* v. *Fowler*, 178 Conn. App. 332, 345, 175 A.3d 76 (2017) ("We are not required to review

The record reveals the following facts and procedural history. On February 17, 2007, the defendant executed a promissory note (note) payable to Ascella Mortgage, LLC, in the principal amount of $672,000. To secure the note, the defendant executed an open-end mortgage deed (mortgage) in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Ascella Mortgage, LLC, on real property located at 35 Sullivan Farm Road in Broad Brook (property). Beginning in February, 2008, and each and every month thereafter, the defendant failed to make any payment on the note. The plaintiff is the present holder of the note, and the mortgage was assigned to the plaintiff on August 11, 2016.

On August 19, 2016, the plaintiff commenced this mortgage foreclosure action by way of a one count foreclosure complaint. After receiving the summons and complaint, the defendant filed a foreclosure mediation certificate. On September 21, 2016, this case was assigned to the foreclosure mediation program. Thereafter, the plaintiff and the defendant participated in several mediation sessions; however, those sessions proved unsuccessful and, as a result, terminated on February 7, 2018.

On February 28, 2018, the defendant filed an answer and special defenses. Specifically, the defendant alleged the following as special defenses: (1) he did not believe that the amount of the debt stated was accurate; (2) he did not believe that the plaintiff was the proper holder of the note and the mortgage; (3) he did not

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.)), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018).

Additionally, the defendant argues for the first time on appeal that the foreclosure action is barred by the doctrine of laches. The defense of laches was neither pleaded nor raised in the trial court. Accordingly, we decline to review this particular claim. See *Peckheiser* v. *Tarone*, 186 Conn. 53, 61, 438 A.2d 1192 (1982).

know if the mortgage was properly recorded; (4) the plaintiff and its predecessors had acted in bad faith by not communicating with the defendant and refusing to make payment arrangements with him; (5) the plaintiff violated the mediator's instructions and did not participate in foreclosure mediation in good faith; (6) the plaintiff failed to bring this action within six years from the defendant's last payment; (7) the plaintiff knew that the defendant had asserted defenses to the enforcement of the loan in a previous foreclosure action that was "dismissed";[4] and (8) it was unfair for the plaintiff to prosecute this foreclosure action after a previous foreclosure action was "dismissed." On October 10, 2018, the plaintiff filed a motion for summary judgment as to liability only, a memorandum of law in support of the motion, an affidavit of Keli Smith, and appended exhibits. The defendant filed an objection to the motion "under oath." Following a hearing on December 10, 2018, the court granted summary judgment with respect to liability only in favor of the plaintiff. The defendant's motion to reargue that decision was denied.

On January 28, 2019, the court rendered a judgment of strict foreclosure in favor of the plaintiff. This appeal followed. The court subsequently granted in part a motion for articulation filed by the defendant and summarized the court's reasoning for granting summary judgment, essentially adopting the analysis of the plaintiff as set forth in its moving papers. The court further stated: "To the extent that [the] defendant's purported special defenses are able to be construed as even constituting special defenses, none [goes] to the making, validity or enforcement of [the] note and/or [the] mortgage. The 'affidavit' of the defendant provides zero evidence, rather conclusory statements, at best. The defendant

[4] In 2008, a prior foreclosure action was commenced against the defendant with regard to the property. See *Bank of New York* v. *Mangiafico*, Superior Court, judicial district of Hartford, CV-08-5022713-S. That action was withdrawn on May 9, 2013.

proudly asserts that he has been in default of his obligations for eight years. Foreclosure is an equitable proceeding." Additional facts will be set forth as necessary.

We begin by setting forth the relevant standard of review and legal principles. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . 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. . . . A material fact is one that makes a difference in the outcome of a case . . . .

"Summary judgment shall be granted 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. . . . The trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes § 49-17]. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights. . . .

"[T]he party raising a special defense has the burden of proving the facts alleged therein. . . . If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses in order to create a genuine issue of material fact . . . . Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . Further . . . [t]he applicable rule regarding the material facts to be considered on a motion for summary judgment is that the facts at issue are those alleged in the pleadings. . . . [B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 743–45, 196 A.3d 328 (2018).

I

The defendant claims that this foreclosure action is barred by the statute of limitations set forth in § 42a-3-118 and, therefore, the trial court improperly rendered summary judgment on the issue of liability in favor of the plaintiff.[5] Specifically, he argues that any action to enforce the underlying debt represented by the note

[5] General Statutes § 42a-3-118 provides in relevant part: "[A]n action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date. . . ."

must have been initiated within six years after the accelerated due date, and that the plaintiff had accelerated the debt in early 2008.[6] The plaintiff contends that the statute of limitations set forth in § 42a-3-118 applies only to the enforcement of a note and does not bar a mortgage foreclosure action on the same debt. We agree with the plaintiff.

"Whether a particular action is barred by the statute of limitations is a question of law to which we apply a plenary standard of review." *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 814, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005). "[T]he rule in Connecticut, as far back as the early nineteenth century, is that a statute of limitations does not bar a mortgage foreclosure. . . . Repeatedly reaffirmed and generally known, it has taken on the aspect of a rule of property and in all probability many mortgages in this [s]tate are now held, after any action upon the debt secured has been barred, in reliance upon it. . . . The rule is in harmony with the accepted principle that the statute of limitations does not destroy the debt but merely bars the remedy." (Citation omitted; internal quotation marks omitted.) Id., 815.

Furthermore, in *New Milford Savings Bank*, our Supreme Court held that "upon the default of the mortgagor, the mortgagee has multiple remedies against both the mortgagor and the mortgaged property. The plaintiff is entitled to pursue its remedy at law on the notes, or to pursue its remedy in equity upon the mortgage, or to pursue both. A note and a mortgage given to secure it are *separate instruments*, *executed for different purposes* and, in this [s]tate, action for foreclosure of the mortgage and upon the note are regarded and treated, in practice, as *separate and distinct causes of action*, although both may be pursued in a foreclo-

[6] The defendant alleges that the plaintiff accelerated the debt and brought a timely foreclosure action in early 2008, and that the case was subsequently "dismissed." See footnote 4 of this opinion.

sure suit." (Emphasis added; internal quotation marks omitted.) *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 266–67, 708 A.2d 1378 (1998).

On appeal, the defendant argues that "[t]he note evidencing the underlying debt and the mortgage that secures the note are inextricably linked. The mortgage only secures the note—[it is] not a debt unto itself. It is only the note, not the mortgage, that can be accelerated. . . . If the statute of limitations expires and the note becomes unenforceable, the mortgage securing that note also becomes unenforceable. The mortgage simply does not exist . . . without the note which it secures." Simply put, the defendant's argument directly contradicts Connecticut law as set forth in *Federal Deposit Ins. Corp.* v. *Owen*, supra, 88 Conn. App. 815, in which this court held, among other things, that § 42a-3-118 does not bar a mortgage foreclosure. Although the defendant contends that we should overrule *Federal Deposit Ins. Corp.* v. *Owen*, "[i]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 632–33, 161 A.3d 562 (2017). Accordingly, the defendant's claim fails.

II

Relying on *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019), the defendant next claims that the trial court should not have rendered summary judgment as to liability only in favor of the plaintiff because the trial court failed to consider his fifth special defense.[7] In support of his claim, the defen-

[7] Because this allegation is the only language in the defendant's answer and special defenses to which the defendant refers in his appellate brief in connection with this claim on appeal, we limit our analysis accordingly.

dant argues that "[t]he plaintiff's bad behavior was identified by both [the defendant] and the foreclosure mediator [in the mediator's final report]." The plaintiff contends that the defendant failed to sufficiently allege or present evidence in support of his special defense. We agree with the plaintiff.

By way of background, in his answer and special defenses, the defendant alleged, relevant to this claim on appeal, that "[the] plaintiff has violated the mediator's instructions and has not participated in the mediation in good faith. The plaintiff was supposed to provide me with an accurate appraisal and never gave me accurate information." In its motion for summary judgment, the plaintiff argued, among other things, that the defendant's fifth special defense failed as a matter of law because it neither was legally sufficient nor did it address the making, validity, or enforcement of the mortgage. In opposition to the plaintiff's motion for summary judgment, the defendant filed an objection "under oath," in which he stated: "The [p]laintiff did not participate in the mediation in 'good faith.' It did not provide information about the appraisal [it] supposedly obtained and [it] also made [a] ridiculous offer that would have required me to make a lump sum payment in the amount [of] hundreds of thousands of dollars." The trial court rejected the viability of the defendant's fifth special defense, among others, stating that "[t]o the extent that [the] defendant's purported special defenses are able to be construed as even constituting special defenses, none [goes] to the making, validity or enforcement of [the] note and/or [the] mortgage. The 'affidavit' of the defendant provides zero evidence, rather conclusory statements, at best."

As an initial matter, on appeal, the defendant relies on the mediator's final report in support of his claim. The record reveals, however, that neither party submit-

ted this report to the trial court.[8] In this connection, it is well settled that "[w]e . . . do not consider evidence not presented to the trial court." *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 756. In addition, to the extent the defendant argues that the trial court refused to consider his "testimony" at the summary judgment hearing, we note that, even if the defendant's statements to the trial court had been under oath, they would not have properly been considered by the trial court as a part of the defendant's evidentiary submission. See *Wells Fargo Bank, N.A.* v. *Ferraro*, 194 Conn. App. 467, 470, 221 A.3d 520 (2019) (reversing summary judgment on basis that "the trial court improperly permitted, considered and relied on live testimony from witnesses at an evidentiary hearing on the plaintiff's motion for summary judgment"); *Magee Avenue, LLC* v. *Lima Ceramic Tile, LLC*, 183 Conn. App. 575, 585–86, 193 A.3d 700 (2018) (concluding that trial court improperly permitted and considered defendant's live testimony during hearing on motion for summary judgment).

Simply put, the defendant's allegations and evidentiary submission were insufficient to fall within our Supreme Court's clarification of the making, validity, or enforcement test, as set forth in *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 675, namely, that "allegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement of the note and mortgage." (Citation omitted; internal quotation marks omitted.) Therefore, because the defendant did not sufficiently

[8] Because the mediator's final report was not submitted to the court for its consideration in the summary judgment context, we need not address the admissibility of such a document.

allege a valid defense or otherwise meet his burden of proving the facts alleged in his special defense; see *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 745; his claim fails.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

STATE OF CONNECTICUT *v.* LAURA C. CRAFTER (AC 41302)

Elgo, Moll and Bishop, Js.

Syllabus

Convicted, after a jury trial, of the crime of assault in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which she lacerated the victim numerous times with a knife. D, who was dating the victim, and M, who was dating the defendant, engaged in a violent fistfight. As they were fighting, the defendant came out of her house and approached the scene holding a ten inch knife. The victim, upon seeing the defendant, pleaded with the defendant to leave D and M alone. In response, the defendant told the victim to "shut the fuck up" and poked her on the forehead with the knife. The victim, fearing that the defendant was going to severely injure D, attempted to grab the knife from the defendant, and a fight for the knife ensued, during which the victim sustained lacerations to her face, thumb and back, which resulted in permanent scarring. At trial, following the close of the state's evidence, the trial court denied the defendant's motion for a judgment of acquittal. *Held*:

1. The evidence presented at trial was sufficient for the jury to find beyond a reasonable doubt that the defendant intended to cause serious physical injury to the victim: the jury reasonably could have inferred the defendant's intent to cause serious physical injury to the victim from her use of a large, ten inch knife to inflict numerous lacerations on the victim, which resulted in permanent scarring, and from her behavior following the incident, which exhibited a consciousness of guilt; moreover, evidence presented at trial of the defendant's interaction with D on the day before the incident, in which D punched the defendant, permitted the jury to infer that, when the defendant came out of her house with a knife, she intended to seriously injure D and that, when the victim requested that she leave D and M alone and foiled her plan to harm D by attempting to grab the knife, the defendant directed her anger toward the victim, and, although the defendant testified that she never intended to harm D or the victim, the jury was free to discredit her version of events on the basis of the evidence before it.

2. The defendant could not prevail on her claim that the trial court committed plain error by failing to instruct the jury, sua sponte, on the defense of others, as that court was not obligated to provide a defense of others instruction to the jury.

State v. *Ortiz* (71 Conn. App. 865), clarified.

Argued February 11—officially released July 7, 2020

Procedural History

Substitute information charging the defendant with two counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Pavia, J.*; thereafter, the court denied the defendant's motion for a judgment of acquittal; verdict and judgment of guilty of one count of assault in the first degree, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Pamela J. Esposito*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Laura C. Crafter, appeals from the judgment of conviction, rendered following a jury trial, of assault in the first degree by means of a dangerous instrument in violation of General Statutes § 53a-59 (a) (1).[1] On appeal, the defendant claims that (1) the court erred in denying her motion for a judgment of acquittal because the evidence was insufficient to establish that she intended to cause serious physical injury to the victim, (2) the state failed to disprove the

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

defendant's defense of self-defense beyond a reasonable doubt, and (3) the court committed plain error by failing to instruct, sua sponte, the jury on defense of others within its self-defense instruction.[2] We affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. In November, 2015, Michael Reed was dating the defendant, and his brother, Demetrius Reed, was dating the victim, Jasmine Turkvan.[3] Prior to the events giving rise to this case, Demetrius, Michael, their younger brother, Christian Reed (Christian), and their mother lived together. Their mother was evicted, and the family's living arrangements changed. Demetrius went to live with the victim, and Michael, Christian, and their mother moved in with the defendant at a housing complex in Bridgeport. Considerable animosity existed between Michael and Demetrius, who would, on occasion, engage in fistfights to settle their personal disputes.

On or about November 19, 2015, Demetrius arrived at the defendant's apartment to obtain marijuana from his mother. Upon opening the door, Demetrius overheard the defendant yelling. Demetrius and the defendant did not get along, nor did they respect one another. After obtaining the marijuana, Demetrius exited the

[2] More precisely, the defendant's second claim is that the state failed to disprove her defense of self-defense beyond a reasonable doubt because there was no evidence that the defendant intended to use deadly physical force on the victim. We need not address this claim because the defendant concedes that the issue is controlled by our Supreme Court's decision in *State* v. *Singleton*, 292 Conn. 734, 974 A.2d 679 (2009), which we cannot modify. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by our precedent"). We recognize that she raises it only for the purpose of preserving it for further appellate review.

[3] Because Demetrius Reed and Michael Reed share a surname, we will refer to them by their first names.

apartment and headed for the elevator. Shortly thereafter, the defendant opened the apartment door and shouted a racial epithet at Demetrius, who responded by remarking on the defendant's lack of income. The defendant proceeded into the hallway, and, as Demetrius entered the elevator, she spat at him. Demetrius emerged from the elevator and proceeded to punch the defendant in the face with sufficient force to knock her to the ground. He then left the building.

On the morning of the next day, November 20, 2015, Demetrius dropped Christian and his niece off at school.[4] Around 3:15 p.m., Demetrius and the victim returned to the school to pick them up. Because Demetrius did not have an automobile of his own, he went with the victim in her vehicle. Unbeknownst to Demetrius, Michael was already at the school picking up his daughter.[5] The defendant was accompanying Michael at that time. As Michael and the defendant departed the school, Demetrius and the victim followed; Demetrius intended to engage in a fistfight with Michael to "get what [he] had off [his] chest." Demetrius and the victim followed Michael and the defendant to the house of the defendant's mother, located at 95 Cambridge Street in Stratford. At Michael's instruction, the defendant brought Michael's daughter inside. Demetrius exited the vehicle with the intention of fighting Michael. Michael told Demetrius that they should not engage in the fight in front of the house, and the two agreed to drive around the block to fight in a more secluded area. Around the corner from the house, the two men exited their respective vehicles and engaged in a violent fistfight, which resulted in Demetrius biting through Michael's eyelid to avoid getting "choked out" and Michael sustaining a dislocated shoulder and suffering an asthma attack.

[4] Demetrius' niece is Michael's daughter.

[5] As it turned out, Christian did not need to be picked up at that time because he had basketball practice after school.

While the melee between the brothers was unfolding, the victim, who remained in the passenger seat of her vehicle that Demetrius had driven around the block, observed the defendant approaching the scene with "something shiny in her hand," which turned out to be a ten inch "Michael Myers" style kitchen knife. According to the victim, she exited the vehicle and pleaded with the defendant to leave the brothers alone, as there was nothing that they could do to stop the fight. She did not know from where the defendant had obtained the knife. The defendant responded by telling the victim to "shut the fuck up" and poking the victim in the forehead with the knife. Fearing that the defendant was going to severely injure Demetrius, the victim panicked and attempted to grab the knife from the defendant. The victim and the defendant, contemporaneously with the fight between the brothers, then engaged in a fight over the knife. As the two women fought for control of the knife, the defendant was waving the knife around, the two were pulling each other's hair, and the victim began to lose feeling in her hand.

Both fights abruptly came to a halt. The victim was unaware that she had sustained a cut on her face until Demetrius told her so. Upon noticing the extent of the victim's injuries, Demetrius proceeded to drive the victim to St. Vincent's Medical Center in Bridgeport (St. Vincent's). Demetrius realized en route that the victim had sustained a wound to her back as well. At St. Vincent's, it was determined that the victim had sustained lacerations to the left side of her face, to her right thumb, and to the left side of her back, resulting in scarring and disfigurement. The injury to the face required twenty stitches, the injury to thumb required twelve stitches, and the back injury required nine sutures to close. She was released from St. Vincent's on the same day.

Meanwhile, Officer Brian McCarthy of the Stratford Police Department responded to a disturbance in the

vicinity of 95 Cambridge Street in Stratford and met with the defendant and Michael. The defendant reported that she had been in a fight with another female and indicated to him that no weapons were used in the fight.[6] Officer McCarthy learned that the victim had sustained knife injuries and proceeded to St. Vincent's to question the victim and Demetrius. He took photographs of the victim's injuries. The knife used by the defendant in the brawl with the victim was never recovered.

The defendant was arrested and was charged by way of a substitute information with one count of assault in the first degree with a dangerous instrument and one count of assault in the first degree with extreme indifference to human life in violation of §§ 53a-59 (a) (1) and 53a-59 (a) (3), respectively.[7] A jury convicted the defendant of assault in the first degree in violation of § 53a-59 (a) (1). In accordance with the verdict, the trial court sentenced the defendant to ten years of incarceration, execution suspended after five years, followed by five years of probation. This appeal followed. Additional facts and procedural history will be set forth where necessary.

I

The defendant's first claim is that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that she intended to cause serious physical injury to the victim. For the reasons that follow, we are unpersuaded.

The standard by which we review the defendant's claim is well established. "In reviewing a sufficiency of

[6] The jury reasonably could have found that a second knife, a Swiss Army style knife distinct from the one used by the defendant to injure the victim, was used by Demetrius to slash a tire on the defendant's automobile before he drove the victim to St. Vincent's.

[7] At trial, the state proceeded on the two counts in the alternative. Accordingly, the trial court instructed the jury that it could not return a guilty verdict on both counts.

the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"While the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014).

"A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . . A [d]angerous instrument is defined as any instrument, article or substance which, under the circumstances in which it is used or attempted or

threatened to be used, is capable of causing death or serious physical injury . . . . Serious physical injury is defined as physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . . Assault in the first degree is a specific intent crime. It requires that the criminal actor possess the specific intent to cause serious physical injury to another person." (Citations omitted; internal quotation marks omitted.) *State* v. *Hudson*, 180 Conn. App. 440, 453–54, 184 A.3d 269, cert. denied, 328 Conn. 936, 184 A.3d 267 (2018).

The following additional facts, which the jury reasonably could have found, and procedural history are relevant to our consideration of the defendant's claim. The defendant testified in her own defense. On direct examination, she testified as follows. She and Michael arrived at her mother's home following their trip to the school on November 20, 2015, and Michael instructed her to bring his daughter inside the house. From inside the house, she could see Demetrius and Michael fighting. She proceeded to exit the house to check on Michael and was not carrying a weapon. According to the defendant, the victim was already outside of her vehicle, which Demetrius had driven, and initiated the second scuffle by hitting the defendant in the eye. The defendant unequivocally denied using a weapon on the victim. On cross-examination, the state elicited testimony discrediting the defendant and her version of events. Specifically, the defendant admitted that she had untruthfully told the police that she, rather than Michael, had been driving a car that was involved in an accident a few days prior to the fight with the victim in order to protect Michael, who had an outstanding arrest warrant. She also admitted that she had told her father to tell the police the extent of Michael's injuries and to state that "no weapons were displayed."

At the close of the state's evidence, the defendant moved for a judgment of acquittal. The defendant argued that the evidence was insufficient to establish that she intended to cause serious physical injury to the victim. The defendant reasoned that because the victim could not precisely identify how she was injured during the fight, which involved tussling, hair pulling, and both parties grabbing for the knife, the defendant did not have the mens rea necessary for conviction. The court denied the motion, concluding in relevant part that "the type of weapon that [was] used, the manner in which the weapon [was] used, the significance of the injury, [and] the amount of force that might be necessary in order to result in the type of [injuries sustained by the victim]" would allow the jury to infer intent.

The defendant's first claim on appeal relates solely to the specific intent element of the crime for which she was convicted. The defendant contends that the fracas between her and the victim was caused by the victim, when she grabbed the knife from the defendant. The defendant maintains that the cumulative evidence, direct and circumstantial, failed to demonstrate that she intended to cause serious physical injuries to the victim. The state counters that, viewing the evidence in the light most favorable to sustaining the verdict, the evidence was sufficient on the basis of the injuries caused by the defendant and the permissible inferences that the jury was entitled to draw therefrom. We agree with the state.

In her principal appellate brief, the defendant points us to numerous cases that collectively stand for the proposition that, although circumstantial evidence may be used by the jury to infer intent, the jury may not resort to speculation to do so. The defendant also analogizes in part to our Supreme Court's decision in *State* v. *Carpenter*, 214 Conn. 77, 570 A.2d 203 (1990), as an example of a case in which the facts "suggested a

spontaneous burst of frustration and accidental injury . . . ." In *Carpenter*, our Supreme Court concluded that the evidence that the defendant killed the victim, a young child, by throwing her into a bathtub, was insufficient to infer that the defendant intended to cause the victim's death. Id., 83. Because the state in *Carpenter* "presented no evidence of any weapon, plan or motive, nor [presented] any evidence connecting the defendant to a pattern of abusive behavior," and "the defendant did not attempt to flee but rather, when he realized the gravity of the situation, immediately summoned medical aid for the baby," the evidence was insufficient to prove beyond a reasonable doubt that the defendant had the specific intent to cause the victim's death. Id., 83–85.

The defendant also suggests that the circumstances of the present case are akin to those in *State* v. *Williams*, 187 Conn. App. 333, 202 A.3d 470 (2019). In *Williams*, the defendant was convicted of manslaughter in the first degree and attempt to commit home invasion. Id., 334 n.1. In that case, the defendant and his cohorts travelled to an apartment complex where one of the victims, Clemente, resided. Id., 335. One of the perpetrators, Jones, and Clemente had an ongoing dispute over a girl. Id. On the evening of the crime, Clemente was not in his apartment but, rather, in another unit. Id. At some point after the defendant and his cohorts unsuccessfully attempted to gain access to that unit with baseball bats, Jones and Clemente engaged in a fight outside while the defendant looked on. Id., 335–36, 340. Clemente's stepfather, Lopez, confronted the defendant and the two began to fight; the defendant repeatedly stabbed Lopez, who later died from his injuries. Id., 336–37. On appeal, the defendant claimed that the evidence was insufficient to support his conviction of attempt to commit home invasion. Id., 337. This court agreed, looking first to the state's theory of the case with respect to the crime of attempt to commit home invasion, namely, that the defendant intended to commit a felony assault on Clemente had he gained access

to the apartment; as opposed to *any* crime as permitted by the statute. Id., 342; see also General Statutes § 53a-100aa (a). This court concluded that there was no evidence from which the jury could infer that the defendant specifically intended to commit such an assault against Clemente. Id., 347–48. Furthermore, because the state charged the defendant as a principal and not as an accessory, the intentions of his codefendants as to Clemente were irrelevant to the defendant's intent. Id., 348.

Neither case supports the defendant's position. With respect to her reliance on *Carpenter*, the defendant conceded that a knife was used by her during the fight with the victim. Further, the jury reasonably could have found that she called the police following the fight, not out of concern for the victim but, rather, for herself and Michael. Indeed, the defendant told her father to tell the police, falsely, that "no weapons were displayed." Contrary to the circumstances in *Williams*, here, the defendant and the victim's fight resulted in serious physical injuries to the victim, whereas in *Williams* there was no evidence that the defendant harmed or intended to harm Clemente, as required to sustain the conviction for home invasion under the state's theory in that case.

The defendant also contends that the evidence established that she was wildly swinging the knife around in the struggle with the victim, and, therefore, she could not have intended to injure the victim. "[I]t is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Pommer*, 110 Conn. App. 608, 619, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). The jury was free to infer that her actions with the knife demonstrated an intention to cause serious injuries to the victim—even if those actions were not necessarily calmly carried out or premeditated in nature. When the victim requested that

the defendant leave the fighting men alone, the jury reasonably could have inferred that the defendant's anger became directed at the victim, as evidenced by the defendant's demand that she "shut the fuck up" and the defendant's subsequent poke of the victim on the forehead with the knife. This conduct was sufficient to infer that, in that moment, the defendant possessed the intent to cause the victim serious bodily injury.

In addition, "[a] fact finder may also infer an intent to cause serious physical injury from other circumstantial evidence such as the type of weapon used and the manner in which it was used." *State* v. *Wells*, 100 Conn. App. 337, 344–45, 917 A.2d 1008, cert. denied, 282 Conn. 919, 925 A.2d 1102 (2007). The large, ten inch knife used by the defendant to cause numerous lacerations on the victim, which resulted in permanent scarring, allowed the jury to infer her intention. In particular, the evidence of the knife wound to the victim's back allowed the jury to infer that the defendant intentionally harmed the victim while her back was turned. Moreover, the jury was entitled to use its common sense that a large kitchen knife was capable of inflicting serious bodily injury. These were reasonable inferences on which the jury could base its verdict.

Additionally, the evidence of the defendant's interaction with Demetrius on the previous day, during which she spat at him and he punched her, causing her to fall to the ground, allowed the jury to infer that she came out of the house with a knife to seriously injure him. The jury could have found that, when the victim foiled the defendant's plan by attempting to grab the knife, the defendant directed her anger toward the victim and slashed her several times with the knife. We also note that, even if the defendant's intention to seriously injure the victim was formed at the instant the victim interfered with her approach toward Demetrius, this court

has concluded that a single, instantaneous, and reflexive act was sufficient to support a conviction of assault in the first degree. See *State* v. *Bunker*, 27 Conn. App. 322, 332–33, 606 A.2d 30 (1992). Although the defendant testified that she never intended to harm Demetrius or the victim, the jury was free to discredit her version of events—in particular, that no knife was used—on the basis of the evidence that was before it.

Finally, we agree with the state that the defendant's behavior following the brawl exhibited a consciousness of guilt.[8] "[Consciousness of guilt] is relevant to show the conduct of an accused, as well as any statement made by him [or her] subsequent to an alleged criminal act, which may be inferred to have been influenced by the criminal act. . . . The state of mind which is characterized as guilty consciousness or consciousness of guilt is strong evidence that the person is indeed guilty . . . and under proper safeguards . . . is admissible evidence against an accused." (Internal quotation marks omitted.) *State* v. *Henry*, 76 Conn. App. 515, 547–48, 820 A.2d 1076, cert. denied, 264 Conn. 908, 826 A.2d 178 (2003). Before the defendant's father spoke on the phone with the police, the defendant told her father to mention that "no weapons were displayed." When Officer McCarthy responded to the defendant's residence, the defendant maintained that she knew nothing about any knife other than the one used by Demetrius to puncture her automobile tire. The police

[8] As the state points out, the trial court declined to instruct the jury on the consciousness of guilt evidence. The court stated: "I am going to decline the consciousness of guilt instruction, although the [s]tate obviously has a right to argue anything that you would like to argue." In reviewing the defendant's sufficiency claim, however, we are entitled to examine such evidence because it was available for the jury to consider in reaching its verdict. See *State* v. *Juarez*, 179 Conn. App. 588, 595, 180 A.3d 1015 (2018) (in reviewing sufficiency claim, we consider whether cumulative effect of evidence adduced at trial sufficiently justified jury's verdict of guilt beyond reasonable doubt), cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019).

were also unable to recover the weapon used by the defendant, which, on the basis of Demetrius' testimony that he observed Michael grab the knife out of the defendant's hand and run back toward the house, allowed the jury to infer that she participated in its concealment. See *State* v. *Moye*, 119 Conn. App. 143, 150, 986 A.2d 1134, cert. denied, 297 Conn. 907, 995 A.2d 638 (2010).

In sum, viewing all of the evidence available in the light most favorable to sustaining the verdict, we conclude that it was sufficient for the jury to find that the defendant intended to inflict serious physical injury on the victim.

II

The defendant also claims that the court committed plain error by failing to instruct the jury, sua sponte, on defense of others; see General Statutes § 53a-19 (a);[9] when the evidence demonstrated that the defendant was seeking to act in defense of Michael. The state responds by arguing that the court had no obligation, sua sponte, to instruct the jury on defense of others, and, even if it did, the defendant failed to meet her burden of producing sufficient evidence to conclude that she assaulted the victim in defense of another. We agree with the state that the trial court had no obligation, sua sponte, to instruct the jury on defense of others.

The defendant concedes that she failed to request a jury instruction on defense of others during the trial. The defendant also acknowledges that, in a long line

[9] General Statutes § 53a-19 (a) provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend . . . a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

of cases, our Supreme Court and this court have concluded that a trial court is not required to provide a defense instruction sua sponte. See, e.g., *State* v. *Bonilla*, 317 Conn. 758, 770, 120 A.3d 481 (2015) (collecting cases). Relying on *State* v. *Ortiz*, 71 Conn. App. 865, 874–77, 804 A.2d 937, cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002), in which this court held that it was plain error for a trial court to fail to instruct, sua sponte, on the defense of inoperability, written directly into the statute for robbery in the first degree; see General Statutes § 53a-134; the defendant, nevertheless, maintains that her conviction should be reversed through the extraordinary remedy of the plain error doctrine. See Practice Book § 60-5. The state argues that we should take this opportunity to clarify that, in light of subsequent precedent from our Supreme Court, *Ortiz* has been overruled to the extent that it stands for the general proposition that a court's failure to provide a defense instruction sua sponte may be reviewed for plain error. We accept the state's invitation.

In *State* v. *Ebron*, 292 Conn. 656, 691–92, 975 A.2d 17 (2009), overruled in part on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011), our Supreme Court stated unequivocally that "trial courts do not have a duty to charge the jury, sua sponte, on defenses, affirmative or nonaffirmative in nature, that are not requested by the defendant." In *Ebron*, the court explained, in a footnote, that *Ortiz* involved circumstances where "there was uncontroverted evidence from the state's witnesses that the gun used was inoperable, and the affirmative defense at issue was written directly into the statute that the defendant was charged with violating." Id., 693 n.30. In light of the subsequent development of case law in this area, we take the opportunity to make clear that *Ortiz*, insofar that it allows plain error review for the failure to provide, sua sponte, a jury instruction on a defense, is limited to circumstances in which the affirmative

defense at issue was specifically provided for in the text of the statute that the defendant was charged with violating. *Ortiz* may not be relied on for the general, broad proposition that a trial court's failure to provide, sua sponte, a defense instruction constitutes plain error. See *State* v. *Martin*, 100 Conn. App. 742, 751 n.5, 919 A.2d 508, cert. denied, 282 Conn. 928, 926 A.2d 667 (2007). As our Supreme Court has aptly explained, "it would be inappropriate to place the onus on a trial court to discern, without any request from the parties, the specific defenses on which a jury should be instructed." *State* v. *Bonilla*, supra, 317 Conn. 772. Accordingly, the court was under no obligation to provide a defense of others instruction to the jury.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] We find it prudent to make the following observation on the defendant's attempted use of the defense of others defense.

As explained by our Supreme Court, "[t]he defense of others, like self-defense, is a justification defense. These defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest. . . . Thus, conduct that is found to be justified is, under the circumstances, not criminal. . . . All justification defenses share a similar internal structure: special triggering circumstances permit a necessary and proportional response." (Citation omitted; internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832–33, 60 A.3d 246 (2013); see also General Statutes § 53a-19 (a). This court thoroughly explained the contours of the defense in *State* v. *Hall-Davis*, 177 Conn. App. 211, 226–27, 172 A.3d 222, cert. denied, 327 Conn. 987, 175 A.3d 43 (2017).

The defendant's theory of defense of others is that she proceeded toward the fight in order to protect Michael, not from the victim, but from Demetrius, and the victim inhibited her from doing so. The defendant cites no authority, nor are we aware of any, for the proposition that the defense of others defense is available when a defendant uses physical force on a person who interferes, i.e., the victim, with her effort to defend a party she reasonably believes is in need of defense from yet another party, who was *not* the victim for purposes of the criminal prosecution, i.e., Michael from Demetrius.

STATE OF CONNECTICUT *v.* MORLO M.*
(AC 41474)

Alvord, Bright and Norcott, Js.

Syllabus

Convicted of the crimes of assault in the first degree, risk of injury to a child and unlawful restraint in the first degree in connection with the beating of the victim, who was the mother of his four minor children, the defendant appealed to this court, claiming that the evidence was insufficient to support his convictions. The defendant had dragged the victim by her hair down stairs into the basement of their home, where he kicked, punched and choked her on three consecutive nights while the children, who ranged in age from fifteen months to thirteen years, were alone on the upper floors of the home. After the defendant left the house on the third day, the victim was brought to a medical center, where staff members observed bruising on her scalp, face, chest, back, legs, arms and left side. The victim also was determined to have had a subconjunctival hemorrhage in her left eye, a broken rib and fluid in her pelvic region. *Held*:

1. The defendant could not prevail on his claim that the state failed to prove that he caused the victim serious physical injury and, thus, that the evidence was insufficient to support his conviction of assault in the first degree: the jury reasonably could have found that the defendant caused the victim to suffer either serious disfigurement or a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury, as the victim and C, a medical center staff member, testified consistently with one another as to the extensive bruising that covered much of the victim's body, the noticeable injuries to her head and face, and that the victim had lost consciousness during one of the defendant's beatings of her, which the jury was free to credit or disregard; moreover, C testified that the bruising was literally everywhere on the body of the victim, who had a subconjunctival hemorrhage in her left eye, and a police officer who took the victim's statement at the medical center saw that she was missing hair and had a swollen face and a bloodshot eye.
2. The defendant's claim that the evidence was insufficient to support his conviction of risk of injury to a child was unavailing; the jury reasonably could have inferred that the defendant put the children at risk of impairment of their health or morals, as the children had no access to parental

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

care during the three nights when he beat the victim in the basement and did not permit her to leave the basement until the morning, the jury was free to credit a psychologist's testimony that the children may have been traumatized as a result of having observed the extensive physical injuries to the victim, and the state did not have to prove actual harm to the children, as the defendant was charged under the portion of the risk of injury statute (§ 53-21 (a) (1)) that required that he have the general intent to perform an act that created a situation that put the children's health and morals at risk of impairment.

3. The evidence was sufficient to support the defendant's conviction of unlawful restraint in the first degree, as the defendant's intent to unlawfully restrain the victim was independent from his intent to assault her: the jury reasonably could have found that the defendant evinced an intent to restrict the victim's liberty to move freely within the house when he seized her by her hair and dragged her into the basement and separately could have reasonably found that he evinced an extreme indifference to human life on the basis of his independent acts of kicking, punching and choking the victim in the basement for three consecutive nights; moreover, the jury reasonably could have found that the defendant's act of dragging the victim down a full flight of stairs by her hair subjected her to a substantial risk of injury, as it presented a real or considerable opportunity for her to have suffered an impairment to her physical condition or to have suffered pain.

Argued March 10—officially released July 7, 2020

Procedural History

Two substitute informations charging the defendant, in the first case, with five counts of the crime of risk of injury to a child and with one count of the crime of tampering with a witness, and, in the second case, with the crimes of assault in the first degree, unlawful restraint in the first degree and strangulation in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kavanewsky, J.*, granted the state's motion for joinder; thereafter, the matter was tried to the jury before *Pavia, J.*; verdicts and judgments of guilty of five counts of risk of injury to a child, tampering with a witness, assault in the first degree and unlawful restraint in the first degree, from which the defendant appealed to this court. *Affirmed.*

Judie Marshall, assigned counsel, with whom, on the brief, was *David J. Reich*, assigned counsel, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Colleen Zingaro*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Morlo M., appeals from the judgments of conviction, rendered following a jury trial, of one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (3), five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and one count of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a).[1] On appeal, the defendant claims that the evidence was insufficient to support his convictions. We disagree and, accordingly, affirm the judgments of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. In the early morning hours of November 28, 2016, the victim, who is the mother of the defendant's four minor children, called the defendant from a gas station to ask that he pick her up and drive her back to the house where they both resided. The victim had been out drinking with someone other than the defendant. Soon after the victim and the defendant arrived at the house, the defendant seized the victim by her hair, dragged her down to the basement of the house, and proceeded to beat her. The defendant kicked, punched, and choked the victim. During this time, the victim's seven children were asleep on upper floors of

[1] The defendant was also convicted of one count of tampering with a witness in violation of General Statutes § 53a-151, which he does not challenge on appeal. The defendant was found not guilty of one count of strangulation in the first degree in violation of General Statutes § 53a-64aa (a) (1) (B).

the house[2] and, thus, did not witness the victim being dragged down into the basement by the defendant. The victim could not leave the basement until the defendant ceased beating her. Subsequently, in the morning of November 28, the victim and the defendant emerged from the basement and sat on their living room couch. The victim remained on the couch throughout the daytime hours of November 28 because of the injuries she sustained from the defendant's beating of her. While the victim remained on the couch, her older children were at school, and her sixteen year old nephew assisted her by caring for her young children. Following the older children's return from school, all of the children were fed and went upstairs.

At nighttime on November 28, 2016, the defendant commanded the victim to return down into the basement. The victim obeyed the defendant's command because she was already hurt and did not want to defy him. The children were upstairs and in their beds when the victim and the defendant went down into the basement. Once they were in the basement, the victim again was beaten by the defendant. The defendant hit and choked the victim, and ripped out parts of her hair.

In the early morning of November 29, 2016, the victim emerged from the basement after a second night of being beaten. The victim's children were still asleep when the victim came up from the basement. The victim spent that day as she spent the day before, resting on the couch. Although she did not know the extent of her injuries, the victim was in pain and thought that she might have broken ribs. Following the return of the older children from school, all the children were fed

[2] On November 28, 2016, the age of the victim's seven children ranged from approximately fifteen months to thirteen years. The defendant is the father of the victim's four youngest children. Each of the five counts of risk of injury to a child with which the defendant was charged alleged risk of injury as to a different minor child.

and then went upstairs. The victim again was beaten on November 29 for a third night in a row. On one of the three nights during which she was beaten, the victim lost consciousness. Following the beatings, the victim's side and head in particular were hurting her.

When the defendant left the house on the third day, the victim contacted a friend, F, who picked up the victim, her seven children, and her nephew, and took them all to a hotel. The victim left the house in a rush, fearing that if she remained there any longer, she would die. The victim's injuries were visible and seen by her children. While at the hotel, the victim, a veteran of the armed forces, called her peer counselor at the United States Veterans Administration Hospital. The victim informed her counselor that she was in pain, had a limited amount of money, and needed to travel to her foster mother in Georgia. The victim's counselor first encouraged the victim to seek treatment at the Veterans Affairs Medical Center in West Haven (medical center). On December 2, 2016, after encouragement from her counselor and because she remained in pain, wanted to know the extent of her injuries, and desired treatment, the victim went to the medical center with her children and nephew. At the medical center, the victim had her injuries photographed, vitals measured, and body imaged. A blood test was also performed. Staff at the medical center observed that the defendant had bruising on her scalp, face, chest, back, legs, arms, and left side. Some of the bruises were more recent than others. The victim also had a subconjunctival hemorrhage in her left eye, parts of her hair torn out, and tenderness in sections of her body, particularly her left chest and left abdomen.

The victim told medical center staff that over the last few days she had been kicked, punched, dragged by

her hair, choked, and that she lost consciousness. Initially, the victim did not disclose who caused her injuries to medical center staff. Eventually, however, the victim did tell the staff that the defendant caused her injuries. The police and the Department of Children and Families (department) were summoned to the medical center and, upon their arrival, took sworn, written statements from the victim. Officer Jonathan Simmons, of the Bridgeport Police Department, who took the victim's statement at the medical center, observed the victim as having parts of her hair missing, a swollen face, and a bloodshot eye.

The victim was evaluated by Julia Chen, a resident at the medical center who specialized in vascular and general surgery. Imaging revealed that one of the victim's ribs on her left side was fractured and that there was indeterminate fluid in her pelvic region. On the basis of the location of the victim's bruising and the fluid in her pelvic region, Chen and other staff at the medical center were concerned that the victim might have had an injury to her spleen. There was also concern that the victim might be bleeding internally. It was recommended to the victim that she be evaluated at Yale-New Haven Hospital (hospital) because the hospital had a trauma center and the medical center did not. Although Chen was not concerned that the victim faced an immediate risk of death, she recommended further evaluation because she was concerned that the victim had very serious internal injuries. Moreover, although Chen could not conclusively determine that the victim's spleen was injured, her concern prompted a recommendation that the victim pursue further evaluation because "a splenic hemorrhage could be very bad."

Contrary to the medical advice given to her, the victim did not seek further evaluation at the hospital and discharged herself from the medical center. The victim did not seek further evaluation at the hospital because

she could not take her children with her. Following her discharge from the medical center, the victim received assistance from a battered women's shelter that enabled her, her children, and her nephew to stay at a hotel. On December 5, 2016, they all checked out of the hotel and rode a bus to the home of the victim's foster mother in Georgia.

While in Georgia, F contacted the victim and urged her to speak with the defendant. F told the victim that the defendant wanted to speak with their twin children because it was their birthday. The victim spoke with the defendant several times while she was in Georgia. During one of their conversations, the victim told the defendant that she had made a statement to the police that identified him as the cause of her injuries. The defendant told the victim that she had to return to Connecticut to "fix" her statement so that he would not get into any trouble.

Following this conversation, the defendant drove to Georgia. After arriving at the home of the victim's foster mother in Georgia, the defendant picked up the victim and five children and proceeded to drive back to Connecticut.[3] They arrived in Connecticut on December 20, 2016, and stayed at the apartment of the defendant's sister. On December 21, the defendant drove the victim to the police station, where she changed her statement to the police at the defendant's behest. The victim changed her statement to allege that another male was the cause of her injuries. The victim and the defendant then returned to the apartment.

Thereafter, on December 21, 2016, police officers travelled to the apartment. The police officers were met by an adult male and female, who provided no information regarding the whereabouts of the defendant, the victim, or the victim's children. As the police

[3] The victim's oldest child and her four youngest children accompanied her and the defendant back to Connecticut. The victim's two other children and her nephew were left in Georgia.

officers were leaving, they observed a child in the living room area of the apartment through a window. At approximately 4:30 p.m. on December 22, the police officers returned to the apartment with a warrant for the defendant's arrest. The victim, who was outside as the police arrived, ran into the apartment, gathered her children, and brought them down into the basement. The police officers located the defendant outside the apartment, in the process of moving a television, and executed the arrest warrant. The police officers then entered the house and found the victim and her children in the basement.

Subsequently, the defendant was charged in two consolidated informations with assault in the first degree, unlawful restraint in the first degree, strangulation in the first degree, five counts of risk of injury to a child, and tampering with a witness. The jury found the defendant guilty of all counts with the exception of strangulation in the first degree, of which he was found not guilty. The defendant received a total effective sentence of fifteen years of incarceration, execution suspended after ten years, followed by five years of probation.[4] This appeal followed. Additional facts will be set forth as necessary.

At the outset, we set forth the following established review principles relevant to each of the defendant's insufficiency of the evidence claims raised in this appeal. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably

[4] The defendant received the following concurrent sentences: fifteen years of incarceration, execution suspended after ten years, followed by five years of probation for assault in first degree; five years of incarceration for unlawful restraint in the first degree; five years of incarceration for each of the five counts of risk of injury to a child; and five years of incarceration for tampering with a witness.

could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . .

"We also note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Additionally, [a]s 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 [jury], 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 reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 186–87, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

I

The defendant first claims that there was insufficient evidence to convict him of assault in the first degree because the state failed to prove that he caused serious physical injury to the victim. We disagree.

Section 53a-59 (a) provides in relevant part that "[a] person is guilty of assault in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct

which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."[5] General Statutes § 53a-3 (4) defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." "Whether an injury constitutes a 'serious physical injury' . . . is a fact intensive inquiry and, therefore, is a question for the jury to determine." *State* v. *Irizarry*, 190 Conn. App. 40, 45, 209 A.3d 679, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019). "[Despite] the difficulty of drawing a precise line as to where physical injury leaves off and serious physical injury begins . . . we remain mindful that [w]e do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record . . . and that we must construe the evidence in the light most favorable to sustaining the verdict." (Internal quotation marks omitted.) Id., 45 n.6.

We conclude that there was sufficient evidence to support the jury's finding that the defendant caused

[5] Although the defendant argues that the victim's injuries did not expose her to a risk of death, his argument in this regard appears to be directed to whether the victim suffered a serious physical injury and not to the other elements of § 53a-59 (a) (3). In fact, he specifically states in his principal brief: "It is the appellant's contention that the state failed to prove that the defendant caused serious physical injury to [the victim]." To the extent that the defendant's reference to the victim not having faced a risk of death is a challenge to the statutory requirement that the defendant must have created a risk of death, we are not persuaded. It is the defendant's *actions*, not the results of those actions, which must create a risk of death. See *State* v. *James E.*, 154 Conn. App. 795, 807, 112 A.3d 791 (2015) ("[t]he risk of death element of the [assault in first degree] statute focuses on the conduct of the defendant, not the resulting injury to the victim" (internal quotation marks omitted)), aff'd, 327 Conn. 212, 173 A.3d 380 (2017). The jury could have reasonably concluded that the defendant's *actions* of dragging the victim down the basement stairs and beating her on three consecutive nights was reckless conduct that evinced an extreme indifference to human life and created a risk of death. That his actions may not have resulted in a risk of death is irrelevant.

serious physical injury to the victim. The jury reasonably could have concluded that the defendant caused the victim either serious disfigurement or serious loss or impairment of the function of any bodily organ.

" 'Serious disfigurement' is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer. In assessing whether an impairment or injury constitutes serious disfigurement, factors that may be considered include the duration of the disfigurement, as well as its location, size, and overall appearance. Serious disfigurement does not necessarily have to be permanent or in a location that is readily visible to others." *State* v. *Petion*, 332 Conn. 472, 491, 211 A.3d 991 (2019).

In *State* v. *Barretta*, 82 Conn. App. 684, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004), the following evidence was presented concerning the victim's injuries: "[T]he victim sustained numerous severe bruises, abrasions and contusions across the trunk of his body. He also had an imprint and welts on his back that caused his skin to be a varied color of purple and blue, with additional visible injuries to his upper left shoulder and neckline. Further abrasions were visible on his collarbone, and there were bruises on his breastbone. Additionally, the medical testimony, given by an attending physician's assistant, described extensive and severe bruising that covered more of the victim's body than the photographs reflected and caused the victim to be tender to pressure across his back and left side." Id., 690. This court noted that "the term 'serious physical injury' does not require that the injury be permanent," "a victim's complete recovery is of no consequence," and "the fact that the skin was not penetrated [is not] dispositive." Id., 689–90. On the basis of the evidence in the *Barretta* record, this court could not conclude that the jury unreasonably found that the victim suf-

fered serious physical injury, namely, serious disfigurement. Id., 690.

In this case, the victim and Chen testified consistently with one another as to the extensive bruising that covered the victim's body. The victim's scalp, face, chest, back, legs, arms, and left side were all bruised. Chen testified that the victim's bruising was "literally everywhere . . . ." Moreover, the victim had a subconjunctival hemorrhage in her left eye, had portions of her hair torn out, and experienced tenderness in various parts of her body. Simmons corroborated the visibility of the victim's injuries, noting that when he met with her at the medical center, he observed her as having missing hair, a swollen face, and a bloodshot eye. In addition, photographs of the victim's injuries were admitted into evidence for the jury to view during its deliberations. Although there was no evidence that the victim's injuries left permanent scarring, there was ample evidence as to the visibility of the bruising that covered much of the victim's body and of the noticeable injuries to her head and face. Under the factors set forth in *Petion*, and in light of the guidance of *Barretta*, we cannot conclude that there was insufficient evidence from which the jury could find that the victim suffered serious disfigurement and, thus, serious physical injury.[6]

[6] We note that *Barretta* was decided prior to *Petion*, and that in *Petion*, our Supreme Court remarked that, in *Barretta*, this court did not consider how the dictionary definition of "disfigurement" was modified by the term "serious." *State* v. *Petion*, supra, 332 Conn. 480 n.7. The court in *Petion* declined to express a view as to whether *Barretta* was correctly decided. Id.

Thereafter, the court in *Petion* concluded that the scar from a knife wound on the victim's left arm was insufficient to constitute serious disfigurement. Id., 477, 494–95. Nevertheless, the court stated that it "agree[d] that, in assessing the seriousness of the disfigurement, the jury was not limited to considering the injury in its final, fully healed state. See, e.g., *State* v. *Barretta*, supra, 82 Conn. App. [690] (contusions and severe bruising all over body from beating with baseball bat established serious disfigurement)." *State* v. *Petion*, supra, 322 Conn. 497. The court was not convinced, however, that the appearance of the victim's injury prior to its healing was sufficient to constitute serious disfigurement. Id.

Although *Barretta*'s viability in the wake of *Petion* has not been examined, we conclude that there was sufficient evidence in this case from which the

We now turn to whether the jury reasonably could have concluded that the defendant caused the victim serious loss or impairment of the function of any bodily organ.[7] In *State* v. *Rumore*, 28 Conn. App. 402, 613 A.2d 1328, cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992), this court held that the jury reasonably could have concluded that the victim suffered serious impairment of the function of any bodily organ on the basis of evidence that the victim became unconscious after the defendant grabbed her by her ankles, causing her to fall to the ground. Id., 405, 415. More specifically, the court stated that § 53a-3 (4) "does not require that the impairment of the organ be permanent. The jury could properly interpret the evidence to prove that the victim's brain was not functioning at a cognitive level when she was unconscious and thus was impaired." Id., 415. In this case, the victim testified that, during one of the three nights when she was beaten by the defendant in the basement, she lost consciousness. The victim's testimony was corroborated by Chen, who testified that the victim informed medical center staff that she lost consciousness at some point during the defendant's repeated beating of her. The jury was free to credit or disregard this testimony.[8] See id. ("[i]t is axiomatic that it is the function of the jury to consider the evidence, draw reasonable inferences from the facts proven and to assess the credibility of witnesses"). On the basis of this testimony, we conclude that there was sufficient evidence from which the jury reasonably could have

jury reasonably could find that the victim's injuries persisted throughout her head and body and, thus, were sufficient to constitute serious disfigurement under the *Petion* factors.

[7] Although it is not necessary, we discuss an additional type of serious physical injury to the victim that reasonably could have been found by the jury.

[8] The defendant argues that because the victim self-reported her loss of consciousness, without any details as to its timing, and did not receive any treatment, there is insufficient evidence of an impairment of the function of a bodily organ. We disagree because the defendant's arguments correspond to the weight of the evidence that was presented to the jury regarding the victim's loss of consciousness, not its sufficiency.

found that the victim suffered a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury.[9] See id.

II

The defendant next claims that there was insufficient evidence to convict him of five counts of risk of injury to a child. The defendant argues that his conviction of those counts was predicated on the children having been found by the police in the basement of the apartment and that he "did nothing to encourage or orchestrate the children being placed in the basement." (Emphasis omitted.) The state responds that "the cumulative force of the evidence established that the defendant's conduct—beating the children's mother—led to a series of situations inimical to the children's psychological or mental health." We agree with the state and, accordingly, reject the defendant's claim.

Section 53-21 (a) provides in relevant part that "[a]ny person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) . . . ." "The general purpose of § 53-21 is to protect the physical and psychological well-being of children from the potentially harmful conduct of adults. . . . Our case law has interpreted § 53-21 [a] (1) as comprising two distinct parts and criminalizing two general types of

[9] The defendant argues that the victim's decision not to go to the hospital for further evaluation and, instead, to travel to Georgia with her children, who she was actively caring for, supports a conclusion that the victim did not have a serious physical injury. We reject this argument because the testimony relied on by the defendant does not displace the evidence from which the jury reasonably could have concluded that the victim suffered a serious physical injury.

behavior likely to injure physically or to impair the morals of a minor under sixteen years of age: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the minor's moral or physical welfare . . . and (2) acts directly perpetrated on the person of the minor and injurious to his moral or physical well-being. . . . Thus, the first part of § 53-21 [a] (1) prohibits the creation of *situations* detrimental to a child's welfare, while the second part proscribes injurious *acts* directly perpetrated on the child. . . .

"Under the situation portion of § 53-21 [a] (1), the state need not prove actual injury to the child. Instead, it must prove that the defendant wilfully created a situation that posed a risk to the child's health or morals. . . . The situation portion of § 53-21 [a] (1) encompasses the protection of the body as well as the safety and security of the environment in which the child exists, and for which the adult is responsible." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 147–48, 869 A.2d 192 (2005). "Because risk of injury to a child is a general intent crime, proof of [s]pecific intent is not a necessary requirement . . . . Rather, the intent to do some act coupled with a reckless disregard of the consequences . . . of that act is sufficient to [establish] a violation of the statute. . . . As a general intent crime, it is unnecessary for the [defendant to] be aware that his conduct is likely to impact a child [under age sixteen]." (Citations omitted; internal quotation marks omitted.) *State* v. *James E.*, 327 Conn. 212, 223, 173 A.3d 380 (2017).

In a substitute information, the state charged the defendant with five counts of risk of injury to a child in connection with conduct "beginning on or about November 27, 2016 through December 22, 2016," that "wilfully and unlawfully cause[d] a child under sixteen (16) years of age . . . to be placed in a situation that

his health and morals were likely to be impaired."[10] The information thus reflects that the state charged the defendant under the "situation" portion of § 53-21 (a) (1). Accordingly, the state did not have to prove actual harm to the children but, rather, that the defendant had the general intent to perform an act that created a situation putting the children's health and morals at risk of impairment. We conclude that there was sufficient evidence from which the jury reasonably could have found the defendant guilty of five counts of risk of injury to a child.

On three consecutive nights, the defendant, by forcing the victim down into the basement, beating her, and not permitting her to leave the basement until morning when they went up together, rendered the victim incapable of caring for her children, who ranged in age from fifteen months to thirteen years and were located alone on the upper floors of their home. In so doing, the defendant risked the health of the minor children, as they had no access to parental care during these three nights. See *State* v. *Branham*, 56 Conn. App. 395, 398–99, 743 A.2d 635 (evidence that defendant left three young children unattended in apartment for approximately one hour deemed sufficient for jury to find that physical well-being of children was put at risk), cert. denied, 252 Conn. 937, 747 A.2d 3 (2000); *State* v. *George*, 37 Conn. App. 388, 389–90, 656 A.2d 232 (1995) (affirming defendant's conviction of risk of injury to child for leaving seventeen month old infant unattended in car between 8 and 9 p.m.).[11]

[10] Contrary to the defendant's argument that his conviction of five counts of risk of injury to a child were based on the children having been found by the police in the basement of the apartment, the state's charging document, the evidence presented at trial, and the state's closing arguments reveal that the basis of the state's charges was the defendant's continuing course of conduct from November 27, 2016 through December 22, 2016.

[11] During oral argument before this court, the defendant's appellate counsel argued that the thirteen year old child could care for the six younger children. Counsel provided no support for this argument and we find it imprudent and unavailing.

Moreover, the defendant's beating of the victim left her with numerous, visible physical injuries that were observed by the children. At trial, Wendy Levy, a clinical psychologist, testified that children witnessing a caregiver with physical injuries caused by abuse can be traumatized because they could develop a fear that they, too, will be subjected to abuse. The jury was free to credit Levy's testimony and to infer that, because the children in this case observed the extensive physical injuries to the victim, their mother and caregiver, they may have been traumatized. See, e.g., *State* v. *Thomas W.*, 115 Conn. App. 467, 475, 974 A.2d 19 (2009), aff'd, 301 Conn. 724, 22 A.3d 1242 (2011); see id., 475–76 ("[I]t is within the province of the jury to draw reasonable and logical inferences from the facts proven. . . . The jury may draw reasonable inferences based on other inferences drawn from the evidence presented." (Internal quotation marks omitted.)). Because the defendant's beating of the victim established this potential sequence, the jury reasonably could have inferred that he put the children at risk of impairment of their health and morals.

III

The defendant's final claim is that there was insufficient evidence to convict him of unlawful restraint in the first degree because there was no evidence presented to the jury of (1) a substantial risk of injury to the victim or (2) an intent to unlawfully restrain that was independent from his intent to commit assault under § 53a-59 (a) (3). We disagree.

Under § 53a-95 (a), "[a] person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury." " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to

another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent." General Statutes § 53a-91 (1). "Physical injury" is defined as "impairment of physical condition or pain . . . ." General Statutes § 53a-3 (3). "Merriam-Webster's Collegiate Dictionary (10th Ed. 1999) defines 'substantial' as 'real' and 'considerable,' and courts often have defined the word 'substantial' in that way." *State* v. *Dubose*, 75 Conn. App. 163, 174–75, 815 A.2d 213, cert. denied, 263 Conn. 909, 819 A.2d 841 (2003).

"Unlawful restraint in the first degree is a specific intent crime. . . . A jury cannot find a defendant guilty of unlawful restraint unless it first [finds] that he . . . restricted the victim's movements with the intent to interfere substantially with her liberty. . . . [A] restraint is unlawful if, and only if, a defendant's conscious objective in . . . confining the victim is to achieve that prohibited result, namely, to restrict the victim's movements in such a manner as to interfere substantially with his or her liberty." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jackson*, 184 Conn. App. 419, 433–34, 194 A.3d 1251, cert. denied, 330 Conn. 937, 195 A.3d 386 (2018). "To convict a defendant of unlawful restraint in the first degree, no actual physical harm must be demonstrated; the state need only prove that the defendant exposed the victim to a substantial risk of physical injury." (Internal quotation marks omitted.) *State* v. *Cotton*, 77 Conn. App. 749, 776, 825 A.2d 189, cert. denied, 265 Conn. 911, 831 A.2d 251 (2003).

We reject the defendant's argument that, under the circumstances of this case, the intent to commit unlawful restraint under § 53a-95 (a) was one and the same with the intent to commit the assault in the first degree under § 53a-59 (a) (3). Our appellate guidance reflects that the requisite mental states for each crime are distinct from one another. Compare *State* v. *Colon*, 71

Conn. App. 217, 226, 800 A.2d 1268 (concluding that § 53a-59 (a) (3) requires that the defendant "must be shown to have had *the general intent to engage in conduct evincing an extreme indifference to human life*" (emphasis added)), cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002), with *State* v. *Jackson*, supra, 184 Conn. App. 433 ("[a] jury cannot find a defendant guilty of unlawful restraint unless it first [finds] that he . . . restricted the victim's movements with *the intent to interfere substantially with her liberty*" (emphasis added; internal quotation marks omitted)). The victim testified that, in the early morning hours of November 28, 2016, the defendant seized her by her hair and dragged her down into the basement, where he proceeded to beat her. On the basis of this evidence, the jury reasonably could have found that the defendant evinced an intent to restrict the victim's liberty, namely, her liberty to move freely within the house. Separately, the jury reasonably could have found that the defendant evinced an extreme indifference to human life on the basis of his independent acts of kicking, punching, and choking the victim in the basement for three consecutive nights after dragging her down the stairs.[12]

We further reject the defendant's argument that there was insufficient evidence of a substantial risk of injury to the victim. On the basis of the evidence presented at trial, the jury reasonably could have found that the defendant's act of dragging the victim down a full flight of stairs by her hair subjected her to a substantial risk of injury because it presented a "real" or "considerable" opportunity for her to have suffered an impairment to her physical condition or to have suffered pain. See General Statutes § 53a-3 (3); *State* v. *Dubose*, supra, 75 Conn. App. 174–75.

[12] The defendant did not contest the sufficiency of the evidence as to the intent element of the charge of assault in the first degree under § 53a-59 (a) (3). See part I of this opinion. We discuss the evidence presented to the jury that supports the defendant's intent to commit an assault to illustrate the severability of that evidence from the evidence supporting the defendant's intent to unlawfully restrain the victim.

The judgments are affirmed.

In this opinion the other judges concurred.

ZBIGNIEW S. ROZBICKI *v.* J. MICHAEL SCONYERS ET AL. (AC 41654)

Bright, Moll and Devlin, Js.

Syllabus

The plaintiff sought to recover damages, including treble damages pursuant to statute (§ 52-568), for vexatious litigation, alleging that the defendants had filed special defenses and brought a counterclaim against him without probable cause and with malicious intent. In a prior civil action, the defendants L and his building company, L Co., had retained the plaintiff to defend them in that action. During the course of his representation by the plaintiff, L contacted his insurance company to inquire about providing a defense for L and L Co. in the civil action pursuant to their liability insurance policy. The insurance company then engaged a law firm on L and L Co.'s behalf to defend them. The plaintiff later commenced an action against L and L Co. seeking to collect outstanding legal fees incurred for his services in the prior civil action. L and L Co. retained the services of the defendants S, an attorney, and the law firm in which he was a partner, A Co., to defend them in the collection action and, on the advice of S and A Co., L and L Co. filed an answer, two special defenses and a counterclaim sounding in legal malpractice against the plaintiff, alleging, inter alia, that the plaintiff had neglected to inquire of L's insurance company whether defense coverage was available for the prior civil action and failed to inform L of the insurance carrier's obligation to defend. The plaintiff and L and L Co. reached a settlement in the collection action, and the counterclaim was withdrawn. The trial court thereafter granted the separate motions for summary judgment filed by S and A Co. and L and L Co. in the vexatious litigation action. On appeal, the plaintiff alleged that the trial court improperly rendered summary judgment on the grounds that the defendants had probable cause to assert special defenses and file a counterclaim against the plaintiff in the collection action and L and L Co. relied in good faith on the advice of S and A Co. in asserting the special defenses and filing the counterclaim. *Held*:

1. The trial court improperly granted the motion for summary judgment filed by L and L Co.: a genuine issue of material fact existed as to whether L and L Co. had probable cause to assert the special defenses and to file the counterclaim in the collection action; although L and L Co. submitted a number of exhibits indicating that L was not aware, at the time he hired the plaintiff in the prior civil action, that insurance

coverage entitling him to a defense was available to him, the plaintiff submitted several exhibits indicating that L was aware at the time he hired the plaintiff that insurance coverage was available to him but that he did not wish to submit a claim for such coverage because, inter alia, he did not want his insurance premiums to increase; moreover, a genuine issue of material fact existed as to whether L and L Co. relied in good faith on the advice of S and A Co. in asserting the special defenses and filing the counterclaim as a factual dispute existed as to whether L conveyed to S all material facts within his knowledge, as the evidence demonstrated that L conveyed to S that he did not know of the availability of insurance defense coverage at the time he hired the plaintiff to defend him in the prior civil action, but there existed a genuine issue of material fact as to whether L knew of the availability of insurance coverage and, thus, whether the advice of S and A Co. was given after a full and fair statement of all facts within L's knowledge.

2. The trial court did not err in granting the motion for summary judgment filed by S and A Co.: the plaintiff's claim that S failed to perform an adequate investigation before asserting the special defenses and filing the counterclaim was unavailing, as S relied on statements and documents provided to him by his clients, consultation with other attorneys, his own experience as a practicing attorney in Connecticut for thirty-six years and legal research, and this information provided S a reasonable basis on which to assert the special defenses and to file the counterclaim; moreover, the plaintiff's claim that S lacked probable cause because he was not an experienced legal malpractice litigator was unavailing, as S acted as a reasonable attorney familiar with Connecticut law in believing that he had probable cause.

Argued February 4—officially released July 7, 2020

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Hon. John W. Pickard*, judge trial referee, granted the motions for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Zbigniew S. Rozbicki, self-represented, the appellant (plaintiff).

Cristin E. Sheehan, with whom, on the brief, was *Robert W. Cassot*, for the appellees (named defendant et al.).

Patrick J. Markey, for the appellees (defendant Frederick J. Laser et al.).

Opinion

MOLL, J. The plaintiff, Zbigniew S. Rozbicki, appeals from the summary judgment rendered by the trial court in favor of the defendants, Frederick J. Laser (Laser), Laser Building Company, J. Michael Sconyers, and Ackerly Brown, LLP, on his one count complaint sounding in vexatious litigation. On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendants on the grounds that (1) the defendants had probable cause to assert special defenses and to file a counterclaim in a prior action commenced by the plaintiff against Laser and Laser Building Company (Laser defendants),[1] and (2) the Laser defendants relied in good faith on the advice of J. Michael Sconyers and Ackerly Brown, LLP (Sconyers defendants),[2] their counsel in the prior action, in asserting the special defenses and filing the counterclaim. We affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In June, 2012, Laser retained the plaintiff, who, at the time, was an attorney with an active license to practice law in Connecticut,[3] to defend the Laser defendants in a civil action captioned *Frey* v. *Noorani*, Superior Court, judicial district of Litchfield, Docket No. CV-10-6003549-S (*Frey* action).[4] In March, 2013, while represented by the plaintiff, Laser contacted NGM Insurance Company (NGM)

[1] The record reflects that Laser is the vice president of Laser Building Company.

[2] J. Michael Sconyers is a partner at Ackerly Brown, LLP.

[3] The plaintiff's license to practice law in Connecticut currently is suspended.

[4] Laser Building Company was named as a defendant in the *Frey* action, but Laser, in his individual capacity, was not a party thereto. The record in the present action is inconsistent on this point; that is, Laser, Laser Building Company, and the Laser defendants collectively are each referred to as

to demand that it provide the Laser defendants with a defense in the *Frey* action pursuant to their liability insurance policy. Soon thereafter, NGM engaged the law firm Hassett and Donnelly, P.C., to appear on behalf of the Laser defendants in the *Frey* action. On March 15, 2013, Attorney Peter G. Barrett filed an appearance on behalf of the Laser defendants, in lieu of the plaintiff, in the *Frey* action.[5] Following his appearance in the *Frey* action, Attorney Barrett negotiated a settlement that resolved the action as to the Laser defendants at no additional cost to them.

In September, 2013, the plaintiff commenced an action against the Laser defendants seeking to collect $11,782.50 in outstanding legal fees incurred for his services in the *Frey* action. See *Rozbicki* v. *Laser*, Superior Court, judicial district of Litchfield, Docket No. CV-13-6009417-S (collection action).[6] Laser hired the Sconyers defendants to defend the Laser defendants in the collection action.

defendants in the *Frey* action. In its memorandum of decision granting the defendants' respective motions for summary judgment, the trial court stated that the plaintiff was retained to represent the Laser defendants collectively in the *Frey* action. For the sake of avoiding confusion, and because none of the parties raises the issue of the discrepancy, we refer to the Laser defendants collectively as having been named defendants in the *Frey* action.

[5] On June 6, 2013, Hassett and Donnelly, P.C., filed a firm appearance in lieu of the individual appearance filed by Attorney Barrett.

[6] The plaintiff named "Fred Laser D/B/A Laser Building Company" as the sole defendant in the collection action. The plaintiff named both Laser and Laser Building Company as defendants in the present action and alleged that their conduct, as well as the conduct of the Sconyers defendants, in the collection action constituted vexatious litigation. In its memorandum of decision granting the defendants' respective motions for summary judgment, the trial court also stated that the plaintiff filed the collection action against the Laser defendants collectively. In an effort to avoid confusion, and because none of the parties raises the issue of the discrepancy, we refer to the Laser defendants collectively as having been named defendants in the collection action. Notwithstanding the foregoing, it is unclear on what basis the plaintiff could prevail on a vexatious litigation claim against Laser Building Company when the only defendant named in the collection action was Laser individually.

In the collection action, the Laser defendants, acting through the Sconyers defendants as their counsel, filed an answer, two special defenses, and a one count counterclaim sounding in legal malpractice. The first special defense alleged that "[t]he plaintiff's fees are extreme, excessive, and unreasonable." The second special defense alleged that "[t]he sums already paid to the plaintiff by the [Laser defendants] far exceed the value of the services performed by the plaintiff."

The counterclaim alleged in relevant part as follows: "[The plaintiff], in violation of his duty [as the Laser defendants' counsel in the *Frey* action], neglected to inquire of Laser's insurance company whether coverage was available and whether it would defend the lawsuit under a reservation of rights. . . . [The plaintiff] knew or should have known that Laser's insurance company would defend the action under a reservation of rights but failed to inform Laser of that fact and in fact counseled Laser not to involve his insurance company in the proceedings. . . . Laser was informed of the fact that his insurance company had a duty to defend him under a reservation of rights by opposing counsel at his deposition [during the *Frey* action]. . . . Once informed of this fact, Laser contacted his insurance company, which then filed an appearance on his behalf and was able to promptly settle the matter at no cost to Laser. . . . The legal advice given by [the plaintiff] and the course of action undertaken by [the plaintiff] in representing [the Laser defendants] was inappropriate, time consuming, costly, and unnecessary. . . . The fees charged by [the plaintiff] were excessive and unreasonable. . . . [The plaintiff's] negligence and failure to properly handle the matter for which his legal services were retained constitute legal malpractice. . . . Due to [the plaintiff's] failure to inform Laser of his insurance carrier's obligation to defend, [the plaintiff's] failure to contact Laser's insurance company to inquire about the policy and the obligation to defend, and [the plaintiff's]

own incompetence in litigating the case, Laser lost $7500 which he paid to [the plaintiff] for unnecessary and unreasonable legal fees." Ultimately, the parties reached a settlement in the collection action, and the counterclaim was withdrawn on May 21, 2014.

On July 6, 2015, the plaintiff commenced the present action against the defendants. In his one count complaint sounding in vexatious litigation,[7] the plaintiff alleged in relevant part that the defendants asserted the special defenses and filed the counterclaim in the collection action without probable cause and with a malicious intent to vex and trouble him. As relief, the plaintiff sought compensatory damages, in addition to double and treble damages pursuant to General Statutes § 52-568.[8] The Laser defendants and the Sconyers defendants, respectively, filed separate answers to the complaint denying the material allegations set forth therein. The Laser defendants also filed several special defenses, in support of which they alleged that they had asserted the special defenses and filed the counterclaim in the collection action with probable cause, without malice, and in reliance on the advice of counsel.

On July 3, 2017, the Sconyers defendants filed a motion for summary judgment accompanied by a supporting memorandum of law and exhibits. On July 5, 2017, the Laser defendants filed a separate motion for summary judgment accompanied by a supporting memorandum of law and exhibits. The plaintiff filed separate

[7] The plaintiff improperly combined in one single count of his complaint claims for both common-law vexatious litigation and statutory vexatious litigation under General Statutes § 52-568. See Practice Book § 10-26 (distinct causes of action shall be numbered separately in complaint).

[8] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

memoranda of law, with exhibits appended thereto, in opposition to the defendants' respective motions for summary judgment. On March 21, 2018, following argument held on November 27, 2017, the trial court, *Hon. John W. Pickard*, judge trial referee, issued a memorandum of decision granting the defendants' respective motions for summary judgment. On April 10, 2018, the plaintiff filed a motion to reargue, which the court denied on April 19, 2018. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before addressing the plaintiff's claims on appeal, we set forth the relevant standard of review and legal principles governing our analysis. "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 applicable principles of substantive law, entitle him [or her] 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 which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rutter* v. *Janis*, 334 Conn. 722, 729, 224 A.3d 525 (2020).

"In Connecticut, the cause of action for vexatious litigation exists both at common law and pursuant to statute. Both the common law and statutory causes of action [require] proof that a civil action has been

prosecuted . . . . Additionally, to establish a claim for vexatious litigation at common law, one must prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . The statutory cause of action for vexatious litigation exists under § 52-568, and differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages." (Internal quotation marks omitted.) *Rockwell* v. *Rockwell*, 196 Conn. App. 763, 769–70, A.3d (2020).

"[T]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man [or woman] in the belief that he [or she] has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted. . . . [T]he existence of probable cause is an absolute protection against an action for [vexatious litigation], and what facts, and whether particular facts, constitute probable cause is always a question of law. . . .

"[In *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 912 A.2d 1019 (2007)] [o]ur Supreme Court . . . had the opportunity to consider whether a higher legal standard of probable cause should be applied to attorneys and law firms sued for vexatious litigation. . . . After considering the statute and the competing policy interests, the court concluded that a higher standard should not apply. . . . Instead, in assessing probable cause, the court phrased the critical question as whether on the basis of the facts known by the law firm, a reasonable attorney familiar with

Connecticut law would believe he or she had probable cause to bring the lawsuit. . . . As is implied by its phrasing, the standard is an objective one that is necessarily dependent on what the attorney knew when he or she initiated the lawsuit." (Citations omitted; internal quotation marks omitted.) *Byrne* v. *Burke*, 112 Conn. App. 262, 274–75, 962 A.2d 825, cert. denied, 290 Conn. 923, 966 A.2d 235 (2009).

"[P]robable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in [vexatious litigation] must separately show lack of probable cause. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . . Were we to conclude . . . that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. The vitality of our [common-law] system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 103–104.

As it relates to the present action, the counterclaim filed by the defendants in the collection action sounded in legal malpractice. "Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . . Generally, a plaintiff alleging legal malpractice must prove all of the following elements: (1) the existence of an attorney-client

relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Internal quotation marks omitted.) *Costello & McCormack, P.C.* v. *Manero*, 194 Conn. App. 417, 431, 221 A.3d 471 (2019).

I

We first turn to the plaintiff's claim that the trial court improperly granted the Laser defendants' motion for summary judgment. Specifically, the plaintiff contends that there were genuine issues of material fact as to whether the Laser defendants (1) had probable cause to assert the special defenses and to file the counterclaim in the collection action, and (2) relied in good faith on the advice of the Sconyers defendants in asserting the special defenses and filing the counterclaim. We agree.[9]

The following additional facts and procedural history are relevant to our resolution of this claim. In their memorandum of law in support of their motion for summary judgment, the Laser defendants claimed that they asserted the special defenses and filed the counterclaim with probable cause, without malice, and in reliance on the advice of the Sconyers defendants. As to probable cause, the Laser defendants contended that Laser asked the plaintiff during the *Frey* action for advice about duty to defend coverage in connection with the *Frey* action, but the plaintiff failed to determine whether the Laser defendants had such coverage and

[9] The plaintiff also claims that the exhibits submitted by the Laser defendants in support of their motion for summary judgment were inadmissible because, inter alia, none of the exhibits complied with Practice Book § 17-46. In his principal appellate brief, the plaintiff provides only a cursory analysis of this claim, and, therefore, we decline to review it. See *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 31, 223 A.3d 75 (2019) ("We 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. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.)).

dissuaded Laser from demanding a defense from NGM. The Laser defendants further asserted that Sconyers advised them that the plaintiff had breached an obligation that he owed to them to determine whether they had duty to defend coverage available to them with respect to the *Frey* action and, if so, to demand a defense. As to their advice of counsel defense, the Laser defendants claimed that Laser provided to Sconyers all relevant documents and facts regarding the *Frey* action and the collection action, and that, on the basis thereof, Sconyers recommended that the Laser defendants assert the special defenses and file the counterclaim. The Laser defendants further contended that they relied in good faith on Sconyers' advice. The Laser defendants submitted several exhibits in support of their motion for summary judgment, including personal affidavits of Laser and Sconyers.

In opposing the Laser defendants' motion for summary judgment, the plaintiff argued, inter alia, that there were genuine issues of material fact regarding whether the Laser defendants (1) had probable cause to assert the special defenses and to file the counterclaim and (2) relied in good faith on the advice of the Sconyers defendants. Specifically, the plaintiff argued that there was evidence in the record demonstrating that, at the time that Laser retained the plaintiff to represent the Laser defendants in the *Frey* action, Laser knew that there was duty to defend coverage available to the Laser defendants in the *Frey* action, but, for financial reasons, he chose to retain the plaintiff as counsel rather than demand a defense from NGM. The plaintiff asserted that Laser's knowledge of the Laser defendants' duty to defend coverage deprived the Laser defendants of probable cause to assert the special defenses and to file the counterclaim, which were predicated on the plaintiff's failure to advise Laser about insurance coverage. Additionally, the plaintiff argued that there was evidence in the record establishing that Laser provided

Sconyers with false or incomplete information, and, therefore, the Laser defendants could not have relied in good faith on the advice of the Sconyers defendants. The plaintiff submitted several exhibits in support of his memorandum of law in opposition to the Laser defendants' motion for summary judgment, including a personal affidavit and copies of correspondence exchanged between the plaintiff and Laser.

In granting the Laser defendants' motion for summary judgment, the trial court concluded that, although not yet recognized in Connecticut, an attorney's obligation to his or her client "arguably" includes the duty to advise the client "on the most affordable course of action including an investigation of potential insurance coverage," such that the Laser defendants' belief that the plaintiff had a duty to advise Laser as to insurance coverage during the *Frey* action was reasonable. The court further concluded that, on the basis of evidence submitted by the Laser defendants indicating that Laser had told Sconyers that the plaintiff did not advise him to seek a determination regarding duty to defend coverage but rather dissuaded him from pursuing such a determination, there was no genuine issue of material fact that the defendants had probable cause to file the counterclaim sounding in legal malpractice in the collection action. The court proceeded to reject several of the plaintiff's arguments directed to the Sconyers defendants, and determined that the plaintiff's personal affidavit raised no genuine issue of material fact as to whether probable cause existed to file the counterclaim.

Having concluded that the Laser defendants had probable cause to file the counterclaim, the court concluded that they likewise had probable cause to assert the special defenses. Specifically, the court stated that if the plaintiff had advised the Laser defendants regarding insurance coverage during the *Frey* action, then NGM would have assigned counsel to defend them at

the outset of the *Frey* action at no cost, and, thus, they never would have incurred the plaintiff's legal fees.

Additionally, the court granted the Laser defendants' motion for summary judgment on the separate ground that there was no genuine issue of material fact that the Laser defendants relied in good faith on the advice of the Sconyers defendants in asserting the special defenses and filing the counterclaim—advice of counsel being an absolute defense to the plaintiff's vexatious litigation claim.

On appeal, the plaintiff does not assert that a legal malpractice claim predicated on an attorney's failure to advise his or her client regarding insurance coverage is not viable, nor does he dispute that he did not advise Laser about insurance coverage. Instead, the plaintiff maintains that he had no reason to counsel Laser about insurance matters because, as evidence in the record indicated, Laser, when he retained the plaintiff in the *Frey* action in June, 2012, knew that NGM would provide a defense to the Laser defendants in the *Frey* action, but, for financial reasons, Laser chose to retain the plaintiff rather than submit to NGM a demand for a defense.[10] In essence, the plaintiff contends that there was a genuine issue of material fact regarding whether the Laser defendants had probable cause to assert the special defenses and to file the counterclaim, both being predicated on the plaintiff's failure to advise Laser about insurance coverage. Additionally, the plaintiff argues that there was a genuine issue of material fact as to whether the Laser defendants relied in good faith on the advice of the Sconyers defendants because there

[10] The plaintiff also asserts that Laser did not retain him in the *Frey* action to provide advice about insurance matters. Because we conclude that the trial court improperly granted the Laser defendants' motion for summary judgment when there existed a genuine issue of material fact concerning Laser's knowledge regarding the Laser defendants' entitlement to insurance coverage, we need not consider this issue further.

was evidence in the record indicating that Laser did not provide Sconyers with all material facts within his knowledge. We address each claim in turn.

A

We first consider the plaintiff's claim that there was a factual dispute regarding Laser's knowledge, at the time that he retained the plaintiff in the *Frey* action in June, 2012, of duty to defend coverage available to the Laser defendants, and, therefore, a genuine issue of material fact existed as to whether the Laser defendants had probable cause to assert the special defenses and to file the counterclaim in the collection action. We agree.

As a preliminary matter, we observe that the factual issue of whether Laser, in June, 2012, knew that the Laser defendants were entitled to a defense provided by NGM was material to the legal question of whether the Laser defendants had probable cause to assert the special defenses and to file the counterclaim. See *Rutter* v. *Janis*, supra, 334 Conn. 729 ("[a] material fact . . . [is] a fact which will make a difference in the result of the case" (internal quotation marks omitted)). The legal theory underlying the special defenses and the counterclaim was that the plaintiff, when retained by Laser in the *Frey* action, had a duty to determine whether the Laser defendants had insurance coverage for the defense of the *Frey* action and, if so, to advise Laser to seek a formal determination regarding said coverage. The Laser defendants contended that, as a result of the plaintiff's breach of that duty, Laser did not discover the Laser defendants' entitlement to a defense by NGM until nearly one year following their involvement in the *Frey* action, during which time they incurred legal fees owed to the plaintiff that never would have accrued had they been provided with a defense by NGM at the outset of the *Frey* action. Implicit in the Laser defendants' claim was that Laser, when he hired the plaintiff in the *Frey* action, was unaware that NGM would have

provided a defense to the Laser defendants in the *Frey* action immediately upon the submission of a proper demand. Consequently, if Laser knew at that time that the Laser defendants were entitled to such a defense, then the Laser defendants would not have had a reasonable, good faith basis on which to assert the special defenses and to file the counterclaim predicated on the plaintiff's failure to determine whether Laser had insurance coverage and to advise Laser thereabout. To summarize, if a genuine issue of material fact existed as to Laser's knowledge, at the time that he had hired the plaintiff in the *Frey* action, regarding the Laser defendants' entitlement to a defense by NGM in connection with the *Frey* action, then the Laser defendants were not entitled to summary judgment as to the issue of probable cause.

The Laser defendants submitted a number of exhibits indicating that Laser was not aware in June, 2012, when he retained the plaintiff in the *Frey* action, that insurance coverage entitling the Laser defendants to a defense in the *Frey* action was available. In his personal affidavit, Laser averred that he submitted a demand for a defense to NGM in connection with the *Frey* action only after learning from opposing counsel during his deposition in the *Frey* action, conducted on March 5, 2013, that NGM was likely obligated to provide the Laser defendants with a defense. In a letter addressed to the plaintiff dated August 20, 2013, Laser similarly represented that he was prompted to submit a demand for a defense to NGM once opposing counsel in the *Frey* action had advised him that NGM was obligated to provide the Laser defendants with a defense in the *Frey* action. Additionally, in an e-mail from Laser to the plaintiff dated October 15, 2013, Laser wrote that, during his first meeting with the plaintiff in the course of the *Frey* action, Laser told the plaintiff that Laser's wife had been informed by their insurance agency, Curtis Insurance Agency, Inc. (Curtis), that the Laser defendants were not entitled to insurance coverage with

respect to the *Frey* action. Collectively, this evidence suggests that, at the time that Laser hired the plaintiff in the *Frey* action, Laser was under the impression that duty to defend coverage in connection with the *Frey* action was not available to the Laser defendants and that he first became aware of such coverage in March, 2013.

In contrast, the plaintiff submitted several exhibits indicating that Laser was aware in June, 2012, that the Laser defendants had duty to defend coverage available to them in connection with the *Frey* action. In his personal affidavit, the plaintiff averred that Laser, when Laser retained him in the *Frey* action, told him that Curtis informed Laser that insurance coverage would be available to the Laser defendants with respect to the *Frey* matter, but Laser did not wish to submit a claim for such coverage because, inter alia, he did not want his insurance premiums to increase. Additionally, Paul Koneazny, an employee of Curtis, during his deposition in the collection matter, testified in relevant part that (1) sometime prior to the Laser defendants' involvement in the *Frey* action, Laser's wife told Curtis that there was a possibility that a legal claim would be made against the Laser defendants, (2) Curtis instructed Laser's wife to notify it promptly if any such claim was filed, (3) Curtis never advised Laser or his wife that they were not entitled to insurance coverage with respect to the *Frey* action, and (4) Curtis first learned of the *Frey* action in March, 2013. Finally, in an e-mail from Laser to another attorney involved in the *Frey* action, on which the plaintiff and Attorney Barrett were copied, dated April 1, 2013, Laser wrote in relevant part that "when [Laser] initially spoke with [the plaintiff] about the [*Frey* action] [Laser] was under the impression that due to the overreaching and frivolous nature of the lawsuit it would be thrown out with minimum cost and paperwork. [The Laser defendants] did not anticipate the case would become as complicated and expensive

as it has become *thus the recent involvement of the insurance company*." (Emphasis added.) Collectively, this evidence suggests that Laser knew, in June, 2012, that the Laser defendants were entitled to a defense in connection with the *Frey* action, but that he chose to forgo submitting a demand for a defense to NGM until the complexity and cost thereof became too great.

In light of the foregoing, we agree with the plaintiff that there existed a genuine issue of material fact regarding Laser's knowledge, at the time that he retained the plaintiff in the *Frey* action, of the Laser defendants' entitlement to insurance coverage for the defense of the *Frey* action. Accordingly, the trial court improperly granted the Laser defendants' motion for summary judgment on the ground that the Laser defendants had probable cause to assert the special defenses and to file the counterclaim in the collection action.

B

We next address the plaintiff's claim that there was a genuine issue of material fact as to whether the Laser defendants relied in good faith on the advice of the Sconyers defendants in asserting the special defenses and filing the counterclaim in the collection action. Specifically, the plaintiff asserts that there was a factual dispute as to whether Laser conveyed to Sconyers all material facts within his knowledge. We agree.

"Advice of counsel is a complete defense to an action of . . . [malicious prosecution or] vexatious suit when it is shown that the [client] . . . instituted his [or her] civil action relying in good faith on such advice, given after a full and fair statement of all facts within his [or her] knowledge, or which he [or she] was charged with knowing. . . .

"In determining whether a [client] gave a full and fair statement of the facts within his or her knowledge to counsel, reliance on whether the omitted information

would have had any impact on counsel's decision to bring the allegedly vexatious action . . . is irrelevant . . . because, as a matter of law, showing an impact on an attorney's ultimate course of action is not an element of the defense of reliance on counsel. . . . The ultimate issue is whether the [client] failed to provide his or her counsel with a fact within his or her knowledge that was material to the action. . . . In other words, a client should not be permitted to rely upon the defense of advice of counsel if the client did not disclose all of the material facts related to a potential claim, because the lawyer cannot render full and accurate legal advice regarding whether there is a good faith basis to bring the claim in the absence of knowledge of all material facts. In such instances, a client's reliance on the advice of counsel is unreasonable regardless of whether the material facts would have altered counsel's assessment of the validity of the claim." (Citations omitted; internal quotation marks omitted.) *Rogan* v. *Rungee*, 165 Conn. App. 209, 227–29, 140 A.3d 979 (2016).

Our resolution of this claim is guided by our conclusion in part I A of this opinion that a genuine issue of material fact existed as to whether Laser, at the time that he hired the plaintiff in the *Frey* action, had knowledge of the availability of duty to defend coverage to the Laser defendants. The evidence submitted with regard to the Laser defendants' motion for summary judgment, including the respective personal affidavits of Laser and Sconyers, in addition to correspondence exchanged between Laser and the plaintiff that Sconyers reviewed, demonstrates that Laser conveyed to Sconyers that Laser, at the time that he retained the plaintiff in the *Frey* action, was unaware that the Laser defendants were entitled to a defense provided by NGM in the *Frey* action. If the information provided from Laser to Sconyers was inaccurate or incomplete, then Laser could not have relied in good faith on Sconyers'

advice. Thus, because there existed a genuine issue of material fact as to Laser's knowledge regarding insurance coverage in the defense of the *Frey* action, a genuine issue of material fact also existed as to whether Laser provided Sconyers with all of the material facts that he knew. Accordingly, the trial court improperly granted the Laser defendants' motion for summary judgment on the ground that the Laser defendants relied in good faith on the advice of the Sconyers defendants, given after a full and fair statement of all facts within Laser's knowledge, in asserting the special defenses and filing the counterclaim.[11]

II

We next address the plaintiff's claim that the trial court improperly granted the Sconyers defendants' motion for summary judgment. For the reasons that follow, we disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. In their memorandum of law in support of their motion for summary judgment, the Sconyers defendants asserted that a reasonable attorney familiar with Connecticut law would have believed that probable cause existed in the collection action to assert the special defenses

[11] In their appellate brief, the Laser defendants claim for the first time that the granting of their motion for summary judgment may be affirmed on the alternative ground that the plaintiff's vexatious litigation claim is untenable because the collection action ended by way of a settlement, which, according to the Laser defendants, did not constitute termination of the action in the plaintiff's favor. The Laser defendants did not present this claim to the trial court or, in accordance with Practice Book § 63-4 (a) (1) (A), raise this claim as an alternative ground for affirmance in their preliminary statement of the issues. As a result, we decline to consider it. See *Red Buff Rita, Inc.* v. *Moutinho*, 151 Conn. App. 549, 557, 96 A.3d 581 (2014) (declining to consider appellee's alternative ground for affirmance raised for first time on appeal and without compliance with § 63-4 (a) (1) (A), and observing that "[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . This rule applies equally to alternat[ive] grounds for affirmance." (Internal quotation marks omitted.)).

and to file the counterclaim. Underlying their claim was Sconyers' belief that, on being retained in the *Frey* action, the plaintiff had a duty to advise Laser to make a formal determination as to whether there was insurance coverage available to provide the Laser defendants with a defense in the *Frey* action.

With respect to the special defenses in particular, the Sconyers defendants contended that Sconyers investigated whether the legal fees that the plaintiff charged the Laser defendants with regard to the *Frey* action corresponded to the services that the plaintiff had provided to them, and, on the basis of his forty years of experience as a practicing attorney, Sconyers determined that the plaintiff's services did not correspond to the fees and that the fees were unwarranted and excessive. Additionally, Sconyers determined that, had the plaintiff advised Laser to seek a formal determination regarding duty to defend coverage, NGM would have defended the Laser defendants at the outset of the *Frey* action, which would have eliminated the need for the Laser defendants to hire the plaintiff and incur his legal fees. As to the counterclaim specifically, the Sconyers defendants asserted that, on the basis of the information known to Sconyers, including that the plaintiff never investigated whether Laser had liability insurance coverage, Sconyers believed that the plaintiff had committed legal malpractice. The Sconyers defendants submitted several exhibits in support of their motion for summary judgment, including a personal affidavit of Sconyers, appended to which were copies of correspondence exchanged between Laser and the plaintiff, and a personal affidavit of Laser.

In opposing the Sconyers defendants' motion for summary judgment, the plaintiff argued, inter alia, that the Sconyers defendants lacked probable cause to assert the special defenses and to file the counterclaim because Sconyers (1) lacked any experience in legal malpractice

claims, (2) failed to perform an adequate investigation before pursuing the special defenses and counterclaim, and (3) lacked a good faith belief in the facts alleged in support of the special defenses and the counterclaim. In support of his memorandum of law in opposition to the Sconyers defendants' motion for summary judgment, the plaintiff attached several exhibits, including a personal affidavit and copies of additional correspondence exchanged between the plaintiff and Laser.

In granting the Sconyers defendants' motion for summary judgment, the trial court concluded that Sconyers was free to rely on the information provided to him by Laser and that a reasonable attorney familiar with Connecticut law could have believed that the plaintiff had violated a duty to the Laser defendants by failing to advise Laser as to insurance matters during the *Frey* action. The court proceeded to reject the plaintiff's arguments, determining, inter alia, that (1) Sconyers' inexperience in the area of legal malpractice was immaterial as to whether he had probable cause to pursue the legal malpractice claim, (2) Sconyers was entitled to rely on the information provided to him by Laser, and, thus, the plaintiff's argument as to Sconyers' purported lack of proper investigation was not viable, and (3) the plaintiff's affidavit failed to address the duty of care issue raised by the Sconyers defendants, and, therefore, it failed to raise a genuine issue of material fact as to whether probable cause existed to file the counterclaim.

Having concluded that the Sconyers defendants had probable cause to file the counterclaim in the collection action, the court concluded that they equally had probable cause to assert the special defenses. Specifically, the court stated that if the plaintiff had advised the Laser defendants regarding insurance coverage during the *Frey* action, then NGM would have assigned counsel immediately to them at no cost, and, thus, they never

would have incurred the legal fees that they owed to the plaintiff.

On appeal, the plaintiff claims that the Sconyers defendants lacked probable cause because Sconyers failed to perform an adequate investigation prior to asserting the special defenses and filing the counterclaim. More specifically, the plaintiff contends that Sconyers, inter alia, failed to consult an expert witness, interview Laser's insurance agent, or review certain documentation predating the collection action that purportedly was available to him. Had Sconyers performed a proper investigation, the plaintiff posits, he would have discovered that Laser did not provide him with accurate information[12] and that there was no reasonable, good faith basis on which to pursue the special defenses and the counterclaim. Additionally, the plaintiff contends that Sconyers' lack of experience in litigating legal malpractice cases further deprived him of probable cause.[13] These claims are unavailing.[14]

[12] As we explained in part I of this opinion, the plaintiff does not claim on appeal that a legal malpractice claim grounded in an attorney's failure to advise his or her client regarding insurance issues is not viable, nor does he dispute that he did not advise Laser regarding insurance coverage; rather, his position is that Laser, when he retained the plaintiff in the *Frey* action in June, 2012, knew that the Laser defendants were entitled to insurance coverage for a defense in the *Frey* action and that any contrary representations made by Laser were false.

[13] The plaintiff also claims that the exhibits submitted by the Sconyers defendants in support of their motion for summary judgment were inadmissible because, inter alia, none of the exhibits complied with Practice Book § 17-46. Like his identical claim directed to the granting of the Laser defendants' motion for summary judgment, the plaintiff has failed to adequately brief this claim, and, therefore, we decline to review it. See footnote 9 of this opinion.

[14] Throughout his principal appellate brief, the plaintiff thinly asserts that Sconyers knew that the information provided to him by Laser was false. To the extent that the plaintiff is claiming on appeal that the Sconyers defendants lacked probable cause on the additional ground that Sconyers filed the counterclaim and special defenses with knowledge that the facts underlying them were false, the plaintiff has failed to provide a meaningful analysis of this claim in his appellate briefs, including a recitation of the specific evidence in the record supporting it, and, therefore, we decline to review it. See *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 31, 223

Turning first to the plaintiff's assertion that Sconyers failed to perform an adequate investigation before asserting the special defenses and filing the counterclaim, we are not persuaded. In his personal affidavit, Sconyers averred that he relied on the statements and documents provided to him by Laser, his consultation with another attorney, and his own experience as a practicing attorney in Connecticut for thirty-six years. In addition, during his depositions in the present case, Sconyers testified that he also interviewed Laser's wife, consulted additional attorneys, and performed legal research. The information received by Sconyers indicated that (1) Laser did not know of the Laser defendants' entitlement to insurance coverage that provided a defense in the *Frey* action when he hired the plaintiff in the *Frey* action, and (2) Laser sought advice from the plaintiff about insurance coverage but the plaintiff dissuaded Laser from pursuing insurance coverage and failed to further investigate the insurance coverage issue, which provided Sconyers with a reasonable basis on which to assert the special defenses and to file the counterclaim. The uncontroverted evidence reflects that Sconyers prepared sufficiently prior to asserting the special defenses and filing the counterclaim, and he was not obligated to take every imaginable step to confirm the veracity of the information that he obtained.[15] See

A.3d 75 (2019) ("We 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. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.)). Even assuming that the plaintiff properly raised this claim on appeal, the evidentiary record with respect to the Sconyers defendants' motion for summary judgment reflects no indication that Sconyers had reason to believe that the information provided to him by Laser was false.

[15] Indeed, "civil proceedings sometimes must be brought before significant investigation of the facts is possible; the means of conducting such an investigation may become available only with commencement of a lawsuit." 4 Restatement (Third), Torts, Liability for Economic Harm § 25, comment (a) (2019).

52 Am. Jur. 2d 250, Malicious Prosecution § 73 (2019) (with respect to malicious prosecution action,[16] "[a] person is not required to verify the correctness of all the information supporting his or her action to be protected from a malicious prosecution action, but if a reasonable person would investigate further before beginning the prosecution, the defendant in a malicious prosecution action will be liable for his or her failure to do so" (footnote omitted)). In addition, without any indication that Sconyers had reason to believe that Laser had given him inaccurate information; see footnote 14 of this opinion; Sconyers was entitled to rely on the information provided to him by Laser. See 4 Restatement (Third), Torts, Liability for Economic Harm § 24, comment (f) (2019) ("an attorney is generally entitled to rely on the factual claims made by a client so long as they are not patently unreasonable or known to be false"). Accordingly, the plaintiff's claim fails.

Additionally, the plaintiff's contention that Sconyers lacked probable cause because he was not an experienced legal malpractice litigator is unavailing. Although Sconyers admitted that he had never tried a legal malpractice case prior to being retained by the Laser defendants in the collection action, the uncontroverted evidence in the record demonstrates that Sconyers practiced law for forty years, thirty-six years of which were

[16] Our Supreme Court has explained that "the elements of malicious prosecution and common-law vexatious litigation essentially are identical. . . . Although the required showing for both torts essentially is the same, there is a slight difference in that a plaintiff in a malicious prosecution action must show initiation of the proceedings by the defendant. In our cases discussing vexatious litigation claims, we have overlooked this difference because, ordinarily, it is not significant for purposes of considering a claim for vexatious litigation." (Citations omitted.) *Bhatia* v. *Debek*, 287 Conn. 397, 405, 948 A.2d 1009 (2008); see also *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 94 ("[a] vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint" (internal quotation marks omitted)).

focused on his practice in Connecticut, and that he consulted several attorneys and performed legal research prior to asserting the special defenses and filing the counterclaim sounding in legal malpractice. The probable cause standard requires consideration of whether "a reasonable attorney familiar with Connecticut law would believe he or she had probable cause . . . ." (Internal quotation marks omitted.) *Byrne* v. *Burke*, supra, 112 Conn. App. 275. An attorney is not required to have extensive experience in the area of law at issue in order to meet this standard. Thus, we reject the plaintiff's claim.

In sum, with respect to the trial court's granting of the Laser defendants' motion for summary judgment, we agree with the plaintiff that there existed genuine issues of material fact as to whether the Laser defendants (1) had probable cause to assert the special defenses and to file the counterclaim and (2) relied in good faith on the advice of the Sconyers defendants, and, therefore, we conclude that the court improperly granted the Laser defendants' motion for summary judgment. With respect to the court's granting of the Sconyers defendants' motion for summary judgment, we reject the plaintiff's claims, and, therefore, we conclude that the court did not err in granting the Sconyers defendants' motion for summary judgment.

The judgment is reversed in part and the case is remanded with direction to deny the motion for summary judgment filed by Frederick J. Laser and Laser Building Company on July 5, 2017, and for further proceedings in accordance with law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LEE WINAKOR *v.* VINCENT SAVALLE (AC 42306)

Prescott, Moll and Harper, Js.

Syllabus

The plaintiff, who had hired the defendant to perform certain home construction site work in conjunction with the construction of a new home, sought to recover damages for breach of contract and for violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), alleging that the work the defendant performed was in violation of the Home Improvement Act (§ 20-418 et seq.). The trial court rendered judgment in part in favor of the plaintiff and awarded the plaintiff compensatory damages and attorney's fees. The trial court determined that the defendant had breached the contract by failing to complete the project on time and had used improper techniques and methods to fulfill the contract. On the defendant's appeal to this court, *held*:

1. The trial court improperly determined that the defendant was liable under CUTPA on the basis of its finding that the defendant violated the Home Improvement Act, as the work performed by the defendant was part of new home construction and, thus, fell within the statutory exception contained in § 20-419 (4), and as such, the defendant's services did not constitute home improvement and there existed no home improvement contract that the defendant violated under the act: contrary to the plaintiff's claim, interpreting the definition of home improvement to include work performed on land regardless of whether there is an existing building would render the clause providing for an exception to new home construction meaningless; furthermore, as the defendant did not violate CUTPA and without any contractual provision on which properly to base an award of attorney's fees, there was no basis for the plaintiff's recovery of any attorney's fees and costs in connection with the alleged CUTPA violation.
2. The defendant could not prevail on his claim that the trial court improperly rendered judgment in favor of the plaintiff on his breach of contract claim because the trial court's findings were clearly erroneous, the plaintiff never having proved beyond reasonable speculation that the defendant's conduct caused damage to the plaintiff's property; the record provided sufficient evidence to support the trial court's finding of a breach of contract claim, the trial court was free to credit the testimony of the plaintiff's witnesses in concluding that the defendant's conduct caused the damages suffered by the plaintiff, and the defendant's argument that there were other possible causes for the plaintiff's damages was inconsistent with the standard by this court must review the trial court's findings, which is not whether there were other conceivable

causes but, rather, whether there was evidence to allow the court to find that the defendant's conduct was the cause.

Argued March 3—officially released July 7, 2020

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Frechette, J.*; judgment in part for the plaintiff, from which the defendant appealed to this court; thereafter, the trial court granted the plaintiff's motion for attorney's fees, and the defendant amended his appeal. *Reversed in part; judgment directed.*

Patrick J. Markey, for the appellant (defendant).

Paul M. Geraghty, with whom was *Jonathan Friedler*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The principal issue in this appeal is whether services provided by a contractor as part of the construction of a new residence fell outside of the statutory purview of the Home Improvement Act (Improvement Act), General Statutes § 20-418 et seq. The defendant, Vincent Savalle, appeals from the judgment of the trial court rendered in favor of the plaintiff, Lee Winakor, in which the court concluded that the defendant was liable to the plaintiff in the amount of $100,173.32 for breach of contract, violation of the Improvement Act, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b et seq. On appeal, the defendant claims, among other things, that the trial court improperly rendered judgment in favor the plaintiff on (1) the CUTPA count because it predicated CUTPA liability on the erroneous determination that the defendant had violated the Improvement Act, and (2) the breach of contract count because there was insufficient evidence to estab-

lish causation, which is necessary to prove damages. The defendant also claims that the trial court abused its discretion in awarding attorney's fees to the plaintiff. We agree with the defendant on his claim regarding the improper imposition of CUTPA liability and the award of attorney's fees but disagree with him on his claim that the court improperly found for the plaintiff on the count alleging a breach of contract. Accordingly, we affirm in part and reverse in part the judgment.

The following facts, as found by the court in its memorandum of decision or as undisputed in the record, and procedural history are relevant to the defendant's claims. In 2005, the plaintiff purchased real property located at 217 Legend Wood Road in North Stonington. In 2012, he entered into a contract with Golden Hammer Builders, LLC (Golden Hammer), through its principal, Brian Mawdsley, to construct a new single-family home on the property (GH contract). The GH contract contemplated site work and construction of the home for $425,300 and permitted the plaintiff to find another contractor to perform the site work and to subtract the cost of such work, $55,000, from the total cost.[1]

In mid-2012, the plaintiff met with the defendant to consider hiring him to perform the site work. After meeting with the plaintiff to discuss the scope of the site work, the defendant submitted a bid for $50,000, which was $5000 less than the $55,000 it would have cost the plaintiff under the GH contract. As a result, the plaintiff hired the defendant to perform the site work. The plaintiff drafted a contract pursuant to which the defendant would purchase materials and provide a variety of services that originally were included in the

[1] The GH contract was organized into the following categories: plans and permits, excavation, foundation, exterior, windows and doors, garage doors, insulation, electrical, plumbing, heating/AC, drywall, roofing, cabinets and vanities, flooring, interior trim and doors, stairs, painting, other, landscaping, and interior cleaning.

GH contract.[2] The parties subsequently signed a written contract on September 1, 2012, in which the plaintiff agreed to pay the contract price of $50,000 for the site work, and the defendant agreed to complete the contract within one year of the start date. Subsequently, Mawdsley applied, on the plaintiff's behalf, for a new home building permit on September 17, 2012, under his new home construction contractor's license. The building permit was issued on January 28, 2013.

The defendant began working at the site in September, 2012. The trial court found that "[h]e hammered out a ledge for the foundation, installed a septic tank, constructed retaining walls, began site work, installed a propane tank and gas lines (which he later agreed to do), installed the well electrical line, and partially finished the driveway." In December, 2013, Golden Hammer finished building the house, and the plaintiff received a partial certificate of occupancy. In January, 2014, a full certificate of occupancy was issued for the house.

At that time, however, the defendant had not yet completed his work in accordance with his contract with the plaintiff. The Planning and Zoning Commission of the Town of North Stonington (town) issued a letter to the plaintiff indicating that the house substantially conformed to its zoning regulations and would be approved for zoning compliance on the conditions that, among other things, "the final grading, landscaping, and soil stabilization be completed within [six] months" and the driveway be widened.

[2] The contract required the defendant to "purchase and supply all supplies needed, clear the lot, remove stumps, dig the foundation hole and well trenches, purchase and install a septic tank, build a wall along the edge of the lakeside, build two retaining walls, build two driveways, reclaim asphalt for the driveway, grade the driveway at 8 percent, install footing drains and backfill foundation, finish the grade, seed the lawn, and conduct any blasting."

On January 18, 2014, the defendant entered into a second contract with the plaintiff. That agreement required the defendant to complete the work that was set forth in the first contract by April 1, 2014, for an additional $10,000. At this point, the plaintiff already had paid the defendant $53,000.

Over time, it became apparent that there were problems associated with the quality of the defendant's work.[3] Due to the plaintiff's dissatisfaction with the defendant's workmanship and the defendant's failure to complete the project according to schedule, the plaintiff

[3] In its memorandum of decision, the trial court listed numerous deficiencies in the defendant's performance. "First, the defendant did not properly backfill the foundation, using large rocks and boulders instead of dirt to support the foundation. . . . Additionally, the footing drains for the foundation were improperly installed, causing flooding in the basement of the house.

"Second, the defendant improperly installed the septic system because it was backfilled with rocks instead of sand and too close to the surface, making it more likely it could be crushed. That is exactly what happened in 2014, when the defendant crushed the top of the tank, requiring another tank to be installed in April, 2014. This tank too was deficient and required replacing because the line running from it to the house had a break in it. . . . The defendant admitted in his posttrial brief that he crushed the septic tank.

"Third, the defendant improperly constructed the retaining walls in the front and back of the house because they leaned, contained gaps, and washed out due to improper backfilling.

"Fourth, the defendant improperly installed the patio. . . . [H]is installation used rocks instead of sand as backfill, causing the patio to settle improperly.

* * *

"Sixth, the defendant improperly installed the propane tank. . . . [He] used rocks rather than sand as backfill for the tank and pipe, causing the propane to leak from the pipe and damaging the tank. After inspection, the entire tank and pipe were replaced.

"Seventh, the defendant improperly installed the well electrical line, using rocks instead of sand as backfill. Consequently, the electric line failed and needed replacement.

"Eighth, the defendant did not properly reclaim or grade the driveway. The driveway was at a grade higher than 8 percent, causing the plaintiff to regrade it. Further, the lower half of the driveway was not reclaimed with asphalt because it was left as dirt." (Footnote omitted.)

terminated his relationship with the defendant in April, 2014. Subsequently, the plaintiff hired another contractor, Charles Lindo, to remedy the flaws in the work that the defendant had completed and to finish the work that the defendant had failed to complete. Lindo ultimately completed the project at additional cost to the plaintiff. In October, 2014, the town notified the plaintiff that his new residence fully complied with its zoning regulations.

On May 28, 2015, the plaintiff commenced this action against the defendant. The operative amended complaint asserted five separate counts: breach of contract (count one); unjust enrichment (count two); violations of the New Home Construction Contractors Act (New Home Act), General Statutes § 20-417a et seq. (count three);[4] (4) violations of the Improvement Act (count four); and violations of CUTPA (count five). On August 12, 2015, the defendant filed his answer and a counterclaim, in which he alleged that "[t]he plaintiff is indebted to the defendant in the amount of $28,000 for the services he performed and the materials he sup-

[4] We note the following procedural posture regarding count three of the plaintiff's complaint. As written, the count alleged: "The defendant's conduct is in violation of [§] 20-417a [et seq]." The court, however, never substantively addressed the New Home Act, instead, seeming to treat count three as alleging a violation of the Improvement Act, although the plaintiff had expressly alleged an Improvement Act violation in count four. This is clearly evidenced by the court's memorandum of decision, wherein the court grouped the two counts together in its analysis of the Improvement Act, stating: "The plaintiff's third and fourth counts allege violations of the [Improvement Act] . . . ." After its analysis, the court concluded that the defendant violated the Improvement Act and stated: "The court finds for the plaintiff on counts three and four of his complaint."

The plaintiff has failed to challenge the court's decision to treat count three as pertaining to the Improvement Act rather than the New Home Act. The plaintiff's motion for reconsideration filed with the trial court did not raise this issue. The plaintiff also failed to raise this issue on appeal pursuant to Practice Book § 63-4 (a) (1) (B). Accordingly, we conclude that the plaintiff has abandoned any claim that the court improperly failed to consider separately an alleged violation of the New Home Act.

plied." In response, the plaintiff filed his answer and a special defense asserting that the defendant is barred from recovering from the plaintiff due to his violation of the New Home Act.

The case was tried before the court, *Frechette*, *J.*, over nine days, beginning on March 6, 2018. Subsequently, the parties submitted posttrial briefs.

In a memorandum of decision issued on August 21, 2018, the court found that the defendant had breached his contract with the plaintiff by not completing the project on time and by "using improper techniques and methods to [perform] the contract . . . [causing] the plaintiff [to incur] additional expenses to repair and finish the work the defendant was contractually required to do." Having found a breach of an enforceable contract, the court concluded that the plaintiff was not entitled to recover for unjust enrichment. See *Gagne* v. *Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001) (lack of remedy under contract is precondition for recovery under unjust enrichment theory). The court further determined that the defendant violated the Improvement Act by failing to comply with certain statutory requirements regarding the form of the contract. Specifically, it found that the contract did not contain the name, address, and registration number of the contractor; did not include a notice of the homeowner's cancellation rights; did not disclose whether the defendant worked as a sole proprietor; and did not contain the entire agreement by not including, for example, provisions regarding the propane tank installation. Finally, the court concluded that, on the basis of the Improvement Act violations, the defendant committed a per se CUTPA violation. Accordingly, the court rendered judgment in favor of the plaintiff on counts one, three, four, and five of the complaint and awarded the plaintiff compensatory damages totaling $100,173.32. Subsequently, the defendant filed a motion to reargue, challenging, among other things, the court's findings regarding the applicability of the Improvement Act, the

existence of a contract, and the damages awarded to the plaintiff. The motion was denied, and the defendant's appeal followed.

After judgment was rendered, the plaintiff also filed a motion seeking an award of attorney's fees on the basis of the CUTPA violation. On August 19, 2019, the court held a hearing on the plaintiff's motion for attorney's fees. Thereafter, on September 4, 2019, the court issued an order awarding the plaintiff $126,126.91 in attorney's fees and $2412.05 in costs. The defendant amended his appeal to challenge the court's order regarding attorney's fees.

I

We first address the defendant's claim that the court improperly rendered judgment in favor of the plaintiff on the CUTPA count on the basis of its finding that the defendant violated the Improvement Act.[5] The defendant primarily asserts that the Improvement Act was

[5] We note that the defendant also claims that the trial court improperly rendered judgment in favor of the plaintiff on counts three and four of his complaint because the Improvement Act does not authorize him to bring a private cause of action. No appellate court in this state has directly decided whether the Improvement Act authorizes an independent, private cause of action. In *Hees* v. *Burke Construction*, 290 Conn. 1, 961 A.2d 373 (2009), however, our Supreme Court discussed the scope of General Statutes § 20-429 (a). After reviewing the relevant legislative history of the statute, the Supreme Court concluded that the statute provides a homeowner with a shield from liability sought by a contractor if the contractor failed to comply with the Improvement Act. Id., 12–13. Additionally, "our Superior Court [has] uniformly determined that . . . § 20-429 is a defense and cannot be used as an independent cause of action for a homeowner against a contractor." (Internal quotation marks omitted.) *Huzi* v. *Anglace*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-06-5002246-S (October 13, 2009).

Here, the trial court expressly stated in its memorandum of decision that "the [Improvement Act] may not be used by a homeowner offensively against a contractor except where the homeowner asserts an affirmative CUTPA claim against the contractor." This language suggests to us that the court understood that the defendant's violations of the Improvement Act were material only to the extent that they served as a predicate for the defendant's liability under the CUTPA claim but cannot serve as an independent basis

inapplicable in this case because the work that he performed constitutes new home construction, which is explicitly exempted by the Improvement Act, and, thus, could not support the trial court's imposition of CUTPA liability and its subsequent award of damages and attorney's fees, which flowed therefrom. We agree that the court improperly determined that there was CUTPA liability based on an underlying violation of the Improvement Act. Accordingly, we reverse the court's judgment on counts three, four, and five.

We begin by setting forth the standard of review applicable to this claim.

"CUTPA provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Citation omitted; internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 699, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011). Whether a defendant is subject to CUTPA and its applicability, however, are questions of law. Id., 700. "[If] a question of law is presented, review of the trial court's ruling is plenary, and this court must determine whether the trial court's conclusions are legally and logically correct, and whether they find support in the facts appearing in the record." (Internal quotation marks omitted.) Id., 701.

for the defendant's liability. In light of this conclusion, it is unclear why the court rendered judgment in favor of the plaintiff on counts three and four. In any event, because we conclude that the Improvement Act does not apply under the circumstances of this case and, thus, the court should not have rendered judgment in favor of the plaintiff on counts three, four, and five, we need not decide in this appeal whether the Improvement Act authorizes a freestanding private cause of action by a homeowner.

"Our courts have interpreted [General Statutes] § 42-110g (a) to allow recovery only when the party seeking to recover damages meets the following two requirements: First, he must establish that the conduct at issue constitutes an unfair or deceptive trade practice. . . . Second, he must present evidence providing the court with a basis for a reasonable estimate of the damages suffered. . . . Our Supreme Court has stated on several occasions that under the first requirement, the failure to comply with the . . . Improvement Act is a per se violation of CUTPA by virtue of General Statutes [§ 20-427 (c)], which provides that any violation of the . . . Improvement Act is deemed to be an unfair or deceptive trade practice." (Internal quotation marks omitted.) *Scrivani* v. *Vallombroso*, 99 Conn. App. 645, 651–52, 916 A.2d 827, cert. denied, 282 Conn. 904, 920 A.2d 309 (2007).

A

The defendant argues that the plaintiff failed to satisfy the first requirement of proving his CUTPA claim because he failed to establish that the defendant's conduct constitutes an unfair or deceptive trade practice. Specifically, he argues that the court's determination that he violated the Improvement Act—which served as the sole basis for establishing CUTPA liability—was legally flawed because the Improvement Act is not applicable under the facts of this case, as there was no "home improvement contract" between him and the plaintiff, as contemplated by General Statutes § 20-429. We agree.

Resolution of this claim necessarily involves interpretation of the Improvement Act. The applicability of a statute to a given situation is a matter of statutory construction. "Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, includ-

ing the question of whether the language does so apply. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes." (Footnote omitted; internal quotation marks omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 199, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016). "A fundamental tenet of statutory construction is that statutes are to be construed to give effect to the apparent intention of the lawmaking body. . . . Where the words of a statute are clear, the task of a reviewing court is merely to apply the directive of the legislature since where the wording is plain, courts will not speculate as to any supposed intention because the question before a court then is not what the legislature actually intended but what intention it expressed by the words that it used. . . . When two constructions [of a word] are possible, courts will adopt the one which makes the statute effective and workable . . . . [Further, a] statute should be construed so that no word, phrase or clause will be rendered meaningless." (Citations omitted; internal quotation marks omitted.) *Verrastro* v. *Sivertsen*, 188 Conn. 213, 220–21, 448 A.2d 1344 (1982).

The trial court found that the defendant violated the Improvement Act because he did not comply with contract requirements prescribed by § 20-429.[6] Significantly, however, § 20-429 by its express terms

[6] Specifically, the court found that the contract did not "contain the name and address of the contractor and the contractor's registration number, did not contain a notice of the owner's cancellation rights, and did not disclose whether the defendant worked as a sole proprietor, and did not contain the entire agreement" as required by § 20-429 (a) (1) (A).

applies only to "home improvement contracts." See General Statutes § 20-429 (a) (1) (A) ("[n]o *home improvement contract* shall be valid or enforceable against an owner unless" (emphasis added)). Section 20-419 (5) defines a home improvement contract as "an agreement between a contractor and an owner for the performance of a home improvement." The defendant argues that the work he performed did not constitute a "home improvement" for purposes of § 20-419 (4) but, rather, involved the construction of a new home, which is explicitly exempt from Improvement Act applicability.

Our starting point is the broad language of § 20-419 (4), which sets forth the type of work that constitutes a home improvement. It provides the following: " 'Home improvement' includes, but is not limited to, the repair, replacement, remodeling, alteration, conversion, modernization, improvement, rehabilitation or sandblasting of, or addition to any land or building or that portion thereof which is used or designed to be used as a private residence, dwelling place or residential rental property . . . . 'Home improvement' does not include: (A) The construction of a new home . . . ." Significantly, § 20-419 (4) expressly excludes new home construction as constituting home improvement.

The defendant argues, among other things, that his work for the plaintiff does not fall within any of the types of work included within the definition of home improvement and, in fact, falls within the explicit new home construction exemption. In particular, he contends that new home construction is not confined to the physical building itself but can apply to site work that accompanies the building of the new home. The plaintiff, on the other hand, argues that the defendant's work was "home improvement" under § 20-419 (4) because the statute's list of work that constitutes "home improvement" is not exhaustive and the land on which the defendant performed work was, at the very least,

"designed to be used as a private residence." Thus, the plaintiff contends that "the [Improvement Act], by its very words, contemplates improvement to land, regardless of whether or not there is a building thereupon." A critical determination for our analysis is whether the defendant's conduct falls into the new home construction exception, thereby rendering the Improvement Act inapplicable. If so, there is no further need to determine whether the conduct falls within the nonexhaustive list of work that does constitute home improvement.

Although new home construction is not defined within the Improvement Act, our Supreme Court previously has held that determining whether work constitutes new home construction is dependent on whether the particular work and the construction of the home "were so interrelated, temporally or otherwise, that the [work] constituted an integral part of the construction of a new home . . . ." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666, 678, 657 A.2d 1087 (1995) (*Rizzo*). In determining whether construction work is sufficiently connected to new home construction, this court has considered whether the services furthered the goal of completing the home and whether they were required to make the home habitable. See *Laser Contracting, LLC* v. *Torrance Family Ltd. Partnership*, 108 Conn. App. 222, 227–29, 947 A.2d 989 (2008).

Relying primarily on *Rizzo* and also citing to *Drain Doctor, Inc.* v. *Lyman*, 115 Conn. App. 457, 973 A.2d 672 (2009), the trial court determined that the defendant's work, which "related to the groundwork and landscaping of the house," was separate and distinct from the new home construction, thereby constituting home improvement and implicating the [Improvement Act]. The cases cited by the trial court, however, are factually distinguishable from the present case for the reasons that follow.

In *Drain Doctor, Inc.*, the defendant homeowner contracted with the plaintiff corporation to *fix* a broken sewer line at his home. *Drain Doctor, Inc.* v. *Lyman*, supra, 115 Conn. App. 459. The nature of the construction work involved the plaintiff's repair to an existing component of a home that had already been built. This is in direct contrast to the present matter where no septic system had existed at the time the defendant began performing his contractual duties.

In *Rizzo*, the defendants, while their new home was under construction, signed a contract with the plaintiff to install a swimming pool at the new home. *Rizzo*, supra, 232 Conn. 669. "Although the defendants anticipated that the pool would be installed prior to the completion date of their new home, the contract did not contain either a starting date or a completion date." Id. After a dispute regarding when to begin construction of the pool ensued, the plaintiff initiated an action for breach of contract. Id., 670. The trial court precluded the defendants from asserting a special defense under the Improvement Act, holding that the Improvement Act was inapplicable to the contract because the construction of the pool was part of the construction of a new home. Id., 672–73.

On appeal in *Rizzo*, our Supreme Court concluded that the pool installation was not part of the construction of the new home. In particular, it held that the "pool installation contract was completely separate and distinct from the defendants' home construction contract . . . . Moreover, the documents that comprise the contract for the construction of the swimming pool contain no indication that the pool was to have been installed at any particular stage of the new home construction, or even that it was to have been installed prior to the completion of the new home. In fact, the contract documents make no reference whatsoever to the construction of the defendants' new home." (Footnote omitted.) Id., 677–78. Concluding that the pool

installation and the new home construction were not "so interrelated, temporally or otherwise, that the installation of the pool constituted an integral part of [t]he construction of a new home under § 20-419 (4) (A)," the court held that the Improvement Act was applicable to parties' contract. (Internal quotation marks omitted.) Id., 678.

Key differences exist in the circumstances surrounding the contract between the parties in *Rizzo* and those in the present case. First, unlike the contract in *Rizzo*, which was entirely independent from the new home construction contract and did not make reference to the construction of the new residence, the contract between the plaintiff and the defendant in the present case required the defendant to perform various projects originally set forth in the GH contract and, thus, the contract was linked directly to the new home construction contract. Furthermore, unlike in *Rizzo*, the contract in the present case specified that the defendant was to complete his work within one year of its signing. The fact that the construction of the home was completed in December, 2013, a little more than one year from the date the defendant signed the contract, September, 2012, temporally links the defendant's work to the completion of the home and bolsters the argument that it was sufficiently " 'interrelated, temporally or otherwise' " with the home construction. See id., 678.

The most significant consideration, in our view—and the one that most starkly distinguishes *Rizzo* from the present matter—is the nature of the construction work itself, namely, its relationship to the habitability of the home. In *Rizzo*, the dispute centered around the installation of a pool. In addition to being physically detached from the home, the pool itself served only an ancillary function and was not significantly related to the habitability of the home. By contrast, the work the defendant contracted to perform in the present matter—in particular, hammering out the ledge so that the foundation

could be poured, digging the septic trench for the septic system, building retaining walls, and installing the septic tank, among others—directly contributed to the overall function and habitability of the home.

In *Laser Contracting, LLC* v. *Torrance Family Ltd. Partnership*, supra, 108 Conn. App. 227–29, this court directly addressed this consideration by holding that if the contracted services contribute to making a new home habitable that otherwise would be uninhabitable without such services, the work falls within the new home construction exception to the Improvement Act. The principal issue in *Laser Contracting, LLC*, was whether installing a modular home[7] at a new site and in making improvements to the newly installed home were services that fell within the ambit of the Improvement Act's new home construction exception, thus rendering the Improvement Act's requirements inapplicable to the contract in that case. Id., 227. In that case, this court agreed with the trial court's conclusion that "the modular house was uninhabitable and in need of electrical, plumbing and heating services. A new basement, septic system, well, garage and driveway were constructed where none previously had existed. In sum, the project involved the construction of a new home . . . ." Id., 227–28.

Furthermore, in *Laser Contracting, LLC*, this court held that even the specific "repairs, alterations and upgrades" to the modular home qualified as new home construction under the criteria employed by our Supreme Court in *Rizzo*. Id., 228–29. This court noted that in *Rizzo*, "the pool installation contract involved services that were physically separate and distinct from the new home construction, and performed by separate

[7] "[A] modular home is largely manufactured somewhere away from the eventual home site and brought to the local home site for installation." (Internal quotation marks omitted.) *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 162 Conn. App. 678, 681 n.4, 136 A.3d 24 (2016), aff'd, 326 Conn. 55, 161 A.3d 545 (2017).

unrelated contractors. . . . In addition, the pool contract contained no indication that the pool was to be installed at any particular stage of the new home construction or even that it was to have been installed prior to the completion of the new home. . . . By contrast, the record in [*Laser Contracting, LLC*] shows that the plaintiff's services . . . were not separate and distinct from the underlying project of reassembling and preparing a modular home for resale at a new location. . . . Unlike the situation in [*Rizzo*], then, not only was the contractor always the same entity, but the services it performed consistently served the parties' common goal of completing the house for resale." Id.

Having employed the analysis set forth in *Rizzo* and *Laser Contracting, LLC*, we conclude that the defendant's services for the plaintiff were part and parcel of the construction of the plaintiff's new home. Although there was more than one contractor involved in the construction work here, the defendant's work was originally contemplated as part of the GH contract to construct a new residence and took place simultaneously with Golden Hammer's construction of the new home. The tasks performed were sufficiently interrelated to the new home construction so as to fall within the new home construction exception of the Improvement Act.

The inapplicability of the Improvement Act to the parties' contract in this case is also supported by other definitions within that act, particularly the definition of "owner" as it applies to a home improvement contract. Section 20-419 (6) defines an owner as "a person who owns or resides in a private residence and includes any agent thereof, including, but not limited to, a condominium association. . . ." "'Private residence' " is defined as "a single family dwelling . . . ." General Statutes § 20-419 (8). These definitions, read in conjunction with the previously examined case law, bolster the conclusion that work performed in relation to the construction of a home not yet in existence constitutes new home

construction, which is exempt from the Improvement Act. Although § 20-419 (6) explicitly provides that an individual need not reside in the private residence in order to qualify as an owner, it is axiomatic that there needs to be a dwelling within which the individual *could* reside for it to be considered a private residence such that it invokes the plaintiff's status as an "owner."

The plaintiff's argument that "home improvement" includes work performed on the land, regardless of whether there is an existing building, would render the very clause providing for an exception to new home construction meaningless. Under the plaintiff's logic, all site work related to new home construction would always constitute "home improvement" and, thus, fall within the purview of the Improvement Act. It further would render the definition of "private residence" meaningless, if no dwelling needs to exist for work to constitute home improvement. If different interpretations of a statute are possible, we must adopt the one that creates workable results and does not render any words or phrases meaningless. See *Verrastro* v. *Sivertsen*, supra, 188 Conn. 220–21. In the present matter, the defendant's proposed interpretation of "home improvement" creates workable results and is supported by our case law; on the contrary, the plaintiff's proposed interpretation creates unworkable results.

In light of the foregoing, we conclude that the work performed by the defendant was a part of new home construction and, thus, falls within the statutory exception contained in § 20-419 (4). As such, the defendant's services were not "home improvements" pursuant to § 20-419 (5). Because no home improvement contract existed, the defendant could not have violated the Improvement Act.[8] Because the sole basis for the defendant's CUTPA liability was his alleged Improvement

[8] The defendant also argues, alternatively, that, even if the Improvement Act were applicable, he is exempt due to his status as a licensed septic system installer pursuant to General Statutes § 20-428 and as a subcontrac-

Act violation, we reverse the court's judgment finding the defendant liable for violating CUTPA.[9]

B

The defendant also claims that the court abused its discretion by awarding attorney's fees to the plaintiff. Specifically, he argues that no attorney's fees should have been awarded because (1) the contract he allegedly breached did not provide for the recovery of attorney's fees and (2) he did not violate CUTPA, which permits recovery of attorney's fees only on a finding that CUTPA liability exists.[10]

In contrast, the plaintiff argues that the court did not abuse its discretion in awarding attorney's fees not only on the CUTPA claim but also with respect to the breach of contract claim. He contends that because the two claims are inextricably related, it would have been impracticable to segregate and apportion the fees. We agree with the defendant that the court improperly awarded attorney's fees to the plaintiff.

Before addressing this claim, we first set forth the relevant legal principles concerning a court's award of attorney's fees for breach of contract and CUTPA claims. "[U]nder the American rule,[11] the plaintiff ordinarily cannot recover attorney's fees for breach of contract in the absence of an express provision allowing

tor. Because we conclude that the Improvement Act is inapplicable, we need not address these arguments.

[9] The defendant also argues that the plaintiff failed to satisfy the second CUTPA requirement of proving damages. He argues, among other things, that the type of conduct that the court found as the basis of his CUTPA violation was not within the purview of the Improvement Act and, therefore, damages awarded on that basis were improper. Having reversed the court's judgment on the CUTPA count on a different basis, we need not address the merits of the defendant's claim regarding damages.

[10] Alternatively, he claims that, even if there were a CUTPA violation, the court abused its discretion by awarding the plaintiff *all* of his attorney's fees instead of only those that he incurred in pursuing the CUTPA action. Because we conclude that the plaintiff is not entitled to any attorney's fees, we need not reach the issue of apportionment of such fees.

[11] "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the

recovery . . . .'' (Footnote in original.) *Aurora Loan Services*, *LLC* v. *Hirsch*, 170 Conn. App. 439, 453, 154 A.3d 1009 (2017). In the present matter, the contract between the plaintiff and the defendant did not expressly authorize the nonbreaching party to recover attorney's fees. Accordingly, the plaintiff may not recover attorney's fees for his breach of contract claim.

CUTPA, however, specifically allows the court to award legal fees associated with an action brought pursuant to the act. Specifically, § 42-110g (d) provides in relevant part: ''In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . .''

Turning to the present case, the trial court, regarding attorney's fees, stated in its memorandum of decision: ''Having found a violation of CUTPA here, the court found the plaintiff was entitled to recover attorney's fees and costs.'' It further concluded that ''the plaintiff should be awarded his fees for establishing his breach of contract claims . . . .''

Given our conclusion that the defendant did not violate CUTPA, there is no basis for the plaintiff's recovery of any attorney's fees in the present case. Having reversed the court's judgment on the CUTPA count, and without any contractual provision on which properly to base an award of attorney's fees, we accordingly reverse the court's judgment awarding the plaintiff $126,126.91 in attorney's fees and $2412.05 in costs in connection with the CUTPA violation.

successful party absent a contractual or statutory exception. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights.'' (Internal quotation marks omitted.) *Aurora Loan Services*, *LLC* v. *Hirsch*, 170 Conn. App. 439, 453 n.9, 154 A.3d 1009 (2017).

II

Lastly, the defendant claims that the court improperly rendered judgment in favor of the plaintiff on his breach of contract claim. In particular, the defendant argues that the court's finding that his breach of contract caused the plaintiff's damages was clearly erroneous. We disagree and, accordingly, affirm the court's judgment on the plaintiff's breach of contract claim.

As a preliminary matter, the plaintiff contends that the defendant has not adequately challenged the court's judgment as to the breach of contract count but, instead, "only appears to [attack] the findings on [a] cursory level." The defendant responds that, although he did not expressly label them as such, his general arguments that the court's determinations were based on speculation and insufficient evidence sufficiently challenge the court's findings with respect to causation as it relates to the breach of contract count. Even if we assume for purposes of argument that the defendant had adequately briefed his challenge to the court's finding of causation, we still conclude that he is not entitled to relief on this claim.

We begin by setting forth the standard of review and legal principles relevant to this claim. "It is well established that [t]he elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages. . . . Although this court has intimated that causation is an additional element thereof . . . proof of causation more properly is classified as part and parcel of a party's claim for breach of contract damages." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 186, 90 A.3d 219 (2014). "Under Connecticut law, the causation standard applicable to breach of contract actions asks not whether a defendant's conduct was a proximate cause of the plaintiff's

injuries, but rather whether those injuries were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct." *Theodore* v. *Lifeline Systems Co.*, 173 Conn. App. 291, 306 n.5, 163 A.3d 654 (2017).

"Causation [is] a question of fact for the [fact finder] to determine . . . and, thus, is governed by the clearly erroneous standard of review." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 193. Under this standard, "we overturn a finding of fact when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 225, 990 A.2d 326 (2010).

Here, the court found that the plaintiff proved all elements of his breach of contract claim. On the issue of damages, the court stated in its memorandum of decision that "the plaintiff provided a detailed account of the damages he sustained due to the defendant's poor workmanship," finding that "[a]s a result [of] the defendant's improper work, the plaintiff paid $50,714.46 to finish the defendant's work and $60,508.86 for corrective work . . . ."

On appeal, the defendant argues that the court's finding of damages is clearly erroneous because the plaintiff never proved beyond speculation that the defendant's conduct caused damage to the plaintiff's property. He contends that "[t]he intervening period of time between [his] conduct and the appearance of any defective condition, the lack of a definitely identified cause for the defective conditions, the fact that the plaintiff had work done after [he] left the job which was not necessary or that the plaintiff did not do work he should have done,

and the several other potential causes of the defective conditions, ensured that any conclusion of causation was premised on mere speculation."

The defendant's arguments can be best characterized as an assertion that there were other possible causes for the plaintiff's damages. This contention, however, is inconsistent with the standard by which we must review the court's finding—it is not whether there are other conceivable causes but, rather, whether there was evidence to allow the court to find that the *defendant's conduct* was the cause. "Proof of a material fact . . . need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact." *Rockhill* v. *Danbury Hospital*, 176 Conn. App. 39, 44, 168 A.3d 630 (2017).

The plaintiff, on the other hand, argues that there was adequate evidence to show that the defendant's work caused his damages, particularly in the form of testimony from multiple witnesses, including Charles Lindo. We agree.

Lindo served as a fact witness and as an expert witness[12] in the areas of site work, excavation, septic installation, and site preparation; he testified as to various problems that arose as a result of, among other things, the defendant's repeated use of rocks instead of sand as backfill.[13] Other witnesses who testified regarding

[12] The defendant also argues that the court's finding of causation was clearly erroneous because the plaintiff failed to offer expert testimony to prove that the defendant's work caused the plaintiff's damages. We reject the premise of this contention because Lindo testified and offered expert opinion regarding a variety of issues involving the defendant's work based on his training, experience, and expertise in this area.

[13] Lindo testified in response to questioning by the plaintiff's counsel to the following regarding the effect of using rocks as backfill on the septic system:

"Q.: And when you were digging do you recall the type of the material that was coming out of the trench?

"A.: Yeah. I mean, it was just rock. There was no— you know, usually you would dig down and hit a layer of sand and that's where you'd start hand shoveling, but it was all rocks. . . .

problems with the defendant's backfilling included George Brennan, the town's fire marshal,[14] and Brett Sheldon, a representative from the gas company.[15] Lindo also testified to problems he saw related to the defendant's construction of the retaining walls, as well as the driveway.

"Q.: And what's the purpose of putting sand in there instead of the fill that you discovered in there?

"A.: To protect the pipe from breaking.

"Q.: And is there a reason that a pipe might break if it's in material that's laden with rocks or—?

"A.: Yeah. I mean, a pipe's only so strong. You can't, you know, put a rock on it and then, you know, any kind of pressure on it whether it'd be settling, or you know . . . anything's [going to] break the pipe."

Lindo testified to the following regarding the effect of using rocks as backfill for the foundation:

"Q.: When you backfill footing—not footings, but foundations, what type of material are you supposed to use against the foundation properly?

"A.: Backfill on a foundation depends what's on site. You know, if you have bad material there, you try and bring in something decent to keep around the foundation wall.

"Q.: When you say bad material what are you talking about?

"A.: Big rocks, boulders, things like that. . . .

"Q.: Was there a lot of bad material on this site?

"A.: Yeah.

"Q.: And why do you try to avoid putting rocks and so forth up against the foundation?

"A.: A lot of reasons. You know, cracks in the wall, you know, if you keep a lot of —pull out a lot of big boulders in that area where you've dug, you're [going to] have the material shifting and settling, and you know, it could push on the wall itself."

[14] Brennan testified on direct examination by the plaintiff's counsel to the following regarding the proper material for backfilling:

"Q.: It shouldn't have rocks or other debris?

"A.: No, sir.

"Q.: And why is that?

"A.: Because in New England rocks move under the ground with the frost . . . and it will rub against the pipe eventually and cause it to either leak or—eventually it will leak."

[15] The following colloquy occurred during the plaintiff's counsel's direct examination of Sheldon:

"Q.: [I]s that something you would have expected in terms of the scratches to see if it had been backfilled with proper material?

"A.: That is not what would happen if that tank was backfilled properly.

"Q.: Okay. In looking at [an exhibit depicting large rocks], is that material that should have been used to backfill?

"A.: No. Absolutely not.

"Q.: [C]ould you tell the court—or if you know why the water might back up into the regulator box?

"A.: The regulator would have backed up because the water had nowhere to flow out because as the fire marshal had stated, the clay that was found

"[I]t is the exclusive province of the trier of fact to weigh . . . conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." *Rockhill* v. *Danbury Hospital*, supra, 176 Conn. App. 44. The trial court, as the trier of fact, was free to credit the testimony of the plaintiff's witnesses in concluding that the defendant's conduct caused the damages suffered by the plaintiff. We conclude, therefore, that the court's findings were not clearly erroneous and there was evidence in the record to support the breach of contract judgment rendered in favor of the plaintiff.

The judgment is reversed as to counts three, four, and five, and as to the award of attorney's fees, and the case is remanded with direction to render judgment in favor of the defendant on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MICHAEL GERRISH *v.* PAUL HAMMICK ET AL.
(AC 41759)

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

Syllabus

The plaintiff sought to recover damages for, inter alia, defamation and tortious interference, in connection with a statement made by the defendant W to the plaintiff's employer, Q. The plaintiff, formerly a sergeant with a town police department, retired and took a position as a public safety officer with Q. Prior to the plaintiff's retirement, he was accused of insubordination and neglect of duty. The chief of the police department, the defendant H, ordered W to conduct an internal affairs investigation into the accusations but the plaintiff retired before the investigation had been completed and a decision could be made whether to discipline him. Q decided to arm certain of its public safety officers, including former police officers, who were able to provide a letter of good standing to Q. K, an investigator for Q, asked W whether the plaintiff would ever

around [the] tank would have kept the water in there and not allowed it [to] have gone through like it would have if sand was around the tank. That water would have drained out through the sand."

be able to receive a letter of good standing from the department, to which W responded "no." The plaintiff's employment was therefore terminated by Q. The trial court denied W's motion for summary judgment but thereafter granted W's motion to reargue and, after reconsidering its ruling, granted W's motion for summary judgment and the plaintiff appealed to this court, claiming that the trial court improperly granted the motion to reargue and the motion for summary judgment.

Held:

1. The trial court did not abuse its discretion in granting W's motion to reargue; W asserted that the court made several errors, including that it overlooked certain evidence or misapprehended facts in denying his motion for summary judgment and, thus, the court was well within its discretion to grant the motion to reargue and reevaluate its decision.
2. The trial court properly granted summary judgment in favor of the defendants on the plaintiff's claims of defamation and tortious interference: there was no genuine issue of material fact that W's statement to K was substantially true, as he submitted evidence, namely, the affidavit of H, who averred that the plaintiff did not leave the department in good standing and that he had declined to provide the plaintiff with a letter of good standing, a decision which the evidence demonstrated was within his sole discretion as chief to make, and, after W met his burden of demonstrating that there was no genuine issue of material fact that his statement was substantially true, the plaintiff failed to proffer any evidence demonstrating the existence of such an issue; moreover, as defamation was the tort underlying the plaintiff's tortious interference claim, the tortious interference claim failed as a matter of law because there was no genuine issue of material fact that the alleged defamatory statement underlying the tortious interference claim was substantially true and, therefore, there was no evidence that W's alleged interference resulted from the commission of a tort.

Argued February 13—officially released July 7, 2020

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Hon. A. Susan Peck*, judge trial referee, denied in part the defendants' motion for summary judgment; thereafter, the trial court granted the defendants' motion to reargue; subsequently, the court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Justin Sargis, for the appellant (plaintiff).

Kristan M. Maccini, for the appellee (defendant Matthew Willauer).

Opinion

PRESCOTT, J. This is a tort action brought by the plaintiff, Michael Gerrish, against the defendant Matthew Willauer seeking to recover damages for injuries that he claims to have sustained as a result of an allegedly defamatory statement made by the defendant to the plaintiff's former employer, Quinnipiac University (Quinnipiac).[1] The plaintiff appeals from the trial court's granting of summary judgment in favor of the defendant. On appeal, the plaintiff claims that the trial court, which initially had denied the defendant's motion for summary judgment, improperly granted (1) the defendant's motion to reargue and (2) upon reconsideration, the defendant's motion for summary judgment as to the defamation and tortious interference counts of his complaint. We disagree with both claims and, therefore, affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. The plaintiff worked as a police officer for the Bloomfield Police Department (department) from February, 1993 until June 1, 2012, when he retired with the rank

[1] The plaintiff's complaint contained five counts, alleging that the defendants, Paul Hammick, chief of the Bloomfield Police Department, Matthew Willauer, a lieutenant and commander of the professional standards division of the Bloomfield Police Department, and the town of Bloomfield, were liable to the plaintiff for tortious interference, breach of implied contract, defamation, negligent infliction of emotional distress, and intentional infliction of emotional distress. The trial court granted summary judgment in favor of all three defendants on all five counts of the complaint. On appeal, however, the plaintiff only challenges the court's granting of summary judgment on the tortious interference and defamation counts with respect to Willauer. Thus, all references to the defendant in this opinion are to Willauer.

of sergeant.[2] Prior to retiring from the department, a department lieutenant accused the plaintiff of insubordination and neglect of duty and requested that he be investigated. After reviewing the request for an investigation, Paul Hammick, as chief of the department, ordered the defendant, who was a lieutenant and commander of the professional standards division of the department, to conduct an internal affairs investigation of the accusations made against the plaintiff. Before the investigation could be completed and before a decision could be made on whether to discipline the plaintiff, the plaintiff announced that he was retiring from the department.

Shortly after retiring from the department, the plaintiff began working for Quinnipiac as a public safety officer in October, 2012. In 2014, Quinnipiac decided that it would arm certain public safety officers, including former police officers like the plaintiff. To become an armed officer, officers needed to satisfy certain criteria, including "retir[ing] in good standing from their prior department and provid[ing] a letter of good standing" to Quinnipiac.

In determining whether the plaintiff was qualified to become an armed officer, Quinnipiac sought information from the department, including whether the plaintiff had retired from the department in good standing. Department policy defines "good standing"[3] and gives the chief of the department the sole discretion to determine whether a department officer retired in good

[2] See footnote 8 of this opinion for a discussion about a discrepancy in the record over the date on which the defendant retired from the department.

[3] Department policy defines "[g]ood standing" in relevant part as "retirement or resignation that was . . . not the result of or avoidance of, any current or past disciplinary or punitive action, work performance contract, or criminal matter . . . ." Bloomfield Police Dept., Manual of Policy and Procedure (Rev. September 25, 2006) vol. 2.

standing.[4] Quinnipiac investigator Karoline Keith conducted a background investigation of the plaintiff, which included investigating whether the department would issue the plaintiff a letter of good standing. When Keith asked the defendant whether the plaintiff would ever be able to obtain a letter of good standing from the department, the defendant responded, "no" (defendant's statement to Keith).[5] Indeed, Hammick had determined, at some point after the plaintiff announced that he was retiring from the department, that the plaintiff had not left the department in good standing and thus would not be able to receive a letter of good standing. Because the defendant could not receive a letter of good standing from the department, as communicated to Keith by the defendant, Quinnipiac terminated his employment on August 19, 2014.

The plaintiff commenced this action on August 16, 2016. The complaint alleged that the defendant was

[4] Department policy states in relevant part: "The issuance of a retirement identification card and badge *is at the discretion* of the [c]hief of [the department]. In general, [s]worn [o]fficers who meet the criteria listed [in this policy] are eligible to receive a retirement badge and identification card, as a token of appreciation from the department." (Emphasis added; internal quotation marks omitted.) Bloomfield Police Dept., Manual of Policy and Procedure (Rev. September 25, 2006) vol. 2. One of the criteria for receiving a retirement badge and identification card is that the officer retired or resigned in "good standing," as defined in the policy. See footnote 3 of this opinion.

[5] In his complaint, the plaintiff does not explicitly state which statement of the defendant's was defamatory. The plaintiff more generally alleges in his complaint that the defendant "falsely communicated to Quinnipiac . . . that [the] plaintiff was not entitled to retirement identification and falsely stated that he was found to have committed misconduct at the time of his retirement."

The court, in its May 31, 2018 memorandum of decision on the defendant's motion for summary judgment, determined that the defendant's response of "no" to Keith's question of whether the plaintiff would ever be able to obtain a letter of good standing from the department was the statement underlying the plaintiff's claims of defamation and tortious interference. Moreover, at oral argument, the plaintiff reaffirmed that this statement by the defendant was the allegedly defamatory statement underlying his claims against the defendant.

liable for, among other things, defamation and tortious interference. See footnote 1 of this opinion. The defendant denied the allegations in his answer and set forth special defenses in which he stated, among other things, that the plaintiff had failed to state claims for which relief could be granted with respect to both counts.

On October 2, 2017, the defendant moved for summary judgment on all counts of the plaintiff's complaint.[6] With respect to the defamation count, the defendant, in his motion for summary judgment and memorandum of law in support thereof, stated that the plaintiff's defamation claim failed as a matter of law because the defendant's statement to Keith—that the plaintiff could not obtain a letter of good standing from the department—was substantially true. Regarding the tortious interference count, the defendant stated that this claim must fail "as a matter of law, because there exists no genuine issue of material fact that he did not provide any false information or, otherwise, improperly disclose information to Quinnipiac representatives concerning the plaintiff." In essence, the defendant asserted that the plaintiff's tortious interference claim must fail as a matter of law because there was no evidence in the record demonstrating that the defendant committed defamation, which was the tort underlying the tortious interference claim.

On March 12, 2018, the court denied the defendant's motion for summary judgment with respect to the defamation and tortious interference counts. In its memorandum of decision, the court set forth its reasoning for denying the defendant's motion for summary judgment on these counts. Regarding the defamation count, the court determined that whether the defendant's statement to Keith was true was a question of fact for the

[6] On October 3, 2017, the plaintiff filed a motion for summary judgment on all counts of his complaint. The court, however, denied this motion on all counts. On appeal, the plaintiff does not challenge the court's denial of his motion for summary judgment.

jury "because it is unclear whether the plaintiff would ever receive a letter of good standing." With respect to the tortious interference count, the court concluded that "there [was] a genuine issue of material fact as to whether [the defendant's] conduct was tortious." Specifically, the court stated that, "[b]ased on [the] evidence, a trier of fact could conclude [that the defendant] acted tortiously in either of two ways. First, he could have misrepresented whether the plaintiff would ever get a letter of good standing as he may have known that only Hammick, [as the chief of the department], could make that determination. Alternatively, he could have intentionally interfered in the plaintiff's employment without justification because, upon learning about Keith's investigation, he sought to make the plaintiff suffer an adverse employment action by ensuring [that] Quinnipiac would never obtain a letter of good standing from the [department]. Such conduct would qualify as malicious and, thus, a tortious act. Whether such conduct is malicious is for the trier of fact to decide." (Footnote omitted.) The court, therefore, denied the defendant's motion for summary judgment on the defamation and tortious interference counts.

In response to the court's denial of his motion for summary judgment on these counts, the defendant, on April 2, 2018, moved for the court to reconsider this decision. First, the defendant argued that that the court incorrectly had concluded that the plaintiff's defamation claim did not fail as a matter of law. In support of this argument, the defendant asserted that the court had arrived at its incorrect conclusion because it had determined that there was a genuine issue of material fact as to the truthfulness of the defendant's statement to Keith that the plaintiff could not obtain a letter of good standing, even though "the uncontroverted evidence [before the court was] that the plaintiff was not provided with a letter of good standing and retirement badge when he left the . . . [d]epartment in May of

2012; nor in June of 2014, when he sought [a letter of good standing] for a position at Quinnipiac . . . nor [was he provided with a letter of good standing] at any subsequent time. Thus, [the defendant's] response of '[n]o' to [Keith] in response to her question to the effect of whether the plaintiff would be able to get a letter of good standing was substantially true." (Footnote omitted.) Thus, the defendant asserted that, because the defendant's statement to Keith was substantially true based on the uncontested evidence before the trial court, the plaintiff's defamation claim failed as a matter of law.

In his motion to reargue, the defendant also argued that the court improperly denied his motion for summary judgment on the tortious interference count. The defendant asserted that, in doing so, "the court . . . misapprehend[ed] or overlook[ed]" the underlying tort upon which his tortious interference claim was based. The defendant pointed to the plaintiff's complaint, which states that "[t]he plaintiff's claim for tortious interference . . . is based upon [the] plaintiff's allegation that [the defendant] 'falsely communicated to Quinnipiac . . . that [the] plaintiff was not entitled to retirement identification and falsely stated that he was found to have committed misconduct at the time of his retirement.' " Thus, according to the defendant, "the [plaintiff's tortious interference] claim [was] based upon the underlying tort of defamation." In denying the defendant's motion for summary judgment on this count, however, the court "conclude[d] that a trier of fact could find that [the defendant] is liable either for the underlying tort of fraudulent misrepresentation or intentional interference," even though "[n]either tort is [pleaded] in the plaintiff's [c]omplaint nor can either be inferred from the allegations set forth."

In response to the defendant's motion to reargue, the court ordered the plaintiff to file a response to the

defendant's motion by April 27, 2018, which the plaintiff did. On May 1, 2018, the court granted the defendant's motion to reargue its ruling on the motion for summary judgment because the defendant "raise[d] controlling principles of law and possible misapprehension of facts by the court to warrant reargument." In light of the court's granting the defendant's motion to reargue, both parties submitted supplemental memoranda in support of and opposition to summary judgment on the defamation and tortious interference counts.

On May 31, 2018, the court, after reargument and reconsideration, granted the defendant's motion for summary judgment on the defamation and tortious interference counts and, accordingly, vacated its March 12, 2018 memorandum of decision on the motion. In its revised memorandum of decision, the court set forth its reasoning in support of its granting summary judgment in favor of the defendant on both counts. With respect to the defamation count, the court concluded that "the [defendant] . . . met [his] burden of showing an absence of a genuine issue of material fact that no defamatory statement was made by [the defendant] to Quinnipiac." In arriving at this conclusion, the court determined that there was no genuine issue of material fact regarding the substantial truth of the defendant's statement to Keith. Indeed, the statement was substantially true, according to the court, because Hammick, as the chief of the department, had "previously determined that the plaintiff had not retired in good standing and was [therefore] ineligible" to receive documentation stating that he left the department in good standing. Thus, the court concluded that, "because [the defendant's] statement [was] substantially true and truth is an affirmative defense to defamation, [the defendant] is entitled to summary judgment as to [the defamation] count . . . ."

The court also concluded that the defendant was entitled to summary judgment as to the tortious interference count. In arriving at this conclusion, the court agreed with the defendant that the tort underlying the plaintiff's tortious interference claim was defamation. Moreover, having determined that "there [was] insufficient evidence that [the defendant] committed [the] underlying tort" of defamation, the court concluded that the plaintiff's tortious interference claim failed as a matter of law, entitling the defendant to summary judgment on that count. This appeal followed.

I

The plaintiff first claims that the trial court abused its discretion in granting the defendant's motion to reargue because "it was unreasonable for the trial court to [conclude] that it had misapprehended any facts" or overlooked any controlling principles of law in its original decision on the defendant's motion for summary judgment. We disagree.

Before addressing the merits of the plaintiff's claim, we first set forth our standard of review of a trial court's decision on a motion to reargue, as well as well established legal principles concerning these motions. Importantly, "[t]he granting of a motion for reconsideration and reargument is within the sound discretion of the court." (Internal quotation marks omitted.) *Ray* v. *Ray*, 177 Conn. App. 544, 574, 173 A.3d 464 (2017). Accordingly, "we review a court's decision on [a] motion [to reargue] for an abuse of discretion." *Priore* v. *Haig*, 196 Conn. App. 675, 685, A.3d (2020). "[A]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In addition, where a motion is addressed to the discretion of the court, the burden of proving an abuse of that discretion rests with the

appellant." (Internal quotation marks omitted.) *Gibbs* v. *Spinner*, 103 Conn. App. 502, 507, 930 A.2d 53 (2007).[7]

Turning to the present case, the trial court, in granting the defendant's motion to reargue, determined that the defendant had "raise[d] controlling principles of law and possible misapprehension of facts by the court to warrant reargument." This court repeatedly has stated that "[a] motion to reargue is proper either when its purpose is to direct the court's attention to a case or legal principle that the court has overlooked or when the movant seeks to correct a misapprehension of facts." *Benedetto* v. *Dietze & Associates, LLC*, 159 Conn. App. 874, 879, 125 A.3d 536, cert. denied, 320 Conn. 901, 127 A.3d 185 (2015); see also *Marquand* v. *Administra-*

[7] In his appellate brief, the plaintiff made two other arguments in support of his claim that the court improperly granted the defendant's motion to reargue. First, the plaintiff argued that the court improperly considered the motion to reargue because it was filed more than twenty days after the court denied the defendant's motion for summary judgment and thus was untimely. See Practice Book § 11-12 (a). At oral argument, however, the plaintiff withdrew this part of his claim pertaining to the timeliness of the court's granting of the defendant's motion to reargue.

Second, the plaintiff argues that, in granting the defendant's motion to reargue, the court improperly considered the defendant's argument that his statement to Keith was substantially true and thus was neither defamatory nor constituted tortious interference as a matter of law. The plaintiff asserts that considering this argument was improper because the defendant "failed to raise or brief this argument in [his] original argument for summary judgment . . . and [thus] should have been deemed abandoned." The defendant, however, did argue in his motion for summary judgment and the memorandum of law in support thereof that the plaintiff's defamation claim should fail as a matter of law because his statement to Keith was substantially true. Indeed, the defendant stated the following in his October 2, 2017 memorandum of law in support of summary judgment: "With regard to the [defamation] claim directed toward [the defendant], [the defendant] simply responded '[n]o' to . . . Keith upon her asking him whether the plaintiff would ever be provided a letter of good standing from the [department]. [This statement] is not false but rather is *substantially true*." (Emphasis added; internal quotation marks omitted.) Moreover, in the same memorandum, the defendant argued that the plaintiff's tortious interference claim failed as a matter of law because "[he] simply responded *truthfully* to Quinnipiac University's investigator's inquiry . . . ." (Emphasis added.) Thus, the plaintiff's argument is unavailing.

tor, Unemployment Compensation Act, 124 Conn. App. 75, 80, 3 A.3d 172 (2010) (trial court did not abuse its discretion in granting defendant's motion to reargue when, in that motion, defendant "argued that the court's prior ruling failed to give the appropriate weight to the strict statutory standards for appeals, and the long line of case law in support of that view" (internal quotation marks omitted)), cert. denied, 300 Conn. 923, 15 A.3d 630 (2011).

Indeed, in the present case, the defendant, in his motion to reargue, raised several errors that he claimed that the trial court made in its March 12, 2018 decision on his motion for summary judgment. First, the defendant asserted that the court relied on the wrong statement to determine whether to grant his motion for summary judgment on the defamation count. Indeed, the defendant pointed out that, in its March 12, 2018 memorandum of decision, the court determined that the defendant told Keith "that the plaintiff would never get a letter of good standing." The defendant asserted, however, that "[t]he undisputed fact . . . as documented in Keith's report submitted as [an] exhibit . . . in support of [the defendant's motion for] summary judgment is that Keith asked [the defendant] if [the plaintiff] 'would ever be able to obtain a letter of good standing from the . . . [d]epartment and he replied to her, '[n]o.' "

Second, the defendant asserted that the court misapprehended whether the plaintiff would be able to receive a letter of good standing from the department, which, according to the defendant, was critical to the court's deciding whether to grant his motion for summary judgment on the defamation count. Indeed, as the defendant noted, the court, in its March 12, 2018 memorandum of decision, stated that "it [was] unclear whether the plaintiff would ever receive a letter of good standing." The defendant stated, however, that, in arriving at this conclusion, the court must have overlooked

"the uncontroverted evidence [before the court] that the plaintiff was not provided with a letter of good standing and retirement badge when he left the . . . [d]epartment in May of 2012; nor in June of 2014, when he sought [a letter of good standing] for a position at Quinnipiac . . . nor [was he provided with a letter of good standing] at any subsequent time."

With respect to the tortious interference claim, the defendant asserted that the court incorrectly determined that misrepresentation or intentional interference were the torts underlying this claim. Rather, the defendant contended that, based on what the plaintiff alleged in his complaint, defamation was the tort underlying the tortious interference claim.

Having been made aware of these potential errors that it made in its March 12, 2018 memorandum of decision on the defendant's motion for summary judgment, the trial court was well within its discretion to order reargument on the defendant's motion for summary judgment and, in doing so, to reevaluate its prior denial of the motion. See *Benedetto* v. *Dietze & Associates, LLC*, supra, 159 Conn. App. 879; *Marquand* v. *Administrator, Unemployment Compensation Act*, supra, 124 Conn. App. 80. Thus, we conclude that the trial court did not abuse its discretion in granting the defendant's motion to reargue.

II

The plaintiff next claims that, even if the trial court properly granted the defendant's motion to reargue, it improperly granted the defendant's motion for summary judgment on his claims of defamation and tortious interference against the defendant. We disagree.

Before analyzing each part of the plaintiff's claim, we first set forth our well established standard of review of a trial court's granting a motion for summary judgment. See *Kusy* v. *Norwich*, 192 Conn. App. 171, 175,

217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019). "On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . [O]ur review is plenary and we must decide whether the [trial court's] conclusions are legally and logically correct and find support in the facts that appear on the record. . . .

"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. . . .

"A material fact is a fact that will make a difference in the outcome of the case. . . . Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue . . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . 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.) *Streifel* v. *Bulkley*, 195 Conn. App. 294, 299–300, 224 A.3d 539, cert. denied, 335 Conn. 911, A.3d (2020).

A

The plaintiff first argues that the court improperly granted summary judgment in favor of the defendant on the defamation count because there was a genuine issue of material fact as to whether the defendant's statement to Keith was substantially true. We are not persuaded.

"A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . ." (Internal quotation marks omitted.) *NetScout Systems, Inc.* v. *Gartner, Inc.*, 334 Conn. 396, 410, 223 A.3d 37 (2020). "At common law, [t]o establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement." (Internal quotation marks omitted.) Id.

"[F]or a claim of defamation to be actionable, the statement [at issue] must be false . . . ." (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 431, 125 A.3d 920 (2015). In other words, a defendant cannot be held liable for defamation if the statement at issue is substantially true. See *Goodrich* v. *Waterbury Republican-American, Inc.*,188 Conn. 107, 112–13, 448 A.2d 1317 (1982).

Moreover, "[c]ontrary to the [common-law] rule that required the defendant to establish the literal truth of the precise statement made, the modern rule is that only substantial proof need be shown to constitute the justification. . . . [Thus] [i]t is not necessary for the defendant to prove the truth of every word of the libel. If he succeeds in proving that the main charge, or gist, of the libel is true, he need not justify statements or

comments which do not add to the sting of the charge or introduce any matter by itself actionable." (Citations omitted; internal quotation marks omitted.) Id. Importantly, if a defendant moves for summary judgment on a defamation count and there exists no genuine issue of material of fact as to whether the alleged defamatory statement is substantially true, then it is appropriate for the trial court to enter summary judgment in favor of the defendant. See *Strada* v. *Connecticut Newspapers, Inc.*, 193 Conn. 313,315 n.4, 318, 321–22, 477 A.2d 1005 (1984) (affirming trial court's granting summary judgment in favor of defendant on libel count because trial court correctly concluded that defendant's alleged libelous statements were substantially true); *Mercer* v. *Cosley*, 110 Conn. App. 283, 303–305, 955 A.2d 550 (2008) (affirming trial court's rendering summary judgment in favor of defendant after having "conclude[d] that the [alleged defamatory] statements were true, either substantially or literally").

In support of his argument that there was a genuine issue of material fact as to whether the defendant's statement to Keith was substantially true, the plaintiff, in his appellate brief, stated that Hammick's deposition testimony about when he determined whether the plaintiff had left the department in good standing contradicted what he averred in a subsequent affidavit. In his affidavit, which the defendant proffered in support of his motion for summary judgment, Hammick stated that, "[a]t the time that [the plaintiff] resigned, he continued to be under investigation . . . . Based upon my review of the facts and evidence of the internal affairs investigation, along with [the plaintiff's] decision to resign from his position while the investigation was ongoing, I determined that he did not leave the department in good standing. . . . As a result, I made the determination not to provide [the plaintiff] with a retirement badge and identification card upon his resignation. . . . For the same reasons, I declined to provide

him with a letter of good standing when he subsequently requested one."

During his deposition, Hammick was shown a May 21, 2012 e-mail from a town employee notifying him that the plaintiff was not returning to work for the department, effective immediately, and was retiring as of June 1, 2012.[8] Hammick was also shown his response to this e-mail. The plaintiff's counsel then asked Ham-

[8] In the plaintiff's complaint, he alleged that he retired from the department on June 1, 2012. In his affidavit and in the statement of the facts that he submitted in opposition to the defendant's motion for summary judgment, however, the plaintiff and his counsel aver that the plaintiff retired on May 21, 2012. An exchange between the plaintiff's counsel and Hammick during Hammick's deposition appears to clarify this discrepancy. Indeed, this exchange supports a conclusion that the plaintiff notified the town that he would not be returning on May 21, 2012, and that he intended to begin collecting his retirement benefit on June 1, 2012. This exchange, in relevant part, is as follows:

"Q. I'm showing you what's marked [e]xhibit 17, which is a[n] e-mail trail starting with an e-mail from Cindy Coville to you dated May 21—yeah, May 21, 2012. Have you ever seen that before?

"A. I—I remember seeing this and gathering information for disclosure, yes.

"Q. Okay. And Cindy is the director of Human Resources; right?

"A. Yes.

* * *

"Q. And she said [the plaintiff] submitted his letter of resignation effective today and his intent to collect his retirement benefit—I'm sorry, retirement beginning June [1], 2012; right?

"A. That's correct, that's what it says.

"Q. And then is that your response above?

"A. It appears to be, yes.

* * *

"Q. Well, you—you didn't give him a letter of good standing subsequent to this e-mail; right?

"A. I did not.

"Q. At the time that you wrote this e-mail to Cindy Coville, had you already decided that [the plaintiff] would not leave in good standing?

"A. I don't believe I had made that decision yet.

"Q. Okay. Did you communicate to anyone at that time, in May [21] or thereabouts, that you had determined that [the plaintiff] would not be leaving in good standing?

"A. I don't believe I communicated that with anyone.

"Q. So at the time that [the plaintiff]—that you were notified that [the plaintiff] was resigning and collecting his retirement benefits, you didn't make a determination that his service would be—would not be in good standing?

mick if, at the time he responded, he had decided whether the plaintiff had left the department in good standing. Hammick responded, "I don't believe I had made that decision yet." In light of this alleged contradiction between the averments that Hammick made in his affidavit and his deposition testimony, the plaintiff contends that there was a genuine issue of material fact as to whether the defendant's statement to Keith was substantially true.

This contention is flawed, however, because the portion of Hammick's deposition testimony to which the plaintiff directs our attention only supports a conclusion that Hammick had not decided whether the plaintiff had left the department in good standing *at the time he replied* to the May 21, 2012 e-mail from the town employee notifying him that the plaintiff was retiring from the department. It does not, however, contradict what Hammick stated in his affidavit: that sometime after the plaintiff announced that he was retiring from the department, he determined that the plaintiff did not leave the department in good standing and that he declined the plaintiff's request for a letter of good standing when the plaintiff later requested one. Indeed, in the same exchange during the deposition to which the plaintiff directs our attention, the plaintiff's counsel asked whether Hammick "g[a]ve [the plaintiff] a letter of good standing subsequent to" his responding to the May 21, 2012 e-mail from the town employee, to which Hammick responded, "I did not."

Moreover, after the defendant met his burden, the plaintiff did not proffer any evidence demonstrating a genuine issue of material fact as to whether the defen-

* * *

"A. I don't recall making that determination at that time.

"Q. So you didn't tell [the plaintiff] at the time that he was retiring here that he was retiring not in good standing; right?

"A. I didn't have a conversation with [the plaintiff]."

dant's statement to Keith was substantially true. In support of his motion for summary judgment, and in furtherance of his assertion that his statement to Keith was substantially true, the defendant proffered Hammick's affidavit, in which Hammick averred that the plaintiff did not leave the department in good standing and that he declined to provide the plaintiff with a letter of good standing. In addition, both parties proffered the department policy stating that good standing determinations are made at the discretion of the chief of the department. See footnote 4 of this opinion. Importantly, at oral argument, the plaintiff conceded, and our independent review of the record confirms, that there was no evidence in the record demonstrating that the plaintiff could obtain a letter of good standing from the department. In light of the uncontested averment by Hammick that he had decided that the plaintiff would not receive a letter of good standing from the department—a decision that was undisputedly within his sole discretion to make[9]—the trial court properly determined that there was no genuine issue of material fact as to whether the defendant's statement to Keith was substantially true. See *Kusy* v. *Norwich*, supra, 192

[9] In the plaintiff's statement of facts in dispute, the plaintiff's attorney denies that "[t]he issuance of a retirement badge, identification card and/or letter of good standing to a retired [department] officer is at the sole discretion of the chief . . . ." Instead, he avers that "[t]he issuance [of a letter of good standing] is subject to [department policy] which Hammick did not consistently apply."

In effect, the plaintiff's counsel avers that Hammick improperly applied the criteria to determine whether to issue the plaintiff a letter of good standing that is stated in the department policy pertaining to "good standing" determinations. This, however, is a separate issue from whether it was within Hammick's discretion to make such determinations and to issue "good standing" letters. The plaintiff provided no evidence disputing the policy that both he and the defendant proffered, which stated that the issuance of documentation showing that an officer left the department in good standing was within the chief's discretion. Moreover, at oral argument before this court, the plaintiff admitted that the decision to provide him with a letter of good standing was solely within the province of the chief of the department. Thus, Hammick's discretion to issue such documentation is undisputed for purposes of this appeal.

Conn. App. 182 (stating that "upon a proper burden shifting, [the nonmoving party must] proffer . . . evidence in opposition to a motion for summary judgment" that raises genuine issue of material fact or else court should grant motion for summary judgment). Because there was no genuine issue of material fact as to whether the defendant's statement to Keith was substantially true, we conclude that the court properly granted summary judgment in favor of the defendant on the defamation count. See *Strada* v. *Connecticut Newspapers, Inc.*, supra, 193 Conn. 322; *Mercer* v. *Cosley*, supra, 110 Conn. App. 303–305.

B

The plaintiff next argues that the trial court's granting of the defendant's motion for summary judgment on the tortious interference count was improper because there was a genuine issue of material fact as to whether the defendant's alleged interference with his employment relationship with Quinnipiac was tortious. Specifically, he argues that "there [was] a genuine [issue] of material fact as to whether [the defendant] misrepresented that the plaintiff would never receive a letter of good standing," resulting in Quinnipiac terminating his employment as a public safety officer. We are not persuaded.

Before addressing the plaintiff's argument, we first set forth well settled principles concerning tortious interference. Our Supreme Court has stated that "[a] claim for tortious interference with contractual relations requires the plaintiff to establish (1) the existence of a contractual or beneficial relationship, (2) the defendants' knowledge of that relationship, (3) the defendants' intent to interfere with the relationship, (4) the interference was tortious, and (5) a loss suffered by the plaintiff that was caused by the defendants' tortious conduct." (Internal quotation marks omitted.) *Land-*

mark Investment Group, LLC v. *CALCO Construction & Development Co.*, 318 Conn. 847, 864, 124 A.3d 847 (2015).

With respect to the fourth element of a claim for tortious interference—whether the interference was tortious—this court has stated that, "to substantiate a claim of tortious interference with a business expectancy, there must be evidence that the interference resulted from the defendant's commission of a tort." (Internal quotation marks omitted.) *Benchmark Municipal Tax Services, Ltd.* v. *Greenwood Manor, LLC*, 194 Conn. App. 432, 440, 221 A.3d 501 (2019). Moreover, in cases in which a defendant moves for summary judgment on a tortious interference count and "present[s] evidence demonstrating the lack of a genuine issue of material fact regarding an essential element [of a claim of tortious interference] the plaintiff [can no longer] rest on the factual allegations in the complaint and [must] provide counteraffidavits or other evidence demonstrating a genuine issue of material fact." *Brown* v. *Otake*, 164 Conn. App. 686, 711–12, 138 A.3d 951 (2016). If the plaintiff, as the nonmoving party, fails to do this, then the court should grant summary judgment in favor of the defendant on the tortious interference count. See id., 712.

In support of his argument that the court improperly granted summary judgment in favor of the defendant on the tortious interference count, the plaintiff asserts that there was a genuine issue of material fact as to whether the defendant's statement to Keith misrepresented the plaintiff's ability to obtain a letter of good standing from the department. In support of this assertion, the plaintiff contends that Hammick had not yet determined whether he left the department in good standing when the defendant made his statement to Keith or, in the alternative, even if Hammick had determined that the plaintiff did not leave the department in good standing by the time that the defendant made

this statement, the defendant was unaware of such a determination having been made.

Before addressing the plaintiff's arguments, it is important that we first note that the trial court, in its May 31, 2018 memorandum of decision, correctly determined that defamation was the tort underlying the plaintiff's allegation that the defendant tortiously interfered with his employment relationship with Quinnipiac. Indeed, the plaintiff's complaint alleges that, "[o]n August 19, 2014, the [defendant] communicated false and *defamatory* information to [the] plaintiff's employers at Quinnipiac . . . . [The defendant] . . . falsely communicated to Quinnipiac . . . that [the] plaintiff was not entitled to retirement identification and falsely stated that he was found to have committed misconduct at the time of his retirement. . . . As a result of the false and defamatory statements by [the defendant] Quinnipiac . . . was induced to fire [the] plaintiff on August 19, 2014." (Emphasis added.)

Because we concluded in part II A of this opinion that the plaintiff's defamation claim fails as a matter of law because the defendant's statement to Keith was substantially true, his claim that the court improperly granted the defendant's motion for summary judgment on the tortious interference count does not warrant substantial discussion. See *Benchmark Municipal Tax Services, Ltd.* v. *Greenwood Manor, LLC*, supra, 194 Conn. App. 440. Indeed, the plaintiff proffered no evidence rebutting the defendant's evidence that his statement to Keith was substantially true and, at oral argument, admitted as much.[10] Moreover, whether the defendant knew that Hammick had determined that the plaintiff would not receive a letter of good standing is of no consequence to our determination that the defendant's statement to Keith was not defamatory as

[10] Indeed, the plaintiff, at oral argument, stated that, if the defendant's statement to Keith was substantially true, then the statement was "not necessarily tortious."

a matter of law because it has no bearing on whether the statement was substantially true. Therefore, because the plaintiff failed to proffer evidence rebutting the defendant's evidence demonstrating that there was no genuine issue of material fact as to whether the defendant's conduct was tortious—namely, there was no genuine issue of material fact as to whether the statement he made to Keith was substantially true and thus not defamatory—we conclude that the court properly granted summary judgment in favor of the defendant on the tortious interference count.[11] See *Brown* v. *Otake*, supra, 164 Conn. App. 712.

The judgment is affirmed.

In this opinion the other judges concurred.

ARTHUR PETRUCELLI *v.* CITY OF MERIDEN (AC 39631)

Prescott, Moll and Flynn, Js.

Syllabus

The petitioner appealed to the Superior Court from the decision of the citation hearing officer for the respondent city upholding the issuance of a written notice to the petitioner for violation of the city's ordinance concerning abandoned, inoperable, or unregistered motor vehicles. After a de novo hearing, the trial court rendered judgment in favor of the city, and directed the city to enforce the judgment. On appeal to this court, the petitioner claimed, among other things, that the court erroneously concluded that his due process rights had not been violated. *Held*

[11] The plaintiff argues that the court improperly granted summary judgment because he proffered evidence that the defendant acted with malice, which, he contends, created a genuine issue of material fact as to whether the defendant's interference with his employment relationship with Quinnipiac was tortious. We need not address this argument, however, because we conclude that the plaintiff failed to proffer evidence that the defendant's interference resulted from his commission of a tort; namely, in this case, defamation. Because the plaintiff failed to proffer this evidence, his tortious interference claim fails as a matter of law. See *Benchmark Municipal Tax Services, Ltd.* v. *Greenwood Manor, LLC*, supra, 194 Conn. App. 440; *Brown* v. *Otake*, supra, 164 Conn. App. 712.

that the trial court should have dismissed the petition for lack of subject matter jurisdiction rather than addressing any of the petitioner's claims in the petition and directing the city to enforce the judgment: the petitioner did not have a statutory right to appeal to the Superior Court from the hearing officer's decision as the statute (§ 14-150a) pursuant to which the city expressly enacted the motor vehicle ordinance did not contain any language providing that an aggrieved individual had a right of appeal to the Superior Court from an adverse decision concerning a violation of an ordinance enacted pursuant to the statute; moreover, the petitioner could not prevail on his claim that a certain statute (§ 7-152b) enabled him to appeal as the hearing officer's determination of a violation was based on § 14-150a, a statute that is not listed in § 7-152b, and the hearing officer's decision was not an assessment for purposes of that statute, which unequivocally provided that the procedures set forth therein applied when a city sought to collect fines, penalties, costs, or fees imposed for alleged violations of ordinances enacted pursuant to certain statutes, and an assessment entered under § 7-152b required the payment of a monetary sum, which the hearing officer did not order the petitioner to pay; furthermore, our rule of practice (§ 23-51), which the petitioner also claimed enabled him to appeal, sets forth the procedures for the filing of a petition to reopen and the proceeding to be held on the petition, and does not confer a right to appeal.

Argued November 14, 2019—officially released July 7, 2020

Procedural History

Petition to reopen a citation assessment issued by the respondent, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, where the court, *Cronan*, *J.*, rendered judgment for the respondent, from which the petitioner appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed.*

Jeffrey D. Brownstein, for the appellant (petitioner).

Stephanie Dellolio, city attorney, with whom, on the brief, was *Deborah Leigh Moore*, former city attorney, for the appellee (respondent).

Opinion

MOLL, J. The petitioner, Arthur Petrucelli, appeals from the judgment of the trial court rendered in favor

of the respondent, the city of Meriden (city), following a de novo hearing held on his petition to reopen a decision issued by a city hearing officer upholding the issuance of a written notice to the petitioner for violation of the city's ordinance concerning abandoned, inoperable, or unregistered motor vehicles. On appeal, the petitioner claims that the court (1) erroneously concluded that his due process rights had not been violated, (2) improperly denied his posthearing motion to reopen the evidence or, in the alternative, to take judicial notice, and (3) committed several evidentiary errors during the de novo hearing. We do not reach the merits of the petitioner's claims, however, because we conclude that the petitioner did not have a statutory right to appeal to the Superior Court from the hearing officer's decision and, therefore, the trial court lacked subject matter jurisdiction to entertain the petition. Accordingly, the form of the trial court's judgment is improper, and we reverse the judgment and remand the case with direction to dismiss the petition for lack of subject matter jurisdiction.

The following facts are relevant to our resolution of this appeal. In 1998, pursuant to General Statutes § 14-150a,[1] the city enacted chapter 198 of the Code of the City of Meriden (motor vehicle ordinance). The motor vehicle ordinance provides in relevant part as follows. Pursuant to § 198-4 of the motor vehicle ordinance, "[i]t shall be unlawful to deposit, park, place, permit

[1] General Statutes § 14-150a provides: "Any municipality may, by action of its legislative body, provide for the removal of abandoned, inoperable or unregistered motor vehicles within the limits of such municipality which remain unmoved for thirty days after: (1) Notice to the owner of the property on which such motor vehicle so remains, requesting removal of such motor vehicle and (2) notice in a newspaper having a substantial circulation in such municipality. The legislative body shall designate the local board or officer who shall be responsible for notifying such owner, causing publication of the general notice and for removal and disposition of such motor vehicles."

to remain, store or have any abandoned or inoperable or unregistered motor vehicle or any part thereof on any property located within the City of Meriden." Pursuant to subsection (A) of § 198-6 of the motor vehicle ordinance, any sworn city police officer, upon finding on private property "any motor vehicle which appears to be abandoned, inoperable or unregistered," shall (1) "[c]ause a general notice to be placed in a newspaper having a substantial circulation in the City of Meriden" providing, inter alia, that the motor vehicle is under investigation as being abandoned, inoperable, or unregistered, and will be removed and disposed of by the city unless it is removed and properly disposed of within thirty days following publication of the notice, and (2) send a written notice to the owner of the private property, with a copy to the last registered owner of the motor vehicle, if known, at his or her last known address, requesting removal of the motor vehicle within thirty days following the publication of the notice in the newspaper and describing the procedure for an appeal to a hearing officer. The subsection further provides that, if the motor vehicle has not been removed by the expiration of the thirty day period, then the motor vehicle will be removed by the city chief of police or his or her authorized agent.

Pursuant to subsection (C) of § 198-6 of the motor vehicle ordinance, the owner of the private property or the last registered owner of the motor vehicle may contest the determination that the motor vehicle is abandoned, inoperable, or unregistered by submitting to the city manager, within the thirty day period, a written application for a hearing. The subsection further provides in relevant part that "[t]he hearing officer shall proceed with reasonable dispatch to conclude any matter pending before him and render a decision. The hearing officer shall provide both parties with written notice

of his decision, which shall state the reason for his determination. If the hearing officer determines that the motor vehicle is in violation of [the motor vehicle ordinance], said motor vehicle must be removed within the thirty-day period or within five days from the issuance of the hearing officer's decision, whichever is later."

Pursuant to subsection (E) of § 198-6 of the motor vehicle ordinance, if the motor vehicle has not been removed or brought into compliance with the motor vehicle ordinance at the expiration of the thirty day period, then it "shall be caused to be removed and stored by an authorized agent of the [city] Chief of Police." The subsection further provides that, within forty-eight hours following the removal and storage of the motor vehicle, the city police department shall give written notice to the owner of the motor vehicle, if known, inter alia, that the motor vehicle has been taken into custody and stored and may be sold and/or destroyed after either fifteen or ninety days, depending on the market value of the motor vehicle, and that the owner has the rights to retrieve the motor vehicle by paying all associated costs and to appeal the sale of the motor vehicle under the procedure set forth in subsection (C) of the motor vehicle ordinance.

The trial court set forth the following relevant procedural history in its memorandum of decision dated September 2, 2016. "On June 16, 2015, the [petitioner] was sent a certified letter concerning a claim of abandoned, inoperable, or unregistered motor vehicles on property located at 144 Lincoln Street in the city of Meriden. The city took this action under [the motor vehicle ordinance]. . . . On July 2, 2015, the [petitioner] requested a hearing before a city hearing officer which was scheduled for July 27, 2015. On July 23, 2015, the [petitioner] requested a postponement of the hearing. During this

time period, the city sent the [petitioner] additional letters concerning abandoned, inoperable, or unregistered motor vehicles on his properties located at 109 Lincoln Street and 48 Bradley Avenue.

"Under [the motor vehicle ordinance], a notice of the actions [was] published in the Meriden Record Journal on August 2, 2015. A new hearing date was scheduled for August 19, 2015. The [petitioner] once again requested a postponement, [which] was granted until September 28, 2015. A hearing was held on this date and continued until October 26, 2015. The city citation hearing officer, subsequent to the hearings, issued an adverse decision and under the [motor vehicle ordinance], the [petitioner] was required to remove the vehicles in question within five days of the hearing officer's decision . . . ." The hearing officer further ordered that, "[a]fter the expiration of the five day period, the abandoned motor vehicles are subject to action by the Meriden Police Department."

In November, 2015, the petitioner commenced the present action by filing a petition to reopen the hearing officer's decision, which he referred to as an "assessment." The petitioner asserted that he was filing the petition pursuant to General Statutes § 7-152b (g)[2] and

[2] General Statutes § 7-152b provides in relevant part: "(a) Any town, city or borough may establish by ordinance a parking violation hearing procedure in accordance with this section. The Superior Court shall be authorized to enforce the assessments and judgments provided for under this section.

* * *

"(g) A person against whom an assessment has been entered pursuant to this section is entitled to judicial review by way of appeal. An appeal shall be instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee in an amount equal to the entry fee for a small claims case pursuant to section 52-259, at the Superior Court facility designated by the Chief Court Administrator, which shall entitle such person to a hearing in accordance with the rules of the judges of the Superior Court."

Practice Book § 23-51.[3] The petition[4] set forth fourteen numbered paragraphs asserting various claims. The petitioner requested that the trial court conduct a de novo hearing and grant relief by, inter alia, reversing the hearing officer's decision and providing certain injunctive relief.

The trial court held a one day de novo hearing on the petition on March 31, 2016.[5] On August 16, 2016, the petitioner filed a posthearing motion to reopen the evidence to allow him to introduce the hearing officer's case file or, in the alternative, to submit the case file to the court to take judicial notice thereof. On August 17, 2016, the court denied that motion.

On September 2, 2016, the court issued a memorandum of decision rendering judgment in favor of the city. After dismissing thirteen of the fourteen claims that the

[3] Practice Book § 23-51 provides: "(a) Any aggrieved person who wishes to appeal a parking or citation assessment issued by a town, city, borough or other municipality shall file with the clerk of the court within the time limited by statute a petition to open assessment with a copy of the notice of assessment annexed thereto. A copy of the petition with the notice of assessment annexed shall be sent by the petitioner by certified mail to the town, city, borough or municipality involved.

"(b) Upon receipt of the petition, the clerk of the court, after consultation with the presiding judge, shall set a hearing date on the petition and shall notify the parties thereof. There shall be no pleadings subsequent to the petition.

"(c) The hearing on the petition shall be de novo. There shall be no right to a hearing before a jury."

[4] The petition was captioned as a "Petition to Reopen Assessment." We observe that § 7-152b (g) provides that a person against whom a parking assessment has been entered may institute an appeal by filing a "petition to *reopen* assessment . . . ." (Emphasis added.) By comparison, Practice Book § 23-51 (a) provides that an aggrieved person may appeal from a parking assessment by filing a "petition to *open* assessment . . . ." (Emphasis added.) We will refer to the petition as a petition to "reopen" the "assessment" in conformity with the language of § 7-152b (g).

[5] On April 14, 2016, after completing a de novo hearing on a separate matter involving the parties, the court briefly reopened the evidence in the present case to address requests by the petitioner to mark an exhibit for identification and to admit into evidence a separate exhibit as a full exhibit.

petitioner set forth in the petition, the court stated that it "rejects the [petitioner's] claims and finds the [petitioner] in violation of § 198-4 of the [motor vehicle ordinance] with respect to all abandoned, inoperable, or unregistered vehicles located on the [petitioner's] property at 144 Lincoln Street, 109 Lincoln Street, and 48 Bradley Avenue, all in the city of Meriden. The one exception would be [a] red 1994 BMW located at 48 Bradley Avenue if, in fact, this vehicle is still the subject of a Probate Court action. The court hereby directs the city of Meriden to enforce this judgment under [§] 198-6 (C) of the [motor vehicle ordinance]."[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the petitioner raises a number of claims concerning the judgment rendered in the city's favor on his petition to reopen. As a threshold matter, however, we must determine whether the petitioner had statutory authorization to appeal to the Superior Court from the hearing officer's decision, which implicates the trial court's subject matter jurisdiction. See *Gianetti* v. *Dunsby*, 182 Conn. App. 855, 863–64, 191 A.3d 260 (2018) (trial courts lack subject matter jurisdiction to entertain administrative appeals in absence of statutory authorization), citing *Tazza* v. *Planning & Zoning Commission*, 164 Conn. 187, 190, 319 A.2d 393 (1972). For the reasons that follow, we conclude that the petitioner did not have a statutory right to appeal to the Superior Court from the hearing officer's decision, and,

[6] In asserting a violation of his due process rights, one of the petitioner's contentions is that the hearing officer determined that he was in violation of the motor vehicle ordinance with respect to motor vehicles located at 144 Lincoln Street only and that it was improper for the trial court, in deciding his petition to reopen, to consider whether he had violated the motor vehicle ordinance with respect to motor vehicles located at 109 Lincoln Street and 48 Bradley Avenue. We do not address the merits of that contention because the trial court lacked subject matter jurisdiction over the petitioner's petition to reopen.

therefore, the trial court lacked subject matter jurisdiction over the petition to reopen.

"Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal."[7] (Internal quotation marks omitted.) *In re Probate Appeal of Knott*, 190 Conn. App. 56, 61, 209 A.3d 690 (2019).

"[W]ith respect to administrative appeals generally, there is no absolute right of appeal to the courts from a decision of an administrative [body]. . . . Appeals to the courts from administrative [bodies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created . . . and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal from [an administrative body's] decision.[8]" (Footnote

[7] On January 21, 2020, after previously having heard oral argument from the parties, we sua sponte ordered the parties to file supplemental briefs addressing: "(1) Whether the decision of the hearing officer, dated October 26, 2015, constituted an 'assessment' subject to judicial review pursuant to . . . § 7-152b (g) and Practice Book § 23-51; and (2) if not, whether any other statute authorized an appeal to the trial court in this case." The parties have filed supplemental briefs in accordance with our order.

[8] "'In hearing administrative appeals . . . the Superior Court acts as an appellate body.' *Fagan* v. *Stamford*, 179 Conn. App. 440, 443 n.2, 180 A.3d 1 (2018)." *Gianetti* v. *Dunsby*, supra, 182 Conn. App. 862 n.5.

in original; internal quotation marks omitted.) *Gianetti* v. *Dunsby*, supra, 182 Conn. App. 862.

We begin by noting that § 14-150a, pursuant to which the city expressly enacted the motor vehicle ordinance, does not contain any language providing that an aggrieved individual has a right to appeal to the Superior Court from an adverse decision concerning a violation of an ordinance enacted pursuant to the statute. See footnote 1 of this opinion. Similarly, although the motor vehicle ordinance sets forth a hearing procedure for an aggrieved individual to utilize to contest a notice of violation thereof before a hearing officer, the ordinance does not contain any provision indicating that a right to appeal from an adverse decision issued by a hearing officer exists under a particular statute. The petitioner does not assert otherwise. Instead, the petitioner claims that § 7-152b (g) and Practice Book § 23-51 enabled him to appeal, by filing the petition to reopen, to the Superior Court from the hearing officer's decision. We are not persuaded.

Our resolution of the petitioner's claim requires us to interpret § 7-152b and Practice Book § 23-51. "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When

a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 851–52, 222 A.3d 1025 (2019). The rules of statutory interpretation equally apply when construing rules of practice. See *Compass Bank* v. *Dunn*, 196 Conn. App. 43, 46–47, A.3d (2020).

Section 7-152b (a) provides that "[a]ny town, city or borough may establish by ordinance a parking violation hearing procedure in accordance with this section. The Superior Court shall be authorized to enforce the assessments and judgments provided for under this section." Section 7-152b (c) permits a town, city, or borough, within two years following the "expiration of the final period for the uncontested payment of fines, penalties, costs or fees for any alleged violation under any ordinance adopted pursuant to section 7-148 or sections 14-305 to 14-308, inclusive," to send notice to the operator of the motor vehicle, if known, or the registered owner of the motor vehicle informing him or her (1) of the allegations against him or her and the amount of the fines, penalties, costs or fees due, (2) that he or she may contest his or her liability before a parking violations hearing officer, (3) that an assessment and judgment shall enter against him or her if no hearing is demanded, and (4) that such judgment may issue without additional notice.

Section 7-152b (d) provides in relevant part that if a person wishes to admit liability, then "such person may, without requesting a hearing, pay the full amount of the fines, penalties, costs or fees admitted to in person or by mail . . . . Any person who does not deliver or mail written demand for a hearing [within the applicable

time period] shall be deemed to have admitted liability, and the designated town official shall certify such person's failure to respond to the hearing officer. The hearing officer shall thereupon enter and assess the fines, penalties, costs or fees provided for by the applicable ordinances and shall follow the procedures set forth in subsection (f) of this section." Section 7-152b (e) provides in relevant part that if a hearing officer, following a hearing authorized by the statute, determines that the person is liable for the violation that he or she is contesting, then the hearing officer "shall forthwith enter and assess the fines, penalties, costs or fees against such person as provided by the applicable ordinances . . . ." Section 7-152b (f) provides in relevant part that "[i]f such assessment is not paid on the date of its entry," then the hearing officer shall send notice of the assessment to the person found liable and shall file a certified copy of the notice of assessment, together with an $8 entry fee, with the appropriate Superior Court clerk, who shall enter judgment "in the amount of such record of assessment[9] and court costs of eight dollars" against the person and in favor of the town, city or borough. (Footnote added.) Section 7-152b (f) further provides that "[n]otwithstanding any provision of the general statutes, the hearing officer's assessment, when so entered as a judgment, shall have the effect of a civil money judgment and a levy of execution on such judgment may issue without further notice to such person." Section 7-152b (g) provides in relevant part that "[a] person against whom an *assessment* has been entered pursuant to this section is entitled to judicial review by way of appeal. An appeal shall be instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee . . . at the Superior Court

[9] Pursuant to § 7-152b (f), "[t]he certified copy of the notice of assessment shall constitute a record of assessment."

facility designated by the Chief Court Administrator . . . ." (Emphasis added.)

Whether § 7-152b (g) authorized the petitioner to appeal, by filing the petition to reopen, to the Superior Court from the hearing officer's decision is dependent on whether the decision constituted an "assessment" under § 7-152b. A plain reading of § 7-152b leads us to conclude that the hearing officer's decision was not an assessment for purposes of the statute. First, § 7-152b (c) unequivocally provides that the procedures set forth therein apply when a town, city, or borough seeks to collect fines, penalties, costs, or fees imposed for alleged violations of ordinances enacted pursuant to General Statutes §§ 7-148 or 14-305 through 14-308, inclusive. In the present case, the hearing officer determined that the petitioner had violated the motor vehicle ordinance, which was adopted pursuant to § 14-150a, a statute that is not listed in § 7-152b (c).

Second, it is evident that an "assessment" entered under § 7-152b requires the payment of a monetary sum. Section 7-152b (c) allows a town, city, or borough seeking to pursue "fines, penalties, costs, or fees" for the violation of an ordinance covered by the statute to send a notice informing the operator or registered owner of the motor vehicle, inter alia, of the "amount of the fines, penalties, costs, or fees due . . . ." Section 7-152b (d) enables a person wishing to admit liability to "pay the full amount of the fines, penalties, costs or fees . . . ." If the person does not demand a hearing, then he or she shall be deemed to have admitted liability and the hearing officer, upon certification of the person's failure to demand a hearing, shall "enter and assess the fines, penalties, costs or fees . . . ." General Statutes § 7-152b (d). Section 7-152b (e) requires the hearing officer, upon determining, following a hearing authorized by the statute, that a person has committed the violation that he or she is contesting, to "enter and assess the fines, penalties, costs or fees against such person

. . . ." Section 7-152b (f) provides in relevant part that if the "assessment is not paid on the date of its entry," then notice of the assessment will be sent to the violator and a certified copy thereof will be sent, along with an entry fee, to the appropriate Superior Court clerk, who must enter judgment "in the amount of such record of assessment and court costs of eight dollars," and, when the hearing officer's assessment is entered as a judgment, it "shall have the effect of a civil money judgment and a levy of execution on such judgment may issue without further notice to such person." In the present case, in upholding the notice of violation issued to the petitioner, the hearing officer did not order the petitioner to pay a monetary sum; rather, the hearing officer ordered that the petitioner's motor vehicles had to "be removed within five (5) days of the issuance of [the] decision" and that "[a]fter the expiration of the five day period, the abandoned motor vehicles [will be] subject to action by the Meriden Police Department."[10]

[10] The petitioner points to subsection (D) of § 198-6 of the motor vehicle ordinance in support of his assertion that the hearing officer's decision was an assessment for purposes of § 7-152b. Subsection (D) of § 198-6 provides that "[i]n the event that a motor vehicle is not removed prior to the expiration of the thirty-day period [following publication of the notice in the newspaper] and is therefore removed by the [city] Chief of Police or an authorized agent, the last registered owner of the motor vehicle and the owner of the property from which the motor vehicle was removed shall be jointly and severally liable for all costs of such removal, storage or sale of said motor vehicle, and a lien for such cost shall be placed on the real property from which the motor vehicle was removed. Notwithstanding the above, if the owner of the property upon which the motor vehicle is found notifies the [city] Chief of Police, in writing, that said motor vehicle was abandoned and that the owner of said property is not the owner of said motor vehicle and consents to its removal prior to the expiration of the thirty-day period, the owner of said property shall not be liable for any costs associated with removal, storage or sale of said vehicle." Here, the hearing officer's decision did not impose any costs on the petitioner, and there is no indication in the record that the city has removed the petitioner's vehicles and charged the petitioner with the costs of removal. Furthermore, even if the hearing officer's decision required the petitioner to pay a monetary sum, the decision nevertheless would be outside the ambit of § 7-152b because the procedures set forth therein pertain only to violations of ordinances enacted pursuant

In light of the foregoing, the hearing officer's decision was not an assessment for purposes of § 7-152b. Therefore, § 7-152b (g) did not provide the petitioner with a statutory right to appeal to the Superior Court from the hearing officer's decision.

The petitioner's reliance on Practice Book § 23-51 is also misplaced. Section 23-51 sets forth the procedures for the filing of a petition to reopen and the proceeding to be held on the petition. See footnote 3 of this opinion. It does not confer a right to appeal. See *Chanosky* v. *City Building Supply Co.*, 152 Conn. 449, 451, 208 A.2d 337 (1965) ("The right to an appeal is not a constitutional one. It is but a statutory privilege available to one who strictly complies with the statutes and rules on which the privilege is granted.").

The petitioner does not cite to any other statutory authority in support of his claim that he had a statutory right to appeal to the Superior Court from the hearing officer's decision, and we are unaware of any such authority.[11] Without a statute providing him with an

to §§ 7-148 and 14-305 through 14-308, inclusive. General Statutes § 7-152b (c). As we have noted, the motor vehicle ordinance was adopted pursuant to § 14-150a. Thus, the petitioner's reliance on subsection (D) of § 198-6 of the motor vehicle ordinance is misguided.

[11] Although the petitioner does not rely on the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., we observe that the UAPA did not authorize an appeal to the Superior Court from the hearing officer's decision. "The UAPA provides a statutory framework within which an appeal from an administrative *agency* may be taken." (Emphasis in original.) *Maresca* v. *Ridgefield*, 35 Conn. App. 769, 771 n.2, 647 A.2d 751 (1994). Section 4-166 (1) defines " '[a]gency' " to mean "each *state* board, commission, department or officer authorized by law to make regulations or to determine contested cases, but does not include either house or any committee of the General Assembly, the courts, the Council on Probate Judicial Conduct, the Governor, Lieutenant Governor or Attorney General, or town or regional boards of education, or automobile dispute settlement panels established pursuant to section 42-181 . . . ." (Emphasis added.) As the statutory definition of agency illustrates, "[t]he UAPA applies only to state agencies . . . ." (Internal quotation marks omitted.) *Gianetti* v. *Dunsby*, supra, 182 Conn. App. 864. The hearing officer is not an agency for purposes of the UAPA, and, therefore, the UAPA is inapplicable.

Additionally, we observe that, pursuant to General Statutes § 7-148 (c) (7) (H) (xv), the city has enacted an anti-blight ordinance codified in chapter 159 of its city code (anti-blight ordinance). Pursuant to § 159-3 of the anti-blight ordinance, a property is blighted, inter alia, if "[p]arking lots/areas

avenue of appeal, we conclude that the trial court lacked subject matter jurisdiction to entertain the petitioner's petition to reopen.[12] Accordingly, rather than addressing any of the petitioner's claims in the petition and directing the city to enforce the judgment, the trial court should have dismissed the petition for lack of subject matter jurisdiction.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to dismiss the petitioner's petition to reopen for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

are left in a state of disrepair or abandonment and/or are used to store abandoned or unregistered vehicles" and/or the property is "not being maintained" in that "[a]bandoned, wrecked, or junked motor vehicles are stored on the premises." Pursuant to § 159-6 of the anti-blight ordinance, violations of the anti-blight ordinance are "punishable by a fine of $100 for each day a violation exists and continues." The city may enforce a violation pursuant to § 159-7 of the anti-blight ordinance "by citation, in addition to other remedies, in accordance with [General Statutes § 7-152c]." Section 7-152c, which largely parallels § 7-152b, enables municipalities to establish "a citation hearing procedure" in accordance therewith and sets forth procedures for a municipality to follow in seeking the payment of fines, penalties, costs or fees owed "for any citation issued under any ordinance adopted pursuant to section 7-148 or section 22a-226d, for an alleged violation thereof . . . ." General Statutes § 7-152c (a) and (c). An "assessment" entered pursuant to § 7-152c may be appealed to the Superior Court. General Statutes § 7-152c (g). In the present case, the city issued to the petitioner, and the hearing officer upheld, a notice of violation of the motor vehicle ordinance. The petitioner was not alleged to have violated the anti-blight ordinance. Accordingly, § 7-152c (g) conferred no right to the petitioner to appeal from the hearing officer's decision.

[12] To the extent his argument can be distilled, the petitioner asserts that he is entitled to judicial review of the hearing officer's decision because it implicates his due process rights respecting his property interest in his motor vehicles, and, thus, he may obtain judicial review of the hearing officer's decision by seeking injunctive relief pursuant to General Statutes § 52-471 et seq. and/or by an action for a declaratory judgment. We need not determine whether the petitioner may file an independent action to obtain judicial review of the hearing officer's decision. The dispositive question before us is whether the trial court had subject matter jurisdiction to entertain the petitioner's petition to reopen, through the filing of which the petitioner sought to commence an administrative appeal from the hearing officer's decision. Notwithstanding any proper avenues of recourse available to him, the petitioner was not entitled to seek judicial review of the hearing officer's decision by way of an administrative appeal.